The Position of Indian Territorial Waters and Continental Shelf in Constitutional Law—An Appraisal

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I

THERE IS NO GENERAL agreement on the width of the territorial sea or waters. A conference on the Law of Sea was convened by the United Nations at Geneva in February 1958. Out of the four conventions adopted at this conference, one related to the territorial sea and another dealt with the continental shelf. The Convention on the Territorial Sea and the Contiguous Zone came into effect on September 10, 1964, and the Convention on the Continental Shelf on June 10, 1964. The Geneva Conference of 1958 as well as of 1960, could not provide solution to the problem of the width of the territorial sea. At the Geneva conferences the political, economic and security interests of the various nation-states came into sharp clash and each state took a position in conformity with its national interest. These conferences failed to reconcile the demands of the newly emerging states and the demands of nations for access to resources because of developing science and technology. The width of the territorial sea proved to be a ticklish problem for which the nations could not find an agreed solution.[1]

India is among those countries who have not yet ratified the Convention on Territorial Sea and Contiguous Zones. As to the width of the territorial sea, India, at first, adopted the rule of three-mile limit of the English customary law. As early as 1871, the Bombay High Court held in *R.* v. *Kastya Rama* that it had jurisdiction to try an offence committed within three miles from the coast.[2] However, in *R.* v. *Kyn*,[3] an English

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1. The Convention just spoke about "the Sovereignty of a State" as extending "to a belt of sea adjacent to its coast, described as territorial sea" (Article 1). See Colombos, *International Law of the Sea* 89-90 (6th ed. 1967).
2. 8 B.H.C.R.
3. (1876) 2 Ex. D. 63.

court held that it had no jurisdiction to try an offence committed in territorial sea. Hence the British Parliament passed the Territorial Waters Jurisdiction Act, 1878, and its application was extended to British India also. The width of territorial sea, according to this Act, was fixed at three miles from the low watermark. When the present Constitution of India came into force in 1950, the earlier three-mile limit continued to remain as law in India and it found place in article 372. On March 22, 1956, the President of India issued a proclamation under which the territorial sea of India was extended from three to six miles. It recited that whereas international law recognised that on the high seas adjacent to its territorial waters, a coastal state may exercise the control necessary to prevent and punish the infringement within its territory or territorial waters of its customs fiscal, immigration and sanitary regulations, control had been assumed up to a distance of twelve nautical miles from the base line from which the width of the territorial waters was measured. By virtue of rule 3 (qq) of the Petroleum and Natural Gas (Amendment) Rule, 1966, made by the Government of India in exercise of the powers conferred by sections 5 and 6 of the Oilfields (Regulation and Development) Act, 1948, the territorial sea was defined as the "belt of sea adjacent to the coast of India including its islands and extending into the sea to a distance of six nautical miles measured from the appropriate base line." In 1966, Pakistan adopted a twelve-mile territorial sea. As a result, India was forced to extend the limits of its territorial sea to twelve miles. This was achieved on September 30, 1967, through a Presidential proclamation. Similarly, India assumed full and exclusive sovereign rights on the continental shelf through the Presidential proclamation of August 30, 1955. It stated that whereas valuable natural resources were known to exist in the sea-bed and in the sub-soil of the continental shelf and the utilisation of such resources was being made practicable by modern technological progress; and whereas it was established by international practice that for the purpose of exploring and exploiting such resources in an ordinary manner every coastal state had sovereign rights over the sea-bed and sub-soil of the continental shelf adjoining its territory; accordingly, the President had proclaimed that India had, and always had, full and exclusive sovereign rights over the sea-bed and sub-soil of the continental shelf adjoining its territory and beyond its territorial waters. This proclamation was incorporated into the Indian law through the amendment of article 297 in 1962. After this amendment, article 297 reads as follows : "All lands, minerals, and other things of value underlying the ocean within the territorial waters or continental shelf of India shall vest in the Union and be held for the purposes of the Union." Neither the proclamation of 1955 nor the amendment of 1962 defined the continental shelf. However, rule 3(aa) of the Petroleum and Natural Gas (Amendment) Rules, 1966, made under sections 5

and 6 of the Oilfields (Regulation & Development) Act, 1948, defined it as follows :

> Continental shelf means the sea-bed and sub-soil of submarine areas adjacent to the coast of India including its islands but outside the area of its territorial waters to a depth of 200 metres or beyond that limit to where the depth of the superjacent waters admits of exploitation of natural resources of the area.

This definition is similar to the one adopted in the Geneva Convention on the Continental Shelf. By conferring on the Oil and Natural Gas Commission an exclusive competence to exploit the oil resource of the shelf, the necessity of passing a separate legislation on the shelf has been avoided for the time being. But there is still a need for a comprehensive law that would regulate problems concerning exploration and exploitation of natural and mineral resources and jurisdiction. As a large number of states in the world have adopted in practice the rule of a territorial sea of twelve miles, Indian claims appear to be sound in international law. However, a lingering doubt exists as to its validity under the Indian municipal law. A proclamation is undoubtedly, valid for the purposes of International Law, but a proclamation does not have any legislative effect in Indian law.[4] The paradox is well presented by a scholar : "We validly claim a territorial sea of 12 miles according to international law, but we cannot legally exercise jurisdiction beyond 6 miles according to Indian municipal law."[5] The reason for this is that the proclamation being a mere executive order appears inconsistent with the earlier statute, the Territorial Waters Jurisdiction Act of 1876, which continues in force by virtue of article 372 of the Constitution. The absence of appropriate legislation incorporating the presidential proclamation on territorial waters raises few other practical problems.[6] For instance, section 18(d) of the Indian Penal Code defines India as meaning the territory of India, excluding the State of Jammu and Kashmir. Does the territory of India include the territorial waters of India as defined in the Presidential proclamation ? The Forty Second Report of the Law Commission of India raised this doubt because of the importation of the common law theory accepted in Britain that the territory of the realm included shore down to low water-mark and internal waters only, but not the territorial waters forming part

4. Ahluwalia, "Some Problems of Territorial Sea and Continental Shelf", in Dubey (ed.) *International Law* 281 (1972).
5. *Ibid.*
6. One possible way out can be, as Professor Rama Rao states :
   "that the extension of territorial waters constitutes an acquisition of territory which is an Act of State and cannot be questioned in a municipal court, no matter how it was acquired. But whether an Act of State can supersede a

of the high seas.[7] The commission pointed out that Indian legislation has not always been drafted on the footing that the territory of India necessarily included its territorial waters.[8]

II

The position in constitutional law of territorial sea in India presents an interesting area of inquiry. According to article 297, all lands, minerals and other things of value underlying the ocean within the territorial waters or the continental shelf of India vest in the Union Government and are to be held for the purposes of the Union. Thus, the Constitution vests the continental sea-bed and sub-soil in the Union. But, the question arises, who has the sovereignty over the territorial sea ? Is it the Union or the state ? It will be in order at this stage to refer to relevant constitutional provisions :Reference has already been made to article 297. Parliament has exclusive power to legislate on matters enumerated in List I of the Seventh Schedule of the Constitution. One of such matters, mentioned under entry 57 of List I, is fishing and fisheries beyond territorial waters. The state legislatures are authorised to legislate on matters enumerated in List II and entry 21 of List II mentions fisheries.

The interpretation of these provisions constituted the subject-matter of *A.M.S.S.V.M. & Co.* v. *State of Madras*[9] decided by the Madras High Court.[8] The facts of the case may be recalled briefly : The Raja of Ramanathapuram, whose zamindari was one of the estates permanently settled under Regulation 25 of 1802, granted a lease to the petitioners of the right to fish chanks in the Gulf of Mannar and Palks Bay opposite the coast of the zamindari for a period of ten years on an annual rent of Rs. 14,000/. The Legislature of the Province of Madras passed the

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statute in municipal law is open to debate."
See, "Some Problems of International Law in India", 6 *The Indian Yearbook of International Affairs* 3 at 13 (1957).

7. *Forty Second Report* : *Indian Penal Code* 6 (1971); see also its remarks in connection with definition of 'territory' in the Code of Criminal Procedure, Vol. 1 *Forty First Report* 4 (1969).
8. The earliest reference in Indian legislation to territorial waters is to be found in section 4 of the Indian Fisheries Act, 1897. In recent legislation, section 2 (2) of the Merchant Shipping Act, 1958, provides for the applicability of the Act to any foreign ship while it is "within India including the territorial waters thereof." The Customs Act of 1962 contains in section 2(27) a definition of India as including the territorial waters of India. Section 23 of, and item 14 in the Second Schedule to the Extradition Act, 1962, refer to any offence "committed on board any vessel on the high seas, or any aircraft which in the air outside India or the Indian territorial waters which comes into any port or aerodrome of India."
9. A.I.R. 1954 Mad. 295.

Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, abolishing the estates within the State of Madras (Tamil Nadu). As a consequence of a notification under this Act, the entire zamindari vested in the Madras State. This Act and consequential order of the government were challenged as unconstitutional and illegal. The petitioners argued, *inter alia*, that the Act insofar as it related to the fisheries in the seas was extra-territorial in character and beyond the legislative jurisdiction of the state and therefore, void to the extent or at least void as regards fisheries beyond territorial waters. In reply, the State of Madras urged the following contention : Firstly, the impugned Act was not a law in respect of fishing or fisheries in the seas, but in respect of land and land tenures which fall exclusively within the jurisdiction of the state. Secondly, the state had power to legislate on fishing and areas in question had come to be recognised by reason of long possession and international reeognition as part of the territorial waters.

The first question to which the court addressed itself was whether the Act was in substance a legislation in respect of land and land tenures or was it to any extent a legislation on fishing and fisheries in the seas. In order to decide upon this, the court applied the test that when a subject was within the legislative competence of a state, it was no objection to the validity of a law on that subject, that it incidentally trenched on subjects which were not within its jurisdiction.[10] The court arrived at the conclusion that the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, was in substance a legislation in respect of land and land tenures and was not to any extent a legislation on fishing and fisheries in the seas. In the opinion of the court, the particular provisions in the Act in respect of fisheries in the seas were just incidental to the effective legislation on the subject which was clearly within the competence of the Madras Legislature. The right to fisheries in the seas came into the picture only as it formed part of the assets included in the zamindari under the *sanad* issued under the Permanent Settlement Regulation of 1802, and that it had no existence apart from it. When that Regulation was repealed and the estate abolished, by a competent Act of legislature, the court stated, the rights appurtenant thereto including the right to fisheries in the seas came to an end with it and that was clearly incidental to the legislation.[11] The court further stated :

> It is not without significance that the question of the right to fisheries in the seas arises only with reference to the zamindari of

10. *Id.* at 295.
11. *Id.* at 296.

Ramnathapuram and that itself is sufficient to show that it is only incidental and not the pith and substance of the legislation.[12]

The court next addressed itself to the question whether the fishing waters formed part of the Province of Madras. The answer to this question would also determine if the impugned Act had extra-territorial operation. The court, though in an *obiter*, stated that whatever theory might ultimately find acceptance with the family of nations as to the true basis of the right which a state possesses over territorial waters, there cannot be any doubt that with reference to the rights of fishery, the marginal belt must be regarded as part of the territory of the littoral state. The court rejected the contention that the limits of a state extend only to its lands and that the rights of fishery over the seas, even if they be within territorial waters, are extra-territorial in character cannot be upheld.

The court then examined the question, how far the territorial waters extend to the sea and whether the fishing waters involved in the present case were within those limits ? The court arrived at the conclusion that fishing areas involved in the case were within territorial waters of the State of Madras.[13] The court cited authorities on International law seeking to prove that the rule of three-mile limit of the marginal belt could not be adopted in the present case where the marginal belt did not open into the ocean, but was screened by a row of islands lying in close proximity to the shore beyond the territorial waters and, further, there were landlocked and inland bays bounded by the inland of Ceylon.[14] The court stated that there was a ring of islands off the coast of Ramanathapuram within a distance of six miles and the fishing area in question was within the territorial waters.[15]

The court further noted the fact that in the present case the marginal belt emerged into the open sea. The Palks Bay was land-locked

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12. *Ibid.*
13. *Id.* at 299.
14. *Ibid.*
15. The court cited the rule laid down by Higgins and Columbus :
Where an island is, therefore, situate within the three-mile limit, the belt of waters round it will constitute territorial waters. This belt will be three miles wide and will be measured from low watermark following the sinuosities of the island. If the island is more than three, but not more than six miles from the coast, then the whole extent of waters would be territorial since it would be inadvisable to allow any small strip of high seas between the coast and the island. Where the island is more than six miles from the shore, but only slightly so, then it would appear reasonable to permit a State to claim a small extension of its marginal belt in order to establish a uniform regime of its territorial waters. *Ibid.*

except for a small opening in the north-east. The court cited authorities which would govern such bays. When bays were bounded by the territory of the same state on both sides, the six-mile rule might be adopted but this rule was subject to the exception that on historical and prescriptive grounds or for reasons based on the special characteristics of the bay, the territorial state was entitled to claim a wider belt of marginal waters, provided that it could show affirmatively that such a claim had been accepted expressly or tacitly by the great majority of other nations. Occupation of a bay for a long time by some state and the acquiescence therein by other states were sufficient to support the title of that state to the bay. On the above ground, the court stated that Strait of Palk was within the territorial waters of Madras State. It also stated that the Ramanathapuram coast forming part of the Gulf of Mannar did not, as regards its configuration, character and size, differ from the Strait of to the north of it and, therefore, the rule of effective occupation and acquiescence by other states was applicable to it in an equal measure.[16]

The court, finally, took up the contention of the petitioner that the impugned Act was *ultra vires* because it was only the Union and not the states that had the competence to legislate on territorial waters. Rejecting this, the court held that the State of Madras was competent to legislate on territorial waters. Reading entry 23 in Federal List 7 and entry 24, State List, Government of India Act, 1935, (corresponding to entry 57, Union List and entry 21, State List of the Constitution), the court stated, it was clear that the states had the competence to legislate generally on fisheries and it was only fishing and fisheries beyond territorial waters that were excepted from their jurisdiction.

The court further stated that section 99(1) of the Government of India Act, 1935, provided that the Federal Legislature could make laws for the whole or any part of British India and under section 311 "British India" was defined as meaning "all territories for the time being comprised within the Governors' and the Chief Commissioners' provinces". The result then was that if a territory did not belong to any province, it did not form part of British India and if territorial waters did not belong to the provinces, the Centre will have no jurisdiction either. The true position, according to the court, was that over the same territory the province had power of legislation in respect of subjects enumerated in List II and the Centre over those mentioned in List I with a concurrent power over the subjects set out in List III. In this view, the court held, the territorial waters, if they belonged to British India, must belong to the several littoral

16. *Id.* at 300.

states from which the marginal sea takes off; and under entry 24 of List II, it was only the provinces that had competence to enact laws with reference thereto.

Another argument of the petitioners was that whatever the validity of Act 26 of 1948 and of the notification issued thereunder on 7.9.1949 under the Government of India Act, 1935, when the notice dated 13.3.1951, which is what is assailed here, was issued, the Constitution of India had come into force and under article 297 thereof, the territorial waters had come to be vested in the Central Government. Therefore, the notice issued thereafter was beyond the competence of the State of Madras. The court held that property having already vested in the government, they were entitled to take all steps which owners of property were entitled to take wherever properties might be situated, and the notice dated 13.3.1951 was within their rights as owners. The court also rejected the contention that under the Constitution the territorial waters were vested in the Union Government. Under the provision of article 297, what vested in the Union was the bed of the sea beneath the territorial waters and not the waters themselves. In law, the court said, the two did not stand in the same position. The sea-bed belonged to the littoral state absolutely in the same manner as its land. It had the fullest dominion over it. It alone was entitled to the minerals therein and it was entitled to construct tunnels thereunder. The territorial waters of a state, however, were, unlike the sea-bed, subject to certain rights in favour of other nations such as peaceful navigation. Therefore, the court concluded that it was not correct that article 297 which vested sea-beds in the Union had also the effect of vesting territorial waters in them. The court further remarked that as regards territorial waters, the position under the Constitution remained what it was under the Government of India Act. Even if it came to different conclusion, on this point, the court added, it would still hold that entry 21 in the State List was sufficient to empower the state legislature to enact laws in respect of fisheries in territorial waters notwithstanding that they vested in the Union. The court relied on a distinction between proprietary rights and legislative jurisdiction. There was no presumption, in the opinion of the court, that just because legislative jurisdiction was vested in the Union Parliament, proprietary rights were transferred to it.[17] Relying on this principle, the court stated that there was no need to determine whether the right to territorial waters vested in the states; it was sufficient that the power to legislate on fisheries therein was granted to them. The court also kept in view the theory that the title to the sea-bed was one thing and title to territorial waters or even right to fisheries was quite a different thing.

17. *Id.* at 301.

The decision of the Madras High Court is questionable on more than one count.

First, the proposition that as the object of the impugned Act was merely to abolish private rights in zamindaris, and that it was in pith and substance one related to land and land tenure and not to fisheries in the seas, is of doubtful validity. The court attached virtually no importance, it may be submitted, to the fact that the zamindari in question included sedentary fisheries in the high seas. Moreover, there is a respectful body of scholarly opinion in favour of the view that "the 'pith and substance' rule is applicable only in cases of conflict of jurisdiction between two legislatures of co-ordinate authority but cannot be used to overcome the bar against extra-territorial legislation".[18] What was really needed, if the Madras Act were to be declared *intra vires*, was the proof of a sufficient territorial nexus with the object of legislation, that is, the sea-bed or chank fisheries in question.

Second, the court's opinion, though by way of *obiter* only, that the impugned Act was not extra-territorial in operation and its interpretation that territorial waters, if they belong to (British) India, must belong to the several littoral states from which the marginal sea takes off is also open to question. It is widely known that according to the rules of international law sovereign states have rights over territorial waters. The units of federal states in the absence of international personality, cannot have rights over territorial waters. The basis of the paramount rights of the sovereign state or national government are the pressing national interests, national responsibilities and national concerns.[19] Therefore, the constituent states in India could not have independent existence before the formation of the federation, as they were carved out of the territories of a unitary state. The court relied upon article 1 of the Constitution (and to the corresponding section 311 of the Government of India Act, 1935) which defined the territory of India as "comprising the territory of States". But if article 1 is not interpreted in the light of international law, it will be difficult to reconcile it with article 297 and the court itself recognised this.

Third, the court also relied upon the rule of effective occupation by the State of Madras of the chank bed underlying the Gulf of Mannar, and

18. *Supra* note 6 at 16.

19. See M.P. Jain, *Indian Constitutional Law* 731 (1972). In fact it was on these grounds that the U.S. Supreme Court decided in favour of the federal government disputes as to whether territorial waters belonged to the state government or the federal government. In the opinion of the U.S. Supreme Court, the protection and control of the territorial waters was the function of the national external sovereignty. See, *U.S.* v. *State of California*, 332 U.S. 19 (1947); see also, *U.S.* v. *State of Louisiana*, 339 U.S. 699 (1950) and *U.S.* v. *State of Texas*, 339 U.S. 707 (1950).

that being so, the Madras Act was validly passed by virtue of the entry on "fisheries" in List II of the Seventh Schedule. What was involved in the case was the ownership of chank bed and according to the impugned Act, it vested in the state government. Thus, the scope of the Act in question went far beyond the mere regulation of the fisheries and the court failed to appreciate this point.

Finally, the principal reasoning of the court that under article 297, territorial waters do not vest in the Union is assailable. What is vested in the Union, according to the court, is what underlies the ocean within territorial waters but not the territorial waters themselves, which belong to the state governments. The court made a distinction between territorial sea-bed and territorial waters, which it thought, stood on different footing. This view is quite contrary to the policies projected at national and international level. Expectations of people inside India were originally expressed in the Constituent Assembly. The view of the framers of the Constitution was that "anything above the land goes with the land. If there is a tree above the land, the tree goes with the land. Water is above the land and so it goes with the land."[20] The chairman of the Drafting Committee, Ambedkar, had this to say on this point :

> We, therefore, want to state expressly in the Constitution that when any maritime State (like Cochin, Travancore or Cutch) joins the Indian Union, the territorial waters of that maritime State will go to the Central Government. That kind of question shall never be subject to any kind of dispute or adjudication.[21]

The framers of the Constitution, therefore, appeared pretty clear on the point that the word 'land' in article 297 would denote not only land but also water above it, and by declaring that the land within territorial waters belonged to the Union, the article would declare that the territorial waters over this land would also belong to the Union.[22] These expectations created by the Constituent Assembly and incorporated in article 297 have in no way been modified by subsequent developments in the country except for the learned opinion of the Madras High Court. Indeed, the later developments and policy declarations and decisions at the national level reinforce the expectations of the Constitution-makers. Moreover, trends in the field of international law also support the view vesting territorial waters in the Union. In view of the practical importance of the matter, it is hard to agree with the view of M.P. Jain, who is otherwise a superb scholar and the most authoritative writer on Indian

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20. 8 *Constituent Assembly Debates* 892.
21. *Ibid.*
22. *Supra* note 19 at 732; *supra* note 4 at 282.

Constitutional Law, that "the question of ownership of territorial waters does not appear to be of much significance."[23] At the nomeent a vigorous campaign is going on at international level of the basis of the concepts of "extended territorial waters" and "fishery zones" with some states claiming even as long as 200 miles or more on the seas. Pakistan is thinking of extending the limits of its territorial waters and India may also be forced to do the same. Also, India has proposed recently the concept of exclusive fishery zone in international conferences. The 1974 Conference on Law of the Sea at Caracas will consider these proposals and it is almost sure that the width of territorial waters will expand. If that happens, it is just possible that on the one side the Centre will claim wider territorial waters at international level and a coastal-constituent unit of it, which does not see eye to eye with the Centre, will exercise automatically extended fishery jurisdiction in an expanded territorial waters with impunity, citing the decision of the Madras High Court as a legal sanction.

In short, the problem requires rethinking and interpretation of article 297 and the entries in Lists I and II of the Seventh Schedule as referred to above, which would be in accordance with both the national and international law standards, should be restored. Also comprehensive enabling legislation be passed to incorporate the presidential proclamations on the territorial sea and continental shelf.

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23. *Supra* note 19 at 733.