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BOOK REVIEWS

The Public Order of the Oceans

By

MYRES S. MCDOUGAL AND WILLIAM T. BURKE

New Haven: Yale University Press. 1962.
Pp. xxv, 1226, \$15.00

The oceans, and all that they contain or overlies, are among the world's great natural resources. This fact makes the oceans of vital interest to conservationists who seek to preserve their riches, to economists who plan to utilize their many resources, to scientists who investigate their varied phenomena, and to lawyers who attempt to apply to them public order. *The Public Order of the Oceans* is the third book in recent years written by Professor McDougal in collaboration with associates in which a "policy-oriented jurisprudence" has been used to study selected problems of international law. In this large volume he and Professor Burke have employed this discipline in order to clarify the nature of the common interest in the resources of the oceans and to make policy-oriented recommendations.

As the authors state:

This book, written from perspectives of identification with the larger community of mankind and addressed to all who share such identification, is designed as a clarification of the common interest in the continued maintenance of an international law of the sea which rejects all claims of special interest and weights every decision most heavily in favor of inclusive, rather than exclusive, interests. The conviction which inspires us, in direct opposition to certain recent parochial assertions of special interest and increasing overemphasis on exclusive interest, is twofold: first, that all peoples can benefit most from a public order of the oceans which secures for all the highest possible degree of shared access to ocean resources and of shared competence over ocean activities and, secondly, that a public order adequate to such ends can only be established and maintained by peoples' effective recognition and understanding of their common interests, with continuous reassessment in the context of the development and change characteristics of the contemporary world.

After such a statement one might expect the writers to be among those who dogmatically propose absolute freedom of the seas and access to its resources. However, they do not in fact take such a position, but rather maintain that such "internationalist myopia" obscures the real issues as much as the "pro-

vincial myopia" of those who assert the claims of individual nations to the exclusion of all others. As Professors McDougal and Burke point out, neither doctrinaire posture will best serve the common interest of mankind, for neither will result in the optimum use and conservation of the ocean resources. Just because one resource can be more efficiently exploited by coastal states does not mean that such states should have exclusive control over the sub-soil, the seabed and all above it for all uses. Likewise, just because all nations, including non-coastal states, have an interest in unfettered navigation on the surface should not lead to the conclusion or even the presumption that the same policy considerations apply in regard to the extraction of minerals from the bottom of the sea or the prescription of conservation measures or pollution controls.

At first glance, it may seem plausible to assert that the same state which exercises control over navigation should reasonably exercise control over fishing, or vice versa. However, this argument ignores the complexities of the situation. In dealing with such a vast and varied resource as the ocean, the difficulty of balancing the many competing claims in the common interest of all is a formidable task. It is a task which can only be accomplished after laborious and thorough consideration of all the policy considerations. For example, in dealing with conservation goals it is not enough to consider only the biologic data of the reproductive rate of the fish, but consideration also must be given to such varied factors as the economic consequences of any given policy on the fishermen, the dietary consequences on the population, and the requirements for capital investment.

The writers have systematically clarified the issues and considerations involved within a disciplined framework of enquiry so that the competing interests can be balanced rationally in the common interest. For example, in clarifying policy in regard to contiguous zones, the authors start from "the perspective of a general community policy designed to secure the greatest net gain for all mankind from ocean resources," and posit that, "it would appear genuinely in the common interests of all peoples to promote exploration and production of the mineral resources of the ocean floor."

After a close examination of the problem, they conclude that exclusive control by the coastal state is desirable. Some of the aspects given consideration include: that security requirements of coastal states may be threatened by the building of permanent drilling structures off their shores by a foreign, perhaps hostile power; that current exploitation techniques require the use of adjacent shore facilities; that, since an oil pool may extend under the land surface of a country, the local oil reserves and local production and conservation policies could be materially affected by offshore drilling even though located outside the territorial waters in a contiguous zone; and that there is considerable practice already established for the control of offshore exploitation of oil by the coastal states.

However, "from the mere fact that the general community has for good reason come to honor a comprehensive exclusive competence in the coastal states over the mineral resources of adjacent submarine areas, the conclusion is not inescapable in either logic or policy that a similar competence must be honored with respect to living resources in such areas." Many of the considerations that gave the coastal state a particular interest in mineral resources do not apply to the exploitation of the living resources. Fishing activities are not dependent upon cooperation with the shore in the way that mineral extraction is. Permanent offshore installations are not required, and the living resources do not underlie the ocean and the adjacent land mass as is the case in oil deposits. Therefore, the authors submit that it "seems more economic to encourage use by safeguarding equal opportunity for all, subject to rational conservation, than to accord monopoly control to particular states." The writers thus reach a different conclusion in regard to access to living resources than they did in the case of mineral resources. This is an illustration of their unwillingness to accept as infallible either the inclusive assertions of the internationalists or the exclusive position of the provincialists. Instead, they methodically look at each claim in its context and try to determine what policies apply from the perspective of the general community welfare. This flexibility in approach would make it quite possible for a state to be allocated exclusive competence over one resource in a given area, yet be denied exclusive competence over another resource or activity in that same area.

In regard to conservation, the book explores: (1) the goals of international conservation policy regarding marine resources, (2) methods for determining which states should be allowed to fish stock subject to conservation control and at what intensity, (3) what states should be allowed to enact and enforce conservation measures, and (4) who should decide disputes arising out of such matters.

The book points out the complexities and difficulties involved in establishing conservation goals and controls for the oceans. The case of anadromous species such as the salmon illustrates these difficulties. Intense fishing of salmon on the high seas can so substantially reduce the numbers left to be taken in the rivers where they spawn that it would not be economic for the coastal state to preserve the river as a spawning ground for the salmon. Based on sheer economics, it might become advisable for the coastal state to use the river for industrial purposes that would destroy the spawning grounds so there could be no salmon fishing for anyone either on the high seas or in the river. However, a non-coastal state such as Japan depends heavily on its high seas salmon fishing for food, and large numbers of its fishermen would be displaced if the coastal state were permitted to unilaterally impose stringent salmon fishing controls on the high seas. Such factors as these must be considered and the interest is of

the coastal and the non-coastal state satisfactorily balanced in order to arrive at a policy which best secures the common welfare.

In regard to conservation goals, the writers criticize the use of "the maximum sustainable yield from a resource" as the conservation goal for living marine resources. Maximum sustainable yield is a biological criterion which is in vogue with many conservationists, and is embodied in most international agreements and the 1958 Geneva Convention on Conservation. However, in the opinion of the writers, this is only one of the factors that should be considered. Economic and social criteria should be taken into account, such as the economic effect on the fishing industry, the incomes of fishermen, and the food requirements of society. This is especially true, the writers feel, since there is considerable scientific disagreement over the validity of the maximum sustainable yield as a criterion.

The Public Order of the Oceans is a particularly valuable contribution to current literature on the subject because it not only thoroughly treats the current trend and practice of the law of the sea, but also analyzes pertinent policies and makes provocative recommendations regarding what such policies should be. The writers include much information and research from the economic and scientific fields that a lawyer does not often find in legal research. By the same token, economists, scientists, and others interested in the natural resources of the sea will find the comprehensive exposition of legal concepts and practices illuminating. Perhaps a complaint that readers may make about the book is the possible difficulty which may be encountered in understanding some of the terminology. It is true that much of the language of policy-oriented jurisprudence has a special and precise meaning, and in order to fully appreciate this book it is necessary to acquaint oneself with the language and framework of enquiry which is set out in the early chapters. It is worth the effort.

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