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Ocean Law and the Processes of Globalization

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PREFACE

Papers from the Law of the Sea Institute conference, *Bringing New Law to Ocean Waters*, are now revised and published in the volume under that title, edited by LOSI Co-Directors Harry N. Scheiber and David D. Caron (Brill Academic Publishers, 2004). A highlight of the conference was a luncheon address given by Professor Kjell Åke Modéer, a legal historian and leading figure in Europe's cultural discourses on law, religion, and state authority. Assessing the relationship of modernism to the law is a major theme in recent jurisprudential writing, but there have been only a few studies of modernity in relation to ocean law – a theme on which no one has written more thoughtfully than Professor Modéer. He brings to his subject the perspective of one who has written penetrating analysis of modernism in other contexts of legal study, e.g., as in his chapter entitled "An American Dilemma and the Scandinavian Dream: The Citizen Meets Modernity and the Strong Nation-State – A Study in Comparative Legal Cultures," in *Earl Warren and the Warren Court: The Legacy in American and Foreign Law* (H.N. Scheiber, editor, Lexington Books, 2007), another recent publication of the Institute for Legal Research. Professor Modéer's many contributions to historical scholarship and cultural, policy, and social analysis have been recognized prominently with such awards and appointments as honorary life member of the American Society for Legal History, the Samuel Pufendorf Chair Professorship at Lund University in Sweden (his own institution, where he served as dean of the law faculty and the university deputy vice chancellor), election to the Danish Academy of Sciences, and a medal for scholarly achievement bestowed by the King of Sweden. It is an honor for the Law of the Sea Institute to include his important talk as the fourth in this new series of LOSI Occasional Papers.

Harry N. Scheiber

OCEAN LAW AND THE PROCESSES OF GLOBALIZATION

Kjell Åke Modéer[1]

I.

As I reflect on the presentations at this conference, I look upon myself as an outsider, at least in relation to maritime law in general. I'm a legal historian coming from a country in the European periphery with comparative legal cultures as my current research field. My perspectives therefore have to be explained as seen through my glasses.

There are four keywords I would like to elaborate on, in considering the core theme of this fascinating conference: *Bringing New Law to Ocean Waters*. They are: globalization, modernity, post colonialism and soft-law.

But let me start with an observation regarding our own common, current historical perspectives. When we observed the first photographs taken on the moon in the 1960s, I would say the most exiting ones were not the detailed pictures of the stony surface on the moon. The photo that really impressed most people, including myself, was the one showing the Earth, *Tellus*, swimming as a blue diamond in orbit. For the first time in human history we as human beings got a common identity. We had this flourishing but vulnerable planet in common in a sterile, black orbit.

From that moment we went global; we could grip the world in reality. We could also make travels around the world with help of a new global airborne tourism. Since then *globalization* has been a keyword for many political, economical, legal and cultural discourses. In the western world the globalization process was conceptualised in modern societies, in which collectivistic and welfare-state models belonged to the *Zeitgeist* in the 60s. Immanuel Wallerstein has in a recent essay divided the 20th century – the century of modernity – into the time before and the time after 1968. Three decades ago the keywords were *liberation* and *equality*, in global politics as well as in sexuality. From that time on the modern world went post-modern.

The decolonialization of the western hemisphere created a quite new relation between the traditional European colonizers and their former colonies. But even if we recognized this emancipation between the sovereign and the

[1] Professor of Law, Lund University. This talk was presented at lunch for the conference on "Bringing New Law to Ocean Waters," Boalt Hall School of Law, UC Berkeley, April 6, 2002.

subaltern, we found that historical culture-bound categories stayed on in the discourses between the "We'"s in the West and "the Other" in the East or in the South. At the same time we jurists shifted beliefs in jurisprudence: we went from an enduring earth-bound legal realism into different forms of critical theories. It was not an easy shift for many law professors; it took place with the student revolts as an effectual background.

It was in the 1960s that the strong liberation theology movement started out from postcolonial territories in Latin America. One of the senior representatives in this movement is the Brazilian clergyman Leonardo Boff**.** He has repeatedly declared that two of the world's greatest current problems are those related to poverty and environment. And neither of these problem areas can be solved with help of traditional political solutions. They cannot be solved just by reason. They also need empathy and solidarity to be solved.

II.

The Legal History of the 20th century is today one of the most interesting and fascinating topics for legal historians, and several monographs have recently been published on this modern history of ours.[2] Why so? Because today we are able to recognize, indeed virtually forced to recognize, the dramatic changes in our modern history. And we need these observations and perspectives from the discipline of history to be able to understand the postmodern, multi-cultural and legal pluralistic society. Increasingly it has been easier for us to observe the always-ongoing waves of trends between traditions and culture on one hand and of reform and modernization on the other. Today we can deal in an interpretive way with even the late 20th century. Thus, as Harry Scheiber and others have emphasized in their papers for this conference, the prerequisites for ocean law and maritime law have changed dramatically since World War II – and increasingly since the 1970s.

Bringing New Law to Ocean Waters: This title gives us an observation on transition and change. After having listened to the presentations at this conference, I would like to put it this way: Increasingly we are bringing *global laws* to ocean waters. This concept of transition has a history starting around 1970, with the UN Conference in Stockholm on Human Environment in 1972. It was from that time onwards that the first postwar generation could contribute in formulating the agenda for the future. From that year and up to today international law, public law perhaps more than private law, has played a growing and important role for politicians as well as jurists. As Lawrence Juda puts it in his paper, we have to "consider international law as a tool to promote coherent,

[2] E.g., Lawrence M. Friedman, The Law in America in the 20th Century, New Haven: Yale University Press 2002.

integrated management of ocean space." The legislators thus still play an important role in constructing ocean law.

III.

For the vast majority of jurists, land law has for a long time been regarded of greater importance than ocean law. Land law was in pre-modern times more or less identical with private law. Ocean law, however, has been categorized traditionally as international public law, *ius gentium*.

We all know of the famous legal political struggle in the early 17th century between the Dutch jurist Hugo Grotius and the English one John Selden about the status of the open seas. Who owned the great oceans? Who had the right to claim property rights on the oceans? In late medieval times the oceans were divided between the colonizers. But Grotius declared that all oceans must be free and open for maritime purposes. His thesis on *"De Mare Liberum,"* the freedom of the seas, became a political argument for the young Dutch republic, which wanted to get an international position for its maritime commerce. His English colleague Selden opposed this position, arguing the seas should be closed, *"De Mare Claustrum."* They belonged to the nations with coastlines to the oceans. As we know, Grotius's position for centuries, actually up to late modernist time has been the winning concept. At the same time as international trade became reoriented, with the decolonization movement and new competition patterns among commercial markets, there occurred a new set of challenges – culminating in the Law of the Sea movement in the UN and global diplomacy – to the inherited tradition of Grotian principles.

Historically the oceans have been the main infrastructure for global transportation schemes and a prerequisite for the colonization of the Indias as well as the Americas. Such challenges as there were to the rules of international public law regarding the borderless vast oceans, however, were up to the latter part of the 20th century a minor problem. The globalization process has given new dimensions to this situation. Especially so as the dynamics between macro- and micro-relations, between the local and the global, in this modernization, have demonstrated the differences between the political and legal cultures. The trends to harmonize international public law with help of legal instruments as *conventions* or *declarations* have resulted in ongoing conflicts between cultural concepts of different sorts.

The result has been that we now have a quite a different geopolitical map than the one we are creating in the globalization process for the five land continents. The modernization of the laws related to the high seas is always bound to the local legal cultures in the national coastal states. These countries had a core interest to be involved and engaged, not only to benefit from the new system but also to fulfil the duties put on them. As Hugo Tiberg has

demonstrated, the Baltic Sea is an example of this ongoing transition. The European political map up to 1989-90 divided the Baltic Sea into two parts. One part belonged to the Western the other to the East-European political system. The Iron Curtain/wall and all problems related to national security on both sides were drawn through the Baltic. Political rhetoric dominated on both sides. Subsequently, beginning with the 1990s, however, the Baltic Sea has been a common great project for all the nations around the coastline. Several of those *fugacious* problems that Richard McLaughlin discusses in his paper have been identified in the Baltic Sea region as severe and concrete pollution problems and fishing quote problems. Up to 1989 such problems only got rhetorical solutions. Today this region has been identified as a common European one. The context of commonality as European – and as political – will be still more important and emphasized when the Baltic countries and Poland in the future have become members of the European Union.

The modernization of ocean law in recent years is created differently than is done within the law for the continent. The legal globalization-process of today, as such, is more characterized by privatisation. We are observing a breakup of the national-state-orientated concept of the 19th century. The new liberal economy has in recent years changed the focus from legal problems regulated through public law – many of them related to welfare-state problems – into private legal solutions. The market – not the political and administrative processes – increasingly forms the legal agenda. The administrative law of the 20th century, with its peak around 1970, has nowadays run into an eroding period, in which especially the welfare-systems in the western countries have been heavily reviewed. This privatization of the law has resulted in a global mega-structure not only in business but also within the legal profession. The mega law firms of today are global law firms. They are regulating the legal problems in contracts and the conflicts they create are also solved in a private way, by arbitration or by mediation. The NGOs are another example of the new political powers and legal forces of this private, and no longer the public, agenda for reforms.

The legal culture of ocean law is quite different. It is bound to the participants on the scene of the international public law. Harmonization and consensus are the only concepts to reach pragmatic results on this area. In this field the international declarations and conventions not only have to be signed, they also must be ratified and implemented. The extremely low speed in this process of course challenge all the contra-forces who in a short perspective want to misuse the natural resources and even devastate the aims of the conventions, as, e.g., the Convention on Biological Diversity.

IV.

From a global perspective the new economical order has given us a new political map. The national states are meeting competition from the forces on the

supranational level. Different forms of federalistic categories have been formatted during the 1990s. It is not only NAFTA and the European Union that we have observed showing their economic and political muscles in recent years. Also MERCOSUR in Latin America and ASEAN in South-East Asia are examples of the identification of regionalization of economic and political powers. As the contributions to this conference have demonstrated, this regionalization is to be seen also regarding the oceans. In the medieval times the Mediterranean was regarded as the dominating ocean. Later. in early modern times, the Atlantic Ocean came into central focus. Today it is the Pacific. with its important natural resources for the whole world, which is the ocean that – as far as I have observed on this conference – is perhaps now and potentially the most regulated one regarding fishing and natural resources. The consequences for the climate and the environment from "El Niño" some years ago (and more recent meteorological-oceanographical disturbances) were also related to the Pacific Ocean and have highlighted for the world its importance as an ecosystem and especially as a food source.

V.

The great problem in this globalization process, it may be said regarding the continents as well as the oceans, is the difficulties involved in going from political aims to functional reforms, from theory to practice. The legal systems created for the national states on the continents are normally bound to sanctions. "Hard law" not only provides norms, it also implements enforcement mechanisms and it places sanctions against those who are violating the norms. Late-modern legal systems are more transparent. In recent years the mobility of people and goods all over the world on one hand have been made possible with help of the new technology. The *roll on/roll off*-technology (for shipment of cargo in containers) created quite new transportation systems over the oceans. New cargo vessels and new port-facilities, as in Hong Kong, Singapore and Rotterdam, created global hubs for the ocean traffic. *Transparency*, *free markets* and *open boundaries* were the keywords for the new millennium. The traumatic events of September 11 created on the other hand a quite new situation. The visionary keywords demonstrated how vulnerable the late modern society is. After September 11 we also clearly recognized the dichotomy between economically and culturally founded legal concepts. Most of the papers of this conference have demonstrated the failures of national societies as well of the global society to find the solutions to get rid of the misuses of the visionary aims to create the "good society" and to let us "live in the best of all worlds". To that extent this conference serves better to show the lacks in the contemporary systems than the concrete possibilities for quick reforms on the Ocean Law area.

We have been able to look into the legal realities and their foreseeable consequences for the future. Modern jurists have traditionally regarded themselves as well suited to be "social engineers" for legal reforms. But the

global situation looks more depressing than optimistic unless there is a possibility within the terms of a democratic order to successfully cope with such problems as IUU (illegal, unregulated, unlicensed) fishing, corruption, the mafia, white collar crimes as well as other international orientated crimes such as drugs and trafficking, let alone international terrorism – that to say, the many problems that area related to the increasing polarization between the rich and the poor, "We and the Other." Professor Craig Allen's talk at this conference about legal responses to the risk of maritime terrorism demonstrated the dilemma for an evolutionary based theory, it may be social, technological or economical. The pendulum doesn't go further. The pendulum instead strikes back. Without insights and knowledge of the deeper cultural structures of the law the gap will remain between aims and reality, theories and practice.

VI.

In a famous talk in 1872 the German law professor Rudolph von Jhering urged the jurists to struggle for law and justice. "Struggle for Law" was the title of his pamphlet, translated into many languages and published in as many editions all over the world. Jhering was a scholar who observed the necessity of making theory and practice cooperate, and of lifting jurisprudence up from its muggy national level up to a vivid and fruitful international one. Jhering urged the jurists to be fighters and to combat for the law. If the jurists did not make it, he argued, nobody else would take care of the illegalities, of the crimes, of the insulted and wounded. Jhering was a law professor grounded in the *Zeitgeist* of the idealistic period of jurisprudence before the Great War. After the Great War there was no longer any place for idealistic perspectives of the law, not in my part of the world anyway. The "law in books" concept of law changed into that of "law in action".

Let me finally be a bit rhetorical: What postmodernism in my view has brought into the legal mind, after the trips to the moon in the 60s, is the revival of the universalistic ideals, of values, as demonstrated in the role human and civil rights have played for legal argumentation in the globalized discourses in recent years. I leave this conference with new insights on the misbalance between the global legal systems and the optimistic aims to find the tools to *bring new laws to ocean waters*. With the help of a bit more idealism among the actors involved and a determination to reach an understanding of the deeper differences between legal concepts and legal cultures, we may achieve more concretely successful reforms. I will in any event leave Berkeley to return home to Sweden after this conference more enlightened and with Jhering's call for a more effective law ringing in my ears.