De verkeersopvatting

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Summary

In a number of crucial sections the Dutch Civil Code uses the concept *verkeersopvatting* (plural: *verkeersopvattingen*). The subject of this thesis, this concept is difficult to translate into English. Legal dictionaries give *common opinion, public opinion, generally accepted principles, views accepted in society, generally prevailing opinion*, *general business understanding*, or *general understanding of the business community*. In an English translation of a judgment of the European Court of Justice in which the Dutch version referred to *verkeersopvattingen*, the translator decided on *generally accepted views*. As none of these translations is entirely satisfactory, the author and translator have chosen not to translate the concept.

English speaking lawyers should in particular bear in mind that *verkeersopvatting* has been a statutory concept since the Dutch Civil Code was recodified in 1992. A statute containing such an 'indeterminate concept' is open textured. Dutch courts observe the concept not only in instances referred to by law, but independently in case law as well. In a nutshell, it is therefore a 'legal criterion' in Dutch civil law.[1]

Criticism has been levelled at the use of the concept *verkeersopvatting* in the Netherlands (as well as in Germany). It poses problems for lawyers in establishing legal findings. In *which instances* should the concept be used and *where* or *how* should a lawyer search in trying to establish a legal finding? To be avoided is the use of the concept as a pronouncement, a filler or a means to ending any further discussion. The problem articulated by this thesis is the lack of a theoretical framework for the concept and the associated risk of legal uncertainty and arbitrariness in its use. The book attempts to sketch a theoretical framework and subsequently to offer guidelines for establishing legal findings based on the concept.

Following an exploratory investigation of the subject in chapter 1, chapter 2 articulates the benefits and drawbacks of the concept *verkeersopvatting*. One way of reducing the tension between a dynamic society and legislation, which is frequently static, is by introducing so-called open norms into laws. In line with German dogma, this book refers to the concept *verkeersopvatting* as an indeterminate concept, which forms part of an open norm. In this connection

1 Particularly in what is called property law (books 3 and 5 of the Dutch Civil Code) and the law of obligations, which covers contracts, tort and strict liability (book 6 of the Dutch Civil Code).

the ambiguity of the word norm is considered, which – in both Dutch and English – may refer either to a behavioural norm or a norm in the sense of a standard or criterion. The concept *verkeersopvatting* is never a behavioural norm, but as an indeterminate concept does play a role in statutory norms (standards). Use of the concept has the considerable advantages both of making it possible to do justice to various different situations and of adapting law to developments in society without actually having to amend legislation. The use of indeterminate concepts and open norms is unavoidable and necessary, in order to maintain law's flexibility and elasticity.

Substantive criticism of the use of the concept is twofold. On the one hand it is said to be vague, elusive and indefinable and, on the other, it is sometimes labelled a pronouncement, a filler, or a means to ending any further discussion. It appears that the problems are chiefly *i)* the difficulty of being able to distinguish its meaning exactly, *ii)* uncertainty about the extent of its validity, and *iii)* uncertainty about its relationship to written law.

Chapter 3 looks principally at the nature of the concept *verkeersopvatting*, which has been the subject of fierce debate since it was first used by the Supreme Court (in 1936). Does the concept refer to a factual circumstance or to unwritten law?

After concluding that a *verkeersopvatting* cannot be measured or proved easily, at least that its measurement or proof hardly occurs in the courts, if at all, thus entailing problems, an analysis follows of both the literature and case law. Among Dutch legal scholars there are proponents of the idea that a *verkeersopvatting* is a factual circumstance as well as those who argue that it refers to unwritten law. A number of writers subscribe to a third view, namely that it can be either, depending on the instance in question.

The position taken in the literature, that a *verkeersopvatting* – always or in some instances – refers to something that *is* rather than something that *should be*, has proved untenable. It is always a concept about something that *should be* and is normative in nature. Its application is never free from obligation and its substance is internally consistent. Moreover, the Supreme Court also assesses the concept as a legal one. In short, the concept *verkeersopvatting* refers to *unwritten law* observed by society.

This form of unwritten law manifests itself in three ways. In some cases the concept refers to immediately identifiable and obvious ideas about what is appropriate in society; failing this it provides a basis for the process of establishing a legal finding, and finally it gives its name to the finding that is the result of that process.

Chapter 4 examines a number of specific characteristics of *verkeersopvattingen*. Their most important and at the same time a distinguishing feature is that they do *not* involve behavioural norms. Behaviour can, however – as something that has occurred – form part of the complex of facts and circumstances to be judged. The *verkeersopvatting* is drawn upon to legally qualify the facts and circumstances of the case in question.

A second characteristic is its intrinsic changeability. It appears that the substance of a *verkeersopvatting* is formed chiefly of – often implicit – normative expectations about a 'normal course of events'. These expectations may change with time. Often, however, *verkeersopvattingen* are amazingly stable, meaning that the consequences of this changeability for their precedent value are not serious.

A third characteristic is that in Dutch law *verkeersopvattingen* may be used in various ways (both implicitly and explicitly) and on various levels. In the methodical sense a *verkeersopvatting* may play a role as an aid to explaining statutory concepts, or on the level of the legal norm itself, as an independent criterion for a decision. These levels are, however, difficult to distinguish from one another, and this distinction is chiefly academic. In substantive terms a *verkeersopvatting* may play a role in questions at various levels within one and the same doctrine. It *is* important to distinguish these substantive levels in order to properly select the relevant facts and identify the points of view for resolving the specific question of qualification.

Fourthly, a *verkeersopvatting* is topical (i.e. from the Greek *topos*, meaning a 'commonplace', also used currently to mean source of arguments). It always involves a general point of view that is relative in nature and that stands in relation to other points of view of a general nature (i.e. *topoi*). Noticeable in the Dutch law of obligations is that the legislature often avails itself of many combinations of sources for arguments. This is less so in the law of property, where the concept *verkeersopvatting* seems at first sight to be used as the only *topos*. It transpires that in Dutch law pertaining to both obligations and property there is little clarity about the relationship between the *topos verkeersopvatting*, other statutory points of view, and statutory norms.

Discussed finally as the fifth characteristic of the concept *verkeersopvatting* is its intertwining with the facts. The result of this is that the selection of facts relevant to the decision is often hindered by the indeterminate nature of *verkeersopvattingen*. Only once a decision is pronounced is the concretised *verkeersopvatting* clear, and it is clear to what facts and circumstances the decision is tailored. At the same time, however, *verkeersopvattingen* transcend individual cases.

Chapter 5 looks at the link between *verkeersopvatting* and related concepts. The concept *verkeersopvatting* appears to occupy the middle ground between on the one hand generally known facts and rules of experience and, on the other, behavioural norms such as what is generally considered appropriate and common decency. It differs from 'generally known facts' and 'rules of experience' in the sense that it is normative by nature. Its impact is not doubly normative, such as is the case with common decency and behaviour that is generally considered appropriate (a normative judgement of behaviour and, coupled to this – also normative – legal consequences). It turns out that the concept *verkeersopvatting* is singly normative.

Discussed next is the connection between *verkeersopvatting* and the principle of reasonableness and fairness, with an outline of its relationship to the con-

cepts *maatschappelijke opvattingen* (translated here as 'generally accepted views of society') and *de in Nederland levende rechtsovertuigingen* ('legal convictions prevailing in the Netherlands'). It transpires that the concept 'generally accepted views of society' has a broader sweep than *verkeersopvattingen*, as it encompasses more than just legal views. *Verkeersopvatting* stands closer to the concept 'legal convictions prevailing in the Netherlands'. Like *verkeersopvattingen*, these convictions always have a legal character and are bound up with issues of law. Both concepts are a species of the concept 'legal convictions' in a general sense. The concept *verkeersopvatting*, however, is not a species of the concept 'legal convictions prevailing in the Netherlands' referred to in section 3:12 of the Dutch Civil Code, because the latter concept always involves behavioural norms. These two concepts, therefore, stand *alongside* one another without overlapping.

As regards the relationship between *verkeersopvatting* and the principle of reasonableness and fairness, the following conclusions were drawn. The concept *verkeersopvatting* cannot be used as a means for further concretising behavioural norms that, based on the principle of reasonableness and fairness, should apply between parties within a legal relationship. Conversely, as a metanorm, the principle of reasonableness and fairness *does* play a role in concretising the concept *verkeersopvatting*.

As to its relationship to customary law, the conclusion is that the concept *verkeersopvatting* bears considerable similarity to what is known as *opinio iuris* or *opinio necessitatis*. Furthermore, a *verkeersopvatting* is often – but not always – based on a consistent pattern of behaviour (i.e. usage), meaning that in such instances it is customary law in another guise. It therefore appears that the prevailing view in the Dutch literature, that customary law now only plays a marginal role in Dutch civil law, is ripe for review. In instances where usage does not apply, however, the concept refers to 'other unwritten law' and not to what is generally known as customary law.

Chapter 6 describes the functions of the concept *verkeersopvatting* in the system of Dutch civil law. Its methodical functions lie in the reception of *verkeersopvattingen* prevailing in society, their transformation where such views are lacking but where a court is nevertheless expected to deliver a decision, and thus delegation of the authority to form laws. As in Germany, the receptionary function in the Netherlands of open norms and indeterminate concepts tends to be decreasing (a trend known in Germany as 'Funktionswandel', meaning function shift).

The material functions of the concept *verkeersopvatting* lie in its power to give *legal qualification* to facts and circumstances and the concomitant obligation to *objectivise* them and to *frame them within the context*. In addition, in my view, the concept merely supplements what is prescribed by written law.

The chief function of the concept *verkeersopvatting* lies in the legal qualification of facts and circumstances rather than any judgement of behaviour. A problem that arises in qualifying facts and circumstances is that, in instances of doubt, it is not always immediately apparent *what* facts are relevant. The

fact that these decisions are always 'polar', or yes-or-no affairs, reduces the problem of establishing legal findings.

The concept objectivises and frames within the context in the sense that it always has to be determined 'what *people* think' and 'whether people *still* think that'. The big problem here is that *prior* consensus about the substance of a *verkeersopvatting* is often lacking, precisely because the concept is used in cases of doubt. In cases lacking prior consensus, the aim should be to reach a decision that carries persuasive power. This can be enhanced by finding objective and testable grounds for the decision based on the *verkeersopvatting* in question, and by giving clear and plain grounds for the decision.

Finally, it transpired that the concept *verkeersopvatting* only has – and should have – supplementary effect. There is no evidence that the legislature would want *verkeersopvattingen* to have a derogatory effect on any provision of law. Nor is it logical that they should have since the introduction of the concept by the legislature means that legal findings are established *intra legem* and, furthermore, the Dutch Civil Code is currently up to date. *Verkeersopvattingen contra legem* are unprecedented and this should remain the case.

Following this outline of the theoretical background to the concept *verkeersopvatting*, chapter 7 provides hints for answering the question *how* a *verkeersopvatting* can and should be ascertained. Here, given the legal character of the concept, we must define techniques for establishing legal findings. An investigation of the stated characteristics and functions of the concept led to the formulation of three context-related guidelines:

i) the context of the law;
ii) the context of a specific case; and
iii) the context of changing society.

The context of the law provides four guidelines for establishing legal findings. A primary requisite is the realisation that written law prevails over *verkeersopvattingen* (because of their supplementary effect). If a specific statutory provision is lacking, then the ratio and legislative history, the interrelationship between statutory norms and other *topoi* referred to in the law, may provide leads for articulating the *verkeersopvatting* in the case in question.

The context of a specific case provides possibilities for comparing – and consequently distinguishing – cases. Here, four ways of comparing cases are distinguished, which are suitable and tried-and-tested techniques for concretising *verkeersopvattingen*. Discussed are subsumption in case of a manifest *verkeersopvatting*, comparing cases based on precedents, comparison using a catalogue of viewpoints or circumstances (topical technique), and comparison with hypothetical cases. The intrinsic changeability of *verkeersopvattingen* does not appreciably stand in the way of creating – conditional – precedents. With all comparison techniques it should be borne in mind that the nature of *verkeersopvattingen* is such that they give expression to a general 'sub-rule' and are never restricted to a norm that applies only to a single specific case (in German: a *Fallnorm*).

The context of changing society means that *verkeersopvattingen* should be objectivised and framed within their context. To objectivise a *verkeersopvatting* it transpired that the perspective of an objective third person is crucial. In property law this mainly appears to involve the perspective of a third person regarding the outward facts, while in the law of obligations the question is rather what – hypothetical – view an objective third person, in the sense of a right thinking reference person, would hold about the less easily recognisable relevant circumstances of the case in question. Finally, demarcation of the group of relevant persons seems occasionally to be of some assistance in concretising and objectivising a *verkeersopvatting*. When framing a *verkeersopvatting* within the right context, the establishment of legal findings in particular requires an awareness of its ties to questions of law as well as an appreciation of perceptible lines of development in society.

After outlining the hints and guidelines for establishing legal findings, the legitimisation of decisions was examined. The word *verkeersopvatting* is devalued if used as a pronouncement, a filler, a means to ending all further discussion, or an empty formula, if the decision does not include a proper explanation of *what verkeersopvatting* was found and – to a lesser extent – *how*. Two requirements may be said to apply to grounds for decisions taken based on *verkeersopvattingen*. The chosen *verkeersopvatting* must, subject to the decision in question being set aside in cassation proceedings, be *i)* formulated as precisely as possible. In addition, because of the intrinsic changeability of *verkeersopvattingen* and their objectivising function, a court *ii)* must demonstrate that in arriving at its decision it has objectivised the *verkeersopvatting* in question and qualified it. Possibilities for review on appeal and in cassation are enhanced if a court clearly formulates its chosen *verkeersopvatting*, justifying not merely its distinction from one chosen previously, but also its assessment in conformance with the earlier precedent.

This thesis principally advocates the acceptance of the legal character of *verkeersopvattingen* as used in Dutch civil law. Another theme is the characteristic that distinguishes *verkeersopvattingen* from other indeterminate concepts. *Verkeersopvattingen* do not refer to behavioural norms but rather views about what is appropriate *other* than behavioural norms. They are particularly relevant in determining a) the nature and scope of objects, b) the distinction between possession and holdership and c) the attribution of risks.

Restrictive use of the concept, limiting it to cases in which the law actually refers to *verkeersopvattingen*, is not advisable. Use of the concept should, however, be limited to the legal qualification of complexes of facts and circumstances, or to normative non-behavioural norms. In short, limited use of the concept is advocated on functional grounds.

English translation by Ian Gaukroger.