Finding a subject for an article for Philip Thomas was not difficult. There had to be some sort of a Dutch-South African connection, and plenty of subjects fit that bill. Joannes van der Linden is at least as good as any, but probably better. He prepared the first finished draft Civil Code for the Kingdom of Holland, but his works also found their way to South Africa, and indeed his famous *Regtsgeleerd, Practicaal en Koopmans-Handboek* of 1806 was formally the “Code” in the Transvaal Republic between 1859 and 1901, and has maintained a considerable importance in Southern Africa ever since. Strangely, Van der Linden is a rather under-researched subject, which provided another reason to have a good look at him and his work. And finally, Philip Thomas himself gave a paper on Van der Linden’s draft Code at the conference of the Société Internationale “Fernand de Visscher” pour l’Histoire des Droits de l’Antiquité in 1999, in Exeter, so I am confident that he will enjoy reading about him, and hopefully I can tell him some things he may not have known.

1 Some biographical and bibliographical data

Van der Linden deserves, but does not have, a full biography. Writing it cannot be the purpose of an article like this, which has only a limited scope. However, I may well

1 It was commissioned by the new King Louis Napoleon late in 1806 or early in 1807 and finished by Van der Linden in January 1808, but for political reasons never became law. The modern edition is: J.Th. de Smidt, *Joannes van der Linden, Ontwerp Burgerlijk Wetboek 1807-1808. Heruitgave met nog enige onuitgegeven stukken*. Amsterdam 1967.


3 The title of his paper was “The ‘Code’ of Johannes van der Linden”.

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Van der Linden was born in Zuid Scharwoude on 23 February 1756, the son of a minister of the Church. We know little about his education except that his father taught him Latin, from a rather unusual textbook: the Institutes of Justinian! He studied law at Leiden and obtained his doctorate just after his eighteenth birthday, on 1 March 1774, with a dissertation entitled De jure viduarum.\(^5\) He worked as a lawyer in The Hague until 1797 and afterwards in Amsterdam,\(^6\) where he died on 1 August 1835. He was married to Geertruida Kragt; little or nothing is known about her and there is no mention of any children having been born from this marriage – further investigation is clearly called for.

Before the revolutionary events in the Netherlands in 1795, Van der Linden had held several public offices, but later he devoted himself to his legal practice and to writing and translating many books of all kinds. In 1824 there was a major celebration of the fiftieth anniversary of his doctorate; Van der Linden’s speech which he delivered on this occasion was published both in the original Latin version and in a Dutch translation. Shortly thereafter, he received a decoration from King Willem I.\(^7\) Finally, he was made a judge in the Amsterdam tribunal, partly to honour his services to legal practice and also to provide him with an income; he was anything but rich, always having sent his clients only moderate bills, many of which had remained unpaid.\(^8\) It is uncertain whether his books and his translations generated any significant income.

A full bibliography of Van der Linden’s works also lies outside the scope of this contribution. However, a few words should be said about his literary production, which is a somewhat neglected aspect of his life. He published far more than is normally realised, even if it is usually mentioned that apart from his juridical works in a stricter sense, he produced a number of useful indexes and several translations, notably of works by Pothier. But some works, especially translations, have escaped notice and deserve to be mentioned, if only to cast some light on Van der Linden’s wide interests and his astonishing appetite for work.

The Nederlandse Centrale Catalogus yields most of the known works that Van der Linden wrote or translated, especially the legal ones. Lesser known are his translations on
of a biography of Napoleon,\(^9\) of biographies of the Empress Catherine II of Russia,\(^10\) and of her husband Czar Peter III of Russia\(^11\) – incidentally, the first book in which, at the explicit request of his publisher, he allowed his name to be put on the title-page as the translator – as well as a book on the somewhat risqué subject of the lovers of Catherine.\(^12\) There are a few travel-books as well, one of considerable size,\(^13\) and a “psychological” work by C.F. Pockels, \textit{Geheimrat} of the Duke of Brunswick-Lüneburg.\(^14\) Van der Linden himself tells us that after 1795 he refrained from writing legal works for some time because he was not sure which direction the development of the law would take in the Netherlands.\(^15\)

Important additional information is provided by Van Hall\(^16\) – who knew Van der Linden quite well personally – in his biographical sketch. Van Hall mentions that Van der Linden originally contemplated studying medicine or theology rather than law, and only decided against the former two possibilities because he did not consider himself to be physically strong enough. However that may be, it appears that Van der Linden remained true to his old loves to the extent that he translated two books by the German physician Girtanner, one on venereal diseases and another on the diseases and education of children;\(^17\) also a book by another German physician, Hufeland, on pathology,\(^18\) and one on forensic medicine by Metzger.\(^19\) Finally, Van der Linden had a long-term translation project in

\(^9\) Het leven van Buonaparte / naar het Fransch door J. van der Linden. Amsterdam, Allart 1801-1802.

\(^10\) Het leven van Catharina II, keizerin van Rusland. Met pourtraiten. Uit het Fransch. (3 vols.), Amsterdam, Johannes Allart, 1798-1799; the author was Jean-Henri Castéra.

\(^11\) Geschiedenis van Peter III, keizer van Rusland / naar het Fransch door Joa. van der Linden. Leiden 1799; the author was Jean-Charles Laveaux.

\(^12\) Minnarijen van Catharina II, keizerin van Rusland; en geschiedenis van haare voornaamste minnaars. Naar het Fransch door J. van der Linden. Amsterdam, [s.n.], 1800.

\(^13\) Tafereel van Cayenne, of Fransch Guyana (naar het Fransch door Joannes van der Linden). Leiden, A. & J. Honkoop, 1800; Reize van De La Pérouse in de jaaren 1785, 1786, 1787 en 1788 / J.F.G. de la Pérouse; naar het Fransch door Joannes van der Linden. (3 vols.), Amsterdam, J. Allart, 1801-1804.


\(^15\) In the introduction to his biography of Peter III (above, note 11).

\(^16\) Maurits Cornelis van Hall (1768-1858) studied law at Utrecht and Leiden and worked as a lawyer in and around Amsterdam from 1787 onwards. He was a Member of Parliament 1789-1800 and then returned to legal practice. He was a trusted adviser of King Willem I after 1813. In 1831, he was appointed President of the Court of Law in Amsterdam (where Van der Linden was one of the judges since 1827), from which position he retired in 1856.

\(^17\) Christoph Girtanner, Verhandeling over de venerische ziekte. Uit het Hoogduitsch. Leiden, 1796; Verhandeling over de ziekten der kinderen, en derzelver natuurkundige opvoeding door Christoph Girtanner, uit het Hoogduitsch. Leiden: bij A. & J. Honkoop, 1797. Van Hall (above, note 4 at 22) refers to these translations; Van der Linden himself mentions them in the introduction to his translation of Hufeland’s \textit{Pathologia} (below, note 18).

\(^18\) Pathologia, ad academicarum praelectionum usum adornata a Chr. Wilh. Hufeland et e Germanico in Latinum sermonem translata a Joa. van der Linden. Pars I: Pathogenia. Lugduni Batavorum, 1800. The introduction to this book by the translator Van der Linden confirms that he also translated the two books by Girtanner.

line with his theological interests: from 1802 until 1826 he published a translation in eight volumes of Reinhard’s *System der christlichen Moral*. All in all, Van der Linden produced many thousands of pages of translations.

2 The codification process in Holland and Van der Linden’s draft Code

In 1798, the first constitution (*Staatsregeling*) for a single Dutch nation came into force, which provided for codifications of several areas of law to be produced. A committee with twelve members was appointed, and divided itself into sub-committees. The sub-committee for the codification of private law, under the presidency of the Amsterdam professor Hendrik Constantijn Cras, soon got bogged down in disputes about theoretical questions, and the work slowly ground to a halt, although the members did manage to produce a partial draft. When Louis Napoleon became King of Holland (that is, the northern Netherlands) in 1806, he found the codification process in a rather uncompleted state. After he had investigated what had been achieved and what still needed to be done, he commissioned Joannes van der Linden to produce a draft Civil Code all by himself.

Though the exact reasons for the appointment of Van der Linden are not known, he was obviously the right man for the job. Where academics had failed, it must have seemed like a good idea to appoint someone who was a well-known practitioner. He had just recommended himself by writing his *Regtsgeleerd, Practicaal en Koopmans-Handboek*, an eminently practical manual for both private, commercial and even penal law, and further, he was thoroughly versed in the law of Holland of the Ancien Régime, having prepared indexes to De Groot’s *Inleidinge* and having edited two volumes of the *Placaat-boek*, to name but two of his relevant works. Finally, Cerutti suggests that Van der Linden may have been recommended to the King by Farjon, one of the members of the 1798 Committee, who apparently knew Van der Linden well.

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20 *De christelijke zeden-leer, door Frans Volkmar Reinhard; uit het Hoogduitsch vert. door Joannes van der Linden; met eene aanprijzende voorrede van Sebald Fulco Johannes Rau*. Leiden, A. & J. Honkoop, 1802-1826. This is mentioned by Van Hall (above, note 4 at 24), and the fact that Van der Linden was the translator is also apparent from the review of the first volume in the *Bibliotheek van Theologische Letterkunde* 1804, II, 219-249. The translation has been wrongly attributed to another Van der Linden: the theologian Johannes van der Linden van Sprankhuizen (1766-1855; NNBW 10, 957).


22 J. van der Linden, D. Lulius, P. & R. van der Spaan, *Rechtsgeleerde observatien, dienende tot opheldering van verscheide duistere, en tot nog toe voor het grootste gedeelte onbewezene passagien uyt de Inleidinge tot de Hollandsche rechtsgel. van wylen Mr. Hugo de Groot, door een Genootschap van rechtsgeleerden, onder de spreuk, ab omnibus libenter disce, quod nescis*. ‘s-Gravenhage 1776-1778; *Groot placaat-boek (*) VIII bijeen gebracht door Didericus Lulius en Joannes van der Linden*, Amsterdam 1795; idem, IX, Amsterdam 1796.
Van der Linden’s appointment may be dated roughly to the end of 1806 or the beginning of 1807. He delivered the Introduction and the first book of his draft on 1 April 1807. Book 2 was finished on 28 September, book 3 on 15 October and the fourth and final book on 2 January 1808. All books and Van der Linden’s explanatory notes were printed, but not officially published. For his labours, Van der Linden received a total fee of 7,000 guilders.

The draft never became the law of the land. Strong political pressure by Napoleon in favour of introducing the French Code Civil made it unthinkable that his brother would introduce a codification of his own. A triumvirate was appointed, consisting of the Rotterdam lawyer A. van Gennep, and two members of the Courts of Appeal of Holland and Zeeland: Van Wesele Scholten and Loke. On 28 January 1808, they presented a number of guidelines to the King that they intended to follow; one of those consisted in using Van der Linden’s draft as much as possible. On 9 February they presented a systematic overview and a list of differences with the French Code Civil. The King agreed with both reports. The new draft was produced as early as 30 May 1808. After some fine-tuning of the drafts for a Criminal Code and a Code for Legal Procedure, the Civil Code was approved without further ado by the Legislative Body (Wetgevend Lichaam) on 9 December 1808 and came into force on 1 May 1809, under the name of Wetboek Napoleon ingerigt voor het Koningrijk Holland. It was the first Civil Code for the northern Netherlands as a united country.23

3 Van der Linden almost forgotten

In spite of having been the first to successfully complete a draft Civil Code, Van der Linden was more or less forgotten for a long time. His friend Van Hall wrote a biographical sketch of him in 1853 which still provides useful information,24 but as far as his draft Civil Code goes, the jurist S.J. Hingst found it necessary in 1887 to highlight Van der Linden’s important but forgotten role in the codification process.25 Even after that, Van der Linden was ignored by historiography, and while he is mentioned in Van Heijnsbergen’s Geschiedenis der Rechtswetenschap in Nederland, there is not a word about his draft Civil Code.26 It was not until the 1960s that he was rescued from near-oblivion by the Nijmegen professor of Legal History, Cerutti, who wrote two articles about him.27

24 See above, note 4.
Further articles by Cohen Jehoram and Kop provided substantial information, and Van der Linden’s draft Civil Code was published by De Smidt in 1966.

Cerutti analysed Van der Linden’s draft Civil Code and showed that it did not rely so much on the French Code Civil as a source of inspiration, but rather on the drafts of the 1798 codification Committee, which Van der Linden had at his disposal. In addition, he did use the Code Civil to some extent. Cerutti observed that in some cases the source Van der Linden relied on is difficult to determine, but may be either his Regtsgeleerd, Practicaal en Koopmans-handboek (henceforth, Handboek) of 1806 or another source, such as the Prussian Code of 1794, even though it seems that there was no copy of this work in Van der Linden’s library. Cerutti supposes that, at least in part, Van der Linden went his own way or copied existing Dutch law.

4 Delict in Van der Linden’s draft Civil Code

At least one important legal topic in Van der Linden’s draft Civil Code that remains uncharted territory, is the extra-contractual liability for intentional or negligent conduct, which is now known in Dutch private law as onrechtmatige daad and in South African, as in Scots law, as delict. This was not explicitly dealt with by Cerutti. However, it is of special significance, since this is a topic on which the 1798 Committee had not produced anything. Van der Linden could not accordingly have built on their work as he did or may have done for other topics. This article will focus on Van der Linden’s treatment of the onrechtmatige daad and thus provide additional information to that in Cerutti’s two pioneering articles.

5 Van der Linden’s draft compared with his Regtsgeleerd, Practicaal en Koopmans-handboek and with the Code Civil


The title contains thirty nine articles. The first article is a general one; articles 2-3 are on manslaughter; 4-6 on hurting, maiming and wounding. Articles 7-22 lay down a regulation on injurie: insult and injuring someone’s honour. Articles 23-31 contain a specific regulation for “bettering the honour” of an unmarried woman who was made pregnant. Article 32 is about returning goods and paying damages after robbery or theft; articles 33-36 are about damaging another’s property; article 37 treats the liability for

29 See above, note 4.
30 See above, note 1.
31 Cerutti, Het ontwerp Burgerlijk Wetboek (above, note 23) 51-57.
children, servants and workmen; article 38 deals with damage caused by animals and, finally, article 39 concerns the calculation of damages, especially the question whether loss of profit should be included.

The structure of the title is the same as that of the Handboek of 1806. The latter treats the subject Van Misdaden en Quasi-Misdaden in book I, part XVI. This part contains six paragraphs.

The first of these defines the Misdaad and divides them into four categories: against life, body, honour and goods. This is based entirely on Hugo de Groot’s Inleidinge, the references to the latter are added, with some further references to Voet and one to Bort (Nagel. Werken, Lib. 4, Tit. 2, pag. 148 seqq.). There are also references to Van der Linden’s own Regentsgeleerde Observatiën – which is about De Groot’s Inleidinge.

The second paragraph treats the misdaad tegen het leven, in other words: manslaughter (with references to De Groot’s Inleidinge 3,33 and to the Regentsgeleerde Observatiën). The third concerns the misdaad tegen het lichaam: hurting or maiming (with references to De Groot’s Inleidinge 3,33, to the Regentsgeleerde Observatiën and to Voet ad leg. Aquil – D. 9,2). The fourth is about the misdaad tegen de eer (against the honour), and is subdivided into actions for injurie, and actions for defloratie (references are to Justinian’s Institutes and Digest, De Groot and Voet; here the treatment is different from that by De Groot). The fifth paragraph treats the misdaad tegen de goederen, and is subdivided into cases of taking things away (robbery and theft, with references to the Digest, de condiciione furt. – D. 13,1) and damaging them (with reference to the Digest, ad leg. Aq. – D. 9,2 – and De Groot, Inleidinge 3,37).

The sixth paragraph is about Quasi-Misdaden, defined as acts that do not warrant a penal sanction but still, because of the lack of attention or care inherent in them, renders whoever committed them liable to pay damages (with an incorrect reference to the Digest, de oblig. quae quasi ex del. – this is actually a title from the Institutes: Inst. 4,5). Examples given are: throwing something down from the upper floor of a dwelling (with a reference to Digest, de his qui effud. vel dejec. – D. 9,3); the spread of a fire to another’s house through carelessness (references to D. 9,2,27,8 and 9,2,30,3); and stealing of luggage from travellers, resulting from a lack of care and attention by a master of a ship or a landlord (with a reference to Digest, naut. caup. stabul. – D. 4,9).

In Van der Linden’s draft Civil Code, the outline from his Handboek has really only been elaborated somewhat in the form of articles. Let us have a look at this particular title in Van der Linden’s draft in some detail. I will not treat every single article, but at least most of them, and will do so with reference to the (my own) English translation.

Article 1 All those who, through an act that is not allowed, insult another in his Person, Honour or Goods are liable (notwithstanding the punishment established by Law for such an act) to compensate the damage caused.


34 On this subject see S.J. Fockema Andreae, De defloratie en het onderzoek naar het vaderschap. Rechtsgeleerd Magazijn 5 (1886) 433-473.
This article is a mixture of several influences. The basic structure is that of the Code Civil 1382 ("Tout fait quelconque de l’homme qui cause a autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer."). However, there are some significant differences. Van der Linden omits the term *faute* that would become an important point of reference for further development in French doctrine and case law. He could afford to do so because he specified the degrees of *culpa* elsewhere: in articles 2, 6, 33-36, 37, 38 and 39. But he also adds a number of elements. The reference in brackets to a possible sanction under penal law which the article contains is merely technical and of little interest, though it proves beyond any doubt that penal and civil sanctions do not exclude each other.

More significant is the addition of the term "[an act] that is not allowed" ("ongeoorloofde [daad]"). This is a far more restricted expression than "tout fait quelconque de l’homme" in the Code Civil. Van der Linden has taken the term "ongeoorloofde" from Hugo de Groot’s *Inleidinge tot de Hollandse Rechtsgeleerdheid*, 3,32,3: "Misdaed is een doen ofte laten, zijnde uit zich zelve ofte door eenige wet ongeoorloft" (A wrong is a doing or not-doing which is not allowed, either in and of itself or through any law). The latter distinction corresponds to that between natural law and positive law, two sources of law often juxtaposed by De Groot. Finally, there is the expression “Persoon, Eer of Goederen”, which gives a typical natural-law catalogue of personality rights. The origin probably lies in De Groot’s *Inleidinge* as well, even if the items are not quite the same: De Groot speaks of “t leven,’t lichaem, de vrijheid, de eer ende goederen” (life, body, freedom, honour and goods).

Van der Linden’s *Handboek* is interesting in one particular respect: he defines *Misdaad* (book I, title XVI, *Van Verbintenissen uit Misdaaden en Quasi-Misdaaden*) as “een vrijwillig doen of laten, strijdig met de wet, en uit dien hoofde strafbaar”. Unlike De Groot, therefore, he limits the basis for *Misdaad* to the written law. He also reduces De Groot’s five categories to four, leaving out freedom. Here there is a further reduction in the Draft, life and body being brought together under “persoon”.

Article 2 Killing another, wilfully or through negligence, obliges the killer to pay the Widow or Children who are normally supported by the labour of the deceased, compensation for damages and losses, calculated by way of annuity.

This article is derived directly from Van der Linden, *Handboek* I, XVI, II, first sentence, which is in turn based on De Groot, *Inleidinge* 3,33,2.

Article 3 Liable to pay this compensation are all those, who have also manually taken part in the killing, or belonged to the company of the Killer, though it cannot be established who struck the fatal blow.

This article is a slight variation on Van der Linden, *Handboek* I, XVI, II, second sentence, which is derived from De Groot, *Inleidinge* 3,33,4.

Article 4 Injuring or maiming any part of the Body, gives the injured party the right to claim compensation of the doctor’s fee, and the damage and losses, which the injured...
party is to have and suffer through the infliction of the wound. – The pain and suffering, and also the disfigurement of the Body, are estimated by the Judge in a reasonable Sum of money.

This article is almost identical to Van der Linden, *Handboek* I, XVI, III, first sentence, which is in turn based on De Groot, *Inleidinge* 3,34,2.

Article 5 He who has been injured by a group of Persons, and cannot explicitly indicate the one, who has inflicted the wound upon him, has the right to claim compensation from all those, who belonged to the group.

This article is based on the *Handboek* I, XVI, III, second sentence; references are to De Groot, *Inleidinge* 3,34,6 and to Van der Linden’s own *Regtsgeleerde Observatiën* II, Obs. 89 (p. 203-204) and IV page 255 (supplement to II, Obs. 89).

Article 6 Killing or injuring out of self-defence, or by accident, does not give right to claiming compensation.

This article is a combination of Van der Linden, *Handboek* I, XVI, II, fourth sentence, and I, XVI, III, third sentence which are in turn founded on De Groot, *Inleidinge* 3,33,7-9 and 3,34,4.

At this point we leave out the articles on offences against someone’s honour, which are divided into insults by words, writings or acts (injurie, arts. 7-22) and “dishonouring a woman and leaving her pregnant” (arts. 23-31). They are based on the *Handboek*, I, XVI, IV, which treats the “actiën van injurie” and the “actiën uit hoofde van defloratie”.

In the following part, Van der Linden loosely follows his *Handboek* I, XVI, V (wrongs against goods) in articles 32-35 and uses part of I, XVI, VI (quasi-wrongs) in article 36.

Article 32 He who takes away from another the latter’s goods, be it with violence and through robbery, be it secretly and through theft, is bound to give back what was robbed or stolen, and to compensate all costs, damages and interests caused by his deed.

References in the *Handboek* are to *Digest*, De cond. furt. (D. 13,1), to *Digest*, Ad legem Aquil. (D. 9,2) and to De Groot, *Inleidinge* 3,37 (Van misdaed tegens goed).

In the articles 33-36, Van der Linden introduces an interesting – and rather strangely numbered – specification of the degrees of culpa in the damaging of another’s goods, all of which result in a liability to pay compensation:

Article 33 He who causes damage to another’s goods, is bound to compensate the damage:

a. if he has done so wilfully or intentionally.

Article 34 b. Or through negligence and lack of care, in case he was bound to watch the goods with due care.

Article 35 c. Or through ignorance and weakness, if he had pretended to have sufficient skill and strength to perform a specific thing.

Article 36 d. Or through an inexcusable carelessness. – Thus is bound to pay compensation he, who carelessly dumps or throws something from an upper floor, or has something hanging out which has fallen and damaged another’s goods.
It is not clear what Van der Linden’s purpose was in distinguishing four different degrees of *culpa*. Only article 33 has a specific function with respect to article 39 (cf. below). Article 34 appears to reflect, to some extent, the Roman liability for *custodia*. Article 35, in turn, seems to be inspired by the Roman liability for *imperitia*. The articles appear to have been included to complete an inventory of several degrees of *culpa* rather than to establish a distinction between specific categories with specific individual functions.

In article 36, Van der Linden moves on to the category of Quasi-Misdaaden of his *Handboek*, but uses only one of the three examples provided there (the other two are that of a fire which spreads from one house to another, and the Roman liability for *receptum* of shipmasters and landlords; examples found in De Groot’s *Inleidinge* in 3,38,2 and 3,38,9 – although De Groot has the full Roman triad of shipmasters, landlords and stable-owners). It is important to observe that there is a material change in the law here: Van der Linden turns a Roman liability without *culpa* into one based on carelessness – in other words, lack of care, and therefore a form of *culpa*. To that extent he is seen to follow a basic principle of natural law, which denies the existence of liability without *culpa*. The basis for article 36 was in De Groot’s *Inleidinge*, 3,38,3-6. De Groot however, unlike Van der Linden, saw all the examples in *Inleidinge* 3,38 (*Van misdaaden door wet-duiding*) as cases of objective liability.

Articles 37-38 appear to be inspired by the French Code Civil, articles 1384-1385. They have no equivalent in the *Handboek*. However, they are by no means identical with the French articles, and De Groot’s *Inleidinge* is in the background as well:

> Article 37 A wrong committed by Children or Servants or Workmen does not bind the Parents or Masters to paying compensation, unless the circumstances of the case were to show, that the Parents or Masters had given rise to the deed through some negligence of their own.

In this article, the three categories of persons for whom another may be liable are certainly taken from the French Code Civil, article 1384. However, the liability is quite different. In Van der Linden’s draft, there is no liability, unless the parents or masters have been negligent themselves – in other words, a normal liability for *culpa*, in which the defendant’s *culpa* will have to be proven by the plaintiff. In the French Civil Code, however, the liability of article 1384 contains a *praesumptio iuris* of liability on their part, which they may try to disprove: the burden of proof is on the defendant. Van der

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37 Kaser I, 509; Kaser II, 428.

38 Cc 1384: “On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde. – Le père, et la mère après le décès du mari, sont responsables du dommage causé par leurs enfants mineurs habitant avec eux; – Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés; – Les instituteurs et les artisans, du dommage causé par leurs élèves et apprentis pendant le temps qu’ils sont sous leur surveillance. – La responsabilité ci-dessus a lieu, à moins que les père et mère, instituteurs et artisans, ne prouvent qu’ils n’ont pu empêcher le fait qui donne lieu à cette responsabilité.”
Linden thus adheres to natural law much more closely than does the Code Civil. His draft is also roughly in line with De Groot’s *Inleidinge*, 3,38,8 which as a rule does not hold masters responsible for their servants.

Article 38 When someone’s Beasts have inflicted damage on another, the Owner or User of those Beasts is liable for compensation. – He may, however, limit himself to surrendering the Beast to the Injured Party, unless the Owner or User himself, through not properly locking up his Beast, or through some other negligence committed, were to have occasioned the infliction of the damage.

In this article, the first sentence is a distinct echo of Code Civil article 1385. That article also mentions the user of the animal in addition to its owner as the person who may be liable for damage caused by the animal. The second sentence refers to the Roman rule of *noxae deditio*. This was apparently still the rule in Holland, at least according to De Groot’s *Inleidinge*, 3,38,10-4. Van der Linden simplifies the position to some extent: De Groot states that *noxae deditio* is not allowed in the case of a dog killing swans or other birds, and also says – in line with Roman law – that the liability stops if the animal dies without fault on the part of its owner. Both these exceptions are missing in Van der Linden’s draft. In the case of the second, this implies once again a serious material change in the law: Van der Linden abandons what was essentially still a penal element, characteristic for the Roman rules on damage caused by animals (*pauperies*).

Article 39 Compensation for damages only comprises a restitution of the thing to its former condition, but no loss of profit, unless the damage was inflicted wilfully and intentionally, or the Law expressly provides to the contrary. – This loss of profit limits itself in all cases to missing profits that were foreseeable with reasonable certainty. – In Estimating the loss of profit the Judge will never consider uncertain or imaginary profits.

This is an article that does not seem to have a basis either in De Groot or in the French Code Civil. It makes it possible to grant compensation for loss of profit if the damage was inflicted wilfully or intentionally (cf. art. 33). The idea of making the extent of the compensation depend on the degree of fault is also found in the Prussian *Allgemeines Landrecht* of 1794 (ALR). The ALR (*Erster Theil, Sechster Titel* §§ 1-17) distinguishes on the one hand several kinds of damage (*unmittelbarer Schade, mittelbarer Schade, zufälliger Schade* and *entgangener Gewinn*) and, on the other hand, several degrees of culpability (*Vorsatz, grobes Versehen, mäßiges Versehen* and *geringes Versehen*). Causing damage to another by *Vorsatz* or *grobes Versehen*, results in having to pay full compensation, including *entgangener Gewinn*. In the case of a lesser degree of fault, the proportion of compensation is correspondingly smaller. However, even if Van der Linden may have taken the general idea behind article 39 from the ALR neither the terminology nor the system as a whole is reflected; there is no clear and direct relationship with the ALR’s regulations. A more plausible explanation for this suggestion of a parallel may

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39  *Cc* 1385: “Le propriétaire d’un animal, ou celui qui s’en sert, pendant qu’il est à son usage, est responsable du dommage que l’animal a causé, soit que l’animal fût sous sa garde, soit qu’il fût égaré ou échappé.”

40  Cf. D. 9,1,1,13.
well be that there is a common source in the form of one or more treatises on degrees of *culpa*. Further investigation is certainly required here.

### 6 Van der Linden’s draft Civil Code and the *Wetboek Napoleon ingerigt voor het Koningrijk Holland*

As indicated earlier, Van der Linden’s draft Civil Code never obtained force of law, through no fault of its own, but solely due to political circumstances. It is significant that the three-man committee appointed by King Louis Napoleon to prepare a new draft – which was to become the first Civil Code for the Netherlands, the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* (WNH) in 1809 – decided to take their lead from Van der Linden’s draft. To complete my investigation, I will take a brief look at what exactly that involved. How much of Van der Linden is still present in the Civil Code they produced?

Of course, this brief look will be limited to the topic I have been treating. In the WNH of 1809, the articles on delict are 1313-1328. They come under the heading “Van delicten of quasi-delicten”. The committee obviously produced a mixture of the Code Civil and Van der Linden’s draft. Articles 1313-1317 correspond with Code Civil articles 1382-1386 and are, generally speaking, no more than fairly literal translations. Yet a notable difference in article 1313 is that “faute” is translated as “schuld of verzuim” (fault or negligence). This is rather an important step away from the original meaning in the Code Civil. The word *fait* in article 1382, which finds its roots in the works of Domat, should be interpreted as *fait illicite*, an intentional wrong. Article 1382 therefore covers damage caused intentionally;\(^41\) article 1383 refers to damage caused by *culpa*. The same distinction is found in Pothier’s *Traité des obligations*: Pothier distinguishes between “délits” and “quasi-délits”, *dolus* being required for the first category and *culpa* for the second.\(^42\) This distinction again corresponds exactly to articles 1382 and 1383 Code Civil, respectively. The WNH, by extending the basic liability to one for *culpa*, completely upsets the relationship between articles 1382 and 1383: eventually this would result in the first article (1313, later 1401 of the 1838 Dutch Civil Code) referring to causing damage by conduct (by acting), and the second article (1314 WNH, 1402 of the 1838 Code) referring to causing damage by neglecting to do something (by not acting).

The following two articles 1314 and 1315 are almost literal translations of Code Civil articles 1383-1384. This is especially significant in the case of article 1315: it adopts the French presumption of liability with the burden of proof on the defendant, unlike Van der Linden, who had opted for a straightforward liability for fault or negligence.

Article 1316 corresponds to Code Civil article 1385, with a few interesting differences. The WNH does not provide a translation of “pendant qu’il est à son usage” and at the end of article 1316 adds “voor zooverre hij door zijne schuld of nalatigheid daartoe aanleiding

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heeft gegeven” (to the extent that he has caused it through his fault or negligence). Thus, the owner or user is liable for the damage caused by an animal that escaped only if his own fault or negligence caused the escape. This is a limitation in comparison to the text of the Code Civil, which does not explicitly contain this requirement for liability.

Article 1317 corresponds with Code Civil article 1386, but there are two differences. The WNH turns “sa ruine” into “whole or partial collapse”, and it is more limited in that liability for the owner of a house only lies in the case of neglect in the maintenance, not in case of faulty construction.

The remaining articles in the WNH, articles 1318-1328, are based on Van der Linden’s draft. Article 1318 derives from Van der Linden’s article 2, but it differs in the way the damages are calculated: in the WNH, this is not done “bij manier van lijfrenten” but the compensation is to be estimated by the judge, according “to the person (of the victim) and the circumstances”. This is an interesting change. Van der Linden apparently considered that Ulpian’s table of D. 35,2,68 still applied. In the older Dutch law, this was a contested issue. Simon van Leeuwen and Antonius Matthaeus II thought D. 35,2,68 should be applied; Simon van Groenewegen considered it to have been abrogated. The WNH takes Groenewegen’s side. The other criterion in the WNH, of taking the person of the victim into consideration, ultimately goes back to Thomas Aquinas’s *Summa Theologiae*; it probably came to the Netherlands through the works of Dominicus Soto and Leonardus Lessius which influenced Hugo de Groot.

WNH 1319 is literally – but for one insignificant point – Van der Linden’s article 3. WNH 1320 is a combination of Van der Linden’s articles 4 and 5. There are small insignificant differences in wording, but there is a material difference in the way the damages for pain, suffering and disfigurement of the body (*pijn, smart en ontsiering van het lichaam*) are calculated: the court is to calculate them “in a reasonable sum of money” (*op eene Geldsomme in billijkheid*) according to Van der Linden, whereas the WNH states that the court calculates the damages “in accordance with the person and the circumstances” (*naar gelang van den persoon en de omstandigheden*), as it also does in article 1318.

WNH 1321 is almost Van der Linden’s article 6, the term “by unavoidable coincidence” (*bij onvermijdelijk toeval*) taking the place of the latter’s “by accident” (*bij ongeluk*).

The rest of the articles in the WNH (1322-1328) all concern the subject of *injurie* (insult and injuring someone’s honour) that I did not consider earlier. For that reason I will not treat them individually; suffice it to say that Van der Linden’s articles 7-22 are all used for the WNH, with the exception of articles 11-14 which contain definitions of different ways of insulting, and of article 8 which excludes from liability for insult those who due to their youth or mental incapacity cannot have a relevant intention to insult. It also gives the court the option to consider drunkenness or anger as mitigating circumstances.

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45  De Jong (above, note 43), 503, 514.
Given that the *injurie* is incorporated in the regulations of the WNH, it is remarkable that the WNH has no parallel for Van der Linden’s articles 23-31 concerning “dishonouring a woman and leaving her pregnant”. Is this particular form of injuring someone to be understood to fall under the general provision of article 1313? It has also not left any trace in the first book, on the rights of persons. The explanation cannot be that this was suddenly no longer perceived as a social and legal problem: it returned in a later draft for a Dutch Civil Code in 1814.\(^{46}\) For the time being its absence from the WNH remains a mystery.

Finally, the WNH also does not have a parallel for Van der Linden’s articles 32-36, and with good reason: these articles only state that stealing or damaging someone’s goods leads to liability, and specify several degrees of *culpa*. They can be considered to be covered by WNH articles 1313-1314.

7 Conclusion

The above analysis is an addition to Cerutti’s research on Van der Linden’s sources for and method of compiling his draft Civil Code of 1807. It centers on a topic on which the 1798 Committee had not produced any draft articles. Van der Linden goes on to do exactly what Cerutti expected him to do in such a situation. His draft on *onrechtmatige daad* is essentially a mixture of articles from the French Code Civil and principles laid down in his own *Regtsgeleerd, Practicaal en Koopmans-Handboek*, possibly with a little influence from the Prussian Code of 1794. But he does make a few important material changes. The main one is that rather than following the (far too) broad French definition of *tout fait quelconque de l’homme* in Code Civil 1382, he introduces the limiting term *ongeoorloofd* (that is not allowed). Had his draft Code become law, lawyers would have been faced with the problem of interpreting this term, which remains undefined in the draft itself.\(^{47}\)

Other significant changes with respect to his sources are found in articles 37 and 38 of his draft. In article 37, he rigourously adheres to *culpa* as the criterion for liability, without ever shifting the burden of proof to the defendant as the French Code does in its article 1384. In contrast to this, however, in article 38 he still maintains an apparent strict liability for the owner of an animal that has caused damage, and even increases this liability by leaving out the clause that in the law of Holland provided for an end to the liability when the animal died. His last article (art. 39) remains something of a mystery; the general idea behind it is also found in the Prussian Code of 1794 but there is no conclusive parallel.

The further comparison between Van der Linden’s draft Civil Code and the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* confirms the conclusion already formulated by Cerutti: the committee appointed in 1808 by Louis Napoleon to prepare

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\(^{46}\) Greuter-Vreeburg (above, note 32), 192.

\(^{47}\) This is exactly what happened later with the corresponding term “onrechtmatig” in art. 1401 of the Dutch Civil Code of 1838: see G.E. van Maanen, *Onrechtmatige daad aspecten van de ontwikkeling en structuur van een omstreden leerstuk*. Deventer 1986.
another draft Civil Code – which in 1809 became the Netherlands’ first codification of
civil law – drew on Van der Linden’s work to a far greater extent than had always been
thought. The title of the WNH makes it sound as if it was little more than an adaptation
of the French Code Civil. In fact, it was almost as deeply rooted in the Dutch law of the
Ancien Régime as was Van der Linden’s draft, though the French influence is admittedly
stronger. Louis Napoleon has a deserved reputation for wanting to be the King of Holland
rather than just a representative of his brother. This article serves to underline once more
his intentions to steer his own course, also as far as legislation was concerned.