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R. P. Anand

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History of International Law Revisited

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To

Vivek
Sanjay
Kavita

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R.P. ANAND (A SHORT BIOGRAPHY)

Dr. R.P. Anand (born June 15, 1933), after his LL.B. with a first division in 1953, received his LL.M. in 1957 from Delhi University (India) with distinction in International Law. He was declared as the best LL.M. student in the University in that year and awarded a special prize. In 1958, he joined the Indian School of International Studies as a Senior Research Fellow in International Law.

In 1960–61, he was recipient of a Rockefeller Foundation Fellowship in International Organization at Columbia University in New York. From 1961 to 1963, he joined the Yale University School of Law as a Sterling Fellow where he received his LL.M. in 1962 and J.S.D. in 1964. In January 1964, Dr. Anand was appointed Research Associate at the World Rule of Law Center, Duke University School of Law.

In 1965, he returned to the Indian School of International Studies (now part of the Jawaharlal Nehru University) where he has been Professor of International Law and also Chairman of the Center for Studies in Diplomacy, International Law and Economics.

In 1969, Dr. Anand was selected National Lecturer in Law by the University Grants Commission of the Government of India, and he delivered lectures at several universities in India on "New States and International Law."

In 1970–71, Dr. Anand was awarded a fellowship by the Woodrow Wilson International Center for Scholars in Washington, D.C. In 1973 he was appointed Consultant to the United Nations Secretary-General on Law of the Sea.

On leave from his University, from 1978 to 1982, Dr. Anand joined the Culture Learning Institute of the East-West Center Honolulu, as a Research Associate where he was working on a project on "ASEAN and the Law of the Sea."

Besides nine books, Dr. Anand has published more than fifty articles in Indian, European and American professional journals.

PREFACE

This study was undertaken as part of my project at the East-West Culture Learning Institute on "ASEAN and the Law of the Sea." It is merely a truism to state that geography affects the fate and history of countries and peoples. Geographical environment is the permanent element in the shifting fate of states. Covering far more of the surface of Southeast Asia than land, the sea has always played an important role in the history, life and culture of Southeast Asian peoples. The two largest countries of the region, Indonesia and the Philippines, are archipelagos consisting of thousands of islands with "territories" which contain more sea than land. Indonesia is not a homeland to its people but their *tanahair* or "homelandwater." In Indonesia it used to be said that "the sea unites and the land divides." The sea was never considered as a dividing factor in Southeast Asia.

In recent years, Southeast Asia has been described as a collection of countries facing outward and turning their backs on one another. The heterogeneity of Southeast Asia has become almost a cliché. But it is important to note that experts on maritime trade, like J.C. van Leur, appreciated the unity and continuity of Southeast Asian history.[1] It is also significant that, despite all differences in languages, religions, customs and legal systems, the five countries of Southeast Asia – Indonesia, Malaysia, the Philippines, Singapore and Thailand – bound together by common bonds of geography, a common pre-colonial history and similar aspirations for the future, have decided to join hands together in the form of the Association of Southeast Asian Nations (ASEAN) for the protection of their common interests.

For at least 2000 years, deltaic, coastal and archipelagic empires have distinguished the Southeast Asian region as a zone of maritime transit and transaction. Innumerable explorers, emissaries, traders, missionaries, raiders and

1. J.C. van Leur, *Indonesian Trade and Society: Essays in Asian Social and Economic History* (The Hague, 1955)

refugees have for centuries traced and retraced a dense pattern of maritime traffic and flourishing trade in this important region of the world. Once the port of Malacca, now the island of Singapore, the region has always been an important centre of maritime commerce. But despite these long traditions of maritime navigation and trade, the anthropology of maritime law in Southeast and other parts of Asia remains virtually an unstudied subject.

It is generally assumed that modern law of the sea originated in Europe in the seventeenth century as a result of interactions among European states. Hugo Grotius' *Mare Liberum,* published anonymously in 1609, is supposed to have initiated the doctrine of the "freedom of the seas" and the modern law of the sea. Nobody has cared to note how Grotius and other classical jurists and their doctrines were influenced by the Asian maritime practices.

In any case, ever since the acceptance of the "freedom of the seas" in Europe after a long and acrimonious struggle, this concept has totally coloured Western thinking on law of the sea. It has been accepted as an incontrovertible principle, almost a religious dogma, which could not be questioned. It is rarely realized that with the recent technological developments and phenomenal changes in the uses of the sea, the doctrine of the freedom of the seas will have to be drastically modified, if not abandoned. An attempt has been made in this book to look at the origin and acceptance of the freedom of the seas through the centuries and how its acceptance has come to be changed and modified in recent years.

I am extremely grateful to Dr. Verner C. Bickley, Director of the Culture Learning Institute, for all his help and encouragement in pursuing my rather unorthodox thesis and for permitting me to visit various universities and archives in the United States, Asia and Europe in search of material. I am obliged to Dr. John Walsh, Coordinator of the Project on Social and Cultural Developments in ASEAN, for his lively interest in my research work. My heartfelt thanks are also due to my colleagues, Dr. Choon-ho Park and Dr. J. Philip, who have helped me in numerous ways. I must acknowledge my gratitude to Ms. Charlene Fujishige and Ms. Jenny Ichinotsubo for the tremendous patience with which they have typed and re-typed the whole manuscript.

I am deeply obliged to Honorable Judge Shigeru Oda of the International Court of Justice for taking time out of his busy schedule to read my manuscript and for his encouraging remarks.

Last but not least, I should not fail to mention the cooperation and strength I received from my wife throughout.

R.P. Anand

Honolulu, Hawaii.
May 11, 1981

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1. INTRODUCTION

International Law, Product of European Civilization

It is generally believed and widely accepted that modern law of the sea, like other rules of international law, is a product of the European or Western Christian civilization to which extra-European, especially Asian and African, countries have made little or no contribution. It is said to be the "product of the European mind" and "European beliefs"[1] and is based on European state practices which were developed and consolidated during the last three centuries. Thus, relating the story of the development of international law, Professor Verzijl states:

> The body of positive international law once called into being by the concordant practice and agreement of European states, has since the end of the eighteenth century onwards, spread over the rest of the world as a modern *ratio scripta,* to which extra-European states have contributed extraordinarily little. International law as it now stands is essentially the product of the European mind and has practically been "received"... lock, stock and barrel by American and Asiatic states.[2]

With rare exceptions,[3] every Western writer on international law affirms or confirms this opinion. As Professor B.V.A. Röling asserts:

> There is no doubt about it: the traditional law of nations is a law of European lineage.[4]

Professor Jozef Kunz wholeheartedly agrees: "Our international law is a law of Christian Europe. It has its roots in the *Respublica Christiana* of Medieval Europe," and "is based on the value system of the Occidental culture, or Christian, and often catholic values."[5]

Although some of the ancient countries, like China, India, Egypt and As-

syria, with quite advanced forms of civilizations, might have had certain generally accepted principles and rules of inter-state conduct, the Western jurists feel that these practices "reveal little that could, even in the broader sense of the word, be considered as international law."[6] In any case, these ancient rules and practices of extra-European states, it may be noted, had no effect on the later development and consolidation of modern international law, because Asian and African countries lost their international status and personality as members of the family of nations under the impact of colonialism. They could not, therefore, play any role in its formulation in the most creative period of its history during the last two or three centuries.[7]

Grotius' Mare Liberum

The modern system of international law, we are told, emerged only after the disintegration of the Roman Empire and the emergence of independent states in Europe in medieval times. Practically every history of modern international law, while giving a passing reference to some rules of inter-state conduct in the ancient Orient, or Greek and Roman times, or to "scanty and vague" Islamic law of international relations, points out that the present system of international law originated only in the sixteenth and seventeenth centuries after the discovery of America in 1492 and the sea route to India in 1498, in the relations amongst European states. Besides the writings of a few Spanish theologians and scholars, like Francisco Vitoria, Fransisco Suarez, Pierino Belli, Bathasar Ayala 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 title *Mare Liberum,* or "The Free Sea." Few works of such small size have gained such great reputation as the *Mare Liberum.* It is said to be "the first, and classic, exposition of the doctrine of the freedom of the seas"[8] which has been the essence and backbone of the modern law of the sea ever since its origin. In this remarkable book, which became part of his later and more authoritative work, *De Jure Belli ac Pacis* (1625), "Grotius is so especially associated with international law as to become entitled to the general tribute he has received in modern times as 'father of International Law'."[9] It is interesting to note that Grotius wrote and published his *Mare Liberum* in order to defend his country's right to navigate in the Indian Ocean and other Eastern seas and to trade with India and the East Indies (Southeast Asian islands), over which Spain and Portugal (which was then part of the Spanish Empire) asserted a commercial monopoly as well as political domination. In fact, *Mare Liberum* was merely one chapter (Chapter XII) of a bigger work which Grotius, as advocate of the Dutch East India Company, had prepared in 1604–5 as a legal brief. In 1601, while the Netherlands was at war with

Spain, a Dutch naval commander captured a Portuguese galleon in the Strait of Malacca loaded with a valuable cargo of spices; Portugal, at the time, was under Spanish domination. The ship, *Santa Catharina,* was brought to Amsterdam and its sale was sought there as a prize. Objections having been raised to this action by the shareholders of the Dutch East India Company itself on the ground, *inter alia,* that Christians must not wage wars against each other, Grotius, a young brilliant attorney practising in Amsterdam, was asked by the Company to express an opinion on the objections, which he prepared in the form of a book, *De Jure Praedae* (On the Law of Spoils). While he refrained from publishing this work, one chapter of this book was published with necessary changes to stand by itself under the title *Mare Liberum.*

It is almost universally agreed that Grotius "was the first to proclaim the freedom of the seas by elaborate argument" which later came to be accepted as an unchallenged doctrine of international law, and it is asserted that this doctrine "alone would have been sufficient to ensure him (Grotius) lasting fame."[10] Although accepted as a binding principle under Roman law, freedom of the seas had been lost and forgotten in Europe after the disintegration of the Roman Empire and was said to have been enunciated for the first time during the modern period by this seventeenth century Dutch scholar and jurist in this famous book. "The freedom of the seas slumbered the sleep of the Sleeping Beauty," it is suggested, until this gallant knight from Holland appeared "whose kiss awakened her once more."[11]

Whether Grotius was indeed the originator or inventor of this doctrine in the modern period, or "founder" or "father" of international law, or whether he "plucked the ripe fruit" of the Spanish theologians and publicists of the sixteenth and seventeenth centuries, who also argued for the freedom of the seas based upon the tenets of Roman law,[12] as suggested by a few scholars,[13] may be debatable and a matter of opinion. But modern writers on international law have no doubt that the doctrine of the freedom of the seas, which forms the bulk and essence of the law of the sea, originated in Europe and is based on European beliefs and concepts, and derived from European state practices.

Eurocentrism in Law and Thinking

This Eurocentrism in law and thinking was not only predominant in the colonial period during the nineteenth and the first half of the twentieth centuries, but can be found even to this day. Thus it is noted "with a certain amount of amusement" how the Asian states grasp "as the highest and, indeed, as universal values certain fundamental ideas created and elaborated by the West."[14] According to this view, there is clear

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