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The Maritime Aspects of the Republic of China's Constitution: Some Observations

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The 1982 United Nations Convention on the Law of the Sea finally entered into force on November 16, 1994, and up to August 1995, more than eighty countries had ratified or acceded to this new institution. In all respects, this is indeed a breakthrough in the modern development of an international law of the sea. The Convention is quite comprehensive, not only codifying preexisting customary rules on maritime affairs, but also creating some new regimes to suit the modern uses of the marine sphere. Although the Constitution of the Republic of China (ROC) was enacted some fifty years ago, it is not without references to maritime law. For example, it expressly mentions in Article 108 that the central government has power over the shipping and marine fishery. Through interpretation, it is therefore submitted that fundamental laws in this country are capable of keeping pace with the aforementioned developments in the law of the sea.

Keywords: maritime law; international law of the sea; Constitution; the Republic of China

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Taiwan (the Republic of China; ROC) is a tiny island surrounded by seas. Thus, the maritime sphere has constituted an indispensable part of the ROC's national life. However, the international law of the sea has undergone some fundamental and rapid changes in the past few decades. With respect to maritime relations, the international law has not only imposed more duties on nations, but also conferred more rights on coastal states. In terms of this variety and complexity, difficulties may therefore arise for municipal legal systems to observe their new obligations and apply their new rights.

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At first glance, the ROC Constitution, which was adopted in 1946, may seem too obsolete to keep pace with these developments. Indeed, constitutions of recently independent states have often included express provisions on relevant matters. For example, Article 100 of the Republic of Namibia's Constitution clearly provides that "land, water, and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State where it is not otherwise lawfully owned."[1]

Although the ROC Constitution does not have express provisions on these matters, it could cover some maritime aspects by implication. For example, the ownership of natural (both mineral and living) resources in the exclusive economic zone (EEZ) as well as the continental shelf may well be implied. Moreover, the Constitution lays down fundamental principles for the settlement of international disputes which no doubt could (or should) be applied to maritime areas. Thus, this paper will examine these points in some detail, specifically from an international law perspective. The best approach to this is of course to examine the position in the various zones under the contemporary international law of the sea, i.e., internal waters, territorial seas, the EEZ, and the continental shelf.

Internal Waters and Territorial Seas

Internal waters are those waters which lie on the landward side of the baseline from which territorial sea and other maritime zones are measured.[2] In general, they form an integral part of the coastal state, and the latter enjoys full territorial sovereignty over them.[3] In the ROC, the Constitution[4] has settled the status of internal waters

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[1]For a succinct discussion of the Namibian Constitution, see Arnold M. Mtopa, "The Namibian Constitution and the Application of International Law: A Comment," in *South African Yearbook of International Law* 16 (1990/91): 104-12.

[2]Robin R. Churchill and Vaughan Lowe, *The Law of the Sea*, 2nd edition (Manchester: Manchester University Press, 1988), 51.

[3]Ibid. Except restricted by international treaties, e.g., Panama Canal and Suez Canal. See Holger Kuhl, *Baseline Determination: An Examination with Special Reference to the Low-Water Mark*, Institute of Marine Law of the University of Cape Town, Special Publication no. 4 (1987): 16, 21 n. 2.

[4]For the English text of the Constitution, see ROC Government Information Office (GIO), *The Constitution of the Republic of China*, 6th edition (Taipei: GIO, 1994).

as part of the state, as Article 4 provides that "the territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly." By the term "territory," it may not be unreasonable to argue that this includes, in addition to the airspace superjacent to land territory and the territorial sea, internal waters.[5]

As for territorial seas, the Constitution implies, as mentioned above, that the ROC territory includes a maritime belt off its coast. However, this is also a source of confusion, as the second part of the provision stipulates that the territory "shall not be altered except by resolution of the National Assembly." It is not clear whether this requirement applies to the extension of territorial seas from, say, three nautical miles to twelve nautical miles.

In a way, this question was once examined in the English case *R. v. Keyn*.[6] In that instance, the *Franconia*, a German ship, collided with the *Strathclyde*, a British ship, at a point in the English Channel within three miles of the English coast. The defendant, the German captain of the *Franconia*, was prosecuted at the Central Criminal Court for the manslaughter of a passenger on board the *Strathclyde*, who died as a result of the collision. The defendant was found guilty, but the question whether an English court had jurisdiction to try the case was reserved for the Court for Crown Cases Reserved which decided, by seven votes to six, that it did not.[7] In ruling that the three-mile belt of sea surrounding Great Britain was not British territory under English law, Lord Cockburn C.J. gave the following judgment:

> . . . To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage. . . . *Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law.* In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a

[5]Yang Min-hua, *Zhonghua minguo xianfa lun* (On the Constitution of the Republic of China), 6th edition (Taipei: Zhisheng wenhua, 1992), 38.

[6](1876) 2 Ex.D. 63, Court for Crown Cases Reserved. For a succinct report on this case, see D. J. Harris, *Cases and Materials on International Law*, 4th edition (London: Sweet & Maxwell, 1991), 76-79.

[7]Ibid., 76.

> matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law. . . .[8]

In the present context, the core of the problem lies in the fact that the ROC extended its territorial seas from three nautical miles to twelve nautical miles solely by executive decree.[9] This has created a huge legal difficulty in terms of the Constitution. According to the Constitution, "existing national boundaries" shall not be altered except by resolution of the National Assembly. Although the term "existing national boundaries" is not elaborated elsewhere, it is generally understood that this refers to, as far as territorial seas are concerned, a three-nautical-mile limit.[10] This may be traced back to 1931, when the Ministry of Transportation officially laid down that the ROC's territorial seas extended for three nautical miles. The Decree of the Ministry of Transportation No. 1612 states, ". . . the Executive Yuan . . . decides that the extent of the territorial seas is three nautical miles and the extent of customs enforcement is twelve nautical miles. The Ministry of Finance will establish the detailed rules for exercising customs enforcement. . . ."[11] Since the adoption of the decree was prior to the institution of the 1946 Constitution, the three-nautical-mile limit must have been intended to form the "existing national boundaries" mentioned by the Constitution.[12] After all, the term "existing national boundaries" must refer to those which already existed before 1946, when the Constitution was adopted.[13] Thus, the extension of territorial seas from three nautical miles to twelve nautical miles, which no doubt constitutes a change of "existing national boundaries," must be approved by the National Assembly.[14] At this point, of course,

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[8]Ibid., 77. Emphasis added.

[9]On September 6, 1979. For the English text of the decree, see Myorn H. Nordquist and Choon-ho Park, eds., *North America and Asia-Pacific and the Development of the Law of the Sea: The Republic of China* (New York: Oceana, 1981), 6. The Chinese original was published in *Zhongyang ribao* (Central Daily News) (Taipei), September 7, 1979.

[10]For a detailed discussion in this respect, see Kuan-Ming Sun, *The Problems of Delimitation of the Exclusive Economic Zone Between Taiwan and the Philippines with Special Reference to the Legality of Their Claims*, Institute of Marine Law of the University of Cape Town, Special Publication no. 12 (1990): 26-29.

[11]*Jiaotongbu gongbao* (Gazette of the Ministry of Transportation), 1931, 1-2. Author's translation.

[12]Sun, *The Problems of Delimitation*, 38.

[13]Ibid.

[14]See note 5 above.

one may still argue that the requirement does not apply in the present case. However, the basic problem here is that this argument would render the outer edge of the subsequently extended territorial waters, i.e., the area beyond the original three-nautical-mile limit, not an integral part of the Republic. This could create a very serious situation for the Constitution and the Republic. Hence, it is submitted that the 1979 decree on the extension of territorial seas is legally void,[15] as the act of administration was ultra vires.[16]

In short, the 1946 Constitution may well be said to provide a reasonable foundation for the ROC's internal and territorial seas despite the aforementioned confusion.

The Exclusive Economic Zone

The EEZ has its roots in the concept of the exclusive fishing zone and the doctrine of the continental shelf,[17] combining and developing them.[18] The concept may be traced back to the 1945 Truman Proclamation with Respect to Coastal Fisheries in Certain Areas of the High Seas, by which the United States tried to establish fishery conservation zones in waters contiguous to its territorial seas.[19] However, it was not until the Third United Nations Conference on the Law of the Sea that the so-called EEZ was nurtured to full strength.[20] At that conference (1973-79), there was widespread support for the zone in question,[21] and consequently, the Law of the Sea Convention (LOSC) of 1982 provided a detailed structure (Articles 55-75) in this respect.[22]

Under the Convention, the EEZ is an area beyond and adjacent to the territorial seas,[23] not extending beyond two hundred nautical

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[15]Sun, *The Problems of Delimitation*, 38.
[16]Ibid.
[17]Harris, *Cases and Materials on International Law*, 418.
[18]Ibid.
[19]Gerhard Von Glahn, *Law Among Nations: An Introduction to Public International Law*, 6th edition (New York: Macmillan, 1992), 472. The text of the proclamation may be found in "Supplement to Document," *American Journal of International Law* 40 (1946): 46.
[20]J. G. Starke, *Introduction to International Law*, 10th edition (London: Butterworths, 1989), 269.
[21]Ian Brownlie, *Principles of Public International Law*, 4th edition (Oxford: Clarendon, 1991), 209.
[22]Ibid.
[23]The Law of the Sea Convention (LOSC), Article 55.

miles from the baselines from which the breadth of the territorial sea is measured.[24] In the text, the zone is not defined as a part of the high seas[25] and is sui generis.[26] Moreover, in this maritime zone the coastal state has, inter alia, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or nonliving, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds."[27]

The customary law version of this concept is closely related to the aforementioned provisions and is to an extent based upon the Convention model.[28] This customary law status has been recognized by the International Court of Justice (ICJ)[29] in two cases.[30] In the *Continental Shelf (Tunisia v. Libya) Case*,[31] the ICJ ruled that the zone "may be regarded as part of modern international law."[32] In the *Continental Shelf (Libya v. Malta) Case*,[33] the ICJ reaffirmed that "the institution of the exclusive economic zone . . . is shown by the practice of States to have become a part of customary law."[34] Thus, generally speaking, the EEZ is now a settled part of contemporary international law.[35]

In the 1946 Constitution, there are two articles which could provide a legal foundation for the ROC to exercise sovereign rights in the EEZ. The first is Article 108, which stipulates that:

> In the following matters, the central government shall have the power of legislation and administration, but the central government may delegate the power of administration to the provincial and county governments:
> . . .
> (3) forestry, industry, mining, and commerce. . . .

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[24]LOSC, Article 57.
[25]LOSC, Article 86.
[26]See note 21 above.
[27]LOSC, Article 56 (1) (a).
[28]Brownlie, *Principles of Public International Law*, 210.
[29]Ibid.
[30]Harris, *Cases and Materials on International Law*, 424.
[31]*International Legal Materials* 21 (1982): 225-317.
[32]Ibid., 253, para. 100.
[33]Ibid. 24 (1985): 1189-1276.
[34]Ibid., 1199, para. 34.
[35]Starke, *Introduction to International Law*, 269 n. 4.

. . . .
(6) shipping and *marine fishery* . . . .[36]

Through interpretation, the items listed in this article may well cover the resources in the EEZ's seabed and subsoil as well as those of the superjacent waters above the seabed. Hence, Article 108 as a whole could provide a constitutional basis for the ROC to exercise its sovereign rights in the EEZ. The second possible basis is Article 143, paragraph 2 which includes "mineral deposits which are embedded in the land, and natural power which may, for economic purposes, be utilized for the public benefit shall belong to the state. . . ." This might provide a foundation for the ROC to exercise sovereign rights over nonliving resources in the continental shelf. At this juncture, however, one may oppose this view by saying that the "land" here should be limited to land territory and the seabed of the territorial sea. This is because paragraph 1 of the same article states that "all land within *the territory of the Republic of China* shall belong to the whole body of citizens."[37]

In responding to this, however, it is submitted that, since paragraph 2 was formed separately, there is still room to interpret the term "land" as including the continental shelf (in this case, of course, the land in question is to be equated with the seabed and subsoil of the shelf). Thus, in the opinion of this author, Article 143 might provide an extra basis for the ROC to claim sovereign rights over mineral resources in the continental shelf in particular. In short, the EEZ could reasonably find a place in the Constitution.

Continental Shelf

Here, it is only necessary to consider the situation on the continental shelf beyond two hundred nautical miles from the baseline, i.e., beyond the limits of the EEZ.[38] The reason is that for up to two

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[36]Emphasis added. At this juncture, however, it should be noted that the author has substituted "marine fishery" for "deep-sea fishery" in paragraph 6. This is because the latter, which appears in the English translation by the ROC Government Information Office, is inconsistent with the Chinese original.

[37]Emphasis added. Cf. Article 4 of the Constitution mentioned above.

[38]Dermott J. Devine, "Marine Resources and the Namibian Constitution," *South African Yearbook of International Law* 16 (1990/91): 117.

hundred nautical miles, the continental shelf is subsumed in the EEZ.[39] In this context, the relevant rules of the LOSC are as follows:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
> . . . .
> 4. The natural resources referred to in this Part consist of the mineral and other nonliving organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[40]

Moreover, the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or of the airspace above those waters.[41] As with the EEZ, the Chamber of the International Court, in the *Gulf of Maine Case*,[42] has recognized that "these provisions, even if in some respects [bearing] the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question."[43]

In the ROC Constitution, there are several provisions capable of keeping pace with this development. First, Article 143, paragraph 2, which states that "mineral deposits which are embedded in the land . . . shall belong to the state," could easily apply to "the mineral . . . resources of the seabed and subsoil [of the continental shelf]." This is because, as mentioned above, there is still room to interpret the term "land" as including the seabed and subsoil of the continental shelf. Second, "marine fishery" as mentioned in Article 108 and over which the ROC government has the power of legislation and administration, could no doubt include sedentary development. In short, the Constitution can thus adequately cope with the situation in question.

The Cultural Zone

Modern international law allows a coastal state to claim jurisdic-

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[39]LOSC, Article 76 (1).
[40]LOSC, Article 77.
[41]LOSC, Article 78 (1).
[42]*International Legal Materials* 23 (1984): 1197-1269.
[43]Ibid., 1221, para. 94.

tion over objects of historical and archaeological interest up to twenty-four nautical miles from its baseline.[44] Although the term "cultural zone" is not found in general international conventions, such a zone is clearly envisaged and authorized in the LOSC.[45] Article 303 of the LOSC states:

> 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
> 2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial seas of the laws and regulations referred to in that article.

Recently, the Republic of South Africa's Parliament has enacted the Maritime Zones Act[46] to enforce this specific aspect of the law of the sea. Article 6 of the Act states that:

> 1. The sea beyond the territorial waters . . . but within a distance of twenty-four nautical miles from the baselines, shall be the maritime cultural zone of the Republic.
> 2. Subject to any other law, the Republic shall have, in respect of objects of an archaeological or historical nature found in the maritime cultural zone, the same rights and powers as it has in respect to its territorial waters.

In essence, this is intended to give the coastal state the right to control traffic in objects of an archaeological or historical nature up to the limit of the contiguous zone,[47] which may not extend beyond twenty-four nautical miles from the baselines from which the breadth of the territorial sea is measured.[48]

In the ROC Constitution, one article actually explicitly touches upon the question: Article 108 states that "in the following matters, the central government shall have the power of legislation and administration, but the central government may delegate the power of administration to the provincial and county governments: . . . preservation of ancient books and *articles and sites of cultural values* [emphasis added]." This, it is submitted, could fit the present situation quite

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[44]Dermott J. Devine, *Maritime Zone Legislation for a New South Africa: Historical, Contemporary and International Perspectives*, Institute of Marine Law of the University of Cape Town, Special Publication no. 17 (1992): 24.

[45]Ibid., 88.

[46]Act No. 15 of 1994. For the text of the Act, see *Government Gazette of the Republic of South Africa* 353, no. 16083 (1994).

[47]Devine, *Maritime Zone Legislation*, 88.

[48]LOSC, Article 33 (2).

well. Although one may still argue at this juncture that the provisions concerned are not clear enough, one can also say that only basic matters should appear in the Constitution, with the details contained in other legislation.[49] In this respect, the Constitution could be said to be adequate (or even advanced).

Settlement of Disputes

In the ROC Constitution, Article 141 spells out the fundamental principles of the ROC's foreign policy:

> The foreign policy of the Republic of China shall, in a spirit of independence and initiative and on the basis of the principles of equality and reciprocity, cultivate good-neighborliness with other nations, and respect treaties and the Charter of the United Nations, in order to protect the rights and interests of Chinese citizens residing abroad, promote international cooperation, advance international justice, and ensure world peace.

This, it is submitted, is relevant in the present context of settling maritime boundary disputes.

Generally speaking, the law on maritime boundary delimitation has changed considerably in the past several decades. In the 1958 Geneva Convention on the Continental Shelf, it was originally stated that:

> 1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.
> 2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.[50]

In other words, the delimitation, according to that convention,

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[49]Devine, *Maritime Zone Legislation*, 68.
[50]Article 6 of the said Convention.

was to be carried out either through agreement or by application of the equidistant principle. However, this, and the role of equidistance in particular, were fundamentally rejected in the 1969 *North Sea Continental Shelf Cases*, in which the ICJ actually ruled to the contrary: the principle of equidistance was not applicable in the proceedings and it did not embody or crystallize any preexisting or emergent rule of customary law.[51] In the 1979 *Anglo-French Continental Shelf Case*,[52] the arbitration tribunal even decided that the rule was not applicable between states that are parties to the Geneva Convention, because the preference for equidistance had not been established and modern developments had to be taken into account in interpreting existing international agreements.[53] In these cases, the courts invariably held that the maritime delimitations should be carried out in accordance with equitable principles, taking account of all relevant circumstances so as to arrive at an equitable result.[54] Under the influence of the judicial decisions, the relevant provisions of the LOSC has consequently stated that "the delimitation of the exclusive economic zone [or the continental shelf] between States with opposite or adjacent coasts shall be [put into effect] by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."[55]

In any case, however, it is submitted that Article 141 of the Constitution is capable of containing this development since the ROC undertakes to "cultivate good-neighborliness with other nations" and the Constitution actually features negotiation as the primary means of settling international disputes. Moreover, there is a duty on the ROC's part to respect the existing international legal order so as to "advance international justice." In the opinion of this author, therefore, the Constitution has provided a solid foundation for peaceful settlement of maritime boundary disputes.

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[51] *International Legal Materials* 8 (1969): 373, para. 69.
[52] Ibid. 18 (1979): 397-493.
[53] Ibid., 417, para. 48.
[54] *The North Sea Continental Shelf Cases*, *International Legal Materials* 8 (1969): 384, para. 101 and *The Anglo-French Continental Shelf Case*, ibid. 18 (1979): 421, para. 70. See also *The Continental Shelf (Tunisia v. Libya) Case*, ibid. 21 (1982): 262, para. 133; *The Gulf of Maine Case*, ibid. 23 (1984): 1224, para. 112; *The Continental Shelf (Libya v. Malta) Case*, ibid. 24 (1985): 1207, para. 62; *The Guinea/Guinea-Bissau Case*, ibid. 25 (1986): 289, para, 88, 290, para. 91; and *The St. Pierre and Miquelon Case*, ibid. 31 (1992): 1163, para. 38.
[55] LOSC, Articles 74 (1) and 83 (1).

Conclusion

Generally speaking, the ROC Constitution is compatible with modern components of the law of the seas and capable of coping with the needs of the ROC's maritime policies. Indeed, the instrument not only definitively settles the status of internal waters and territorial waters as part of the state, but also provides an implied foundation for the Republic to exercise its sovereign rights over the EEZ and the continental shelf. Moreover, it lays down the fundamental principles for peaceful settlement of maritime disputes. Although the approach is not detailed (and sometimes not explicit), it is obvious that only basic matters should appear in the Constitution. The details should be contained in other legislation which, needless to say, should be drafted in such a way as to avoid conflict with the Constitution. Thus, the 1946 Constitution cannot be said to be inadequate, at least as far as the aforementioned maritime aspects are concerned.