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 2

Utilization of cases in the Netherlands
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1. Introduction

The previous chapter examined the first phase in the operation of the case law mechanism in the Netherlands, namely how cases are published. Getting published is a necessary, but obviously not sufficient condition for a court judgment to become a leading case that shapes the law. If, for example, a published case never catches the attention of legal scholars, practising lawyers and judges, it will not be cited in court judgments or scholarly writings and hence will be forgotten instead of becoming a leading case. Consequently, it is logical for this chapter to, following the previous chapter that has investigated how cases are published, examine how cases are used in the Netherlands.

The utilization of cases has long been the focus in the existing literature on the role of cases in civil law jurisdictions.\(^{310}\) In particular, scholars tend to concentrate on how a particular type of actors, namely judges, makes use of cases in court practice.\(^{311}\) This research wishes to, as already explained in the introduction of this study, broaden the scope of investigation on the use of cases.\(^{312}\) The following three paragraphs will successively investigate how cases are used in scholarly legal research, legal education and adjudication in the Netherlands. This chapter will demonstrate that in the Netherlands there are multiple actors that make use of cases and that the way each type of actor uses cases makes a certain contribution to the functioning of cases as a source of law.

Nowadays cases are widely used in different settings by various users in the Netherlands. Not only do judges, legal scholars and law students, but also practising lawyers and even the legislature make use of cases.\(^{313}\) This chapter focuses on the use of cases in adjudication, in scholarly legal research and in legal education, but does not examine how the legislature makes use of cases. This choice is made, on the one hand, due to the limited time and resources, but also because the next chapter will briefly cover the way cases are used in legislation.\(^{314}\) How practising lawyers make use of cases is also an interesting topic to investigate. However, this chapter will not elaborate on this point, but the investigation into the way judges make use of cases does touch upon the role of practising lawyers.\(^{315}\) This choice is made again due to the limited time and resources available. This study welcomes other researchers to conduct in-depth studies into the way practising lawyers make use of cases and their contribution to the case law mechanism.

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\(^{311}\) This is of course not to say that the way other actors make use of cases has never been discussed in the existing literature. Deák 1934, p. 354 and Dainow 1966, p. 428-430, for example, mentioned the use of cases in legal education in civil law jurisdictions. Yiannopoulos 1974, p. 77 and Taruffo 1997, p. 457, for example, touched upon the use of cases by legal scholars in civil law jurisdictions. However, references to the way cases are used by other actors than judges are rather brief and lack in-depth analysis.

\(^{312}\) See the paragraph in the introduction to this book that explains the analytic framework developed by and used in this study.


\(^{314}\) See the relevant passages in chapter three that examine some of the legislation techniques that the legislature in the Netherlands uses.

\(^{315}\) See the paragraph in this chapter that examines the way cases are used in adjudication practice.
Furthermore, it should be noted that nowadays cases are widely used in all major legal areas in the Netherlands, including civil, criminal, constitutional and administrative law. This chapter focuses on the use of cases in civil law, in particular tort law. Two major considerations have led to this choice. First, civil law, in particular tort law, is an area where the use of cases as a source of law is particularly active and visible, as this is an area where the legislation contains many flexible or broadly drafted norms that need to be further specified in adjudication practice. Secondly, I graduated in Dutch civil law, and am hence more capable of appreciating the use of cases in this area than in criminal or administrative law. I am aware of the limitations imposed by this methodological choice, and hence do not assert that its findings can be generalized without qualification of the way cases are used in other legal areas in the Netherlands. This is, of course, not to say that the way cases are used in civil law deviates fundamentally from the way they are used in other legal areas. In fact, discussions with legal scholars and judges who are familiar with other areas of the law indicate that the way cases are used in, for example, criminal and administrative law does bear similarities to the way cases are used in civil law in the Netherlands. Scholars who are familiar with other legal areas are welcome to conduct similar research into the way cases are used in those areas and to compare their findings with this study, so that we will be able to gain more comprehensive insights into the way cases are used in the Netherlands.

2. Use of cases in scholarly legal research

2.1 Method

One of the challenges for this part of the study is that there is an enormous amount of data (i.e. cases are used in a vast array of scholarly writings), whereas the existing literature does not offer a readily usable analytic framework. In order to obtain a general impression of the use of cases in academic legal research and to develop an analytic framework, I conducted a pilot study. The primary method was text analysis. The studied sources included relevant literature on the role of legal scholars in general and randomly selected writings of legal scholars where cases are used. In addition, semi-structured interviews have been conducted with two law professors to obtain data that are missing in the studied written sources, in particular with regard to the ways legal scholars systemize and interpret cases.

The main research used the method of text analysis. For obvious reasons, it is impossible to study all available academic legal writings on every area of the law. The

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317 Hartkamp and Sieburgh, for example, observe that no other provision of the old Civil Code has led to so many cases and scholarly writings as Art. 1401 (current Art. 6:162 BW, the general clause of tort law), see Hartkamp & Sieburgh 2011b, § 2.
318 I presented the findings of this research at four universities in the Netherlands to legal scholars who are specialized in different legal areas. The feedback that the audience gave during the discussion sessions indicates that the way cases are used in other areas of the law bears similarities with the findings of this chapter.
319 See e.g. interviews NL20131008-1, NL20131029 and NL20131107-3.
322 Interviews NL20130304 and NL20130305.
research was limited to the area of tort law for reasons already mentioned in the introduction to this chapter.

The studied sources include two types of scholarly writings: books and journal articles. In total, five books were selected: the Asser Series,\textsuperscript{323} Monographs on the Civil Code: Tort,\textsuperscript{324} Text and Comments on the Civil Code,\textsuperscript{325} the Green Series\textsuperscript{326} and a textbook on tort law.\textsuperscript{327} The selection was inspired by the method of stratified sampling. The author first identified three types of books written by legal scholars: handbooks, textbooks and practice-oriented books. The Asser Series and Monographs on the Civil Code: Tort are well-known and influential handbooks. The textbook written by Spier e.a. was chosen as an example of textbooks, as it is used in the legal education at, among others, Leiden University,\textsuperscript{328} Tilburg University\textsuperscript{329} and Maastricht University.\textsuperscript{330} The Green Series and Text and Comments on Civil Code are books chosen as examples of practice-oriented books, as these two books are widely used by judges and practising lawyers.\textsuperscript{331}

In addition, articles on tort law in four law journals (NJB,\textsuperscript{332} AA\textsuperscript{333} NTBR,\textsuperscript{334} and MvV\textsuperscript{335}) from 2008 till 2012 have been studied. The selection was made primarily on the basis of the target audience and the general style of the journals. The NJB was chosen because it is a highly prestigious and widely used general law journal that has a widely defined audience including practically all legal scholars and practitioners. Ars Aequi is also a general law journal, but it has a more specific target audience, namely law students. The NTBR is a journal specialized in private law with a slightly scholarly style, whereas the MvV is essentially specialized in the same area as the NTBR but has a slightly more practical flavour. The timespan of five years was chosen for the practical reason that the limited time available for this research does not allow a larger sample of journal articles to be studied. The starting point was set to 2008 because the five-year timespan from 2008 till 2012 is the most recent to the time when the research was conducted.

\textsuperscript{323} The Dutch title is Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht, Deel 6-IV Verbintenis uit de wet, see Hartkamp & Sieburgh 2011a.

\textsuperscript{324} The Dutch title is Monografieën BW, B 45 Onrechtmatige daad: algemene bepalingen, see Jansen 2009.

\textsuperscript{325} The Dutch title is Burgerlijk Wetboek: de tekst van de boeken 1, 2, 3, 4, 5, 6, 7, 8, 10 van het BW en International Convention for the unification of certain rules of law relating to bills of lading, voorzien van commentaar, see Nieuwenhuis & Stolker & Valk 2011.

\textsuperscript{326} The Dutch title is De Groene Serie, see Jansen 2012.

\textsuperscript{327} Spier e.a. 2012.

\textsuperscript{328} See https://studiegids.leidenuniv.nl/courses/show/35418/verbintenissenrecht.

\textsuperscript{329} See http://mystudy.uvt.nl/it10.vakzicht?taal=n&pfac=&vakcode=650262.

\textsuperscript{330} See http://www.maastrichtuniversity.nl/web/Main1/SiteWide/courseDetailpagina/OnrechtmatigeDaadEnSchadevergoeding500199362012NIPRI4008.htm.

\textsuperscript{331} See e.g. interviews NL20131008, NL20131017, NL20131021, NL20131022 and NL20131114.

\textsuperscript{332} The Dutch title is Nederlands Juristenblad.

\textsuperscript{333} The Dutch title is Ars Aequi.

\textsuperscript{334} The Dutch title is Nederlands Tijdschrift voor Burgerlijk Recht.

\textsuperscript{335} The Dutch title is Maandblad voor Vermogensrecht.

\textsuperscript{336} The journal covers all major areas of the law, such as civil law, criminal law, administrative law and international law.
2.2 Findings

In the decades immediately following the introduction of the Old Dutch Civil Code in 1838, cases did not play a particularly prominent role in academic legal research.\(^{337}\) It used to be common that handbooks clarified the law from the perspective of law professors, with occasionally a casual footnote that referred to one or two Supreme Court decisions where the Court had, in the eyes of the law professors, expressed a different opinion.\(^{338}\) This situation began to change in the early decades of the 20\(^{th}\) century, when prominent law professors such as Meijers and Scholten began to annotate cases.\(^{339}\) Nowadays, legal scholars pay close attention to cases in their research. Nearly every type of academic legal writing involves judicial cases. Almost every law journal deems it a crucial task to keep its readers informed of the latest cases.\(^{340}\) Handbooks and textbooks are frequently updated to incorporate the relevant cases that have emerged since the last version.\(^{341}\)

Writings of legal scholars where cases are used can be roughly divided into two categories: case-focused and system-oriented. A key feature of case-focused writings is that they intensively discuss the substance and implications of one or a couple of (related) cases.\(^{342}\) System-oriented writings, on the other hand, provide an overview of a certain field of the law\(^ {343}\) or discuss a specific legal device.\(^ {344}\) Within each category, a further distinction can be made between descriptive and evaluative writings, the difference being that descriptive writings do not\(^ {345}\) contain explicit opinions of legal scholars on the soundness and desirability of the discussed judicial decisions, whereas evaluative ones do.\(^ {346}\) This typology can be visualized as in Table 4. The following two subparagraphs will take a closer look at the different types of scholarly legal writings.

<table>
<thead>
<tr>
<th></th>
<th>Case-focused</th>
<th>System-oriented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Descriptive</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evaluative</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 4 Typology of scholarly legal writings that involve cases

2.2.1 Descriptive scholarly writings involving cases

As the above-presented typology suggests, descriptive scholarly writings include two subtypes, i.e. case-focused and system-oriented writings. Contrary to what the term “case-focused” might suggest, it is not true that case-focused scholarly writings only discuss the content of a particular case without any effort to embed the discussed case in a broader system. Nor is it true that system-oriented writings solely seek to systemize judicial decisions without properly assessing the content of individual cases. In fact, both case-focused and system-oriented descriptive writings essentially do two things:

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\(^{337}\) Brunner 1994, p. 32.
\(^{338}\) Bruinsma 1988a, p. 115
\(^{339}\) Ibid.
\(^{341}\) Vranken 1995, p. 114.
\(^{342}\) See e.g. Tjong Tjin Tai 2005 and Jansen 1967.
\(^{343}\) Handbooks and textbooks belong to this category.
\(^{344}\) See e.g. Klaassen 2012 and Hartlief 2013.
\(^{345}\) See e.g. Wessels 2006 and Enneking 2013.
\(^{346}\) See e.g. Roelofs 2008 and Giesen 2008.
(1) interpretation, i.e. identifying and explaining what has been decided in a case, and
(2) systemization, i.e. verifying and explaining whether, and if so how a judicial decision fits in the system of the law.

The following passages will examine these two aspects in details.

2.2.1.1 Interpretation

Although both case-focused and system-oriented descriptive scholarly writings seek to identify and explain what has actually been decided in a case, they differ in the intensity and details with which they treat this aspect. System-oriented writings usually give a much briefer account of the content of a case than case-focused scholarly works. Very often, system-oriented writings summarize the essence of a case in no more than one or two sentences by distilling a norm from the judicial decision.347 Most case-focused writings, on the other hand, do not only distil a norm or norms from a judicial decision, but also summarize the key facts, analyse the legal reasoning that the court employs to reach the decision and explore possible implications of the discussed case for similar or related cases in the future.348 Some case-focused writings even provide a brief explanation of the background of the lawsuit and give a summary of the judgments in lower instances before the case reached the Supreme Court.349 These findings can be summarized in a table (see Table 5).

<table>
<thead>
<tr>
<th></th>
<th>Case-focused</th>
<th>System-oriented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Background of the case</td>
<td>Sometimes included</td>
<td>Seldom included</td>
</tr>
<tr>
<td>Facts</td>
<td>Usually included</td>
<td>Seldom included or very brief</td>
</tr>
<tr>
<td>Norms that can be distilled from the case</td>
<td>Usually included</td>
<td>Usually included</td>
</tr>
<tr>
<td>Analysis of the legal reasoning of the court</td>
<td>Usually included</td>
<td>Seldom included or very brief</td>
</tr>
<tr>
<td>Implications for future cases</td>
<td>Usually included</td>
<td>Seldom included or very brief</td>
</tr>
</tbody>
</table>

Table 5 Comparison of interpretive aspects of case-focused and system-oriented descriptive scholarly writings

2.2.1.2 Systemization

Although most case-focused writings intensively discuss only one case, they do not analyse the case as an isolated island. Instead, scholars frequently refer to relevant legislation, doctrines and previous cases, thus putting the discussed case in a broader perspective.350 Such systemization efforts help to clarify the significance of the discussed case for the development of the law and for future practice.

The systemization aspect is particularly prominent in system-oriented writings. After all, a key feature of system-oriented writings is that they process a large amount of judicial cases by allocating them to proper places within a certain framework and by organizing them in a certain order. Throughout the years scholars have developed a

347 See e.g. the cases and the comments to them in Nieuwenhuis & Stolker & Valk 2011, Article 6:162, Commentary 5, paragraph a.
348 See e.g. Haas 2010 and Fernhout 2010.
349 See e.g. Lindenbergh 2008c and Wegerif 2011.
350 See e.g. Fernhout 2010 and Haas 2010.
number of ways to accomplish this task. This study has been able to identify two basic systemization models and three frequently used grouping patterns.\footnote{351} One basic case systemization model is to adopt the structure of a piece of legislation and to allocate cases to the legislative provisions to which they are related. This study defines it as the legislative case systemization model. Both the \textit{Green Series}\footnote{352} and the \textit{Text and Comments on the Civil Code}\footnote{353} follow this model. These books adopt the structure of the Civil Code. Scholars comment on each article of the Code. Cases that are related to a particular article of the Code are integrated into the scholarly comments.\footnote{354}

Another basic model is to systemize cases according to a doctrinal structure. This study defines it as the doctrinal case systemization model. Many handbooks,\footnote{355} textbooks\footnote{356} and system-oriented journal articles\footnote{357} adopt this model. These academic writings do not contain scholarly comments to a piece of legislation on an article-by-article basis. Instead, they follow a structure developed by scholars that reveal the interrelationship between various components of a certain field of the law or a legal doctrine. Cases are allocated to the doctrinal components with which they are associated.\footnote{358}

It sometimes occurs that many cases are related to the same legislative provision or the same doctrinal point. Scholars have developed various ways to organize such related cases. A frequently used method to group related cases is, what this study calls, the “norm application” pattern. An author who uses this pattern to group cases first identifies a case that has established a certain norm.\footnote{359} Then the author lists a group of cases where the norm has been applied in different situations in order to illustrate the content of the norm.\footnote{360}

“Norm modification” is another frequently used case grouping pattern. This pattern usually serves to illustrate how a certain point in law has been developed in a series of cases. The grouping begins with a case that has established a general starting point or a general rule. This leading case is then followed by a group of cases that have modified the starting point or general rule by making subtle distinctions, limiting or broadening the scope of the general rule, specifying sub-norms or creating exceptions.\footnote{361}

\footnote{351} This study does not claim the discovered models and patterns to be exhaustive, but they do seem to be the common ones. \footnote{352} See Jansen 2012. \footnote{353} See Nieuwenhuis & Stolker & Valk 2011. \footnote{354} See e.g. Nieuwenhuis & Stolker & Valk 2011, Article 6:163, commentary 1-4 and Jansen 2012, Article 6:162, commentary 1-7. \footnote{355} See e.g. Jansen 2009 and Hartkamp & Sieburgh 2011b. \footnote{356} See e.g. Spier e.a. 2012. \footnote{357} See e.g. Noorlander & Pajjmans 2011 and Tjong Tjin Tai 2011. \footnote{358} See e.g. Jansen 2009, p. 50-57 and Hartkamp & Sieburgh 2011b, commentary no. 35 on the five elements of an action based on tort. \footnote{359} See e.g. Lindenbergh 2008b, p. 598, footnote 9. See also the case HR 22 November 1974, \textit{NJ} 1975, 149 cited in Jansen 2012, Art. 6:162, Commentary 89.2. \footnote{360} See e.g. Lindenbergh 2008b, p. 599, footnotes 10. See also the cases Rb. Arnhem 2 April 2002, \textit{NJ/Kort} 2003, 6, Rb. Roermond 11 June 2003, \textit{VR} 2005, 24 and Rb. Breda 12 November 2008, \textit{NJF} 2008, 312 cited in Jansen 2012, Art. 6:162, Commentary 89.2. \footnote{361} See e.g. Hartkamp & Sieburgh 2011b, commentary 45, where the case HR 17 September 1982, \textit{NJ} 1983, 278 (\textit{Zegwaard/Knijnenburg}) is cited as a case that established a rule, whereas the case HR 3 November 2000, \textit{NJ} 2001, 108 (\textit{ABS/Groenewegen}) is cited as an exception to the rule. See also Nieuwenhuis & Stolker & Valk 2011, Article 6:162, Commentary 7 and 8b.
Still another grouping pattern is, what this study calls, the “diversity” pattern. It sometimes occurs that different courts adopt different solutions to a particular legal problem. Under such circumstances, legal scholars may point out that courts have adopted different approaches on the issue and group the cases related to the issue by sorting them to each of the competing solutions.\(^{362}\)

2.2.2 Evaluative scholarly writings involving cases

In case-focused and system-oriented evaluative academic writings, legal scholars not only interpret what a court has decided in a case, but also explicitly comment on how good or how bad the decision is.\(^{363}\) Some scholars go even further to argue what a better decision or solution would have been.\(^{364}\)

Evaluative scholarly comments on judicial decisions can be positive\(^ {365}\) or critical.\(^ {366}\) A closer look at evaluative scholarly comments on cases suggests that both in case-focused and in system-oriented evaluative writings legal scholars seem to perform the role of “quality control” inspectors\(^ {367}\) by examining and evaluating various aspects of a judicial decision. An important aspect that scholars examine closely is how the court arrives at its decision. In particular, scholars are keen to point out mistakes in the court’s legal reasoning.\(^ {368}\) Criticism on courts’ legal reasoning may involve legal technical deficiencies such as wrongly applied techniques to interpret statutory provisions\(^ {369}\) as well as distorted interpretation and improper application of norms established in earlier cases.\(^ {370}\) Also logic errors such as circular or self-contradictory reasoning frequently attract scholarly criticism.\(^ {371}\) Furthermore, it is worth noting that scholars check whether the court has violated procedural norms while arriving at its decision. Where a judicial decision has a norm-creating element, for example, legal scholars may verify whether the court has exceeded the boundaries of its lawmaking power.\(^ {372}\)

Another aspect that frequently provokes evaluative scholarly comments is how the court justifies and explains its decision. A judgment where the court jumps to its conclusion without sufficiently explaining the reasons for doing so is often a target of scholarly criticism.\(^ {373}\) Scholars are also keen to point out some crucial aspects that the court has ignored in the justification of its decision.\(^ {374}\)

\(^{362}\) See e.g. Noorlander & Pajtmans 2011, paragraph 4.1-4.3 and Jansen 2012, Article 6:162, Commentary 91.1.

\(^{363}\) See e.g. Kottenhagen 2010a and Oldenhuis 2010.

\(^{364}\) See e.g. Lindenbergh 2008a, p. 239 and Hartlief 2011.

\(^{365}\) See e.g. Lindenbergh 2008d, p. 120 and Oldenhuis 2011.

\(^{366}\) See e.g. Hartlief 2010 and Oldenhuis 2010.

\(^{367}\) This term is inspired by Bruinsma, who draws an analogy between the Supreme Court and the quality control department of a company, see Bruinsma 1988b. If the Supreme Court can be seen as to perform the task of quality control within the judiciary, it seems fair to say that legal scholars perform the task of quality control vis-à-vis the courts, including the Supreme Court.


\(^{369}\) See e.g. Kolder 2010, paragraph 5 and Van Dam 2010, footnotes 93 and 94.

\(^{370}\) See e.g. Arons 2012, footnote 31, where the author criticized the District Court Utrecht for neglecting a key norm established in an earlier relevant case decided by the Supreme Court.

\(^{371}\) See e.g. Kottenhagen 2010b and Oldenhuis 2010.

\(^{372}\) See e.g. Kottenhagen 2011.

\(^{373}\) See e.g. De Groot 2011 and Arons 2012.

\(^{374}\) See e.g. Arons 2012.
Still another aspect that scholars pay close attention to is the quality of the court’s solution to the disputed issue. Where the disputed issue is a question of law and the court (implicitly or explicitly) creates a rule in its judgment, scholars may criticize the decision if the rule produced by the court is vague or uncertain.\(^{375}\) Where the court imposes a sanction on a litigating party, scholars may verify whether the sanction is disproportional.\(^{376}\) Furthermore, scholars often evaluate the quality of a court decision by exploring its possible consequences. Nieuwenhuis, for example, praised the controversial \textit{DES Daughter} case for it has reached very positive results beyond the litigated case itself, i.e. preventing hundreds of similar lawsuits and promoting a piece of good legislation later on.\(^{377}\) Hartlief, on the other hand, criticized the Supreme Court’s decision in the \textit{Hammock} case, because it creates uncertainty about the application of Article 6:179 and Article 6:173 of the Civil Code.\(^{378}\)

These findings can be summarized in a “check list” (see Table 6). This list is not exhaustive. Nor does this study suggest that legal scholars explicitly go through the list while examining every court decision. Nonetheless, the list does provide an overview of the key points which legal scholars are likely to examine when evaluating judicial decisions.

<table>
<thead>
<tr>
<th>A. How does the court arrive at its decision?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Has the court made mistakes in its legal reasoning?</td>
</tr>
<tr>
<td>(1) Has the court correctly identified, interpreted and applied relevant legislative provisions?</td>
</tr>
<tr>
<td>(2) Has the court correctly identified, interpreted and applied norms established in earlier cases?</td>
</tr>
<tr>
<td>(3) Has the court made logic errors such as circular or self-contradictory reasoning?</td>
</tr>
<tr>
<td>2. Has the court violated procedural norms while arriving at its decision?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. How has the court justified and explained its decision?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Has the court provided justification for its decision?</td>
</tr>
<tr>
<td>2. Has the court ignored certain crucial elements in the justification that it provided?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C. Quality of the court’s answer to the disputed issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. If the court explicitly or implicitly devises a rule in its answer to a disputed point of law, is the rule vague?</td>
</tr>
<tr>
<td>2. If the court imposes a sanction on one or more of the litigating parties, is the sanction disproportional?</td>
</tr>
<tr>
<td>3. Is the decision likely to trigger undesirable consequences?</td>
</tr>
</tbody>
</table>

| Table 6 “Check list” for scholarly evaluation of court decisions |

**2.2.3 Contribution to the case law mechanism**

The findings presented in the above subparagraphs indicate that legal scholars do not treat cases randomly. Instead, they have developed certain patterns to systematically process cases and to incorporate them in scholarly writings. The relevance of scholarly writings for the operation of case law in civil law jurisdictions may not seem

\(^{375}\) See e.g. Hartlief 2008, p. 900 and Kottenhagen 2010b.  
\(^{376}\) See e.g. Bartman 2011, p. 130.  
\(^{377}\) Nieuwenhuis 2010, p. 418.  
\(^{378}\) Hartlief 2011.
particularly noteworthy to researchers adopting a judge/court-centred approach that seeks to study the role of cases by focusing on the analysis of published court judgments. After all, it is uncommon in the Netherlands and some other civil law jurisdictions for judges to cite or discuss scholarly writings in their judgments. Accordingly, researchers may, if they concentrate on studying court judgments, overlook the importance of scholarly writings for the operation of case law.

This study argues that scholarly research that processes cases makes a significant contribution to the operation of case law in the Netherlands, even though the ways through which legal scholars influence the operation of case law may not always be direct or explicit. A relatively tangible way through which legal scholars contribute to the operation of case law is that normative proposals advanced by legal scholars in evaluative scholarly writings as to how a certain issue should be addressed may eventually be adopted by courts and thus exercise a strong influence on the development of the law. A good example is that the proposal by Molengraff, a prominent Dutch legal scholar in the 19th century, to expand the scope of “unlawful acts” in tort law to include acts that violate what according to unwritten law has to be regarded as proper social conduct was eventually adopted by the Supreme Court in the *Lindenbaum/Cohen* case in 1919, which significantly changed the landscape of tort law in the Netherlands.

A less explicit way through which legal scholars influence the operation of case law is that normative comments expressed by legal scholars in evaluative writings may affect the likelihood that the commented cases are followed in court practice. In the *Epskamp/Brand* case, for example, the Court of Appeal in Amsterdam refused to follow an interpretation adopted by the Supreme Court in a set of previous cases, due to, among other things, severe criticism expressed in scholarly writings on the Supreme Court’s interpretation. Also interviews with judges conducted by this study indicate that judges do take scholarly evaluative comments on cases into careful consideration and that (persistent) scholarly criticism on a case may reduce the likelihood that judges follow the criticized decision, whereas positive scholarly reaction to a case may add to the weight that the case carries in judicial deliberation.

Another indirect yet relevant way through which normative scholarly writings contribute to the operation of case law is that scholarly efforts to critically review published cases stimulate judges to enhance the quality of their work. Writings in the existing literature and interviews conducted by this study suggest that judges are aware that legal scholars closely monitor their work and that many of them perceive it as undesirable to attract severe criticism from the legal academic forum by producing flawed judgments. If the Supreme Court can be said to fulfil the role of a “quality inspector” inside the judiciary, it seems fair to say that legal scholars perform the role of an external “quality inspector” that helps maintain a decent level of overall quality of

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380 Van Maanen 2009.
382 Ibid.
383 See e.g. NL20130912, NL20131008-1, NL20131017, NL20131022, NL201310031 and NL20131114.
384 Draaisma & Duynstee 1988, p. 25.
385 See e.g. NL20131017, NL20131022, NL20131029 and NL20131031.
386 Bruinsma 1988b, p. 4.
court judgments, which in its turn is conducive for a well-functioning case law mechanism.

Even descriptive scholarly writings, where the role of legal scholars is commonly presumed to be that of a detached spectator giving a neutral account of the state of the law, are capable of influencing the functioning and the development of case law. The very fact that legal scholars choose to closely analyse a particular judicial decision in case-focused descriptive writings may be perceived as a sign that the analysed case is of particular noteworthy interest, which may accordingly have the effect of, however slightly, increasing the likelihood that the analysed case catches the attention of judges, practising lawyers or other players in law, and subsequently exercises a certain influence on judicial deliberation, scholarly doctrinal forming or legal teaching.  

System-oriented descriptive scholarly writings can also affect the development of case law due to, among other things, the many choices that legal scholars make in the way they select, interpret and systemize cases. Which cases do legal scholars select to involve in their research and to incorporate into their system-oriented descriptive publications? If the court’s holding in a judicial decision is susceptible to different understandings, how do legal scholars interpret the case and what do they present as the essence of the case in their descriptive writings? If various courts have adopted divergent positions towards an issue, do legal scholars ascertain whether there is a prevailing approach among the courts and if so, which cases do they present in their descriptive publications as reflecting the dominant view? Obviously, the way legal scholars deal with these questions may not be able to single-handedly dictate which judicial decisions become the leading cases that shape the law, but the choices made by legal scholars are capable of, however subtly, affecting which cases are likely to be consulted and applied by other users such as judges and practising lawyers as well as how such cases are likely to be understood and applied by those users. One may infer that this influence pattern is subtle and indirect, but it would be a mistake to assume that the effect of descriptive scholarly writings on the development of case law is trivial. By choosing a group of cases to be included in system-oriented descriptive scholarly writings, legal scholars give these cases a status that many published cases never get, thus fulfilling an important selective role in influencing which cases eventually become the law.

An even more indirect but perhaps the most important contribution by legal scholars to the case law mechanism is that the results of their work make it easier for other users to make use of cases and hence facilitate cases to fulfil the role of a source of law in practice. Without the efforts by legal scholars to carefully select, interpret and systemize cases, judges and lawyers would have to comb through the vast body of published judicial decisions to find the relevant cases, to make sense of the holdings in those cases, to map out the relationship among the published cases and to ascertain how those cases relate to legislation. Such work by judges and lawyers would be so time-consuming and costly that one may rightly doubt whether cases could be efficiently used as a source of law in practice, if individual judges and lawyers would have to conduct the work of legal scholars in all the cases they handle. Of course, this study does not suggest that, as long as there are legal scholars that study and systemize cases, judges and lawyers no longer need to conduct any case research in their work. However, this study does wish to stress that judges and lawyers do derive great benefit from scholarly efforts to study and systemize cases, as they no longer have to repeat

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387 See e.g. Jansen 1967 and interviews NL20130304, NL20131107 and NL20131031.
388 All interviewed judges agree that the scholarly works facilitate their adjudication practice, see their responses to question 20 of Appendix 4.
certain case research and, when they do need to carry out their own case research, they can use the existing scholarly works as a helpful starting point. One may, of course, downplay the significance of legal scholars by qualifying the role of legal scholars as “assisting” or “supporting” the legal practice. However, this study prefers to see legal scholars as bridge-builders between the vast body of published court judgments and other users of cases. Without the scholarly efforts to select, interpret and systemize cases, published court judgments would remain like loose sand. It is legal scholars who play an important role in transforming such loose sand into building materials that can be conveniently used by other actors such as judges, lawyers and law students. Through this transformation legal scholars create great added value and make a considerable contribution to the operation of the case law mechanism.

3. Use of cases in legal education

3.1 Method

There are in total ten universities in the Netherlands that offer legal education. This research focuses on Leiden University as an example. This choice is made because a small pilot study I conducted suggests that the way cases are used in legal education at Dutch universities is fairly similar. In order to verify the representativeness of the findings of this study, six respondents that have received legal education or have had teaching experience at five universities have been requested to read a draft version of the main findings and to give feedback. The feedback confirmed that the way cases are used at these universities is indeed very similar to the descriptions provided by this study. Differences indicated by the respondents have been incorporated into the final version of this study.

The examined materials include primarily syllabi, exercise books, textbooks and exams of private law courses taught at Leiden University Law School. In addition, semi-structured interviews with two law professors who teach private law courses have been conducted in order to obtain data that are missing in written materials, in particular with regard to the reasons why cases are used in legal education and factors that law professors take into account when considering which cases should be assigned as compulsory learning materials.

3.2 Findings

It is difficult to trace when exactly cases began to be incorporated in university legal education in the Netherlands. I have found two pieces of scholarly writings that point to the early decades of the 20th century as the starting point of using cases in university

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389 See e.g. NL20131008-1, NL20131022, NL20131107 and NL20131114.
390 The ten universities are University of Amsterdam, VU University Amsterdam, University of Groningen, Leiden University, Maastricht University, Radboud University Nijmegen, Erasmus University Rotterdam, Tilburg University, Utrecht University and Open University. See Smits 2012, p. 624.
391 The pilot study consists primarily of discussions with teachers, students and graduates of universities that offer legal education. I also visited the websites of the law faculties of the ten universities to obtain information on their legal education.
392 The universities include Utrecht University, Radboud University in Nijmegen, University of Amsterdam, VU University Amsterdam and Erasmus University in Rotterdam.
393 Interviews NL20120327-1 and NL20120327-2.
legal education in the Netherlands. Despite some uncertainty about the exact starting point, it is plain that in the 19th century cases were not, or at least not widely used in legal education, but nowadays using cases in legal education has become a common practice at Dutch universities. The prominence of cases in legal education has reached such a degree that Vranken wrote the following passage in 1995:

Not only has he (a law student) been required to study legislation and legal literature, at least an equal amount of attention, if not more, has been paid to cases. He has to study hundreds of them.

Cases used in legal education can be divided into two types (see Figure 5). The cases that students are assigned to study belong to the first type. The second type includes cases that students must find using search tools. The distinction between these two types is not related to the content of the cases, but rather whether students are required to actively search for the cases. The first type of cases will be referred to as “assigned cases” further in this study and the second type as “non-assigned cases”.

Among the assigned cases, two subtypes can be identified. The first subtype are cases that are selected as teaching materials for the purpose of illustrating how certain legal norms are applied in practice. In other words, these cases are used as examples and the emphasis is not on the legal norms, but on the application of those norms. The second subtype includes cases that have contributed to the development of the law by, among other things, giving new interpretations to existing legal concepts or rules. These cases are selected as teaching materials due to their normative impact rather than their illustrative value. The following subparagraphs will take a closer look at the use of the various types of cases in legal education.

![Figure 5 Typology of cases used in legal education](image)

### 3.2.1 Assigned cases

University legal education in the Netherlands normally consists of two phases: a three-years’ bachelor programme and a one-year master programme. At Leiden University, for example, a student who intends to obtain a master’s degree in law normally needs to

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394 Brunner 1994, p. 34 and Fockema Andrea 1938, p. 73.
395 As already mentioned earlier in this subparagraph, there are ten universities in the Netherlands that offer legal education. Cases are widely used in the legal education at all of these universities, see Vranken 1995, p. 116.
397 The text of the assigned cases is sometimes incorporated into the syllabi or exercise books, see e.g. Leiden Law School 2012f, p. 24-28 and Leiden Law School 2012e, p. 2. Usually, however, case citations or links to online case publications are provided in syllabi or exercise books so that students can easily find the text of the assigned cases, see e.g. Leiden Law School 2012g, p. 7.
398 Interviews NL20120327-1 and NL20120327-2.
399 See websites of the law schools of the ten universities that offer legal education.
complete about 33 courses (25 bachelor courses and 8 master courses). The syllabus of almost every law course requires the student to study, and in some events even to memorize, a certain amount of judicial cases. Also the textbooks used in various law courses usually contain references to a large amount of cases. These cases constitute the type one cases, as set out earlier in the typology. A common feature of this type of cases is that students are clearly instructed which particular cases they are required to study, so that they do not need to undertake complicated search activities. Even though the syllabi of some law courses only provide case citations instead of the full text of the required cases, the search activity that a student needs to undertake is usually simple and straightforward. Typing the citation in an online case database is usually sufficient.

Some of the type one cases are selected due to their illustrative value. These cases are primarily meant to show the students how an abstract legal norm is applied in practice. Students are usually not required to carefully analyse these cases. Normally they would not need to use these cases in exams.

A more important subcategory of type one cases is formed by judgments that are of great legal importance. Students are required to study these cases because these judgments have added something new to the previously existing body of legal norms. A very small number of these legally important cases are selected due to their historic value. These cases are usually no longer used in legal practice because they have been incorporated into legislation or replaced by new cases, but historically they have made such a prominent contribution to the development of the law that professors would still require students to study them. The vast majority of the legally important cases, on the other hand, are of significant practical value. Without knowledge of these prominent cases, the student’s knowledge of the law would be incomplete, as the norms contained in them are treated in practice as the existing law.

Students are required to study the legally important cases carefully. The syllabi of many courses instruct students to read not only the original judgments, but also the available scholarly annotations to the legally important cases. Students may often need to use the legally important cases to answer questions or to apply them to solve legal problems in homework assignments. Also exam questions require students to cite and apply the legally important cases that they have been required to study.

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400 Bachelor thesis is counted as one course.
401 Master thesis is also counted as one course.
402 Although I have only examined teaching materials used in private law courses, cases are also widely used in the teaching of other areas of the law such as criminal, constitutional and administrative law, see interviews NL20120327-1 and NL20120327-2.
403 See e.g. Leiden Law School 2012i, p. 1-2 and Leiden Law School 2012g, p. 7.
404 See the extensive table of cases in e.g. Hijma e.a. 2010 and Spier e.a. 2012.
405 Interviews NL20120327-1 and NL20120327-2.
406 Interviews NL20120327-1 and NL20120327-2.
407 A good example is HR 31 January 1919, NJ 1919, 161 (Lindenbaum/Cohen), which significantly changed the landscape of tort law in the Netherlands. The holding of this case was later codified in Article 6:162 of the new Dutch Civil Code.
408 Interview NL20120327-1.
409 Interviews NL20120327-1 and NL20120327-2.
Since some exams do not allow students to consult case law collections, students must memorize the key points of a certain amount of legally important cases. By studying assigned illustrative and legally important cases, students gradually develop the skills and techniques to read and analyse cases. The skills required to answer homework or exam questions by using the legally important cases, however, are usually not complicated. Very often, students only need to apply the norm contained in a case that they have been required to study as if it were a legislative norm while citing the name of the case as the basis for a legal proposition.

3.2.2 Non-assigned cases

In addition to cases that students are explicitly required to study, legal education in the Netherlands also involves cases that students must actively find and use. Students usually learn to deal with this type of cases at a relatively advanced stage of their study in courses such as moot court and some master courses. Writing a bachelor or master’s thesis may also require students to actively search for, evaluate and use cases.

Moot court and some practice-oriented master courses often contain assignments that require students to solve a legal problem with (imaginary) facts and legal claims, which resemble to a certain extent legal disputes in practice. Teachers do not tell students which cases may be relevant for them to complete their assignments. Instead, the student must analyse the problems by him/herself and determine whether, and if so, what kind of cases may be needed. Then the student needs to develop a search strategy, using various search tools and techniques to find the possibly relevant cases. Once these cases have been found, the student must read and analyse them to determine their relevance. Finally, if he or she deems a found case relevant and usable, the student must apply the case to solve the problem at hand. Such an exercise trains the student to acquire a series of skills and techniques, such as using case law search tools, analysing, evaluating and applying cases. Similarly, writing a thesis may also help students enhance these skills and techniques.

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413 The number of exams that do not allow students to consult case law collections varies from university to university. Leiden University seems to be relatively strict in this respect. A rare example of an exam that allows students to consult case law collections in Leiden is the exam civil procedure for master students, see Leiden Law School 2012h, p. 4. At the Radboud University, however, students are usually allowed to consult case law collections during exams, see interview NL20140627.

414 At the beginning of their legal education, first year’s law students usually get some instructions on how to read cases, see Syllabus Introduction to Civil Law (Inleiding burgerlijk recht), p. 47. These instructions, however, tend to be relatively abstract. The assigned cases give the students an excellent opportunity to apply the instructions that they have learned. First year’s law students at the VU University Amsterdam and the University of Amsterdam also receive similar instructions and training, see interviews NL20131212 and NL20140721.


416 See Leiden Law School 2012a, p. 11-14 and Leiden Law School 2012h, p. 3-5. Students at the VU University Amsterdam begin relatively early to train such skills in courses such as Arresten lezen (Reading Cases), Juridische vaardigheden (Legal Skills) and Rechtzoeken (Searching for the Law), see interview NL20140721.

417 See Leiden Law School 2012a, p. 15.


419 Teachers do provide students with general instructions on search methods and case citing rules, see Leiden Law School 2012a, p. 18-26.
3.2.3 Contribution to the case law mechanism

When it comes to the relationship between using cases in legal education and the status of cases as a source of law in legal practice, there is a traditional view that adopts a “one-way street” thinking. According to this view, it is due to the fact that in legal practice cases have acquired a highly important status that legal education began to use cases. In other words, this view tends to assume that legal education merely follows and reflects the trends in legal practice.

This study, however, prefers a “two-way street” model to analyse this relationship. In the comparative law literature, the “two-way street” model has already been presented in a paper by Dainow in 1966:

There is naturally a direct reciprocal influence between the nature of a legal system and the pattern of legal education. The nature of the former promotes the method of the latter, which in turn perpetuates the original character of the system. The program of law studies and the method of legal education establish and fix the fundamental understanding and the mode of thought which condition the individual for his entire professional career.

Applying this model to the context of using cases in legal education in the Netherlands, this study argues that using cases in legal education makes contributions at three levels at least to the functioning of the case law mechanism. First of all, at the level of the impact of individual cases, using cases in legal education can have the effect of enhancing the status of some particular cases. As described earlier in this chapter, the syllabi of various law courses require students to study, and in some events even to memorize, many cases that are presented as containing legal innovation. The norms extracted from this type of cases are presented as the law. Accordingly, law students may perceive these particular cases as highly influential, and it is possible that they may continue to entertain this perception throughout their later career.

Obviously, this study does not argue that cases become influential in practice because they have been used in legal education. Asserting so would amount to a reversed “one-way street” model that does no justice to the reality. In fact, it follows from the description provided earlier in this chapter that judgments would not be used as legally important cases in legal education, if they had not already gained significant prominence in practice.

This is, however, not to say that, contrary to what the “one-way street” model would imply, selecting a body of cases and presenting them in legal education as the valid law has no further impact on the status of those cases in practice. This study wishes to highlight that presenting a body of cases in legal education as being the law can have the effect of confirming and reinforcing the prominent status of those cases in practice. As the next paragraph will reveal, how a case is received in academic writings and in legal practice is an important factor that judges take into consideration when determining whether a previous case will be followed or not in later decisions. The fact that a case is presented in legal education as being the law can serve as a powerful

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420 See e.g. Fockema Andreea 1938, p. 73.
421 Ibid.
422 Dainow 1966, p. 428.
423 See the relevant passages in the following paragraph on the various factors that influence the likelihood that a case is followed in adjudication practice.
indication that consensus on the soundness and the desirability of the concerned judicial
decision has been reached in scholarly writings and in legal practice, which may in its
turn further enhance the likelihood that the case will be followed in future court
practice.\textsuperscript{424} In this context, it seems that the observation by Nieuwenhuis that the
highest status a case can reach is to be incorporated into legislation\textsuperscript{425} can be
supplemented by a remark that the next highest status that a case can obtain is to be
incorporated into a classic law textbook as a judicial decision that has further developed
the law. In fact, one may even go one step further and argue that being incorporated
into a classic law textbook as a court decision that has further developed the law is a
status even higher than being incorporated into legislation, because the latter makes the
case redundant but the former further strengthens the authority of the case.\textsuperscript{426}

Another contribution that legal education makes to the operation of case law is
at the level of skills and techniques. For cases to fulfil the function of a source of law in
legal practice, it is crucial that actors such as judges, public prosecutors and lawyers
possess the necessary skills and techniques to find, analyse and apply cases to solve
legal problems. As the previous paragraph illustrates, two types of cases are used in
university legal education in the Netherlands, which can train law students to acquire
such skills (see Table 7). At an early stage of a university legal education programme,
for example, cases are used that primarily help students to develop the necessary skills
to read and analyse judicial decisions. At a relatively advanced stage, students are
trained to develop more sophisticated case law techniques and skills, such as searching,
evaluating and applying cases to solve legal problems. It can accordingly be said that
by using cases, legal education supplies legal practice with law graduates that are
armed with the necessary skills to handle cases.

<table>
<thead>
<tr>
<th>Types of cases used in legal education</th>
<th>Type I: Assigned cases</th>
<th>Type II: Non assigned cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases as illustration materials</td>
<td>Yes, but thorough analysis not always required</td>
<td>Yes</td>
</tr>
<tr>
<td>Cases of legal significance</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Search for cases through online databases or other media</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Apply cases to solve legal problems</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Yes, but usually straightforward application</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 7 Types of cases used in legal education and related techniques and skills

The third, and possibly the most fundamental contribution seems to be at the
level of awareness. One of the effects of repeated use of cases throughout nearly all
courses in a university law programme is that law students gradually develop a “case
law awareness”, i.e. an internalized conviction that cases are highly relevant materials

\textsuperscript{424} See e.g. interviews NL20131008-2, NL20131022 and NL20131107-03.
\textsuperscript{425} Nieuwenhuis 2000, p 687.
\textsuperscript{426} I would like to thank Van Rooij for inspiring me to derive this insight from the findings of this subparagraph.
that ought to be treated seriously and carefully when dealing with legal problems. Given the fact that the key legal professions (judges, public prosecutors and lawyers) in the Netherlands all require a university law degree as a basic qualification, it would be anything but surprising if one should find a high level of case law awareness among the key players in law in the Netherlands. In this respect, Vranken observed rightly that:

> Without knowledge of case law and legal literature, lawyers are not able to exercise their profession properly. Every lawyer knows this, because it has been hammered into his head from the very first day of his legal education.

By cultivating a strong case law awareness among law students, university legal education becomes an important institution that contributes to forge and maintain a strong perception among the key players in law that cases are a highly important source of law.  

### 4. Use of cases in adjudication

#### 4.1 Method

Two main research methods used in this part of the study include analysis of relevant writings in the existing literature and semi-structured interviews with judges. The relevant literature has been found, in the first place, by searching in online database Picarta and by using Google Scholar. The snowball method was also used. Consulting the bibliographies of publications on this topic has led me to many other relevant scholarly writings.

In addition to text analysis, I conducted semi-structured interviews with 14 judges that are mainly involved in the trial of civil cases. These respondents were found through my personal network, as gaining access to judges through the courts turned out to be difficult. Nine of the interviewed judges are appeal judges. Four of the interviewed judges serve in district courts. Out of the nine interviewed appeal judges, seven have previously served in district courts. The sample covers, considering the district courts where seven of the nine interviewed appeal judges have previously served, all the four courts of appeal in the Netherlands as well as seven out of the eleven district courts in the Netherlands. Although the sample covers all the courts of

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428 See Vranken 1995, p. 116 and interviews NL20131008, NL20131029, NL20131107-2 and NL20131114.
429 www.picarta.nl
430 The search terms include, among other things, “gezag van jurisprudentie” (authority of cases), “arresten lezen” (reading cases), “arresten interpreteren” (interpreting cases) and “jurisprudentie rechtsbron” (cases source of law).
431 The four courts of appeal are the Court of Appeal of Amsterdam, Court of Appeal of Arnhem-Leeuwarden, Court of Appeal of Den Bosch and Court of Appeal of The Hague, see http://www.rechtspraak.nl/Organisatie/Gerechtshoven/Pages/default.aspx.
432 The seven district courts are the District Court of Amsterdam, District Court of The Hague, District Court of Gelderland, District Court of Limburg, District Court of North Holland, District Court of East Brabant and District Court of Rotterdam.
433 The four district courts that are not covered by the sample are the District Court of Middle Netherlands, District Court of North Netherlands, District Court of Overijssel and District
appeal and most of the district courts, doubt can be cast on the representativeness of the sample, because the number of respondents is limited and no Supreme Court judge has participated in the interview. Readers are urged to be aware of this methodological limitation of the interviews. This study, as has been pointed out in the introduction, is of an explorative nature. Scholars are welcome to test the representativeness of the interview results by, among other possible methods, conducting systematic studies that include a more representative sample of respondents.

4.2 Findings

The existing literature suggests that cases have been playing an important role in adjudication practice in the Netherlands since at least the early decades of the 20th century. For quite a long time, judges were careful to conceal the influence of previous cases on their decision-making by avoiding citing previous court decisions in judgments. Since the Bull Calf case in 1980, explicit case citations and discussions in judgments grew steadily and have now become a common practice in the Netherlands.

How judges use previous court decisions to solve legal disputes is a topic that has fascinated Dutch legal scholars for a long time. In particular, academic writings on this topic tend to focus on the question what kind of force previous cases carry in adjudication practice. A commonly used method is to analyse references to previous cases in court judgments. This study, as mentioned in the previous paragraph, experimented with a different method to study the use of cases in adjudication by conducting semi-structured interviews with judges. One of the reasons to choose this method is that the legal reasoning in court judgments may not always completely reveal all the considerations that have influenced the deliberation of judges. Moreover, this study not only investigated the question what kind of force previous cases carry in court practice, but also paid attention to the ways through which judges find and analyse previous cases in their adjudication work. Such data cannot, or at least cannot easily be inferred from the text of judgments. The key findings will be summarized in the following two subparagraphs.

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Court of Zeeland-West Brabant. For a complete overview of the district courts in the Netherlands see http://www.rechtspraak.nl/Organisatie/Rechtbanken/Pages/default.aspx.

434 See e.g. Teixeira de Mattos 1885, p. 31 and Telders 1938.
435 Drion 1968b, p. 168.
437 See e.g. Glastra van Loon e.a. 1968 and Brunner 1994.
439 See e.g. Kottenhagen 1986 and Struycken & Haazen 1993.
441 For details see the previous subparagraph on the methods used for this part of the research.
442 Some appeal judges, for example, do not cite cases decided by district courts or other appeal courts even if they have consulted and followed such cases, see interviews NL20131008-1 and NL20131022.
4.2.1 How judges find relevant cases

The findings of this study indicate that when dealing with disputes where consulting previous cases can be necessary or desirable, judges rarely have to begin from scratch, as the counsels of the litigating parties usually cite and discuss previous cases that they find relevant to the dispute at hand in their oral and written submissions to the court. The quality of the submissions with regard to previous cases, i.e. whether the scope of the cases cited in the submissions is complete and how relevant the cited cases are for the legal dispute at hand, varies depending on the competence and skills of the lawyers. Where the quality of the submissions by the counsels is high, the efforts that judges need to make in order to find relevant cases are usually fairly limited, so that they can concentrate on verifying the interpretations given by the counsels to the cited cases and evaluating the submitted arguments based on the cited cases. Even where the counsels’ submissions do not contain a thorough examination of relevant previous cases, judges still benefit from the submissions as the cases cited by counsels usually provide a fairly good starting point for extra case research that the judges themselves conduct.

When carrying out case research, judges tend to combine two search approaches. The first is to use handbooks or other scholarly writings as a starting point to locate the disputed legal issues and to find the relevant cases. Another way to find possibly applicable cases is to use the search engines in online legal databases. Which one of the approaches a judge would start with tends to depend on the degree to which he or she is familiar with the legal area(s) that the litigation involves.

Where the litigation involves a legal area that is relatively new to the judge, consulting the relevant handbooks or other system-oriented scholarly works is often the first step to take, as the relevant cases are usually conveniently organized and explained in this type of publications. When they are familiar with the legal area(s) involved in a dispute, judges tend to rely primarily on online databases to find cases that may be relevant to the litigation at hand. A frequently used online search tool is Porta Iuris, a portal website with an integrated search engine that does not only offer access to full-text judgments, but also shows whether and if so in which scholarly publications a case has been commentated. Many of the interviewed judges replied that where a search generates a great number of hits, cases that have attracted many scholarly comments are more likely to catch their attention than those that have not been commented on or those that have attracted but limited or no scholarly attention.

443 The fact that cases play an important role in adjudication practice in the Netherlands does not mean that in every case the judge needs to consult previous court decisions. Many disputes concern solely factual issues, so that the need to consult case law in this type of lawsuits is usually rather limited, see interviews NL20131008-2 and NL20131021.

444 All respondents indicated that it is quite common that lawyers cite and discuss previous cases in their submissions if consulting previous case law is necessary or desirable to solve the dispute at hand.

445 See e.g. NL20131008-1, NL20131017, NL20131022, NL20131028, NL20131029 and NL20131107-1.

446 See e.g. NL20131008-1, NL20131021 and NL20131114.

447 See e.g. NL20131008-2, NL20131017, NL20131022, NL20131029, NL20131031 and NL20131107-1.

448 For more information on Porta Iuris see Van Opijnen 2006a.

449 NL20130923, 20131008-1, NL20131008-2, NL20131017, NL20131021, NL20131022, NL20131028, NL20131029, NL20131107-1 and NL20131107-2.
4.2.2 How judges analyse cases

When it comes to analysing the essence of previous cases, the interview results suggest that scholarly writings that discuss cases are generally perceived to be a helpful tool. In particular, where the holding of a case is susceptible to different interpretations, many judges are inclined to consult scholarly writings such as annotations and journal articles that explore the essence and the application scope of the case. For the analysis of Supreme Court cases, the advisory opinions of the Advocates General are also perceived to be valuable, as such opinions usually contain fairly thorough references to and analysis of relevant cases and scholarly writings, which can help judges to put the analysed case in a proper context.

The interview results further indicate that when analysing a previous case, judges do not simply focus on possible rules that can be extracted from the case, they also pay attention to the facts and circumstances of the case. One of the reasons why they pay attention to the particular facts and circumstances of previous cases is that when, on the surface, a rule extracted from a previous case is broad enough to cover the dispute at hand but applying the rule may lead to a highly undesirable outcome, judges may try to avoid applying the previous case by seeking differences between the facts and circumstances of the litigated case at hand and those of the previous one. Another reason is that, as some respondents indicated, a previous court decision may be prompted by the particular facts of that specific case (e.g. in order to protect a weaker party in that individual case), so that a possible rule extracted from such a case, if there is one to be extracted, is likely to be interpreted narrowly by judges.

Moreover, the interview results indicate that subtle differences in the wording of judgments may affect how judges interpret cases. A district court judge, for example, replied during the interview that she would not necessarily interpret a judgment that applied the holding of a previous Supreme Court decision with the wording that “as the Supreme Court has decided in the … case, the valid law is that…” in the same way as a judgment that applied the same holding with the wording “the Supreme Court rightly held that…”. Even though both judgments applied the holding of the same case, the second wording unambiguously supports the holding of the Supreme Court, whereas the first one does not explicitly indicate whether the court that has followed the previous case substantively agrees with the holding of the cited case. Such a distinction is subtle but can be relevant, because, as will be further explained in the next subparagraph, how well a previous court decision is received in later court practice can affect the weight that the previous case carries in judicial deliberation. It is possible that a case cited with wordings that explicitly demonstrate endorsement by later courts may,
all else being equal, carry, however slightly, more weight than a case that courts have followed in later decisions with neutral wordings that do not express explicit consent to the substantive correctness or desirability of the previous holding.

4.2.3 The force of previous cases in adjudication

4.2.3.1 Various factors jointly determine the influence of a case

What kind of force previous cases carry in adjudication is a question that has led to many scholarly writings in the Netherlands. A commonly used framework to analyse this question is one based on the concept of “binding force”. Drion, for example, submits that Supreme Court decisions carry legally binding force upon lower courts. Many other scholars seem to be inclined to the view that Supreme Court cases carry de facto binding force, whereas lower court decisions do not carry binding force, except where they constitute a constant court practice.

It should be pointed out that a framework based on a distinction between “binding” and “non-binding” cases has significant limitations. To say that a case is binding means, in essence, that judges have to follow the case irrespective of evaluation of the substantive soundness of the previous court decision, i.e. whether judges agree with the holding of the previous case or not, they have to follow it. If one, for example, observes that Supreme Court decisions are binding upon lower courts, it would mean that in order to ascertain whether they should follow a previous case, judges are supposed to observe a formal criterion, i.e. which court has made the judgment, whereas substantive considerations such as the soundness and desirability of the holding of the previous case are not supposed to affect their decision. Moreover, a framework based on a distinction between “binding” and “non-binding” creates a dichotomy. Within such a framework, a case is either binding or not binding, so that it seems nothing could be in between.

A preferable view is that the influence of previous cases in adjudication can be understood as a matter of degree that is jointly determined by an assessment of a number of elements, as the responses by the interviewed judges indicate that the weight that they attribute to a previous case depends on their assessment of a number of factors such as:

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461 Drion 1968b.


463 This view has been inspired by, among other publications, Lund 1997 and Haazen 2007.

464 See e.g. Cross & Harris 1991, p. 3 and Haazen 2007, p. 238-239.

465 This view has already been brought forward in, among other scholarly writings, Glastra van Loon e.a. 1968, p. 145 and Nederpel 1985, p.112. However, Glastra van Loon and Nederpel did not specify the evidence for their observation.

466 It should be noted that this list is not exhaustive. One of the judges mentioned, for example, that he would also pay attention to comparative law elements, i.e. where a solution adopted in an earlier case deviates significantly from the responses to the same issue in neighbouring countries, he would be less inclined to follow the case than if the solution is similar to approaches in neighbouring jurisdictions, see NL20131008-1. Two other judges mentioned that who has/have written the judgment is also a relevant factor, i.e. if the judge(s) that has/have
(1) the hierarchy of the court that has made the judgment;\(^468\)
(2) the strength of the arguments that the court employs to reach the decision;\(^469\)
(3) legal scholars’ reaction to the case (severe criticism by legal scholars on a case may reduce the likelihood that it will be followed in later adjudication practice, whereas endorsement by legal scholars may add to the weight that the case carries in adjudication);\(^470\)
(4) how well the case has been received in court practice (a case that has been constantly followed in later court practice is likely to carry more weight than one that has been constantly deviated from);\(^471\)
(5) whether applying the holding of the previous case would lead to a highly unjust or undesirable outcome in the dispute at hand (many judges indicated that if applying a previous case to solve the dispute at hand would lead to a highly unjust or undesirable outcome, they would refuse to follow the previous case or they would try to find differences between the facts and circumstances underlying the previous court decision and the facts of the dispute at hand in order to demonstrate that the holding of the previous case does not cover the dispute at hand)\(^472\);
(6) whether the holding of the previous case is in conflict with supranational norms such as EU legislation, case law of the Court of Justice of the European Union or provisions of international treaties that are directly applicable in the Dutch legal order;\(^473\)
(7) whether the case has been decided a long time ago.\(^474\)

4.2.3.2 Analysis of two formal factors

If we make an analysis of these factors, we would discover that five of the above-listed seven factors involve substantive considerations (factor 2 to 6). Factor 1 (hierarchy of the court that has decided the case) and 7 (the age of the case) appear, at first glance, to be purely formal criteria. Whether a case has been decided a long time ago, for example, is a factual question. However, explanations given by the respondents indicate that this factor is also related to substance, as the older a case is, the more likely it is that relevant legislation, court practice and scholarly opinions have changed so that applying the old case may no longer be appropriate.\(^475\) In other words, judges seem to perceive the old age of a case as an alert for them to closely examine the substance of the case. A proper understanding of the relevance of this formal criterion would therefore be that where judges decide to deviate from an older case, they do not do so

\(^{468}\) All respondents indicated this as a relevant factor.
\(^{469}\) Ibid.
\(^{470}\) Ibid.
\(^{471}\) Ibid.
\(^{472}\) NL20130923, NL20131008-1, NL20131108-2, NL20131017, NL20131021, NL20131022, NL20131028, NL20131031, NL20131107-1, NL20131107-2, NL20131107-3 and NL20131114.
\(^{473}\) NL20131008-1, NL20131031 and NL20131107-3.
\(^{474}\) NL20130923, NL20131017, NL20131022, NL20131029 and NL20131107-1.
\(^{475}\) NL20130923, NL20131017, NL20131022, NL20131029 and NL20131107-1.
due to the mere fact that the case is old, but rather because the substance of the holding
no longer fits the current legislation, court practice or scholarly views.

Similarly, the first factor, i.e. the hierarchy of the court that has decided the
case, also seems be a formal criterion. However, explanations provided by the
respondents suggest that this factor also involves considerations that are related to the
substance. The following passages will examine a crucial difference between the way
the interviewed judges indicate how they treat Supreme Court decisions and the way
they treat lower courts’ (courts of appeal and district courts) decisions before exploring
the reasons why such a difference exists.

Responses by the interviewed judges all indicate that whether a case is decided
by the Supreme Court is of crucial importance for their decision whether they will
follow the case or not. The very fact that a case has been decided by the Supreme Court
is likely to, as the interview results suggest, induce the interviewed judges to attribute
so much weight to the case that they would normally follow the case, unless one or
more of the other factors strongly point to a different direction. Moreover, the
interviewed judges indicate that, where they decide to deviate from a Supreme Court
decision that can be said to cover the dispute at hand, they perceive a strong duty to
justify and explain why the previous Supreme Court decision should not be followed in
the particular case that they decide. In other words, the responses by the interviewed
judges suggest that when it comes to possibly applicable Supreme Court cases, judges
tend to ask themselves why they should not follow the Supreme Court decision, and
when they decide not to follow, they perceive a heavy duty of argument on their part as
to why the Supreme Court decision should not be applied to resolve the dispute at hand.

The fact that a case has been decided by a court of appeal or a district court, on
the other hand, does not urge judges to follow the case, as the respondents indicate that
they feel much freer to evaluate the substance of a lower court’s decision and to deviate
from it as soon as they do not substantively agree with the holding, than to assess the
soundness of a Supreme Court’s case and to avoid applying it merely on the ground that
they do not endorse the substance of the ruling. Moreover, where they decide not to
follow a previous case decided by a lower court, the respondents indicate that they
normally do not perceive a duty to justify or explain why they deviate from the
previous case, except where the litigating parties explicitly invoke one or more previous
decisions of lower courts that bear close relevance to the dispute at hand. Such
responses suggest that when dealing with previous cases decided by lower courts,
judges tend to ask themselves why they should not follow such cases instead of why they
should not follow them, and that it is, where they invoke lower courts’ cases in their
argumentation, up to the litigating parties to use substantive justifications to convince
the judges that the cases they invoke should be applied.

When asked why they make such an important distinction between the fact that
a case is decided by the Supreme Court and the one that a case comes from a lower

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476 See the responses of the interviewed judges to question 7 of Appendix 4.
477 See the responses of the interviewed judges to question 10 of Appendix 4.
478 See e.g. NL20110519, NL20130923, NL20131008-1, NL20131021 and NL20131028 and
NL20131022. It should be pointed out that the responses by the interviewed district judges and
some appeal judges that have previously worked in district courts did not indicate that they
would attribute more weight to cases decided by the court of appeal, which has the power to
reverse their judgments than cases decided by other courts of appeal merely due to the risk of
reversal, see the interviews cited at the beginning of this footnote. For an exception see
NL20131008-2.
479 See e.g. NL20110519, NL20130923, NL20131008-2, NL20131021 and NL20131028 and
NL20131022.
court, and why they attribute so much more weight to the former than the latter, the respondents unanimously identified the threat of reversal of their judgments as one of the key reasons. This is anything but difficult to understand, as the institution of cassation makes sure that the Supreme Court has the final say on matters of law in civil, criminal and tax cases in the Netherlands.\textsuperscript{480} The interview results, however, suggest that, contrary to what some commentators assert in the existing literature,\textsuperscript{481} it is not due to concerns of their career development that judges are reluctant to deviate from Supreme Court decisions. In fact, respondents indicate that the reversal rate is not used in the Netherlands as a criterion to evaluate judges’ performances.\textsuperscript{482} The real consideration behind the interviewed judges’ reluctance to deviate from Supreme Court decisions purely on the ground that they themselves do not endorse the substantive choices made by the Supreme Court is that they are aware that, other than under exceptional circumstances, the Supreme Court normally adheres to its previous decisions, so that deviating from Supreme Court cases without sufficient justification would impose a heavy burden upon the litigating parties, not only in terms of litigation costs and time, but also in terms of stress and anxiety, to carry on the lawsuit all the way to the Supreme Court in order to get the lower court’s judgment reversed.\textsuperscript{483} This is, of course, not to say that concerns for the burden of appeal and cassation would under all circumstances induce judges to abide by previous Supreme Court decisions. Some of the respondents stressed that they are aware that it is undesirable for the law to be fixed forever and that it can be beneficial to get rid of, among other things, out-dated Supreme Court decisions that no longer fit the current social realities.\textsuperscript{484} Consequently, they consider it to be one of the responsibilities of lower judges for the development of the law to deviate from out-dated or highly undesirable Supreme Court cases in order to induce an appeal that would offer the Supreme Court an opportunity to reconsider its previous decisions.\textsuperscript{485} Once they deem the benefit for the development of the law outweighs the burden of extra litigation all the way to the Supreme Court, these lower judges would be inclined to deviate from Supreme Court decisions.\textsuperscript{486} Obviously, whether a previous Supreme Court decision should be deemed as out-dated or undesirable and whether deviating from the case would be beneficial for the development of the law are questions that cannot be answered by applying formal criteria alone, but require substantive considerations of the merits of the previous case.

Another reason why judges make a significant distinction between Supreme Court cases and those decided by lower courts is related to some of the institutional differences between cassation and those on the one hand and trial procedures in the first and second instances on the other. One of the unique institutional aspects of the cassation procedure is that in every civil case and most criminal cases brought to the Supreme Court, the Court receives an advisory opinion submitted by the Procurator General or one of the Advocates General.\textsuperscript{487} It is usually esteemed legal scholars,\textsuperscript{488} former

\textsuperscript{480} See e.g. Brunner 1994 and Smits 2012.
\textsuperscript{481} See e.g. Dedek & Schermaier 2012, p. 362. See also Lawson 1977, p. 85, where the author expressed a more nuanced view than Dedek and Schermaier.
\textsuperscript{482} See NL20110519, NL20130923 and NL20131022.
\textsuperscript{483} All the interviewed judges gave this explanation when answering question 11, see Appendix 4.
\textsuperscript{484} See e.g. NL20131022 and NL20131031.
\textsuperscript{485} Ibid.
\textsuperscript{486} Ibid.
\textsuperscript{487} In tax cases advisory opinions are not required, but in practice the Supreme Court does hear advisory opinions submitted by Advocates General, see
judges and practising lawyers who are appointed to the position of (deputy) Procurator General or Advocates General. An advisory opinion usually summarizes the facts upon which the Supreme Court must base its judgment, reviews the judgment(s) in the previous instances, points out the legal question(s) that the Supreme Court must answer and provides a thorough summary and analysis of the relevant scholarly writings and cases. Although the Supreme Court is free to concur with or differ from such advisory opinions and is not obliged to account for itself in this respect, the institution of advisory opinions is generally deemed to be of great value for the Supreme Court’s work. District and appeal courts, on the other hand, do not have such an institution of advisory opinions by Procurator General, Advocates General or comparable officials.

Another unique institution of the Supreme Court is the Wetenschappelijk bureau, an in-house research institute staffed primarily by legal researchers who usually have a mixed academic and practising background. Staff of this in-house research institute provide assistance to Procurator General, Advocates General and judges of the Supreme Court by, among other things, making initial analyses of the cases brought to the Supreme Court, carrying out research into relevant legislation, cases and scholarly publications, writing memos and making drafts of advisory opinions. Such an in-house research institute is absent in district and appeal courts.

Still another relevant difference as indicated by the interviewed judges is that cases brought to the Supreme Court are usually decided by a panel of five judges, whereas appeal cases are usually heard by a panel of three judges and district court cases are normally decided by a single judge. Moreover, the overall quality of Supreme Court judges is commonly perceived to be very high, as it is usually top-class


488 The current Procurator General, deputy Procurator General and 23 out of the 26 Advocates General have an academic background, i.e. they have worked as researchers and/or lecturers at law schools. Fifteen out of the current 26 Advocates General have been or are still law professors, see http://www.rechtspraak.nl/ORGANISATIE/HOGE-RAAD/OVERDEHOGERAAD/ORGANISATIE/Pages/Parket.aspx.

489 The current Procurator General, deputy Procurator General and 16 out of the 26 Advocates General have been judges prior to their appointment to the current position, see http://www.rechtspraak.nl/ORGANISATIE/HOGE-RAAD/OVERDEHOGERAAD/ORGANISATIE/Pages/Parket.aspx.

490 Thirteen out of the 26 current Advocates General have worked as practising lawyers (either in law firms or as in-house legal counsels in companies), see http://www.rechtspraak.nl/ORGANISATIE/HOGE-RAAD/OVERDEHOGERAAD/ORGANISATIE/Pages/Parket.aspx.

491 The (deputy) Procurator General and Advocates General enjoy life tenure and are independent from the Government and the Parliament, see http://www.rechtspraak.nl/ORGANISATIE/HOGE-RAAD/OVERDEHOGERAAD/ORGANISATIE/Pages/Parket.aspx.

492 See e.g. Spier 2010a and Spier 2010b.


495 See ibid.

496 See NL20110509, NL20131021, NL20131022, NL20131028 and NL20131107-3.
legal scholars, former judges or practising lawyers who are appointed to serve as judges in the Supreme Court.497

At first sight, such institutional differences appear to be of formal instead of substantive nature. Explanations provided by some of the interviewed judges, however, indicate that they tend to infer from such institutional factors that Supreme Court decisions are the final products of a long and careful process in which the status of the existing law has been, or at least has had a good chance to be, thoroughly investigated and that the wider implications of the choices and decisions made in the final judgments most probably have been carefully considered, whereas judicial deliberation in district and appeal courts may tend to be less thorough.498 Such an inference suggests that the relevance of the formal criterion whether a previous case is decided by the Supreme Court eventually rests on a presumption that judgments reached through the cassation procedure, due to some of the unique institutional features of cassation, are likely to be well-balanced decisions and accordingly deserve to carry significant weight in judicial deliberation as to whether such a case should be followed or not. In other words, the first factor (hierarchy of the court that has made the judgment) listed at the beginning of this subparagraph is related to substantive considerations, even though on the surface this factor seems to involve only a simple formal criterion.

4.2.3.3 Summary

It is doubtful whether the concept of “binding force” combined with distinctions in the court hierarchy is an optimal framework to analyse the influence of cases on judicial decision-making in the Netherlands. Using such a framework may easily lead to a dichotomy, i.e. cases decided by the Supreme Court are de jure or de facto binding on lower courts, whereas cases decided by other courts are not binding.499 This kind of observation may raise the impression that the influence of a case depends on its pedigree, i.e. it depends on which court has made the decision, rather than on the substantive soundness of the decision itself. Furthermore, such a framework may raise the impression that the influence of a case is something static and abstract, as within such a framework a case is either binding or not binding. Accordingly, this framework does not quite cater for the possibility that the influence of a case may vary over time or according to the context of the specific disputes to which it may bear relevance.

The findings of this study suggest that in adjudication practice, judges tend to perceive the influence of previous cases as a matter of attributing weight to arguments in a process of deliberation. How much weight a previous case carries in judicial deliberation depends on a series of factors, many of which involve substantive consideration, such as the strength of the arguments employed by the court to reach the decision in the previous case and how well the case has been received in scholarly writings. Court hierarchy is a significant factor in this context. The relevance of this factor, however, does not purely depend on the threat of reversal caused by the hierarchical structure of the court system, but it also rests upon judges’ presumption that cases decided by the Supreme Court, due to some of the unique institutional features of the cassation procedure, are likely to contain well-balanced decisions.

497 See the interviews cited in the previous note. For the selection process of Supreme Court judges see http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/Organisatie/Pages/Wervingenselectieraadsheren.aspx. See also Bruinsma 2003, p. 31-32.
498 See e.g. NL20110509, NL20131021, NL20131022, NL20131028 and NL20131107-3.
499 See e.g. Glastra van Loon e.a. 1968 and Brunner 1994.
Furthermore, the findings of this study indicate that the influence of a previous case on judicial decision-making needs to be ascertained in the context of a concrete dispute to which the previous case may bear relevance, as whether or not a previous case will be followed in the resolution of a legal dispute brought to court depends not only on the weight that judges attribute to the case, but also on arguments that argue against the application of the previous case to the dispute at hand. Where, for example, applying a previous case to resolve a legal dispute may lead to a highly undesirable outcome in light of the concrete circumstances of a specific dispute, judges may attribute so much weight to the consideration of avoiding a highly undesirable outcome that the previous case will not be followed. Accordingly, it seems more appropriate to see the influence of previous cases as something that has a relative and dynamic nature, rather than something that has an absolute and fixed value that is not susceptible to change or adjustment.

### 4.2.4 Contribution to the case law mechanism

Findings in the previous subparagraph suggest that the development of case law in the Netherlands takes place in, what Kühn calls, “a process of rational discourse”. Judges, legal scholars and practising lawyers all participate and exercise a certain degree of influence in this process. By making choices such as which previous cases to follow and which to avoid in adjudication, judges exercise considerable influence on which previous court decisions eventually become the leading cases. This form of contribution by judges to the operation of case law, i.e. influence at the level of the influential status of individual cases, is relatively easy to understand, so that it is not necessary to elaborate on this point. What I do wish to further explore is the contribution made by judges to the operation of case law at a methodological level, which will be elaborated in the following passages.

One of the prerequisites for cases to fulfil the role of a source of law in any legal system is that the way judges treat previous cases in adjudication must be reasonably predictable. It is difficult to imagine how cases could provide a desirable degree of certainty in a legal system where judges make random and arbitrary use of previous cases. For the way judges treat previous cases in adjudication to be reasonably predictable, it is crucial that, among other things,

(a) judges follow certain common methodological guidelines when dealing with previous cases in adjudication and

(b) such guidelines must be accessible to the public.

Findings in the previous paragraph reveal that when dealing with disputes in adjudication, judges in the Netherlands do follow a certain common methodological framework in assessing the influence of previous cases. This framework is common, in the first place, in the sense that judges are likely to take the same set of factors into account when assessing the relative weight that should be attributed to previous cases. Obviously, the mere fact that judges are likely to take the same set of factors into account cannot guarantee a completely accurate prediction as to how judges will treat relevant previous cases in each dispute. After all, the different factors that judges take into account may point in different directions in a specific dispute, so that it is not unthinkable that litigants and their counsels may reach different conclusions from the

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500 See e.g. NL20131017, NL20131028, NL20132019, NL20131107-2 and NL20131114.
503 Ibid.
judges, depending on the weight they attribute to each factor. This is, however, not to say that the way judges assess the weight of previous cases in adjudication in the Netherlands is utterly arbitrary and subjective. The existence of such a set of factors that jointly determine the weight of previous cases in judicial deliberation offers litigants and their counsels a useful framework to estimate how judges are likely to react to arguments based on possibly relevant previous cases. Moreover, the predictability is enhanced by the fact that some patterns have emerged in adjudication practice, one of which is that Supreme Court decisions carry so much weight in judicial deliberation that judges would normally follow Supreme Court decisions in disputes that concern the same legal issues as those decided in earlier Supreme Court cases unless considerations based on other factors would produce a strong justification for deviation.\(^504\) Another pattern, as revealed earlier in this chapter, is that cases decided by district courts and courts of appeal normally carry much less weight than Supreme Court decisions, so that the mere fact that a district court or a court of appeal has decided a previous similar case in a certain fashion is normally not sufficient to justify an expectation that the previous case will be followed in later court practice.\(^505\) This means that where litigants or their counsels, for example, base their argumentation on a previous decision of the Supreme Court that has decided the same legal issue as the one involved in the dispute at hand, to which legal scholars have not expressed severe criticism and lower courts have not demonstrated considerable resistance in adjudication practice, they can be fairly confident that the chances are rather slim that judges would deviate from the previous case, whereas if they cite a previous decision by a district court that has not won much support in scholarly writings or court practice, they would have to be aware that they need to provide strong justification as to why this previous case should be followed in the dispute at hand. From such patterns one can reasonably infer some thumb rules as to how much weight certain types of cases are likely to carry in judicial deliberation under normal circumstances. Such thumb rules are obviously not of such a precise nature to guarantee completely accurate prediction in each case. However, they are nonetheless capable of considerably facilitating the litigants and their counsels to estimate the likelihood that a previous case will be followed in adjudication.

One may of course argue that even if judges in the Netherlands do follow a certain common methodological framework in assessing the influence of previous cases, the way judges treat previous cases would still be unpredictable if this methodological framework is only known within the judiciary, whereas litigants, practising lawyers and legal scholars have no way to gain insight into the contour of the framework. Fortunately, the way judges treat previous cases in adjudication is not a black box in the Netherlands. As mentioned earlier in this paragraph, citing and discussing previous cases in judgments has now become a common practice in the Netherlands.\(^506\) Citation and discussion of previous cases in judgments offer valuable insights into the factors that judges take into consideration when evaluating arguments based on previous cases.\(^507\) In addition to judgments, one can also derive useful insights

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\(^504\) See the responses of the interviewed judges to question 7 (Appendix 4).
\(^505\) See e.g. NL20110519, NL20130923, NL20131008-1, NL20131021 and NL20131028 and NL20131022.
\(^507\) This is of course not to say that the way judges cite and discuss cases in the Netherlands has become so accurate and elaborate that there is no room for improvement any more. In fact, it is more than desirable that judges be more transparent about the real considerations that have shaped their decisions when providing justification for their decisions in judgments. However,
from scholarly writings that analyse the way judges interpret and apply previous cases in adjudication. Moreover, the law has been highly professionalized in the Netherlands. Key players in law such as judges, practising lawyers and legal scholars have all accomplished academic legal education and have received similar case law trainings at law schools, which helps to forge a shared fundamental mode of thinking with regard to, among other things, how previous cases should be used to solve legal disputes. This is of course not to say that every practising lawyer and every legal scholar in the Netherlands does in fact know the exact details of the method that judges adopt when using previous cases in adjudication. Nor does this mean that the method of using previous cases in adjudication has been thoroughly and clearly articulated in scholarly writings in the Netherlands. What this study does wish to point out is that the methodological guidelines that judges adopt in adjudication with regard to the use of previous cases are knowable to other players in law such as practising lawyers and legal scholars, and that the fact that such methodological guidelines are accessible to a broader public than the judges alone contributes to a reasonable degree of predictability as to how likely it is for previous cases to be followed in adjudication practice.

To summarize, the analysis above indicates that judges in the Netherlands adopt certain common methodological guidelines with regard to the use of previous cases in adjudication. Such guidelines are knowable to a broader public than the judges themselves due to, among other things, the practice of citing and discussing previous cases in judgments and the fact that judges, practising lawyers and legal scholars have received similar case law trainings at law schools. The fact that judges follow common methodological guidelines when using previous cases to solve legal disputes in court and the fact that such guidelines are knowable to other players in law are conducive to achieve a reasonable degree of predictability as to how previous cases are likely to be treated when invoked as arguments in legal proceedings. A reasonable degree of predictability, in its turn, contributes to the fact that cases are able to fulfil the role of source of law that offers a fair degree of certainty.

Moreover, the data presented in this paragraph also indicate that judges function as a selective force in the utilization phase that, jointly with other actors such as legal scholars and practising lawyers, influences which court judgments eventually become the law. They do so by following or rejecting cases brought forward by the counsels of the litigating parties in legal proceedings, and by searching for and using other relevant cases. Through these two modes of selection, judges influence how a case is likely to be treated in later court practice as well as in scholarly writings and in legal education.

5. Concluding remarks

The previous chapter illustrated that once cases are selected for publication, they undergo two basic processes before being made available to the public: a rudimentary process of categorization and a relatively simple process of interpretation. An example of categorization is that cases concerning a particular area of the law such as consumer law, real estate law and intellectual property law, get published in commercial the situation now is undoubtedly much better than that before 1980 when judges almost never cited previous cases in judgments.


See the paragraph in this chapter on the way cases are used in legal education.

Ibid.
periodicals that cover that specific legal area. In this way, published cases are sorted into different categories. As to the process of interpretation, a clear example is that some cases published in commercial periodicals are accompanied by a commentary (case annotation). Even cases that are not annotated in the publication phase rarely get published without any added information. At least some key words are added to each published case in order to help the reader get a quick impression of the essence of the case. In a broad sense, adding such information as key words and summaries to published cases can also be seen as a basic form of interpretation, as such information can help the reader to better understand the essence of a published case.

This chapter revealed that both the process of categorization and the process of interpretation further continue in the utilization phase. The categorization is for the most part done by legal scholars in the utilization phase. This chapter demonstrated that one way to classify scholarly writings involving cases in the Netherlands is to divide them into case-focused and system-oriented publications. In system-oriented publications, for example, legal scholars have developed two basic models to categorize and systemize cases, i.e. adopt the structure of a piece of legislation or follow a doctrinal structure. Furthermore, this chapter illustrated that legal scholars in the Netherlands developed three grouping patterns to sort cases that are relevant for a particular legislative provision or a particular doctrinal component into a certain order. As for interpretation, this chapter demonstrated that legal scholars also perform a very important role in interpreting cases in the utilization phase. System-oriented scholarly writings, for example, often summarize the essence of a case in one or two sentences by distilling a norm from the judicial decision. Most case-focused writings, on the other hand, demonstrate even more elaborate efforts of legal scholars to interpret published cases, as they not only distil a norm or norms from a judicial decision, but also summarize the key facts, analyse the legal reasoning that the court employs to reach the decision and explore possible implications of the discussed case for similar or related cases in the future.

Another, and arguably more intriguing process that takes place in the utilization phase is that normative elements are drawn from published cases, and such normative elements are subsequently used and evaluated in various settings by various users. Such normative elements can be rules, principles or assessment frameworks. This chapter illustrated that not only judges, but also legal scholars and even law students distil normative elements from published cases, evaluate them and use them to solve legal problems. This process of retrieving, using and evaluating normative elements from published cases inevitably produces different views and standpoints. Differences of opinion with regard to the content, scope and soundness of the normative elements retrieved from published cases are settled in a relatively transparent fashion, i.e. through a rational discourse that takes place in open forums such as court trials and academic as well as legal professional publications. The Supreme Court has a significant voice in this discourse, but this chapter demonstrated that also other actors

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511 There are nowadays many commercial periodicals in the Netherlands that publish cases in very specific legal areas. See e.g. Woonrecht (Housing Law), Tijdschrift voor ambtenarenrecht (Journal for Civil Servant Law), Intellectuele eigendom en reclamerect (Intellectual Property and Advertisement Law), Tijdschrift voor consumentenrecht (Consumer Law Journal), Jurisprudentie sociale voorzieningen (Social Services Cases) etc. For details see Appendix 1.
512 See e.g. the cases and the comments to them in Nieuwenhuis & Stolker & Valk 2011, Article 6:162, Commentary 5, paragraph a.
513 See e.g. Haas 2010 and Fernhout 2010.
514 The Dutch term for this word is “toetsingskader” or “gezichtspunten”.
such as lower judges, legal scholars and practising lawyers can exercise meaningful influence on the outcome of the discourse. Where the way various users use and evaluate a case converges in the positive direction, the case is more likely to ultimately become the law than where the way one particular actor uses and evaluates the case is questioned or challenged by other users. It can therefore be concluded that, no more than the publication phase is the utilization of cases monopolized by judges, and that the operation of case law in the Netherlands has a dynamic nature that involves the participation by and allows for influence of various actors.