From case to law: A study on how cases fulfil the role of a source of law in the Netherlands and its implications for China and comparative law
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Chapter 1

Publication of cases in the Netherlands
Chapter 1 Publication of cases in the Netherlands

1. Introduction

The introduction of this study presented the concept of case law mechanism and defined it as a set of institutions and practices in a codified legal system that jointly enable legal norms to be derived from cases through a process of publishing, organizing, interpreting, evaluating and applying court judgments. Subsequently, an analytic framework was presented that identifies the operation of a case law mechanism as a process consisting of two major phases: the publication and the utilization of cases. Publication is identified as the first phase, because before any court judgment can become a leading case, it must be, in the first place, be brought out of the sphere of the court that has made the judicial decision and be made accessible to the public, otherwise it would be very difficult, if not impossible for various users to get to know the content of the case and to use it. Moreover, as long as not all court judgments are published, it is important to ascertain how cases are selected for publication, because this selection determines which cases will be given a chance to be detected and used by various players in law and hence stand a chance of ultimately becoming a leading case that shapes the law.

In accordance with the analytic framework presented in the introduction, this study begins its enquiry into the way cases fulfil the role of a source of law in the Netherlands by examining how cases are published. This chapter will investigate a series of questions concerning case publication, such as which actors are involved in the publication of judgments, what proportion of decided cases is published, what the selection criteria are for publication, through which mechanisms published cases can be found and how practising and academic lawyers reflect on the way cases are published in the Netherlands. This chapter will also reflect on the role that case publication fulfils in the case law mechanism.

The main body of this chapter consists of two parts. Paragraph two examines commercial case publication, and paragraph three focuses on official case publication. Case publication is defined as making court judgments accessible to the public through various media such as periodicals and online databases. Commercial case publication refers to the practice that profit-oriented publishers make court judgments accessible to the public through paper or digital periodicals and online databases. Official case publication refers to the practice that the judiciary makes court judgments accessible to the public through paper or digital media. The distinction between commercial and official case publication is meaningful and important for the purpose of this study, because the actors involved as well as some other relevant aspects of these two modes of case publication are different. The key findings will be summarized in the conclusion.

The main method used in this chapter is literature and archive research. A supplementary method is the expert interview. The studied materials include, in the first place, scholarly writings on case publication in the Netherlands from different periods

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63 This definition is inspired by Article 1 paragraph a of the new case publication selection criteria published on the official portal website of the judiciary of the Netherlands, see Appendix 3.
64 This distinction is also commonly adopted in the existing literature, see e.g. Taruffo 1997, p. 451-454 and Van Opijnen 2011b.
of time since 1838. These materials have been found chiefly by searching in two online databases: Picarta and Rechtsorde. In addition, first-hand data have been collected through archive research in the law library as well as the main library of the University of Amsterdam. In particular, various case report periodicals since the 1830’s have been consulted in order to find out various aspects of commercial case publication, such as publication format, search mechanisms and case annotation styles. Moreover, interviews with 13 judges, two court staff members, three editors of case reporting periodicals and one interview with a researcher who has conducted an in-depth PhD research into the way cases are published in the Netherlands were conducted. These interviews have been used as a supplementary method to verify the data obtained and to collect data that are missing in the above-mentioned sources, in particular with regard to the selection procedure for official case publication and selection criteria used in commercial case publication.

2. Commercial case publication

Despite the fact that the dominant legal theory in the 19th century held that cases were not a source of law, commercial case publication began to emerge immediately after the Netherlands introduced its Civil Code in 1838. As many as five periodicals started to publish court judgments soon after the Dutch Civil Code went into force. Since then the number of periodicals containing case reports continued to grow. Historical research suggests that, by the middle of the 1870s, case reporting by way of commercial periodicals had become an established practice in the Netherlands. Nowadays there are over 100 periodicals that publish court judgments, many of which are specialized journals that focus on very specific areas of the law.

Although commercial case publication has been an established practice in the Netherlands for almost two centuries, quantitative data suggest that, despite the large number of periodicals, only a tiny proportion of decided cases is published through this

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65 www.picarta.nl.
66 www.rechtsorde.nl.
67 Interviews NL20130923, NL20131008-1, NL20131008-2, NL20131017, NL20131021, NL20130122, NL20130128, NL20130129, NL20130131, NL20131107-1, NL20131107-2, NL20131107-3 and NL20131114. The interview notes are all on file.
68 Interviews NL20131021-2 and NL20131024.
69 Interviews NL20130603, NL20131021 and NL20131031.
70 Interview NL20121017.
71 The method used is a semi-structured interview. The respondents were found through my personal network. I am aware that, due to this selection method and the relatively small number of respondents, doubt can be cast on the representativeness of the data obtained through these interviews. It should, however, be pointed out that the vast bulk of the data have been obtained through published written sources. This study welcomes other researchers to conduct more extensive interviews with systematically selected respondents to verify the findings of this chapter.
72 See e.g. Opzoomer 1865, p. VII, Diephuis 1869, p. 25, Teixeira de Mattos 1885, p. 31 and Land 1899, p. 12.
73 It should be noted that case publications existed before the introduction of the Civil Code in the Netherlands. Periodical Dictionary of Administrative and Judicial Decisions, for example, began to publish cases as early as 1829, see Appendix 1.
74 See Appendix 1.
75 See Appendix 1.
76 Jansen & Zwalve 2013, p. 196.
77 See Appendix 1.
channel. A research commissioned by the Ministry of Justice in the 1970s revealed that out of the 603500 judgments handed down in 1976 only 0.48% was published. This low publication rate seems to remain fairly stable. As Table 1 shows, the rate of cases published in commercial periodicals never exceeded half a per cent out of the total of decided cases in the first decade of the 21st century.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total decided cases</th>
<th>Cases published commercial periodicals</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>1,450,000</td>
<td>6369</td>
<td>0.44%</td>
</tr>
<tr>
<td>2002</td>
<td>1,555,880</td>
<td>7250</td>
<td>0.47%</td>
</tr>
<tr>
<td>2003</td>
<td>1,561,960</td>
<td>7384</td>
<td>0.47%</td>
</tr>
<tr>
<td>2004</td>
<td>1,767,810</td>
<td>7130</td>
<td>0.40%</td>
</tr>
<tr>
<td>2005</td>
<td>1,801,000</td>
<td>7230</td>
<td>0.40%</td>
</tr>
<tr>
<td>2006</td>
<td>1,752,420</td>
<td>8147</td>
<td>0.46%</td>
</tr>
<tr>
<td>2007</td>
<td>1,726,400</td>
<td>8249</td>
<td>0.48%</td>
</tr>
<tr>
<td>2008</td>
<td>1,827,620</td>
<td>8430</td>
<td>0.46%</td>
</tr>
<tr>
<td>2009</td>
<td>1,935,260</td>
<td>8695</td>
<td>0.45%</td>
</tr>
<tr>
<td>2010</td>
<td>1,960,900</td>
<td>8577</td>
<td>0.44%</td>
</tr>
</tbody>
</table>

Table 1 Case publication rate in commercial periodicals 2001-2010

Moreover, quantitative data suggest that the case publication rate varies significantly among different levels of courts. In the first half of the 1970s, for example, 83.7% of all the civil cases decided by the Supreme Court was published, whereas only 10% of the civil cases decided by all five courts of appeal was published in 1973. Another study suggests that about 55 to 60% of all cases decided by the Supreme Court in 1994 was published. The publication rate of cases decided by courts of appeal in that year was 10%, whereas the publication rate of cases decided by district courts was only 0.5%.

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79 Data in this column are based on Van Opijken 2011a, p. 2143, Table 1. It should be noted that Van Opijken’s research data do not cover cases published in all commercial periodicals in the Netherlands, but rather cases published in commercial periodicals that have been included in the electronic database of the LJN-index. As the LJN-index includes the most commonly used legal periodicals, the data can be very close to the entire number of cases published in all commercial periodicals in the Netherlands. See interview NL20121017 as well as the methodological notes in Van Opijken 2011a, p. 2150.
80 Raad voor de Rechtspraak (Council for the Judiciary) 2003, p. 49.
81 Raad voor de Rechtspraak (Council for the Judiciary) 2004, p. 57.
82 Raad voor de Rechtspraak (Council for the Judiciary) 2006, p. 79.
83 Ibid.
84 Ibid.
85 Raad voor de Rechtspraak (Council for the Judiciary) 2009, p. 65.
86 Ibid.
87 Raad voor de Rechtspraak (Council for the Judiciary) 2011, p. 54.
88 Ibid.
89 Ibid.
90 The case publication rate indicates what percentage of judgments handed down in a certain year has been published.
91 Snijders 1978, p. 203.
93 Ibid.
The low overall case publication rate as well as the significant variation in case publication rates among different levels of courts raises a crucial question, i.e. how cases are selected for commercial publication. The next subparagraph will therefore investigate which actors play a key role in determining which cases will be published in commercial periodicals and which criteria are used in the selection process. In addition, the next subparagraph will examine some other aspects of commercial case publication such as the publication format, the practice of case annotation, search mechanisms and reflections on commercial case publication by academic and practising lawyers in the Netherlands.

2.1 Selection of cases for commercial publication

2.1.1 Actors involved in the selection

Each periodical that reports cases has an editorial board that decides which cases will be published. It is usually a team of prominent legal scholars and experienced practising lawyers that form an editorial board. Although editors are the final selectors in commercial case publication, they are not the only actors that determine which cases will be published in commercial periodicals. After all, editors do not have direct access to the archives of various courts where decided cases are filed, so that they have to depend on other actors to supply them with cases. This practice means that the suppliers of cases play an important role in the selection process, as they determine which cases will be available to the editors.

Traditionally, editors relied primarily on the so-called “correspondents” in courts to send them cases. Throughout the years, publishers have developed a network of “correspondents” in various courts. The correspondents are judges and court staff that have agreed to regularly send certain types of cases decided in the courts where they work to the editorial boards of various periodicals. It used to be through these correspondents that editors obtained a regular supply of cases for publication.

The importance of the role of court correspondents as case suppliers, however, has been declining significantly since the judiciary launched its online judgments database in 1999, which is commonly referred to as Rechtspraak.nl. Interviews with periodical editors, judges and court staff indicate that nowadays editors obtain the vast bulk of cases by searching directly in the official online judgments database of the judiciary instead of through court correspondents. Although in many courts there are still correspondents, the accent of their work has shifted from selecting and sending cases to editorial offices of various periodicals to primarily responding to periodical editors’ requests for copies of specific cases.

94 Van Arkel 1994, p. 82-83. See also interviews NL20131024 and NL20131031.
95 See e.g. Van Arkel 1994, p. 83 and Jansen & Zwalve 2013, p. 220.
96 Another possible channel through which editors obtain cases is to request a specific court to send copies of specific cases to them, see Schuijt 2004, p. 18.
97 Kottenhagen & Kaptein 1989, p. 27.
98 See e.g. Crommelin 1988, p. 752 and De Meij e.a. 2006, p. 18.
99 See Voskuil 1980, p. 38-61. The correspondents rarely receive monetary rewards. Often they get a free subscription to the periodicals to which they send cases as reward for their contribution. See De Meij e.a. 2006, p. 18.
100 For more details of the online judgments database see the next paragraph of this chapter.
101 See e.g. interviews NL20131021, NL20131024 and NL20131031.
102 Interviews NL20131021 and NL 20131024.
Another source of case supply that periodical editors rely on, both before and after the launch of the online judgments database of the judiciary, is litigating parties and/or their counsels.\textsuperscript{103} For various reasons, litigating parties and/or their counsels may wish to see the judgments in their cases be published and may send them to the editorial boards of relevant periodicals.\textsuperscript{104} This happens, however, on an ad hoc basis and does not constitute the major source of supply.\textsuperscript{105}

In sum, the selection process of commercial case publication has two rounds. The first round takes place primarily in various courts where judges play a decisive role in determining which cases will be published in the online judgments database of the judiciary.\textsuperscript{106} During the second round, periodical editors (i.e. expert academic and practising lawyers) make a final decision.

\subsection*{2.1.2 Selection criteria}

Given the low publication rate and the large number of actors involved in the selection process, one may expect that well-defined selection criteria have been developed in commercial case publication, because otherwise it would be difficult to ensure a consistent selection policy. In practice, however, commercial periodicals rarely disclose their selection criteria.\textsuperscript{107} A closer look at some of the published selection criteria reveals that they usually contain fairly abstract standards, which give the selectors a large margin of appreciation.\textsuperscript{108} The six selection criteria used by the \textit{Nederlandse Jurisprudentie} (Netherlands Cases), for example, can be summarized as:\textsuperscript{109}

- legal importance\textsuperscript{110}
- topical value\textsuperscript{111}
- value for the forming of new law\textsuperscript{112}
- concretization of open norms\textsuperscript{113}
- remarkable facts\textsuperscript{114}
- importance that reaches beyond the specific decided case\textsuperscript{115}

The selection criteria of another periodical, \textit{Tijdschrift voor Consumentenrecht en handelspraktijken} (Consumer Law and Trade Practice Journal), are similarly formulated in a non-detailed fashion:\textsuperscript{116}

- balanced case reporting on various aspects of consumer law\textsuperscript{117}

\begin{flushright}
\textsuperscript{103} Van Opipjen 2006b, p. 18.  \\
\textsuperscript{104} De Meij e.a. 2006, p. 34.  \\
\textsuperscript{105} Crommelin 1988, p. 752.  \\
\textsuperscript{106} For a detailed account of the institution of official case publication see the next paragraph.  \\
\textsuperscript{107} Kottenhagen & Kaptein 1989, p. 18.  \\
\textsuperscript{108} Van den Berg 1994, p. 961.  \\
\textsuperscript{109} These criteria have been published in a newsletter of the \textit{Nederlandse Jurisprudentie} in 1986, see Kottenhagen & Kaptein 1989, p. 33.  \\
\textsuperscript{110} The original Dutch text is “juridisch belang van een zaak”.  \\
\textsuperscript{111} The original Dutch text is “zit er actualiteitswaarde aan een uitspraak”.  \\
\textsuperscript{112} The original Dutch text is “vindt rechtsvorming plaats”.  \\
\textsuperscript{113} The original Dutch text is “worden open rechtsnormen ingevuld”.  \\
\textsuperscript{114} The original Dutch text is “het bieden van een ‘zeker kleurengamma ten aanzien van feitelijke oordelen’”.  \\
\textsuperscript{115} The original Dutch text is “in hoeverre de beslissing van de rechter die op dat moment oordeelt ook buiten de gegeven casuspositie van belang is”.  \\
\textsuperscript{116} Hondius 2005, p. 37-38.
\end{flushright}
representativeness\textsuperscript{118}
\begin{itemize}
\item nature of the magazine\textsuperscript{119}, i.e. only consumer law cases will be published
\item value for the forming of new law\textsuperscript{120}
\end{itemize}

Interviews with court correspondents suggest that unpublished selection criteria also tend to be vague and flexible.\textsuperscript{121} Cases may be selected for publication because they deviate from previous judgments, because they involve an issue on which few judgments have been published or because they attract a lot of public attention.\textsuperscript{122} Wide use of such broad selection criteria prompted, as will be revealed further in this chapter, doubts among some academic lawyers on the consistency of the selection policy as well as on the representativeness of the selected cases.\textsuperscript{123}

\subsection*{2.2 Publication format and case annotation}

Although there is no uniform case publication format among the large number of periodicals that report cases, a typical case report usually contains three elements:

\begin{enumerate}
\item technical details, such as the name of the court, the date on which the judgment was handed down, the case number etc.;
\item information added by editors to facilitate reading and searching, such as key words and summaries;
\item the judgment in full text or part(s) of the judgment.\textsuperscript{124}
\end{enumerate}

Some cases decided by the Supreme Court are published together with an advisory opinion of an Advocate General.\textsuperscript{125} Moreover, some important cases are published together with an annotation, which can be very helpful for understanding and applying the published cases. Since case annotation has become a very important practice in commercial case publication in the Netherlands, the following passages will look at this practice in greater detail, examining the origin of this practice as well as the authors, the form, the substance and the impact of case annotations.

Historical research reveals that the practice of case annotation originated in France.\textsuperscript{126} There is some debate on the question when case annotation first emerged in the Netherlands. According to Bloembergen, it was Meijers (1880-1954), a prominent law professor at Leiden University, who first started to annotate cases published in the

\textsuperscript{117} The original Dutch text is “evenwichtige verspreiding over de verschillende onderdelen van het consumentenrecht”.
\textsuperscript{118} The original Dutch text is “gepubliceerde uitspraken zijn representatief voor de betrokken instantie”.
\textsuperscript{119} The original Dutch text is “aard van het tijdschrift”.
\textsuperscript{120} The original Dutch text is “of de betrokken uitspraak een bijdrage kan leveren aan de rechtsonderbouwing”.
\textsuperscript{121} Voskuil 1980, p. 61. See interviews NL20131008, NL20131021 and NL20131031.
\textsuperscript{122} See sources cited in the previous note.
\textsuperscript{123} See the subparagraph in this chapter on the reflections of academic and practising lawyers on commercial case publication.
\textsuperscript{124} Whether a judgment will be published in full or in part, and if in part, which part(s) will be published is determined by the editors of periodicals, see interview NL20131031.
\textsuperscript{125} Advocates General are officials of the Public Prosecution service that are based in the Supreme Court. One of their primary tasks is to deliver advisory opinions to the Supreme Court in criminal, civil and tax cases. Such opinions are not binding for the Supreme Court, but in practice Supreme Court judges do take these opinions seriously, see Bruinsma 1988a, p. 59-78.
\textsuperscript{126} Jansen 2003, p. 1757-1759.
journal *Weekblad van het recht*\(^{127}\) in 1910.\(^{128}\) Jansen, however, argues that the first case annotator in the Netherlands was most probably Van Boneval Faure (1826-1909), who wrote comments on cases published in the *Regtsgeleerd bijblad behoorende tot de Nieuwe bijdragen voor regtsgeleerdheid en wetgeving*\(^{129}\) in the mid-19\(^{th}\) century.\(^{130}\) Despite such controversies on the exact time when case annotations began to emerge in the Netherlands, it can reasonably be said that case annotation became an established practice in the early decades of the 20\(^{th}\) century.\(^{131}\)

Editors of periodicals tend to invite prominent legal scholars to annotate published cases.\(^{132}\) In addition to legal scholars’ annotations, some periodicals also publish annotations written by practising lawyers. Exceptionally, even judges of the Supreme Court wrote annotations to comment on, among other things, cases that they themselves have decided.\(^{133}\) Which cases will be annotated is often a choice jointly made by editors of the various commercial periodicals and annotators that have agreed to cooperate with them.\(^{134}\) The criteria that editors and annotators use to select cases that will be annotated are not well articulated.\(^{135}\) A common perception is that it is important\(^{136}\) cases that are selected for annotation.\(^{137}\) Quantitative empirical data reveal that it is mainly cases decided by the highest courts that are annotated.\(^{138}\) A case annotation takes the form of a short commentary on a published case. As Figure 4 demonstrates, the average length of annotations rarely exceeds 1,000 words.

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\(^{127}\) The title of this periodical can be translated as *Law Weekly*.


\(^{129}\) The title of this journal can be translated as *Supplement to the Contribution to the Study of Law and Legislation*.

\(^{130}\) Jansen & Zwalte 2013, p. 200-201.

\(^{131}\) See e.g. Fockema Andreae 1938, p. 90 and Remmelink e.a. 1988, p. 9.

\(^{132}\) Remmelink e.a. 1988, p. 6 and Lindo 1993, p. 1301.

\(^{133}\) See e.g. Remmelink e.a. 1988, p. 10. It should be emphasized that nowadays commercial periodicals no longer invite Supreme Court judges to write annotations, although occasionally they do invite some former Supreme Court judges to write annotations. See e.g. Bloemберgen 2002, p. 88.

\(^{134}\) See e.g. Crommelin 1988, p. 753 and Lindo 1993, p. 1301.

\(^{135}\) According to Crommelin, for example, the criterion is whether readers need clarification of a case. This is obviously a very general and flexible criterion. See Crommelin 1988, p. 753.

\(^{136}\) Obviously, “importance” is by no means a precise selection criterion, as it merely shifts the question to what constitutes an important case. It seems that editors and annotators primarily rely on their professional experiences and subjective evaluation to determine which cases will be annotated.

\(^{137}\) Kottenhagen & Kaptein 1989, p. 43. Interviews with judges indicate that whether a case has been annotated and if so, how many annotations have appeared is often perceived as a sign of the legal importance of a case, and that judges are more likely to, all else being equal, pay attention to an annotated case than one that has not been annotated. See e.g. interviews NL20131008-1, NL20131022, NL20131107-3 and NL20131114.

\(^{138}\) Van Opijnen 2011a, p. 2145-2146.
The content of case annotations can vary from annotator to annotator. In general, however, it can be said that case annotations usually contain the following elements:

1. A very brief summary of the facts and how the case has been decided in previous instances.
2. An analysis of the key legal questions involved in the annotated case and an explanation of the court’s answers to these questions.
3. An analysis of the position of the case in the legal system. Annotators often make great efforts to ascertain and explain whether, and if so, how an annotated case fits in the legal system and what it adds to the existing system.
4. Evaluation of the court decision. It is common that annotators express their opinions on the soundness, the desirability or some other aspects of the court decision that they comment on. Such opinions can be positive or critical.

Figure 4 Average length of case annotations (number of words) 2000-2010

Van Opjinen 2011a, p. 2145.

For a summary of different annotation styles see Bruinsma 1988a, p. 111.

It should be noted that some annotators have a very concise writing style, tending to skip the facts and the decisions of the previous instances in their comments, see e.g. the annotations by G.J. Scholten to the Cellar Trapdoor (HR 5 November 1965, NJ 1966, 136) and the Pos/Van den Bosch case (HR 17 November 1967, NJ 1968, 42). Whether the advisory opinion of an Advocate General is published together with the judgment may also affect an annotator’s decision whether or not to mention the facts and decisions of previous instances in the annotation, as it is common for an Advocate General to include such materials in his or her opinions.

A case may involve a number of disputed questions of law. Which of these disputed questions will be analyzed in an annotation depends on the choice of the annotator. Different annotators may choose to comment on different aspects of a case. The choice can be related to the expertise of the annotators. See Bloembergen 2002, p. 90.

See Bloembergen 2002, p. 90.


See e.g. paragraph 1 of C.J.H. van der Brunner’s annotation to the Shell/State case (HR 30 September 1994, NJ 1996, 196) as well as paragraph 2 of the same author’s annotation to the DES Daughters case (HR 9 October 1992, NJ 1994, 535).

See e.g. the first and the second paragraph of Molengraaff’s annotation to the Lindenbaum/Cohen case (HR 31 January 1919, NJ 1919, 161) as well as paragraph 2 of C.J.H. van der Brunner’s annotation to the DES Daughters case (HR 9 October 1992, NJ 1994, 535).


Snijders 2003.
Implications for future practice. Another key question that case annotations often discuss is the possible impact of the annotated court decisions on future cases. It is, for example, very common that annotators analyse how broad or narrow a norm formulated in the annotated case is likely to be interpreted and what kind of cases in the future are likely to be affected by the annotated court decision.

The practice of case annotation fulfils a number of important functions. First of all, case annotations are of great value to judges and practising lawyers, as they are usually concise and offer useful insights for future practice. In this sense, case annotations form an important bridge between legal scholarship and legal practice. In addition, case annotations form a valuable source of feedback to judges. There are, for example, cases where the judicial decision is clearly inspired by ideas that have been expressed in previous case annotations. Moreover, case annotations serve a useful educational function, as they can help law students to better understand the essence and the relevance of a case by putting it in a proper context of legislation, doctrinal writings and previous cases.

Although the value and influence of specific case annotations can vary depending on the authority of the annotators and the soundness of the analysis in the annotations, the value of the practice of case annotation as a whole is commonly deemed very high in the Netherlands. In a time when more and more court decisions are freely available on the Internet (details of which will be examined in the following paragraph of this chapter), case annotations are considered as a core added value of commercial case publication. A noteworthy recent development in this context is that many universities in the Netherlands nowadays no longer recognize case annotations as academic publications. At present this downgrade of the status of case annotation has not led to a dramatic decrease in the number of annotated commercial case publication periodicals, but some legal scholars have expressed concerns that in the long term

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149 Molengraaff, for example, was very positive about the Lindenbaum/Cohen case decided by the Supreme Court (HR 31 January 1919, NJ 1919, 161). In the last paragraph of his annotation to this case, Molengraaff wrote “(s)eldom has the Supreme Court decided a case that can be expected to have such a salutary influence on our legal life”.

150 J.B.M. Vranken, for example, pointed out a flaw of circular argumentation by the Supreme Court in the Baby Kelly case (HR 18 March 2005, NJ 2006, 606) in paragraph 17 of his annotation to this case. Another example is that, in his annotation to the Cellar Trapdoor case (HR 5 November 1965, NJ 1966, 136), G.J. Scholten criticized the criteria formulated by the Supreme Court in that decision as being incomplete.

151 Snijders 2003.

152 See e.g. the conclusion of N. J. Nieuwenhuis’ annotation to the Potassium Mine case (HR 23 September 1988, NJ 1989, 743) and paragraph 7 of C.J.H. van der Brunner’s annotation to the DES Daughters case (HR 9 October 1992, NJ 1994, 535).

153 See e.g. interviews NL20131008-1, NL20131022, NL20131107-3 and NL20131114.


155 Draaisma & Duynstee 1988, p. 25.

156 Lindo 1993, p. 1301.

157 At Leiden University Law School, for example, annotations to some cases are compulsory study materials for law students, see e.g. Leiden Law School 2012b, p. 3 and Leiden Law School 2012f, p. 1.

158 See e.g. Snijders 2003 and Hondius 2007a, p. 21.

159 See e.g. Bergwerf & Houweling 2008, p. 9 and Van Opijnen 2011a, p. 2145.

160 For an analysis of the reasons that have led to this recent development see Schlossels 2012, p. 230-231.

161 Van Opijnen 2011a.
this downgrade may hurt the operation of case law in general as it suppresses legal scholars’ willingness to write case annotations.\textsuperscript{162}

2.3 Search mechanisms

As the volume of published cases grows year by year, publishers have developed increasingly powerful mechanisms to improve the findability of published cases. The following passages will examine how the search mechanisms evolved in commercial case publication since 1838.

In the earliest decades after the introduction of the Dutch Civil Code in 1838, periodicals that published court judgments depended largely on some simple search tools such as chronological tables of cases\textsuperscript{163} and indexes based on key words\textsuperscript{164} and/or article numbers of legislative provisions.\textsuperscript{165} The tables and indexes in a number of case publication volumes were sometimes integrated into an index volume\textsuperscript{166} so that readers could search across cases published in different years.\textsuperscript{167} A disadvantage of these earlier search tools is that it was difficult to search across different periodicals, as the indexes of various periodicals were not integrated into one search platform.

An improved search tool emerged in 1850 when a book with the nickname \textit{Leons Regtspraak} (Leon’s \textit{Cases}) was first published.\textsuperscript{168} A swift look at the table of contents may give the impression that this book is merely a collection of legislation, as the title of each chapter corresponds with the name of a statute\textsuperscript{169} or law code\textsuperscript{170}. However, what makes this book unique is that it incorporated references to published cases\textsuperscript{171} and scholarly writings into the legislative provisions. For example, under article 1401 of the Civil Code (the general tort clause), the author integrated references to and short summaries of more than 40 cases published in various periodicals in the period between October 1838 and September 1850.\textsuperscript{172} Moreover, the author integrated scholarly writings related to this legislative provision as well.\textsuperscript{173} In this way, readers are not only able to find cases and literature across different years, but also across different periodicals.

Another integrated search tool was a periodical called \textit{Repertorium van de Nederlandse jurisprudentie en rechtsliteratuur} (Index of Dutch Cases and Legal Literature). This magazine emerged in 1878 and ended in 1944. As the title suggests, this periodical contains an alphabetic keyword index that incorporates published cases.

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\textsuperscript{162} See e.g. Snijders 2003 and Schlossels 2012.
\textsuperscript{163} See e.g. Van Den Honert 1942, p. I-IV.
\textsuperscript{164} See e.g. Brocx & Stuart 1839, p. 417-464 and Van Vleuten & Perk 1839, p. 1-10.
\textsuperscript{165} See e.g. Van Den Honert 1942, p. VII-XXVI.
\textsuperscript{166} See e.g. Brocx & Stuart 1855.
\textsuperscript{167} Even today many periodicals are still offering indexes as a basic search tool, see e.g. the last editions of \textit{Nederlandse jurisprudentie} (Netherlands Cases)
\textsuperscript{168} Leon was the author of the book, see Leon 1850a and Leon 1850b.
\textsuperscript{169} For example, chapter three of the first volume of this book is “Grondwet van 1840” (Constitution of 1840).
\textsuperscript{170} For example, chapter four of the second volume of this book is “Burgerlijk Wetboek” (Civil Code).
\textsuperscript{171} Contrary to what the title of this book suggests, it does not only contain references to published cases decided by the Supreme Court, but also references to published judgments of lower courts, see e.g. p 358, 361 and 362 of the second volume.
\textsuperscript{172} See Leon 1850b, p. 356-362.
\textsuperscript{173} References to writings of prominent legal scholars such as Diephuis and Asser can be found, for example, on page 362 of the second volume.
and legal literature, which enables the users to search cases and academic legal writings across various years and across various periodicals.

A common limitation of Leons Regtspraak and the Repertorium was that “real time” search was not possible, because there was a gap between the time when a case was published in a periodical and when the search instruments were published. Leons Regtspraak, for example, was published yearly, so each edition enabled the users to search for cases published in the past year, but not in the current year.

The problem of delay was solved by a better search tool called the card system. Publisher Tjeenk Willink introduced this search instrument in 1913, when it began to publish the well-known case law report Nederlandse Jurisprudentie (Netherlands Cases). A key feature of this case report periodical was that case publications were accompanied by a card system. The card system took the physical shape of boxes with cards that were divided into six legal areas. Cards were organized in the order of article numbers of statutory provisions and contained references to cases published in the Nederlandse Jurisprudentie and many other periodicals. A major innovation of this system was that the cards were updated as soon as new cases were published, so that users could easily find recently published cases without a significant delay. The card system became so popular in the Netherlands that its use soon spread to many other areas.

Although the inventor of the card system asserted that this system was future proof, it has not been able to escape the fate of being replaced by more advanced and powerful search mechanisms: computerized search tools, first in the form of CD-roms and DVDs with an incorporated search function between the 1980s and mid-1990s, and later in the form of online databases with powerful search engines. Nowadays users of commercial online legal databases can find published cases by the date of decision, key words, party names, article numbers of statutory provisions, as well as many combinations of these elements. Information provided by commercial legal databases is often highly integrated, so that users can easily find cases and legal literature published in different years and different periodicals. Also the issue of delay has been successfully addressed by online databases, since the databases are updated so frequently that cases can be found in these databases soon after they are published.

The evolution of commercial case search mechanisms reveals that case publication is not merely a question of making cases available by simply putting the texts of judgments in paper periodicals or computerized databases, but is also about making published cases findable. Moreover, the evolution process suggests a trend towards more and more integrated case search tools, as well as striving towards a minimum delay between the moment of case publication and that of integrating the published case into search tools.

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175 The inventor of the card system drew inspiration from a similar German system, see Remmelink e.a. 1988, p. 9.
176 Editors' Board Rechtsgeleerde Magazijn 1913.
177 Crommelin 1988, p. 745.
178 The card system introduced by the Nederlandse Jurisprudentie was a great success, see e.g. Van Holk 1963, p. 648, Remmelink e.a. 1988, 8-9 and Hoefer-van Dongen 1988.
180 Important examples are Kluwer Navigator (www.kluwernavigator.nl) and Opmaat (http://opmaatnieuw.sdu.nl).
2.4 Academic and practising lawyers’ reflections on commercial case publication

When commercial case reports emerged after 1838, the overall reaction was quite positive.\(^{181}\) In 1840, for example, De Pinto, a prominent practising lawyer, wrote the following comments on the emergence of a case report periodical commonly referred to as Van den Honert’s Collection of Cases:\(^{182}\)

> I have repeatedly pointed out that a good collection of cases decided by the Supreme Court is indispensible for the use of a generally written code. That is, I would say, something that no one can doubt about and therefore does not need to be argued. Nevertheless, nobody has fulfilled this need. Things that already existed were totally insufficient or unusable. It is therefore no wonder that nearly everyone warmly welcomes this new case report periodical.

For more than one century, the way cases were published through commercial periodicals did not provoke significant debates among academic or practising lawyers and systematic research into this matter seemed to be absent.\(^{183}\) This situation changed in the 1970s and 1980s, when the Ministry of Justice commissioned a systematic research into the way cases were published\(^{184}\) and a number of scholars began to critically reflect on the long-established practice of commercial case publication.\(^{185}\) Research and debates on this topic since the 1970s reveal a number of significant shortcomings of commercial case publication, which will be briefly examined in the following passages.\(^{186}\)

1. Too few cases are published.\(^{187}\) As table 1 illustrates, not even a half per cent of all decided cases is published each year. Kottenhagen argues that such a low publication rate can lead to inequality between litigating parties, because some large organizations that frequently litigate, such as big law firms and insurance companies,

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\(^{181}\) See e.g. De Pinto 1840 and De Vries & Molster 1860.

\(^{182}\) De Pinto 1840, p. 357-358.

\(^{183}\) Kottenhagen & Kaptein 1989, p. 18-26 gives an overview of systematic research into this matter. The study by Kottenhagen and Kaptein shows that systematic research into this matter started rather late, namely in the 1970’s.


\(^{186}\) Writings that critically reflect on commercial case publication were primarily published in the period between the 1970s and the mid-1990s. It seems that after this brief period the topic of commercial case publication lay dormant again. The readers are reminded of the fact that the sources cited in the following passages come largely from the 1970s and 1980s and that a part of the cited research was restricted to some areas of the law. It would require too much time for the current study to verify whether every shortcoming identified in the cited literature is still present today and whether certain limitations identified in certain areas of the law were or are still present in other areas of the law. It should be noted that the purpose of this subparagraph is not to get substantively involved in the debates on commercial case publication in the Netherlands, but to inform the reader of the way Dutch academic and practising lawyers perceived the merits and limitations of commercial case publication before the birth of official case publication, and to create a context for the reader to better appreciate what has made the judiciary in the Netherlands introduce an official online judgments database in 1999.

have their own collections of non-published cases, which may put their opponents who do not have such collections in a disadvantaged position.\textsuperscript{188}

2. Lack of transparent and well-defined selection criteria for publication.\textsuperscript{189} Kottenhagen’s research points out that almost no commercial periodical has a set of explicit selection criteria for case publication.\textsuperscript{190} Moreover, his research suggests that personal preferences of editors can have a significant influence on the types of cases that are selected for publication.\textsuperscript{191}

3. Published cases are not representative of all court decisions.\textsuperscript{192} Snijders’ research, for example, shows that the visitation (omgangsregeling) cases published in the Nederlandse Jurisprudentie (Netherlands Cases) are exceptional court decisions that do not represent the court practice in general.\textsuperscript{193} Hartkamp’s research suggests that published tenancy cases lack representativeness in terms of regions, since it is primarily cases decided by courts in the economically more developed regions that are published.\textsuperscript{194}

4. There is a significant delay in case publication.\textsuperscript{195} A research among users of the Nederlandse Jurisprudentie (Netherlands Cases) shows that 53% of the respondents is of the view that it takes too long before cases are published.\textsuperscript{196} Quantitative data suggest that on average it takes 103 days before a case is published in an annotated commercial case report periodical.\textsuperscript{197}

5. Too expensive. Some commentators are concerned that subscription fees to commercial case publication periodicals are usually so high that non-professional users may not be able to afford them.\textsuperscript{198} This is deemed problematic because such a price barrier may hinder the public from knowing the law and it may also weaken the public’s ability to exercise a certain degree of supervision on the work of the courts.\textsuperscript{199}

\textbf{2.5 Sub-conclusion on commercial case publication}

Data collected in this paragraph suggest that commercial case publication has a highly practice-oriented nature. It has been developed largely to facilitate the practice of law, i.e. the work of judges and lawyers.\textsuperscript{200} Case selection and annotations tend to focus on legally significant cases that are likely to affect the practice of law, rather than providing a representative picture of the functioning of the courts. Also the relatively high prices suggest that commercial case publication has been developed primarily to satisfy the needs of professional users, rather than to keep the public informed of case law development or to enhance the transparency of the work of the courts.

The practice-oriented and profit-driven nature of commercial case publication led to the question whether it is desirable to leave such an important task as case publication nearly entirely to commercial entities. Since the 1970s and in particular in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{188} Kottenhagen 1994, p. 42.
\item \textsuperscript{189} See e.g. Hondius 1973, p. 746 and De Jong 1980.
\item \textsuperscript{190} Kottenhagen 1994, p. 42.
\item \textsuperscript{191} Kottenhagen & Kaptein 1989, p. 38-43.
\item \textsuperscript{192} See e.g. Kottenhagen & Kaptein 1989, p. 99 and Matthijssen 2000, p. 13.
\item \textsuperscript{193} Snijders 1977.
\item \textsuperscript{194} Hartkamp 1981, p. 356.
\item \textsuperscript{195} See e.g. Franken 1981, p. 393 and Kottenhagen 1994, p. 42.
\item \textsuperscript{196} Crommelin 1988, p. 755.
\item \textsuperscript{197} Van Opjinen 2011a, p. 2144-2145.
\item \textsuperscript{198} Van Holk 1963, p. 644 and Matthijssen 2000, p. 17.
\item \textsuperscript{199} Matthijssen 2000, p. 16-17.
\item \textsuperscript{200} See e.g. De Pinto 1840 and De Vries & Molster 1860.
\end{enumerate}
\end{footnotesize}
the 1980s, there has been a growing awareness that it is a responsibility of the government to make cases accessible to the public.\textsuperscript{201} The cornerstone of the reasoning underlying such a conviction is that in a democratic constitutional state, the government has the responsibility to make the law accessible to the public.\textsuperscript{202} As over the years cases have developed into an essential source of law in practice in the Netherlands,\textsuperscript{203} the government should, in addition to legislation, make cases accessible to the public.\textsuperscript{204} Also the idea of public oversight on the work of the courts has contributed to this awareness.\textsuperscript{205} This growing conviction has eventually led to the emergence of online official case publication in the late 1990s, which will be examined in greater details in the following paragraph.

3. Official case publication

For well over one and a half century, cases used to be nearly exclusively\textsuperscript{206} published through commercial paper and digital periodicals in the Netherlands. The close to monopoly position of commercial publishers in case publication ended in December 1999, when the official portal website of the judiciary (www.rechtspraak.nl) was launched.\textsuperscript{207} The launching of this official website was part of a broader government initiative to make government information better accessible to the public.\textsuperscript{208} A crucial component of the website is an online database through which a selection of judgments of all courts is published.

In the first decade of its existence, the official portal website published more than 200,000 cases.\textsuperscript{209} The publication rate grew from 0.48% to 1.4% during the first decade of the 21\textsuperscript{st} century (see Table 2). In a little more than ten years time, the official website of the judiciary has become an important source of case law information in the Netherlands.\textsuperscript{210}

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Decided Cases</th>
<th>Published\textsuperscript{211}</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>1,450,000\textsuperscript{212}</td>
<td>6967</td>
<td>0.48%</td>
</tr>
<tr>
<td>2002</td>
<td>1,555,880\textsuperscript{213}</td>
<td>10308</td>
<td>0.66%</td>
</tr>
<tr>
<td>2003</td>
<td>1,561,960\textsuperscript{214}</td>
<td>11905</td>
<td>0.76%</td>
</tr>
<tr>
<td>2004</td>
<td>1,767,810\textsuperscript{215}</td>
<td>14424</td>
<td>0.82%</td>
</tr>
</tbody>
</table>

\textsuperscript{201} See e.g. De Jong 1980, p. 2, Editors’ Board 1982, p. 3-4 and Commissie Jurisprudentiedocumentatie (Case Law Documentation Committee) 1994.


\textsuperscript{205} Matthijssen 2000, p. 10.

\textsuperscript{206} For some rare examples of cases published by the government in the Staatsblad (Bulletin of Acts and Decrees of the Kingdom of the Netherlands) and the Staatscourant (Netherlands Government Gazette), see De Jong 1981, p. 2.

\textsuperscript{207} Mommers & Zwenne & Schermer 2010, p. 2073.

\textsuperscript{208} See Ministerie van Binnenlandse Zaken (Ministry of Internal Affairs) 1997.

\textsuperscript{209} Van Opijken 2011a, p. 2142.

\textsuperscript{210} Van Opijken 2011a, p. 2147.

\textsuperscript{211} Data in this column are based on Van Opijken 2011a, p. 2143, Table 1.

\textsuperscript{212} Raad voor de Rechtspraak (Council for the Judiciary) 2003, p. 49.

\textsuperscript{213} Raad voor de Rechtspraak (Council for the Judiciary) 2004, p. 57.

\textsuperscript{214} Raad voor de Rechtspraak (Council for the Judiciary) 2006, p. 79.

\textsuperscript{215} Ibid.
### Table 2 Case publication rate through the official website of the Judiciary 2001-2010

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Published</th>
<th>Case Rate</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>1,801,000</td>
<td>16361</td>
<td>0.91%</td>
</tr>
<tr>
<td>2006</td>
<td>1,752,420</td>
<td>19539</td>
<td>1.1%</td>
</tr>
<tr>
<td>2007</td>
<td>1,726,400</td>
<td>22112</td>
<td>1.3%</td>
</tr>
<tr>
<td>2008</td>
<td>1,827,620</td>
<td>24588</td>
<td>1.3%</td>
</tr>
<tr>
<td>2009</td>
<td>1,935,260</td>
<td>26417</td>
<td>1.4%</td>
</tr>
<tr>
<td>2010</td>
<td>1,960,900</td>
<td>27735</td>
<td>1.4%</td>
</tr>
</tbody>
</table>

#### 3.1 Selection of cases for official publication

##### 3.1.1 Actors involved in the selection

Although the official website of the judiciary offers an integrated platform to publish cases decided by all courts in the Netherlands, there is no centralized editing office that decides which cases will be published. Each court selects its own cases for publication.\(^{222}\) It is also the individual courts that take care of the technical tasks of editing and uploading the selected cases into the online database, so that the public can access them through the official portal website of the judiciary.\(^{223}\)

Each court is supposed to set up a team to take care of the selection and publication of its own cases.\(^{224}\) In practice, it is usually the judges in various sections of a court that select cases for publication.\(^{225}\) On the whole, it can be said that the selection process is decentralized and closed, as in practice it is normally the individual judges in various courts that determine which cases that they themselves have decided will be published and it is nearly impossible for actors outside the judiciary to directly influence the selection process.\(^{226}\)

##### 3.1.2 Selection criteria

Since its launch in 1999, the official website has published two sets of selection criteria.\(^{227}\) The first set of criteria was in use from December 1999 until March 2012, when it was replaced by a new set.\(^{228}\)

The old selection criteria were drafted in very general language. In total there were ten criteria. The first criterion was, for example, “public attention”.\(^{229}\) The second

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\(^{216}\) Ibid.
\(^{217}\) Raad voor de Rechtspraak (Council for the Judiciary) 2009, p. 65.
\(^{218}\) Ibid.
\(^{219}\) Raad voor de Rechtspraak (Council for the Judiciary) 2011, p. 54.
\(^{220}\) Ibid.
\(^{221}\) Ibid.
\(^{222}\) Mommers & Zwenne & Schermer 2010, p. 2074.
\(^{223}\) Matthijssen 2000, p. 41.
\(^{225}\) See e.g. Van der Hoek 2010 and Van Opjinen 2014, p. 220-221. See also interviews NL20131008-1, NL20131021, NL20131022, NL20131024, NL20131028, NL20131031, NL20131107-1 and NL20111114.
\(^{226}\) In theory, the public can request a court to publish a specific case that the court has decided through the official website. This rarely happens in practice. See Jongeneel 2010, p. 2415 footnote 9.
\(^{227}\) See Appendix 2 and 3.
\(^{228}\) Editors’ Board 2012.
\(^{229}\) See Appendix 2.
criterion was also very vague: “importance for the public life.” Other criteria were drafted in similarly broad terms, except the last four negative criteria that clearly defined which cases would not be published, such as personal and family law cases that have been concluded in first instance without an appeal being lodged and civil cases that have been concluded in absentia.

A source of inspiration for the drafters of the selection criteria was a recommendation adopted by the Committee of Ministers of the Council of Europe in 1995 [hereafter Recommendation R (95) 11], which encourages member states to set up automated case law retrieval systems (i.e. case law databanks) that would facilitate better public access to court judgments. One of the basic principles of Recommendation R (95) 11 is that member states are allowed to select cases for publication, as long as the selection is objective and the selected court decisions are representative of the case law in the sector of law where the selection is made.

Furthermore, the Recommendation proposed two types of selection criteria: positive criteria and negative ones. The essence of the negative selection criteria is that in principle all cases will be published except judgments that are evidently of little value because, for example, the grounds on which the court decisions are based are stated according to a standard formula. Positive selection criteria, on the other hand, suggest that cases will not be published unless they possess certain merits that justify publication. Furthermore, the Recommendation explicitly encourages member states to apply the negative selection method to cases decided by the highest courts in all fields of law. In other words, the Recommendation suggests that all cases decided by the highest courts in all legal areas should be published, unless they are evidently of little value.

A comparison between the old selection criteria and Recommendation R (95) 11 reveals that, formally, the old criteria were not entirely in conformity with the Recommendation. It is, for example, striking that the Recommendation puts great emphasis on the objectivity of case selection for publication, whereas it is highly doubtful how objective the broadly drafted old selection criteria adopted by the judiciary were. Moreover, the old selection criteria did not explicitly state that the method of negative selection would be applied to cases decided by the highest courts. Implicitly, however, the old selection criteria did adopt the method of combining positive criteria with negative ones. Moreover, in practice the highest courts did apply the negative selection method by publishing all their judgments through the official website except those without substantive content.

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230 See Appendix 2.
231 See Appendix 2.
232 Committee of Ministers of the Council of Europe 1995.
234 Paragraph III, sub-paragraph 2, Appendix I of Recommendation R (95) 11, see Committee of Ministers of the Council of Europe 1995.
235 Paragraph II, sub-paragraph 5, Appendix II of Recommendation R (95) 11, see Committee of Ministers of the Council of Europe 1995
236 Ibid.
237 Ibid.
238 Ibid.
239 See e.g. paragraph III, sub-paragraph 2, Appendix I of Recommendation R 95 (11) and paragraph II first sentence, Appendix II of Recommendation R (95) 11.
240 The last four criteria can be seen as negative ones, whereas the rest were positive. See Appendix 2.
241 Van Opijnen 2011b, p. 177.
The abstract and vague selection criteria incurred frequent criticism from both within and outside the judiciary.\textsuperscript{242} In order to better facilitate the selection process and to increase the transparency of the selection policy, the judiciary published a new set of selection criteria in March 2012. The new criteria contain a number of improvements.

First of all, the new criteria are more elaborate. The old criteria were rather sketchy, containing only 261 words, whereas the new criteria (948 words) are almost four times as lengthy as the old. Moreover, the new criteria are published together with elaborate explanations (1689 words) that provide useful clarifications to each selection criterion as well as to the new criteria in general. The clarifications can be very useful for understanding and applying the criteria.

A second improvement is that the new criteria explicitly adopt the negative method in the selection of cases decided by the highest courts as well as three special court sections.\textsuperscript{243} This change makes the previous \textit{implicit} practice of publishing all highest courts’ judgments with substantive content \textit{explicit}.

A third improvement is that the new criteria use much more objective selection standards than the old. An objective selection standard is a criterion that is, in principle, susceptible to only one interpretation.\textsuperscript{244} In other words, a selector has, in principle, no margin of interpretation when applying an objective selection criterion. The old selection criteria contained only four objective standards.\textsuperscript{245} Moreover, the objective standards of the old criteria were only used to identify which cases were \textit{not} supposed to be published. The new selection criteria use 19 objective standards to indicate which cases should be published.\textsuperscript{246} Broader use of objective selection standards provides more concrete guidance to the selectors than the old criteria. Another advantage of using objective standards is that it makes the selection decision more verifiable than using primarily subjective criteria.

A fourth improvement is that the new selection criteria and the explanations articulate an active case publication principle, i.e. courts should try to publish as many cases as possible, whereas the old criteria did not convey such a message. Article 5 paragraph a of the new selection criteria, for example, states that a judgment will always be published if before, during or after the court session the case has attracted attention of the public media in the broadest sense. Terms such as “always”, “before”, “during”, “after” and “in the broadest sense” indicate that courts are supposed to apply a broad, rather than restricted publication policy in cases that have attracted public attention. Another example is Article 6 paragraph 1, which explicitly states that certain types of cases should be published “as much as possible”. Still another example is the explanation to Article 5 paragraph e, which says:\textsuperscript{247}

\begin{quote}
A broad interpretation of this subparagraph is appropriate, since the selector is not always able to ascertain to what extent a judgment indeed has a precedent forming character: in fact, doubt about the legal importance of a judgment is by itself already sufficient for deciding to publish it.
\end{quote}

\textsuperscript{242} Editors’ Board 2012, p. 1436.
\textsuperscript{243} See Article 3 of the new selection criteria and the explanation to this criterion in Raad voor de Rechtspraak (Council for the Judiciary) e.a. 2012.
\textsuperscript{244} Kotthenhagen & Kaptein 1989, p. 28.
\textsuperscript{245} See the last four standards of the old criteria in De Meij e.a. 2006, p. 15.
\textsuperscript{246} See Article 3, Article 4 and Article 5 paragraph b of the new selection criteria.
\textsuperscript{247} See Appendix 3.
3.2 Publication format

Since its launch in 1999, the official website of the judiciary has been using the Internet as the sole medium for case publication. Cases are published online in a uniform format, which contains three parts:

1. Technical details of a case such as the European Case Law Identifier (ECLI) number (prior to June 2013 the LJN number was published), case number, name of the court, date of the judgment, date of publication, field of law etc. A noteworthy and useful feature of the official case publication is that if a case published in the official online database has also been published and/or annotated in one or more commercial case report periodicals, the details of commercial publication such as the name(s) of the periodical(s), the publication year and sequence number as well as the name(s) of the annotator(s) are integrated into the technical details of the official case publication.

2. Content indication. This part is usually very brief, containing a number of key words or short sentences that give an indication of the substance of the case.

3. The judgment in full text. Judgments are published in unedited form, except that information that could reveal the identity of natural persons is erased.

A major difference between official case publication and commercial publication is that cases published on the official website of the judiciary are not annotated. Another difference is that the content indication of officially published cases tends to be rather short, whereas some commercial periodicals provide quite elaborate summaries of some of the published cases.

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248 The European Case Law Identifier (ECLI) number is a case law citation standard developed by the European Union to facilitate the correct and unequivocal citation of judgments of the European and national courts, see https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-en.do.

249 LJN is an abbreviation of Landelijk Jurisprudentienummer (national case law number). One of the core functions of LJN was to facilitate the searching and citing of cases by giving each case a unique identification code. The LJN was a national case law identification system in the Netherlands. It was replaced by a European case law citation standard (ECLI) in June 2013. For details see the following subparagraph.

250 The case number should not be confused with the European Case Law Identifier (ECLI), as the former is a code assigned to a case by the court that has decided it for chiefly administrative purposes, whereas the latter is a code that follows a European standard that chiefly serves the purpose of facilitating the identification and unequivocal citation of judgments across Europe.

251 The Dutch term for such publication details is “vindplaats”, which literally means “place where something can be found”.

252 The Dutch term is “inhoudsinicatie”.

253 Names of natural persons who are involved in the case in professional capacities such as judges, lawyers and interpreters do not have to be anonymized, for more details see Raad voor de Rechtspraak (Council for the Judiciary) 2007.

254 For example, the content indication of the case ECLI:NL:HR:2011:BO5803 decided by the Supreme Court published on the official website has only 55 words, whereas the commercial periodical Nederlandse Jurisprudentie (Netherlands Cases) provides a summary of 561 words. For more examples compare the content indication of the officially published version of the following cases with the summaries of the commercially published versions: ECLI:NL:HR:2011:BP0567, ECLI:NL:HR:2010:BN6236 and ECLI:NL:HR:2011:BP6996.
3.3 Search mechanisms

The official website of the judiciary has a built-in case search engine.\textsuperscript{255} The search engine offers its users a number of search possibilities to find cases published on the website. Users can search by technical details of a case, such as the case number or the European Case Law Identifier (ECLI). It is also possible to search by the area of law, by court name or by date of judgment. Still another possibility is to search by key words. Furthermore, users can combine search approaches, such as searching by court name and key words.

In this context it is worth noting that the judiciary introduced an innovative and useful case search tool called the LJN-index in February 2006, which existed as a separate search tool in addition to the comprehensive built-in case search engine on the official website of the judiciary until June 2013 when the LJN-index search functionality was integrated into the built-in case search engine.\textsuperscript{256} A key feature of the LJN-index was the possibility for users to find out in which commercial periodicals a case had been published and/or annotated. The index achieved this feature by assigning a unique identification code called the Landelijk Jurisprudentienummer (national case law number) to each case published on the official website of the judiciary as well as to each case published in commercial periodicals that had been integrated into the Judiciary’s internal legal information portal website Porta Iuris.\textsuperscript{257} By creating this national case law identification system, the LJN-index successfully built a bridge between officially and commercially published cases. When the national case law number of a judgment was entered into the search field, the LJN-index would reveal whether, and if so, in which commercial periodical(s) the case had been published. Moreover, the search result would show whether, and if so, in which periodical(s) the case had been annotated. This feature can be very useful for users who find a case through the built-in case search engine on the official website and wish to find possible annotations to the case in commercial periodicals.

As in June 2013 the LJN-index ceased to exist and was replaced by ECLI, the search functionality of the LJN-index was integrated into the comprehensive built-in case search engine on the official website of the judiciary.\textsuperscript{258} In this way, the technical move to switch from LJN to ECLI did not affect the innovative search functionality introduced by the LJN-index, as after the switch users are still able to find the commercial periodicals in which a case has been published and annotated by entering the unique identification code of a case into the appropriate search field of the built-in case search engine on the official website of the judiciary.\textsuperscript{259}

3.4 Academic and practising lawyers’ reflections on official case publication

Since going online in December 1999, the official portal website of the judiciary has made considerable contributions to the accessibility of cases in the Netherlands, which has earned positive reactions from commentators. An obvious contribution is that

\begin{itemize}
\item \textsuperscript{255} http://uitspraken.rechtspraak.nl/.
\item \textsuperscript{256} http://www.rechtspraak.nl/Uitspraken-en-Registers/Uitspraken/Hulp-bij-zoeken/Pages/default.aspx#TOCHeadingRichHtmlField14.
\item \textsuperscript{257} It should be noted that a case acquires only one LJN identification code if it is published both on the official website of the judiciary and in commercial periodicals. For more details of the LJN-index see Van Oprijnen 2006a.
\item \textsuperscript{258} See http://www.rechtspraak.nl/Uitspraken-en-Registers/Uitspraken/Pages/ECLI.aspx.
\item \textsuperscript{259} Raad voor de Rechtspraak (Council for the Judiciary) 2012.
\end{itemize}
official case publication eliminated the price barrier of commercial case publication, as cases are nowadays available on the official website of the judiciary free of charge.\textsuperscript{260} Moreover, thanks to official case publication, the overall case publication rate and the total number of published cases in the Netherlands have more than doubled in ten years time (see Table 3 and compare it with table 1 and 2).\textsuperscript{261} Even critics of the selection mechanism of official case publication admit that the official website of the judiciary has become one of the most important sources of legal information in the Netherlands.\textsuperscript{262}

<table>
<thead>
<tr>
<th>Year</th>
<th>Total decided cases</th>
<th>Cases published commercial periodicals and on the official website of the judiciary\textsuperscript{263}</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>1,450,000\textsuperscript{264}</td>
<td>10579</td>
<td>0.73%</td>
</tr>
<tr>
<td>2002</td>
<td>1,555,880\textsuperscript{265}</td>
<td>13826</td>
<td>0.89%</td>
</tr>
<tr>
<td>2003</td>
<td>1,561,960\textsuperscript{266}</td>
<td>15159</td>
<td>0.97%</td>
</tr>
<tr>
<td>2004</td>
<td>1,767,810\textsuperscript{267}</td>
<td>17019</td>
<td>0.96%</td>
</tr>
<tr>
<td>2005</td>
<td>1,801,000\textsuperscript{268}</td>
<td>18560</td>
<td>1.03%</td>
</tr>
<tr>
<td>2006</td>
<td>1,752,420\textsuperscript{269}</td>
<td>21408</td>
<td>1.22%</td>
</tr>
<tr>
<td>2007</td>
<td>1,726,400\textsuperscript{270}</td>
<td>23684</td>
<td>1.37%</td>
</tr>
<tr>
<td>2008</td>
<td>1,827,620\textsuperscript{271}</td>
<td>26163</td>
<td>1.43%</td>
</tr>
<tr>
<td>2009</td>
<td>1,935,260\textsuperscript{272}</td>
<td>27898</td>
<td>1.44%</td>
</tr>
<tr>
<td>2010</td>
<td>1,960,900\textsuperscript{273}</td>
<td>28800</td>
<td>1.47%</td>
</tr>
</tbody>
</table>

Table 3 Overall case publication rate (both commercial and official case publication) 2001-2010

\textsuperscript{260} Bergwerf & Houweling 2008, p. 9.
\textsuperscript{261} Van Opijnen 2011a, p. 2149.
\textsuperscript{262} Mommers & Zwenne & Schermer 2010.
\textsuperscript{263} Data in this column are based on Van Opijnen 2011a, p. 2143, Table 1. It should be noted that Van Opijnen’s research data do not cover cases published in all commercial periodicals in the Netherlands, but rather cases published in commercial periodicals that have been included in the electronic database of the LJN-index. As the LJN-index includes the most commonly used legal periodicals, the data can be very close to the entire number of cases published in all commercial periodicals and through the official website of the judiciary in the Netherlands. It should further be noted that in his paper Van Opijnen has taken proper technical measures to prevent double counting of cases that have been published both on the official website of the judiciary and in commercial periodicals. See interview NL20121017 and the methodological notes to Van Opijnen’s paper in 2011, see Van Opijnen 2011a, p. 2150.
\textsuperscript{264} Raad voor de Rechtspraak (Council for the Judiciary) 2003, p. 49.
\textsuperscript{265} Raad voor de Rechtspraak (Council for the Judiciary) 2004, p. 57.
\textsuperscript{266} Raad voor de Rechtspraak (Council for the Judiciary) 2006, p. 79.
\textsuperscript{267} Ibid.
\textsuperscript{268} Ibid.
\textsuperscript{269} Raad voor de Rechtspraak (Council for the Judiciary) 2009, p 65.
\textsuperscript{269} Ibid.
\textsuperscript{271} Raad voor de Rechtspraak (Council for the Judiciary) 2011, p. 54.
\textsuperscript{272} Ibid.
\textsuperscript{273} Ibid.
Still another contribution welcomed by commentators is that, thanks to official case publication, the delay in case publication has been shortened. A study on the publication of labour law cases reveals that, on average, labour cases are published 35 days earlier on the official website than in a specialized case report periodical Jurisprudentie arbeidsrecht (Labour Law Cases).\textsuperscript{274} Another study reveals that in 2010, more than half of all cases available on the official website were published within seven days, and that nearly all cases decided by the Supreme Court were published on the same day the judgment was handed down.\textsuperscript{275} The delay in commercial case publication in 2010 was considerably longer, as the median publication delay was 81 days.\textsuperscript{276} Timely publication is therefore deemed as one of the key strengths of official case publication.\textsuperscript{277}

Despite these contributions, official case publication incurred criticism, mainly due to its case selection practice.\textsuperscript{278} As mentioned earlier in this paper, the old selection criteria attracted criticism both from within and from outside the judiciary due to their vagueness.\textsuperscript{279} Also the fact that case selection is controlled entirely by judges incurs criticism, as some commentators argue that such a practice may raise the impression of censorship.\textsuperscript{280} Accordingly, these commentators suggest that, as one of the alternatives to the current selection mechanism, the selection should be made by an organization entirely independent from the judiciary.\textsuperscript{281}

It is worth noting that particularly in recent years some commentators have been calling for the judiciary to abandon the practice of selecting cases for publication all together and to publish all judgments online.\textsuperscript{282} Some of these commentators base their argument on legal provisions such as Article 6 of the European Convention on Human Rights and Article 121 of the Dutch Constitution.\textsuperscript{283} Others argue that the current case selection practice should be abolished, because it results in a small and unrepresentative sample of cases being published, which makes legal and social scientific research nearly impossible.\textsuperscript{284}

Criticism on the selection criteria led the judiciary to adopt more detailed and more objective selection standards.\textsuperscript{285} The suggestion to entrust the task of case selection to an organization independent of the judiciary, however, has not yet caused

\textsuperscript{274} Bergwerf & Houweling 2008.
\textsuperscript{275} Van Opijnen 2011a, p. 2144.
\textsuperscript{276} Ibid.
\textsuperscript{277} Bergwerf & Houweling 2008, p. 9 and Van Opijnen 2011a, p. 2149. It should be noted that the high speed with which cases are published on the official website of the judiciary is achieved not only by using the internet as the publication medium, but also by eliminating time-consuming elements such as adding summaries and annotations to the published cases.
\textsuperscript{278} Another aspect of official case publication that has been frequently criticized is the anonymization policy and practice, see e.g. Schuift 2004 and De Meij e.a. 2006.
\textsuperscript{279} Editors’ Board 2012, p. 1436.
\textsuperscript{280} See e.g. Mommers & Zwenne & Schermer 2010, p. 2077.
\textsuperscript{281} See e.g. Mommers & Zwenne & Schermer 2010, p. 2077. This proposal is not entirely new. A decade before the launch of the official website, some scholars already suggested that case selection should be done by actors independent of the judiciary, see Kottenhagen & Kaptein 1989, p. 112-113.
\textsuperscript{282} Even before the launching of the official website, some commentators were already arguing that all cases should be published on the internet, see e.g. De Mulder 1996.
\textsuperscript{283} De Meij e.a. 2006, p. 3-8.
\textsuperscript{284} Mommers & Zwenne & Schermer 2010, p. 2072.
\textsuperscript{285} Raad voor de Rechtspraak (Council for the Judiciary) e.a. 2012.
the judiciary to change its current case selection practice. Nor has the recommendation to publish all cases been adopted. An argument against publishing all cases is that it is useless to publish the vast body of judgments that contain merely standardized formulas. Another argument that rejects publishing all cases is that doing so would make it difficult to search among the vast body of published judgments. Still another argument against publishing all cases is that doing so would cost too much money, especially given the fact that anonymization of judgments still has to be done manually. Given these arguments it seems very unlikely that the judiciary would soon switch from the practice of selecting cases for publication to publishing all cases. Whether in the long run the judiciary will eventually publish all court judgments still remains to be seen.

4. Concluding remarks

The data collected in this chapter reveal that case publication has been an established practice in the Netherlands for well over a century. Nowadays, there are two channels through which cases are made accessible to the public, i.e. the official website of the judiciary and various commercial case reporting periodicals. Case publication fulfils an important role in the case law mechanism in the Netherlands, as it builds a bridge between the vast body of decided cases and the various users of cases. At the same time, case publication can be said to fulfil a selection function in the case law mechanism in the Netherlands, as case publication is an important step in a chain that determines which judgments eventually become the leading cases that shape the law.

4.1 Bridge function

A basic yet important contribution that case publication makes to the case law mechanism is that it makes a body of selected court judgments available to users beyond the courts that have decided the cases. Without case publication, it would be very difficult for judges, practising lawyers and legal scholars to use previous cases to solve problems in legal practice and to further develop the law, because they would have considerable difficulty in accessing court judgments.

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286 The argument that case selection by judges may raise the impression of censorship has been dismissed as lacking substantive evidence, see Van der Hoek 2010.
287 See e.g. Van der Hoek 2010.
288 See e.g. Jongeneel 2010, p. 2145.
289 See e.g. Phillippart 2010.
290 See Jansen & Zwalve 2013, p. 196 and Appendix 1.
291 This study does not argue that without case publication it would be totally impossible for judges, practising lawyers and legal scholars to use cases. The judiciary in the Netherlands, for example, has an internal digital database named the E-archief where all court judgments are stored, see Van Opijnen 2006b, p. 18 and interview NL 20131008-2. This means that at least in theory, judges nowadays do not have to rely on official or commercial case publication to access judgments made by their colleagues. However, before this digital database was created, judges had to rely primarily on published cases in order to know how their colleagues had decided certain issues in previous judgments. In fact, even after the creation of this digital database, judges still use the official online judgments database of the judiciary and commercial case reporting periodicals to find cases. See e.g. interview NL20130923, NL20131008-1, NL20131008-2, NL20131021, NL20131022 and NL20131024.
The task of making court judgments available to the public used to be nearly solely fulfilled by commercial case publication.\footnote{For some rare examples of cases published by the government in the \textit{Staatsblad (Bulletin of Acts and Decrees of the Kingdom of the Netherlands)} and the \textit{Staatscourant (Netherlands Government Gazette)}, see De Jong 1981, p. 2.} Since the launch of the online judgments database by the judiciary in 1999, however, this task has been gradually taken over by official case publication.\footnote{See e.g. Van Opijnen 2006b and Van Opijnen 2011a, p. 2143.} Nowadays commercial publishers are largely publishing cases that have already been made available in the online judgments database by the judiciary. This, however, does not mean that commercial case publication has become redundant. The reasons why commercial case publication has not disappeared, even though the cases that commercial publishers nowadays publish have already been made available by the judiciary free of charge on its official website, are related to two other ways through which case publication makes a contribution to the case law mechanism, i.e. making cases findable and better understandable. These two aspects will be further discussed in the following passages.

One of the difficulties in using cases as a source of law is that when a relatively large volume of cases has been made available to the public, it could be time-consuming and troublesome for users to, without the assistance of a good search tool, manually comb through the large body of published judgments in order to find the cases that are relevant for them. Developing good systems to classify and organize published cases so that users can quickly find the cases they need is therefore of great importance. As this chapter has revealed, both commercial publishers and the judiciary have made a considerable contribution to the enhancement of the findability of published cases by improving the search tools that they provide. There is a trend towards more and more integrated search tools as well as striving towards a minimum delay between the moment of case publication and that of integrating the published case into search tools. In this respect, commercial case publication seems to offer more powerful solutions, as the online databases of some publishers provide highly integrated search tools that can help users to find not only cases, but also related legislation and scholarly works easily and quickly, whereas the search tools in the official online judgments database of the judiciary do not offer a similar functionality.\footnote{See e.g. \url{http://www.kluwernavigator.nl/} and \url{http://opmaat.sdu.nl/}.}

Not only does case publication in the Netherlands make cases available and findable, it also adds relevant information to published cases that can help the user to quickly grasp the essence of published judgments. In official case publication, a number of key words or sentences is added to each published case to indicate the essence of the judgment.\footnote{This is called “inhoudsindicatie” in Dutch, which can be translated as content indication.} Commercial publishers usually add a summary to published cases.\footnote{See e.g. HR 25 May 2012, NJ 2012, 340 and HR 11 April 2014, NJ 2014, 309.} Moreover, commercially published cases are sometimes accompanied by an annotation, i.e. a brief commentary by a (prominent) legal scholar or practising lawyer that usually summarizes the essence of the judgment, ascertains the place of the case in the legal system, evaluates the soundness of the decision and explores possible implications of the case for future practice. The value of the practice of case annotation as a whole is commonly deemed very high in the Netherlands, as case annotations can not only benefit judges and practising lawyers by saving them time and offering them...
insights for future practice, but can also serve an educational function by helping law students to better understand the essence and the relevance of an annotated case.  

### 4.2 Selection function

This chapter revealed that far from all decided cases are published in the Netherlands. Even in today’s Internet age, the overall case publication rate in the Netherlands is still barely 1.5%. The fact that only a very small proportion of all decided cases is published has implications for the way case law develops and functions in the Netherlands.

One effect of publishing only a small proportion of decided cases is that it can help prevent the body of published cases from growing so huge that it would become extremely difficult and time-consuming for users to find the cases that they need. This, as has been revealed in this chapter, has been used as an argument to reject the proposal by some legal scholars for the judiciary to abandon the practice of selecting cases for publication and to switch to publishing all cases online.

Another, and arguably much more significant effect of publishing only a small proportion of all decided cases is that, instead of being a mere neutral tool through which users gain access to decided cases, case publication has become a step in the case law mechanism in the Netherlands that fulfils a substantive role, i.e. it has become a link in a chain that determines which court judgments eventually become leading cases that shape the law. After all, it is usually published cases that will be used to decide future cases and to further develop the law. Accordingly, by determining which cases are made accessible to the public and which are not, case publication can have a significant impact on the substance of the law. If many exceptional cases are published that do not represent the majority approach adopted by courts on a certain issue whereas cases that do represent the majority approach are not published because they are conventional and thus less sensational, case publication may create a distorted image of the court practice. Doing so would create a risk that users of cases could be misled into perceiving the exceptional cases as the common approach in court practice.

One possible solution to prevent the risk of case publication being intentionally or unintentionally abused to manipulate the development of case law is to abandon the

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298 See table 1, 2 and 3.
299 See e.g. Jongeneel 2010, p. 2145 and Van der Hoek 2010.
300 See the subparagraph in this chapter that reviews academic and practising lawyers’ reflections on official case publication in the Netherlands.
301 As has been mentioned earlier in this chapter, the judiciary in the Netherlands has an internal digital database named the E-archief where all court judgments are stored, see Van Opijnen 2006b, p. 18 and interview NL 20131008. Some judges indicated during interviews that they do make use of this internal database to find unpublished cases that bear relevance to the cases that they decide, see interviews NL 20131008 and NL 20131107-3. It is therefore not true that only published cases influence judicial decision-making. This, of course, does not change the fact that it is usually published cases rather than the unpublished ones that influence the development of the law. After all, it is published cases that are cited in judgments and practising lawyers, legal scholars as well as other actors outside the judiciary normally only have access to published cases.
303 See Snijders 1977 and interview NL20131021.
practice of selection and to publish all decided cases.\textsuperscript{304} This chapter showed that the judiciary in the Netherlands did not adopt this solution, even though some legal scholars have been arguing for this in recent years.\textsuperscript{305} Instead, the judiciary seeks to limit this risk by, among other things, making the selection criteria more elaborate and objective.\textsuperscript{306} One of the purposes for doing so could be to enhance the transparency and verifiability of case selection for publication, thus counterbalancing the fact that published cases are not selected by a neutral and independent third party, but by judges that have decided the cases, who can be perceived to have a personal interest in “hiding” certain (types of) cases.\textsuperscript{307} Another strategy of the judiciary to limit this risk is to follow the recommendation of the Committee of Ministers of the Council of Europe by adopting a negative method in the selection of cases decided by the highest courts and three special court sections, i.e. these cases should in principle all be published unless they are evidently of little value.\textsuperscript{308} With regard to the publication of cases decided by other courts, the attitude of the judiciary seems to be increasingly active, as judges are nowadays encouraged to publish as many cases as possible.\textsuperscript{309} It seems that the judiciary is trying to seek a balance among competing considerations, such as managing the volume of published cases to prevent difficulties in searching and using cases, protecting the privacy of litigants by deleting information in published judgments that could reveal the identity of litigants and limiting the risk of case publication being abused to manipulate the development of case law. How well the judiciary succeeds in finding a proper balance and whether the judiciary will or should eventually publish all cases or at least adopt a negative method in the selection of cases decided by all courts can be interesting topics for future research.

\begin{footnotesize}
\textsuperscript{304} See e.g. De Mulder 1996, De Meij e.a. 2006 and Mommers & Zwenne & Schermer 2010.
\textsuperscript{305} See the subparagraph in this chapter that reviews academic and practising lawyers’ reflections on official case publication in the Netherlands.
\textsuperscript{306} Raad voor de Rechtspraak (Council for the Judiciary) e.a. 2012.
\textsuperscript{307} See Mommers & Zwenne & Schermer 2010, p. 2077.
\textsuperscript{308} See e.g. Article 5 Paragraph a and Article 6 Paragraph 1 of the new selection criteria and the explanation to this criterion in Raad voor de Rechtspraak (Council for the Judiciary) e.a. 2012.
\textsuperscript{309} See e.g. Article 3 of the new selection criteria and the explanation to this criterion in Raad voor de Rechtspraak (Council for the Judiciary) e.a. 2012.
\end{footnotesize}