The ownership of inshore fisheries in Scotland: an opportunity for community ownership?

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<ABSTRACT>

The Scottish Government has pledged to reform inshore fisheries by 2020, while the UK Government is in the process of reforming fisheries legislation with the Fisheries Bill, brought forward in anticipation of the departure of the UK from the EU. . As the necessary starting point for any regulatory reform is an understanding of the existing rights subject to regulation, this article investigates the nature of the existing rights to fish in inshore Scottish waters and assesses whether reform of the ownership of Scotland's fishery needs to be assessed at the same time as its regulation. The article considers the theory behind Scotland's fishing rights, the extent of the right to fish, the Crown's right to alienation and the statutory impacts on the right to fish, before finally placing these findings in the context of contemporary developments of Scottish property and land reform law.</ABSTRACT>

<A>Introduction

The Scottish Government has pledged to reform inshore fisheries legislation, promising to bring forward a 'fresh legislative framework' by 2020.[1] The starting point of any investigation into regulation is to assess the nature of existing rights to be regulated; it

[1] Marine Scotland *Scottish Inshore Fisheries Strategy* (2015), outcome 1 www.gov.scot/Resource/0049/00494784.pdf.

is difficult to regulate something without understanding what it is. Rights to fish in the sea are surprisingly poorly understood. Most commentators glibly state something like: 'white fish and shellfish within tidal waters are available for the general public'.[2] But this legally intriguing sentence raises more questions than it answers. It leaves unsaid who owns the right to fish, its nature and extent, and whether the right can be alienated (sold or leased) by the Crown.

The purpose of this article is to investigate those issues and assess whether reform of the ownership of Scotland's fishery needs to be assessed at the same time as the regulations. We will investigate the theory behind Scotland's fishing rights, the extent of the right to fish, the Crown's right to alienation and the statutory impacts on the right to fish, before finally placing these findings in the context of contemporary developments of Scottish property and land reform law.

<A>The theory behind fishing rights

Property of the sovereign in Scotland is divided into property that is held in trust for the public and which cannot be alienated, and property which is part of the royal patrimony and can be granted as a right to a particular estate or person.[3] This property division is sometimes referred to as the *regalia majora* (which cannot be alienated) and the *regalia minora* (which can be). For the Crown to grant out one of the *regalia minora*, such as salmon fishing, there has to be a specific grant of the right in the crown charter habile to carry that right.

Many of the earlier cases on fishing rights are concerned with whether or not the particular fishing right is one that is held in trust for the public or is a right that can be alienated. Such cases then go on to consider whether or not the particular crown charter has granted that particular fishing right. In addition, certain fishing rights can be acquired by prescriptive possession (a form of 'squatter's right') on particular titles,

[2] Stair Memorial Encyclopaedia *Property – Part I: Vol 18: General Law* (LexisNexis 2017) para 251.

[3] George Joseph Bell *Principles of the Law of Scotland* (10th edn W Guthrie 1899) paras 638–74.

such as a barony title[4] or a title *cum piscationibus*, where the right has not been specifically mentioned, but the rights were implied.

<A>Historical background

<B>The territorial sea

The territorial sea has to be distinguished from the open or high sea, which lie beyond the boundary of the territorial sea and where '(t)he main ocean is common to all nations, in which they meet on a footing of equal right'.[5]

Historically, the territorial sea comprised:

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(a) the *mare clausum*, which is the internal waters such as rivers, sea lochs, landlocked gulfs and bays and

(b) the sea extending three nautical miles seawards measured from:

(i) the low-water mark along the general line of the coast (ignoring the *mare clausum*) or

(ii) in case of bays not exceeding 10 nautical miles in width, a straight line from headland to headland and probably large bays and estuaries measured between their points of land.[6]

<list>

Erskine[7] elaborates on this, recording that: 'the king holds both the sea and its shore as trustee for the public. Both therefore are to be ranked in the same class with several other subjects which by the Roman law were public but are by our feudal plan deemed

[4] The erection of a landed estate into a Barony carried with it certain rights in the land, including the right to prescribe a title to fishings; see *Green's Encyclopaedia of the Laws of Scotland Vol 2 Barony Title* (W Green 1927) paras 316, 318 (re fishing) and 323 (re mussel-scaps).

[5] Bell (n 3) para 639.

[6] William M Gordon and Scott Wortley *Scottish Land Law* (3rd edn W Green 2009) para 8-05.

[7] John Erskine *An Institute of the Law of Scotland* (Bell & Bradfute 1871) II.i.6.

regalia or rights belonging to the crown …'. A similar view was taken by Rankine[8] when he stated that

> <ext>[t]he narrow seas, and a strip formed by an imaginary line drawn three miles out to sea from low-water mark along the general line of the coast, disregarding gulfs and minor inlets, are regarded as belonging to the Sovereign, as custodier of, or trustee for, the public rights of navigation and the national rights of fishing.</ext>

Furthermore, Stewart[9] describes the territorial sea as the 'mare proximum' and states that its 'waters are vested in the sovereign as a jus publicum for the good of the lieges'.

The territorial sea is now defined by the Territorial Sea Act 1987[10] as extending out to 12 nautical miles from a base line to be established by Order in Council.[11]

<B>The Crown's rights in the territorial sea

In *Crown Estate v Fairlie Yacht Slip Ltd*[12] the Lord Ordinary (Lord Dunpark) summarised the right of the Crown in the territorial sea as: 'a right of property, although that right is subject to certain public rights of user, such as the right of navigation and of white fishing'.[13] He went on to hold that the Crown's ownership of the seabed was

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[8] John Rankine *A Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland* (4th edn W Green & Sons 1909) 251.

[9] Charles Stewart *A Treatise on the Law of Scotland Relating to Rights of Fishing* (2nd edn T & T Clark 1892) 17.

[10] Territorial Sea Act 1987 s 1(1).

[11] The baselines are currently set out in the Territorial Sea (Baselines) Order 2014 and the boundaries of Scotland's territorial waters are set out in the Scottish Adjacent Waters Boundaries Order 1999.

[12] 1979 SC 156, [159]–[160].

[13] He added that: 'This accords with the statement of the law by Craig (I, 15, 13), Stair (II, 1, 5) Erskine (II, 1, 6), by Bell himself in the 5th Edition of his *Principles* at section 639, and with the views expressed obiter by the Lord Ordinary (Kyllachy) in Lord Advocate v. Clyde Navigation Trustees, 1891, 19 R. 174 , at pp. 177–8: also by the

a patrimonial right and that the seabed within the territorial limit and the foreshore was not part of the public patrimony of the crown. Similarly, in the Shetland Islands, where Udal law[14] applies, the Crown owns the seabed by virtue of the royal prerogative.[15]

Although the Crown can grant title to the foreshore to a subject, it is doubtful to what extent the Crown can grant an effectual title in the *solum* of the seabed to a subject. In *Lord Advocate v Wemyss*, Lord Watson concluded that, while the *solum* was vested in the Crown, '[w]hether the Crown could make an effectual grant of that solum or of any part of it to a subject appears to me to be a question not unattended with doubt; but I do not think that the Crown could, without the sanction of the Legislature, lawfully convey any right or interest in it which, if exercised by the grantee, might by possibility disturb the solum or in any way interfere with the uses of navigation, or with any right in the public'.[16]

However, the Crown Estate Commissioners (now Crown Estate Scotland)[17] can, and do, lease the sea bed for the purpose of fish farming or the laying of boat moorings etc. It is acknowledged that the public does not have an unfettered right of navigation, but that other uses of the sea must not constitute a material interference with the public right of navigation.[18] Therefore, it must be concluded that the Crown is able to grant an interest in the *solum* to a subject only to the extent that such interest is not 'likely to

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Lord Justice-Clerk (Macdonald) at pp. 180–1 , Lord Young at p. 183 and Lord Trayner at p. 184'.

[14] Udal Law is based on the Norse legal system which regulated Shetland and Orkney and still survives mainly in relation to land law including fishings; see Stair Memorial Encyclopaedia *Udal Law Vol 24* (LexisNexis 1989).

[15] *Shetland Salmon Fishing Association & The Port & Harbour of Lerwick v Crown Estates Commissioners* (1991) SLT 166.

[16] *Lord Advocate v Wemyss* 1899 2 F (HL) 1, [8]–[9] (Lord Watson).

[17]http://www.crownestatescotland.com/about-us; Scotland Crown Estate Bill 2018, when passed will regulate Crown Estate Scotland for the future http://www.parliament.scot/Scottish%20Crown%20Estate%20Bill/SPBill24S052018.pdf.

[18] *Walford v Crown Estate* 1988 SLT 377.

constitute a material interference with [the] exercise by members of the public exercising [their rights of navigation and fishing] reasonably'.[19]

It is of note that in *Mull Shellfish Ltd v Golden Sea Produce Ltd*[20] the court held that a lease from the Crown Estate Commissioners of an area of seabed for the purpose of cultivating mussels on ropes suspended in the water included, by implication, the Crown's sole right to attract free-floating mussel larvae.

<C>The extent of the public right to fish in the territorial sea

The Crown holds the fishings in the seas and shores for the benefit of the public but, unlike the inalienable right of navigation, not all fishing rights are inalienable (the fishing rights that may be alienated are considered under 'Alienable fishing rights' below).[21] Furthermore, the right of navigation is superior to that of fishing.[22]

The public right to fish in Scottish waters is limited to certain species of fish, although the precise extent of the species included is not always clear. Gordon[23] states that the right of public fishing 'extends to fish of all kinds except those which are *inter regalia*. It covers all floating white fish such as cod, haddock, plaice, whiting, hake, saithe, skate and ray, and herrings and the minor varieties of shellfish such as cockles, limpets, scallops, whelks, shrimps, crayfish, periwinkles, prawns, crabs and probably lobsters'. He includes herring on the authority of Tait,[24] although it should be noted that Stair[25] records 'so fishing without these bounds is common to all, and within them also, except as to certain kinds of fishes, such as herrings, etc'. The *inter regalia* fish referred to

[19] *The Crown Estate Commissioners v Fairlie Yacht Slip Ltd (*1979) SC 156, [178] (Lord President).

[20] 1992 SLT 703 (2nd Div).

[21] Bell (n 3) 646.

[22] Stair Memorial Encyclopaedia *Fishing, Vol 7* (LexisNexis 2017) para 259.

[23] Gordon and Wortley (n 6) para 8-06.

[24] J H Tait *A Treatise on the Law of Scotland relating to Game, Trout and Salmon Fishing and Sea Fisheries* (J O Taylor 1928) 265.

[25] James Viscount of Stair *The Institutions of the Law of Scotland* (David M Walker (ed), University Presses of Edinburgh and Glasgow 1981) II.i.5.

above comprise salmon and fish of a salmon kind, oysters and mussels, and 'royal fish', which include 'great whales' (although they are not fish).[26]

As to who is entitled to exercise the public right to fish, this is not considered by many of the institutional writers. Stewart suggested that the right of fishing in territorial waters could only be exercised by 'subjects of the country to which the water pertains' and that a Crown licence would be needed for subjects of another country to fish in such waters.[27] As Scotland is still a part of the United Kingdom, it is submitted that, despite devolution, this would mean that all subjects of the UK can therefore exercise the public right to fish in Scottish waters (subject to regulatory controls). However, writing much more recently, Barnes suggests that, subject to acquiring the necessary statutory permissions, '[t]here is no evidence to suggest that fishermen of any nationality could not fish in coastal waters so long as they were fishing from Britain, rather than fishing as distant water fleets'.[28] Certainly the 'landscape' has changed significantly since Stewart's time. The UK has entered (and has now agreed to leave again) the European Union, which has brought with it the introduction of the Common Fisheries Policy (CFP) to the UK. The regulation of fisheries under the CFP is beyond the scope of this article, but it is probable that the category of persons eligible to exercise the public right to fish may become more important once the UK has left the EU and the CFP no longer applies to UK waters.

<C>The nature of the public right to fish in the territorial sea

The precise nature of the public right to fish in the territorial sea is defined differently in the text books and case law, leaving the underlying basis of the right unclear.

Stewart[29] states that:

[26] See Gordon and Wortley (n 6) paras 8-06 and 8-22 (whales).

[27] Stewart (n 9) 19.

[28] Richard Barnes 'Revisiting the public right to fish in British waters' (2011) 26 *International Journal of Marine and Coastal Law* 433, 452.

[29] Stewart (n 9) 20.

> <ext>The right of white fishing in the territorial seas of Scotland may be considered, in one sense, as vested in the Crown, but it is held, not as patrimonial property, but, like the right of navigation, for behoof of the public. It has not been expressly decided, and may still perhaps be considered as an open question, whether a Crown grant to an individual to fish in the sea for white fish can be sustained.</ext>

Although Stewart leaves it as an open question, it is notable that in *Commissioners of Woods and Forests v Gammell*,[30] the title relied on by Mr Gammell was a grant of the Lands and Barony of Portlethen with, amongst other rights, 'the white fishings in the sea'. The case concerned only a claim to the salmon fishings in the sea, but in light of later authorities, if this was a grant of the white fishings, it must have been a non-exclusive grant along with the public right to fish for white fish.

Professor Bell[31] also noted that, at this time, the effect of a grant of white sea-fishing had not been fully tried, although he argued that 'every subject has a title to use the shore for taking floating white fish in a proper mode, and the Crown's right to white fishings in the sea appears to be only a trust for the public and therefore inalienable'. The case of *McDouall v Lord Advocate*[32] confirms Bell's assessment. The Lord Advocate sought a declarator against McDouall of Logan that he had no right to fish for salmon, grilse or salmon trout in the sea *ex adverso* the Logan estate. McDouall claimed a prescriptive right under his barony title and other titles granted *cum piscationibus* to fish for salmon. There was an issue as to whether or not the evidence of fishing carried out was for salmon or for white fish, as fishing for white fish would not have been a prescriptive basis for salmon fishing. In this context, the Lord Chancellor (Lord Cairns) held that:

> <ext>after all, there was a general right of fishing by the public for white fish; any one of the public might have fished for white fish' and continued 'Beyond all doubt the law in Scotland is, that white fishing in the sea round the whole coast of Scotland is perfectly free, and not only is it perfectly free, but there is a title on the part of the

[30] (1859) 3 MacQueen 419, [421].

[31] Bell (n 3) 646.

[32] (1875) 2 R(HL) 49.

> subjects to use the shore for the purpose of conducting white fishing in a proper mode … no person had a right to prevent them …[33]</ext>

This was endorsed in *Parker v Lord Advocate*,[34] when the Lord President confirmed that the right to take floating white fish in the sea and in tidal waters is 'free for all'.

While the Crown is unable to alienate white fishing, it is clear from the case law that the Crown, through Parliament, retained the right to control the public's use of the right of white fishing. In *Gibson v Lord Advocate*,[35] Gibson (who owned an inshore fishing vessel) sought a declarator that the EEC CFP,[36] which allowed other EEC Member States to fish in Scottish waters, was contrary to the Act of Union 1707 and so null and void. Gibson argued that the right to fish was a private right which should not be interfered with, on the basis that the consolidated EU treaties[37] set out at Article 345 that 'the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. In response, the Lord Ordinary referred to Act 29 Geo. II, cap. 28 entitled 'an Act for encouraging the fisheries in that part of Great Britain called Scotland' (The Fisheries Scotland Act 1756) as illustrating the fact that the Crown could legislate to regulate the public right to white fish and held that:

> <ext>In my opinion that branch of law which is concerned with the control of fishing in territorial waters round the coasts of Scotland is a branch of public law. These waters are regarded as belonging to the sovereign as custodier or trustee for public, not private, rights of navigation and fishing.[38] </ext>

[33] ibid [53] and [55] (Lord Chancellor, Lord Cairns).

[34] (1902) 4 F 698 at 711, affd (1904) 6 F (HL) 37.

[35] 1975 SC 136.

[36] Contained in Council Regulation (EEC) 2141/70.

[37] Treaty on the Functioning of the European Union (Consolidated version) (2016) OJ C202.

[38] *Gibson v Lord Advocate* (1975) SC 136, [142].

The public right of fishing includes the right to use the foreshore (between high and low water mark) 'for the purposes of conducting white fishing in the proper mode'.[39] Herring and white fishers had a right to use waste and uncultivated land for the space of 100 yards inland from the high water mark for pickling, drying, unloading and loading fish,[40] although this right has since been repealed.[41]

The public right of fishing will yield to the private right to fish for salmon as confirmed by the Lord Justice Clerk in *Gilbertson v MacKenzie*:[42] 'as a general rule the right of white fishing must be so used as not to interfere with or injure the right of salmon fishing'. Lord Guthrie confirmed this in *Earl of Mansfield v Parker*,[43]stating that 'it may be that, in such a conflict of rights, the heritable right of salmon fishing would be held the paramount right as against the public right of white fishing'.

<C>The Crown's common law duty to protect the public's right to fish

It is arguable that the Crown has a common law duty to protect the public's inalienable right to fish for white fish in the territorial waters or to prevent any encroachment on that right, given that the white fishings are held by the Crown in trust for the public.

In *Lord Advocate v Wemyss*[44] referred to above, Lord Watson suggested that the crown could not do anything that might 'in any way interfere with the uses of navigation, or with any right in the public'. This suggests that there is an obligation on the Crown not to do anything that would derogate from the public's rights (unless sanctioned by statute).

The court in *Crown Estate Commissioners v Fairlie Yacht Slip Ltd*[45] went further and suggested a positive obligation on the part of the Crown. The case concerned whether

[39] *McDouall v Lord Advocate* (1875) 2 R(HL) 49, [53] (Lord Chancellor).

[40] Fisheries Act 1705; 11 Geo III c 31 s 11.

[41] *Gilmour v Peterson* 1901 3 F 569.

[42] (1878) 5 R 610, [621].

[43] 1914 SC 997, [1014].

[44] Note 16 at [66] (Lord Watson).

[45] 1979 SC 156, [169].

or not the Crown could lay, or authorise the laying of, fixed moorings on the seabed. The Lord President referred to 'the rights of the public to use [the seabed] for the public uses of navigation and fishing' and went on to say that '[i]ndeed the obligation of the Crown is to vindicate these public rights'.

The Scottish Law Commission[46] confirmed this view when, in discussing the Crown's rights in the seabed and foreshore, it commented that 'the Crown retains an inalienable right and duty to protect the public's rights in this situation'.

<A>Alienable fishing rights

<B>Salmon

Although salmon fishing has for a long period been granted out by the Crown, it was only in the mid-19th century that litigation about salmon fishing rights blossomed with the increase in value of salmon fishings. In *Commissioners of Woods and Forests v Gammell*[47] the crown tried to interdict Mr Gammell from fishing for salmon by stake or bag nets or other means *ex adverso* his lands and estates. Gammell argued that, while the Crown owned the salmon fishings in the enclosed waters of the firths and bays, off the open east coast, salmon fishing was part of the public right. The court held that the salmon fishings in the open sea around the coast of Scotland, unless parted with by grant, belonged exclusively to the Crown and formed part of its hereditary revenues. Furthermore, the court held that the right of the Crown was not merely a right of fishing for salmon but 'a right to the salmon-fishings around the sea-coast of Scotland'.[48]

<B>Royal fish

Also reserved to the Crown are 'royal fish'. These include 'great whales' (although whales are not fish).[49] While whales are subject to a moratorium on fishing under the

[46] Scottish Law Commission 'Discussion Paper No 113; Discussion Paper on Law of the Foreshore and Seabed' (April 2001) para 3.5.

[47] Note 30.

[48] (1859) 3 MacQueen 419, [419] and [455].

[49] Gordon and Wortley (n 6) para 8-22.

International Convention for the Regulation of Whaling (to which the UK is a party),[50] the Crown does exercise this right in respect of stranded whales that are too large to be drawn to land by a 'wain pulled by six oxen'. This is interpreted by Marine Scotland as a whale of over 25 feet in length.[51]

<B>Shellfish

Oyster and mussel fishings are part of the patrimony of the Crown, which may be granted or leased to a subject.[52] However, the public may be entitled to gather mussels and similar things on the sea-shore between the high and low water mark, until they have been excluded by a valid and effectual grant, although the nature of such use is less clear. In *Duke of Argyll v Robertson* it is referred to as a common law right,[53] whereas in *Duchess of Sutherland v Watson* the court suggests that no such right exists and that any such use by the public might be by consent of the Crown tacitly given.[54] Indeed, in *Parker v Lord Advocate* the court confirmed the decision in *Duchess of Sutherland v Watson* and held further that even where the right had not been granted out, the Crown could protect its oyster and mussel fishing from exploitation by the public.[55]

In the *Parker* case, the Lord Ordinary in the Court of Session suggested that the patrimonial right in mussels (as distinct from the public right in other types of shellfish) could be explained on the basis that mussel-scaps attach to the seabed and foreshore and so become *partes soli*.[56] Although he also noted that the greater value in shellfish such as mussels as a source of food could also explain the different treatment, suggesting that in order to avoid indiscriminate fishing and therefore the destruction of

[50] International Convention for the Regulation of Whaling (2 December 1946).

[51] Marine Scotland 'Royal Fish: Guidance for dealing with stranded Royal Fish (e.g. whales over 25 feet) in Scottish waters' (2011).

[52] *Duchess of Sutherland v Watson* (1868) 6 M 199; *Parker v Lord Advocate* 1902 4 F 698, affd (1904) 6 F (HL) 37.

[53] *Duke of Argyll v Robertson* (1859) 22 D 261, [265] (Lords Cowan and Deas).

[54] *Duchess of Sutherland v Watson* (1868) 6 M 199, [212] (Lord Cowan).

[55] *Parker v Lord Advocate* [1904] AC 364 (HL) [372].

[56] ibid [373].

the fishery, 'expediency supported by practice has introduced a prerogative in the Crown of gifting mussel scalps to individuals' in order to preserve their use.[57]

The collection of mussels and other shellfish by the public, however it is characterised, is now subject to restriction under the Sea Fisheries (Shellfish) Act 1967.

<A|>The current position relating to ownership

It is clear that the right to fish for salmon, oysters, mussels and (if it were legal) whales is alienable Crown property, held in a similar manner to most privately owned real estate. Therefore, the rights can be granted or leased by the Crown or it can lose possession to a subject by prescription on a habile title.

The position with regard to the public right is, however, far more complicated. The Crown cannot dispose of fishing rights for 'floating fish' and, since these rights are already available for the public to enjoy, a claim for possession by prescription of the right cannot be maintained.[58] However, the Crown does have a right to control the public's use of its right to fish for floating white fish.

The unusual nature of this form of public ownership leaves a trail of inevitable problems:
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- As part of the *regalia majora* what duties are there on the Crown?
  - Should the Crown be seeking to preserve public fishing rights against encroachment?
  - Is there a duty on the Crown to preserve the stock?

[57] ibid [370].

[58] See Stewart (n 9) 26. It is worth noting that this is not the position in English and Welsh law, where prescription is a valid method of establishing a several fishery (see for example *Carter v Murcot* [1558–1774] All ER Rep 620 (King's Bench) and *Neill v Duke of Devonshire* (1882) 8 App Cas 135).

- Should the Crown be seeking to prevent negative impacts on the stock from other activities?

- If the right is for 'floating fish':
- How much ancillary impact can fishing operations have on the seabed?
- Does this right cover all fish species? Razor fish for instance live below the seabed.

- On what basis does the Crown allocate exclusive fishing rights to the commercial fishing industry thus excluding the public from 'general right of fishing by the public for white fish'?[59]

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It is beyond the scope of this article to answer all of these questions but it is important to recognise that the absence of an obvious answer to many of them at this stage is a material issue for good governance, and many of these points will be revisited.

It should be noted that the Scottish Law Commission in their Report on Law of the Foreshore and Sea Bed[60] recognised that '[a]t common law the public enjoy rights over the sea, sea bed and foreshore. These are a right to fish, a right to navigate and a right of recreation' and went on to recommend that '[t]he common law public rights should be abolished and replaced by statutory public rights'. If this is done it will clarify the public right to fish for whitefish and to gather shellfish.

<A>Statutory regulation of sea fishing

<B>Legislation

While the public right to white fish is clearly recognised, equally it is recognised that the Crown, through first the pre-Union Scottish Parliament and then post Union the

[59] (1875) 2 R(HL) 49, [53] (Lord Chancellor) and [55] (Lord Cairns).

[60] Scottish Law Commission *Report on Law of the Foreshore and Seabed* (Scot Law Com No 190) (March 2003) paras 3.1 and 3.8.

Westminster Parliament, may legislate to control the public right to fish.[61] The steady effect of this legislation, culminating in the EC CFP and quotas, is that the public right to fish is increasingly being eroded and the right to fish has been concentrated through quota in limited hands.[62]

The diminution of the public right to fish can be traced through the legislation set out in Table 1. The originating statute from Fisheries (Scotland) Act 1705 is still on the statute books and justified the creation of a substantial public right on the basis of:

> … encouraging the Salmond [sic] White and Herring fishings they being not only a natural and certain fund to advance the trade and increase the wealth thereof but also a true and ready way to breed seamen and set many poor and idle people to work …

Having granted a huge right to the public, the next three centuries of legislation have attempted to limit that right. In terms of property law, these regulations do three things: they create the geographical boundaries of the Scottish fishery, they permit ministers to create technical measures to restrict fisheries activities, and they create possible mechanism of privatisation and local control of the fishery.

[61] Regulation of sea fishing is devolved to the Scottish Parliament except 'sea fishing outside the Scottish zone (except in relation to Scottish fishing boats)': Scotland Act 1998, Sch 5, para C6. Sea Fishing (cf n 68 for definition of 'Scottish zone').

[62] John Anderson 'Rights based management in the United Kingdom: the Shetland experience' FAO Fisheries Technical Paper 50 *Case Studies in Fisheries Self-governance* (2008).

Table 1: Key Scottish Fisheries Regulations relating to property rights[63]

Law	**Effect on Rights**
Fisheries (Scotland) Act 1705	Gives rights to subjects to 'take, buy and cure' white fish with the free use of ports and shores etc.
Crown Estate Act 1961	Enables the Crown Estate Commissioners to manage Crown land and other property, rights and interests
London Convention 1965	Permits access to UK waters to various nations in the 6 to 12 nautical mile limit
Sea Fish (Conservation) Act 1967	Creates vessel licensing system and conditions for limiting catch per vessel (quota) and permits Scottish Ministers to create direct orders on fisheries
Sea Fisheries (Shellfish) Act 1967 ('Shellfish Acts') As amended in 1973, 1997 and 2000 (Scotland)	Sets out the process where area management can be established for shellfisheries through 'Regulating Orders' and areas of shellfisheries 'severed' (effectively leased) through 'Several Orders'
Sea Fisheries Act 1968	Enables ministers to make regulations for fisheries
European Communities Act 1972	Enables EU exclusive competence in fisheries
Fishery Limits Act 1976	Establishes mechanism for UK exclusive fishing zone up to 200 nautical miles
Sea Fisheries Act 1981	Creates the fisheries marketing quango 'Seafish'
Inshore Fisheries (Scotland) Act 1984 (and 1994)	Gives powers to Scottish Ministers to restrict fishing (and removed much pre-existing regulation)
Territorial Sea Act 1987	Enables establishment of the 12 nautical mile limit of the territorial sea

[63] For a slightly different list see: Scottish Government *Acts* (2017) http://www.gov.scot/Topics/marine/Compliance/legislation/acts.

Sea Fisheries (Wildlife Conservation) Act 1992	Enables environmental restrictions to be placed on sea fishing
Scotland Act 1998	Regulation of sea fishing within the Scottish zone (s 126(1)) and regulation of Scottish fishing boats fishing outside the Scottish zone is not reserved – Schedule 5 C6
Marine (Scotland) Act 2010	Enables the creation of 'marine protected areas'
Marine and Coastal Access Act 2009	*Inter alia* establishes mechanism for UK exclusive economic zone up to 200 nautical miles
EU Regulation 1380/2013 (Basic Regulation)	Sets out core principles and key rules required under the EU's common fisheries policy
EU Regulation 1379/2013 (CMO Regulation)	Sets out rules for setting up a Fish Producer Organisation to market fishery products and collectively hold quota
EU Regulation 508/2014 (EMFF Regulation)	Sets out the rules for subsidy and funding allocation to UK (€108 million – 2015 to 2020)

<B>Geographical limits

The public right to fish (both under common law and under the Fisheries Act 1705) applies out to the seaward limit of the territorial waters. This right extends to British subjects (although see the comments above concerning the possible inclusion of anyone fishing from British soil). Under the Basic Regulation[64] and the London Convention,[65] access is permitted to some EU Member States with historic rights between the six nautical mile to 12 nautical mile limits (see Figure 1).

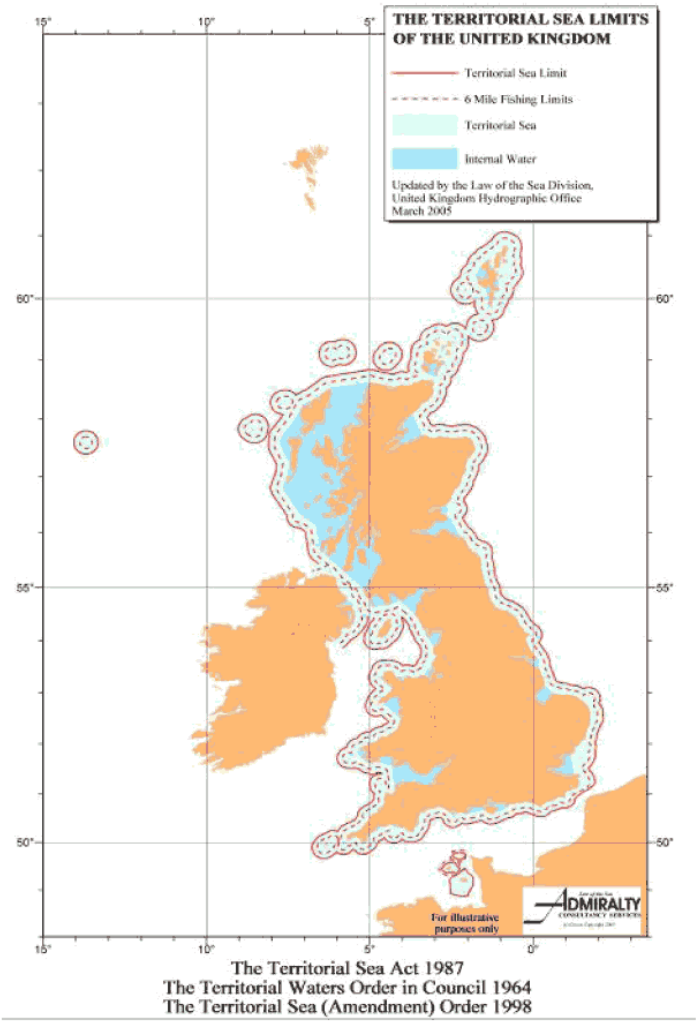

Figure 1: The territorial sea limits of the United Kingdom

[64] Regulation (EU) No 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy [2013] OJ L 354/22.

[65] Convention on Fisheries (London Convention) (adopted 9 March 1964, entered into force 15 March 1966).

Source: Scottish Government

Beyond the 12 nautical mile limit there is no express authority for UK (or European) fishers to fish in Scottish waters under Scottish law. However, the Basic Regulation requires equal access[66] to waters outside the 12 mile limit. Furthermore, it is submitted that when the EEZ was declared, bringing the 12nm to 200nm zone within the sovereignty of the UK, the public right to fish automatically extended out to cover this zone.[67]

The Scottish Zone[68] is set out in Figure 2, but its management falls largely under EU regulation. As noted above, the court in *Gibson v Lord Advocate*[69] has (for the time being at least) dealt with the arguments that the exercise of fishing rights is subject to Scottish property laws as private property, otherwise there may be some argument that those enjoying access would have to accede to any restrictions placed on the public rights through property law rather than other regulation.

[66] EU Regulation 1380/2013 art 5.

[67] See *Commonwealth of Australia v Yarmirr* [2001] HCA 56 [para 75] and Barnes (n 28) 457.

[68] Scotland Act 1998 s 126(1): '"the Scottish zone" means the sea within the British fisheries limits (that is, the limits set by or under section 1 of the Fisheries Limits Act 1976) which is adjacent to Scotland'.

[69] Note 35.

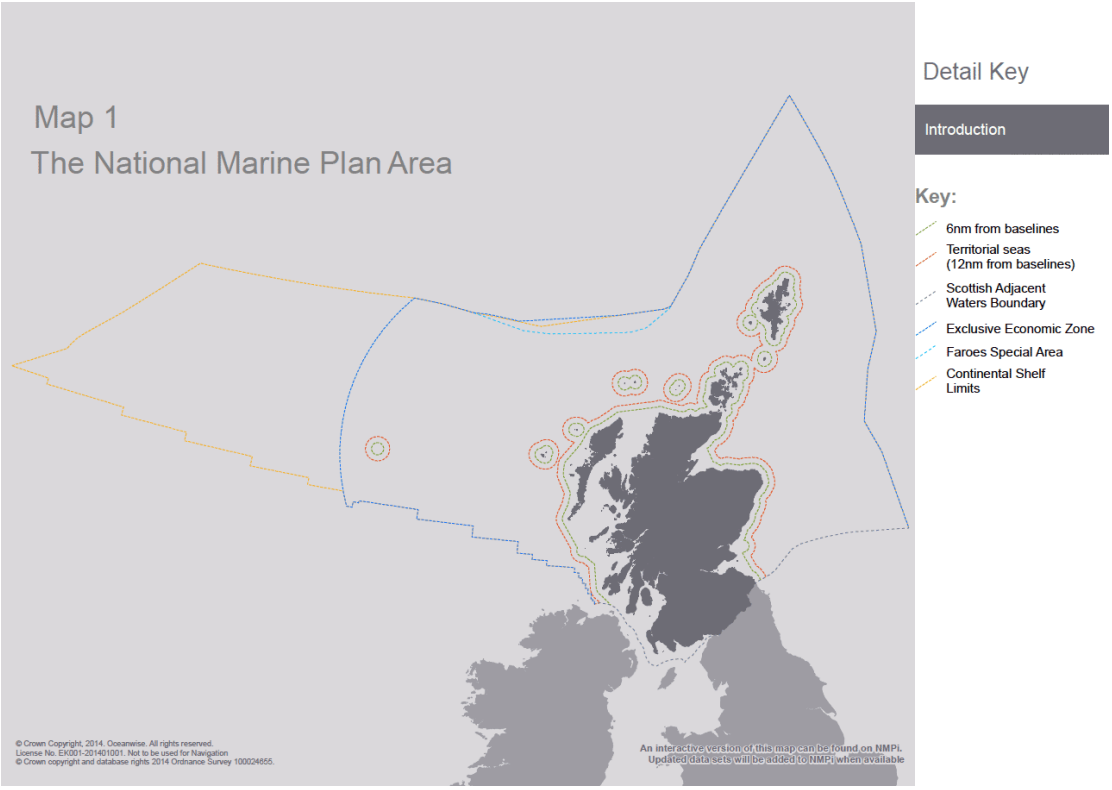

Figure 2: The Scottish zone

Source: Marine Scotland

<B>Technical measures

This article does not discuss the technical restrictions on the public right to fish in any detail. However, it is worth setting out the types of restrictions generally used. These include:

<bullet list>

- temporary and permanent closed areas
- days at sea
- gear restrictions
- restrictions on the type of fish caught
- quota on certain species
- handling requirements on some species
- landings obligations
- penalty points
- compliance with rules from fish producer organisations

</bullet list>

The conditions on these licences are altered on a weekly basis[70] and are very detailed, relating to different categories of vessel and fishery. General regulations, and the vessel licence in particular, have been used to micro-manage fishing businesses. However, the existing mechanisms for the delivery of those regulations stem either from the minister or from the EU and there is currently no direct possibility of issuing local controls except for shellfisheries through the regulating and several order processes under the Shellfish Acts.

<A>Property rights and fisheries

There are several ways in which private property rights can be created in fisheries. The Shellfish Acts permit the creation of either private (or 'severed') shellfisheries or locally controlled 'regulated' shellfisheries. Currently in Scotland there is one regulating order in place in Shetland and a handful of several orders (in place in Loch Ewe, Little Loch Broom, Loch Crinan and Loch Caolisport).[71] An attempt to create a regulating order for the Clyde has been rejected.[72]

It is not the place here to investigate the political reasons for the lack of uptake of regulated shellfisheries. However, in terms of the process, there are several bureaucratic obstacles to the creation of regulated fisheries. Probably because of its legacy as a public right, to create a regulated or several fishery requires a similar process to abrogating the public right to use the highway. If there are any objections the matter can go to public inquiry,[73] which can be a drawn out and expensive process.

Another method of private ownership is through the leasing of the seabed. The Crown Estate Scotland regularly leases 'fish farms' and mussel strings in Scottish waters,

[70]http://www.gov.scot/Topics/marine/Licensing/FVLS/licencevariations.

[71] Scottish Government *Regulating and Several Orders* (2017) http://marine.gov.scot/information/regulating-and-several-orders.

[72] Scottish Government *Clyde Regulating Order Application* (2017) http://www.gov.scot/Topics/marine/Sea-Fisheries/InshoreFisheries/clydero.

[73] Shellfish Act 1967 Sch 1 para 4.

although potentially interfering with public rights of navigation and fishing, the leasing process for these operations is relatively straightforward compared with that for several and regulating orders. Mussels are part of the *regalia minora* and penned fish are private property as they are no longer *ferae naturae*; thus, all that is needed in terms of property law is the grant of a lease from Crown Estate Scotland to the tenant. This lease will attract a commercial rent as the Crown Estate Scotland is subject to the provisions of the Crown Estate Act 1961 placing a statutory duty on those managing the Crown Estate to enhance the value and return of crown property.[74] Complexity can enter the process in the realm of planning law, as aquaculture can require planning permission[75] and an environmental impact assessment.[76]

The final method of privatisation seems to be more by mistake than design. The Scottish Government (and the UK Government before it) have permitted the trade in vessel licences and fishing quota, and even endorsed the informal grandfathering of 'entitlements' to engine size, type of trawl, scallops and shellfish, so that when licences are bought and sold these elements of a licence can be disaggregated and sold. There is no formal statutory basis for these sales (and indeed these were allocated free of charge to the initial holder), but the policy has attracted some protection under human rights legislation. In *United Kingdom Fish Producers Association v Secretary of State for the Environment Food and Rural Affairs*[77] the UK fisheries minister attempted to reallocate unused English fishing quota from one group of fishers to another. Because of the trades in quota, Justice Cranston held that it was a possession under Article 1 of the First Protocol of the European Convention on Human Rights and therefore should have required compensation for the reallocation. However, because the quota in question was unused it had no value, and thus compensation was not due. This raises a strong argument that quota which is regularly used would require compensation for reallocation; any value it has clearly diminishes the value of the public fishery.

[74] Crown Estate Act 1961 s 1(3).

[75] Town and Country Planning (Scotland) Act 1997 (as amended) ss 26, 26AA and 31A.

[76] The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 Sch 2 para 1(d)(b), where the development is designed to hold a biomass of 100 tonnes or greater.

[77] [2013] EWHC 1959 (Admin) [112].

Quota holding has also created a two-tier system, with the smaller inshore vessels (usually under 10m) being directly managed by the Scottish Government and the larger vessels owners (normally over 10m) forming fish producer organisations (FPOs) and gaining some degree of control over quota, collective marketing and other advantages. FPOs are set up under EU regulation and have been central to the management of Scotland's waters, but their management structures are opaque and the vast bulk of fishing vessels (particularly of the inshore fleet) are not members.

Table 2: Value and volume of fishing by sectors (2005)[78]

Category of vessel	Number of vessels	As a %age of total fleet	Volume of landings	Value of landings	Volume of landings as % of total Scottish landings	Vessels targeting Non quota species	Vessels fishing quota species
FPOs	554	23%	443,586t	£276.9m	97%	6%	94%
Non Sector	182	8%	8,097t	£12.7m	1.8%	61%	39%
Under 10m	1,628	69%	5,319t	£12.9m	1.2%	76%	24%
Total	2,364	100%	457,002t	£302.5m	100%		

Source: Scottish Government

Table 2 demonstrates effectively the discrepancies between those in the FPOs and those who are not (the 'non-sector' and under 10m vessels). There has been no public study on the distribution of quota within the FPOs themselves in Scotland, but the English

[78] Anon *Scotland: Non-sector, 10 metre and under fleet fishing quota and non-quota species* (2008) http://www.gov.scot/Topics/marine/Sea-Fisheries/17681/Non-Sec10mu.
The authors have been unable to find more recent data, although the proportions are not expected to have changed considerably since the data in Table 2 was collected.

quota holdings were investigated extensively by Greenpeace,[79] who found that three companies owned 61 per cent of English quota. Although FPOs do represent a measure of delegation of authority, there needs to be a better understanding of the impact of FPOs on rural communities and in particular the effects of concentration of ownership.

It is interesting to note that as part of the *regalia majora* the public fishery is supposed to be inalienable, and yet through quota allocation over 85 per cent of Scotland's fishery may now be in private hands,[80] although the terms of that arrangement remain legally nebulous. However, the Scottish Government has not accepted the result of the *UKAFPO* case, stating that they 'consider that fish quotas are a public asset belonging to no one individual or set of individuals'.[81]

The legal status of Scottish fishing quota is therefore still very much open for discussion. At one extreme, some quota holders may be under the impression that they have a freehold interest in their quota (at least an identified share in Scotland's fishery) and, at the other, the Scottish Government is adamant that quota remains in public ownership. Moreover, it is arguable that the Crown has a duty to prevent any encroachment on the public fishery[82]; and thus contest the acquisition of some form of private title in quota without due statutory process. It is notable that the Sea Fish (Conservation) Act 1967 was not an act which contained a formal mechanism for the creation of private property rights and so, unlike the Shellfish Acts or the Crown Estate Act 1961, it also lacks any of the usual checks and balances for the privatisation of a public asset. The Fisheries Bill,[83] before parliament at the time of writing, also lacks such checks and balances, although it does appear to recognise the problems with the current quota system and adopts a different approach for any new quota in relation to the English fishery. It is anticipated that similar legislation will be passed in Scotland

[79] Maeve McClenaghan and Crina Boros 'Investigation: big quota barons squeeze out small fishermen' *Greenpeace Energy Desk* (2016) 26.

[80] Using the figures in Table 2.

[81] Scottish Government *Consultation on the allocation of Scottish fish quotas* (2014).

[82] See Scottish Law Commission Discussion Paper No 113 (April 2001) para 3.5. Arguably the same duty applies to the public right to fish for white fish – see above.

[83] Fisheries HC Bill (2017-2019) [278]

for the Scottish portion of any new quota received after the UK's departure from the EU.

<A>Land reform in Scotland

The terms and pattern of property ownership are critical to the formation of a successful society. While fishing is in danger of an unregulated privatisation, concentrating control over the fishery into fewer and fewer hands, it is perverse that Scottish Government policy for rural land ownership in general has been travelling in the opposite direction. Community rights to buy have been recognised as key policy to sustain the future of rural communities across Scotland, where the Scottish Government's vision for land reform is:

> For a strong relationship between the people of Scotland and the land of Scotland, where ownership and use of the land delivers greater public benefits through a democratically accountable and transparent system of land rights that promotes fairness and social justice, environmental sustainability and economic prosperity.[84]

<B>Community rights to buy and sustainable development

Land reform, which started following the establishment of the Scottish Parliament on 12 May 1999, has, in part, focused on giving communities the right to buy their land. Initially, under the Land Reform (Scotland) Act 2003 rural communities were given a pre-emptive right to buy land and salmon fishings in which a community company, approved by the Scottish ministers, had registered an interest to buy.[85] The 2003 Act was amended by the Community Empowerment (Scotland) Act 2015, which extended the community right to buy to urban areas as well.

[84] Scottish Government 'A consultation on the future of land reform in Scotland' (2014) para 33.

[85] Land Reform (Scotland) Act 2003 Pt 2.

Further, crofting communities (through a crofting community company) approved by the Scottish minsters, were given an absolute right to buy 'eligible croft land', which generally comprises the common grazings, together with the salmon fishings in inland waters within or contiguous to the land that is purchased.[86]

Before the Scottish ministers will approve either a community or a crofting community right to buy, they must be satisfied, amongst other criteria, that the acquisition is in the public interest and 'is compatible with furthering the achievement of sustainable development'.[87]

This theme of furthering sustainable development is continued in the new provisions introduced by the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2016. The 2015 Act introduced Pt 3A into the 2003 Act, which allows a community to buy abandoned, neglected or detrimental land. Of particular interest in relation to fishings is detrimental land where 'the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community'.[88] Land includes inland waters (within the meaning of section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) and the foreshore.[89] Environmental harm 'includes harm the environmental effects of which have an adverse effect on the lives of persons comprising the relevant community'.[90]

Part 5 of the 2016 Act allows a community body to buy land to further sustainable development provided that the application fulfils the sustainable development conditions in section 56(2). Land includes the foreshore and salmon fishings in inland waters as defined by section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.[91] The Scottish ministers must not consent to the

[86] ibid s 68.

[87] ibid ss 51 (community) and 74 (crofting community).

[88] ibid s 97C(2)(b).

[89] ibid ss 97B(b) and (d).

[90] ibid s 97C(3).

[91] Land Reform (Scotland) Act 2016 s 45(1).

application to buy unless the sustainable development conditions are met, which include that:

<list>

(i) the transfer of land is likely to further the achievement of sustainable development in relation to the land

(ii) the transfer is likely to result in significant benefit to the relevant community

(iii) the transfer is the only practicable, or the most practicable, way of achieving that significant benefit and

(iv) that not granting consent to the transfer of land is likely to result in harm to that community.[92]

</list>

The community right to buy under the 2003 Act permits a community to acquire salmon fishings, and these do not appear to be limited to inland waters, so the community should be able to acquire netting rights along any foreshore that it has purchased. However, the right to acquire the salmon fishings under Part 3A of the 2003 Act as part of 'abandoned, neglected or detrimental land' or under Part 5 of the 2016 Act is limited to salmon fishing in inland waters.

<B>Communities and fisheries

The sustainability of coastal communities has clearly interlinked the land economy with the local fishing industry and this was the focus of government policy in the highlands from 1882 to 1892.[93] Such policy was given effect by the Congested Districts (Scotland) Act 1897 which, by section 4, authorised the Congested Districts Board, in congested districts, to apply money inter alia (a) aiding and developing agriculture etc and (e) aiding and developing fishing (including industries connected with and subservient to fishing) and the erection of fishermen's dwellings and holdings, thus clearly linking crofting and fishing in the area.

[92] ibid ss 56(1) and (2).

[93] Ewen A Cameron *Land for the People? The British Government and the Scottish Highlands, c. 1880–1925* (John Donald Short Run Press 2014) 72–76.

This policy has reappeared in various shapes over the years. Prior to joining the EU, fishing was a central part of the Highlands and Islands Development Board[94] aid to communities, where £430,000 was spent on the purchase of fishing boats and the provision of boatyards and fish processing facilities. This provision of boats was discontinued after 1971 because of uncertainties arising from the CFP.[95] The CFP[9697] and the European Marine and Fisheries Fund (EMFF)[98] have (at least in spirit) attempted to maintain support for fishing communities (although membership of the EU has always been considered something of a mixed blessing for fishing communities).

Although control of fishing within the six mile limit is already within control of the Scottish Government, there are opportunities within the Brexit negotiations to move away from the complex subsidies of the EMFF system and localise ownership and control of Scotland's inshore fisheries in the same vein as the terrestrial land reform movement.

<A>Conclusions

The public right to fish for white fish, enhanced by the Fisheries (Scotland) Act 1705, has been both a strength and weakness for Scotland's fishers. At the time of the Highland clearances, fishing was one of the few occupations which was not controlled by Scotland's huge estates and enabled at least some rural communities to survive while so many had to seek their fortunes abroad. However, after over 300 years the public right to fish has reached its limitations.

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[94] Established under the Highlands and Islands Development (Scotland) Act 1965 (c 46), part of whose function was to make and implement proposals 'for the economic and social development of the Highlands and Islands': see s 3(1).

[95] Highlands and Islands Development Board *Sixth Report 1 January 1971 to 31 December 1971* (1972) p 44–49.

[96] See Consolidated Treaty of Functioning of the European Union art 39(b).

[97] EU Regulation 1380/2013 art 2(5)(d).

[98] EU Regulation 508/2014 art 6(d).

Time and statute (and lawyers) have started to erode the bar on alienation of *regalia majora* and the rules against private ownership are being circumvented. The statutory process of the creation of regulating and several orders contains many appropriate checks and balances but is too cumbersome to be effective. The main means of local ownership of a fishery is through the leasing of fish farms, but these have a concentrated ownership pattern, largely by Norwegian multi-nationals.[99] Mussel farming currently represents the simplest method of developing a fishery under local ownership.

For the vast proportion of Scotland's waters, however, the main method of private control has been through the maze of interests being created under the Sea Fish (Conservation) Act. The most significant of these is the quota management system. The mechanisms for local ownership and control in fisheries do not work effectively. With the exception of isolated instances of Regulating and Several Orders and aquaculture all fisheries regulation is centralised to Edinburgh or Brussels. Where there has been delegation through the FPOs, the English experience of the same system would lead to the conclusion that the delegation has simply failed to be sufficiently transparent and locally accountable to halt the concentration of ownership among a few favoured individuals.

Yet this approach is exactly contradictory to the direction of travel in terrestrial rural Scotland. After centuries of concentrated ownership, communities are finally being able to acquire their own neighbouring resources. It is suggested that communities should have similar powers to acquire (or at least control) the fishing rights in the seas out to the 6 nautical mile limit. This should include salmon, white fish fishing and oyster and mussel-scalps.

Overfishing or other exploitation of fish stocks in a local area could well cause harm to the environmental wellbeing and sustainable development of a community, particularly

[99] Karen A Alexander and others 'An assessment of the benefits to Scotland of aquaculture' Report prepared for Marine Scotland (2014) 86 ff.

if there are some fishers in the community, yet the community[100] does not have control of the fishery.

The Scottish Government has emphasised its desire of 'furthering the achievement of sustainable development' in coastal communities. We consider that it is important to re-link both the economics of the community with the economics of the local coastal fishing. This would best be achieved by giving the community control and management of the fishery and its infrastructure such as ports and harbours within their local community area. This is particularly so where the control of the Crown Estate rights has been transferred to the Scottish institutions. For the first time, the Scottish Government has control of both the fishing rights and the subjacent seabed. There are clear opportunities for creative and sustainable use of this vast and fertile resource by coastal communities – but to realise these opportunities communities need to be able to have a greater sense of ownership.

It is suggested that statutory local management and perhaps even ownership of inshore fisheries, would best represent the public interest. To achieve these ends, there are certain basic legal steps which need to be followed.
<bullet list>

- Ownership of the public fishery needs to be clearly vested in an identifiable public body.
- There need to be statutory duties placed on this body to prevent encroachment, to abide by principles of good management and maintain the fishery.
- The body could be given a power to dispose of a fishery on certain limit terms (essentially simplifying the several/regulating order regime) to local communities.

[100] By the use of the term 'community', we mean a whole community not just those benefiting financially from the exploitation of the resource – which would have an inherent conflict of interest.

- In any commercial fishing rights there needs to be a clear definition of the rights being granted.[101]
- The mechanisms of any disposal need to be carefully scrutinised but ensure there are no conflicts of interest or anticompetitive activity and secure appropriate transparency.
- Legal structures created (either for management or ownership) need to empower local control and local management with a central administration retaining an oversight and policy function.

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While Brexit poses both a threat of instability and withdrawal from the EMFF, it also brings with it an opportunity to restructure fisheries management. It is hoped that the powers that be use this opportunity to achieve greater local management for Scotland.

[101] The operation of an 'untrammelled' right to fish has meant that government is constantly struggling to regulate fisheries after they have been developed, rather than assessing the impact of a new fishery before it is allowed. This has exacerbated the boom and bust cycle of fisheries.