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Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices

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1. Introduction

How do judges decide cases in a globalised legal context, i.e. a world which is characterised by the increased interconnections between legal systems and between actors, including courts, in these legal systems?¹ This question is particularly significant for the highest courts in national legal systems. These courts, charged with finally judging questions of law at the national level, have been obliged to redefine their role in light of the ongoing ‘internationalisation’ of the law.² It has been noticed that the highest courts in recent years have adapted their practices, in particular through the increased reference to foreign law.³ Certain authors have made comments about this development and they have given reasons why judges cite foreign law.⁴ However, existing scholarly work does not explain how this internationalisation of judicial decision-making has specifically affected deliberations and the reasoning of the highest courts. Attention to this matter is important, as it relates to fundamental questions regarding legal argumentation as well as the conception of the judicial role.

The aim of this article is to explain the development of the highest courts’ decision-making practices in light of the trend of the internationalisation of the law. The point of departure for the analysis is formed by existing legal scholarship on judicial decision-making in the liberal-democratic normative framework.⁵ Research shows that normative frameworks for judicial decision-making generally allow judges a considerable amount of discretion regarding the sources which they take into account.⁶ Therefore,

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1 See inter alia J.B. Auby, *La globalisation, l’Etat et le droit*, 2010; M. Tushnet, ‘The Inevitable Globalisation of Constitutional Law’, in S. Muller & S. Richards (eds.), *Highest Courts and Globalisation*, 2010, pp. 129-147. On the effects of globalisation on governance, see A.M. Slaughter, *A New World Order*, 2004.

2 The emergence of transnational connections between courts has been referred to under many different names. Muller & Richards use the term ‘judicial internationalisation’ to capture the increased exchange of legal ideas and experiences between judges in different legal systems, a trend also referred to as ‘transjudicialism, judicial dialogue, judicial cosmopolitanism, judicial globalisation, the migration of legal ideas, (and) legal transplants’; see S. Muller & S. Richards, ‘Introduction’, in Muller & Richards, supra note 1, p. 4.

3 Muller & Richards, supra note 1; B. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law*, 2006.

4 See inter alia Markesinis & Fedtke, supra note 3; M. Andenas & D. Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: a Liber Amicorum*, 2009.

5 See inter alia A. Barak, *The Judge in a Democracy*, 2006; R. Posner, *How Judges Think*, 2008.

6 Markesinis & Fedtke, supra note 3, pp. 7-46.

foreign legal materials may play a role both in the heuristic phase of the judicial deliberations and in the phase of the legitimising of the decision through the court's reasoning. Nonetheless, several elements regarding the highest courts' roles and working methods can be identified which give direction to the judicial use of legal sources. This article will demonstrate to what extent the process of judicial decision-making in the highest courts is bound by constitutional, institutional and organisational factors as well as by the personal approach of individual judges as representative of their feeling or opinion regarding their judicial role. The article will then analyse how these factors have played a role with regard to the development of the use of foreign law in two specific highest courts: the Supreme Court for the UK and the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*). This analysis will show that judicial approaches to the use of foreign law vary considerably between the highest courts in different national legal systems as well as between judges in specific highest courts. In this way, the article will make clear what highest court judges can and may do in the specific context in which they are functioning.

The comparability of the British and Dutch highest courts follows from their shared background in Western liberal democracies, i.e. states which share the traditions of democracy, the rule of law, human rights protection and open government,⁷ and from the similarities in these courts' position in the national legal systems in which they are functioning.⁸ The relevance of the comparison lies in the fact that the British and Dutch Supreme Courts are both currently facing important changes which, at least in part, seem to be related to the effects of globalisation in national legal systems.⁹ To assess the development of the judicial practices of the British and Dutch highest courts, an investigation was made of case law and public speeches. Furthermore, semi-structured interviews with judges were conducted to establish which individual approaches to the use of foreign law exist and how these approaches affect the practices in these specific highest courts. In the UK, interviews were held in November 2009 with seven of the then eleven Supreme Court judges and one recently retired Law Lord. In September and October 2009, interviews were held at the Supreme Court of the Netherlands with thirteen of the then 41 judges, selected from each of the three Chambers of the Court. The participation rates suggest that the information obtained through these interviews is sufficiently comprehensive to represent the whole of judicial views and approaches concerning the use of foreign law which can be identified in these national highest courts. Given the specific working methods of the Dutch Supreme Court, interviews were further held with five Advocates General at this Court.¹⁰ The aim of these interviews was to gain more insight into the way in which legal materials are introduced in the judicial deliberations. Because of confidentiality, the results will be presented in this article in the form of a narrative rather than through quotes from the interviews.

This article consists of two parts. First, four types of variables which influence judicial practices are described and it is shown how these variables shape the judicial decision-making of the highest courts in liberal-democratic legal systems. Examples are related to the British and Dutch legal systems. Secondly, the specific development of the use of foreign law in the highest courts of the UK and the Netherlands is analysed. Similarities and differences between judicial practices are pointed out and linked to the variables which were identified in the first part of the analysis. The conclusion of the article summarises the results of the analysis and gives a suggestion for further research.

2. Variables for judicial decision-making

To set the stage for the analysis of the use of foreign law, the legal framework for the development of highest court practices will be described. It will be demonstrated that the judicial decision-making at the level of the highest national courts is shaped in a process of balancing constitutional, institutional, organisational and personal variables.¹¹

7 T. Koopmans, *Courts and Political Institutions: A Comparative View*, 2003.

8 See further *infra*.

9 See further *infra*.

10 Concerning the function of the Advocate General, see *infra* Section 2.3.

11 These variables relate first and foremost to the legal framework in which the highest courts function. However, they also contain political, economic, sociological, psychological and historical aspects.

2.1. Constitutional variables

First of all, the development of judicial practices concerns the conception of the judicial function. In Western liberal democracies, the judicial function is defined by a constitution, which expresses the fundamental principles, rules and conventions for the governing of the community and is relatively unchangeable.¹² Based on the requirements of the rule of law,¹³ neutral dispute resolution in liberal-democratic legal systems is generally provided in the form of court procedures and is guaranteed through the independence of the judiciary vis-à-vis the other branches of government.¹⁴ The conception of the judicial function is influenced by elements of the constitutional framework of the specific national legal system. This framework encompasses the constitution and its underlying conventions.¹⁵ As regards the judicial function, relevant constitutional aspects in general include the specific legal system's constitutional culture, the relation between the national and the transnational legal orders, and the scope of the judicial power regarding constitutional interpretation.¹⁶

The flexibility of the constitutional framework determines to what extent normative changes can be integrated in national legal systems. This 'constitutional flexibility' concerns the relative openness of the constitutional framework of a specific legal system with regard to the expression of normative change.¹⁷ Constitutional flexibility is the parameter which explains to what extent national constitutions allow for the integration of, for example, the idea that it is useful for judges to have recourse to foreign law when deciding cases. On the basis of its degree of flexibility, the constitutional framework determines how and to what extent this idea can be integrated in the national legal system. The constitutional framework of a specific national legal system thus enables or constrains the integration of normative change. The degree of flexibility of a specific constitutional framework depends on the legal system's constitutional corpus of rules and the possibilities of modifying these rules, as well as on the judicial interpretation of the constitution and the influence of international law.¹⁸

An example can clarify how normative changes related to the trend of globalisation are integrated in national legal systems. A specific change concerns the distribution of competences to produce and interpret valid norms for the national legal order. The effects of globalisation have affected the balance of powers in national legal orders, both concerning the relation between the national legislator and the national courts and with regard to the relation between national and international courts. In the Dutch legal order, this change was set in motion by the revision of the Constitution in 1953. This revision introduced Sections 93 and 94 of the Constitution, which regulate the validity and application of treaty norms and decisions of international organisations.¹⁹ First of all, the judicial obligation to set aside national legal provisions in case of conflict with treaty norms introduced a relativisation of the principle of the sovereignty of Parliament. It thus gave rise to a shift in the balance of powers at the national level in favour of the judiciary. Moreover, the competence to interpret norms of international origin in individual cases came to belong to the national courts as well as international courts with relevant jurisdiction. In this way, the door was opened for the Court of Justice of the European Union (ECJ) and the European Court of Human Rights (ECtHR) to gain significant influence in the Dutch legal order.²⁰

When focusing on the constitutional aspects of the integration of this normative change, a different development can be identified in the UK. In the UK's dualist mechanism, international treaties need

12 V.C. Jackson, *Constitutional Engagement in a Transnational Era*, 2010, p. 3.

13 T. Bingham, *The Rule of Law*, 2010, p. 85.

14 See for example Chapter 6 of the Dutch Constitution, which concerns the administration of justice.

15 P. Avril, *Les conventions de la Constitution*, 1997.

16 See for example Chapters 5 and 6 of the Dutch Constitution.

17 E. Mak, 'Justice at a New Scale: Introducing a Conceptual Framework for the Analysis of Highest Courts' Role in a Globalised Context', in Muller & Richards, *supra* note 1, pp. 115-127; see also E. Mak, *De rechtspraak in balans*, 2007, Chapter 3.

18 Mak 2010, *supra* note 17.

19 Section 93 of the Constitution states that '(p)rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published'. On the basis of Section 94 of the Constitution, '(s)tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions'. The official translation of the Constitution is available at <<http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>> (last visited 8 March 2012).

20 E. de Wet, 'The Reception Process in the Netherlands and Belgium', in H. Keller & A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, pp. 229-309.

to be transposed into national law before they become binding norms of the national legal system. The Human Rights Act 1998 (HRA) gave the English courts competence to review Acts of Parliament in light of the provisions of the HRA, and in this way indirectly in light of the European Convention on Human Rights (ECHR).²¹ However, Parliament itself created this competence (and can take it away again). Also, the courts do not have competence to set aside legislative provisions which violate the HRA. They can only give a ‘declaration of incompatibility’.²² Therefore, formally speaking the principle of the sovereignty of Parliament has not been encroached upon.²³ However, practice has shown that a declaration of incompatibility puts significant pressure on Parliament to bring legislation into line with the HRA.²⁴ Hence, the HRA can be considered to impose norms with constitutional status on the legislator.²⁵ A normative change concerning the balance of powers was thus integrated at the level of the constitutional conventions which underlie the English legal system.

2.2. Institutional variables

The institutional variables for the development of judicial practices form the translation of constitutional principles into specific institutional arrangements of government. At this institutional level, the development of the judicial practices of the highest courts is influenced by the relations between the highest national courts and other actors wielding public power. Variables which play a role in this respect concern the institutional status of the highest courts as either supreme courts or constitutional courts, as well as their relationship with the other branches of government, other national courts, international or supranational courts, the general public, and academics. Jurisdiction and the function of dialogue are essential elements at this level.

2.2.1. Jurisdiction

The status of a specific highest court is related to its jurisdiction. The two highest courts examined in this article illustrate what the institutional set-up of the highest national courts in liberal-democratic legal systems can look like.

The Supreme Court for the UK was established in 2009 to replace the Appellate Committee of the House of Lords. This reform, set in motion by the Constitutional Reform Act 2005,²⁶ can be seen as ‘the last step in the separation of powers’ in the British legal system.²⁷ The UK Supreme Court’s jurisdiction concerns the final appeal in civil cases in the UK and in criminal cases in England, Wales and Northern Ireland.²⁸ An appeal is possible in cases where leave to appeal has been granted by the lower court (in most cases this is the Court of Appeal of England and Wales), or where a case has been admitted by the Supreme Court itself. The criterion for case selection is the ‘general public importance’ of arguable points of law.²⁹ No constitutional review of legislative acts exists, but the HRA goes a long way in this direction.³⁰

The Dutch court system is based on the French model. The Supreme Court is a ‘court of cassation’, which means that the Court’s jurisdiction is restricted to the judgment of questions of law, and does not include the judgment of facts.³¹ The court has final jurisdiction in civil, criminal and tax law cases in the

21 <http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1> (last visited 5 March 2012). Much has been written about this reform and its impact on the UK legal system. See inter alia T. Hickman, *Public Law after the Human Rights Act*, 2010; A. Kavanagh, *Constitutional Review under the UK Human Rights Act*, 2009.

22 Section 4 of the HRA.

23 Bingham, *supra* note 13, p. 164.

24 The Department of Constitutional Affairs has examined the declarations of incompatibility given by the British courts and subsequent amendments of the law. See <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>> (last visited 5 March 2012).

25 Kavanagh, *supra* note 21, p. 294.

26 <http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1> (last visited 5 March 2012).

27 ‘UK Supreme Court judges sworn in’, BBC News, 1 October 2009, available at <http://news.bbc.co.uk/2/hi/uk_news/8283939.stm> (last visited 5 March 2012).

28 The judges of the Supreme Court also sit on the Judicial Committee of the Privy Council (JCPC), which is the final court for cases from Commonwealth jurisdictions; <<http://www.jcpc.gov.uk/about/role-of-the-jcpc.html>> (last visited 8 March 2012). Some of the former and current judges of the Supreme Court furthermore are Non-Permanent Judges of the Court of Final Appeal of Hong Kong; <<http://www.judiciary.gov.hk/en/organization/judges.htm>> (last visited 5 March 2012).

29 <<http://www.supremecourt.gov.uk/about/role-of-the-supreme-court.html>> (last visited 5 March 2012).

30 See *supra* Section 2.1.

31 Section 79 of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*).

Netherlands.³² Administrative law cases in the last instance are dealt with separately by special courts, among which the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrecht-spraak van de Raad van State*) deals with the most significant number of cases. The Supreme Court, like all courts in the Dutch legal system, does not have competence for a constitutional review of legislative acts.³³

2.2.2. Dialogue as a catalyst for change

The catalysts for change at the institutional level are two-fold. First of all, change can be the consequence of the interaction between actors through the formal ‘products’ of public decision-making, such as legislative acts and judicial decisions. Secondly, change can be induced by comments put forward in the wider societal debate on public decision-making, which includes political, public, and academic discourses. This process of ‘development through dialogue’ can be illustrated by looking at recent developments concerning the institutional position of the British and Dutch highest courts, and in particular the role that judges have played concerning the development of this role.

In Britain, a significant change was set in motion with the adoption of the HRA 1998. This Act induced a change in the judicial and political attitudes regarding the protection of human rights and the balance of powers in the British legal system.³⁴ The late Lord Bingham of Cornhill is considered a key figure in the coming about of these reforms.³⁵ He and other judges at the highest national level have taken part in public discussions regarding the role of the Supreme Court in this evolving legal and political context. In public speeches and in academic articles, judges have presented their views on current changes which affect the role and functioning of the national highest court.³⁶

On the other side of the Channel too, the high judiciary’s role in the domestic legal system is a topic of ongoing discussion.³⁷ Judges of the Supreme Court of the Netherlands are actively involved in discussions regarding their Court’s role in the present-day context. Recent debates have focused on the envisaged internal reform of the Supreme Court’s organisation,³⁸ and the visibility of the Court in Dutch society.³⁹

2.3. Organisational variables

At the organisational level, the development of judicial practices concerns court organisation and working methods. Variables at this level have an influence on the possibilities for comparative legal research, which is a prerequisite for the use of foreign law by the highest courts. These variables include the size of a specific court, the case load of the court, the process of researching foreign law by the court and by other actors in the court proceedings, the process of deliberations, and the style of judgments of the court. It transpired from the interviews with judges that change can take place through the exchange of ‘best practices’ between judges from different highest courts, for example regarding the availability of foreign case law. The British and Dutch highest courts can be seen as practical illustrations of the elaboration of this variable.

32 Section 78 of the Judiciary (Organisation) Act.

33 Section 120 of the Dutch Constitution.

34 See supra Section 2.1.

35 B. Hale, ‘A Supreme Judicial Leader’, in Andenas & Fairgrieve (eds.), supra note 4, pp. 209-220.

36 See inter alia Lord Bingham, ‘The Rule of Law’, 2007 *Cambridge Law Journal* 66, pp. 67-85; Lord Phillips, ‘The Rule of Law in a Global Context’, *The Qatar Law Forum*, 30 May 2009, available at <http://www.qatarlawforum.com/files/QLF_2009_Lord_Phillips_address.pdf> (last visited 8 March 2012); Lord Phillips, ‘The Supreme Court and Other Constitutional Changes in the UK’, Address to Members of the Royal Court, the Jersey Law Society, and Members of the States of Jersey, 2 May 2008.

37 See recently J. Vranken, ‘Taken van de Hoge Raad en zijn parket in 2025’, in A.M. Hol et al. (eds.), *De Hoge Raad in 2025*, 2011, pp. 33-50.

38 Hammerstein Committee, *Improving Cassation Procedure*, 2008.

39 G.J.M. Corstens, ‘Vertrouwen in de rechtspraak’, keynote speech for the yearly conference of the Netherlands Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*) ‘Magistraat 2.0 – de update’, The Hague, 9 October 2009; G.J.M. Corstens, ‘De derde macht’, speech for the Dutch Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*), 16 April 2009. Both speeches are available at <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Pages/default.asp>> (last visited 8 March 2012).

2.3.1. Court organisation

In 2009, the Appellate Committee of the House of Lords disposed of 104 petitions for leave to appeal and had a case load of 40 cases.⁴⁰ Its successor the Supreme Court disposed of 69 applications for permission to appeal and had a case load of 30 cases.⁴¹ The UK Supreme Court is a small organisation compared to the Dutch Supreme Court. At the time of the interviews, there were eleven Supreme Court judges. Most of these judges are former Law Lords, who took up office in the new Supreme Court in October 2009. The twelfth position in the Court was filled up by the appointment of Sir John Dyson as Justice of the Supreme Court. Cases are judged by a panel of five judges, and occasionally – at the discretion of the President – by a panel of seven or nine judges.⁴² The use of a larger panel is considered desirable by some of the interviewed judges in order to avoid inconsistencies between panels. However, this is difficult to realise because of the time constraints the Court has to deal with. The judges currently have support from seven judicial assistants, who work cooperatively.

The Dutch Supreme Court at the time of the interviews consisted of the President, six Vice-Presidents, 31 Supreme Court judges and 3 extraordinary judges. The judges are distributed over three Chambers: the Civil Law Chamber, the Criminal Law Chamber and the Tax Law Chamber. Cases are judged by a panel of three or five judges. There is a Procurator General's Office at the Supreme Court, which consists of the Procurator General, the Deputy Procurator General, and 21 Advocates General. The Procurator General's Office provides an 'opinion' (*conclusie*) to the Court in most cases, and thus acts as an advisor to the Court on how to decide the questions of law raised in the case at hand. The Advocates General work in one of the three fields of competence of the Supreme Court. The Court has a support staff, which is organised in the Court's Research Service (*Wetenschappelijk Bureau*). Judges in the Criminal and Tax Law Chambers have personal judicial assistants. In the Civil Law Chamber, two assistants are available for all judges together. In 2009, judgments were given in 527 cases by the Civil Law Chamber, in 3,464 cases by the Criminal Law Chamber and in 999 cases by the Tax Law Chamber.⁴³

On the basis of the particularities of their jurisdiction and organisation, some differences can be expected regarding the use of foreign legal sources in these two courts. These differences relate mostly to the number of judges and the case load that the Courts have to deal with. The judges in the UK Supreme Court are formally not specialised and will regularly sit on cases with each of their colleagues. The judges in the Dutch Supreme Court act within the context of a specific Chamber, and their exchange of ideas will thus be restricted to a specific field of law and a less varied group of colleagues. Because of this internal specialisation, judicial ideas about the use of foreign legal sources might differ between the specific Chambers. Concerning the case load, in contrast to the UK Supreme Court, the Dutch Supreme Court currently has no formal possibility of case selection,⁴⁴ thus limiting the time which judges are able to spend on individual cases and on the insights which foreign law might offer in these cases. The one exception to this rule concerns the possibility for the Advocates General in tax law cases (but not in criminal or civil law cases) to select the cases for which they will write an opinion addressed to the Court.⁴⁵ The Court does have the possibility to dismiss appeals with a shortened reasoning if it considers that there are no grounds for cassation and the case does not raise any legal questions which should be answered in the interest of legal uniformity or the development of the law.⁴⁶

40 *Judicial and Court Statistics 2009*, available at <<http://www.justice.gov.uk/downloads/statistics/mojstats/jcs-stats-2009-211010.pdf>> (last visited 8 March 2012).

41 *Judicial and Court Statistics 2009*, available at <<http://www.justice.gov.uk/downloads/statistics/mojstats/jcs-stats-2009-211010.pdf>> (last visited 8 March 2012).

42 For an overview, see the *Supreme Court Annual Report and Accounts 2009-2010*, available at <http://www.supremecourt.gov.uk/docs/ar_2009_10.pdf> (last visited 5 March 2012), pp. 24-25.

43 *Hoge Raad der Nederlanden: verslag over 2009-2010*, available at <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/jaarverslag%202009%202010.pdf>> (last visited 8 March 2012), pp. 53, 63 and 76..

44 The introduction of a general mechanism of case selection is part of the proposal of the Hammerstein Committee, *supra* note 38. A bill based on the recommendations of this committee has been submitted to Parliament; *Kamerstukken II 2010/11*, no. 32 576.

45 One of the interviewed Advocates General suggested that this exception relates to the absence of mandatory legal representation in tax law cases.

46 Section 81 of the Judiciary (Organisation) Act.

2.3.2. Working methods

The procedures of the UK Supreme Court can be found in the Court's Rules,⁴⁷ as well as in the Practice Directions issued by the President of the Court.⁴⁸ The Supreme Court judges hand down individual opinions for the judgment of each case. These individual opinions are often lengthy and can include the discussion of foreign legal materials and academic writings.

Interestingly, the move to the new Supreme Court was a reason for the British judges to rethink their way of working. During the interviews, several judges mentioned that the new Supreme Court building invites a more collegiate approach. The judges' offices are now closer together and it is easy for one judge to walk in and discuss a case with his colleague. Furthermore, the move of the Law Lords out of Parliament, where members speak for themselves and joint speeches hence would have been odd, has made it possible to modify the system of separate opinions. Since October 2009, the judges have been experimenting with a system in which one judge writes the lead opinion and the other judges on the panel may choose to concur with this judge, to write a separate opinion, or to write a dissenting opinion.⁴⁹ One judge explained that the selection of the reporting judge takes place on the basis of several factors, including whether this judge is part of the majority, has a special interest in the case, and is not too busy. By changing its working methods in this way, the Court aims to create more transparency. Indeed, it is felt that working with majority opinions leads to more consistency and gives clearer guidance to the lower courts on how to operate in the future. Transparency, also vis-à-vis the general public, is further enhanced because the new way of working is closer to the procedures of the ECtHR. Even so, all of the interviewed Supreme Court judges in the UK gave much importance to the possibility of writing an individual opinion. They feel that this possibility enables them to express thoughts of their own and to produce judgments which are readable to the audience. One judge indicated that the use of foreign legal materials need not be hampered by the increased use of majority opinions. An individual judge might still choose to write a separate opinion about foreign law if this judge is not satisfied with the majority opinion.

The practice of the Supreme Court of the Netherlands is in many ways the exact opposite of the British way of working. On the basis of the principle of the secrecy of deliberations, the Supreme Court works with collective judgments. Slight differences exist between the ways in which each of the Court's Chambers has organised the judicial deliberations.⁵⁰ A common feature is that case files are studied by all judges on the panel which was assigned to the case. When preparing the deliberations, the judges study in particular the opinion of the Advocate General and the additional materials put forward by him.⁵¹ Selected foreign legal materials can form part of this preparation. In 5-judge cases, the case is discussed during the deliberations of the competent full Chamber. Much weight is attached to the internal coordination in the court which is brought about by the participation of all judges of a Chamber in these deliberations. For each case, one judge is assigned to write a draft judgment. This draft is sent back and forth between the judges on the panel for the case until they agree on a final version.⁵²

Concerning the reasoning of its decisions, the Dutch Supreme Court used to have a culture of short, apodictic judgments like the French *Cour de cassation*, from which it inherited its working methods. However, over the years the practices of all three Chambers of the Supreme Court have evolved and judgments are now reasoned more extensively than in the past. An average judgment will consist of two or three pages, while the reasoning in more difficult cases can be much longer.⁵³ However, as a rule no citations of foreign law are included in the reasoning of judgments. In light of the relatively concise style of reasoning, it is felt by the judges that the opinion of the Advocate General adds to the transparency of

47 *Rules of The Supreme Court 2009*, available at <http://www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf> (last visited 7 March 2012).

48 See <<http://www.supremecourt.gov.uk/procedures/practice-directions.html>> (last visited 7 March 2012).

49 See for example *In Re Sigma Finance Corporation (in administrative receivership)* and *In Re The Insolvency Act 1986 (Conjoined Appeals)* [2009] UKSC 2.

50 A detailed description is given by the Hammerstein Committee, *supra* note 38, pp. 20 et seq.

51 Mitchel Lasser has shown how significant this kind of 'hidden' dialogue is for the judicial deliberations. See M. de S.O.l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, 2004.

52 Hammerstein Committee, *supra* note 38, pp. 20-21 and 27.

53 See for example HR 18 March 2005, *Nederalndse Jurisprudentie* 2006, 606, *Baby Kelly*.

the judgments. This opinion is published alongside the judgment and holds a more detailed consideration of the arguments, sometimes including comparative legal research.

2.4. Personal variables

At the personal level, finally, the development of judicial practices concerns the individual approaches of judges to judicial decision-making. The ideas of a judge concerning his role have an influence on the margin of discretion which this judge considers he has in hard cases, i.e.: judges may have different views regarding the degree of deference which they should show to the legislator and the executive power.⁵⁴ Similarly, judges may have different views regarding the role which foreign legal ideas and experiences can or should have in judicial decision-making. These approaches are related to the legal training and professional experiences of judges, the interaction with colleagues at the court, and the personal views on judicial discretion in constitutional and legal interpretation.⁵⁵ Changes in the individual approaches of judges take place through cognitive processes of personal reflection, informed by personal experience and participation in debate.

The variety in approaches to judicial decision-making can be illustrated on the basis of the question whether it is legitimate or interesting for judges to look at foreign law. A judge who is more aware of the global context and who considers it valuable to take account of foreign legal materials will probably use these materials more often and with a greater impact on his decision-making than a judge who is less aware of the global context or who does not consider it worthwhile to study foreign legal materials. In this light, it is instructive to look at views on the judicial role which judges have expressed in public. Aharon Barak, the former president of the Supreme Court of Israel, represents the mind-set of the ‘global judge’. He has said that:

‘When a national jurist – a judge, a professor of law, or an attorney – is confronted with the need to understand a legal phenomenon – for example, “what is law?”; “what is a right?”; “what is a legal person?”; “what is the relationship between morality and law?” – that jurist is certainly permitted, and it is even desirable, to examine the understanding of legal phenomena and legal concepts beyond his national framework. These are all universal aspects which cross national boundaries, and in order to understand them, it is worthwhile to turn to all thought which has been developed on the subject, be its geographical origin as it may. So did our forefathers through the years. And so did Holmes, Cardozo (judges), Roscoe Pound, Hohfeld, Fuller, Llewellyn (professors), and many others. They did not shut themselves inside of their national borders. The entire world was before them.’⁵⁶

On the other hand, some judges have vehemently condemned the judicial search for inspiration outside of the national legal framework. Most famous is the view of Justice Antonin Scalia of the Supreme Court of the United States. In his dissenting opinion in the case of *Roper v. Simmons*, which concerned the constitutionality of the juvenile death penalty, Scalia presented the following argument with regard to the use of foreign law in judicial decision-making:

‘Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage. (...) the basic premise of the Court’s argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand. (...) I do not believe that approval by “other nations and peoples” should buttress our commitment to American principles any more

54 Barak, *supra* note 5, p. 118.

55 On the non-legal elements which influence judicial decision-making see also Posner, *supra* note 5. The relevance of Posner’s analysis for the Dutch judiciary has formed the topic of a special issue of *Rechtstreeks*, a periodical issued by the Dutch Council for the Judiciary. See ‘Hoe rechters denken: wat Posner ons leert’, 2010 *Rechtstreeks* no. 4, featuring contributions by H. Kerkmeester & L. Visscher and A. Hol & E. Mak.

56 A. Barak, ‘Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia’, speech for the Fulbright Convention, 29 January 2006, <<http://www.fulbright.org.il>> (last visited 7 March 2012).

than (what should logically follow) disapproval by “other nations and peoples” should weaken that commitment. (...) What these foreign sources “affirm”, rather than repudiate, is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. “Acknowledgment” of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court’s judgment – which is surely what it parades as today.⁵⁷

Given this variety in judicial approaches, it is interesting to observe that the selection of judges in certain legal orders, for example the US, is highly politicised. Through the selection process of the highest courts’ judges, the mixture of judicial approaches in a specific court can thus be influenced from the outside.⁵⁸

The variables which influence the development of judicial practices have now been identified. It has been shown how these variables shape the decision-making of the Western highest courts, in particular in Britain and the Netherlands. As a second step of the analysis, it will be seen how the UK and Dutch Supreme Courts’ deliberations and reasoning have developed in light of the increased role of foreign law as a source for these courts’ decision-making.

3. The development of British and Dutch Supreme Court practices

When examining the practices of the British and Dutch highest courts, it becomes clear that changes induced by the internationalisation of the law and of judicial decision-making processes have affected the constitutional, institutional, organisational, and personal level of decision-making in these courts. It will now be examined to what extent developments at each of these levels have taken place with regard to the use of foreign law by these two highest courts.

3.1. Constitutional developments regarding the use of foreign law

The different developments in common law and civil law systems illustrate how constitutional culture plays a role with regard to the integration of the use of foreign law in the judicial function of the highest courts. Common law constitutions historically seem to be open to the judicial exchange of legal ideas when this is related to the further development of the common law. Cross-citations between common law courts in different jurisdictions are relatively frequent.⁵⁹ At the same time, a sharp line is drawn between national law and international law, which is usually integrated in common law systems through a dualist system.⁶⁰ Under the influence of globalisation, it currently appears that:

‘common law courts are abandoning their traditional dualist orientation and are beginning to utilize unincorporated human rights treaties in their work despite the absence of legislation giving domestic legal effect to the treaties.’⁶¹

Yet, significant differences can be identified between the comparative practices of the courts in common law systems, notwithstanding their similar historical outset. While the American debate is dominated by resistance to the influence of foreign sources in the domestic legal system,⁶² comparative references are

57 543 U.S. 2005, *Roper v. Simmons*, dissenting opinion of Justice Scalia, pp. 16-23.

58 Concerning the US see inter alia N. Dorsen, ‘The selection of U.S. Supreme Court justices’, 2006 *International Journal of Constitutional Law*, no. 4, pp. 652-663.

59 E. Mak, ‘Why Do Dutch and UK Judges Cite Foreign Law?’, 2011 *Cambridge Law Journal*, 70, no. 2, pp. 420-450.

60 A detailed analysis of the differences between the common law systems, focusing in particular on the UK and Australia, is presented by M. Kirby, ‘The Common Law and International Law: A Dynamic Contemporary Dialogue’, 2010 *Legal Studies* 30, no. 1, pp. 30-60.

61 M.A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’, 2007 *Columbia Law Review* 107, p. 633.

62 Markesinis & Fedtke, *supra* note 3.

used relatively frequently in the deliberations and judgments of judges in the UK Supreme Court⁶³ and in the Supreme Court of Canada.⁶⁴

In continental European legal systems, important differences exist between the approaches of the national courts regarding the use of international and foreign law in judicial decision-making. These differences can be related to differences between legal cultures, in particular concerning the authority granted to treaty law in the national legal system.⁶⁵ However, a certain degree of convergence can currently be identified with regard to the national judicial treatment of the ECHR and EU law.⁶⁶ The use of foreign law in judicial deliberations and sometimes in judgments often concerns references between jurisdictions with a shared legal heritage. This genealogical aspect explains the interest of Dutch Supreme Court judges in French and German law and case law.⁶⁷

3.2. Institutional developments regarding the use of foreign law

As an illustration of the development of British and Dutch judicial practices at the institutional level, mention can be made of the interaction between the highest national courts and the ECJ and ECtHR as well as between the highest national courts themselves. This example will make visible how institutional variables can enable or constrain the emergence of formal and informal 'judicial dialogue'.⁶⁸

Currently, both the Supreme Courts in the UK and in the Netherlands are actively reconsidering their position vis-à-vis these European courts in Luxembourg and Strasbourg. The development of European integration in the context of the EU, starting in the 1950s, redefined national courts as 'decentralised Community judges'.⁶⁹ The accession of the UK to the EU 'proved to be a catalyst for change and for bringing international law directly into the legal system of the UK'.⁷⁰ The British Law Lords have actively sought to create a 'dialogue' with the European Courts, both as regards the implementation of EC law in the national legal order and as regards the interpretation of the ECHR through the HRA.⁷¹ Some English judges have addressed specific issues regarding Europeanisation, such as the difficulties concerning the convergence of the English common law system and civil law systems in Europe,⁷² and the implementation of the case law of the ECtHR concerning terrorism and human rights.⁷³ Also, some judges have expressed their views concerning the use of comparative law in the English courts.⁷⁴

In the Netherlands, the national courts are considered to have taken a very open approach to the European jurisprudence, based on Sections 93 and 94 of the Dutch Constitution.⁷⁵ Still, the highest national courts are considered to be an 'anchor' for both the national and the international legal order.⁷⁶ Awareness of this role was emphasised in a speech by the President of the Dutch Supreme Court, Corstens, delivered at the opening of the ECtHR's judicial year in 2010. The Supreme Court President stressed the ECtHR's role as a leader in the protection of human rights in Europe, and specified that the

63 Mak, supra note 59.

64 B. Roy, 'An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation', 2004 *University of Toronto Faculty of Law Review* 62, pp. 99 et seq.

65 See supra, Section 2.1.

66 G. Martinico & O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*, 2010.

67 Mak, supra note 59.

68 Regarding this concept, see supra note 2.

69 F. Amtenbrink & H.H.B. Vedder, *Recht van de Europese Unie*, 2008; cf. M. Claes, *The National Courts' Mandate in the European Constitution*, 2005.

70 Kirby, supra note 60, p. 31.

71 F. Jacobs, 'European Law and the English Judge', in Andenas & Fairgrieve (eds.), supra note 4, pp. 419-437.

72 Lord Mance, 'The Common Law and Europe: Differences of Style or Substance and Do They Matter?', Holdsworth Club Presidential Address, Birmingham, 24 November 2006, available at <<http://www.law.bham.ac.uk/documents/Mance-Holdsworth-Address.pdf>> (last visited 7 March 2012).

73 Lord Phillips, 'Terrorism & Human Rights', University of Hertfordshire Law Lecture, 19 October 2006, available at <<http://www.judiciary.gov.uk>> (last visited 7 March 2012).

74 Lord Mance, 'Foreign and Comparative Law in the Courts', 2001 *Texas International Law Journal* 36, p. 415; Lord Rodger, 'Developing the Law Today: National and International Influences', 2002 *Journal of South African Law*, no. 1, p. 1. In the 1980s, Lord Goff was instrumental in bringing about a change of attitude among the judges of the then House of Lords concerning the use of comparative law; see B. Markesinis & J. Fedtke, *Engaging with Foreign Law*, 2009, p. 36.

75 De Wet, supra note 20.

76 Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *De toekomst van de nationale rechtsstaat* [The Future of the National Constitutional State], 2002, pp. 81-82.

ECtHR can only fulfil this role if Member States to the Convention give effect to the Court's judgments and if national judges conform to these judgments.⁷⁷

3.3. Organisational developments regarding the use of foreign law

The British and Dutch judges have to deal with legal materials coming from many different sources outside of the national legal system. Five types of foreign legal materials can be identified on the basis of the interviews with judges and the analysis of the case law. Binding sources which are used by judges are the ECHR, EU law, and other international legal materials such as treaties and decisions of international organisations. Non-binding legal materials which play a role in the deciding of cases are the judgments of foreign courts as well as non-binding regulatory instruments such as transnational private regulations and the Principles of European Contract Law. To illustrate the organisational developments in the British and Dutch highest courts under the effects of globalisation, the focus in this analysis will be on the increased reference to foreign case law.⁷⁸

3.3.1. Researching foreign law

The judges of the Supreme Court for the UK feel that counsel should bring forward all legal materials which are relevant for deciding the case, including foreign judgments and academic resources concerning foreign law. The judges sometimes do conduct additional research themselves or ask a judicial assistant to look for useful sources. Some judges put more time and effort into this kind of research than others. With regard to a comparison with non-common law jurisdictions, the judges in general conduct research by themselves, i.e. without the help of judicial assistants. Therefore, the selection of this kind of foreign sources seems to be very much dependent on the personal background of the judges, in particular concerning the languages they master and the data they have access to.

The judges in the Dutch Supreme Court obtain most of their information through the opinion of the Advocate General. Besides the information provided in this way, they depend almost entirely on the research carried out by their assistants and on their own research to find out about foreign legal materials which might help to decide a specific case. The interviewed judges indicated that the citation of foreign judgments or academic literature by counsel is very rare. As in the British Court, some judges are more inclined than others to carry out extra research into foreign legal materials.

3.3.2. The use of foreign law in deliberations and judgments

The use of foreign judgments in particular has confronted the highest court judges with fundamental questions of methodology. Several factors which instruct the judicial reference to foreign judgments can be identified on the basis of the interviews and the analysis of case law carried out for this article.

The *Practice Direction (Citation of Authorities)* for the UK Supreme Court provides that:

'Cases decided in other jurisdictions can, if properly used be a valuable source of law in this jurisdiction. At the same time, however, such authority should not be cited without proper consideration of whether it does indeed add to the existing body of law.'⁷⁹

For the British Supreme Court judges, the first criterion for the selection of foreign judgments concerns the legal family, in the sense of the shared background with other common law systems. Sources most often referred to come from Commonwealth legal systems and from the US legal system. Concerning the Commonwealth legal systems, in particular the case law of the highest courts of Australia, Canada and New Zealand is considered helpful. The accessibility of these sources, as regards language and availability, forms an extra reason for the judges to look at these foreign sources first. To a lesser extent, a foreign court's prestige can provide a reason for the judges to take this court's case law into account. In this

77 G.J.M. Corstens, speech at the occasion of the opening of the judicial year of the ECtHR, seminar 'The Convention is yours/La Convention vous appartient', 29 January 2010, available at <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Pages/default.aspx>> (last visited 8 March 2012).

78 For an analysis of the use of other types of foreign law, see Mak, *supra* note 59.

79 [2001] 1 W.L.R. 1001 (Sup. Ct.).

respect, the judges occasionally cite judgments coming from courts in France, Germany or Italy. Dutch judgments are sometimes referred to as well. This can be seen, for example, in the *Fairchild* judgment, in which the Law Lords cited the Dutch Supreme Court's case law regarding employers' liability for asbestos-related diseases.⁸⁰ Regarding human rights cases, the British judges mentioned the case law of the Inter-American Court of Human Rights as a source of inspiration. However, concerning these 'non-common law sources' the problems of language and availability are felt to be significant.

Some examples given by the British judges shed more light on the way in which they use foreign judgments. The *Reynolds* case, first, concerned liability for libel in the light of qualified privilege for political events. The question to be answered by the House of Lords was whether 'a libellous statement of fact made in the course of political discussion is free from liability if published in good faith' or whether 'liability may also arise if, having regard to the source of the information and all the circumstances, it was not in the public interest for the newspaper to have published the information as it did'.⁸¹ In this judgment, explicit mention was made of solutions adopted in other countries. In particular, attention was paid to the US, where the *Sullivan* case⁸² is the leading authority on the topic at hand. The overview of foreign case law in the judgment further included an analysis of Canadian, Indian, Australian, South African and New Zealand case law.⁸³ The consideration for looking at these foreign sources in this specific case seemed to be to show that no uniform or non-controversial case law exists in the area in question. Lord Nicholls stated that:

'Before turning to the issues raised by this appeal mention must be made, necessarily briefly, of the solutions adopted in certain other countries. As is to be expected, the solutions are not uniform. As also to be expected, the chosen solutions have not lacked critics in their own countries.'⁸⁴

Another example is the *Jewish Free School* case, which concerned the admission policy of a religious school.⁸⁵ The school's policy was to give preference to those whose status as Jews is recognised by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (the OCR), i.e. 'those children whose mothers satisfy the matrilineal test or who are Jews by conversion by Orthodox standards'.⁸⁶ The question to be answered by the Supreme Court was whether this policy constituted a violation of Section 1 of the Race Relations Act 1976. In deciding this case, the nine judges on the special panel of the UK Supreme Court paid attention inter alia to the case law of the Supreme Court of Israel.⁸⁷ Several members of the panel indicated that extra comparative legal research had been carried out at the request of the judges themselves.

Extra research was also demanded by the judges in a number of cases concerning the freezing of assets of suspected terrorists. In the Supreme Court's judgment of 27 January 2010, reference is made to the measures adopted in Australia and in New Zealand regarding the implementation of the applicable UN Resolutions.⁸⁸ The relevant ECJ judgment in *Kadi v. Council of the European Union*⁸⁹ is analysed in the light of Canadian and US case law. An interviewed judge indicated to have suggested looking at Canadian case law, as this might give guidance on how to judge the case. However, the cited foreign case law was considered not to be decisive for the case at hand.⁹⁰

80 *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2002] 3 WLR 89.

81 *Reynolds v. Times Newspapers Limited and Others* [1999] 4 All E.R. 609, opinion of Lord Nicholls of Birkenhead.

82 *New York Times Co. v. Sullivan* (1964) 376 U.S. 254.

83 *Reynolds v. Times Newspapers Limited and Others* [1999] 4 All E.R. 609, see respectively the opinions of Lord Steyn and Lord Nicholls.

84 *Reynolds v. Times Newspapers Limited and Others* [1999] 4 All E.R. 609, opinion of Lord Nicholls, section 'In other countries'.

85 *R (E) v. Governing Body of JFS* [2009] UKSC 15.

86 *R (E) v. Governing Body of JFS* [2009] UKSC 15, opinion of Lord Phillips, at [5].

87 *R (E) v. Governing Body of JFS* [2009] UKSC 15, opinion of Lord Hope, at [159], where reference is made to *No'ar K'halacha v. The Ministry of Education*, HCl 1067/08, 6 August 2009.

88 *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others (FC)* [2010] UKSC 2, opinion of Lord Hope, with whom Lord Walker and Lady Hale agreed, at [50]. See also the opinion of Lord Phillips, at [120]-[122], in which two New Zealand cases put forward by counsel for the defendant were analysed.

89 *Kadi v. Council of the European Union*, Joined Cases C-402/05P and C-415/05P [2009] AC 1225.

90 *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others (FC)* [2010] UKSC 2, opinion of Lord Hope, at [71].

In a more general sense, the British judges considered that citations of foreign law mostly occur in human rights cases and in private law cases. In human rights cases, the judges hope to find guidance in case law concerning the interpretation of the ECHR or concerning comparable instruments for human rights protection. In contract and tort cases, the shared background with other common law legal systems is thought to make legal comparison often useful. One of the judges indicated that in particular tort law is still relatively untouched by statute law and thus leaves room for comparison with other common law jurisdictions. Appreciation is voiced for Australian case law in particular, which is mentioned by several judges for its high quality. Australian case law was further mentioned as a source of inspiration for the judgment of asylum and refugee cases. When looking at the published judgments of the UK judges in recent years, cited Australian judgments can indeed be found in a number of cases. An inventory of the Law Reports of 2008 reveals that in 37 published cases of the Law Lords in which foreign law was cited, reference to Australian judgments was made in nine cases, yielding a total of 11 Australian judgments cited in the judicial opinions.⁹¹

The use of foreign law is less frequent in criminal law cases. However, several judges indicated a personal interest in French or German case law. One judge remembered having looked at French case law in a case concerning the balancing of the anonymity of parties and the interest of media coverage in the light of the right to a fair trial and the principle of open justice. Another judge, speaking about the same legal question, mentioned having searched German law and having made inquiries with personal contacts in Germany in order to find useful information, which then might give rise to a question to counsel to base arguments on this information. In the decision given on 27 January 2010, Lord Rodger, who delivered the unanimous judgment, remarked that:

‘Unfortunately, no real additional help with the question of anonymity orders can be obtained from examining the practices of courts in Europe when issuing judgments. In all the principal systems, at least, steps can apparently now be taken, where appropriate, to anonymise reports of matrimonial disputes and disputes relating to children. Apart from that, however, what is striking is the variety of approaches.’⁹²

This observation is followed by an overview of French, Italian and German case law.⁹³ The responses of the interviewed judges and the reasoning in the judgment suggest that the comparative analysis in this case was carried out with the aim of obtaining a clearer insight into the state of the domestic law. The observed variety of approaches can be considered a justifying argument for the decision taken, which stays very close to the facts of this specific case. Furthermore, the foreign case law gives an indication of factors to be taken into account when balancing the right of privacy against the rights of the press. In this way, knowledge of the practices in other legal systems seems to have helped the judges to mark out the relevant questions during the process of discovery.

For the Dutch Supreme Court judges, foreign judgments which are taken into account in the judicial deliberations mostly originate in France and Germany, and sometimes in the UK or the US. Several judges mentioned that they consult the German *Bundesgerichtshof*'s case law in cases regarding commercial law, e.g. the law on bills of exchange, and in intellectual property law cases. The Supreme Court considered, for example, the case law of the *Bundesgerichtshof* in deciding whether LEGO, after the expiry of its patent, could halt the copying of its toy building blocks through an action based on precise imitation (*'slaafse nabootsing'*).⁹⁴ Another example concerned the comparison of Dutch and German judgments in cases where the interpretation of the Convention on the Contract for the International Carriage of Goods

91 Most noteworthy among these judgments were *OBG Ltd v. Allan* [2007] UKHL 21, [2007] 2 WLR 920 concerning actions for economic loss in English law (four Australian judgments cited), and *Sempra Metals Ltd v. IRC* [2007] UKHL 34, [2008] 1 AC 561 concerning the calculation of interest in a case regarding restitution for unjust enrichment (five Australian judgments cited).

92 *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others (FC)* [2010] UKSC 1, [2010] 2 WLR 325, at [53].

93 *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others (FC)* [2010] UKSC 1, [2010] 2 WLR 325, at [54]-[57]. The judgment also contains a careful analysis of relevant ECtHR case law concerning Articles 8 and 10 of the ECHR; see *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others (FC)* [2010] UKSC 1, [2010] 2 WLR 325, at [22]-[52].

94 HR 20 November 2009, LJN BJ6999. Advocate General Verkade, at [4.6], discusses BGH 2 December 2004, I ZR 30/02, GRUR 2005/4, p. 349.

by Road (CMR), which forms part of transnational uniform commercial law, is required. An Advocate General specialising in civil law cases mentioned that specific legal systems, such as the US and Germany, are known for their expertise in specific topics and hence are frequently looked at for guidance. The prestige of these legal systems and their courts here seems to be the main factor for the legal comparison.

In criminal law cases, most of the interviewed judges consider that references to foreign judgments occur more often with regard to questions of substantive law than with regard to questions of procedural law. The aim of these references seems to be to better identify the current state of the domestic law. Examples which were mentioned concern the comparison with German law regarding the absoluteness of the right of non-disclosure;⁹⁵ the explanation of rights of appeal (*‘Rechtsmittelbelehrung’*); and the interpretation of the concept of self-defence (*‘noodweer’*).⁹⁶ In a case concerning the insulting of a group (*‘groepsbelediging’*), extra literature and case law was added to the judges’ file by the reporting judge, and on the suggestion of another judge a judgment of the British Law Lords was used in the deliberations in chambers. Concerning the right to a fair trial, US law is considered instructive in addition to the ECHR.

Concerning tax law, in some cases the case law of courts in other OECD Member States is analysed to find guidelines for the application of the OECD Model Tax Convention. Furthermore, the example was mentioned of a case in which the Court of Appeal for England and Wales was contacted because it seemed that pending preliminary questions by this Court to the ECJ might be of use for the decision of the Dutch case as well. In yet another case, the judgment of a Greek court was deemed relevant for a decision regarding unjustified VAT reclaims. However, here the problem of understanding the context and language of the decision emerged.

Since references to foreign case law and legal doctrines in principle do not occur in the published judgments of the Dutch Supreme Court and are relatively scarce in the opinions of the Advocates General, it is difficult to assess the impact of comparative law on the decisions taken. The Supreme Court’s Annual Report 2007-2008 does address ‘international dimensions’ in the Civil Law Chamber’s case law.⁹⁷ However, comparative legal research is merely mentioned as a tool which is used to identify the meaning of rules of uniform private law, and only two specific examples are given of cases in this category in which the Supreme Court’s decision was based on the use of international and foreign law.⁹⁸ Still, the information obtained from judges and Advocates General confirms that comparative law at least plays a role in the phase of discovery before the judgment is written.

3.4. Development of personal approaches regarding the use of foreign law

The researching of judicial practices in the highest British and Dutch courts reveals 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 and EU law, and the use of non-binding foreign legal materials, such as foreign case law, in the deciding of cases. The interviews conducted for this research reveal that British and Dutch judges are more open to the consultation of foreign law if they have knowledge of foreign languages or specific foreign legal systems. Moreover, judges with a prior career in academia seem to be more inclined to research foreign legal materials than judges who have made a career in legal practice. These personal variables are thus of significant importance in relation to practical aspects of the judicial use of foreign law.⁹⁹

Still, some general observations concerning the aims and methods of the use of foreign law by the British and Dutch judges can be made as well. As regards the aim of looking at foreign legal materials, the interviewed judges indicated that several motives play a role, on their own or in combination. First of all, the use of foreign law is considered useful when the case to be decided has particular public importance. Secondly, foreign legal materials can help judges to obtain better knowledge or a yardstick for the

95 See for example HR 12 October 2010, LJN BN0526, opinion of Advocate General Jörg, at [90], citing German, French, Swiss and US legal sources which define the scope of the right of non-disclosure.

96 See for example HR 4 January 2011, LJN BO4475, opinion of Advocate General Silvis, at [10], citing German doctrine and the case law of the *Bundesgerichtshof* as sources which confirm the case law of the Dutch Supreme Court.

97 Supreme Court of the Netherlands, *Annual Report 2007-2008*, pp. 50-59.

98 *Ibid.*, pp. 55-56.

99 Regarding these practical aspects, see Mak, *supra* note 59, pp. 446-447.

judgment in the case at hand. Thirdly, judges compare themselves with other courts and use the study of foreign legal materials as a means to meet the same quality standards as their 'peers' in other jurisdictions. Finally, researching foreign legal materials allows judges to spot trends regarding the development of the law in other legal systems and to determine their own position regarding these trends.¹⁰⁰

Concerning the methodology and legitimacy of having recourse to foreign law, considerations of principle concern the use of foreign law as the main argument or merely as an additional argument for judicial decisions. Whereas binding legal sources can provide the main argument for a decision, non-binding legal sources are generally considered helpful only to buttress the decision taken. Judges in the Supreme Court of the UK are guided in this respect by the *Practice Direction (Citation of Authorities)*.¹⁰¹

The interviews with judges made clear that the use of foreign law 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. 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.

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 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 they do sometimes mention additional arguments based on non-binding comparative legal sources.¹⁰²

4. Conclusion

This article has demonstrated how constitutional, institutional, organisational and personal variables have an influence on judicial decision-making in the highest national courts. This analytical framework was then used to analyse the development of decision-making in the Supreme Courts of Britain and the Netherlands. By focusing on the increased judicial use of foreign law an insight was obtained into the development of judicial practices under the effects of globalisation. On the basis of this comparative study of the British and Dutch Supreme Courts' practices, the conclusion can be drawn that the legal sources discussed in judicial deliberations as well as the working methods of these courts in general are becoming increasingly similar. Two main reasons for the increased judicial recourse to foreign legal sources can be identified. At the constitutional and institutional level, the increased interconnections between legal systems, for example in the framework of the EU and the ECHR, have made it legitimate and interesting for the highest court judges to take account of foreign legal ideas and practices. At the organisational and personal level of judicial decision-making, personal contacts between judges and the better availability of foreign legal materials have created a platform for the exchange of legal ideas and practices between the highest courts.

A question to be looked into in further research is how far this convergence of judicial decision-making practices can go. Taking into account the slow process of legal integration in Europe it seems that the transnational convergence of legal orders and judicial practices can only develop through a gradual process of harmonisation, which furthermore has its limits. Moreover, a strong posture of resistance to the use of foreign law in the judging of cases exists in some circles, most prominently in the US.¹⁰³ Further research regarding the aims, methods and legitimacy of the use of foreign law can help to clarify what the highest national courts can and may do, and thus guide the further development of these courts' judicial decision-making practices.

100 For a more elaborate analysis and examples, see Mak, *supra* note 59.

101 See *supra*, Section 3.2.

102 See in more detail Mak, *supra* note 59, pp. 442 et seq.

103 Jackson, *supra* note 12.