Powerful Lessons from Roman Law for Global Constitutionalism

by

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Abstract: The Roman parallel to contemporary issues often exerts an energetic attraction. In this article, I argue that Roman law, which was one of several sources of inspiration to the American founding fathers, can serve today as an inspiration toward global constitutionalism. Looking to Roman law helps reduce certain prejudices derived from the current privileging of the sovereign state and positivist paradigm as the only genuine and possible model of international law. These prejudices constitute an actual hindrance for the right development of global constitutionalism. Global constitutionalism is inherently postsovereignist, postnationalist, and postpositivist. That Roman law was also intrinsically presovereignist, prenationalist, and prepositivist assists constitutionalists in eliminating from global constitutionalism any nonfoundational elements derived from a highly statist paradigm. Roman law constitutes a good antidote especially against any kind of extreme global constitutionalism, which seeks to extend the language and modes of national constitutionalism without sufficiently filtering and refining them.

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Key words: global constitutionalism, global law, Roman law, sovereignty, nation-state, constituent power.

1. Introduction

This article tries to contribute to the gripping academic debate on global constitutionalism¹ by drawing on ideas and arguments from Roman law. This approach entails neither nostalgia nor

¹Global constitutionalism is an umbrella expression used to capture the need for applied constitutional principles, values, standards, procedures, and mechanisms beyond the state. The term denotes a way of thinking about global governance that promotes a deeper understanding on the foundations of international law and the global legal order applying the language of constitutional law. In fact, international law is moving, at least in some areas, from a paradigm based on state sovereignty and consensualism to a new one based on progressive constitutionalization. For a general overview of the current debate on global constitutionalism as well as for selected bibliography on this topic, see Anne Peters, “Global Constitutionalism,” in Michael T Gibbons (ed.), The Encyclopedia of Political
anachronism. Just as Roman constitutional principles and values illuminated the decision of the framers who drafted the US Constitution of 1787,\(^2\) so Roman constitutional history can also have a practical impact on the global constitutionalist experience.\(^3\) This can occur especially if we consider the word “constitution” (from Latin *constituere*, to set up, to establish) in the broader and traditional sense—i.e., linked to concepts of community, checks and balances, and participation, rather than in the narrow modern sense of the liberal, democratic, formal constitutions associated with sovereign nations. While the Americans can rightly say “We the People of the United States,” the Romans many centuries earlier were able to declare “We the People of Rome.” It seems to me, thus, that Roman public law can assist global constitutionalists in developing principles, rules, mechanisms, and standards to order the emerging global human community, as well as its correlative incipient legal order—so-called global law.\(^4\)

Roman law constitutes a good antidote especially against any kind of extreme constitutionalism that would seek to extend unfiltered or unrefined language and modes of national constitutionalism. But Roman law also constitutes a good antidote against those who are skeptical about the viability of global constitutionalism. Looking to Roman law helps one shed certain prejudices that view the current constitutional positivist sovereign state as the only genuine and possible paradigm. These prejudices, in my opinion, constitute an actual hindrance for the right development of global constitutionalism, which is genetically postsovereignist, postnationalist, and postpositivist. If global constitutionalism is *post* all of these things, Roman law was, so to speak, *pre* all of them: presovereignist, prenationalist, and prepositivist. Global constitutionalism and Roman law are thus linked in being nonsovereignist, nonnationalist, and

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nonpositivist. They represent the past and the future of the law, though not the present, which is mostly sovereignist, nationalist, and positivist.

The Roman law paradigm does not constitute a perfect framework for global constitutionalism, since by definition global constitutionalism cannot be presovereignist, prenationalist, and prepositivist as Roman law was. Moreover, the Romans did not share fundamental values of global constitutionalism, such as radical human equality under law, liberal democracy, the principle of nondiscrimination, or the moral duty to avoid wars, among others. Nevertheless, some aspects of Roman law can provide inspiration to cosmopolitan constitutionalists. Put differently, what Roman law offers to global constitutionalism is not an imitable model but genius, vision, ideas, and stimulus.

Let me offer three caveats before developing my argument. First, my effort is not undermined by the fact that Roman law was instrumental in the maturation and progress of the classical doctrine of international law, which the new constitutionalism seeks to overcome. This historical tension is merely a consequence of the polyvalent capacity of Roman law to illuminate even opposite undertakings. On the other hand, classical international law was founded not only on the Roman idea of the law of nations (ius gentium) but also, and specifically, on the Roman law of contracts and property. The laws governing international treaties owe much to Roman law of contracts. The same can be said of the Roman law of property in relation to the doctrine of sovereign territory. Global constitutionalism, however, could benefit from other ideas and values of the constitution of the Roman Republic that are at the heart of Roman public law.

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6 In the history of International law there are many examples of contradictory arguments based on Roman law.
7 On this topic, see Max Kaser, [*Ius gentium*] (Vienna, Cologne, and Weimar: Böhlau, 1993).
My second caveat is that, while Roman law supported an empire and, therefore, an imperialist perspective, this fact does not reduce the potential advantages of Roman law’s inspiration. On the contrary, the transition from the Roman Republic to the Roman Empire during the Principate (27 BCE to 284 CE), inaugurated by Emperor Augustus (63 BCE – 14 CE), implied a break to Republican constitutional order and principles that supports my argument. The Roman revolution initiated by Augustus revealed the false universalism of empire, just as any constitutional attempt to transform the world into a global state will unveil the false universalism of a spurious global constitutionalism. Here, too, Roman history is a heuristic key to life.

My third caveat is simply a reminder that the global human community is universal because it includes humankind as a totality and in its totality. Thus, the global community merits a unique framework, a tailor-made model of law. Therefore, the language of Roman law, which governed a nonuniversal and instrumental political community, should be transposed very carefully, and always in a limited way, to the contemporary global community, which is intrinsically universal and necessary.

2. Applying some lessons from Roman law to global constitutionalism

In this section I will describe ten good examples that Roman law provides to global constitutionalism. First I will explain the relevant Roman principle, value, or social fact, and then I will refer to its potential translation into the realm of global constitutionalism. I will accommodate my explanations of Roman law to the purpose of this article, which is specially addressed to constitutionalists.

2.1. A cosmopolitan spirit. Roman law offers global constitutionalism a good example of supporting cosmopolitanism as a political ideal and a noble human attitude. The Stoic spirit,

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which animated almost all the Roman jurists and many of the Roman thinkers during both the republic and the empire (Cicero, Seneca, Marcus Aurelius), was cosmopolitan in character and constituted the main influence on Roman legal education. Cicero applied Stoic ideas to international relations, making relevant statements on the duties of communities and peoples toward one another, as well as coining the expression *ius gentium* (law of nations) in the process.\(^\text{12}\) According to Cicero, the human race is naturally and harmonically united in a way similar to the relation of the parts of the body to each other. That is why “nature does not allow us to increase our means, our resources, and our wealth by despoiling others”\(^\text{13}\) The same principle, according to Cicero, is established in the law of nations, which does not permit one to harm a political community for personal advantage.\(^\text{14}\)

Among the late classical Roman jurists, Ulpian was the most cosmopolitan. His philosophical views, deeply influenced by Stoicism, were egalitarian, and they helped resolve the new legal challenges arising from the extension of citizenship to all free individuals of the empire by the Antonine constitution (212 CE). Ulpian tried to convert Roman law into a more cosmopolitan legal system in accordance with the needs of a multicultural society and based on the values of liberty, dignity, universality, and equality. In this sense, contemporary scholar Tony Honoré considers him a pioneer of the human rights movement.\(^\text{15}\)

Global constitutionalism is foundationally cosmopolitan.\(^\text{16}\) What in ancient Rome was an ideal and aspiration shared by philosophers and lawyers is today a verifiable reality: all human beings are in fact members of an emerging global human community in which they share needs, interests, and projects. Global constitutionalism claims that this universal community must also be ruled by law, and that each nation state should be cosmopolitan in spirit, in the sense that it

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\(^\text{12}\) The most significant mention can be found in the Cicero’s moral essay *On Duties* 3. 69. After speaking of society in the broad sense as uniting all people with each other, Cicero referred to lesser societies made up of *gentes*, or those formed into cities.


should preserve, assist, and sustain the global legal order. Roman law offers good arguments for the legitimation and justification of these two claims. It also opens the door to the so-called postnationalistic approach, which insists on reformulating the idea of the nation-state in the face of globalization and reterritorialization.

2.2. Unwritten constitution. The language of constitutionalism in relation to the global community benefits from the Roman law experience, which established a model of community without a codified constitution.

Rome never had a written constitution. Rather than a single text, Rome’s constitution was a living and nimble set of legal and political norms. It was a long, ongoing, and complex process of constituting the Republic by creating and developing institutions, political powers, principles and rules, practices and functions, as well as mutual institutional relations. The constitution of Rome was never reduced to a document; largely unwritten and evolving over time, the Roman constitution was based on tradition, but not on obsolete precedents. The annual election of two consuls, the existence and functions of the Senate, and the gathering of different popular assemblies for different purposes all were elements of the constitution but were unregulated by written statutes. The Roman constitution accommodated changing circumstances with new ideas and arguments. For this reason, the Roman constitution was inescapably controversial, intrinsically political, and always opens to testing in public debate. Romans were proud of the superiority of their constitution because of its stability, balanced structure, clear assignment of functions, and solid discipline. The great Greek historian Polybius (c 200–118 BCE) associated Roman military success with the perfection and greatness of Rome’s

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19 Although nationalism appears to have been on the rise in the last decades, as result of the breakup of the former Soviet Union, and the increase immigration, among other reason, the deterioration of the idea of nation-state continue growing.
constitution,\textsuperscript{22} which enabled Rome to bring almost the whole of the Mediterranean world under its dominion within a mere fifty-three years.

Polybius and Cicero understood the Republican constitution as a mixed constitution. It combined elements of aristocracy (the Senate) with democracy (the people) and monarchy (the consuls). According to Cicero,\textsuperscript{23} such a constitution has an extensive component of equality; it provides harmony and stability, and it prevents corruption. Simple constitutions lead to corrupted versions of each kind of rule, producing a despot instead of a king, an oligarchy instead of an aristocracy, and a chaotic mob instead of a democracy. In contrast, the Roman constitution provided a system of checks and balances based on a combination of powers and vetoes of magistrates, and of political control of the magistrates by the Senate and the people. The greatness of the Roman constitution was reflected in a very short phrase: “the Senate and the People of Rome” (*Senatus Populusque Romanus*, abbreviated as SPQR). As Cicero explained through Cato the Elder, one of the reasons the Roman constitution was superior to others was that it was established not by the great ability of a single man but by leadership of many, and not in the course of one life but over eras and generations.\textsuperscript{24}

The constitutional experience of Rome helps international constitutionalists to replace the state paradigm by a global paradigm. The global community does not need a written, comprehensive, and totalizing constitution, as if it would be the supreme law of a world state. The global paradigm does not need to resemble the constitutional features of a nation state. Any attempt to establish a comprehensive constitution will fail both at the national and the global level. Rather, the global community needs to be organized under a coherent global legal order that ensures global harmony, stability, and development and limits the use of power. Such a legal order demands, of course, some degree of constitutionalization, but not a comprehensive written constitution.

\textit{2.3. Respect for tradition.} The Romans possessed a special veneration for tradition, precedent, and authority. They esteemed ancestral customs (*mores maiorum*), the ways of their


forebears, and their traditional ideas, particularly in the field of law. Romans preserved a notable spirit of traditionalism. They were reluctant to abolish any valid law, because they considered their ancestors part of the Roman people. Romans had a deeply rooted distaste for unnecessary changes and greatly distrusted novelty. They did not like quick innovations, hurried modifications, and revolutionary attitudes. They tried to build on what their ancestors had built, exquisitely respecting key legal decisions in the past. This conservative attitude explains the centuries-long preservation of the rigid and severe formalism that characterizes the primitive legal system. At the heart of the Romans’ conservatism and respect for tradition lay the idea that justice, as a constant, continual, and perpetual individual and collective will, required careful and gradual historical development. The leader was the people as an eternal community, not this or that particular lawgiver.

The evolutionary nature of Roman law constitutes a good example for global constitutionalism because the integrative conceptual framework of global constitutionalism should be evolutionary, not revolutionary. Global constitutionalism should respect tradition. International law is mainly a European tradition.\(^{25}\) Constitutionalism is both a European and an American tradition. But the universality of global constitutionalism should by no means exclude respect for the particularity of tradition. As Koskenniemi pointed out, “if the universal has no representative of its own, then particularity itself is not scandal.”\(^{26}\) The particular indeed transcends itself when it is accepted by others as universal. For my purposes, this means that global constitutionalism will be universalized when it is universally accepted as an inherent element of the global human community and an adequate politics of global law.

2.4. Nonsovereign state paradigm. Roman law can help global constitutionalism to transcend the sovereignty-based state paradigm. The sovereign nation-state is a modern abstraction quite contrary to the Roman spirit. Politically, the Roman people was invested not with sovereignty but with *maiestas* (majesty), one of the fundamental principles of the Roman


Republic.\textsuperscript{27} Maiestas was an original concept with no equivalent word in Greek. Maiestas comes from \textit{maior} (greater) and expresses the idea of the superiority and greatness of the Roman people. In virtue of its superiority, Rome demanded respect and submission from other peoples, although this requirement did not imply a rejection of others’ liberty. Indeed, liberty of other peoples was considered a necessary condition of Roman maiestas. The transference of majesty from the people to the emperor began with Augustus and was completed by the beginning of the Dominate at the end of the third century. As the emperor’s majesty grew, republican structure declined, but majesty remained the measure of authority.

The idea of sovereignty, on the other hand, represents a French absolutist and exclusive adaptation of Roman majesty. Sovereignty appeared for the first time in Jean Bodin’s \textit{Les six livres de la République} (1576).\textsuperscript{28} Bodin understood sovereignty as the absolute and permanent power that a republic exercises in a determinate context: “la puissance absolue et perpetuelle d’une République” [the absolute and perpetual power of a political community].\textsuperscript{29} In the Latin version of that work, the definition of maiestas appears clarified and loosely translated, inspired in part by Ulpian’s phrase, \textit{princeps legibus solutus}: “the emperor is not bound by statutes.”\textsuperscript{30} Sovereignty was thus an exclusive and excluding power in the hands of the prince, who could impose laws on his subjects without their consent and without himself being bound by them. Sovereignty so conceived implied an absolute indivisibility of power within a community and an absolute independence in international relations. This concept of sovereignty—which again replaced the Roman concept of \textit{maiestas}—definitively closed the doors to a harmoniously ordered international system, instead artificially standardizing a constellation of states having plenary powers in their respective territories enclosed by borders.


\textsuperscript{28} The Medieval antecedents, above all beginning with the formula \textit{rex superiorem non recognocens in regno suo est imperator}, can be found in Francesco Calasso, \textit{I glossatori e la teoria della sovranità} (3rd ed., Giuffrè, Milan, 1957). The theory, though, needs revision.

\textsuperscript{29} Jean Bodin, \textit{Les six livres de la République} I (Paris: Librairie Arthème Fayard, 1986) p. 179. Bodin uses the Latin term \textit{maiestas} as a synonym of sovereignty. Thus, for example, in chapter 10 of book I, with deals with “Des vrayes marques de souveraineté” (pp. 245-341), he speaks of “la première marque de la souveraineté” (p. 306), but of “la seconde marque de majesté” (p. 310).

Of course, there is little left of this initial concept of sovereignty in current international law, but the whole system of international law was, in a way, vitiated by this exclusionary idea of sovereignty. Moreover, if the very category of international law seems to appear outdated in our globalized world, it is probably because of the restrictions imposed by the idea of sovereignty. Sovereignty was essential to the creation of an international law based on coexistence, but it is a real hindrance in developing an international law based on cooperation and solidarity. The idea of sovereignty must be revised for it to be compatible with the principles and values of global constitutionalism. The options appear to be adopting a pluralist sovereign approach or replacing the concept of sovereignty with a new political concept that captures the essence of the global community as different from the global state. This does not mean that sovereignty has no role in the new global paradigm. Sovereignty could continue as an instrumental and useful concept, but only after its reformulation.\(^{31}\) It is the role of global constitutionalists to rid the idea of sovereignty of its dark side, which involves exclusions, boundaries, impunity, and lack of solidarity. \(^{32}\) If Roman law is presovereignist, global constitutionalism should be definitely postsovereignist.

2.5. An integrated idea of public law. Ulpian roughly defined public law\(^{33}\) as the law that regarded the state of the Roman commonwealth (\textit{quod ad statum rei Romanae spectat}). By contrast, he defined private law as the law governing relations between private individuals (\textit{ad singulorum utilitatem}). In general, public law was established for the interest of the political community or the people. It covered everything not concerned with the private interest of individual citizens. Public law dealt with the constitution, administration, and functioning of the Roman political community. It integrated and combined religion and administration of the political community. It was concerned with magistrates, priests, and sacred things. Public law basically emanated from popular assemblies and the Senate and later from the emperor as well.

While public law was a collective product of generations of senators and magistrates, private law was a manifestation of the free will of the individual. It was an expression of


individual rights and freedoms, though it was not governed just by self-interest. Private law retained the idea of moral duty. The most important practical difference between Roman public law and private law was that “public law cannot be changed by agreements concluded between private individuals.”34 This unchangeable law is exactly what we would now call *ius cogens.* However, at the heart of both public and private law lay the idea that public law could not eclipse or replace private law. In Roman law, public law was an expansion of private law, and not vice versa, because the individual—the citizen—and not the political community was the center of the Roman legal system. Public law proceeded from private law. This original model of the construction of the law, from the bottom up and not from the top down, ought to be transferred to all legal spheres, including global constitutionalism, traditionally established from top down.

In Ciceronian thought, public interest (*utilitas rei publicae*) and stability (*salus*) were the twin aims of public law.35 Public interest served as a principle for legitimating new statutes, a standard for legal interpretation, and a guide for jurisprudential activity. Papinian36 mentioned public interest as the ultimate ground for the validity of praetorian law, and Ulpian37 did not hesitate to put the idea of *utilitas* at the center of any legal change: “in determining new rules, there out to be some clear advantage (*utilitas*) in view, as to whether a law which has been considered just for a long time is to be modified.” Drawing upon Greek philosophy and the Ciceronian understanding of *utilitas,* classical jurists abundantly invoked the idea of *utilitas* (in the general sense of practicality, social interest, and sound policy) as a good reason to explain the acceptance of a concrete and pragmatic legal solution instead of another solution based on strict logical and dogmatic reasoning.

Modern public law is a result of necessary secularization, rationalization, and positivization.38 Still, the essential Roman ideas of *utilitas* should continue to be vital. The theory of sovereignty held sway for centuries as the basis of public law, but it should be replaced by the

ideas of public service, solidarity, and functionality. These should be at the heart of global constitutionalism as well. An excessive entanglement of sovereignty and public law leads to a fragmentation of public law. By contrast, a more inclusive normative idea of public law connected with its purpose (or ultimate cause) constitutes a source of global integration.

2.6. Recovering the idea of necessity as a source of binding law. For the Romans, necessity (necessitas) was a source of binding law. Necessitas was the Roman goddess who personified the constraining force of destiny, the inevitable. She was identified with the Greek goddess Ananke and was depicted as a powerful goddess who walked before Fortuna carrying brass nails and wedges to fix fast the decrees of Fate. Opposed to free will, necessity is a force or influence that compels an unwilling person or a group of persons to act.

Necessity affects the law in two different ways. Sometimes the plea of necessity should be taken into consideration to legally justify a departure from ordinary law. This is indeed the practice regarding the doctrine of necessity in international law, which is based on the rule that the law does not apply when necessity comes into play (cessat lex ubi venit necessitas). Sometimes, however, necessity creates law by grounding legal obligations and duties. This circumstance is reflected in the well-known legal French aphorism: nécessité oblige. Thus

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45 For a commentary on this rule and other similar rules, see Rafael Domingo (ed.), *Principios de Derecho Global* (3ª ed., Cizur Menor: Thomson Aranzadi, 2006) no. 146.
necessity becomes an important source of law, that is to say, of binding legal obligation. I am using the concept of necessity in this latter way, though the two legal implications are interconnected. If necessity can lead to the suspension of laws it must also be able to suggest new laws. Otherwise, society would dissolve into chaos.

It is no mere coincidence that the wording of the most famous definition of obligation, from Justinian’s Institutes,\textsuperscript{46} includes the word “necessity.” In this context, necessity expresses the idea that the obligation created by a legal bond constrains the wishes of the party. This definition of obligation entered the Anglo-American common law tradition via the work of Henry de Bracton’s (c. 1210–68) \textit{De legibus et consuetudinibus Angliae}.\textsuperscript{47}

The Roman jurist Modestinus, in his first book of legal rules, expressed very well what I am trying to explain here: “Thus, all law has been made either by consent, or established by necessity, or confirmed by custom.”\textsuperscript{48} In this sentence, the term necessity has its ordinary, nontechnical meaning: an imperative need or desire, a pressure of circumstances, a physical or moral compulsion, which excuses someone from fulfilling an obligation or creates a new one.\textsuperscript{49}

In our day a strong sense of contractualism has fueled disregard for the partition of sources of law into consent, custom, and necessity. Consent has become primary, while custom and necessity are relegated to irrelevance. Custom, however, has succeeded in maintaining its (admittedly secondary) status in the international realm thanks to the very nature of international law\textsuperscript{50} and thanks, in part, to the defense of customary international law by some international

\begin{footnotes}
\footnotetext{46}{Justinian’s Institutes 3.13 pr. (ed. Paul Krüger, Institutiones. Corpus Iuris Civilis, vol. I, 16ª ed., Berlin: Weidmann, 1954): “obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura” [An obligation is a legal binding whereby we are bound by a necessity of performing some act according to the laws of our community].}
\footnotetext{47}{Henry de Bracton, \textit{De legibus et consuetudinibus Angliae (On the Law and Customs of England)} (ed. George E. Woodbine & Samuel E. Thorne, Selden Society, Cambridge Massachusetts: Harvard University Press, 1968) vol. II, p. 283: Et sciendum quod obligatio est iuris vinculum quo necessitate adstringimur ad aliquid dandum vel faciendum [An obligation is a legal bond whereby we are constrained by necessity (whether we wish to be or not), to give or do something.]}
\footnotetext{50}{Indeed, in cases in which it is difficult to achieve an agreement between states due to the strong disagreement between them, custom could play an important role. For this and other areas in which customary law is developed, see Antonio Cassese, \textit{International Law} (2nd ed. Oxford University Press, 2005) p. 166.}
\end{footnotes}
scholars in recent years.\textsuperscript{51} But global constitutionalism still needs to recover the concept of necessity to develop a correct approach to the law in this era of globalization. As Tony Honoré aptly puts it: “As regards the world community, necessity is the relevant ground.”\textsuperscript{52} The reason was explained already in the sixteenth century by Francisco de Vitoria using Aristotelian thought: necessary causes are final causes.\textsuperscript{53} Indeed, human relationships in an era of globalization have made it necessary for humanity to manage its global needs well. Some of those needs derive directly from human dignity (e.g., eradicating poverty and combating international terrorism). Global constitutionalism provokes the pressing question of the legitimacy of global governance,\textsuperscript{54} and the principle of necessity offers a good response.

The special norms of \textit{ius cogens} and \textit{erga omnes},\textsuperscript{55} which in our day have acquired more practical relevance, constitute a powerful expression of the current recovery of the principle of necessity. The peremptory character of the ius cogens and the existence of norms that all states can invoke in case of violation (erga omnes) may suggest the necessity of some norms and standards in order for the system of international law itself to survive. Indeed, the international legal order could not be a universal system if it were founded only on the principle of consensualism. If a political community did not consent to the system of rules, international law would cease to be universal. It is precisely the principle of necessity that makes international law universal (global law) by protecting some irrevocable moral values (ius cogens) and expanding their scope (\textit{erga omnes} norms).

\textbf{2.7. A nonfoundational approach to constituent power.} Roman law helps clarify that what is really foundational to global constitutionalism is the political community of free citizens,\textsuperscript{56} not

the constituent power or constitution as such.\textsuperscript{57} The Senate and the People of Rome (Senatus Populusque Romanus), which embodied the political power of the Roman Republic, presupposed the very idea of people. It was the people (the citizens of the past and the present) that ultimately provided legitimacy to the Roman constitution, not the other way around.

The idea of constituent power, however, is modern at least in the form in which it emerged with the creation of the nation-state. Constituent power was associated with constitutionalism through the Calvinist interpretation of sovereign power and was transformed during the European Enlightenment as a result of secular rationalization.\textsuperscript{58} The concept of constituent power presupposes not only the belief that political power vests ultimately in the people or political community but also the understanding that the political constitution derives its power and legitimacy from the people. The political community thus becomes the ultimate source of the constituent power that legitimates the authority of constitutions.

At the global legal dimension, however, the concept of constituent power should be reformulated. Otherwise, the global community would be at risk of being transformed into a global state. This transformation into a global state would be, in the words of Hannah Arendt, “the end of all political life as we know it,”\textsuperscript{59} the end of liberty itself. The global community is a community of many peoples and as such does not constitute a single people. A people is a plurality of persons recognized as a whole. The global community, however, does not comprise merely a plurality of the world’s population but is its totality. The idea of a people demands otherness—this people as over against some other people. Because the global community is unique in its totality, it is incompatible with otherness. Thus the global community does not require a constituent power in the modern sense of the expression “We the People.” There is no “We the Humanity,” and thus there can be no written formal constitution either.


In his revised account of constituent power under the perspective of global constitutionalism, Mattias Kumm argues that constituent power is vested not only in “We the People” but also in “the international community” as a requirement of a cosmopolitan and postpositivist conception of constitutionalism.60 The two components, “We the People” and the “international community,” would be “co-constitutive” of both national constitutions and the international community. This co-principle of constituent power assures the integration of national constitutions into the global order. Kumm thus challenges the positivistic approach that traditionally attributed to the constituent power a foundational role, and he defends instead a normatively constituted and circumscribed approach.

I basically agree with Kumm, but I differ in the formulation of the argument. In my opinion, because of globalization and the emergence (by necessity) of a global community, the constituent power of a political community is no longer vested in “We the People,” but in “We a people of the global community.” A people is no longer an independent political community but one interdependent with the rest of the world’s population. A political community is thus always an expression and a part of the global community. The global community does not require an autonomous global constituent power because it is not a complete community.61 Ultimately, the reason why both the political community and the global community are the constituent power of any particular community, while at the same time there is no global constituent power, is that the global community consists of an incomplete but necessary community. I call complete those communities that, informed by the principle of autonomy and self-government, endeavor to satisfy as many human needs as possible within their borders (work, health, education, security, and so on). By contrast, incomplete societies are those that strive to satisfy only certain specific human needs. Aristotle and Aquinas considered the polis62 or civitas63 as the only complete and


63 Cf. Thomas Aquinas, Summa Theologiae I-II, q. 90 a. 3 ad 3; Summa Theologiae II-II, q. 65 a. 2 ad 2, and Sententia libri Politicorum 1.1.23 (ed. Enrique Alarcón, Corpus Thomisticum, University of Navarra, 2000. on line: www.corpusthomisticum.org). For more on the concept of “communitas perfecta” in Thomas Aquinas, see, John
self-sufficient community. In our day, the nation-state is the paradigm of a complete community. In addition to being complete in this sense, the nation-state is also an instrumental society: it is not necessary inasmuch as its purpose is not natural and its responsibilities can be carried out by other intermediate political and social groupings. In the same manner that Belgium, Japan, or the United States began to exist in a concrete historical moment, they can also cease to exist. These communities are not an irreplaceable requisite for human existence. They are a cultural product of human experience and historical development. The rich variety of existing political communities is mutable, insomuch as they are subject to political vicissitudes. In these political communities, the science of the possible reigns; that is, these entities do not have an intrinsic value so much as an instrumental one. They are not ends in themselves since they are instrumental and political by nature.

The global community now has become a necessary but not sufficient condition for any constituent power of any people who are a subset of humanity organized as a complete political community. In other words, the self-government of any political community or people must be viewed within the framework of global law to be globally legitimated. The practical consequence of this insight is that global law should not depend on the consent of the state, as happened with classical international law. Global law should have the same legitimacy in the global community that the national law has in the national community. In this sense, a postpositivist approach (see next section 2.8) is required, since any political community influences the global community, and the global community influences the national community. From this perspective, no legal system in a globalized world would consist only of norms and regulations commanded by a single sovereign. If this is so, the idea of constituent power should be extended and not rigidly constrained to national power. This does not mean, however, that a global constituent power should be recognized.

2.8. A nonpositivist approach to the law. Roman law offers a prepositivist approach to the law and prevents global constitutionalism from taking an implicit or explicit positivist position. The term positive law (ius positivum) is not a Roman creation but a medieval one. The distinction between positive law and natural law was first proposed by French scholars such as

William of Conches, Hugh of Saint Victor, and Peter Abelard, as well as French canonists of the twelfth century.\textsuperscript{64} This does not mean that Roman law does not consist of positive law: the Roman civil law, the praetorian law, and the Roman law of nations certainly can be categorized by the non-Roman term “positive law.” In the words of one of the great positivists, Hans Kelsen, “positivism confines itself to a theory of positive law and its interpretation.”\textsuperscript{65} Positivism thus stands completely outside Roman law, which offers instead an integrated framework to the different dimensions of the law: law of nations, fettial law, sacred law, praetorian law, and civil law, among others.

Global constitutionalism should recognize the relevance of positive law, but positive law must fulfill its function as part of a cosmopolitan and postpositivist framework.\textsuperscript{66} Global constitutionalism cannot be positivist because it could not be firmly connected to the most relevant postulates of positivism. Unlike positivism, global constitutionalism demands that the sovereign lawmaking authority should be able to be subjected to legitimate limitation. Unlike positivism, global constitutionalism advocates for internal constraints of constituent powers that cannot be provided just by appealing to the will of people. Unlike positivism, global constitutionalism demands that global normative standards cannot be created out of nothing, based only on a sovereign act of popular will. Unlike positivism, global constitutionalism should not confuse global law and global legality. Unlike positivism, global constitutionalism should not demand a basic norm as a reason for validity, but some principles, values, institutions, and standards should be used as parameters to inspire the new global public law.

Global constitutionalism should transcend positivism rather than rejecting all positivist ideas and assumptions. As postpositivists accept that the theories, knowledge, and values of a researcher can influence what is observed,\textsuperscript{67} so global constitutionalism states that any behavior

\textsuperscript{67} The connection between post-positivism and quantum physics is obvious. Quantum theory, states that by the very act of watching, the observer affects the observed reality. For an overview on quantum physics, see, among others,
of a political community affects the global community, and any behavior of the global community affects the particular community. The global community and the national community are both observers and observed constitutional realities. Global constitutionalism allows us to see the state not only from within but also from outside. This explains why interdependence is at the heart of global constitutionalism. 68 The protection of human rights, for example, is critical in both international and national law. If human rights are not well protected in national courts, then international tribunals are available to review violations. But if international tribunals violate the international law of human rights, national courts need not abide by their decisions. In these cases, as Geir Ulfstein has well argued, the constitutional value of protecting human rights should prevail over the importance of respecting judicial decisions by international tribunals. 69

2.9. Centrality of litigation and plurality of jurisdictions. The history of Roman legal procedures is hardly less than the history of the legal system itself. Legal remedies and litigation in general so influenced the structure and evolution of Roman law that substantive law can be understood only from this procedural perspective. Roman jurists were more concerned about specific legal remedies than abstract rights. For this reason, Roman law is by nature a law of actions. The link between the classical period and legal procedure is so strong that the classical period ended along with the fading of the so-called formulary procedure around 230 CE.

The praetor was the jurisdictional magistrate par excellence. The key to praetorian law lay in the fact that the praetor controlled remedies, and his primary legal function was to grant remedies in individual cases. If both parties were Roman citizens, the magistrate with jurisdiction inside the limits of Rome was the urban praetor. If one or both litigants were not Roman citizens, the jurisdictional magistrate was the praetor peregrinus. The growth of international trade led the Romans to recognize some institutions and transactions (e.g., contract of sales, service, and loans) that could be applied by Roman courts to relations between


foreigners and between foreigners and citizens (*ius gentium*). The aediles curules had jurisdictional power over sales concluded in the market of Rome. A special court had jurisdiction where some relevant inheritances were claimed or the validity of a will was challenged. Some cases of greater public interest came under the jurisdiction of a court of several judges called *recuperatores*. In the provinces, the governor had jurisdiction and played the role of the praetor. Local magistrates were to display and administer justice according to the edict of the provincial governor. In Italian municipia, local magistrates had a limited jurisdiction, and it was possible for parties to demand transfer of the procedure to Rome. By voluntary and formal agreement (*compromissum*), Roman law also allowed parties to submit a dispute to arbitration. The enforcement of the award came from the reciprocal stipulations given by the litigants and was strengthened by penalties as an additional part of the agreement. The advantage of arbitration was that the arbitrator had more freedom to determine an award than did the judge of the formulary procedure, who was always bound by the praetor’s instructions inserted in the formula. This basic outline of legal procedure shows the great flexibility of the Roman legal order due to the plurality of interrelated jurisdictions under the same legal system.

A relevant feature of current international law, and a clear expression of its constitutionalization, is the increased importance and establishment of international tribunals and the judicialization of dispute settlement. In the last decades, new courts and tribunals, such as the International Tribunal of the Law and Sea, the World Trade Organization dispute-settlement body, and the ICSID arbitration, among others, have been created. As a result, relevant areas of law, such as international trade law and the law of sea, are brought under international judicial control. These tribunals mix in and interfere in national state actions while developing constitutional functions beyond the state. Global constitutionalism should continue expanding a system of jurisdictional pluralism that hinders, restrains, and prevents the excessive concentration of judicial authority, without being afraid of reasonable fragmentation. Roman law offers to global constitutionalism a good example of legal and jurisdictional pluralism. Territorial borders cannot solve all legal conflicts.

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2.10. A practical law connected with reality. Roman jurists cultivated a sophisticated and practical legal science and produced a substantial literature in the field of law: commentaries on civil law and on the praetorian edict, collections of legal opinions or legal distinctions, monographs on legal topics, and so on. But unlike the Greeks, Roman jurists spent little time on philosophical abstractions. They were primarily concerned with finding fair solutions in individual cases. Their interest in philosophical issues was peripheral. They did not develop a general theory of justice, law, the state, or political administration. They simply accommodated Greek philosophy when necessary for their legal purposes. Roman jurists were concerned with the daily practice of law, probably because most of them were public men involved in politics and interested in legal issues (without any remuneration) only as a part of their political careers. The development of legal science was a matter of disputations over interpretations of law, and legal science was very much linked with authentic legal conflicts.

Global constitutionalism is mainly defended and developed by scholars and, to some extent, by international courts, but not by national governments, treaty-makers, and powerful international actors. Thus, constitutionalism runs the risk of isolating itself, creating its own unconnected discourse detached from legal reality or, as Anne Peters pointed out, the risk of promoting a government of judges “in which judicial self-empowerment is achieved with the help of constitutional language.” This peril is real. Roman law offers global constitutionalism a good example of developing a practical legal science elaborated from legal conflicts and not from legal abstractions. Global constitutionalism should not be only an intellectual, infertile product. It should be, on the contrary, a way of thinking that illuminates the whole body of international law in the era of globalization.

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3. Conclusion

Roman law offers good lessons of how legal systems, doctrines, and paradigms can be developed and modernized based on equitable ideas and principles. It is therefore a profitable source of inspiration for emerging global constitutionalism. The cosmopolitan spirit of Roman law, its unwritten constitution, its respect for tradition, and its legal pluralism are among the features of the Roman law system that can help to develop a coherent constitutionalization of international law. But the most important link between Roman law and global constitutionalism is that while Roman law offered a prestatist, presovereignist, prenationalist, and prepositivist framework, global constitutionalism offers a postsovereignist, postnationalist, and postpositivist framework. Roman law constitutes an excellent antidote to the excess of statist, positivist, and sovereign elements in the elaboration and development of global constitutionalism.