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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Citation for published version (APA):
Chapter 3

Recognition of cases as a source of law in the Netherlands
Chapter 3 Recognition of cases as a source of law in the Netherlands

1. Introduction

The previous two chapters examined two phases in the operation of the case law mechanism in the Netherlands. The findings demonstrated that far from all court judgments eventually become leadings cases that shape the law and that various actors exercise a certain degree of influence upon the final outcome as to which court judgments ultimately become leading cases that shape the law. The previous chapters essentially inform us how a case becomes the law, but they did not yet tell us whether, and if so, how cases – including not only the leading cases, but also the vast majority of cases that never get published and the many published cases that never get detected and used – as a whole acquire the status of a source of law. In order to answer this question, one cannot limit the investigation to study only how cases are published and used in practice, but should also examine the normative views on the status of cases as a source of law and pay attention to the possible dynamics between what happens in practice and what gets normatively accepted as desirable and justified.

In order to gain a comprehensive understanding of the way cases fulfill the role of a source of law in the Netherlands, this chapter will examine the normative views in the Netherlands on the status of cases as a source of law and reflect on the possible dynamics between the practice of publishing and using cases and the normative views on the desirability and acceptability of what happens in practice. A key question that this chapter will investigate is whether cases are explicitly or implicitly recognized as a source of law in the Netherlands. A closely related question that this chapter will also examine is whether judges are explicitly or implicitly accepted to perform a lawmaking role in the Netherlands.\(^{515}\)

The wish to investigate the normative views in the Netherlands on the status of cases as a source of law was furthermore triggered by the fact that in the existing literature it is commonly held that although throughout time cases have in practice acquired a highly influential status in many civil law jurisdictions, they are still not recognized as a source of law.\(^{516}\) This commonly held observation raises the impression that the actual influence of cases in practice has undergone a remarkable change in many civil law jurisdictions, moving from being relatively insignificant to highly influential, but the normative views on the status of cases as a source of law have remained the same, i.e. cases used to be denied as a source of law in the past and nowadays they are still not recognized as a source of law. Moreover, this commonly held observation raises the impression that the growing significance of cases in practice throughout time does not have an impact on the normative views, i.e. it tends to suggest that despite the rising significance of cases in practice, the normative views on the status of cases as a source of law have not changed. By investigating the normative views in the Netherlands on the status of cases as a source of law, this chapter seeks to ascertain whether the impression raised by this commonly held observation is correct and if not, what nuances can be added to this observation.

\(^{515}\) Recognition of cases as a source of law and acceptance of the lawmaking role of the judge are in fact two sides of the same coin, see Adams 1999, p. 466.

1.1 Analytic framework

Although the question whether cases are recognized as a source of law seems to require a yes or no answer, it can be helpful to envisage a sliding scale as an analytic tool in which the answer to this question can be placed. Such a sliding scale can be visualized with an absolute denial of cases as a source of law at one end and an unequivocal acceptance at the other (see Figure 6). It can be useful to use such a sliding scale as an analytic tool, because ascertaining the normative views on the status of cases as a source of law often requires careful analysis and interpretation of various sources, which is a process that may involve a delicate balancing of various competing opinions and arguments. The result of such an analysis may not comfortably fit in a resolute yes or no. Using a sliding scale may enable us to analyse the data and to present the findings with a desirable degree of nuance.

Moreover, a time dimension is added to the sliding scale (see Figure 7). A time dimension combined with the sliding scale can help to reveal possible changes that the normative views have undergone over time, and it can help to visually present the possible changes in the form of a curve.

As to the question whose views will be investigated, this chapter chooses to examine the views of the legislature, the judges and legal scholars, as they are commonly deemed as the three major actors in law in civil law jurisdictions. In accordance with this multi-actor approach, this chapter will present the findings in a graph with three axes x, y and z as shown in Figure 8, which represent the attitude of the legislature, the judges and respectively legal scholars. Although the time dimension is not incorporated in this graph, two different graphs will be presented at the end of this chapter to illustrate whether, and if so how, the views of the three actors in the Netherlands at present differ from their views around 1838 when the Dutch Civil Code was introduced.

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517 See Van Caenegem 1987.
Of course, the analytic framework developed by this study is not free of limitations. The views of the legislature, judges and legal scholars on the status of cases as a source of law are something that can hardly be measured in quantity. This means that the value that a researcher assigns to the sliding scale involves subjective evaluation and thus cannot be mathematically accurate. However, this does not mean that the value that a researcher assigns to the sliding scale is necessarily arbitrary and hence entirely unverifiable. Scholars may differ on the question which exact point in the sliding scale should be chosen to represent the degree of normative acceptance of cases as a source of law, but it is possible that, after examining the various sources and arguments, scholars may agree upon a certain margin on the sliding scale that can be reasonably said to represent the degree of acceptance. Despite the difficulty of accurate quantification, the sliding scale framework can still serve to facilitate the analysis of data as well as the presentation of the findings.

Another limitation can be that the sliding scale framework tends to avoid giving a clear-cut answer to a question that requires a yes or no. It should be noted that the sliding scale is not incompatible with a yes or no answer. As Figure 9 illustrates, anything short of an unequivocal acceptance can be categorized as a no, albeit the no answer does not have to be an unqualified negation. In other words, the sliding scale does not have to be seen as a replacement of a yes or no answer, but rather a supplement to it.
1.2 Method

The primary method used in this chapter is analysis of written texts. In addition, one semi-structured interview was conducted with a legal scholar to obtain data that are missing in his writings.\footnote{See interview NL 20110519.}

Four types of data have been gathered and analysed:

1. Legislation and records of legislative history. These sources are primarily used to ascertain the attitude of the legislature towards the recognition of cases as a source of law.
2. Cases. This source is used primarily to ascertain the views of judges. Due to the huge volume of cases published since 1838 and the limited time for this study, it has not been possible to conduct a systematic research on all published cases. Only cases to which relevant scholarly writings refer have been consulted. This methodological choice is made for two major reasons. The first reason is that existing studies\footnote{See e.g. Fockema Andreae 1904, Polak 1953, p. 54 and Hesselink 2001, p. 9 and 11-13.} have already demonstrated that for a long time legal reasoning in judgments was very formalistic, so that it is not very likely that older judgments might contain in their legal reasoning explicit recognition that cases are a source of law. Secondly, a number of scholars have already conducted systematic studies on published cases to verify whether the \textit{stare decisis} rule applies in court practice.\footnote{See e.g. Kottenhagen 1986 and Struycken & Haazen 1993. Two less systematic yet relevant empirical studies also contain useful data, see Jesurun D'Oliveira 1973 and Vranken 1995, p. 170.} Data collected by these studies are very useful for the current study. Given these two facts, I have chosen to rely on case law data collected in earlier scholarly writings.
3. Speeches, interviews and publications by (former) judges. This type of data is primarily used to ascertain the views of judges.
4. Scholarly writings. This study has primarily focused on three types of scholarly writings:
   (a) Introductory and handbooks of (private) law. This type of books are a valuable source to ascertain the views of scholars on the status of cases as a source of law, because many of these books contain a section that explicitly discusses the question of the sources of law.
   (b) Books and papers that explicitly discuss the sources of law.
   (c) Scholarly writings on the theory and practice of judicial decision-making (\textit{rechtvinding}). This type of literature also contains valuable data because the lawmaking role of the judge and the authority of case law are two of the frequently discussed topics in this type of publications.
   (d) Scholarly writings that comment on some of the legislative provisions that shed light on views of the legislature. This type of literature is relevant for this study because it provides scholarly interpretations to some of the relevant legislative provisions.

Two search methods have been used to find the above-mentioned data. The first method uses online library catalogues and online databases. In particular, I have made frequent use of Picarta, a Netherlands-based database that contains references to Dutch and English literature including books and journal articles, and Opmaat, a Dutch legal
database that contains Dutch legislation and cases. The second method is the snowball method. Scholarly writings often contain useful references to legislation, cases and other legal literature. Part of the data has been found by verifying these references.

1.3 Structure of the chapter

The main body of this chapter consists of three parts that successively examine the views of the legislature, judges and legal scholars. The key findings will be summarized in the conclusion.

2. The legislature

It is difficult to find a clear-cut answer in Dutch legislation to the question whether the legislature recognizes cases as a source of law. Both arguments pro and contra can be found in various legislative provisions. Some older statutory provisions enacted in the 19th century tend to suggest that originally the legislature was of the view that judges ought only to apply enacted laws and that cases were not supposed to fulfil the role of a source of law. Some later statutes, however, suggest that the attitude of the legislature has changed and that it has deliberately endorsed judges to perform a lawmaking role in some areas. The following subparagraphs will examine the arguments pro and contra that can be drawn from legislative provisions and legislation techniques. The analysis will reveal that the attitude of the legislature is shifting from denial to an increasingly open recognition of the lawmaking role of the judge as well as the status of cases as a source of law.

2.1 Arguments contra the status of cases as a source of law

2.1.1 The Constitution (De Grondwet)

The Constitution of the Netherlands was introduced in 1815, and has been amended several times since then. A number of significant amendments took place in 1848, which put an end to the nearly absolute power of the King and made the Netherlands a constitutional monarchy.

One of the cornerstones of the 1848 amendments was Montesquieu's theory of the separation of powers. This is reflected in a number of constitutional provisions. Article 81, for example, confers the legislative power to the Government and the Parliament, whereas the adjudication power is conferred to an independent

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521 Some of the key words used in the search include: “sources of law”, “legalism”, “precedent”, “stare decisis”, “precedent system”, “case law”, “judge-made law” and “lawmaking role of the judge”.
522 Staatsblad 1815, 45.
523 See e.g. Staatsblad 1848, 60, Staatsblad 1953, 264, Staatsblad 2002, 200, Staatsblad 2008, 240 etc.
524 See e.g. Staatsblad 1848, 59 and Staatsblad 1848, 60.
525 Franken 1985, p. 103-105.
526 The Government consists of the King and the ministers, according to Article 42 Paragraph 1 of the Constitution. The ministers, and not the King, are responsible for acts of parliament, according to Article 42 Paragraph 2 of the Constitution.
527 “Acts of Parliament shall be jointly enacted by the Government and the State General”, according to Article 81. “State General” is the official name of the Dutch Parliament, which
Moreover, Article 120 expressly forbids the courts from performing constitutional reviews.

The fact that the Government and the Parliament jointly exercise the legislative power illustrates that the separation of powers in the Netherlands is not as strict as Montesquieu envisaged. However, it is obvious that the Constitution intends to separate the legislative and the adjudication powers. This can be interpreted as to mean that the legislature does not recognize cases as a source of law, since such a separation is based on a model that restricts the role of the courts to the application of laws enacted by a legislative body.

2.1.2 The Kingdom Legislation Act (Wet houdende algemene bepalingen der wetgeving van het koninkrijk)

Together with the old Civil Code, the Kingdom Legislation Act went into force on 1 October 1838. Many articles of this statute bear a clear mark of the 19th century legalism, which held legislation to be the only source of law. Article 3, for example, provided that “customs create no law unless legislation refers to them”. This used to be seen as clear evidence that the legislature originally intended legislation to be the only source of law, thus denying that cases ought to be recognized as a source of law. However, in the 1980’s, the old legalistic theory became so out-dated that the legislature decided to delete this article.

Although Article 3 has been deleted, this statute still contains a number of provisions that tend to deny that cases are a source of law. Article 11, for example, provides that “the judge must adjudicate according to legislation”, and that “he may under no circumstance evaluate the intrinsic value and fairness of legislation”. Article 12 goes on to provide that “no judge may adjudicate cases submitted to him by way of general ordinances, dispositions or regulations”. Furthermore, Article 13 provides that “the judge that refuses to adjudicate, under the pretext of silence, obscurity or incompleteness of legislation, can be prosecuted for the offence of refusing to administer justice”.

These legislative provisions used to be widely accepted as to mean that the legislature does not recognize cases as a source of law. Article 12, for example, used to be interpreted as restricting the binding force of a judgment to the litigating parties and forbidding judges from playing a lawmaking role. Article 13 used to be understood

consists of a Lower House (Tweede Kamer) and an Upper House (Eerste Kamer), according to Article 51 Paragraph 1 of the Constitution.

“Judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour”, see Montesquieu 2001.

“The doctrine that holds legislation to be the only source of law has led our legislature to enact this rule”, according to Van Apeldoorn, see Van Apeldoorn 1939, p. 71.

“The constitutionality of Acts of Parliament and treaties will not be reviewed by the courts”, according to Article 120.

In Montesquieu's view, “judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour”, see Montesquieu 2001.

Diephuis 1869, p. 2.

“The doctrine that holds legislation to be the only source of law has led our legislature to enact this rule”, according to Van Apeldoorn, see Van Apeldoorn 1939, p. 71.


See e.g. Opzoomer 1865, p. 68, Diephuis 1869, p. 86-87, Teixeira de Mattos 1885, p. 31, Land 1899, p. 198, Suijing 1918, p. 7 and Zonderland 1974, p. 190.
as a denial by the legislature that legislation could ever be incomplete or ambiguous, as these were in the eyes of the legislature mere "pretexts".\footnote{See e.g. Pitlo 1968, p. 16 and Zevenbergen 1925, p. 166-167.}

Such negative interpretations changed over time. Since the 1950s, some scholars argued that Article 12 is not quite relevant for the debate, because this article is copied from Article 5 of the French Civil Code, which was intended to address a problem that had never existed in the Netherlands, namely the practice that during the Ancien Régime French courts were authorized to decide cases by issuing general regulations (Arrêt de règlements).\footnote{See Drion 1968b, 156. For more elaborate discussion of the meaning of this article see Kottenhagen 1986, p. 113-116.} Moreover, the assumption that laws enacted by the legislature are never incomplete or obscure has become so unattractive over time that nowadays Article 13 is seen as an “invitation” for cases to fulfil the function of a source of law.\footnote{See Albers e.a. 2009, p. 127. For an earlier similar view see Bellefroid 1937, p. 107.}

\subsection*{2.1.3 Article 236 Civil Procedure Code (Wetboek van burgerlijke rechtsvordering)}

Yet another legislative argument against recognizing cases as a source of law can be drawn from Article 236 of the Civil Procedure Code, which provides that “decisions on the disputed legal relation contained in a legally irreversible judgment has binding force between the parties in another law suit”.\footnote{This article was originally codified in Article 1954 of the old Dutch Civil Code. Later it was moved to Article 67 of the Civil Procedure Code. See Van Hattum 2012, p. 16.} This article can be understood to mean that a judgment only has binding force between the litigating parties. However, since the 1950s a number of scholars argued that this article has no bearing with the \textit{stare decisis} rule and thus does not hinder the recognition of cases as a source of law.\footnote{See e.g. Drion 1968b, p. 155, Kottenhagen 1986, p. 111-113 and Struycken & Haazen 1993, p. 104-105.}

\subsection*{2.2 Arguments pro the status of cases as a source of law}

\subsubsection*{2.2.1 Article 424 Civil Procedure Code}

In the Netherlands, the Supreme Court can quash a judgment by a lower court without directly making a final decision.\footnote{This can happen for example when some facts still need to be ascertained, see Article 421 Civil Procedure Code.} When this happens, the Supreme Court refers the case to another lower court with instructions on questions of law. Article 424 of the Civil Procedure Code requires the lower court to which the case is referred, to decide the case in compliance with the judgment of the Supreme Court. This can be seen as evidence that, at least in some cases, lower courts are bound by decisions of the Supreme Court, so that in these cases it can be said that judgments by the Supreme Court function as a source of law.\footnote{See Drion 1968b, p. 147. C.f. Struycken & Haazen 1993, p. 108-110.}

\subsubsection*{2.2.2 Article 78 Court Organization Act (Wet op de rechterlijke organisatie)}

Article 78 of the Court Organization Act may also lend some support to the proposition that the legislature recognizes cases as a source of law. This article creates an institution
called “cassation in the interest of the law”.

This legal institution authorizes the Procurator General to request the Supreme Court to annul a judgment of a lower court for legal errors or for non-compliance with some crucial formality requirements. This is an extraordinary remedy at law for a number of reasons. First, it cannot be used by the litigating parties, but only by the Procurator General. Second, it cannot be used until it is no longer possible for the litigating parties to challenge the judgment by way of an ordinary remedy such as an appeal or a cassation procedure. Third, the decision of the Supreme Court in such a case cannot negatively affect the rights of the litigating parties.

The purpose of this legal institution is obviously not to remedy possible wrongs suffered by the litigating parties, but rather to obtain a decision by the highest court in order to maintain uniformity in the application of legislation. Some scholars argue that this purpose cannot be achieved unless it is accepted that Supreme Court judgments are binding on lower courts, so that this legal institution can be seen as recognition by the legislature of the binding force of Supreme Court judgments.

2.2.3 Article 79 Court Organization Act

Another article of the Court Organization Act, namely Article 79, suggests a remarkable change in the attitude of the legislature. This article was previously numbered Article 99 in the Court Organization Act. In 1963, this article underwent an important change. Before 1963, this article provided that one of the grounds for the Supreme Court to annul a judgment by a lower court was “violation of legislation”. In 1963, the legislature changed this phrase into “violation of the law”. Some scholars argue that “the law” also includes case law, so that this change confirms the status of cases as a source of law.

2.2.4 Article 80a Court Organization Act

Article 80a of the Court Organization Act can be seen as yet another piece of evidence that the attitude of the legislature has changed in favor of openly recognizing the lawmaking role of the judge, and hence the status of cases as a source of law.

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542 The Dutch term is “cassatie in het belang der wet”. For details of this legal institution see Den Hartog Jader 1994.
543 For details of this legal institution see Den Hartog Jader 1994.
544 Article 78 Paragraph 1 Court Organization Act.
545 Article 78 Paragraph 2 Court Organization Act.
546 Ibid.
547 Glastra van Loon e.a. 1968, p. 145.
549 Staatsblad 2002, 1.
550 Staatsblad 1963, 272. It should be noted that this change of legislation did not cause tremendous changes in practice, because in its adjudication practice the Supreme Court has already expanded the ground of cassation to include, among other things, violation of general legal principles and customary law even before 1963, see Veegens 1971, p. 132-333. This, of course, does not undermine the symbolic value of the change that Article 99 of the Court Organization Act underwent, see Wiarda 1972, p. 43.
This provision (previously numbered Article 101a\textsuperscript{552}), was added to the Court Organization Act in 1988.\textsuperscript{553} It authorizes the Supreme Court to dismiss a cassation appeal without providing substantive reasons, if the Supreme Court is of the opinion that the appeal grounds cannot lead to annulment of the challenged judicial decision and “the dismissal of the appeal does not require answering legal questions in the interest of the legal unity or the development of the law”.\textsuperscript{554} This provision suggests that the legislature regards maintaining the legal unity and developing the law as two major tasks of the Supreme Court, whereas maintaining legal unity used to be seen as the only task of the Supreme Court.\textsuperscript{555} Developing the law, in turn, suggests playing a lawmaking role, so that this provision can be seen as the legislature’s open recognition of the lawmaking role of the Supreme Court.\textsuperscript{556}

2.2.5 Article 392 – 394 Civil Procedure Code

In 2012, the legislature added three new articles (Article 392-394) to the Civil Procedure Code, authorizing the Supreme Court in the Netherlands to, by way of preliminary rulings,\textsuperscript{557} answer questions of law submitted by lower courts in civil proceedings.\textsuperscript{558} According to Article 392, Paragraph 1, a lower court may submit a question of law to the Supreme Court and request a preliminary ruling while the proceeding stays in the lower court itself, if the answer to the question is directly relevant for settling mass claims or for resolving many other proceedings in court that arise from similar facts where the same question of law is involved.

The Explanatory Notes (\textit{Memorie van Toelichting}) to Article 392-394 indicate that the legislature expects that the Supreme Court’s answers to questions of law by way of preliminary rulings can prevent lower courts from reaching conflicting judgments in similar cases and that this new legal institution of preliminary rulings will enable the Supreme Court to “optimally fulfil the task of developing the law”\textsuperscript{559} in cases where there is a great need in society for a leading decision by the Supreme Court.\textsuperscript{560} This can be seen as yet another recognition by the legislature of the lawmaking role of the Supreme Court and the status of Supreme Court decisions as a source of law.

2.2.6 New legislation techniques

Not only can specific legislative provisions shed light on the increasingly favorable attitude of the legislature towards openly recognizing cases as a source of law, some of the new legislation techniques also suggest this trend. One such technique is incorporating case law into legislation. This technique was widely used during the

\textsuperscript{552} \textit{Staatsblad} 2001, 621
\textsuperscript{553} \textit{Staatsblad} 1988, 286.
\textsuperscript{554} The text cited within the quotation marks is part of Article 80a in my translation.
\textsuperscript{555} See e.g. Hondius 1988b.
\textsuperscript{556} See e.g. Snijders 1988, p. 1611, Martens 2000, 747-748 and Asser 2008, p. 10.
\textsuperscript{557} The Dutch term for this new legal institution is “prejudiciële vragen aan de civiele kamer van de Hoge Raad”, see http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/Bijzondere-taken-HR-en-PG/Pages/Prejudici%C3%A9ABlevragenaandecivielekamervandeHogeRaad.aspx.
\textsuperscript{558} \textit{Staatsblad} 2012, 65.
\textsuperscript{559} The original Dutch text is “optimale vervulling van de rechtsvormende taak”, see Opstelten 2012, p. 5
\textsuperscript{560} See Opstelten 2012, p. 5.
The recodification of the civil law in the second half of the 20th century. The new Civil Code of the Netherlands contains many provisions that are based on case law developed since 1838. The wide use of this technique can be seen as an open recognition by the legislature of the authority of case law. Obviously, the authority of some cases proved to be so high in practice that even the legislature followed them.

Another legislative technique that has gained popularity since the second half of the last century is the use of open norms in legislation. Again, the new Civil Code is a good example, as it contains many open norms such as “reasonableness and fairness”, “unreasonably onerous”, “generally accepted views” and “proper social conduct”. A key characteristic of these open norms is that they only provide an abstract framework, thus allowing the judge to develop more detailed substantive legal norms. The increasing use of open norms in legislation illustrates that nowadays the legislature intends to allow judges to play an active lawmaking role in certain areas.

The increasingly favorable attitude of the legislature towards case law is not only reflected in what the legislature does, but also in what it chooses not to do. Sometimes, the legislature explicitly chooses not to regulate an issue in legislation, because it deems it more desirable for judges to develop the law on that matter. A good example is the pre-contractual liability. Originally, the draft new Civil Code contained a provision regulating pre-contractual liability. However, this provision was later deleted from the draft, because legislators deemed it preferable to allow judges to fully develop the law on this matter.

An even clearer indication that the legislature recognizes cases as a source of law is that sometimes the legislature chooses not to enact laws on a certain matter, because case law has already adequately addressed the issue. In 1928, for example, the minister of justice withdrew a bill submitted earlier to the parliament, which intended to broaden the tort liability grounds contained in Article 1401 of the old Civil Code. One of the reasons to withdraw the bill was that it was no longer necessary, as the Supreme Court had already laid down essentially the same rule in the Lindenbaum/Cohen case in 1919.

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561 Although the current Civil Code has already been in force for more than 20 years, the word “new” is still used here to distinguish the current Civil Code from the first Civil Code of the Netherlands introduced in 1838, which is often referred to as the old Civil Code.


563 The increasing use of open norms is not limited to private law legislation. The same tendency can be found in administrative legislation as well, see Wiarda 1972, p. 40-42.

564 Article 6:2 Civil Code.


566 Article 3:4 Paragraph 1 Civil Code.

567 Article 6:162 Paragraph 1 Civil Code.

568 By using such open norms, “the legislature implicitly charges the judge with the task of developing the law in many areas”, according to Kottenhagen, see Kottenhagen 1986, p. 6. Many scholars share this view, see e.g. Pitlo 1968, p. 34, Nederpel 1985, p. 106 and Giesen & Schelhaas 2008, p. 136.

569 Article 6.5.2.8a.

570 See Hartkamp & Sieburgh 2010, p. 159.

571 Drion 1968b, p. 159 footnote 79.

572 Ibid.
2.3 Sub-conclusion on the attitude of the legislature

In sum, it can be said that evidence can be found in legislative provisions and techniques that indicates an increasingly favorable attitude of the legislature towards recognizing cases as a source of law. It can also be concluded that the legislature is becoming more aware of the limitations of its lawmaking capacity and that it has been intentionally making use of case law to supplement its legislative work. On the other hand, it should be pointed out that there is evidence of implicit recognition by the legislature of the status of cases as a source of law, but there is no evidence of explicit recognition. Accordingly, it should be concluded that unequivocal recognition of cases as a source of law is still lacking in legislation. The changing attitude of the legislature can be visualized as in Figure 10.

In this context it is particularly worth noting that the recodification of civil law in the Netherlands did not “kill” case law. Both the technique of incorporating previous case law into the new Civil Code and the wider use of open norms in the new Code conveyed a positive attitude of the legislature towards the status of cases as a source of law.

3. Judges

For quite a long time, judges in the Netherlands were reluctant to openly admit the influence of cases on their decision-making, even though in practice previous decisions of higher courts did have significant impact on judicial deliberation in court practice. This attitude began to change in the 1970s and the 1980s. Although I have not been able to find judgments that explicitly discuss the question whether cases are a formal source of law, I have been able to find evidence that reflects changes in the attitude of judges in two sources: legal reasoning in judgments on the one hand and speeches, publications and interviews by judges on the other.

3.1 Legal reasoning in judgments

The legal reasoning in judgments used to be very formalistic in the Netherlands. References to cases in judgments used to be very rare. Often it seemed as though the

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See e.g. Drion 1968b, p. 168.

See e.g. Fockema Andreae 1904, Polak 1953, p. 54 and Hesselink 2001, p. 9 and 11-13.

Glastra van Loon wrote in 1968 that the Supreme Court of the Netherlands never explicitly cited its own decisions, see Glastra van Loon e.a. 1968, p. 141. However, later studies proved...
decision came entirely from legislative provisions, without the slightest doubt that the case could have been decided otherwise.\textsuperscript{576}

In the early decades after the introduction of the old Civil Code in 1838, it was to a certain extent understandable that the legal reasoning in judgments did not cite cases. After all, not so many cases were available at that time and the dominant theory in the 19\textsuperscript{th} century denied that cases could have any authority beyond the specific disputes in which the judicial decisions were made.\textsuperscript{577} However, the practice of avoiding citing and discussing cases in judgments continued well into the time when cases in practice played a highly important role and the legal theory no longer denied that cases could have authority beyond the litigating parties. In 1931, for example, Scholten concluded that, although lower courts rarely explicitly cited cases decided by the Supreme Court, influence of earlier cases on their decision-making could be found in the fact that lower courts did repeat the arguments and the phrases that had been used previously by the Supreme Court.\textsuperscript{578}

The practice of avoiding citing and discussing cases in the legal reasoning in judgments was misleading in the sense that it obscured one crucial factor, namely cases, that influenced judicial decision-making. Many scholars criticized this practice and argued that it is desirable that judges explicitly cite and discuss cases in their judgments.\textsuperscript{579}

Old habits, however, die hard. It was not until the \textit{Bull Calf} case\textsuperscript{580} decided by the Supreme Court in 1980 that the old habit of keeping silent on the role of cases in judicial legal reasoning began to change significantly.\textsuperscript{581} Since 1980, explicit case citations and discussions in judgments has increased steadily and has now become a common practice in the Netherlands.\textsuperscript{582} From the fact that judges nowadays explicitly cite and discuss relevant cases in their judgments it can be inferred that judges openly admit that cases are capable of furnishing grounds for further judicial decisions, i.e. that cases are a source of law. This can be interpreted as an implicit way of recognizing cases to be a source of law.

\subsection*{3.2 Speeches, publications and interviews by judges}

Not only can evidence be found in the legal reasoning in judgments that in recent decades judges have become increasingly willing to openly admit the influence of cases on their decision-making, such evidence can also be found in speeches, interviews and

\textsuperscript{576} Vranken 1995, p. 110.
\textsuperscript{577} For details see the subparagraphs in this chapter that discuss the legal theory in the 19\textsuperscript{th} century.
\textsuperscript{578} Scholten 1931, p. 116.
\textsuperscript{579} See e.g. Scholten 1934, p. 116, Polak 1953, p. 60, Kottenhagen 1986, p. 6 and Hondius 1988b, p. 252.
\textsuperscript{580} HR 7 March 1980, \textit{NJ} 1980, 353 (\textit{Stierkalf}). This is a case about the liability for damages caused by animals. In this case, the Supreme Court explicitly cited one of its own previous decisions and discussed the relevance of other judicial decisions, including those by lower courts.
\textsuperscript{581} Kottenhagen 1986, p. 11-12.
\textsuperscript{582} This is shown by a number of empirical studies, see e.g. Kottenhagen 1986, p. 11-12, Struycken & Haazen 1993, p. 112-133 and Vranken 1995, p. 170.
writings published by judges. In his farewell address in 1971, the then president of the Supreme Court, De Jong, explicitly discussed the influence of previous cases on the decision-making of the Supreme Court.\(^{583}\) Towards the end of the address he said:\(^{584}\)

There are of course a number of cases from which we could not deviate without causing serious confusion. If the Supreme Court should overrule the case of 1929 where property transfer as a means of providing guarantee was held legal, or the Harms/De Visser case of 1945, the consequences would be unforeseeable. People can be assured: the Supreme Court shall always regard itself bound by such cases.

Another former president of the Supreme Court, Martens, discussed the lawmaking role of the judge in his farewell address in 2000. In this address, Martens said that in the 1950s and 1960s, scholars, the legislature and judges no longer regarded the lawmaking role of the judge as a taboo, and they began to openly recognize this role of the judge.\(^{585}\) Moreover, he argued that although judges are not elected, judicial law-making is justified by the rule of law.\(^{586}\)

Similar views can be found in interviews given and papers published by judges of the Supreme Court.\(^{587}\) Roelvink,\(^{588}\) for example, said in an interview in 1988, that “a lot of judge-made law has been developed in recent years, because the codification does not solve every problem.”\(^{589}\) When asked about the desirability of judicial law-making on controversial issues, he replied:\(^{590}\)

I do not think it is so bad that, at a certain moment, the judge is called upon in such cases to solve a problem without the help of a specifically for that problem enacted law. We then try to create a solution that fits in our legal system and that is consistent with the views of the majority of the Dutch people.

Twenty years later another judge of the Supreme Court wrote the following passage in a paper:\(^{591}\)

The judge, especially the Supreme Court, has become increasingly active in law-making. It has gone far beyond filling in “loopholes in legislation”. More than ever, legislation is giving the judge a lot of freedom, and the legislature indicates more than ever that a certain issue should be left to the judges to be further developed. It has thus become an out-dated idea that the legislature has the primacy in law-making.

\(^{583}\) De Jong 1971.

\(^{584}\) De Jong 1971, p. 577.

\(^{585}\) Martens 2000, p. 747-748.

\(^{586}\) Martens 2000, p. 751.

\(^{587}\) See e.g. Bruinsma 1988a, p. 95 and Ras 1988, p. 74.

\(^{588}\) Former Vice President of the Supreme Court. When he was interviewed in 1988, he was serving as a judge in the Supreme Court.

\(^{589}\) Mensonides 1988, p. 12.

\(^{590}\) Mensonides 1988, p. 13.

\(^{591}\) Asser 2008, p. 11.
3.3 Sub-conclusion on the attitude of judges

Evidence presented in this subpart demonstrates a remarkable change in the attitude of judges. Instead of carefully concealing the influence of previous cases on judicial decision-making, judges are nowadays more and more open about their lawmaking role and the status of cases as a source of law. It should, however, be noted that the evidence presented in this paragraph indicates largely an implicit instead of an explicit recognition by judges of the status of cases as a source of law. The change can be visualized as in Figure 11.

4. Legal Scholars

Prior to the legislature and judges, many legal scholars have long openly recognized the lawmaking role of the judge and the status of cases as a source of law. The following sections will examine how legal scholars’ views on the status of cases as a source of law evolved throughout three periods since 1838.

4.1 1838-1900 Legislation is the only source of law

After the introduction of the old Civil Code and the Kingdom Legislation Act in 1838, the dominant view among jurists held that only the legislature was authorized to create law, whereas judges ought only to apply laws enacted by the legislature. Opzoomer, one of the most prominent Dutch legal scholars of the 19th century, wrote in 1865 that “(c)ustoms have ceased to be a source of law; also for the private law all the power is in the hands of the legislature”. 593

The view that only the legislature is authorized to make law lasted well until the end of the 19th century. In 1899, Land, another well-known scholar in the 19th century, wrote that “(i)t should remain the task of the legislature as representative of the community, rather than of the judge, to express the legal consciousness of the community”. 595

592 Former professor of law at Utrecht University. In the 19th century, the legal scholarship in the filed of private law was dominated by two law professors: Opzoomer and Diephuis, according to Scholten, see Scholten 1931, p. 239.
593 Opzoomer 1865, p. VII.
594 Former professor of law at Groningen University.
595 Land 1899, p. 12.
The view that all the lawmaking power should be in the hands of the legislature led to another dominant view that legislation is the only source of law. Diephuis, a highly esteemed legal scholar of the 19th century, wrote the following passage in 1869, arguing that legislation is the only source of law:

The legislature, authorized to enact laws and thus to prescribe what will be the law among us, is also authorized to prescribe whether anything else will be recognized in equal sense as a source of law in addition to legislation…Now our legislation does not recognize any other source of law, which, in addition to legislation, defines the private law. So in our country legislation is the only source of law, as expressed by the Kingdom Legislation Act.

Land endorsed Diephuis’ view that legislation is the only source of law. In 1899 he wrote that “(customs) used to be a source of law”, implying that they had ceased to be a source of law since the introduction of the national codification.

Of course not everybody in the 19th century accepted that legislation was the only source of law. Van Hall, for example, argued that customs were, in addition to legislation, an independent source of law, especially when legislation was silent on a given question of law. However, even though he denied that legislation was the only source, Van Hall did not say a word about cases being a source of law.

Another dominant view during this period was that cases, even those decided by the Supreme Court, should not have a particular authority higher than opinions of legal scholars, so that judges were not bound by previous cases, not even by those decided by the highest court. Teixeira de Mattos, for example, wrote the following passage in 1885:

The crucial difference between legislation and a judicial decision is that the former is general and binds everyone, whereas the latter only decides a single case and only has force for the parties concerned (Article 1954 Civil Code), without being able to be invoked vis-à-vis third parties, not even in a similar case…It should thus be clear how wrong it is to attribute too much weight to the so-called jurisprudence, and to use it to replace legislation, which is an error that, in particular in France, has gained much ground in recent years.”

The warning that it is wrong to attribute too much weight to cases and to use them to replace legislation, seems to suggest that towards the end of the 19th century cases were beginning to play an increasingly important role in legal practice, so

596 Former professor of law at Groningen University.
597 Diephuis 1869, p. 25.
598 Land 1899, p. 6.
599 Former professor of law at Utrecht University.
600 Van Hall 1851, p. 61-62.
601 See e.g. Diephuis 1869, p. 87.
602 Teixeira de Mattos 1885, p. 31.
603 The word jurisprudence is used here to denote judicial decisions, not legal theory.
604 In the same book where the author criticized the practice of attributing too much authority to cases, he admitted that it was crucial for practitioners to know and to use cases, because whether a law suit could be won sometimes depended more on cases rather than on legislation, see Teixeira de Mattos 1885, p. 31.
important that cases were even beginning to threaten the status of legislation as the only source of law. The phrase “in particular in France” seems to imply that such a practice was also growing in the Netherlands, albeit not as fast as in France. At the same time, Teixeira de Mattos’ criticism on such a practice, in his words “an error”, shows that at the end of the 19th century the mainstream legal theory was still trying to defend the traditional view that cases are not and should not be a source of law. However, it did not take long before this old view began to encounter increasingly strong resistance, which will be illustrated in the following subparagraphs.

4.2 1900-1930 Initial challenges to the 19th-century views

Academic writings in the first three decades of the 20th century demonstrated some initial signs towards an open recognition of the lawmaking role of the judge. In his inaugural lecture The Sources of Private Law in 1913, Anema admitted that according to the prevailing theory in his time judges were only supposed to apply enacted laws. However, he argued that history and reality proved that judges had always played and were still playing a lawmaking role, albeit people no longer dared to openly admit it due to Montesquieu’s “silly fantasy” of the separation of powers. In 1918, Suijling introduced the notion of “de facto law” and argued that judges were able to create factually binding norms, implying that cases were a de facto source of law. Bellefroid was of the view that a constant court practice was capable of creating generally binding law.

Despite these initial steps towards an open recognition of cases as a source of law, traces of the 19th-century legalism were still visible. Zevenbergen, for example, refused to accept cases as a source of law and insisted that judges could only “discover”, but never create law. Also Suijling insisted that judges were not authorized to create law due to the limitations imposed by Article 12 of the Kingdom Legislation Act. Even Bellefroid, who argued that a constant court practice did create generally binding law, excluded cases from the formal sources of law in his book published in 1927. It was not until 1937 that he changed this view and openly recognized cases as a source of law.

In sum, the old view that enacted laws were the only source of law was quickly losing ground in the first three decades of the 20th century. However, there was no

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605 Former professor of law at the VU University Amsterdam.
606 Anema 1913, p. 8.
607 Anema 1913, p. 12.
608 Anema 1913, p. 13.
609 Former professor of law at Utrecht University.
610 The Dutch term that Suijling used is “feitelijk recht”, see Suijling 1918, p. 6.
611 “Ultimately, what is actually being applied as law is what the judge claims to find in enacted laws”, see Suijling 1918, p. 12.
612 Bellefroid 1927, p. 192.
613 Former professor of law at the University of Amsterdam.
614 Zevenbergen 1925, p. 326.
615 Even a constant practice of the courts cannot create law, according to Zevenbergen, see Zevenbergen 1925, p. 327.
617 In 1927 Bellefroid only recognized three formal sources of law: enacted laws, customs and treaties, see Bellefroid 1927, p. 2.
618 “Customs, enacted laws in the broad sense, treaties and cases are the formal sources of the contemporary Dutch law”, see Bellefroid 1937, p. 58.
consensus yet on the lawmaking role of the judge. Open recognition of cases as a source of law was still rare.

4.3 1930 - present: growing recognition for cases as a source of law

In 1931 Paul Scholten, one of the most revered legal scholars of the 20th century in the Netherlands, published his masterpiece *The General Part*. In this book Scholten refuted the legalistic doctrine that equated legislation with the law. He also disproved the view that the role of the judge is limited to applying laws enacted by the legislature. Scholten argued that the law is an “open system” to which every judicial decision adds something new. On page 102 of his book Scholten wrote:

The law is never “finished”. It keeps changing, not only as a result of legislation, i.e. deliberate creation of new law, but also by way of its application. We can put it as such: the system should be seen as “dynamic”, not as “static”. The theory of logical completeness treats the law as a static system that does not change until the legislature takes action. That is where it is mistaken.

After the publication of Scholten’s *General Part*, more and more legal scholars began to openly recognize the lawmaking role of the judge. In 1938, for example, Telders made an analysis of the various ways in which judges contributed to the development of the law in the 100 years after the introduction of the old Dutch Civil Code in 1838. The influence of judges on the law was so huge that he used the term “legislative judgments” to refer to the (in his view nearly countless) lawmaking judicial decisions and argued that “every judicial decision, in particular those of the Supreme Court, has for us the meaning of a contribution to the existing law”. Two other law professors of the 1930s, Bellefroid and Bregstein, also endorsed the view that judges do and ought to be recognized as playing a lawmaking role.

In the following two decades the lawmaking role of the judge continued to gain academic recognition. In 1953, Polak argued that both legislation and adjudication involve law making and that judges should decide as “legislature ad hoc”. Pitlo wrote in 1968 that deciding a case is by no means purely a matter of finding out the solution that the law dictates in the case at hand, but in the first place an act of

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619 Former professor of law at the University of Amsterdam.
620 Scholten 1931. This book is the general part of the *Asser’s Series*, a very influential private law handbook series in the Netherlands, which is widely used by academics, judges and practising lawyers.
622 Scholten 1931, p. 1-8 and 100.
623 Scholten 1931, p. 100-103.
624 Former professor of law at Leiden University.
625 Telders 1938.
626 Telders 1938, p. 205.
627 Telders 1938, p. 198.
629 Former professor of law at the University of Amsterdam. See Bregstein 1939, p. 18.
630 Former professor of law at the University of Wageningen.
631 Polak 1953, p. 17.
632 Former professor of law at the University of Amsterdam.
“What people call interpretation is not seldom lawmaking rather than application of the law”, according to him. The same trend continued in the 1970s and reached a climax in the 1980s when the Supreme Court openly acknowledged its lawmaking role by organizing a symposium in 1988 on the lawmaking role of the Supreme Court in celebration of the 150th anniversary of its establishment. By this time the lawmaking role of the judge had been so widely accepted that the Supreme Court was referred to as the “deputy lawgiver” in some academic writings. A large volume of academic publications on the lawmaking role of the judge emerged in the 1980s and afterwards. The academic debates moved far beyond the question whether judges do or ought to create law. Scholars have been debating since on more in-depth questions such as why judicial lawmaking is justifiable in a civil law country, where the boundaries of judicial lawmaking are, how to avoid retroactive application of judge-made law and how to harmonize judicial lawmaking with legislative work.

The jurists’ growing acceptance of the lawmaking role of the judge is accompanied by an increasingly open recognition of cases as a source of law in academic writings. Since the 1930s the majority of scholars argues that, although the Netherlands has no precedent system and judges are under no legal obligation to follow

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633 Pitlo 1968, p. 34.
634 Ibid.
636 Papers presented on the occasion of this symposium have been published in the following volume Baardman 1988.
637 Vranken wrote in 1988 that “(i)t can be said that nowadays the lawmaking role of the civil judges has been generally accepted”, see Vranken 1988, p. 1161.
638 This term is believed to be introduced by Verburg in 1977 and was frequently cited in the 1980s and afterwards. See Verburg 1975, Mensonides 1988, p. 13, Vranken 1988, p. 1161 and Brunner 1994, p. 36.
640 By the 1980s only a very limited number of scholars expressed doubts in their writings as to whether judges are authorized to create law, see e.g. Kortmann 2008 and Bovend’Eert 2009.
641 Martens, for example, argues that, despite the lack of democratic legitimacy, judicial lawmaking is justified by the rule of law, see Martens 2000, p. 751. Rijpkema (professor of law at the University of Amsterdam), on the other hand, disagrees that judicial lawmaking is not democratically legitimated because judges in the Netherlands are not elected. Instead, he gives a fresh interpretation of the term “democratic legitimacy”. According to Rijpkema, “the law is democratically legitimate if it is created in accordance with the formal and substantive requirements stemming from the fundamental norms that form the cornerstones of the democratic constitutional state of the Netherlands... As long as judges observe these fundamental principles, judicial lawmaking is not less democratically legitimate than lawmaking by the legislature”. See Rijpkema 2001, p. 19.
642 See e.g. the literature cited in the previous note.
643 See e.g. Smits 2000 and Haazen 2001.
644 Some scholars propose to create an institution of periodic consultations between the legislature and the Supreme Court in order to coordinate their lawmaking activities, see Giesen & Schelhaas 2008.
645 A small minority of scholars argues that there is a precedent system in the Netherlands and that judges are under a legal obligation to adhere to the rule of stare decisis, see e.g. Drion 1968b and Glastra van Loon e.a. 1968, p. 140-142.
cases decided by themselves or by any other court. The importance of cases in practice has grown to such an extent that they have, contrary to the original intention of the legislature, nonetheless developed into a source of law.

In 1931, Scholten gave a vivid account of the crucial role of cases in practice:

Someone that attends a pleading in civil cases will notice that a lawyer never feels more confident than when he can base his argument on a case decided by the Supreme Court, and that analysing and comparing judicial interpretation is a second nature to the counsels. It is the list of cases that the judge hearing the pleading will primarily pay attention to as preparation to draft his judgment. It is the case reports that every lawyer keeps up with and treats as the most essential, no matter how little time his daily work allows him to study. The legal scholarship regards it as one of its primary tasks to study the development of case law and to systemize it...When one compares the role that cases play in a current text book with that they had in one of fifty years ago, one will come to understand how much authority cases have won.

The extraordinary importance of cases in practice led Scholten to conclude that “(t)he recognition of cases as authoritative is imposed upon us by the facts.” He was so convinced of the authoritative role of cases that he wrote, “If we have to follow cases, what sense does it make to say that they are not a source of law?”

Similar accounts and views can be found in many scholarly writings in the following years and decades. In 1939 Van Apeldoorn wrote:

Whoever thinks that the law can be learned solely from codes and enacted laws shall be disappointed. One finds the law more in case reports than in enacted laws. That is because the law is not simply what “is in the legislation..., but is legislation as interpreted, transformed and supplemented by cases to suit the needs of our time”.

In 1953 Polak argued that “despite Article 12 of the Kingdom Legislation Act, cases have authority”. “All in all, it seems justified to say that judge-made norms in case law are equal to statutory ones”, according to him.

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646 Bellefroid, for example, wrote the following passage in 1937: “The interpretations of legislation given by the judge and the judge-made rules have no general binding force. They are only binding for the specific cases to which they are applied. Therefore the judge is in principle not bound by cases decided by other courts, not even the highest one... Therefore the judge may also deviate from his own previous decisions”, see Bellefroid 1937, p. 108. Note that Bellefroid used the term “in principle” and that he emphasized in the following passages of his book that a constant court practice is capable of creating generally binding law. For similar views see Bregstein 1939, p. 7, Van Apeldoorn 1939, p. 86 and Pitlo 1968, p. 36.

647 See literature cited in the following passages.

648 Scholten 1931, p. 115.
649 Scholten 1931, p. 118.
650 Italics by Scholten.
651 Scholten 1931, p. 119.
652 Former professor at the University of Amsterdam.
653 Van Apeldoorn 1939, p. 86.
654 Polak 1953, p. 38.
655 Ibid.
In 1968 Pitlo wrote, “The value of cases is extraordinarily high. So high that we can say that he who knows enacted laws but does not know the cases in the latest decades, only has a highly insufficient impression of our law.”  

In 1973, Jessurun d’Oliveira conducted a literature review on the authority of cases and concluded that “(i)t has become a dominant view that, contrary to the original design of our legal system where cases were granted no independent value as a source of law, cases have nevertheless developed into a source of law, at least where there is a constant court practice.”

This trend continued in the following decades and in 1993 Struycken and Haazen concluded that “in recent decades a certain consensus has been reached on the recognition of cases as a source of law”. Not only did these two authors conclude that a certain consensus had been reached, they went on to argue that it is desirable to revise some of the existing statutes in order to bring legislation in line with the new theoretic insights, so that an explicit recognition of cases as a source of law will no longer be hindered.

4.4 Sub-conclusion on the attitude of legal scholars

This subparagraph shows that, although the dominant view among jurists in the 19th century denied cases to be a source of law, the rising importance of cases in practice has eventually led more and more scholars to openly accept the lawmaking role of the judge and to explicitly recognize cases as a source of law. Here, again, it should be stressed that not all evidence points to an explicit recognition. It should also be noted that some of the academic writings cited in this subparagraph are of a descriptive nature, i.e. they observe a fact that judges have in fact been playing a lawmaking role and that cases have in practice been functioning as a source of law, whereas other writings express a normative view that judges ought to be allowed to play a lawmaking role and that cases ought to fulfil the role of a source of law. It should therefore be concluded that the evidence examined in this subparagraph does indicate a trend towards an open recognition of cases as a source of law, but the trend has not yet reached such a point that there is an undisputed normative conviction among legal scholars that cases ought to fulfil the role of a source of law and ought to be explicitly recognized as a source of law. This trend can be visualized as in Figure 12.

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657 Former professor of law at the University of Amsterdam.
659 Professor of law at Utrecht University and partner at NautaDutilh, a prominent Dutch law firm.
660 Professor by special appointment of comparative and transnational civil procedure at the University of Leiden, and counsel at Boies, Schiller & Flexner LLP.
661 Struycken & Haazen 1993, p. 103.
662 Ibid.
5. Concluding remarks

This chapter illustrates that originally, i.e. when the old Civil Code was introduced in the Netherlands in 1838, cases were not designed to fulfil the role of a source of law. The Kingdom Legislation Act enacted in 1838, for example, shows that the legislature intended legislation to be the only source of law. Prominent legal scholars of the 19th century endorsed the original intention of the legislature and commonly denied that cases ought to have normative force beyond the litigating parties. For a long time, judges hardly ever cited cases as a relevant factor for judicial decision-making, even though in practice they did pay attention to previous cases. Accordingly, the formal role of cases around 1838 and the following decades can be seen as very close, if not identical, to the position of an absolute denial. This position can be visualized as in Figure 13.

Nowadays the situation is different. Since 1988, the legislature openly admits that it is one of the chief tasks of the Supreme Court to develop the law, implying that

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663 See in particular Article 3, Article 11 and Article 12 of this Act.
664 See e.g. Diephuis 1869, p. 87 and Teixeira de Mattos 1885, p. 31.
(the highest) judges are authorized to play a lawmaking role. This can be seen as (at least) an implicit recognition by the legislature that judges ought to be allowed to play a lawmaking role. Since the 1930s, there is a growing consensus among scholars that it is inevitable and desirable for judges to play a lawmaking role, and cases are nowadays more than ever openly recognized as a source of law in academic writings. Also the views of judges have changed. It has become a common practice that judges explicitly cite and discuss cases in judicial decisions. Moreover, judges are nowadays even willing to openly admit their lawmaking role and the influence of cases on judicial decision-making in speeches, interviews and publications.

Notwithstanding these remarkable changes, an unequivocal acceptance of cases as a source of law has not been reached so far. Some of the old legislative provisions that reflect the 19th century legalism are still in force. There is still no legislative provision that explicitly declares cases to be a source of law. Although more and more scholars recognize cases as a source of law, some of them still put some qualifications on this view. In judgments or other sources that reflect the attitude of the judges, it is also difficult to find unreserved acceptance of cases as a source of law. The current situation can accordingly be visualized as in Figure 14.

Figure 14 Current views on the status of cases as a source of law in the Netherlands

Moreover, this chapter suggests that normative views that recognize cases as a source of law are not a necessary condition for the development of case law in practice in the Netherlands and, by careful analogy, probably not in other codified legal systems.
either.\textsuperscript{673} In other words, denying that cases ought to fulfil the role of a source of law may not be able to prevent cases from ultimately achieving a highly influential status in practice in a codified legal system. A possible explanation for this phenomenon could be that, due to the limitations of codifications and statutes such as the use of abstract language and the difficulty to amend codes and statutes swiftly to cope with the technical and social development in reality, there is an innate need in practice for cases to fulfil the role of a source of law and to supplement codes and statutes in a codified legal system.\textsuperscript{674}

This is, of course, not to say that normative views on the status of cases as a source of law are incapable of exercising any influence on the actual functioning of case law in practice. After all, there has been a period of time after the introduction of the Dutch Civil Code in 1838 where cases did not seem to have played a particularly influential role in practice.\textsuperscript{675} Moreover, the dominant view in the 19\textsuperscript{th} century that denied cases as a source of law induced judges to carefully conceal the influence of cases on their decision-making for as long as one and a half century by avoiding citing cases in judgments, which has had the effect of complicating the use of cases in practice.\textsuperscript{676} These findings suggest that denial of cases as a source of law is capable of delaying the rise of case law in a codified legal system, even though in the long term it may not be able to prevent cases from ultimately acquiring the status of a source of law in practice.\textsuperscript{677}

On the other hand, it is worth noting that the actual influence of cases in practice is capable of affecting the normative views. If we synthesize the three graphs showing the attitude of the legislature, judges and respectively legal scholars, we will get a new graph (Figure 15), which clearly indicates that it was legal scholars who took the lead in openly recognizing cases as a source of law in the Netherlands. Careful analysis of the relevant scholarly writings in the early decades of the 20\textsuperscript{th} century shows that such a change was neither the result of initiatives of the legislature or the courts to officially attribute broader normative force to cases,\textsuperscript{678} nor the influence of the common law doctrine of precedent.\textsuperscript{679} In fact, it was primarily the reality that cases have acquired a highly important status in practice that prompted legal scholars in the early 20\textsuperscript{th} century and later to openly recognize cases as a source of law.\textsuperscript{680} Later changes in the attitude

\textsuperscript{673} As the works of some legal scholars indicate, cases already achieved a highly influential status in practice before the 1930s when Scholten and many other legal scholars began to explicitly recognize cases as a source of law, see Teixeira de Mattos 1885, p. 31, Scholten 1931 and Polak 1953.

\textsuperscript{674} For similar views see Bellefroid 1927, p. 5, Bellefroid 1937, p. 123 and Polak 1953, p. 58.

\textsuperscript{675} It is in academic writings around the end of the 19\textsuperscript{th} century and the beginning of the 20\textsuperscript{th} century that I have been able to find the earliest signs of cases beginning to play an increasingly influential role in practice, see e.g. Teixeira de Mattos 1885, p. 31 and Anema 1913. It seems that between 1838 and the end of the 19\textsuperscript{th} century, cases did not occupy a particularly authoritative status in practice.

\textsuperscript{676} See e.g. Drion 1968b, p. 168.

\textsuperscript{677} The findings of this study lend support to the observation by Dawson in Dawson 1970, p. 503.

\textsuperscript{678} See the relevant paragraphs that examine the views of the legislature and judges in this chapter.

\textsuperscript{679} In fact, I have not been able to find many scholarly writings in the Netherlands that studied the common law doctrine of precedent as a positive model to draw inspiration from. One exception is Kottenhagen 1986.

\textsuperscript{680} Scholten observed, for example, that “if we have to follow cases, what sense does it make to say that they are not a source of law”, see Scholten 1931, p. 119.
of the legislature and judges may have been stimulated by increasing scholarly recognition of cases as a source of law combined with further growth of the actual influence of cases in practice.\footnote{See e.g. Kottenhagen 1986, p. 6 and Asser 2008, p. 11.}

In conclusion, this chapter demonstrates that the normative views on the status of cases as a source of law have not remained static in the Netherlands since 1838, and that there is an interesting dynamic between the normative views and the actual significance of cases in practice. The rising influence of cases in practice has not been the result of an explicit recognition by the legislature or the judiciary of cases as a source of law. Rather, it was the rising importance of cases in practice that has pushed the boundaries of the normative views on the status of cases as a source of law. On the other hand, an increasingly favorable attitude towards openly accepting cases as a source of law, as well as the lawmaking role of the judge, further stimulates and institutionalizes the practice of publishing and using cases, so that not only the leading cases, but also cases as a whole eventually acquire the status of a source of law. In this sense, recognition can be seen as an ultimate step in the case law mechanism in the Netherlands, as it arises from, strengthens and provides legitimacy to the practice of publishing and using cases to solve legal problems and to further develop the law.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Relative_positions_of_legislature_judges_scholars.png}
\caption{Relative positions of the legislature, judges and scholars}
\end{figure}