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THE RIGHT OF THE LAND-LOCKED STATES TO THE USE OF THE SEA IN THE LIGHT OF THE THREE UNITED NATIONS CONVENTIONS ON THE LAW OF THE SEA

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TO:

MY FATHER AL HAJI MUHAMMAD JAH, MY BROTHERS OUSMAN AND SARIGN MODOU JAH, TO MY WIFE AMY AIDARA AND TO THE SOUL OF MY MOTHER KHADY BAH. MAY HER SOUL REST IN PEACE. AMEEN.

PREFACE

The purpose of this work is to fulfil a partial requirement of my Master's degree programme. This work is also motivated by my interest to deal with the Law of the Sea which reflects the modern development of public International Law in general. As a result of disintegration of many empires and the process of decolonization, there came into being independent countries that have no outlet to the Sea. Despite the fact that some writers like A. Mpazi Senjela, S.C. Vassianie and Glassner have dealt with the rights of these states to the use of the sea, the matter has not yet been given its adequate share of academic research. We will attempt to discuss the rights of land-locked states to the use of the sea in the light of the three United Nations Conventions on the Law of the sea. It is not our intention here to give a detailed account of the rights of every individual land-locked state *vis a vis* individual littoral states but we will deal with them as a group of disadvantaged states.

Our research will be doctrinal (arm chair research) based on the available materials in the library and some relevant documents collected from some foreign missions in Kuala Lumpur.

In connection with this work, I wish to express my profound gratitude to Professor Mohammed Imam of the Kulliyyah of Laws of the International Islamic University Malaysia under whose supervision, this work has been accomplished.

The accomplishment of this work could also not have been possible without the great help of the University Malaya Law Library staff. Particular thanks are due to Devindar Kaur Chall who issued me a nine-month-student pass to use the UM Law Library facilities.

I am also very much indebted to Colette Hassan working at the Swiss Embassy in Kuala Lumpur from whom I was able to receive important documents pertaining to the Swiss Maritime Law.

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CS	Coastal State
CS	Continental Shelf
EEZ	Exclusive Economic Zone
LLs	Land-locked states
LLGDs	Land-locked and geographically disadvantaged states
OAU	Organization of African Unity
TS	Territorial Sea
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAT	United Nations Conventions on Transit and Trade
WTO	World Trade Organization

INTRODUCTION

As a result of the disintegration of many empires, and the process of decolonization, there came into existence some independent states without having a direct access to the Sea. Until 1989, there were only twenty four land-locked countries in the world.[1] Today, however, there are thirty one of them. These countries because of being geographically disadvantaged, a fact which has contributed negatively to their underdevelopment, have always tried collectively to attract the attention of littoral states to the fact that the lack of direct access to the sea and its living resources has been one of the handicaps they suffer. The Sea occupies 70.8 percent of the earth's surface; it is a medium of communication, a source of food and a vast treasure of untapped resources. Today man looks to the sea for sustenance as never before at a time when growing population and high living standard have intensified demands for food and fuel.

Because of this significance, land-locked countries are in a dire need to get equitable share of the use of the sea and its living resources.

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[1] Ian Brownlie, Principles of Public International Law, 3rd ed. 283 (1979).

This study is purported to discover the extent of their share and legal ground therefore under the three United Nations Conventions on the Law of the sea.

The dissertation is divided mainly into two parts i.e. the theoretical part and the practice part. In the former which is divided into three chapters, we will examine theoretically what are the rights of land-locked states to the use of the sea under international law.

In Chapter One, we will attempt to outline the historical background of the issue. It should be noted that our objective here is not merely to give historical presentation but our aim is twofold: One, to investigate the status of the sea before and after the disintegration of the Roman empire and two, to see how the state practice and international provisions divided the sea into areas of different nature and this served as the basis for the divergence of LLs' rights in those different areas.

In the second chapter, we will deal with the definition and the number of land-locked states, their role as a collective group in the Law of the sea Conferences, their claims to use the sea and the counter-claims of the coastal states. In this chapter the focus will be on the traditional rights,[2] which are not problematic.

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[2] e.g. right of navigation and overflight.

In the third chapter, we will discuss right to access to the living resources of the exclusive economic zone and the legal ground on which LLs relied to justify right to access to the living resources of the EEZ regime.

Finally, we will discuss in chapter four the rights of LLs in practice. Here right to transit through transit states, and bilateral and multilateral transit treaties will be discussed. We will conclude the chapter with the discussion of the Swiss Law on Maritime navigation as a representative example of the land-locked states.

CHAPTER 1

A HISTORICAL ACCOUNT OF THE USE OF THE SEA

(A) FREEDOM OF THE SEA BEFORE THE DISINTEGRATION OF ROMAN EMPIRE

Centuries before history was recorded, the people of Asia engaged in Free navigation and Maritime trade in the Indian Ocean.[1] According to *Ulpian*, the sea was open to everybody by nature and this view was supported by *Celsus*, who said that, the sea like the air was common to all Mankind.[2] The commerce between India and Babylon must have been carried on as early as 3000 B.C. Apart from land routes, one of the most important trade routes joining India and the West was that which ran from India to the red sea up to Arabian Coast. It linked India, not only to Southern Arabia, but to Egypt and *Judea*. From *Judea Indian* goods found their way to the *Mediterranean* through the adjacent ports of Tyre and Sidon.[3]

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1 R.P. Anand, Origin and Development of the Law of the Sea, 10 (1983).

2 L. Oppenheim, International Law Vol.1, 9th ed. 720 (1992).

3 Gerard J. Mangone, Law for the World Ocean, 6 (1981).

There are also some evidences about Maritime trade in the Mediterranean in a period which runs back into darkness. It is suggested by historians that Indians and Phoenicians, probably, traded on the shores of Arabia. During their heyday, Phoenicians founded several Colonies around 1500 B.C. Among these Colonies was a small Aegean Island, Rhodest, in the Eastern Mediterranean. Describing the Rhodians power, the Roman historian *Strabo* said:

> The Rhodians were distinguished seamen with a reputation for honesty and skill. Their strong, constant, law-abiding character, their knowledge of business and their admirable Marine and Commercial Laws Made Rhodes a model among all the trading cities of the Mediterranean. By her continental and successful wars with the pirates, who, at the time, disturbed the peace of the seas in great bands, Rhodes had become the protectors and refuge of Merchant shipping in "Eastern Waters."[4]

This is a clear indication that Rhodes not only believed in the practice of freedom of the sea but acted as protectors of those who followed the sea.

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[4] Quoted in R.P. Anand, op.cit. at 10 and 11.

> Claims to sovereignty over a part of the open sea began to be made in the second half of the middle ages.[5]

And at the time when modern international law gradually arose, it was the conviction of the states that they could extend their sovereignty over certain parts of the open sea. The Republic of Venice was recognized as sovereign over the Adriatic Sea, and the republic of Geneva as the sovereign of the Ligurian Sea. Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic South of Morocco and Spain over the Pacific and the Gulf of Mexico. Sweden and Denmark claimed sovereignty over the Baltic, and the great Britain over the narrow seas, the north sea and the Atlantic from the North Cape to Cape Finisterre.[6]

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[5] L. Oppenheim, op.cit. Also see L. Oppenheim, International Law A Treaties, 583 (1955).

[6] Ibid. Also see Thomas Wemyss Fulton, The Sovereignty of the Sea, 4 (1976).

(B) THE BATTLE OF THE BOOKS BETWEEN MARE LIBERUM AND MARE CLAUSUM

1. The Status of the Sea

Although there was a general practice relating to freedom of navigation and Maritime trade; and it was universally accepted that no state had right to appropriate the sea and restrict the right to access to it, there was a general absence of legal doctrine about the status of the sea. Even Roman Law before the second century was as Silent as Greek and Indian Law on the subject of the status of the sea.[7]

However, the first definition of such kind can be traced in the digest of *Justinian* in 529 A.D. in a text of Marciamus who lived in the second century. The sea is declared there as jus natural and common to all, incapable of appropriation as it is the air. But the real beginning to define the status of the sea started with works of some prominent authors and Jurists after the disintegration of the Roman Empire, and the Medieval times. Besides the writings of few Spanish theologians and scholars like Francisco Victoria, Peirino Belli and the Italian Jurist Gentili, the First book On International law and law of the sea was written by a Dutch Jurist, Hugo Grotius, and published anonymously in 1609 under the

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[7] Gary Knight and Hungdah Chiu, the international Law of the Sea, 10 (1936). Also see Anand, op.cit at 83.

title of Mare Liberum or the free sea.[8] This book is said to be the first and classic exposition of the doctrine of the freedom of the seas which has been the essence and backbone of the modern law of the sea ever since its origin. This remarkable book became a part of the later and more authoritative work De Jure Belli ac pacis (1625). Grotius is especially associated with international law as to become entitled in Modern times as `Father of International Law.'

It is interesting to note that Grotuis wrote and published his Mare Liberum in order to defend his country's right to navigate in the Indian Ocean and other Eastern Seas Over which Spain and Portugal (which was then a part of Spanish Empire) asserted a Commercial Monopoly as well as political domination. In fact, Grotuis' Mare Liberum was merely one chapter (Chapter XIII) of a bigger work De Jure paraedae which he prepared as advocate of the Dutch East India Company in 1604.[9] While he refrained from publishing this work, one chapter of it was published with necessary changes to stand by itself under the title: Mare Liberum.

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[8] R.P. Anand, id. at 2. Also see Gerard J. Mangone, Supra note 3 at 7 and 18.

[9] Id. at 2 and 3.

2. Grotius' Mare Liberum (Freedom of the Sea)

From here, the battle of the books started; both the English and French were ready to crack Portugal's Monopoly in the East Indies, and to trade with the Spanish Colonies in the new world. But the Maritime conflict started in the Dutch front; between the Portuguese and a Dutch Company for which Grotuis worked. The detail of the conflict that led to the Grotius' work is not within the scope of this chapter. However, we will mention what we see a necessity to understand his (Grotius) Contention. The event, in summary, was a controversy amongst the Dutch about the lawfulness of prize from captured Portuguese ships by Admiral Jacob Van Heemskercic in the Strait of Malacca in 1604.[10] The Ship Santa Catharina was proposed to be sold in Amsterdam as a prize and its proceeds distributed as part of the profits of the East India Company. The Controversy arose between the shareholders; some of whom supported the selling of the ship while others opposed it. Grotuis was directed, as a lawyer associated with the Company, to defend the Company's action. In his Contention, Grotuis showed that war might rightly be waged against and prize be taken from the Portuguese who had wrongfully tried to exclude the Dutch and others from Indian trade.[11]

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[10] Op.cit. at 77.

[11] Thomas Wemyss Fulton, Supra note 6 at 341.

In propounding his thesis about the freedom of the seas, Grotuis was not only well-aware of the long tradition of freedom of the sea, but also got his helpful cue from the Asian State practice. In his writing, he made extensive use of the writings of two Spanish theologians *Francis Alphonso de Castro* and *Fernand Vasquis* who were the first to raise their voice against the prevailing practice in Europe to appropriate the sea, as mentioned above concerning the claims of Venice and Genoa Over Adriatic Sea and Ligurian respectively.

As to these two writers, Grotuis argued that appropriating the seas is contrary to the imperial Law, the primitive right of Mankind and the Law of nature,[12] and according to both Grotuis and Vasquis, the sea is a common heritage to all mankind since the beginning of the world.

In Mare Liberum, Grotuis shows a keen awareness of an independent political and legal state system in Asia with its own rules of inter-state conduct.

In challenging Portuguese claim to sovereignty to those parts of East Indies like Java, Ceylon and Moluccas, Grotuis pointed out:

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[12] D.P. O'Connell, international Law, Vol.1 2nd ed. 445 (1970). Also see Anand, op.cit at 81.

> These islands of which we speak now, have and always have had their own Kings, their own governments, their own Laws and their own legal systems. The inhabitants allowed the Portuguese to trade with them, just as they allowed other nations the same privilege, therefore, in as much as the portuguese pay tolls and obtain leave to trade from the rulers there, they thereby give sufficient proof that they did not go there as sovereign but as foreigners.[13]

Grotius' intention in Mare Liberum was to establish two propositions: One is to show that the sea cannot be state property because it cannot be taken into possession through occupation, and that, consequently, the sea was by nature free from sovereignty of any state.[14] While arguing in favour of freedom of the sea, he put navigation and fishing on the same footing.[15]

As he puts it:

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13 Quoted in R.P. Anand, ibid.

14 L. Oppenheim, supra not 5 at 721.

15 R.P. Anand, op.cit. at 100.

> If a thing so vast as the sea a man were to reserve to himself from general use nothing more than mere sovereignty, still he would be considered a seeker after unreasonable power. If a man were to enjoin other from fishing, he would not escape the reproach of Monstorous greed.[16]

This view was supported by several authors; one of them was Gentilis who defended the Spanish and English claims in his book Advocatio Hispanica 1613.[17]

3. Mare Clausum: (Closed see)

While the European powers were challenging the Portuguese supremacy in the Indian Ocean on the basis of Mare Liberum, each one was also struggling to create a monopoly for itself and trying to keep others out. In 1609, for example, King James I of England had not only ordered all ships passing through the English seas to lower their top-sails and strike their flags as an acknowledgement of English sovereignty but also prohibited fishing by foreigners along the British and Irish Coast.[18]

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16 Ibid.

17 L. Oppenheim, op.cit.

18 R.P. Anand op.cit. at 100. Also see Gerard J. Mangore, op.cit. at 18.

Consequently, the impact of Grotuis' Mare Liberum was seen in the strong feeling of bitterness in England in particular; a feeling which was shared by King James that Grotuis had attacked English policies as he used such a strong language.

Despite the fact that King James of England was very irritated that he complained of the audacity of Grotuis and requested that he should be punished,[19] it was the Scottish Lawyer William Welwood, who undertook the first task of replying to Grotuis. In 1613, he revised his earlier work on (Sea laws of Scotland) to refute the argument advanced in Mare Liberum.

He argued that Roman law was only applied to Romans which means that Grotuis' dependence on Roman law for Mare Liberum was not a dependence on the right and relevant law. He also argued that the fluidity of the ocean was no bar to its occupation; and that it could be and had been in certain cases divided by the ordinary methods used by navigation within certain reach and bounds of seas. He did not explain what those bounds were but quoted the Italian Limit of 100 miles with approval.[20]

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19 Supra note 17.

20 R.P. Anand, ibid.