Athens Contemporary Law Lectures
Direction of Series: Charalambos Pamboukis

Editor:
Charalambos Pamboukis
Professor, Faculty of Law, National and Kapodistrian University of Athens

Symposium on the Future of Global Law

Contributors:
Franco Ferrari
Nikitas E. Hatzimihail
Alex Mills
Arnaud Nuyts
Charalambos Pamboukis
Gunther Teubner

ΝΟΜΙΚΗ ΒΙΒΛΙΟΘΗΚΗ

Περιεχόμενα

1. Introduction 1

2. Fragments of Legal discourse on the Future of Global Law 7
Charalambos Pamboukis
Professor, Faculty of Law, National & Kapodistrian University of Athens

3. Towards a Genealogy of Global Law 19
Nikitas E. Hatzimihail
Associate Professor of Private Law, Comparative Law and Legal History,
University of Cyprus

4. The Diminishing State in Global Law 35
Alex Mills
Professor of Public and Private International Law, Faculty of Laws, UCL

5. A New Paradigm for International Substantive Law Conventions 43
Franco Ferrari
Professor, School of Law, New York University

6. Exequatur Going Global: The doctrine of exhaustion of remedies in the Member State of origin of the judgment 63
Arnaud Nuyts
Professor at the University of Brussels (ULB), Member of the Bar of Brussels

7. Transnational Economic Constitutionalism in the Varieties of Capitalism .. 97
Gunther Teubner
Professor emeritus, Law Faculty, Goethe-Universitât Frankfurt am Main

8. Concluding Remarks: A future for Global Law? 121
Nikitas E. Hatzimihail
Associate Professor of Private Law, Comparative Law and Legal History,
University of Cyprus

3

Towards a Genealogy of Global Law

Nikitas E. Hatzimihail
Associate Professor of Private Law, Comparative Law and Legal History, University of Cyprus

1. Introduction

I will start this journey *in medias res*: a mid-eighteenth century maritime case before the Court of King's Bench, in London, which involved a freight claim to a cargo in a British ship captured by the French and then recaptured, and sold, by a British privateer[1]. The case, originally tried in Devonshire, was reserved for the Court by Lord Mansfield, one of the founding fathers of English commercial law who played a pivotal part in the role asserted by the common law courts in these matters. I read from the *Reports*:

> Lord Mansfield said that though he was of the same opinion at the assizes as he was now; yet he was desirous to have a case made of it, in order to settle the point more deliberately, solemnly, and notoriously; as it was of so extensive a nature; and especially, as the maritime law is not the law of a particular country, but the general law of nations "non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit"[2].

In the two and a half centuries since Lord Mansfield, this passage has been often quoted by writers have sought validation for their own normative visions, political agendas and doctrinal aspirations. The Latin quotation comes from Cicero's *On the Republic*[3], a relatively early philosophical work, which at the time was surviving only frag-

1. *Luke v Lyde* (1759), 2 Bur. 882, 97 Eng.Rep. 614 (KB).
2. Ibid., 887.
3. Cicero, *De Republica*, 3.33. See for the passage below at p. 31.

mentary[4]. There is very little law in Cicero's actual passage, as we shall see below[5]. But Roman law is not the question here. What is more interesting is how this text, and passages like this, have been cited, quoted, misquoted, re-interpreted in discussions about natural law, obviously, but also *lex mercatoria*, transnational law and, now, also global law.

It is not the ambition of this essay to propose a genealogy, in the strict sense of the word, for global law. In fact, I do not even have to attempt to *define* global law. Nor am I concerned with pointing to the anachronisms and historical inaccuracies in such genealogies. What I am interested in concerns the stories being told — what narratives are being projected, and what the use of such narratives tells us about their authors, as well as about more general aspirations, challenges and recurring patterns in doctrine and theory. Admittedly, however, such an endeavour has a genealogical function.

The essay constitutes a preliminary exploration of some ideas, building on my ongoing work on the history of, and historical perceptions about, "transnational" commercial governance[6]. It is structured along two axes. On the one hand, the story — rather stories — about the fundamental concepts cutting across the history of legal ideas, which have been employed, or could be employed, in genealogies of global law. On the other hand, a very broad, rough typology of different potential meanings that "global law" could take.

There are two themes running through these axes — and my essay. First, the same term – or even concept – has meant different things to different people and/or in different eras. Second, different terms, and concepts, may be used, across time and space, to express the same thing — the same notion or aspiration, the same need or function.

2. Concepts in search of a story

Those looking for a story of legal evolution towards a global law, are well served by Rafael Domingo's stimulating book on the *New Global Law*[7]. The title is telling. Indeed, in his conclusion ("The Third Time is the Charm") Domingo puts forward a narrative of three ages:

4. See for more James E.G. Getzel, *Cicero: On the Commonwealth and On the Laws* (Cambridge: Cambridge University Press, 1999) and Ioannis Deligiannis, *M. Tullius Cicero On the Republic* (Athens: Kardamitsas, 2015, in Greek).
5. See below pp. 32.
6. See e.g. Nikitas E. Hatzimihail, "Genealogies of Lex Mercatoria" in *Studies in Memoriam of Professor Anthony M. Antapassis* (Ant.Sakkoulas, 2013) 311-351.
7. Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2010).

> If the ancient *ius gentium* served the hegemonic interests of Rome, and international law those of a state-based Europe, the new global law, based on the person, must contribute to the common good of humanity and to the development of world peace. The third time is the charm![8]

The structure of the book reflects this idea. In the first, historical part, Domingo traces the evolution "From the *Ius Gentium* to International Law"[9], in which there are three stages: "The *Ius Gentium*, A Roman Concept"[10]; "The *Ius Commune*, a Medieval Concept"[11]; "International Law, A Modern Concept"[12]. This could suggest that global law is the fourth stage, the move towards which is analyzed in the book's second part[13].

My own approach is markedly different. In my research project, I am examining all three of these concepts, alongside with natural law and the *lex mercatoria*. Three of these five have had a long history: natural law, *ius gentium* and the *ius commune*. Something similar could be argued about *lex mercatoria*, even though I would suggest that it has acquired its historical pedigree ex post. International law is a relatively recent term, which at the dusk of the Early Modern era replaces the latest incarnation of the *ius gentium*.

What all five of these concepts seem to have in common is that they have stood, across time, for an approach to law broader than a very strict, parochial positivism. But even this argument is tenuous, once subjected to historical scrutiny. Moreover, each of these concepts took different meanings across time; sometimes, these different meanings of the same concept even coexisted in the same context. And the concepts thm - selves often coexisted – there were subtle shifts, with one concept often picking up territory that the other had abandoned, but there has been no clear conceptual succession.

2.1 Natural law

Natural law offers the best example. The term itself has been in use for over two millennia – going back to Classical Antiquity, in the very least. It could even be suggested that it has been used continuously since then. But it has meant different things to different eras. At this point, I would happily draw on the Italian jurist Al-

8. Ibid., 195.
9. Ibid., 3ff.
10. Ibid., 3ff.
11. Ibid., 12ff
12. Ibid., 22ff.
13. Ibid., 53ff. ("Toward a Global Law").

exander Passerin d'Entreves, who distinguished three past eras (I would say three lives) of natural law[14].

In Roman law, "natural law" was conceived in broad terms, as providing a legal standard uniting humanity into a universal community[15]. The function of natural law was "not to generate an external measure against which to judge positive statute so much as to explain why the human race could be placed under an obligation to obey an identical act of human laws without regard to geographic, cultural, linguistic or racial differences"[16]. There is no indication of natural law being superior to "positive law," or of a rights discourse[17].

Medieval canonists, and the scholastics who followed them, elaborated a natural law grounded on God's will[18]. Such hierarchical provenance created a higher source of law — and the doctrine that any dictate had to conform to the rational principles of justice established by natural law in order to have the force of law[19]. I should note that the Medieval doctors of civil law, while learned children of their era, remain greatly influenced by their Roman law texts in this regard.

Early modern natural law, especially as we move into the Enlightenment, was rationalistic, individualistic and radical[20]. *Rationalistic* in the sense of a conviction that human reason was enough by itself to ascertain the laws of nature. *Individualistic* in the sense of emphasising the role of human beings as bearers of rights[21]. Conceived in terms of a *natural right* or *rights*, over time, and under the influence of the Enlightenment[22], "natural law" becomes more radical in its political associations and can be found behind the American, French (and, I would argue, even the Greek) revolution.

Today, all these ideas co-exist in the modern discourse. Moreover, even though we do not talk much about natural law as a fixture of present-day law, its influence

14. Alexander Passerin d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (1951) (New Brunswick / London: Transaction Publishers, 1994).
15. Ibid., 22ff.
16. Cary J. Nederman, "Introduction," in Passerin d'Entrèves, *Natural Law*, xv.
17. Passerin d'Entrèves, *Natural Law*, 34.
18. Ibid., 37ff.
19. Ibid., 45.
20. Ibid., 51ff.
21. Ibid., 61: "The *ius naturale* of the modern political philosopher is not the *lex naturalis* of the medieval moralist nor the *ius naturale* of the Roman lawyer."
22. See also Jonathan Israel, *Radical Enlightenment* (Oxford: Oxford University Press, 2002), esp. 258ff.

is widespread and the functions it has served are being attributed to different legal constructs.

2.2 Ius Gentium

This history of natural law is connected to the other concepts, especially *ius gentium* and the *ius commune*. This is not the place to explore the tripartite and bipartite schemes of Gaius and Ulpian, Bartolus and Baldus, Grotius, Voet and Huber, but it must be noted that pre-Modern legal hierarchies are more complex than our Kelsenian positivist pyramid.

We know relatively little about the Roman legal institution of *ius gentium*[23]. Especially during the period of the urban empire, the main body of Roman law, *ius civile* remained applicable in the relations between citizens (*inter cives*). Relations between alien residents (*peregrini*) and between citizens and aliens were not subjected to *ius civile*, but to a separate body of law, the *ius gentium*, administered by a separate Roman official, the *praetor peregrinus*. There are limited sources to make us understand what exactly the peregrine praetor's law was. On the other hand, we can draw on Roman texts, such as the Institutes of Gaius, where *ius gentium* is equated to natural law, as opposed to *ius civile*[24]. However, Gaius wrote long after the peregrine praetor had finished his work, and we possess no record of the *ius gentium* of Cicero's time as it pertains to private-law matters[25]. He himself has left no evidence of dealing with peregrines. Whereas he seems in some of his writings to invoke *ius gentium* in distinguishing between a "universal" *ius gentium* and the ius civile[26], and has been quoted likewise, some of his occasional references imply a triple distinction between the law of nature (*lex naturae*), the common *ius* of nations (*commune ius gentium*) and the *ius civile*[27] – a conception also encountered in some of the classical jurists of the Digest like Ulpian[28]. In any case, it must be remembered that Cicero was trained in law but worked principally as a statesman and orator. A quick look at the texts quoted can suggest the extent to which he was invoking these terms and concepts in different pursuits, pursuing a normative agenda of moralizing the Roman law and integrating philosophical influences into the public and moral life of the Republic.

---

23. See notably Gabrio Lombardi, *Ricerche in tema di Ius Gentium* (Milano: Giuffrè, 1946) and *Sul concetto di "ius gentium"* (Rome: Istituto di diritto romano, 1947); Max Kaser, *Ius gentium* (Cologne: Böhlau, 1993).
24. See Gaius, *Institutes*, 1.1.
25. Kaser, *Ius gentium*, 17.
26. Cicero, *De officiis*, 3.17.69-70.
27. Cicero, *Oratio de haruspicum responso*, 14.32.
28. D. 1.1.1.2.

In the middle Ages, *ius gentium* plays little role — for example, in Bartolus it serves to provide a common legal framework on reprisals between Western Christianity *(populus Romanus)* and the *populi externi*[29]. It is actually *ius commune* that covers functions which will be eventually reclaimed by *ius gentium*[30]. Over time, that *ius gentiumis* gradually being addressed in the vernacular and renamed the law of nations[31].

What I have found at least equally fascinating, is the role the Roman *ius gentium* has been playing in the imagery of private international lawyers since the nineteenth century[32]. As historical narratives evolved in accordance with the changing worldview of private international lawyers, what was once regarded as a sophisticated device of conciliating the ancient insistence to keep native law away from foreigners with the practicalities of commerce and life, came to be regard as the first real conflicts system, either because the Romans were the first forum to apply the rules of different laws depending on the origins of the parties, or because they asked the eternal conflicts question (i.e. which is the applicable law to a relationship connected to more than one legal systems); parallels were even drawn between the peregrine praetor and the direct (substantive) regulation of international private relations in modern conflict of laws, until eventually *ius gentium* was reclaimed by legal cosmopolitanism. Presented as a "model to which all law ought as far as possible to conform," a "legal system based on natural reason and having a universal purport"[33], *ius gentium* became connected to *lex mercatoria* and myths of global law.

2.3 Lex mercatoria

And this brings us to lex mercatoria — our elusive Arlesienne. We are now into genealogies, rather than history. In my earlier work, I contrasted the two main types of historical narratives employed in doctrinal literature of international commercial law[34]. Thus Clive Schmitthoff, the emblematic figure of those advocating for a law of international business inclusive of national/legislative sources, presents an evolutionary or progress narrative, which, while romancing about the role of au-

29. See e.g. Bartolus, *Tractatus represaliarum* vol. 10, fol. 119^{vb}–124^{va} (Venice, 1602).

30. Claudia Storti, "'Early "Italian' Scholars of *Ius Gentium*" in G. Bartolini (ed.), *A History of International Law in Italy* (Oxford: Oxford University Press, 2020), 19-46

31. See e.g. Emmer de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (Paris, 1758).

32. Nikitas Hatzimihail, "Pre-Historical Private International Law" (forthcoming in the *Yearbook of Private International Law*).

33. Friedrich Juenger, *Choice of Law and Multistate Justice* (Dordrecht: Martinus Nijhoff, 1993), 9.

34. Nikitas E. Hatzimihail, "The Many Lives - and Faces - of Lex Mercatoria: History as Genealogy in International Business Law" *Law & Contemporary Problems* 71 (2008): 169-190.

tonomous merchant communities, acknowledges the contribution of national legislation at certain points in history[35]. In contract, Berthold Goldman, an early proponent of an a-national *lex mercatoria*, espoused a cyclical narrative, where lex mercatoria as the child of commercial practice prospers and then vanishes, as civilization collapses or legal nationalism takes charge[36]. There are of course other narratives. Practitioners or legal economists with emphasis on spontaneous law devise narratives of perpetuity, almost alluding to natural law[37].

The way in which each of these authors embrace or appropriate much of the history of natural law et cetera has close affinities with potential similar endeavours to provide a pedigree for global law: parallels between the three lives of Goldman's *lex mercatoria* and Domingo's global law is an easy example.

3. What is Global Law?

So what is global law? Or at least, what "global law" is, or has been, about? The very rough list that follows could be grouped into three or four groups. In the first group, "global law" is about *norms* — about providing us with a concrete legal rule or legal source to enable the solution of a concrete legal problem. In the second group, "global law" acts as a symbol, weapon or tool, for a broader normative or professional agenda. In the third group, "global law" has a mostly epistemic significance — it is about making us think in different terms.

3.1 "Global Law" as Legal Institutions

"Global law" can be about legal institutions that have travelled, becoming "global" — in the sense of being widely adopted, of course, but especially in the sense that we have lost track of their origins, or at least that there is no more any effective meaning these origins in understanding the institution in question and its function.

This is the case with much of the law on the sea. The bills of exchange offer another prominent example[38]. To the list we can add other medieval and early modern instruments of commercial practice, including the law on business associations, especially partnerships, and even insurance contracts.

---

35. Hatzimihail, "Many Lives," 175ff., discussing Clive Schmitthoff, The Unification of the Law of International Trade, *Journal of Business Law* (1968), 105ff., 105-109.
36. Hatzimihail, "Many Lives," 181ff., discussing Berthold Goldman, :"Lex Mercatoria," *Forum Internationale* 3 (Nov. 1983), 3ff., 3-7.
37. See e.g. Bruce Benson, "Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (1989): 644-661.
38. See notably James Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge: Cambridge University Press, 1995).

There are normative stakes in the genealogy of these institutions: a legal institution deriving from universal, ancient custom is easier to defend against politics or legislative intervention, and this is indeed the story of invocations of the law merchant in Early Modern England[39]. Conversely, there are lessons to be drawn from the study of these institutions' evolution, and shifting operation, over time. But the roots of the legal institution no longer carry *direct* interpretative significance[40].

3.2 "Global Law" as Legal Hierarchies

Global law can also be about a hierarchically superior body of law or a legal system, superior in the hierarchy. Images of natural law, *ius gentium*, the *ius commune*, or *lex mercatoria* and the "truly international" order public spring to mind.

Let us consider for example the theory of legal sources in the Italian jurist Bartolus da Sassofferato (1313-1357). Bartolan doctrine revolves around Roman imperial law, the "common law" (*ius commune*): city law, the *iura propria*, are supposed to emanate (derogate) from this law. But he also envisages a hierarchy of laws in which divine law, natural law, and the *ius gentium* are all, in some sense, higher than the law of the emperor[41]. For Medieval jurists, such *iura* constituted a structure of axiomatic higher norms, within the context of which the power of the emperor to create positive law had to operate[42]. They were therefore binding even on the emperor – and of course, they are at least as binding on all other polities nominally or formerly subordinate to him. For example, Bartolus views natural law as setting limits to what could be done to change procedural systems[43]. He also argues that the Emperor cannot just take away individual property (*dominium*) without cause because it derives *de iure gentium*[44]. This is a hierarchical function internal to the legal system.

---

39. See M.E. Basile et al., *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife* (Cambridge MA: The Ames Foundation, 1998).

40. This is not to deny the normative stakes involved. Thus Rogers was motivated into his historical work on commercial papers by his work on modern payment systems, leading to James S. Rogers, *The End of Negotiable Instruments: Bringing Payment Systems Law Out of the Past* (Oxford: Oxford University Press, 2011). See also Hatzimihail, "Genealogies," 348ff.

41. Bartolus ad D.1.1.9, nu. 2.

42. Joseph Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge: Cambridge University Press) 76: "[T]he constitutive element of law was not the ruler's command or the people's consent alone, but that will exercised in accordance with moral, religious and rational criteria."

43. Bartolus, *Tractatus super constitutione* Ad reprimendum, v^{o} *figura*, vol. 10, fol. 99^{rb} (Venice, 1602).

44. In contrast to things he can do under the *ius civile*, such as actions in law. See Bartolus ad C.1.22.2 nu. 3, 92b (Basel, 1562): "quaedam de iure civili, ut actiones, et istae possunt auferri per principem. Quaedam de iure gentium, ut dominium, et istud non potest auferri."

3.3 "Global law" as vantage point

A different but related function to hierarchical superiority is the invocation of "global law" in providing us with an external perspective[45]. Even in a purely horizontal system of territorial states, such a perspective can provide a mediating argument in the conflict between the laws of "competing" legal systems. In a more complex legal world, the bilateral conflict merges into triangulation: for example, whereas medieval conflicts doctrine cannot be seen purely in terms of a "horizontal" conflict between the legal systems of two states, it is certainly much more than a hierarchical conflict between *ius commune* and *iura propria*. This is, in fact, often the case with Bartolus on the conflict of laws[46]. Many conflicts in early fourteenth-century Italy involved one city whose law derogated from the *ius commune*, and one which followed the *ius commune* in the case at hand; in these cases, Bartolus invokes the *ius commune* as an arbiter between the jurisdictional claims of two states: his famous – and widely misunderstood today – distinctions between statutes (on a first level between prohibitive and permissive, within the latter a distinction between favorable and burdensome; an occasional distinction between *circa personam* and *circa rem*) must be understood in this context.

Such triangulation, however, is not absolute. There are instances, notably with regard to punitive legislation, where Bartolus invokes "foreign" law in order to enable *forum* derogation from the *ius commune*:, in the case of a foreign resident whose offense is "commonly prohibited" by city statutes[47], and, in the case of a citizen punished under the law of the place where the wrong was committed[48].

3.4 "Global Law" as Common Legal Language

This brings us to yet another function or apparition: global law as a common language, the common interface of the interaction between distinct legal regimes. This was an important function of the learned law (our *ius commune*) in both Medieval and Early Modern Europe.

3.5 "Global Law" as Legitimation Narratives

The imagery of "global law" and its kin can be a powerful weapon in legitimation narratives and professional strategies of groups. These legitimation strategies are

45. On the idea of an external as contrasted to an internal perspective see e.g. Lea Brilmayer, *Conflict of Law*s, 2nd ed. (Boston: Little, Brown, 1995), 1ff.
46. Nikitas Hatzimihail, *Preclassical Conflict of Laws* (Cambridge: Cambridge University Press, 2021), 219 ff.
47. Bartolus ad C.1.1.1, nu. 20.
48. Ibid., nu. 48.

not unique to our discourse: Consider for example, *Volksgeist*: the "spirit of the people/nation," of the German historical school: this was a powerful concept with profound impact on nineteenth-century legal thinking, yet it tended to be about empowering Roman-law scholars more than embracing folk customs, let alone people power. The globalization of law offers its own examples, as has been demonstrated in studies looking into international arbitration from the point of view of legal sociology and professionalization strategies[49].

If we now look to anti-statist lex mercatoria narratives, for example our very own Berthold Goldman and the anarcho-capitalist Bruce Benson, both emphasising the spontaneous, "private" origin of commercial norms but having very different agendas.

Goldman, who wants to renew the legitimating foundations of the existing order of international commercial law and dispute resolution actors, uses merchants as his Savignian Volk: he thus makes barely any explicit reference to merchants as norm creators: even to rebut skeptics claiming that no *societas mercatorum* exists, he refers to arbitral awards — rendered by jurists. For him, commercial norms are spontaneous because they simply appear, and spontaneous means custom[50].

On the contrary, Benson, who takes issue with the notion that state law is necessary for the development and enforcement of property and contract rights, would even draw on arguments from behavioural economics and game theory in support of his claim that "modern commercial law is, in fact, largely made by the merchant community despite governmental efforts to take over provisions of such law"[51].

3.6 "Global Law" as Disciplinary Renewal

Another instance of legitimation / professional strategies is how "global law" is therefore being promoted as a concept, or term, to revitalise a legal discipline such as public international law – or, closer to home, private international law. As to the former, let us consider, for example, Rafael Domingo, who is motivated into his reconceptualization by the "crisis of international law," which he associates with the challenges to the primacy of "States as subjects of international law"[52]. As to

49. Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago IL: University of Chicago Press, 1997). For another example see Dezalay & Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (Chicago IL: University of Chicago Press, 2002)
50. Berthold Goldman, "Frontières du droit et lex mercatoria," *Archives de philosophie du droit* 9 (1964) 177, 189.
51. Benson, "Spontaneous Evolution," 644.
52. Domingo, *New Global Law*, 53ff.

the latter, the other contributions in this book, including the programmatic opening of Haris Pamboukis, offer a prime example[53].

"Global law" has also been used to introduce new kinds of actors, and new subjects, into an existing field. If the terminological and conceptual shift from "law of nations" to "international law" was connected, at least in substantial part, to legal positivism (and legal classicism)[54], the new terminology has been employed as a way of more prominently integrating non-governmental actors, or quasi-public subjects, from international economic law to public-interest litigation. In this respect, "global law" follows on the term "transnational law," introduced by Philip Jessup to encompass "all law which regulates actions or events that transcend national frontiers"[55].

The new term has also been used to bring together legal disciplines — for example comparative and international law. A novel term can be a powerful tool: for example, the wholesale adoption of the term *private international law*, as opposed to conflict of laws, was part of the construction of a distinct legal discipline in the field[56]. Sometimes, a novel term is introduced simply as a morale booster, in a manner not unlike our moving furniture around the house to feel better and better off:

---

53. See also e.g. the contributions in Franco Ferrari and Diego Fernández Arroyo (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham/ Northampton MA: Edward Elgar, 2019).

54. The term "international law" is credited to Jeremy Bentham (1780), who did spoke of "international jurisprudence:" Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (Oxford, 1879: reprint of the 1823 edition), § 17.25, esp. 326 n. 1:

> The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the law of nations: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D'Aguesseau has already made, I find, a similar remark: he says that what is commonly called droit des gens, ought rather to be termed droit entre les gens.

See e.g. M. W. Janis, "Jeremy Bentham and the Fashioning of 'International Law'," *American Journal of International Law* 74 (1984): 405-418. We should reach the mid-nineteenth century to truly find the term and concept of international law taking hold. See e.g. Louis Renault, *Introduction au droit internationa*l (Paris, 1879).

55. Philip C. Jessup, *Transnational Law* 2 (New Haven CT: Yale University Press, 1956). At Harvard, Detlev Vagts promoted this approach: Henry J. Steiner & Detlev Vagts, *Transnational Legal Problems: Materials and Text* (Mineola NY: Foundation Press, 1968); Detlev Vagts, *Transnational Business Problems* (Mineola NY: Foundation Press, 1986). See also Harold Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996) 181-207.

56. See Nikitas Hatzimihail, "On Mapping the Conceptual Battlefield of Private International Law," Hague Yearbook of International Law 13 (2000): 57-64; idem, *Preclassical Conflict of Laws* esp. 17 ff., 64 ff., 201 ff.

some of the references to "transnational law" or even "global law" in the field of international commercial law seem to be about that[57].

3.7 Global law as Global Governance

Global law has also been linked to an interdisciplinary approach. "Global law" in that sense is global governance, forcing us to think in terms of a "complex of more or less formalized bundles of rules, roles and relationships that define the social practices of state and non-state actors interacting in various issue areas". The process, however, by which the said bundles are produced, in the course of that interaction, is at least as important as the complex itself.

There has been a growing interest among private international lawyers to engage with the concept, and consequences, of global governance[58]. This engagement offers opportunities of epistemic renewal for our discipline. Private international law, whose long-term viability was questioned in the turn-of-millenium days of "irrational exuberance", is reclaiming its relevance, just as it is transformed in meeting the challenges of regulatory law and decentralized methods of regulatory enforcement[59]. New perspectives are being considered: in addition to the perspective of a national or international legislator, or of a judge, "global" legal and business practice invites us to see things from the point of view of private actors whose activities, interests (and soft power) transcend national borders: *compliance* is the key word.

3.8 Epistemics of Global Law

This brings us deeper into the epistemic dimension of "global law." In its most expansive definition, "global" can be contrasted to "local." This has been explored especially in disciplines such as anthropology[60]. Global could be likewise defined in terms of encompassing context, or in terms of norms produced by anything but the state.

---

57. See e.g. the essays in Klaus-Peter Berger (ed.), *The Practice of Transnational Law* (Kluwer, 2003): the collection represents the internal diversity of approaches, but one could well substitute "transnational law" for *lex mercatoria*.
58. See e.g. H. Muir Watt and D. Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015); Matthias Lehmann, "Regulation, global governance and private international law: squaring the triangle," *Journal of Private International Law*, 16 (2020), 1-30; and the ongoing book project on the role of private international law in the achievement of the UN's Sustainable Development Goals 2030, run by Ralf Michaels, Veronica Ruiz Abou-Nigm and Hans van Loon.
59. See the essays in Arnaud Nuyts & Nikitas Hatzimihail (eds.), *Cross-Border Class Actions: The European Way?* (Sellier, 2013)
60. See e.g. M. Kearney, "The Local and the Global: The Anthropology of Globalization and Transnationalism" *Annual Review of Antthropology* 24 (1995) 547-565.

3.9 Global Law as Cosmopolitanism

"Global law" can also serve as a more juristic term for cosmopolitanism. The term is legal cosmopolitanism, with undertones of cosmopolitanism in law. But I am more interested in the Stoic idea of the κοσμόπολις, which proved especially influential in the Rome of the late Republic and the Principate, and thus found its way to Roman law, as well as Roman philosophy[61]. Contrary to common conviction, cosmpolitanism is not a celebration of a-national or rootlessness. The Stoic man is an engaged citizen of his polis but also understands that everything is connected and he and his city forms part of a whole. The Greek word συμπάθεια is used to indicate this awareness of interconnectedness.

This brings us back to Cicero's passage on natural law from *On the Republic*. It is actually

> True law is right reason, consonant with nature, spread through all people. It is constant and eternal; it summons to duty by its order, it deters from crime by its prohibitions. Its orders and prohibitions to good people are never given in vain; but it does not move the wicked by these orders or prohibitions. It is wrong to pass laws obviating this law; it is not permitted to abrogate any if; it cannot be totally repealed. We cannot be released from this law by the senate or the people, and it needs no exegete or interpreter like Sextus Aelius. There will not be one law at Rome and another at Athens, one now and another later; but all nations at all times will be bound by this one eternal and unchangeable law, and the god will be the one common master and general (so to speak) of all people. He is the author, expounder, and mover of this law; and the person who does not obey it will be in exile from himself. Insofar as he scorns his nature as a human being, by this very fact he will pay the greatest penalty, even if he escapes all the other things that are generally recognized as punishments[62].

It is clear that Cicero is not talking about "international law" or even *ius gentium*, (however we — or the Romans — have conceptualised that latter). If anything, he is assumes a diversity of actual law in different places and times, in order to contrast it with what he presents as "eternal and unchangeable" "law." He even contrasts the sanctions and enforcement mechanisms of legal norms with this "true law." We should be paying attention to the last few sentences.

---

61. See Tamara T. Chin, "What is Imperial Cosmopolitanism? Revisiting Kosmopolitēs and Mundanus," in Mylan Lavan, Richard E. Payne, John Weisweiler (eds.), *Cosmopolitanism and Empire: Universal Rulers, Local Elites and Cultural Integration in the Ancient Near East and Mediterranean* (Oxford: Oxford University Press, 2015), 129-151.

62. Cicero, *De republica*, 3.33, as translated by Getzer, *Cicero On the Republic*, 71-72.

This is certainly closer to natural law, as the Romans defined it. But I would invite you to think beyond "law" strictly speaking. Cicero warns us against hiding, in our ethical choices, behind legal norms or the prospect of sanction. The greatest penalty is the exile from oneself, scorning one's nature as a human being. It is not an accident that this passage has been preserved for posterity by Lactantius, a Christian author of the Late Antiquity[63].

Conclusion

So what is global law? Does it have a past and how would this connect to its future possible future? These are early thoughts on a vast and challenging topic – indeed an agglomeration of subjects. But some themes and constants are emerging. I would suggest that the allure of the notion of global law lies precisely in its potential to mean different things to different people (and ages). For me, global law is an invitation to reflect upon, and tell stories about, the life of the law. With this in mind, I would discern three themes, cutting across the historical material and the literature on "global law," broadly defined.

First, the use of *fictions* to shape our world to carve out new fields, reshape scholarly subjects, establish practice niches. Sometimes, these fictions are even literal: *lex mercatoria* has been an apt example, from the anonymous medieval English jurist who called her the daughter of the common law, to Berthold Goldman's "venerable old lady."

Second, global *governance*: one may be sceptical of novel concepts but still must acknowledge the value – and the reality – of the efforts by a globalised humanity to create/recreate institutions with a global touch. These institutions are pre-empting, or appropriating, global practices. They are reshaped by — and are in their turn reshaping — as well as being transformed alongside the economy.

Third, and this brings us full circle to our natural law passage, feeling out the moral / ethical boundaries within which law operates. To quote, again, Passerin d'Entrèves:

> Natural law is the outcome of man's quest for an absolute standard of justice. It is based upon a particular conception of the relationship between the idea and the real. it is a dualist theory which presupposes a rift though not necessarily a contrast between what is and what ought to be[64].

63. Lactantius, *Institutes*, 6.8.6-9.

64. Passerin d'Entrèves, *Natural Law*, 93.

The study of law is theory and practice, pragmatism and idealism, understanding and action, *iusti atque iniusti scientia*[65] and *ars aequi et boni*[66]. The quest for "global law" allows us to explore justice in the broadest sense: not just the creation and the application of the norms, but also an awareness of their consequences and of the interconnectedness of things. Like its sibling concepts, "global law" represents the collective ethos — and effort — of jurists to make this a better world, to make a lasting contribution all while being aware of the true scale of things, in time and space. It is an affirmation of our faith in law, as well as of our awareness that law can only be sovereign when a servant of humanity, aware of its own limitations.

65. Inst. 1.1.1.

66. Dig. 1.1.1.