THE FREE SEA

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

Knud Haakonssen
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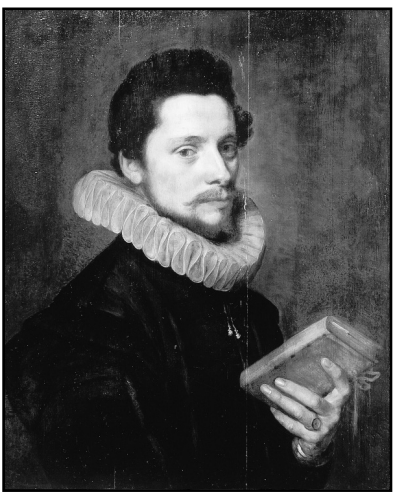
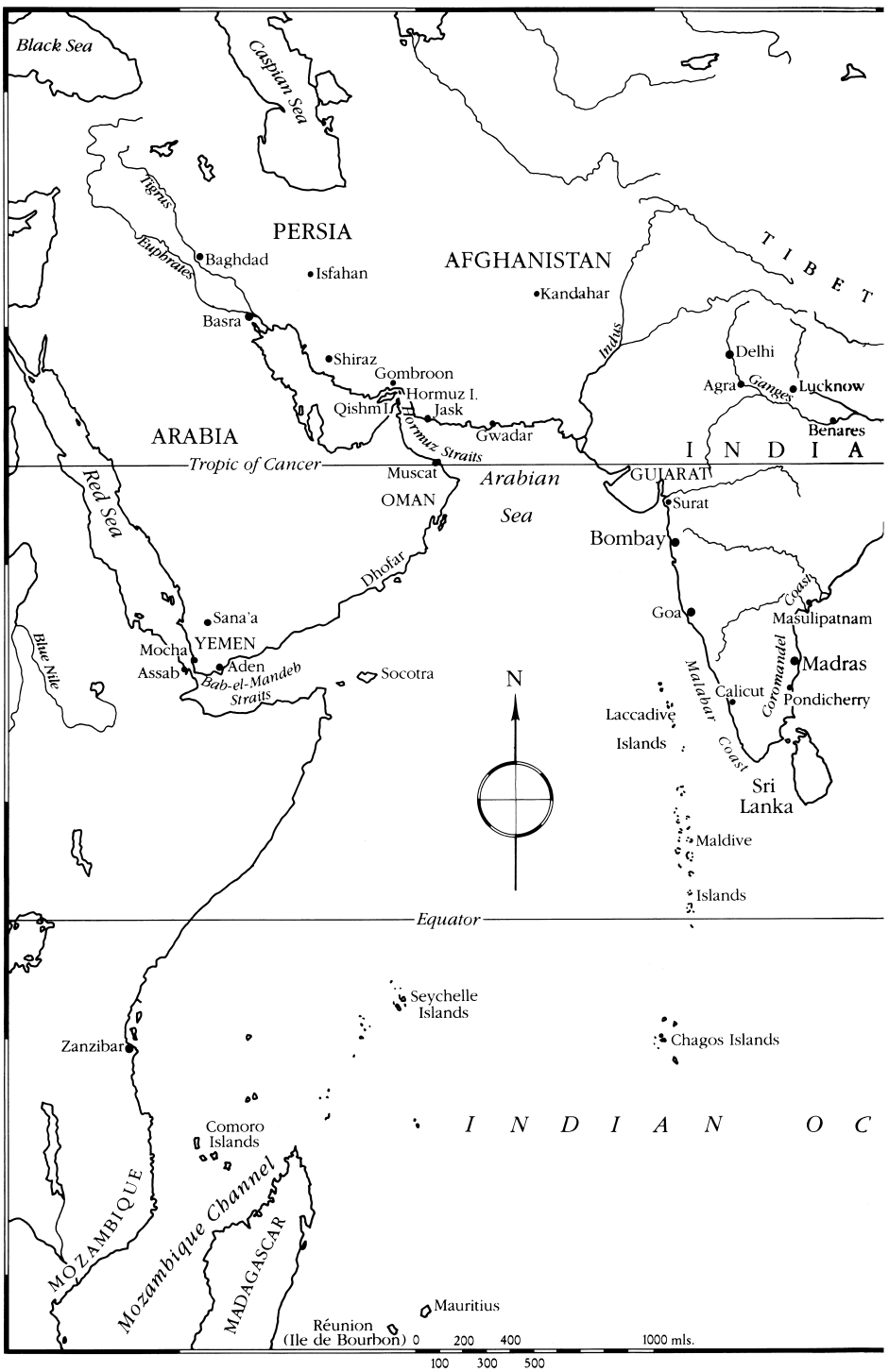


Hugo Grotius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NATURAL LAW AND
ENLIGHTENMENT CLASSICS

The Free Sea

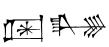
Hugo Grotius

Translated by Richard Hakluyt

with William Welwod's Critique
and Grotius's Reply

Edited and with an Introduction
by David Armitage

Major Legal and Political Works of Hugo Grotius



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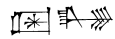

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INTRODUCTION

Few works of such brevity can have caused arguments of such global extent and striking longevity as Hugo Grotius's *Mare Liberum* (*The Free Sea*). The book first appeared in Leiden as a pocket-sized quarto volume from the famous publishing house of Elzevier in the spring of 1609. The publication was anonymous, perhaps because (as Grotius later wrote) "it seemed to me to be safe, like a painter skulking behind his easel, to find out the judgment of others and to consider more carefully anything that might be published to the contrary" (*Defense,* p. 78, below). Grotius was only in his late twenties but already possessed a reputation as one of Europe's most precocious and penetrating humanist scholars. Though self-taught as a lawyer, his reputation as an advocate and adviser was growing, along with his political influence. By publishing *Mare Liberum,* he was displaying the literary, rhetorical, and philosophical talents that had won him his burgeoning fame and respect, and he was also intervening in two political debates of pivotal significance for his own country. The first was the relationship between the United Provinces and the Spanish monarchy, from which the Dutch had broken away in 1581; the second was the Dutch right to commercial penetration in Southeast Asia. Although the arena of dispute was local, the implications of *Mare Liberum*'s arguments were global. The book was taken by the English and the Scots as an assault on their fishing rights in the North Sea and by the Spanish as an attack on the foundations of their overseas empire. It had implications no less for coastal waters than it did for the high seas, for the West Indies as much as for the East Indies, and for intra-European disputes as well as for relations between the European powers and extra-European peoples.

The immediate context for the publication of *Mare Liberum* was the process of negotiating a truce between the Dutch and the Spanish to end

the decades of contention that had begun with the Dutch revolt of the late sixteenth century.[1] Among the issues on the table during these discussions was the question of Dutch access to the expanding markets of the East Indies, where the Dutch were engaged in cut-throat competition with the Portuguese, the Spanish, and, increasingly, the English for the huge profits to be gained from trade in silks, spices, porcelain, and other luxury goods. This was, of course, no novel dispute in 1609, but the process of drawing up a definitive truce between the Dutch and the Spanish had brought matters to a head, not least for the Dutch East India Company (VOC). Indeed, it was at the insistence of the Zeeland Chamber of the VOC in the autumn of 1608 that Grotius prepared *Mare Liberum* for publication, just as it had been at the VOC's behest that he had originally written it as part of a larger work in 1604.[2]

The original occasion for the composition of the text that would later comprise *Mare Liberum* had been the major international dispute occasioned by the Dutch seizure of a Portuguese vessel in the Straits of Singapore in February 1603.[3] On that occasion, the Dutch captain Jakob van Heemskerck had captured the carrack *Sta. Catarina,* which was carrying a fabulously wealthy cargo of trade goods. When its contents were sold in Amsterdam, they grossed more than three million guilders, a sum equivalent to just less than the annual revenue of the English government at the time and more than double the capital of the English East India Company.[4] A prize of such magnitude generated an equally prominent debate

1. Martine van Ittersum, "Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615" (Ph.D. dissertation, Harvard University, 2002), 442–53.

2. For correspondence from November 1608 to [April] 1609 relating to the publication of *Mare Liberum,* see *Briefwisseling van Hugo Grotius,* ed. P. C. Molhuysen, B. L. Meulenbroek, and H. J. M. Nellen, 17 vols. (The Hague: M. Nijhoff, 1928–2001), I, 128–34, 139–41, 144–45.

3. Peter Borschberg, "The Seizure of the *Sta. Catarina* Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602–ca. 1616)," *Journal of Southeast Asian Studies* 33 (2002): 31–62.

4. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 80; Borschberg, "The Seizure of the *Sta. Catarina* Revisited": 35.

about the legitimacy of the Dutch capture of a Portuguese vessel in the distant seas of the East Indies. The twenty-one-year-old Grotius was drafted to supply a defense of the VOC's position that the ship had been taken as booty in a just war: As he recalled later, "The universal laws of war and prize (*universi belli praedaeque jura*), and the story of the dire and cruel deeds perpetrated by the Portuguese upon our fellow-countrymen, and many other things pertaining to this subject, I treated in a rather long *Commentary* which up to the present I have refrained from publishing" (*Defense,* p. 77, below). The manuscript of that commentary remained unknown to posterity until it resurfaced at a sale of de Groot family papers in 1864. Its discovery revealed that *Mare Liberum* was substantially identical to the twelfth chapter of the work usually referred to by Grotius himself as *De rebus Indicis* (*On the Affairs of the Indies*),[5] though better known by the title given to it by its first editor, *De Jure Praedae Commentarius* (*Commentary on the Law of Prize and Booty*).[6]

Although *Mare Liberum*'s influence and importance were—and remain—independent of that larger commentary, they cannot be fully understood outside of the argument of which they formed a part. Grotius defended the Dutch seizure of the *Sta. Catarina* on the basis of a set of natural laws, which he derived originally from the divine will.[7] The two primary laws of nature were self-defense and self-preservation. He defined self-preservation as acquiring and retaining anything useful for life, a process which assumed that God had bestowed the gifts of his creation upon all human beings collectively but on none particularly: Only through physical seizure (*possessio*) leading to use (*usus*) could ownership (*dominium*) be derived. Two further laws, of inoffensiveness (harm no one) and abstinence (do not seize the possessions of others), set limits to these pri-

5. For example, *Briefwisseling van Hugo Grotius,* ed. Molhuysen, Meulenbroek, and Nellen, I, 72 ("de rebus Indicis opusculum").

6. Hugo Grotius, *De Jure Praedae Commentarius,* ed. H. G. Hamaker (The Hague: M. Nijhoff, 1868); Grotius, *De Jure Praedae Commentarius,* 2 vols. (Oxford: Oxford University Press, 1950). All references in the text are to the translation in the first volume of the latter edition.

7. Richard Tuck, *Philosophy and Government, 1572–1651* (Cambridge: Cambridge University Press, 1993), 169–79.

mary laws; from these followed two further laws of justice: that evil deeds should be punished and that good deeds should be rewarded (*De Jure Praedae,* pp. 8, 10, 11, 13, 15). Together, these laws provided the basis for Grotius's judgment of the facts of Luso-Dutch relations in the East Indies. If it could be shown that the Portuguese had committed evil deeds against the Dutch and against their indigenous allies, and if it could be shown that van Heemskerck had engaged in a just war against the Portuguese captain of the *Sta. Catarina,* then his spoils taken in that war would be a legitimate prize for the corporate body on whose behalf he acted, the VOC itself.

The bulk of Grotius's argument turned on the two issues of law and fact. In the first third of *De Jure Praedae,* he laid out the conditions under which booty might be justly seized by Christians from other Christians and the broader circumstances that defined a war between Christians as just. Having established the terms of law, he turned to matters of fact in a detailed narrative of relations since the Dutch revolt between the Dutch on one side and the Spanish and Portuguese on the other, to show that "[t]he latter . . . have invariably set an example of perfidy and cruelty; the Dutch, an example of clemency and good faith" (*De Jure Praedae,* p. 171). Then, in the twelfth chapter of his defense, Grotius went on to argue "that even if the war were a private war, it would be just, and the prize would be justly acquired by the Dutch East India Company" (*De Jure Praedae,* p. 216).

When Grotius came to publish that chapter as *Mare Liberum,* he made no reference to the case of the *Sta. Catarina* or to the supposed facts of Portuguese aggression and depredation in the East Indies. Instead, he prefaced his argument with a refutation of skepticism about the natural basis of moral distinctions (*The Free Sea,* pp. 5–6, below). Against the instrumentalist view that such distinctions had been invented solely to benefit the powerful in their rule over the powerless, Grotius affirmed that the laws of nature are the product of divine will and that they can be universally understood by the application of natural reason. He again argued that God had created the world in common for all humanity but that property could be acquired through human "labor and industry," subject to two of the primary natural laws he had set down in *De Jure Praedae:* "that all surely might use common things without the damage of all and, for the

rest, every man contented with his portion shall abstain from another's" (*The Free Sea,* p. 6, below).

Freedom of navigation and trade (*commeandi commercandique libertas*) exemplified those principles, whether applied to particular communities or to the universal society of humanity. To support this contention, Grotius appealed to Greek and Roman literature, to Roman law (in particular, to *Institutes,* II. 1. 1 and *Digest,* I. 8. 4), and to sixteenth-century Spanish authorities, above all the Dominican theologian Francisco de Vitoria and his fellow Salamancan, the jurist Fernando Vázquez de Menchaca. A notable omission from his battery of authorities was Scripture, a resource that Grotius's Scottish antagonist, William Welwod, would later exploit. However, by framing his argument in this way, Grotius could illustrate the obligations of natural (rather than revealed) religion, beyond the interpretive traditions of particular denominations, and show that even the juristic traditions of the Spanish monarchy (which since 1580 had included Portugal) opposed the Portuguese. His broader framing of the argument also ensured that *Mare Liberum* would be understood as a general statement of the right to freedom of trade and navigation. In this way, it sparked a wider and more enduring controversy regarding the foundations of international relations, the limits of national sovereignty, and the relationship between sovereignty (*imperium*) and possession (*dominium*) that would guarantee its lasting fame and notoriety.

Grotius broke down the Portuguese claim of exclusive access to the East Indies into three constituent parts: the right of possession, the right of navigation, and the right of trade. The Portuguese could claim no right of possession by virtue of first discovery, because the lands of the East Indies were not *terra nullius* (unpossessed land) but were in the possession of their native rulers. The fact that those rulers were "partly idolaters, partly Mahometans" did not invalidate their right to dominion (*The Free Sea,* p. 14, below): As Aquinas and Vitoria had argued (against earlier thinkers like Hostiensis and John Wycliffe), grace could not confer dominion. Nor were the peoples of Southeast Asia "out of their wits and insensible but ingenious and sharp-witted." No assumptions of tutelage, or even appeals to Aristotelian conceptions of natural servitude, could therefore be employed to dispossess them, as Vitoria had likewise argued against the use

of such arguments in the Americas (*The Free Sea,* p. 15, below). Papal donation could not have transferred *dominium* to the Portuguese because the pope possessed no temporal power, least of all over infidels (as, yet again, Vitoria had argued in relation to the New World). The only possible remaining claim was by "right of prey" (*jure praedae*) or conquest; however, that too was inapplicable to the Portuguese case, because the indigenous peoples had supplied no *casus belli* on which a claim to conquest in a just war could have been founded. With this reprise of four centuries of European arguments regarding the dispossession of the "barbarian," Grotius left the Portuguese with no legitimate argument for possession. He then turned to their arguments for exclusive navigation and commerce.

Only at this point did Grotius directly address the subject of his title (*Mare Liberum, The Free Sea*) rather than his subtitle (*De Jure quod Batavis Competit ad Indicana Commercio, The Right Which the Hollanders Ought to Have to the Indian Merchandise for Trading*), as his argument shifted from rights over land to those over the sea. This distinction between territorial and maritime possession rested on a yet more fundamental difference between those things that could be appropriated and those that remained common by nature. If (as Grotius had argued in the body of *De Jure Praedae*) *dominium* could be derived only from use based on physical apprehension (*possessio*), only those things capable both of possession and of use could be appropriated from their pristine state of natural community, subject to the proviso that no other person should be harmed by the act of appropriation (an important limiting factor that permitted the private appropriation of the seashore but not at the expense of common access or use). On these grounds, Grotius argued that neither the Portuguese nor anyone else could claim exclusive possession of the ocean around and leading to the East Indies. Because the sea is fluid and ever changing, it cannot be possessed; because it (and its resources, such as fish) is apparently inexhaustible, it cannot be used: "[t]he sea therefore is in the number of things which are not in merchandise and trading, that is to say, cannot remain proper" (*The Free Sea,* p. 30, below). The land, by contrast, can be physically circumscribed, human labor does transform it, and its products are rendered private by their use. This fundamental contrast between the

properties of sea and land would remain central to later conceptions of property within the natural-law tradition up to and beyond John Locke's agriculturalist argument for appropriation, which similarly exempted "the Ocean, that great and still remaining Common of Mankind" (Locke, *Second Treatise,* § 30) from the possibility of exclusive possession.[8]

Yet if the Portuguese could claim no right of possession (*dominium*) over the sea, the question remained whether they could still claim jurisdiction (*imperium*), which would allow them to debar others from trade with the East Indies. In the last part of the work, Grotius rebutted Portuguese claims to exclusive rights of trade. He argued that the right of navigation could not be appropriated by the Portuguese or anyone else (including the pope). Because that right of navigation was an objective feature of natural law, it could not be altered by human custom or by prescription, as Grotius showed with extensive quotations from Vázquez de Menchaca (a proponent of the freedom of the seas, to be sure, but also an exponent of the idea that navigation was not only unnatural but also suicidally dangerous, a feature of Vázquez's argument Grotius conveniently ignored).[9] As with the right of navigation, so with the right of trading, which was also "agreeable to the primary law of nations" (*The Free Sea,* p. 51, below). After this point, Grotius added a new conclusion to the material he had drawn from *De Jure Praedae,* arguing that "we wholly maintain that liberty which we have by nature, whether we have peace, truce or war with the Spaniard," but with the threat attached that "he that shall stop the passage and hinder the carrying out of merchandise may be resisted by way of fact, as they say, even without expecting any public authority" (*The Free Sea,* p. 60, below).

The Twelve Years' Truce between the Dutch republic and the Spanish monarchy was soon ratified, but *Mare Liberum*'s relevance was not dimin-

8. John Locke, *Two Treatises of Government,* ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 289. Locke possessed Grotius, *"De mari libero,"* in his copy of the 1680 Hague edition of *De Jure Belli ac Pacis:* John Harrison and Peter Laslett, *The Library of John Locke* (Oxford: Oxford University Press, 1965), item 1331.

9. Fernando Vázquez de Menchaca, *Controversiarum illustrium . . . libri tres* (Frankfurt, 1572), II. 20. 11–20.

ished. Grotius's arguments could still justify the VOC's encroachment on the Portuguese colonial empire, despite the armistice in Europe; and their applicability to other contemporary disputes regarding the freedom of navigation, trade, and fishing made *Mare Liberum* a shot heard around the world. Its rebuttal of papal claims ensured that it was rapidly placed on the Church's *Index* of prohibited books in January 1610.[10] Sophisticated and extensive responses also came from the jurists William Welwod in Scotland (*An Abridgement of All Sea-Lawes* [1613]; *De Dominio Maris* [1615]), John Selden in England (*Mare Clausum* [ca. 1618]), Justo Seraphim de Freitas in Portugal (*De Justo Imperio Lusitanorum Asiatico* [1625]), and Juan Solórzano Pereira in Spain (*De Indiarum Jure* [1629]).

The only response to which Grotius replied was Welwod's *Abridgement.* Grotius had been shown Welwod's book in 1613, when he was in London as a delegate to the Anglo-Dutch colonial conference, and he took it to be *"exemplar Servi Maris"* ("the pattern of the unfree sea").[11] Welwod had understood *Mare Liberum*'s alleged East Indian context as a cover for the work's real purpose: to reinforce the claims of the Dutch herring-fleets to fish in British (in particular, Scottish) territorial waters. Those claims were indeed a topic of much contention after 1610, and Welwod could be forgiven for suspecting *Mare Liberum*'s contingent applicability. Yet Welwod stressed only the argument about fishing, ignored the broader questions of trade and navigation, and concentrated his fire on the fifth chapter of *Mare Liberum* alone. Like Grotius, he argued from the precedents of Roman law, but he also appealed to Scripture to argue that the sea could be occupied and hence acquired as the basis for customary claims to exclusive national rights over territorial waters. However, Welwod excepted the high seas from such claims to exclusive possession and agreed with Grotius that they should remain *"mare vastum liberrimum"* ("the great and most free sea": Welwod, "Of the Community and Propriety of the Seas," p. 74, below). That major concession was not enough to secure Grotius's assent to

10. Franz Heinrich Reusch, *Der Index der verbotenen Bücher,* 2 vols. (Bonn: M. Cohen and Son, 1883–85), II, 102.

11. J. Boreel to Hugo Grotius, 5 May 1614 (N.S.), *Briefwisseling van Hugo Grotius,* ed. Molhuysen, Meulenbroek, and Nellen, XVII, 111.