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MARE CLAUSUM

John Selden (1584-1654)

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Selden was born in West Tarring, Sussex on 16 December 1584 and died on 30 November 1654 at Whitefriars, London, the house he had inherited from his long-time companion and possibly spouse Elisabeth Grey, Countess of Kent (1582-1651). After having attended a prebendal school at Chichester and having studied two years at Hart Hall in Oxford (since 1600), Selden moved to London to prepare for a legal career, first at Clifford's Inn (1602) and then at Inner Temple (1603). He was called to the bar in 1612. Selden remained active in legal practice for most of his life, as a barrister but mainly as a legal counsel. This and the scholarly reputation which he already acquired in the 1610s gained him the patronage of some leading aristocrats and access to the highest tiers of learned and political society. Selden's own involvement with politics started in 1621 when he assisted parliament as a consultant. Selden's defence of the jurisdictional rights and privileges of the House of Lords led to his brief arrest by order of the king. From 1624, Selden was a member in all parliaments until the Long Parliament, except those of 1625 and 1640. Together with Edward Coke (1552-1634), he was one of the draftsmen and proponents of the Petition of Right (1628). After the adjournment of parliament, Selden was arrested again in March 1629 and this time confined to the Tower, until he was moved to Marshalsea eight months later. Free on bail since 1631, Selden saw himself discharged in 1634. Although at the inception of the Civil War Selden's loyalties had appeared somewhat uncertain, he remained an active MP for the duration of the Civil War. He was not included in the purge of 1648, but Selden dissociated himself from the Rump Parliament by remaining absent. This did not prevent him from acting as a counsel to the Cromwell regime at times.

During his lifetime, Selden won great renown as one of the leading men of letters of England. John Milton famously named him ‘the chief of learned men reputed in this Land’. Selden was a most prolific writer; the width and depth of his scholarship was astonishing. He was an antiquarian, Orientalist and Talmudic scholar, who mastered numerous languages including Greek, Hebrew, Aramaic, Arabic, Chaldean, Samaritan, Persian and Ethiopic. But Selden was first and foremost a legal and institutional historian. Selden ascribed to the emerging school of historical jurisprudence, which was deeply influenced by humanism and had come to prominence in England through the efforts of Edward Coke. But whereas Coke saw the authority of the law in its remote origins, Selden underscored the evolutionary character of the law and of its contingency on time and place. This was reflected in his many – including comparative – studies of legal systems as diverse as pre-Norman and Norman English law, Roman law, canon law, Judaic law and the institutions of the Ancient Near East. Selden is widely recognised to be the major trailblazer for English legal history, as indicated through the foundation of the Selden Society in 1887. Selden’s sole contribution to legal theory, apart from *Mare Clausum*, is his *De Iure Naturali & Gentium, Iuxta Disciplinam Ebraeorum libri septem* (1640).

John Selden’s greatest claim to fame in the history of international law stems from his *Mare Clausum*, which made him the foremost contemporary contender of the doctrine of the freedom of the seas which Hugo Grotius had articulated in *Mare Liberum* (1609). Clearly construed as a response to *Mare Liberum*, the direct origins of the actual publication of Selden’s far more elaborate treatise lay in the maritime and fiscal policies of the early Stuarts. During the latter decades of Queen Elisabeth’s rule, England’s maritime policy had been directed at attacking Iberian claims to the monopoly over navigation and trade outside Europe. Under James I, the focus shifted towards claiming dominion over the seas around the British Isles. James’s policies were targeted at Dutch fishery, which he wanted to license and tax. Selden, who had already worked on a manuscript in refutation of *Mare Liberum* before, was approached by the royal court to publish a tract defending the British rights over the adjacent seas. The manuscript Selden submitted to the king in 1619 first met with approval, except for the final chapter in which he defended British claims to the north which clashed with those of James’ ally and brother-in-law, King Christian IV

of Denmark. Nevertheless, Selden failed to gain permission by the king's favourite, the Duke of Buckingham, to publish.

The project was revived in 1634-35, after Charles I, having made peace with the Catholic courts of France and Spain, returned to the anti-Dutch naval policies of his father. Most probably, Selden's consent to a request from court was part of the deal that led to his discharge and which was brokered by William Laud, Archbishop of Canterbury. Selden reworked his old manuscript by taking into account the shifts Grotius had made in his position on the possibility to vest a dominion over some parts of the sea, in particular bays and straits, in his *De Iure Belli ac Pacis* (1625). *Mare Clausum Seu de Dominio Maris libri duo* (London, excudebat Will. Stanesbeius, pro Ricardo Meighen, 1635) was published in November 1635.

To Selden, the writing and publication of *Mare Clausum* was, more than a chance to oblige the government, an occasion to contend with Grotius as a legal theorist and philosopher. Whereas the exact extent of his revisions cannot be determined, it is clear from the many references to Judaic sources whom he only came familiar with in the 1630s that Selden used the revision to strengthen his theoretical argument on the laws of nature and nations in reply to Grotius' *De Iure Belli ac Pacis*.

Mare Clausum fell into two books. In the first book, its author refuted Grotius' thesis that by nature the high seas cannot be occupied and hence cannot be subject to dominion. The second book proved that the subsequent governments of England had continuously laid claim to dominion over the seas around England and that the English monarchy thus has a historic right to them.

The first part offered its author occasion to articulate a theory of laws in answer to that of Grotius. Later, in his *De Iure Naturali & Gentium*, Selden would much elaborate his theory. In *Mare Liberum*, Grotius had argued the impossibility to gain ownership of the sea under natural law. According to Grotius, the origins of property lay in first occupation, which fell within the remit of the law of nature. The sea was naturally unsuited for occupation as it was common property, limitless and could not be exhausted by its use. Moreover, natural law dictated the freedom of its navigation.

In the first book of *Mare Clausum*, Selden refuted each of these arguments. Selden's major argument was that the origins of property lay not in natural law, but in human action. The first

division of property occurred between Noah and his sons after the flood and was based on human compact. Title to territory could also be gained by occupation, but that this was seen was also based in consent and thus fell outside the remit of natural law. Selden distinguished between obligatory and permissive natural law. The content of the first, obligatory rules of natural law was very restricted. In his *De Iure Naturali & Gentium*, the author of *Mare Clausum* would more clearly equate it to pre-Noachite divine law, no more than seven divine commands. The permissive law of nature could best be defined through the study of the laws and customs of the 'more civilized and more nobles Nations'. Although the foundations of positive law lay in human decision and consent, generally applied laws could not be countenanced to contradict the rules of permissive natural law. Selden's elaborate proof of historic claims to dominion over the seas in classical Antiquity thus served to argue that natural law did not preclude the occupation of the sea, but permitted it. Selden also expressly repudiated the claim by Grotius and other modern authors that the sea was naturally unsuitable for occupation. As with rivers, its fluid character did not prevent that geographical limits could be set to its dominion. The value of the sea could effectively be diminished by its use, as through fishery. Finally, ownership could coexist with a right of navigation for foreigners. This left Selden to prove that the English kings held a claim over the British seas based on historic practice, either through occupation or consent or both. In the second book, Selden did so through an elaborate historical survey of English practices regarding the adjacent seas, starting with Caesar. Whereas his exposition on pre-Norman practice was largely based on literary texts and farfetched conjecture, he could bring a lot of archival documents to bear on the period since the 11th century.

Mare Clausum was well received in British political circles. In the Republic, it went through three unauthorised editions in 1636. The Dutch Estates-General asked Dick Graswinckel, the author of a treatise on Venetian trade rights, *Libertas Veneta* (1634) to reply. Graswinckel's *Vindiciae Maris Liberi Adversus I.C. Janum Seldenum* (1636) was, however, subsequently suppressed by the same Estates. Grotius took a keen interest in seeing *Mare Clausum* refuted, but could not act himself as he was since 1634 the ambassador of Sweden in Paris and could not oppose Sweden's own claim in the Baltic. Under the Commonwealth, *Mare Clausum* regained political currency in London to sustain Cromwell's navigation policies. In 1652, in the context of war with the Republic, an English translation by Marchamont Nedham was published at the request of the Council of State (London, Printed by William Dugard, 1652), followed by its re-edition in 1663 through the

endeavours of the court historiographer, James Howell (London, Printed for Andrew Kembe and Edward Thomas, 1663), this time in support of Charles II's anti-Dutch policies. *Mare Clausum* remained the classical text for the defence of British rights over its adjacent seas throughout the 17th century and together with *Mare Liberum* became a classical point of reference in the modern historiography of international law with regards the discussion on the laws of the sea. Selden's contribution to legal theory, from *Mare Clausum* and *De Iure Naturali & Gentium*, gained far less attention until Richard Tuck in his *Natural Rights Theory* (1979) labelled Selden as a forerunner of Thomas Hobbes for his restricted interpretation of the role of natural law and his alleged rejection of the concept of innate ideas apparent to human reason. On the latter point, Tuck's thesis was persuasively nuanced by J.P. Sommerville (1984).

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