



THE PUBLIC TRUST DOCTRINE IN THE SEA: BRINGING IT BACK HOME

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DEFINITION OF THE PUBLIC TRUST DOCTRINE (PTD)

Certain natural resources should be “... *held in trust by government, which must manage their consumptive use and protection on behalf of present and future citizens.*”

(Sagarin & Turnipseed, 2012)

CONTEXT

Reactive

- No overarching vision
- Requires degradation to happen before anything is done

Current Environmental Legislation

Technocratic

- Distrust of experts
- Lacks sentimentality

CONTEXT

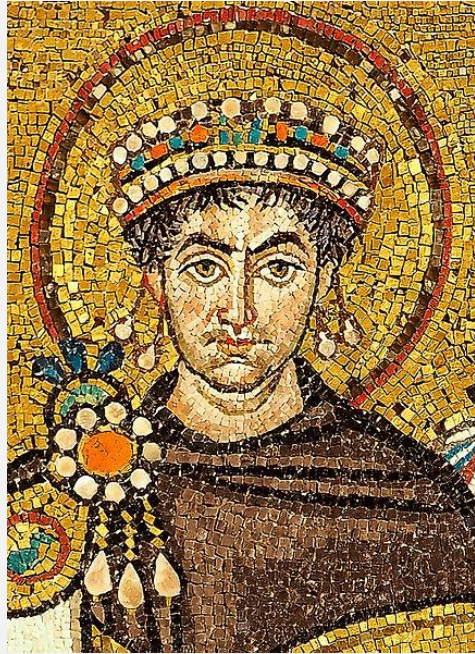
Legislation vulnerable to executive power and 'red tape challenges'

PTD puts responsibilities on high office rather than the government

J G Allen, 'The Office of the Crown' (2018)
77(2) Cambridge Law Journal 298



PTD ORIGINS



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- *“The sea is common to all, both as to ownership and as to use. It is owned by no one; it is incapable of appropriation, just as is the air. And its use is open freely to all men. The same is true of the shore, which derives its character from the sea...”* (Justinian I, *Digest*)
- Magna Carta – the King is subject to the will of the people (Deveney, 1976)
- Digges and Crown ownership of the foreshore (Moore, 1888)
- The Crown as the “*vindicator and protector*” of the *jus publicum* (Hale, *De Jure Maris*)

PTD IN CASE LAW

The sea and the foreshore belong to the King, but both are “...*prima facie publici juris*, or clothed with a public interest [in respect of navigation and fishing]”

Blundell v Catterall 1814-23] All ER Rep 39 (KB), [45] (Holroyd J)

“... the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and to belong to all the subjects of the Crown – the soil of the sea, and its arms and estuaries, and tidal waters being vested in the Sovereign as a trustee for the public.”

Murphy v Ryan (1868) IR 2 CL 143, [149] (O’Hagan J)

“[i]t appears to us that the basic principle is that a court should not be too easily persuaded that the Crown has been deprived of a property or a right, given that the property or right is held for public good”

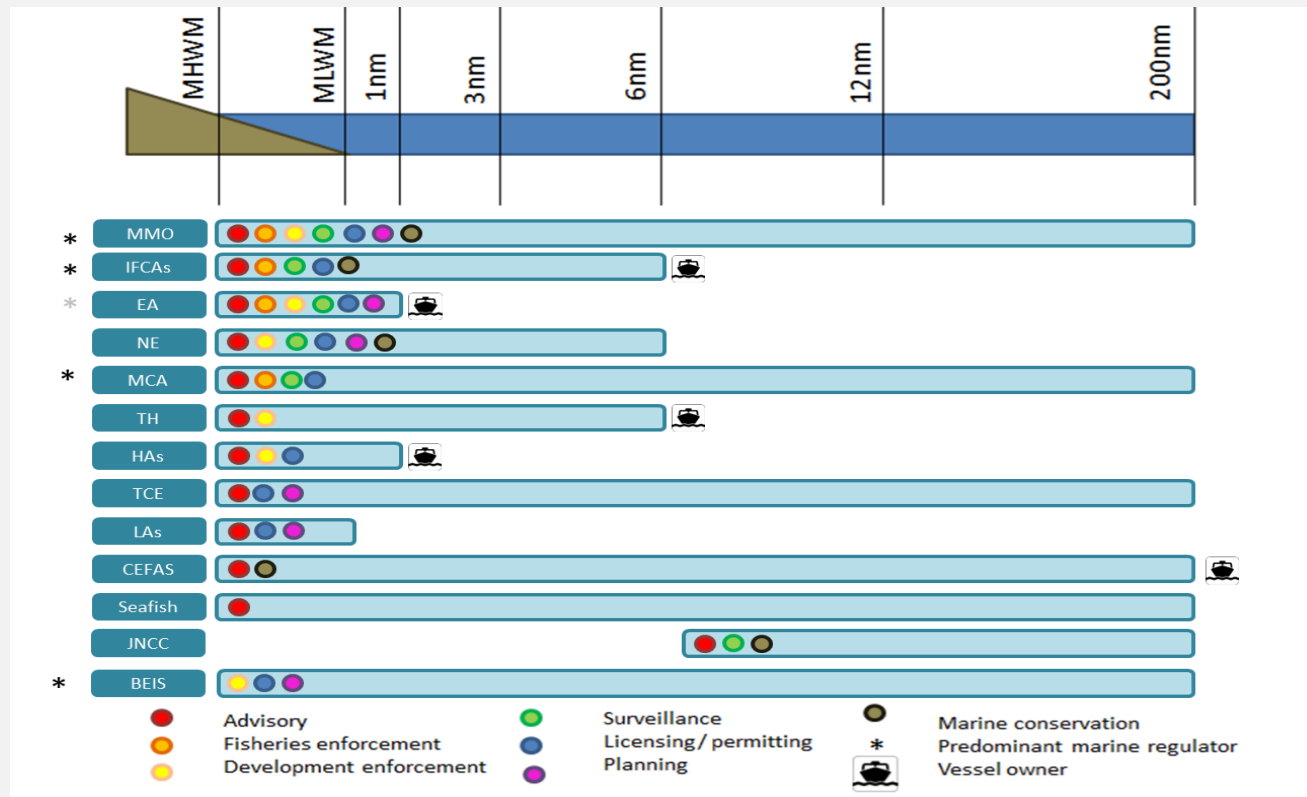
Loose v Lynn Shellfish Ltd & others [2016] UKSC 14, [2017] 1 All ER 677, [692] (Lord Neuberger P and Lord Carnwarth)

PTD IN THE SEA – WHY?

- Coastal ecosystems productivity
- Competition over natural resources
- Blue health
- Blue growth
- Complexity in governance



A 'HORRENDOGRAM'



- Sectoral rather than coherent management – the case for a ‘blue-water’ PTD (Turnipseed, 2009).
- Dissatisfaction in regulatory process – advancing the Sovereign Trust of Government (Wood, 2009)

Source: MMO (2017)

PTD IN THE SEA...WHERE?

- Much of the sea is in public ownership
 - PTD origins over the foreshore & navigable waters
 - Evolution into Constitutional Law and Environmental Statutes
- PTD remains lurking beneath the wedding cake of regulation.

Does common law have the potential to represent the *longer-term* public interest?



cc licence Huro Kitty

PTD IN USA...AND BEYOND

- *Control of state for the purposes of trust can never be lost, except as to such purposes as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interests in the lands and waters remaining”*

Illinois Central Railroad v Illinois
(1892) 146 US 387

- Not one PTD in the US but 51

→ An instrument for democratization?



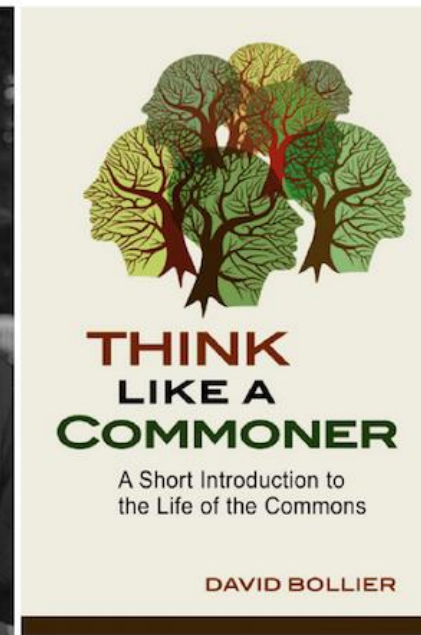
Joseph Sax – 1936 to 2014
cc licence Berkeley Law, University of California

PTD POTENTIAL

'As a trustee, the state has affirmative obligations to assure maximum possible transparency, participation and stewardship at the lowest level of governance possible'.

David Bollier, 2014

- Legal innovation to give commons real standing in law
- Grass roots movements (Cullinan, 2011)



PTD IN THE UK

- A trust in the “higher sense” –
Tito v Waddell (No. 2) [1977] Ch 106
- Different PTD in each administration, for example the Scottish position is different to England (Agnew, Appleby & Bean, in press)
- Well-being of Future Generations (Wales) Act 2015



Crown of Princess of Margaret of York, circa 1461

PTD IN UK...HOW? TRUSTS AS CURRENTLY USED

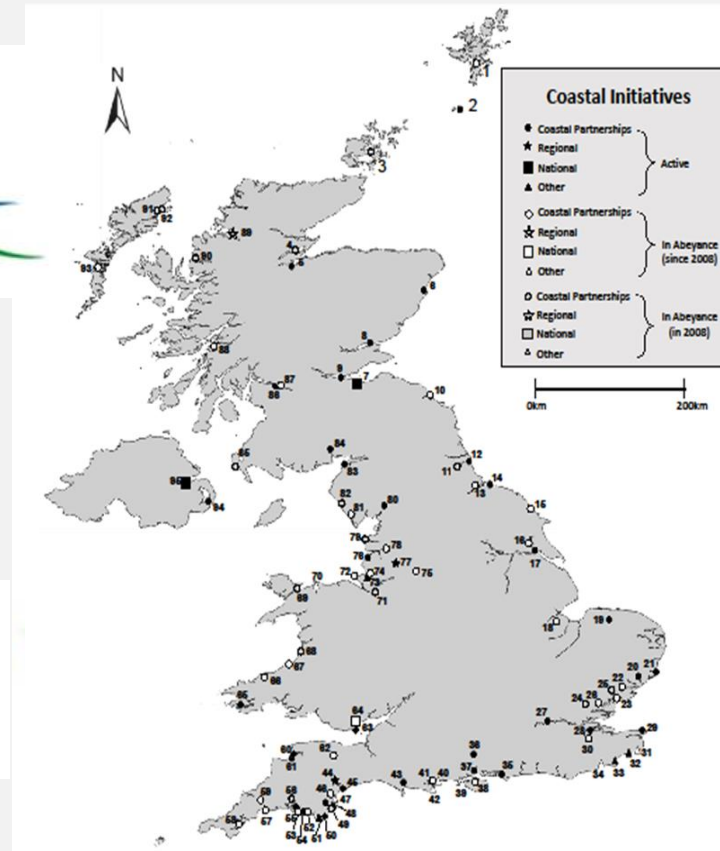


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AC represents the trusts with Natural Resources Wales and Welsh government but above all, is the champion of Wales' thirty-three rivers, and the many lakes and smaller watercourses. Their environment, fish and fisheries and the wide range of diverse species depend on clean water and unspoilt habitats.

<http://afonyddcymru.org/>



IMPACT POTENTIAL OF PTD

Strengths

- Gets upstream of the ownership of “public” resources
- Holds power to account
- Loosens the grip of the regulators
- Nature included via the public – stewardship?

Risk / Opportunity

- Nature included via the public
- The law governing Crown behaviour is not settled.
- Fuels the flames or resolves “red tape challenges”?



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OUR ROLE



Humans do not own the earth (its land or seas)
but hold them on a provisional basis as trustees.

Robin Attfield, 2015

THANK YOU

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www.watersecuritynetwork.org
www.twitter.com/water_network

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