The Public Trust Doctrine for Coastal Stewardship

'The emergence of public trust as a legal tool empowers environmental activists against powerful private and government interests that imperil natural resources.'

Do you agree?

Critically discuss the public trust doctrine with reference to case laws.

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ABSTRACT

This paper discusses the current position and potential of the public trust doctrine as a legal tool, to help prevent short term exploitation and improve longer term stewardship, of natural resources.

The over-arching legal framework for natural resource protection is introduced together with a brief overview of the role of key actors. The evolution of the public trust doctrine from the United States is described, followed by an illustration of its growing adoption in the law of other countries, particularly the global south. Observations will be made on the position of private and government interests and the role of environmental activists and non-governmental organisations. This will be discussed in the context of the duties of sovereign states towards their citizens and the principles of stewardship, guardianship and trusteeship,

A key focus for the discussion in this paper is on the inshore waters and coast - to assess how the public trust doctrine is now exercised in the location of its origins. An assessment is made of the opportunities and constraints on environmental activists for future utilisation of the public trust doctrine to support coastal stewardship in the UK[i]. Finally, general observations will be made on the potential of the doctrine in relation to global ethics and citizenship.

CONTENTS

1 INTRODUCTION

1.1 The Public Trust Doctrine

The public trust doctrine (PTD) is essentially about giving people rights over access to natural resources. Its origins lie in Roman jurisprudence when in 535 AD the first legal recognition of the commons was enshrined in law ”By the law of nature these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea…”[1].

The English common law adopted the PTD and the United States Supreme Court adopted these principles in *Shively v. Bowlby*[2] (1894) when seaward of high water mark, the states took shorelands in ‘trusteeship’ for the public, meaning that conduct must be exercised for the public purpose and must not merely be a gift of public property for a strictly private purpose[3].

US case law in the late 1800s and early 1900s oscillated around the trustee duties of the federal government, but was made clearer with the *Illinois Central Railroad Company v. Illinois* case[4] when the court articulated the public trust principle as central to the government providing widely available public services. Confusion still arises, however, from the failure of many courts to distinguish between the governments’ general obligations to act for the public benefit, and

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[1] Henry Rose (2013) p90
[2] *Shively v. Bowlby,* 152 U.S. 1, 57 (1894)

[3] *Light v.United States*, 220 u.s. 523, 536 (1911)
[4] *Railroad Company v. Illinois* 146 U.S 387 (1892)

the more demanding, obligation which it may have as a trustee of certain public resources. [5]

A seminal article by Joseph Sax in 1972 highlighted the doctrine through examples of case law, which further evolved through the 1970s and 1980s. Whilst the PTD has emerged predominantly from the U.S., it is growing through constitutional and case law, particularly in countries of the global south[6].

1.2 International and State Obligations toward Natural Resources

Natural resources are goods supplied by nature and available for consumption, use or enjoyment[7]. Human well-being depends upon access to natural resources and their ecosystem services which provide food, clean water, disease and climate regulation, spiritual fulfilment and aesthetic enjoyment[8]. There isn't one international framework for natural resources law, but the following key agreements.

Name	Year	Purpose/Specific relevance
Millennium Development Goals (2015) replaced by Sustainable Development Goals (UN General Assembly)	2016	MDG: 8 goals signed by 191 countries aimed at eradicating poverty. SDG 17 goals inc goal 11 sustainable communities; goal 14 marine resources.
Aarhus Convention	2001	Access to information, participation and environmental justice; signed by 46 states in Europe and Asia.
Convention on Biological Diversity arose from Rio (above)	1993	Article 8 envisaged institutions devised for the equitable sharing of benefits arising from local knowledge.
Rio Declaration (UNCED)	1992	27 principles to guide sustainable development signed by 170 countries.
Stockholm Declaration (UN)	1972	1st international law reflecting rights to a healthy environment
Declaration of Human Rights (UNDHR)	1946	Became international law in 1976 – includes rights of access to natural resources such as water.
World Conservation Strategy	1980	First time governments and NGOs came together to address global conservation.

[5] J Sax (1970), p.478
[6] See Table 2 *herein*
[7] Robin Attfield (2015), p.81
[8] E Blanco & J Razzaque (2009), p.12

Table 1 International framework legislation for natural resource law

Natural resources are under increasing pressure from state and non-state actors feeding the global market economy[9] but states have responsibilities towards their current as well as future citizens to represent the (longer term) public interest. They chose a variety of ways to achieve this through their constitutions, statutory powers and regulatory bodies acting on behalf of the general public. In common law countries there is also a body of case law to draw on the interpretation of the public interest in relation to international and national obligations.

1.3 Communities and the role of Non-Governmental Organisations (NGOs).

There is no shortage of evidence that natural resources are imperilled in many parts of the world and indeed globally from climate change[10]. There are many examples of global multi-national companies (MNCs) entering into agreements with governments over the development of natural resources, which are often not aligned with the interests of local communities or sustainable development (e.g. in the *Vedanta* case, Orissa[11]). The ability of communities to represent their interests is often weaker than the state and non-state actors; with access to justice through the courts to remedy damages dependent upon the background legal framework (as well as citizens financial capacity). Where natural resource exploitation is significant and brought to the attention of the local or global non-governmental organisation (NGO) community, they may have access to justice

[9] E Blanco & J Razzaque, 2011
[10] National Academy of Sciences, US and the Royal Society, UK (200..) *Climate Change Evidence and Causes*
[11] OECD, 2009

on behalf of communities and the environment through the International (or regional) Court of Justice to prevent exploitation and/or offer remedies.

Paradoxically, judicial interest in the doctrine waned in the heyday of the environmental movement (1970s onwards) largely in response to the enactment of numerous environmental statues…which eclipsed interest in a common-law doctrine and the courts have not significantly developed the PTD over the past four decades[12]. NGOs use of the PTD has not been prevalent, perhaps because of this.

2 EVOLUTION OF THE PTD

2.1 United States Origins

The origins of the PTD lie in the United States and with rights over the foreshore and navigation. The doctrine guarantees the public the right to use navigable or tidal bodies of water for commerce, fishing and navigation. Over the past 75 years some states have extended the rights to recreational use[13].

Key case laws such as the *Mono* Lake decision[14] extended the doctrine to groundwater and the *Waiahole Ditch* decision[15] encompassed the precautionary principle in U.S. case law. Whilst the doctrine had its origins associated with foreshore and navigable waters in the US, it has evolved beyond this geographically and internationally.

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[12] Weston & Bollier (2013) p.239
[13] Henry Rose (2013) p.92
[14] National Audobon 9 P.3d v. Superior Court (*Mono Lake),* 33 Cal. 3d 419 (1983) in Blumm and Guthrie p.747
[15] *Waiahole Ditch I,* 9 P.3d at 445 (2000) in Blumm and Guthrie p.748

2.2 International Evolution

Since the 1970s the PTD has evolved from its origins in court cases into constitutional law and statutory duties through environmental regulation overseen by public agencies. Versions of the doctrine can now be found in most legal systems of the world[16] as shown in Table 2.

Country	Legal adoption of the PTD	Example	Comment on future prospect
India	Constitution 2010. Supreme Court declared the doctrine was the 'law of the land' and has fully embraced the doctrine over a substantial period of time.	Restoration of a park.	Substantial potential due to origins in natural law and the most detailed judicial consideration of any jurisdiction outside of the US.
Pakistan	Supreme Court has interpreted the doctrine.	Protection of coastal land from waste disposal.	Potential due to emerging case law.
Kenya	Several provisions of the 2010 Constitution.	Remedy for the discharge of raw sewage into the Kiserian river.	Good potential due to position in constitution and emerging case law.
South Africa	Embedded into the Constitution and environmental statutes.	Water resources, minerals and coastal zones.	Substantial due to reference in constitution and statutes, but proof of implementation needed.
Canada	Suit against the federal government.	Common right to fish in Atlantic waters	Considerable potential to adopt a viable PTD (p750).

Table 2 Representation of the PTD in state law[17].

2.3 An Instrument for Democratization

In 1970 Joseph Sax made the case that the doctrine was an instrument for democratization, citing the *Gould v Greylock Reservation Commission* [18] which dealt with how to represent the public interest (over commercial interests). He wrote that "the doctrine contains the seeds of ideas whose importance is only beginning to be perceived, and that the doctrine might usefully promote needed

[16] David Bollier (2014) p.88
[17] Summarised from Michael Blumm and Rachel Guthrie (2012) p.760-807
[18] *Gould v Greylock Reservation Commission* 350 Mass 410, 215 N.E.2d 114 (1966)

legal development"[19] with a role for the court in providing for democratic policy making, especially where there is a conscious effort to minimize public awareness and participation.

Since the 1970s, the PTD has evolved from its origins in court cases into constitutional law and statutory duties through environmental regulation overseen by public agencies. However, complications still emerge over interpretation of the PTD, whilst a number of courts believe that they are not an appropriate forum to deal with it[20]. The role of communities and environmental activists may therefore be key to preventing environmental destruction by bringing cases to justice. Grassroots movements for 'earth democracy' are growing[21]. However, the degree to which environmental activists are utilising the doctrine appears not to be fulfilling its potential (Wood, 2014).

Further review in this paper will focus on application of the PTD to the foreshore and inshore waters at the coast, with specific discussion about the current UK context where the doctrine was founded in common law many centuries ago.

3 APPLICATION OF THE PTD TO COASTAL STEWARDSHIP

3.1 States' Fiduciary Responsibilities and Regulatory Approaches

Despite huge take-up of the PTD in the U.S., there are still many problems with management of the coast and marine environment such as agricultural and urban runoff, stormwater and sewage pollution leading to beach closures, harmful algal blooms, the degradation of wetlands and contamination of sediments and

[19] Joesph Sax, 1970 p.485
[20] Joseph Sax, 1970 p.551
[21] e.g. Cormac Cullinan in *Wild Law*, 2011 p163-165.

seafood. A large range of sectoral legislation and regulatory bodies with responsibilities over the coastal zone hinders an integrated and co-ordinated approach to coastal governance. In the US, over 140 federal laws shape coastal and ocean policy and over 20 federal agencies and departments oversee various coastal and ocean activities and users[22].

State regulation and its role as a trustee of common assets is often weakened by economic growth priorities. In capitalist economies, it is particularly easy to forget that many resources managed by the state still *belong to the people* when public bodies have removed citizens from direct reliance upon their local resources. Regulation is generally dominated by procedures and scientific expertise, so that the views of local residents or individual consumers do not carry as much weight in decision-making as technical experts and corporate officials. People often find themselves delegitimized as participants in the governance process (due to its complexity and time demands), or simply unable to afford the costs of participating. Wood (2009) goes further to suggest that "the modern environmental administrative state is geared almost entirely to the legalization of natural resource damage"… with the issuing of permits/licences affectively authorising the destruction of resources by private interests[23]. However, the enactment of numerous environmental statutes does not mean tha the PTD is inoperative, but requires the courts to step-up and recognize the ancient provenance and purpose of the doctrine[24].

[22] Mary Turnipseed et al. (2009) p.1
[23] Mary Christina Wood at III "The Failed Paradigm of Environmental Law"(2009).
[24] Weston and Bollier (2009) p.240

The state does not ‘own’ resources; it is authorised to act only as an administrative and fiduciary agent of the people. To emphasise the state’s stewardship obligation, Bollier (2014) calls large-scale, state-mediated commons *state trustee commons*[25] and argues for a ‘commons infrastructure’ which better represents smaller communities with the state acting as a trustee for commoners:

> “As a trustee, the state has affirmative obligations to assure maximum possible transparency, participation and stewardship at the lowest level of governance possible (‘subsidiarity’)[26]”

Bollier (2014) concludes that we need legal innovation that can give the commons real standing in law. We therefore turn to the ability of the doctrine to support stewardship at the local level – perhaps championed by environmental activists.

3.2 UK context for the PTD

3.2.1 Top-down vs bottom-up governance

Increasingly, legal measures are being taken to find ways to account for intergenerational equity, as shown in Table 1. However, the ability to implement trusteeship at the state or regional level from a purely ‘top-down’ approach is questionable. States often trade their natural resources in the interests of economic growth with shorter term political and socio-economic interests rather than longer term stewardship, as illustrated by two examples:

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[25] Weston & Bollier (2013) p.238-243
[26] Bollier (2014) p.141

i) The European Common Fisheries Policy (CFP) has resulted in overfishing [27] and fishermen feeling disenfranchised from their stewardship responsibilities towards the state of the seabed.

ii) Political support in South Wales for tidal lagoon development promises economic 'prosperity' and new recreational opportunities at the expense of habitat destruction, particularly to fisheries in the Severn Estuary and its tributaries. Perhaps these proposals will lead to a legal challenge over implementation of the new Future Generations of Wales Act (2015).

Whilst 'top-down' governance may provide a supporting legal framework, implementation of the PTD also needs to emerge from the 'bottom-up' through environmental activists, possibly defaulting to the courts to help develop new case law.

3.2.2 Role of The Crown Estate

Through English common law, tidal seas and tidal land below the high-water mark, are owned by the Crown Estate as sovereign but a lack of sympathy for public rights was shown in *Blundell v. Catterall*[28] which took a narrow view and restricted public rights over the foreshore to navigation and fishing. The Crown continues to own over half the foreshore and manages it with the dual purposes of commercial gain and stewardship[29].

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[27] Emma Cardwell *in* Thomas Hojrup and Klaus Schriewer eds 'European Fisheries at a Tipping Point' (2012)
[28] Blundell v. Catterall (1821) *in* Bonhady p.28
[29] Crown Estate Marine Stewardship Programme Annual Review (2014)

The Crowns' fiduciary responsibilities towards the coast appear to be limited by *Tito vs. Attorney General*[30] which defined the use of the word 'trust' in relation to the Crown as *not* imposing a fiduciary duty upon the Crown but rather a governmental obligation which the courts could not enforce. This therefore re-inforces the reliance on regulatory bodies to represent the public interest and the powers of NGOs to assert the public interest appear to be limited by this UK case law[31].

3.2.3 Access to the Courts

According to Sax (1970) [32] many courts respond to threats to resource development and conservation simply by asserting that protection of the public interest has been vested in some public agency[33] and that it is not appropriate for citizens of the courts to involve themselves with second guessing the official indicators of the public interest. So it is, in the UK in the 21st century, where a wide range of public agencies are tasked with implementing environmental law and citizens seem to get less direct access to the courts. Recently, the UK government has attempted to make it harder for citizens to access the courts through proposals to restrict access to judicial review[34]

3.2.4 UK Coastal Governance and the PTD

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30 *Tito vs. Attorney General* (1977)

31 It is notable that in the case of *Dibden Bay (v RSPB)* it is very unlikely that there would have been any mention of the PTD in this protracted legal case; a sign that the PTD is not applied by one of the UK's leading environmental NGOs to protection of the foreshore.

32 Joseph Sax (1970) p.498

33 e.g. *Harrison-Halsted Community Group v. Hoseing & Home Fin. Agency*, 310 F2d 99, 105 (7th Cir.1962), cert. denied, 373 U.S. 914 (1963) ''The Legislature, through its lawfully created agencies, rather than 'interested' citizens, is the guardian of the public neds to be served by social legislation''

34 Michael Dougan *pers comm.* April 2017 at UWE, Bristol Law School lecture

The degree of regulatory complexity for management of the UK coast is well known[35] as it is in the US[36]. European and UK natural resource management has become highly bureaucratic[37]; with a multiplicity of Directives transposed into domestic statutes and the added complexity over how terrestrial and marine legislation applies across the land-sea interface (see Figure 1).

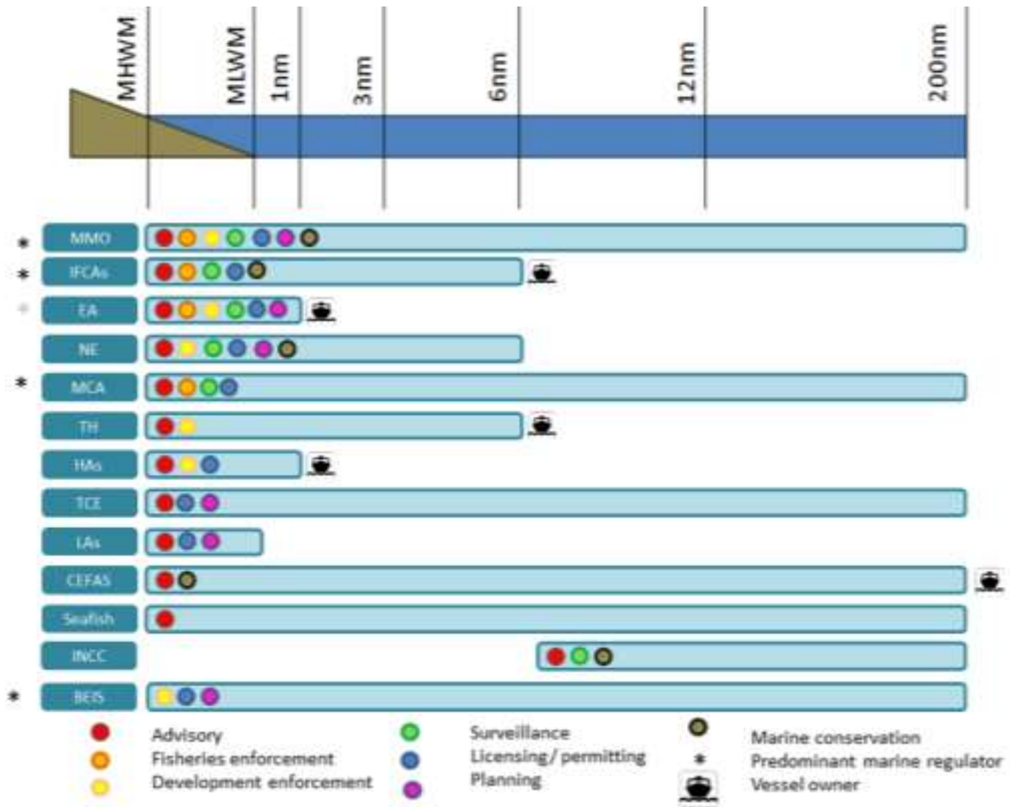

Figure 1 UK regulatory roles in the UK coastal and marine environment from Mean High Water Mark (MHWM) out to 200 nautical miles (nm)[38] illustrating overlap and complexity which makes public participation in decision-making challenging.

The stranding of the *Napoli* container ship in south Devon during 2007 demonstrated the complexities arising from too many regulators confused by

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[35] Defra (2006)
[36] *supra* note *22*
[37] Sue Boyes and Mike Elliot (2014)
[38] Source: Neal Gray, Marine Management Organisation. Presentation to South West Marine Ecosystems conference, Plymouth University, 27th April 2017

historic laws, cultural traditions and a lack of integration across the land-sea interface. This resulted in a slower response which led to pollution of the foreshore and marine environment[39]. NGOs had little direct role in the handling of this incident, even the National Trust who own part of the foreshore at Branscombe Beach. This and other examples of damage to the environment suggest that NGOs ought to consider utilising the PTD to a greater extent. However, public trust is rarely sighted in UK case law. A recent case *Loose v Lynn Shellfish Ltd* (2016)[40] commented on law relating to the foreshore receiving some welcome clarification:

> "The foreshore originally belonged to the Crown [but]…over the years… by Crown action or by common law or by statute ownership, other rights have in many instances passed to others, such as local authorities and private landowners. Ports and docks have been governed by their own statues. In practice in many situations the local authority appears expressly or implicitly to have taken over the ownership and management of many foreshores; and appears in a sense to hold the foreshores on *public trust for public benefit* (authors' emphasis)." …"the Crown is assumed to hold the foreshore in the *public interest* preferably for public purposes[41]

It is worth noting the use of the terms *public trust, benefit* and *interest* which are not clearly defined.

[39] Jason Lowther, Richard Glover and Michael Williams (2009)
[40] *Loose v Lynn Shellfish Ltd* (2016)
[41] *Lynn Shellfish* at [32].

On the application of *Newhaven Port and Properties v East Sussex*[42] Lord Carnwath argued that "the importance of conclusively deciding the nature and extent of the public's right's over the foreshore of England and Wales is self-evident".

Samuel (2017)[43] recognises that pressures on the coast are increasing, environmental issues loom large and it requires sensitive attention. He proposes a Law Commission review and a clarifying statue for the foreshore and beaches of England; and for the foreshore to be declared to be public property, held in trust for the public. Whilst recognising the role of public bodies, he proposes that the National Trust (which own many miles of coastline) also has a role to play. Samuel proposes a statute to set out the guiding principles regarding management and control and use, supported by a code of guidance and disputes settled by a nominated tribunal, with an appeal on a point of law.

This proposal would appear to offer some scope for the PTD to be applied to management of the UK coast, perhaps championed by an NGO such as The National Trust, RSPB, WWF and The Wildlife Trusts who have a strong membership base and campaign on coastal and marine policy. However, they would need to go beyond their current campaigning remit to seek greater impact through case law, with the aim of leading a resurgence in the application of the PTD. The idea that participatory approaches are the best way of resolving different perspectives on the environment is gathering pace (Bell, p83) so it

[42] *Newhaven Port and Properties v East Sussex CC [2015] UKSC 7; (2015) 2 W.L.R. 601* at [133]
[43] Alec Samuels (2017) p.265-268.

seems probable that environmental activists could be supported by a wider spectrum of the public interest.

3.3 Participatory Engagement and the Role of Trustees

3.3.1 Limitations of the PTD

An inherent weakness in the PTD exists if its application is limited to public benefit which maybe met through mitigation or offsetting. There is an important distinction to be made between the PTD and potential representation of natural resources *in their own right*. Environmental NGOs and the third sector could seek to apply the fiduciary responsibilities of the state further through trusteeship or guardianship principles where the environment has moral and legal standing[44]. Greater engagement of local people - whose understanding for systems it too easily overlooked – is a key principle of collaborative planning[45], the commons movement and approaches to improve green governance[46]. Environmental activists and NGOs could do more to support the commons movement through public awareness, campaigning government regulators and furthering the evolution of case law through the courts.

3.3.2 Strengthening the PTD

Informal governance mechanisms are emerging in the UK through Coastal Partnerships[47] and Rivers Trusts[48], initiated by the third sector and supported by

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[44] Christoper Stone (1972)
[45] Healey (1997)
[46] Burns Weston and David Bollier (2013) p233
[47] For further information see Stojanovic and Barker (2008) and http://www.coastalpartnershipsnetwork.org.uk/wpcontent/uploads/2016/11/Natasha-PhD_CPN-Durham-Nov2016.pdf
[48] For further information see CREW (2012) and http://www.theriverstrust.org/riverstrusts/index.html

public bodies. These partnership initiatives highlight the value of natural capital[49] and are supported financially by a wide range of public, private and third sector partners plus volunteers in communities becoming trustees. This 'bioregional' [50]model challenges the 'top-down' regulatory approach to stewardship by utilising strong 'bottom-up' approaches to governance that engage communities, lever finance and are being shown to be more efficient from a regulatory perspective[51]. The holistic, ecosystem based approach of these initiatives may provide good foundations for NGOs to demonstrate how development decisions over natural resource use in the public interest shouldn't compromise the health of an ecosystem unit such as a river catchment or coastal system. There is potential for this approach to build on recent case law in New Zealand and India which has given legal personality to rivers. Whilst this may appear ambitious in western capitalistic society where communities have less direct links to their natural resource base (compared to indigenous/tribal communities); the PTD may offer a route towards this through the greater involvement of trustees representing an ecosystem.

There are other means to achieve strengthening of the PTD which could be championed by environmental activists, but discussion is beyond the scope of

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[49] Mike Acreman, Ed Maltby, Natasha Bradshaw, Paul Bryson and Alistair Maltby (2017)

[50] Bioregionalism: "One of a kind of communitarianism, suggests that people can normally only be motivated to care for and preserve the environment of their locality, and that the factor of scale makes global environmental problems incomprehensible. Hence society should be organised on the basis of natural territorial units with which people can identify (bioregions like the catchment area of a river such as the River Dart in Devon) and efforts should be made to promote the local self-sufficiency of such regions" in Robin Attfield *The Ethics of the Global Environment.* Edinburgh Studies in Global Ethics, p.157

[51] For example, the operations of the Severn Rivers Trust.

this paper. However, of particular relevance is the need to invoke it to deal with transboundary responsibilities for common resources like the oceans[52] There are also strong arguments[53] that the PTD should apply to a far broader array of natural resources including protection of the Earth's atmosphere.

4 SUMMARY

This paper has shown how evolution of the PTD is increasingly giving legal rights in the public to defend the natural resource law. Forty years on from Joseph Sax's seminal article, environmental quality concerns are paramount but the doctrine has been more widely adopted in constitutional law and statute. The main barrier to further adoption in the global north and western capitalist economies appears to be due to complex regulatory frameworks which distance communities from natural resource stewardship. Whilst access to environmental justice remains a global challenge, the PTD is a tool which could be better utilised by environmental activists, including global and local NGOs to challenge the role of state sovereignty over the stewardship of natural resources. A state can, if it chooses, lay the legal groundwork for the establishment of commons governance over common pool resources that are part of the State's public trust[54].

Current management of the UK coast illustrates how multiple public bodies managing resources across the land-sea interface limits public engagement in decision-making. However, the fiduciary duties of The Crown Estate[55] together with the potential role of the third sector and NGOs have potential to further

[52] Christopher Stone (2009) and Mary Turnipseed et al. (2009)
[53] For example, Mary Christina Wood in *Nature's Trust, supra* Ch.6 note 62
[54] Burns Weston & David Bollier, 2013 p.241
[55] Barrett (2015)

trusteeship duties, especially where catchment or coastal partnerships are already mobilising participatory engagement. Recent legal standing granted for rivers in countries with indigenous communities, may offer new routes for highly regulated countries where ‘bottom-up’ governance mechanisms are gaining momentum - some philosophers believe that only through bottom-up community focus will global sustainability be achieved[56].

Global ethics for the environment need fostering at all levels; through international treaties, state sovereignty, public bodies, private interests and local stewardship initiatives. Humans do not own the earth (its land or oceans) but hold them on a provisional basis as trustees. The PTD has potential to further global trusteeship[57] and the spread of participatory democracy at all levels of decision-making, especially if NGOs at the global and local level, north and south, advance its application away from general obligations to act for the public benefit, and towards their obligation as a trustee of public resources.

[56] Fritjof Capra and Hugo Mattei (2015)
[57] Robin Attfield (2015) p.180

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We live towards …"the possibility of lives of participation in a larger scene, in which humanity is related to nature and to the shared but vulnerable natural environment of the planet, ..in which human beings are global stewards as well as global citizens, and the planetary biosphere a trust"

Robin Attfield in *The Ethics of the Global Environment (2015) p.240*

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[i] The reason for focusing on inshore waters and the coastal zone is due to the author's PhD study on participative engagement mechanisms which support stewardship of the coast.