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## Precedent in the Netherlands

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### 1. Introduction

This report addresses the Rule of Precedent or *stare decisis*, the extent to which it finds recognition in the Netherlands, the approach to precedent by the Supreme Court (*Hoge Raad*) and other Dutch courts, and the theoretical underpinnings of that approach. Professor Hondius' comments provide an excellent starting point for such analysis.

I salute the International Academy of Comparative Law's decision to address this topic now. Although much – perhaps too much – has been written about precedent, I actually believe that some great comparative lessons can be drawn from the approach of the courts in the Netherlands and the theory of precedent they have developed. (See below, in particular § 9). I also believe that a thorough, worldwide, comparative study of this issue is desirable because the Civil Law and Common Law still lack a proper understanding of each other's systems, and stubborn misconceptions linger in this area. To clear up a few:

- the importance of precedent is not measured by the sheer number of reported cases, or the frequency of citation to decided cases (see below § 4);
- binding force is an on/off category; it is not a matter of degree (at least not under traditional legal theory) (see § 6);
- *stare decisis*, the binding force of precedent, is not to be confused with accepting precedents as a source of law. Indeed, based on one strand of English legal thought, it is the exact opposite (see § 7).

I do not believe there is any sort of convergence among the various legal systems, notably the Common Law and the Civil Law, even if we consider that the highest courts in England, Australia, Canada and the United States ultimately do not consider themselves bound by their own decisions. Convergence implies a trend or some type of movement toward a position in the center, which is not what is happening at this point in time. England, for example, threw off its shackles in 1966, which is 40 years ago, hardly a reason to now all of a sudden speak of a 'trend'. To the extent courts at

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the intermediate level remain bound by precedents of their own making, such a rule is not being followed in the Netherlands and, by common agreement, deserves no following whatsoever.

This report describes a philosophy of adjudication that is not what the Common Law has traditionally used to justify *stare decisis*. But it fits better to explain when precedent should or should not be followed than the Common Law's own theories, which are ultimately inadequate. The philosophy more or less prevails in the *Hoge Raad*'s jurisprudence. It is a flexible methodology that accounts for the *Hoge Raad*'s evolving case law without the 'childish fiction' that every new decision represents how the law should always have been understood. It is a conservative approach in the true sense of the word, but not *ultra*-conservative like strict adherence to precedent is.

In the spirit of this conference, however, I address first what I believe may fairly be called the 'common core' when it comes to the treatment of precedents in different legal systems.

## **2. The 'Common Core': a Minimalist take on Precedent**

There are at least three benefits to adhering to precedent, each of which provide a good policy reason why courts should generally follow precedents. They may represent a 'common core' among a variety of approaches to precedent in the sense that lawyers from different jurisdictions would agree that these policies are sensible. But even when each of these three rationales are combined in support of adherence to precedent they present no more than a *minimalist* view of precedent. This minimalist view of precedent is based on expedience:

*Efficient use of judicial resources.* The first benefit or rationale, I believe, is judicial efficiency. Similar issues and questions of law come up all the time. Once a competent court has struggled with a legal problem and resolved it intelligently, other courts can, and should, reap the benefits of that mental exercise. Courts must not engage in reinventing the wheel; it is too time-consuming and – assuming the previous court is just as competent as the next – not productive. Avoiding duplication of efforts saves everyone's time, including that of legal counsel. By adopting another court's solution, or sticking with its own decision reached in an earlier case, the court is basically telling the advocates:

'Look, you don't have to keep pressing the same argument. We, and our colleagues on the bench, have already considered them, weighed them against other arguments, and rejected (or accepted) them'.

Thus if no substantially different arguments are offered, the presumption must be that the next case will be decided the same way. This rationale does not invoke the notion that the law should apply equally to all. It is efficiency, plain and simple.

*Setting the parameters of the debate.* A second rationale is also practical. In a world where 'everything has to do with everything' adherence to precedent serves as an indispensable tool to focus (i.e., limit) the debate between the parties and the judge. Counsel may advance whatever argument they want; but it better be tied, even if only loosely, to existing law. If something similar has been done by another court an advocate's claim that this court should act likewise is not outlandish or frivolous. It is at least a good faith argument. You cannot be ridiculed by your opponent. You will not be laughed out of court. You are within the bounds of zealous advocacy.

*Predictability.* Third, adherence to precedent serves as the necessary link between knowing the law as applied and the ability to predict how it is likely to be

applied next time on a similar set of facts. That is important because specific facts test the scope and limits of general rules. Without adherence to precedent judicial decisions would merely be drops of history. The legal community would have nothing but a few general statements of the law. And general propositions, in the famous words of Oliver Wendell Holmes, do not decide concrete cases.<sup>1</sup>

### **3. Consistency is not *Stare Decisis***

The above rationales are, I suspect, unproblematic. There may be other good reasons to follow precedent, and they too may be part of the ‘common core’. But we need not elaborate on these or any additional rationales for one simple reason. They may explain why adherence to precedent is practical or expedient, how it saves time and effort, and how it allows practitioners to predict how current issues will be adjudicated. *But they do not explain what is known as the rule of precedent or stare decisis.* They do not *constitute* the rule of precedent, nor do they *justify* it. All they argue for is consistency.

But consistency in adjudication, with or without citation to precedent, is not the proper measure for the existence of the rule of precedent. There is a difference between adherence to precedent and adherence to the *rule* of precedent. The rule of precedent declares that precedents *must* be followed. The mere adherence to precedent (i.e., consistency) may be explained by any number of reasons other than that adherence is mandatory. Judicial laziness could be one of them; a preference for old rules reflecting traditional values may be another. Consistency may also be more benevolently explained by an honest belief that the existing rule is the better one. None of these potential explanations imply that a legal system recognizes the rule of precedent as part of the law. None justify the sweeping conclusion that the rule of precedent is on the rise in jurisdictions like the Civil Law, where courts more or less consistently follow the same rule or even cite precedent in their opinions, much less the vastly overstated proposition that legal systems are ‘converging’.

### **4. Quantitative Analysis cannot establish that *Stare Decisis* is on the Rise**

Various studies have made quantitative analyses of the role of precedents in Dutch law.<sup>2</sup> They support a number of important observations that touch on the treatment of precedent in the Netherlands.

First, the *Hoge Raad* frequently cites to its own case law or makes general references to ‘settled law’ and also frequently incorporates by reference the advice given by the Advocate-General, which in turn tends to be based on a thorough analysis of the *Hoge Raad*’s case law and doctrinal writing. Second, explicit overrulings occur a few times (once or twice) per year and are thus very rare.<sup>3</sup>

Third, lower courts pay little attention to – or at least they do not cite – other lower court’s decisions with the exception of *Kantonrechters* who have jurisdiction in employment, landlord-tenant disputes and small claims, and whose decisions are often not subject to appeal.<sup>4</sup> Lower courts cite to other lower court decisions both in support and to deviate from them. They sometimes cite to their own case law.<sup>5</sup>

<sup>1</sup> *Lochner v State of New York*, 198 U.S. 45 (1905), (Holmes, J., dissenting).

<sup>2</sup> See, e.g., Snijders 1978; Kottenhagen 1986; Struycken & Haazen 1993, p. 91 et seq.

<sup>3</sup> Struycken & Haazen 1986, p. 114-121.

<sup>4</sup> Struycken & Haazen 1986, p. 125 (describing D’Oliveira’s and Kottenhagen’s results).

<sup>5</sup> Struycken & Haazen 1986, p. 124-25.

The most noticeable finding is that the *Hoge Raad* cites its own case law both as a reason to decide likewise and to distinguish or deviate from them.<sup>6</sup> Such case citations were rare in the early 1980s and have become fairly common practice today; their frequency went up from 1% in 1981-83 to 12% in 1992, and has risen since.<sup>7</sup>

None of these studies show that *stare decisis* is finding general acceptance in the Netherlands or that it is on the rise. The binding force of precedent cannot be measured by the sheer number of decided cases, or the frequency of the *Hoge Raad*'s citation to its own case law. In the Netherlands, the number of reported cases has steadily *decreased* in the last 15 years. And even if the total volume of reported and unreported cases went up and this were some sort of sign that case law has gained importance that would still do little to show a trend toward acceptance of the rule of precedent. A large volume more likely shows that the population has grown and with it the number of controversies, and perhaps also the number of judges on active duty. Or it is a sign that society has become increasingly complex and litigious, and that parties insist more and more on prosecuting their cases all the way up to the *Hoge Raad*, as has frequently been observed.<sup>8</sup> It is true, we hope, that the more issues the *Hoge Raad* addresses, the fewer issues it leaves unresolved, and the more predictable the law becomes. But that does not show that the *Hoge Raad* feels obliged to follow precedents – just that it is making lots of them.

A court can increase its production of decisions by working more efficiently. As far as the *Hoge Raad* is concerned, part of that efficiency is due to technological improvements and the Court's internal organization; another part has to do with its practice to summarily dispose of matters without opinion (or rather a very brief one) where the matter does not require reversal and raises no questions in the interests of clarity or the law's development. See Article 81 RO (Judicature Act). Without addressing these alternative explanations one cannot possibly conclude that there is any change in the importance attached to precedents.

Even when the *Hoge Raad* cites its own cases that practice does not show it was bound to follow precedent. The *Hoge Raad* cites its case law both when it continues and when it overrules precedent. There is nothing in that practice that makes the cases cited in any way binding. Case citations are better explained by the 'second rationale' (see above): the implied message that litigants should stop bogging the overloaded court with more of the same. There certainly are cases that tend to show that the *Hoge Raad* supports this minimalist view of precedent. In HR 20 April 1990, *NJ* 1990, 525, for example, the *Hoge Raad* held that petitioner's argument failed 'on grounds set forth in paragraph 3.3 of HR 14 April 1989'. And in HR 15 June 1990, *NJ* 1990, 678, it summarily rejected the petitioner's arguments 'because the Court of Appeal's decision is correct (cf. paragraph 3.2.2 of HR 16 March 1990, *RvdW* 1990, 68)'.

Similarly, when summary disposition pursuant to Article 81 was introduced in the 1980s the legislature had the second rationale in mind: it would allow the *Hoge Raad* to speedily reject weak or frivolous arguments 'which for whatever reason raise issues that have been repeatedly addressed and settled by the *Hoge Raad*'.<sup>9</sup>

Even if one accepts minimalist precedent, as the Dutch courts undoubtedly do, one is still miles away from accepting *stare decisis* as a rule of law. To turn good

<sup>6</sup> See, e.g., HR (Dutch Supreme Court) 11 November 1986, *NJ* 1987, 488; HR 16 October 1987, *NJ* 1988, 1014.

<sup>7</sup> Struycken & Haazen 1986, p. 117-18, 130.

<sup>8</sup> See, e.g., Faure & Hartlief 1999, p. 2007; Schuyt 1997, p. 926-30; Brunner 1996, p. 11; Hammerstein 1999, p. 956-57; Haazen & Spier 1996, p. 45.

<sup>9</sup> *Memorie van Antwoord Wijziging Wet RO no. 199953*, at 11 (my translation).

policy into a broad and absolute rule that would apply even when the underlying policy does not, would amount to unwarranted formalism. Accepting strict adherence just because in 30, 40, 50 or even 90% of cases there are good reasons not to re-examine precedent in *no* way justifies summarily rejecting a good legal argument in the remaining percentage of cases merely because the issue has once been dealt with. If there is no continuity there is no law. But continuity alone does not justify the rule of precedent.

Quantitative analysis is nevertheless useful because the rule of precedent may be adequately *disproved* by a large incidence of non-adherence. If the *Hoge Raad* regularly fails to adhere to precedent (whether through express overruling or by simply not following (or ignoring) precedent, or indeed by narrowly limiting a prior decision to the precise facts on which it was decided, or otherwise), such failure serves as evidence that the rule of precedent does not exist in any meaningful sense. While explicit departures are rare in the Netherlands, their number is at the same time large enough from year to year to conclude that there is *no* rule of precedent in the Netherlands.<sup>10</sup>

## 5. The Lower Courts are not bound by any Precedent

Up to this point, we have assumed the rule of precedent is all about the horizontal relationship of precedents. Vertical *stare decisis* – the rule that a lower court must abide by the decisions of a higher court that has appellate jurisdiction over its decisions – is interesting from a comparative perspective because the Netherlands and the Common Law stand diametrically opposed. As far as I am aware, the lower courts in England (and Wales and Scotland) must follow their superior courts' decisions.<sup>11</sup> The same is generally true in the United States. English and U.S. courts have gone as far as rejecting 'anticipatory overruling' – departing from precedent 'in anticipation of' (and therefore prior to) the House of Lords' or the U.S. Supreme Court's actual overruling of its precedents, at a time when such overruling is perceived as imminent.<sup>12</sup>

<sup>10</sup> See, e.g., HR 28 June 1996, *NJ* 1997, 494 (*Moksel AG v Koel- en Vriesveem Vlissingen*) (declining to follow HR 16 March 1933, *NJ* 1933, 790 (*Dordrechtse autogararage v DIC*) in light of the 'development of the law since'); HR. 28 February 1992, *NJ* 1992, 687 (*Changoe v Staat*); HR 27 March 1992, *NJ* 1992, 496; HR 31 May 1991, *NJ* 1991, 721; HR 29 June 1990, *NJ* 1991, 120; HR 19 June 1990, *NJ* 1991, 119; HR 28 October 1988, *NJ* 1989, 765 (*Solar v Allaguthurai*); HR 16 May 1986, *NJ* 1986, 723 (*Heesch v Van de Akker*); HR 7 February 1986, *NJ* 1986, 474 (*Koflach v Stobasport*); HR 1 February 1985, *NJ* 1985, 698 (*Transocean Towage v Hyundai*). See generally Struycken & Haazen 1986, p. 114 et seq.

<sup>11</sup> See, e.g., *Davis v Johnson* (1979) A.C. 264; *Cassell v Broome* [1972] A.C. 1027; *Young v Bristol Aeroplane Co. Ltd.* [1944] 1 K.B. 718.

<sup>12</sup> In *Rodriguez de Quijas v Shearson*, 490 U.S. 477 (1989), the United States Supreme Court held that a certain arbitration clause did not violate a provision of the Securities Act of 1933. The year before, the Court of Appeals had held the same, following the Supreme Court's 1987 decision overruling *Wilko v Swan*, 346 U.S. 427 (1953) that such arbitration clauses were not contrary to the identical provision in the Securities Exchange Act of 1934. Although the Supreme Court agreed, with the Court of Appeals and again overruled itself with respect to the provision in the 1934 Act, as it had done with respect to the 1933 Act, it nevertheless criticized the appellate court, which it held 'should follow the case which directly controls, leaving to the [Supreme] Court the prerogative of overruling its own decision'. *Idem* at 484; see also *Hoffman v Jones*, 280 So.2d 431, 440 (Fla. 1973); cf. *Miliangos v George Frank (Textiles) Ltd.* (1976) A.C. 443.

Again, there is no such rule in the Netherlands. There are rare cases that have *suggested* otherwise,<sup>13</sup> but the predominant view is that the lower courts are not obligated to follow the case law of appellate courts or the *Hoge Raad*, and that the courts of appeal need not follow the *Hoge Raad*.<sup>14</sup> For example, in Hof Amsterdam 19 December 1991, *NJ* 1993, 36, the Amsterdam Court of Appeals referred to the *Hoge Raad*'s case law but declined to follow it because the cases were old, criticized in the literature, and there had been an increasing practice among lower courts not to follow these decisions.<sup>15</sup>

Nor can the *Hoge Raad*'s practice of citing its own decisions be construed as implying that a lower court is being reversed because it failed to treat those decisions as binding. The *Hoge Raad* cites its case law even when the cited opinions issued that same day or a week earlier and have remained unpublished. For example, in HR 19 June 1992, *NJ* 1992, 590, the *Hoge Raad* held the trial court should have decided in accordance with the *Hoge Raad*'s decision of 21 June 1991. But that decision had not yet been published at the time of the trial court's decision on July 4, 1991, which was only two weeks later.<sup>16</sup> Clearly, references such as these serve only to indicate what the *Hoge Raad* believes to be the correct view that should have been applied below; they do not suggest that there is a rule of vertical *stare decisis*.<sup>17</sup>

Obviously, the 'sanction' for a failure to follow precedent is likely a reversal (assuming there is a right of appeal),<sup>18</sup> and that is, like in England and the U.S., the *only* sanction. Since reversal threatens a Dutch court the same way it threatens its Common Law counterparts, one may wonder why the rules are nevertheless so different between them. The explanation, I believe, lies in a few rules whose collective function is to strike a balance between uniformity of domestic law and judicial experimentation. Generally speaking, Dutch law perceives diversity of opinion (or judicial experiment if you like) among the lower courts as relatively unproblematic or even helpful to the development of the law – a view that distinguished scholars such as Jan Vranken and Jan van Dunné have expressly endorsed.<sup>19</sup> Vertical *stare decisis*, on the other hand, serves the uniform application of the law, and is therefore, as such, less conducive to experiment. It thus counterbalances other factors at play within the Common Law that may have an opposite effect, such as the fact that there is no appeal as of right to the House of Lords or the U.S. Supreme Court, a factor that would otherwise foster almost unhibited experimentation.

<sup>13</sup> E.g., HR 4 November 1988, *NJ* 1989, 854 (stating that the appellate court reasoned 'in accordance with HR 7 May 1982 . . . and therefore correctly'). Lower courts' citations to the *Hoge Raad*'s case law are no sign that those cases are treated as binding authority: lower courts equally cite to various decisions of administrative or even foreign courts, which could never be precedential even if there were a rule of precedent; Struycken & Haazen 1986, p. 126.

<sup>14</sup> Asser-Scholten 1974, p. 86; Van Dunné 1990, p. 626 (in developing the law, the lower court does not need the Supreme Court's *imprimatur*); Haazen 2001), p. 319-23. But see Abas 1985, p. 20 (suggesting an appellate court has an obligation to follow the latest *Hoge Raad* decisions).

<sup>15</sup> In Rb Groningen 27 June 1990, *NJ* 1991, 196, the trial court openly questioned and examined the *Hoge Raad*'s case law, which it decided to give, for lack of a better alternative, the benefit of the doubt.

<sup>16</sup> See also HR 8 November 1991, *NJ* 1991, 277 (citing its own decision of even date) and HR 25 September 1987, *NJ* 1988, 940 (same).

<sup>17</sup> Struycken & Haazen 1986, p. 120-21.

<sup>18</sup> E.g., HR 6 April 1990, *NJ* 1991, 689 (HR sticks with settled law despite different views held by trial court, appellate court and Advocate-General).

<sup>19</sup> Asser-Vranken 1995), no. 186; Van Dunné 1990, p. 626.

In the Netherlands, by contrast, litigants have a broad entitlement to judicial review by the *Hoge Raad* (Art. 81.RO). Thus, whatever diversity the absence of a rule of vertical *stare decisis* invites, it is severely curtailed by the lower courts' desire to keep their reversal rates down.

Although each legal system will have to strike its own balance its own way, the Common Law experience with anticipatory overruling shows that vertical *stare decisis* goes too far in either system. Once it is clear, or at least likely, that obsolete precedents are ready to be buried and an appellate court knows it faces little risk of reversal if it did just that, it should not be forced to apply it one last time – just for the sake of it. That is wasteful and serves no purpose but pointless formalism. It does not even serve the minimalist reasons for consistency in adjudication (efficient use of judicial resources, setting the parameters of the debate, or predictability). It forces another round of litigation upon the parties, does not limit the range of relevant arguments which will inevitably expand before the Supreme Court, and it does specifically *not* set forth how the case will be decided next time.

It is pretty clear that the *Hoge Raad* would not play the vertical *stare decisis* game. Indeed, in HR 16 October 1992, *NJ* 1993, 167 it was willing to overrule its own 1960 decision precisely because it had been criticized and frequently not followed by the lower courts – quite the opposite of vertical *stare decisis* and an implicit endorsement of anticipatory overruling by a noble court whose willingness to listen to criticism is quite admirable.

For similar reasons I must admit to having a hard time understanding a rule that binds a court of intermediate jurisdiction to its own precedents. There is no such rule in the Netherlands but it apparently prevails in the English Court of Appeal in criminal cases.<sup>20</sup> Maybe one could understand if a court would promulgate such rule for itself (but see below § 6-8). But for the highest court to reverse a court of intermediate jurisdiction on the ground that it failed to follow its own precedent simply makes no sense. If the highest court disagrees with the new decision it should say so and reverse on that ground (it should not cite to the old appellate decision in support of that reversal because a lower court decision is obviously not binding on the highest court). If it agrees, however, it should affirm. The court would have to come from Mars to agree with the appellate court in substance and yet reverse because the appellate court failed to follow a precedent that both courts now reject. Rather it should take the opportunity to state its own view of the law<sup>21</sup> and be grateful that the appellate court paved its path rather than complain that the appellate court beat it to the punch.

## **6. There is no Rule of Precedent in the Netherlands – nor should there be**

The heart of *stare decisis* lies in the horizontal relationship: the binding force that precedents have on the court from which it emanated. The question presented is what a court may or must do if it finds itself disagreeing on substantive grounds with a precedent. Will it be free to hold what it believes to be correct, or must it follow the earlier decision believed to be wrong (either wrongly decided at the time or no longer correct)? Put differently: is a court bound to eternally continue a previous mistake? If

<sup>20</sup> Questions involving the liberty of the subject exempted, see *R. v Taylor* (1950) 2 K.B. 368; see also Cross & Harris 1991, p. 117-118, 163.

<sup>21</sup> Unless the highest court's standard of review is not that the law was erroneously applied but only whether the court abused its discretion; when reviewed under an abuse of discretion standard, a lower court's shift in the exercise of its discretion is also likely to be sustained.

one asks the question this way – and that is the core issue at this conference – the answer is not complicated: *no one wants precedents to be binding*. ‘[W]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it’.<sup>22</sup>

At first blush it appears that there is a wide specter of opinion in Dutch legal doctrine as to the authority accorded to precedent (in the horizontal sense). The views range from ‘*in principle*, judges are bound’,<sup>23</sup> ‘*de facto* binding effect’,<sup>24</sup> ‘an informally restricted *stare decisis* principle’,<sup>25</sup> ‘conditional binding force’,<sup>26</sup> to no more than ‘a certain precedential effect’,<sup>27</sup> or the view that a court is ‘in principle free to alter its policies’<sup>28</sup> or ‘in principle not bound by its own decisions’.<sup>29</sup> Another view is that precedents are only binding in the sense that they require the court to provide additional grounds in its opinion if it declines to follow them.<sup>30</sup> As Professor Hondius correctly notes, the more common view in the Netherlands appears to be that precedents are at least ‘sort of binding’.<sup>31</sup>

While these views reflect differences of degree, they have two elements in common: they all seek some compromise between the binding force of precedent and judicial freedom, and none (literally: *none*) *actually* accepts precedents as truly binding. For what does it mean to claim that in the Netherlands precedents are ‘sort of binding’ (as opposed to ‘strictly binding’)? Really not that precedent *are* ‘sort of binding’. Rather it means that people are confused as to the meaning of ‘binding’. Binding force is not a matter of degree. A court is either bound or not bound by precedent. If there is a way out, the court is not bound. If precedent is only ‘presumptively’ binding, or ‘*de facto*’ (but not ‘legally’) binding, or ‘in principle’ binding, *it is not binding*. Arguing that a precedent is ‘binding’ in the sense that it is not binding as long as a court provides sufficient grounds for its decision not to follow it, is close to being pointless. Similarly, forcing judges to follow an earlier decision unless it was ‘wrongly decided’ or unless the judges believe it to be no longer correct has *nothing* to do with the rule of precedent.<sup>32</sup>

<sup>22</sup> *Trammel v United States*, 445 U.S. 40, 48 (1980) (quoting *Francis v Southern Pacific Co.*, 333 U.S. 445, 471 (Black, J., dissenting)).

<sup>23</sup> Pitlo-Gerver 1988, p. 42 (emphasis added); see also Abas 1985, p. 20.

<sup>24</sup> Brunner 1994, p. 2-4. See also Olzen 1985, p. 157-163.

<sup>25</sup> Brunner 1973, p. 4, n. 7.

<sup>26</sup> Jessurun D’Oliveira 1999, p. 141; Snijders 1997, p. 1796. Cf. Larenz 1983, p. 414 (precedent presumptively binding); Bydlinski 1991, p. 508-512.

<sup>27</sup> Van Schilfgaard 1982, p. 669; Polak 1989, at 60 (precedent has ‘authority’); Jessurun D’Oliveira 1973, p. 237 (precedents are ‘a reason, not the sole reason, and not the strongest’ to continue to decide likewise).

<sup>28</sup> Koeman 1982, p. 981 and 984.

<sup>29</sup> Opinion of the Advocate-General Mok, HR 28 May 1999, *NJ* 1999, 816 (*Nassy-Tseng v Curaçao*), 2.4.3.

<sup>30</sup> Asser-Vranken 1995, nos. 186, 240; Kottenhagen 1981, p. 282.

<sup>31</sup> Hondius 2006, p. 5; Haazen 2001, p. 340.

<sup>32</sup> Barendrecht 1992, p. 198 (there is no point in claiming that precedents are binding if they need only be followed if and to the extent they are considered substantively correct); Haazen 2001, p. 324.

‘[S]tare decisis, if it is to mean anything in this context, obliges a court to apply a case even though it is wrong’.<sup>33</sup>

If a judge is bound depending on whether he agrees or disagrees with the precedent, the case derives its force from its substance, not from its formal status as a precedent.

Thus there can be no doubt that *stare decisis*, properly understood, is entirely foreign to Dutch law, and I am aware of no scholars that would propagate pure petrification of precedent, even where the earlier decision is no longer correct or desirable, or never was. The point is perfectly illustrated by former Chief Justice Martens who once commented that ‘in principle, the *Hoge Raad* considers itself bound by its own decisions’, to which he hastens to add: ‘but it is undeniable that it will not hesitate to overrule’ an earlier decision ‘if it is persuaded that it is incorrect and legal certainty does not justify clinging to it’.<sup>34</sup>

## 7. *Stare Decisis* is Theoretically Impossible

We have thus far applied two standards to measure the rule of precedent in the Netherlands: (i) the simple fact that the Supreme Court does not always follow precedent and shows no signs that it feels obliged to, and (ii) the fact that no scholar is willing to argue in its favour without distorting the meaning of *stare decisis*.

It also helps that the *Hoge Raad* has unequivocally rejected such rule.<sup>35</sup> In *Farzoo v Upjohn*, it stated that ‘there is no reason at all why the Court of Appeal would be obligated to follow the *Hoge Raad*’s decision reversing and remanding [an appellate court’s decision] in another case’. It’s a firm rejection of *stare decisis* in the vertical (and *a fortiori* in the horizontal) sense: if the *Hoge Raad* does not bind the Court of Appeal it certainly does not bind itself.

As a matter of pure logic, however, the holding in *Farzoo v Upjohn*, cannot be conclusive: if a court holds that it is not bound by its own decisions, that decision (i.e., the decision not to be bound) cannot be considered binding authority. It does not necessarily follow that precedents are *non-binding* either because that would presuppose that the Court is bound by its decision that precedents are not binding.<sup>36</sup> This leads to a fourth ground to conclude the rule of precedent does not exist in the Netherlands: it is theoretically impossible.

There are a number of theoretical issues that both Civil and Common lawyers inevitably have to face when addressing the issue of *stare decisis*. The question of case law as a source of law is one of them (see below § 9). There is a striking resemblance between the Common Law and the Civil Law in that the traditional view is Blackstone’s ‘declaratory’ theory: the view that judges cannot, and do not, create new law.<sup>37</sup> In the Netherlands the view was widely accepted in the past, and in the eyes of some still is.<sup>38</sup>

<sup>33</sup> Wesley-Smith 1987, p. 79; see Cross & Harris 1991, p. 4 (‘the judge in the instant case [is] obliged to decide it in the same way as that in which the previous case was decided, even if he can give a good reason for not doing so’).

<sup>34</sup> Martens 1988, p. 155.

<sup>35</sup> HR 4 December 1998, *NJ* 1999, 340.

<sup>36</sup> In other words, one cannot justify the rule of precedent with precedent. See Wesley-Smith 1987, p. 77 et seq.; Blackshield 1987, p. 110; Williams 1957, p. 186-187. One cannot deny the rule of precedent with precedent either. See below.

<sup>37</sup> Blackstone 1836, p. 69-71. See, e.g., *Kleinwort Benson Ltd. v Lincoln City Council* [1998] 4 All E.R. 513, 534-37 (Lord Goff); *Choice Investments Ltd. v Jeronimon* [1981] 1 All E.R. 225, 226 (Lord Denning MR) (‘Every decision of the House . . . declares what the law is and always has

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The Common Law and Civil Law systems draw completely opposite conclusions from the very same theory. In the Common Law, the binding force of precedent is seen as a necessary corollary of this view. Because judges are forbidden to change the law, they must be forbidden to change precedent:

‘[I]t is my duty to say that your Lordships are bound by this decision. . . . [I]f it were not considered equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority’.<sup>39</sup>

‘The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature’.<sup>40</sup>

This Blackstonian view of *stare decisis*, however, is inconsistent on its face. It holds that judges cannot make law, i.e. that their decisions do not constitute law but are merely ‘evidence’ of the law found elsewhere, and yet feels compelled to ban any change in judicial decision-making because a change of precedent would change the law. But if court decisions do not create new law why would they have the effect of changing the law when neither the overruled precedent nor the new decision constitutes the law? Any decision that fails to reflect pre-existing law is simply a mistake under the declaratory theory. If a precedent does not create law, as the declaratory theory proclaims, there is no reason why a successor court would be bound by the mistake rather than pre-existing law. ‘A judge is bound to apply the law, not another judge’s determination of it’.<sup>41</sup>

In the Netherlands, the declaratory view has been used to justify retroactive application when a court breaks with precedent.<sup>42</sup> It has never been used to prohibit a modification of precedent. Many Civil lawyers are in fact quite surprised to find out that the declaratory view ever prevailed in England, or that it was meant to justify *stare decisis*. Typical Civil Law thinking has long overlooked that the view that courts do not make and cannot alter the law and that that is why courts are not free to depart from precedent is also dominant in England. Dutch scholars, for example, have traditionally reasoned that *stare decisis* cannot exist in a Civil Law system because treating judicial decisions as binding would be to *recognize* their force of law; and in codified systems, *unlike in the Common Law* (so goes the Civil lawyer’s understanding of the Common Law) judges do not make law.

been’); *Mineo v Port Auth. of New York and New Jersey*, 779 F.2d 939, 943 (3d Cir. 1985) (citing Blackstone’s view that judges do not make but merely discover law); *Cash v Califano*, 621 F.2d 626, 628 (4th Cir. 1980) (‘the Blackstonian view, that judges do not make law, they find law’).

<sup>38</sup> See, e.g., Pitlo-Gerver 1988, p. 42; Dubbink 1990, p. 4; Koopmans 1986, p. 413.

<sup>39</sup> (1861) 9 H.L.C. 274, 338 (Lord Campbell).

<sup>40</sup> *Myers v Director of Public Prosecutions* [1965] A.C. 1001.

<sup>41</sup> Wesley-Smith 1987, p. 79.

<sup>42</sup> See, e.g., HR 5 September 1997, NJ 1999, 410 (*Stamicarbon v Dow Chemical*) (patent and patent infringement must be judged by novel patent infringement rules); HR 18 December 1981, NJ 1982, 570 (*Gielen v Assuradeuren*) (applying new fraud in the inducement rules retroactively to old insurance policies); Rb Utrecht 11 november 1931, NJ 1933, 1021 (*Minimax v Spanjaard*) (applying HR 31 januari 1919, NJ 1919, 161 (*Lindenbaum v Cohen*) (which overruled HR 10 June 1910, W. 9038 (*Zutphense juffrouw*)) retroactively to facts dating back to 1904). See also Asser-Scholten 1974, p. 137; Polak 1986, p. 300; 1962, p. 13.

In light of the above, the Civil Law's 'misunderstanding' of the Common Law is quite understandable. Indeed, it seems to have actually understood the Common Law better than the Common Law understood itself: denying that the courts have the capacity to create new law, or that their decisions have the force of law (or that case law is a source of law) is *incompatible* with *stare decisis*. The more intuitive view would be the opposite: that novel court decisions are binding on subsequent courts precisely because such decisions *do* create law; if precedents create law, they are binding as any other rule of law is.<sup>43</sup>

But this 'constitutory theory of precedent' is equally problematic. Again Wesley-Smith has said most of what needs to be said about this issue: 'A court's authority to make law must be a continuing authority, which would be denied if a court were bound by its own decisions'.<sup>44</sup> Why recognize a court's creative power, and then mandate that it can only be exercised once? I can think of no societal concern (that is not already addressed by the minimalist view of precedent) that requires turning a judge into his predecessor's servant or a slave to himself.<sup>45</sup>

## 8. Equal Justice does not Necessitate *Stare Decisis*

What about the principle that the law should apply equally to all? The principle finds strong support in the Netherlands. It is laid down in Article 1 of the Constitution, permeates all areas of the law, and has been invoked to support minimalist precedent.<sup>46</sup> Is it not a principle of law so fundamental that it requires us to acknowledge a much stronger rule of precedent? Does it not require that like cases be treated alike?

Sure it does, but that begs the question when cases are alike. Clearly, it matters whether there has been a change in the law. If that were not a valid reason for different treatment no change in the law – whether by overruling precedent or by legislative enactment – could ever be effective. If all cases had to be treated alike at all costs Europeans would still be governed by tribal law. At most, treating like cases alike could require that the new decision not be applied retroactively to the case at hand or to cases from the same era. But it is in itself insufficient ground to extend outdated law even further into the future.

There is another reason why treating like cases alike is problematic as a justification for making precedents binding. It is of course a truism that cases are never identical because the facts are never truly the same. The point here goes beyond this truism, which would be of little relevance if all we were interested in is the broadly worded general proposition of law – sufficiently broad to reach a variety of facts, the details of which one need not be concerned with. But under standard theory of precedent we are not. Under standard theory only the *ratio decidendi* is binding,

<sup>43</sup> A trace of this reasoning is found in HR 10 May 1996, *NJ* 1996, 643 (*Cijntje v Protestants Nijverheidsonderwijs*) (stating that when the highest court 'concludes' a legal development its decision may be treated as a new rule of law). The court's wording suggests that no further development is anticipated but stops short of prohibiting it, or accepting any decision that was a building block in that development as binding. See Haazen 2001, p. 325.

<sup>44</sup> Wesley-Smith 1987, p. 82.

<sup>45</sup> See Lord Denning's unsuccessful argument in *Gallie v Lee* [1969] 2 Ch. 17 (Lord Denning, dissenting) ('I do not think we are bound by prior decisions of our own, or at any rate, not absolutely bound. . . . It was a self-imposed limitation; and we who imposed it can also remove it').

<sup>46</sup> See, e.g., Asser-Scholten 1974, p. 47; Brunner 1973, p. 3. See also Bydlinski 1991, p. 509.

not those statements of the law that are merely *obiter dictum*. The *ratio decidendi* (or 'holding' as it is referred to in the U.S.) is the 'principle of the case', the legal principle upon which the case was decided (upon which the outcome of case rests). An *obiter dictum* (or 'dictum' in American parlance) is a statement of law in the opinion which could not logically be a major premise of the selected facts of the decision, and was therefore not determinative of the outcome.

As an initial matter, I should mention that there is such a thing as *obiter dictum* (*overweging ten overvloede*) in Dutch law. But labelling a portion of the Court's opinion as such has no significance; it says no more than that the point is not strictly necessary to support the outcome of the case, and no legal consequences are attached to categorizing a statement one way or another. Indeed, if anything, one might consider an *obiter dictum* of more value than any other portion of a Dutch Court's opinion. In the Netherlands, the judges on the panel that hears a case do not write individual opinions. The opinion of the collective court is largely devoid of redundant language, more formal in style, and considerably shorter than opinions usually are in the Common Law. If the Court adds an *obiter dictum* there is all the *more*, not *less*, reason to believe it is trying to say something of particular importance.

From a principled perspective, one may wonder why anyone would even care about the *ratio-dictum* distinction. If an *obiter dictum* states the law, it states the law. Why would it matter that the statement was not indispensable to come to the conclusion the Court reached? While there is some truth to the view that a court's statement of the law should be authoritative even if it did not function as a necessary premise of the outcome in a case, the distinction is nevertheless important. As many have observed (in England, for example, Goodhart), the true meaning of an earlier decision does not lie in the general proposition of law, which was likely pronounced in a case where all its consequences and its potential reach could not be foreseen; instead, it lies in the particularized rule of the case, embedded in the rich factual context of that case, which shows why the pronounced rule is fitting and what that general statement means in a concrete situation.<sup>47</sup> An *obiter dictum* is not tied to particular facts of the case and therefore not as useful in understanding particularized rules.

If anything turns on the *ratio-dictum* distinction, it becomes a problem that there is not necessarily one right answer to the question precisely what 'the' principle of a particular case is. It may well require a determination by the very court that also decides whether or not it *wants* to be 'bound' by 'the' principle of an earlier case or would rather prefer to go a different direction. It can be hard to find 'the distinction between the *ratio decidendi*, the court's own version of the rule of the case, and the true rule of the case, to wit, what it will be made to stand for by another later court'.<sup>48</sup>

Identifying the precise facts which in a given case were determinative for the outcome not only separates the *ratio decidendi* from *obiter dictum* but may also enable a subsequent court to distinguish the matter before it from the 'crucial' facts upon which the earlier case was decided. By the same token, *extending* the particularized rule of the case to a different set of facts implies that those facts of the

<sup>47</sup> See Goodhart 1972, p. 10-26.

<sup>48</sup> Llewellyn 1996, p. 53; see also *idem*, p. 79 ('every precedent, according to what may be the attitude of future judges, is ambiguous'); Frank 1949, p. 279 ('For precedential purposes, a case, then, means only what a judge in any later case says it means').

earlier case that were different are being considered not to be part of the *ratio decidendi*. Thus '[i]t is by his choice of material facts that the judge creates law'.<sup>49</sup>

While Goodhart's theory may not be generally accepted in the Common Law and appears to miss application altogether in a jurisdiction like the Netherlands, where the *ratio-dictum* distinction plays virtually no role, it still represents a highly valuable insight in the process of adjudication. The view is in many ways very close to what is now commonplace among European legal methodologists inspired by legal hermeneutics, *topica*, 'problem-thinking', and the like, each of whom focuses on contextualized, fact-specific, fact-dependent, particularized legal norms. Nowadays, these views (or variations of them) find wide acceptance among scholars in the Netherlands,<sup>50</sup> which is why the binding force of precedent becomes hard to accept if its rationale is that like cases must be treated alike. If the particularized rule of the case is what is binding, the facts of the case – not some general proposition of law – are determinative. Once that is accepted, the observation that facts are never the same cannot be dismissed as sophistry, and few such particularized, context-specific rules will actually lend themselves to repeated application.

## **9. Community-based Legal Reasoning: Understanding the *Hoge Raad*'s Approach to Precedent**

What then is the attitude towards precedent, and what should it properly be? It is two things: first, it is the minimalist view, which is sufficient to generally give favorable treatment to precedents, even if a court is not obligated to do so; and beyond that, it is a matter of a court's *substantive* agreement or disagreement with the earlier decision. In other words, whether the court believes that a different view has emerged that should now be formally recognized or rather that the old formulation still represents the law.

The approach to precedent that the *Hoge Raad* has developed in the 1980s and 1990s is largely a response to the age-old argument that legal change is the exclusive domain of the legislature, and that judges who have not been democratically elected and therefore lack the ability to make law with sufficient democratic legitimacy should refrain from doing so. That argument overlooks that democracy is more than an election mechanism and formal procedures, and that a court that legislates with popular support is quite capable of rule-making in a manner that is democratic and legitimate.

On the other hand, a legislature which is more or less democratically elected but then uses its legislative powers to make laws contrary to popular will is certainly not doing any better in terms of grounding law in popular will. The same is true for legislation that has lost all legitimacy through desuetude, even though it came about through proper parliamentary procedures and originally reflected popular will when it was enacted.

Reflected in the *Hoge Raad*'s approach then is the view that law (or rather: legitimate, democratic law) has both a formal and a substantive component. The *Hoge*

<sup>49</sup> *Idem*, p. 10.

<sup>50</sup> E.g., Asser-Vranken 1995, no. 103; Vranken 1990, p. 198; Smits 1995, p. 48-80; Schoordijk 1972, p. 9 et seq. (facts give legal norms their substance and concrete meaning); Nieuwenhuis 1997, p. 109-21; Asser-Scholten 1974, p. 8, 46-48, 76, 121, 133-34; Van Maarseveen 1965, p. 909 (the case law further defines particularized norms, which is how the courts create law); Hesselink 1999, p. 407-410 (every court opinion gives some particularized meaning, correction, extension or modification to 'the' rule); Leijten 1981.

*Raad* has developed a democratic or ‘community-based’ approach to precedents to determine whether they should be followed or replaced. The view echoes Justice Marshall’s statement in *Flood v Kuhn* that:

‘[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself’.<sup>51</sup>

Under this approach to adjudication, a rule of law is properly part of the law when it is formally recognized as such *or* finds such strong support in the community that it effectively guides people’s actions and is considered as part of the law even before it finds official recognition. A decade ago, the community-based approach was well formulated by two Law Lords in *Kleinwort Benson*:

‘The English common law is not confined to decided cases. In the field of commercial law, for example, the custom of merchants has always been a fruitful source of law. . . . [I]t does not need a court of law to establish a custom’.<sup>52</sup>

‘There are areas of the law which are sparsely covered by judicial decision . . . In such areas the commercial world acts, and has to act, on the generally held view of lawyers skilled in the field’.<sup>53</sup>

In sharp contrast to simply jumping from precedent to precedent (with retroactive application) this community-based approach actually tries to trace what changed in society that could deserve to be recognized by the law. It also avoids a situation where everything in society changes except for precedent. The community-based approach thus presents a welcome alternative to an impossible choice between shock therapy and sclerosis.

For example, in *Gielen v Assuradeuren*,<sup>54</sup> the *Hoge Raad* overruled an earlier case known as *Tilkema’s duim*.<sup>55</sup> In *Tilkema’s duim*, the *Hoge Raad* had held that an insurance contract is void for fraud under (the now superseded) Article 251 of the Netherlands Code of Commerce where the insured failed to disclose past criminal convictions to the insurer, even where the insurer did not specifically ask for that type of information. That view was abandoned in *Gielen v Assuradeuren* which held that Article 251 does not create an obligation to voluntarily and spontaneously disclose such information if it had not been specifically requested, so that no cause for fraud would lie on the ground of an insured’s non-disclosure of a material fact.

The background of this change was a shift in thinking about privacy and the importance society has come to attach to its protection, as has been correctly observed by Verkade:

<sup>51</sup> 407 U.S. 258, 293 n. 4 (1972), (Marshall, J., dissenting).

<sup>52</sup> *Kleinwort Benson Ltd. v Lincoln City Council* [1998] 4 All E.R. 513, 549 (Lord Lloyd).

<sup>53</sup> *Kleinwort Benson* [1998] 4 All E.R. 513, 549 (Lord Browne-Wilkinson). See also *idem*, 557-58 (Lord Hope) (tracing the development of opinion in the relevant circles).

<sup>54</sup> HR 18 December 1981, *NJ* 1982, 570.

<sup>55</sup> HR 8 June 1962, *NJ* 1962, 366.

‘The question of protecting people’s personal information did not become an issue until around 1970. In the Netherlands, the 1970 census combined with the advent of electronic databases triggered opposition both in Parliament and in Dutch society against the practice of collecting, storing and distributing personal information in increasing amounts which had thus far remained unregulated’.<sup>56</sup>

The privacy issue drew considerable attention in the early 1970s when legal periodicals published special privacy issues and the government established the Koopmans Commission which published its report and drafted new legislative proposals in 1976.<sup>57</sup> Wachter, an influential scholar, wrote in 1978 that:

‘it is common knowledge that Article 251 can no longer be considered as striking the balance between the duties [of the insurer and insured] when contracting for insurance in a way that comports with the prevailing views in society’.<sup>58</sup>

In 1981, a year before *Gielen v Assuradeuren*, the insurance industry’s trade association had circulated a letter to its members advising them to incorporate specific questions regarding past criminal convictions in their questionnaires.<sup>59</sup> All these indications showed that the law had in fact changed between 1962 and 1982, and that the insurance industry did in fact have knowledge of such change.

While the *Hoge Raad* applied its new view retroactively, it followed neither the declaratory theory nor did it truly make new law. It made no claim that its new view represented the law as it should always have been understood, and merely recognized what had in practice been widely accepted.

Similarly, in *Verhoeven v Peters*,<sup>60</sup> the *Hoge Raad* departed from its case law dating back to 1861 and 1881 holding that disposing of personal property by will creates only an obligation to transfer the property and that title is not automatically transferred upon death by operation of law. In practice, that view had been abandoned for decades and the decedent’s death was treated as *ipso facto* transfer of title under the will.<sup>61</sup> The *Hoge Raad* followed this generally accepted view without either ‘making’ new law or ‘declaring’ what it had always been.

In *Plataforma v Curaçao*, the *Hoge Raad* overruled three appellate court decisions, approximately 20 years old, which had held that trial counsel must specifically notify the court that they have been appointed by their clients to represent them in court, and that absent such statement, their court papers are deficient. Following the Advocate-General’s advice that the ‘contemporary view of due process’ rejects such formalism, and that a trend away from such formalities had begun in the 1970s,<sup>62</sup> the court adopted the opposite view.

<sup>56</sup> Verkade 1982, p. 532 (my translation).

<sup>57</sup> *Idem*. See also Redactioneel *NJCM* 1997, p. 237 (describing the developments in the 1970s).

<sup>58</sup> HR 19 May 1978, *NJ* 1978, 607 (*X v Goudse Verzekering*), note Wachter (my translation).

<sup>59</sup> VL-81-82 dated November 5, 1981, see HR 3 February 1984, *VR* 1985, 64 (*Interpolis v X*), note Van Wassenauer van Catwijk.

<sup>60</sup> HR 11 May 1984, *NJ* 1985, 374.

<sup>61</sup> HR 11 May 1984, *NJ* 1985, 374 under 3, note Kleyn; Van Schilfgaarde 1984, p. 624.

<sup>62</sup> HR 2 October 1998, *NJ* 1999, 1 and 4.12-14 (Advocate-General Spier). Administrative courts follow a similar approach, see, e.g., CRvB 6 October 1994, *AB* 1995, 534 (overruling ‘settled law’ that disallowed interest on an award for fees and costs, and allowing such interest in light of the ‘development of prevailing opinion which cannot be ignored’).

In a 1980 case that became known as the *Stierkalf* case,<sup>63</sup> the *Hoge Raad* completely reversed settled law which it had followed since 1915 and lastly reiterated three years earlier in 1977.<sup>64</sup> In *Stierkalf*, the *Hoge Raad* turned an animal owner's liability based on 'presumptive fault' (subject to the defendant's proof that he had not been negligent in the care and supervision of the animal) into a strict liability. It discarded all historical arguments and simply stated that 'the development of views about who should bear the risk of damage done by animals is more important' and followed the emerging rule that had been laid down in the *draft* revision of the Civil Code (which did not come into effect until twelve years later) – a technique the *Hoge Raad* has frequently followed since.<sup>65</sup>

Perhaps the clearest example of the community-based, democratic approach that recognizes dominant opinion and the prevailing attitudes in society as law is *De Schelde v Cijssouw*,<sup>66</sup> which involves asbestos-induced illnesses like mesothelioma. Mr. Cijssouw had died of mesothelioma in 1989 after being exposed to asbestos during most of his working life from 1949 to 1967. In a survival action, De Schelde was accused of having been negligent in taking precautionary measures necessary and proper in light of the known dangers of asbestos, which creates a liability pursuant to Article 1638x of the (former) Netherlands Civil Code under an increased risk theory. The *Hoge Raad* held that De Schelde's negligence 'must be judged by the standards prevailing at the time'; where, as here, conduct was not regulated by statute, those standards 'are determined in part by the then-prevailing views in society' regarding the appropriate level of precautionary measures.<sup>67</sup>

It is thus clear that the *Hoge Raad* has developed a philosophy that adds a substantive component to positivist thinking or if you like a formal component to views normally associated with the Historical School. A rule is imperfect as a legitimate rule of law when it has been pronounced but lacks popular support or support from the relevant community. Similarly, it is imperfect when it has that support but has yet to be actually recognized by the legislature or a court of law. When one version of a given rule of law has the support, while another version of it is on the books, a court can follow either version because both are equally imperfect rules of law. The court will, however, eventually follow the rule that upon its recognition will be both formally recognized and substantially supported.<sup>68</sup>

<sup>63</sup> HR 7 March 1980, *NJ* 1980, 353.

<sup>64</sup> See HR 15 October 1915, *NJ* 1915, 1071; HR 1 July 1977, *NJ* 1978, 73 (*Van Doorn v Van Blokland*).

<sup>65</sup> See, e.g., HR 13 March 1987, *NJ* 1988, 190 (allowing emancipation of an 18-year old minor 'in light of the views prevailing in today's society' and in anticipation of legislative change lowering the legal age of majority from 21 to 18 years); HR 21 March 1986, *NJ* 1986, 585 (allowing both unmarried parents to have legal custody over children).

<sup>66</sup> HR 2 October 1998, *NJ* 1999, 683.

<sup>67</sup> *Idem* at 3.3.2. See also HR 30 September 1994, *NJ* 1996, 196 (*Staat v Shell*), 30 September 1994, *NJ* 1996, 197 (*Staat v Duphar*), HR 20 September 1994, *NJ* 1996, 198 (*Staat v Fasson*), HR 24 April 1992, *NJ* 1993, 643, and HR 9 February 1990, *NJ* 1991, 462 (*Staat v Van Amersfoort*), establishing that polluters are liable to pay for the clean-up costs incurred by the government since the mid-1970s, when societal views had taken such a turn that the government became a foreseeable plaintiff even with respect to a clean-up of defendants' own properties, which the law of property had previously allowed a property owner to use or destroy at will. The tipping point was around January 1, 1975, which the *Hoge Raad* chose as the cut-off date for retroactive liability.

<sup>68</sup> See, e.g., HR 16 October 1992, *NJ* 1993, 167 (declining to follow its own case law and instead adopting the view that it believed 'in line with contemporary views prevailing in society'); see also Asser-Vranken 1995, no. 104 ('an essential element of the court's submission to the Rule of →

The *Hoge Raad*'s approach may be considered a conservative one in the sense that it (i) is disinclined to change until new ideas gained such acceptance that they can be said to have come to dominate, (ii) follows the minimalist view of precedent when no such evolution in societal opinion has occurred, and (iii) does not allow a court to be ahead of its time or lead the development of the law by countermajoritarian rulemaking. However, it is also flexible because it in no way requires strict adherence to precedent. And it seeks democratic legitimation for the court's formal acceptance of legal propositions into law.

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