The law of the seas - overview

• The law relating to all aspects of state use, jurisdiction and control over the oceans

• Traditionally one of the main branches of public international law

• The relevance of history for understanding the law
History – two main and competing tendencies

- Development of the notion of *the freedom of the seas*

- Establishment of *dominion and sovereignty over the sea*

The law has been shaped by changing historical forces

- Changing global “power structures” - cf. Grewes “epochs”
  - (Antiquity – Roman law)
  - “the Middle Ages”
  - “the Spanish age” (1494-1648)
  - “the French age” (1648-1815)
  - “the British age” (1815-1919)
  - The “modern” age

- The law of the seas as a product of interests, power and legal ideals in each age

- Commercial and trading interests and naval power
The legal doctrines

- The “freedom of the seas” doctrine ("mare liberum")
  - Roman law – the sea is not subject to ownership
  - Natural law principle of the sea as common to all
  - Freedom of commerce and navigation

- The “closed sea” doctrine ("mare clausum")
  - The seas can be subject to occupation and dominion (sovereignty) in the same manner as land
  - Assertion and effective exercise of dominion as the basis of sovereignty
  - Coastal state territorial interests

- The doctrines are not necessarily mutually exclusive!

Freedom of the seas in the middle ages

- The Roman law concept of freedom of the seas as the main legal premise (i.e. generally accepted legal doctrine)

- But claims of exclusive rights/dominion in certain regions from the 12th century
  - Venice and Genoa in the Adriatic and the Mediterranean
  - Denmark/Norway and England in the North Sea and the Baltic Sea

- Extension of territorial jurisdiction and coastal state maritime interests as the basis of claims to exclusive maritime dominion
Spanish and Portuguese claims of universal maritime dominion from 1494

• Overseas discovery and dominance over new continents – basis of law in Christian religion and papal authority
  • The papal edict of pope Alexander VI (Rodrigo Borgia) in 1494
    – Allocation of the world into Spanish and Portuguese dominions – including the high seas
    – Main purpose – Spanish and Portuguese claims to exclusivity of colonial trade
• The freedom of the seas doctrine as a challenge of existing hegemony and authority

The rise of the doctrine of the freedom of the seas

• Freedom of the seas originally championed by emerging trading nations England and Holland
• Grotius, Mare Liberum (1609) – originally written for the Dutch-East India Company in the case of the Santa Caterina (de jure predae, 1604)
• Closely aligned with Dutch commercial interests
• Not a new notion as such, but Grotius challenged the papal authority to create rights over the oceans
• Limited to the open sea, i.e. not land-locked seas, bays, coastal waters etc
Competing doctrines – «mare liberum» versus «mare clausum»

- Anglo-Dutch rivalry over neutrality and fishing rights
- John Selden, *Mare Clausum*, written on assignment from the English king in 1635 to justify English claims to its surrounding sea
  - The sea is not impervious to jurisdiction and occupation, but this requires effective power and control
  - Legitimate dominion must be established on the basis of historical rights and custom
  - Claimed extensive rights for England – the «Oceanus Britannicus»
  - Basis of English maritime policy during most of 17th century
  - But English reliance on the doctrine abated with increase of English maritime power and naval dominance

Freedom of the seas and naval warfare

- Maritime prize law and neutrality rights as the main reality of the international law of the sea during the 17th and 18th centuries
  - Right to capture (i) enemy property at sea, and (ii) neutral contrabande etc
- The freedom of seas doctrine as the basis of neutral rights
  - The main issue – trade with belligerents, especially colonial trade
  - The doctrine of «free ship – free goods»
  - The competing English doctrines of continuous voyage and the rule of 1756
- Insertions on the freedom of the seas by rights claimed by maritime powers to inspect
- «Breakdown» of neutrality rights during the two world wars as a demise of the freedom of the seas doctrine
The development of coastal state sovereignty and jurisdiction

- Notional relation to the *Mare clausum* doctrine but much older historical precedents
- Traditionally based on unilateral claims of the coastal state
  - E.g. Norway 1812: «Cancelli promemoria» - territorial sea stretches «one customary sea mile’s distance from the outermost island or rock not overflowed by the sea» = 4 modern nautical miles
- Generally supported in theory from 17th century that the coastal state could establish dominion through effective control (e.g. Grotius, Bynkershoek)
  - i.e. territorial sovereignty over adjacent sea not opposed to but complementary to the freedom of the seas doctrine

State practice and custom

- Must be seen in relation to the development of sovereignty and the modern (European) state as such
- Varied state practice from the 16th century – based on unilateral assertions of power and control
- General acceptance by the 19th century of effective control as the basis of jurisdiction – the «canon shot rule» (= 3 nautical miles)
- Different conceptions of dominion
  - The property theory
  - The police theory
  - The competence theory
Rights of navigation through the territorial sea

- Must be seen in relation to the development of the territorial sea as a concept
- Right of innocent passage generally recognized by the end of the 18th century e.g. in English prize law practice
- The Corfu Channel case in 1949 – right of innocent passage recognized even for war ships

The concept of baselines and internal waters

- The low water mark as the traditional basis of jurisdiction
- Norwegian practice of drawing straight baselines, cf. the 1812 promemoria («the outermost island or rock not overflowed by the sea»
- The Anglo-Norwegian fisheries case, 1951
Coastal state claims beyond the territorial sea

- Old practice of certain states (at least late 18th century) to claim and exercise customs control in a «contiguous zone» beyond the territorial sea
- Long standing practice of several states to claim exclusivity of fishing beyond the territorial sea (e.g. Iceland)
- Some states also claimed 200 nm territorial sea, primarily for the purpose of fishing
- Culminated with the recognition of the Exclusive Economic Zone
- Return to mare clausum?

Rights over the seabed – continental shelf

- Historically unclear and undefined status – no practical use
- Technological development only made rights over the seabed a practical issue from the 20th century
- The 1945 Truman declaration by the US – quickly followed by other claims
- Norway claimed rights over the continental shelf in 1963
The deep sea bed

- Only quite recently a practical issue
- One of the most controversial issues in UNCLOS (ch. 11)
- The concept of «common heritage of mankind»

Sources – overview

- History itself (i.e. established practice/custom) as a source of law

- Aside from custom, historically mainly regulated by bilateral treaties

- Development of multilateral codifications from WWII
  - The work of the ILC
  - The four 1958 Geneva Conventions (UNCLOS I) – codification of customary law relating to (i) the Territorial Sea and Contiguous Zone, (ii) the Continental Shelf, (iii) the High Seas and (iv) Fishing and Conservation of the Living Resources of the High Seas
  - The 1982 Law of the Sea Convention (UNCLOS III)
Custom as a source of law

• The ICJ Statute art. 38: “…international custom, as evidence of a general practice accepted as law”

• In the law of the sea – unilateral state claims coupled with acquiescence of other states as the basis of customary law

• The concept of instant custom – e.g. in relation to the continental shelf

General principles

• The ICJ statute art. 38: “the general principles of law recognized by civilized nations”

• General conceptions relating to property and dominion/sovereignty have been instrumental in shaping the law of the sea
  – e.g. the requirement of effectiveness (“the canon shot rule”)
  – The freedom of the seas as a corollary of principles of property (“not subject to appropriation”)

• Equity
Subsidiary sources - legal doctrine/theory

- ICJ art. 38: “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”

- In the law of the sea, especially significant in formation of the early law (e.g. Grotius, Selden)

- Historically connected to the authority of natural law, or in contemporary terms; evidence of «general principles»

Subsidiary sources – judicial practice

- Historically significant prize law practice from national prize courts, especially US and English courts
  - Sir William Scott/Lord Stowell was a significant influence at the turn of the 18th century

- In a contemporary setting, several important cases from the ICJ
  - The Corfu Channel case
  - The Anglo-Norwegian fisheries case
  - The Fisheries jurisdiction case
  - North Sea Continental Shelf case
  - East Timor case

- ITLOS
Regional solutions

- Cooperation as a general duty under the law of the sea
  - Parallel use, environmental protection and resources management

- Often requires more limited regional cooperation

Regional cooperation in the Arctic

- Special environmental and resource concerns in the Arctic
- No formal and separate «Arctic regime», but framework of cooperation
  - The Arctic Council, consisting of the eight Arctic states
  - The Ilulisaat Declaration, by the five coastal states bordering the Arctic ocean
  - Both generally affirms UNCLOS as appropriate legal framework