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 4

Implications for literature on cases in civil law jurisdictions
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1. Introduction

The previous three chapters concentrated on one jurisdiction, i.e. the Netherlands. From this chapter on, this study will look beyond the Netherlands and explore broader implications of the findings of the first three chapters. This chapter will place the findings of the first part of this study, i.e. chapter one, two and three, in the context of a broader body of English-language comparative law literature related to the role of cases in civil law jurisdictions, whereas the next two chapters will link the first three chapters to a trend in China since the 1980s, i.e. a growing interest in case law among Chinese judges and legal scholars, and reflect on the relevance of the experiences with case law in the Netherlands for China to further enhance the use of cases.

The first three paragraphs of this chapter will put the findings of chapter one, two and three separately in the context of the existing literature related to the role of cases in civil law jurisdictions and reflect on the relevance of the findings of each chapter for this body of literature. The last three paragraphs of this chapter will link the findings of chapter one, two and three as a whole to the existing literature and explore the relevance of these findings for three debates in this body of literature, i.e. whether the common law and the civil law legal families are converging, whether civil law jurisdictions have a case law method and whether civil law jurisdictions should adopt the doctrine of precedent.

This chapter relied on the method of literature analysis. Online search engines and the snowball method have been used to find the relevant literature. In particular, Google Scholar and Picarta were used.682

The findings of the first three chapters reflect only the situation in the Netherlands, while it could not be established that the Netherlands is a representative example of all continental European civil law jurisdictions where cases have developed into a source of law in practice.683 Consequently, this chapter will not seek to contribute to the existing literature by generalizing from the Netherlands to all civil law jurisdictions.

The fact that the representativeness of the findings of the first three chapters cannot be firmly established, however, does not mean that no meaningful insights can be drawn from them that may make a contribution to the existing literature. The paper of Seawright and Gerring on case selection techniques684 in case study research demonstrates that studying representative cases is not the only way to generate new insights, as studying other types of cases, i.e. cases that are not selected due to their representativeness, can be a good method to, among other things, test theories, verify

682 Some of the search terms included “case law in civil law jurisdictions”, “cases in civil law jurisdictions”, “stare decisis in civil law jurisdictions” and “case law in codified legal systems”.
683 This is of course not to say, as has already been pointed out in the introduction of this study, that the Netherlands is a deviant example that demonstrates essential differences from other continental European civil law jurisdictions. Scholarly writings on the role of cases in France and Germany in the existing literature, for example, do suggest that the case law mechanism in the Netherlands bears many similarities to the way cases fulfil the role of a source of law in these two prominent civil law jurisdictions. See e.g. Loussouarn 1958, Yiannopoulos 1974, Kiel & Göttingen 1997, Troper & Grzegorczyk 1997, Dedek & Schermayer 2012 and Fauvarque-Cosson & Fournier 2012.
684 The word “case” is used here in a methodological sense to denote an “example” in the method of case study instead of a court judgment.
observations in the existing literature and to explore new hypotheses or new research questions.685

Accordingly, instead of generalizing from the Netherlands to all civil law jurisdictions, this chapter contributes to the existing literature by, among other approaches and in light of the findings of the first three chapters of this study, questioning the soundness and correctness of some of the assumptions underlying or some of the observations in some of the writings in the existing literature. Paragraph two of this chapter, for example, questions the soundness of the assumption that case publication is a (mere) technical matter, given that chapter one of this study demonstrated that, in the Netherlands at least, case publication has a selective effect and that the design of case publication requires answering a series of important questions that involve value judgments and principle considerations. Another way in which this chapter seeks to contribute to the existing literature is to use the findings of the first three chapters as an entry point to search for questions concerning the role of cases in civil law jurisdictions that may be worth further investigation. Paragraph four, for example, reflects on one of the key findings of chapter three that the legislature, judges and legal scholars in the Netherlands have been demonstrating an increasingly favorable attitude towards openly recognizing cases as a source of law, and raises a series of questions, such as whether other European civil law jurisdictions have been experiencing a similar trend and if so, what the implications of this trend would be for cases to continue to be a criterion in the classification between the common law and the civil law legal families.

2. Is case publication merely a technical matter?

Chapter one of this study carried out an in-depth investigation into various aspects of case publication in the Netherlands. This is an unusual approach compared to the existing literature on the role of cases in civil law jurisdictions. As already has been pointed out at the beginning of chapter one, publication is a basic yet important requirement for cases to fulfil the role of a source of law in any jurisdiction.686 This obvious requirement, however, appears to have escaped the attention of many scholars who study the role of cases in civil law jurisdictions.687 While legal scholars never seem to get tired of debating whether cases are or ought to be a source of law in civil law jurisdictions, not so many of them have dealt with case publication.688 The underlying assumption seems to be that case publication is a dull technical matter that does not deserve much scholarly reflection, i.e. case publication is a mere technical question of making the final result of a legal battle in court available to a public beyond the litigating parties.689 The fast development of computer and Internet technologies in recent decades may have even further strengthened this assumption. After all, nowadays it is very common that judges no longer “write” but “type” their decisions on computers so that publication of judgments seems to have become a really simple matter of uploading already digitally stored judicial decisions to an online database.

The findings of chapter one suggest, however, that case publication is by no means a mere technical matter. A close analysis of the evolution of case publication in

685 Seawright & Gerring 2008.
the Netherlands and the debates around this topic demonstrate that designing and implementing a good case publication institution requires answering a series of important questions. What should be the purpose(s) of case publication, to facilitate the work of professional actors such as judges and lawyers or to enhance the transparency and the accountability of judicial work? Should case publication be deemed a responsibility of the state or can it be entrusted entirely to commercial entities? Should all cases be published? If so, what would be the positive and negative consequences? If not, which cases should be published? What should be the selection criteria? Who should select cases, judges or actors independent from the judiciary? Is it sufficient to provide the raw text of the judgments or is it desirable to add extra information to the published cases? If adding extra information to published cases is desirable, what extra information should be added and would the added information justify the increased costs and the possible delay in publication? Should the entities that publish cases only be concerned with accumulating judgments in digital databases or paper periodicals that are accessible to the public, or should they make further efforts to devise and improve search mechanisms to help users quickly find the cases that they are interested in and if so, what can be done to enhance the findability of cases?

Obviously, answers to these questions may involve technical considerations. The evolution of search mechanisms in commercial and official case publications in the Netherlands, for example, demonstrates how solutions to enhance the findability of cases benefits from technical improvement. However, it would be wrong to assume that these questions only require considerations of a technical nature. This study shows that answering these questions also involves value judgments and principle considerations, some of which can even be of a fundamental nature. In the debate on the question whether case publication should be considered a responsibility of the state, for example, chapter one revealed that some commentators invoked a fundamental principle of a constitutional state, i.e. it is a responsibility of the state to make the law accessible to the public. Similarly, when debating whether all cases should be published, some commentators invoked the principle of public oversight on the judiciary as well as a right of every citizen to know how legislation has been interpreted and applied in actual cases. This is of course not to say that whenever such (fundamental) principles are invoked, they will always dictate the outcome of a debate. In fact, this study illustrated that answering the questions that arise in the context of case publication often involves balancing various principle and practical considerations, and that the outcome depends on the relative weight that one assigns to the competing considerations.

The answers to the above-raised questions, as chapter one of this study illustrated, have not remained static in the Netherlands since 1838. There has been, for example, an increasing awareness that case publication is a responsibility of the state and that case publication should not only serve the purpose of facilitating the work of judges and lawyers, but should also serve the purpose of increasing the transparency of judicial decision-making and enhancing public oversight on the work of the

\[ \text{690 See the subparagraphs in chapter one on the search tools in commercial and official case publication in the Netherlands.} \]
\[ \text{691 See e.g. Hondius 1973, p. 745-746 and Kottenhagen & Kaptein 1989, p. 99.} \]
\[ \text{692 See e.g. Matthijssen 2000, p. 10 and De Meij e.a. 2006, p. 8.} \]
\[ \text{693 See e.g. the debate on the question whether all cases should be published. Compare e.g. De Meij e.a. 2006 and Mommers & Zwenne & Schermer 2010 with Philippart 2010, Van der Hoek 2010 and Jongeneel 2010.} \]
judiciary.\textsuperscript{694} Moreover, this study shows that case publication in the Netherlands has been moving from simply making cases available towards making them findable, understandable and affordable to the users.\textsuperscript{695} This study does not present the solutions adopted in the Netherlands as the best practice, but by closely examining how cases are published in the Netherlands this study does wish to identify and highlight the key questions that arise in case publication. Those who are interested in the functioning of cases as a source of law are invited to pay close attention not only to the way cases are or should be used in court practice, but also to the way cases are or should be published.

3. Are legal scholars losing ground to judges in civil law jurisdictions as the significance of case law continues to rise?

As has been mentioned earlier in this study, there is a consensus in the existing literature that the actual influence of cases in practice has risen to such a high level in many continental European civil law jurisdictions that they have in fact become a source of law.\textsuperscript{696} On the other hand, some writings in the existing literature observe that the influence of legal scholars in these jurisdictions has been declining.\textsuperscript{697} Deák’s paper, for example, suggests that in the 20\textsuperscript{th} century scholarly writings in civil law jurisdictions more or less deteriorated into a series of comments on cases.\textsuperscript{698} Lawson even contrasted the rising authority of cases directly with the, in his view, shrinking role of legal scholars and observed that:\textsuperscript{699}

French law has become almost as much a system of judge-made law as English law… Gény and other jurists came to the conclusion that there was no longer any point in running an orthodox body of juristic doctrine derived from exegesis of the Civil Code side by side with a body of unorthodox doctrine actually enforced in the courts. Whatever the jurists might think, the latter was the working law of France, and the new school of jurists ended by accepting it and finding a theoretical basis for it in the custom of the courts. The jurists still reserve to themselves the right to criticize, but more in the spirit of American jurists.

Such scholarly writings may raise the impression that legal scholars are losing ground to judges in civil law jurisdictions and that the influence of legal scholars is declining as a result of the rising significance of cases in practice. The findings of chapter two of this study, however, suggest that, at least in the Netherlands, such an understanding is not entirely accurate.

In the first place, the findings of chapter two indicate that legal scholars in many ways fulfill an important role in the case law mechanism in the Netherlands, although their influence is not always explicit. Evaluative scholarly comments on a case, for example, can influence the likelihood that the case will be followed in later court practice, as scholarly reaction to previous cases is one of the many factors that jointly

\textsuperscript{694} See e.g. Editors’ Board 1982 and Commissie Jurisprudentiedocumentatie (Case Law Documentation Committee) 1994.

\textsuperscript{695} See e.g. the subparagraphs in chapter one on the search tools in commercial and official case publication and on the practice of publishing annotations together with cases.


\textsuperscript{697} See e.g. Deák 1934, p. 346 and Lawson 1977, p. 82-83.

\textsuperscript{698} Deák 1934, p. 346.

\textsuperscript{699} Lawson 1977, p. 82-83.
determine the weight that judges attribute to previous cases in judicial deliberation. It is through the enormous scholarly efforts of systemizing, analyzing, interpreting and evaluating cases that scattered individual judgments become more structured, better comprehensible and easier to use. One may, of course, rightly observe that the ways through which legal scholars influence the law are nowadays no longer the same as the way they influenced the law in the 19th century, but this does not necessarily mean that the influence of legal scholars has declined in the Netherlands or, by careful analogy, in other continental European civil law jurisdictions. More importantly, the findings of chapter two indicate that it is not accurate to, as the writings of Lawson tend to imply, see legal scholars and judges as two opposing groups that fight for dominance. It is perhaps more in line with the reality to see the relationship between legal scholars and judges in a civil law jurisdiction as a cooperative one, even though legal scholars do express critical comments on court judgments. The findings of chapter two indicate that on the one hand, legal scholars pay close attention to development in court practice and on the other hand, judges derive considerable benefit from scholarly works that select, systemize, interpret and evaluate published cases and that they generally deem such scholarly works valuable.

In this respect, I concur with Vranken, who observed rightly that: Court practice and legal scholarship are dependent on each other. There is cooperation and interaction between the two. The level of the one also influences the level of the other.

4. Is there a trend in civil law jurisdictions towards explicit recognition of cases as a source of law?

As pointed out earlier in chapter three, 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 in these jurisdictions. This commonly held observation gives the impression that 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.

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700 See the paragraph in chapter two that analyses the way cases are used in adjudication.
701 See the paragraph in chapter two that analyses the contribution of legal scholars to the case law mechanism in the Netherlands.
702 Ibid.
703 See e.g. Loussouarn 1958 and Kiel & Göttingen 1997.
704 Lawson 1977, p. 82-83.
705 The paper of Loussouarn expressed a similar view, see Loussouarn 1958, p. 268.
706 See chapter two of this study.
The findings of chapter three illustrated that in the Netherlands it is not true that the normative views on the status of cases as a source of law have remained static. By using an analytic framework consisting of a sliding scale combined with a time dimension to examine the views of the legislature, judges and legal scholars in the Netherlands on the status of cases as a source of law, chapter three of this study demonstrated that the views of these actors have moved away from an absolute denial and are approaching an unequivocal acceptance of cases as a source of law. Moreover, the findings of chapter three suggest that it was the rising significance of cases in practice that has pushed the boundaries of the normative views.

These findings, if we reflect carefully upon them in the context of civil law jurisdictions, can raise important and intriguing questions. Given the persistent influence of cases in practice and the increasingly favorable attitude among the legislature, judges and legal scholars towards openly recognizing cases as a source of law, could it be possible that the legislation in the Netherlands would one day be revised to explicitly recognize cases as a source of law? Are similar changes taking place in other civil law jurisdictions and if so, can we speak of a trend towards an explicit recognition of the status of cases as a source of law in the civil law legal family? And if there is indeed such a trend and the trend eventually leads to an unequivocal recognition of cases as a source of law not only by legal scholars but also by the legislature and judges in (a considerable number of the members) the civil law legal family, can the role of cases still have a distinguishing capacity in the classification between the common law and the civil law? Obviously, it goes beyond the scope of this study to answer all these questions. What this study does aim to do is to stimulate the readers to reflect on these questions and to invite (comparative) legal scholars to carry out further investigation into these questions either by using the analytic framework developed by this study, or by developing and applying more advanced analytic frameworks.

5. Are the common law and civil law legal families converging?

Some scholars argue that there is a trend of convergence between the common law and the civil law legal families. This claim is chiefly based on an observation that the actual authority that cases have in court practice in many continental European jurisdictions no longer differs fundamentally from that of precedents in common law legal systems, i.e. judges in many continental European civil law jurisdictions are in fact bound by certain types of cases, especially those decided by the highest courts. This argument is highly result-driven, and tends to focus solely on the courts. In essence, this argument draws the conclusion of convergence between civil law and common law primarily from the premise that where lawyers in civil law jurisdictions invoke arguments based on previous cases, especially those decided by the highest courts, the result that such arguments are likely to achieve in civil law courts would be very similar to what common lawyers would be able to achieve in court by citing precedents.

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711 See the sources cited in the previous footnote that argue there is a trend of convergence.
This study offers a process-oriented approach to explore the role of cases as a source of law in civil law jurisdictions, which may yield some fresh insights for the convergence theory debate. It is, after all, not unthinkable that the same result can be achieved through different processes. In other words, even if proponents of the convergence theory have convincingly established that the result of citing cases in court proceedings is the same in civil law courts as in common law courts, doubt can still be cast on their conclusion of convergence if it turns out that the same result is achieved through different processes in these two legal families.

This study reveals that in the Netherlands the result that cases fulfil the role of a source of law is achieved through a process of publication and utilization of cases that involves multiple institutions, practices and actors in each phase of the process. When we adopt such a process-oriented approach to explore the role of cases as a source of law against the background of the convergence theory debate, we would soon see a series of new and intriguing questions arising. Is the fact that cases fulfil the role of source of law in common law jurisdictions the result of a single doctrine of *stare decisis*, or is this result also achieved through a process of publication and utilization of cases that involves multiple institutions, practices and actors? If the latter is true, what kind of institutions, practices and actors jointly contribute to the result of cases fulfilling the role of a source of law in common law jurisdictions? Do legal scholars in common law jurisdictions play a similar role to their counterparts in civil law jurisdictions in the selection process for case publication? Do legal scholars in common law jurisdictions also fulfil a bridge function between the published cases and other users of cases by systemizing, interpreting and evaluating previous court decisions? Is there a similar dynamic in the utilization phase between judges and legal scholars in common law systems as that in civil law jurisdictions, and in particular, do scholarly evaluative comments on a previous case have a similar effect on the influential status of the case in adjudication practice in common law jurisdictions as that in civil law systems? Answers to these questions can enrich our understanding of the differences and similarities between the civil law and the common law legal families, and may shed new light on the convergence theory debate. Obviously, it goes beyond the scope of this study to answer all those questions. However, the approach adopted by this study does make it clear that there is much more to be explored than what has been done in the convergence theory debate so far. Hopefully, this study will encourage comparative legal scholars to further investigate this topic.

Furthermore, the distinction that this study draws between the result that cases fulfil the role of a source of law on the one hand and the process through which cases fulfil such a role reveals a shortcoming in the convergence theory debate, i.e. comparative legal scholars participating in this debate do not always clearly define the concept and the scope of convergence so that different understandings of and diverse appraisal criteria for convergence occur in the existing literature, which, to say the least, does not facilitate a meaningful debate. Some scholars, for example, endorse the convergence theory by observing that nowadays case law forms a major source of law both in common and civil law countries, whereas other scholars are more cautious to accept the conclusion of convergence because, although as a result cases are indeed a source of law in both legal families, there are still considerable differences between the method of using cases in the common law and that in the civil law legal family. Obviously, the disagreement is related to the fact that the first view defines convergence at the level of the result, whereas the second view examines convergence.

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713 See e.g. Dainow 1966, p. 15 and Baudouin 1974, p. 12-16.
not only at the level of the result, but also at the level of methodology. If we examine
the existing literature, we will also find differences in the scope of convergence that
scholars attempt to establish. Some scholarly writings tend to suggest that the two legal
families are converging on the whole, whereas others tend to restrict their
observation of convergence to specific areas. Moreover, different appraisal criteria
are used to assess whether there is a trend of convergence. De Cruz, for example, uses a
fairly low criterion. As long as some degree of convergence is taking place and
continues to take place, De Cruz would deem the case for convergence already
proven. Haazen, on the other hand, denies that there is a trend of convergence,
because, although courts in civil law jurisdictions more or less follow the same rules or
even cite precedents in their opinions, there is, in his view, no evidence suggesting that
any of the civil law jurisdictions recognizes the doctrine of precedent as part of the
law. Such an argument implies a very high criterion, as it suggests that Haazen
would not accept the theory of convergence until the doctrine of precedent has been
accepted in civil law jurisdictions as part of the law. One may rightly doubt whether
such a criterion is appropriate, because should the doctrine of precedent indeed be
accepted as part of the law in civil law jurisdictions one day, one might as well observe
that the civil law legal family has been, at least at the point of the legal authority of
precedents, assimilated by the common law family rather than that the two legal
families are converging.

This study submits that, for a clear debate on the convergence theory, it is
important to conduct systematic comparative research where at least the following three
questions need to be explicitly addressed. The first is whether a comparative research
intends to examine possible convergence between the common law and the civil law
families as a whole, or does it intend to investigate possible trends within certain legal
areas or possible changes with regard to certain legal institutions. An explicit answer
to this question can help avoid inappropriate generalization from the findings, and it
may also avoid possible misunderstandings on the scope or level of convergence that a
scholarly research seeks to verify or establish.

The second question that needs to be clarified is which jurisdictions are to be
included in a comparative study on convergence. Some of the existing scholarly
writings study only one or two civil law jurisdictions such as Germany and France, but
claim or imply that the findings also apply to other civil law jurisdictions. Such an
approach is obviously far from ideal. This study submits that, which jurisdictions are to
be included in a systematic comparative study that seeks to verify a possible trend of
convergence between the common law and the civil law is barely to be answered in
abstract, but should rather be assessed in relation to a number of factors, such as the
scope of convergence that the research intends to investigate, i.e. convergence between
legal systems as a whole or convergence in certain legal areas, the expertise of the
researchers, the available time and financial resources etc.

The third but certainly not the least important question that needs to be clarified in
a comparative study on convergence is how to define convergence. This study
submits that a good definition of convergence should explicitly address at least three

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714 See e.g. Markesinis 1994, p. 30-32 and Bogdan 2013, p. 75.
716 De Cruz 2007, p. 503.
718 Inspiration has been drawn from Mattei & Pes 2008, p. 268-269.
719 See e.g. Deák 1934, Lipstein 1946, Dainow 1966 and Silving 1966.
720 This view is inspired in particular by Oderkerk 2001.
aspects: time, direction and distance. Convergence, after all, implies a trend of change and the concept of change involves a time dimension, i.e. it involves a comparison between at least two situations: a situation somewhere in the past and the situation now. It is therefore desirable for any study that seeks to participate in the convergence theory debate to make explicit which time span it covers. Moreover, convergence also implies movement. Movement can be analysed in at least two aspects: direction and distance. Such aspects are relevant for the convergence theory debate. It could be helpful to envisage a situation somewhere in the past where the common law and the civil law legal families were situated at the extreme ends of a line. For any scholarly research that seeks to investigate a possible trend of convergence between these two legal families or certain legal areas or legal institutions within these two legal families, it is crucial to identify whether the objects of study have moved, and if so in which direction. Obviously, if the legal families are moving further apart from each other, it would make no sense to conclude that there is a trend of convergence. This study agrees with what has been tacitly assumed or explicitly expressed in many of the existing literature that convergence can be understood as a movement towards a certain central point by the objects of study that were originally separated by a certain distance. In addition to the direction, it is also important for any study that seeks to participate in the convergence debate to define the distance that the studied objects must have covered in order for the conclusion to be drawn that there is a trend of convergence. Does any movement towards a certain central point, no matter how small, justify a conclusion of convergence, or must both legal families have moved fairly close to the central point in order for the conclusion of convergence to be drawn? This question has rarely been explicitly addressed in the existing literature. It is desirable that future studies be more open about the criterion of distance that they apply to ascertain whether there is a trend of convergence. Obviously, the nature of the studied objects does not quite allow for an accurate quantified measurement. It is nonetheless desirable that future studies at least indicate a margin of distance that they deem acceptable for the conclusion of convergence to be drawn.

To summarize, the role of cases as a source of law in a legal system has often been involved in comparative law studies that debate on the question whether there is a trend of convergence between the common law and the civil law legal families. This study agrees that the role of cases in a legal system is indeed a relevant issue for the convergence theory debate, either as an object of study on its own, or as a component for scholarly research that seeks to explore a possible system-wide scale of convergence. The approach adopted by this study to investigate the functioning of case law in the Netherlands indicates that the role of cases as a source of law can be explored from different perspectives, e.g. as a result or as a process. Adopting a different perspective may lead to different insights into the similarities and differences between the common law and the civil law legal families. In order to avoid misunderstanding and overgeneralization, it is desirable for future scholarly studies that seek to participate in the convergence theory debate to clarify, among other things, from which perspective(s) they study the role of cases as a source of law in a legal system, the scope or level of convergence that they seek to verify and the definition of convergence that they adopt.

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721 One may also call distance a matter of degree.
724 De Cruz did explicitly deal with this question, see De Cruz 2007, p. 503.
6. Do civil law jurisdictions have a case law method?

In the existing literature, some scholars have expressed doubts as to whether civil law jurisdictions have a workable case law method. “[A] relative absence of skills in case analysis”, for example, is said to be “the Achilles heel of civil-law methods”. 725 Dawson observed that there is no workable case law technique in French law. 726 These views were recently challenged by Komárek, who argues that the continental European tradition has its own way of dealing with cases, whose techniques, although different from the common law case law method, are no less rational and intellectually sophisticated. 727 The findings of this study can yield some fresh insights for the debate on case law method in civil law jurisdictions, which will be elaborated in the following passages.

At the outset, this study wishes to emphasize that, for a meaningful debate on case law method in civil law jurisdictions, it is crucial to make a distinction between the question whether civil law jurisdictions have developed a coherent and well-articulated methodological theory regarding the use of cases on the one hand, and the question whether a set of methodological standards or guidelines have emerged and been more or less consistently used in practice in civil law jurisdictions on the other hand. At the theoretic level, it seems that civil law jurisdictions are indeed lagging behind. In this respect, it is not difficult to accept the observation by Vogenauer that “[t]he highly developed case law theory of Anglo-American jurisdictions has no counterpart on the Continent” 728 to the extent that coherent and in-depth theoretic writings on methods of using cases are at least still scarce in the Netherlands. 729 However, it is unjustified to jump from the fact that theoretic case law methodological writings are scarce in civil law jurisdictions to the conclusion that there is no workable case law method in these jurisdictions. As Vogenauer rightly pointed out, even a de facto source of law that is habitually followed needs to be interpreted and applied according to certain methodological standards. 730 The findings of this study suggest that at least in the Netherlands certain methodological guidelines and thumb rules have indeed emerged in adjudication practice. 731 Of course, it would be more than desirable to further develop and refine these methodological guidelines both in practice and in theory. However, neither the fact that such methodological guidelines have not yet been sufficiently articulated in theoretic methodological writings, nor the fact that in practice they have not yet been thoroughly developed seems to justify the conclusion that these methodological guidelines are not workable.

Perhaps more importantly and more interestingly, this study can stimulate us to reflect on the definition of case law method in the existing literature. Currently, scholarly writings on case law method tend to concentrate largely on ascertaining the ways cases are interpreted and applied in court practice. 732 This study suggests a broader understanding of the case law method. In its basic meaning, method connotes

725 Glendon 1997, p. 102.
727 Komárek 2013.
729 This is of course not to say that there are no academic writings that reflect on the method or method(s) of interpreting and using cases in the Netherlands, see e.g. Scholten 1931, p. 114-124, Snijders 2007 and Lubbers 2008.
731 See the paragraph that examines the way cases are used in adjudication practice in chapter two of this study.
732 See e.g. MacCormick & Summers 1997b and Vogenauer 2006.
the “path” or “way to achieve and end”. From this perspective, case law mechanism in the Netherlands, as revealed by this study, can be seen as a case law method in a broader sense. After all, it is through the case law mechanism that cases have been able to fulfil the function of a de facto source of law in the Netherlands, contributing to attain ideals of the law such as legal certainty, legal unity, equality before the law and a desirable degree of flexibility. If we understand case law method in this broader sense, we will see a whole new and promising research area emerging for comparative law. Vogenauer rightly pointed out that there is a huge gap in comparative research on case law, i.e. whilst there is a significant body of literature as to whether cases are or are not a source of law in different legal systems, almost no comparative analysis of the case law method has been done. If we realize that “the case law method” that Vogenauer referred to is defined in a narrow sense instead of the broader sense advanced by this study, it becomes plain how huge the gap actually is. This study has made a modest attempt to fill a tiny portion of the gap by drawing the contours of the case law method in the Netherlands both in a narrow and in a broad sense. Hopefully, this study will encourage comparative legal scholars to explore the case law method/mechanism in other legal systems and to compare their findings.

7. Should civil law jurisdictions adopt the doctrine of precedent?

Still another debate in the existing literature on the role of cases in civil law jurisdictions is whether civil law jurisdictions should adopt the doctrine of precedent or at least a certain variant of the doctrine of precedent, for example, in the sense that previous court decisions are presumed to be rational and correct and should be followed unless a court can find sufficient justification for deviating from previous cases. I doubt whether it would be desirable for civil law jurisdictions to abandon their current practice and to adopt a strict doctrine of precedent or a form of conditional doctrine of precedent where courts are bound by previous cases unless they can find sufficient justification to deviate from them.

Crucial to the doctrine of precedent is the notion of binding force, i.e. judges must follow previous cases that are binding upon them even if they substantively do not agree with those cases. One of the effects of the doctrine of precedent in English law, for example, is that lower courts are bound by previous cases decided by higher courts, which means that lower courts must follow previous cases decided by higher courts that are applicable to later disputes, even if lower courts believe that the previous cases are substantively wrong or undesirable. At first sight, it might be quite appealing to introduce such a rule to a civil law jurisdiction such as the Netherlands. As this study

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733 Vogenauer 2006, p. 885.
735 Compare e.g. Kottenhagen 1986, p. 4 with Hondius 2007a, p. 19-20 and Drion 2014.
736 There is an elaborate body of literature that discusses the common law doctrine of precedent, see e.g. Schaefer 1967, Hardisty 1979, Cross & Harris 1991, Kalt 2003, Markman 2003, Cartwright 2007, p. 21-24, Nelson 2011 and McLeod 2011. Upon careful analysis of this body of literature, one would realize that the questions addressed in these writings are often related to the notion of binding force, such as what binding force means, which cases have binding force, which part of a case has binding force (i.e. the distinction between ratio decidendi and obiter dictum), which courts are bound by previous cases, are there exceptions to the rule of binding force and if so, under what circumstances are precedents not binding.
737 Cross & Harris 1991, p. 5-7. It should be noted that this is not an absolute rule. For a summary of the limited exceptions to this and other rules based on the doctrine of stare decisis see Cross & Harris 1991, p. 163-164.
reveals, Dutch judges take various substantive considerations into account when deciding whether a previous case will be followed, such as how well the case has been received in scholarly writings and whether following the previous case would lead to an undesirable or unjust result in a later lawsuit. Such substantive considerations, one may argue, involve a subjective evaluation of the judge and may even point to different directions, so that it would be very difficult for litigants to predict whether judges would follow a previous case or not. Seen in this light, introducing the doctrine of precedent may have a huge benefit of simplifying the prediction of the reaction of judges to previous cases, i.e. whether a previous case will be followed depends on a clear objective criterion: whether the previous case has been decided by a higher court.

It is, however, doubtful whether introducing a strict or conditional doctrine of precedent would indeed eliminate substantive considerations with regard to the merits of previous cases in adjudication practice and subsequently contribute to a higher degree of legal certainty in civil law jurisdictions. In the first place, it should be pointed out that a conditional doctrine of precedent in the sense of a legal obligation for courts to follow previous cases unless they can justify why a previous case that they are supposed to follow is wrong, undesirable or no longer good law, by definition, opens the door for substantive considerations with regard to the merits of previous cases. In other words, under such a conditional doctrine of precedent, judges are still able to avoid following previous cases that they deem undesirable or wrong on substantive grounds, so that litigants still need to estimate whether the judge substantively endorses previous cases. That would mean, in the context of the Dutch legal system, even if a conditional doctrine of precedent were to be introduced, litigants would most probably still have to check the various substantive factors that judges take into account under the current methodological framework, in order to assess how likely the judge would substantively endorse previous cases. It is therefore not obvious how such a conditional doctrine of precedent would be able to create an effect of simplifying the prediction of judges’ reaction to previous cases in adjudication.

Would, one may rightly wonder, a strict form of unconditional doctrine of precedent eliminate judges’ substantive considerations with regard to the merits of previous cases and subsequently make it easier for litigants to predict the reaction of judges to previous cases? The practice in common law jurisdictions tends to suggest that the answer would most likely be negative. It is no longer a secret that judges in common law jurisdictions have developed various ways to avoid following precedents that they do not substantively endorse even though they are formally bound by such previous court decisions. One of the ways to avoid applying binding precedents is to manipulate the distinction between ratio decidendi and obiter dictum. Another well-known, if not notorious, way to avoid binding precedents that judges do not like is to use the technique of distinguishing, i.e. by demonstrating that there are crucial differences between the facts underlying the binding precedent and those of the dispute at hand so that the precedent is not applicable. It is anything but unthinkable that, if a strict form of doctrine of precedent were to be introduced to a civil law jurisdiction, judges would resort to various technical constructions to avoid applying binding

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738 See the paragraph on the way cases are used in adjudication practice in the Netherlands in chapter two of this study.
739 For details of the substantive factors that judges take into account see the paragraph on the way cases are used in adjudication practice in the Netherlands in chapter two of this study.
740 See e.g. Deák 1934, p. 341 and David 1984, p. 10-11.
742 See e.g. Deák 1934, p. 341 and David 1984, p. 10-11.
precedents that they do not endorse due to substantive considerations. At least, the interviews with Dutch judges that I conducted indicate that the technique of distinguishing is by no means unique to the common law legal family, as many interviewed judges replied that they would try to avoid applying Supreme Court cases to solve a legal dispute at hand by seeking crucial factual differences between the previous case and the lawsuit at hand, where, among other situations, applying the previous case would lead to a result that they deem highly unjust or undesirable.\textsuperscript{743} Accordingly, this study suspects that introducing a strict form of doctrine of precedent to a civil law jurisdiction may have the effect of forcing judges to use technical reasons to conceal the real substantive considerations that underlie their choice not to follow previous cases. One may rightly doubt whether such an effect would be desirable, as a growing trend to resort to technical constructions to avoid applying previous cases would obscure the real substantive considerations that judges take into account, which would neither facilitate an open and rational discourse on the merits of different approaches to solve a legal problem, nor be helpful to enhance the litigants’ ability to predict how judges would react to relevant previous cases in adjudication.

One may argue that introducing a conditional or a strict form of the doctrine of precedent will at least impose a burden of argument on judges in the sense that they have to provide substantive or technical justifications for their decision to deviate from possibly applicable previous cases, which is conducive to enhance legal certainty, as judges would no longer be able to ignore relevant previous cases or to deviate from them without any explanation.\textsuperscript{744} To this argument I wish to respond, in the first place, that as far as Supreme Court cases are concerned, judges interviewed by this study all indicate that they are fully aware that they in fact bear a burden of argument where they decide to deviate from possibly applicable previous cases decided by the Supreme Court.\textsuperscript{745} As far as previous cases decided by the courts of appeal and trial courts are concerned, most judges interviewed for this study indicate that in practice they do perceive a burden of argument where litigants or their counsels explicitly invoke previous cases decided by other courts than the Supreme Court and such cases do bear close relevance to the dispute at hand.\textsuperscript{746} In other words, the findings of this study suggest that at least in the Netherlands judges already carry a certain degree of burden of argument in practice, so that it is doubtful whether imposing an explicit burden of argument on judges would lead to significant changes in reality.

This is, of course, not to say that nothing needs to or can be done to improve the way cases function as a source of law in civil law jurisdictions. As far as the use of cases in adjudication is concerned, it is crucial, as explained earlier in this study, that judges follow certain common methodological guidelines and that such guidelines be accessible to the public, otherwise it would be highly difficult for litigants to predict how judges are likely to treat possibly relevant previous cases and thus undermining legal certainty.\textsuperscript{747} Accordingly, in order to improve the predictability of the way judges

\textsuperscript{743} E.g. interviews NL20130923, NL20131008-2, NL20131017, NL20131028-1, NL20131028-2 and NL20131114.
\textsuperscript{744} Kottenhagen 1986, p. 5-6.
\textsuperscript{745} The interview results indicate a strong normative conviction among the respondents that judges ought to provide sufficient justification if they decide to deviate from an applicable case decided by the Supreme Court. Not doing so would be, according to one senior judge, “utterly unprofessional and unacceptable”, see interview NL20131008-1. For similar views see NL20131021, NL20131022, NL20131028-1 and NL20131114.
\textsuperscript{746} See e.g. interviews NL20131008-1, NL20131022, NL20131031 and NL20131107-2.
\textsuperscript{747} See the passage that examines the way cases are used in adjudication practice in the Netherlands in chapter two.
treat previous cases in adjudication, it is desirable to refine the method of using cases in adjudication and to make the (application of the) method transparent to the public. This study agrees with Komárek that the case law method developed under the common law doctrine of precedent is neither the only possible nor the most rational or advanced method of using previous cases to solve legal disputes and to develop the law.\(^{748}\) The findings of this study suggest that, at least in the Netherlands, judges do apply, perhaps not always explicitly, certain common methodological guidelines when using cases in adjudication. Such methodological guidelines are obviously not yet so sophisticated and accurate that no improvement is possible. It is therefore desirable for judges, academic and practising lawyers in the Netherlands and other civil law jurisdictions to pay closer attention to the question of method and to experiment with possible ways to improve their existing method of using cases.

In addition, it is highly desirable that judges shed more light on their judgments on the real considerations that shape the way they treat previous cases by, among other things, providing more elaborate and honest reasoning and argumentation in their judgments. In this context, introducing a strict form of doctrine of precedent may not be a wise move, as doing so is likely to induce judges to avoid substantive discussion of previous cases in judgments by resorting to formalistic and technical argumentation. Perhaps more elaborate and honest reasoning and argumentation in judgments with regard to the use of previous cases is not something to be (easily) achieved by imposing legal sanctions under a strict or conditional doctrine of precedent.\(^{749}\) After all, the findings of this study suggest that the fact that judges in the Netherlands no longer conceal the influence of previous cases on judicial deliberation has not been induced by a change in legislation, but is related to a gradual change of mentality among the key players in law with regard to the justification of the lawmaking role of the judge and the desirability to have cases as a source of law.\(^{750}\) Accordingly, more elaborate and honest reasoning and argumentation in judgments with regard to the use of previous cases may very well depend on further changes in the mentality of the key players in law rather than the introduction of a doctrine of precedent.

8. Concluding remarks

The insights presented in this chapter are diverse. They touch upon various topics such as case publication, the role of legal scholars, explicit recognition of cases as a source of law, a possible trend of convergence between the civil law and the common law legal families, case law method and the desirability of adopting the doctrine of precedent in civil law jurisdictions. In substance, there does not seem to be a common theme that runs through all these topics. However, the insights presented in this chapter do have one thing in common, i.e. this study would not have arrived at such insights if it had not questioned and broken away from the dominant approach in the existing literature, which studies the role of cases in civil law jurisdictions from the perspective of the common law doctrine of precedent by focusing chiefly, if not solely on the question how judges treat previous cases in court practice.\(^{751}\)

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\(^{748}\) Komárek 2013.

\(^{749}\) See e.g. Adams 2007, p. 175 and Drion 2014.

\(^{750}\) See chapter three of this study.

\(^{751}\) Komárek observes rightly that there is a “dominance of the common law paradigm” in the existing literature on case law method, see Komárek 2013, p. 150. The common law paradigm also seems to dominate in the existing literature that studies the role of cases in civil law
At the outset, it was pointed out that concepts such as "stare decisis" or "precedent" would not be used to analyse or describe the way cases fulfil the role of a source of law in the Netherlands and in other civil law jurisdictions, for doing so might cause the readers to, consciously or unconsciously, project a common law understanding of precedent onto the functioning of cases as a source of law in civil law jurisdictions. Subsequently, this study developed the concept of case law mechanism and a new analytic framework, which broadened the scope of investigation from the way judges use cases in court practice to include other aspects such as case publication and the use of cases in legal research and in legal education. If this had not been developed, this study would most probably not have been an in-depth investigation into the way cases are published in the Netherlands and would hence most probably not have reflected on the soundness of the assumption that case publication is a mere technical matter. Similarly, if this study had not broken away from the focus on judges and if it had not broadened the scope of investigation to also include the way legal scholars use cases, it would probably not have been able to discover the subtle ways through which legal scholars influence the development of case law and would hence probably not have been able to question the tendency in the existing literature to de-emphasize the influence of legal scholars on case law in civil law jurisdictions. The last paragraph of the final conclusion of this study will further reflect on this methodological point and will make an appeal to legal scholars to seriously consider the soundness of the dominant common law paradigm in the existing literature related to the role of cases in civil law jurisdictions and to create more neutral and suitable analytic tools to explore this topic.

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752 Komárek 2012, p 54.