

Book Note: Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts, by Elaine Mak

Mohsen Seddigh

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

Book Note

Citation Information

Seddigh, Mohsen. "Book Note: Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts, by Elaine Mak." *Osgoode Hall Law Journal* 52.1 (2015) : 369-371.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol52/iss1/20>

This Book Note is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Book Note**JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS, by Elaine Mak¹**

MOHSEN SEDDIGH

FOR CENTURIES, CANADIAN COURTS have cited foreign, in particular English, case law. The courts' reliance on such sources has to do with the common law heritage of our legal system. As the world becomes more globalized, however, so does arise the need, and often requirement, for courts to resort to and apply myriad legal sources that originate outside the Canadian legal system. This trend is readily noticeable in the ever-increasing number of cases—such as *Baker v Canada (Minister of Citizenship and Immigration)*,² *Canada (Prime Minister) v Khadr*,³ and *Kazemi Estate v Islamic Republic of Iran*⁴—where the Supreme Court of Canada has applied outside sources to interpret Canada's international obligations and resolve domestic problematics.

It is this judicial phenomenon that Elaine Mak explores in *Judicial Decision-Making in a Globalised World*. Mak bases her research on qualitative analysis of anonymous interviews with judges of the highest courts of five Western nations—the United Kingdom, Canada, the United States, France, and the Netherlands—as well as their public speeches, legal writing, and interviews with some of their law clerks. As such, her research is not only empirical but also comparative as between five countries with rather distinct legal systems. The United Kingdom, Canada, and the United States follow the common law with a single “supreme” court (which Mak labels the “Anglo-Saxon model”),⁵ while

-
1. (Oxford: Hart, 2013) 272 pages.
 2. [1999] 2 SCR 817, 174 DLR (4th) 193.
 3. 2010 SCC 3, [2010] 1 SCR 44.
 4. 2014 SCC 62, [2014] SCJ No 62 (QL).
 5. *Supra* note 1 at 36.

France and the Netherlands belong to the civil law tradition, each with several, more specialized highest courts at the national level (the “French model”).⁶

By focusing on the experiences of the judges of each of these courts, Mak sheds light on how the decision making of the courts has evolved in view of the internationalization of law and increased transnational judicial communication. More specifically, the aim of the research is not to assess the quantitative occurrences of the use of foreign law but to describe and analyze the different aspects of the development of the practices of the highest courts.

Following an introduction in chapter one, Mak presents the constitutional-theoretical concept of “constitutional (in-)flexibility” in chapter two. She uses this concept to assess the development of internationalized judicial practices at the highest courts. This theoretical framework aims to clarify how national constitutional frameworks enable or constrain the integration of changes induced by judicial internationalization in national legal systems.

To set the scene for the analysis that follows, Mak offers a comparative overview of the selected courts in chapter three. The most noticeable highlight in this regard is the existence of multiple highest courts under the French model, raising the question of whether these courts interact *inter se* and how they position themselves with respect to above-national level courts within the European Union and highest courts in foreign jurisdictions.

Chapters four and five present the bulk of the author’s research. Chapter four looks at two aspects of the role of the highest courts: first, their function as guardians of the law, including the guarantee of the uniform application of the law and the protection of fundamental entitlements, and, second, their contribution to the development of the law. The research indicates that the highest courts take account of relevant foreign legal sources as well as the ideas and experiences of judges in other jurisdictions. As for the impact of global influences, the analysis shows that the personal approaches of the judges significantly influence their level of participation in transnational exchanges and the need they feel to include foreign legal sources in the highest courts’ decision-making.

Chapter five delves into more detailed scrutiny of the case law of the highest courts in relation to the interviews with the judges. Mak differentiates between the use of formally binding sources of international law—e.g., the *European Convention on Human Rights*⁷ and EU law vis-à-vis the three European highest courts—and non-binding foreign law sources such as the judgments of the UK

6. *Ibid* at 45.

7. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur TS 5.

Supreme Court in Canada. She identifies certain systematic factors that influence the status granted to foreign legal sources. These factors include the model for the implementation of international law in each jurisdiction, the style of legal reasoning of the highest courts, and the personal approaches of the highest court judges such as their familiarity with certain foreign law.

In the final chapter, the author applies the theory developed in chapter two to her research findings. Chapter six is, in other words, a comparative analysis of the findings of the research, clarifying how the similitudes and differences are integrated within each legal system. Mak's constitutional-theoretical perspective reveals the influence of each judge's individual approach on the development of judicial internationalization at the highest courts.

Judicial Decision-Making in a Globalised World highlights some of the complexities involved in the use of foreign and international sources by the highest courts. This book can benefit anyone interested in judicial behaviour and comparative legal studies. Furthermore, in the face of an ever more globalized world and an evolving legal and societal context, empirical scholarship such as this book can also assist judges in approaching domestic cases.

