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Si è svolta da marzo a giugno di quest'anno l'ottava edizione del corso di Transnational Law, la quinta da quando il professor Sapienza ha assunto la responsabilità dell'insegnamento.

Il programma del corso prevedeva, come nelle precedenti edizioni, una parte generale, introduttiva, dedicata all'esame delle teorie elaborate dalle principali scuole di Transnational Law statunitensi ed europee e una parte speciale, di approfondimento monografico, quest'anno costituita dallo studio della possibilità di un approccio "transnational" al diritto internazionale del mare.

La parte speciale del corso, il Tlaw Lab, frequentata con assiduità da 26 studenti, è consistita nell'esame della teoria proposta da Josh Martin nel suo scritto *A Transnational Law of the Sea,* pubblicato nel *Chicago Journal of International Law* nel 2021.

Secondo la visione di Martin, rimane dubbio se mai sia esistita una lex maritima prodotta e rispettata dalla comunità dei naviganti prima che gli Stati sovrani si affermassero con i loro poteri di sovrani legislatori tanto sul piano interno quanto internazionale

«This picture of a transnational legal system, most idealistically found in the commercial context, has also found expression in numerous other visions of global legal communities, the most interesting of which for present purposes is the *lex maritima*, or maritime law.

The *lex maritima* envisages that, long before nation-states appropriated the law of the sea and transcribed it into domestic legislation, much maritime activity was self-governed by the maritime community themselves. The networking of mariners across continental ports in previous centuries arguably necessitated the development of mariners' own systems of rules and customs. These customs and rules were often enforced internally or via available town councils, merchant courts, and guild consuls. Indeed, it seems well accepted that prior to the embedding of the Westphalian ideology from the 17th century, many of the maritime community's rules had derived from widely shared codes and customary principles, such as the *Lex Rhodia*, *Rôles d'Oléron*, Laws of Wisby, and the *Consolata del Mare*. For example, one historian noted how maritime law was regarded as a universal and "common system of law," given that "[t]here was . . . in those days nothing strange in laws that were not national." Therefore, the extent to which these maritime codes actually formed a unified common law, in preference to local custom and decentered regulation, has for some time been a question of academic interest.

More recent and detailed historiographical scholarship on the matter, however, has put considerable doubt on whether such a *common* maritime law ever existed. Indeed, many have correctly pointed out that the dearth of social bonds and interdependencies between regional actors in the pre-globalization age makes it inevitable that divergent customs and interests would have undermined any efforts at establishing unified laws across continents. A great deal of research has, therefore, attempted to disprove the transnational account by disproving the historical account. Yet, whether a common maritime law existed in the medieval period does

not detract from the essential hypothesis that unified systems carry normative advantages in denationalized contexts».[1]

Comunque, quando il sistema normativo degli Stati, quello che Martin indica come il modello westfaliano, è emerso e si è affermato sia a livello interno che internazionale ha sviluppato un insieme di norme, pensate essenzialmente per la disciplina per i rapporti internazionali sulla terraferma, la cui applicazione al mare e ai problemi giuridici del suo utilizzo non ha prodotto risultati apprezzabili.

«It is becoming increasingly clear that there is something wrong with the *system* of the international law of the sea, rather than merely the content of the *laws* themselves. However, while law of the sea scholars have made ad hoc or casual references to issues such as zonality, territorial sovereignty, and state compliance, commentary has rarely pointed at the Westphalian system of international law as the root cause of failed ocean management. This section suggests that three integral and interlinked manifestations of the Westphalian system—sovereign *exclusivity*, sovereign *equality*, and *territorial* sovereignty—represent the fundamental weaknesses in our international law of the sea»[2].

Dopo un accurato esame degli effetti negativi di queste caratteristiche del sistema westfaliano, Martin afferma che le

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[1] J. MARTIN, *A Transnational Law of the Sea,* in *Chicago Journal of International Law* 2021, pp. 419 ss. alle pp. 430-431. Si veda pure R. SAPIENZA, *Il diritto internazionale del mare. Un sistema normativo in costante evoluzione,* in Idem*, Spazi marini e diritto internazionale. Testi e documenti per il corso di diritto internazionale del mare*, Catania 2022, p. 11 ss.

[2] *Ibidem* p. 432

nuove tendenze verso un Integrated Ocean Management, ossia una concezione integrata della gestione degli oceani e in genere degli spazi marini, postulano oggi la creazione di un sistema che può definirsi autenticamente transnational, un sistema che vada oltre il monopolio legislativo degli Stati sovrani e veda il coinvolgimento di tutti gli altri attori, pubblici e privati, interessati alla gestione del mare e dei suoi asssetti[3].

«At the very heart of the coveted "integrated" model of ocean governance is the consistent desire for both greater *stakeholder inclusivity* and for increased *multi-level regime-building*. In other words, the desire to truly bring the global community of persons beyond states—the unfortunately titled "non-state actors"—into positions of governance authority, as well as to release some of the grip on legal authority by national governments and displace it to governance networks found at local, national, regional, and global scales. In fact, this ideal of post-national governance accords neatly with Elisabeth Mann Borgese's visionary 1998 monograph, *The Oceanic Circle: Governing the Seas as a Global Resource*, which promoted a new *global* approach to ocean governance»[4]

Certo non basta ricostruire in teoria la desiderabilità di un simile approccio o evidenziare qui e là quelli che sembrano

[3] Su questa visione si possono vedere R. BARNES, *The Law of the Sea Convention and the Integrated Regulation of the Oceans*, in *International Journal of Marine and Coastal Law* 2012, pp. 859 ss.; E. A. KIRK, *The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance*, in *Ocean Development and International Law* 2015 p. 33 ss.

[4] *Ibidem* p. 467

essere esempi dell'emergere di questo nuovo modo di vedere il diritto del mare.

«Yet, it is clear that ocean jurisprudence continues to proceed along the same tired inter-national lines. For example, the current negotiations over an internationally binding legal instrument on the protection of BBNJ appear to carry the same weaknesses of inter-state consent-based bargaining and lowest common denominator weaknesses which were lamented throughout this article. More investment is needed in the mobilization and advancement of private and hybrid actors, such as NGOs, transnational corporations, subnational actors, and standards bodies, as well as effective supranational and regional institutions, which are able to force meaningful consent and compliance across ocean space.

Far more can be discussed on the expansion of pluralistic, multi-stakeholder, and multi-level systems of maritime law and governance, as well as the means of achieving such a global system of regulation. Nevertheless, this article has focused an early critical point in these discussions, by arguing that the worldwide search among academics and experts over the past three decades for new "integrated" modes of ocean governance has, in fact, been merely a calling for a new post-Westphalian, multi-level, and stakeholder-inclusive governance regime»[5]

Per poi concludere che

«The integration and coordination between the traditional inter-national order of the oceans, as epitomized and constitutionalized through the LOSC, with the emerging

[5] *Ibidem* p. 474

seaward migration of a new transnational understanding of global governance, is a ripe area for future research. The first port of call would be to finally identify our outmoded devotion to Westphalianism as being at the heart of our failing system up to now. If we are ever to govern this blue planet effectively, a *transnational law of the sea* is not just desirable—it is indispensable»[6].

E gli studenti che hanno frequentato il TLaw Lab quest'anno hanno proprio avviato questa riflessione presentando ognuno una relazione su uno dei vari profili evidenziati nello scritto di Martin.

[6] *Ibidem* p. 475