

## REVIEWS

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THE PUBLIC ORDER OF THE OCEANS. By Myres S. McDougal & William T. Burke. New Haven and London: Yale University Press, 1962. Pp. xxv, 1226, Index. \$15.00.

ALTHOUGH Myres McDougal does nothing to ease the study of international law, scholarship is forever changed by the framework for analysis and understanding supplied by him and such associates as William Burke. We are deeply indebted to them. They bring to our attention, as have no others, the many and diverse factors bearing upon law's development, and reveal that the international lawyer must master not only the discipline of law, but also history, philosophy, sociology and science. Discouraged by this imposing task, one is convinced that only those as educated as McDougal and Burke are able to deal comprehensively with the problems involved in sharing the use of the world's oceans. The subject is complex, but if the lesser men who make and apply the law have the patience to plow through the verbiage, ignore the prolixity, and tolerate the repetitions in this book, they will be better equipped to carry on their trade.<sup>1</sup> The index is excellent. Henceforth even cursory research into the law of the sea will demand reference to this valuable work. It is already recommended reading for all United States Naval Officers.

To one not schooled in Professor McDougal's mode of analysis in this and companion volumes, *The Public Order of the Oceans* is hard reading. However, while the system it describes is indeed intricate, a basic understanding is not so difficult as first appears. The authors presuppose that such legal order as the world possesses is best described as a "comprehensive process of authoritative decision,"<sup>2</sup> embracing the interdependent activities of men everywhere. The law of the sea, part of this process, embodies three distinct features: interactions among the ocean users in which the seas and their resources are exploited; claims of jurisdiction and of rights of access relating to these interactions; and decisions by authorized decision-makers responding to these claims. These interactions, claims, and decisions relate generally to seven major topics: internal waters; territorial seas; the boundaries between internal and territorial waters; the width of the territorial sea; the waters adjacent to territorial waters; the high seas; and the maintenance of public order and the nationality of ships. The subjects are treated comprehensively in separate chapters, each dealing with current problems of great variety and of enormous importance to the United States, and with matters bitterly debated at the two recent United Nations Conferences on the Law of the Sea. Aspects of particular interest are the authors' use of scientific information in the discussion of fishing controversies and the control of pollution at sea; their study

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1. I sympathize with the intelligent reader who remarked to me recently, "If you look through that miasmatic swamp of \*\*\* obfuscation, he *does* have something to say, and it's damned interesting."

2. P. vii.

of the confusing problems of "innocent passage," and their recognition of the relativity of "freedom of the seas." Unfortunately no maps illustrate their discussions.

The four Geneva Conventions resulting from the 1958 meetings,<sup>3</sup> and the discussions at the 1960 conference are closely analyzed. The authors cite occasions when the delegates substituted confusion for precision,<sup>4</sup> were moved by ignorance rather than knowledge,<sup>5</sup> were inebriated by a "flow of traditional words" rather than sobered by refreshing clarity<sup>6</sup> and were motivated by chauvinism rather than by enlightened forbearance.<sup>7</sup> McDougal and Burke are devastating critics. They do not condemn all that they survey, however; for, when the Conference adopted criteria of flexibility sufficient to permit growth and creativity, the product is praised.<sup>8</sup> Although the parochial motivations of some delegations<sup>9</sup> and the falsehoods of others<sup>10</sup> are revealed, the precise reasons for some of the Conference failures remain hidden. Why, for example, did a compromise proposal to establish a six-mile width for the territorial sea fail by only one vote?<sup>11</sup>

By vividly demonstrating the drawbacks of the "one nation-one vote principle," the Conferences support the case against formal international meetings devoted to the codification and restatement of controversial matters of international law. The overwhelming number of smaller nations with maximum interests in protecting their coasts and coastal waters, but with minimum general maritime interests, wielded influence that made it difficult to enhance common interests.<sup>12</sup> Many nations failed "to realize that their own long-term interests will not be served if other states make similar extravagant claims."<sup>13</sup>

As the authors demonstrate throughout their text, the law of the sea arises from basic principles which embody "two sets of competing and often conflicting interests—those of the coastal and noncoastal states."<sup>14</sup> The exclusive interests of the coastal state find expression in such doctrines as "territorial sea," "internal waters," "continental shelf," and "hot pursuit." The inclusive

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3. Convention on the Territorial Sea and the Contiguous Zone, p. 1143; Convention on the High Seas, p. 1153; Convention on Fishing and Conservation of the Living Resources of the High Seas, p. 1164; Convention on the Continental Shelf, p. 1173.

4. Pp. 875, 893 (rights of visit); pp. 1128-40 (requirement of "genuine link between state and vessel").

5. P. 1002 (critique of the Fishing Convention).

6. P. 548.

7. P. 151 (Soviet-bloc claims of immunity for government owned commercial vessels); p. 211 (claims relating to the Gulf of Aqaba); pp. 554-55 (bloc voting).

8. Pp. 763, 778 (flexibility in describing "freedom of the seas"); pp. 842, 1088 (provisions regarding safe navigation).

9. P. 554 (Arab-Israeli dispute); p. 555 (Soviet-bloc voting); p. 778 (Soviet proposal regarding naval maneuvers).

10. Pp. 550-53 (claims relating to dependence on ocean resources).

11. P. 547.

12. Pp. 557-58.

13. P. 12.

14. P. 9.

interests of other nations are expressed in such phrases as "freedom of navigation and fishing," and "innocent passage." These opposing interests are reflected in legal rules. In a companion volume<sup>15</sup> we are told that legal rules conflict, frequently come in pairs, and do not point definitely toward pre-ordained conclusions. This view of the legal order is frustrating to law students, most frequently condemned by critics,<sup>16</sup> and misunderstood by lawyers. McDougal and Burke show that to expect rules to supply automatic solutions imposes too great a burden on man's ability to generalize, leads to rigidity in making decisions and hinders change. The true purpose of legal rules is to reveal significant varying factors, to predict the expectations of others and to permit creative and adaptive, rather than arbitrary and irrational decisions.

One of the most frequently misunderstood rules is the doctrine of "freedom of the seas." The authors show that this is not an absolute conception.<sup>17</sup> It includes freedoms to navigate, exploit resources, lay cables and fly through the airspace over the oceans—all enumerated in the High Seas Convention. These rights are not exclusive, however, and are subject to the general policies of other ocean users. The legality of every use of the ocean must, therefore, be measured by what is, after final analysis, "reasonable."<sup>18</sup>

While the authors display scepticism about the utility of legal rules, they are devoted adherents to those rules founded upon basic principles. One of these is that the maintenance of public order on the high seas depends on a clear and certain distinction between national and non-national ships.<sup>19</sup> A rule developed from this principle holds that each state is free to confer its nationality upon a vessel, and that no other state can question this for reasons of its own policy. The first state to confer its nationality on a vessel concludes the matter. McDougal and Burke describe the efforts of some who oppose the use of flags of convenience by requiring a genuine link<sup>20</sup> between ship and state as clearly irrational,<sup>21</sup> and demonstrate at great length the confusion<sup>22</sup> which this concept in the High Seas Convention introduces. Characteristic of the depth of their research is the disclosure of the substance rather than the form of the controversy over the use of flags of convenience. The dispute does not, they find, involve standards of safety and labor as much as it does maritime union prerogatives, flag discrimination and subsidized shipping.<sup>23</sup> The

15. MCDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 56-57 (1961).

16. Fisher, *Law and Policy in International Decisions*, 135 *SCIENCE* 658 (1962); Anderson, *A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes*, 57 *AM. J. INT'L L.* 378 (1963).

17. P. 11; pp. 757-63.

18. P. 48 and McDougal & Schlie, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648, 660 (1955).

19. P. 1010.

20. Art. 5, *Law of the Sea, Convention on the High Seas*, April 29, 1958, [1962] 13 *U.S.T. & O.I.A.* 2312, 2315, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962).

21. P. 5.

22. P. 1133.

23. Pp. 1018, 1021-26.

legitimate interests of labor unions, they urge, are not ultimately served by questioning the fundamental principle of the law of the sea.

To understand the process of decision, the phase of most interest to lawyers, the authors require us to identify the people who make the decisions, know the bases of their power, and diagnose the strategies they pursue. These decision-makers are diverse officials of the ocean-user nations who may serve on other occasions as claimants. Because of this dual function, the process of decision "requires of the official the promise of reciprocity in all his decisions and claims."<sup>24</sup> It is at this point that the authors display "the primitive structure and techniques generally characteristic of international law,"<sup>25</sup> because not all decision-makers recognize the sanction of this promise of reciprocity and risk of retaliation. Those who make decisions after a judicious evaluation of all facts are more likely to show this characteristic; the opinion of the Supreme Court in *Lauritzen v. Larsen*<sup>26</sup> is a notable example, but, except in matters involving internal and territorial waters, the courts have a minor role in developing the law of the sea. More often the decision-maker is an administrative official in government service who is unlikely to see the disadvantages of pressing a claim in the international arena. A very recent controversy is illustrative. The Congressman who complains about the Russian or Cuban fishing trawlers passing through Florida waters is vitally interested in the complaints of his constituents, but is little concerned by the risk that restrictions upon these vessels may lead to reciprocal restraints upon United States vessels.<sup>27</sup> On the other hand, officials of the Navy and the Department of State urge caution in limiting the rights of vessels engaged in innocent passage because they realize that unreasonable demands may have almost immediate effect upon United States ships.

To this reviewer the book is of immense value and well worth the effort of comprehending. However, the authors' deprecation of the value of black letter rules is too often misunderstood by some readers who too easily leap to the conclusion that because legal rules must be construed, they can be construed arbitrarily to serve immediate ends. This is not true, because one of the functions of a rule is to keep the exercise of discretion within bounds. This is most easily accomplished by simply stated prescriptions. Decision-makers of our armed forces, especially important to the law of the sea, command enormous destructive power, must act quickly and under great pressure, and it is urgent that their emotions, hunches and reactions be limited by the civilizing force of law.

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24. P. 37.

25. P. 1047.

26. P. 345 U.S. 571 (1953), quoted by authors, pp. 159-60.

27. *Hearings on Russian Trawler Traffic in U.S. Territorial Waters Before the Subcommittee for Special Investigations of the House Committee on Armed Services*, 88th Cong., 1st Sess. (1963).

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