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The Lighthouse of Law*

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Abstract
The mere use of the terms 'globalization' and 'global law' is ripe with dangers, as if often causes the academic debate to slip towards the all too simple question of how much global law there really is. In fact, these are container terms which have become fashionable to indicate the historic and paradigmatic shift law is undergoing. Under it are caught three fundamental and interrelated evolutions which are dramatically changing the way we practice, teach and research law: the turn from systemic, disciplinary and methodological monism towards systemic, disciplinary and methodological pluralism. In this perspective and in the light of the challenges these shifts bring to the world of legal practice and academia,'global law' becomes more than the sum of those legal rules and concepts which are truly global. It gains some of the function the *ius commune* of late-medieval Europe had: that of a lighthouse to which all the ships and boats of local law have to steer to.

Keywords
global law; legal history; ius commune; Roman law; international law; globalization

Since the end of the Cold War (1989), the interest of legal academia in globalization has vastly grown. The financial crisis of the West, which started in 2008, has put globalization center-stage and made it into one of the most fiercely debated issues in legal academia. In the debate, the term 'global law' is increasingly forwarded as shorthand to indicate the new or coming reality of law under the impact of globalization.

'Global law' is an umbrella term that covers many aspects of a process which is far from unequivocal and even farther from having attained any kind of conclusion.[1] It carries its dangers. One of these is that the sole use of

* This paper is based on the introduction rendered at the First Annual Global Law Conference of the Law Schools Global League at Tilburg on 22 June 2012.

[1] In the Montesquieu Lecture, which he rendered at the occasion of the Global Law Conference at Tilburg on 21 June 2012, entitled 'Intimations of Global Law', Neil Walker indicated no less than seven dimensions of the term.

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it causes the debate to slip towards the all too simple question of how much global law there is and allows the opponents of the idea to reduce its relevance with the remark that ultimately there is little law which is truly global.

But that is not the heart of the matter. The relevant question is not how much law there is which is truly applied globally; the relevant question is how much impact globalization has and is going to have on the way we practice, teach and research law? Global law is not just a reality; it is also an ambition, a direction, maybe an end goal.

The heart of the matter is that law is a global phenomenon. This in itself is nothing new as this has been the case for all of recorded history, but it is a fact which has become far more relevant in our space in history. As we trade more, travel more, migrate more, intermarry more, communicate more across national borders and continents than ever before, we have more need for law that transcends national and cultural borders along with us. And as the great challenges of our age – such as climate change, energy shortage, security, nuclear proliferation, migration, sustainability of our financial system – have become global, we are forced to become global ourselves and develop a legal framework that allows us to address these problems in an adequate way.

At this point, a reference can be made to Sir Hersch Lauterpacht (1897-1960), one of the finest minds of the 20th century and of who applied himself to what was then the still fairly marginal subject of public international law. Lauterpacht, who was a student of Hans Kelsen (1881-1973),[2] asked himself what the 'fundamental rule' (*Grundnorm*) of international law was. His simple answer was that it was the mere existence of an international community.[3] When Lauterpacht wrote this in the 1930s, *that* international community was still very much thought of in terms of a community of States and the 'global law' that ruled it was a law solely applicable to States. But Lauterpacht was one of the earliest and staunchest proponents of the return of the individual on the scene of international law – mainly through the international protection of human rights – and thus the extension of the body of 'global law' outside the confines of public international law. Writing in the 1950s, Lauterpacht acknowledged that positive international law was still very much based on the fundaments of an international

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[2] Elihu Lauterpacht, *The Life of Hersch Lauterpacht, QC, FBA, LLD* (Cambridge University Press 2010) 22-27.

[3] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933) 420-423.

society of States, but that this international society should, at the same time, be thought of as a community of human beings.[4]

Since the midst of the 20th century, the body of 'global law' in the narrow sense of rules that are globally applied has grown beyond the confines of traditional public international law, as we have seen the growth of an unprecedented mass of international law in relation to trade, business, environment or human rights. As globalization goes further, this will go further too. Nevertheless, for the foreseeable future, law will predominantly remain regional, national and even local. But the debate on the globalization of law is no less relevant in relation to these levels. As real life becomes more international, the global, local, national and regional law will have to adapt. The debate on the globalization of law goes much beyond the question of how much truly global law there is and moves into a debate on the need for the convergence of national and other legal systems, and on the need for a common legal language, common legal concepts and principles, common legal procedures, and common standards, values and ultimately ideals to guide that convergence. This function of global law as a common legal ideal or point of convergence is caught in the coining of global law as our age's new common law.[5]

To the European, the latter is reminiscent of the debate on a common law of Europe which has been waged in legal academia in the context of European integration.[6] To the European legal historian, it is reminiscent to the role the *ius commune* of Roman and canon law played in the Late Middle Ages. That role has been brilliantly captured in a metaphor by the Italian legal historian Manlio Bellomo. He compared the role of the *ius commune* to that of a lighthouse to which all the ships and boats of local law had to set their course.[7] One may of course argue, if one wants to substitute global law by Roman law, that there was a fixed body of Roman law laid

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[4] Hersch Lauterpacht, 'International Law – The General Part' in Elihu Lauterpacht ed, *International Law Being the Collected Papers van Hersch Lauterpacht, Q.C., LL.D., F.B.A.,* vol. 1 (Cambridge University Press 1970) 28-31. Also see Hersch Lauterpacht, *An International Bill of the Rights of Man* (Cambridge University Press 1947).

[5] Patrick Glenn, *On Common Laws* (Oxford University Press 2005); Rafael Domingo, *The New Global Law* (Cambridge University Press 2010).

[6] See eg Bruno de Witte and Caroline Forder eds, *The Common Law of Europe and the Future of Legal Education* (Deventer 1992); Reinhard Zimmermann, 'Civil Code and Civil Law: the "Europeanization" of Private Law within the European Community and the Re-emergence of a European Civil Science' (1995) Columbia Journal of European Law 1, 63.

[7] I heard him say this at the Medieval Canon Law Conference organized at Catania in 2000. Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* (Washington 1995).

down in the codification of Justinian, which served as a kind of Bible to the 'priests of justice' that the Roman law professors were,[8] and that there is therefore no such thing as global law. But in truth, the medieval 'Roman law' was as little a fixed body of applicable law as 'global law' is. The lighthouse of the *ius commune* was indeed vested on the foundational authority of the Justinian codification and built from the bricks and marble taken from it, but ultimately, it was built by generations of medieval and early-modern legal scholars who believed in the ideal of 'their' learned law and pragmatically framed it to the needs of their time.[9] Should we, with the global challenges we are facing, strive for less?

And whereas today's proponents of global law lack a fixed authoritative corpus of legal texts the medieval and early-modern lawyers had in the *Corpus Iuris Civilis* and *Corpus Iuris Canonici*, there is a source of authority to vest the new common law on. The recognition of our common humanity, while going far back in time, is, thanks to globalization, more widely spread and more deeply imbedded than ever. Moreover, over the last seven decades, our idea of common humanity has gradually become articulated into instruments of positive international and regional law as it has never before. A *Corpus Iuris Humani* is lurking in the collecting of the major multilateral instruments of public international law, human rights law, international trade law, international environmental law and transnational private law.

The debate on the globalization of law is also extremely relevant because under this flag we can catch some of the main challenges legal practice, legal education and legal scholarship face today.

First, we are going through a historic paradigmatic shift. The paradigm of law and legal teaching which most lawyers have been raised on is, while under challenge, still not defunct. It dates back to the great law school reforms of the latter decades of the 19th and the earliest decades of the 20th century, when Roman law had to abdicate its central position on law school curricula in favor of national law.[10] It is a paradigm which is premised on the sovereign State's claim to a monopoly on law making and law

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[8] D. 1.1.1.1 (Ulpian) 'Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur (…).'

[9] On the *ius commune* and its role in the formation of law in Europe, Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge University Press 2009) 265-75.

[10] See eg Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford University Press 2001) 1-105.

enforcement. This paradigm has led to a triple monism in our approach to law and particularly legal education.

Primo, there is systemic monism. Since the early 20th century at the latest, in most systems of legal education, students do not study law; they study their own national law. Whereas the attention to international and comparative law has certainly grown, in most university programs, this remains an add-on. *Secundo*, there is disciplinary monism. The dominance of the sovereign State over law has caused, regardless of the rise of legal realism, traditional legal education, legal scholarship and, to a large extent, even legal practice to become self-contained realities where little room is left for reflection on the interaction between law and society. This does not mean that students are not taught to think critically about law, or even not taught to think *de lege ferenda*, but often this critical reflection is reduced to one about the consistency of the law, rather than its societal effects. *Tertio,* there is methodic monism. In most countries, traditional legal teaching and research are based on one method. Because this method is dominant and often goes unchallenged, it can largely remain implicit.[11] Of course, over the last decades this paradigm and this triple monism have been severely challenged, as the study of comparative law, transnational law as well as interdisciplinary approaches to law and methodological pluralism are on the rise. These trends are strong and will prove far more than just being fashionable. But what these also do is raise the question of a new paradigm, which has not been answered yet, but is the challenge of the generation to come. These three changes are not solely driven by globalization, but are closely intertwined with it and cannot be thought independently from it.

Second, there is the challenge of finding a new balance between the global and the local, a question which the sovereign State's claim to the monopoly of law had allowed us to dust under the carpet or to narrow down to a few formal questions, such as the status of international law in national jurisdictions. For the future, and in the context of convergence of legal systems, we will need to broaden the scope. If global law is to act as a standard for legal convergence, then the local, where most of the instruments and institutions of implementation and enforcement are situated, becomes ever more crucial to the global. It might be ironic, but the globalization of law will lead us to more in-depth studies about other people's local laws.

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[11] Jan Vranken, *Exploring the Jurist's Frame of Mind* (Deventer 2006).

Third, there is the challenge of a multi-polar and multicultural world. As we gear up to answer the call of globalization as lawyers, we also need to embrace the – in some cases slowly dawning – understanding that we will have to do this in a world in which the civilization that was so instrumental in starting this process of globalization is no longer dominant. The old debate between universalists and relativists gains new traction, but also might become more productive if universalist and Western will no longer be, and be seen to be, one and the same.