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The Concept of Free Seas: Shaping Modern Maritime Policy Within a Vector of Historical Influence

Lawmaking is a complex political activity. In the international system, law is shaped and reshaped mainly by the governments of states. Governmental policies in turn are often influenced by domestic, transnational, and international factors. Which of these combine as prime movers or stand as dependent variables is likely to vary with each political situation. When new law emerges, it may be said to be a result of complex influences and forces—or, as has been said aptly, vectors of force.[1]

An analysis of the concept of free seas, undertaken with a view toward emphasizing the political underpinnings of the concept, reveals a study in conflicts and compromises. Within this concept a politics of tension is to be seen. The very principle of freedom of the seas reflects tensions at play. It responds to sporadic exercises of tension and acts independently of it. One view which may be taken is that the formation of the concept of a territorial sea was but a reaction to the freedom of the seas concept—with coastal state rights emerging after basic conflicts were resolved. Another is that sovereignty—its recognition, maintenance, and expansion—was the key factor responsible for shaping the historical perspective behind territorial waters. The analysis which follows will show that both the politics of freedom and the concept of sovereignty have shaped and continue to shape the freedom of the seas as well as of territorial waters. Because modern thinking reflects both views it has oftentimes led to confusion and difficulty in pursuing permanent resolutions to conflicts.

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[1]Henkin, *Politics and the Changing Law of the Sea*, 89 POL. SCI. Q. 46, 47 (1974); Henkin, *Old Politics and New Directions*, in NEW DIRECTIONS IN THE LAW OF THE SEA 3 (R. Churchill, K. Simmonds & J. Welsh eds. 1973).

Maritime Jurisdiction and the Freedom of the Seas

An understanding of the historical beginnings of the concept of free seas is important to any complete appreciation of current problems. These beginnings show the early politics of lawmaking. They also reflect the politics of freedom and the principles of sovereignty at work in shaping the very concept of freedom of the seas.

The historical concept of freedom of the seas was formulated early as a principle of law in the Roman characterization of the sea as being *commune omnium,* or the common property of all, as to both ownership and use. The other variant of this principle was that the seas were also considered *usus publicus* (or as a public utility) and, hence, *re nullius* in that they could not belong—in a possessory sense—to any one person. When Rome ruled the Mediterranean, control of—or sovereignty over—the seas was not of especial importance; at least the issue was not seriously put in contest by other powers.[2]

It was in the Middle Ages, when Venice became a center of commerce and maritime power, that strong competition among nations for use of the seas was evidenced. The claim by Venice of sovereignty over the entire Adriatic Sea was followed by the Republic of Genoa's claim to dominion over the Ligurian Sea. Other Mediterranean states followed closely behind in adopting policies of control or appropriation regarding waters in which they were interested. Appropriation was normally effected by force and "legalized," if at all, subsequent to the appropriation.[3] The seas were the source of food (i.e., fish), navigation, and commercial activities which translated into wealth, power, and economic growth. These, in turn, were the necessary prerequisites of territorial expansion or a means of strengthening the political position of ruling sovereigns. Territorial supremacy then, perhaps more so than today, was synonymous with sovereignty.[4] Spain and Portugal were notable among the nations who, supported by authority from the Roman pontiff, made extravagant claims to colonial discoveries in the New World. Britain was equally notable for resisting such claims.[5]

Free Seas—A Politics of Freedom

To study English history, particularly its maritime history, is to study the principle of freedom and its dynamic application. The early politics of freedom—not sovereignty—shaped the concept of freedom of the seas for the English. Although not as significant today, the politics of freedom still has definite influence in determining maritime policy.

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[2]E. Jones, LAW OF THE SEA 6 (1972); S. Swartztrauber, THE THREE MILE LIMIT OF TERRITORIAL SEA 10, 11 (1972); Smith, *Apostrophe to a Troubled Ocean,* 5 IND. L. REV. 267, 271 (1972).

[3]T. FULTON, THE SOVEREIGNTY OF THE SEA 3 (1911)

[4]W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 37 (1966).

[5]S. SWARTZTRAUBER, *supra* note 2.

In order to provide for a "liberty of fishing," King Edward III entered into the first formal treaty on fishing in 1351 with the King of Castile. Henry IV followed the practice of Edward and in 1403 entered with the King of France into the first of what proved to be numerous agreements guaranteeing the freedom to fish for herring in the narrow seas between their two countries. For nearly two hundred years, in fact into the middle of the 16th century, England sought with its neighbors to guarantee freedom of fishing in the waters of its coast. No license was required nor any tribute levied upon fishermen fishing in the English seas. The freedom to fish at sea was so generally recognized in England during the 15th century that the principle could be regarded rightly as being a part of English international policy and custom.[6] Scotland, however, did not promote such a freedom. As early as the 12th century, the Scottish kings were making exclusive claims to their coastal waters and the abundant sources of herring they yielded.[7]

North Sea routes and those through the English Channel were important to many European countries. Free navigation through them was of especial importance to Holland, France, and Spain—all of whom had significant fishing and commercial interests. The national policy of Britain was to leave its sea boundaries undetermined and thereby to avoid frequent, costly wars over territorial boundaries. Thus, when the navy was strong and efficient and suitable occasions were presented, any pretensions to maritime sovereignty could be posited and used as a political instrument of force. A vague notion of maritime boundaries also allowed pretensions of ocean sovereignty to lapse quietly when naval strength was inadequate and thus not risk "national honour" being jeopardized. Tension and exercises of force were thus kept to a minimum.[8]

Elizabeth I (1558-1603) established herself as champion of a national policy of free seas long before Grotius and his ideas of *mare liberum* came to popularity. Yet her motives were not directed toward a betterment of mankind, but rather, toward maintaining freedom of trade and fishing for her nation. As noted, Spain and Portugal were threatening these freedoms under various claims to sovereignty over parts of the seas.[9]

It is important to appreciate the fact that apart from their obvious economic and commercial value, fisheries were considered indispensable in maintaining power and security. Indeed, fishermen and their vessels constituted a "considerable part of the naval force available for the defense of the kingdom, for offensive operations and the transport of soldiers."[10]

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[6]T. FULTON, *supra* note 3 at 67 *passim.*

[7]*Id.* at 76.

[8]*Id.* at 20, 105. *See also* P. JESSUP & F. DEAK, 1 NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW 10, 11 (1935).

[9]T. FULTON, *supra* note 3 at 15-18, 86. *See generally* D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES (1965).

[10]*Id.* at 58, 86.

From 1536 to 1539, the Roman monasteries were closed in England. The Reformation was flourishing. It is principally because of the Reformation that the English fisheries began to decay. So long as they were required to observe numerous days of fasting from meat in order to meet religious obligations by the Church of Rome, Englishmen obeyed. Once this ecclesiastical burden was lifted with the dissolution of the Church, their preference for meat was reinstated.[11] The phenomenal growth of Dutch fisheries and commerce also had a pronounced effect on the general decline of the English fisheries. After Holland gained its independence from Spain in 1581, immediate and successful steps were undertaken to make the deep sea herring fisheries "the chief industry of the country and principal gold mine to its inhabitants."[12]

Political Tensions Arise

The first note of English jealousy of the fleets of foreign fishing vessels from Zealand and Holland was recorded in 1570 when a petition was received by the Privy Council requesting that restraints be imposed on these fleets. Unemployment in the English fishing industry was high. The shipping industry, in turn, was having difficulty sustaining itself. Elizabeth was unwilling, however, to interfere with the freedom or "liberty" of fishing by foreign nations. Rather, she chose to increase popular consumption of fish through the passage of laws requiring it, and she sought at the same time to restrain the foreign importation of fish. For a time, a National Fishery was considered. None of these efforts succeeded in reviving the fishing industry.[13]

Several decades later (in 1609) James I (1603-1625) exercised sovereignty over the British Seas by prohibiting foreign fishermen from fishing in them without first being licensed and paying a tribute. By so doing, he sought to protect English freedoms of the sea from foreign encroachments.[14] However in February, 1609, Hugo Grotius had enunciated a simple thesis: the sea could not in fact be occupied. It was intended by nature to be free to all—*mare liberum.* This was not a new idea. Its attractiveness was to be found in its appeal "to the sense of justice and conscience of the free peoples of Christendom to whom it was dedicated."[15] John Selden, upon the request of James, undertook to prepare a response to Grotius entitled *Mare Clausum sue de Dominio Maris.* This piece was prepared in 1618 and withheld from publication until 1635. Its major thesis was that the sea was not common to all men but, indeed, capable of dominion and ownership and

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[11] *Id.* at 87.
[12] *Id.*
[13] *Id.* at 87, 95, 115.
[14] *Id.* at 116. Lapidoth, *Freedom of Navigation—Its Legal History and Its Normative Basis,* 6 J. MARITIME L. & COMM. 259, 265 (1975).
[15] T. FULTON, *supra* note 3 at 341-42; C. FENWICK, INTERNATIONAL LAW 498 (4th Ed. 1965).

that the King of England was the "proprietor" of the surrounding sea "as an inescapable and perpetual appendix of the British Empire."[16]

It perhaps should be emphasized that James I made no assertion to a total maritime sovereignty during his reign. In order to ensure freedom on the seas what he did was to set boundaries of neutrality in the waters off the coast of England. Within the waters of some twenty-six bays surrounding England called "King's Chambers," belligerents were prohibited from engaging in hostile acts. The extent of the chambers varied with the geography of the coastline; but the very establishment of these bays was antagonistic to claims of extensive maritime sovereignty since they "restricted a most important attribute of such sovereignty to a comparatively narrow space in the adjacent sea, though a space much greater than that now comprised in the so-called territorial waters."[17]

The action taken by James in 1609, and later rescinded in 1610 for political motives, which directed the imposition of a license requirement upon all foreign fishermen on the British Seas, was in truth but an exercise in the politics of freedom. In order for the English to enjoy the freedom of fishing in English waters, it was necessary—as observed—to restrict all foreigners, and particularly the Dutch, from their unrestricted use. English statesmen and economists alike saw in the Dutch fisheries off their coasts a menace to the nation's power and wealth. If this evokes memories of more recent disputes, the differences are mainly relative today, not substantive.

Charles I ascended the English throne in 1625. After countless attempts to strengthen the fisheries failed (including establishment of a National Fishery Association), Charles engaged the Dutch in war. Numerous sea encounters followed and the Dutch established their supremacy of the seas in 1639. This they held until a decade later when Cromwell reasserted, and at last established, British sea supremacy.[18]

The closing years of the 17th century bore witness to a diminution of claims to exclusive sovereignty over extensive sea areas and their replacement with policies determining exact boundaries of ocean control for various special purposes. These claims were normally validated by the conclusion of international treaties. This emergence of the concept of a territorial sea as a reaction to free seas will be explored more fully in a subsequent section of this paper. Interestingly, from about 1689 in England, definite boundaries were determined for fishing.[19]

In the 18th century, the British pretensions to ocean sovereignty were—as other similar national claims had been previously—abandoned. It was not until 1817,

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[16]O'Connell, *The Juridical Nature of the Territorial Sea*, 45 BRIT. Y. B. INT'L L. 303, 305 *passim* (1971).

[17]T. FULTON, *supra* note 3 at 118-120.

[18]*Id.* at 236-37.

[19]*Id.* at 523, 524.

however, that Selden's theory was officially repudiated by the courts. In that year Lord Stowell declared in the *Twee Gebroeders* case that all nations "have an equal right to the unappropriated parts of the ocean for their navigation."[20]

The principle which emerged in the 18th century and carried on into the 19th and the middle 20th centuries was that the oceans were free and open and could not be appropriated. It was also established, even though never agreed to universally, that all states possessed sovereign rights in those parts of the sea which touched their shores. The precise extent of these rights was not determined. A three-mile limit was regarded, however, as the most practical extent in so far as effective control could be exercised by a state.

The Concept of Coastal State Rights

Recognition of the new principle of freedom of the seas as it came forward in the 19th century was met at once with a new claim for its modification. This was to be found in the assertion by the coastal states of a right to protect their territory and their citizens from "attack, invasion, interference and injury."[21] Health had to be protected along with commerce. The extent to which the protection given by the coastal state would be applied was to be measured by the state's power to control the areas of concern.

Under a variety of labels such as "contiguous zone," "customs area," "defensive area," "conservation zone," and "zone of neutrality," the states exercised an acknowledged competence to declare the existence of these zones and to function within them. Some states chose to claim these zones as extensions of their territorial waters. Other merely sought to safeguard certain special rights over parts of the seas through them.[22]

The contiguous zones are traditionally imposed today and recognized for purposes of safeguarding sanitary regulations, for protection of a state's fiscal or revenue programs, and more especially for the prevention of smuggling activities. The width of the zones varies. Their creation does not extend the state's territorial sovereignty, for the waters within the zones remain part of the high seas.[23] Customary international law dictates that the acts of the coastal states within the zones are always to be of a reasonable nature.[24]

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[20]P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 4 (1927).

[21]*Id.* at 5.

[22]W. MASTERSON, JURISDICTION IN MARGINAL SEAS 337 *passim* (1929).

[23]Address by Professor William Bishop, Jr., Inter-American Bar Association Conference, Detroit, Michigan (1949) W. MASTERSON, *Id.;* O'Connell, *supra* note 16.

[24]P. JESSUP, *supra* note 20 at 95 and ch. 2.; M. MCDOUGAL & W. BURKE, THE PUBLIC ORDERS OF THE OCEANS, ch. 6 (1962); M. WHITEMAN, 4 DIGEST OF INTERNATIONAL LAW 480-98 (1965).

A Vector of Historical Influence

Today, the United Nations Law of the Sea Conference considers anew in modern focus the continuing problems of contiguous zones and the extent of their application, exclusive economic zones, the extent of territorial seas and basic coastal state jurisdiction, innocent passage versus free transit through international straits and a plethora of other international maritime problems.[25] Yet, the etiology of these problems may be found in the primary and continuing struggle—rooted in history—between aggressive coastal state needs (e.g., demands) for expansion of sovereignty or, in the alternative, preservation of freedom; and the conflicting needs (e.g., demands) of the international community for free, open seas in order to promote commerce and maintain military preparedness.[26]

Under the United States proposal submitted to the United Nations Law of the Sea Conference, coastal states would be given a right to establish their territorial sea breadth at a maximum distance of twelve nautical miles from the baseline. Thus, states wishing to set a varying breadth—three, four or six nautical miles—would be allowed to do so. The second central provision in the Draft Proposal structured a system of free transit through international straits. Not only would the existing regime of passage be changed from "innocent passage" to "free transit," but submerged passage and overflight would—under this proposal—be brought within the scope of the new right of free transit. The application of the

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[25]Smith, *The Politics of Lawmaking: Problems in International Maritime Regulation—Innocent Passage v. Free Transit,* 37 U. PITT. L. REV. 487 (1976); Jessup, *The United Nations Conference on the Law of the Sea,* 59 COLUM. L. REV. 234 (1959); Stevenson, *Lawmaking for the Seas,* 61 A.B.A. J. 185 (1975); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session,* 69 AM. J. INT'L L. 1 (1975); Stevenson & Oxman, *The Third United Nations Conferences on the Law of the Sea: The 1975 Geneva Session,* 69 AM. J. INT'L L. 763 (1975); Swing, *Who Will Own the Oceans?* 54 FOREIGN AFF. 527 (1976).

[26]A half century ago, the classical dispute between appropriated seas and a free, open one appeared to have been resolved. Under a form of dualism, the coastal state was acknowledged as having sovereignty over a belt of waters, denominated "territorial water," subject to the right of innocent passage. The high seas beyond these territorial waters were recognized as *res communis;* thus, they were not subject to acquisition by title or extension of asserted coastal state sovereignty. They were subject to an international regime structured in terms of "freedom," to be enjoyed by the flags of all nations. These freedoms were, subsequently, codified in the 1958 Geneva Convention on the High Seas. Article 2 of the Convention provides:

> *The High Seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.* Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules on international law. It comprises, inter alia, both for the coastal and non-coastal states: (1) Freedom of Navigation; (2) Freedom of Fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas. These freedoms, and others which are recognized by the general principles of international law shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas. (Emphasis added.) [1962] 13 U.S.T. 2312, 2314, T.I.A.S. No. 5200.

See Jennings, *A Changing International Law of the Sea,* 31 CAMB. L.J. 32, 48 (1972); Farer & Capolvitz, *Towards a New Law for the Sea: The Evolution of United States Policy,* in THE CHANGING LAW OF THE SEA 40 (R. Zacklin ed. 1974).

United States proposal to warships through international straits is also provided.[27]

The Revised Single Negotiating Text of the Law of the Sea Conference which emerged from the Spring Session of the Conference[28] in New York City in 1976—building upon the Informal Single Negotiating Text emerging from the spring 1975 meeting of the Sea Conference in Geneva[29]—recognizes that "every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the present Convention."[30]

The 1976 Negotiating Text provides that, in straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone, all ships (presumably including warships since no differentiation is made) and aircraft "enjoy the right of transit passage, which shall not be impeded."[31] The Text also states that if "the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if a high seas route or a route in an exclusive economic zone or similar convenience with respect to navigational and hydrographical characteristics exist seaward of the island."[32] Certain duties to move expeditiously, with care, and so on, are imposed upon ships and aircraft during their passage.[33]

A provision allowing for "ships of all States," to enjoy the right of innocent passage through the territorial sea is guaranteed under the Revised Single Negotiating Text.[34] The high seas (defined as all parts of the sea not included in the exclusive economic zone, in the territorial sea, in the internal waters of a State or in the archipelagic waters of an archipelagic State) remain open to all States.[35] Exclusive economic zones are allowed to extend not beyond two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured.[36] Contiguous zonees may extend up to twenty-four nautical miles from baselines from which the breadth of the territorial sea is measured.[37]

A casual perusal of the Revised Single Negotiating Text shows clearly that coastal states are increasing their bases of power: 12 miles for territorial seas, 24

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[27]Smith, *supra* note 25 at 531, 532.
[28]A/Conf.62/WP. 8/Rev. 1/ Part II, 6 May 1976.
[29]A/Conf.62/WP. 8/ Part II, 7 May 1975. *See also,* Smith, *supra* note 25 at 546-548.
[30]*Supra* note 28, Art. 2.
[31]*Id.*, Art. 37.
[32]*Id.*
[33]*Id.*, Art. 38.
[34]*Id.*, Art. 16, Art. 43.
[35]*Id.*, Art. 75.
[36]*Id.*, Art. 45.
[37]*Id.*, Art. 32.

for contiguous zones and 200 for exclusive economic zones. The major international maritime powers—in the name of the entire maritime community—will gain transit rights through international straits. Whether these tradeoffs will be accepted by the conferees is an open question.

Conclusion

One conference surely cannot be expected to produce a single treaty which seeks to structure a new order for the oceans, in a comprehensive way, and embrace social, economic, technological, ideological, and political spheres of emerging influences. This is an undertaking which will probably continue for the remainder of the century. Whether world interests can be harmonized in any age of political militancy where new, equally militant, and frustrated ideals are advanced by small, emerging nations is debatable. Changing circumstances dictate the level of response law takes in order to be reflective of the social ordering. This response, however, does not guarantee harmonization. Especially is this true when it is realized that the new law of the sea will, to a very significant degree, be shaped by patterns and strategies of group solidarity found among the unaligned, underdeveloped members of the world community who wish to promote, build, and develop a new law which is basic to the "egoism of the poor."[38]

[38]Brown & Fabian, *Diplomats at Sea,* 52 FOREIGN AFFAIRS 301, 315 (1974); Henkin, *The Once and the Future Law of the Sea,* in TRANSNATIONAL LAW IN A CHANGING SOCIETY 155 (W. Friedmann, L. Henkin & O. Lissitzyn eds. 1972).