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

Guo, J.

Citation for published version (APA):
Conclusion
Conclusion

This study explored three main questions. In the first place, it investigated how cases fulfil the role of a source of law in the Netherlands. The findings were then linked to the existing English-language literature related to the role of cases in civil law jurisdictions in order to seek new insights that may enrich this body of scholarly writings. The last two chapters linked the findings of the first part of this study to efforts in China since the 1980s to create a case law system, and explored the possible implications that can be drawn from the experiences with case law in the Netherlands for China to further enhance its case law practice. The final conclusion of this study will summarize the key findings with regard to these three questions, put them in an interrelated context, reflect upon them and seek insights at an overarching level.

1. Case law mechanism in the Netherlands, summary and reflections

The introduction of this study presented the concept of case law mechanism and an analytic framework that identifies the operation of a case law mechanism as a process that consists of two major phases, i.e. the publication and utilization of cases (see Figure 17).

![Figure 17 Case law mechanism as a process of publication and utilization of cases](image)

Using this framework, it was discovered that in the publication phase, cases undergo a remarkable and rigorous selection process in the Netherlands. Even in today’s Internet age, 98.5% of all decided cases never get published in the Netherlands. 1065 The lucky tiny proportion of 1.5% that does get selected for publication subsequently undergoes some further treatment in order to make it not only available to the public, but also findable and better comprehensible. The cases that are selected for publication are categorized and supplemented with keywords, headnotes or a summary (the Dutch term for this process is “ontsluiting”1066). Some of the cases that are published in commercial periodicals even receive a luxurious treatment of being escorted by a commentary (case annotation) written by a (prominent) legal scholar or a practising lawyer.

In the utilization phase, as chapter two of this study revealed, published cases become building materials or ingredients for various users such as judges, legal scholars and law students to produce various products, such as judgments, legal academic publications as well as bachelor’s and master’s theses. One of the remarkable things that happen during the utilization phase is that normative elements, such as rules, principles and assessment frameworks1067 are drawn from published cases. These

---

1065 See Table 3 in chapter one.  
1066 This term can be translated as “indexing” or “disclosing”.  
1067 The Dutch term for this word is “toetsingskader” or “gezichtspunten”.

161
normative elements are subsequently evaluated and applied in various settings such as adjudication, scholarly legal research and legal education. In this process of drawing normative elements from published cases as well as evaluating and using them, not only judges, but also legal scholars play a significant role, as scholarly works that systemize, interpret and evaluate published cases exercise in various ways direct or indirect influence on judicial decision-making.  

The two-phase framework as presented in the introduction of this study has been a useful analytic tool to disentangle the processes and actors involved in the case law mechanism. This, however, does not mean that the two-phase framework is the only possible approach. As this study is of an explorative nature, the concluding part of this study will put the findings of the various parts of this study together and reflect on possible alternative approaches. The following subparagraphs will present two alternative approaches, i.e. case law mechanism as one continuous selection process and case law mechanism as a process that consists of three phases: publication, utilization and recognition.

1.1 Case law mechanism as a continuous selection process

When the findings of chapter one (case publication) and chapter two (utilization) are put together, it becomes plain that a crucial process that takes place in both phases is “case selection”. Chapter one revealed that far from all decided cases are published. Chapter two revealed that far from all published cases actually catch the attention of legal scholars, judges and practising lawyers and are eventually able to become leading cases that shape the law. Accordingly, an alternative approach could be to define the operation of a case law mechanism as one continuous process of selecting leading cases that shape the law.

If case law mechanism is defined as one continuous process of selecting leading cases that shape the law, what does this process look like? The findings of chapter one and chapter two of this study indicate that, at an abstract level, a selection process that moves from case to law has at least three crucial steps (see Figure 18). The first step is selection for publication. As many authors have pointed out, it is difficult to imagine how an unpublished case can have a significant impact on the development of the law. Accordingly, the first battle that a case needs to win in its journey from case to law is to catch the attention of the actors that select cases for publication and convince them that it has an added value beyond the specific dispute in which the judicial decision was made. This first battle, as has been revealed in chapter one, is a tough one to win, because only a tiny proportion of 1.5% of all decided cases gets the approval from judges and editors of commercial case reporting periodicals to appear in the

---

1068 See chapter two of this study.
official online judgment database of the judiciary and in commercial periodicals.\textsuperscript{1070}

After publication, the struggle of a case to become the law continues. The second battle that it needs to win is to catch the attention of the various users of cases and to convince them that it can offer these users valuable materials that can help them to attain their goals, be it deciding a new case in court, developing a new legal doctrine in scholarly publications or writing an academic thesis. Obviously, if a published case never gets detected and used by legal scholars, practising lawyers or judges, it cannot significantly influence the law, any more than an unpublished case.

Being used and cited in judgments and scholarly writings prevents a case from being forgotten or neglected, but it does not guarantee a final victory in its journey from case to law. As chapter two revealed, not all cases cited in scholarly writings receive positive comments from legal scholars. In fact, there are plenty of cases, even those decided by the Supreme Court, that are severely criticized in legal academic publications.\textsuperscript{1071} Such severe criticisms, as chapter two revealed, can (significantly) reduce the weight that a case carries in judicial deliberation. Also how judges evaluate a case can significantly influence the chance that a case is followed in court practice. As the study of Haazen indicates, a severe critical attitude expressed by lower courts towards Supreme Court decisions can in some instances even induce the Supreme Court to abandon and change a position adopted in its earlier cases.\textsuperscript{1072} Accordingly, the final hurdle that a case needs to clear in its journey from case to law is to win positive evaluation from as many users as possible. Only when a case receives sufficient normative endorsement from the users of cases, can it become a legal authority.\textsuperscript{1073}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Case &  \\
\hline
Being published & Not being published  \\
\hline
Being used & Not being used  \\
\hline
Receiving positive evaluation & Not receiving positive evaluation  \\
\hline
Law  \\
\hline
\end{tabular}
\caption{Case law mechanism as a continuous selection process}
\end{table}

After publication, the struggle of a case to become the law continues. The second battle that it needs to win is to catch the attention of the various users of cases and to convince them that it can offer these users valuable materials that can help them to attain their goals, be it deciding a new case in court, developing a new legal doctrine in scholarly publications or writing an academic thesis. Obviously, if a published case never gets detected and used by legal scholars, practising lawyers or judges, it cannot significantly influence the law, any more than an unpublished case.

Being used and cited in judgments and scholarly writings prevents a case from being forgotten or neglected, but it does not guarantee a final victory in its journey from case to law. As chapter two revealed, not all cases cited in scholarly writings receive positive comments from legal scholars. In fact, there are plenty of cases, even those decided by the Supreme Court, that are severely criticized in legal academic publications.\textsuperscript{1071} Such severe criticisms, as chapter two revealed, can (significantly) reduce the weight that a case carries in judicial deliberation. Also how judges evaluate a case can significantly influence the chance that a case is followed in court practice. As the study of Haazen indicates, a severe critical attitude expressed by lower courts towards Supreme Court decisions can in some instances even induce the Supreme Court to abandon and change a position adopted in its earlier cases.\textsuperscript{1072} Accordingly, the final hurdle that a case needs to clear in its journey from case to law is to win positive evaluation from as many users as possible. Only when a case receives sufficient normative endorsement from the users of cases, can it become a legal authority.\textsuperscript{1073}

\textsuperscript{1070} See Table 3 in chapter one.
\textsuperscript{1071} See e.g. Schutgens 2009, Kottenhage 2010b, Van Dam 2010, Hartlief 2011 and De Groot 2011.
\textsuperscript{1072} Haazen 2007, p. 236.
\textsuperscript{1073} Haazen 2007, p. 246-251.
Even if a case has won all the three battles and has become a leading case, its victory is not secured forever. Social changes and evolving moral standards may lead to the birth of new cases that challenge the existing leading cases and may even eventually defeat them in a battle to win the most positive normative endorsement from the users. In this sense, the selection process is a dynamic and continuous one.

An advantage of this continuous selection approach is that it can integrate the findings of chapter one and two into a fairly fluent whole. Moreover, this approach can lead to deeper insights, if one goes one step further to explore some questions that are related to any form of selection. A crucial question that any form of selection involves is who select(s). Another essential question is what the selection criteria are. The remaining passages of this subparagraph will examine these two questions and explore the implications of the answers to them for our understanding of the case law mechanism in the Netherlands.

If we examine the first question, i.e. who select(s), in each step of the selection process, the findings of this study tell us that multiple actors are involved in each of the three steps. In case publication, for example, judges have played an increasingly dominant role since the launch of the official online judgment database by the judiciary in December 1999, but legal scholars and practising lawyers are still capable of exercising a certain degree of influence in determining which cases will be published.\(^{1074}\) In the step of determining which published cases will be used, not only judges but also legal scholars and practising lawyers play a role. Cases that are not cited by practising lawyers in oral or written submissions to the court or by legal scholars in academic publications are less likely to attract the attention of judges than those that do get cited in such materials.\(^{1075}\) Also in the third step, namely evaluation, judges are not the only actors who determine the outcome, as scholarly evaluative comments are one of the factors that jointly influence the status of a case in adjudication practice.\(^{1076}\)

The second question, i.e. what the selection criteria are, has been explicitly addressed in chapter one on case publication. It was discovered that the selection criteria for case publication are becoming more and more transparent, detailed and objective in the Netherlands, in particular since the launch of the official online judgment database of the judiciary.\(^{1077}\) The selection criteria in the second step, i.e. in determining which cases will be used and which will not, have not been explicitly dealt with in this study. Most probably, the selection criteria in this step may not be uniform, but may vary from user to user and may depend on the goal(s) that a user wishes to attain. As to the selection criteria in the third step, i.e. whether a case receives positive normative evaluation from the users, chapter three revealed a number of criteria that legal scholars explicitly or implicitly use, which can be summarized as a checklist (see Table 8). It seems highly probable that other actors such as judges and practising lawyers (implicitly) use a similar set of criteria to evaluate court judgments.

\(^{1074}\) See the subparagraph in chapter one that examines the actors who are involved in the case selection for commercial publication.

\(^{1075}\) See the paragraph in chapter two that analyses the way cases are used in adjudication practice in the Netherlands.

\(^{1076}\) See the subparagraph in chapter two on the factors that influence the weight that a case carries in adjudication practice.

\(^{1077}\) Compare the commercial case publication criteria cited in chapter one with the criteria adopted in official case publication in Appendix 2 and 3. Also a comparison between the old and the new case publication criteria adopted by the judiciary leads to this conclusion. See Appendix 2 And 3.
From the analysis above it can be concluded that, contrary to what some scholars assert,1078 case law in the Netherlands is not simply what the Supreme Court decides. The forming of case law is not a top-down process. The result of this process is not single-handedly determined by one actor who has the highest rank in the judicial hierarchy and the final power to reverse judgments. Instead, the forming of case law is a process that involves various actors such as judges, legal scholars and practising lawyers, and the outcome is determined by a process of selection that is becoming increasingly transparent both in the step of case publication, i.e. by publishing the selection criteria and making them more detailed and objective, and in the third step (determining which cases receive positive normative evaluation) by citing previous cases in, among other things, judgments and scholarly writings and by openly discussing the substantive merits of previous cases. All in all, it seems fair to conclude that the selection of leading cases takes places in a rational discourse.1079 In this discourse, court judgments that, owing to their substantive merits, win a (large degree of) consensus among the legal community stand the best chance of becoming leading cases that shape the law.1080

This conclusion has significant relevance for the normative justification of case law in the Netherlands, and by analogy, in other codified legal systems. One of the objections to case law in codified legal systems is that, contrary to legislation, case law lacks democratic legitimacy, because judges are not elected.1081 The analysis in this subparagraph, however, demonstrates that case law formed through a case law mechanism as that in the Netherlands, does not necessarily lack democratic legitimacy.1082 After all, which cases become the law is determined through a relatively

---

1078 See e.g. Draaisma & Duynstee 1988, p. 25.
1079 The term rational discourse is borrowed from Kühn 2007, p. 379.
1080 Loussouarn’s paper suggests that the situation in France is quite similar to that in the Netherlands in this respect, see Loussouarn 1958, p. 261.
1082 The argument in this passage has been particularly inspired by Rijpkema 2001.
transparent and rational process in which various actors take part and exercise influence, while the winners of this process derive their status as leading cases ultimately from a certain consensus in the legal community. Accordingly, the mere fact that judges are not elected does not justify that case law formed through such a process mechanism lacks democratic legitimacy. This can perhaps be yet another reason to explicitly recognize cases as a source of law, which will be further discussed in the following subparagraph.

1.2 Case law mechanism in three phases: publication, utilization and recognition

The first part of this study not only investigated how cases are published and used in the Netherlands, it also examined the normative views of the legislature, judges and legal scholars towards the question whether cases ought to be recognized as a source of law. Chapter three revealed that a distinction can be made between explicit and implicit recognition of cases as a source of law. Moreover, the findings of chapter three indicate that the legislature, judges and legal scholars in the Netherlands are increasingly inclined to openly recognize cases as a source of law.

The findings of chapter three, when combined with those of chapter one and two, reveal that an explicit and unequivocal recognition of cases as a source of law by official actors such as the legislature and judges is not a necessary condition for cases to fulfill the role of a source of law in practice. After all, cases were already playing a very influential role in practice towards the end of the 19th century and the beginning of the 20th century in the Netherlands, but it was not until the end of the first half of the 20th century that increasing evidence became apparent in legislative provisions and in legislation techniques that indicates an implicit recognition of cases as a source of law by the legislature.

Moreover, the findings of the first three chapters indicate that it was the increasing significance of cases in practice that pushed the boundaries of normative views on the status of cases as a source of law. Scholten, for example, observed in 1931 that “(t)he recognition of cases as authoritative is imposed upon us by the facts”.

The impact of the rising significance of cases in practice upon normative views on their status as a source of law is also reflected in a rhetorical question raised by Scholten: “(i)f we have to follow cases, what sense does it make to say that they are not a source of law?”

These findings suggest that case law mechanism in the Netherlands can also be seen as a process that consists of three, instead of two steps as illustrated in Figure 19. In this process, cases are first published and then used by certain types of actors in such a way that it becomes possible for litigants to reasonably rely on certain types of cases to defend legal propositions in court. Once the publication and the utilization of cases have reached such a level in practice that cases become capable of significantly influencing judicial decision-making, a third step follows whereby normative views become increasingly favorable towards openly recognizing cases as a source of law.

1083 See e.g. Teixeira de Mattos 1885, p. 31 and Telders 1938.
1084 Scholten 1931, p. 118.
1085 Scholten 1931, p. 119.
1086 Scholten 1931, p. 119.
An advantage of using such a three-step framework is that it can integrate descriptive data and normative views and it can help to draw the attention of the researcher and the readers to the possible dynamics between the actual significance of cases in practice and the normative views on the status of cases as a source of law. A drawback of the three-step framework as presented in this subparagraph is, however, that it tends to imply that the influence pattern is like a one-way street, i.e. increasing significance of cases in practice pushes the boundaries of normative views, but in reality it is not unthinkable that the influence can be mutual, i.e. increasingly favorable normative views towards explicitly recognizing cases as a source of law can in turn further stimulate the use of cases in practice and thus further strengthen the influence of cases in practice. Again, this study is of an explorative nature. The findings that this study has generated are not of such a nature that they can accurately reveal the exact influence patterns between the significance of cases in practice on the one hand and the normative views on the status of cases as a source of law on the other. This study encourages other researchers to develop more rigorously designed methods and analytic tools to further investigate the dynamics between the two.

2. Implications for comparative law literature related to the role of cases in civil law jurisdictions

Chapter four of this study linked the findings of the first three chapters to the existing English-language literature related to the role of cases in civil law jurisdictions. For example, it pointed out that in the debate on the question whether the common law and the civil legal families are converging, many scholars adopt a result-oriented argumentation, i.e. the conclusion that the two legal families are converging often relies on an observation 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. Using a process-oriented approach as the one developed by this study to explore the role of cases as a source of law may possibly shed new light on the similarities and differences between the common law and the civil law legal families and may contribute new insights to the convergence debate.

As a result of the findings of the first part of this study as well as the analysis made in the first paragraph of this final conclusion, this paragraph will highlight one final key argument, i.e. case law is not purely judge-made law in the Netherlands, and by careful analogy, nor in many other continental European civil law jurisdictions.

As the introduction of this study already pointed out, the existing literature on the role of cases in civil law jurisdictions tends to focus primarily on the role of judges and court-related institutions in the functioning of case law in civil law jurisdictions.1087

---

When reviewing this body of literature, one can hardly avoid the impression that case law in civil law jurisdictions is judge-made law,¹⁰⁸⁸ i.e. whether cases are capable of functioning as a source of law in practice and if so, which cases eventually become the law depend on how judges treat them. Some authors, for example, initially submitted that only constant court practice (jurisprudence constant) was capable of creating law, i.e. only when courts repeatedly decided a question of law in a certain fashion, would this position adopted by the courts become the law.¹⁰⁸⁹ Later on, it was recognized that even a single case decided by a court of last resort in a civil law jurisdiction can become the law.¹⁰⁹⁰

This tendency to equate case law with judge-made law seems to be related to the fact that the role of cases in civil law jurisdictions is usually studied from the perspective of the common law doctrine of precedent.¹⁰⁹¹ As case law and judge-made law are commonly used as interchangeable terms in common law jurisdictions,¹⁰⁹² scholars that adopt the paradigm of the common law doctrine of precedent to study the role of cases in civil law jurisdictions may have simply taken over this usage in their writings.

In a formal sense, there is of course an argument to be made for the proposition that case law is judge-made law. One may, for example, define case law as legal principles and rules enunciated and embodied in judicial decisions.¹⁰⁹³ As judges make judicial decisions, one may subsequently argue that judges can also be considered to be the authors, at least in a formal sense, of the principles and rules enunciated and embodied in such decisions.

However, it is doubtful whether it is appropriate to assert that in civil law jurisdictions case law is entirely made by judges, or to use a terminology borrowed from the common law doctrine of precedent that, without further qualification, may raise an inaccurate impression. Chapter two demonstrated, for example, that some case law norms were originally developed in scholarly writings,¹⁰⁹⁴ so that it is doubtful whether it would be fair to say that, in substance, such norms are entirely made by judges. Moreover, this study demonstrated that which previous judicial decisions eventually become the leading cases that shape the law depends on the outcome of a process of rational discourse in which not only judges, but also other actors such as legal scholars and practising lawyers participate and exercise influence.¹⁰⁹⁵ Persistent and severe scholarly criticism on a previous judicial decision may, for example, reduce the likelihood that the decision will be followed in later court practice, as scholarly reactions to judicial decisions are an important factor that together with a number of

¹⁰⁸⁸ Some authors explicitly use the term “judge-made law” to refer to case law in civil law jurisdictions, see e.g. Lawson 1977, p. 82 where the author observed that “French law has become almost as much a system of judge-made law as English law”, Eorsi 1996, p. 76, Kiel & Göttingen 1997, p. 45 and Dedek & Schermaier 2012, p. 362.
¹⁰⁹⁰ See e.g. Lipstein 1946, p. 36 and 42 and Glastra van Loon e.a. 1968, p. 140.
¹⁰⁹¹ See e.g. MacCormick & Summers 1997c, p. 13 and Komárek 2013, p. 150.
¹⁰⁹⁴ See the subparagraph in chapter two that analyses the contribution by legal scholars to the case law mechanism in the Netherlands.
¹⁰⁹⁵ See the subparagraph in chapter two that examines the way cases are used in adjudication in the Netherlands.
other factors jointly determine the weight that judges attribute to previous court decisions when using them in adjudication practice.  

One may, of course, argue that, although legal scholars and other actors do participate in a process of rational discourse that determines the development of case law, the voice of judges, and in particular that of Supreme Court judges, carries significantly more weight than the opinions of other actors, because judicial decisions are backed by state coercion and can be enforced to affect the actual legal rights and obligations of the litigating parties, whereas the views of legal scholars and practising lawyers are mere opinions that have no particular coercive force. 1097 Such an observation is not necessarily wrong. However, even if this observation was accurate, it could only serve to emphasize a particularly important influence of judges in the forming and development of case law, but it does not justify the assertion that case law is purely made by judges in civil law jurisdictions.

The purpose of this study, it should be stressed, is not to engage in a wordplay. Rather, the aim is to add some nuance to many of the existing writings that concentrate on the role of judges in the operation of case law in civil law jurisdictions, by pointing out that the role of judges, important as it is, should not be isolated from a proper context, as judges are not the only actors who shape the development of case law and they derive considerable benefit from the work of other players in law such as legal scholars, practising lawyers and, in the case of Supreme Court judges in the Netherlands, advisory officers such as the Procurator General and the Advocates General. 1098

Moreover, this study wishes to draw attention to one of the limitations of adopting a concept or a paradigm from one legal family to describe or analyse a phenomenon in another legal family without careful qualifications, as such a practice may cause confusion or lead to inaccurate understandings. 1099

This study experimented with the use of a relatively neutral concept to capture the functioning of cases as a source of law in civil law jurisdictions, i.e. the concept of case law mechanism. In addition, this study developed an analytic framework that does not rely on the common law doctrine of precedent to explore the functioning of case law in a civil law jurisdiction. 1100 When describing the way cases fulfil the function of a source of law in the Netherlands, this study tried its best to use neutral terms as much as possible instead of concepts that are typically associated with the doctrine of precedent in the common law legal family. For example, the term “previous cases” is used instead of “precedents” to refer to judicial decisions made in the past. 1101 Also, the neutral term “influence” is used instead of “binding force” or “persuasive force” to describe the impact of previous cases on judicial decision-making. 1102 By making such efforts, this study strives to avoid causing the readers to (unintentionally) project their understandings of the common law doctrine of precedent on the functioning of cases in the Netherlands. Hopefully these methodological attempts will stimulate legal scholars

---

1096 See the subparagraph in chapter two that examines the various factors that influence the weight a case carries in judicial deliberation.
1097 See e.g. Lawson 1977, p. 82-83.
1098 See the subparagraph in chapter two that examines the way cases are used in adjudication in the Netherlands.
1099 See Komárek 2012, p. 54.
1100 See the paragraph in the introduction of this study that presents the concept of case law mechanism and the analytic framework.
1101 This approach is inspired by MacCormick & Summers 1997c, p. 13 and Komárek 2012, p. 54.
1102 Ibid.
to reflect on the soundness of the common approach in the existing literature to examine the role of cases in civil law jurisdictions from the perspective of the common law doctrine of precedent, and to design more suitable analytic tools to explore the role of cases in civil law jurisdictions.

3. Implications for China’s quest for case law

Chapter five of this study examined a relatively recent phenomenon in China, i.e. a growing interest among judges and legal scholars in developing and using case law, despite the fact that China’s codified legal system does not allow judges to fulfil a lawmaking role and hence does not recognize cases as a source of law. The growing interest in case law, as chapter five revealed, was triggered by a number of problems to which many Chinese legal scholars and judges believe that case law can offer an effective cure. A fundamental problem is that 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 has to take on the task of striking a proper balance in lawmaking between four competing requirements: adequacy, feasibility, certainty and adaptability, which is extremely difficult 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. Another widely perceived problem in China is that like cases reach different outcomes in different courts across China, thus undermining the legal unity and the public confidence in the courts. Many Chinese legal scholars and judges argue that case law can be an effective tool to counterbalance the limitations of legislation, enhance consistency in court judgments, increase transparency in adjudication and curb judicial corruption.

After decades of debates and court experiments, the Supreme People’s Court of China finally introduced a new legal institution called the “Case Guidance System” in November 2010. The essence of this new legal institution is that it creates an exclusive power for the Supreme People’s Court to select so-called “guiding cases” from candidate cases recommended by courts at all levels throughout China. Once selected and published, the guiding cases are supposed to be followed in all courts across China.

These findings, when compared with those summarized in the first paragraph of this final conclusion, reveal that both China’s Case Guidance System and the case law mechanism in the Netherlands can be seen as a process of selecting leading cases. The way leading cases are selected in China, however, differs considerably from the way leading cases are selected in the Netherlands.

In the Netherlands, as revealed in the first paragraph of this final conclusion as well as in chapter two, the selection takes place in a relatively transparent rational discourse, in which various actors such as judges, legal scholars and practising lawyers have a chance to influence the outcome of the selection by conducting a relatively visible and traceable debate on the merits of published cases in open forums such as court adjudication and academic or legal professional publications. The outcome of

1103 Van Rooij 2006, p. 25-104.
1104 See the paragraph in chapter five that discusses the problems that triggered a growing interest in case law in China.
1105 Ibid.
1106 The Chinese term is 案例指导制度 (Anli Zhidao Zhidu).
1107 The Chinese term is 指导案例 (Zhidao Anli).
such a selection process can be reasonably said to rely on a (certain degree of) consensus among the legal community.

The selection procedure in China, as revealed in chapter four, is largely non-transparent and lacks an open and traceable debate on the pros and cons of the candidate cases by relevant actors such as judges, legal scholars and practising lawyers. The candidate cases do not have to be published before they enter the selection procedure. The selection process takes place entirely within the judiciary. All courts lower than the Supreme People’s Court are required to select and recommend candidate cases to the Supreme People’s Court. It is a small group of people who occupy high positions, such as the president, the vice presidents and the chief judges of various sections within a court, that decides which cases will be selected and recommended as candidate cases to the Supreme People’s Court. Within the Supreme People’s Court, a final selection takes place. The final decision is again made by a small group of powerful people who occupy high positions in the Supreme People’s Court. Discussions on the pros and cons of the candidate cases are kept secret in all courts and are therefore inaccessible to actors who are not authorized to select cases. This means that not only actors outside the judiciary such as legal scholars and practising lawyers, but even many actors within the judiciary, i.e. the vast majority of judges that do not occupy high positions in a court, have no way to ascertain which candidate cases have been considered and what the substantive considerations have been during the selection procedure. It is, consequently, very doubtful whether the outcome of such a non-transparent selection procedure can be said to rely on a certain degree of consensus among the legal community.

Chapter five of this study reflected on some of the limitations of the Case Guidance System and expressed doubts as to whether the Case Guidance System alone would be able to successfully solve the problems that it is intended to address. It was submitted that the rigid selection procedure might make it very unlikely for the Case Guidance System to produce a sufficient amount of guiding cases that can satisfy the demand for case law in court practice throughout China. Consequently, it was submitted that making effective use of the vast body of unselected cases can be a crucial supplement to the Case Guidance System. Chapter six subsequently argued, among other things, that for an optimal use of the vast body of unselected cases, it is highly desirable that legal scholars in China conduct extensive and systematic research into unselected cases and that law schools in China intensify the use of cases in legal education.

This paragraph, as part of the final conclusion of this study, will not repeat what has already been put forward in chapter six. Instead, prompted by the analysis in the first paragraph on the way leadings cases are selected in the Netherlands and the comparison made earlier in this paragraph, this paragraph will draw the reader’s attention to one crucial question that the development of case law in China still needs to address, i.e. the normative justification for case law in a codified legal system that officially denies cases to be a source of law.

One of the most fundamental normative objections to case law, both in the Netherlands and in China, is that case law lacks democratic legitimacy because judges are not elected.\textsuperscript{1108} Obviously, in reality China is an authoritarian country where no open, fair and meaningful general elections take place, so that even the official legislature in China, i.e. the National People’s Congress and the People’s Congresses at

\textsuperscript{1108} See e.g. Li 2009a and Rijpkema 2001, p. 14.
various local levels, can hardly be said to enjoy sufficient democratic legitimacy.\textsuperscript{1109} However, at least in theory, the legislature in China is an elected representative body. The courts in China, on the other hand, are not even in theory elected. This means that the normative objection that case law lacks democratic legitimacy in China because judges are not elected is certainly not groundless and ultimately needs to be addressed.

Up till now the Supreme People’s Court seems to be very unwilling to openly engage with this question. The Supreme People’s Court is, for example, extremely vague about the legal basis of the Case Guidance System that it introduced in November 2010. The Court only refers very generally to the Organic Law of the People’s Courts without specifying which provision(s) of this legislation justifies or justify this new legal institution that is supposed to create case law.\textsuperscript{1110} The Supreme People’s Court’s answer seems to rely on a theory of mandate, i.e. the Supreme People’s Court obtained a mandate from the legislature to interpret legislation via the Organic Law of the People’s Courts and the Case Guidance System is a way through which the Supreme People’s Court interprets legislation.\textsuperscript{1111}

This study wishes to point out that the mandate theory is not the only possible solution. In fact, this study highly doubts whether the mandate theory chosen by the Supreme People’s Court is the most satisfactory response. In the first place, it should be pointed out that this theory relies on a mandate to interpret legislation. It can be doubted whether such a theory is entirely honest and accurate. In fact, the Case Guidance System not only enables the Supreme People’s Court to interpret existing legislation, but also to create new rules that can hardly be said to rely on existing legislation. Accordingly, even if the mandate theory justifies guiding cases that do nothing more than interpreting existing legislation, it cannot sufficiently justify cases that create new rules.

Another, and much more fundamental reason why it is doubtful whether the mandate theory is a desirable answer, is that the National People’s Congress has only mandated the Supreme People’s Court to interpret legislation, which means that this theory only justifies the legitimacy of guiding cases selected by the Supreme People’s Court, but does not recognize any general normative force of cases decided or selected by any other actor. In other words, this theory can easily lead to a conclusion that only cases selected by the Supreme People’s Court have particular normative force, so that judges are justified to ignore all the unselected cases. Such an understanding would induce an attitude to treat unselected cases as a waste and would accordingly render the use of the vast body of unselected cases in court extremely difficult. This would be highly undesirable, as explained in chapter five, because the vast body of unselected cases may contain valuable materials that, if used properly, can meaningfully supplement the Case Guidance System to satisfy the demand for case law in China.

An alternative approach is not to hide, but to recognize the fact that case law can be or is already a lawmaking mechanism in China. The objection to case law based on a lack of democratic legitimacy can be weakened, if the process through which case law is formed in China can be designed or can evolve in such a way that the selection of leading cases takes place in a transparent discourse in which various actors can exercise meaningful influence through rational debates, so that the outcome can be reasonably

\textsuperscript{1109} For discussions on the authoritarian nature of the regime in China see Weatherley 2006 and Stockmann & Gallagher 2011.
\textsuperscript{1110} See the relevant passages in chapter five that discusses the legal basis of the Case Guidance System.
\textsuperscript{1111} Ibid.
said to rely on a certain consensus in the legal community. If this can be achieved, then the lack of democratic legitimacy due to the fact that judges are not elected can be, at least to a certain degree, compensated by an open and transparent leading case selection process, which is likely to generate case law that is in conformity with the dominant values and norms in the society.

The Case Guidance System introduced by the Supreme People’s Court, however, seems to go exactly in the opposite direction. Under this new legal institution, the selection process is designed in such a way that only a small group of powerful people within the judiciary who occupy high positions exercise decisive influence on the selection of guiding cases in a process that largely takes place in secrecy. Such a design does not weaken, but rather further strengthens the normative objection to case law in China due to a lack of democratic legitimacy. It can therefore be rightly questioned whether the mandate theory and the non-transparent selection process would be conducive eventually to the development of case law in China.

It should, once again, be noted that it is not true that the Case Guidance System introduced by the Supreme People’s Court is unlikely to induce any positive effect. This new legal institution can, for example, raise the overall case law awareness among Chinese judges, legal scholars and practising lawyers and can produce at least a small body of cases that may prove to be useful for court practice in China. By reflecting on some of the limitations of the Case Guidance System, this study wishes to draw the attention of those who participate in the case law debate in China or are interested in the development of case law in China to some of the overlooked aspects in China’s quest for case law, and to invite them to look beyond the courts and to seek creative approaches that may ultimately lead to an effective case law mechanism in China.

---

Inspiration for this argument has been drawn from Rijpkema 2001.