E.M. Meijers and the Recodification of the Dutch Civil Code after World War II:

Renewal's Only Victory?

Optional Thesis

Final Honours School of Modern History

Oxford University

Trinity Term 1997

Contents

Introduction

On 25 April 1947, Professor E.M. Meijers received from the Dutch government the task of drafting a new Civil Code. According to the official announcement, the existing code, introduced in 1838, was too old and no longer sufficiently in tune with developments in jurisprudence, and in society in general. At the conference held in The Hague in 1938 to celebrate the hundredth anniversary of the old code, however, Meijers had been the only speaker to call for a complete recodification. The other speakers had been convinced that such an enormous project could never be completed, and either advocated partial reform or considered the judiciary capable of side-stepping the ambiguities and lacunae of the existing code. Paul Scholten, a colleague of Meijers at the University of Leiden, had said that "Ons Burgerlijk Wetboek is een vredig bezit", and that a new code "ontstaat alleen uit politieken drang."[1] The Minister of Justice, for his part, pointed out that he had more pressing concerns.

Clearly, something had happened between 1938 and 1947 to make a recodification more attractive and to create sufficient "politieken drang". The most obvious potential factor is the Second World War and the German occupation of the Netherlands between 1940 and 1945. This brought many changes to Dutch society, some more lasting than other, and certainly also to the administration of justice and popular confidence in the judicial process. The experience of occupation, the joy of liberation, and the urge for renewal which this brought with it in most of the recently-liberated countries of Western Europe, would seem, at first sight, to be sufficient cause for the sudden popularity of recodification: it is, after all, a form of renewal. It is thus the main object of this thesis to investigate whether the decision to recodify the Dutch Civil Code was the product of the 'Sturm und Drang' mentality of the liberation era, or whether Meijers' appointment in 1947 simply marked the natural culmination of a long-running argument on which the war in fact had little impact. As it turned out, very little came of the hopes for radical changes to Dutch politics and society after the war, and it is tempting to see the recodification as an inexpensive gesture to those, including Queen Wilhelmina herself, who had hoped to see much more.

The actual process of recodification and the legal changes which it eventually brought about have been comprehensively and expertly examined in a recently published Ph.D. thesis by Dr Erik Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek*.[2] In this thesis, I have therefore decided to concentrate entirely on the *decision* to recodify the civil code, rather than the long and somewhat tortuous process by which the new code was drafted and implemented. This thesis investigates the

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[1] P. Scholten, 'De Codificatie-gedachte vóór honderd jaar en thans' in P. Scholten & E.M. Meijers (eds.), *Gedenkboek Burgerlijk Wetboek, 1838-1938* (Zwolle, 1939), pp. 1, 30.

[2] Maastricht, 1995. For an overview of the most significant changes between the two codes, see M. Whincup, 'The new Dutch Civil Code', *New Law Journal*, 1992, pp. 1208-1210.

historical context in which the decision of April 1947 was taken and seeks to understand why it was taken after, rather than before, the Second World War, and how, if at all, the experience of war and occupation contributed to its genesis. In this analysis, the personal motives of Meijers and J.H. van Maarseveen, the Minister of Justice who appointed him, will be of paramount importance.

To see the decision to recodify the Civil Code as 'Renewal's only victory' would be to imply that the instigators of that decision intended it to effect some sort of renewal. Whether this was indeed the case remains to be seen. This thesis is, in other words, a case study of the wider issue of the post-war renewal of society and politics desired by many people, particularly but in no sense exclusively in the Resistance, during the German occupation of Western Europe, and the degree to which these plans and hopes became reality. It also offers an insight in microcosm into the question of continuity and change, and the relation between them, between pre- and post-war European politics and society.

Most of the primary research for this thesis was done at the Ministry of Justice in The Hague, which has extensive archives on the recodification project (which still continues) and the immediate context of Meijers' appointment. Further primary material was found in libraries in The Hague, Leiden and Oxford, and obtained from Dr Erik Florijn and Miss Clara C. Meijers. Thanks are due to these individuals and institutions for their help and advice.

CHAPTER 1

Meijers and the pre-war debate on recodification

Eduard M. Meijers is recognised in the Netherlands as one of the greatest legal minds of the twentieth century. During the course of an active career spanning more than fifty years, he made contributions to many areas of law, most notably civil law, legal history, inheritance law and international private law. More than forty years after his death, he is still widely cited; if his analyses of civil and international private law have been superseded, his influence has remained strong in the field of legal history, while his name remains inextricably linked to the new Civil Code which he conceived.

Meijers was born in 1880, the son of a Jewish naval health officer.[3] He completed his legal studies at the University of Amsterdam in 1903 with a Ph.D. thesis entitled *Dogmatische rechtswetenschap*. Between 1903 and 1910 he practised as a lawyer in Amsterdam. In 1909-10, he was briefly local councillor in Amsterdam for the *Vrijzinnigdemocratische Bond*, one of the more influential liberal political parties.

In 1910, at the exceptionally young age of thirty, Meijers was appointed professor of civil and international private law at the University of Leiden, a position which he was to hold until 1950. Throughout his academic career, Meijers published widely on many issues: a bibliography drawn up shortly after his death lists almost 2000 items. From 1912 until his death in 1954, he was a regular contributor to the *Weekblad voor Privaatrecht, Notarisambt en Registratie* (*WPNR*), for which he briefly—and famously—annotated *arresten* (judgements) of the *Hoge Raad* (Supreme Court). From 1926 he annotated the court's verdicts for *Nederlandse Jurisprudentie*, a journal set up for the specific purpose of publishing jurisprudence. It is ironic that the increasing predominance of jurisprudence as a source of law about which Meijers complained was partly due to the widely-read and expert commentaries with which he and Paul Scholten furnished it. Viewed in another way, however, it might be argued that Meijers' commentaries—which were often sharply critical of the *Hoge Raad*'s interpretation of the civil law—were merely one aspect of his much wider criticism of the manner in which civil law was functioning.

The former Netherlands Civil Code came into force in 1838, after more than three decades of debate and

argument.[4] The addition of Belgium to the Netherlands in 1815 and its reseparation in 1830-1 had contributed significantly to the delay. Nevertheless, the Code that eventually emerged was based, in many cases literally, on the Napoleonic *Code civil* which it was designed to replace. It had been, according to many critics, somewhat carelessly thrown together: the Code's systematic and linguistic mistakes and ambiguities were indeed only too apparent. However, it was not until the 1870s that widespread calls for a complete revision of the Code began to be heard. In Meijers' analysis, this can be attributed to the fact that academics as well as those in legal practice had been insufficiently prepared for the new Code in 1838, and needed a long time to understand it properly.[5] By 1870, two large handbooks, by Diephuis and by Opzoomer, provided all the exegesis of the Code that was required, and legal minds began to envisage more ambitious projects.

Meijers provided three principal reasons for the renewed demands for far-reaching reforms to the Code in the half century after 1870: firstly, many provisions were unsuited to an advanced industrial society, with its railways, telephones, telegraph, cars and aeroplanes. Secondly, many perceived the need to combat social evils through legislation in key areas such as juvenile law, rent law and labour contracts. All of these required modifications and additions to the Civil Code. Finally, the Code was still burdened with many technical faults which required revision. The Code, wrote Meijers, "was in hoofdzaak een afschrift van den Code civil, en dan een slecht afschrift. Het waren vooral de innerlijke tegenstijdigheden, de slordigheden en de stelloosheid van de getroffen regeling, die men den wetgever verweet."[6]

Perhaps inevitably, this very legalistic approach—concern above all for form above content—gave rise to a reaction at the end of the nineteenth century. Rather than viewing the Code in absolute terms, writers began to see it as merely one part of the legal process: "Wet, rechtspraak en wetenschap," in their view, according to Meijers, "zijn niet een meester, een dienaar en een tolk, maar zij zijn tot een eenheid vervlochten."[7] As it neared its hundredth birthday, most in the legal profession seemed content to work with the Code. Its faults could be taken into account by the judiciary, its ambiguities were being smoothed out by jurisprudence. In most areas of law, it was more or less clear what the law was. While there was certainly irritation at the extremely slow rate at which modifications to the Code were being drafted and passed through Parliament, the desire to keep the Code and work with it was almost universal.

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[3] A brief biography of Meijers can be found in *Zestig juristen: bijdragen tot een beeld van de geschiedenis der Nederlandse rechtswetenschap* (Tjeenk Willink, 1987), pp. 252-56.
[4] The best recent overview of the genesis of the 1838 Civil Code can be found in Florijn, *Ontstaan*, Ch. 2.
[5] E.M. Meijers, 'De Honderdjarige burgerlijke wetgeving', *Verzamelde Privaatrechtelijke Opstellen* (Leiden, 1954-55), i. 138-9. This collection is henceforth referred to as *VPO*.
[6] *VPO*, i. 140.
[7] *VPO*, i. 141.

At the conference held in The Hague in 1938 to celebrate the hundredth anniversary of the Civil Code, Meijers was the only speaker to call strongly for complete rather than partial revision. In his address, he discussed previous attempts to modify or improve the Code and indicated why almost all of these failed. He mentioned the timidity of the Commissions appointed to consider more general, systematic structural changes and the reluctance of Ministers and Parliament to spend precious time on all but the most politically pressing points. In many ways, Meijers' impatience with the politicians and his wish that the recodification be carried out by civil servants rather than Parliament was typical of the disenchantment with Parliament widely felt in the Netherlands in the 1930s.[8] In any case, the result of this political inaction was that law was being made increasingly by jurisprudence and not legislation: the ideal of codification, enshrined in all Constitutions since 1798, was being lost. In the light of his previous experience with slow-working Commissions and a reluctant legislature, Meijers' advice was clear: the task of drawing up a new Civil code should be entrusted to one man or, at most, a small number of experts, and only questions of political importance should be subject to prior advice from Parliament. The failure of the Limburg Commission, set up in 1919 to ascertain how the central section of the Code, dealing with the law of property, contracts and obligations might be systematically improved, had clearly influenced his thinking. As early as 1928, in a highly rhetorical and sarcastic article, he had remarked that the Commission had been extremely productive:

> "Vóór alles heeft immers de commissie de verdienste ons bevrijd te hebben van een gevaarlijken waan, den waan, dat er in ons Burgerlijk Wetboek en in het bijzonder... in het vermogensrecht, leemten of onjuistheden van eenige beteekenis zouden voorkomen. Immers, gedurende haar bijkans negenjarige bestaan heeft de Commissie in het tweede en het derde boek van ons Burgerlijk Wetboek geen enkele leemte of onjuistheid kunnen ontdekken."[9]

Meijers suggested that the Commission, having completed its task, should commit the fruits of its labour to paper, and produce a handbook which would demonstrate *luce clarius* that the law of property contained not a single ambiguity or lacuna which required modification. The costs of such an enterprise need not worry the Ministry of Finance, Meijers argued, for

> "Een volledig handboek voor het vermogensrecht, waarin de lezer niet met allerlei controversen en vermeende wettelijke gebreken vermoeid wordt en dat toch dit gedeelte van het recht volledig weergeeft, is van een debiet verzekerd, zo groot, dat met de opbrengst zelfs gemakkalijk de noodzakelijk uitbreiding van de rechterlijk macht kan betaald worden."[10]

Meijers went on to list a hundred points of law which ought to be improved, adding that he would have no difficulty in listing another hundred. The Commission, he argued, was unable to come up with concrete improvements to the law of property because its articles were inter-connected and inter-dependent to such an extent that solving one problem would only serve to create two others. This led to

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[8] Cf. M.L. Smith, 'Neither resistance nor collaboration: Historians and the problem of the *Nederlandse Unie*', *History,* 1987, especially pp. 257-60.
[9] E.M. Meijers, 'Het feillooze deel vans ons Burgerlijk Wetboek', *VPO,* i. 93 ff.
[10] *VPO* i. 50.

the following conclusion: "Zou men niet beginnen met de wijze van herziening te herzien?"[11] The article ended with Meijers' first call for a complete technical revision which, inspired by the Spanish Civil Code, he argued ought to be repeated every ten years.

Meijers' isolation as the only champion of complete revision was again demonstrated at the 1938 conference. In a *Festschrift* for the Civil Code published in the same year, Meijers' colleague Scholten opened his contribution with the famous words: "Ons Burgerlijk Wetboek is een rustig bezit."[12] Opinions might vary as to how and where the Code ought to be revised, but, in his view, not even the most radical proponents of change could argue for an entirely new Code. In the same volume, however, Scholten's co-editor emphasised that a revision could only hope to be successful if it was as all-encompassing as possible.[13] After 54 amendment laws, the Code was, Meijers argued, an organisational, linguistic and systematic mess which only complete revision could repair. The current legal uncertainty on many points of law risked alienating the population from the Code. In a key passage in his speech, Meijers emphasised the symbolic importance of the national codification:

> "Een codificatie is een symbool van eenheid van recht, een nationale codificatie een symbool van nationale eenheid... Wil een nationale codificatie een waarachtig symbool der nationale eenheid zijn, dan dient het wetboek... het vetrouwen van het volk te hebben... De grootste ramp, die een volk treffen kan, is niet een economische achteruitgang, het verlies van politieke macht, een niemand sparende epidemie. Het is een splijting van het volk zelf, veroorzaakt door wanvertrouwen in de onpartijdigheid van recht en rechtsbedeeling."[14]

Always more of a lawyer than a politician, the final two sentences here are ironic, for economic decline was already an obvious fact in 1938, loss of political power was soon to follow in 1940, while a schism in the population was to be a constant spectre throughout the war years.

It should be emphasised, of course, that the 1938 festivities were perhaps not the ideal moment to voice such stringent criticism of the Code; this might perhaps help to explain why Meijers' contribution was such an isolated one and why it received relatively little attention at the time. As J.H. Beekhuis, a later collaborator on the recodification project, wrote in 1950, "de feestelijke herdenking van onze codificatie was nu eenmaal niet het moment om tegelijk haar begrafenis in te luiden, en had eerder tengevolge, dat men zich ging verdiepen in het goede, dat wij er aan te danken hebben."[15] Nevertheless, Meijers' opinions did find some support: in his review of the *Festschrift*, Van Apeldoorn accused Scholten of defending the ideal of codification in name only, and of opposing the renewal of

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11 *VPO* i. 50.
12 P. Scholten, 'De Codificatie-gedachte vóór honderd jaar en thans' in P. Scholten & E.M. Meijers (eds.), *Gedenkboek Burgerlijk Wetboek, 1838-1938* (Zwolle, 1938), p. 1.
13 E.M. Meijers, 'Wijzigingen en aanvullingen van het Burgerlijk Wetboek na 1838' in *ibid*., pp. 33-63. Reprinted in *VPO,* i. 109-136.
14 Meijers, 'De honderjarige burgerlijke wetgeving', *VPO* i. 144-5.
15 J.H. Beekhuis, 'Meijers en de vernieuwing van onze codificatie', *Rechtsgeleerd Magazijn Themis,* 1950, pp. 258-9.

what could no longer be called a codification. Van Apeldoorn concluded his review by agreeing with Meijers that the time was ripe for a complete revision, arguing that there was sufficient legislative talent available which should not be left unused.[16]

If some writers supported Meijers' ideas, however, the majority did not. Certainly the Justice Minister, F. Goseling, felt that, considering developments in Germany, he had more pressing concerns,[17] and without his initiative, nothing could be done. When war broke out in 1940, Meijers, whose belief in the unavoidable necessity of recodification dated back to his student days, had still not been able to win the argument, and showed little sign of doing so.

[16] *Rechtsgeleerd Magazijn Themis*, 1939, p. 84ff.. Cf. Florijn, *op. cit.*, p. 87.
[17] Eerste Kamer 1938-1939, no. 2, document 64A, p. 9. He was later to die in a German concentration camp.

CHAPTER 2

The War

This chapter consists of two parts. The first will discuss the experiences of Eduard Meijers during the war, addressing specifically the question of the work he was able to do on the Civil Code during his enforced absence from university affairs and suggesting a number of possible reasons why he was able to survive the Holocaust. The second part of the chapter will give a brief overview of the German occupation of the Netherlands in as far as it related to law and the administration of justice. It can offer only the most basic introduction: L. de Jong's monumental history of the period alone covers almost 18,000 pages, or about ten pages for each day of the occupation.[18] Nevertheless, the legal aspects of the occupation are significant to the developments of the immediate post-war period and the decision to recodify the Civil Code. The best example is provided by the establishment of the *Vredegerechten* (peace courts), and the response of the *Hoge Raad* to this and other changes in the administration of justice.

On 18 November 1940, all 2500 Jewish civil servants in the Netherlands, including 41 professors and the Chief Justice of the *Hoge Raad*, were suspended by the *Reichskommissar* for the Occupied Netherlands, Arthur Seyss-Inquart. Eight days later, Meijers received a letter from the Department of Education, Arts and Sciences,[19] informing him of his suspension, "ingevolge opdracht van den Rijkscommissaris voor het bezette Nederlandsche gebied terzake van niet-Arisch overheidspersoneel." The same day, at the hour when Meijers was due to give his usual lecture, his colleague and dean of the Law Faculty, Professor R.P. Cleveringa, announced the news to the students. In a speech which immortalised both the speaker and his subject, and which is still commemorated today, Cleveringa expressed his outrage at German oppression and intolerance, and praised Meijers' work and his importance for the University and the country. He knew the consequences of such undisguised protest, and had already packed his suitcase; he was arrested the next day, and spent the next eight months in prison.

Meijers himself took advantage of his enforced absence from university life by turning all of his attention to his research projects in civil law and legal history. He was, however, sufficiently worried by the measures being taken by the occupying authorities to ask a former pupil, L.M.I.L. van Taalingen-Dols,

[18] L. de Jong, *Het Koninkrijk der Nederlanden in de Tweede Wereldoorlog* (The Hague, 1969-1991), 14 vols.
[19] With the government in exile in London, the ministries were led by the secretaries-general (permanent under-secretaries of state), under the supervision of the *Reichskommissariat*. On 1 March 1941, the Jewish civil servants were dismissed outright.

now a lawyer in Haarlem, to look after his interests.[20] Van Taalingen-Dols had a number of Jewish clients in similar positions and had built up important contacts in the disparate German occupation regime, most importantly with the *Generalkommissar für das Sicherheitswesen und SS*, Hanns Rauter.[21] We are extremely fortunate to have her memoirs of her efforts on Meijers' behalf during the occupation.[22] Although aware that the Germans were certain to take economic measures against the Jews, Meijers consistently underestimated, at least in Van Taalingen-Dols' view, the physical dangers to which he and his family might be subjected.[23] His position was made all the more precarious by the wave of student strikes which followed in the wake of Cleveringa's protest, of which the authorities–mistakenly, it seems–regarded him as the *auctor intellectualis*. Meijers' notoriety among the German officials whose help Van Taalingen-Dols sought on his behalf made her work considerably more complicated.

Meijers was finally arrested on 7 August 1942,[24] along with a number of other Leiden professors. Significantly, Meijers was the only one to be sent to the *Judendurchgangslager* at Westerbork; the rest was sent to St. Michielsgestel, a hostage camp for prominent citizens. His wife and youngest daughter were arrested the same day. They had been instructed to bring food and clothing for three days, which seemed to indicate that they were to be transported to Germany immediately.[25] However, through her contacts and other efforts, Van Taalingen-Dols was able to keep the family in Westerbork. On 17 February 1943, they were among the 650 or so prominent Jews transferred to De Schaffelaar in Barneveld, which was under the supervision of *Generalkommissar zur besonderen Wendung* Fritz Schmidt, and offered temporary protection from deportation, at least while Schmidt remained in office. Meijers and his family, in other words, moved from the responsibility of the SS to that of its rival, the *Reichskommissariat*.[26] Soon after Schmidt's mysterious death in France on 26 June 1943,[27] Rauter had

[20] According to Meijers' daughter Clara, Van Taalingen-Dols's appointment came about by chance. Van Taalingen had an appointment with Meijers, and when she arrived at his house, from which the family had just been evicted by the authorities, she found a notice with the new address. On finding Meijers, she asked him if it would not be a good idea to appoint someone to look after his interests. When asked if she knew anyone suitable, she replied that she would be prepared to take up the task: conversation with Miss Clara C. Meijers, 3 September 1996.

[21] Rauter was *Höhere SS- und Polizeiführer* and *Reichsführer-SS* Himmler's man in the Netherlands, largely independent of Seyss-Inquart. Cf. the important D.Phil thesis by L. van der Meij, *The SS in the Netherlands: The Höherer SS- und Polizeiführer Nordwest* (Oxford, 1996).

[22] Published as *De strijd om een mensenleven, 1940-1945* (Goes, 1960), hereafter referred to as Van Taalingen-Dols.

[23] In fact this tragic attitude of optimism was typical of many Jews in the Netherlands: cf. for example J.C.H. Blom, 'De vervolging van de joden in Nederland in internationaal vergelijkend perspectief', *De Gids* 150 (1987), pp. 494-507, and P. Griffioen & R. Zeller, 'Jodenvervolging in Nederland en België tijdens de Tweede Wereldoorlog: een vergelijkende analyse' in *Oorlogsdocumentatie '40-'45: Jaarboek van het Rijksinstituut voor Oorlogsdocumentatie*, vol. 8 (Zutphen, 1997), pp. 10-63.

[24] The dates in this paragraph are those given by Meijers himself, in evidence to the post-war parliamentary enquiry into the government-in-exile: Enquêtecommissie Regeringsbeleid 1940-1945*, Verslag houdende de uitkomsten van het onderzoek*, 8 vols. (The Hague, 1949-56), vol. 6c, pp. 1011-1016. They are corroborated by other authors and documents.

[25] Cf. Van Taalingen-Dols, pp. 52-54.

[26] Cf. Van Taalingen-Dols, p. 177.

[27] For a discussion of Schmidt's death and the rivalries between Rauter and Schmidt and their respective organisations, see *De SS en Nederland: Documenten uit SS archieven, 1933-1945*, ed. N.C.K.A. in 't Veld, 2 vols. (The Hague, 1976), pp. 93, 95 ff., 1102ff.. For our purposes, it is sufficient to note that Schmidt's death marked the definitive ascendancy of Rauter and the SS within the occupation regime.

the facility closed and the group returned to Westerbork on 29 September. On 4 September 1944, with rumours of imminent liberation abounding, the 'Barneveld group', including the Meijers family, was among 2087 Jews transported on the last train to leave the Netherlands for Theresienstadt.[28] Theresienstadt was a 'model' camp, and chances of survival were higher than in destruction camps such as Auschwitz and Sobibor, where the vast majority of Dutch Jews were taken. Nevertheless, the Meijers family was extremely fortunate still to be alive when the camp was liberated by the Red Army in May 1945: between 28 September and 28 October, immediately after the visit of the Danish Red Cross to the camp, more than half of the Ghetto's inmates, about 18,500 people in all, were transported to destruction camps. Only a quarter of the approximately 5000 Dutch Jews sent to Theresienstadt survived the war. Two reasons can be given for the Meijers' survival. Firstly, a very high percentage of the 'Barneveld group' overall survived the war. Along with the baptised Jews, they were exempted, probably on the direct orders of Seyss-Inquart,[29] from the large-scale evacuations to Auschwitz of September and October 1944; after 28 October, no more inmates were transported from Theresienstadt. Secondly, Meijers became the Dutch representative on the *Ältestenrat*, the 'self-government' body then led by Dr. Benjamin Murmelstein set up by the SS to maintain the elaborate pretence that the Jews in the Theresienstadt Ghetto governed themselves.[30] This gave him, and his family, a privileged position and considerably improved their chances of survival. It seems that the order to include Meijers on the *Ältestenrat* had come directly from Berlin, where Van Taalingen-Dols had won the vital assistance of one of Eichmann's assistants at the *Reichssicherheitshauptamt* (RSHA).[31]

It seems that Meijers was able to continue working to some extent throughout his internment, although he only had a few books at his disposal, the last of which were taken from him when he was transferred to Theresienstadt.[32] At Westerbork, Meijers received occasional visits from another former pupil, L. Barmat *alias* De Winter, who was able to obtain the necessary travel and entry permits because of his job at the *Joodsche Raad* in Amsterdam. On 22 October 1942, he reported to Van Taalingen-Dols that "Professor is over zijn bestaan in Westerbork niet ontevreden en zou, als hij zekerheid had niet plotseling op transport te worden gesteld, het liefst in Westerbork blijven."[33] On 3 November, Van Taalingen-Dols herself observed on a visit that Meijers, who had obtained work in the camp's meagre library, had "ruim tijd voor eigen wetenschappelijk werk, natuurlijk minder vlot als in Leiden, omdat

[28] J. Presser, O*ndergang: de vervolging en verdelging van het Nederlandse Jodendom, 1940-1945*, 2 vols. (The Hague, 1965), ii. 497-8. The best work on Theresienstadt remains H.G. Adler, *Theresienstadt 1941-1945: das Antlitz einer Zwangsgemeinschaft: Geschichte, Soziologie, Psychologie* (Tübingen, 1960).
[29] Cf. B. de Munnick, *Uitverkoren in Uitzondering? Het Verhaal van de Joodse 'Barneveld-groep', 1942-1945* (Barneveld, 1991), p. 64n and Presser, *Ondergang,* i. 447. Not one member of the Barneveld group was sent to a destruction camp.
[30] Cf. A. Shek, 'Ein Theresienstädter Tagebuch, 18. okt. 1944 - 19. mai 1945' in *Theresienstädter Studien und Dokumente*, vol. 1 (Prague, 1994), pp. 187, 202n.
[31] Van Taalingen-Dols, especially pp. 303-308.
[32] Cf. Interview with Meijers in *Het Parool*, 14 May 1947, p. 8.
[33] Van Taalingen-Dols, p. 130.

hij hier over minder studiemateriaal beschikt."[34] In Theresienstadt, besides his work on the *Ältestenrat*, Meijers also worked in the accounts department. According to his daughter Clara, who was with him throughout his internment, this enabled him to excuse himself from the tense meetings of the *Ältestenrat* by referring to his accountancy obligations, and vice versa. He thus created the opportunity to work on *De algemene Begrippen van het burgerlijk recht*, a work which he wrote without reference material of any kind and which was eventually published in 1948.[35]

The main question of interest, however, is whether Meijers was able to do any work on a concept for the new Civil Code which he so desired. Certainly, there were strong rumours after the war that he had already completed some parts, if not all, of a new Code in draft form. Most of those who worked on the recodification project after the war assumed that he had at least some sketches, although precious little evidence of such sketches came to light. In an unpublished and undated interview clearly edited during the period shortly after Meijers' appointment, Minister Van Maarseveen stated that "Gedurende de bezettingstijd en met name tijdens zijn internering heeft Prof. Meijers zijn gedachten laten gaan over de noodzakelijke vernieuwing van ons burgerlijk wetboek en hij heeft daaraan zelfs ten dele concrete vorm aan gegeven."[36] When questioned on the subject by Erik Florijn, three men closely involved in the recodification project, J.H. Beekhuis, W.G. Belinfante and G.E. Langemeijer, all stated that it was 'common knowledge' that Meijers had worked on the project during his internment; indeed, according to Langemeijer, it was "bekend dat hij er na zijn onstslag door de Duitsers intens aan gewerkt had, waarschijnlijk een vrij groot gedeelte van het wetboek al klaar had, in ieder geval schetsmatig."[37] Frustratingly for the historian, none offer any concrete proof of exactly what Meijers had done. Jean Schneider, a Frenchman who was in Theresienstadt with Meijers, and later published a book together with him,[38] was also unable to offer any help. R. van den Bergh, a member of parliament, recalled during the first parliamentary debate on Meijers' draft code in 1954 that he, too, had unwittingly witnessed Meijers working on the code during their internment at Westerbork. Although he had not known it at the time, they had probably discussed matters directly related to Meijers' drafts.[39] Florijn mentions several others who, independently of each other, stated that Meijers had worked on the civil

[34] Van Taalingen-Dols, p. 140.
[35] Conversation with Miss C.C. Meijers, 3 September 1996.
[36] 'Interview van de Minister van Justitie naar aanleiding van de opdracht om een nieuw burgerlijk wetboek te ontwerpen, welke opdracht bij Koninklijk besluit is verleend aan Prof. Mr.E.M. Meijers, hoogleraar te Leiden', De Meijere archives, Ministry of Justice, The Hague. The same point was made in a circular, dated 14 May 1947, in which the Justice Minister informed the judiciary, the law faculties and the professional organisations of Meijers' appointment. NBW archives, Ministry of Justice.
[37] Florijn, interview with G.E. Langemeijer, 30 July 1987.
[38] J.J. Salverda de Grave, E.M. Meijers & J. Schneider (eds.), *Le droit coutumier de la ville de Metz au Moyen Age*, vol. 1: *Jugements du maître-échevin de Metz au XIVe siècle* (Haarlem, 1951). It is unclear from Schneider's letter to the author of 24 September 1996 whether they worked on the Metz project in Theresienstadt. It seems likely, for Meijers was almost constantly occupied with it: cf. Van Taalingen-Dols, for example pp. 73, 226-8, 271-5, 299.
[39] C.J. van Zeben (ed.), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek: Invoeringswet Boek I* (Deventer, 1969), p. 1006.

code during his internment. Again, none of these knew exactly which parts he worked on.[40] M. Rood-de Boer, Meijers' secretary from 1949 to 1951, referred in an interview with Florijn to the "vergeelde blaadjes" which she had to type up, which Meijers told her he had written *before* the war. These concerned contract law.[41]

Van Taalingen-Dols also confirms that Meijers was working on the code during his internment again without specifying which aspect: De Winter telephoned her on 8 September 1944 to ask her what to do with the material which Meijers had been forced to leave in Westerbork: "Het werk dat De Winter heeft, handelt over een nieuw B.W."[42] In fact, the only concrete indication of what part of the Civil Code Meijers was working on is provided by very interesting and hitherto unpublished evidence recently discovered by Clara Meijers. It is a collection of correspondence dating from April to August 1944 between Professor W. van Eysinga, a friend and colleague of Meijers who acted as go-between for the distribution and typing of his work, Miss M. Blok, Meijers' secretary, and De Winter, concerning a draft on marriage law (part of Book 1 of the Civil Code) on which Meijers was working. In a letter to Van Eysinga dated 2 April 1944, Miss Blok hints that she had found it considerably more stimulating work than some of the other material Meijers had been sending:

> "Het was erg interessant om te tikken, zoo helder en klaar als de artt. zijn. Er worden ook enkele nieuwigheden ingevoerd, als b.v. art. 16 (geneesk[undig] onderzoek voor het huwelijk), art. 32 (kerkelijk huwelijk door geestelijke, als ambt[enaar] B[urgerlijke] S[tand], zonder voorafgaand huwelijk op 't Stadhuis), art. 50 en v[o]lg[ende] (over wie de huishoudelijke uitgaven moet betalen enz[ovoorts]) (...)"[43]

In a letter from Blok to Van Eysinga, dated 4 July 1944, it emerges that Meijers had left articles 1-52 "vrijwel ongewijzigd", and had made significant changes to articles 53-135. On 1 April 1945, Van Eysinga wrote to Van Taalingen-Dols that Blok "nog steeds bezig is het mooie werk van onze vriend over te tikken."[44] Although it is not entirely certain that this refers to draft material for the civil code, the reference to it as 'mooi werk' (beautiful work), coupled with Blok's enthusiasm for it cited above, strongly suggests that it does. This would also suggest that Meijers had sent considerably more draft material to Miss Blok than simply the 135 articles on marriage law.

Following the departure of German troops on 4 and 5 May 1945, Meijers and the three other member of the *Ältestenrat* effectively ran Theresienstadt for a number of days.[45] In a letter dated 15 May, Meijers

[40] Florijn, *Ontstaan*, pp. 108-9.
[41] Florijn, interview with M. Rood-De Boer, 24 September 1987.
[42] Van Taalingen-Dols, p. 290.
[43] The letters are in the archives of Prof. Dr. W. van Eysinga. I am most grateful to Miss Meijers for bringing these letters to my attention.
[44] Van Taalingen-Dols, p. 298.
[45] Z. Lederer, *Ghetto Theresienstadt* (London, 1953), p. 191.

reported to Van Eysinga that the situation was critical, especially with regard to infections.[46] On 25 June, however, he was finally back in Leiden, "bij stralend zonlicht en ongebroken van geest."[47] By the beginning of July, he had set his first exams at the University and was preparing his lectures. In the following months, he helped set up a student housing corporation and a new University Press. By all accounts, he was fully back to work. Although his experiences had aged him considerably, as he admitted to the former resistance newspaper *Het Parool*, he was nevertheless "ongeknakt van geest."[48]

The dismissal of Jewish civil servants in November 1940 was, of course, merely one aspect of the changes brought about in Dutch society by the German occupation.[49] It was an important turning point, however, in the administration of law and justice during the occupation, for it made it clear that all hopes of continuing normality in this field were illusory, even in supposedly 'non-political' areas. The Dutch government had always assumed that an occupying power would respect the Land Warfare Convention of 1907, which laid down the extent to which an occupying power might interfere with the institutions and laws of an occupied country.[50] The instructions which were drawn up by the government in 1937 to regulate the conduct of civil servants in the event of enemy occupation were based entirely on this assumption.[51] It instructed civil servants to continue in their duties to maintain peace and order. In the event of a conflict of loyalties, it was left to the individual's conscience to judge between the benefits or damage to the population and the potential advantage to the enemy. In case of a clear disadvantage to the Dutch population, he was ordered to resign his position immediately (article 31). It was clearly assumed, however, that the occupation authorities would only interfere with those areas of law and justice which directly affected their military and political interests.

These pious hopes turned out to be thoroughly misplaced and misunderstood the totalitarian aspirations of the Nazi occupation. Although the terms of the Land Warfare Convention could be interpreted broadly, it remained clear that the fundamental point of the convention was that an occupation regime should be conservative. Seyss-Inquart's administration, in the words of De Jong,

> "droeg daarentegen van meet af een diametraal tegenovergesteld karakter: niet op conservatie gericht maar

[46] Quoted in Van Taalingen-Dols, p. 299.
[47] R.P. Cleveringa in *Rechtsgeleerd Magazijn Themis* (1950), pp. 129-130.
[48] *Het Parool*, 14 May 1947.
[49] Apart from De Jong's multi-volume history, the two best short overviews of the German occupation of the Netherlands and its effects on Dutch society are, respectively, J.C.H. Blom, 'Nederland onder Duitse bezetting, 10 mei 1940 - 5 mei 1945' and idem, 'De Tweede Wereldoorlog en de Nederlandse samenleving: Continuiteit en Verandering', in *Crisis, Bezetting en Herstel. Tien studies over Nederland 1930-1950* (Rotterdam, 1989), pp. 56-101 and 164-183.
[50] Article 43 compels the occupying power to "respecter les lois en vigeur sauf empêchement absolu."
[51] 'De Aanwijzingen betreffende de houding, aan te nemen door de bestuursorganen van het Rijk, de Provinciën, Gemeenten, Waterschappen, Veenschappen en Veenpolders, alsmede door het daarbij in dienst zijnde personeel en door het personeel in dienst bij spoor- en tramwegen in geval van een vijandelijke inval', 1937, published in *Enquêtecommissie Regeringsbeleid*, vol. 7A/B, pp. 38ff.

> op wijziging—wijziging in nationaal-socialistische geest, met als einddoel een genazificeerd Nederland dat op de een of andere wijze in het Derde Rijk zou opgaan."[52]

German interference was as far-reaching in the field of of legal administration as it was elsewhere.[53] On 29 May 1940, the day of his inauguration as *Reichskommissar*, Seyss-Inquart decreed that judicial verdicts should be given 'In naam van het Recht' instead of 'In naam der Koningin'.[54] The dilemmas facing judges, prosecutors, lawyers and the civil servants of the Ministry of Justice were henceforth to be no different from those facing other civil servants, and their conduct would resemble closely that of other elements of the administration. Much like the rest of the state apparatus, moreover, the legal establishment was increasingly infiltrated by new recruits of national-socialist sympathies, be they members of Anton Mussert's *Nationaal-Socialistishe Beweging* (NSB) or not.

Despite the interventionist and often annexationist policies of the *Reichskommissariat* and particularly the SS, it should be emphasised that there were many areas of legal practice in which they were not materially interested. Although the prosecution of the Final Solution inevitably implied practical changes in family and nationality law and suspension of parts of the Constitution,[55] most areas of commercial law and the law of contracts, obligations and torts were left alone where they did not affect German interests. In these areas of civil law, the judiciary was able to continue its work almost as if nothing had happened. The removal of Queen Wilhelmina's portrait and name from courtrooms and verdicts was a formality, they could tell themselves, only to be expected given that she and her government-in-exile had allied the country firmly to the Allied cause.

It was inevitably in the field of criminal and economic criminal law that German interference was most pronounced. The post-war verdict on the conduct of the supposed guardian of fairness and impartiality in the administration of justice, the *Hoge Raad*, was extremely critical, and few historians have seen reason to disagree. The court pursued a legalistic bunker mentality that may certainly be described as unnecessarily weak, even if it did not amount to 'collaboration'. The first opportunity for the *Hoge Raad* to state its position came with the requirement that all Jewish civil servants be registered as such. There was a good deal of protest, especially from the universities and the churches. The *Hoge Raad* was the obvious body to register a strong protest, all the more so as its revered President, L.E. Visser, stood to be one of the most notable victims. The judges decided, however, that there was no legal basis for

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[52] De Jong, *Het Koninkrijk,* vi. 641.

[53] There is no satisfactory general study of law and justice during the occupation. De Jong, *Het Koninkrijk*, vi. 638ff., provides an introduction. P.E. Mazel, *In naam van het Recht. De Hoge Raad en de Tweede Wereldoorlog* (Arnhem, 1984) mentions developments relevant to that body.

[54] *Verordnungsblatt für die besetzten niederländischen Gebiete*, Verordnung 1940/3. These decrees are henceforth referred to as VO.

[55] Article 5 of the 1938 Constitution, which forbade discrimination on religious or racial grounds in government appointments, was all but abolished by VO 1940/137.

protest, since international law did not prevent an occupying power from dismissing troublesome civil servants.

According to J.E. van der Meulen, a judge in the *Hoge Raad*, "Tijdens de oorlog hebben wij gewoon door kunnen werken."[56] This is mostly true, but it did not prevent the criminal bench of the court from giving a verdict, on 12 January 1942, known as the *Toetsingsarrest*, which greatly damaged its reputation. It arose from an important question of principle, namely whether the court had the right to judge whether the *Verordnungen* of the occupying power met the rules of the Land Warfare Convention of 1907. In this particular case, the *Hoge Raad* was asked to declare void a *Verordnung* by means of which a fishmonger who had sold fish without the necessary permits and licences had been imprisoned. This the court, in its final verdict, refused to do. It went considerably further than necessary, however, in equating entirely German *Verodnungen*, however unjust, with ordinary Dutch parliamentary legislation, arguing that: "aan het besluit... onder de huidige omstandigheden het karakter van wet in den zin der Nederlandsche wetgeving niet kan worden ontzegd."[57]

Another major criticism of the conduct of the *Hoge Raad* during the German occupation concerns its recognition of the *Vredegerecht.* Mussert had complained of the attacks and abuse to which his NSB members were being subjected by the general public, and the extreme leniency with which the courts presently dealt with such offences.[58] The result was the establishment, on 16 August 1941, of the *Vredegerecht*, a court specifically charged with prosecution of all crimes and offences which "den politieken vrede binnen de volksgemeenschap in gevaar brengen of de hoogste politieke belangen van de volksgemeenschap raken of uit politieke beweegredenen zijn begaan (...)"[59] It was the brainchild of the new germanophile Secretary-General for Justice, J.J. Schrieke who, according to Rauter, was "absolut grossgermanisch im Sinne der Reichsidee ausgericht und ein treuer und verlässlicher Anhänger des Führers."[60] It was the fact that the punishment of the frequent expressions of anti-German sentiment could thus be left to the Dutch judiciary which most angered J. Zaaijer, the chief prosecutor at the trial in 1946 of the court's president, J.H. Carp:

> "Wat ik hem kwalijk neem is, dat hij de *Nederlandsche* Justitie gebruikt heeft als propaganda-instrument

[56] Quoted in Mazel, *In naam van het Recht*, p. 61n.
[57] *Weekblad van het Recht*, 8 April 1942, No. 271.
[58] Mussert's note to Hitler, written in July 1941, was published in *Vijf nota's van Mussert aan Hitler over de samenwerking van Duitsland en Nederland in een Bond van Germaansche Volkeren 1940-1944* (The Hague, 1947). The note never reached Hitler: the *Reichskommissariat* failed to forward it after translation: cf. M. de Geus, 'Vrederechtspraak in Nederland', in *Oorlogsdocumentatie '40-'45: Jaarboek van het Rijksinstituut voor Oorlogsdocumentatie*, vol. 6 (Zutphen, 1995), p. 46n.
[59] VO 1941/156, art. 2[1]. Five *vrederechters* were attached to the regular courts in The Hague, 's-Hertogenbosch, Arnhem, Amsterdam and Leeuwarden. A *vredegerechtshof*, consisting of three judges, was attached to the Court of Appeal in The Hague.
[60] Rauter to Himmler; quoted in De Jong, *Het Koninkrijk*, vi, 673.

> tegen het Nederlandse volk, om door middel van haar moreel gezag bij dat volk het in nationaal-socialistischen geest op te voeden. Het schandelijke is niet, dat men den vrederechter liet optreden, maar dat men hem als *Nederlandschen* rechter liet optreden."

Zaaijer stopped short of demanding the death penalty for Carp, however, largely because the *Hoge Raad* had, "zonder blikken of blozen," allowed the system to operate.[61]

One of the court's goals was to retry, by national-socialist standards,[62] political cases which had already been dealt with, thus abolishing the principle of *ne bis in idem*.[63] This, according to Schrieke, was an illustration of the fact that "een nieuwe wereldbeschouwing met haar onafwijsbare slotsommen bezig is, het tot nog toe heersende stelsel terzijde te schuiven."[64] His courts, the judges of which were chosen without exception from "dem kreis der der NSB angehörenden oder ihr gesinnungsmässig besonderes nabestehenden Rechtwahrer,"[65] tried several hundred cases until they were abolished by the *Reichskommissariat* in 1943.

Although ultimately a failure and short-lived in its application, *vrederechtspraak* was symbolic of the degree to which the occupation authorities sought to alter the foundations of the legal system and place it on a national-socialist basis, and demonstrated conclusively that justice might be used for partisan ends. Similarly, the weak and legalistic response of the *Hoge Raad* was symbolic of its reluctance to oppose German measures, however unjust, and showed that judges were no protection againt an aggressive public authority. In the words of one recent historian, the *Hoge Raad* had "niet alleen verzuimd leiding te geen aan wat rechters wel en niet van de bezetter mochten aanvaarden: hij had zelfs herhaalde malen blijkt gegeven voor de bezetter door de knieën te gaan."[66] It is therefore not surprising that the politicians of the liberation era were faced with strong demands for changes in the structure and personnel of the *Hoge Raad*: it had failed conspicuously to prevent the Nazi occupation from undermining public confidence both in the impatiality and in the effectiveness of the legal system. The subsequent refusal of the court's judges to draw their own conclusions from their inadequate wartime conduct would seem to confirm this conclusion.

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61 Proces-Carp, Bijzonder Gerechtshof 's-Gravenhage, 19 March 1946, quoted in Mazel, *In naam van het Recht*, p. 47.
62 Cf. Mazel, *In naam van het Recht*, pp. 42-3.
63 Wetboek van Strafrecht, art. 68.
64 Quoted in De Geus, 'Vrederechtspraak in Nederland' p. 55.
65 Letter written by *Generalkommissar* Wimmer, 22 December 1941. Quoted in De Geus, *Vrederechtspraak in Nederland*, p. 57.
66 A.D. Belinfante, *In plaats van bijltjesdag: de geschiedenis van de bijzondere rechtspleging na de Tweede Wereldoorlog* (Assen, 1978), p. 98.

CHAPTER 3

The course of events

On 5 March 1947, the Liberal senator R. Zegering Hadders put the following question to the Minister of Justice, J.H. van Maarseveen, during the debate on the Justice Ministry Budget, the first since the war:

> "Ik zal vandaag niet in de breede ingaan op den plaats, die de vrouw krachtens ons Burgerlijk Wetboek in het huwelijk inneemt; ik zal niet spreken over het huwelijksgoederenrecht of over de toegezegde wijziging van de wetgeving betreffende de echtscheiding. Ik volsta met te zeggen, dat naar onze mening ons Burgerlijk Wetboek in hoge mate verouderd is. Op tal van gebieden van het civiele recht zijn volkomen nieuwe denkbeelden naar voren gekomen, terwijl de maatschappelijke verhoudingen sedert 1839 een geweldige verandering hebben ondergaan... Zouden wij den Minister bereid mogen vinden... thans aan een rechtsgeleerde van den eersten rang, ik denk aan prof. Meijers, te verzoeken een geheel nieuw Burgerlijk Wetboek samen te stellen, een ontwerp dat, omdat het door één man wordt ontworpen, van één geest kan zijn vervuld en daardoor tevens een logisch sluitend geheel zal vormen?"[67]

The next day, Minister Van Maarseveen replied that, "nu wij het geluk hebben in onze samenleving zoo'n voortreffelijk jurist als prof. Meijers te hebben," he would certainly consider the idea.[68] On 19 March, he wrote to Meijers suggesting that they meet to discuss the matter. The date set for the meeting was 15 April 1947. On 12 April, Van Maarseveen met with some of his most senior civil servants. One of those present was C.A. de Meijere, *raadadviseur* (senior adviser) at the Ministry of Justice, and we are fortunate that his notes on both meetings have been preserved in the archives of the Ministry of Justice. At the first, the Minister suggested that the legal establishment—the judiciary, law faculties and professional organisations—should be asked to give its opinion on the project. Interestingly, the reason for this is "teneinde voor deze zaak in de juristenwereld belangstelling te wekken."[69] Furthermore, he made it clear that Meijers was not to be allowed to make any far-reaching changes to matters of family law. Meijers was to follow the Minister's instructions. "In de gronden voor echtscheiding moet dus niet—of althans niet veel—worden gewijzigd." The principle that the man was the head of the marital unit was to be left unchanged, although better protection for women against abuse was desirable, and the grounds for separation might be extended.

According to De Meijere's account of the second meeting, with Meijers present, Van Maarseveen announced at the start that Meijers would accept the task.[70] He had clearly already secured Meijers' agreement before the meeting, but there is no record of how this was done. He pointed out that "de wet te veel een doode letter wordt en de jurisprudentie te los van de wet komt te staan." De Meijere continues: "EMM acht BW [Burgerlijk Wetboek] zeer verouderd; het wetboek dreigt slechts leerboek te

[67] Eerste Kamer, 5 March 1947, p. 471.
[68] *Ibid.*, p. 497.
[69] Minutes of meeting of 12 April 1947, De Meijere archives, Ministry of Justice, The Hague.

worden." The rest of the meeting mostly concerned practical matters: the manner of Meijers' appointment, the speed at which he expected to work, the appointment of a second professor of civil law at Leiden University. Van Maarseveen pointed out that "voor verruiming van de echtscheidingsgronden in de kamer geen meerderheid te vinden zal zijn," which Meijers considered "een vereenvoudiging van zijn taak." The 'political' matters, mostly found in Books 1 and 2, were taken to include divorce, marital authority, the involvement of judges in juvenile matters, juvenile law and marriage law. Importantly, it was decided that "Om te voorkomen dat het werk vastloopt op groote verscheidenheid van meeningen moet er de voorkeur aan worden gegeven om niet Boek 1 maar het technische gedeelte van het BW voorop te stellen." Meijers noted that, if the advice of the legal profession was sought, the response could equally well be negative; Van Maarseveen, we are told, "wenscht eventueele oppositie te negeren." Consequently, it was decided not to send the letter until after the Queen had signed the Royal Decree.

A discussion paper was immediately produced by the Department, intended for the next meeting of the Cabinet. Although it does not actually seem ever to have been discussed by the Cabinet,[71] it gives a clear indication of the official reasons for Meijers' appointment:

> "Het burgerlijk wetboek... is behalve oud, ook verouderd. De sporen van ouderdom zijn ondanks de partieele herzieningen, diep in het wetboek gegroefd. De ontwikkeling van het burgerlijk recht, voor zoover dit in het wetboek is neergelegd, is buiten het wetboek getreden, doordat de rechtspaak over het burgerlijk wetboek een ontwikkeling te zien geeft, die buiten het wetboek om gaat en die bovendien tegen beginselen van het wetboek indruischt.
>
> Dit dubbele aspect van de ontwikkeling van het burgerlijk recht doet het wettenrecht wijken voor een jurisprudentierecht, welk recht veel minder dan wettenrecht—en met name wanneer jurisprudentierecht tot ontwikkeling moet komen naast en tegen een bestaand wetboek in—in staat is het gecompliceerde maatschappelijke leven te omvatten."[72]

On the matter of 'political' questions, the paper pointed out that

> Het nieuwe burgerlijk wetboek zal... het midden moeten bewaren tusschen hetgeen bereids gemeen goed van de rechtswetenschap is geworden en de rechtsontwikkeling van de toekomst. Het zal daarom niet te ver mogen vooruitlopen op de resultaten, die de rechtswetenschap heeft bereikt. Het nieuwe burgerlijk wetboek zal daarom geen belangrijke verandering kunnen brengen in onderwerpen, die kort geleden bij wet zijn geregeld en voorts ten aanzien van principieele punten zich conformeren aan het beleid van het oogenblikkelijk Hoofd van het Ministerie van Justitie."[73]

On 18 April, Van Maarseveen sent a modified version[74] to the Queen, "with the agreement of the Prime Minister", and requested her to sign the Royal Decree, which she did on 25 April. The legal profession

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[70] All quotations in this paragraph are from the minutes of the meeting of 15 April 1947, De Meijere archives, Ministry of Justice, The Hague.
[71] Florijn, *Ontstaan*, p. 96.
[72] 'Nota voor den Raad van Ministers over de bewerking van een nieuw Burgerlijk Wetboek door Prof.Mr.E.M. Meijers, Hoogleraar te Leiden,' De Meijere archives, Ministry of Justice, p. 1.
[73] *Ibid.*, p. 5.
[74] Apart from a number of changes in vocabulary and syntax, the most interesting change is the claim that a new Civil Code "met name voor de jongere generatie een machtige impuls [zou] kunnen zijn, om zich met vernieuwden ijver aan de studie

was informed of the appointment in a circular dated 14 May, and requested to submit advice and proposals to Meijers.[75]

In the next seven years, Meijers completed work on an Introductory Title and the first four Books of his draft Civil Code. These were published on 3 May 1954, although much had been ready since 1951,[76] and eventually submitted to Parliament on 4 November. On 25 June, however, Meijers died, causing a number of commentators to argue that the project should be abandoned.[77] The Minister of Justice, L.A. Donker, would have none of it, and a committee consisting of J. Drion, J. Eggens and F.J. de Jong was appointed to continue Meijers' work. They found that Meijers had left them all but complete drafts for books 5, 6 and 7.[78] Book 1 (personal and family law) was passed by parliament in December 1958, Book 2 (partnership and company law) in May 1960. They became law in 1970 and 1976 respectively. Books 3, 5 and 6 (together comprising the law of property, contract and tort), and half of Book 7 (special contracts), were passed in 1980, but did not become law until 1992. Book 8 (means of traffic and transport) came into effect in 1991. Book 4 (law of inheritance) has been passed, but its implementation has been long postponed because of serious objections from the notarial profession. By 1992, in other words, the recodification of the Civil Code was complete except for the law of inheritance, a number of special contracts, and the law of intellectual property (originally envisaged as Book 9, but now all but forgotten). There were many reasons for the slow progress made after Meijers' death, not least the frequent lack of effective leadership after 1954, the increasing number of people involved in the project, and the lack of interest shown in the project by many Ministers of Justice and Members of Parliament.[79] None of this could have been foreseen, however, in 1947.

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van het burgerlijk recht te wijden." This seems to be a clear sop to Queen Wilhelmina's known disappointment at the lack of post-war renewal in Dutch politics and society. Quoted in Florijn, *Ontstaan,* p. 96

[75] Copies in NBW and De Meijere archives, Ministry of Justice.

[76] Meijers' work on the Civil Code between 1947 and 1954 is described at length in Florijn, *Ontstaan,* pp. 106-171.

[77] Florijn, p. 177.

[78] W.G. Belinfante, 'De Totstandkoming van het Nieuwe Burgerlijk Wetboek', in: *Het Ontwerp B.W.. Voordrachten gehouden op het Landelijk Congres 1961 voor Juridische Faculteitsverenigingen* (Deventer, 1961), p. 40.

[79] Cf. Florijn, pp. 573-4.

CHAPTER 4

The anatomy of a decision: General factors

Considering Meijers' signal failure to convince the government of the need to recodifiy the civil code before the war, his appointment in 1947 to do just that initially seems surprising. To understand properly the reasons behind Van Maarseveen's prompt and positive response to Zegering Hadders' parliamentary question, we must place it in its historical context, including the immediate post-war situation in which the decision was taken and, more specificaly, the motives of those involved. Part of this context is provided by comparing the Meijers project with a numer of other recodification projects undertaken at the same time, notably that of the Dutch law of civil procedure and of the French *Code civil*. A comparison between these three projects—of which Meijers' was the only one to succeed—brings us closer to a paradoxical answer to the question posed in the title of this thesis.

During the German occupation, much of the Resistance as well as Queen Wilhelmina and some of her government in London had been convinced that the post-war political landscape of the Netherlands should be radically different from the staid and ineffective pre-war situation. Proponents of this concept of *doorbraak* emphasised new political structures and did not wish to see the pre-war parties reconstitute themselves after the war. Queen Wilhelmina, it was well known, was convinced that only the Resistance epitomised the 'true' Dutch people, and that their contribution to post-war society should be decisive. Somewhat paradoxically, she also sought far-reaching 'presidential' powers for the monarchy, akin to those of the later French Fifth Republic, to which her government was uniformly opposed. In the immediate post-liberation period, it was clear that her consitutional hopes would have to wait while the formidable task of rebuilding the economy and healing the scars in society was undertaken. The main priority of H.A.M.T. Kolfschoten, Minister of Justice in the Schermerhorn/Drees cabinet (1945-46),[80] was the *Bijzondere rechtspraak* which was set up to try the 150,000 or so suspected collaborators who had been interned by the autumn of 1945, and the *zuivering* (purge) of the civil service, press and later also of the judiciary, universities, employers and artists.[81]

[80] The Queen had instructed them to form a 'nationaal kabinet voor herstel en vernieuwing', cf. Mazel, *In naam van het Recht*, p. 150. A comprehensive account of this period is F.J.F.M. Duynstee & J. Bosmans, *Het kabinet-Schermerhorn-Drees (1945-1946)* (Assen/Amsterdam, 1977).

The general election of 1946 confirmed the Queen's worst fears: except for significant gains by the Communists, which mirrored those which occurred in many other elections in Western Europe immediately after the war, the results were almost identical to those of 1937. The reconstituted Catholic party, the *Katholieke Volkspartij* (KVP), won about a third of the seats, as did the *Partij van de Arbeid* (PvdA), a broad grouping mostly of former socialists but also of a number of liberals, catholics and protestants. These two parties formed a coalition government under L.J.M. Beel (1946-48).[82] By this time, it was clear that *doorbraak* had failed: the old parties had reformed under different names, and no constitutional changes were forthcoming.[83] This failure can be attributed largely to an overestimation of the desire for change among the general population caused by an exaggerated perception of the changes brought about in Dutch society by the German occupation.[84] Clearly, the Resistance had experienced it more directly than most. In fact, one opinion poll carried out in August 1945 found that 62% of those questioned said that their life had not changed much as a result of the war. Of the 33% that said that it had, a third said it had improved for the better.[85]

The new Minister of Justice, J.H. van Maarseveen, was confronted with a crisis in the *Bijzondere rechtspraak*. The general impression was of a process taking too much time, in which the 'big fish' were getting away while the minor offenders were being punished with undue severity. To counter this he developed a religiously-inspired policy, later referred to as *barmhartigheidspolitiek*, by which most lesser offenders were gradually released and efforts were concentrated on the more serious cases. His somewhat unfortunate choice of the word *barmhartig* (appealing to Christian charity) to describe the recommended attitude to minor collaborators offended many people, and did his popularity little good. According to an opinion poll published on 16 April 1947, the day after his exploratory meeting with Meijers, only 20% of those questioned thought he was doing a good job.[86]

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[81] Cf. P. Romijn, *Snel, streng en rechtvaardig. Politiek beleid inzake de bestraffing en reclassering van 'foute' Nederlanders, 1945-1955* (Houten, 1989) and Belinfante, *In plaats van bijltjesdag*.
[82] This government is the subject of M.D. Boogaarts, *De periode van het kabinet-Beel: 3 juli 1946-7 augustus 1948*, 4 vols. (The Hague, 1989).
[83] The Queen's abdication in 1948 can be linked to her disappointment at failing to achieve either some sort of *doorbraak* or increased power. In her autobiography, published after her abdication, Princess Wilhelmina, as she was now called, studiously ignored the latter, and described the former as follows: "Ofschoon de partijen voor het merendeel gestreefd hebben naar heroriëntatie, is niet tot stand gekomen wat velen gehoopt en verwacht hadden. Het lichamelijk verzwakte en uitgeputte volk greep bij voorkeur naar het oude, wèlbekende. De plannen voor het nieuwe, waar het hart tijdens de bezetting naar uitging, raakten op de achtergrond." Wilhelmina, *Eenzaam maar niet alleen* (Amsterdam, 1959), p. 419.
[84] Cf. P. Romijn, 'The synthesis of the Political Order and the Resistance Movement in the Netherlands in 1945' in G. Bennett (ed.), *The End of the War in Europe, 1945* (London, 1996), pp. 139-147.
[85] Nederlands Insituut voor de Publieke Opinie en het Marktonderzoek (NIPO), Persbericht no. 1, 30 August 1945. Quoted in J.C.H. Blom, 'Jaren van tucht en ascese. Enige beschouwingen over de stemming in herrijzend Nederland (1945-1950)' in Idem, *Crisis, Bezetting en Herstel*, p. 201.
[86] NIPO, Persbericht no. 100, 16 April 1946. Blom, p. 205.

It had been decided in London that the *Hoge Raad*, because of its tainted reputation,[87] would play no part in the *Bijzondere rechtspraak* which would be administered instead by a separate tier of courts. In fact, the Schermerhorn/Drees and Beel governments had had considerable difficulty in effecting a *zuivering* of the *Hoge Raad*.[88] This was not, however, an issue which seems to have concerned many people: an opinion poll conducted in July 1946 found that, even of those who knew about the problem, 45% had no opinion on it.[89] J. Donner, the only judge on the *Hoge Raad* to emerge from the war with his reputation more or less intact (he had been dismissed by Seyss-Inquart in March 1944), eventually assumed the presidency in November 1944. He agreed to do so only after the other judges had refused to allow an outsider—Kolfschoten had wanted Meijers—to assume the position. Meijers was, in any case, preoccupied with his work for another body overseeing the return to legal normality, the *Raad voor het Rechtsherstel*, which was charged with returning to their former owners, notably Jews, possessions alienated during the war.

One other, more speculative, suggestion can be made about the effect of the occupation on Dutch society and its relevance to the decision to begin work on a recodification of the civil code. As has been stated before,[90] one of the most substantial criticisms which Meijers and others had of the existing civil legislation was that it was no longer an accurate reflection of the civil *law*. "Et les juges?" he asked his audience in Paris in February 1948. "Mécontents d'une loi, qui devient de plus en plus surannée, ils essayent des solutions hardies auxquelles nos grands-pères n'auraient jamais pensé."[91] The result of this was, of course, legal insecurity, whereby those seeking justice had no idea in some cases what the verdict would be. As Meijers had pointed out in his 1938 speech this meant that parties were extremely reluctant to commit their disputes to such uncertain arbitration. He gave an example:

> "Niemand kan, zelfs maar in groote lijnen, zeggen, wat het recht in Nederland is betreffende het door art. 963a B.W. bestreken gebied; men kan een kleine bibliotheek vullen met wat over dit éene artikel geschreven is. Toch is sinds zijn bestaan nog niet eenmaal over dit artikel geprocedeerd. De oorzaak hiervan is niet dat de zoo zwaar bediscussieerde vragen zich in de praktijk niet voordoen; wie de vragenbus van het weekblad voor het notariaat raadpleegt, kan gemakkelijk van het tegendeel beleerd worden. Men durft dienaangaande echter geen procedure aan."[92]

If the lawyers had no idea what the law was, still less could this be expected of ordinary people. Although in no sense a populist, Meijers believed nevertheless that the law should be intelligible not only to the student of law but also to the informed layman. In his 1938 speech he had already warned of the consequences of a popular loss of faith in the administration of justice. The "splijting van het volk

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[87] A summary of the *Toestsingsarrest* had reached the government-in-exile in London via Switzerland, cf. Mazel, *In naam van het Recht*, pp. 87-8.
[88] Cf. Mazel, *In naam van het Recht*, pp. 150-178.
[89] 46% was dissatisfied at the progress made, 9% satisfied. NIPO, Persbericht no. 54, 30 July 1946. Blom, p. 205.
[90] See above, chapter 1.
[91] Meijers, 'La réforme de code civil Néerlandais', *VPO*, p. 159.
[92] Meijers, 'De honderjarige burgerlijke wetgeving', *VPO*, i. 144. Art. 963a, being part of inheritance law, remains on the statute book and continues to perplex legal experts.

zelf, veroorzaakt door wanvertrouwen in de onpartijdigheid van recht en rechtsbedeeling"[93] was threatened by the legal insecurity caused by the failings of the old civil code. This threat of legal insecurity had become much more immediately and more dangerously apparent during the German occupation: *Vrederechtspraak* was clearly NSB, or at least national-socialist, justice, whereby NSB members were judged by entirely different standards than were their opponents. Thus the NSB member in uniform who had inflicted grievous bodily harm on a man who had given him a disparaging look was found not guilty because it was seen as a legitimate defence of his personal and party honour.[94] There was no question of "onpartijdigheid van rechtsbedeeling". Moreover, the failure of the *Hoge Raad* to register a single form of protest against the undermining of the Dutch system of justice throughout five years of occupation had further undermined trust in the judicial system. From the general point made by Meijers in 1938 it seems not so far-fetched to argue, *in extenso*, that the yearning for legal security expressed in the desire for a revision of the civil code found a powerful illustration, if not stimulant, in the disgust felt at Nazi legal policies and the failure of the highest court in the land to stand up for the most basic rights of the national constitution.

In fact, the Dutch recodification project was in no sense unique.[95] The Italian *Codice Civile* of 1866 was replaced by a new Code in 1942, which, despite the fact that it was introduced by a Fascist government, was modern and durable. In France, a commission under professor Léon Julliot de la Morandière was appointed on 7 June 1945 to draft a new *Code civil*. However, there were important differences in the circumstances in which Meijers and Julliot de la Morandière were appointed, and in the objectives which they set themselves. Whereas Meijers was appointed by a regularly elected government in a stable, if difficult, political environment and given clear instructions on what he could and could not do, the Julliot de la Morandière commission was appointed by decree of the Provisional Government of General De Gaulle which, aware of its transitory nature, gave the committee little idea of what was expected of it. Meijers and Van Maarseveen wanted a technical revision of the Civil Code, which left the core, and the basic principles, of the old Code unchanged, the purpose of which was to incorporate the law as it had evolved through jurisprudence and new developments and insights into a single, new, modern, internally coherent and consistent Code.

The background and aims of the French recodification were very different. Significantly more so than in the Netherlands, there were those in France who felt that the *Code civil* no longer suited modern French society, for instance because it sought to protect the employer, the creditor and the landlord against the

[93] *Ibid.*, p. 145.
[94] Cf. De Geus, 'Vrederechtspraak in Nederland', pp. 68-9.

worker, the debtor and the tenant.[96] Gaston Morin spoke in 1945 of "la révolte contre le Code", arguing that "Le Code civil est bien plus le code des choses et de la richesse acquise que celui des personnes."[97] It was the view of Julliot de la Morandière that it was the task of his commission to create an entirely new code that would serve a society entirely different from that of 1804. He anticipated that the France of the post-Second World War period would be governed according to an explicitly socialist constitution, in which the *Code civil* with its liberal-capitalist principles would be replaced by a code which protected not the interests of the individual but those of the community. Under the current "fièvre de socialisation", he argued, a complete revision was needed "des conceptions mêmes qui doivent servir de fondement au Code."[98] With these objectives in mind, the French commission continued work until 1961, but it was soon clear that no 'socialisation' of French society would take place. Successive Fourth Republic governments became less interested in the commission's work, until it was announced in 1965 that plans to recodify the *Code civil* had been abandoned.

A similar fate befell the proposals of the commission under Professor J.T. Doorhout Mees, appointed by Van Maarseveen on 9 September 1947 to draw up guidelines for the recodification of the Dutch laws of civil procedure and judicial organisation.[99] Its conclusions were published in 1948, and recommended radical changes to the existing law with the aim of making justice quicker and more affordable. As such they were clearly influenced by the ideas of renewal and social justice typical of the post-war period, but little was done with them.[100]

Whereas the projects to recodify the French *Code civil* and the Dutch law of civil procedure were a product of a post-war desire for far-reaching social and political regeneration—often referred to, after Goethe, as the *Sturm und Drang* mentality[101]— this can in no sense be said of the Dutch Civil Code project. It might be speculated that in this difference lies the reason for the failure of the former two and the eventual success of the latter: the urge for renewal which drove the French project soon ran out of steam, while the technical revision being worked on in the Netherlands remained necessary and comparatively uncontroversial. "Een nieuw Burgerlijk Wetboek onstaat alleen uit politieken drang," Paul Scholten had said in 1938,[102] but the two civil recodification attempts suggest that political

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[95] Much of the information in this section is derived from E.J.A. Fischer-Keuls, 'Hercodificatie in Frankrijk en ten onzent', in *'t Exempel dwinght* (Zwolle, 1975), pp. 135-147. Cf. also J.-P. Rioux, *La France de la quatrième république* (Paris, 1983).
[96] This was the opinion of A. Tissier, 'Le code civil et les classes ouvrières' in *Livre de centennaire* (Paris, 1904).
[97] G. Morin, *La Révolte du doit contre le Code* (Paris, 1945). Quoted in Fischer-Keuls, 'Hercodificatie in Frankrijk', p. 140.
[98] L.J. Julliot de la Morandière in the 'Avant-Propos' to *Travaux de la Commission de Réforme de Code civil*, vol. 1 (Paris, 1947).
[99] Cf. Boogaarts, *De periode van het kabinet-Beel*, vol. C, p. 1752.
[100] Cf. Interview with T.J. Doorhout Mees in J.M. van Dunné, P. Boeles and A.J. Heerma van Voss (eds.), *Acht civilisten in burger* (Zwolle, 1977), esp. pp. 73-77.
[101] Cf. Fischer-Keuls, *op. cit.*, p. 146n and J. Drion, 'Waarom nieuwe codificatie van het burgerlijk recht' in *Het Ontwerp B.W.. Voordrachten gehouden op het Landelijk Congres 1961 voor Juridische Faculteitsverenigingen* (Deventer, 1961), p. 12.
[102] *Gedenkboek Burgerlijk Wetboek, 1838-1938*, p. 30.

pressure is a transitory phenomenon and, moreover, that far-reaching political ambitions are more of a hindrance than an aid to success.

CHAPTER 5

The anatomy of a decision: Specific factors

If the factors outlined in the previous chapter help to illustrate why the climate for recodification was significantly more favourable in 1947 than it had been in 1938, the fact remains that no recodification would have come about without the presence of the individuals who made it happen. Queen Wilhelmina may well have approved greatly of the plan, as Van Maaseveen knew she would,[103] because she saw in it a hint of the *doorbraak* which had proved so illusive and chimerical in almost all other areas of public life. Moreover, the dissatisfaction at the *zuivering* of the *Hoge Raad* and the *Bijzondere rechtspleging* in general, and painful memories of the divisive effects of the German occupation may well have made a project of legal clarification and renewal more attractive. Yet if Minister Van Maarseveen had not responded favourably to Zegering Hadders' suggestion and found Meijers willing to embark on so arduous an undertaking, no recodification would have taken place. Or, as one insider later put it: "als je die twee niet had gehad, was het helemaal niet gebeurd."[104]It is thus to the personal motivations of Meijers and Van Maarseveen that we must turn, in order to assess why they chose to take advantage of the propitious circumstances to put the plan into action.

Meijers' reasons for desiring recodification have been indicated before and a brief resumé will suffice here. His criticism of the old code was mostly technical: it was defective in many places, and was no longer an accurate reflection of the law. Consequently, new law was being made through jurisprudence rather than through legislation. This threatened, in his view, the principle of codification which implied that it was the duty of the legislature to create and maintain an up-to-date *corpus* of functioning legislation which reflected the law of its time. According to M. de Boer-Rood, his secretary from 1949 to 1951, he said that

> "als je een wetboek hebt, dan werkt dat in feite maar betrekkelijk kort, want vervolgens krijg je interpretaties, die na verloop van tijd gaan werken als slingerplanten die de eik omtrekken. Hij was gefascineerd door de slingerplanten, maar meende dat het om de eik ging. Hij wilde als het ware een nieuw eikeboompje planten."[105]

[103] A marginal note in De Meijere's account of the meeting of 15 April says that the Queen "het [the plan] mooi zal vinden." De Meijere archives, Ministry of Justice, The Hague.
[104] W.C.L. van der Grinten, *Ex tunc, ex nunc* (Zwolle, 1990), p. 197. Quoted in Florijn, *Ontstaan*, p. 103.
[105] Florijn, interview with M. Rood-De Boer, 24 September 1987.

Already convinced of the need for a thorough revision of the civil code during his student days in Amsterdam, he had remained an unwavering advocate of reform throughout his career. He had maintained a notebook with sketches on it for fifty years, and we need not be surprised that he jumped at the chance to put into practice that which he had advocated for so long.

Despite Meijers' own disappointment at the wartime weakness of the *Hoge Raad*, the new civil code can in no way be interpreted, either in its earliest draft or in the version passed by parliament in 1980, as diminishing the Supreme Court's freedom of interpretation. If anything, there are more *open normen* (abstract rules of equity and reasonableness to be applied by the judge as he or she sees fit)[106] in the new code than there were in the old. A.S. Hartkamp, closely involved in the drafting of Book 6 in which many of these abstract rules are to be found, has pointed out that, while they represented a change with regard to current *legislation*, this was not the case with regard to current *law*.[107] The *Hoge Raad* had, in other words, already assumed many of the powers which the new code afforded it. That it should be granted through legislation powers which it already enjoyed in practice is an illustration of the reason why Meijers and other considered a recodification so necessary: to bring the code up to date with current practice, and to define in proper parliamentary legislation what the law was. This consideration was born out of the conviction that it was the task of parliament to make the law and the judiciary to apply it, rather than the judiciary being forced, for want of adequate and up-to-date parliamentary legislation, to perform both tasks simultaneously. Once J. Donner had become president of the *Hoge Raad* it was imperative that the court should be allowed to return to its essential tasks, and Meijers seems to have had no qualms in permitting it to retain its acquired rights.

J.H. van Maarseveen, a former city councillor in Utrecht, had been elected to parliament in 1937 for the Catholic RKSP. When that party, reconstituted as the *Katholieke Volkspartij* (KVP), did very well in the elections of 1946, he became its Minister of Justice in the new Beel government. He had a reputation for being practical, decisive and determined, not a man to mince his words or fudge his plans. He was also a man who "zeer snel iets kon aanpakken als hij daar enige politieke winst in zag."[108] His difficulties with the *Bijzondere rechtspraak* and his consequent general unpopularity have been noted above. Moreover, Florijn points out that he had already made it known in November 1946 that he was interested in a general revision of the civil code, although at that point he was still assuming that it would be done by the *Staatscommissie-Limburg*, whose work Meijers had so vehemently criticised in 1928.[109] On 2 March 1947, it also became clear that, by seniority, Meijers would be the next chairman of that Commission.

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[106] For example, artt. 6:2 and 6:248 BW.
[107] A.S. Hartkamp, 'Open normen (in het bijzonder de redelijkheid en billijkheid) in het nieuwe BW', *WPNR*, 1981, p. 216.
[108] Quoted anonymously in G.J. Veerman, 'Van oude dingen die voorbijgaan—het BW 150 jaar', in *Justitiële Verkenningen*, 14/6, 1988, p. 87n. Florijn, *Ontstaan,* p. 103, names the informer as L. de Vries, former chief of the civil legislation department at the Ministry of Justice.
[109] Florijn, *Ontstaan*, pp. 103-4. For Meijers' criticism of the Commission, see above, p. 11, note 19.

Zegering Hadders' parliamentary question three days later, could not, in other words, have come at a better time.

Another important consideration for Van Maarseveen was the fact that Meijers was an extremely well-known and respected man—particularly after Cleveringa's protest speech of 26 November 1940, his experiences during the war and the wide publicity given to both—and was believed to have done significant preparatory work for the recodification project. Indeed, this fact was referred to in almost every document that his ministry produced on the subject.[110] The resulting expectation, in frequent circulation at the time, was that Meijers would be able to complete the work within two years. As G.J. Veerman has pointed out recently, "Twee jaar is voor een politicus een aantrekkelijke termijn."[111] Apart from personal vanity—"Zou u het niet leuk vinden wanneer Uw naam op het titelblad van het nieuwe Burgerlijk Wetboek zou prijken?" he reportedly told Zegering Hadders[112]—it was a refreshing and renewing project to counter the problems of the *Bijzondere rechtspraak*. The availability and unchallenged suitability of Meijers must have played a decisive role in making up Van Maarseveen's mind that a speedy recodification was both practically possible and politically desirable.

More speculatively, it might be argued that the appointment of Meijers would bring an end to Meijers' own particularly strong criticism of the *Bijzondere rechtspraak*. Meijers was, for example, a member of the advisory council of the *Landelijk comité voor de rechtszekerheid*, an organisation fiercely critical of the *zuivering* process.[113] If this was a motive, it failed: Meijers continued to be a bitter critic of inadequate government support for those citizens, particularly Jews of course, who had been dispossessed during the war, becoming chairman in May 1950 of the *Commissie tot Bescherming der Aanspraken van Gedepossedeerden*, a body directly occupied with protecting the rights of dispossessed Jews.[114] Like most other Jews, he had seen his possessions forcibly sold by German-controlled banks, partly to pay for the maintenance of Westerbork, Barneveld, and other concentration camps.

At first sight, Van Maarseveen's response looks, if anything, *too* quick. It seems likely that Zegering Hadders had at least informed him beforehand that he would put the question. Van Maarseveen's general support for the idea was, in any case, known. The theory that the question was a 'plant' to which the answer was already known is reinforced by the fact that it mentioned Meijers specifically. Moreover, Meijers and Zegering Hadders were members of the same party, and the normal Justice spokesman for

110 See chapter 3, above.
111 Veerman, 'Het BW 150 jaar', p. 87n. According to M. Rood-De Boer, Meijers had, indeed, finished all nine books of his draft code by 1951, and did not replace her when she left. If this is true, then Meijers either overestimated his own progress or left work which his successors, for whatever reason, considered inadequate.
112 Cf. Florijn, 'Het nieuwe Burgerlijk Wetboek en de politiek', NJB, 1992, p. 34.
113 De Jong, *Het Koninkrijk*, xii. 482.

the Liberals in the First Chamber, Professor A.N. Molenaar, was a colleague of Meijers in Leiden. Meijers' desire for recodification was well-known, and the fact that he had done preparatory work for it clearly indicated that he would be willing to perform the task himself. According to G.J. Wiarda, later president of the *Hoge Raad*, "Molenaar heeft gezegd 'ik wil het niet doen, want ik sta er te dichtbij, doe jij [Zegering Hadders] het dan maar.' ... Ik denk dat hij het absoluut zeker wist dat Meijers het leuk vond."[115]

According to Zegering Hadders himself, however, Molenaar was ill on 5 March, and had given him a list of three questions to put to the minister if there was time, from which he chose to ask the second, cited at the start of this chapter.[116] In fact, his formulation of the question—regretting the fact that women could become judges and that married women enjoyed a legal status commensurate with Napoleon's opinion of their kind[117]—indicates that his reasons for choosing that particular question had more to do with his desire to see radical changes in family law, a desire which the meetings at the Ministry of Justice in April 1947 made clear were not shared by the Catholic minister.

Zegering Hadders would have been aware of Van Maarseveen's opposition to large-scale reform of family law; his question should be interpreted, in other words, as an attempt to realise through an overall recodification what he knew he could not achieve through a specific piece of new legislation because of the opposition of the confessional parties in parliament and their Minister of Justice. He may have been hoping that Meijers would be more sympathetic to his viewpoint than was the Catholic traditionalist Van Maarseveen.[118] According to M. Rood-De Boer, Meijers was particularly interested in family law, both on principle and also, more directly, because he had four daughters.[119]

Whether Meijers did in fact intend to make the changes Zegering Hadders desired is not clear, as is indicated by his remark at the ministerial meeting on 15 April 1947 that the fact that he would not be allowed to make too many alterations to family law was a simplification of his task.[120] G.E. Langemeijer, who, had been Zaaijer's deputy at the *Bijzondere Gerechtshof* in The Hague, casts doubt on the theory that Meijers was the man to effect the decisive 'renewal' in civil law that many—but not sufficient, it seems, for a parliamentary majority—wanted. In his view, "Meijers was toch wel bij

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114 De Jong, *Het Koninkrijk*, xii. 685.
115 Interviewed by Florijn. Transcript in NBW Archief, Ministry of Justice, The Hague.
116 Cf. K. Wiersma, 'Meijers en de hercodificatie', *WPNR*, 1980, p. 28.
117 Napoleon's *Code civil* of 1804 was, it will be remembered, the basis for the vast majority of the Dutch code of 1838. It afforded married women the legal status of juveniles, who could undertake no legal action without the consent of their guardian, i.c. their husband.
118 It was his opinion, for example, that women could not enter the judiciary, because "bij de vrouw in het algemeen het gevoelsleven sterker ontwikkeld is dan bij de man en dat bij de man het gevoelsleven meer onder controle van de verstandelijke vermogens staat dan bij de vrouw." Quoted in Boogaarts, *De periode van het kabinet-Beel*, vol. C, p. 1745.
119 Florijn, interview with M. Rood-De Boer. The same point was made by Meijers' son-in-law, the later Minister of Justice I. Samkalden.

uitstek niet een man van de vernieuwing."[121] It is perhaps significant in this context that the changes which Zegering Hadders desired were eventually implemented not in Meijers' draft Book 1, but by a seperate law in 1956.[122] Whatever Meijers' political convictions, however, it should be emphasised that he had little choice in the matter: Van Maarseveen would not countenance any drastic changes to family law. It would therefore seem sensible to agree with J. Drion, who was appointed to succeed Meijers in 1954, that "de gedachte van vernieuwing [van het Burgerlijk Wetboek] geenszins... de vrucht is van een tijdelijke *Sturm und Drang*-mentaliteit die vaak na het einde van een oorlog heerst."[123]

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[120] See above, note 4.
[121] Florijn, interview with G.E. Langemeijer, 30 July 1987.
[122] Cf. C. Asser, *Handleiding tot de beoefening van het Nederlands burgerlijk recht*, vol. 1, *Personen- en Familierecht*, (14th edition, Zwolle, 1992), p. 133-5.
[123] J. Drion, 'Waarom nieuwe codificatie van het Burgerlijk Recht', p. 12.

Conclusion

The principal conclusion which emerges about the decision in 1947 is that, whatever may have been thought at the time, Minister Van Maarseveen did not appoint Meijers in order to effect decisive changes to the Civil Code. Meijers' brief was clearly to perform a thorough technical revision of the code, to re*codify* the *law* as it stood in 1947, rather than to modify it according to new social or political ideas. The law itself was to remain largely unchanged, and the principal purpose of the reform was to reassert the primacy of codification within the legal process. The source of law would once again be the code, rather than the code augmented significantly by jurisprudence. Meijers' task was to incorporate into his new code the changes in the law brought about by jurisprudence. There is no indication that Van Maarseveen was interested in renewal, nor that he was affected by the *Sturm und Drang* mentality of the liberation era. If Meijers was a man for renewal—and many contemporaries doubted it—he was, in any case, content to obey the Minister's restrictions.

This is not to argue, of course, that the concept of renewal and widespread calls for far-reaching change in no way affected the *decision* to embark upon recodification. Contrary to most projects and changes envisaged by the Resistance, the Queen and others during the German occupation, this project was inexpensive and self-contained. It offered the appearance of dynamic renewal and as such provided a welcome distraction from the much more intractable problems with which Van Maarseveen was struggling: although he was able greatly to reduce the number of political detainees during his period in office from 1946 to 1948, the issue of the post-war purges and the punishment of wartime collaborators remained a running sore well into the 1950s.

Seen in its political context, what initially appears to have been Meijers' 'victory' might in fact be seen as much less emphatic. Van Maarseveen may have appreciated the intrinsic merit of recodification—and the influence in this context of Meijers' speech in 1938 should not be underestimated—but his decision to go ahead with it seems to have rested on less idealistic motives. In the troubled political circumstances of the immediate post-war period, there were clearly issues which were more pressing. The old Civil Code had been in force for 109 years and could be expected to survive for a few more years. In fact, owing to the long delays which followed Meijers' death in 1954, most of the 1838 code remained in force until 1992, and some of it remains on the statute book today. The experiences of the German occupation, which had indicated how far an oppressive public authority could go in undermining the legal system, and how little the judiciary could do to defend it, certainly made recodification a more attractive option, but in no way rendered it inevitable or essential. Much like the rest of the state administration, the legal apparatus returned in 1945 to the *status quo ante bellum*, almost as if nothing

had happened. Very few changes had been made to the Civil Code during the war, and the judiciary remained entirely familiar with it, warts and all.

The recodification was not, in other words, despite what Meijers may have thought, a matter of particular urgency. Nor was the decision caused by the simple fact that Van Maarseveen had become convinced of its necessity, although the arguments for recodification were compelling and would on their own have been able to justify it. For the Minister, the project had a number of important advantages. Firstly, it offered a welcome public distraction from general criticism of the *Bijzondere rechtspraak*. Secondly, it held out the prospect of a new Civil Code within a number of years, bearing his name on the front page. Thirdly, it was a chance for his department to get a share of the process of 'renewal': all of the other departments had their projects and so now did his. Added to this, of course, was the fact that Meijers was available, widely respected and incontestably qualified to accomplish the task. In fact, it might be argued that Meijers was the only man capable of carrying out the work and that, had he not survived the war, Zegering Hadders' parliamentary question would simply have met with a polite refusal or, perhaps worse, been referred back to the Limburg commission and kept there indefinitely.

It will be clear from the above that a distinction needs to be made between internal and external causes. Meijers' appointment was not caused by a desire for substantial legal renewal; in fact, he was prohibited from effecting any at all. To the outside world, however, the story was different: it was *doorbraak*, modernisation, dynamic change. This is where the distinction made in the Intruduction comes in, between the *decision* to recodify and the recodification itself, and the question of the objectives of Van Maarseveen and Meijers. Van Maarseveen's decision to recodify was no doubt partly affected by the mood of renewal, if much less so than in the case of the French project. Yet it was always clear in his mind that the recodification itself would be no renewal. His was a technical revision, unlike the revolutionary tumults of De la Morandière's commission. Indeed, this was the principal reason for its success: it was a project which bore all the signs of renewal and yet served an essentially conservative purpose. As such, it represents an excellent symbol of the wider ambivalence of the process of post-war reconstruction in the Netherlands.

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Abbreviations:
AA *Ars Aequi*
NJB *Nederlands Juristenblad*
RMT *Rechtsgeleerd Magazijn Themis*
WPNR *Weekblad voor Privaatrecht, Notariaat en Registratie*

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