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Introduction: Highest Courts in Flux

THIS BOOK AIMS to offer a new perspective on a much-debated question in current legal scholarship: why do judges study legal sources which originated outside of their national legal system and how do they use arguments from these sources in the deciding of cases?[1] The highest national courts in Europe and North America are faced with important changes under the effects of globalisation. Legal systems and actors within these legal systems are increasingly interconnected. These interconnections have brought an increasing number of cases with international or foreign aspects to the courts. Moreover, systemic changes, such as the development of the European legal order and the increase of international legal instruments, have obliged highest courts to develop expertise concerning the application of legal sources elaborated outside of their national legal system. At the same time, meetings in transnational judicial networks and the availability of foreign legal sources, for example through Internet databases, have made it easier and natural for judges to take an interest in developments outside of their national borders.

These developments give rise to questions concerning the role and working methods of the highest national courts in this globalised legal context. How do the courts deal with the systemic changes affecting them and with the available opportunities to learn about foreign legal ideas and experiences? Are courts taking over methods or solutions for the deciding of cases from each other; that is, can a convergence of approaches between courts be identified? To what extent are the individual approaches of judges on the highest courts of influence on the development of their court's working methods and the reasoning of judgments?

[1] In this research, 'foreign law' is used as a general term to refer to legal sources which originated outside of a specific national legal system. In this sense, this qualification also applies to sources which have acquired the status of national law but originate at the international or supranational level, such as international treaty provisions implemented in a specific national legal system and EU law provisions in the Member States of the European Union. Concerning the status of specific foreign legal sources in the examined national legal systems, see further Chapter 5, I.

This book offers a reflection on these questions, based on a two-fold approach. First, we will examine the constitutional framework for the development of judicial practices in Western liberal democracies in the globalised legal context. Secondly, the views and experiences of highest court judges in five national jurisdictions will be described and compared. In a final analysis, the current practices of highest courts will be analysed in light of the described constitutional framework. The next paragraphs will further explain the background to this research, the research methodology, and the structure of the book.

I. THE TREND OF JUDICIAL INTERNATIONALISATION

In recent years, legal scholars, political scientists and social scientists in Western countries have explored the trend of 'judicial internationalisation', meaning the increased interaction between judges from different jurisdictions around the world.[2] It has been suggested that courts, in particular the highest national courts and courts at the international level, have come to see their work as a common judicial effort across national borders, and that a 'global community of courts' is emerging.[3] Some authors have made comments about the citation of foreign law and they have given reasons why judges cite foreign law.[4] These studies focus on the public debate among judges and academics regarding when judges ought to be able to use foreign law. However, the views and practices of judges themselves have not been studied extensively.[5]

This book sets out this previously hidden background to the public debate and to the case law. It presents an inside story concerning the judicial decision-making of Western supreme courts and constitutional courts in the globalised legal context, focusing on the highest courts in five legal systems: United Kingdom, Canada, United States, France and the Netherlands. The case law of the highest courts and public speeches held by judges in these courts were analysed. Furthermore, interviews were conducted with highest court judges. On the basis of these materials, a comparative analysis was made of the processes of judicial deliberations and legal reasoning in these

[2] See, eg S Muller and S Richards (eds), *Highest Courts and Globalisation* (The Hague, Hague Academic Press, 2010); A Hol *et al*, 'Special Issue on Highest Courts and Transnational Interaction' (2012) 8(2) *Utrecht Law Review* 1; and further references in the next footnotes.

[3] AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

[4] B Markesinis and J Fedtke, *Judicial Recourse to Foreign Law* (Abingdon, Routledge-Cavendish, 2006) 7–46.

[5] But see B Flanagan and S Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 *International and Comparative Law Quarterly* 1.

courts. Through this interdisciplinary approach, this book clarifies to what extent global influences have really affected the functioning of the highest national courts in representative common law and civil law systems.[6]

Until now, it has remained unclear in particular to what extent the personal approaches of judges, as representative of their feeling or opinion regarding their role, have an influence on the degree of internationalisation in the decision-making of highest courts. It is no secret that the individual judges at a specific court can have very different opinions about the discretion granted to them in the selection of sources for their decision-making. These differences are visible in the US Supreme Court, where Justice Scalia has opposed the recourse to non-binding foreign law in the deciding of cases, while some of his colleagues—including Justice Breyer, Justice Ginsburg and Justice Kennedy—have taken more favourable positions, both in public debate and in published judgments of the Supreme Court.[7] These differences of opinion are less visible in other jurisdictions, such as France and the Netherlands, where no tradition of separate or dissenting opinions exists. However, the US example and studies on the process of judicial decision-making more generally make clear that the personal approaches of judges can have an influence on the decision-making in concrete cases and on the development of the working methods of specific courts.[8] In this respect, it seems important to obtain more insight into judges' personal approaches regarding the use of legal sources which originate outside of their national legal system. Such insight, both with regard to binding international law and non-binding foreign sources, can contribute to the better understanding of the development of judicial decision-making in the globalised legal context. Aiming to address the issues raised by judicial internationalisation, this book's focus is on the development of the working methods of highest courts and the personal approaches to the use of foreign law developed by the judges in these courts.

II. WHY DO JUDGES CITE FOREIGN LAW?

Why and how do judges use foreign legal sources in judicial decision-making at the highest national level? Answering this research question is essential for the further development of the role of Western highest courts in their national legal order as well as at the transnational level. Indeed,

[6] For a further explanation of the research methodology, see below, III.

[7] N Dorsen, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 *International Journal of Constitutional Law* 519; see further Chapters 4 and 5.

[8] See, eg TJ Miles and CR Sunstein, 'The New Legal Realism' (2008) 75 *University of Chicago Law Review* 831; RA Posner, *How Judges Think* (Cambridge, MA, Harvard University Press, 2008).

questions about the legitimacy and methodology of decision-making have a significant impact on courts and on individual judges, as the US example shows. Uncertainty about the possibilities of using foreign law has been harmful to the image of this highest court in academic circles, and is considered to weaken its ability to develop judicial leadership at the transnational level.[9] Insight into the mechanisms which influence the decision-making of the highest national courts is invaluable for the future development of the role of these courts as guardians and developers of the law at the national level, as well as at the transnational level.

Based on a comparative and empirical analysis, this book makes two central claims. The first claim is that a judge's personal approach is a highly determinative factor as regards both the influence granted to binding foreign legal sources, such as international law and the law of the European Union (EU), and the use of non-binding foreign legal materials, such as foreign case law, in the deciding of cases. In a general manner, the working methods and style of reasoning of courts can enable or constrain the possibilities of including foreign law in judicial deliberations and of the citation of foreign law in judgments. However, the interviews conducted for the research make clear that individual judges have an important influence on the way in which foreign law is used in their court. The individual use of foreign law by judges in deliberations and in judgments, beyond the mandatory use of sources, depends on three main factors: legal tradition, language and the prestige of foreign courts. Interestingly, the voluntary recourse to foreign law currently does not seem to follow a specific logic. Furthermore, even though a theoretical distinction can be made between materials which are formally binding and materials which are not, the interviews reveal that when making use of comparative legal methods the majority of the interviewed judges focus more on finding relevant arguments for their decision than on the status of the source from which these arguments originate. This is particularly the case during the process of discovering the law, where arguments from comparative law are valued for the insights which they provide regarding the possible interpretation of the law. In the process of justifying the decision, judges still look to binding legal sources first but do sometimes mention additional arguments based on non-binding comparative legal sources.

The second major claim of this book is that a trend of convergence of judicial practices, running parallel with the increase of transnational legal instruments and the development of transnational legal orders, seems to be taking place. Certainly, a strong posture of resistance to the use of foreign law in the judging of cases exists in some circles, most prominently in the

[9] VC Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, Oxford University Press, 2009).

United States.[10] Moreover, criticism of the EU legal order, the regime of the European Convention on Human Rights (ECHR), and the courts which are at the top of these structures[11] suggests that the transnational convergence of legal orders and judicial practices can only develop through a gradual process of harmonisation, which furthermore has its limits. Indeed, the recognition of constitutional pluralism in the European Union and a 'margin of appreciation' for member states to the ECHR are fundamental to the nature of these legal regimes.[12] Notwithstanding this continued significance of national legal borders, the comparative study of the five aforementioned legal systems shows that the legal sources discussed in judicial deliberations of the highest national courts in these systems, as well as the working methods of these courts in general, are becoming increasingly similar. Two main causes of this convergence can be identified. On the one hand, the increase of personal contacts between judges and the better availability of foreign legal materials have created a platform for the exchange of legal ideas and practices. On the other hand, the increased formal interconnections between legal systems have made it legitimate and interesting for highest court judges to take account of foreign legal ideas and experiences.

In addition to these observations based on the comparative and empirical analysis, this book contributes to the constitutional-theoretical understanding of the development of judicial practices. Chapter 2 sets out procedural and substantive aspects of legal evolution, which concern the '(in-)flexibility' of national constitutions to accommodate normative changes such as the internationalisation of legal and societal interaction. These aspects of legal evolution concern the development of constitutional rules and procedures, as well as the role of particular principles and conventions which characterise the interaction between actors in specific national legal systems. We come back to this theoretical framework in Chapter 6, in which the explanatory value of the identified aspects is tested in light of the results of the empirical study of the highest courts. This constitutional-theoretical analysis clarifies that the development of judicial internationalisation in national legal systems is dependent on procedural factors as well as substantive factors of legal evolution. At the procedural level, constitutional norms can enable or constrain the use of foreign law by the national courts. The courts can accelerate or slow down the development of this practice through the interpretation of their function in light of the applicable constitutional norms. The integration of binding international treaty law and EU law in national legal systems influences this interpretative process, as these instruments create a systemic framework for judicial interaction across the

[10] Ibid.
[11] See Chapter 4, I.
[12] J Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80.

national legal borders. At the substantive level of legal evolution, the use of foreign law is influenced by the occurrence of 'globalist' and 'localist' views of highest court judges concerning the role of foreign law in the decision-making in domestic cases. These two perspectives relate to a perception of the national and international legal orders as distinct legal spheres (localist view) or as interconnected legal spheres (globalist view), and translate into corresponding views about the possibility and usefulness of transnational judicial exchanges. Other relevant substantive factors of legal evolution are legal tradition and the nature of cases judged by the highest courts, and the effectiveness and efficiency of the decision-making of these courts.

Besides its value for the study of the development of judicial practices in the five legal systems included in this book, the theoretical framework has the potential to explain the role of judicial internationalisation in other Western liberal democracies. Furthermore, this framework provides points of reference for the assessment of the possible future development of judicial internationalisation in Western highest courts.

III. LEARNING FROM THE VIEWS OF JUDGES

This book's arguments are developed through a combined use of comparative and socio-legal research methods and constitutional theory. Through its concern with theoretical aspects of the functioning of highest courts as well as with the actual practices of decision-making in these courts, the book is able to go beyond existing descriptions and explanations of judicial internationalisation. This combination of theoretical and empirical research thus builds on and contributes to the rich field of scholarship which has emerged in recent years to study judicial dialogue and the judicial recourse to foreign law.[13] In particular, this book contributes to the knowledge on judicial approaches by cataloguing the considerations voiced by judges concerning their working methods in the globalised legal context and concerning the use of foreign law in judicial decision-making.

Through interviews with judges in the five examined jurisdictions, this research clarifies which individual approaches of judges to the use of foreign law exist, and how these approaches affect the deciding of cases. The research focuses on the highest national courts, since it can be assumed that judicial reflection on global influences will most likely be found at this level of judicial decision-making.[14] After all, the national highest courts have to deal in the final instance with the most difficult questions of legal interpretation and have the final authority, at the national level, to determine what the law means.

[13] See below, IV.
[14] Muller and Richards, *Highest Courts* (n 2) 2.

Since judicial deliberations are not public and not all considerations made by individual judges are revealed in the judgments of the selected highest courts, talking to the judges themselves was required to establish which personal approaches of judges exist and how influential these approaches are with regard to the use of foreign legal materials in specific courts. The qualitative method of analysis was preferred over the possibility of a quantitative study. Indeed, as the number of judges on the national highest courts is limited, the collection of reliable quantitative data would require the cooperation of almost all judges on a specific court. This was too difficult to achieve. Moreover, sufficiently reliable information could be obtained also through the linking of information from the interviews with case law and other sources which provide information concerning judicial approaches, such as public lectures.[15]

This research focused on the highest national courts in the United Kingdom, Canada, the United States, France and the Netherlands. This selection of courts was based on the fact that these highest courts are currently facing important changes which, at least in part, seem to be related to the impact of globalisation on the national legal systems in which they are functioning.[16] The comparability of the courts follows from their shared background in Western liberal democracies; that is, states which share the traditions of democracy, rule of law, human rights protection and open government.[17] The selection of courts takes into account similarities and differences which might exist based on: (1) the legal tradition in which the highest courts function (common law or civil law); (2) the competences of review, composition and caseload of the courts; and (3) the expected differences in leadership of courts in transnational judicial dialogue on the basis of the size of the legal system in which the court functions and genealogical or linguistic connections with other legal systems.[18]

Two further remarks should be made concerning this selection of courts for the comparative study. First, the absence of Germany might be criticised, given the prominent role of the German Bundesverfassungsgericht and Bundesgerichtshof in transnational judicial communication. Indeed, many of the interviewed judges in the five examined legal systems mentioned the German highest courts as a point of reference or a source of inspiration. However, since the selection needed to be limited, the choice was made to include France rather than Germany as a large civil law system with an 'exemplary' function in transnational judicial dialogue. This choice was based partly on the French heritage of the Dutch highest courts,

[15] See further Chapter 3, IV.
[16] See Chapter 3, I–II.
[17] T Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge, Cambridge University Press, 2003) 7–8.
[18] See Chapters 2 and 3.

which provided interesting elements for the comparison of judicial practices between these two systems. Practical reasons played a role as well, in particular the researcher's greater affinity with and knowledge of the French legal system and the possibilities of getting in contact with judges in the French highest courts. This is not to deny that further research which includes the German legal system could be very rewarding and is therefore recommended. Secondly, the two specialised administrative courts of final appeal in the Netherlands—the Centrale Raad van Beroep (Administrative High Court) and the College van Beroep voor het bedrijfsleven (Trade and Industry Appeals Tribunal)—have been excluded from the comparison. The reason for this is that these courts do not have an equivalent in the other examined legal systems. Moreover, the role of these two courts in the Dutch legal system, in terms of jurisdiction and in terms of caseload, is limited when compared to the general highest courts in the Netherlands.[19]

IV. SCOPE OF THE RESEARCH

This book does not include a quantitative analysis of the use of foreign law by the examined highest courts. As it was already mentioned, the aim of the research was to identify different judicial views and approaches to the use of foreign law rather than to analyse quantitatively the practices in the courts. Therefore, and also because of the confidentiality of the interviews, the research results will be presented in the form of a narrative rather than in quantitative terms. For a substantiation of the number of references between highest courts the research relies on other sources. In particular, the quantitative analysis by Martin Gelter and Mathias Siems regarding cross-citations between highest courts in European legal systems is noteworthy.[20] Concerning the exchange of ideas in judicial networks, furthermore, research has been conducted by Monica Claes and Maartje de Visser and by Emmanuel Lazega in the framework of the Highest Courts Project facilitated by the Hague Institute for the Internationalisation of Law (HiiL).[21]

At the theoretical level, the research presented in this book builds on the work of other constitutional theorists and comparative legal researchers. Vicki Jackson has identified postures of resistance, convergence and engagement of courts with international and foreign law. Her book *Constitutional*

[19] See Chapter 3.

[20] M Gelter and M Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts' (2012) 8 *Utrecht Law Review* 88.

[21] M Claes and M de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8(2) *Utrecht Law Review* 100; E Lazega, 'Mapping Judicial Dialogue across National Borders: An Exploratory Network Study of Learning from Lobbying among European Intellectual Property Judges' (2012) 8(2) *Utrecht Law Review* 115.

Engagement in a Transnational Era focuses on cross-national references in constitutional court decisions. She gives particular attention to the US debate, and argues that the Supreme Court should cautiously engage with transnational legal sources when interpreting the national constitution.[22] Aida Torres Pérez, in her book *Conflicts of Rights in the European Union*, has developed a theory of supranational adjudication. Taking the idea of judicial dialogue as a starting point, she analyses the value of this idea and the possible legitimacy it can give to judicial decision-making at the supranational level of the European Union.[23] Mitchel Lasser's *Judicial Deliberations* offers a thorough comparative analysis of the judicial argumentation of the US Supreme Court, the French Cour de cassation, and the Court of Justice of the European Union (CJEU). Lasser's analysis of institutional, conceptual and argumentative aspects of these courts' decision-making makes visible how specific mechanisms of judicial accountability, judicial deliberations and legitimacy have developed.[24] In *Judicial Transformations*, Lasser examines the so-called 'rights revolution' in the courts of Europe. His book studies the changes in European judicial culture and litigation, in particular in France, in the context of the emergence of fundamental rights protection at the level of states and at the level of the European Court of Human Rights and the CJEU.[25] Finally, Michal Bobek in his doctoral thesis *Comparative Reasoning in European Supreme Courts*, which he defended at the European University Institute in 2011, has analysed the use of comparative arguments as persuasive authority in the judicial decision-making of the national supreme courts in five continental-European countries. His research encompasses a quantitative analysis of these courts' use of foreign law and a theoretical analysis in light of national positivistic legal theories. Bobek concludes that the comparative practices of the examined supreme courts of the Czech Republic, the Slovak Republic, Germany, France, and England and Wales demonstrate a utilitarian and pragmatic approach of courts to the use of foreign law. He argues that the 'digestion' of new legal ideas coming from comparative law should first take place in the legal doctrine, resulting in a mainstream opinion which can be taken over by the judiciary.[26]

The current book's qualitative analysis demonstrates that a more nuanced picture of the judicial views and practices in the globalised legal

[22] Jackson, *Constitutional Engagement* (n 9).

[23] A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford, Oxford University Press, 2009).

[24] M de S-O-l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, Oxford University Press, 2004).

[25] M de S-O-l'E Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford, Oxford University Press, 2009).

[26] M Bobek, *Comparative Reasoning in European Supreme Courts: A Study in Foreign Persuasive Authority* (Doctoral thesis, European University Institute, 2011).

context emerges when considering the background to the public debate and the published judgments of Western highest courts. The judges' views, as expressed in the interviews, highlight the general interest of judges concerning foreign legal ideas and experiences, and the perceived value of judicial engagement in legal comparison. This engagement is becoming more legitimate and interesting for judges under the current effects of legal integration across national borders, embodied in the growth of the international and supranational legal orders and the increase of judicial networks. Judges feel encouraged to look beyond traditional positivistic approaches in their judicial decision-making and to focus on the search for persuasive arguments for the legal reasoning of judgments.

Because of its focus on the general practices of several common law and civil law courts, the current book is able to offer a novel and integrative analysis of the judicial recourse to foreign law. It examines the type of cases and legal tradition as factors which influence the use of foreign law. Furthermore, the insights obtained through the study of the practices of the selected highest courts are linked with a theoretical perspective on processes of judicial decision-making. The analytical framework, developed in Chapter 2 and applied to the development of judicial internationalisation in Chapter 6, describes and explains the constitutional accommodation of the judicial function in Western liberal-democratic legal systems.[27] It reflects a dynamic approach which starts out from the idea that under the effects of societal, economic and political changes, there is a need for new solutions for the functioning of national judiciaries. Judicial internationalisation is an example of such a change which needs to be accommodated into the national legal context. Through its comparison of legal systems, this research is able to map the dynamics of constitutional change, and to identify to what extent change is enabled or constrained by national constitutions and constitutional conventions. This book starts out from this constitutional-theoretical perspective to describe and explain the tendency of judicial internationalisation, and provides empirical insight through a connection with institutional, organisational and individual judicial perspectives on the decision-making of highest courts.

V. OUTLINE OF THE BOOK

In Chapter 2, a constitutional-theoretical perspective is introduced, which will be used to assess the development of internationalised judicial practices

[27] This framework was developed previously in E Mak, *De rechtspraak in balans* (Nijmegen, Wolf Legal Publishers, 2007), and E Mak, 'Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (In-)Flexibility' (2012) 4 *Erasmus Law Review* 193.

in the highest courts. The concept of 'constitutional (in-)flexibility' aims to clarify how national constitutional frameworks enable or constrain the integration of normative changes, such as the changes induced by judicial internationalisation, in national legal systems. Four procedural elements encompassed by this concept are identified: the detailed content of constitutional norms, the modalities for revising the national Constitution, the approach to legal argumentation taken by interpreters of the Constitution, and the influence attributed to international law within the national legal system. Besides these procedural aspects, four substantive factors which might explain the development of judicial internationalisation are introduced. These substantive factors are: considerations regarding the democratic justification of judicial decisions, including the nature of the consulted sources and the nature of the judicial competence; legal tradition, in particular the classification as a common law or as a civil law system; the nature of cases brought before a highest court; and considerations regarding the effectiveness and efficiency of judicial decision-making in the highest courts.

The research into the judicial approaches in the highest courts of the United Kingdom, Canada, the United States, France and the Netherlands is presented next in an integrated comparative analysis. To set the scene for this analysis, the book starts out with an overview of the selected highest courts in Chapter 3, addressing their history and current debates concerning their role and functioning in the globalised legal context. A distinction is made between two institutional set-ups of highest courts, which are labelled the Anglo-Saxon model and the French model of the organisation of final appeal. In some legal systems, a single highest court is at the top of the national judicial system. This is the case for the Supreme Court of the United Kingdom, which is the court of final appeal for civil cases in the United Kingdom and for criminal cases in England, Wales and Northern Ireland. This is also the case for the Supreme Court of Canada, which judges appellate cases in the field of civil and criminal law, and for the US Supreme Court, which is the highest federal court in the United States. In other legal systems, several highest courts together constitute the final appeal system at the national level. In France, the Cour de cassation is the supreme judge in civil and criminal cases and the Conseil d'Etat is the supreme administrative judge. The Conseil constitutionnel, since the introduction of *a posteriori* review of legislation in 2009, has acquired the status of a true constitutional judge, able to protect the rights of citizens in concrete cases.[28] The Dutch judicial system is a carbon copy of the original French model, which was introduced during the Napoleonic occupation between 1795 and 1813. The system features the Hoge Raad der Nederlanden (Supreme Court of

[28] See Chapter 3, IIA.

the Netherlands) as the final judge in civil, criminal and tax law cases and the Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State) as the supreme administrative court with general jurisdiction.[29] The organisation of final appeal on the basis of the Anglo-Saxon or on the basis of the French model has implications for the competences of review, the composition and the caseload of the highest courts. Moreover, the existence of multiple highest courts in the French model raises the question of whether interaction exists between these courts and how they position themselves in the interaction with highest courts at the above-national level and in foreign jurisdictions. The particularities of each of the courts examined in this research are taken into account in the analysis in Chapters 4 and 5, which present the results of the empirical research.

Changes in the functioning of the highest national courts are identified in Chapter 4 with regard to two aspects of their role: the function of guardian of the law, including the guarantee of the uniform application of the law and the protection of fundamental rights, and the contribution to the development of the law. Concerning both of these aspects, the research shows that the highest courts are currently expected to take account of relevant foreign legal sources and the legal ideas and experiences of judges in other jurisdictions. The impact of global influences is examined next with regard to the international relations engaged in by highest court judges, and with regard to the highest courts' working methods for the deliberation and judgment of cases. This analysis reveals that the personal approaches of judges are of significant influence, both concerning the participation in transnational exchanges and concerning the need felt and efforts made to include foreign legal sources in the highest courts' decision-making.

The use of foreign law by the examined highest courts is scrutinised in more detail in Chapter 5. On the basis of the interviews with judges and the analysis of the case law of the highest courts, a distinction is made between the use of formally binding sources of international law and non-binding foreign legal sources. Binding sources which are used by the highest courts include the ECHR and EU law in the United Kingdom, France and the Netherlands, and a variety of international treaties in all of the examined jurisdictions. Non-binding legal materials which play a role in the deciding of cases are the judgments of courts in foreign national jurisdictions, as well as 'soft law' instruments such as transnational private regulations and the Principles of European Contract Law. It is demonstrated that the status granted to foreign legal sources and the use that is made of these sources depend on systemic factors in a specific legal system, such as the model for

[29] See also above, III, concerning the specialised highest administrative courts in the Netherlands.

the implementation of international law or the style of judicial reasoning of the highest court, as well as on personal approaches of the highest court judges, including their affinity with and capability regarding the study of foreign law.

In Chapter 6, finally, the theoretical framework set out in Chapter 2 is applied to the development of judicial internationalisation in the examined jurisdictions. This analysis clarifies how similarities and differences concerning the development of the practices of highest national courts are integrated within different legal systems. The reflection based on the constitutional-theoretical perspective reveals in particular how the individual approaches of judges influence the development of judicial internationalisation in the highest national courts. Furthermore, this chapter contains a brief reflection on the possible future development of the practices of highest national courts in Western legal systems. Under the effects of further internationalisation or, by contrast, a renationalisation of the law, judges can be stimulated either to strive for a further convergence of their decision-making practices or for a return to or persistence of decision-making primarily on the basis of national standards and legal sources. Under the effects of privatisation, the status of regulations made by private actors at the national and transnational level might become more important. We will end our exploration by observing that legal scholarship, such as the comparative analysis presented in this book, can assist highest court judges in establishing what they can and may do when deciding domestic cases in this evolving legal and societal context.