UNIVERSITY OF AMSTERDAM DISSERTATION

William Jing Guo

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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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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INTRODUCTION

1. Background and research questions

Since the beginning of the 20th century, a considerable body of English-language comparative law literature has emerged that studies the role of cases in civil law jurisdictions.[1] One of the reasons why this topic has attracted and still attracts so much academic attention is that the question whether cases are recognized as a source of law used to be regarded as a key criterion for the distinction between the common law and the civil law.[2] Originally, it was accepted that the doctrine of precedent is a unique feature of the common law legal family, i.e. a crucial distinction between the common law and the civil law is that judges in common law jurisdictions are bound by precedents whereas cases in civil law jurisdictions have no particular normative force beyond the litigating parties, so that judges are free to deviate from previous decisions.[3] Subsequently, many scholarly writings emerged that refute or qualify this view.[4] These studies demonstrate that in many continental European civil law jurisdictions cases have acquired such a highly influential status in adjudication practice that judges are in fact bound by certain types of previous court decisions.[5] These findings triggered some scholars to argue that the common

[1] See e.g. Deák 1934, Goodhart 1934, Lipstein 1946, Meijers 1951, Dainow 1966, Silving 1966, Dawson 1970, Dainow 1974, Rudden 1974, Lawson 1977, Cappelletti 1981, Van Caenegem 1987, MacCormick & Summers 1997b, Zweigert & Kötz 1998, p. 256-275, Adams 1999, Eng 2000, Butler 2002, Baade 2002a, Baade 2002b, Hondius 2003, Lundmark 2003, Hondius 2004, Hondius 2007b and Komárek 2013.

[2] See e.g. Deák 1934, p. 340 and Vogenauer 2006, p. 873.

[3] See e.g. Goodhart 1934.

[4] See e.g. Lipstein 1946, p. 34-35, Loussouarn 1958, p. 255, Dainow 1966, p. 426, Baudouin 1974, p. 12, Van Caenegem 1987, p. 40 and MacCormick & Summers 1997c, p. 2.

[5] See e.g. Siving 1966, p. 200, Yiannopoulos 1974, p. 76, Merryman 1974, p. 194-196, Kiel & Göttingen 1997, p. 24-25 and Zweigert & Kötz 1998, p. 263.

law and the civil law legal families are converging.[6] Moreover, since the 1980s, these findings have been used in China, where cases are not officially recognized as a source of law, to justify experiments that seek to increase the use of cases in adjudication practice.[7]

Thanks to the scholarly works in this field, we have gained a much richer and more nuanced understanding of the role of cases in civil law jurisdictions than a century ago. However, despite the progress that has been made, it is still too early to conclude that all important issues and aspects in this field have been thoroughly explored. In fact, the existing literature in this field focuses largely on the question whether cases have force in court practice in civil law jurisdictions and if so, what kind of force they have and how this force resembles or differs from the binding force of precedents in common law legal systems under the doctrine of *stare decisis*.[8] The dominant conclusion is that in practice cases function as a source of law in many European civil law jurisdictions, and that the actual force that certain types of cases have in these civil law jurisdictions is quite similar to the binding force that precedents carry in common law jurisdictions.[9] However, the question *how* cases actually fulfil the role of a source of law in a civil law jurisdiction has not yet been thoroughly explored. Some scholarly writings did touch upon this how-question, but they tend to focus chiefly on the role of judges and court-related institutions in the functioning of case law in civil law jurisdictions, whereas the contribution by other relevant actors, institutions and practices such as legal scholars, case publication and legal education to the operation of case law in civil law jurisdictions rarely attracts equal

[6] See e.g. Zweigert & Kötz 1998, p. 271 and MacCormick & Summers 1997a, p. 531-535. For different views see e.g. Cappelletti 1981, p. 66, Adams 1999, p. 465-466, Haazen 2007, p. 228 and Komárek 2012, p. 67.
[7] See e.g. Zeng 2004, p. 63-64 and Zhang 2004, p. 99, 100, 105.
[8] See e.g. Silving 1966, Lund 1997, Zweigert & Kötz 1998, p. 256-275, Eng 2000 and Taruffo 2007.
[9] See e.g. Lawson 1977, p. 82-83, David 1984, p. 116 and p. 136, Van Caenegem 1987, p. 40, MacCormick & Summers 1997a, p. 531-533 and Zweigert & Kötz 1998, p. 263.

scholarly attention.[10] This emphasis on the role of judges and court-related institutions is not entirely surprising, once one realizes that the current studies on the role of cases in civil law jurisdictions are dominated by the paradigm of the common law doctrine of *stare decisis*.[11] It seems to have become a common practice among scholars who study the role of cases in civil law jurisdictions to analyse the functioning of case law in civil law jurisdictions by adopting common law concepts such as *stare decisis*, *ratio decidendi*, *obiter dictum*, binding authority, persuasive authority, distinguishing, overruling and so on.[12] In other words, existing studies on the role of cases in civil law jurisdictions tend to examine case law in civil law jurisdictions from the perspective of the common law doctrine of precedent. As judges play a prominent and decisive role in the functioning of case law in common law jurisdictions, it is not surprising that scholarly writings that rely heavily on the common law paradigm concentrate largely on judges and court-related institutions while studying the role of cases in civil law jurisdictions.

This study proposes that the question how cases actually fulfil the role of a source of law in a civil law jurisdiction is worth careful investigation, as the answer to this question can yield insights that may further enrich our understanding of the role of cases in civil law jurisdictions. Answering this how-question can,

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[10] See e.g. MacCormick & Summers 1997b and Hondius 2007b. This is of course not to say that aspects such as the role of legal scholars in the functioning of case law, the use of cases in legal education in civil law jurisdictions and the way cases are published have never been discussed in the existing literature, but it should be observed that references to these aspects in the existing literature tend to be rather brief and scattered. For scholarly writings that mention the role of legal scholars in the functioning of case law in civil law jurisdictions see e.g. Yiannopoulos 1974, p. 77, Taruffo 1997, p. 457 and Hondius 2007a, p. 21. For publications that have touched upon the case publication in civil law jurisdictions see e.g. Deák 1934, p 341 footnote 8 and p. 342 footnote 9, Lawson 1977, p. 84 and Taruffo 1997, p. 451. For writings that have paid attention to the use of cases in legal education in civil law jurisdictions see e.g. Deák 1934, p. 354 and Dainow 1966, p. 428-430.

[11] See the analysis in Komárek 2013.

[12] See e.g. Lipstein 1946, p. 35-36, Merryman 1974, p. 194, Eng 2000, p. 278-279, Hondius 2003, p. 417, Haazen 2007, p. 237-238 and p. 244.

for example, reveal fresh insights for the debate on the question whether the common law and the civil law legal families are converging.[13] If it turns out that the result that cases function as a source of law in civil law jurisdictions is achieved through a different way from what leads to the prominent status of precedents in common law jurisdictions, doubt can be cast on the observation that the civil law and the common law are converging.[14]

Moreover, it is worth noting that not in all codified legal systems cases have become a source of law in practice. In some former socialist countries in Eastern Europe as well as in some developing countries with a codified legal system elsewhere in the world, cases have not (yet) been able to acquire as significant a role as that in many civil law jurisdictions in Western Europe.[15] China is a good example of such countries.

Since the communists seized power in China in 1949, cases have been excluded as a source of law, as the socialist political and legal theory denies courts lawmaking power.[16] Since the 1980s, however, there is a growing interest among judges and legal scholars in China to enhance the use of cases in court practice.[17] Whether a case law system can be developed within the codified legal system in China and if so, how cases can be used in court practice to enhance legal unity and legal certainty is a question that has triggered a huge debate in China.[18] Many participants in this debate adopted the method of comparative legal research to seek

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[13] For scholarly writings that discuss a possible trend of convergence between the civil law and the common law see e.g. Deák 1934, p. 341, David 1984, p. 10-11 and P. 137, Markesinis 1994, p. 30-32, MacCormick & Summers 1997c, p. 2, MacCormick & Summers 1997a, p. 531-535, Zweigert & Kötz 1998, p. 71 and p. 259-265, Baade 2002, Hondius 2003, De Cruz 2007, p. 98 and p. 499 and Bogdan 2013, p. 75. Compare these writings with e.g. Dainow 1966, p. 427, Cappelletti 1981, Adams 1999, p. 465-466, Haazen 2007, p. 228 and Komárek 2012, p. 67.

[14] For a detailed analysis of the relevance of this research for the convergence debate see chapter four.

[15] See e.g. Hondius 2007a, p. 21-23, Tran 2009, p. 8, Griffiths 2011 and Innis & Jaihutan 2014, paragraph 1.2.

[16] See the sources cited in the introduction of chapter five of this study.

[17] For details see the paragraph that examines the evolution of China's Case Guidance System in chapter five.

[18] Ibid.

inspiration from the functioning of case law in other countries.[19] The focus of such comparative legal research in the case law debate in China has thus far been primarily on common law jurisdictions.[20]

Exploring how cases fulfil the role of a source of law in a European civil law jurisdiction can be relevant for China's efforts to enhance the use of cases. Of course, the political and social settings in China differ considerably from those in European jurisdictions where in practice cases have developed into a source of law. Accordingly, it would most probably not be a wise move to transplant the case law practices from a European civil law jurisdiction to China. On the other hand, such differences do not mean that there is nothing useful in the experiences with case law in a European civil law jurisdiction for Chinese judges and legal scholars that seek to develop a case law system in China. Understanding how case law actually works in a civil law jurisdiction in continental Europe may, for example, help to clarify some of the misconceptions that underlie the efforts in China to stimulate the use of cases in court practice.[21] Doing so may also help to draw the attention of judges and legal scholars in China to some of the aspects[22] that have been largely overlooked so far in their quest for a workable case law system.

In an effort to make a contribution to the existing English-language comparative law literature on the role of cases in civil law jurisdictions, this study seeks to answer the following first research question:

How do cases fulfil the role of a source of law in the Netherlands?

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[19] See the subparagraph on methodological observations in chapter six of this study.

[20] Ibid.

[21] One such misconception is that it is due to the influence of the common law that cases become influential in civil law jurisdictions. For details see the subparagraph in chapter six of this study that clarifies this misconception.

[22] One such overlooked aspect is the possible contribution of legal scholars to the forming and development of case law, see the paragraph in chapter six that discusses the contribution that legal scholars can make to the functioning of case law in China.

The Netherlands is an understudied yet interesting European civil law jurisdiction where cases, despite the original intention of the legislature in the mid-19th century to uphold legislation as the only source of law,[23] developed into a source of law in practice around the beginning of the 20th century.[24] Why the Netherlands was selected for this study will be further explained in the paragraph on methodology in this introduction.

The answer to the first question will be placed in two different contexts in order to explore the broader implications of this study. In the first place, the findings of this study will be linked with the existing English-language literature related to the role of cases in civil law jurisdictions. In this context, this study will raise and seek to answer the second research question:

What insights can the answer to the first question contribute to the existing English-language literature related to the role of cases in civil law jurisdictions?

Moreover, the findings of this study with regard to the first main research question will be linked with China's efforts to improve the use of cases in court practice. This leads to the last research question:

What implications can be drawn from the answer to the first question that may be useful for China to further enhance its case law practice?

This last research question has two preliminary questions, i.e. what exactly does China need case law for and what has China done so far to develop case law? These preliminary questions will be explored in chapter five of this study, which will set the stage for the final chapter, where the last research question, i.e. the relevance of the experiences with case law in the Netherlands for China, will be investigated.

The nature of this study is explorative. One of the key points that this study wishes to stress is that it is through a process that involves multiple actors, institutions and practices that cases fulfil the function of a source of law in the Netherlands and, by cautious

[23] For details see the paragraph in chapter three of this study that analyses the relevant legislative provisions in the Netherlands, in particular the *Kingdom Legislation Act (Wet houdende algemeene bepalingen der wetgeving van het koninkrijk)*.

[24] See e.g. Scholten 1931, p. 114-124 and Telders 1938.

analogy, other civil law jurisdictions. Although judges and court-related institutions undoubtedly play an important role in this process, this study wishes to emphasize that their contribution should be put into perspective.

2. The concept of case law mechanism

One of the difficulties that I encountered was that the existing literature does not provide a proper concept that adequately captures the way case law functions in a civil law jurisdiction. Some existing studies use concepts adopted from the common law doctrine of precedent to capture the functioning of case law in civil law jurisdictions such as "a light variant of precedent"[25] or "soft *stare decisis*".[26] Although drawing an analogy is a commonly adopted approach in comparative law, this study wishes to avoid using concepts adopted from the common law doctrine of precedent to capture the way cases fulfil the role of a source of law in civil law jurisdictions. This is not only because such concepts are not sufficiently accurate, but also because the use of these concepts may have an unintended consequence of causing readers to, consciously or unconsciously, project a common law understanding of precedent to the functioning of cases as a source of law in civil law jurisdictions.[27]

By reviewing and reflecting upon literature on case law in civil law jurisdictions and by exchanging ideas with a number of legal scholars on this topic, I developed the concept of "case law mechanism" to capture the way case law functions in civil law jurisdictions. Important to the forming of this concept is one of the initial findings of the literature review, i.e. it is not one single actor or one single legal institution that enables cases to fulfil the role of a source of law in the Netherlands. For example, it is not true that cases have become a source of law in the Netherlands because the legislature or the judiciary has at a certain moment created a formal legal institution modelled after the common law doctrine of precedent that attributes binding force to certain types of cases, as existing research demonstrates that there is no such formal legal

[25] Hondius 2003, p. 417.
[26] Lundmark 2003.
[27] Komárek 2012, p 54.

institution in the Netherlands.[28] Nor is it true that the institution of appeal and cassation sufficiently accounts for the fact that cases are treated as a source of law in practice. After all, the institution of appeal and cassation already existed when the Dutch Civil Code was introduced in 1838, but the existing literature shows that cases were not treated as a source of law in the 19th century.[29]

The initial findings of my literature review pointed to the direction that multiple institutions and practices involving various actors are engaged in the operation of case law in the Netherlands. Research by Kottenhagen, for example, shows that case publication is of great importance for cases to fulfil the role of a source of law and that both judges and legal scholars play a significant role in determining which cases will be published.[30] The publications of Bruinsma and Draaisma & Duynstee illustrate that not only judges, but also legal scholars influence which judgments eventually become leading cases.[31] The work of Vranken indicates that widespread use of cases in legal education also has a certain effect on the status of cases as a source of law in practice.[32] By reflecting upon such scholarly writings I developed the concept of case law mechanism, which is defined as a set of institutions and practices in a codified legal system that jointly enable legal norms to be derived from cases through a process of publishing, organizing, interpreting, evaluating and applying court judgments.

3. Analytic framework

Another limitation of the existing literature is that it does not provide a readily usable analytic framework to study how cases fulfil the function of a source of law in a civil law jurisdiction. As revealed in the previous paragraph, some existing studies do touch upon various elements that are related to the functioning of case law in civil law jurisdictions, but these elements have not been put together in an organized structure. This study developed a

[28] For details see chapter three of this study.
[29] See e.g. Opzoomer 1865, p. VII, Diephuis 1869, p. 25 and Land 1899, p. 12.
[30] Kottenhagen & Kaptein 1989 and Kottenhagen 1994.
[31] Bruinsma 1988a, p. 105-121 and Draaisma & Duynstee 1988.
[32] Vranken 1995, p. 116.

framework that can help to illustrate how the various elements that have been fragmentally described in the existing literature relate to each other and form a whole. This framework combines two possible approaches, i.e. a structural and a processual approach, that can be adopted to analyse the case law mechanism in a given jurisdiction. The details of this framework will be presented in the following subparagraphs.

3.1 Structural approach

One possible way to analyse the case law mechanism in a certain jurisdiction is to adopt a structural approach. Such an approach sees the case law mechanism of a given jurisdiction as a machine consisting of a number of parts including various formal or informal institutions and practices (see Figure 1). The key task of a researcher would then be to identify what these parts are and how the functioning of each part and the interaction between the different parts contribute to the functioning of the machine as a whole.

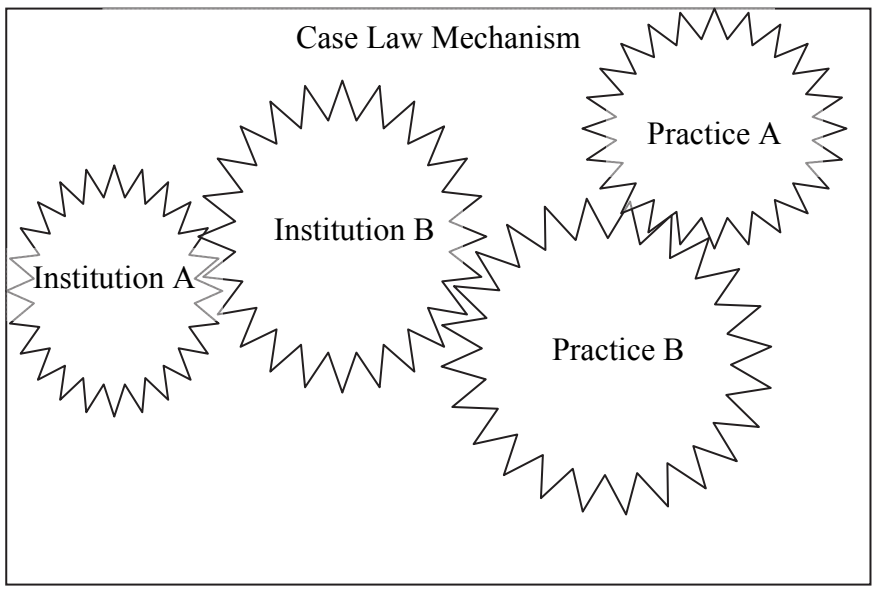

Figure 1 Example of the structural approach

3.2 Processual approach

Another possible approach is to view the case law mechanism as a process consisting of a number of phases or steps, such as the phase of selecting binding cases from a pool of candidate cases followed by the phases of publishing and applying the selected binding cases in later court decisions (see Figure 2). Some Chinese scholars have implicitly adopted this approach in their writings on possible designs of a case law system for China.[33] The key task of a researcher adopting such an approach would be to identify which steps the case law mechanism of a given jurisdiction consists of and to find out the operating procedure in each step.

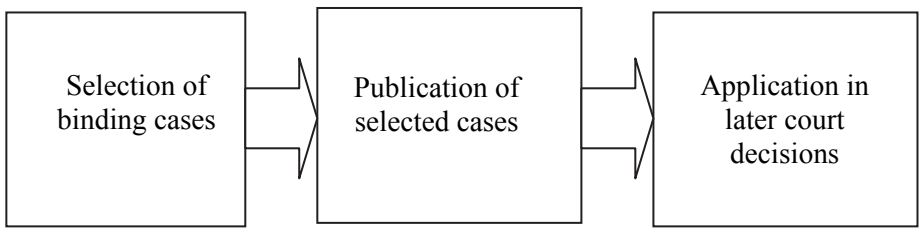

Figure 2 Example of the processual approach

3.3 Combined approach

The analytic framework developed in this study combines the structural and the processual approach. The first step is to identify 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 3). The second step is to identify which actors, institutions and practices are involved in each phase and to find out how these actors, institutions and practices contribute to the function of the case law mechanism as a whole.

[33] See. e.g. Ding 2008a and Hu & Yu 2009.

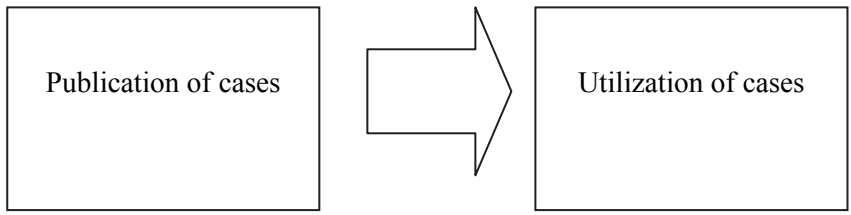

Figure 3 Case law mechanism as a process of publication and utilization of cases

This analytic framework is inspired by, among other scholarly writings, the work of Nederpel, which makes a distinction between judge-made norms contained in judicial decisions on the one hand and legal norms on the other.[34] According to Nederpel, judicial decisions are based on explicitly or implicitly formulated rules, many of which are created by judges.[35] Such judge-made norms, as Nederpel observes, do not automatically become the law.[36] Whether judge-made norms contained in a case become the law depends on, in Nederpel's view, how judges use these norms in court practice, i.e. only norms that judges constantly follow in later adjudication practice become the law.[37]

I agree with Nederpel's observation that whether norms contained in a case become the law depends eventually on how they are used. Accordingly, the analytic framework developed in this study identifies the utilization of cases as a key phase in a case law mechanism. However, it is doubtful whether norms contained in cases become the law *only* depends on how they are used in court practice. First of all, Nederpel's analysis does not address the importance of case publication. As Loussouarn rightly observes, it is hard to imagine how a case can become a legal authority if it has not been published.[38] Perhaps publication is such an obvious requirement that Nederpel did not deem it necessary to mention. However, an obvious requirement is not necessarily a trivial or

[34] Nederpel 1985.
[35] Nederpel 1985, p. 110.
[36] Nederpel 1985, p. 111.
[37] Nederpel 1985, p. 111-112.
[38] Loussouarn 1958, p. 529.

simple one. Which cases are published, as Snijders demonstrates in his research, can have a serious impact on what eventually becomes the law.[39] Moreover, Van Opijnen's research demonstrates that the mode of case publication varies greatly among different jurisdictions.[40] These findings led to the incorporation of case publication into the analytic framework as a crucial phase in the operation of a case law mechanism.

Furthermore, Nederpel's analysis focuses solely on how judges use cases in court practice. The initial findings of my literature review, however, suggest that there are other actors such as legal scholars, practising lawyers, law teachers and students that make use of cases and that how a case is used in court practice is but one of the many factors that jointly influence its status.[41] Accordingly, the analytic framework broadens the scope of investigation in the utilization phase from the use of cases in adjudication to include the use of cases in scholarly legal research as well as in legal education.[42]

4. Methodological choices and limitations of the study

An in-depth research into the way cases fulfil the role of a source of law in a European civil law jurisdiction involves many methodological choices. This paragraph will discuss some of the choices that are of influence on the entire study. Methodological choices that are specific to a particular chapter will be discussed in the relevant chapter.

[39] Snijders 1977.
[40] Van Opijnen 2011b and Van Opijnen 2014, p. 134-147.
[41] See Glastra van Loon e.a. 1968, p. 145, Groenendijk 1981, p. 78-79, Draaisma & Duynstee 1988, Vranken 1995, p. 69 and p. 116, Haazen 2007, p. 246-251 and Haas 2010, p. 162.
[42] See the following paragraph for an explanation on this methodological choice.

4.1 Why the Netherlands?

In many continental European jurisdictions cases have developed into a source of law in practice.[43] Instead of studying how cases fulfil the function of a source of law in some larger jurisdictions such as Germany and France, this research studies the case law mechanism in the Netherlands, a relatively small and less well-known jurisdiction. This methodological choice has been made on the basis of a number of considerations.

An important consideration is related to the requirement of a study of this type, the expertise of the researcher and the limited time available. An in-depth study as to how cases actually fulfil the role of a source of law in a particular jurisdiction, as set out in the analytic framework in the previous paragraph, requires the researcher to be very familiar with the studied jurisdiction. In a study of this kind, mere knowledge of the law in books is far from sufficient, as there is often a considerable gap between the role of cases as defined in statutes and theoretic writings and the actual force that cases carry in practice in a continental European civil law jurisdiction.[44] In order to successfully carry out a study of this type, the researcher must be able to understand the operation of a range of institutions and practices that involve various actors. How these institutions, practices and actors operate is not always neatly recorded in written materials. Even where some rules of operation are recorded in written materials, they may be scattered among various sources and how they actually function in practice may be different from what the written materials suggest. These challenges require the researcher to access a huge body of written and unwritten sources and to be able to appreciate the subtleties of the practice. Given these challenges and the limited time available, I have chosen to study the Netherlands, the jurisdiction where I have received my legal education and where I have easier access to various sources than in other continental European jurisdictions.

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[43] These jurisdictions include, among others, Germany, France, Belgium and Italy, see e.g. Kiel & Göttingen 1997, Yiannopoulos 1974, Adams 2007 and Merryman 1974.

[44] See e.g. Lipstein 1946, p. 34-35, Loussouarn 1958, p. 255, David 1984, p. 10 and p. 112 and Adams 2007, p. 149.

Another reason for studying the case law mechanism in the Netherlands is that the Netherlands is the only Western European civil law jurisdiction that has introduced a new Civil Code in the second half of the 20th century.[45] As such, the Netherlands offers a precious opportunity to study the possible influence of recodification on the role of cases as a source of law. It would, for example, be interesting to verify whether recodification induces a return to legalism, thus weakening the status of cases as a source of law. [46]

Yet another reason for choosing the Netherlands as the object of study is that, contrary to some larger jurisdictions such as Germany and France, relatively little has been written about the Netherlands in the existing English-language comparative law literature.[47] An in-depth study of the case law mechanism in the Netherlands can be a valuable addition to the limited English-language literature on this understudied jurisdiction.

The choice to limit the scope of investigation to the Netherlands does trigger an important question, i.e. whether the findings of this study can be generalized to other continental European civil law jurisdictions. Due to the lack of in-depth and systematic studies on how cases actually fulfil the role of a source of law in other continental European civil law jurisdictions, it is very difficult to ascertain whether the case law mechanism in the Netherlands is representative of the way case law functions in continental European civil law jurisdictions. Scholarly writings on the role of cases in France and Germany in the existing literature, for example, do suggest that the case law mechanism in the Netherlands bears many similarities to the way cases fulfil the role

[45] Although many civil law jurisdictions have revised their civil codes, the Netherlands is the only Western European civil law jurisdiction that has replaced its old Civil Code with a new one, which has an entirely new structure. See e.g. Dainow 1956 and Hondius 1988a. For revisions in some other civil law jurisdictions see e.g. Fauvarque-Cosson & Fournier 2012, p. 346 and Dedek & Schermaier 2012, p. 356.

[46] For details see the relevant passages in chapter three of this study that discuss this question.

[47] For some examples see Glastra van Loon e.a. 1968, Drion 1968a, Hartkamp 1992 and Haazen 2007.

of a source of law in these two prominent civil law jurisdictions.[48] Official case publication, i.e. publication of cases by the judiciary, for example, has been institutionalised not only in the Netherlands, but also in Germany and France.[49] Moreover, existing literature suggests that scholarly case law research plays a similarly important role in the functioning of case law in Germany and France as in the Netherlands.[50]

Obviously, such similarities reflected in scattered writings are incapable of firmly establishing that the Netherlands is a representative example of continental European civil law jurisdictions in terms of the actual operation of case law. On the other hand, the similarities between the Netherlands and other European civil law jurisdictions suggest that it cannot be said that the way cases fulfil the role of a source of law in the Netherlands deviates drastically from the way case law functions in major European civil law jurisdictions. Accordingly, it is neither justified to blindly generalize the findings of this study to other European civil law jurisdictions, nor is it appropriate to dismiss the relevance of this study by asserting that the Netherlands is a trivial and deviant European civil law jurisdiction.

I am aware of the limitations imposed by the choice to study only one small European civil law jurisdiction. Accordingly, this study does not assert that its findings reveal how cases fulfil the role of a source of law in all European civil law jurisdictions. Instead, it wishes to use its findings to trigger the readers to reflect on some of the assumptions underlying many of the existing writings on the role of cases in civil law jurisdictions as well as on some debated issues that are related to this topic. More importantly, this study wishes to trigger the interest among legal scholars to conduct in-depth and systematic studies on how cases actually fulfil the role of a source of law in other civil law jurisdictions and to compare their results with each other as well as with the findings of this study.

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[48] See e.g. Loussouarn 1958, Yiannopoulos 1974, Kiel & Göttingen 1997, Troper & Grzegorczyk 1997, Dedek & Schermaier 2012 and Fauvarque-Cosson & Fournier 2012,

[49] See e.g. Troper & Grzegorczyk 1997, Kiel & Göttingen 1997 and Van Opijnen 2011b.

[50] See e.g. Troper & Grzegorczyk 1997, Kiel & Göttingen 1997 and Fauvarque-Cosson & Fournier 2012.

4.2 Timespan

Although the Netherlands is a small jurisdiction, as soon as one embarks on a quest to closely examine the operation of its case law mechanism, one realizes that there are so many potentially relevant things to examine that, given the limited time available, it would be impossible to investigate all of them. Consequently, further methodological choices have to be made.

One of the choices to make is to define the timespan that this study covers. After all, it has taken a long time for the case law mechanism in the Netherlands to evolve into its current shape.[51] Due to the limited time and historical sources available, it is impossible to elaborately explore how cases evolved into a source of law throughout time in the Netherlands in this study. Consequently, I have chosen to focus on the current situation: i.e. how cases *nowadays* actually fulfil the role of a source of law in practice. It should be noted that although the focus is on the present, this study does refer to situations in the past where such references can help us better understand the present-day situation by putting it in a proper historical context.[52] When researching relevant historical background information, the year 1838 has been taken as the starting point. This choice has been made, as it was in 1838 that the Netherlands introduced its first Civil Code and the Kingdom Legislation Act,[53] which can be seen as demonstrating a fairly clear intention of the legislature to uphold legislation to be the only source of law and to limit the authority of cases to bind only the litigating parties.[54]

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[51] Commercial case publication, for example, already existed in the Netherlands long before the first Civil Code was introduced in 1848, see Jansen & Zwalve 2013, p. 133-185.

[52] Especially when exploring case publication in the Netherlands and the recognition of cases as a source of law, this study consulted many historical sources. For details see chapter one and chapter three.

[53] Diephuis 1869, p. 2.

[54] See e.g. Opzoomer 1865, p. 25, Diephuis 1869, p. 86-87, Land 1899, p. 6 and Van Apeldoorn 1939, p. 71.

4.3 The scope of the studied cases

The Netherlands is a member state of the European Union and a member state of the European Convention on Human Rights. Cases decided by the Court of Justice of the European Union and the European Human Rights Court are used in scholarly writings, legal education and court practice in the Netherlands as authoritative materials. [55] In this study, however, I have chosen to limit the research to the publication and the utilization of cases decided by national courts of the Netherlands.

One of the considerations underlying this choice is of a practical nature, i.e. the limited time and resources. Another reason for making this choice is that the authoritative status of cases decided by the Court of Justice of the European Union and the European Human Rights Court can be said to rely ultimately on obligations imposed upon the Netherlands by treaties that the country signed and ratified, but the status of cases decided by national courts as a *de facto* source of law is not related to similar duties imposed by treaties or legislation.[56] Still anther reason to limit the research to cases decided by national courts is related to one of the purposes of this study, i.e. seeking insights that may be helpful for China to enhance its case law practice. The case law debate in China and the efforts to enhance the use of case law in China are focused on national cases instead of cases decided by international or supranational courts. How cases decided by the Court of Justice of the European Union and the European Human Rights Court are treated in the Netherlands is accordingly less relevant for the purpose of seeking practical insights than the way cases decided by national courts are published and used in the Netherlands.

4.4 Why China?

As has been pointed out in the first paragraph of this introduction, cases have not developed into a source of law in all codified legal

[55] See e.g. Hondius 2007a, p. 19, Lindenbergh & Van Maanen 2011 and Gerards & Fleuren 2013.

[56] For details, see the paragraph in chapter three of this study that examines the relevant legislation in the Netherlands.

systems. In some former socialist countries in Eastern Europe as well as in some developing countries with a codified legal system elsewhere in the world such as Indonesia and Vietnam, cases have not (yet) been able to fulfil the role of a source of law.[57] This raises the question why this study focuses on China instead of any other country with a codified legal system where cases have not (yet) acquired as significant a role as that in many civil law jurisdictions in Western Europe. To this question, there is a subjective as well as an objective answer, which will be clarified in the following passages.

A subjective answer is that I am capable of reading and speaking Chinese, but do not master the official languages in other countries with a codified legal system where cases have not (yet) been able to fulfil the role of a source of law. Accordingly, it is much easier for me to access written and un-unwritten sources in China than in other codified legal systems where cases have not (yet) developed into a source of law in practice.

An objective answer is that China introduced a new legal institution called the "Case Guidance System" in November 2010, which seeks to enhance the use of cases in court practice throughout China by authorizing the Supreme People's Court to select so-called "guiding cases" from candidate cases recommended by lower courts across China.[58] This new legal institution has a peculiar design.[59] To my best knowledge, a similar legal institution has not been introduced in Indonesia, Vietnam or former socialist countries in Eastern Europe. [60] Against this background, China seems particularly worth studying as it has a unique formal legal

[57] See e.g. Hondius 2007a, p. 21-23, Tran 2009, p. 8, Griffiths 2011 and Innis & Jaihutan 2014, paragraph 1.2.

[58] See e.g. Supreme People's Court of the People's Republic of China 2010b and Jiang 2011a.

[59] For details see the paragraph in chapter five of this study that explores the design of this new legal institution.

[60] I presented my findings with regard to China's Case Guidance System to legal scholars that are familiar with and law students that come from Indonesia, Vietnam as well as some former socialist countries in Eastern Europe. The feedback that I obtained indicates that none of these jurisdictions has introduced a formal legal institution similar to China's Case Guidance System.

institution that is specially designed for the purpose of stimulating the development and use of case law.

I am aware that I cannot establish that China is representative of codified legal systems where cases have not (yet) developed into a source of law, as I have not been able to consult extensive literature concerning the use of cases in other codified legal systems where cases have not (yet) been able to fulfil the role of a source of law in practice. Accordingly, this study does not claim that the insights that were carefully drawn from the experiences with case law in the Netherlands for China to further enhance the use of cases can be generalized to other codified legal systems where cases are still not being used as a source of law in practice. Readers from such legal systems are urged to carefully verify the relevance of the thoughts presented in chapter six of this study for their home jurisdictions.

4.5 Quoting Dutch and Chinese sources

This study examines a fairly large amount of Dutch and Chinese sources such as legislation, scholarly writings, court judgments and policy documents. When such materials are quoted, this study provides an English translation, but has chosen not to provide the original Dutch or Chinese texts in addition to the English translation. A key reason for doing so is to facilitate readers that do not master Dutch or Chinese and at the same time to save space in this book. Readers that prefer to consult the original materials can find these materials by using the references provided. All translations are mine unless otherwise indicated.

5. Structure of the book

The main body of this book consists of two major parts. The first part (chapter one, two and three) focuses on the Netherlands. The second part (chapter four, five and six) puts the findings of the first part in a broader context and seeks to explore the implications of the first part for the discussion in comparative law on the role of cases in civil law jurisdictions (chapter four) and for China's quest for a case law system (chapter five and six).

The first chapter investigates the first phase in the case law mechanism and seeks to ascertain how cases are published in the Netherlands. This chapter examines two major case publication channels, i.e. commercial case publication by profit-oriented publishers and official case publication by the judiciary. It investigates a series of questions such as which actors are involved in the publication of judgments, what proportion of decided cases is published, what the selection criteria are for publication, through which mechanisms published cases can be found and how practising and academic lawyers reflect on the way cases are published in the Netherlands. This chapter also reflects on the role that case publication fulfils in the case law mechanism.

The second chapter investigates the next phase in the case law mechanism and explores how cases are used in the Netherlands. Not only does it examine how cases are used in adjudication, it also examines how cases are used in scholarly research and in legal education. Furthermore, this chapter explores the contribution made by the different users to the functioning of cases as a source of law.

The third chapter examines the recognition of cases as a source of law in the Netherlands. It investigates whether the legislature, judges and legal scholars in the Netherlands explicitly or implicitly recognize cases as a source of law. This chapter also reflects on the dynamics between the actual functioning of cases as a source of law in practice on the one hand and the explicit or implicit recognition of cases as a source of law on the other.

The fourth chapter links the first part of this study with the existing body of English-language comparative law literature related to the role of cases in civil law jurisdictions. In particular, this chapter will explore the implications of the findings of the first part of this study for three debates in this body of literature, i.e. (1) whether the common law and the civil law legal families are converging, (2) whether civil law jurisdictions have a workable case law method and (3) whether it would be wise for civil law jurisdictions to adopt the doctrine of precedent.

The fifth chapter concentrates on China's efforts to develop a case law system since the 1980s. This chapter sets the stage for the final chapter by answering an important preliminary question, i.e. what does China need case law for and what has China done so far to develop case law. The main focus of this chapter is on a new

legal institution in China called “Case Guidance System”, which was introduced by the Supreme People’s Court of China in November 2010. This chapter first examines the reasons that have triggered the Supreme People’s Court to introduce this new legal institution. Then it examines the evolution, design and functioning of the Case Guidance System. The final paragraph of this chapter will reflect on some of the limitations of the Case Guidance System.

The last chapter builds upon the first three chapters as well as the data and analysis presented in chapter five. It will carefully draw some insights from the experiences with case law in the Netherlands that may be useful for China to further enhance the use of cases. In particular, this chapter will discuss the possible contribution that legal scholars and legal education can make to the development of a well-functioning case law system in China.

The final conclusion will summarize the key findings of this study, put them in an interrelated context, reflect upon them and seek insights at an overarching level.