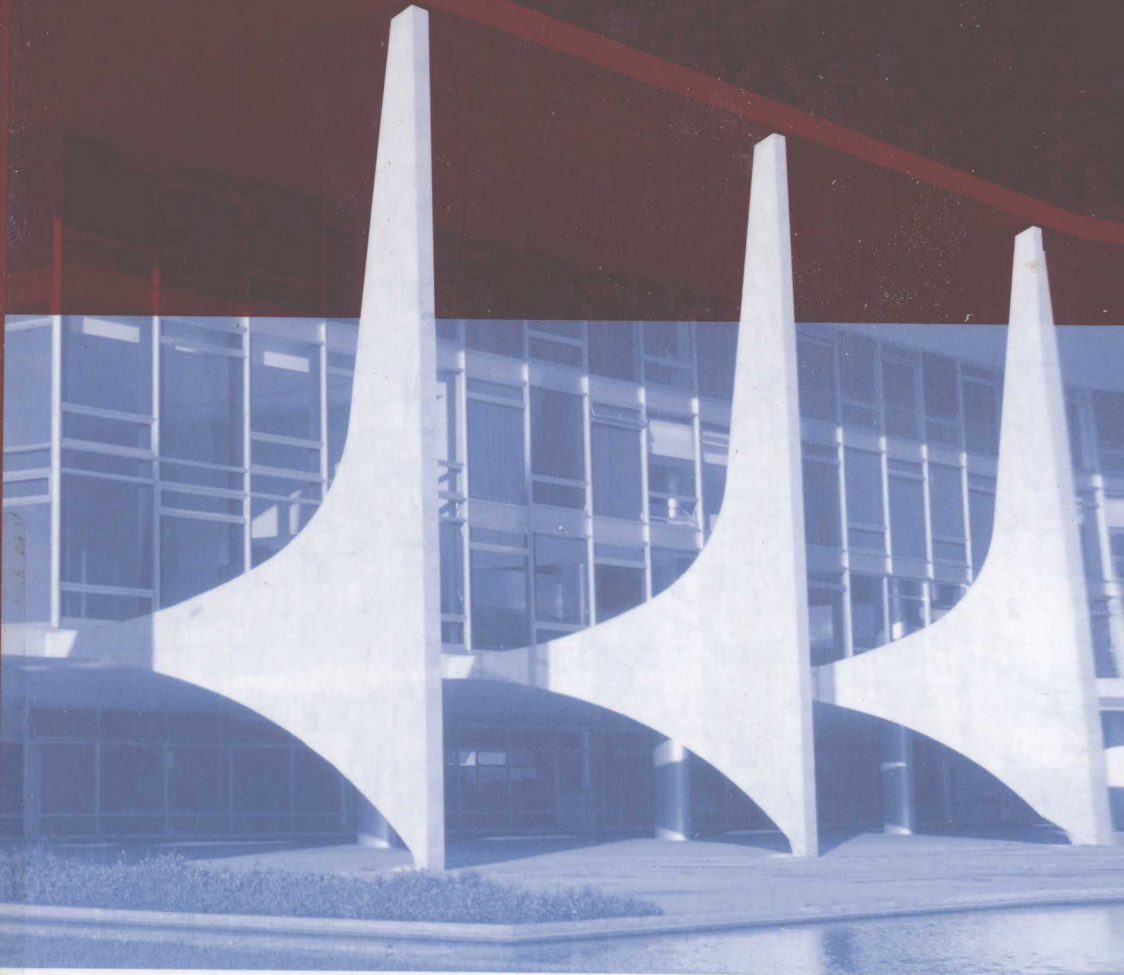


Edited by

**Sam Muller and Sidney Richards**

# Highest Courts and Globalisation



**Hague Academic Press**

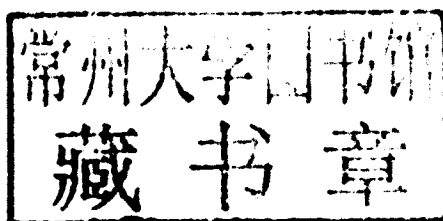
# HIGHEST COURTS AND GLOBALISATION

*Edited by*

Sam Muller and Sidney Richards

*Assistant Editor*

Laura Henderson



Hague Academic Press

An Imprint of T·M·C·ASSER PRESS

Published by Hague Academic Press, an imprint of T·M·C·ASSER PRESS  
P.O.Box 16163, 2500 BD The Hague, The Netherlands

<[www.asserpress.nl](http://www.asserpress.nl)>

Cover: WIM Ontwerpers  
Lay-out: Oasis Productions  
Printing and binding: Koninklijke Wöhrmann

ISBN 978-90-6704-328-1

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PRINTED IN THE NETHERLANDS

## FOREWORD

If – as I am – you are of the belief that it is the duty of a judge to be attuned to the cultural, social and political realities of his jurisdiction, then I believe the contributions in this volume will further compel you to accept that these same realities are strongly conditioned by forces of globalisation. The law and the courts which apply it are not institutions distinct from society; they are part of it. And – like it or not – our societies have been internationalising at a steady pace.

Being a judge on a highest national court no longer implies confining one's perspective exclusively to the world within one's own borders – if indeed it ever did. This much is clear: those public officials who concern themselves with national affairs will invariably be confronted with the fact that those affairs will have an international dimension.

I should however caution against overstating this point. For good reasons, the law follows society at a certain distance. Internationalisation is not a passport to limitless border crossing. Democracy and the rule of law remain our core guiding values. And courts have a specific role to play in respect of these values. They are there to uphold the law when, in specific cases, it is called into question. And they are there to shape and maintain the rule of law in a democratic system by how they act. In some cases, those values will demand that courts do apply legal standards which originate from outside the national system. And that is perhaps in essence what this book is about. Highest national courts, once solely dedicated to a fairly autonomous national legal system are now themselves part of an internationalising society and need to find ways to deal with this changed reality.

The present book exemplifies one of the undeniable virtues of globalisation, namely its power to bring people together from across borders and cultures to exchange valuable knowledge and experiences. In this sense the present work is not merely a study of globalisation and law, but is itself an instance of globalisation changing the way that lawyers (and in this case particularly judges) exercise their profession. 'Judicial internationalisation', as the editors have called it in their introduction to this book, is one of the great benefits of living in a globalised world. Although there is an undeniable trend to emphasize the potential for injustice inherent in globalisation as a catalyst for fragmentation and conflict, we should not be blinded to its potential for cooperation and mutual understanding. Over the course of the many years in which I have been a judge I have on a great many occasions been privileged enough to learn from and exchange views with my foreign colleagues. I believe I am a better judge because of it.

Perhaps one of the most important lessons to learn for today's highest courts is that they are not isolated, that their problems are unlikely to be peculiar to their own jurisdictions and that the advance of modern information technology is becoming ever more effective in breaking down the practical obstacles to more comprehensive forms of cooperation and communication. More often than we probably realise, we *could* work together and quite frequently it would be very *unwise not to* work together, particularly when problems are border transcending. But in what sense can it be said that we *must* work together?

As those judges writing in this volume have pointed out, the first and foremost concern of any national judge is with the needs and concerns of his own jurisdiction. In my view, allowing the experience of other jurisdictions to bear upon one's own decision making does not violate a domestic judge's responsibilities to his constituency. On the contrary, any possible avenue which may shed more light on a complicated problem should not be left unexplored. A judge who is willing to learn from his peers – domestic or foreign – is simply a judge who recognises a duty to subject his deliberations to the strongest form of scrutiny possible. Transnational communication between courts is just one of many instruments of which today's judges today can avail themselves.

This is not to say that legitimacy concerns are not tangible. Such concerns should never be taken lightly, and if transnational judicial cooperation is indeed a useful tool, the authors in this volume shed much light on how to use it judiciously. Indeed, legitimacy ought to be a central concern in every decision a court takes. But this is true for all aspects of judicial decision making, not merely when it involves the consultation of foreign decisions or foreign colleagues. Disputes about the requirements of judicial legitimacy and propriety are essentially and unavoidably contested. Despite this constant feature in the practice of law and politics, it is my firm belief that any judge acting in good faith has much to gain the possibilities of an expansive, even global judicial community. That such possibilities may be fraught is a reason to exercise caution and to endeavour to elucidate the dynamics of judicial internationalisation. In this spirit, the present volume has much to offer to those confronted with globalisation.

Judge Geert CORSTENS

President of the *Hoge Raad der Nederlanden*

[Dutch Supreme Court in Civil, Criminal and Fiscal disputes]

## ACKNOWLEDGEMENTS

The present volume is based on papers that were initially presented at the 2008 annual conference of the Hague Institute for the Internationalisation of Law (HiiL) which was entitled 'The Changing Role of Highest Courts in an Internationalising World'. In the lead-up to this project HiiL organised various events and workshops on this topic in an effort to identify the main issues related to highest courts and globalisation in the minds of both legal practitioners and scholars. These issues eventually set the agenda for the conference, and ultimately the agenda for the contributions in this volume. As such, this volume has benefited tremendously from the comments, views and assistance of many people throughout the process.

We would like to mention some of them in particular. Firstly, the various sponsors which generously agreed to support the conference: the Dutch Ministry of Justice, Maison Descartes, the Canadian embassy in the Netherlands and Caselex. Secondly, we would like to acknowledge the contributions by the various speakers, commentators and participants at the conference which provided the authors with a wealth of insightful suggestions and criticism.

We would also like to gratefully acknowledge the invaluable support of Laura Henderson and in the final proofs phase, Sofie Breslau in preparing this work for publication. Finally we would like to thank Jovana Paredes at HiiL for her editorial work and Marjolijn Bastiaans at T.M.C. Asser Press for her patience and assistance in preparing the final manuscript.

*The Hague, December 2009*

Sam MULLER and Sidney RICHARDS

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## LIST OF ABBREVIATIONS

|                          |  |
|--------------------------|--|
| AAHJF                    | Association africaine des Hautes Juridictions francophones   |
| ACJCP                    | Association canadienne des juges des cours provinciales  |
| ACJCS                    | Association canadienne des juges des cours supérieures   |
| AHJUCAF                  | L'association des hautes juridictions de cassation des pays ayant en parage l'usage du français            |
| AIPP                     | Association Internationale des Procureurs et Poursuivants  |
| AISCCUF                  | Association des Institutions supérieures de contrôle ayant en commun l'usage du français                   |
| Am. J. Comp. L.          | American Journal of Comparative Law  |
| Am. J. Int'l L.          | American Journal of International Law  |
| Am. U. Int'l L. Rev.     | American University International Law Review   |
| Bus. Law. Int.           | Business Law International   |
| C.M.L.Rev.               | Common Market Law Review   |
| Can. Bar. Rev.           | Canadian Bar review  |
| Can. Y.B. Int'l L.       | Canadian Yearbook of International Law   |
| CARICOM                  | Caribbean Community  |
| CCJE                     | Consultative Council of European Judges  |
| CEDAW                    | Convention on the Elimination of All Forms of Discrimination Against Women                                 |
| CEDROMA                  | Centre d'études des droits du monde arabe  |
| CEPEJ                    | European Commission for the Efficiency of Justice/La Commission européenne pour l'efficacité de la justice |
| CFI                      | Court of First Instance  |
| Colum. Hum. Rts. L. Rev. | Columbia Human Rights Law Review   |
| Colum. J. Envtl. L.      | Columbia Journal of East European Law  |
| Colum. J. Eur. L.        | Columbia Journal of European Law   |
| Colum. L. Rev.           | Columbia Law Review  |
| Cornell Int'l L.J.       | Cornell International Law Journal  |
| Cornell L. Rev.          | Cornell Law Review   |
| DePaul L. Rev.           | DePaul Law Review  |
| ECHR                     | European Convention of Human Rights  |
| ECJ                      | European Court of Justice  |

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|   |   |
|---|---|
| ECtHR                                       | European Court of Human Rights  |
| EPJA  | Exchange Programme for Judicial Authorities   |
| ERA   | Academy of European Law   |
| EU  | European Union  |
| Europ. J. Int'l L.                          | European Journal of International Law   |
| European L.J.                               | European Law Journal  |
| FEJA  | Fédération Européenne des Juges Administratifs  |
| Florida International University<br>L. Rev. | Florida International University Law Review   |
| FRAGD                                       | Constitutional Courts of Italy  |
| GEMME                                       | Groupeement européen des magistrats pour la médiation   |
| German L.J.                                 | German Law Journal  |
| German Ybk. Int'l L.                        | German Yearbook of International Law  |
| Harv. Int'l L.J.                            | Harvard International Law Journal   |
| Harv. L. Rev.                               | Harvard Law Review  |
| Hastings Int'l & Comp. L. Rev.              | Hastings International and Comparative Law Review   |
| HiiL  | Hague Institute for the Internationalisation of Law   |
| I.C.L.Q.                                    | International and Comparative Law Quarterly   |
| IARLJ                                       | International Association of Refugee Law Judges/<br>Association Internationale des Juges du Droit des<br>Réfugiés |
| IAS   | Indian Administrative Service   |
| ICCPR                                       | International Covenant on Civil and Political Rights  |
| IDLO  | International Development Law Organisation  |
| IHEJ  | Institut des hautes études sur la justice   |
| INCADAT                                     | International Child Abduction Database  |
| Ind. L.J.                                   | Indiana Law Journal   |
| Ind. J. Int'l L.                            | Indian Journal of International Law   |
| Indiana J. Global L. St.                    | Indiana Journal of Global Legal Studies   |
| Int'l & Comp. L.Q.                          | International and Comparative Law Quarterly   |
| Int'l J. Const. L.                          | International Journal of Constitutional Law   |
| Int'l J. Refugee Law                        | International Journal of Refugee Law  |
| IP  | intellectual property   |
| IPS   | Indian Police Service   |
| J. Legal Pl.                                | Journal of Legal Pluralism  |
| J. Refugee Studies                          | Journal of Refugee Studies  |
| J.C.L.                                      | Journal of Contract Law   |
| Loyola (Los Angeles) L. Rev.                | Loyola Law Review   |
| Maryland L. Rev.                            | Maryland Law Review   |
| MEDEL                                       | Magistrats Européens pour la Démocratie et les  |



|                               |  |
|-------------------------------|--|
|                               | Libertés   |
| Melbourne J. Int'l L.         | Melbourne Journal of International Law                             |
| MISA                          | Maintenance of Internal Security Act                               |
| Mont. L. Rev.                 | Montana Law Review   |
| N.Y.U. J. Legis. & Pub. Pol'y | New York University Journal of Legislation and Public Policy       |
| NAFTA                         | North American Free Trade Agreement                                |
| Netherlands Int'l L. Rev.     | Netherlands International Law Review                               |
| NGOs                          | non-governmental organisations                                     |
| NJ                            | Nederlandse Jurisprudentie   |
| NOW                           | Netherlands Organisation for Scientific Research                   |
| Nw. U. L. Rev.                | Northwestern University Law Review                                 |
| NYU J. Int'l L. & Pol.        | New York University Journal of International Law and Policy        |
| OHADA                         | Organization for the Harmonization of Business Law in Africa       |
| OITJ                          | Organisation internationale pour la formation judiciaire           |
| OJ                            | Official Journal of the European Union                             |
| Osgoode Hall L.J.             | Osgoode Hall Law Journal   |
| Otago L. Rev.                 | Otago Law Review   |
| PACS                          | pacte civil de solidarité  |
| PIL                           | Public Interest Litigation   |
| QMV                           | qualified majority voting  |
| Queens L.J.                   | Queens Law Journal   |
| RECIEL                        | The Review of European Community & International Environmental Law |
| REFJ                          | European Network of Judicial Training                              |
| S. Cal. L. Rev.               | Southern California Law Review                                     |
| SSRN                          | Social Science Research Network                                    |
| Stan. L. Rev.                 | Stanford Law Review  |
| Sup. Ct. Rev.                 | Supreme Court Review   |
| Supreme Ct. L. Rev.           | Supreme Court Law Review   |
| TEC                           | Treaty establishing the European Community                         |
| Tex. Int'l L.J.               | Texas International Law Journal                                    |
| TICOM                         | Tilburg Institute of Comparative and Transnational Law             |
| TRIPS Agreement               | Trade-Related Intellectual Property Rights                         |
| Tul. L. Rev.                  | Tulane Law Review  |

|                        |  |
|------------------------|--|
| U.C. Davis L. Rev      | U.C. Davis Law Review                                      |
| U.N.B.L.J.             | University of New Brunswick Law Journal                    |
| U.S.A.                 | United States of America                                   |
| U.T. Fac. L. Rev.      | University of Toronto Faculty of Law Review                |
| UK                     | United Kingdom   |
| UN                     | United Nations   |
| UNIDROIT               | International Institute for the Unification of Private Law |
| Utah L. Rev.           | Utah Law Review  |
| Utrecht L. Rev.        | Utrecht Law Review   |
| <br>                   |  |
| Va. J. Int'l L.        | Virginia Journal of International Law                      |
| Vand. J. Transnat'l L. | Vanderbilt Journal of Transnational Law                    |
| Virginia. L. Rev.      | Virginia Law Review  |
| <br>                   |  |
| William & Mary L. Rev. | William and Mary Law Review                                |
| Wis. L. Rev.           | Wisconsin Law Review                                       |
| WRR                    | Wetenschappelijke Raad voor het Regeringsbeleid            |
| WTO                    | World Trade Organisation                                   |
| <br>                   |  |
| Yale L.J.              | Yale Law Journal   |

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## INTRODUCTION: GLOBALISATION AND HIGHEST COURTS

Sam Muller\* and Sidney Richards\*\*

### 1. INTRODUCTION: GLOBALISATION AND THE LAW

The reader of the present volume will scarcely need reminding that we live in an interconnected world with porous borders. Nor will he or she need reminding that it is a world which faces many cross-border challenges, among which the threat of international terrorism, the exigencies of global interconnected markets and the degradation of the environment. Owing to its ubiquity in our everyday political and cultural discourse, globalisation is one of those curious concepts with which we all seem intimately familiar despite having difficulty articulating it in a fully satisfactory and uncontroversial manner. Despite frequent claims to the contrary, the academic debate surrounding globalisation appears to be in a healthy state.<sup>1</sup>

Notwithstanding this overwhelming sense of familiarity which we have acquired with the concept, it is a comparatively recent development that legal scholars, taking their cue from legal practice, have begun to fully appreciate the relevance of globalisation to the study of law. Care must be taken, however, for there are many ways in which the law is deeply implicated in processes of globalisation – both new and old. Indeed, support for the view that globalisation is not limited to the current epoch but rather that it is a recurring feature of human affairs, may be found in as ancient a text as Gaius' *Institutes*. As both Jeremy Waldron and Patrick Glenn remind us in their contributions, within the Roman empire the presence of plurality of peoples, each with their own set of culturally determined laws, by no means precluded the coexistence of laws 'common to all mankind.'<sup>2</sup> In other words, a set of laws bound to a certain people or a certain territory – what we may anachronistically describe as *national* law – was merely one in a 'web' of several interconnected legal orders.

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<sup>1</sup> See D. Held and A. McGraw, *Globalization Theory* (Cambridge, Polity Press 2007) Chapter 1.

<sup>2</sup> Gaius, *Institutes*, I.1:1- '*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur*' [All nations, which are governed by laws and customs, draw partly on law peculiar to themselves, partly on law common to all mankind].

Similarly, one of the founding texts of public international law – Hugo de Groot’s *De iure Belli ac Pacis* – anticipated in 1625 many of the structural features that were to govern the dynamics of the international state system in future years. Certainly, the legal component of globalisation is undeniable. The proliferation of international conventions throughout the latter half of the 20th century was eventually supplemented by the establishment of various international and supranational bodies to deal with border-transcending problems. The medium through which many of these institutions – whether the United Nations, the World Trade Organisation or the European Union – operate is the law. In what sense, then, can it be said that legal scholarship was a relatively late arrival at the table of globalisation studies?

## 2. THE INTERNATIONALISATION OF THE JUDICIARY

One response to this question is to abandon a common assumption of traditional legal scholarship, namely the assumption that the law is *either* national *or* international. National courts deal with national law, and international law is consequently incorporated in a suitable way within the national legal order in accordance with the applicable political arrangements. But national courts are, for all intents and purposes, *national* actors and have no autonomous role beyond the border of their state. However, on the basis of the views offered in this volume, the rigid separation between national law and international law is becoming increasingly less tenable. Alongside the development of international law, alternative forms of transnational regulation have emerged and national legal systems are becoming ever more intertwined in the process. Against this background there are growing indications that national courts are carving out an autonomous role beyond their own borders.

This book is in large part based on the premise that insufficient attention has been given to the effects of globalisation on *domestic* courts – in particular the highest courts. More than other disciplines, legal scholarship appears to have been biased towards studying international tribunals and other explicitly international and supranational bodies when dealing with matters of globalisation. But it is only comparatively recently that the role of national highest courts in the international arena has received significant scrutiny. An important catalyst for this change in emphasis was undoubtedly the controversy caused by a string of decisions of the United States Supreme Court in which a number of justices referred to the decisions of foreign courts in interpreting the United States Constitution. This not only prompted severe criticism from their own colleagues – most notably by Justice Antonin Scalia, who, in a dissenting opinion, remarked that

‘[t]he Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part



of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry'<sup>3</sup>

but also generated a wealth of commentary in the media both for and against the practice.

It is important to note, however, that this opposition to the use of foreign sources, although not limited to the United States, is not ubiquitous. In many jurisdictions, the citation of foreign precedents is quite uncontroversial (particularly within the Commonwealth) and occasionally even encouraged by law.<sup>4</sup> It is, however, plausible that the surface issue of citing foreign decisions – which generally lack binding force and, according to many, legal relevance – is a proxy for more fundamental developments. A seminal statement of this hypothesis is found in Anne-Marie Slaughter's *A New World Order*,<sup>5</sup> where it is argued that, as globalisation proceeds apace to give virtually all policy issues a transnational dimension, global governance will increasingly be conducted by informal and formal 'networks' of national actors, rather than by explicitly appointed transnational and supranational institutions. States become 'disaggregated,' as Slaughter describes it, and judges cannot distance themselves from that phenomenon.<sup>6</sup>

We may thus tentatively speak of an 'internationalised judiciary.' Although such a term is inevitably diffuse, the contributions in this volume will provide a much more comprehensive and precise picture of what this entails. At this introductory stage, in a general sense the term can refer to one or more of the following phenomena:

- the aforementioned citation of decisions by foreign courts when interpreting national legislation, particularly when such decisions are not formally binding;
- a high degree of transnational harmonisation in various legal fields, particularly those relevant to trade and commerce (the 'race to the bottom' effect for capital and investment), e.g., intellectual property, fiscal laws, and standards for manufacturing and industrial liability;
- an increase in the formal and informal networks and avenues of communication between judges of different jurisdictions, e.g., conferences, workshops, exchanges and digital meeting places;

<sup>3</sup> *Roper v. Simmons*, 543 US 551 (2005), Scalia J. (Dissenting).

<sup>4</sup> Art. 39 of the South African constitution states that: '1. When interpreting the Bill of Rights, a court, tribunal or forum (...); (b) must consider international law; and (c) may consider foreign law.'

<sup>5</sup> A. Slaughter, *A New World Order* (Princeton, NJ, Princeton University Press 2005).

<sup>6</sup> In his contribution, William Duncan even explicitly recommends that judges be given a role on the process of treaty negotiations, so that they can give advice based on their judicial expertise. This, in his view, would help build a more 'internationalist' approach to interpretation, recognizing 'the need to give autonomous meaning' to convention language. See Duncan, *infra* p. 67.