The Bookshelf / La bibliothèque

Of Patricia Birnie*

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The Sovereignty of the Sea

This seminal work by Thomas Wemyss Fulton, which first came to my attention in 1969, was published in 1911 by William Blackwood and Sons of Edinburgh and London. As its subtitle indicates, it is “An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters: with special reference to the Rights of Fishing and the Naval Salute”. Fulton was not a lawyer but a lecturer on the Scientific Study of Fishery Problems at the University of Aberdeen in Scotland. He brought to his research not only the perspective of the need for scientific research on fisheries, but for regulation based on international agreements and a grasp of the political problems encountered over the centuries in negotiating these, especially in relation to fisheries competed for by the English, Scots, Dutch and French. He originally embarked upon the work intending to deal with these issues only in so far as they concerned sea fisheries, but soon realised, as do all involved in these issues today, that such a limited focus would result in only a partial view since even then, although fisheries was a main issue in determining maritime sovereignty, it was by no means the only one. Freedom of commerce and the limits of a state’s jurisdiction over the waters washing its shores were closely involved as then was the payment of homage to the flag. Fulton’s treatise was thus divided into two sections, one providing an historical account of “pretensions to the dominion of the sea” and the other addressing “the relic of such pretensions” namely “territorial waters”, in the context of the Law of Nations and fishing rights.

I first came across this work when, following my husband’s career, I moved to Scotland in the 1960s, found myself living in Edinburgh and was, faute de mieux, employed as a tutor in international law in the Department of Law at the ancient University of Edinburgh. Having qualified as an English barrister, intending to practice, I had never contemplated an academic career, certainly not in international law, still less with a specialisation in the law of the sea. I soon realised, however,
that this move was the happiest of accidents, not least in leading to my discovery of Fulton and his erudite historical perspective on the development of international law pertaining to fisheries.

I found international law an absorbing field and decided to embark on a PhD with the aim of verifying myself as an international lawyer. This decision coincided with Malta's proposal to the UN General Assembly that it should establish a common heritage regime for exploitation of the resources of the deep sea-bed, whereupon, I registered this as my PhD topic.

The first port of call for the required literature search was naturally the Edinburgh Law library. I began to read relevant works available there. Amongst them was Fulton's book which at once engendered in me a scholarly approach and interest in the intractable problems which developing a legal regime for fisheries had presented from Roman times to the "present day" of 1911. Just as I completed my first reading of Fulton, an eminent Edinburgh friend who had been involved in its operations, suggested that the International Whaling Commission (IWC) might provide a useful case history of the problems involved in managing, at the international level, the exploitation of a shared resource. He offered to send me the papers held by Salvesen's – formerly Britain's leading whaling company – relating the establishment and operation of the IWC. I readily accepted. Fulton had examined many original documents: seventeenth-century fishing licences, James I's Proclamation of King's Chambers and the Trinity House Jury's Declaration Thereon, Instructions of the Scottish Privy Council for the "Levying of Assise Herrings from Foreign Fishermen", and Tromp's "Memorandum on the Striking of the Flag". Fulton's own writing reflected the mellifluous vocabulary and dignified tone of these communications. He also drew my attention to the seminal significance of the rival Grotius/Selden views on the freedoms of the high seas and territorial limits and the 1882 North Sea Convention on the policing of fisheries in the extraterritorial waters of the North Sea, as well as the wide-ranging and still contemporary arguments concerning the legal status of migratory species ventilated in the 1893 Bering Sea Fur Seal Arbitration.

Having read Fulton and studied the vast amount of original documentation made available to me by him and Salvesen's, the romance of the original historical records and Fulton's style and approach so charmed me that I changed the topic of my PhD to "the International Regulation of Whaling". Thus ipso facto, I was launched on a happy and rewarding career as the UN Conference on the LOS progressed, covering not only the legal aspects of marine resource exploitation but related aspects of the law of the sea in general.

Fulton's fluent and felicitously expressed historical account of the development of the sovereignty approach to control of uses of the sea, retains contemporary