

# Globalisation – the State and International Law

edited by  
Stephan Hobe

*(HMRG-Beiheft 76)*



Franz Steiner Verlag 2009

## NATURAL LAW AND THE GLOBALISATION OF THE CHEAP ENERGY MIND

KIRK W. JUNKER\*

„riverrun, past Eve and Adam's from swerve of shore to bend of bay, brings us by a commodius vicus of recirculation back to Howth Castle and Environs ... A way a lone a last a loved a long the”<sup>1</sup>

### Introduction

On the fiftieth anniversary of the Treaties of Rome, the Berlin Declaration declared the period of reflection on the failed Treaty to Establish a Constitution for Europe to be at an end. To replace it, a reform treaty was signed in Lisbon in December of 2007, and newspapers from Dublin to Beijing reported on the communiqué issued by EU leaders in Brussels that stated „The Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future, so that the Union will be able to fully concentrate on addressing the concrete challenges ahead, including *globalisation and climate change* ...”<sup>2</sup> In choosing the problems to highlight in the press release for what still might constitute the legal framework for Europe in the foreseeable future, why did these leaders state, and why did these journalists repeat these two issues together – globalisation and climate change? „Globalisation” and the various processes it describes as such have already been thoroughly discussed in legal literature many times over.<sup>3</sup>

\* Associate Professor of Law and Director of International Programs, Duquesne University School of Law, Pittsburgh, Pennsylvania, USA; former litigation counsel to the Pennsylvania Department of Environmental Protection.

1 These are the first and last lines, respectively, of Joyce, *Finnegan's Wake*, London 1939. Ending the sentence at the beginning of the book and beginning the sentence at the end of the book makes it possible that even this 638 work reads as a cycle.

2 Smyth, *The Irish Times*, December 15, 2007, page 1, found at <http://www.ireland.com/newspaper/frontpage/2007/1215/1197543947005.html> and Xinhua, „Lisbon Treaty marks new beginning for enlarged EU with profound changes,” *The People's Daily*, December 21, 2007, found at <http://english.peopledaily.com.cn/90001/90777/6325284.html>. Emphasis added.

3 See for example Delbrück, *Globalization of Law, Politics, and Markets – Implications for Domestic Law: A European Perspective*, in: *Indiana Journal of Global Legal Studies* 1 (1993), pp. 9 (10 et seq.); Aman, *Globalization, Democracy, and the Need for a New Administrative Law*, in: *UCLA Law Review* 49 (2002), p. 1687; Hobe, *Die Zukunft des Völkerrechts im Zeitalter der Globalisierung – Perspektiven der Völkerrechtsentwicklung im 21. Jahrhundert*, in: *Archiv des Völkerrechts* 37 (1999), p. 253; Dicke, *Erscheinungsformen und Wirkungen von Globalisierung in Struktur und Recht des internationalen Systems*, in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), p. 13.

Likewise climate change is found everywhere in the media. In the Hegelian spiral<sup>4</sup> of human concerns, we have once again arrived at a point when talk of the environment is fashionable. Is it more than that? Although one says that talk of the environment is *again* popular, the spiral of history finds us in a different place than when we last passed by here. During an address at the University of Pittsburgh, former Irish Taoiseach and current EU Ambassador to the USA, John Bruton, stated that climate change is as important an issue for the EU as any issue in the Balkans.<sup>5</sup>

The current „commodius vicus of recirculation” is not what it was in the late 1960s and early 1970s, for example, when talk of the environment was also at a crescendo. And although I say „talk” of the environment, I do not use „talk” dismissively – words are important. One might even go so far as to say that „things are the signs of words,” rather than the usual notion that words are the signs of things.<sup>6</sup>

While in the past, various regions have had problems with their relationships to the earth that one might call local, the warming of the earth is a problem that is characteristic of the whole earth – it is global. So what will the pluralism of domestic law or the fragile unity of international law do about the current environmental problems, most notably global warming? Stephan Hobe has well described the problems in international law that relate to globalisation. Hobe echoes Jost Delbrück in hinting toward the end of the state on a distant horizon. Delbrück has coined the terms „*ent-staatification*” and „*ent-grenzen*” (de-statification and „de-bordering,” respectively). According to Hobe, if one therefore tries to summarize a description of globalisation in public law, one could identify the phenomenon of globalisation as an increase of transnational actors with political negotiation power, global threats and challenges beyond state and intergovernmental capacities of regulation and far-reaching changes of societal and political integration.<sup>7</sup>

„Of an even greater interest is, however, from a doctrinal point of view the increasing importance of non-state actors,”<sup>8</sup> such as NGOs and multinational organisations – further evidence that our conception of law changes over time. Take into consideration for example how the new institutions regard the role of law – they are present in „virtually any international conference and press very hard for more participatory rights. And they are active in various fields as the examples of Amnesty International, Greenpeace..., the International Olympic Committee and the International Chamber of Commerce make evident.” Many „examples demonstrate that the globalised world of today is characterised by two interrelated tendencies: On the one hand, the control-capacity of the sovereign nation state becomes more and more limited and on the other hand, the capacity to act of actors

4 See Hegel, *Logik*, in: Meiner (ed.), *Sämtliche Werke*, 1928.

5 Bruton, public speech at Student Union Building, University of Pittsburgh, Pittsburgh, Pennsylvania, USA, April 9, 2008.

6 See Burke, *What Are the Signs of What? – Language as Symbolic Action*, Berkeley 1968, pp. 360-362.

7 Hobe, *op. cit.*, p. 655 et seq.

8 See Hofmann (ed.), *Non-State Actors as New Subjects of International Law*, Berlin 1999.

of the non-state sector is considerably increased. Apparent examples of this hypothesis are the current problems to find adequate answers against international terrorism.” Hobe concludes that it is „no overstatement if one asks very seriously the question of whether or not the era of globalisation marks an end of public international law.”<sup>9</sup> So indeed one could say that we have necessary reasons to re-conceptualize law. What will lawyers contribute to solving current environmental aspects of those problems? And what will other persons, professions or institutions do about the problems? My concern is the relationship of globalisation to climate change.

While „looking for a few good reasons to go green,” Michael Pollan of the *New York Times* raises the very good question to everyone (not just lawyers): „Why bother?”<sup>10</sup> He emphasizes to everyone that looking to law and politics for answers to environmental problems is the wrong place to look. It may seem to be ironic, but I want to go further and emphasise that point especially to lawyers. Pollan points out that „for us to wait for legislation or technology to solve the problem of how we’re living our lives suggest we’re not really serious about changing – something our politicians cannot fail to notice. They will not move until we do. Indeed to look to leaders and experts, to laws and money and grand schemes, to save us from our predicament represents precisely the sort of thinking – passive, delegated, dependent for solutions on specialists – that helped get us into this mess in the first place. It’s hard to believe that the same sort of thinking could now get us out of it.”<sup>11</sup>

Provocatively, Kenneth Burke would even go so far as to say that this attitude of leaving law to the specialists, to legislate our problems away, has led to constitutions that are at best, „business in a mode of mild self-criticism.” Pollan’s perspective is clear from outside the law, looking in. From the perspective of the inside of law looking out, what can one see? What can one do? How can law or the legal profession, in teaching or practice, lend a hand, if not by legislation or even litigation?<sup>12</sup> Well, if law is more than an instrumentality or utility, and is rather also a way of thinking, as when Germans speak of the *Rechtsstaatsprinzip*, or Americans speak of teaching students to „think like lawyers,” or the Copenhagen criteria for accession to the EU requires a state to „observe the rule of law,” then perhaps there is something internal to the notion of legal thinking that could help.

9 Hobe, op. cit., p. 657.

10 Pollan, Why Bother? Looking for a few good reasons to go green, *The New York Times Magazine*, April 20, 2008, p. 19 et seq.

11 Pollan, op. cit., p. 20.

12 See for example Burns/Osofsky (eds.), *Adjudicating the Climate: International and National Causes of Action on Climate Change*, Cambridge 2008.

## Problem 1: the Legal Schizophrenia Between Natural and Positive Law

The well-known Article 38 of the UN Charter, delineating the jurisdiction of the International Court of Justice, includes, among the sources of law that the court is to apply, a source that by its English name would be politically incorrect – the principles of „civilized” nations. But more important is that its archaic political incorrectness, the implication of the phrase „principles of international law” belies a truth of legal psychology as well – we behave *as though* common principles are a given, and that position rather assumes a natural law posture. But in practicing law – especially in practicing private law – we act as legal positivists. It is only the insightful lawyer, the experienced lawyer, who treats the rule of law just like the factual assertions of parties; that is, as temporary possibilities, appealing for a basis to nothing more than that individual’s perceptions. I call this mode of contemporaneous contradiction „legal schizophrenia.”

When teaching international law, I find myself constantly in the position of needing to persuade students – Americans, Irish, Macedonians and Germans – that international law *is law*. They often think that without an international police force or army, there can be no enforcement. Recently, however, I found myself positioned near the other side of the argument, but for different reasons – not because international law lacks some necessary element (like enforcement) that domestic law contains, but because, as Pollan points out regarding legislation, law is equally as ineffective for guiding human behaviour, regardless of whether that law is domestic or international. We find a striking example of the practice of the legal schizophrenia in comparative law, when we examine what Zweigert and Kötz, called „*praesumptio similitudinis*” in their influential work, *An Introduction to Comparative Law*. They describe the practice as „a presumption that the practical results [of comparison] are similar.”<sup>13</sup> This provides us with a good example of how prescriptions can appear to be mere descriptions. Vivian Curran makes an insightful socio-historical critique of the presumption employed by Zweigert and Kötz when she sees their social science as being within the ideological perspective that those oppressed by Nazis were and are as much human as others, and that therefore common principles must exist for governing their behaviours and redressing the wrongs upon any of them. Curran’s critique may be insightful for many reasons, but here I wish only to emphasize one. Whatever the socio-historical reasons for the Zweigert and Kötz perspective, Curran’s critique demonstrates that these foundational principles of law *have* a socio-historical position. And indeed they must. To bring us back to globalisation and climate change, therefore, and the question of why one should bother to do anything about the other, and to the Pollan critique that waiting for law to do something for us is part of the problem itself, we are left to ask what fundamental principle(s) has put us in this situation, and to see how we ourselves – not our legislators and not our scientists – can work

13 Zweigert/Kötz, op. cit., p.31.

our way out of it. The „it,” according to Pollan’s clear focus, is what Wendell Berry called „the cheap energy mind.”

## Problem 2: The Cheap Energy Mind

While still trying to solve the puzzle called „why bother?” Michael Pollan explains the cheap energy mind, a term coined by Wendell Berry in the 1970s, as follows: As Adam Smith and many others have pointed out, the division of labour has given us many of the blessings of our civilization. (Of course, August Comte also pointed out in volume one of his *cours* that even in his world of disciplinary reduction, there needed to be those whose specialization was generalization.<sup>14</sup> That is to say, someone must specialize in keeping all the specialists working together and understanding one another.) Yet it was Smith’s notion of specialization that made cheap energy possible in the first place. „Cheap fossil fuel allows us to pay distant others to process our food for us, to entertain us and to (try to) solve our problems, with the result that there is very little that we know how to do ourselves.”<sup>15</sup> The more biting point that Pollan makes is that it is this cheap energy that both gives us climate change but at the same time „fosters precisely the mentality that makes dealing with climate change in our own lives seem impossibly difficult. Specialists ourselves, we can no longer imagine anyone but an expert, or anything but a new technology or *law*, solving our problems. Al Gore asks us to change our light bulbs because he probably can’t imagine us doing anything much more challenging...”<sup>16</sup>

As a result we have the „cheap energy mind.” The „cheap energy mind asks ‘Why bother?’ because it is helpless to imagine – much less attempt – a different sort of life, one that is less divided, less reliant. Since the cheap energy mind translates everything into money, its proxy, it prefers to put its faith in market-based solutions – carbon taxes and pollution-trading schemes. If we could just get the incentives right, it believes, the economy will properly value everything that matters and nudge our self-interest down the proper channels. The best we can hope for is a greener version of the old invisible hand.”<sup>17</sup> But as Pollan goes on to discuss, „merely to give, to spend, even to vote, is not to do...”<sup>18</sup> I would add to that, when is legislating or adjudicating the same as doing? They are not; at least not for those other than the judge or the legislator. These acts of law, like the act of voting in politics, are what Cicero called regrettable necessities. Why „regrettable”? Because they are indicia that we have ceased to act. In a May 7, 2008 broadcast of the radio show „The Allegheny Front,” Michael Parks, the legal director of the Group Against Smog and Pollution (GASP) noted that the city of Pittsburgh has been called the „Saudi Arabia of coal.” He noted as well that the

14 Comte, *Cours de philosophie positive*, Paris 1830–42.

15 Pollan, *op. cit.*, p. 23.

16 Pollan, *op. cit.*, p. 23 (Emphasis added).

17 Pollan, *op. cit.*, p. 23.

18 Pollan, *op. cit.*, p. 23.

Pittsburgh region has 17/19 of the waste coal plants in the US. The effects of coal production and use led him to conclude that „We need to turn to energy efficiency,” not just more sources of energy to be burned the same old way. That same old way is the cheap energy mind. Parks, a *lawyer*, has identified the connection of the cheap energy mind to law.

### A Solution: The Individual's Natural Law Mind

Pollan says something that to me, screams for a connection between changing the cheap energy mind and natural law. He asks whether it matters for one to do something to reduce CO<sub>2</sub> just to have other persons in other countries increase their CO<sub>2</sub> levels. What does one have to show for the trouble?

“A sense of personal virtue, you might suggest, somewhat sheepishly. But what good is that when virtue itself is quickly becoming a term of derision? And not just on the editorial pages of *The Wall Street Journal* or on the lips of the vice president, who famously dismissed energy conservation as a ‘sign of personal virtue.’ No, evening the pages of the *New York Times* and *The New Yorker*, it seems the epithet „virtuous,” when applied to an act of personal environmental responsibility, may be used only ironically. Tell me: How did it come to pass that virtue – a quality that for most of history has generally been deemed, well, a virtue – became a mark of liberal softheadedness?”<sup>19</sup>

I like to use a personal teaching anecdote to illustrate by example how we have institutionalized this loss of virtue. While teaching environmental law to postgraduate American law students who were nearly ready for their state examination, I had invited a biologist to address some issues of water biology contained in Pennsylvania's environmental regulations. On the way to the lecture, the biologist, who had never been in a law school classroom before, asked me what sorts of things the students talk about. I replied with some technical details from environmental regulations. „No, no” she responded, „I mean what sorts of law things do they talk about; do they talk about justice?” Without meaning to joke, I answered „no, these are upper-level students; they don't talk about justice anymore.” I meant it seriously – in the first semester, law professors tell them that policy arguments (and sadly, justice is considered by many to be at the level of policy only), are the lowest level of argument for an advocate. So my biologist colleague gave her scientific lecture. At the end, I asked the students why they thought a particular water standard therefore had been set the way it had. „Balancing of interests” was one answer from a student. „Judicial economy” was another student's answer. Then silence. „What about justice?” I asked. Half of the class laughed audibly. I looked at the biologist – she was horrified. The virtue of justice had been institutionally categorized as something laughable – for students of the law, no less. Where else might one hear laughter at justice? In the law of climate change itself – reduced to

19 Pollan, op. cit., p. 19.

the characterization of „mere” virtue. Although emissions trading practices precede the Kyoto Protocol, they are perhaps best known due to the Kyoto Protocol, and indeed in Europe, the Emissions Credit Trading Scheme of the EU, one of three „flexibility mechanisms” permitted under the Kyoto Protocol, is explicitly implemented as a tool by which European member states attempt to comply with the Kyoto Protocol. To earn a tradable credit, a qualifying facility must emit less air pollution than either the statutory limit or the permit limit for that facility. Having done so, the facility may sell the right to emit the tons of carbon (or sulphur) to a facility that emits more air pollution than either statute or permit allow. But what is being bought and sold here? Is there a right to pollute? Of course not. If I drive an automobile under the speed limit, can I sell the extra kilometres-per-hour that I did not use to someone so that he or she may therefore exceed the limit by that speed? Of course not. But nevertheless, the expediency of trying to fix a problem without annoying too many powerful concerns means that anyone choosing not to pollute is merely exercising personal virtue, and making no real contribution to society.<sup>20</sup>

## Conclusion

Michael Pollan concludes his essay in the Hegelian manner of spiral by noting that „Maybe going green will prove a passing fad and will lose steam after a few years, just as it did in the 1980s when Ronald Reagan took down Jimmy Carter’s solar panels from the roof of the White House.” At this brief moment for reflection on globalisation and the natural environment, specifically climate change, we have seen that within the operating principles of law that which can appear to be descriptive practices of social science can in fact be prescriptions. They can be prescriptions that function as presumptions, as with Zweigert and Kötz’s *praesumptio similitudinis*, or they can be prescriptions to do nothing in the face of climate change, as when the vice president of the United States sneers at energy conservation, damning both the effort and personal virtue itself. It is precisely personal virtue, institutionalized in the legal mind historically as natural law that must be called upon for prescriptions. Can these prescriptions help? Maybe. If they can, it will be the job of lawyers and legal educators to see the subtle power and contribution to be made by changing the legal mind from the cheap energy mind that waits for the mechanics of positive legislation to effect change, to one that takes personal action for that change. Institutions change, sources of law change, but the concept of law’s function must also change from the operation of law as positive rules imposed from the top downward, to law in the life of individual choice.

20 See Junker, Ethical Emissions Trading and the Law, in: University of Baltimore Journal of Environmental Law 13 (2006), p. 149.