

Contents

<i>Acknowledgments</i>	v
<i>Table of Cases</i>	xiii

1. Introduction: Highest Courts in Flux	1
I. The Trend of Judicial Internationalisation	2
II. Why Do Judges Cite Foreign Law?	3
III. Learning from the Views of Judges	6
IV. Scope of the Research	8
V. Outline of the Book	10
2. Understanding the Development of Highest Courts' Practices:	
A Constitutional-Theoretical Approach	14
I. Constitutional Theory and Legal Evolution	16
A. Understanding Legal Evolution through	
Constitutional Theory.....	16
B. Concept of 'Constitutional (In-)Flexibility'	18
II. Procedural Aspects of Legal Evolution.....	20
A. Detail of Constitutional Norms	20
B. Modalities for Revision of the Constitution	21
C. Approach of the Interpreter of the Constitution	24
D. Impact of International Law in the Domestic	
Legal System	26
III. Substantive Aspects of Legal Evolution	28
A. Democratic Justification of Judicial Decisions	28
(i) Authority of the Consulted Sources.....	29
(ii) Nature of the Judicial Competence	31
B. Legal Tradition	32
C. Nature of Cases	34
D. Effectiveness and Efficiency of Judicial	
Decision-Making.....	34
IV. Conclusion	35
3. Introducing the Comparative and Empirical Analysis	36
I. Anglo-Saxon Model: A Single Highest Court	
(United Kingdom, Canada, United States).....	36
A. Competences of Review	37
(i) UK Supreme Court	37
(ii) Supreme Court of Canada	37
(iii) US Supreme Court.....	38

B. Composition: Judges and Staff.....	39
(i) UK Supreme Court.....	39
(ii) Supreme Court of Canada.....	40
(iii) US Supreme Court.....	41
C. Caseload	42
(i) UK Supreme Court.....	42
(ii) Supreme Court of Canada.....	43
(iii) US Supreme Court.....	44
II. French Model: Multiple Highest Courts (France, the Netherlands).....	45
A. Competences of Review	46
(i) Courts of Cassation.....	46
(ii) Supreme Administrative Courts.....	47
(iii) Conseil Constitutionnel	49
B. Composition: Judges and Staff.....	51
(i) Courts of Cassation.....	51
(ii) Supreme Administrative Courts.....	52
(iii) Conseil Constitutionnel	54
C. Caseload	55
(i) Courts of Cassation.....	55
(ii) Supreme Administrative Courts.....	57
(iii) Conseil Constitutionnel	58
III. Comparing the Courts	59
A. Competences of Review	59
B. Composition	61
C. Caseload	61
IV. An Empirical Analysis.....	62
A. Interviewed Judges	62
B. The Interviews	64
C. Other Sources: Case Law, Speeches and Articles.....	66
V. Conclusion	67
4. Incorporating the Transnational: Judicial Roles, Relations and Working Methods in a Globalised World	68
I. Judicial Roles in a Globalised World.....	69
A. Guardian of the Law.....	69
(i) Ensuring the Uniform Application of the Law	69
(ii) Ensuring the Protection of Fundamental Rights.....	76
B. A Developer of the Law	78
(i) Judicial Authority and Autonomy in a Globalised World.....	78

(ii) Horizontal Dialogue: Leadership amongst One's Peers	80
(iii) Vertical Dialogue: Leadership vis-à-vis the European Courts	80
C. Conclusion	82
II. International Relations of the Highest Courts	83
A. Judicial Networks and Exchanges	83
(i) UK Supreme Court	84
(ii) Supreme Court of Canada	85
(iii) US Supreme Court	88
(iv) French Highest Courts	90
(v) Dutch Highest Courts	95
B. Individual Views Concerning Globalisation	98
(i) Involvement in Debate About Globalisation	99
(ii) Influence of 'Globalist' and 'Localist' Mind-Sets of Judges	102
(iii) Judicial Politics	106
(iv) Personal Background	107
C. National Judges in International Courts	109
D. Conclusion	112
III. Working Methods in a Globalised World	113
A. Internal Research of International and Comparative Law	114
(i) UK Supreme Court	114
(ii) Supreme Court of Canada	115
(iii) US Supreme Court	116
(iv) French Highest Courts	116
(v) Dutch Highest Courts	117
B. Role of Counsel, <i>Amici Curiae</i> and Interveners	120
(i) UK Supreme Court	120
(ii) Supreme Court of Canada	121
(iii) US Supreme Court	122
(iv) French Highest Courts	123
(v) Dutch Highest Courts	123
C. Deliberations	124
(i) UK Supreme Court	124
(ii) Supreme Court of Canada	125
(iii) US Supreme Court	126
(iv) French Highest Courts	127
(v) Dutch Highest Courts	128
D. Published Judgments	129
(i) UK Supreme Court	129
(ii) Supreme Court of Canada	130
(iii) US Supreme Court	131

(iv) French Highest Courts	132
(v) Dutch Highest Courts	135
E. Conclusion	136
IV. Conclusion	137
5. The Use of Foreign Law in Judicial Decision-Making	139
I. Status of Foreign Law	140
A. Impact of International Law	141
(i) UK Supreme Court	141
(ii) Supreme Court of Canada	144
(iii) US Supreme Court	145
(iv) French Highest Courts	146
(v) Dutch Highest Courts	148
B. Role of Comparative Law	150
(i) UK Supreme Court	150
(ii) Supreme Court of Canada	151
(iii) US Supreme Court	154
(iv) French Highest Courts	158
(v) Dutch Highest Courts	160
C. Conclusion	161
II. Use of Foreign Law: Examples from Case Law	163
A. Use of International Law	163
(i) UK Supreme Court	163
(ii) Supreme Court of Canada	166
(iii) US Supreme Court	169
(iv) French Highest Courts	171
(v) Dutch Highest Courts	173
B. Use of Comparative Law	178
(i) UK Supreme Court	178
(ii) Supreme Court of Canada	181
(iii) US Supreme Court	187
(iv) French Highest Courts	190
(v) Dutch Highest Courts	194
C. Conclusion	197
III. Justification of Developed Practices	198
A. Judicial Argumentation and the Style of Judgments	198
(i) Citation of Foreign Legal Materials	199
(ii) Why Judges Cite Foreign Law	200
(iii) Methodological Challenges	203
B. Selection of Comparative Legal Materials:	
Tradition, Language and Prestige	206
(i) UK Supreme Court	206
(ii) Supreme Court of Canada	206
(iii) US Supreme Court	209

(iv) French Highest Courts.....	211
(v) Dutch Highest Courts	212
C. Conclusion.....	213
IV. Conclusion	213
6. Conclusion: Assessing the Development of Highest Courts’ Practices	217
I. Constitutional (In-)Flexibility in Action: Procedural and Substantive Explanations for the Development of Highest Courts’ Practices	217
A. Procedural Explanations	218
(i) Accommodating Change Through Constitutional Norms	218
(ii) Accommodating Change Through Constitutional Interpretation	223
B. Substantive Explanations	227
(i) Democratic Justification of Judicial Decisions	227
(ii) Legal Tradition and the Nature of Cases: Contextual Factors for the Use of Foreign Law	230
(iii) Effectiveness and Efficiency of Judicial Decision-Making	232
C. Conclusion	233
II. Epilogue: The Future of Judicial Internationalisation.....	234
A. Judges’ View of the Future.....	234
B. Possible Scenarios for the Future.....	237
<i>Annex: Interview Design.....</i>	<i>240</i>
<i>Bibliography</i>	<i>243</i>
<i>Index.....</i>	<i>257</i>