9 CASUISTRY RESULTING IN LAWS
JUDICIAL ASPECTS OF DESIGN RESEARCH

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How to arrive at general statements/rules using individual situations (cases) is an important question in many fields of science and in the field of law it is the same.

In this contribution a number of judicial aspects of design research will be discussed: the issue regarding the generation of general rules based upon cases is part of this. We will firstly distinguish between scientific and practical judicial study with respect to building. Furthermore, we will address the unique rôle cases play in law. Some cases can be denoted as 'standard rulings'. In this way a court decision regarding one case is defined as a general ruling regarding a specific area of law. We illustrate this with an example. Finally, we discuss the various levels of scale to be recognised in the ruling on building.

9.1 SCIENTIFIC JUDICIAL RESEARCH

In society many things are not going well, there are problems and also in the extensive area of building: the subsoil appears to be contaminated in many areas in the land, there is a scarcity of locations for new construction, not enough inexpensive living accommodation, 'durable' construction is lacking and complaints are made about newly built houses, etc, etc.

Proposals can be made in order to create new legislation for these problem areas or to amend existing legislation, from different sides (politicians and/or lawyers). A large part of the scientific judicial study lies here. Furthermore, following an inventory of the existing legislation (including the respective legal precedents[a]) and the problems that are not adequately resolved by it, proposals are drawn up for new legislation that should be able to resolve problems. In this way, judicial study, deviating from study in many other scientific fields, is highly prescriptive.

Adriaansens and Fortgens phrase the judicial scientific practice as follows. *"The judicial scientific work, according to many, differs significantly from the scientific work in the remaining fields of social science and natural sciences. It is mainly composed of classification of information, document processing, establishing the scope of legal rules and harmonising the conflicting regulations. In order to do this, considerable amounts of literature, case law, legislation and other regulations must be read and processed. At a higher abstraction level, the aim of judicial scientific practice is the establishment, development and systemising of general legal rule, using general legal principles, legislation, legal precedents and doctrine"*.[b]

With judicial science the emphasis is 'how things should happen', more specifically: directing behaviour using regulations. Our statute, in this respect, is the most important documentation; the way things should happen is laid down by legislation, which is what 'by law' means.

The purpose of laws is to promote positive behaviour, to prevent or punish negative behaviour, to find resolutions for conflicting interests etc. This directing of behaviour by means of legislation is linked to the principle of legality that prevails in our legal system. This principle states that no other restrictions can be imposed on the civil liberties other than those which are equally valid for all, laid down in law by the parliament.

It is legitimate to talk about the 'designing of ruling', since the process has the characteristics of a design process. The term 'designing' often immediately evokes technical associations, but it should not be restricted to them, since designing is not only 'methodical thinking out', but according to its nature, a process of persuading and convincing as well.[c] The process giving rules and the one giving laws are comprising both elements: a set of coherent rules is being 'thought out', but those rules are also legitimised in a political process.

a With legal precendents we mean: verdicts of judges.
b Adriaansens, C.A. and A.Ch. Fortgens (1990) *Volkshuisvestingsrecht*, p. 3.
c Schokker, J.T. (1996) *Wet en informatiesysteem in de maak: een onderzoek naar processen van wetgeving en systeemontwikkeling vanuit een taalspel-perspectief*, p.12,46.

9.2 EXAMPLE OF SCIENTIFIC JUDICIAL RESEARCH

The rather abstract circumscription of scientific judicial research from the preceding paragraph we clarify by way of an example. In the law-giving policy of the last years we are witnessing increasingly and more often that private parties (enterprises, lobbies, branch-organisations) are participating in the process of making rules. As an example one may think of the vast amount of technical norms or normalisation norms to which the Building Decree refers. These norms have been determined for the larger part by the Netherlands Normalisation Institute (NNI). What is actually happening in this respect is legally conditioned self-regulation: the phenomenon is termed 'normalisation'.

The motivation for the government to use normalisation law giving is found in enhancing support and effectiveness of these rules. In addition, because of it the law giving process can be simplified and accelerated. From a judicial point of view, however, the question remains whether it is permitted, on the level of state law, to refer to norms drawn up by private parties in public rule giving, with the aim to make these in this way into rules binding to all and everyone.[a] Another question concerns the intellectual property aspects of normalisation norms. Who owns it in the case of normalisation norms? What is the relation between the rights of the author and the requirement of the potential cognisance of law giving referring to norms, now that in practice the norms are available at the NNI only by way of purchase against commercial tariffs?

Both these questions have been studied by M.H. Elferink in her thesis.[b] She comes to the conclusion that normalisation norms are generally binding prescripts and that they have not come into being in a judicially valid way; since the state law requirement of public cognisance, that rules binding everyone should be published formally and officially in the *Staatsblad* or *Staatscourant* or one of its supplements.[c] The *Staatscourant* does publish the announcements of new NEN-norms, but not their text. This makes the potential to become aware of these rules, a legal requirement of our democratic law-abiding state, too vague.[d]

She also studied what the consequences of this could be for the building sector. Her conclusion is that suing claims of constructors and private persons who had to adapt or demolish buildings on the basis of the rule giving as recorded in normalisation norms might be successful.[e]

In addition she concludes that the normalisation norms of the NNI are not protected by authors' rights, since generally binding prescripts are at stake. By the same token everybody may make them public and copy them (as intended in the Authors' Law). On top of that, these norms should be provided to the users free of charge and should preferably be financed by public means.[f]

The first conclusion is one that must be put before the judge: is the judge also of the opinion – if the question should come on the agenda – that in the case of normalisation norms (like the NEN-norms) rule giving is concerned which has not come into existence legally. The other conclusion regarding authors' rights and the costs can also lead to new policy, if the Law (Minister and Parliament) would endorse this conclusion.

9.3 PRACTICAL JUDICIAL STUDY

Next to the scientific judicial study with respect to building, there is also the practical judicial study with respect to building. In our contribution we assume that the architect under the terms of the assignment carries out the practical judicial study.

For the architect the practical judicial research will take on a form in accordance with the obligations which the Dutch SR (Standard Conditions for the legal relationship between the architect and the client) formulates in this matter: "With the realisation of the assignment the architect must consider the public law regulations, the existence of which is considered to be common knowledge among architects."

a If this would be juridically illegal, these norms could imply only a recommendation.
b Elferink, M.H. (1998) *Verwijzingen in wetgeving: over de publiekrechtelijke en auteursrechteljke status van normalisatienormen*.
c Bekendmakingswet.
d Elferink, o.c. p. 265.
e In connection with this questions were asked in Parliament to the Ministers of Justice and the Environment on the juridical status of normalisation norms.
f Elferink, o.c. p. 273 a.f.

As part of the framework of the application for building permission the architect must carry out the required practical judicial research. Is a building permit actually required or is the work a structure for which an official notification is required? Do the zoning plans allow the intended construction to be built on site? If this is not the case, is it the intention of municipal administration to co-operate with the exemption of the zoning plans? Which on-site demolition regulations apply? Is a clear ground certificate for the construction a requirement? Are specific urban aesthetics regulations applicable? Which regulations incorporate the Building Decree for the intended construction?

Practical judicial research can cover many other judicial aspects. In this way neighbours rights and obligations issues can be presented, for example: can windows be placed on the sidewall of the building, overlooking the neighbour's property? How can an existing easement (for example a right of way) that obstructs the building plan be cancelled? Questions regarding compensation claims can also arise, for example if the municipality only wishes to co-operate to the exemption of the zoning plans under the stipulation that any loss resulting from government planning decisions incurred by the neighbours will be paid for by the builder. Can this be done just like that?

Pursuant to the SR, it is not a 'standard' obligation for the architect to resolve these practical judicial questions, stated in this paragraph, for the customer. However, he can accept an (extra) assignment for this purpose.

Various 'tools' exist, which are architecturally beneficial when carrying out practical judicial research. Besides survey work[a] the tools mainly consist of: checklists, models, guidelines, form letters and business forms, example solutions, standard contracts etc, satisfying judicial requirements. Without trying to attain completeness, examples are listed beside.

- Stichting Bouwresearch, ed. (without year) *Praktijkboek Bouwbesluit grotere bouwwerken; leidraad bouwaanvraag*
- Koning, B.M.G. de, ed. (1999) *Arbobesluit voor de bouw; Inclusief diskette met de modellen van het Kennisgevingsformulier, het Veiligheids- en Gezondheidsplan, het V&G-dossier en checklists*.
- Stichting Bouwresearch (1998), *Hoe te handelen bij schade*
- Stichting Bouwresearch en TNO Bouw (from 1992) *BSC Bouwregelgeving Consultatie Systeem*. (CD-rom).
- VROM (1989) *Bestemmen met beleid; nieuwe mogelijkheden voor het bestemmingsplan*
- Vereniging van Nederlandse Gemeenten (1999) *Bedrijven en milieuzonering* (inclusief diskette met afstandentabellen naar categorie)
- Schenke, H.A., W.D. Susanna *et.al.* (1996) *Contractvorming in de bouw; juridisch praktijkboek*
- Meijer Drees, F.J. (without year) *Handleiding Milieuwetgeving; deel 3, 3a Inrichtingen en procedures* (losbladig)
- Infomil (1999) *Informatiebladen regelgeving (Kantoorgebouwen, School- en opleidingsgebouwen enz.)*

9.4 FROM CASE TO GENERAL RULING

The Dutch legal system can be found in 'sources of law'. The sources of law are: the statute, international conventions, common law and legal precedents. In this paragraph one source of law will be specifically examined: legal precedents. Based upon the legal precedent phenomenon, we will deal with the question: how can we (in the law) generate public knowledge based upon cases?

As in many other sciences, law makes use of cases. With the term 'cases' we are referring to, in law: rulings by judges concerning disputes. There are various types of disputes: between individuals(private)/private organisations among themselves (example: not fulfilling a contract), between local authorities and private individuals (example: not granting a building permit) and between the authorities themselves (example: the municipality which does not want to co-operate regarding the construction of a motorway through a nature reserve). Each judicial decision regarding disputes contains besides facts, an imposition of a rule of law.

In Holland thousands of rulings are made annually. For our considerations it is useful to divide the total of rulings into three parts: (a) un-published rulings, (b) published rulings and (c) standard rulings.

(a) Un-published rulings

Most rulings are un-published. This means that a written ruling from a judicial authority was produced regarding the submitted dispute, but this ruling was not published in legal precedent magazines; the reason being that the ruling was not interesting enough for judicial sciences and practices.

(b) Published rulings

A smaller number of rulings are published in legal precedent magazines; rulings of interest to judicial sciences and practices. There are different reasons as to why a ruling is interesting enough to be published. One reason may be that the ruling provides clarity regarding an issue

a For example: Recht en Techniek, Sectie (2001) *Recht voor ingenieurs*. Also: Berg, M.A.M.C. van den (2000) *Bouwrecht in kort bestek*.

upon which no ruling was in existence up until that point. Broad announcement by means of publication is then useful. Another reason for publication may be that the court of justice has made a ruling that deviates from the traditional course of previously published ruling in the field of law concerned. Published rulings are sometimes 'annotated', which means: provided with juridical comments. The annotator discusses the judicial aspects of the ruling that are of interest for the judicial sciences or practices, in his note.

(c) Standard rulings

A subset of the published rulings propels it to standard ruling. These are rulings from the 'supreme judge' in a specific judicial area. In civil law the Supreme Court, in administrative law the Department of Administrative Jurisdiction from the Council of State and in (one category) building arbitration cases, the Arbitration Board for the Construction Companies in Holland. In a standard ruling a Court of Justice makes a ruling considered to be of significant importance for judicial sciences and practices. There are various reasons why a ruling receives the status of standard ruling. One reason may be that the highest court of justice clarifies conflicting rulings from a lower court of justice (district courts, courts of appeal), with its ruling. Another reason may be that the Court of Justice 'fills' a lack of clarity or a deficiency in the law. Another reason may be that the Court of Justice returns to other rulings from the same Court of Justice. It is then said that the Supreme Court (or another Court of Justice) 'switches round'.

Standard rulings are not only published and annotated; they are also collected in special ruling volumes used in practice and education. Standard rulings are also used in judicial handbooks and loose-leaf judicial commentaries.

An interesting aspect of them is that they are strong determining factors for rulings in comparable situations brought before the lower courts: these District Courts and Courts of Appeal will not deviate from the regulations as formulated in standard ruling. Also in practice the parties will not be able to get around them. We see here the interesting phenomenon that public knowledge is generated using an n=1 situation. The legal rule as formulated in one case which was ruled upon by the Court of Justice, becomes a general ruling. We have gone from case to general ruling. More importantly, standard ruling can lead to amendments of the existing law in agreement with the standard ruling. In these cases, this is casuistry resulting in laws.[a]

A standard ruling has a wider purport than an individual case wherein a ruling is made, the condition being that the new cases are comparable with the original situation. Or vice versa, unless there are special circumstances at issue, the lower Courts of Justice (just as the courts of justice which made the standard ruling) will not deviate from the regulations of the standard ruling. This is an important area of work for the legal profession. If the regulations of the standard ruling do not satisfy his client, an attorney will argue, (a) that in this case the circumstances are not comparable with the standard ruling and, therefore, (b) the regulations of the standard ruling are not applicable in this case.

An interesting parallel can be seen for standard ruling with the art of building. Designs and/or buildings can also offer a 'solution' that extends further than the individual building concerned. Likewise, deviations of these solutions can be argued.

The rôle of cases is in Anglo-Saxon countries (United States, Great Britain) even larger than in countries with a continental judicial system like The Netherlands, Germany and France. This is due to the fact that, in the countries stated, a comprehensive system of legislation is in place (Civil Code, administrative laws, criminal legislation, etc.), whereas Anglo-Saxon countries do not actually have a code of law. Their laws are almost fully based upon judicial precedents (cases). In addition, they work with, for example, extremely comprehensive con-

a Also a special variant of this situation occurs in practice: the standard verdict is (politically) undesirable and the Minister responsible tries to neutralise the standard verdict by a change in the law. An example of this is the ruling of the 'Hoge Raad', the highest legal authority in the country of September 1994. The verdict was that Shell was not responsible for damage in the soil of the Zellingwijk neighbourhood in Gouderak by pollution during the fifties. The Minister of Ecological Affairs, being very disappointed by this ruling, next made an effort to adjust the jurisprudence on soil sanitation in terms of responsibility to the old pollution. This proposal proved to meet with serious opposition in the Senate; and, in the end, the Minister did not get his way as intended.

tracts, for which regulations have been laid down in legislation in Holland. These regulations are applicable in Holland, unless the parties agree otherwise. Therefore Dutch contracts are much more concise than in the United States, for example. In Great Britain the rulings of the supreme courts of justice are used as precedents: the lower courts of justice are formally bound to the Supreme Courts rulings. In Holland, on the other hand, there is no formal (however, there is a practical) commitment.

9.5 EXAMPLE OF STANDARD RULING

In this paragraph we clarify the phenomenon 'standard ruling' on the basis of an example in the field of construction and building. The case concerns the '*Graafstroom* question'.

The Monument Law of 1988 gives to the Municipal Executive the right to give permission for intervention in state monuments by way of monument permits. However in order to be able to use this right, the Municipal Executive must obey a condition: the municipality needs to comply with a Monument Ordinance, in which co-operation with a committee for the care for monuments is organised advising the Municipal Executive on the monument permission that is applied for (article 15 of the Monument Law). The Monument Law does not state specific requirements with regard to the number of committee members or to expertise!

What happened in the case of the *Graafstroom* municipality? It had appointed the existing committee of the council of the municipality for Public Works, Housing and Environment as the committee for monuments as well. According to the municipality the members of this existing committee were in their expertise sufficiently equipped to function as members of the monument committee, while they all lived in the community and by the same token aware of the situation surrounding the state monument in jeopardy.

The Council of State (*'Raad van State'*), highest judge in the field of policy law, had to rule in the final and highest instance in a conflict between the municipality and an interested lobby association, 'Bond Heemschut'. The lobby had appealed against a monument permission given by the municipality; it implied demolition of the monument. The Council of State was of the opinion that the composition of the municipal monument committee (members of the Public Works committee) was well under par and ruled that a monument committee may comprise admittedly some members without specific expertise, "provided that the expertise on the field of the care for monuments has been warranted sufficiently by the appointment of other members."[a] In other words: the committee may include members without expertise, but then the expertise should be guaranteed by the presence of other members who can be considered experts.

Although the Law has formulated no requirements with regard to the composition or expertise of a municipal monuments committee, the judge does formulate them. So the judge is complementing the law. The complementing requirement demonstrated by this ruling does not only apply for the monuments committee of the Graafstroom municipality, but for *all* monument committees in The Netherlands. The ruling in this single case has a general effect.

The ruling in the Graafstroom question established new jurisprudence: before this the Council of State had made no statements on the composition of municipal monuments committees. Given its national importance, the ruling quickly got publicity.[b] The ruling was also published in a journal on jurisprudence.[c] In a loose-leaf comment on the Monument Law the ruling is discussed.[d] Finally the ruling is dealt with in educational material.[e] All taken together, we may call it a 'standard ruling' in monument legislation.

An interesting comparison may be made, here as well, between judicial science and architecture. Also in architecture, buildings that may establish a new 'standard' are getting publicity, are being commented on and treated in education. However, it is our impression, that the documentation infrastructure in judicial science has been institutionalised and professionalised

a Ruling Chairman Legislation Department Council of State, November 27th 1991. Published in Administratiefrechtelijke Beslissingen 1993, 133.
b Cate, F. ten (1992) *Monumentencommissie met alleen gewone raadsleden is niet deskundig genoeg.*
c See footnote a.
d Zundert, J.W. van (1994) *Artikelsgewijs commentaar Monumentenwet 1988; Artikel 15, aantekening 3.*
e Hobma, F.A.M. (1997) *Monumentenrecht.*

better than in architecture. In this respect architecture has something to learn from judicial science.

9.6 SCALE LEVELS IN RULING FOR BUILDING

Just as in architecture, we may discern in ruling for building scale levels; the 'spatial interface' of rules for building may differ on different scale levels.

- As an example the Physical Planning Act recognises (among others) The Netherlands as a whole as interface: structural outline plans may be made going through the Physical Planning Key-Decision[a] procedure. These structural outline plans are making spatial statements in national level.
- The same law is encompassing also the regional level as an interface: regional plans may be formulated with spatial statements on regional level.
- For the level of agglomerations rules exist as well: the Frame-work Law Policy in Change obliges seven specifically named agglomerations to formulate a structure plan. In such a plan the locations of projects important to the individual agglomeration have been recorded.
- For (parts of) the municipal scale level land-use plans can be formulated, pursuant to the Physical Planning Act.
- Urban Renewal Act enables that for certain neighbourhoods an environmental ordering is formulated in terms of well-being.
- On the level of the separate building the rulings of the Building Decree apply, pursuant to the Housing Act. On the basis of the Environmental Control Act an extensive system of general rules for 'facilities' applies there as well.

Although it is possible, therefore, to order rulings for building according to scale level, the ruling for building has not been designed generally with spatial scale levels for point of departure. This does not make consulting rulings for building by architects any easier. Ruling for building is by its very being, quite extensive and thereby hard to consult. Technical and constructional rules exist, rules for materials, rules for urban planning, environmental rules, rules for working conditions of the workers themselves, rules for historic buildings, rules for bidding, rules for professional conduct, rules for judicial relationships between parties in the building process: and so on, and so forth. In spite of many efforts to attain deregulation[b], the rule giving for building remains a vast complex. For judicial scientific study of the building profession this entails, - see also paragraph 1 – that, amongst others, study will continue to be done with respect to the length of the arm of the law-rules and to harmonising conflicting rules. For the practical judicial study on the field of building itself – compare paragraph 3 – this entails that architects and those who build do well to use the tools available to lead the commission in suitable channels.

a Planological Core-decision. Examples of structural schemes are the Structural schema Traffic and Transportation and the Structural Schema Green Space (with the Ecological Main Structure).

b 'De-regulation' is understood to be here alleviating the pressure of rulings on industry and citizens, particularly as materialised in lessening the number of rules.