The Use of Case Law in the Legal Curriculum: Why and How?

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Artikel ini membahas dua permasalahan mengenai peran yurisprudensi dalam kurikulum pendidikan hukum, terutama di system civil law seperti Indonesia dan Belanda. Permasalahan pertama adalah mengapa yurisprudensi harus menjadi bagian dari pendidikan hukum. Mengenai hal ini, dapat dikatakan bahwa yurisprudensi yang ditetapkan oleh pengadilan tertinggi tidak hanya diakui sebagai sumber hukum yang sah, tetapi juga menjadi sulit untuk mengerti aturan hukum tanpa mengerti kasus-kasus tersebut. Yurisprudensi dapat menunjukkan bagaimana aturan hukum dapat diimbangi oleh satu sama lainnya. Mempelajari hal ini membutuhkan analisis yang hati-hati dan kritis terhadap kasus penting di bidang hukum apapun.

Permasalahan kedua adalah bagaimana memasukkan kasus-kasus hukum tersebut dalam kurikulum pendidikan hukum. Filosofi pengajaran 'pembelajaran aktif' memungkinkan berbagai metode. Di samping 'metode kasus' dan 'metode studi kasus', perhatian khusus harus diberikan pada bagaimana kasus hukum dapat digunakan dalam pengaturan 'Pembelajaran Berbasis Masalah'. Dalam artikel ini ditunjukkan bagaimana metode pengajaran ini memungkinkan untuk menggunakan kasus dalam mengarahkan siswa untuk menganalisis kasus, memecahkan masalah hukum dan untuk menilai secara kritis hasil yang dicapai oleh pengadilan.

This contribution examines two questions concerning the role of case law in the legal curriculum, in particular in civil law jurisdictions such as Indonesia and the Netherlands. The first question is why case law should be part of legal education. It is argued this is not only because cases decided upon by the highest courts are recognized as an 'official' source of law, but also because it is impossible to properly understand a legal rule – designed to be applied to real-life situations – without studying those situations. Case law shows how rules can be balanced against each other; learning how to do this requires the careful and critical analysis of key cases in any field of the law.

The second question is how to incorporate cases within the curriculum. The teaching philosophy of 'active learning' allows for various methods. Next to the 'case method' and 'case study method,' special attention is paid to how case law can be used in a setting of 'problem-based learning' (PBL). It is shown how PBL allows us to use cases in instructing students to analyse judicial cases, to solve legal problems and to critically assess the outcome a court reaches.

1 Introduction

It seems evident that case law must be part of the legal curriculum. Most types of legal education pay ample attention to cases decided upon by the courts. This does not mean that the role of cases in

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teaching the law does not differ depending on the jurisdiction in question – with a special role for the distinction between civil law and common law systems – but this is rather a gradual than a principled difference. In short, no proper legal education seems possible without elaborate attention paid to case law.

In this contribution, two questions are discussed concerning the role of case law in the legal curriculum. The first question is why cases are in fact such an important element of learning the law. I will show this is not only the case because of cases being (to a greater or a lesser extent) an 'official' source of law, but also for reasons unrelated to any recognition of sources as proper law within the State (Sections 2 and 3). Once it has been established why case law is an essential element of the legal curriculum, a second question emerges: how to teach these cases? Experience shows that various approaches can be applied, depending on the jurisdiction involved and the 'teaching philosophy' being adopted (Section 4).

The 'lessons', if any, this contribution seeks to convey are not limited to one specific field of the law. In the Western legal tradition, case law has come to play an important role in all fields of law, including private law, constitutional law and criminal law.[1] Within the Western legal tradition, cases are therefore part and parcel of teaching any course in the standard legal curriculum. In the European context, the creation of the Court of Justice of the European Union in 1952 and of the European Court of Human Rights (in the context of the Council of Europe) in 1959 also contributed to case law becoming part of the multilayered legal structure in which national and European courts interact. This latter aspect is not discussed here in view of the audience for which this contribution was primarily written – jurists at law faculties in Indonesia. This also explains the occasional reference to case law (yurisprudensi) in Indonesia, and the emphasis placed on civil law jurisdictions (and in particular on Dutch law, the remains of which are still visible in present-day Indonesia[2]) in discussing the two questions mentioned above.

2 The Importance of Cases in Learning the Law: They are a Source of Law

Why involve case law as part of the legal curriculum? Multiple answers to this question are possible. The intuitive answer any lawyer would give is that case law is simply one of the official sources of law, next to legislation, international treaties, generally accepted principles of law and custom.[3] In common law jurisdictions, case law then is seen as the main source of law, explaining why legal reasoning is, to a large extent, based upon cases. The common law premise is that the ultimate authority in law making lies with the courts, much more than with the legislature.[4] In civil law jurisdictions, it is the democratic legislature that has the ultimate power to make law, be it that the courts play a vital role in not only interpreting statutes but also in reviewing their consistency with generally accepted principles of law, international conventions and, in many jurisdictions, the national constitution. This explains why in particular highest courts, such as in the Netherlands, the Supreme Court (Hoge Raad) and Council of State (Raad van State), in Germany, the Supreme Court (Bundesgerichtshof) and Constitutional Court (Bundesverfassungsgericht) and in France, the Court of Cassation (Cour de Cassation) and Constitutional Council (Conseil Constitutionnel), shaping the law

[1] *Cf.* H.P. Glenn, *Legal Traditions of the World*, 5th ed., Oxford, OUP, 2014.
[2] On which *e.g.,* P. Burns, *The Leiden Legacy: Concepts of Law in Indonesia*, Leiden, KITLV, 2004. The Dutch Civil Code of 1838, for example, is no longer formally binding but is used as a 'guideline.'
[3] All recognized as law in any jurisdiction I know of, including Indonesia. See *e.g.,* S. Kouwagam, *How Lawyers win Land Conflicts for Corporations*, PhD Thesis, Leiden University 2020, p. 37, with reference to the main Indonesian textbooks.
[4] *Cf.* G.H. Samuel, *A Short Introduction to the Common Law*, Cheltenham, Edward Elgar, 2013.

alongside the national legislature is in practice increasingly.[5]– This happens in an intricate process in which elements of cooperation and competition between the two main national lawmakers go hand in hand and in which legal academia also has a role to play.[6] For the sake of this contribution, it suffices to conclude that this makes it impossible to know the law without looking at decisions of the highest courts.

The role of the courts in the Netherlands provides an example. Dutch courts contribute to lawmaking in various ways. First, they interpret statutes. In Indonesian legal education, reference is sometimes still made to well-known cases decided before Indonesian independence in 1945. Thus, the Netherlands Supreme Court interpreted the term 'property' in Article 310 of the 1886 Dutch Criminal Code (in essence still applicable in Indonesia today as Article 362 Kitab Undang-Undang Hukum Pidana) to mean not only physical objects, but also electricity.[7] As electricity represents financial value to the 'owner', taking away such value by putting a pin into the metre and preventing it from running qualifies as theft. This is undoubtedly lawmaking; this decision tells the lower courts, and everyone else involved in the fabric of the law, what the meaning of this provision is. The decision may not be formally binding on the basis of the doctrine of stare decisis, as in the common law where precedents must be followed, but lower courts will in practice follow it as persuasive authority and in order to maintain legal certainty.

A second type of lawmaking by courts is when they fill gaps. Modern codifications or statutes often deliberately give the courts the power to fill gaps by providing open-ended norms. A famous example in private law is Article 6:162 Dutch Civil Code (Burgerlijk Wetboek 1992) on tort (onrechtmatige daad). The article is an updated version of the old Dutch Article 1401 Civil Code (1838), which was similar to the current Article 1365 of the Indonesian Kitab Undang-Undang Hukum Perdata. Even though the 1838 version may not have had the aim to give much discretion to the courts, the revised 1992 version is different, having codified the famous case of Lindenbaum/Cohen that is still taught in Indonesian legal education today.[8] In the last 100 years, Dutch law was largely formed by courts specifying the norm that damages must be paid in case of "an act or omission in violation of a rule of unwritten law pertaining to proper social conduct" (as Art. 6:162 BW formulates it). The reach of this open-ended norm was recently shown again in widely publicized decisions ordering the State[9] and a multinational company[10] to reduce greenhouse gas emissions.

The third type of lawmaking distinguished here is when courts supplement, or even go against, statutes in order to do justice to the circumstances of the case. The civil law court is allowed to do so, given its role in the constitutional order to safeguard the interests of citizens and further develop the law. So even when the legislator does not aim to give judicial discretion, courts can have good reasons to make law outside of the legislative framework, thus recognizing that all legislation is patchwork. One example is where courts derive principles from existing statutes and then start to apply those principles to wholly new situations. This happened in the Netherlands with the judicial development in the 1970s and 1980s of the so-called general principles of proper administration (Algemene Beginselen van Behoorlijk Bestuur), subsequently codified in the General Administrative Law Act (Algemene Wet Bestuursrecht) of 1994.

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[5] A development from 'heteronomous' to 'autonomous' lawmaking that started a long time ago but is still continuing today. *Cf.* G.J. Wiarda, *Drie Typen van Rechtsvinding*, 4th ed., Zwolle, Tjeenk Willink, 1999.

[6] R.C. Van Caenegem, *Judges, Legislators and Professors*, Cambridge, CUP, 1993.

[7] HR 23 May 1921, NJ 1921, 564, ECLI:NL:HR:1921:186.

[8] HR 31 January 1919, NJ 1919, 161, ECLI:NL:HR:1919:AG1776.

[9] HR 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda*), English translation available at www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf.

[10] District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie et al/Royal Dutch Shell*), English translation available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf.

These three types of lawmaking show that courts do make law. This is also their 'constitutional' task. Judges not only 'find' the law, they also create it. One point merits further attention. It is sometimes asserted that it would be contrary to the nature of a civil law jurisdiction to accept judicial decisions as a source of law. This unveils a misunderstanding about qualifying a jurisdiction as belonging to the civil law tradition. Essential to the civil law is that the legislature is at all times allowed to 'take back' the territory it lost to the courts. This was perhaps best formulated by the father of the current Dutch civil code, Prof. E.M. Meijers. Meijers saw as one of the main reasons to recodify private law, the need to reorganize what otherwise would become a 'chaotic mass' of case law.[11] However, it is something entirely different to say that the qualification of a certain jurisdiction as belonging to the civil law has the normative consequence that case law is not a source of law. Qualification as a civil or common law jurisdiction is only a way to distinguish types of jurisdictions from each other. Case law being a source of law also within civil law jurisdictions follows from the fact that it is regarded as such by the legal community.[12] This does not require an official decision by the legislature.

It is important to realize the consequences of the important role cases have in civil law jurisdictions. If cases are a source of law, they must also be intelligible, both as to the reasoning provided by the court and as to the publicly available publication of the key cases.[13] These two elements of course go hand in hand with the recognition of cases as a source of law; if the court's reasoning is unclear, or does not sufficiently explain the reasons for the decision, its decisions will not be accepted as authority by the legal community in the first place.

3 Cases are also Relevant for Another Reason: They Are the Flesh and Blood of the Law

It was shown in Section 2 that also in a civil law system it is impossible to know the law without reference to cases decided by the highest courts. Learning the law is as much about statutes and treaties as it is about case law (or general principles and legal doctrine for that matter). Yet, there is a second reason why legal education cannot do without case law. Cases are not only an official source of law, but they also provide the flesh and blood to statutes and other rules.[14] It is impossible to properly understand a legal rule – designed to be applied to real-life situations – without in fact studying those situations. These could be fictitious cases, but the wealth of actually decided cases available within any jurisdiction provides a much more fertile source of experience. Case law shows that decisions in concrete situations never follow from rules automatically. The essence of legal reasoning lies in balancing conflicting rules, thus putting practical wisdom at the heart of the legal discipline. The law is not primarily about universal truths or theory, but about valuing the uniqueness of each case and the ability to make a reasoned decision.[15]

It does not need much explanation that learning this ability to decide cases must be part of any legal education. This is why, also in civil law jurisdictions, training lawyers is always a combination of acquiring knowledge about the law and learning the skills to apply the law itself. This training of

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[11] E.M. Meijers, 'La réforme du Code Civil Néerlandais', *in Verzamelde Privaatrechtelijke Opstellen 1*, Leiden 1954, p. 161.

[12] On this theme: N. Jansen, *The Making of Legal Authority*, Oxford, OUP, 2010.

[13] C.J.H. Jansen and W.J. Zwalve, *Publiciteit van jurisprudentie*, Deventer, Kluwer, 1913. S. Butt, 'Judicial Reasoning and Review in the Indonesian Supreme Court', 6 *Asian Journal of Law and Society* (2019), p. 67 refers to a belief among Indonesian judges that the civil law tradition does not require judicial decisions to be elaborately motivated.

[14] *Cf.* C.K. Allen, *Law in the Making*, 7th ed., Oxford, OUP, 1964, p. 243: 'the life-blood of legal systems.'

[15] See J.M. Smits, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, p. 91 with reference to Alasdair MacIntyre and Martha Nussbaum.

future professionals has been an essential element of legal education since the founding of universities in the eleventh century and one that cannot do without ample attention to how to decide cases. In modern terminology, lawyers are creative conflict solvers, which in my view means they must also develop other skills than just legal ones and be able to help solve cases in a multidisciplinary setting.[16] This helps students to better solve real-world problems that are usually not restricted to the legal aspect only.

4 How to Teach Case Law? Examples

Having established that case law is an essential element of the legal curriculum (Sections 2 and 3), the question must be asked how to incorporate this in the actual teaching of courses. I do not believe there is one 'best' way of doing this. This will not only be dependent on the type of jurisdiction and the teaching philosophy one wants to adopt, but also on the audience one seeks to address. At most law faculties, the students are a diverse group of individuals who all learn in different ways. This makes it unlikely there is a one-size-fits-all type of legal education. What is possible, though, is to provide examples of how to integrate cases in the curriculum. If we leave aside the traditional model in which the professor unilaterally explains the essence of a case – the 'sage on the stage', not conducive to active learning – I have three examples to offer.

The best-known example of cases playing a central role in legal education is the so-called 'case method' as practiced at American law schools. This method, invented in the 1870s by Christopher Columbus Langdell at Harvard Law School, focuses on cases as a means of exemplifying the existing principles of law. Students are asked to read (appellate) court cases and engage in Socratic question-and-answer sessions about these cases in contrast to one-sided listening during the professor's lecture. The method is directed towards the 'scientific' uncovering of rules and principles from decided cases.[17] It presumably has the great advantage that it requires active learning by the student, in much the same way as one has to navigate through the law after graduation. In addition to this advantage, the method instils a critical mind in the students practicing it. In recent years, the case method has been increasingly criticized for being too dominant, not allowing for alternative teaching methods.[18] It is also not the ideal model for teaching the civil law, with the important role it attaches to statutes next to case law.[19]

The case method must be distinguished from the 'case study method'. This method, developed for business schools and later expanded to other fields including the law, asks students to analyse actual cases or problems and come up with solutions. In clinical legal education the case study method is enhanced by encountering real people.[20] The method fits in with a view of lawyers as creative conflict solvers, dealing with real-world problems as set out in Section 3 above. Judicial cases are part of the case study method but are not necessarily the key element in finding solutions to the problem at hand.

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[16] T.D. Rakoff & M.L. Minow, 'A Case for Another Case Method', 60 *Vanderbilt Law Review* (2007), p. 597.
[17] On the genesis of this, initially highly criticized, method *e.g.,* R.L. Weaver, 'Langdell's Legacy: Living with the Case Method', 36 *Villanova LR* 517 (1991), p. 517.
[18] A. Colby, W. Sullivan, J.W. Wegner, L. Bond & L.S. Shulman, *Educating Lawyers: Preparation for the Practice of Law*, Stanford, Carnegie Foundation for the Advancement of Teaching, 2007.
[19] Disputed by F.M. Toller, 'Foundations for a Revival of the Case Method in Civil Law Education', 3 *Journal of Civil Law Studies* (2010), Art. 5.
[20] A. Alemanno & L. Khadar (Eds.), *Reinventing Legal Education: How Clinical Education Is Reforming the Teaching and Practice of Law in Europe*, Cambridge, CUP, 2018.

The third example concerns the use of case law in a setting of PBL.[21] PBL was first applied at a law faculty in a civil law country in 1982, when Maastricht University in the Netherlands started a programme on Dutch law based on this teaching philosophy. The premise of PBL is that active learning allows students to construct their own understanding of the materials, thus facilitating them in better grasping what the law is about and how to apply it.[22] The 'problem' referred to in the term PBL can be manifold and range from a multifaceted case study requiring a multidisciplinary analysis to the question of how the law reads, or should read, in a specific case. It is important to note that PBL is an umbrella term that still allows for different types of learning methods and is a concept that evolves over time. The current core principles of PBL at Maastricht University are that learning is constructive (student-centred, with learners constructing their own knowledge, recognizing that multiple answers are possible), collaborative (stimulating students to share ideas and knowledge), contextual (uses real everyday problems) and self-directed (students take initiative in formulating learning goals and in planning, reflecting and evaluating).[23]

PBL provides a fertile setting for discussing case law. If the aim of legal education is to learn the law, to solve legal problems and to think critically about the specific solution chosen by (in this case) the court (and thus to develop the skills necessary to work as a legal professional), paying attention to case law can greatly contribute to these goals. I will subsequently discuss these three aims.

In line with the recognition of cases decided by the (highest) courts as an important source of law (Section 2), the first goal of incorporating case law in a course is to simply learn the law. In most courses, lists of standard cases are provided (often per topic) that students must read. The main aim for students is to understand the decision of the court and what it is the case adds to the previously existing law. In a PBL setting all students can be asked to read the case, followed by a discussion in class on exactly these two questions. One student could be asked to present the facts of the case, while another student is to present the decision, a third one to indicate which new 'rule' it brings, and a fourth one to critically assess the case. In most courses in the Maastricht curriculum, students will have to find decided cases themselves, thus mimicking in an early stage what they will have to do later in practice anyway.[24] Experience shows it can be quite a challenge for students to read the case, distinguishing between what the various parts a decision typically consist of and finding its main elements. To facilitate this process, various methods exist that help students to take the necessary steps in understanding the decision.[25]

A second way in which case law can help students is by using cases to solve legal problems. Decisions, in particular by lower courts, provide a wealth of material. Fact patterns and legal questions one could not imagine oneself can be used as course material. One way to do this is by providing students with the facts of such a case in class, asking them how they would decide the case. Here too, students can be assigned different roles including that of acting as counsel for the parties and as a judge. This also provides students with the important lesson that judicial practice is often not about the 'rules', but much more about establishing the facts of the case.

There is still a third element that can be added to critically assess the case at hand. This element has become a standard method in the Maastricht curriculum. It consists of comparing the case decided upon in one jurisdiction with a similar case in another jurisdiction. This comparative approach has the great advantage that different solutions to similar problems can be compared to each other,

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[21] Out of the large literature on PBL: E. de Graaff & A. Kolmos, 'Characteristics of Problem-Based Learning', 19 *International Journal of Engineering Education* (2003), p. 657.

[22] On the Maastricht teaching model, see *e.g.,* A.W. Heringa & B. Akkermans (Eds.), *Educating European Lawyers*, Antwerp, Intersentia, 2011.

[23] See https://edlab.nl/pbl-learning-principles.

[24] This does of course require the wide availability of judicial decisions, such as through www.rechtspraak.nl.

[25] See for an Indonesian audience *e.g.,* S. Riyanto (ed.), *Keterampilan Hukum*, Yogyakarta, Gadjah Mada University Press, 2018.

thus providing the student with a much richer view of the law than in the case of a focus on only one legal system. In fields such as tort law, contract law and constitutional law, comparative casebooks are available for inspiration.[26] These volumes show a whole range of cases on which different jurisdictions ask similar questions but reach diverging outcomes, as in the field of damages for wrongful birth, termination of a contract or constitutional review. Again, students can be asked to take up a role in class, for example, by finding and discussing an alternative outcome in a similar case abroad. I emphasize that this is not primarily about learning another jurisdiction; it is much more about learning and understanding one's own laws by putting it into perspective. This method can also provide good services in case the style of reasoning of a court in one's own jurisdiction does not give sufficient information about the reasons behind the decision.[27] The foreign decision in a similar case can then be used to find the arguments pro and against the outcome the 'own' court has reached.

5 Conclusions

There is not one best way to study law. However, little doubt exists about the essential role that case law must play in all types of legal education. As a matter of substantive law, this follows from the recognition of cases decided upon by the highest courts as a source of law. Not paying attention to these cases in training new lawyers would make legal education irrelevant. But cases are also an essential element in developing skills. The careful and critical analysis of case law is a necessary means to learn how to make reasoned decisions. Judicial cases lend themselves very well for active learning because of the various elements they consist of. The facts of these cases show the great variety of real-life situations that can happen and that lawyers need to deal with. The court decisions based upon these facts, in particular when a comparative perspective is adopted, show different ways of reasoning and the divergent outcomes that follow from these.

[26] For example, in the *Ius Commune Casebooks for the Common Law of Europe* series published by Hart Publishing.

[27] The template Indonesian first instance courts use may not incite elaborate reasoning: the template is reproduced by Kouwagam 2020, p. 46.