

## Series Editor's Preface

The CERDIN research centre of the University of Paris I (*Panthéon-Sorbonne*) is very pleased to inaugurate the Series 'French Studies in International Law', and we are grateful to Hart Publishing for agreeing to publish it. The Series aims to contribute to the dissemination in English of the works of the most eminent international law scholars writing in French. Because these works have not yet been published in English, this scholarship has been inaccessible to a great number of potential readers who, due to the language barrier, have not been able to become acquainted with or discuss it. This is highly regrettable, as it limits the debate on international law to works in English—the *lingua franca* of our contemporary world—and thus primarily to Anglophone scholars.

The publication of these works in English therefore seeks to create the conditions for genuine debate among Francophone and Anglophone international law scholars across the globe, a debate that should henceforth be based on the work of both. Learning of the others' theories through translation is in fact the first essential step towards acknowledging the contributions and differences of each. *Knowledge* and *acknowledgement* lead to understanding the irreducible core, as well as truth, in each legal culture's international law doctrine, its traditions and distinct ideas, as well as each author's way of thinking. They should make it possible to avoid the all-too-frequent misunderstanding of each other's position on international law that results from simple ignorance of each other's work. Between the Francophone and Anglophone worlds the rule has all too often been mutual, even courteous, indifference or ignorance, and dialogue the exception.

No book could better introduce this Series than Mireille Delmas-Marty's superb volume, *Ordering Pluralism*. Professor at the Collège de France, where she holds the chair in Comparative Legal Studies and Internationalisation of Law, Mireille Delmas-Marty is one of the

most eminent and well-known of French legal scholars. Translated here for the first time into English, *Ordering Pluralism* provides a vision for the world and suggests a solution based on analyses so strong, illuminating and profound that they will leave no reader indifferent. It cannot help but stimulate a discussion that I hope is only just beginning.

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## Foreword

Mireille Delmas-Marty is a Member of the Institut de France, a professor at the Collège de France, a visiting professor at universities all over the world, the author of dozens of books and articles on legal subjects, particularly criminal and international law, and the recipient of many honors and awards. In a word, she is a great legal expert. She has specialized in international and transnational law. And that is the subject of this book.

Professor Delmas-Marty here writes about law that transcends national boundaries. That law is increasingly made in an ever-growing number of transnational legal bodies, including regional associations, such as the North American Free Trade Area, and more globally inclusive bodies, such as the International Criminal Court. Justice Sabino Cassese tells us, for example, that in 2004 there were around 2000 'global regulatory bodies, called international or intergovernmental organizations'.<sup>1</sup>

International and transnational law is made, not simply by those who write the treaties establishing these bodies, but also by the administrators and judges who work for them, including, for example, administrators at the European Union, judges at the Inter-American Human Rights Court, arbitrators at the Iran-US International Claims Tribunal, and adjudicators working at the World Trade Organization. The legal rules they create or interpret cover subjects of all kinds, ranging from commercial or trade law to criminal law. The content of that law relates ever more closely to the content of national legal systems, as each system draws inspiration from, and helps to shape, the others.

Those who work with law that reaches beyond the boundaries of a single nation work within an ever-expanding legal universe; and they understand the need to knit together the parts of that expanding legal

<sup>1</sup> Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 *NYU J Int'l L & Pol* 663, 671 (2005).

universe into a more coherent whole. We know that law made outside the United States can affect Americans. We know that sometimes it does so by providing the applicable norm for deciding a specific domestic case and sometimes by influencing the content of another applicable domestic or transnational norm. We know that all the while transnational law is itself subject to the influence of national law as both kinds of law evolve through the work of both domestic and transnational decision makers. But how are we to describe the content, the evolution, the direction of this ever more important expanding set of legal systems?

Just what is it that those who work with, and within, transnational law have been doing? How successful have they been? What are their failures? What are the consequences of what they have done? What more should be done? We cannot even begin to think about such questions until we have conceptual tools fitted for the job. We need a framework and concepts that allow us to describe what this law is, what it does, how it has grown, and how it fits together. We need an initial description.

This book provides those tools and that description. It helps us understand how law among nations and beyond single nations develops through cross-referencing, through efforts to harmonize, and through the creation of hybrid rules of substance and procedure. It helps us understand where this law develops, regionally or internationally. And it helps us understand the significance of the temporal leads and lags created as this law develops over time. In a word, the book helps us understand, talk about, and evaluate what is happening before our very eyes.

Why is this important to Americans? Consider how in recent years the abstract considerations I have just mentioned have produced concrete issues in the Supreme Court of the United States, the Court on which I serve. Consider the practice of cross-referencing. Some members of my own court (of which I am one), when writing an opinion in a case involving American constitutional law, will sometimes refer to decisions handed down by judges of foreign constitutional courts. Two recent Supreme Court cases, *Lawrence v Texas* and *Roper v Simmons*, illustrate the practice.<sup>2</sup> In *Lawrence* the court struck down a state law criminalizing certain forms of homosexual conduct, and it supported its decision in part by referring to a

<sup>2</sup> *Lawrence v Texas*, 539 US 558 (2003); *Roper v Simmons*, 543 US 551 (2005).

somewhat similar case from the European Court of Human Rights.<sup>3</sup> In *Roper* the court struck down state laws that would have applied the death penalty to 16- or 17-year-old defendants (convicted of capital murder), and it supported its decision in part by referring to the fact that no other nation applied a death penalty to offenders under the age of 18.

The practice has proved surprisingly controversial. Dissenting justices as well as several commentators have criticized the justices' practice of referring to foreign legal decisions. And 40 Members of Congress introduced legislation that would severely limit federal courts' use of foreign law in deciding constitutional issues. Since that time judges and commentators alike have engaged in debate. Indeed, my colleague Justice Scalia and I have debated the issue in opinions and at law school forums.

The terms of the debate run roughly as follows: those favoring the foreign-reference practice point to historical precedent. They add that the decisions of foreign courts do not bind us. And they argue that, in an ever more democratic world with ever more independent judicial systems faced with ever more similar problems, one nation's judges can and should learn from the experience of others. Those who oppose the use of foreign references distinguish historical practice, primarily on the ground that many of the foreign cases referenced came from nations with special jurisprudential ties to the United States, namely Britain or the British Commonwealth. They add that nothing prevents an American judge from learning about foreign case law by reading the work of others or corresponding with foreign colleagues. But, they say, an opinion's supporting citation wrongly smuggles a foreign view of a foreign law into a Constitution that is, and was meant to be, American in meaning and application. One distinguished judge wrote: "To cite foreign law as authority is to flirt with the discredited . . . idea of a universal natural law; or to suppose fantastically that the world's judges constitute a single elite community of wisdom and conscience."<sup>4</sup>

Note what is omitted from these arguments. Neither side says much about how the practice of cross-referencing within the United States takes place within a broader geographical context. Judges across the world make increasing use of each other's opinions. That may well be because of the increased use of written constitutions

<sup>3</sup> *Dudgeon v United Kingdom*, 45 ECtHR (1981) p 52.

<sup>4</sup> Judge Richard Posner, *Legal Affairs*, July/August 2004, at [www.legalaffairs.org](http://www.legalaffairs.org).

seeking to protect democratic institutions and individual human rights and the increased reliance upon independent judiciaries to help enforce those protections; it may reflect the increased similarity of legal problems faced across the world. Regardless, the practice of cross-referencing will have global, as well as local, effects. Before we can evaluate those effects, we must know what they are. And we cannot know what they are without a vocabulary, a framework, and an initial description of the transnational universe.

Consider the docket of our court. The number of cases involving foreign or transnational law has been growing rapidly. Indeed, in the year between *Lawrence* and *Roper* the court considered or referred to foreign law in at least six ‘bread-and-butter’ cases, cases that are important but do not involve such publicly controversial subject matter as Lawrence’s homosexual rights or Roper’s death penalty. The court’s use of foreign law in these six cases provoked no adverse comment. Everyone understood the need. The cases were unusual only in that their number, six out of a total docket of 79, indicates the increasingly routine nature of this kind of court business.

Consider the subject matter of those cases: (1) Does American antitrust law authorize an Ecuadoran vitamin distributor to file suit in America against a Dutch vitamin producer? (The distributor says that the producer was a member of an unlawful vitamin price-fixing cartel operating outside the United States.)<sup>5</sup> (2) Does American ‘discovery’ law permit one American firm to obtain documents from another American firm in order to present them to the European Union’s anti-cartel Authority? (The Authority says it does not want them.)<sup>6</sup> (3) Does the American Foreign Sovereign Immunities Act bar Maria Altmann, an American citizen born in Austria, from bringing a federal court lawsuit in 2001 against the Austrian National Gallery to obtain possession of six Klimt paintings that she says the Nazis took from her uncle in 1938?<sup>7</sup> (4) Does an environmental statute bar entry of trucks from Mexico—entry that the North American Free Trade Agreement authorizes the President to permit?<sup>8</sup> (5) To what kinds of contemporary injuries today does the general language of the early-enacted (1789) American Alien Tort Statute apply?<sup>9</sup> (The Statute permits compensation for injuries

<sup>5</sup> *F Hoffmann-La Roche Ltd et al v Empagran SA et al*, 542 US 155 (2004).

<sup>6</sup> *Intel Corp v Advanced Micro Devices, Inc*, 542 US 241 (2004).

<sup>7</sup> *Republic of Austria v Altmann*, 541 US 677 (2004).

<sup>8</sup> *Department of Transportation v Public Citizen*, 541 US 752 (2004).

<sup>9</sup> *Sosa v Alvarez-Machain et al*, 542 US 692 (2004).

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caused by actions ‘in violation of the law of nations,’ and its authors likely intended the statute primarily to authorize compensation for injuries caused by pirates.) (6) Does the Warsaw Convention, governing international airline accidents, authorize recovery for a death caused by an allergy to cigarette smoke?<sup>10</sup>

In all these cases the parties expected the court to look, and it did look, to international, transnational, or foreign legal sources. In the antitrust and discovery cases, for example, several foreign nations (Germany, Japan, Canada, and France) and the European Union filed briefs. In the airline accident case all participating judges agreed that the court must examine and treat as precedents Warsaw Convention cases decided in the courts of other nations. In applying the Alien Tort Statute, the court had to determine today’s equivalent of 18th-century piracy, and in doing so it consulted both older and modern international legal practice.

In Mrs Altmann’s case the decision of an intermediate Paris appeals court helped me better understand the ‘sovereign immunity’ to which the American statute referred.<sup>11</sup> Christian Dior had sued ex-King Farouk to collect a bill for dresses that the ex-King had bought for his wife before he lost his throne. The Paris court held that Farouk could no longer assert the sovereign immunity defense because he was no longer king. The decision thereby indicated that the Austrian National Gallery could no longer claim sovereign immunity, for (unlike the 1930s and 1940s) it was now engaged in commercial activities.

The growing number of these ordinary cases suggests a need for American judges better to understand the requirements of law that is not purely domestic. Two of the cases, the anti-trust case and the discovery case, required the court to understand how an administrative unit of a transnational regional organization, namely the European Union, does its work. One required an understanding of the legal relation of a different set of transnational rules, those of NAFTA, to American law. One required interpretation of a treaty, the Warsaw Convention. One required the application to a foreign entity of a legal concept, namely sovereign immunity, which draws content from international law. And one required the court to understand and to evaluate the likely consequences of its interpretation of a domestic law, the American Alien Tort Statute, in a world where

<sup>10</sup> *Olympic Airways v Husain*, 540 US 644 (2004).

<sup>11</sup> *Ex-King Farouk of Egypt v Christian Dior*, 84 Clunet 717, 24 ILR 228 (CA Paris 1957).

many other countries may seek to apply somewhat similar law to the same or similar parties. The judges must know where to look to find the relevant transnational information; and they must know enough about its context to be able to evaluate what they find.

Again, to take this ‘foreign law’ into account properly demands some knowledge of the broader picture, that is, of the context in which that law is developing. If law professors and scholars understand that context, they can better inform us, directly or by informing the lawyers who practice in the area. And this book will help them do so.

Consider another recent case, *Medellin v Texas*.<sup>12</sup> The subject matter of the case before the court in that case involved the death penalty. The Vienna Convention on Consular Rights requires the police of a signatory nation to inform an arrested person from another signatory nation that he has a right to communicate with his own nation’s consul. Texas state police had failed to inform a murder suspect from Mexico of this right; and the suspect was later convicted of murder and sentenced to death. The Vienna Convention also authorized the International Court of Justice (ICJ) to interpret that treaty. And the ICJ had held that the Convention required the United States to hold an additional hearing to see whether this communication failure was harmless. Texas refused to do so.

The American Constitution says that ‘treaties’ are ‘supreme law’ and ‘Judges in every State shall be bound thereby.’<sup>13</sup> The question was whether this constitutional rule required Texas to follow the ICJ’s ruling without more, that is, without any further domestic law enacted by Congress. The court answered that Texas need not comply; further action by Congress was needed; these provisions of the Vienna Convention were not self-executing. And, in so holding, the court set forth a legal rule that reaches well beyond cases involving the death penalty. It set forth criteria for determining when treaty provisions are self-executing. And those criteria, I fear, are so restrictive that few treaty provisions could satisfy them.

In my (dissenting) view, the circumstances present in *Medellin* satisfied traditional criteria long used (here and abroad) for determining whether a treaty provision is self-executing. The language of the treaty is specific and binding. The subject matter, criminal procedure, is judicial in nature (unlike, say, disposition of armed forces). It is easy for judges to fashion procedures to carry out the

<sup>12</sup> *Medellin v Texas*, 128 S Ct 1346 (2008).

<sup>13</sup> US Constitution, Art VI.

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Convention's (and the ICJ's) mandate (unlike say, many highly generalized obligations). Judicial enforcement raises no constitutional issues (unlike, say, a treaty provision that deprived an individual of rights guaranteed by the American Constitution or which violated principles of separation of powers). In a word, the treaty and ICJ decision 'address' the 'judicial,' not the political, branches of government.<sup>14</sup>

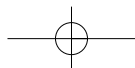
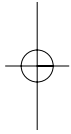
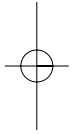
My own view, however, did not carry the judicial day. And one might ask, now what is to be done? Because of the political difficulty of seeking individual laws from Congress provision by provision treaty by treaty, specifying whether an international obligation is self-executing, the court's contrary holding may threaten the enforcement of a range of treaty provisions, involving, for example, intellectual property, trade, and other subjects of commerce. Does that consequence warrant an effort to obtain a more general, criteria-specifying law, from Congress? What should any such law say?

Once again, to answer this question sensibly, we should know something about the likely contemporary significance of treaties and particularly treaties that create adjudicatory bodies. What is their likely subject matter? How important is it to ask Congress for what would be, in effect, a delegation to the treaty makers, to the President (who signs treaties) and to the Senate (which ratifies them), but not to the House of Representatives (which plays no role), of the authority to change domestic law? Once again I can point out that this book, by providing a description of what is happening in the transnational legal world as well as a conceptual framework for discussing it, can help us answer these very practical legal questions.

In providing these examples, I do not mean to suggest that this book will find its audience only among judges. To the contrary, the book is aimed at scholars, at specialists, and at those among the general public who take an interest in their work. I do mean to suggest, however, that even judges and even lawyers increasingly fall within the latter category. The subject is one that has practical implications for their work. The book is timely and relevant to the practical concerns of those who work with, and within, the legal system. We must thank Professor Delmas-Marty for her fine work. It will help us get started.

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<sup>14</sup> *Medellin*, 128 S Ct 1392 (Breyer J dissenting).



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