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 6

Case law mechanism, insights for China
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1. Introduction

As has been analysed in the previous chapter, the Case Guidance System alone would probably not be sufficient to adequately solve the problems that it is intended to address. A fundamental problem is that, as the previous chapter revealed, due to the lack of an institutionalized system through which societal norms can move bottom-up to become part of the national legal system, the legislature in China bears virtually all the burden and responsibility to make the law not only adequate and certain, but at the same time also feasible and adaptable. This is an extremely difficult, if not impossible task for the legislature in such a large and fast-developing country as China with a unitary legal system where lawmaking is largely a top-down process dominated by a relatively small group of powerful people. The Case Guidance System does not significantly change all this, as this new legal institution also works top down and runs through a single actor, i.e. the judiciary, without engaging a broader system of research and education that spreads cases beyond the confines of the court system.

Another reason for this study to doubt whether the Case Guidance System alone would be adequate is that, due to its rigid and time-consuming case selection procedure, it is unlikely that the Case Guidance System would be able to produce a significant amount of guiding cases that can satisfy the need for leading cases in court practice across China. This means that the vast majority of cases will not be chosen as guiding cases and may thus be excluded from the Case Guidance System. This study submits that it can be very helpful to make effective use of the vast body of unselected cases in order to supplement the Case Guidance System and to mitigate the limitations of its top-down case selection scheme.

For an optimal use of the vast body of unselected cases, this study argues that it is very important to look beyond the courts and to mobilize other actors to further strengthen and develop not only the Case Guidance System, but also other relevant institutions and practices. It is, for example, important to keep investing in and improving case publication in China. More importantly, this study argues that it is

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958 See the last paragraph in the previous chapter that reflects on the limitations of the Case Guidance System.
959 Van Rooij 2006, p. 47.
960 Van Rooij 2006, p. 44-49.
961 I wish to thank Van Rooij for inspiring me to derive these insights from the data presented in the previous chapter.
962 This chapter will not elaborate on case publication. This is not only due to limited time and resources, but also because the Chinese judiciary has been making increasing efforts to enhance case publication in recent years. A noteworthy and positive initiative in this regard is that at the beginning of 2014 the Supreme People’s Court launched a website “Judicial Opinions of China” (中国裁判文书网, Zhongguo Caipan Wenshu Wang, http://www.court.gov.cn/zgcpwsw/bj/), where all courts in China are supposed to publish all their judgments except those that satisfy one of the conditions not to be published as specified in Art. 4 of the Supreme People’s Court’s Rules on Internet Publication of Judgments of People’s Courts (最高人民法院关于人民法院在互联网公布裁判文书的规定, Zuigao Renmin Fayuan Guanyu Renmin Fayuan zai Hulianwang Caipan Wenshu de Guiding), see Supreme People’s Court of the People’s Republic of China 2013. Many courts have already been using this website to publish judgments. It is, however, nearly impossible to ascertain whether the courts that have been publishing judgments on this website do indeed adopt an active case publication policy and faithfully implement the Supreme People’s Court’s Rules on
crucial for Chinese scholars to conduct systematic research into cases, and that legal education also has a meaningful role to play in the development of a well-functioning case law practice in China. The following two paragraphs will reflect on the case law mechanism in the Netherlands and explore the possible contribution by legal scholars and legal education in China in greater detail. The last paragraph of this chapter will further reflect on the experiences with case law in the Netherlands and add some final observations and remarks that may be helpful for enhancing the case law practice in China.

2. Possible contributions by legal scholars to the development of case law in China

In the case law debate in China there is a clear emphasis on the role of courts and judges, as the debate chiefly focuses on questions such as which courts should be authorized to select cases, what kind of criteria judges should use to select cases and what kind of force should be attributed to selected guiding cases in court practice. This study does not deny that courts and judges do have an important role to play in the functioning of case law, but it would be unwise to overlook the contribution that legal scholars can make to the development of a well-functioning case law mechanism. In the Netherlands, for example, legal scholars play an important role both in the publication and in the utilization phase of the case law mechanism. This study argues that for the development of case law in China, it can be very helpful if Chinese legal scholars get involved and conduct similar research into cases as their colleagues in the Netherlands do. This argument is not based on copy-paste reasoning, i.e. Dutch scholars’ research into cases makes a contribution to the functioning of the case law mechanism in the Netherlands, therefore Chinese scholars should adopt this practice. Instead, this argument is based on an analysis that consists of three steps. First, this study explores why extensive and systematic scholarly case research constitutes an important component of the case law mechanism in the Netherlands. Then it seeks to ascertain whether similar needs for scholarly case law research also exist in China. The final step is to assess whether it is feasible for Chinese legal scholars to contribute to the development of case law in China by doing systematic and extensive research into cases. Based on the answers to these three questions, this study argues that it is highly desirable for Chinese legal scholars to conduct systematic and extensive research into cases and to integrate such research results in their publications such as journal articles, handbooks and textbooks.

While exploring the question why scholarly case law research is an important component of the case law mechanism in the Netherlands, this study wishes to make a comparison between enacted laws and case law. When it comes to the functioning and development of enacted laws in codified legal systems, scholarly efforts to systemize, interpret and evaluate legislative provisions are commonly accepted as valuable in many of these legal systems. Comparing the characteristics of enacted laws with those of case law reveals that, for the functioning and development of case law in

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963 See the paragraph that reviews the evolution of China’s Case Guidance System in the previous chapter.
964 See chapter one and chapter two.
965 See e.g. Yiannopoulos 1974, p. 82-83, David 1984, p. 142-144, Vranken 2005, p. 120 and De Cruz 2007, p. 72.
codified legal systems, scholarly efforts to interpret, systemize and evaluate cases are equally needed as, if not more necessary than, their efforts to interpret, systemize and evaluate enacted laws.

A similarity between enacted laws and case law is that they both need systemization. Enacted laws need to be systemized, because it is hardly avoidable that the vast body of legislation in a codified legal system may contain conflicting provisions, and the relationship among various legislative provisions is not always self-evident.\textsuperscript{966} The degree of systemization among previously decided cases is lower than that among legislative provisions. Whereas enacted laws in codified legal systems are usually drafted in a more or less systematic fashion, published cases in their raw form are mere \textit{ad hoc} decisions in individual disputes. Moreover, unlike the legislature which enjoys a fairly high degree of discretion as to what to lay down in a piece of legislation, judges are often restricted in their decision-making by, among other things, the specific facts of the case as well as the claims and defences submitted by the litigating parties.\textsuperscript{967} Accordingly, it is not surprising that judicial lawmaking takes place in a haphazard or even accidental way. It can take a series of cases that have a timespan of years or even decades to develop a set of more or less comprehensive rules that address a specific legal issue.\textsuperscript{968} Therefore, in order to correctly appreciate the value of a particular previous court decision for the solution of a new legal problem, it is crucial to put the earlier decision in a proper context that involves not only relevant legislative provisions, but also related cases. Given the vast amount of previously decided cases and the heavy workload of judges,\textsuperscript{969} it is unrealistic to expect judges to do all the work of systemization by themselves. Nor is it, due to similar reasons, realistic to expect the legislature or practising lawyers to fulfil a major role in systemizing previous cases. Against this background, it is not surprising that legal scholars in the Netherlands have been playing a crucial role in case systemization.

Another similarity between enacted laws and case law is that they both need interpretation, although the specific techniques to interpret them are not the same.\textsuperscript{970} Scholarly efforts to interpret legislative provisions have long been appreciated as valuable in the Netherlands and many other codified legal systems.\textsuperscript{971} Again, given the heavy workload of judges, it is unlikely that they would have sufficient time to thoroughly analyse the meaning of each legislative provision that is susceptible to multiple interpretations in each dispute brought to court. Similarly, it is unlikely that judges would have sufficient time to thoroughly analyse and ascertain the essence of each previous case that is relevant for the resolution of a legal dispute in court. Scholarly efforts to explore the various interpretations of previous cases and their debates on the merits of each possible interpretation offer valuable assistance to judicial decision-making.\textsuperscript{972} Thanks to scholarly interpretation of cases, judges no longer have to start from scratch while trying to ascertain the essence of a previous case. They can, for example, adopt a scholarly interpretation that has won the most support in scholarly

\textsuperscript{966} See e.g. Ferdinandusse 2001, Heemskerk 2005, p. 129 and Raad van State 2013, p. 43.
\textsuperscript{967} Vranken 1995, p. 9.
\textsuperscript{968} See e.g. Owisia 1991, p. 43 and Giesen 2008, p. 565.
\textsuperscript{969} See Fruytier e.a. 2013.
\textsuperscript{970} For a comparison between the techniques of interpreting legislation and those of interpreting cases see Snijders 2007.
\textsuperscript{971} Scholarly works in the early decades after the codification in the 19th century in France and the Netherlands, for example, were largely comments on legislative provisions that sought to reveal the meaning of the commented legislation, see Scholten 1931, p. 237-240.
\textsuperscript{972} See interview with judges NL20131008-1, NL20131008-2, NL20131017, NL20131021, NL20130122 and NL20131031.
debates. Of course, they can also make other choices, such as developing a new interpretation on the basis of the existing scholarly interpretations or adopting a scholarly interpretation that, although not having won the most support in scholarly debates, offers the most desirable solution in a specific dispute. In any event, it seems fair to say that scholarly interpretations of cases offer valuable insights for judicial decision-making.

Still another aspect in which enacted laws and case law are similar is that neither of them can be flawless and both of them need to be constantly improved. One of the core activities of legal scholars in the Netherlands and other codified legal systems is to critically evaluate the work of the legislature by, among other things, checking for inconsistencies, ambiguities and loopholes in legislation. There is no reason to assume that the work of judges never contains defects. No more than the legislature can judges foresee all the consequences of their decisions. Nor is it uncommon that judgments contain imprecisely drafted expressions that cause ambiguities. Legal institutions such as appeal and cassation can undoubtedly correct some mistakes in judicial decisions. However, it is unrealistic to expect the judiciary to remove all flaws in judicial decision-making through appeals and cassation. After all, even the highest judges are capable of making mistakes or overlooking certain consequences of their decisions. Given such limitations of judicial work, it is not surprising that scholarly efforts to critically evaluate cases make an important contribution to the functioning of case law in the Netherlands. Just as their critical examination of legislation helps the legislature to improve the quality of enacted laws, scholarly evaluation of cases offers valuable feedback to judges and stimulates them to improve the quality of adjudication, which leads to better production and better application of cases in court practice.

Having explored why scholarly efforts to systemize, interpret and evaluate cases play an important role in the case law mechanism in the Netherlands, this study continues to examine whether such needs also exist in China. Do court decisions in China constitute a coherent and easy to understand system so that no efforts of systemization would ever be required? Are court decisions in China drafted in such clear language that they would never be susceptible to different interpretations? It is difficult to imagine that these questions could be answered affirmatively. After all, cases produced by Chinese judges in their raw form are also mere ad hoc decisions in individual disputes. Furthermore, it is not difficult to find examples where Chinese judgments contain ambiguities that may give rise to different interpretations. Obviously, systemization and interpretation of cases are equally needed in China.

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974 See e.g. Oldenhuis 2010 and Hartlief 2011.
975 See e.g. Hartlief 2008, p. 896 and Kottenhage 2010b.
976 In fact, whether or not appeal judges get a chance to correct mistakes made in first instance depends on whether at least one of the litigating parties initiates an appeal procedure. Whether the Supreme Court gets a chance to correct mistakes made by lower judges primarily depends on whether at least one of the litigating parties files a cassation appeal, although the law does allow the Procurator General to initiate a special cassation procedure called “cassatie in het belang der wet” (cassation in the interest of the law) according to Art. 78 Para. 1 Wet op de rechterlijke organisatie (Judicial Organisation Act).
977 See e.g. Schutgens 2009, p. 854 and Oldenhuis 2010, p. 2460.
978 See the paragraph on the role of legal scholars in the case law mechanism of the Netherlands in chapter two.
979 See e.g. Gechlik & Dai 2014.
Is it possible, one might ask, that Chinese judges are able to fulfil this need by themselves so that no scholarly efforts to systemize and interpret cases would be needed? After all, contrary to the situation in the Netherlands, many Chinese courts have a research department staffed by judges who are allowed to do research without the burden to try cases. In fact, research and trial judges in China have been making important contributions to the experiments with and the development of case law in China since the 1980s by, among other things, selecting cases for publication and by organizing them in a certain form. Some of them even take the initiative to write explanatory notes to published cases. Why would scholarly efforts to systemize and interpret cases be needed, if Chinese judges are doing such work?

The efforts by Chinese judges to systemize and interpret cases are certainly more than welcome. However, given the vast amount of cases produced in China each year, it is doubtful whether efforts by judges alone would be sufficient. The core task of the majority of Chinese judges is to resolve disputes brought to court, instead of conducting systematic and extensive legal research. Accordingly, the time that they are able to invest in case research is likely to be rather limited. Even the supposedly full-time research judges have to spend a lot of time handling bureaucratic tasks, such as drafting speeches for the leadership of the courts and processing court statistical information. Consequently, their ability to fulfil the need for case systemization and interpretation should not be overestimated.

In addition to scholarly efforts to systemize and interpret cases, developing a well-functioning case law mechanism in China also requires scholarly efforts to evaluate cases. No more than their colleagues in the Netherlands are Chinese judges able to foresee all possible consequences of their decisions or to avoid making mistakes entirely. The Chinese judiciary seems to be fairly aware of the fact that not all flaws in judicial work can be eliminated through appeal or other formal institutions within the courts. The leadership of the Supreme People’s Court, for example, highly emphasises the need to submit the work of the courts to public oversight.

980 Interview CN20130408.
981 Two examples of case reports selected and edited by judges in China are China Law Reports (中国审判案例要览, Zhongguo Shenpan Anli Yaolan) and Selection of Cases Decided by People’s Courts (人民法院案例选 Renmin Fayuan Anlixuan), see http://njc.chinacourt.org/old/jxky/spyl.php.
982 Some cases published in Selection of Cases Decided by People’s Courts (人民法院案例选 Renmin Fayuan Anlixuan) are accompanied by comments written by judges, see Song 2009.
983 According to the statistics provided by the Supreme People’s Court, all courts in China handled 12,396,632 cases in 2012, see http://www.court.gov.cn/qwfb/sfsj/201312/t20131213_190137.htm.
984 Interview CN20130408 and Chen 2012a.
985 In fact, even guiding cases selected by the Supreme People’s Court are not completely flawless. Guiding case no. 1, for example, is about the question whether a clause in a brokerage contract is enforceable, which specifies liquidated damages in the event that the client, after obtaining some information and service from the broker, concludes a transaction with another broker or party. The judgment cites Art. 424 of the Contract Law (合同法 Hetong Fa) of China as its legal basis. This article only gives a definition of brokerage contract, but says nothing about the issue in question. A more relevant legislative provision and more accurate legal basis for the judgment is in fact Art. 426 of the Contract Law, which, although rather generally, specifies the conditions for the client’s obligation to pay for the broker’s service. I wish to thank Dr Jin Zhenbao for contributing the analysis on this shortcoming in guiding case no. 1.
986 Supreme People's Court of the People's Republic of China 2009 and Supreme People’s Court of the People’s Republic of China 2014, paragraph 7.
evaluation by the general public is accepted as valuable for the improvement of judicial work, it seems all the more reasonable to accept that evaluation by legal scholars, i.e. a group of people with legal expertise who operate in a academic forum, can offer valuable feedback to the courts in China and can stimulate them to improve the way they produce and use cases.  

Of course, the mere fact that scholarly efforts to systemize, interpret and evaluate cases are desirable in China does not in itself mean that it is possible for Chinese legal scholars to contribute to the development of case law in China. One possible obstacle for Chinese legal scholars to fulfil a substantial role in developing case law in China, one might argue, is that too few cases are published in China so that legal scholars do not have sufficient materials to work with. However, it should be pointed out that the mere fact that not a large volume of cases have been published in China does not have to be an insurmountable obstacle for Chinese legal scholars to contribute to the development of case law. The case publication rate in the Netherlands, after all, has long remained less than half a per cent. Even with the latest Internet technologies, the case publication rate in the Netherlands still has not exceeded 2%. Such a low case publication rate has not prevented legal scholars in the Netherlands from conducting meaningful case research. It is difficult to see why a low case publication rate in China would make scholarly case research impossible. In any event, the possibilities that Chinese legal scholars nowadays have do not seem to be much worse than what their Dutch colleagues had in the early decades of the 20th century. Since the 1980s, many courts in China have adopted the practice of selecting and publishing cases, either on paper or on their websites. At the beginning of 2014, the Supreme People’s Court launched a website where all courts in China are required to publish in principle all decided cases except those that meet the conditions not to be published. In addition, Chinese legal scholars can nowadays make use of online commercial legal databases in China that contain a reasonable collection of cases. Therefore, it seems fair to say that, although the case publication practice in China is still far from optimal, the situation is not so bad that no meaningful scholarly case research would be possible in China. Another obstacle, one might argue, is that, contrary to the elaborate judgments in common law jurisdictions, Chinese judgments are drafted in a rigid and formalistic style, which rarely contains substantial legal reasoning or analysis, so that there is not much for legal scholars to find in such judgments. This, again, does not have to render scholarly case research impossible. Dutch judgments also used to be drafted in a rigid and formalistic style. The Lindenbaum/Cohen case decided by the Supreme

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987 In fact, the Chinese judiciary is increasingly appreciating the value of legal scholars. This is reflected in, among other things, a recent initiative of the judiciary to appoint law professors as part-time judges, see Wang & Gong 2013.
988 For critical views on case publication in China see He 2005 and He 2006.
989 See the paragraph on commercial case publication in the Netherlands in chapter one.
990 Ibid.
991 See e.g. Zhang & Zhu 2007, p. 66-67 and Han 2009.
992 The website is called “Judicial Opinions of China” (Zhongguo Caipan Wenshu Wang), see http://www.court.gov.cn/zgcpwsw/. For the rules on case publication on this website see Supreme People’s Court of the People’s Republic of China 2013.
994 For critical views on insufficient legal reasoning in Chinese judgments see Zong 2009 and Cheng 2012.
Court in 1919, for example, was drafted in such a way that the decision seems to flow naturally from the Civil Code, although in fact the Supreme Court has drastically modified the law of tort by broadening the definition of unlawful act from violation of someone else’s rights and breach of duties imposed by legislations to acts that are to be regarded as improper social conduct according to unwritten law. 996 Even though nowadays citing previous cases in judgments has become a common practice in the Netherlands, Dutch judges still do not seem to have come close to the elaborate and discursive drafting style of their counterparts in common law jurisdictions. 997 Despite the relatively brief and formalistic judgment drafting style, Dutch legal scholars have been able to retrieve valuable information from cases by, among other things, carefully analysing the legal issues involved in the disputes and by comparing the analysed cases with relevant previous court decisions. Similarly, the fact that Chinese judges seem reluctant to shed much light on how they reach their decisions does require legal scholars to develop methods and strategies to analyse cases drafted in a formalistic fashion, but it does not necessarily mean that there is nothing for Chinese legal scholars to discover in Chinese judgments.

Still another obstacle could be that Chinese legal scholars do not have sufficient incentives to carry out extensive and systematic case research, because such research is unlikely to be treated seriously by the courts and hence do not help them advance their career. 998 One may, for example, argue that scholarly case research in China would be useless, because in court practice Chinese judges do not treat cases as authorities and will therefore not pay attention to scholarly case research. This argument, however, has a chicken-and-egg flavour. In China there is currently indeed a correlation between the fact that Chinese judges do not treat cases as authorities on the one hand, and that scholars do not carry out extensive and systematic case research on the other. However, it is not convincing to infer that the former caused the latter. It is not unthinkable that cases have not been able to fulfil the role of legal authorities in court practice in China, because, among other reasons, Chinese legal scholars have not yet produced a sufficient body of literature that systemizes, interprets and evaluates previous cases. In fact, the findings of this study on the way case law functions in the Netherlands demonstrate exactly how important scholarly case research is for cases to fulfil the role of a source of law. 999 Given the possibility that the causal relationship could be the other way round, it is not obvious why one should assume that judges in China would never pay serious attention to scholarly case research, even if Chinese legal scholars could produce a serious body of literature that systemizes, analyses and evaluates previous cases. A more fundamental obstacle could be that in an authoritarian country such as China, legal scholars do not have sufficient space to develop case law. 1000 In a country where the freedom of expression is not guaranteed, one may argue, academic freedom may be threatened, so that legal scholars are not able to pursue unhindered case research. 1001 This argument touches upon a crucial difference between the Netherlands

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996 Van Maanen 2009.
997 For criticisms on legal reasoning in judgments of Dutch courts see Bruinsma 1988a, p. 120 and Drion 2009.
998 See interview CN20111205.
999 See the paragraph in chapter two on the contribution of legal scholars to the case law mechanism in the Netherlands.
1000 For discussions on the authoritarian nature of the regime in China see Weatherley 2006 and Stockmann & Gallagher 2011.
1001 For discussions on academic freedom in China see Shen 2000 and Wang 2012a.
and China, i.e. Dutch legal scholars operate in a constitutional democratic state where they are free to pursue their academic interest and to express critical opinions on court decisions, whereas such freedom is not guaranteed in China. However, the restrictions imposed upon Chinese legal scholars are not of such a nature that any type of scholarly research into any type of cases would be impossible. Although Chinese scholars may have to exercise a certain degree of self-censorship by, for example, avoiding certain legal issues that the regime deems sensitive\textsuperscript{1002} or by softening their criticism on certain court decisions, it is still possible for them to conduct at least meaningful descriptive case research in many areas of the law that are not deemed sensitive. In any event, if Chinese legal scholars are able to conduct research on enacted laws in non-sensitive areas of the law, it is not obvious why they would not be able to do research into cases in these areas.

In conclusion, there are undoubtedly considerable challenges for legal scholars to carry out systematic and extensive case research in China, such as a low case publication rate, formalistic judgment drafting style, old habits among judges that neglect to pay proper attention to previous cases and an authoritarian environment that does not guarantee academic freedom. However, none of these obstacles is of such a nature that it would render scholarly case research impossible or meaningless in China. The real question is probably whether legal scholars in China are\textit{ willing} to invest their time and energy in systematic and extensive case research. After all, combing through hundreds or even thousands of published cases to find judgments that are possibly relevant for the solution of legal problems and for the development of the law, ascertaining the essence of those cases and systemizing them could be tough work, whereas such work, given the old habits among judges or even legal scholars that do not pay particular attention to the possible relevance of previous cases, may not be immediately helpful for legal scholars to gain prestige or to advance their career. An optimist may, of course, respond to the assumption of such an unwilling or hesitant attitude by interpreting the introduction of the Case Guidance System in 2010 as a grand opportunity for Chinese legal scholars to intensify case research. It is possible that, one may argue, this new case law institution will have the effect of stimulating the case law awareness among Chinese judges, so that they will begin to pay more attention to relevant previous cases in court practice, which may subsequently create fresh incentives for Chinese legal scholars to generate case research products in order to meet the rising demand in legal practice for usable case law materials. However, it is not unthinkable that the Case Guidance System triggers an opposite effect. A narrow understanding of the Case Guidance System may lead Chinese judges to believe that\textit{ only} cases selected by the Supreme People’s Court through the Case Guidance System have special normative force, so that all other cases can be ignored, including those highlighted in scholarly writings. Such an attitude may consequently discourage legal scholars from exploring and systemizing the vast body of unselected cases.

It seems fair to say that Chinese legal scholars are now facing a crucial moment for their role in shaping the future case law practice in China. If Chinese legal scholars do not start to research the vast body of unselected cases and extract materials that can provide valuable assistance to legal practice from the unselected cases, their future role in the development of case law in China may become limited.\textsuperscript{1003} Once a narrow

\textsuperscript{1002} For a discussion on the types of cases that the regimes deems sensitive see Fu & Peerenboom 2010.

\textsuperscript{1003} It should be noted that although the\textit{ Provisions Concerning Work on Guiding Cases} does not explicitly allocate a role for legal scholars in the case selection procedure, some courts do consult prominent legal scholars during the process of case selection for advice, but the
understanding of the Case Guidance System takes root in court practice in China, it may generate a path dependency pattern that has the effect of marginalizing the role of legal scholars. Fortunately, some Chinese legal scholars have already started to conduct case research.\footnote{\textsuperscript{1004} See e.g. articles published in \textit{Case Law Review} (判例评论 Panli Pinglun), an academic journal edited by the China Case Law Research Centre of Nanking University (南京大学中国法律案例研究中心 Nanjing Daxue Zhongguo Falu Anli Yanjiu Zhongxin), available at http://www.njucasereview.com/web/research/review/31_1.shtml.} It is highly desirable that more and more Chinese legal scholars join this initiative to explore possible treasures hidden in the vast body of unselected cases, as the future of a well-functioning case law mechanism in China may very well depend on how efficiently and effectively the vast body of unselected cases is used.

3. Possible contributions by legal education to the development of case law in China

In addition to the role of legal scholars, this chapter highlights the possible contribution of legal education to the development of case law in China. It is highly desirable for law schools in China to enhance the use of cases in legal education, not merely as examples to illustrate abstract legislative provisions, but also as materials that can be used to solve legal problems and to further develop the law.

As explained earlier, in order for cases to fulfil the role of a source of law in a legal system, the way that judges treat previous cases in adjudication must be reasonably predictable.\footnote{\textsuperscript{1005} This passage summarizes what has been said about legal education in the chapter on the utilization of cases in the Netherlands. For a detailed description and sources, see the relevant paragraphs in chapter two.} The findings of this study suggest that in the Netherlands a reasonable degree of predictability as to how judges are likely to treat previous cases is achieved by, among other things, two facts, i.e. judges follow certain common methodological guidelines when using previous cases to solve legal disputes in court and such guidelines are accessible to other players in law such as practising lawyers and legal scholars.\footnote{\textsuperscript{1006} Ibid.} Furthermore, the findings of this study suggest that the way cases are used in legal education in the Netherlands contributes both to the fact that judges follow certain common methodological guidelines with regard to the use of previous cases and to the fact that such methodological guidelines are accessible to other players in law, as the key players in law in the Netherlands such as judges, practising lawyers and legal scholars have all accomplished academic legal education and have received similar case law trainings at law schools.\footnote{\textsuperscript{1007} Ibid.} Throughout their education at law schools, law students are required to learn a large body of cases by heart and to treat these cases as heavy-weight legal authorities.\footnote{\textsuperscript{1008} Ibid.} This body of cases constitutes a common core of case law authorities among law students, which helps to forge a strong awareness among future judges, lawyers and legal scholars that cases are not mere illustration materials, but are capable of carrying a normative force that helps to shape the law.

Through repeated use of cases in the entire curriculum at law schools, law students acquire fundamental case law methodological skills such as analysing, interpreting,
They also learn how to develop legal arguments based on previous cases and how to evaluate the strengths and weaknesses of such argumentation through activities such as moot court and thesis writing. All these case law training activities ultimately cultivate a case law methodological framework among law graduates, which continues to exercise a long-standing influence on their mode of thinking throughout their careers as judges, lawyers and legal scholars. It should be emphasized that this study does not submit that it is the use of cases in legal education that has created a shared case law methodological framework among the key players in law in the Netherlands. It is surely not unthinkable that certain case law methodological approaches had already emerged in legal practice before cases began to be incorporated into university legal education in the Netherlands in the early decades of the 20th century. However, the findings of this study do suggest that legal education is an important link in a chain of possible causes that ultimately contribute to the forming and the strengthening of a shared case law methodological framework among the key players in law in the Netherlands.

If cases were to be used as an effective tool to enhance legal certainty and legal unity in China without losing a desirable degree of flexibility, it is crucial that the way Chinese judges treat previous cases in adjudication must be reasonably predictable. In the current situation, however, it is highly unpredictable how judges will treat cases in their deliberation, even though judges in China occasionally do consult previous cases in court practice and lawyers sometimes do submit cases as part of their argumentation. It is nearly impossible to ascertain from judgments produced by Chinese courts whether previous cases have influenced the judicial decision-making and if so, what factors judges have taken into account to evaluate the relevance of previous cases, as Chinese judges hardly ever cite or discuss previous cases in judgments. Nor is there evidence suggesting that certain thumb rules have emerged in practice as to what types of cases are likely to be followed in court. The introduction of a nationwide Case Guidance System may help to create some clarity to the extent that guiding cases selected through the Case Guidance System may be more likely to be followed in court practice than other cases. However, as stated earlier in this study, the amount of guiding cases is likely to be so limited that they alone will most probably not be able to meet the vast demand of legal practice. Accordingly, it is crucial to exploit the vast body of unselected cases. In order to make effective use of the vast body of unselected cases, it is crucial to develop a shared case law methodological framework among judges, lawyers and legal scholars in China, otherwise the use of unselected cases will remain unpredictable and will consequently

1009 Ibid.
1010 Ibid.
1011 Ibid.
1012 Fockema Andreae 1938, p. 73.
1013 This observation is in particular inspired by Dainow 1966, p. 428.
1014 Flexibility must be highlighted in this context. Enacting very detailed legislation would be able to strengthen legal unity and certainty, but doing so without a proper case law mechanism would render the law inflexible. For a deep analysis on this issue see Van Rooij 2004 and Van Rooij 2006.
1015 See e.g. Research Department of the Supreme People's Court 2007 and interviews CN20111205, CN20110221, CN20110302, CN20110307, CN20110705 and CN20110708.
1016 See Wang 2006, p. 24, footnote 68.
1017 See Research Group of the Higher People's Court of Beijing 2007 and interviews CN20111205, CN20110221, CN20110302, CN20110307, CN20110705 and CN20110708.
1018 See reflections on the Case Guidance System in the previous chapter.
not be able to provide a desirable degree of legal certainty. Of course, studying and further developing legal methodology including methodological guidelines for using cases is an important task of scholarly legal research, but legal education also has a role to play, because proper use of cases in legal education, as the experiences with case law in the Netherlands illustrate, can contribute to the forming of a shared case law methodological framework among the key players in law.

One possible objection could be that the findings of this study do not prove that it is the use of cases in legal education that has created a shared case law methodological framework among judges, lawyers and legal scholars in the Netherlands, as it is possible that a set of methodological guidelines had already evolved in legal practice before cases began to be incorporated in legal education in the Netherlands. One could therefore say that the role of legal education is merely to teach students what has already been long established in legal practice instead of creating something new. Accordingly, one may continue to argue, as no shared case law methodological guidelines have yet been developed in legal practice in China, legal education has nothing to teach.

This argument is unconvincing for a number reasons. First, it overlooks or at least downplays the possibility that, although legal education alone may not be sufficient to create a case law methodological framework among the key players in law, it is still capable of fulfilling the role of a link in a causal chain that ultimately leads to the forming and the strengthening of such a framework. Secondly, the fact that no shared case law methodological framework has yet been established in legal practice in China can be interpreted positively as to mean that law professors, teachers and students have a grand opportunity to fully use their creativity and to experiment with various methodological approaches to use cases that have not been selected through the Case Guidance System. Thirdly, it is highly doubtful whether there is indeed nothing to teach. After all, the Supreme People’s Court has already selected and published a small body of guiding cases. This small body of guiding cases, of course, does not offer sufficient teaching materials that satisfy the need of all the courses taught in a law curriculum. However, the guiding cases can be used at a methodological level, i.e. they can be used as models to teach students how to analyse cases. A careful study of the published guiding cases suggests that the Supreme People’s Court seems to be using a four-step method to analyse cases. The first step is to ascertain the facts of the case. The second step is to identify the core disputed question of law in the analysed case. The third step is to find out and summarize the court’s answer to the disputed question of law and the last step is to ascertain and summarize the reasons why the court has provided this answer. It can be a good exercise to ask students to analyse cases that have not been selected through the Case Guidance System by using this four-step method derived from the guiding cases, and to write case summaries in a similar format as the one adopted by the Supreme People’s Court in the published guiding cases. Moreover, nowadays there are both official court websites in China that publish cases which can be consulted free of charge and online commercial case databases to which many law schools have a subscription. It can be a good exercise to encourage students to search for cases in these databases and to use them in, among other things, moot court and thesis writing. In other words, case law teaching could focus on cases

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1019 See the paragraph in chapter two on the contribution of legal education to the case law mechanism in the Netherlands.
that students need to actively search for and analyse, as this is good legal training. These are but two examples of how the available resources in China can be used in legal education to stimulate students to explore the use of unselected cases and to develop case law methodological skills. If law professors, teachers and students are willing to fully use their creativity, they may find many other possible ways to make meaningful use of cases in legal education in China, so that the fact that no shared case law methodological framework has yet emerged in legal practice does not have to be an insurmountable obstacle.

Another possible objection could be that, if all the law schools in China were to experiment with case law methodological approaches, many different case law methodological approaches could emerge, which would render the use of unselected cases unpredictable. This concern is certainly not groundless, given that there are more than 600 law schools in China. However, it seems to overlook the fact that it can take a long period of time before a shared case law methodological framework evolves and takes root in any legal system. During the long evolution process, it is neither surprising nor undesirable that different methodological approaches exist. Indeed, it can even be healthy for the development of a shared methodological framework to have various approaches compete with each other. Such a competition can lead to the survival of the fittest. Or, if the courts in China would like to play a decisive role in case law method engineering, competing case law methodological approaches developed by various law schools can at least offer candidate options for the courts to choose. In fact, the evolution of the nationwide Case Guidance System has experienced a period where various courts in China experimented with their own methods of selecting, publishing and using cases. These experiments have offered valuable materials to the Supreme People’s Court for its design of a nationwide Case Guidance System. Similarly, competing methodological approaches to use unselected cases developed by different law schools can be a constructive step towards a more or less standardized nationwide case law methodological framework.

Still another challenge for making effective use of cases in legal education in China is that systematic and extensive scholarly research into published previous cases is still relatively rare in China. The findings of this study indicate that two types of cases are used in legal education in the Netherlands, i.e. cases that students are assigned to study either due to their normative impact as leading cases or as illustration materials on the one hand, and cases that students must actively search for and apply to complete assignments. Systematic and extensive scholarly research into previous cases is helpful for the choice of the first type of cases, i.e. such research can help law professors and law teachers in deciding which cases they would assign students to study. Without systematic and extensive scholarly case research, it could be difficult for law professors and teachers to, among other things, ascertain which cases actually represent a dominant approach in court practice across China towards a certain legal issue and should therefore be assigned as studying materials. To this challenge this study does not

1022 See Sun 2011.
1023 See the paragraph on the evolution of China’s Case Guidance System in the previous chapter.
1024 Shen 2009a, p. 5.
1025 This situation is gradually changing in recent years. See e.g. the articles published in Case Law Review (判例评论 Panli Pinglun), an academic journal edited by the China Case Law Research Centre of Nanjing University (南京大学中国法律案例研究中心 Nanjing Daxue Zhongguo Falu Anli Yanjiu Zhongxin), available at http://www.njucasereview.com/web/research/review/31_1.shtml.
have a proposal for a quick solution, as whether this challenge can be met may very well ultimately depend on the willingness of legal scholars in China to engage in systematic and extensive case research. This is in fact yet another reason why this study stresses the importance of scholarly case research for the development of case law in China and why this study makes an appeal to Chinese legal scholars to intensify their efforts to systemize and analyse the vast body of cases that have not been selected as guiding cases through the Case Guidance System.

To summarize, this study submits that, despite the many challenges, it is desirable for law schools in China to enhance the use of cases in legal education, as proper use of cases in legal education may help raise the case law awareness among law students and it may help them develop the necessary methods and skills to use cases to solve legal problems and to develop the law. This study does not argue that Chinese law schools should copy the way cases are used at Dutch law schools or the case law education mode in any other legal system. Instead, it encourages law schools in China to experiment with their own methods of using cases and to engage in an open debate on the merits of competing case law methodological approaches, as this can be an important step towards forming a common methodological framework in China with regard to the use of previous cases to solve legal problems, which in its turn may help to enhance legal certainty without losing a desirable degree of flexibility by improving the predictability as to how judges are likely to treat previous cases in adjudication.

4. Some further observations

4.1 Methodological observations

The case law debate in China since the 1980’s has led to a considerable body of literature. Comparative law is a frequently used method in this body of literature. One of the methodological choices that each comparative law research project needs to treat carefully is the selection of legal systems/jurisdictions to be studied and compared. When reviewing the Chinese-language literature that adopts the method of comparative law to participate in the case law debate in China, one could hardly avoid the impression that there is a selection bias, i.e. the experiences with case law in common law jurisdictions tend to receive more attention than the role of cases in civil law jurisdictions.

It is doubtful whether it is wise for Chinese legal scholars and other actors that participate in the case law debate to focus heavily on common law jurisdictions in order

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1026 The author of this study searched for 案例指导(Case Guidance) and 判例(Precedent) in the largest academic online database in China 中国知网(China Knowledge Resource Integrated Database www.cnki.net. The search rendered nearly 2200 journal articles and dissertations that have been published since 1980.
1029 This is of course not to say that the role of case law in civil law jurisdictions with case law has been totally ignored in the Chinese legal literature. For publications that refer to the role and functioning of case law in civil law jurisdictions see e.g. Zhang 2002a, Zeng 2004, Pan 1998 and Zhang 2008a. It should, however, be noted that accounts of case law in civil law jurisdictions are generally (much) less detailed and in-depth than studies on case law in common law jurisdictions in the Chinese legal literature that uses comparative legal research as a method to participate in the case law debate. Compare e.g. literature cited in this note with Zhong 1989, Liang 1991, Meng 2004, Jiang 2004, Chen 2004, Lin 2009 and Lü 2010.
to gain comparative insights for China to enhance the use of cases. At first sight, it seems more than natural for Chinese researchers to pay close attention to the functioning of case law in common law jurisdictions, not only because these jurisdictions have a long tradition of using cases to solve legal disputes and to develop the law,1030 but also due to the fact that in common law jurisdictions there is a body of literature on the method and techniques of using cases.1031 This, however, does not mean that the experiences with case law in civil law jurisdictions are less relevant or valuable for China and therefore deserve less attention. In fact, as far as the tradition is concerned, it should not be neglected that before the codification wave in the 19th century, continental European civil law jurisdictions also had a long history of using previous cases to solve legal disputes and to further develop the law.1032 Another reason to doubt the wisdom of focusing primarily on common law jurisdictions as a source to draw inspiration for China to enhance the use of cases is that the current Chinese legal system seems to be much more influenced by and to bear more similarities with the continental European civil law legal family than the common law.1033 Moreover, continental European civil law legal systems have had a stage in their history of development where, similar to today’s China, cases were explicitly rejected as a source of law, and where courts did not use cases in their argumentation, legal scholars did not care to analyse cases in their writings and law students were not required to study cases,1034 whereas nowadays the importance of cases has reached such an extent in these jurisdictions that they have become a source of law in practice.1035 Given these facts, it seems fair to say that, if comparative law is accepted as a useful method in the case law debate in China, the experiences with case law in continental European civil law jurisdictions are at least equally relevant as the functioning of case law in common law jurisdictions, so that a selection bias in favor of common law jurisdictions may not be conducive to a balanced debate.

By conducting an in-depth investigation into the way cases fulfil the role of a source of law in a continental European civil law jurisdiction, i.e. the Netherlands, this study wishes to offer a fair amount of descriptive materials for Chinese researchers that are capable of reading English to examine and to reflect upon. It is hoped that the data provided by this study may be useful for Chinese researchers to gain fresh insights that could be useful for the case law debate in China. It is also hoped that this study will arouse the interest among Chinese researchers to carry out more research into the way case law functions in civil law jurisdictions.

4.2 Misconceptions on the role of cases in civil law jurisdictions

As has been pointed out in the previous sub paragraph, comparative law has been used as an important method in the Chinese-language literature that participates in the case law debate in China. When closely examining this body of literature, one would notice some curious assumptions underlying some of the comparative law arguments advanced in the debate. One of the arguments to justify the use of cases as an

1030 See e.g. Frederick 1959, Cross & Harris 1991 and Cartwright 2007, p. 3-13.
1033 See e.g. He 2010 and Xu 2012.
instrument to enhance legal certainty and legal unity in China, for example, is that doing so would fit a global trend of convergence between the civil law and the common law where each legal family learns from the other’s strong points to supplement its limitations. Such an argument seems to involve at least two assumptions. First, China is assumed to be a civil law jurisdiction, or at least a jurisdiction with a codified legal system that bears considerable similarities with civil law jurisdictions. Another assumption appears to be that case law is originally something alien to the civil law legal family and that it is through a process of convergence where the two legal families learn from each other that cases come to fulfil an increasingly prominent role in civil law jurisdictions.

This study does not wish to extensively discuss the first assumption, because although one can doubt whether China can be said to belong to the civil law legal family, it seems at least acceptable to say that China does have a codified legal system that bears similarities with civil law jurisdictions. What this study does wish to point out is that serious doubt can be cast on the second assumption, because it is neither true that cases are alien to civil law jurisdictions, nor justified to infer from a possible trend of convergence between the civil law and the common law that it is due to the influence of the common law doctrine of precedent that cases become influential in civil law jurisdictions.

As has been explained in the previous subparagraph, before the codification wave in the 19th century, civil law jurisdictions already had a long history of using cases as legally relevant materials to solve disputes in court and to further develop the law. The codification movement in the 19th century did interrupt this long tradition, but this interruption does not justify the conclusion that case law is originally something alien to civil law jurisdictions. Moreover, it is highly doubtful whether the fact that cases nowadays fulfil the role of a de facto source of law in civil law jurisdictions is indeed induced by efforts to learn from the common law doctrine of precedent. The findings of this study suggest that, at least in the Netherlands, it is neither through formal instruments such as legislation or court orders that explicitly attribute binding force to certain types of cases upon future judges, nor through comparative legal research that draws inspiration from the common law doctrine of precedent that cases became influential in practice and eventually grew into a source of law. Rather, it was the fact that cases in practice became influential in the first place that prompted legal scholars, the legislature and judges to reflect upon the soundness of some of the assumptions underlying the codification movement in the 19th century and to adjust their views towards the question whether cases should be accepted as a source of law.

1037 See e.g. He 2010 and Xu 2012.
1038 The Chinese term “相互借鉴” (learning from each other) is frequently used in the body of Chinese-language literature on the case law debate, see e.g. Guo 2004, p. 147, He & Hong & Sun 2008, p. 140, Xu 2009, Jiang 2011a and Yuan 2014. The use of this term in this context is misleading, as this term does not merely describe a factual converging trend, but also implies a pattern of influence and a process of intentional learning. Some Chinese authors even explicitly indicate that legal scholars and judges in civil law jurisdictions turned to the doctrine of precedent in common law jurisdictions for inspiration in order to find remedies that could compensate the limitations of codification, see Pan 1998, p. 52 and Kong 2004, p. 96.
1039 See e.g. Drion 1968b, p. 149-154 and Dawson 1970.
1040 See chapter three.
1041 Ibid.
legally relevant materials to solve legal problems is a practice that more or less grew naturally in civil law jurisdictions out of a need in practice for proper instruments to supplement the limitations of codes and legislation,\textsuperscript{1042} rather than that case law is something that is originally alien to civil law jurisdictions but has been later imported from common law jurisdictions during the 20\textsuperscript{th} century. Accordingly, this study is inclined to concur with the view of Komárek that the increasing importance of cases should perhaps not be seen as an instance of civil law’s convergence with common law, but rather as the coming back of cases from illegality to a place it once occupied in the civil law tradition as an important type of law.\textsuperscript{1043}

This study wishes to clarify this point of misunderstanding, because doing so may be relevant for the practice of using cases in China. One of the arguments against using cases as legally relevant materials for solving disputes in court and for further developing the law in China tends to rely on a form of syllogistic reasoning, i.e. the conclusion that judges do not need to treat cases as legally relevant materials in court is drawn from two propositions: case law is alien to civil law jurisdictions and unique to common law as the major premise and China is a civil law jurisdiction or at least a jurisdiction with a codified legal system that bears more similarities with civil law jurisdictions than common law jurisdictions as the minor premise.\textsuperscript{1044} The findings of this study combined with insights drawn from some of the existing English-language comparative law literature\textsuperscript{1045} indicate, as illustrated in the previous passage, that the major premise is not true, so that doubt can be cast on the soundness of the conclusion that judges in China are justified to ignore outright and do not have any obligation to respond to arguments submitted by litigating parties or their counsels that invoke or rely on similar previous cases.

One may argue that the introduction of the Case Guidance System has already put an end to the debate as to whether cases can be used in adjudication in China, because if the Supreme Court did not believe that cases should be treated as legally relevant materials in judicial deliberation, it would not have introduced such a legal institution that requires judges to follow the guiding cases that the Supreme Court selects. Accordingly, one may continue to argue that since the introduction of the Case Guidance System in 2010, it is no longer necessary to clarify the misunderstanding that case law is alien to civil law jurisdictions and that the rising importance of cases in civil law jurisdictions throughout the 20\textsuperscript{th} century is the result of learning from the common law doctrine of precedent.

It should, however, be pointed out that, although the Case Guidance System may have the effect of coercing judges to take the guiding cases selected by the Supreme Court into consideration in adjudication practice, it does not explicitly provide how judges are supposed to treat unselected cases.\textsuperscript{1046} Accordingly, it is not unthinkable that the misunderstanding that case law is alien to civil law jurisdictions or codified legal systems such as the Chinese legal order may induce judges to narrowly interpret

\textsuperscript{1042} MacCormick & Summers 1997c, p. 2.
\textsuperscript{1043} Komárek 2012, p. 67.
\textsuperscript{1044} See e.g. Li 2009a and Zhu 2010.
\textsuperscript{1046} Article 9 of the \textit{Provisions Concerning Work on Guiding Case} touches upon a small aspect of the status of unselected cases, i.e. the status of cases that the Supreme People’s Court has selected and published prior to the introduction of a nationwide Case Guidance System, but remains silent on the status of other cases that have not been selected as guiding cases after November 2010.
the Case Guidance System as a signal by the Supreme Court that only guiding cases selected through the Case Guidance System deserve particular attention in adjudication. Such an understanding may subsequently induce judges to believe that they are justified to continue to ignore arguments submitted by the litigating parties or their counsels that involve merely previous cases that have not been selected as guiding cases. Such a narrow interpretation could hardly be conducive to strengthening the use of cases as an effective instrument to counterbalance the limitations of legislation. As has been pointed out in the previous chapter, the Case Guidance System alone may not be sufficient to address the problem that like cases are not treated alike, because, among other reasons, the amount of guiding cases selected through the Case Guidance System is unlikely to be sufficient to meet the vast demand in practice for leading cases, so that it is desirable to explore the vast body of unselected cases for usable materials that may supplement the Case Guidance System. If a narrow understanding of the Case Guidance System were to take root in China, it could lead to an attitude that treats unselected cases as irrelevant materials for judicial decision-making, which would render it difficult to make effective use of unselected cases in adjudication, whereas the difficulty to use unselected cases in adjudication may in its turn discourage legal scholars to explore and systemize the vast body of unselected cases.

Obviously, it is undesirable for such a vicious circle to occur. Therefore, this study wishes to clarify this misunderstanding and to emphasize that using cases to solve legal disputes in court and to further develop the law is not unique to the common law, but is actually something quite natural in codified legal systems. As MacCormick and Summers rightly observed, case law is a form of law of great antiquity, not only in common law jurisdictions, but also in civil law jurisdictions. In other words, case law is not something imported from the common law legal family, but is rather something that is inherent in civil law jurisdictions themselves, although its prominence has been suppressed for a brief period of time since the codification wave of the 19th century. If Chinese judges and legal scholars do regard China as a civil law jurisdiction or at least as a codified legal system that bears similarities to civil law jurisdictions, it seems more appropriate to infer from such an understanding that it is natural for Chinese judges to take relevant previous cases into account in adjudication, rather than categorically denying the relevance or usability of cases unless there is a certain form of official recognition that explicitly confirm their possible influence on judicial-decision making. Accordingly, I wish to call upon Chinese judges and legal scholars to abandon the misconception refuted in this subparagraph and to treat not only guiding cases selected through the Case Guidance System, but also relevant unselected cases as usable materials for solving legal disputes in adjudication and for further developing the law.

4.3 Limitations of cases

In the Chinese-language literature that participates in the case law debate in China, there is considerable optimism about the possibilities of using cases to enhance consistency in judgments. Of course there are critical writings that question the ability of case law to deal with the problem of conflicting judgments, but the general

1047 See the last paragraph of the previous chapter.
1048 See e.g. MacCormick & Summers 1997c, p. 2 and Komárek 2012, p. 67.
1050 See e.g. Drion 1968b, Dawson 1970 and Hondius 2007a.
attitude towards the possibilities of enhancing legal certainty and legal unity through a case law institution has been positive and hopeful.\textsuperscript{1052}

When used properly, cases can indeed be a valuable instrument to supplement the limitations of codes and statutes and to help curb conflicting judgments, which can be conducive to enhance legal certainty and unity in codified legal systems.\textsuperscript{1053} However, it should be pointed out in the context of the case law debate in China that the ability of cases to enhance consistency in judgments should not be overestimated. Inconsistency in judgments, after all, can have many different causes.\textsuperscript{1054} One of the causes of conflicting judgments could, for example, be related to ambiguous or broad norms in legislation that are susceptible to different interpretations.\textsuperscript{1055} In the Netherlands, the cassation system has been introduced to address this cause of conflicting judgments by making it possible for the Supreme Court, which is a court of cassation, to reverse judgments of lower courts that do not conform to interpretations of legislation adopted by the Supreme Court as expressed in its previous cases.\textsuperscript{1056}

However, inconsistency in judgments may also be related to the way judges exercise discretionary power of, among other things, awarding damages or imposing criminal sanctions.\textsuperscript{1057} The exercise of such discretionary power does not always involve interpretation of legislation, so that the ability of the Supreme Court in the Netherlands to reduce inconsistency caused by the exercise of judicial discretion through deciding cassation appeals is limited.\textsuperscript{1058} Accordingly, judges in the Netherlands have developed other mechanisms to enhance consistency in judgments. Labour law judges in the Netherlands, for example, have developed a formula to calculate the amount of severance pay that a laid-off employee is entitled to.\textsuperscript{1059} Family law judges have developed recommendations to standardize the award of alimony.\textsuperscript{1060} Criminal judges have developed sentencing guidelines with regard to some common offences as well as agreements on, among other things, the amount of damages to be awarded in case of detention on remand according to Article 89 of the Code of Criminal Procedure.\textsuperscript{1061} Such instruments, although not officially binding as judges are allowed to deviate from them, are devised to enhance consistency in judgments in areas where the effect of using previous cases to standardize judicial decision-making is likely to be limited.\textsuperscript{1062}

\begin{footnotesize}
\textsuperscript{1052} See e.g. Wu 2004, Shen 2009b, Cao 2010, Jiang 2011a, Lu 2011 and Wang 2012b.
\textsuperscript{1053} This study will not elaborate on this point, as it has already been established in many existing writings, see e.g. Zhang 2002a, Van Rooij 2004, Wang 2004a, Liu 2006 and Xu 2009.
\textsuperscript{1054} See e.g. Xu 2009 and Su & Li 2009, p. 14.
\textsuperscript{1055} Ibid.
\textsuperscript{1056} There is a consensus in the legal scholarship in the Netherlands that enhancing legal unity is one of the key purposes of the institution of cassation, see e.g. Korthals Altes & Groen 2005, p. 156-162 and the sources cited in this book.
\textsuperscript{1058} Korthals Altes & Groen 2005, p. 236-240.
\textsuperscript{1059} See http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-kantonrecht/Aanbevelingen-van-de-kring-van-kantonrechters/Pages/Kantonrechtersformule.aspx.
\textsuperscript{1060} See Dijksterhuis 2008.
\textsuperscript{1061} See http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-strafrecht/Documents/Orientatiepunten-en-afspraken-LOVS.pdf.
\textsuperscript{1062} Cite sources. http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Pages/default.aspx
\end{footnotesize}
A close examination of the guiding cases selected by the Supreme People’s Court in China through the Case Guidance System reveals that such cases are mainly intended to clarify ambiguities in or caused by legislation. It is not obvious how this type of cases can fulfil a prominent role in eliminating inconsistency in judicial decision-making caused by, among other things, the exercise of judiciary discretion in awarding damages or imposing criminal sanctions. This is, of course, not to say that there is no mechanism in China other than the Case Guidance System that is capable of enhancing consistency in judgments. Nor does this imply that it would be impossible for Chinese judges and legal scholars to fully use their creativity and to develop proper ways to use unselected cases to standardize judicial decision-making caused by the exercise of judicial discretion. What this study does wish to point out is that, instead of generally asserting or expecting that using cases will solve the problem of like cases not being treated alike, it would be wise for participants in the case law debate in China to bear the limitations of cases as an instrument to promote consistency in judicial decision-making in mind, to closely analyse the various causes that lead to the problem of conflicting judgments, and to carefully consider, with regard to each cause, whether using previous cases would be the most suitable instrument to standardize judicial decision-making and if not, what other instruments could be used to achieve the goal of promoting consistency in judgments. This study understands the enthusiasm in China about the Case Guidance System, as this legal institution could indeed be a very positive step towards a well-functioning case law mechanism in China. However, it would not be particularly helpful for the development of case law in China to raise too high an expectation among the participants of the case law debate and the public. Instead, it seems wiser for those who wish to further explore the use of case law in China to carefully consider and to make explicit what case law can and cannot achieve, so that the Case Guidance System or possible ways developed by judges and legal scholars to exploit the vast body of unselected cases will not be unjustly blamed for possible problems that persist in the future, which the method of using previous cases is neither intended nor suitable to solve.

5. Concluding remarks

This chapter reflected on the relevance of the experiences with case law in the Netherlands for the development of case law in China. It was submitted that in order to make optimal use of the vast body of cases that have not been selected as guiding cases through the Case Guidance System, it is highly desirable that legal scholars in China conduct systematic research into published cases and integrate such research results into their publications such as handbooks, textbooks and journal articles. It was also submitted that law schools can make a meaningful contribution to the development of a well-functioning case law practice in China by enhancing the use of cases in legal education, as doing so may help to forge overtime a common methodological framework with regard to the use of cases among law students, i.e. future judges, lawyers and legal scholars. Moreover, this chapter clarified a misconception among many Chinese judges and legal scholars and pointed out that, contrary to what some of the Chinese-language publications assert, case law is not something imported from

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1063 See http://cgc.law.stanford.edu/guiding-cases/.
1064 The Supreme People’s Court, for example, issued a policy document to standardize criminal sentencing in September 2010, see Supreme People’s Court of the People’s Republic of China 2010a.
common law to continental European civil law jurisdictions, but has grown naturally in civil law jurisdictions.

As has been pointed out in the introduction of this study, there are considerable differences between China and European civil law jurisdictions including the Netherlands. Accordingly, it is not the intention to present the case law mechanism in the Netherlands as the best practice for China to copy. Nor does this study purport to be able to provide a road map for China to build a well-functioning case law mechanism. Instead, this study hopefully will fulfil the humble role of supplying descriptive materials that have been so far largely missing in the case law debate in China. The thoughts presented in this chapter are neither meant as instructions nor as policy recommendations, but rather as an invitation for those who are interested in further enhancing the use of cases in China to reflect on some of the assumptions, approaches and commonly held perceptions in the case law debate in China and to fully use their creativity to develop practices and methods of using cases that are most suitable for China.