

The New Global Law

RAFAEL DOMINGO



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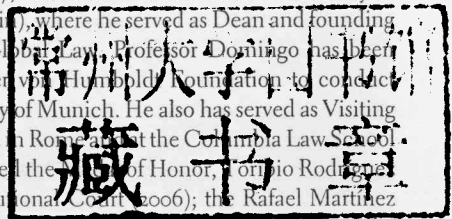
THE NEW GLOBAL LAW

The dislocations of the worldwide economic crisis, the necessity of a system of global justice to address crimes against humanity, and the notorious “democratic deficit” of international institutions highlight the need for an innovative and truly global legal system — one that permits humanity to reorder itself according to acknowledged global needs and evolving consciousness.

A new global law will constitute, by itself, a genuine legal order and will not be limited to a handful of moral principles that attempt to guide the conduct of the world’s peoples. If the law of nations served the hegemonic interests of ancient Rome and international law served those of the European nation-state, then a new global law will contribute to the common good of all humanity and, ideally, to the development of durable world peace. This volume offers a historical–juridical foundation for the development of this new global law.

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In memory of Emilio Nadal

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Preface

We live in a world of profound change. The implementation of new technologies; the growing impact of mass media communications; the unprecedented development of a market economy on a global scale; the ubiquitous role of a civil society progressively consolidating, vertically and horizontally; the shared desire to address the problems afflicting humanity, such as international terrorism, arms trafficking, hunger and poverty, sexual exploitation, political and economic corruption, abuse of power, and increasing environmental challenges that threaten the configuration and peace of the planet – these are some of the issues that characterize our unique and never-recurring historical moment.

We are propelled through life at a dizzying speed. Perhaps this is the most salient difference from the past: the hectic pace of our social relations, which at times makes it difficult to adapt to the demands of justice. Our society is the product of a complex mosaic of political, economic, and cultural relationships, the intricacies of which are hardly recognizable merely by applying the social norms of yesteryear.

Faced with this reality, which is as certain as our own existence, we jurists cannot and should not turn a blind eye, thereby allowing the law of the jungle to take over in this age of globalization because of lack of foresight, consistency, or imagination. We cannot acquiesce to world domination by economic imperialism or political cryptocracy as if it were some kind of private estate. The science of law has become obsolete in many respects; it has been overwhelmed by new facts and circumstances. The increasingly opaque distinction between public and private spheres, the intrinsic complexity of facts to be ordered by law, and poor planning in the face of a rapidly changing future have eviscerated many legal principles that once might have seemed permanent and unchanging and now seem, at best, mercurial. At times, the

weight of cultural idiosyncrasies and circumstance is so great that we think of them as part of nature. Nature itself, however, also changes – at least in part.

I am reminded of the famous words in Gaius' *Institutes* (2.73), where the second-century jurist states that "what a man builds on my land becomes mine by natural law, although he built on his own account, because a superstructure goes with the land" (*superficies solo cedit*).¹ I doubt that the same jurist would repeat this precept, accepted by courts throughout the ages, if he had taken a stroll along Manhattan's Fifth Avenue. Today, this principle has been overturned in many cases, with "structure prevailing over land." Thus, natural law, in the modern sense of the term, does not embrace this tenet. In Ancient Rome, however, the inherent nature of things (*rerum natura*) prevailed as the standard of legal interpretation that led Gaius to formulate this principle. To be sure, though, for a long time, the stricture was observed.

In his classical essay *Revitalizing International Law*, Richard Falk complained that jurists – especially American jurists – are averse to paradigm shifts in response to the complexities of society and political phenomena.² Globalization commands a reformulation of the law, an appropriate legal response to changing times to avoid becoming hostage to outmoded, transient paragons. It is a moral obligation.³ The time has come for a global law just as earlier, the time was ripe for the law of nations and what later became "international law." Without the *ius gentium*, international law cannot be understood. Moreover, absent the development of international law, nascent global law would not come into being. These three legal domains (the law of nations, international law, and global law) are like grandfather, father, and grandson, respectively. They are part of one and the same family. Therefore, they have common traits that bind them even though they are based on different legal principles and were applied at completely different times in history. That they have coexisted and overlapped bespeaks this commonality and difference.

¹ Vide Gaius, *Institutes* 2.73 (ed. Francis de Zulueta, *The Institutes of Gaius, Part I. Text with Critical Notes and Translation*, Oxford University Press, Oxford, 1946), pp. 84–85: "Praeterea, id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit."

² Richard Falk, *Revitalizing International Law* (Iowa State University Press, Ames, 1989), p. 10: "Paradigm changes are especially uncongenial to the American lawyers who tend to view constructive social change as necessarily incremental and who distrust overall explanations of complex social and political phenomena."

³ See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford, New York, 2007), p. 432: "The task of international legal reform is no longer merely a morally permissible option, something to be pursued only so far as it promotes the 'national interest'; it is a moral necessity."

I do not, therefore, entirely agree with the great legal scholar Lassa Oppenheim (1858–1919) – nor with his followers – when he suggests that international law in the term's current sense is "a product of Christian civilization" that gradually began to develop in the Late Middle Ages, especially with Grotius, who was the originator of a later conceptualization of the law of nations.⁴ Such a point of departure is somewhat artificial. Is it possible to understand Grotius without at least Gentili or Vitoria, Vitoria without Thomas Aquinas, or Aquinas without Isidore of Seville? Can we understand St. Isidore without first knowing Ulpian, Ulpian without Gaius, Gaius without Cicero, the great Roman orator without the Stoics, and stoicism without Socrates? The litany of epistemological "moments" of development leads to a simple and succinct response: Of course not. Certainly, this penchant in favor of fragmentation has occurred within the history of international law, notable for platitudes that, like a family heirloom, have been passed down for generations.

I do accept, however, the happy turn of phrase with which Jean Monnet (1888–1979) closes his fascinating memoirs: "*les nations souveraines du passé ne sont plus le cadre où peuvent se résoudre les problèmes du présent.*"⁵ It represents an outdated notion and pointless nostalgia, but it also underscores the need to acknowledge that tools useful at certain times in history, such as the concept of the sovereign nation itself, may lose their relevance in another era. The time has come for imagination and creativity. Humanity has common problems that must be addressed by the justice system and, therefore, by law – a law that, to use the well-known expression of the "Father of Europe," must unite mankind, not merely nation-states.⁶

Better yet, the time has come for a law that integrates the highest values of different legal traditions while acknowledging the living synthesis of diverse and often disparate cultures. In this sense, it seems that global law calls for a "pure theory of Law," although not in a Kelsian paradigm, because nothing can be farther from a pristine construct than "hyper-conceptualization." The approach to global law must employ new legal instruments, concepts, and rubrics to order, in accordance with law, new social realities. There is an attendant need to "refine" once again those legal tenets that have been misconstrued as instruments of economic and political power.

We must recover the notion of *populus* in its most authentic sense, that is, as a grouping of mature adult citizens, and apply it to humanity. "The people" is

⁴ Lassa Oppenheim, *International Law I* (8th ed., edited by Hersch Lauterpacht, Longmans, Green and Co., London, New York, Toronto, 1955), §1, p. 6.

⁵ Jean Monnet, *Memoirs* (Librarie Arthème Fayard, Paris, 1976), p. 617.

⁶ Jean Monnet, *Memoirs* (Librarie Arthème Fayard, Paris, 1976), p. 9: "Nous ne coalisons pas des États, nous unissons des hommes."

inclusive, whereas the *enlightened nation* never was. Humanity will never be a global nation in a revolutionary sense. It will come closer to the concept of a people, a sort of *populus populorum*, organized into an anthroparchy. People as most “popular” and “commonly accepted” is “we”; whereas it is the “they” who chart the course of any nation. Humanity refers to itself as “we” but not as “they.” In this respect, I agree with John Rawls.⁷ We should not forget that the American Revolution was carried out by the people, the French Revolution by the nation, and the Russian Revolution by the party.⁸ This is one reason why the American Revolution has, conceptually speaking, best withstood the passage of time. It is this proposition that most likely will contribute to the system of global law.

The ancient Roman concept of *maiestas*, which was replaced by *sovereignty* in the sixteenth century, must be subjected to sustained analysis. In the formation and transformation of a new global law designed to coexist with its domestic and international counterparts, we must restore to the law the notion of person, which has been lost in analytical jurisprudence. The human person, and not the state, should constitute the cornerstone of global law. Humanity is the global amalgamation of *persons*, not states. Consequently, a global law must find its normative foundation in the *person*, that is, the individual in space and time who ultimately is responsible for and is the reason for being of all jurisprudence and positive law. Uniquely situated as spectator, spectacle, legislator, and target of all normative precepts, it is the concept of *person* in all its richness that constitutes the first principle of the global law. Indeed, contrary to Kelsen’s assertions, all law stems from the *person* (*ius ex persona oritur*). It is the very “personification of the state”⁹ that has caused the dehumanization of the *person*, its objectification and stripping of the special properties of human dignity. This proposition constitutes the lodestar for securing a comprehensive understanding of the effort that this text embodies.

* * *

This modest effort offers the academic community a historical–juridical foundation that may constitute the basis for this *ius commune totius orbis*, whose

⁷ John Rawls, *The Law of Peoples, with The Idea of Public Reason Revisited* (Harvard University Press, Cambridge, Massachusetts, 1999), pp. 23–30.

⁸ In this vein, cf. David Armstrong, *Revolution and World Order: The Revolutionary State in International Society* (Oxford University Press, Oxford, New York, 1993).

⁹ For more on the analogy of the person and the state in international law, see Charles R. Beitz, *Political Theory and International Relations* (with a new afterword by the author) (Princeton University Press, Princeton, Oxford, 1999), p. 70: “Perceptions of international relations have been more thoroughly influenced by the analogy of states and persons than by any other device.”

coming into being is inevitable. It is the aspiration of this text to explain ideas and ideals but not ideology.¹⁰ I understand global law to be a world legal order that governs the ambit of justice as it affects humanity as a whole. Global law, compatible with the existing legal systems and traditions within the framework of international economics and politics, would gradually abandon the corset of the nation-states and employ a legal metalanguage in response to the new challenges of globalization in all its permutations.

The reader must not confuse global law with a closed legal system or juridical order, let alone a mere collection of more or less binding and sterile rules. Rather, it would be a system of systems, a *iuris ordorum ordo*, which necessarily would develop into an *ordo orbis* as it is gradually accepted by all communities and citizens of the world. Its purpose would be similar to that of the sun in the solar system that is mostly composed of planets but also of billions of smaller bodies: asteroids, meteorites, comets, and so on. In my example, each of the planets would correspond to a legal tradition on which various legal systems would depend. The principles of global law would be like the sun’s nucleus, which radiates energy by thermonuclear reactions, whereas the gravitational force that attracts them, namely, global jurisdiction, would be different from what we now call universal jurisdiction.

To continue with the solar metaphor – just as there are varying intensities in the gravitational field as a function of acceleration – various jurisdictions must also coexist, principally as a function of subject matter. The urgency of a global criminal jurisdiction to combat international terrorism is not comparable to the need to harmonize the world’s legal systems in matters concerning the registration of intellectual property, however important this need may be, or to approve new common rules for the recognition and perfunctory enforcement of international arbitral awards.

Global law is born, then, with a cosmopolitan destiny, although this characteristic does not suggest that it would immediately achieve its destiny. The *ius* needs force – coercion – to prevail, and force is, in the final analysis, more political than juridical. If there is no political will to order, jurists cannot regulate society pursuant to law. This proposition explains how law is often subject

¹⁰ In this vein, see J. H. H. Weiler, “Fine-de-siècle Europe: Do the New Clothes Have an Emperor?,” in J. H. H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge University Press, Cambridge, New York, 1999), pp. 239–240: “We should not confuse ideals with ideology or morality. Ideals are usually part of an ideology. Morality is usually part of ideals. But the terms do not conflate [...] Ideology is part of an epistemology, a way of knowing and understanding reality; and in part a program for changing that reality to achieve certain goals. Ideals, in and of themselves, constitute neither an epistemology nor a program for realization, and are often the least explained elements of any given ideology.”

to and conditioned by the science of the *polis*. Law is a check on injustice and can prevail (the rule of law) only by the free submission and acceptance of the political community, particularly that of its governing circles and ruling elites. On this act of acquiescence rest its greatness *and* its poverty, its controlling function and its subsidiary position, its all-encompassing calling and its limitations in practice.

Global law does not presuppose a break with earlier legal traditions, much less a revolution. Just as the law of nations coexisted with international law for a long time, global law has to work with international law, at least for a time. "Cosmopolitan right can supplement – but not replace – sovereignty-based public international law," states Jean L. Cohen.¹¹ This issue is not, as that writer forcefully suggests, a question of an updated international law or a cosmetic makeover, but rather the transcending of the notion of international law in the face of economic and cultural globalization. International law and global law are two different species of the same genus. Whereas international law is destined for extinction, or at least complete transformation, the future of global law is development and evolution.

This notion of the coexistence of laws is present in the history of the West and has been a benefactor in the development of juridical systems. In Ancient Roman law, Praetorian law (*ius praetorium*) coexisted for a time with the *ius civile* until the late classical period ushered in the birth of a *ius novum*, transcending both and founded basically on rescripts and the *orationes Principis*. A similar development was witnessed centuries later during the Middle Ages with the common law, which made possible an entirely independent and parallel equity jurisdiction. Here, law and equity were simultaneously applied in the administration of justice, but they never intersected. This waning jurisdictional duality found its way into Anglo-American law. It remains there, despite its diminished influence in the tradition stemming from the common law.

The new world legal order must above all be a jurisdictional law and not an interstate jurisdictional model: consensual, not bureaucratic, positive, or official. It should be proposed and not imposed – based more on mutual agreement than on laws and codes and led by a civil society protected by global institutions and not by hierarchical and technocratic state entities. From this perspective, the common law system – because of its proximity to the quotidian and its own methodology and system of sources – is better suited to globalization than European civil law, which is one reason why common law finds itself at such ease in the world of international business

¹¹ Jean L. Cohen, "Whose Sovereignty?: Empire versus International Law," in Christian Barry and Thomas W. Pogge (eds.), *Global Institutions and Responsibilities: Achieving Global Justice* (Blackwell Publishing, Malden, Massachusetts; Oxford, 2005), No. 9, p. 162.

and transnational arbitration. With the new global law, the public would be identified more with *social* issues than with matters of state, which certainly is not now the case in European and Latin American contexts.¹²

* * *

This book comprises two parts of a coherent whole. The first section, historical in focus, addresses the conceptual continuity of the notion of the law of nations as the solitary source of global law as well as its relationship with the *ius commune*, the importance of which should be kept in mind throughout this entire effort because *ius commune latet, ius gentium patet*.

In the first chapter, I establish the view that each historical era begets a unique juridical system embedded with its own idiosyncrasies. The aim of developing this proposition is to highlight and underscore the inextricable link between globalization and the birth of global law. I raise this assertion without prejudice to the premise that enduring juridical strictures that provide continuity to the development of the law need to be identified, studied, and understood as contributing forces, that is, rector in the development of a new law. Perhaps it is the very tension inherent in incorporating the past into the developing present and future that is emblematic of the most important contribution of Ancient Greek philosophy to the science of law. A legal system requires balance, moderation, and the stability provided by both. The *ius gentium* comprises the centerpiece of this chapter: a Roman construct but one pervaded by Greek thought. It is here that we inevitably come across the origins of our global law. Cicero was the first to use the term *ius gentium*, which would later be replaced by the Roman jurists and medieval theologians, scholars, and canonical writers, the Renaissance humanists, and rationalists of the Enlightenment, ultimately becoming interstate law in the strictest sense of this term.

In the second chapter, the *ius commune*, the most salient contribution arising from the Middle Ages to juridical culture, is analyzed. This task seeks to illustrate the compatibility between what is commonly shared and the idiosyncrasies of sovereign states. Both "sameness" and "particularity" can be harmonized among all states and cultures. This chapter details a legal system having "general" legitimacy and normativity harmoniously applied together with local law (*iura propria*). The European Union as a juridical entity is indebted to the principle of a common unified law that for centuries accomplished the daunting task of unifying Europe while ensuring that the

¹² Moreover, this corresponds to the etymological sense because the adjective *publicus* is a hybrid of *pubes* and *populus*, the result of a linguistic conflation. Cf. Álvaro d'Ors, *Derecho privado romano* (10th ed., edited by Xavier d'Ors, Euns, Pamplona, 2004), §16, p. 53, note 2.

individual sovereigns comprising the union retained their cultural and political identities.

In the third chapter, the birth of the “modern” concept of “international law” is explored by taking its contours from the *ius gentium*, or the *inter nationes*. Here, both Bentham and Kant are distinguished and set apart as the fathers of contemporary concepts of international law and *Weltbürgerrecht*, respectively, which were centerpieces for the consolidation of international law. I also analyze some of the more recent efforts to conceptualize international law, such as those of Philip C. Jessup (1897–1986), C. Wilfred Jenks (1909–1973), John Rawls (1921–2002), and Álvaro d’Ors (1915–2004). Other authors could have been selected,¹³ but, in my opinion, these addressed this *vexata quaestio* from different perspectives from those presented here. Currently, Benedict Kingsbury, Richard Stewart, and other distinguished scholars at New York University School of Law are making significant contributions to our understanding of global administrative law.¹⁴

In the second section, I attempt to detail from a person-based perspective the first principles and normative foundation of the new juridical global order, a legal system for *humanity* and not merely for the interrelationships between and among states. I selected as a logical point of departure the crisis that now plagues “modern international law,” which is inextricably bound to the failings of the current concepts of “state” and “sovereignty.” Doubtless, the “nation-state” was a marriage of convenience that may be justified and certainly had its reason for being. Modernity, however, has witnessed this marriage’s plight end in divorce. Habermas is on point in highlighting that “a world dominated by nation-states is indeed in transition toward the post-national constellation of a global society.”¹⁵ The crisis afflicting international law has its genesis in the once helpful concept of territoriality. The ostensibly attractive principle of

¹³ Suffice it to mention as an example that the great American jurist Harold J. Berman (1918–2007), who, though devoted to Soviet law, Western legal history, and reconciliation between law and religion, felt masterfully in 1995 toward the concept of “world law.” Cf. Harold J. Berman, “World Law,” in *Fordham International Law Journal* 18 (1995) 1617: “The term ‘world law’ will, I believe, become more and more widely used as humanity moves into a new century and a new millennium. It will embrace, but not replace, both terms ‘international law,’ introduced by Jeremy Bentham in 1789, and the term ‘transnational law,’ introduced by Phillip Jessup in 1956.”

¹⁴ Cf. Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, “The Emergence of Global Administrative Law,” in *Law and Contemporary Problems* 68 (2005), pp. 15–61; Benedict Kingsbury, “The Concept of Law in Global Administrative Law,” in *International Law and Justice Working Papers* (Global Administrative Law Series), finalized 02/27/2009 (www.iilj.org).

¹⁵ Jürgen Habermas, “Does the Constitutionalization of International Law Still Have a Chance,” in *The Divided West* (edited and translated by Ciaran Cronin, Polity, Cambridge, Malden, Massachusetts, 2006), p. 115.

territoriality diverted attention and importance from the less visible but much more fundamental concept of “person” as the rudimentary precept on which a global law construct for humanity must rest.

It is my contention that the principle of “territoriality” mostly serves a pragmatic organizational and administrative purpose and function. Therefore, it cannot help but be secondary in nature and subordinate at best. Put simply, territoriality cannot play the role of a conceptual protagonist in forming and transforming international law, contrary to modernity’s foolish belief. I tend to compare its mission and function with that of a handbrake that provides greater safety but at the expense of progress. The extent to which a society can be deemed postmodern is best measured by the degree to which it views, employs, and conceives of territoriality as a means and not an end that must have for its goal the furtherance of the concept of person.

The fifth chapter aims to develop certain novel concepts with respect to the *usus* of the earth, dealing with the global form of government that must be incident to a new global law. I have labeled this global governmental rubric “anthroparchy,” so that it may comport with the ubiquitous underlying “anthropos.” The connection aspires to be conceptual and hardly limited to a philological play on words. The term “*usus*” of the earth is of Roman origin and appropriately brings to mind Schmittian connotations, as most of this chapter constitutes an analytical and synthetic critique of the doctrinal exegesis articulated by Carl Schmitt in his work *Der nomos der Erde*.¹⁶ Anthroparchy is the form of government proposed for humanity, which conforms structurally and substantively to Western European models as well as to emerging paradigms of contemporary vintage. Deeply steeped in the principle that “what affects all must be approved by all,” anthroparchy shall gradually flourish and become institutionalized: a United Humanity. Conceptually, this government shall be a global institutional paragon, descended from the United Nations, and charged with the governance of anthroparchy. I underscore anthroparchy and not anthrocracy because at issue is a form of government predicated more on the legitimacy of rule (*-archy*) than on unbridled power of rule (*-cracy*).

The sixth chapter is dedicated to exploring the orderly arrangement of a global legal system that is indispensable for providing true and legitimate global justice. Without a global law, “global justice” would be reduced to little more than a chimera. The global order rests on the human being, specifically on the unique dignity of the individual and collective human person, the true spring of liberty and equality among all human beings. Borrowing from

¹⁶ Carl Schmitt, *Der nomos der Erde im Völkerrecht des jus publicum europaeum* (4th ed., Dunker & Humblot, Berlin, 1997).

H. L. A. Hart's terminology, *the rule of recognition*¹⁷ of the global order is no different from the precept *quod omnes tangit ab omnibus approbetur*, which cannot be severed from the creation of any democratic institution. The fulcrum of the institution of a United Humanity rests with the global parliament, which will be charged with deciding how resources are to be allocated under the governance of a global legal domain. Accordingly, these resources and jurisdictional strictures shall remain within the auspices, at least in part, of national governments and legislatures. At the end of this chapter, I propose a new juridical pyramid that substitutes the pyramidal structure erroneously ascribed to Hans Kelsen. In this juridical pyramid an attempt has been undertaken to synthesize the different levels of the application of law: personal, local, national, supranational or transnational, and, finally, global.

The last chapter explains the seven constituent principles of the new global legal order. Three of these tenets – justice, reasonableness, and coercion – are common to any legal order, including an international legal rubric. The remaining four strictures – universality, solidarity, subsidiarity, and horizontality – are the principles that clearly distinguish global law from international law. Consonant with a millennium-old tradition, the reader is then presented with a handful of juridical rules that succinctly summarize the fundamental doctrines articulated in the entire text. I resorted to Latin as the language with which to express these rules for philological, conceptual, and historical reasons.

These global legal propositions are small and modest steps that aim to initiate an open and inclusive intellectual dialogue, that is, a conversation and exchange of ideas that can best take place within a transcultural and purely academic framework. The aspiration is for this dialogue to serve as a point of departure and fertile ground for the development, formation, and transformation of this embryonic legal discipline. To be sure, these strictures are completely separate from the dangerous and perfidious precepts that seek to eviscerate national identity or international Machiavellianism (twenty-first century *Realpolitik*), a Machiavellianism that has succeeded even the most radical expressions of Marxism. National citizens, cultures, and peoples simply shall not and should not disappear as if by magic. The governing principles of this new global law certainly do not constitute the tools or means to be employed by persons aspiring to create a world government. Here the construct and framework are substantially and materially different. Global law is not amenable to implementing norms that in turn would have as their objective

¹⁷ H. L. A. Hart, *The Concept of Law* (2nd ed., with a postscript edited by Penelope A. Bulloch and Joseph Raz, Oxford University Press, Oxford, New York, 1997), pp. 95–110.

rendering the world monolithic or homogeneous as a methodology for global governance. Instead, its aim is to organize a system that renders it viable for the challenges and problems afflicting humanity to be addressed universally by citizens of the world, and not states, all acting in concert. This aspiration is the single path that leads to the much-longed-for *pax perpetua*.

This text is far from the goal of constructing a normative or conceptual theory of global law that comports with Dworkin's demands.¹⁸ An attempt is made, however, to take the first steps toward developing the nascent reality of global law. A medieval phrase is helpful for expressing the universal truth that the law comes *after* the fact: *ius ex facto oritur*.¹⁹ So too does theorizing, or at least the theoretical undertaking that seeks to be both *constructive* and *interpretative*. Here the law and language have a common phenomenon. They are both so gradually molded that it becomes difficult to determine when each began by sprouting from a common stem. Global law is starkly "splitting off" – creating a new *ordo* – from international law, as Castilian separated from Latin, English from Old English, or, more recently, American English from British English.

I anticipate the reader's awareness of my European – although not Eurocentric – training and education. It certainly is not my intent to overlook the roots of our legal tradition or to assume an inflexible Western arrogance. It would be a mistake to purport to create, *ex nihilo*, a new global law as if it were a sculpture to be cast from bronze. It is more feasible to construct a *ius novum* on the solid foundation offered by the most universal legal systems than by creating a *tabula rasa*, which would be tantamount to destroying the fertile *hereditas iuris* constructed over the ages.

Finally, it is the author's opinion that the science of law should take flight on two wings of theory and experience. I believe what the great internationalist C. Wilfred Jenks reminds us of in his book *A New World of Law*: "We need the right mix of scholarship and shrewdness, of detachment and experience."²⁰ In this delicate but healthy balance between theory and practice, between intuition and cognition, strategy and execution, lies the real development of an enlightened society.

¹⁸ In this vein, see Ronald Dworkin, *Taking Rights Seriously* (2nd ed., Duckworth, London, 1978; reprint 2005), p. VII.

¹⁹ On the origin and development of this rule, vide Rafael Domingo (ed.), Javier Ortega, Beatriz Rodríguez-Antolín, and Nicolás Zambrana, *Principios de Derecho Global. 1000 reglas, principios y aforismos jurídicos comentados* (2nd ed., *The Global Law Collection*, Thomson Aranzadi, Cizur Menor, 2006), §326.

²⁰ C. Wilfred Jenks, *A New World of Law* (Longmans, Green & Co. Ltd., London, 1969), p. 21.

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PART ONE

FROM THE *IUS* GENTIUM TO INTERNATIONAL LAW

1 The *Ius Gentium*, a Roman Concept

1. A LAW FOR EVERY AGE

Every age has its law. *Cuius tempora eius ius* – one may say in the language with which Europe was built. In every age of history, the law has had its own language – Latin, German, French, and English mainly – and its own idiomatic way of generating concepts.¹

Law is life; it is experience. The words U.S. Supreme Court Justice Oliver Wendell Holmes uses to begin his well-known work, *The Common Law*, have gone around the world: “The life of the law has not been logic: it has been experience.”² As different sociological conditions arise, new forms of juridical-political organizations, laws, jurisprudence, and mechanisms for conflict resolution become necessary, and with them new ideas, new concepts, and new paradigms.

The Hellenic *polis*, the Macedonian Empire, the Roman Republic and the later Roman Empire, the medieval *Res Publica Christiana*, and the rise of nation-states are all responses to different times and places. Something similar may be said of the forms of organization and conflict resolution within

¹ The linguistic question is not insignificant. The issue posed by the historian Paul Vinogradoff in “The Foundation of a Theory of Rights” (1924), in *Collected Papers* (Wiley & Sons Ltd., London, 1963), has not lost currency: “Why is right contrasted with law in English, while *Recht* stands for both right and law in German, *ius* in Latin, *droit* in French, *Pravo* in Slavonic languages? Obviously, the nations of Continental Europe laid stress in their terminology on the unity of legal order – on the fact that it is constituted and directed by the general authority of the commonwealth.” On the meaning of the word “law” in different languages, *vid.* also Hans Kelsen, *Reine Rechtslehre* (2nd ed., Verlag Franz Deuticke, Vienna, 1960; reprint 1967), § 6, pp. 31–32.

² Oliver Wendell Holmes, *The Common Law* (Little, Brown & Company, Boston, 1881; reprint ed. Marc de Wolfe Howe, Harvard University Press, Cambridge, Massachusetts, 1963), p. 5.

the ambit of Islamic, Chinese, Japanese, or Hindu law.³ The structure and government of these political systems and their cultural worldview determined their idiosyncratic concept of law. Despite this, all stages in humanity's legal development have a common thread: the presence of relationships of justice among persons or groups needing rules to resolve disputes. The etymology of the word "justice" appears to confirm this juridical ethos: *ius stitium* – the cessation of claims. In this sense, "peace is the fruit of justice" (*opus iustitiae pax*).⁴

The various garments in which law – fundamentally a mediator of inter-group relationships – has been cloaked throughout history denote the various stages of the science of law, which developed in a particular fashion during the twilight of the Roman Republic and the dawn of the principate. Greek natural law (later developed by Roman jurists and in Christian thought); Roman *ius gentium*, as the source of inspiration in international relations; medieval *ius commune*; Islamic *Siyar*; vernacular variants of modernity, such as the German *Völkerrecht*, the French *droit des gens*, or, by the sixteenth century, the English "law of nations"; the *ius universale*, international law, and the interstate law (*Staatenrecht*) of the rationalist Enlightenment; and more recent descriptors, such as transnational law, the common law of humanity, or the law of peoples – all these mark intellectual efforts directed toward forming a more just intercommunitarian order.

However, the fact that each age is identified by its law does not mean that in the various legal systems, there are no common points, keys to mutual understanding, recurrent problems, or permanent solutions. This permanence imparts value and meaning to these historical projections and shows that although time may have had great influence in shaping new law, humanity remains the same regardless of the historical moment in which they live. This may be Greece's great contribution to law – adequately resolving the tension between change and permanence by finding a point of equilibrium that makes it possible to go forward without forgetting the past, and building without dismantling what has already been built.

³ A general overview of these legal systems can be found in H. Patrick Glenn, *Legal Traditions of the World* (2nd ed., Oxford University Press, Oxford, New York, 2004), or Werner Menski, *Comparative Law in a Global Context. The Legal System of Asia and Africa* (Cambridge University Press, Cambridge, New York, 2006). The work of John H. Wigmore, *A Panorama of the World's Legal Systems* (2nd ed., Washington Law Book Company, Washington DC, 1936) is a classic. Cf. also David J. Bederman, *The Classical Foundations of the American Constitution* (Cambridge University Press, Cambridge, New York, 2008).

⁴ Isaiah 32:17.

2. A WORD ABOUT DIKE

Although justice exists in all civilizations – especially in Israel, as an expression of the Covenant of Sinai⁵ – it was the Greek concept of justice that truly opened the doors to *ius gentium*, already a Roman construct, as we shall see.

In Greece, justice was personified by the goddess Dike, the daughter of Zeus and his second wife, Themis (sister of Eunomy and Eirene). Writing about Dike in the eighth century B.C., Hesiod⁶ tells how Dike, unlike Themis, who in the Homeric epics passes on the gods' mandate that must be followed, prosecutes earthly injustice by punishing the guilty and imposing a reciprocal equality – the correlation demanded between different people's actions.

This idea of justice as equality was elevated by the Pythagoreans to the plane of arithmetic and was symbolized by the numbers 4 and 9, which are the squares of an even and an odd number, respectively. This illustrated the relationships among justice, equality, the comparison of people's actions, the reciprocation of benefits, and the correlation between infraction and punishment – indeed, the idea of harmony and proportion.

Plato⁷ attributed the status of virgin to the goddess Dike to show her incorruptible nature.⁸ As mentioned by Aristotle in the fifth book of the *Nicomachean Ethics*,⁹ the antithesis between natural justice (*dikaion physikon*) and positive or conventional justice (*dikaion nomikon*) is fundamental in this regard. One finds the same thought in his *Rhetoric*¹⁰ and in the earlier thinking of Alcibiades, whose dialogue with his uncle Pericles appears in Xenophon's *Memorabilia*. In this work,¹¹ the Greek historian writes about the Socratic idea equating justice with law, but he understands the latter comprises written laws approved by citizens as well as unwritten laws that come from a divine lawgiver.

The conviction that nature (*physis*) transcends human will by limiting its decisions is the foundation for the universality of certain norms (*nomos*) applicable to all people at all times, just by virtue of their humanity.¹² What

⁵ Exodus 24:3–8.

⁶ Hesiod, *Teogonia*, 901.

⁷ Plato, *The Laws*, 943 a.

⁸ On Plato's thinking about law, *vid.* the extensive study by Harald Seubert, *Polis und Nomos. Untersuchungen zu Platons Rechtslehre* (Duncker & Humblot, Berlin, 2005).

⁹ Aristotle, *Nicomachean Ethics*, 1134 b.

¹⁰ Aristotle, *Rhetoric* I, 1368 b.

¹¹ Xenophon, *Memorabilia* IV-4, 19–24.

¹² On the contribution of Greek thought to law, *vid.* Erik Wolf, *Griechisches Rechtsdenken*, 3 vols. (Klostermann, Frankfurt-am-Main, 1950–1956); J. Walter Jones, *The Law and Legal Theory of the Greeks* (Oxford University Press, Oxford, 1956); Erich Berneker (ed.), *Zur griechischen Rechtsgeschichte* (Wissenschaftliche Buchgesellschaft, Darmstadt, 1968); Antonio