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Globalisation of the National Judiciary and the Dutch Constitution

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1. Introduction

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.¹ It has been suggested that courts, in particular the highest national courts and courts at the international level, have come to see their work more as a common judicial effort across national borders, and that a ‘global community of courts’ is emerging.² This development has been triggered by the trend of globalisation in the legal sphere, meaning the increased interconnections between legal systems in the world.³ Systemic changes, such as the development of the European legal order and the increase in international legal instruments, have brought an increasing number of cases with international or foreign elements to the national courts in Western countries. The courts, in particular the highest courts, have been obliged 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.

This article explores how this tendency of judicial internationalisation has affected the decision-making of the highest national courts in the legal system of the Netherlands, and which implications for the constitutional normative framework for judicial decision-making follow from this development. The article will not consider the role of binding international treaties in the decision-making of the Dutch courts, a topic which is addressed in other contributions to this special issue.⁴ Instead, we will analyse the role of non-binding foreign legal sources, such as foreign legislation and the case law of

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1 See inter alia S. Muller & S. Richards (eds.), *Highest Courts and Globalisation*, 2010; the contributions by Antoine Hol and others to the special issue on ‘Highest Courts and Transnational Interaction’, 2012 *Utrecht Law Review* 8, no. 2; and further references in the next footnotes.

2 A.-M. Slaughter, ‘A Global Community of Courts’, 2003 *Harvard International Law Journal*, pp. 191-219.

3 Mark Tushnet has defined globalisation in the legal sphere as the ‘convergence among national constitutional systems in their structures and in their protection of fundamental human rights’; M. Tushnet, ‘The Inevitable Globalisation of Constitutional Law’, in Muller & Richards, *supra* note 1, p. 130. Patrick Glenn has defined globalisation in the legal sphere in a more general sense as the ‘trend toward world domination of specific regimes’; H.P. Glenn, *Legal Traditions of the World*, 2007, p. 49.

4 See the articles by Besselink, and Efthymiou & De Wit in this special issue: L. Besselink, ‘The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All’, 2013 *Utrecht Law Review* 9, no. 2, pp. 19-35; N. Efthymiou & J. de Wit, ‘The Role of Dutch Courts in the Protection of Fundamental Rights’, 2013 *Utrecht Law Review* 9, no. 2, pp. 75-88.

national courts in foreign jurisdictions, in judicial decision-making.⁵ The occurrence of this practice raises fundamental questions with regard to the normative basis for judicial decision-making under liberal-democratic constitutions, as it is problematic in light of the positivist doctrine on legal sources. Liberal-democratic constitutions, with the exception of the South African Constitution of 1996,⁶ do not allow for the use of non-binding foreign law as a formal basis for a judgment in a domestic case. It thus becomes pertinent to know which specific use is made of foreign legal sources by the national judiciaries. Is foreign law consulted as a source of authoritative arguments or as a source of persuasive arguments for domestic decisions?⁷ Which implications does the use of foreign law, as an example of the increased internationalisation of judicial practices, have for the constitutional normative framework for judicial decision-making? In recent years, legal scholars, political scientists and social scientists have explored these questions. However, their studies have focused mostly on common law jurisdictions, in particular the United States,⁸ or on large jurisdictions, such as the UK, France and Germany.⁹ Few scholars have as yet addressed the specific case of the Dutch legal system.¹⁰ A more detailed study of the judicial practices in this legal system seems valuable in light of identified factors which influence cross-citations between national jurisdictions in Europe: legal tradition, language group, and the size of the jurisdiction.¹¹ Moreover, the particularities of the Dutch constitutional framework, in particular its openness towards international and European law, might have an influence on the approaches of judges to the use of foreign law. Because of this openness, Dutch judges are familiar with the interpretation and application of legal sources originating outside of the national legal system, and with the precedence which such sources can take over national laws.¹²

In light of these observations, this article will focus on the practices of the two most significant highest national courts in the Dutch legal system: the *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands, hereafter: *Hoge Raad*) and the *Afdeling bestuursrechtspraak van de Raad van State* (Administrative Jurisdiction Division of the Council of State; hereafter: *Afdeling bestuursrechtspraak*).¹³ The responsibility of these courts with regard to the interpretation and development of the law entails that the need to reconsider judicial approaches under the influence of globalisation is arguably most pressing at this level of judicial decision-making.¹⁴ The article combines a socio-legal analysis of the

5 The analysis does not include the reliance of judges on foreign academic authors. On this topic, see inter alia A. Braun, 'Burying the Living? The Citation of Legal Writings in English Courts', 2010 *American Journal of Comparative Law*, pp. 27-52. She argues that the convention, which has existed for a long time in legal systems in Europe, not to cite living academic authors can have different reasons. In the English courts, this convention related to 'a desire amongst the English legal profession to maintain control over the development of the common law and to assert its own power' (p. 51). In continental European legal systems, this convention was based on 'the aim (...) to prevent legal scholars from having an impact on the decision-making process and to confirm the legislature as the primary source of law' (ibid.). Reservations concerning the judicial use of non-binding foreign law might be similar to these motives. However, an important difference seems to be that the enacted laws and judgments of foreign liberal-democratic institutions have a stronger democratic legitimation than the writings of legal scholars. See further infra, Section 4.1.

6 Art. 39(1) of the Constitution of the Republic of South Africa provides that: 'When interpreting the Bill of Rights, a court, tribunal or forum (...) may consider foreign law'. This possibility, introduced in the country's first democratic Constitution, was thought to offer judges the opportunity to strengthen the authority of their decisions by citing judgments of prestigious courts in established liberal democracies. See U. Bentele, 'Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law', 2009 *Georgia Journal of International and Comparative Law*, pp. 219-266; A. Lollini, 'The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law', 2012 *Utrecht Law Review* 8, no. 2, pp. 55-87.

7 F. Schauer, 'Authority and Authorities', 2008 *Virginia Law Review*, pp. 1931-1961.

8 See inter alia V.C. Jackson, *Constitutional Engagement in a Transnational Era*, 2009; B. Flanagan & S. Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges', 2011 *International and Comparative Law Quarterly*, pp. 1-28.

9 See inter alia B. Marquesinis & J. Fedtke, *Judicial Recourse to Foreign Law*, 2006.

10 E. Mak, 'Why Do Dutch and UK Judges Cite Foreign Law?', 2011 *Cambridge Law Journal*, no. 2, pp. 420-450; M. Adams & E. Mak, 'Buitenlands recht in nationale rechtspleging: onder welke voorwaarden is dat feitelijk nuttig en mogelijk?', 2011 *Nederlands Juristenblad*, pp. 2912-2919; M. Adams, 'Globaliserende rechtspraak: democratisch omstreden?', 2012 *Ars Aequi*, pp. 531-540.

11 M. Gelter & M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts', 2012 *Utrecht Law Review* 8, no. 2, pp. 88-99.

12 See further Besselink's contribution to this special issue: L. Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All', 2013 *Utrecht Law Review* 9, no. 2, pp. 19-35.

13 Two specialised tribunals with final jurisdiction in administrative cases will not be included in the analysis in this article. The *Centrale Raad van Beroep* (Central Appeals Tribunal), based in Utrecht, rules on appeals in social security and civil service cases. The *College van Beroep voor het bedrijfsleven* (Trade and Industry Appeals Tribunal), based in The Hague, decides cases in the field of social-economic law and is the court of appeal for cases arising under specific laws, including the Competition Act and the Telecommunications Act. These two tribunals, because of their small size, occupy a relatively less prominent place in the Dutch judicial system when compared to the other highest courts.

14 Muller & Richards, supra note 1, p. 2.

judicial decision-making of the Dutch highest courts with a legal-theoretical analysis of the constitutional implications of the identified practices. In Section 2, the competences and organisation of the two highest courts are presented, and the research design is outlined. Section 3 examines to what extent the use of foreign law has been integrated into the practices of the *Hoge Raad* and the *Afdeling bestuursrechtspraak*. Section 4 sets out the normative implications of the judicial recourse to foreign law at the constitutional level. This analysis will concern the constitutional factors which influence the role of the highest courts, and the adaptations to the Constitution which might be required in order to fit the globalised context of judicial decision-making. Section 5 presents some concluding remarks.

2. Setting the scene: a qualitative study of the Dutch highest courts

We will first consider the general characteristics of the two courts which are central in this analysis, the *Hoge Raad* and the *Afdeling bestuursrechtspraak*. Next, the empirical research design used in this research will be explained.

2.1. The highest courts of the Netherlands

The Dutch court system has been inspired by the French model. It features a judicial branch charged with the judgment of civil and criminal cases, and an administrative branch charged with the judgment of administrative cases. This system was introduced in the Netherlands during the French occupation of 1795-1813.¹⁵ Significant reforms of the court system have taken place since, in particular concerning the integration of administrative adjudication into the general courts of first instance and the clearer organisational separation between the legislative and judicial functions in the Council of State (*Raad van State*).¹⁶ However, the highest courts still reflect the general characteristics of the original model.

The *Hoge Raad* is the court of final appeal in civil, criminal and tax law cases in the Netherlands. It is a court of cassation, meaning that its jurisdiction is limited to the judgment of questions of law, and does not include the judgment of facts.¹⁷ The *Hoge Raad* has a number of additional competences. These competences include advice to the Government concerning legislative bills or reform plans for the judiciary,¹⁸ the judgment of applications for cassation in the interests of the uniform application of the law (*cassatie in het belang der wet*),¹⁹ the judgment of applications by the Procurator General concerning the suspension or discharge of judges,²⁰ and the judgment of public-office offences committed by members of the States General, ministers and state secretaries.²¹ On 1 July 2012, a law has entered into force which allows the lower courts in the Netherlands to ask the *Hoge Raad* for a preliminary ruling on legal questions which have arisen in a large number of similar cases. This procedure is limited to civil cases.²²

The *Hoge Raad* at the time of the interviews consisted of the President, 6 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 *Hoge Raad*, 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 (rather like that of the Advocate General before the Court of Justice of the European Union (CJEU)), and thus acts as an advisor to the Court on how to decide on the questions of law raised in the case at hand. The Advocates General work in one of the three fields of competence of the *Hoge Raad*. 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.

15 K.J. Kraan, 'Het Koninkrijk der Nederlanden', in L. Prakke & C.A.J.M. Kortmann (eds.), *Het staatsrecht van de landen van de Europese Unie*, 2004, p. 559.

16 See *infra*.

17 Art. 79 of the Judiciary Organisation Act 1827 (*Wet op de rechterlijke organisatie*).

18 Art. 74 of the Judiciary Organisation Act 1827.

19 Art. 78(1) of the Judiciary Organisation Act 1827.

20 Art. 111 of the Judiciary Organisation Act 1827.

21 Art. 119 of the Dutch Constitution.

22 Supreme Court Preliminary Questions Act 2012 (*Wet prejudiciële vragen aan de Hoge Raad*), *Staatsblad* 2012, 65.

The highest administrative court in Netherlands, the *Afdeling bestuursrechtspraak*, is part of the historically developed institution of the Council of State, which combines the tasks of legislative consultation and the judgment of administrative cases.²³ The competence of the supreme administrative court mirrors that of the court of cassation. However, the *Afdeling bestuursrechtspraak* has the additional competence to judge some cases as a first instance court.²⁴ Criticism of the combination of political and judicial tasks in the Council of State has in recent years led to a reform of the internal organisation of the Raad van State, in particular consisting of a stricter division of legislative and judicial functions.²⁵

The *Raad van State* is formally headed by the Queen of the Netherlands, who holds the position of President. In practice, the Council is headed by the Vice-President. This position is currently held by Piet-Hein Donner, who succeeded Herman Tjeenk Willink in February 2012.²⁶ The *Raad van State* is further composed of a maximum of ten members, approximately 40 State Councillors, and a small number of Extraordinary Councillors.²⁷ Amongst the Extraordinary Councillors are one or two members of the *Hoge Raad*, whose role is to contribute to the consistency of the case law of the highest courts.²⁸ Member of the *Raad van State* Pieter van Dijk and Councillor Ben Vermeulen have been, since November 2010, deputy members of the Constitutional Court of Sint Maarten, one of the Dutch overseas territories.²⁹ To guarantee the independence of the judicial decision-making, no more than ten members and State Councillors may combine functions in the advisory and judicial divisions of the *Raad van State*.³⁰ Members and State Councillors who take part in the judicial division are appointed for life by Royal Decree.³¹ The selection of candidates is made by the *Raad van State* itself, and candidates are considered on the basis of their expertise and experience in the fields of legislation, government, or the judiciary. If a member or State Councillor is solely appointed to the judicial division, prior legal training is a requirement for appointment.³²

The *Afdeling bestuursrechtspraak* consists of three chambers, each dealing with cases concerning a specific field of administrative law. The Spatial Planning Chamber decides cases at first and final instance under specific legislative acts, including the Spatial Planning Act, the Nature Conservancy Act, and the Transport Infrastructure (Planning Procedures) Act. The Aliens Chamber hears appeals in the field of immigration and asylum law under the Aliens Act 2000. The General Chamber, finally, decides cases under a variety of legislative acts, including the Environmental Permitting (General Provisions) Act, the Government Information (Public Access) Act, as well as cases under general municipal bye-laws and cases concerning planning permission and the like.³³ Until 1 June 2011, environment cases were dealt with by a separate chamber in the division. This chamber was integrated in the General Chamber on the occasion of the entry into force of the Environmental Permitting (General Provisions) Act.³⁴ Each chamber of the judicial division is composed of a Chamber President, one or more Vice-Presidents and a number of members, which in 2010 ranged between 11 and 24.³⁵ These members can be part of more than one chamber. The *Afdeling bestuursrechtspraak* is assisted by lawyers and support staff, who work in the Administrative Jurisdiction Department. The entire support staff of the *Raad van State* comprises around 600 persons, including 250 lawyers.³⁶

23 Art. 73 of the Constitution. See further the Council of State Act 1962 (*Wet op de Raad van State*).

24 See Art. 8:105 of the General Administrative Law Act 1994 (*Algemene wet bestuursrecht*) and Art. 2 of the Annex on Administrative Jurisdiction Competence (*Bevoegdheidsregeling bestuursrechtspraak*).

25 Council of State Restructuring Act 2010 (*Wet herstructurering Raad van State*), *Staatsblad* 2010, 175.

26 'Donner benoemd tot vicepresident Raad van State' (The Hague, 16 December 2011), <<http://www.rijksoverheid.nl/nieuws>>, accessed January 2013.

27 <http://www.raadvanstate.nl/the_council_of_state>, accessed January 2013.

28 Concerning this practice, see S. Kingma, 'Raadsheer Snijders verbindingsofficier met de Raad van State' (Cassatieblog, 15 November 2011), <<http://cassatieblog.nl/category/hoge-raad-algemeen>>, accessed January 2013.

29 'Constitutional Court Officially Inaugurated' (Philipsburg, 16 November 2010), <<http://www.thedailyherald.com/islands/1-islands-news/10271-constitutional-court-officially-inaugurated.html>>, accessed January 2013.

30 Art. 2(3) of the Council of State Act 1962.

31 Arts. 2(1) and 8(3) of the Council of State Act 1962.

32 Art. 2(4) of the Council of State Act 1962.

33 <http://www.raadvanstate.nl/the_council_of_state>, accessed January 2013.

34 Raad van State, Jaarverslag 2010, <<http://www.raadvanstate.nl/publicaties/jaarverslagen>>, accessed January 2013, p. 207.

35 *Ibid.*, pp. 223-227.

36 <http://www.raadvanstate.nl/the_council_of_state>, accessed January 2013.

2.2. The research design

The research presented in this article was conducted as part of a three-year research project concerning the changing role of the highest courts in Western legal systems under the influence of globalisation. This research project encompassed the highest courts of the Netherlands, France, the UK, Canada, and the United States.³⁷ The aim of the research was not to point out quantitative occurrences of the use of foreign law, but to describe and analyse the development of the practices of the highest courts in the globalised legal context. Since judicial deliberations are not public and not all considerations made by individual judges are revealed in the judgments of the 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 the examined courts. Sufficiently reliable information was obtained through the linking of information from the interviews with case law and other sources which provide information concerning judicial approaches, such as public lectures.

In the Netherlands, interviews were held with thirteen judges of the Hoge Raad, as well as with five Advocates General. These interviews took place in September and October 2009. The selection of judges and Advocates General was made based on the advice of a judge at the Court. The interview requests were sent to the President of the Court and to the Procurator General, who forwarded this request to the selected judges and Advocates General. With the exception of one Advocate General, who could not participate because of time constraints, all of the contacted judges and Advocates General agreed to take part in the research. Additional information was obtained through meetings with two judicial assistants at the Court. These meetings were arranged with the help of a judge at the Court. The results of the interviews were used in a comparative analysis with the UK Supreme Court, at which interviews were held in November 2009.³⁸ Furthermore, interviews with two members of the *Afdeling bestuursrechtspraak* and with a liaison officer took place in March 2011. The progress which had been made with the research at the other highest courts in the research project at that time justified the focus on a small number of the highest administrative judges. The judges at the *Afdeling bestuursrechtspraak* were selected on the basis of their expertise in the field of international law, EU law and comparative law. The interviews were arranged with the help of a contact at the Council of State.

In order to obtain as much useful information as possible, while at the same time allowing the comparison of results, a semi-structured interview technique was chosen.³⁹ A list of themes was formulated in advance. Questions based on these themes were brought up during the interviews, while flexibility in the formulation and the sequence of these questions was allowed. A central concern in the interview design was to create an atmosphere in which the judges would feel free to express their personal views. For this reason, the judges were informed that any information used in publications would be non-attributed. Furthermore, no interviews were tape-recorded. Each interview lasted between 45 minutes and one hour. Notes made during the interviews were typed out as soon as possible after the interview. Mostly, this was done on the same day or on the day after an interview had taken place. The notes of each interview were organised by connecting them with the selected themes of the research.

The questions which were discussed with the judges focused on several main lines of inquiry. These concerned, first of all, the personal experiences of the judges with international and foreign elements in their decision-making. Secondly, questions were asked concerning the judges' participation in the international relations of their court, for example through judicial networks and exchanges between courts. Further questions concerned the types of foreign legal materials used in the judges' decision-making, and the practical aspects of the search for and the use of these materials in judicial deliberations and reasoning. The aim of this line of inquiry was inter alia to find out to what extent judicial assistants, litigants and legal counsel and academics have an influence on the judges' use of foreign legal materials. To get a better idea of the influence of the judges' personalities on their decision-making, some questions

37 The results of this research will be published in E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (forthcoming 2013).

38 Mak, *supra* note 10.

39 Concerning this research methodology, see J.A. Maxwell, *Qualitative Research Design: An Interactive Approach*, 2012. See also I. Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences*, 2006; J.W. Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches*, 2012.

were asked concerning the judges' personal background. These questions concerned the judges' legal training and their professional experiences before being appointed to the highest court. Finally, questions were put to the judges regarding the perception of their role in the balance of powers at the national level and in the global legal context.

The analysis of case law, the academic publications of judges and public speeches delivered by judges was used to validate and complement the results of the interviews. This analysis started out from judgments and publications mentioned during the interviews. An additional analysis of case law was made through the search for citations of foreign law in the published judgments of the highest courts. The purpose of this analysis was not to establish the frequency of references to foreign law, but to confirm the judges' account of the different ways in which foreign law is used in judicial decision-making and of the foreign jurisdictions which are consulted. The aim of the analysis of public speeches and academic publications by judges was to find out whether the views expressed by individual judges in the interviews corresponded with public statements that they had made regarding the discussed topics. Moreover, this part of the research made it possible to assess the views of judges who did not participate in the interviews. The sources which were used for this research were the case reports in *Nederlandse Jurisprudentie* and the published judgments on the websites of the judiciary⁴⁰ and the Council of State.⁴¹ Public speeches by judges were retrieved through a search of the official websites of the highest courts, national governments, judicial networks, universities and other institutions and a general search on the Internet. Finally, the academic publications of judges were collected using the standard methods of literature research in legal scholarship.

The study of these additional sources has proved to be very valuable for the completion of the picture which was established on the basis of the interviews. Points of view and examples mentioned by the judges in the interviews could be placed in context by the study of their public statements and the analysis of relevant judgments of the highest courts. The published judgments of the courts, in turn, can be understood better through the explanation offered by judges concerning the use of foreign law. The judges' observations and the information from the analysed public sources corroborate each other and together clarify the development of judicial internationalisation in the highest courts and its implications for judicial decision-making at this level.

3. Constitutional dynamics: the judiciary and globalisation

In the interviews, the judges of the *Hoge Raad* and the *Afdeling bestuursrechtspraak* outlined their experiences with the use of foreign legal sources and they shared their views concerning the usefulness of references to these sources in judicial decision-making.

3.1. Judicial considerations: the usefulness of foreign law in judicial decision-making

Which motives do the highest court judges in the Netherlands have for using non-binding foreign law in their deliberations and judgments? The views of the judges regarding what constitutes sound and efficient judicial decision-making are of importance here. Concerning the aim of using foreign legal materials in judicial deliberations, interviewed judges in Western highest courts have indicated that several motives play a role, on their own or in combination.⁴² The use of foreign legal sources is considered useful, firstly, when the case to be decided holds particular public importance. Secondly, foreign legal materials are considered helpful when judges want to obtain better knowledge or a yardstick for the judgment of the case at hand. Thirdly, judges measure themselves with other courts and want to meet the same quality standards as their 'peers' in other jurisdictions. Finally, the research of foreign legal materials allows judges to spot trends regarding the evolution of the law in other legal systems and to determine their own position regarding these trends.

40 <www.rechtspraak.nl>, accessed January 2013.

41 <www.raadvanstate.nl>, accessed January 2013.

42 See Mak, *supra* note 10.

Particularities of the views in the Dutch highest courts relate to the legal tradition and developed style of reasoning in the two examined courts. References to foreign case law and legal doctrines in principle do not occur in the published judgments of the Dutch *Hoge Raad* and are relatively scarce in the opinions of the Advocates General. Most of the interviewed judges expressed the fear that the discussion of foreign judgments in their decisions would give rise to criticism concerning the legal systems to which reference is made: why look at one system, but not at another? References to foreign judgments would thus risk weakening the authority of the judgments of the *Hoge Raad*. Indeed, the discussion of foreign judgments would not fit the Dutch tradition of judgments, which might no longer be apodictic but are still reasoned more ‘economically’ than is the style in the common law tradition.⁴³ Moreover, citations of case law are already rare in the case law of the highest courts, as no formal system of precedent exists in the Netherlands.⁴⁴ In this context, the judges consider that the citation of foreign judgments in the decisions of the *Hoge Raad* would be a bridge too far. They feel that the opinions of the Advocates General, which are published alongside the Court’s judgments and which sometimes contain a discussion of arguments from foreign law, are sufficient to give more insight into the background of the Court’s reasoning. These opinions clarify to some extent whether, and if so which, foreign sources have played a role in the decision-making of the Supreme Court.

Judges in the *Hoge Raad* further mentioned that sometimes a specific approach to the use of foreign legal sources is dictated by the subject-matter of the case at hand. In extradition cases, for example, the starting-point is mutual trust between states. The Court, because of this mutual trust, will try to grant requests for extradition to the largest possible extent. This involves the comparison of the national law and the law of the foreign legal system which sent the request for extradition. The study of the law of a foreign legal system here is an essential element to the judgment of the case at hand and the consistency of the interpretation of legal provisions is an important aim of the judicial decision-making.

At the Raad van State, the influence of comparative law is considered to be more significant in the Council’s function as an advisory body on legislation than in its function as the highest general administrative court in the Netherlands. An interviewed judge observed that in judging one has to limit one’s focus to what matters for the case at hand. In that specific context, comparative law generally only has limited usefulness. Why would one choose to be guided by the German *Bundesverfassungsgericht*, which functions under a different system regarding the implementation of international law? Or by French law which is much less direct than the equivalent Dutch law? The judge indicated that, if a choice has to be made, the judges in the Raad van State prefer to engage in a vertical comparison, for example with the CJEU or the European Court of Human Rights (ECtHR), rather than in a horizontal comparison with courts in other national jurisdictions. The European courts are considered to be the ‘cassation judges’ for EU law and the European Convention on Human Rights (ECHR), which makes it interesting and legitimate for the Raad van State to pay attention to the case law of these courts. Concerning the horizontal comparison with other national courts, the particularities of national legal systems and procedural laws are thought to form an obstacle for a fruitful study of the judgments of these foreign courts. The judge made an exception for the *Grondwettelijk Hof van België* (Constitutional Court of Belgium), previously the *Arbitragehof* (Court of Arbitration).⁴⁵ This Court is considered to function in a similar system of the implementation of international law as the Raad van State. This provides a basis for legal comparison, for example concerning the concept of the ‘reading together’ of fundamental rights provisions. In the case *Jezus redt*, for example, Articles 6 and 7 of the Dutch Constitution, concerning the freedom of religion and the freedom of expression, were read together with Articles 9 and 10 of the ECHR, concerning the same fundamental freedoms.⁴⁶

This judge further considered that comparative law is interesting for judges only in an abstract sense. The judge felt that comparative law should only be used at the level of concepts and that it should only serve as an inspiration. Concerning the deciding of individual cases, from a practical point of view time

43 See Mak, *supra* note 10, concerning the comparison of Dutch and UK judgments.

44 See Gelter & Siems, *supra* note 11. See further *infra*, Section 4.2.

45 <<http://www.const-court.be>>, accessed January 2013.

46 ABRvS, 14 July 2010, LJN BN1135. See further *infra*, Section 3.2.

constraints limit the possible engagement of judges with foreign law.⁴⁷ From a principled point of view, this judge's reservations concerned the usefulness of comparative law in light of the argument that foreign legal systems are very different from the domestic legal system of the Netherlands, and that these foreign legal systems do not provide specific solutions. The judge considered that the point of departure for the use of comparative law should be the usefulness for pending cases, combined with the requirement of the celerity of proceedings.

3.2. *Judicial practices: the use of foreign law in judicial decision-making*

Because of the absence of citations of foreign law in published judgments, it is difficult to assess the impact of comparative law on the decisions taken by the Dutch highest courts. However, information from the interviews and other published sources make it possible to sketch the use of foreign sources in more detail.

The *Hoge Raad's* Annual Report 2007-2008 addresses 'international dimensions' in the Civil Law Chamber's case law.⁴⁸ However, comparative legal research is merely mentioned as a tool 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.⁴⁹ This is slightly different in the Annual Report 2009-2010, which is entirely dedicated to the internationalisation of the *Hoge Raad's* decision-making. The chapter of the report concerning the Civil Law Chamber contains a detailed explanation of the Court's use of the comparative method of interpretation, which has become the standard in cases in which no supranational court exists to which a request for a preliminary ruling can be sent.⁵⁰ The information obtained from judges and Advocates General confirms that, in this type of cases, comparative law at least plays a role in the phase of discovery before the judgment is written.

For the judges of the *Hoge Raad*, 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 case law of the German *Bundesgerichtshof* in cases regarding commercial law, for example the law on bills of exchange, and in intellectual property cases. The *Hoge Raad* 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*').⁵¹ Advocate General Verkade, in his opinion for this case, discussed a relevant judgment of the German Federal Court of Justice (*Bundesgerichtshof*).⁵² Although the *Hoge Raad* reached a different decision than the German Court and did not mention the German case in the reasoning of its own judgment, interviewed judges indicated that they appreciate the opportunity to learn from foreign case law. A similar concern played a role in the *Baby Kelly* case regarding a 'wrongful life' claim. In this case, a claim for damages was made in the name of a severely handicapped child, born as a result of an incorrect diagnosis during the mother's pregnancy. In his opinion for this case, Advocate General Hartkamp included an extensive discussion of inter alia French and German case law.⁵³ Again, the *Hoge Raad* judged differently on the legal question than its foreign counterparts. Yet, the judges felt that the information about the foreign case law was helpful to obtain knowledge and find an adequate yardstick for deciding the case.

47 See *infra*, Section 3.2.

48 Hoge Raad, Verslag 2007 en 2008, <<http://www.rechtspraak.nl>>, accessed January 2013, pp. 50-59.

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

50 Hoge Raad, *Verslag over 2009-2010*, <<http://www.rechtspraak.nl>>, accessed January 2013, pp. 17-21.

51 HR 20 November 2009, LJN BJ6999.

52 *Bundesgerichtshof* 2 December 2004, I ZR 30/02, GRUR 2005/4, p. 349. Advocate General Verkade, at [4.6], cited the German Court's reasoning in which it took account of a policy argument in favour of limited legislative protection for technical innovations in order to reject the legal protection of patent holders after the expiration of their patent. The German judgment was used by the Advocate General to complement Dutch academic criticism (voiced inter alia by Verkade himself) regarding previous case law of the Dutch Supreme Court, which had enabled the (extended) monopoly of patent holders concerning a specific design. It seems that the Supreme Court did not get to a (re)consideration of the cited policy argument. The Supreme Court, at [3.5.3], considered that the Court of Appeal's judgment, which held that the building blocks produced by LEGO's competitor differed in appearance from LEGO's blocks in such a way that no danger of needless confusion existed, was not incomprehensible.

53 HR 18 March 2005, NJ 2006, 606 (*Baby Kelly*). On the transnational judicial dialogue in wrongful life cases, see further I. Giesen, 'The Use and Influence of Comparative Law in "Wrongful Life" Cases', 2012 *Utrecht Law Review* 8, no. 2, pp. 35-54.

In criminal cases, most of the interviewed judges considered that references to foreign judgments occur more often with regard to questions of substantive law than with regard to questions of procedural law. These references seem to have for an aim 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;⁵⁴ the explanation on rights of appeal (*‘Rechtsmittelbelehrung’*); and the interpretation of the concept of self-defence (*‘noodweer’*).⁵⁵ In a case concerning the insulting of a group (*‘groepsbelediging’*), extra literature and case law were added to the judges’ file by the reporting judge, and at 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 (MTC).⁵⁶ 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 of this Court to the CJEU might be of use for the decision in 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 came up.⁵⁷

Finally, judges in the *Hoge Raad* indicated that they sometimes take account of prestigious ‘soft law’ instruments when judging cases. A judge in tax cases mentioned that regulations of the International Accounting Standards Board⁵⁸ have been used by the *Hoge Raad* as a guideline for its decision-making. Likewise, the OECD Commentary to the MTC is considered an aid to the interpretation of this treaty. In the Civil Law Chamber, the Principles of European Contract Law (PECL) are sometimes used as a source of reference.⁵⁹ A search of the published judgments of the *Hoge Raad* yielded 23 judgments of the Civil Law Chamber, delivered between 2002 and 2012, in which reference was made to the PECL or commentaries of these Principles. All references are to be found in the opinions of the Advocates General.⁶⁰ The interviewed judges and Advocates General asserted that the PECL are used for guidance only. An Advocate General mentioned the example of assessing the termination of a breach of contract, taking account of the fundamental interests of the parties. The analysed case law of the *Hoge Raad* corroborates this view. In a case concerning the interpretation of the termination clause included in a contract of employment, Advocate General Huydecoper observed that two kinds of interpretation identified in the Dutch academic literature in some foreign legal doctrines are considered to be identical.⁶¹ In a footnote to this observation, he remarked that:

‘Notwithstanding many differences, the sources of law for our neighbouring countries indicate a remarkable unanimity as regards the idea a) that contracts are to be interpreted in the first place on the basis of the intentions of the parties, which unless proved otherwise have to be interpreted in light of the standard of the “reasonable man”; and b) that an addition to what was agreed upon in the absence of proved or reasonably assumed intentions of the parties has to take place with reference to what reasonably judging parties in the given case would have assumed.’⁶²

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

55 See for example HR 4 January 2011, LJN BO4475 (opinion of Advocate General Silvis), [10], citing German doctrine and the case law of the Bundesgerichtshof as sources which confirm the case law of the Hoge Raad.

56 See <<http://www.oecd.org>>, accessed January 2013.

57 Concerning these practical obstacles to the use of comparative law, see further infra, Section 4.3.

58 See <<http://www.ifrs.org>>. accessed January 2013.

59 Commission on European Contract Law, *Principles of European Contract Law: Parts I & II*, 1999, and Commission on European Contract Law, *Principles of European Contract Law: Part III*, 2003.

60 <<http://www.rechtspraak.nl>> (search term ‘Principles of European Contract Law’), accessed January 2013.

61 HR 13 November 2009, LJN BJ8724 (opinion of Advocate General Huydecoper), [20].

62 HR 13 November 2009, LJN BJ8724 (opinion of Advocate General Huydecoper), [note 18] (my translation).

The influence of these observations on the deliberations and the decision of the *Hoge Raad* is not evident from the judgment, since the judgment was given with a shortened reasoning.⁶³

A research of the case law of the *Afdeling bestuursrechtspraak* yielded only a few citations of judgments of national courts in other jurisdictions. An interviewed judge recalled the judgment of the Council in the case of the Mothers of Srebrenica Citizens' Association, which had requested the disclosure of documents concerning the UN Protection Force in the former Yugoslavia.⁶⁴ In this case, assistance for the interpretation of the UN Convention on Privileges and Immunities was found in Belgian case law. The *Raad van State* considered:

'According to [appellants], the judgment delivered by the Tribunal de Première Instance de Bruxelles on 11 May 1966 in *Manderlier v The United Nations* (Journal des Tribunaux 1966, p 721ff; 'Manderlier') confirms that the privileges and immunities of the UN may not be accepted unreservedly but must be subject to review.'⁶⁵

The *Afdeling bestuursrechtspraak* cited its own earlier case law, in which it had held that the UN Convention prohibited the Minister of Defence from granting the application for the disclosure of requested UN documents.⁶⁶ After discussing the UN's view concerning the confidentiality of the documents requested in the case at hand, the *Raad van State* discussed the argument advanced by the appellants on the basis of the *Manderlier* judgment. The Council considered:

'The *Manderlier* judgment at first instance gives no reason to conclude otherwise. In its judgment the court of first instance in Brussels dismissed the plaintiff's civil claim against the UN because the UN invoked its immunity from every form of legal process pursuant to article II, section 2 of the UN Convention on Privileges and Immunities. In its judgment of 15 September 1969 (*Revue critique de jurisprudence belge* 1971, p 449 ff) the Cour d'Appel de Bruxelles upheld the court of first instance's judgment. In its judgment, the appeal court held that by acceding to the UN Convention on Privileges and Immunities, the parties to the UN Charter have established the necessary privileges and immunities and that the courts would be exceeding their authority were they to assume the right to evaluate the necessity of the immunities vested in the UN by that convention (...).'⁶⁷

The *Raad van State* held that the argument of the appellants was untenable and that the appeal therefore was unfounded. It upheld the contested judgment of the District Court of Amsterdam.⁶⁸ It seems that the Belgian judgments in this case were discussed primarily to give a reply to the arguments put forward by counsel for the appellants. An interviewed judge pointed out that in principle the *Raad van State* does not refer to the case law of foreign courts for the interpretation of international treaties, if sufficient information is available through international courts, in particular the European Courts. This approach is taken with regard to all foreign courts, including constitutional courts. Therefore, the described case should indeed be considered to be an exception.

Concerning the research of foreign legal sources, the interviewed judges in the *Hoge Raad* confirmed that they get most of their information through the opinion of the Advocate General. The judges of the

63 This shortened reasoning is allowed by Art. 81 of the Judiciary Organisation Act in cases in which the judges consider that there are no grounds for cassation and no legal questions have been raised which should be answered in the interest of legal uniformity or the development of the law.

64 ABRvS 3 March 2010, LJN BL6245. The judgment also contains a discussion of EU law and CJEU judgments mentioned in the arguments of the appellants. A civil claim by the *Mothers of Srebrenica Citizens' Association and Others v. the State of the Netherlands and the United Nations* was judged by the District Court of The Hague on 10 July 2008 (LJN BD6796) and on appeal by the Court of Appeal of The Hague on 30 March 2010 (LJN BL8979). On 13 April 2012, the Civil Chamber of the *Hoge Raad* dismissed the appeal in cassation which had been lodged against the latter judgment (LJN BW1999). A translation of the judgment in English is available through the *Hoge Raad's* webpages at <<http://www.rechtspraak.nl>>, accessed January 2013.

65 *Ibid.*, [2].

66 ABRvS 25 March 2009, LJN BH7691.

67 ABRvS 3 March 2010, LJN BL6245, [2].

68 *Ibid.*

Hoge Raad and at the *Afdeling bestuursrechtspraak* indicated that the citation of foreign judgments by counsel is very rare. By contrast, binding legal sources originating at the international level, in particular EU law and the ECHR, are frequently used in the arguments of counsel. Besides the information provided in this way, the judges depend almost entirely on the research done by their assistants and on their own research to find out about foreign legal materials which might help to decide a specific case. Some judges seem to be more inclined than others to carry out extra research of foreign legal materials. An interviewed judge of the *Afdeling bestuursrechtspraak* pointed out that the time which can be spent on research for individual cases is limited. The *Afdeling bestuursrechtspraak* works with delays for judgment which are strictly upheld. The normal delay is one year, and for spatial-planning cases a judgment has to be given within six months.

3.3. Conclusion

In the globalised legal context, the Dutch highest courts pay attention to the laws and case law developed in foreign national jurisdictions. However, the citation of foreign sources in the published judgments of the highest courts, or in the opinions of the Advocates General at the *Hoge Raad*, does not constitute a frequent practice.⁶⁹ In order to better understand the developed practices, we will now focus our attention on the constitutional normative framework for the judicial decision-making of the highest courts. This second part of the analysis will clarify whether the changed judicial practices fit within the existing constitutional framework or whether an adaptation of this framework should be considered in light of the effects of globalisation.

4. Constitutional implications: a new framework for judicial decision-making?

Which consequences does the described trend of judicial internationalisation have for the constitutional normative framework concerning the judicial decision-making of the highest courts in the Netherlands? We will consider relevant aspects which emerge from the empirical research and which should be taken into account in efforts to adapt the Dutch Constitution to the current globalised legal context. Three aspects seem to be concerned. Firstly, the constitutional normative framework should acknowledge the shifting emphasis in judicial approaches from the formal status of legal sources, based on their democratic legitimation, to the substantive value of these sources for the deciding of cases. Secondly, the framework should take into account the influence of legal tradition and the nature of cases on the use of foreign law in judicial decision-making. Finally, the effectiveness and efficiency of judicial decision-making should be considered.

4.1. The democratic justification of judicial decisions

How does the use of foreign law relate to specific theories of judging and how do these theories affect the attitudes of judges concerning the role of their highest national court in the globalised legal context? The question of the authority of sources for judicial decision-making is more complicated than the positivist distinction between sources which *have* and sources which *have not* been approved as binding sources of domestic law by the competent national authorities. Analyses of judicial approaches in case law, for example concerning the use of foreign law by the US Supreme Court, demonstrate that the authority of legal sources is connected to the development of the use of these sources. In an informal and incremental process, a source will often become less or more binding in proportion to the frequency with which use is made of this source in the judgment of cases.⁷⁰

The underlying issue, in this respect, is whether the recourse to foreign legal sources is considered desirable or not. Arguments in favour of and against the use of foreign law have been formulated by judges, academics and political actors on the basis of diverse normative points of view. It has been argued that disagreement on this topic can be traced back to attitudes concerning the role of judges,

69 This corroborates the quantitative analysis of Gelter & Siems, *supra* note 11.

70 Adams, *supra* note 10, p. 534. See also Schauer, *supra* note 7.

such as pragmatist and legalist views or liberal and conservative views.⁷¹ In the context of the globalised legal context, judicial attitudes concerning the appropriate practices of highest national courts can be considered to translate into globalist and localist views.⁷² Vicki Jackson has made a further classification by relating the approaches of courts in different jurisdictions concerning the internationalisation of judicial decision-making to three different postures: the resistance to global influences, the aspiration of the cross-border convergence of legal rules, and the engagement with foreign legal sources as ‘interlocutors’ in judicial decision-making.⁷³ We will assume that localist judges take a posture of resistance to the use of foreign law and that globalist judges will represent postures of convergence or engagement.

The empirical research presented above reveals that none of the interviewed judges in the Dutch highest courts are absolutely against the study of foreign law. Indeed, the arguments of judges with a localist view differ. Judges who take an absolutely resistant posture oppose the use of non-binding foreign legal sources on the basis of the absence of formal authority of these sources within the highest court’s jurisdiction. US Supreme Court Justice Antonin Scalia, who has expressed his views in dissenting opinions, speeches and publications, is perhaps the most well-known proponent of this view. He has argued that the citation of foreign law in judicial reasoning cannot be considered to be merely of a supportive nature besides the reasoning based on the national law. In his view, if the Supreme Court acknowledges foreign support for a specific interpretation of the law it grants to the foreign law the value of an authoritative source for its decision-making.⁷⁴ Other localist judges, including several of the interviewed Dutch judges, do not contest the use of foreign law in judicial deliberations as such. However, they are doubtful about the guidance which might be derived from the study of foreign law. These judges emphasise that judgments handed down in foreign jurisdictions cannot provide specific solutions for domestic cases, because of the differences between national legal systems based on the national legal culture. In this respect, the time-consuming nature of comparative legal research might be an additional reason for abstaining from an inquiry into foreign legal sources.

Globalist judges appear in two types. Most of the judges included in this study are not absolutely in favour of striving for convergence with the laws of other countries or with international law. Indeed, and befitting the balanced nature of the judicial function, the majority of the judges seem to have a nuanced approach regarding the use of foreign law in judicial decision-making. These judges fit the posture of engagement with foreign law. The judges expressed different degrees of willingness to engage with global influences. This willingness seems to be related to the perceived usefulness of foreign legal sources in the decision-making in concrete cases. The mentioned limitations of comparative legal research for the judgment of concrete cases echo the criticism expressed by localist judges. However, globalist judges underline the inspiration which foreign concepts and solutions can bring for the decision-making in difficult cases and cases of public importance. The yardstick or example provided by foreign case law can help judges to find a solution or support for their decision. The globalist judges feel that this can strengthen the judicial reasoning and enhance the public trust in the court’s judgment. Moreover, they are of the opinion that the study of foreign law can assist them in making sure that their standards for decision-making are of the same quality as those of their foreign peers. Finally, the study of foreign law is considered useful for assessing whether a domestic judgment would be following general trends in the development of the law in other Western legal systems. These considerations fit the idea, voiced by John Bell, that the use of foreign law can add force to arguments based on domestic law on the basis of ‘a sense of fairness that similar situations should receive similar solutions across legal systems.’⁷⁵ While acknowledging that the justification of judgments should still be connected to the domestic law, Bell considers that foreign case law can provide a ‘reflecting mirror’ which enables a better judicial analysis of the domestic law.⁷⁶

71 Adams, *supra* note 10, p. 535.

72 *Ibid.*

73 Jackson, *supra* note 8.

74 See inter alia N. Dorsen, ‘The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer’, 2005 *International Journal of Constitutional Law*, pp. 519-541.

75 J. Bell, ‘The Argumentative Status of Foreign Legal Arguments’, 2012 *Utrecht Law Review* 8, no. 2, pp. 8-19, here p. 18.

76 *Ibid.*

4.2. Legal tradition and the nature of cases

Concerning legal tradition, it seems that the doctrine of precedent has only a limited influence on judicial practices regarding the reference to foreign case law. This doctrine, which obliges courts to follow prior decisions taken by the highest courts in their jurisdiction, is typical for the common law tradition but not for the civil law tradition in which the Dutch courts function.⁷⁷ In civil law systems, no formal system of precedent exists. However, persuasiveness can be identified as an element in the approach of courts in these systems with regard to previously decided cases.⁷⁸ In practice, judgments of the highest courts in the Netherlands regularly feature as an ‘informal precedent’ in later decisions of these courts and in general are followed by the courts of first instance and the courts of appeal in their decision-making.⁷⁹

The judgments of courts in foreign jurisdictions, in principle, do not have binding force in other jurisdictions. This is the case regardless of whether these are common law systems or civil law systems. Nonetheless, the research presented in this article reveals that, in the globalised legal context, foreign judgments are sometimes consulted to find persuasive arguments for deciding domestic cases. The Dutch courts sometimes look to the case law of foreign courts in order to find arguments to assist the decision-making in their own cases. It can be argued that, through regular use, these foreign judgments incrementally become binding sources for the judgment of domestic cases.⁸⁰ Indeed, it appears that most of the interviewed judges in the Dutch highest courts are more concerned with the persuasive force of legal arguments than with the formal source from which these arguments derive. In this respect, the authority of legal sources in the decision-making of the highest courts does not depend so much on the formally binding or non-binding nature of these sources.

However, a relevant aspect related to legal tradition concerns the style of judicial reasoning at the Dutch highest courts. The interviewed judges pointed out that the citation of case law as such is rare in the judgments of the *Hoge Raad* and the *Afdeling bestuursrechtspraak*. For reasons of tradition and the requirement of a unanimous decision, judgments in the Dutch system tend to be relatively short. In this light, the citation of foreign law would be exceptional.⁸¹ Indeed, some interviewed judges felt that the reasoning of a judgment might be weakened because of possible criticism of the use of foreign law, for example with regard to the scope and relevance of the legal comparison with other jurisdictions.

Furthermore, legal tradition plays a role in the selection of foreign legal materials for comparison by the Dutch courts. The judges most often study foreign sources originating in other civil law jurisdictions. They consider that the French and German influences in the Dutch legal system provide reasons for looking to these systems first when engaging in a comparative legal study. Besides language, all interviewed judges also take into account the prestige of specific foreign courts, such as the German *Bundesgerichtshof*, the French *Cour de cassation* and *Conseil d'État*, and the UK Supreme Court, when selecting case law for a comparison. These considerations parallel the factors identified by Gelter and Siems concerning cross-citations between highest courts in Europe.⁸² The Dutch judges display a preference for legal sources which come from courts which: 1) share the same legal tradition; 2) are accessible in terms of language; and 3) operate in larger jurisdictions, allowing them to build up qualitatively sound and politically influential case law.

The interviews clarified that the nature of cases plays a role in the judicial use of foreign law, too. The study of foreign law can be a requirement in cases in a specific field of law, such as private international law cases or extradition cases. However, the use of foreign law is certainly not restricted to cases which by their nature require judges to engage in such an exercise. Many of the interviewed judges pointed out

77 Glenn, *supra* note 3, Chapters 5 and 7; F. Schauer, ‘Precedent’, in Andrei Marmor (ed.) *The Routledge Companion to Philosophy of Law*, 2012. See also U. Mattei, *Stare Decisis: Il Valore del Precedente Giudiziario negli Stati Uniti d’America*, 1988; D.N. MacCormick & R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study*, 1997.

78 M. Cappelletti, ‘The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference or No Difference at All’, in H. Bernstein et al. (eds.), *Festschrift Konrad Zweigert*, 1981.

79 See V. Fon & F. Parisi, ‘Judicial Precedents in Civil Law Systems: A Dynamic Analysis’, 2006 *International Review of Law and Economics*, pp. 519-535.

80 See *supra*, Section 4.1. See also Bell, *supra* note 75, p. 8.

81 *Ibid.*

82 Gelter & Siems, *supra* note 11.

the usefulness of a comparative analysis of foreign legal materials for the judgment of difficult cases, in which no case law existed in the national legal system.

4.3. *The effectiveness and efficiency of judicial decision-making*

The functioning of highest national courts in liberal democracies is determined not only by classic liberal-democratic principles, such as the guarantees of judicial independence and impartiality and the abovementioned requirements related to the principle of democracy and national legal tradition. The highest courts, like all national courts, are also subject to standards concerning the effectiveness and efficiency of judicial proceedings. Such standards can be identified in Article 6 ECHR, which states that the right to a fair trial encompasses the individual's entitlement to a hearing 'within a reasonable time'. More generally, it can be noted that an increasing emphasis on the effectiveness and efficiency of judicial functioning has occurred in Western liberal democracies under the influence of theories of New Public Management. These theories have been used in judicial reforms in Western European countries since the 1980s and 1990s in order to find adequate solutions for the organisation of judicial decision-making in the current complex societal and legal context, for example through a restructuring of court management or increased specialisation within the judiciary.⁸³

When relating the above to the topic addressed in this article, it can be argued that the use of foreign law by the highest national courts might have a negative effect on the effectiveness and efficiency of these courts' decision-making. After all, researching foreign legal sources and the discussion of these sources in judicial deliberations might not yield arguments which are essential to the deciding of the case. Furthermore, this research might be time-consuming. Still, the effectiveness of the judicial decision-making could increase if the research of foreign law yields substantial input for the deciding of a case. Besides these considerations of principle, it is likely that the possibilities for the highest courts to engage in the use of foreign law will be limited by practical constraints. Such constraints may concern the knowledge of foreign languages, the access to foreign legal sources, and the availability of assistance with the conduct of comparative legal research.

Indeed, the research of the practices of the Dutch highest courts confirms that judges take into account the costs, in terms of the time spent on the research and study of foreign legal materials, and the benefits of this exercise, in terms of useful concepts and arguments for their decision in a domestic case. The research provides helpful information to add nuance to this conclusion.

The costs of the comparative exercise, firstly, vary for judges depending on: the assistance which they can make use of for this research; their personal affinity with and ability to conduct comparative legal research; and the accessibility of foreign legal sources, for example through databases, judicial networks and personal contacts. Both the *Hoge Raad* and the *Afdeling bestuursrechtspraak* have access to judicial assistance, which seems to provide adequate help with comparative legal research.⁸⁴ Many of the Dutch judges have the ability to conduct comparative research by themselves and to have access to relevant sources. This is related to the legal training and experience of the judges as well as to their involvement in transnational judicial exchanges.⁸⁵ In sum, both organisational and personal factors in the Dutch highest courts suggest that the costs of using foreign law in judicial decision-making do not constitute an obstacle to the further development of this practice.

Concerning the benefits of the study of foreign law, a clear relation exists with the postures of judges concerning the role of their highest court in the globalised legal context.⁸⁶ Globalist judges will consider the study of foreign law to be more useful for their court's decision-making than localist judges. Therefore, depending on personal affinity and ability, globalist judges will engage in the study of foreign law more readily than their localist counterparts. Interestingly, considerations in this respect seem to be related mostly to the personal approach of judges to the task of judging. In this respect, the approaches

83 See E. Mak, *De rechtspraak in balans*, 2007. See also G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007; D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*, 2010.

84 See *supra*, Section 3.2.

85 On judicial networks, see M. Claes & M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', 2012 *Utrecht Law Review* 8, no. 2, pp. 100-114.

86 See *supra*, Section 4.1.

of judges of a similar mind who work in different highest courts might be closer to each other than the approaches of two judges at the same highest court who hold opposite views on the usefulness of the study of foreign law.

4.4. Discussion

The justification of judicial decisions, legal tradition and the nature of cases, and the effectiveness and efficiency of judicial decision-making are all affected by the developing practices of the Dutch highest courts concerning the use of foreign law. At the normative level, the most significant change concerns the slow but steady shift from a formal-positivist approach to the use of legal sources to an approach based on the substance of legal sources. This shift can be understood in light of the more general trend of legal globalisation and the dissolution of national legal borders which is caused by this trend. US Supreme Court Justice Stephen Breyer, discussing the impact of international and foreign law on his professional life, has observed about this development:

‘For one thing, my description blurs the differences between what my law professors used to call comparative law and public international law. That refusal to distinguish (at least for present purposes) may simply reflect reality. The commercial law of various States, for example, has become close to a single, unified body of law, in part through the work of uniform state law commissioners, in part through a pattern of similar judicial responses to similar problems, in part because of the work of intermediate judicial institutions such as federal bankruptcy courts, in part because the interstate nature of commercial contracts means that judges in different states apply each other’s law. Formally speaking, state law is state law. But practically speaking, much of that law is national, if not international in scope. Analogous developments internationally, including the development of regional or specialised international legal bodies, also tend to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in various legal areas.’⁸⁷

This observation reveals the inadequacy of traditional state-oriented constitutions to capture the current relations between national and international legal rules. The substance of legal rules is increasingly converging, both vertically between national and international legal orders and horizontally between national legal orders. In this respect, the distinction between dualist and monist mechanisms for the implementation of international law in national legal systems is becoming less important. Still, the traditional openness of the Dutch monist system might have paved the way for the current willingness of many judges of the *Hoge Raad* and the *Afdeling bestuursrechtspraak* to consider foreign legal sources. These judges have been educated and they have built up judicial experience in a system which places a high responsibility on judges concerning the establishment of the relationship between international and national legal rules. Whereas Justice Breyer’s statement might give rise to debate in the dualist US legal system,⁸⁸ many of the interviewed Dutch judges would not seem to have any problem in accepting his description of the globalised legal context.

This openness of the Dutch judges to engage with legal rules developed outside of the national legal system further seems to be connected with the involvement of the Netherlands in the process of legal integration within the European Union (EU). While this process aims at the harmonisation of national laws within the European legal context, it respects the fundamental differences between the national constitutions of the EU Member States. This recognition of constitutional pluralism enables national courts to engage in a dialogue with the CJEU, steering clear from the traditional emphasis on the vertical relation between the Member States and the supranational legal order.⁸⁹ In a similar way, the ‘global

⁸⁷ Ibid.

⁸⁸ Concerning the debate about the use of foreign law, see Dorsen, *supra* note 74. See also M.A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’, 2007 *Columbia Law Review*, pp. 628-705.

⁸⁹ See in this respect M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, 2005 *European Law Journal*, pp. 262-307; A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, 2009; M. Avbelj & J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2011.

community of courts', as described by Anne-Marie Slaughter,⁹⁰ finds its legitimacy in the recognition of shared fundamental values from which judges can derive inspiration for the judgment of domestic cases, and the simultaneous recognition of national cultural differences which delimit the scope of useful comparative exercises. Concerning this relative usefulness, the research clarifies that the recourse to foreign law is considered by judges more readily if a shared legal framework exists because of historical ties with another legal system, or if the nature of the case to be decided invites a legal comparison.

5. Concluding remarks

The constitutional normative framework for judicial decision-making in the Dutch highest courts is evolving. The judicial practices of the *Hoge Raad* and the *Afdeling bestuursrechtspraak* reflect acknowledgment of the increasing intertwinement of legal orders and the search for a judicial approach which fits with this globalised legal context. This approach seems to have been found in an increased emphasis on the persuasiveness of legal arguments rather than on the source from which these arguments originate. Debates about the Constitution should consider how this changing approach to judging can be reconciled with the positivist nature of the current provisions concerning judicial decision-making and the implementation of international legal rules. Concerning the use of non-binding foreign law, no formal constitutional arrangements seem to be required. The developed judicial approaches and the views expressed by the interviewed judges in the Dutch courts reveal a careful and nuanced reflection. Domestic law still remains the basis for all judicial decisions. Further judicial exchanges and academic debates can facilitate the development of a methodology of comparative legal research for the benefit of judicial decision-making, and discuss the argumentative possibilities for the use of foreign legal sources in the legal reasoning of judgments.

90 See *supra*, note 2.