NORTH EAST LAW REVIEW

NEWCASTLE UNIVERSITY EST. 2013

Volume 2
Issue 1
2014

North East Law Review

Volume 2
Issue 1

January 2014

North East Law Review

Newcastle University

Board of Editors

Foreword

Message from the General Editor

Welcome to Issue One, Volume Two of the North East Law Review. Following on from last year's successful launch of Volume One, the Editorial Board has endeavoured to continue publishing the highest quality work from the students of Newcastle University. This Issue is the result of sustained hard work and enthusiasm from everyone involved. I would like to thank our contributors for allowing us to publish their excellent work. It is a pleasure for us to edit articles of such a high standard. Secondly, I wish to thank all of the administrative and library staff for their constant assistance. My particular thanks go to: the Head of School, Professor Christopher Rodgers, for helping us gain financial support, to our staff liaisons, Mr Colin Murray and Dr Nikki Godden for their advice, and to Mr Richard Hogg, Mr Jamie Stogden and Miss Catherine Dale for the many hours that they have spent assisting us with graphic design, imagery and printing. Finally, leaving the most important thank you until last, I would like to thank the Members of the Editorial Board for their time and effort spent on the Law Review so far this year. Without the enthusiasm and dedication shown by our editors, the Law Review would not be possible. By picking up a copy today, you are showing support for hours of voluntary hard work – thank you!

Catherine Caine

Message from the Managing Editor

It is a great pleasure to be acting as the Managing Editor of the North East Law Review this year. Being part of the NELR Editorial Board is a rewarding and life-learning experience as it provides students with the opportunity to publish their work and to engage with the legal academic community. As one of our core aims is to encourage a culture of research excellence, this year's Editorial Board has created a series of educational seminars concerning advice on legal writing, legal research, career development, and publishing. Alongside this, we have encouraged students, as well as academics, who have a passion for legal writing, to contribute to our Current Legal Issues Blog. I hope that students have benefited vastly from engaging with the North East Law Review thus far, and that the Review will continue to provide a platform for them to explore the benefits of legal writing and research in future.

Lida Pitsillidou

The Editorial Board would like to thank all of the staff and students from Newcastle University who have helped in the creation of this Issue. Without their support, the Law Review would not be possible. Particular thanks are owed to Mr Richard Hogg who has spent many hours designing the front cover for this issue.

For its financial support, the North East Law Review is indebted to Newcastle University Law School for providing funding for printing costs.

University of Newcastle upon Tyne
NE1 7RU

This volume should be cited as (2014) 2(1) N.E.L.R.

Table of Contents

THE 'SOVEREIGNTY' DEBT CRISIS?

GRANT HOLLIS[*]

An exploration of how the sovereign debt crisis has affected the legitimacy and democratic credentials of the economic and monetary union. This paper will offer a discussion of the attribution of legal, political and financial authorities within European constitutional frameworks. This will be examined in the light of the Global Financial Crisis of 2007, with particular attention paid to the effect on Member States. It will be examined whether sovereign states are still in control of their domestic affairs, and a debate will be provided surrounding the possibility that the sovereign debt crisis has developed into a sovereignty crisis. Ordoliberalism, a philosophical legal theory, has contributed to the separation of macroeconomic policy from politics, and is thus a key way of exploring the topic. Despite the challenges posed in creating an Economic and Monetary Union, it has not resulted in a sufficient increase in democratic political integration. Ultimately, this paper will reach a conclusion as to whether or not an increase in political integration is purely a Utopian ideal within the Eurozone.

1 INTRODUCTION

The Global Financial Crisis of 2007 caused not only financial turmoil in the European Union (EU) but set the scene for the sovereign debt crisis that jeopardised the solvency of individual Member States and threatened the Economic and Monetary Union (EMU) as a whole. The fallout from the subprime mortgage collapse in the United States[1] acted as a precursor for the European sovereign debt crisis as the vulnerabilities of Member States became exposed.

Greece, Cyprus, Spain, Italy, Portugal and Ireland were all vulnerable for a variety of reasons. Greece had pursued unsustainable economic growth fuelled by a domestic demand boom to the detriment of its external competitiveness.[2] This was furthered by severe irregularities in Greek accounting procedures that exposed their debt to GDP ratio at 13.6% rather than their initial assertion of 3.7%.[3]

---

[*] Grant Hollis, Newcastle University, LLB (Hons) Law.

[1] Carmen Reinhart and Kenneth Rogoff, 'From Financial Crash to Debt Crisis' (2011) 101 American Economics Review 1676, 1702.

[2] European Commission, *The Economic Adjustment Programme for Greece* (Occasional Papers 61, Directorate General for Economic Affairs, May 2010) <http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf> accessed 27 March 2013, 6.

[3] ibid 8.

Cyprus[4] and Ireland[5] were vulnerable due to imbalances that had built up in the domestic banking sector and became heavily exposed during the onset of the 2007 financial crash. The southern countries, Spain,[6] Italy[7] and Portugal[8] presided over an increase in private debt largely fuelled by low interest rates in southern Europe. This caused a debt-fuelled boom that led to an external lack of competitiveness making it hard to compete in a global economic downturn.

The response to the sovereign debt crisis saw the Council, the Troika (ECB, Commission and IMF) and individual Member States assist in refinancing these countries through a combination of direct lending and indirect funding.[9] In return the lenders have imposed strict 'conditionalities'[10] that effectively amount to economic micro-management. As a large creditor of the bailouts and a strong political force, Germany has exerted their influence over the 'conditionalities' that have been imposed.

The notable influence of Germany has led to the view that we are now in a 'Europe Speaking German', to the detriment of democratic control and accountability by sovereign governments.[11] As such, this paper will explore whether the sovereign debt crisis has been transformed into a sovereignty debt crisis, where democratically legitimate sovereign states are no longer in control of their domestic affairs. By critically evaluating the governance of the EMU, it will be recognised that the response to the sovereign debt crisis presents considerable challenges to both the legitimacy and democratic credentials of the EMU. These challenges can only be overcome through deeper political integration. However, as will be conceded, the sovereign debt crisis has created a political climate that is counterintuitive to further

[4] Council Recommendation 2011/C210/04 on the National Reform Programme 2011 for Cyprus and delivering a Council opinion on the updated stability programme of Cyprus, 2011-2014 [2011] OJ C210/12.
[5] European Commission, *The Economic Adjustment Programme for Ireland* (Occasional Papers 76, Directorate General for Economic Affairs, February 2011) <http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf> accessed 27 March 2013, 11.
[6] European Commission, *The Financial Sector Adjustment Programme for Spain* (Occasional Papers 188, Directorate General for Economic Affairs, October 2012) <http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp118_en.pdf> accessed 27 March 2013, 8.
[7] Council Recommendation 2011/C215/02 on the National Reform Programme 2011 for Italy and delivering a Council opinion on the updated stability programme of Italy, 2011-2014 [2011] OJ C215/4.
[8] European Commission, *The Economic Adjustment Programme for Portugal* (Occasional Papers 79, Directorate General for Economic Affairs, June 2011) <http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp79_en.pdf> accessed 27 March 2013, 4.
[9] Patrick O'Callaghan and Joanna Gray, 'Legal Perspectives on Tensions at the Heart of the 'Project'' (2011) Robert Schuman Centre for Advanced Studies Policy Paper 2011/04, 27 <http://cadmus.eui.eu/bitstream/handle/1814/18736/RSCAS_PP_2011_04.pdf?sequence=1> accessed 27 March 2013.
[10] Case C-370/12 *Pringle v. Ireland* [2012] OJ 2012/C303/30.
[11] Jan-Herman Reestman and Leonard Besselink, 'The Fiscal Compact and the European Constitutions: "Europe Speaking German"' (2012) 8 European Constitutional Law Review 1, 7.

integration.[12] The lack of trust and solidarity amongst EU citizens makes such a proposition look like a utopian ideal.

This paper will be set out as follows. Section two will outline three theoretical presuppositions that will be referred to in subsequent discussions and that underline the overall theory. Firstly, writings during the enlightenment era provide a contextual underpinning for this paper in which sovereignty is grounded in the self-determination of the people.[13] Secondly, the concept of sovereignty can be auto-positioned wherever self-determination is adequately provided for,[14] and finally that self-determination is legitimised through a combination of input and output mechanisms.[15] This provides a basis on which to explore how the self-determination of European citizens has been frustrated in the sovereign debt crisis and as such, how the sovereign debt crisis has been transformed into a sovereignty debt crisis.

Section three will discuss how the conception of the EMU at Maastricht placed reliance on output orientated mechanisms of self-determination. Through the influence of Ordoliberal philosophy, German negotiators at Maastricht sought to insulate macroeconomic policy away from politics in independent institutions such as the European Central Bank (ECB)[16] and through constitutional safeguards,[17] such as the Treaty on Stability, Coordination and Governance (Fiscal Compact).[18] The exploration of Ordoliberal philosophy not only provides a contextual underpinning but also offers a topical insight into the rhetoric of a 'Europe speaking German'.[19]

Section four will build upon the contextual discussion of the independence of the ECB in section three and note how in comparison to other central banks, the ECB exerts a high degree of independence.[20] The response of the ECB to the debt crisis undermined a key principle of output legitimacy in adhering to institutional norms through its purchase of secondary debt instruments under the Securities and Market

[12] Fritz Scharpf, 'Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis' (2012) Max-Planck Institute for the Study of Societies Discussion Paper 12/6, 29 <http://www.mpifg.de/pu/mpifg_dp/dp12-6.pdf> accessed 26 April 2013.
[13] Jim Miller, *Rousseau: Dreamer of Democracy* (Yale University Press 1984) 105.
[14] Richard Joyce, 'Sovereignty after Sovereignty' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 38.
[15] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 6.
[16] Ray Barell and Karen Dury, 'Choosing the regime: Macroeconomic Effects of UK Entry into the EMU' (2001) 38 Journal of Common Market Studies 625, 629.
[17] Remi Colliat, 'A Critical Genealogy of European Macroeconomic Governance' (2012) 18 European Law Journal 6, 8.
[18] European Council, 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' ('Fiscal Compact') <http://www.consilium.europa.eu/media/1478399/07_-_tscg.en12.pdf> accessed 28 March 2013.
[19] Reestman and Besselink (n 11) 7.
[20] Fabian Amtenbrink and Kees Van Duin, 'The European Central Bank before the European Parliament: theory and Practice after ten years of monetary dialogue' (2009) 34 European Law Review 561, 566.

Programme (SMP).[21] Given the long-term unfeasibility of the SMP, liquidity is now provided to sovereigns through an intergovernmental fund in the form of the European Stability Mechanism (ESM)[22] and European Financial Stability Fund (EFSF).[23] In return for providing liquidity the funders of the ESM and EFSF have sought to impose strict conditionalities amounting to detailed economic micro-management. This has served to frustrate the preferences of European Citizens in both creditor and recipient countries.

Section five will use the theory of Ordoliberalism to explore the theoretical foundations of the Fiscal Compact and will expose three problems that undermine its legitimacy; namely its passage outside the confines of the Lisbon Treaty, the economic implications of pan-European austerity and the practical problems of constitutionalising economic rules.

The final section will conclude with an evaluation of the proposed direction towards greater integration in the EMU. Whilst the vision of a 'genuine EMU' is that of more central fiscal and economic coordination,[24] there has not been an adequate increase in democratic political integration. The only way to create a democratic and legitimate EMU that satisfies the self-determination of European citizens is by creating a democratic and political union that is capable of European economic governance. This will allow European citizens to exercise a preference over the economic policy that affects their daily lives.[25]

However, the response to the sovereign debt crisis has caused effects that are counterintuitive to deeper political integration. As such this paper will begin to make some preliminary recommendations to improve the legitimacy and democratic credentials of the EMU.

2 SOVEREIGNTY AND DEMOCRACY: THREE CONTEXTUAL PRESUPPOSITIONS

Before turning to the substantive discourse of this paper it is necessary to outline three theoretical presuppositions that inform subsequent discussions. Firstly, it is necessary

[21] Francesco Drudi, Alan Durre and Francesco Paolo Mongelli, 'The Interplay of Economic Reforms and Monetary Policy: The Case of the Eurozone' (2012) 50 Journal of Common Market Studies 881, 889.
[22] Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro ('ESM Treaty') [2011] OJ L91/1.
[23] European Financial Stability Fund, *Articles of Incorporation* (Luxembourg 6 December 2011) <http://www.efsf.europa.eu/attachments/efsf_articles_of_incorporation_en.pdf?> accessed 28 March 2013.
[24] Herman Van Rompuy, José Manuel Barroso, Jean-Claude Juncker and Mario Draghi, 'Towards a Genuine Economic Monetary union' (Report For European Council, 5 December 2012).
[25] Stefan Collignon, 'Towards a Genuine Economic and Monetary Union' (Directorate General For Internal Policies, Report for European Parliament's ECON Committee, 17 December 2012) <http://www.europarl.europa.eu/document/activities/cont/201212/20121213ATT57988/20121213ATT57988EN.pdf> accessed 28 March 2013, 28.

to explore the grounding of sovereignty in self-determination.[26] Secondly, this paper will advance the theory that sovereignty can be auto-positioned wherever self-determination is adequately provided for.[27] Finally, it is necessary to draw upon the work of Shcarpf who recognises that self-determination can be achieved through a combination of input and output mechanisms.[28]

Basing this paper upon the concept of sovereignty can be rightly questioned. The concept of sovereignty is both highly ambiguous and contested.[29] R.G. Collingwood, the English Philosopher and Historian, argues that it acts as a 'smokescreen' that conceals political issues.[30] Others have argued that we are now in an era after sovereignty where the concept should no longer be used in modern political and legal discourse.[31] The discussion of sovereignty could constitute a paper in itself without coming to a definitive conclusion. Despite its conceptual misgivings the overarching concept of sovereignty provides for a useful tool of polemics.[32] It allows for an exploration into the ascription of power over a territory and the normative duties that flow from the post-modern concept of sovereignty, namely, a grounding in the self-determination of the people.

2.1 Sovereignty and Self-determination

Historically, sovereignty defined the dominion of the monarchs and their unrivalled power.[33] The prevailing idea of sovereignty was synonymous with the absolute power of the King as evident in the proclamation by Louis XV claiming that that 'Sovereign power resides in my person alone...It is from me alone that my policies take their existence and their authority'.[34] However, the prevailing idea of sovereignty in asserting the divine right of Kings did not go uncontested.

Writing in 1579, some 200 years before the proclamation of Louis XV, the Huguenot author Mornay asserted that 'kings receive their royal status from the people; the whole people is greater than the King'.[35] Despite this early contestation the emergence of sovereignty grounded in self-determination did not gain real prominence until the work of Rousseau during the enlightenment era.

---

[26] Miller (n 13) 105.
[27] Joyce (n 14) 38.
[28] Shcarpf (n 15) 6.
[29] Hent Kalmo and Quentin Skinner, *Sovereignty in Fragments* (Cambridge University Press 2010) 1.
[30] Robin George Collingwood, *Essays in Political Philosophy* (Oxford University Press 1989) 106.
[31] Joyce (n 14) 61.
[32] Martti Koskenniemi, 'Vocabularies of sovereignty-powers of paradox' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments* (Cambridge University Press 2010) 239.
[33] Miller (n 13) 119.
[34] ibid 120.
[35] Philippe de Mornay, 'Vindiciae contra tyrannos' in Julian Franklin (trs), *Constitutionalism and Resistance in the Sixteenth Century* (Pegasus 1969) 190.

Rousseau's use of sovereignty was no longer empire but *volonté.*[36] He asserted that the essence of sovereignty should be found in a democracy rather than a monarchy. In '*Lettres écrites de la montagne'* (Letters from the mountain) Rousseau wrote: 'In a democracy where the people is sovereign...there resides law and authority'.[37] In 'Letters to D'Alembert' he indicated that democracy is a form of sovereignty, 'in a democracy, the subjects and the sovereign are only the same men considered in different relations'.[38] For Rousseau democracy as a form of sovereignty offered a valuable check on the abuse of power through the scrutiny of all citizens.[39] Rousseau's concept of sovereignty became synonymous with democracy and provided a basis for later thinkers to develop the concept.

A notable development came through the emergence of representative democracy both during and after the French Revolution where self-determination could be expressed through a representative in a national assembly.[40] Alexis de Tocqueville developed the concept on the basis of his experience in the United States and attributes self-determination as being grounded in the name of the people and represented in national legislative assemblies.[41] This theory accords with modern day political thought and the popular conception of sovereignty as being vested in national legislative assemblies, somewhat reflective of Dicey's Parliamentary sovereignty.[42]

This raises questions about where the post-modern concept of sovereignty (as grounded in the self-determination of the people) should lie in an age of modern governance structures such as the EU. Asking such a question has undertones akin to the well-established debates in the democratic deficit literature.[43] Whilst this paper may have nuances that are attributable to this debate it is not the main thrust of this discussion, which seeks to primarily explore how the current constitutional framework of euro-zone governance presents considerable challenges to both sovereignty and democracy.

It is not possible to do justice to the intricate works of Rousseau, Tocqueville and Dicey in this brief summary but suffice to acknowledge their contribution of developing a concept of sovereignty that is grounded in the will of the people. This

---

[36] Miller (n 13) 120.
[37] Jean Jacques Rousseau, *Lettres écrites de la montagne* (University of Toronto Digital Library 1765).
[38] Miller (n 13) 105.
[39] ibid 5.
[40] Thomas Paine, *Rights of Man* (Oxford University Press 1998) 223.
[41] Alexis de Tocqueville, *Democracy in America* (London, Saunders and Otley 1835).
[42] Albert Dicey, *Introduction to the Study of The Law of the Constitution* (5th edn, Online Library of Liberty 1885) <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1684&Itemid=27> accessed 26 April 2013.
[43] Andreas Follesdal and Simon Hix, 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsk' (2006) 44 Journal of Common Market Studies 533; Giandomenico Majone, 'Europe's Democratic Deficit: The Question of Standards' (1998) 4 European law Journal 5; Moravcsik A, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union' (2002) 40 J Comm Mar St 60.

provides a basis to explore how the self-determination of European citizens has been frustrated in the sovereign debt crisis and as such explore how the sovereign debt crisis has been transformed into a sovereignty debt crisis.

2.2 Sovereignty is Auto-Positioned through Self-Determination

The second theoretical presupposition of this paper builds upon the discussion of postmodern sovereignty being grounded in self-determination and recognises that a claim to sovereignty can be auto-positioned wherever self-determination is provided for.[44]

Richard Joyce reasons that in contrast to the theories that advocate the indivisible nature of sovereignty, sovereignty can be asserted wherever self-determination is provided for.[45] He develops the work of Derrida who draws a relationship between sovereignty and self-determination.[46] For Derrida, a legitimate sovereign is grounded by self-authorisation and having the ability to exercise a salient preference over issues that the sovereign is responsible for.[47]

Joyce qualifies this with a recognition that despite the ability of sovereignty to be auto-positioned it cannot be claimed by anyone and must have an adequate grounding.[48] For Joyce, this grounding comes through a relationship with the community. A sovereign cannot be sovereign for the sake of being sovereign; it is dependent on a relation to the community and self-determination.[49]

This theory and the inextricable connection between sovereignty and self-determination form a contextual basis on which to advance the view that the EMU, with the right institutional design, can be capable of responding to the salient preferences of European citizens through a form of democratic economic governance. This paper proposes that if self-determination can be adequately provided for at the European level then the concept of sovereignty can also be satisfied at the European level through the expression of self-determination.

Asserting that citizens can look to the EU as sovereign is a bold claim, given the national patronage that comes associated with the concept of sovereignty. Whilst such a claim may bring with it connotations of European patronage, the likes of which were rejected in the Constitutional Treaty,[50] such a claim exaggerates the extent of this dissertation's proposition. The theory of this paper presupposes that as sovereignty can be auto-positioned, it can be satisfied wherever self-determination is

[44] Joyce (n 14).
[45] ibid 38.
[46] ibid.
[47] Jacques Derrida, *Rogues: Two Essays on Reason* (Pascale-Anne Brault and Michael Nass tr, Stanford University Press 2005) 12.
[48] Joyce (n 14) 46.
[49] ibid 45.
[50] Treaty Establishing a Constitution for Europe [2004] OJ C310/47.

adequately provided for. It seeks to overcome the premise that sovereignty is indivisible, encapsulated by Neil McCormick's assertion that 'sovereignty is like virginity...once lost...it never comes back'.[51]

2.3 Input and Output Legitimacy

The third theoretical presupposition draws upon the work of Scharpf in recognising that the exercise of self-determination through a governing authority can be legitimised by a combination of input orientated and output oriented mechanisms.[52]

Scharpf describes input orientated democratic thought as 'government by the people' where political choices are legitimate if and because they reflect the 'will of the people'.[53] Input orientated mechanisms of legitimacy are derived by the authentic preferences of the members of a community and commonly associated with the rhetoric of participation and consensus.[54] Scharpf notes that because input mechanisms may result in sacrifices by individuals in the name of collective benefice, input mechanisms are dependent on a 'thick' collective identity; something that the EU lacks.[55] He reasons that individuals will accept sacrifices on the basis that fellow citizens will be more willing to trust in the benevolence of fellow citizens if there is trust in a collective sameness which arises from pre-existing commonalities of history, language, culture and ethnicity.[56]

By contrast, the output perspective emphasises 'government for the people'.[57] Here, political choices are legitimate if and because they effectively promote the common welfare of the constituency in question. Shcarpf recognises that in governance some problems need to be solved through longer-term, independent and specialised institutes. In contrast to input mechanisms, output legitimacy can rely on a 'thin' collective identity where there is no shared history, culture or ethnicity. Shcarpf recognises that methods of output legitimacy are not grounded in representative forms of democracy but rather institutional norms that hinder the abuse of public power and facilitate effective problem solving in the name of public interest.[58]

Shcarpf reasons that the EU relies on output orientated mechanisms of legitimacy, as it does not have the 'thick' collective identity needed to exercise effective input legitimacy with the lack of a European people.[59] However, the preference afforded to output legitimacy can no longer stand in the aftermath of the sovereign debt crisis.

---

[51] Neil MacCormick, 'Sovereignty Myth and Reality' (1995) 11 Scottish Affairs 1, 2.
[52] Shcarpf (n 15).
[53] ibid 7.
[54] ibid.
[55] ibid 8.
[56] ibid 9.
[57] ibid 11.
[58] ibid.
[59] ibid 12.

The imposition of detailed and stringent conditionalities in bailout programmes are frustrating the salient preferences of European Citizens as intergovernmental institutions became involved in domestic economic micro-management.[60] As Scharpf notes, intergovernmental legitimacy cannot legitimise discretionary interventions in individual member states.[61] Additionally, the Fiscal Compact,[62] in entrenching a constitutional policy of austerity, has hollowed out the domain of national budgetary autonomy to the detriment of national governments that are influenced by the self-determination of a domestic electorate.

The EMU can no longer rely solely on mechanisms of output legitimacy and on borrowed national legitimacy through intergovernmentalism. The EMU must be legitimate in its own regard and start adequately responding to the salient preferences of European Citizens through deeper political integration. The use of sovereignty as a normative tool facilitates a discussion as to the ascription of power over a territory and allows for an exploration into the duties that flow from the post-modern concept of sovereignty being grounded in self-determination. It also creates a theoretical underpinning to advance the view that the EMU can be capable of providing for the self-determination of European citizens through a system of democratic economic governance.

The following sections will discuss how the constitutional framework of the EMU does not adequately provide for the self-determination of European citizens and will also note how the course of action adopted during the sovereign debt crisis has further undermined the legitimacy and democratic credentials of the EMU.

3 THE FOUNDING OF THE EMU: A TENSION BETWEEN MACROECONOMIC GOVERNANCE AND DEMOCRACY

The EMU formed an important strand of the re-launch of European integration in the 1980s and 1990s.[63] The Maastricht Treaty encompassed bold principles to introduce a single currency and unified monetary policy managed by an independent European Central Bank.[64]

The challenge to conventional norms by transferring monetary policy to central bankers at the EU level meant that countries would be sacrificing a key preserve of domestic policy making and more symbolically, their own currencies. As such, each country had to be satisfied that the structure and governance matched the aims of their domestic remits.

---

[60] ESM Treaty (n 22).
[61] Scharpf (n 12).
[62] Fiscal Compact (n 18).
[63] Kenneth Dyson and Kevin Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press, 1999) 3.
[64] Consolidated Version on the Treaty on the Functioning of the European Union [2010] OJ C83/102.

The negotiations at Maastricht were influenced by many causal theories and as Dyson and Featherstone state, 'To attribute integration to one causal theory would be like putting reality into a straight jacket'.[65] For the purposes of this paper it is useful to focus on the influence of German Ordoliberalism as an informing theory. It creates a contextual basis on which to explore the democratic credentials of the European Central Bank (ECB) in the next section and also the influence of constitutionalising economic principles in Section five. It also offers a topical insight into the rhetoric that we are now in a 'Europe speaking German'.[66]

3.1 The Influence of Ordoliberalism

German negotiators had the national tradition and experience of post-war Ordoliberal economics as their reference point in negotiations at Maastricht.[67] This stressed the importance of price stability managed by an independent central bank and constitutionalising economic principles.[68] Dyson and Featherstone note that the German negotiators saw it as their responsibility to ensure these features of Ordoliberal economics were replicated at the EU level.[69]

Ordoliberalism came to fruition in the context of the Weimar crisis consisting of economic depression, conditions of ungovernability, austerity and entrenched class positions.[70] Using this as a starting point, Walter Eucken, the primary architect of Ordoliberalism, sought to develop an alternative to school of Historicism that failed to provide answers to the complex economic developments of the period.[71]

Eucken fashioned a new relationship between law and economics and as such developed 'rules for the economic game'.[72] The failure of *laissez-faire* economic governance in the late 1920s proved to Eucken that the economy could not be left to organise itself.[73] He sought a third way between *laissez-faire* liberalism and collective forms of political economy by constitutionalising economic principles.[74]

---

[65] Dyson and Featherstone (n 63) 1.
[66] Reestman and Leonard Besselink (n 11) 7.
[67] Dyson and Featherstone (n 63) 14.
[68] David Gerber, 'Constitutionalizing the Economy: Germany Neo-liberalism, Competition Law and the "New Europe"' (1994) 42 American Journal of Comparative Law 25, 72.
[69] Dyson and Featherstone (n 63) 20.
[70] ibid 1.
[71] Gerber (n 68) 34.
[72] Viktor Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism' (2004) *Freiburg Discussion Papers on Constitutional Economics 04/11,* 5 < http://www.walter-eucken-institut.de/fileadmin/bilder/Publikationen/Diskussionspapiere/04_11bw.pdf > accessed 26 April 2013.
[73] Werner Bonefiled, 'Freedom and the Strong State: On German Ordoliberalism' (2012) 17 New Political Economy 633, 634.
[74] Vanberg (n 72).

Constitutionalising Economics

Eucken's guiding principles meant that the economic constitution was essentially a political decision as to how the economic life of a nation should be structured.[75] He believed that setting out these rules in constitutional terms would provide the philosophical basis on which the state could guide what Adam Smith termed, the 'free hand of the market'.[76] This holistic conception was meant to influence a process dimension he termed *Ordungspolitik,* where all laws provided principles of economic conduct and where government officials would be prevented from intervening in the markets at their discretion.[77]

The Ordoliberal wariness of majoritarian influences to a large extent accords with Shcarpf's theory of output legitimacy. Scharpf recognises that 'government for the people' derives legitimacy from its capacity to solve problems that require collective solutions.[78] Output legitimacy insulates certain institutions away from majoritarian influence in order to benefit from long-term policy making and institutional expertise.[79]

Dyson and Featherstone recognise the influence of Ordoliberalism on the German chancellors Erhard and Kohl who were heavily involved in negotiating the ERM at council meetings and informal bi-lateral agreements with France.[80] Germany insisted on erecting strict and detailed convergence tests to assess the capability of their partners, to allay the already sceptical Ordoliberals that the area would remain economically stable. [81] Their insistence on state administered rules also conformed to the lack of central fiscal coordination in the EU. However, the problems with relying on states to administer rules for excessive deficits, nominal convergence and no bailout clauses are evident when looking at the current problems in the EMU.

For all Germany sought to limit the power of government intervention in the market through the reliance on detailed rules, they were not overtly concerned with ensuring the economic framework was democratic as they believed that legitimacy would derive from the inherent design of the system and positive economic benefit.

3.2 Monetary Stability and an Independent Central Bank

Monetary stability was also a key concern for German Ordoliberals who, as O'Callaghan recognises, have the painful memory of hyperinflation etched into their

---

[75] Razeen Sally, 'Ordoliberalism and the Social market: Classical Political Economy from Germany' (1996) 1 New Political Economy 233, 234.
[76] Remi Colliat, 'A Critical Genealogy of European macroeconomic Governance' (2012) 18 European Law Journal 1, 12.
[77] Gerber (n 68) 46.
[78] Shcarpf (n 15) 11.
[79] ibid.
[80] Dyson and Featherstone (n 63) 284.
[81] ibid 277.

perspective.[82] Ordoliberals see price stability as being central to the contract between state and society and as forming the basis of economic and political decision making.[83] They reason that it provides stable foundations for society to exist and are still very wary of the memories of hyperinflation.[84]

Ordoliberals see an independent central bank as a paradigm for maintaining price stability and as a fundamental part of the German economic constitution. Their requirement for an independent central bank highlights their underlying apprehension of the democratic masses. Having an independent central bank allays concerns that the central objective of price stability will be jeopardised by mass society and the merciless culture of the wage dependent proletariat.[85] Röpke argued against the power of financial capitalism and expressed concern that mass democracy would favour compensatory fiscal policies.[86] For Germany, an independent central bank was a non-negotiable requirement. This was underpinned by the strength of the Deutschmark, which was never devalued and allowed the Bundesbank to form the basis of ECB.[87]

3.3 Ordoliberal Influences in Response to the Debt Crisis

From a wider perspective German Ordoliberal thinking can be seen to influence the current response to the sovereign debt crisis. The influences of Müller-Armack and Erhard as previous Chancellors in the Christian Democrat Party (CDU) are still visible in the policy response advocated by Merkel.[88]

Germany, as a large contributor to the EFSF,[89] ESM[90] and through bi-lateral loans, has been keen to promote their own solution to the crisis.[91] The response to the sovereign debt crisis has favoured sweeping austerity, wage moderation and balanced budget rules,[92] all of which have a distinct Ordoliberal influence. Ordoliberal principles can also be through the Fiscal Compact in constitutionalising economic rules and through a wariness of majoritarian influence with decisions being made

---

[82] Patrick O'Callaghan, 'Collective memory in law and policy: the problem of the sovereign debt crisis' (2012) 32 Legal Studies 642, 648.
[83] Ray Barrell and Karen Dury, 'Choosing the regime: Macroeconomic Effects of UK Entry into EMU' (2001) 38 JCMS 625, 629.
[84] O'Callaghan (n 82) 10.
[85] Sally (n 75) 245.
[86] ibid.
[87] Christopher Allen, 'Ordo-liberalism trumps Keynesian in the Federal Republic of German' in B Moss (ed) *Monetary Union in Crisis: The European Union as a Neo-liberal Construction* (London, Palgrave Macmillan 2005) 215.
[88] Miles Johnson, 'Germany backs Spanish Austerity plans' *Financial Times* (London, 24 July 2012) <http://www.ft.com/cms/s/0/ff95df08-d592-11e1-b306-00144feabdc0.html#axzz28zCa9S5K> accessed 14 September 2012.
[89] EFSF (n 22).
[90] ESM Treaty (n 23).
[91] Desmond Dinan, 'Governance and Institutions: Impact of the Escalating Crisis' (2012) 50 Journal of Common Market Studies 85, 88.
[92] Council Recommendation 2010/190/EU of 16 February 2010 to Greece with a view to ending the inconsistency with the broad guidelines of the economic policies in Greece and removing the risk of jeopardising the proper functioning of economic and monetary union [2010] OJ L83/65.

through inter-governmental and supranational institutions.[93] As such, the influence of Germany in the EMU goes beyond the rhetoric of a 'Europe speaking German'.[94]

The wariness of majoritarian influences shows a preference for output legitimacy coming from institutional independence and expertise. Whilst output legitimacy is an effective method of legitimising institutions and policy making, it is dependent on the qualification that the specified institution acts in accord with institutional norms,[95] which in this instance are the European treaties. As the next section will demonstrate the actions of the ECB during the sovereign debt crisis have to a large extent undermined this key qualification.

4 THE DEMOCRATIC CREDENTIALS OF THE EUROPEAN CENTRAL BANK

Whilst the influences behind an independent ECB can be traced in part to Ordoliberalism,[96] they can also be analysed through a wider body of economic and political evidence that advocates the merits of independent central banking.[97] This section will explore how the increase in the competencies to the ECB during the sovereign debt crisis has not been matched by an increase in accountability.

4.1 The Theoretical Foundations of an Independent Central Bank

The concept of independent central banking recognises that a central bank, overtly influenced by the political will of Government, is susceptible to short-term policy making.[98] Such short-term policy making could potentially be over-expansionary with governments seeking to inflate the economy with excess spending to create jobs, increase GDP and boost their credentials for re-election.[99] It was widely believed that a high degree of central bank independence would assure price stability, restrain inflation and prevent monetary policy being used as a political tool.[100]

Majone recognises that such 'short-termism' is the most obvious consequence of the temporal limitations on democratically elected governments.[101] The segmentation of

[93] Fiscal Compact (n 18).
[94] Reestman and Besselink (n 11).
[95] Scharpf (n 15) 13.
[96] Fabian Amtenbrink and Kees Van Duin, 'The European Central Bank before the European Parliament: theory and Practice after ten years of monetary dialogue' (2009) 34 European Law Review 561, 566.
[97] Rene Smits, *The European Central Bank: Institutional Aspects* (Kluwer Law International 1997) 159.
[98] Christopher Taylor, 'Role and Status of the ECB: Some prospects for accountability and cooperation' in Colin Crouch (eds), *After the Euro: Shaping Institutions for governance in the wake of Economic and Monetary Union* (OUP 1999) 183.
[99] ibid.
[100] Jakob De Haan and Sylvester Eijffinger, 'The Democratic Accountability of the European Central Bank: A Comment on Two Fairy-tales' (2000) 38 Journal of Common Market Studies 393, 394.
[101] Giandomenico Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions' (1996) European University Institute Working Paper 96/57 <http://cadmus.eui.eu/bitstream/handle/1814/1472/RSCAS_1996_57.pdf?sequence=3> accessed 5 October 2012, 1.

the democratic process into short-term electoral periods creates a disincentive for long-term policies.[102] As such, democratic politicians have few incentives to develop policies that will come into fruition after the next election.[103] Independence also alleviates the problem of time-consuming political deliberations and allows more qualified and experienced individuals to manage monetary policy.[104]

From an early stage the concept of an independent central bank was deemed necessary with recognition of this in the Delors report.[105] The monetary experts involved in negotiating the Maastricht treaty considered an independent central bank an important element in the EMU, despite concerns about its high degree of independence and the lack of democratic influence.[106]

4.2 One of the World's Most Independent Central Banks

In comparison to other central banks, such as the Federal Reserve and the Bank of England, the ECB ranks as one of the most independent central banks in the world.[107] The ECB has a high degree of autonomy through a combination of factors namely the independence of its personal, fiscal arrangements and policy remit.[108]

In terms of a policy remit, the primary objective of the European System of Central Banks (ESCB) is to maintain price stability.[109] Without prejudice, the ECSB and ECB shall also contribute to the achievement of the general economic policies in the EU and maintain financial stability.[110]

Verdun notes that the ECB gains its legitimacy from staying within strict accordance of its narrow mandate of price stability and operating within the parameters set out in the treaty.[111] This also accords with Scharpf's assertion that output legitimacy is grounded in institutional norms.[112] Begg and Green reason that the narrow remit confers legitimacy as it creates an ascertainable method of appraisal.[113] By operating within these parameters it demonstrates that the ECB is acting legally which confers

---

[102] ibid.
[103] ibid.
[104] Amtenbrink (n 96) 563.
[105] Smits (n 97) 154.
[106] Amy Verdun and Thomas Christiansen, 'Policies, Institutions and the Euro: Dilemmas of Legitimacy' in Colin Crouch (eds), *After the Euro: Shaping Institutions for governance in the wake of Economic and Monetary Union* (OUP 1999), 167.
[107] ibid 566.
[108] De Haan and Eijffinger (n 100) 394.
[109] Protocol No 4 on the Statute of the European System Central Banks and the European Central Bank ('Statute of the ECB') [2010] OJ C83/230.
[110] ibid, art 2 OJ 83/230.
[111] Amy Verdun, *The Euro: European Integration Theory and Economic and Monetary Union* (Rowman and Littlefield Publishers 2002) 140.
[112] Scharpf (n 15) 13.
[113] Iain Begg and David Green, 'The Political Economy of the European Central Bank' in Phillip Arestis and Malcolm Sawyer (ed), *The Political Economy of Central Banking* (Edward Elgar 1998) 124.

an inherent sense of legitimacy. However, the operations of the ECB during the sovereign debt crisis would appear to jeopardise such a proposition.

4.3 The Role of the ECB During the Crisis

The ECB expanded its monetary policy by means of secondary market purchases from credit institutions in the debt securities market through the Securities Market Programme (SMP).[114] The ECB justified this on the basis of correcting malfunctioning markets and remedying a liquidity shortage that could risk a credit crunch.[115] It first started its purchase of Eurozone periphery sovereign debt under the SMP in May 2010 and has expanded its interventions through a range of instruments.[116] The ECB implemented longer term refinancing options by indirectly acting as a lender of last resort for Spain and Italy by facilitating the purchase of their debt by domestic banks in the primary issue market.[117]

As De Grauwe explains, the ECB's intervention was justified because of the problems caused by a sovereign debt crisis occurring in a monetary union.[118] In a monetary union there is an inherent connection between sovereign debt and liquidity problems. For example, monetary union investors, in a country such as Spain at risk of sovereign default, may sell government bonds because of the risk of default and reinvest the euros they have received from the sale in a more stable country such as Germany. Unlike an independent country such as the UK, where the investors are likely to reinvest pounds in the UK, euros can be reinvested in a more stable country causing a liquidity problem.[119] Moreover, the Bank of England has the ability to buy government securities unlike the ECB, which furthers the risk of a liquidity crisis.[120]

The legality of the SMP is questionable given that Article 123(1) of the TFEU forbids the purchase of debt instruments by the ECB and Article 125, as the 'no bailout' clause prevents the Union assuming the liabilities of the Member State.[121] However, the ECB denies acting as lender of last resort for sovereigns as this would be a violation of its treaty obligations.[122]

---

[114] Francesco Drudi, Alan Durre and Francesco Paolo Mongelli, 'The Interplay of Economic Reforms and Monetary Policy: The Case of the Eurozone' (2012) 50 Journal of Common Market Studies 881, 889.
[115] ibid 890.
[116] Willem Buiter and Ebrahim Rahbari, 'The European Central bank as a Lender of Last Resort for Sovereigns in the Eurozone' (2012) 50 Journal of Common Market Studies 6.
[117] ibid.
[118] Paul De Grauwe, 'Governance of a Fragile Eurozone' (2011) 346 Centre for European Policy Studies Working Document <http://www.ceps.eu/book/governance-fragile-eurozone> 3.
[119] ibid.
[120] ibid 5.
[121] Anne Sibert, 'Role of the ECB in Financial Assistance Programmes' (Directorate General for Internal Policies, Policy Department A: Economic and Scientific Parties, European Parliament Committee on Economic and Monetary Affairs 07/07/12) <http://www.europarl.europa.eu/document/activities/cont/201207/20120702ATT48166/20120702ATT48166EN.pdf> accessed 5 October 2012, 4.
[122] Drudi et al (n 114) 893.

De Grauwe holds that the ECB's decision to buy government bonds under the SMP does not represent a violation of the treaties on the basis of Article 18 and 21 of the Statute of the ECB.[123] Article 18 allows the ECB to operate in financial markets by buying and selling marketable instruments, such as governments bonds.[124] Article 21 prohibits the overdrafts and the purchase of debt instruments from public entities. As such, he reasons that the ECB is allowed to buy government bonds in the secondary market as it does not provide credit to governments and instead provides liquidity to the holders of government bonds, typically financial institutions.[125]

4.4 Post Crisis: The EFSF and ESM

Whilst this may be strictly true, the actions of the ECB are tenuous and led to the perception that the ECB was acting as *de facto* lender of last resort.[126] At the very least the SMP stretched the ECB's remit and violated the spirit of the treaties.[127]

The unfeasible nature of the ECB's action led it to the establishment of two bailout funds through in the form of the EFSF[128] and ESM.[129] The ESM is a permanent bailout fund established as an intergovernmental organisation in international law.[130] The ESM replaces the EFSF and serves to provide financial assistance to Eurozone countries facing financial difficulty.[131] The task of the ESM (and its predecessor the EFSF) is to provide liquidity to governments experiencing a liquidity shortage and also reduce the risk of moral hazard by imposing tough 'conditionalities' on the governments that seek financial assistance.

The establishment of the EFSF and ESM is particularly problematic for enhancing democratic accountability and legitimacy in the Eurozone. The intergovernmental nature of the ESM and its establishment as an organisation in international law places it outside the remits of the treaties, and outside the remit of EU procedures and accountability. Scharpf recognises that whilst intergovernmental input legitimacy can sustain general rules applying to all members, it cannot legitimate discretionary interventions in individual member states through the imposition of 'conditionalities'.[132]

---

[123] Paul De Grauwe, 'The European Central Bank: Lender of Last Resort in the Government Bond Markets' (2011) 3659 Centre for Economic Studies Institution of Finance Working Papers <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1927783> accessed 28 March 28, 2013, 11.
[124] Phoebus Athanassiou, 'Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What is Legally Possible (and what is not)' (2011) 36 European Law Review 558, 566.
[125] ibid.
[126] Willem Buiter and Ebrahim Rahbari, 'The European Central Bank as Lender of Last Resort for Sovereigns in the Eurozone' (2012) 50 Journal of Common Market Studies 6.
[127] Sibert (n 121) 11.
[128] EFSF (n 23).
[129] ESM Treaty (n 22).
[130] ibid.
[131] ibid.
[132] Scharpf (n 12) 29.

The Commission's Economic Adjustment Programme for Ireland suggests a structural reform package to underpin growth, with the specific reference to a readjustment of the national minimum wage.[133] Although prepared by the Commission, the influence of the ECB is apparent given their formalised role in the ESM Treaty and as part of the Troika. Whilst the Pringle[134] judgment held that the ESM Treaty did not increase the powers of the ECB, the court failed to appreciate the influence that the ESM Treaty gives the ECB in jointly assessing request for stability with the commission. The ECB also exert a high degree of both informal and formal influence as one of the three institutions in the troika. This is most salient in their influence over Ireland in pressuring the country to accept a bailout from the EU.[135]

4.5 Pringle: Entrenching Conditionalities

The legality of the ESM Treaty was affirmed in Pringle; a case that challenged the validity of the Council Decision creating the ESM and its compatibility with treaty provisions relating to the governance of the EMU.[136]

The validity of the ESM was upheld on the basis that it does not confer any new competences on the Union and, even though it makes use of the Union's institutions, this does not undermine its validity. In relation to its compatibility with Article 123 TFEU, which prohibits the ECB from granting overdraft facilities to Member States, the Court held that the application of this article was not relevant as it only applied to the ECB.[137] The reasoning of the court allowed the ESM as an intergovernmental institution to circumvent the treaty provisions. In a clear need to avoid the restrictions of Article 123[138] the Council resorted to establishing a mechanism outside the confines of the treaty. This fundamentally undermines the grounding of output legitimacy in institutional norms.[139]

In relation to Article 125, the 'no-bailout' clause, the court upheld the ESM treaty on the basis of two qualifications.[140] Firstly, the court held that Article 125 is qualified by Article 122(2) in that it provides for assistance in exceptional circumstances.[141] Secondly, the court reasoned that the ESM is compatible with Article 125 on the qualification that funding through the ESM is based on compliance with the attached conditionality.[142] The court reasoned that the imposition of conditionalities accords

[133] Economic Adjustment Package for Ireland (n 5).
[134] Pringle (n 10).
[135] Karl Whelan, 'The ECB's Secret Letter to Ireland: Some Questions' (*Forbes* 17 August 2012) <http://www.forbes.com/sites/karlwhelan/2012/08/17/the-ecbs-secret-letter-to-ireland-some-questions/> accessed 12 October 2012.
[136] Pringle (n 10) 186.
[137] ibid 128.
[138] Consolidated Version on the Treaty on the Functioning of the European Union [2010] OJ C83/99.
[139] Scharpf (n 15) 13.
[140] Pringle (n 10) 129.
[141] ibid 131.
[142] ibid 135.

with the purpose of Article 125 in ensuring that Member States maintain budgetary discipline and a commitment to the financial stability of the monetary union.[143]

The establishment of the ESM and the role of the ECB in the ESM and the Troika is problematic as economic micro-management is now being controlled through intergovernmental operations and the highly independent ECB. As Scharpf recognises, it is tenuous to suggest that these institutions are indirectly legitimated through the operation of intergovernmentalism.[144] European citizens in the affected Member States are no longer able to influence microeconomic management through democratic input. Instead their preferences are being frustrated by the operation of intergovernmentalism and the dominance of key financiers in the ESM; namely, Germany. This furthers the proposition the need for a democratic political union that is capable of economic governance.

4.6 The Increasing Role of the ECB not Matched by an Increase in Accountability

Despite the increase in competencies, the accountability of the ECB has not been increased. The main objection to the high level of independence afforded to the ECB, as recognised by the literature[145] and indeed the ECB itself[146] are its lack of democratic credentials.

The Statute of the ECB is particularly biased in its treatment of independence over accountability, perhaps due to the large influence of monetary experts involved in the drafting at Maastricht.[147] The provisions in the Statute of ECB concerning accountability are extremely vague and allow discretion in their execution.[148] The only real requirements of accountability require the ECB to draw up and publish quarterly reports and a weekly financial statement alongside an annual report.[149]

Whilst the legal framework is particularly vague in terms of its requirements it must be noted that the ECB does exceed its treaty obligations. The ECB publishes monthly bulletins rather than the required quarterly one.[150] The annual report of the ECB now includes a dedicated section on accountability and communication.[151] The ECB also publishes other documentation detailing policy positions, macroeconomic projections and information relevant to the general public.[152] The President of the ECB reports on a quarterly basis to the European Parliament's Economic and Monetary Affairs

[143] ibid.
[144] Scharpf (n 12) 29.
[145] Verdun, *The Euro: European Integration Theory and Economic and Monetary Union* (n 111) 129.
[146] European Central Bank, *The Monetary Policy of the ECB 2011* (European Central Bank 2011) <http://www.ecb.int/pub/pdf/other/monetarypolicy2011en.pdf> accessed 28 March 2013, 86.
[147] Verdun and Christiansen (n 106) 168.
[148] The Statute of the ECB, art 10.2 (n 109).
[149] ibid.
[150] European Central Bank, *Annual Report 2011* (European Central Bank 2011) <http://www.ecb.int/pub/pdf/annrep/ar2011en.pdf> accessed 5 October 2011, 144.
[151] ibid.
[152] ibid.

(ECON) where the discussion involves wide-ranging macroeconomic issues and not just monetary stability.[153]

As such, reporting on monetary policy is the principal method of accountability for the ECB.[154] However, this level of disclosure and reporting fall short of the level of accountability needed for the ECB.[155] Although the president of the ECB appears before the EP on a quarterly basis, an in-depth analysis of the monetary dialogue reveals a defensive rather than constructive dialogue. This point is illustrated by a frank discussion between Philippe Lamberts MEP and Mario Draghi in a recent ECON monetary dialogue.[156] Mr Lamberts questions the unaccountable nature of the ECB drawing a comparison to a 'Chinese-style regime' and calls for the ECB to use Article 129 of the ECB treaty to improve their transparency.[157]

4.7 The ECB's Relationship with the EP: Some Qualifications

In addition to increasing their transparency through disclosure, the ECB seeks to legitimise its operations by building a relationship with the EP. As noted above, the only obligation on the ECB is to address an annual report on the activities of the ESCB to the European Parliament.[158] Although the treaty remains weak on its legal requirements, Amtenbrink notes a maturing of the relationship between the EP and ECB through the monetary dialogue.[159]

There are many theoretical reasons that support the role of the EP in holding the ECB to account.[160] Amtenbrink reasons that in a liberal democracy it serves as a reminder that elected governments delegate powers.[161] The majority of commentators[162] and indeed the ECB in its annual reports[163] recognise the importance of accountability and oversight coming from the EP. As the only elected institute in the EU it is understandable that the EP perform a role in the oversight of the ECB. Indeed, the relationship between a central bank and a parliament has to play a major role in the evaluation of democratic accountability of the central bank.[164]

---

[153] ibid 145.
[154] Smits (n 97) 172.
[155] Jakob De Haan, Fabian Amtenbrink and Sandra Waller, 'The Transparency and Credibility of the European Central Bank' (2004) 42 Journal of Common Market Studies 775, 788.
[156] Committee of Economic and Monetary Affairs, 'Monetary Dialogue with Mario Draghi' (European Parliament, Committee on Economic and Monetary Affairs, 9 July 2012) <http://www.europarl.europa.eu/document/activities/cont/201208/20120820ATT49771/20120820ATT49771EN.pdf> accessed 12 October 2012, 9.
[157] ibid.
[158] The Statute of the ECB, art 15 (n 109).
[159] Amtenbrink (n 96) 562.
[160] Nicolas Jakbo, 'Democracy in the age of the Euro' (2003) 10 Journal of European Public Policy 710.
[161] Amtenbrink (n 96) 565.
[162] ibid; De Haan and Eijffinger (n 100) 402.
[163] European Central Bank (n 150) 144.
[164] Jakob De Haan and Fabian Amtenbrink, 'Democratic accountability and central bank independence: A Response to Elgie' (2000) 23 West European Politics 179, 182.

Yet, whilst the EP does have a role to play in the oversight of the ECB, its role must be qualified by its inherent limitations. The EP lacks may qualities in providing for adequate input legitimacy, as recognised by Scharpf.[165] It is considered weak when compared to national parliaments and other institutions in the EU and has extremely low turn out in elections.[166] It has low visibility and a lack of confusion surrounds its operation.[167] As such, the EP's ability to provide legitimacy to the ECB needs to be qualified by its own inherent limitations in providing legitimacy.

4.8 A Legitimate Future for the ECB?

This section has demonstrated that the increased role of the ECB in the Troika and its role in the ESM has not been qualified by an increase in its accountability. The ability for the ECB to influence economic micro-management through the imposition of 'conditionalities' is to the detriment of democratically elected governments.

It should be recognised that whilst the ECB has gone over and above its treaty requirements in terms of transparency, this is not sufficient given the wide-ranging remit of the ECB. The accountability and level of transparency in the ECB needs to be reflective of its level of responsibility.[168]

One method of doing this would be to adopt the recommendation of De Haan and Eijffinger in affording a role to the EP in setting the definition of monetary stability along with the ECB.[169] This proposition will be fully substantiated at the end of this paper but it is useful to briefly acknowledge the possibility of a role for the EP in setting the definition of Monetary Stability in the present discussion.[170] Such a mechanism operates in New Zealand and has the ability to improve the accountability and legitimacy of the EMU.[171]

5 THE FISCAL COMPACT: A RETURN TO CONSTITUTIONAL ECONOMICS?

> 'The Constitution is not intended to embody one particular economic theory'
> - Justice Oliver Wendell Holmes[172]

In addition to the increased role for the ECB, the sovereign debt crisis has resulted in a range of legislative responses to remedy the defects in the design of the EMU. The

---

[165] Scharpf (n 12) 29.
[166] A Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union' (2002) 40 *Journal of Common Market Studies* 60.
[167] ibid.
[168] Jakob De Haan and Laurence Gormley, 'The Democratic Deficit of the European Central Bank' (1996) 21 European Law Review 95, 97.
[169] De Haan and Eijffinger (n 100) 398.
[170] ibid.
[171] ibid.
[172] *Joseph Lochner, Plaintiff in Error v. People of the State of New York* 198 U,S, 45, 76 (1905).

Fiscal Compact was designed to remedy the lack of budgetary discipline in Member States by enshrining a golden rule to prevent excessive deficits in national constitutions. The German inspired solution has its roots beyond the influence of Chancellor Merkel with core principles being influenced by Ordoliberal thinking. It is problematic on three accounts. Firstly, the passage of the Fiscal Compact outside the confines of the treaty process raises questions about the legitimacy of its passage. Secondly, there are fundamental problems of constitutionalising economic principles and finally its effects in creating a pan-European austerity policy.[173]

5.1 Fiscal Ill-Discipline in Member States

From the onset of the sovereign debt crisis it became apparent that there were fundamental problems with the design of EMU.[174] The leniency of Member States in their own budgetary discipline and the lack of supervision from the EU led to burgeoning state debt exposing the fragility of the EMU project.[175]

A notable example of this is Greece.[176] The country pursued unattainable economic growth with a GDP of 4% compared to an EU GDP averaging 2% bringing with it a domestic demand boom and inflationary pressures leading to a decline in external competitiveness that is seen through its decline of external trade to just 19% of GDP in 2009.[177] Greece grew its public sector from 44% of economic output in 2000 to over 50% in 2009, and failed to reform a burdensome health and pension system.[178] This was furthered by irregularities in their accounting system with the realisation that their debt to GDP ratio stood at 13.6% rather than 3.7%.[179]

The legislature responded largely through the 'Six Pack' of five regulations[180] and one directive[181] with the aim of instilling budgetary discipline in Member States. These

[173] Robert Boyer, 'The four fallacies of contemporary austerity policies: the lost Keynesian legacy' (2012) 36 Cambridge Journal of Economics 283, 291.
[174] Fabian Amtenbrink, 'Responsive and Responsible European Economic Governance?-Modeling the European Union's Answer(s) to the Euro Area Debt Crisis' (Second ACELG Annual Conference, University of Amsterdam, November 2012).
[175] ibid 6.
[176] Kevin Featherstone, 'The Greek Sovereign Debt Crisis and EMU: A failing state in a skewed regime' (2011) 49 Journal of Common Market Studies 193.
[177] Economic Adjustment Programme for Greece (n 2).
[178] ibid.
[179] ibid.
[180] Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation (EC) No 1466/97 on the of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8; Regulation (EU) No 1176/2011 of European parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25 ('Six Pack').

measures failed to have sufficient impact in the financial markets and did not enhance the public perception that political leaders were taking robust action to combat the fiscal ill discipline of the past. [182]

5.2 A Political Solution to an Economic Problem

For those funding the bailouts there was a need to find a solution that appeased both the financial markets and domestic electorates. Chancellor Merkel was under increased political pressure because of the feeling that German taxpayers were bailing out 'club med'.[183] This created the need for a robust response to allay fears of Moral Hazard. A consensus between France and Germany emerged that advocated instilling fiscal discipline into the EU treaties.[184] Both Merkel and Sarkozy felt that this would send out a strong and symbolic message to both the markets and their domestic electorate. The pressure on Chancellor Merkel was evident in the constitutional court challenges providing aid to Greece[185] and the establishment of the ESM.[186]

The proposition was to strengthen EU oversight over Member States economic policy by amending the Lisbon Treaty through a treaty change requiring unanimity.[187] However, the UK vetoed the opening of a treaty revision process, which prevented any change to the primary law. Publically, this unwillingness was because of a lack of safeguards for the UK financial sector,[188] although this claim remained unsubstantiated when probed by the House of Lords EU Committee.[189] A more realistic interpretation could be attributed to domestic euro sceptic pressures in Mr. Cameron's conservative party.

Given the opposition of the UK and Czech Republic, the 25 participating countries resorted to an international treaty outside the confines of the Lisbon Treaty to instil budgetary discipline.[190] Such recourse is questionable given the possibility to utilise

---

[181] Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks for Member States [2011] OJ L306/1.
[182] Paul Craig, 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism' (2012) 37 European law Review 231.
[183] Josef Joffe, 'Berlin is right to say no gain without pain' Financial *Times* (London, 21 March 2013) <http://www.ft.com/cms/s/0/33250226-9240-11e2-851f-00144feabdc0.html#axzz2OqUlaeIq> accessed 28 March 2013.
[184] Matjaz Nahitgal and Bojan Bugaric, 'The EU Fiscal Compact: Constitutionalisation of Austerity and Preemption for Democracy in Europe' (University of Primorska, Slovenia) <http://works.bepress.com/matjaz_nahtigal/1/> accessed 1 November 2012.
[185] *Constitutional Complaint against the aid measures for Greece* 2 BvR 987/10 (German Federal Constitutional Court).
[186] *Application for a temporary Injunction in respect of the ESM* 2 BvR 1390/12 (German Federal Constitutional Court).
[187] Craig (n 182), 231.
[188] Kenneth Armstrong, 'Stability, Coordination and Governance: Was a Treaty Such a Good idea?' (*Eutopia Law,* 8 March 2012) <http://eutopialaw.com/2012/03/08/stability-coordination-and-governance-was-a-treaty-such-a-good-idea/> accessed 24 November 2012.
[189] European Union Committee, *The Euro Area Crisis* (HL 2010-12, Paper 260).
[190] Craig (n 182) 237.

the enhanced cooperation procedure under Article 20 TEU or Article 326 TFEU.[191] The use of the enhanced cooperation mechanism would have allowed for efficient use of EU resources, benefit of EU procedures and conferred an integral legitimacy on the Fiscal Compact.[192] Much like the creation of the ESM, the passage of the Fiscal Compact outside the confines of the Lisbon Treaty undermines a key component of output legitimacy being grounded in institutional norms.[193] Alternatively, the UK and the Czech Republic could have sought derogation in a similar vein to the Schengen agreement. [194]

In addition to concerns surrounding the passage of the Fiscal Compact, there are also inherent problems in constitutionalising economic rules as captured in the words of Justice Holmes quoted at the beginning of this section.

5.3 The Golden Rule

The provisions in the Fiscal Compact are largely akin to the original Stability and Growth Pact (SGP) and are to an extent consolidated from existing amendments through the 'six-pack'[195] and 'two-pack'.[196] However, this section will note the real impact comes through the requirement of constitutionalising a 'golden-rule' of deficit control which has its roots in Ordoliberal thinking.[197]

The main provision of the Fiscal Compact comes through Article 3, which states that the budgetary position of the general government should be balanced, or in surplus. This will be respected if the annual structural balance of the general government is at its country-specific medium term objective, as defined in the Stability and Growth Pact, with a lower limit of a structural deficit of 0.5%.[198] The provisions contained in Article 3 try to alleviate a fundamental flaw contained in the design of the EMU, namely the exposure of the Eurozone to the externalities of national budgets.[199]

---

[191] European Scrutiny Committee, *Reinforcing the Eurozone: Written Evidence from Professor Paul Craig* (2011-12 HC) 38.
[192] EUI Working Papers, 'Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty' (2012) <http://cadmus.eui.eu/bitstream/handle/1814/21496/LAW_2012_09_Kocharov_ed.pdf?sequence=1> accessed 23 November 2012.
[193] Scharpf (n 15) 13.
[194] Craig (n 182), 237.
[195] Six Pack (n 180) (n 181).
[196] Council of the European Union, 'Draft consolidated version of the text, incorporating the outcome of the trilogue of 20 February 2013. on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area ' (6726/13, Brussels, February 2013);
Council of the European Union, 'Draft consolidated version of the text, incorporating the outcome of the trilogue of 20 February 2013: Regulation on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits in the Member states of the Euro area'(6726/13, Brussels, February 2013).
[197] Vanberg (n 72).
[198] Fiscal Compact (n 18) art 3.
[199] EUI Working Paper (n 192) 5.

The essence of 3(1)(b) is somewhat similar to regulation 1466/97 as amended in 2011, where deficits cannot exceed 1% of the structural deficit.[200] Although the provision is slightly lower in 3(1)(b), the substance of this provision is contained in regulation 1466/97. It is arguable therefore that this could have been revised in accordance with the correct procedures to the lower limit of 0.5%, conferring an inherent sense of legitimacy and avoiding resources to an intergovernmental treaty. However, such an amendment would have lacked the impact that Merkel and Sarkozy wanted; impact that is evidenced in Article 3(2) and Article 8.

Article 3(2) imposes the requirement that the aforementioned rules take effect in binding force and permanent character, preferably constitutional. This provision affects the autonomy of national constitutional orders, where budgetary autonomy is normally the preserve of the nation state.[201] It also accords with core Ordoliberal principles that economic principles can be preserved in constitutions.

Article 8 facilitates the ability of a Member State to bring an action before the Court of Justice.[202] The legitimacy of Article 8 in allowing for a Member State to bring such an action before the Court of Justice is questionable given that not all Member States have agreed for the Commission and Council to have the Court powers utilised in this way. Although the court in *Pringle*[203] held that the use of Union institutions outside the confines of the Treaties did not inhibit the legality of the ESM, it should be noted that such recourse has negative consequences for legitimacy. The use of Article 8 will also mean the Court of Justice deciding upon intricate issues of national constitutional law and entering into the autonomy of national constitutional orders.[204] This is problematic given the already prominent influence the ECB and Commission have over national budgets. This became apparent when it was reported that the Irish Budget had reached the German Bundestag before arriving in the Irish Parliament.[205]

Although the Council legal service have confirmed the validity of using the Court in such a way,[206] it is not possible to explore the reasoning of the Council Legal Service any further due the confidentiality of their internal proceedings. Despite the request of this author using regulation 1049/2001[207] as the basis to access public documents, the Council Legal Service will not disclose their reasoning because of concerns that it will undermine the protection of the financial, monetary or economic policy of the Union.[208]

---

[200] Craig (n 182) 235.
[201] Reestman and Besselink (n 11) 2.
[202] Fiscal Compact (n 18) art 8.
[203] Pringle (n 10).
[204] Reestman and Besselink (n 11) 4.
[205] BBC, 'German Parliament given Irish Budget Plan' *BBC* (London, 18 November 2011) <http://www.bbc.co.uk/news/world-europe-15788530> accessed 1 November 2012.
[206] Craig (n 182) 235.
[207] Council Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ C144/43
[208] Letter to author from European Council Legal Service (17 January 2013).

The requirement of Article 3 in constitutionalising budgetary discipline could be seen as reflecting core Ordoliberal values. Eucken believed that setting out economic rules in constitutional terms provided a sound basis on which the 'free hand of the market could operate'.[209] The principle of constitutionalising economic principles is also evident in Article 115(2) of the German Constitution[210] further demonstrating the influence of Germany in the current crisis.

By enshrining a requirement that the structural deficit remains at 0.5% it restricts the ability of national parliaments to pursue economic policies that are favoured by domestic electorates. Reestman and Besselink justify this on the basis that it makes the requirement self-imposed in national constitutions.[211] However, this is questionable especially considering the conditionality of acceding to the Fiscal Compact and receiving assistance from the ESM.[212] Budgets are normally the domain of the national sovereigns and are now a matter of constitutional law where major players with extensive powers of control and sanction are supranational institutions.[213]

This restriction on input legitimacy impacts upon both democratic legitimacy and accountability.[214] As Dyson recognises, economic governance has been hollowed out at the national level.[215] The hollowing out at the national level has not been replaced by an increase in democratic governance at the European level. Constitutions are inherently inflexible documents making it difficult for them to reflect salient and current economic preferences.

In addition to concerns about the impact on democratic viability this next section will analyse how the practical problems in the implementation of the 'golden rules' will undermine the legitimacy and effectiveness of the Fiscal Compact.

5.4 The Constitution is not Intended to Embody One Particular Economic Theory

It is apparent that the policy of austerity has now become the mantra across Europe as countries seek to restore their finances to a more sustainable level. In an economic assessment conducted by Creel, Hubert and Saraceno they note that the EU is using deficit reduction as an *objective* of policy action rather than an *instrument* of policy.[216] This is problematic as deficit reduction needs to be balanced with growth led policies rather than being used as an end in itself.[217]

---

[209] Vanberg (n 72).
[210] ibid 24.
[211] Reestman and Besselink (n 11) 6.
[212] Fiscal Compact (n 18).
[213] Jérôme Creel, Paul Hubert and Francesco Saraceno, 'An Assessment of Stability and Growth pact Reform Proposals in a Small-Scale Macro Framework' (2012) French Economic Observatory, 11/18 <http://hubertpaul.free.fr/JCPHFS_Revised.pdf> accessed 24 November 2012.
[214] Amtenbrink (n 174) 18.
[215] ibid.
[216] Creel, Hubert and Saraceno (n 213) 18.
[217] ibid 2.

The use of objectifying economic aims through constitutional rules is a key element of Ordoliberal thinking.[218] Eucken advocated the reliance on detailed rules for the economic rules, which effectively made the economic rules in the constitution a political decision as to how to structure economic life.[219] Such a concept is problematic generally because of the robust nature of the constitution and the problems in amending it. This problem is exaggerated in the European Union that is made up of a plurality of political persuasions. The idea of constitutionalising a rule that effectively implements pan-European austerity is also problematic in its implementation.

De Grauwe recognises that when all Eurozone countries are forced to accept austerity at the same time, deflationary forces are set in motion that lower output and government revenues through the constitution.[220] Research carried out by IMK highlights that austerity measures across Europe are likely to push large parts of the EU into a recession.[221] This is not only damaging for the economies of Europe but for Europe's democratic credentials, as European citizens are now faced with a restriction on their ability to exercise input legitimacy.

The balanced budget rule constitutionalises a policy of austerity which brings with it fundamental implications for the personal economic situation of Member State citizens. An economic course pursuing austerity has an impact on economic growth, employment and social welfare. Having an inbuilt course of austerity in national constitutions fundamentally restricts the ability of European citizens to exercise effective democratic input and self-determination. Given that further integration in EMU appears to be the political choice, the redistribution of economic policy tools needs to be equated with an increase in democratic input and accountability at the European level through the creation of a democratic political union that is capable of economic governance.

5.5 The Imprecision of Calculating Structural Budget Deficits

Another problem in implementing the Fiscal Compact is the level of difficulty in calculating the structural budget deficit. This can be seen in the contrast between figures provided by the EU Commission and the IMF in relation to the Irish structural budget deficit where the difference of 6.5% equates to €11.5billion. [222] The margin of

[218] Vanberg (n 72).
[219] ibid.
[220] Paul de Grauwe, 'Balanced budget fundamentalism' (CEPS Commentaries 5 September 2011) <http://www.ceps.eu/book/balanced-budget-fundamentalism> accessed 1 November 2012.
[221] IMK, OFCE and WIFO, 'Fiscal Compact deepens Euro Area Crisis' (Macroeconomic policy institute) < http://www.boeckler.de/pdf/p_imk_report_71e_2012.pdf> accessed 1 November 2012.
[222] Nevin Economic Research Institute, 'Information note on the Fiscal Compact Treaty' (May 2012), 13 < http://www.nerinstitute.net/download/pdf/neri_fiscal_treaty_note_may2012_final.pdf> accessed 1 November 2012.

error in measuring the structural deficit at 0.5% implies a great deal of precision that will be hard to achieve in practice.[223]

The effectiveness of the Fiscal Compact is further jeopardised when an analysis is undertaken of the current level of compliance with the 0.5% requirement. The below graph from the Nevin Economic Research Institute is an assessment of compliance with the 0.5% requirement or 1% in the case of Bulgaria, using data from the European Commission.[224] The data shows that only 6 countries are currently compliant. Whilst the Commission have flexibility in implementing Article 3 of the Fiscal Compact, the prevailing policies of austerity are compounding sluggish growth[225] and do not appreciate that if well managed and sustainable, public deficits can be beneficial.[226]

Chart 8. EU Commission Estimates of the Government Structural Deficit in 2011 [5]

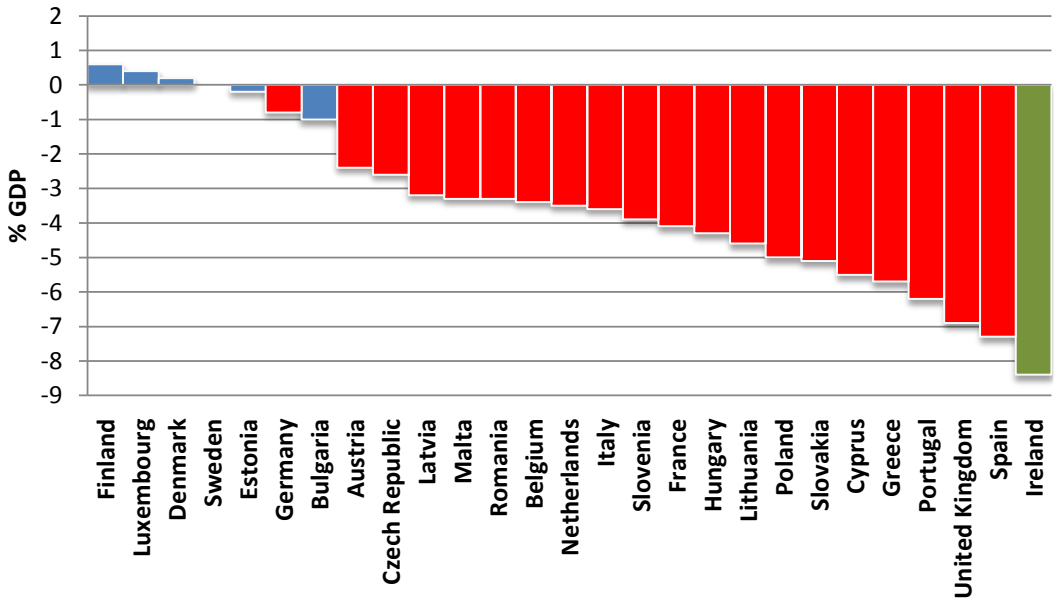

Diagram no.1: Nevin Economic Research Institution[227]

If countries are unable to comply with the stringent nature of the Fiscal Compact then this will serve to further undermine the legitimacy of the provision. Equally, if it goes unenforced, as did the original Stability and Growth Pact[228] then its impact will be negligible.

Chart 3 shows the different estimates by the EU Commission and IMF of the structural deficit. As can be seen, using the latest methodology, and even with the benefit of hindsight, the EU Commission estimates that in 2006 the structural balance was 2.2% (an upward revision from 1.7% which was estimated at the time). Given the structural deficit permitted is 0.5%, this suggests (even with the latest methodology and with the benefit of hindsight) it might have been possible for Ireland to have spent an additional 2.7% in GDP or €4.8 billion (or reduce taxes accordingly).

Whilst the announcement of the Fiscal Compact went some way in reassuring the markets and the domestic electorates in creditor countries such as Germany, it is apparent upon further analysis that the legality and economic basis of the Fiscal Compact can be questioned. The passage of the Fiscal Compact serves to frustrate the self-determination of European citizens and is likely to result in further distrust

[223] It is useful to compare historical and cross-agency performance on estimation of the structural deficit. The IMF (2012b) has estimated that Ireland had a 'structural' budget deficit of 4.5% of GDP in 2006, whereas the EU Commission (2012a, b) has estimated that it had a 'structural' surplus of 2.2% in the same year (Chart 8). For that year the difference in estimates was 6.5% of GDP, equivalent to €11.5 billion. At the very least, targeting a structural deficit of 0.5% requires an ability to measure to an accuracy greater than 0.5%. However, on average the difference in estimate between the EU and

[224] ibid.
[225] ibid 8.
[226] Nahtigal and Bugaric (n 184) 19.
[227] Nevin Economic Research Institute (n 222).
[228] European Council Resolution of 17 June 1997 on the Stability and Growth Pact OJ C 236/1.

amongst EMU Member States. This is compounded by the rigid nature of constitutions and the imprecise nature of calculating structural deficits. It is for these reasons that Justice Holmes asserted that 'the constitution should not embody one particular economic theory'.[229]

The next section will explore the move towards further economic and fiscal integration as proposed by the Presidents of the European Council, Commission, Central Bank and Euro-group. The section will note that whilst efforts have been made to deepen economic integration this has not been matched by an increase in democratic political integration, to the detriment of control by democratically accountable governments.[230]

6 IS IT POSSIBLE TO HAVE A FISCALLY INTEGRATED EUROPE THAT IS DEMOCRATIC AND ACCOUNTABLE?

The preceding sections have demonstrated the ad-hoc response to the sovereign debt crisis with recourse to unprecedented legislative action in both form and substance. In a bid to articulate a progressive future for the EMU, the Presidents of the European Council, Commission, ECB and Euro-Group, at the request of the European Council have produced a roadmap towards a 'genuine EMU'.[231] The roadmap envisages deeper fiscal and economic integration as the solution to remedy the current design of the EMU. Unfortunately this approach is not met by greater political and economic integration.

6.1 Towards a Genuine EMU

Given the fiscal ill discipline of some Member States and the somewhat piecemeal response to the sovereign debt crisis, the European Council of 14 December 2012 concluded that there was a need to strengthen EMU.[232] This was to come through a report authored by the Presidents of the Commission, European Council, ECB and Euro-group: 'Towards a Genuine Economic Monetary Union'[233] (Herein referred to as the Presidents' Report). The Presidents' Report sets out four processes of how closer integration is to be brought about:

- Integrated financial framework
- Integrated budgetary framework
- Integrated economic policy and
- Assurances of democratic accountability and legitimacy.[234]

---

[229] Lochner (n 172).
[230] Collignon (n 25).
[231] Herman Van Rompuy, José Manuel Barroso, Jean-Claude Juncker and Mario Draghi, 'Towards a Genuine Economic Monetary union' (Report For European Council, 5 December 2012).
[232] European Council, '13/14 December 2012 Conclusions' (EUCO 205/12, Brussels 14 December 2012) < http://register.consilium.europa.eu/pdf/en/12/st00/st00205.en12.pdf> accessed 28 March 2013, 1.
[233] Van Rompuy et al. (n 231).
[234] ibid 5.

Whilst the report begins to alleviate the problems caused by the lack of fiscal integration, it fails to create a genuine economic and monetary union as it leaves unsolved the disparity that exists between economic and political integration.

6.2 Integrated Financial Framework

The creation of an integrated financial framework is to be brought about through the creation of a single banking supervisor that will be the ECB. The ECB will be responsible for safeguarding financial stability and ensuring an effective framework to regulate financial institutions.[235] The single banking supervisor is to be supported by the creation of the Single Resolution Mechanism (SRM) that ensures when a bank fails, the appropriate action can be taken. This will be funded by a levy on banking transactions and using the European Stability Mechanism as a credit line.[236]

In addition to the SRM and single banking supervisor, the integrated financial framework will be complemented by a harmonised deposit guarantee scheme across the union and a single rule for banks with unified capital requirements. The Council envisage that these proposals will break the vicious circle between banks and sovereigns, the problems of which are evident. It is apparent that the lack of harmonisation in the banking union has prevented genuine integration of financial markets. The lack of integration has had a spill over effect on the solvency of national governments when they acquired private sector banking debt.

Questions have been raised about the viability of the ECB taking on the role as bank supervisor for fear it may jeopardise its primary mandate of price stability. Collignon notes the concern that combining monetary and regulatory functions under one roof could lead to a conflict of interest.[237] Such a conflict can arise when the central bank resists interest rate increases for fear of de-stabilising the financial system.[238] However, this is largely dependent on the structure of the banking system, and in a more open competitive market system Collignon recognises the need for a single authority to internalise externalities.[239]

Whilst the role of the ECB as a single supervisor is a progressive step towards further integration it is inhibited by responsibility of national regulators in winding up failing banks. The ECB has regulatory powers, but no powers to actually close down a bank.[240] This dilemma reveals the paradox facing current EMU governance, and the piecemeal approach that is taken towards European Governance.

---

[235] ibid.
[236] ibid.
[237] Collignon (n 25) 17.
[238] ibid.
[239] ibid.
[240] Financial Times, 'Battle Lines Drawn for Next Stage of Integration' (London, 14 December 2012).

6.3 Integrated Budgetary Framework

The crisis has revealed the interdependence of euro-area countries and has demonstrated how national budgetary policies are of concern for the whole EMU. The Presidents' Report seeks to remedy the dependence between euro-area budgets through the creation of an integrated budgetary framework and the ex ante coordination of annual budgets.[241] This is complemented by the development a fiscal capacity for the EMU to adjust to economic shocks; a transfer union in all but name.[242] The exploration of the Fiscal Compact in the preceding section revealed how allied national budgets are to the concept of sovereignty. It is for this reason that Collignon asserts that closer integration of macroeconomic policies needs to be done in the context of efficiency and legitimacy, with the latter being conferred through democratic involvement.[243]

6.4 Integrated Economic Policy

Building on the need for an integrated budgetary framework the Presidents' Report recognises the dangers that exist in allowing Member States to pursue unsustainable economic policies. The report seeks to address the root cause of macroeconomic imbalances through contractual arrangements that focus on microeconomic sectoral reforms.[244] In essence this means greater central control over national budgets and more influence in economic micro-management.

6.5 Democratic Legitimacy and Accountability

Given that elements of macroeconomic governance are being transferred 'upwards' to the European level at the expense of democratically elected governments, the Report for the European Council sets out a series of measures to enhance democratic legitimacy and accountability.[245] However, these mechanisms are weak and do not appropriately account for the transfer of power that has taken place.

A clear theme emerges in both the European Council decision and the Presidents' Report that accountability and legitimacy will be derived from the European level.[246] The European Council have stated that 'Democratic accountability will be taken at the level in which decisions are taken and implemented';[247] this is increasingly looking like the European level given the move towards a banking union and the emergence of fiscal integration. However, the increase in economic and fiscal integration is not matched by suitable democratic political integration.

---

[241] Van Rompuy et al (n 231) 8.
[242] Martin Nettesheim, 'The Future of the Euro Zone - Political Options and Constitutional Law Restraints' (Newcastle Law School Seminar Series, Newcastle University Law School, 5 December 2012).
[243] Collignon (n 25).
[244] ibid.
[245] ibid.
[246] Van Rompuy et al. (n 231) 16; European Council Conclusion (n 232).
[247] Van Rompuy et al. (n 231) 5.

The Presidents' Report recommends that the integrated financial framework should derive accountability through reporting to the national parliaments of the participating Member States.[248] Secondly, the integrated budgetary and economic policy framework is to benefit from input legitimacy through debates and recommendations coming from the European Parliament and national parliaments.[249] The Presidents' Report does not detail any arrangements for ensuring the democratic legitimacy and accountability for the fiscal capacity of EMU, instead leaving details on specific arrangements for a future date.

The Presidents' Report concludes with an emphasis that intergovernmental arrangements will prevail and will become integrated into the legal framework.[250] This is because of the need to ensure rapid executive decisions to improve crisis management and economic policy-making.[251]

6.6 A Democratic and Political Union

Citing accountability and democracy at the European level is the right approach to take. The success and legitimacy of the EMU is largely dependent on the pursuit of the common interest of the union and the higher order of union interests as recognised in *Pringle*.[252] National Parliaments are often not best placed to take regard of these decisions instead having regard for the majoritarian national preferences.

Whilst the Presidents' Report rightly recognises the problems of national parliaments it disappointingly overlooks the problem of intergovernmentalism in promoting national interests. Although national parliaments pursue national interests,[253] the same accusation can be levied against national leaders and governments. The domestic pressure on Chancellor Merkel has seen her taking a tough stance in the conditionalities imposed through lending via the EFSF.[254] The entrenchment of intergovernmental procedures is not sustainable as it will seek to prioritise national interests at the behest of the EMU. This has led to a dominance of German inspired solutions to the crisis, largely influenced by Ordoliberal ideas.

Additionally, the reliance on intergovernmentalism does not allow for the ability of European citizens to exercise adequate self-determination. As Scharpf recognises, intergovernmentalism cannot legitimise discretionary interventions in individual member states.[255] By relying on decisions coming from an intergovernmental body, decisions will be inherently biased to certain nation states that hold a power base. At present this power base is held by Germany as a large contributor to the EFSF and bi-

[248] ibid 17.
[249] ibid.
[250] ibid.
[251] ibid.
[252] Pringle (n 10).
[253] Van Rompuy et al. (n 231) 16.
[254] Scharpf (n 12) 29.
[255] ibid.

lateral loan arrangements. Decisions of a micro-economic nature are being made by the Council and Commission and in some instances the Troika.[256] To rely on the concept that democratic governments legitimise these bodies indirectly is insufficient and falls short of conferring an adequate degree of legitimacy.

If the EMU is to progress towards greater centralisation then there needs to be an adequate increase in political and democratic integration.[257] This should facilitate the ability of European citizens to choose between economic and other policies that affect their daily lives.[258] The current reliance on output legitimacy and indirect input legitimacy is not sufficient to justify the increase in competencies of the EMU and the course adopted during the sovereign debt crisis. As sovereignty can be auto-positioned wherever self-determination is provided for then European citizens can look to Europe rather than national sovereigns as an expression of their self-determination.[259] This will alleviate the concerns expressed in the German Constitutional Court judgment that budgetary powers must remain a protected function of national constitutional identity.[260]

6.7 Interim Recommendations: Adopting a Pragmatic Approach

However, deeper political integration is dependent on both political and popular support. As Scharpf recognises, the response to the sovereign debt crisis has caused effects that are counterintuitive to deeper political integration.[261] The disastrous impact of rescue policies designed by creditor governments have provoked conflict of interest, created mutual distrust and diverging public discourse in national polities.[262] As such, the proposition of deeper political integration could rightly be recognised as a utopian ideal given the political obstacles that would likely prevent deeper political integration. This is in addition to the problems commonly referred to such as the lack of a European demos, European media and pan-European political parties.[263] Whilst such claims could be overcome with enough willingness,[264] the overwhelming lack of trust and solidarity amongst European citizens make deeper political integration look unlikely.[265]

It is understandable that the benefits of deeper political integration are yet to be realised, given that European citizens are seeing their salient preferences frustrated

[256] Collignon (n 25).
[257] ibid 28.
[258] ibid.
[259] Joyce (n 14).
[260] German Constitutional Court Judgments (n 185) (n 186).
[261] Scharpf (n 12) 30.
[262] ibid.
[263] Richard Bellamy, 'Democracy without Democracy? Can the EU's democratic 'outputs' be separated from the democratic 'inputs' provided by competitive parties and majority rule?' (2010) 17 Journal of European Public Policy 2, 15.
[264] Tobias Theiler, 'Does the European Union need a community' (2012) 50 Journal of Common Market Studies 783.
[265] Nathaniel Copsey and Tim Haughton, 'Editorial: Desperate but not serious – The EU in 2011' (2012) 50 Journal of Common Market Studies 1, 2.

through the largely unaccountable supranational institutions and the operation of intergovernmentalism. This is disappointing since the very obstacle that is commonly cited to deeper integration, which is sovereignty, could be exercised at the European level provided there was enough will from institutional actors and citizens. At present calls for deeper political integration are not forthcoming

In recognition that deeper political integration looks like an ideal, it is advantageous to make some preliminary suggestions to improve the democratic credentials and legitimacy of the EMU. This is not to avoid the challenges in advancing the concept of a European economic government; it is merely to adopt a pragmatic approach.

Firstly, a greater role could be afforded to the EP in the role of the ESM. Participant status is already afforded to the Commission, President of the Euro-group and President of the ECB.[266] Such a move would signal that regard is being had for the self-determination of European citizens and would confer a greater degree of input legitimacy by allowing for greater democratic input over the 'conditionalities' that are imposed on Member States. Such a move would likely be resisted given that creditors to the ESM will want to exert a decisive influence over how their money is being spent. However, such opposition is exactly the reason why the EP should have a role in the ESM.

Additionally, the powers of the EP's ECON committee could be strengthened in its Monetary Dialogue with the ECB. Whilst the monetary dialogue has somewhat matured over the years there is still room for improvement. The limited time of two hours of questioning by ECON is insufficient and a reading of the transcripts demonstrates that this time limit has a real impact on the debate.[267] Strengthening the inquisitorial role of the EP would boost democratic oversight of the ECB and confer a greater degree of legitimacy over its operations.[268]

Thirdly, the EP could be afforded a role in setting the definition of monetary stability that is currently the exclusive remit of the ECB. This proposition is advocated by De Haan and Ejiffinger who recognise the merits of such a system in New Zealand.[269] The New Zealand Central Bank has to agree with government a tight target range for inflation, allowing for an adequate degree of democratic input.[270] The current definition of monetary stability for the ECB is an inflation rate of around 2%. This is very vague and undermines the benefits of the ECB having a single mandate. If the Governing Council were to agree a tight definition of monetary stability in consultation with ECON subject to a review every three years, as in New Zealand, it

[266] ESM Treaty (n 22).
[267] Committee of Economic and Monetary Affairs (n 156) 10.
[268] Taylor (n 98) 184.
[269] De Haan and Eijffinger (n 100) 398.
[270] ibid.

would improve accountability and control over the ECB. This would still preserve their independence and enhance the benefit of having a single monetary objective.

Finally, the relationship between national parliaments and the EMU can and should be improved. For all national parliaments are not best placed to have regard to European wide interests, they do serve as an effective means of addressing the salient preferences of the domestic electorate.[271] Provision is already made for accountability to be derived from reporting to national Parliaments in the Presidents' report.[272] The report also recommends further input legitimacy in the integrated budgetary and economic policy framework coming from a dialogue with national parliaments.[273]

This would embrace the connection that national parliaments have with a domestic electorate[274] and would allow for the creation of a more representative discourse of input legitimacy. Any involvement of national parliaments must go beyond a mere consultative process and provide for real and substantiated decision-making.[275] Such involvement could come in binding form through an amendment to Protocol No.1 on the Role of National Parliaments.[276]

Whilst all of the above would improve Scharpf's recognition of input legitimacy, regard also needs to be had for improving the output legitimacy of the EMU. The Presidents' Report fails to recognise how the course of action adopted during the sovereign debt crisis circumvented a key grounding of output legitimacy in institutional norms.[277] For all legitimacy can be improved with greater input, a good starting point for a 'genuine EMU' would be to start acting in a genuine and legitimate manner, more specifically within the parameters of the treaties. The preceding discussions have demonstrated how recourse outside the treaties through the creation of the ESM and the Fiscal Compact has undermined a regard for due process and legitimacy.

It is both pragmatic and disappointing to recognise that deeper political integration looks unlikely at the present time. It is hoped that the recommendations set out above can go some way to improve the legitimacy and democratic credentials of EMU governance. All of the above infers that more Europe and greater integration is the course to be pursued. However, this is not the course favoured by all. For Scharpf, a

[271] Ben Crum and John Fossum, 'The Multilevel Parliamentary Field: a framework for theorising representative democracy in the EU' (2009) 1 European Political Science Review 249.
[272] Van Rompuy et al. (n 231) 16.
[273] ibid.
[274] Crum (n 271) 251.
[275] Cristina Fasone, 'The Struggle of the European Parliament to Participate in the New Economic Governance' (2012) Robert Schuman Centre for Advanced Studies EUDO Research Paper 2012/14, 2 < http://cadmus.eui.eu/bitstream/handle/1814/23429/RSCAS_2012_45.pdf?sequence=1> accessed 10 January 2013.
[276] Protocol on the Role of National Parliaments in the European Union [2004] C310/204.
[277] Shcarpf (n 15) 6.

reduction in the competencies of the EMU would be preferable.[278] He reasons that this would reduce the legitimacy burden on the EMU, as it would no longer be acting in such highly salient areas.[279] However, given the unprecedented levels that Member States have gone to in preserving the Eurozone and in recognition of the ill-discipline of Member States in the past, a path of decentralisation looks as utopian as deeper political integration.

7 CONCLUSION

Using sovereignty as an underpinning for this paper has allowed for an exploration into the ascription of power and authority in the constitutional framework of the EMU. It has served as a normative tool to discuss the responsibilities that flow from the post-modern concept of sovereignty, namely a grounding in the self-determination of the people. It has been demonstrated that the reliance of self-determination coming through indirect input mechanisms in the form of intergovernmentalism and via output mechanisms in the form of institutional independence can no longer stand in the aftermath of the sovereign debt crisis.

The ability of European citizens to exercise their self-determination has been severely restricted by the course of action adopted during the sovereign debt crisis. The ECB, as a highly independent central bank and the ESM as an intergovernmental organisation are exercising a level of influence over economic policy that is not matched by an adequate level of input or accountability. This is most notable in the imposition of 'conditionalities' that effectively amount to economic micro-management. Relying on such highly independent institutions does not allow for the adequate self-determination of European citizens. Instead, citizen's preferences are frustrated by the demands of those funding the ESM and leading to the perception that we are now in a 'Europe speaking German'.[280] This has led to a dominance of German inspired solutions to the crisis, largely influenced by Ordoliberal ideas of austerity, constitutional economics and a wariness of majoritarian influences.

In addition to the lack of effective input legitimacy, the response to the sovereign debt crisis has also frustrated a key grounding of output legitimacy in institutional norms. In this instance, compliance with institutional norms is facilitated through adherence to the European treaties, which confers an inherent sense of legitimacy and prevents abuses of public power.[281] The passage of the Fiscal Compact as an intergovernmental agreement that utilises European institutions shows a fundamental disregard for treaty compliance. Equally, the creation of the ESM as an intergovernmental organisation is a clear attempt at circumventing the restriction in the European treaties. These actions jeopardise the legitimacy of the EMU and lead to a fundamental distrust amongst European citizens in the governance of the EMU.

---

[278] Scharpf (n 12) 30.
[279] ibid 31.
[280] Reestman and Besselink (n 11).
[281] Shcarpf (n 15) 11.

As such, the most suitable way to improve the democratic credentials and legitimacy of the EMU is through the creation of democratic economic governance. This would allow European citizens to exercise input into economic issues that affect their daily lives. As the proposed direction of the EMU is towards greater economic and fiscal integration then regard needs to be had for deeper political economic integration and the creation of a governance structure that is both democratic and legitimate.

However, deeper political integration currently looks like a Utopian ideal given the lack of popular support. This is further jeopardised by the unlikelihood of Eurozone leaders relinquishing control given the level of effort they have placed into saving the Eurozone. As such, the recommendations in this paper seek to offer a preliminary method of improving the democratic credentials and legitimacy of the EMU. Given the inability of European citizens to exercise adequate self-determination it is apparent that the EMU is suffering from not only a sovereign debt crisis, but a *sovereignty* debt crisis.

THE DIFFICULT RELATIONSHIP BETWEEN FAMILY LAW AND FAMILIES

CHARLOTTE NEEDHAM[*]

This paper analyses the difficulties that arise surrounding the definition of what constitutes a 'family' and how this directly relates to changing familial structures. It is submitted that the law needs to have wider scope with which to approach diverse issues and should also evaluate the functions of families, alongside a formalistic approach. The assumption of a relationship between a family and the state, and its associated problems, are then analysed. The conclusion drawn is that whilst family law may be seen as incoherent, its arbitrary approach may be argued to bring about an essence of desired predictability.

Family law governs close emotional relationships and relations between adults, children and the state.[1] However, as families are 'fluid things which spill over into irregular shapes'[2] the related law is inevitably incoherent, making family law impossible to define as it is 'as different and unique as [the] human beings'[3] it works with. Therefore, numerous difficulties arise approaching the relationship between law and families. This stems from problems defining 'family', combined with family law's unclear role. The law is therefore subject to controversies regarding its relationship with families; highlighted through the theoretical approaches of functionalism, the public/private divide and feminism. However, this chaos is inescapable, and difficulties can be remedied if contradictions surrounding law's relationship with families are balanced.

There are dangers[4] in discussing what family law is 'unless we are clear what [is meant]… by families',[5] as to identify family law's role we must be aware which 'group of people is intended to be covered'.[6] This is important as family law confers rights, responsibilities and obligations on those falling within the families protected 'privileged status'.[7] However, as there is no 'statutory… [or] common law

---

[*] Charlotte Needham, Newcastle University, LLB (Hons) Law.

[1] Jonathan Herring, *Family Law* (5th edn, Longman, Essex 2011) 15.

[2] Carol Smart, 'Stories of Family Life: Cohabitation, Marriage and Social Change' [2000] 17 CJFL 20, 22.

[3] Andrew Bainham, 'Family Law in a Pluralistic Society' [1995] 22 JL & S 234, 236.

[4] Herring (n 1) 5.

[5] ibid.

[6] ibid.

[7] Alison Diduck, 'A Family by another Name… or StarbucksTM comes to England' [2001] 28 JL & S 290.

definition',[8] families are 'notoriously difficult to define';[9] particularly due to increasingly popular blended families.[10]

Families have 'changed so much… with… formation and functioning',[11] that it appears that the idealised 'nuclear family'[12] consisting of a husband, wife and '2.4 kids'[13] is 'on the way out'.[14] This is due to social changes including: increased cohabitation, same sex relationships, high divorce rates, dropping marriage rates, and lone parent households[15] becoming 'more… acceptable'.[16] Therefore, the traditional family is now representative of only 24% of families.[17] For example, three parent families[18] are common due to parents divorcing and remarrying, as increased individualism[19] to serve one's self makes relationships negotiable[20] and promotes 'families of choice'.[21]

Diverse families expose difficulties for family law as it 'takes shape and is given meaning through a particular… ideology'[22] of the nuclear family, thus the 'shrinking number'[23] of such pushes 'law to encompass the reality of our families'.[24] The law has had to respond to this lacuna[25] through a 'shift in constellation'[26] with regards to who is considered to be a 'family'. It was historically 'an abuse of the English language'[27] to include unmarried couples, however a 'complete revolution in society's attitude'[28] resulted in recognising unmarried couples regardless of children but still

[8] Alison Diduck & Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (2nd edn, Hart Publishing, Oxford 2006) 21.
[9] Herring (n 1) 1.
[10] Martha Minow, 'All in the Family & in All Families: Membership, Loving, and Owing' [1992-1993] 95 WVLR 275, 285.
[11] Martha Fineman, 'Progress and Progression in Family Law' [2004] 2004 UCLF 1.
[12] Sophie Borland, 'Nuclear family is "on the way out", Government advisor warns' (*The Daily Mail,* 30 November 2009) <http://www.dailymail.co.uk/news/article-1231955/Traditional-nuclear-family-broken-says-Government-advisor.html> accessed 5 March 2013.
[13] Nina Lakhani, Andrew Johnson and Jonathan Owen, 'Nuclear families? Not us!' (*The Independent on Sunday*, 24 May 2009) < http://www.independent.co.uk/news/uk/home-news/celebrating-diversity-nuclear-families-not-us-1690131.html> accessed 5 March 2013.
[14] Borland (n 12).
[15] Herring (n 1) 7.
[16] Minow (n 10) 285.
[17] Herring (n 1) 1.
[18] Frances Gibb, 'Judges are asked to rule over child who has "three parents"' (*The Times,* 7 February 2012) < http://www.thetimes.co.uk/tto/law/article3311411.ece> accessed 5 March 2013.
[19] John Eekelaar, 'Self-Restraint: Social Norms, Individualism and the Family' [2012] 13 TIL.
[20] Diduck & Kaganas (n 8) 9.
[21] ibid.
[22] ibid 12.
[23] ibid 13.
[24] Paris R Baldacci, 'Pushing the Law to Encompass the Reality of our Families: Protecting Lesbian and Gay Families from Eviction from their Homes – *Braschps* Functional Definition of "Family" and Beyond' [1993-1994] 21 FULJ 973.
[25] Diduck & Kaganas (n 8) 21.
[26] Minow (n 10) 276.
[27] *Gamman v Ekins* [1950] 2 KB 328, 331.
[28] *Dyson Holdings Ltd v Fox* [1976] QB 503, 512.

required 'permanence and stability'[29] mirroring marriage. Same sex couples have only recently been acknowledged in *Fitzpatrick v Sterling Housing Association*[30] where a 'longstanding, close, loving and faithful, monogamous homosexual relationship'[31] constituted a 'family' for the purposes of the Rent Act 1977.

Therefore, arguably 'legal rights and obligations flow from… a relationship[s] functions rather than… form'[32] in order to 'reflect… understanding of such changes… of social life'.[33] However, this may prove as rigid[34] as formalistic definitions as it still leads to excluded entities[35] if they fail to meet idealised functions. Furthermore, deciding a family's functions is problematic when they range so broadly, and are hard to prove.[36] Nonetheless, many see *Fitzpatrick* as transformative[37] as the law now recognises families previously deemed unworthy.[38] Cases regarding Article 8's 'right to family life'[39] suggest celebrations are not limited to 'the purpose of… housing law',[40] as same sex couples without children amounted to 'family life' in *Schalk and Kopf v Austria.*[41]

However, it appears these entities fall under an already established ideal,[42] thus we 'must be wary'[43] of adopting such decisions as encompassing 'brave new families',[44] as it is 'not the meaning [of the family] which has changed but those… capable of falling within the words'.[45] Law continues to uphold traditional values of nuclear families, reinforcing these qualities as the law's ideal model despite not taking strict form. Emphasis on sexual relationships[46] accentuates this, denying a 24 year old man and 75 year old woman living together constituting a 'family' due to lack of sexual relations.[47] Therefore, debatably law should prioritise 'caretaker-dependent'[48] relationships regardless of sexual relations, or replace 'family' with personal law[49] to avoid difficulties qualifying as a 'family'.

---

[29] ibid 513.
[30] *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27.
[31] ibid 32.
[32] Diduck & Kaganas (n 8) 26.
[33] *Fitzpatrick* (n 30) 51.
[34] Baldacci (n 24) 988.
[35] ibid.
[36] Herring (n 1) 3.
[37] Diduck (n 7) 291.
[38] ibid.
[39] European Convention on Human Rights and Fundamental Freedoms 1950, art 8.
[40] Diduck (n 7) 292.
[41] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).
[42] Diduck (n 7) 291.
[43] ibid.
[44] Minow (n 10) 286.
[45] *Fitzpatrick* (n 30) 39.
[46] ibid 44.
[47] *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928.
[48] Fineman (n 11) 12.
[49] John Eekelaar, *Family Life and Personal Life* (OUP, Oxford 2006) 31.

It seems 'much still needs to be done'[50] to give family lifestyles equal recognition, as law still operates with the ideal family in mind. This forms 'a hierarchy of families… with the top position taken by married couples, with unmarried heterosexual couples and same sex couples below'.[51] Thus, recent acceptance of same sex marriage[52] is a 'hollow victory'[53] as it promotes less regard for equality for families beyond marriage. Many call to abandon this hierarchy as families deserve equal worth.[54] Nonetheless, legal recognitions provide optimism that 'things are getting better for non-traditional families'[55] as social changes 'put pressure on the legal system'.[56]

Family law must categorise limits, as if 'law attempts to range too widely… [it may] fail'.[57] Sexual relation requirements ensure exclusion of friendships that do not mirror 'stability and continuity'[58] of families. Therefore, law's combined 'formalistic and function-based approach'[59] appropriately responds to social changes whilst centring notions around ideal family values to mark perimeters; the difficulty for family law is ensuring the essence of a 'family' remains without discriminating against modern relationships.

If defining 'family' is hard, inevitably 'defining family law… [is] complicated'.[60] It is unique as it needs wide scope to cover diverse issues due to the diverse nature of families.[61] This threatens the rule of law[62] ensuring certainty in the legal system as family law is 'messy, unprincipled and too… engaged with human passions'.[63] Nonetheless, this 'chaos… [is] perfectly normal'[64] and 'scarcely surprising'[65] given the social facts it must deal with, and arguably family law 'exemplifies… modern legalism'[66] through adopting 'a mix of both rules and discretion'[67] and discarding winner and loser approaches,[68] thus providing flexibility for justice.

---

[50] Bainham (n 3) 243.
[51] Herring (n 1) 6.
[52] Matt Chorley, 'Commons votes in favour of same-sex marriage by majority of 225 despite 136 hardline Tories voting against PM' (*The Daily Mail,* 5 February 2013) <http://www.dailymail.co.uk/news/article-2273546/Gay-marriage-vote-Same-sex-weddings-make-society-stronger-claims-David-Cameron.html> accessed 6 February 2013.
[53] John Dewar, 'Family Law and its Discontents' [2000] 14 IJL Pol & Fam 59, 65.
[54] Bainham (n 3) 244.
[55] Jamie Stroops, 'Law and its Impact on Non-traditional Families' [2004-2005] 34 SULR 597, 606.
[56] Martha Fineman, 'The End of Family Law? Intimacy in the Twenty-First Century' [1994] 5th Constitutional Law Symposium DLR 23.
[57] John Eekelaar, *Family law and social policy (Law in Context)* (Littlehampton Book Services Ltd, 1978) 44.
[58] Minow (n 10) 319.
[59] Herring (n 1) 6.
[60] Sonia Harris-Short & Joanna Miles, Family Law: *Text, Cases and Materials* (2nd edn, OUP, Oxford 2011) 2.
[61] John Dewar, 'The Normal Chaos of Family Law' [1998] 61 MLR 467, 468.
[62] Dewar (n 53) 78.
[63] ibid.
[64] Dewar (n 61) 468.
[65] ibid 481.
[66] ibid 469.

However, growing dissatisfaction[69] towards family law's 'broad discretionary nature'[70] is arguably pushing towards a rules and rights approach.[71] The conflict between discretion and rules stems from tension[72] between whether family law's purpose is to promote rights or welfare. Although welfare is important, there has been 'gradual reversion to rights';[73] for example child support schemes introducing statutory formulas.[74] Furthermore, pressure from Father's Rights Groups and the Human Rights Act 1998 has 'intensified this… struggle'.[75] Arguably this shift is subconscious to bring further 'predictability [and] transparency'[76] due to increased diverse relationships shaking law. Some argue this move highlights law 'trying to modify behaviour in line with some moral code'.[77] Thus, law is moving from discretion to rights to send out moral messages[78] hoping for just outcomes, debatably encouraging traditional family models. However, it is questionable whether this is the role of the law.

This doctrinal incoherence and uncertainty regarding family law's purpose leads to further difficulties as it undermines the theoretical approach of functionalism regarding 'family law as having a series of goals to be fulfilled'.[79] Arguably, a better understanding of family law can be gained by looking at its functions and judging how successfully they are met.[80] Suggested functions are 'protective... adjustive… [and] supportive',[81] however there are difficulties with this oversimplification as realistically 'law rarely has [one]… clearly identified goal'[82] and has 'contradictory aims',[83] highlighted through the rights and welfare struggle. Preference of the idealised family implies an objective is to promote such relationships; however this highlights another danger[84] of functionalism as it is questionable who judges whether functions are correct.[85] For example, debatably a fairer aim would be to encourage more diverse families. These criticisms portray the theory's serious limitations[86] as it cannot cope with modern complex difficulties of family law.

---

[67] ibid 470.
[68] Harris-Short & Miles (n 60) 14.
[69] ibid 4.
[70] ibid.
[71] ibid.
[72] ibid 3.
[73] Herring (n 1) 32.
[74] Dewar (n 53) 66.
[75] Harris-Short & Miles (n 60) 4.
[76] ibid 10.
[77] ibid 12.
[78] ibid.
[79] Herring (n 1) 15.
[80] Dewar (n 61) 467.
[81] John Eekelaar, *Family law and social policy* (2nd edn, Weidenfeld and Nicolson, London 1984) 24-6.
[82] Herring (n 1) 16.
[83] ibid.
[84] ibid.
[85] Dewar (n 61) 467.
[86] Herring (n 1) 16.

Family law does more than confer rights; it also 'assumes… a certain type of relationship between family and the state'.[87] Rights mean less intervention for the state,[88] thus in keeping with the traditional notion that family law is the 'protector of private [family life]',[89] hence 'inappropriate for… state to intervene'.[90] This is based on the public/ private divide,[91] which is the theory that some things belong beyond the law's reach in the private sphere (such as within a family), whereas others belong in the public sphere (such as the state). State intervention in families is therefore considered 'harmful and undesirable'[92] unless there are very good justifications,[93] as families are not law's business until 'something goes wrong',[94] for instance divorce or abuse.

This is because families are presumably safe places,[95] thus explains why the law is upholding the 'ideology of family privacy',[96] as it is assumed the best environment to raise children.[97] However, 'we do not know what goes on behind closed doors'[98] and the government's confidence in the traditional family's ability to govern itself may prove dangerous[99] as controversies arise between law's need to protect privacy and 'guard against unfairness and exploitation'.[100] Family law must deal with the difficulty of balancing protecting private families with protecting members in trouble. Increased privatisation[101] of family law causes concern as the law is 'regulating less and less',[102] for example through encouraging mediation and cutting legal aid.[103] Contrastingly, arguably family law is more involved where it needs to be in cases of divorce and children's welfare.[104] The 'state should not be telling people how to run their families',[105] but intervenes when families are in crisis[106] and no longer serve public interests. This appears contradictory as family law does not want to impede autonomous decisions, but indirectly encourages people to live in certain idealised

[87] Martha Fineman, 'What Place for Family Privacy?' [1998-1999] 67 GWLR 1207.
[88] Harris-Short & Miles (n 60) 3.
[89] Herring (n 1) 19.
[90] ibid.
[91] ibid.
[92] Harris-Short & Miles (n 60) 12.
[93] Herring (n 1) 20.
[94] Diduck & Kaganas (n 8) 17.
[95] ibid 14.
[96] Fineman (n 87) 1207.
[97] Diduck & Kaganas (n 8) 5.
[98] Joan Smith, 'Broken Britain is a media invention' (*The Independent,* 7 December 2008) < http://www.independent.co.uk/voices/commentators/joan-smith/joan-smith-broken-britain-is-a-media-invention-1055539.html> accessed 5 March 2013.
[99] Bainham (n 3) 234.
[100] Dewar (n 61) 475.
[101] Herring (n 1) 23.
[102] ibid.
[103] ibid 23, 29.
[104] ibid 23.
[105] ibid 26.
[106] Harris-Short & Miles (n 60) 12.

forms to keep the function of family law and the family's place in the private sphere credible: this proves another difficult equilibrium to strike.

Many criticise the public/private split as 'not naturally occurring'[107] and the state defines the line of intervention, as through non-intervention they accept the status quo.[108] This leads feminists to critique law's 'reluctance to uphold moral judgements'[109] as this is responsible for the 'historical oppression of women'.[110] Therefore, the public/private distinction risks the imbalance[111] of sexes and potential abuse as the law's historically muted[112] response allowed men power over women. This makes the distinction ambiguous[113] in the eyes of feminists as the emphasis on private families leads to direct and indirect discrimination against women.[114]

However, this is arguably remedied through banishing marital rape[115] and responding to domestic violence.[116] Moreover, 'feminists do not speak with one voice'.[117] Liberal feminists argue for an egalitarian shift towards complete equality, whereas feminism of difference accepts men and women's differences but resent disadvantages from this, for example through assuming mothers should take child care responsibility.[118] This relates to feminists' argument that the public/private sphere assumes gender roles: the male in the public workplace, and the female in the private home.[119] What makes a 'good mother' and 'good father' is very different,[120] as the father is the bread winner whilst the mother is the 'traditional day to day care[r]'.[121] Feminists argue this 'ideology of motherhood'[122] is damaging to both men and women,[123] as the woman has an assumed role and fathers are discriminated against through courts favouring mothers in child contact issues.

Many now believe family law is 'gender neutral'[124] and these arguments are outdated, only assuming abuse in the domestic arena and power imbalances.[125] For example, many women have entered the workplace,[126] and fathers are willing to share child

[107] Diduck & Kaganas (n 8) 16.
[108] ibid.
[109] Herring (n 1) 28.
[110] Harris-Short & Miles (n 60) 13.
[111] ibid 14.
[112] ibid 15.
[113] John Dewar, 'Family, Law and Theory' [1996] 16 OJLS 725, 733.
[114] Herring (n 1) 16-17.
[115] *R v R* [1991] 4 All ER 481.
[116] Katharine T Bartlett, 'Feminism and Family Law' [1999-2000] 33 FLQ 475, 495.
[117] Harris-Short & Miles (n 60) 13.
[118] Herring (n 1) 18.
[119] ibid 17.
[120] ibid.
[121] Minow (n 10) 313.
[122] Harris-Short & Miles (n 60) 15.
[123] ibid.
[124] Martha Fineman, 'Fatherhood, Feminism and Family Law' [2000-2001] 32 MLR 1031, 1037.
[125] Fineman (n 87) 1219.
[126] Minow (n 10) 313.

care. The difficulty for family law regarding its relationships with families is ensuring desire to uphold traditional family values does not hinder equality and enforce gender roles. This may prove difficult as the idealised family is considered the best way to raise children[127] and if roles of the ideal mother and father are undermined this may impede children's welfare. However, many feminists agree motherhood is an exception to their arguments and some see working mothers as a 'source of empowerment and strength'.[128]

In conclusion, family law is an incoherent special law[129] due to the diverse range of families and issues it deals with. Lack of one clear purpose causes numerous difficulties regarding the relationship between law and families due to its contradictory aims of how to impose itself on family life. These difficulties have increased through social changes pushing boundaries of what is considered 'family'. Arguably family law arbitrarily favours families mirrored on the permanence and stability of nuclear families, but this upholds at least some element of predictability. Theoretical approaches of functionalism, the public/private divide, and feminism highlight strains for family law when assessing the role of law's relationship with families. However, if law balances these conflictions it can operate adequately in its own distinctive way.

[127] Diduck & Kaganas (n 8) 5.
[128] Harris-Short & Miles (n 60) 16.
[129] Fineman (n 87) 1207.

REFORMS OF COMPETITION LAW IN THE UK – AIMS AND OUTCOMES

*THOMAS ACWORTH**

The reforms of competition law in the UK aimed to deliver restorative justice and deter anti-competitive conduct. This paper analyses the reforms and their outcomes in the light of a move to an opt-out regime and introducing stand-alone actions as a mechanism serving deterrence. It also presents problems undermining the effectiveness of the reforms, such as the unavailability of exemplary damages awards in collective actions.

The proposed reforms to collective actions in UK competition law ensure that the regime is more effective 'in delivering restorative justice for consumers and small businesses'.[1] However, this is not their aim. Instead, enhancing the delivery of restorative justice is the mechanism through which the true aim of the reforms, deterring anti-competitive conduct, is realised. Whilst the proposed reforms of moving to an opt-out regime and allowing stand-alone actions to be brought effectively utilise this mechanism to achieve the aim of deterrence, the unavailability of exemplary damages awards in collective actions only serves to undermine the effectiveness of the proposed reforms.

It could be argued that the move to an opt-out regime is only concerned with enhancing the delivery of restorative justice, for, in contrast to opt-in regimes, an opt-out collective action is 'the type of regime most likely to deliver redress to most of those wronged'.[2] This is because 'opting-in … requires affirmative action',[3] and whether or not redress is delivered to 'most of those wronged' depends directly on 'most of those wronged' opting-in to the action.[4] '[I]n cases where the amount of damages per claimant is very low' it is likely that an opt-in action would be entirely ineffective in delivering redress,[5] for, in such cases, 'many victims consider the amount of damages awarded … not worth their time or effort' and are disinclined to act affirmatively and opt-in.[6] An opt-out system counters this problem effectively. It requires affirmative action to be taken for a victim to opt-out of a claim. If victims do not consider it 'worth their time or effort' to take affirmative action that might result

* Thomas Acworth, Newcastle University, LLB (Hons) Law.

[1] Department for Business, Innovation and Skills, 'Private Actions in Competition Law: A Consultation on Options for Reform' (*UK Government,* April 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/ffil/31528/12-742-private-actions-in-competition-law-consultation.pdf> accessed 9 December 2013, [5.6].

[2] Department for Business, Innovation and Skills (n 1) [5.26].

[3] Jocelyn G Delatre, 'Beyond the White Paper: Rethinking the Commission's proposal on private antitrust litigation' (2011) 2(1) Comp L Rev 29, 46.

[4] Department for Business, Innovation and Skills (n 2).

[5] Department for Business, Innovation and Skills (n 1) [5.27].

[6] Delatre (n 3).

in a small gain, they are less likely to take affirmative action which would guarantee them receiving no damages at all.[7]

However, relying on victims' reluctance to engage in affirmative action to opt-out of a claim is not indicative of a primary concern with enhancing the delivery of restorative justice. Rather, it indicates that the motive underlying these proposals is to deter undertakings from behaving anti-competitively. Given that an opt-in system requires victims to take affirmative action to have their loss added to the overall value of a claim, it would be necessary for a large proportion of victims to take such action if the damages awarded against an errant undertaking were to bear reasonable relation to the economic harm resultant from its anti-competitive behaviour. For instance, in *The Consumers' Association v JJB Sports PLC*[8] the compensation awarded was less than 0.1% of the value of the harm inflicted. This is because less than 0.1% of victims elected to opt-in.[9] Such a result suggests that the opt-in regime under section 47B of the Competition Act 1998 (section 47B) did not act as an effective deterrent. Moreover, because 'the rational tortfeasor will not make his efforts dependent on the danger of causing damage but on the amount of damages ordered to pay', section 47B allowed behaving anti-competitively to be viewed as a rational choice in certain circumstances, as the profit gained would, almost invariably, outweigh the damages incurred.[10]

Given that victims are unlikely to take affirmative action to guarantee receiving no damages, an opt-out regime allows the majority of victims' losses to be factored into the total damages award. The total damages award is therefore likely to be larger and bear closer resemblance to the economic harm that the conduct of the undertaking has occasioned. This means that the profits to be gained from behaving anti-competitively become lower and that behaving anti-competitively becomes less attractive. Furthermore, once the possibility of paying two sets of legal costs, due to the Government's decision to retain the loser pays rule, is considered, behaving anti-competitively is less likely to be at all profitable.[11] Thus, enhancing the delivery of restorative justice by introducing an opt-out regime acts as a mechanism to aid 'the law of compensation … to fulfil its function of deterrence and prevention of damage'.[12]

---

[7] Delatre (n 3).
[8] *The Consumers' Association v JJB Sports PLC* [2009] CAT 1078/7/9/07.
[9] Department for Business, Innovation and Skills (n 1) [5.4].
[10] Hans-Bernd Schaefer, 'The Bundling of Similar Interests in Litigation. The incentives for class action and legal actions taken by associations' (2000) 9(3) European Journal of Law and Economics 183, 184.
[11] Department for Business, Innovation and Skills, 'Private Actions in Competition Law: A consultation on options for reform- government response' (*UK Government,* January 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/ffil/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf> accessed 9 December 2013, [5.60].
[12] Schaefer (n 10).

The Government asserts that allowing stand-alone collective actions to be brought will increase 'access to justice for the claimant as well as … deterrence'.[13] However, unchecked exercise of this right compromises the effectiveness of the proposed reforms by enabling claimants to make monetary gains where defendants have not breached competition law. This is because allowing stand-alone collective actions to be brought gives rise to the problem of 'spurious cases' being 'brought to try to pressure a company to settle'.[14] This is particularly problematic in the context of collective actions due to their aforementioned tendency to result in high damages awards. Thus, a proposal that aims to operationally enhance the delivery of restorative justice in order to provide a greater deterrent against anti-competitive conduct could, without checks, 'bring about a regime in which the correct action for a defendant with a strong and winnable case is to settle to avoid the risks of damages or legal costs', as it might be more financially viable to settle a spurious claim than to contest it.[15]

Despite increasing the situations in which anti-competitive conduct can be tackled by the proposed regime, extending the right of collective actions to businesses exacerbates this problem.[16] This is because it widens the category of those who might bring a spurious claim. Furthermore, if a spurious claim were to be brought, the pressure on the innocent defendant to settle would be even greater, as the value of any potential award of damages would increase further.

However, the Government is aware of this problem and proposes to combat it by employing 'a strong process of judicial certification, including a preliminary merits test'.[17] This measure ought to prevent claims that are obviously spurious from proceeding. However, this does not mean that the pressure to settle placed on an undertaking will be any less. It simply means that claims proceeding ought to have some merit. Although undertakings with 'strong and winnable' cases may still settle, this is unproblematic.[18] It is likely that in such circumstances the primary motivation to settle would be the fear of losing the case and, as Charles Silver observes, 'nothing is self-evidently wrong with a settlement that occurs because a defendant fears losing at trial'.[19] Moreover, if an undertaking settles because it fears it will lose the case, this of itself suggests recognition on the part of the defendant that its conduct was anti-competitive. The extension of the collective action to business and the availability of stand-alone collective actions, when coupled with this safeguard, do serve to enhance the aim of deterrence by improving the delivery of restorative justice. This is because the category of situations in which recourse can be sought via a collective action is expanded and such actions will only proceed where there is some merit to the claim.

[13] Department for Business, Innovation and Skills (n 11) [5.21].
[14] Department for Business, Innovation and Skills (n 1) [5.11].
[15] Department for Business, Innovation and Skills (n 1) [5.32].
[16] Department for Business, Innovation and Skills (n 13).
[17] Department for Business, Innovation and Skills (n 11) [5.55].
[18] Department for Business, Innovation and Skills (n 15).
[19] Charles Silver, '"We're scared to death": Class Certification and Blackmail' (2003) 78 NYU L Rev 1357, 1359.

The Government's decision 'to prohibit exemplary damages in collective actions' is also premised on a concern that undertakings with winnable claims will settle.[20] However, despite the fact that exemplary damages are concerned with punishment, their prohibition severely compromises the effectiveness of the proposed reforms use of improving the delivery of restorative justice to further the deterrence.[21] Consequentially, the Government's rationale for prohibiting exemplary damages is flawed in two respects: firstly, exemplary damages are not more likely to force innocent defendants to settle, and secondly, the unavailability of exemplary damages limits the ambit of claims that will be brought via a collective action.

The Government's decision to prohibit is exemplary damages is a recognition that the availability of such an award will result in defendants being 'pushed into settling' because 'they are not certain of being able to defend the claim'. However, it is submitted that a claim for exemplary damages ought not, of itself, to result in a defendant being forced to settle. For, whilst defendants may indeed be uncertain of being able to defend a claim, claimants must be equally, if not more, uncertain that the claim will succeed. This is because claims for exemplary damages do not automatically result in their award. Therefore, in order for the possibility of exemplary damages to result in an undertaking being forced to settle, that undertaking would also have to fear losing the case and, as aforementioned, 'nothing is self-evidently wrong' with such a situation.[22]

Furthermore, because of the specificity of the circumstances in which the Competition Appeal Tribunal (CAT) will award exemplary damages, any assertion that the defendant 'is not certain of being able to defend the claim' is tantamount to stating that the defendant is certain that they will not be able to defend the claim.[23] In *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited*,[24] the CAT held that, in the context of the Chapter II prohibitions, exemplary damages would only be awarded 'in those cases where an undertaking is aware that its proposed conduct is probably unlawful or is clearly unlawful'.[25] This rationale can also be extended to anti-competitive agreements for, as Barry Rodger opines, 'with the typical and blatant competition law violations such as price fixing … profit seeking motivation should not be too difficult to prove'.[26] As 'profit seeking motivation should not be too difficult to prove',[27] it is not unreasonable to suggest that undertakings who engaged in this activity knew that doing so was 'probably unlawful

[20] Department for Business, Innovation and Skills (n 11) [5.58] [5.39].
[21] Barry J Rodger, 'Private enforcement and the Enterprise Act: an exemplary system of damages' [2003] ECLR 103, 110.
[22] Silver (n 19).
[23] Department for Business, Innovation and Skills (n 11) [5.39].
[24] *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 1178/5/7/11.
[25] ibid, 490.
[26] Rodger (n 21) 111.
[27] Rodger (n 26).

or clearly unlawful'.[28] If an undertaking knows that an activity it is going to engage in is ''probably unlawful or clearly unlawful', it also knows that this will expose it to having exemplary damages awarded against it.[29] Thus, the fear of losing a case indicates knowledge of a reason why the case ought to be lost. Defendants who have 'strong and winnable' cases[30] as they have not wilfully engaged in anti-competitive conduct, ought not to fear losing, and thus will not feel 'pushed into settling'.[31]

Moreover, because exemplary damages awards are available in other competition law claims, their absence from the collective actions regime could result in some claimants being discouraged to use the procedure.[32] This is because where the value of an individual claim contained within a collective action is sufficient to make bringing an individual action viable, this claimant would opt-out of the collective lawsuit and pursue their claim independently due to the possibility of obtaining an exemplary award. This reduces the ambit of the collective action to only catering for those claims where 'the individual value is too low to make bringing an individual claim worthwhile'.[33]

The consequences of this are threefold. Firstly, this gives rise to the possibility of parallel proceedings and diminishes the reformed collective action's ability to increase the efficiency of the CAT.[34] Secondly, it removes the principal benefit that the reformed collective action procedure bestows upon the defendant, the ability to quantify their predicted loss at the outset of proceedings.[35] Thirdly, and most relevantly to the collective action's deterrent capability, such claims being removed from a collective action would result in the value of damages available in that action reducing. This means that collective actions would pose less of a financial deterrent to undertakings and, moreover, suggests that a rational means of avoiding substantial claims would be to simply avoid behaving anti-competitively in high value transactions, as these pose the greatest financial risk. Thus, permitting the award of exemplary damages is essential to ensure that claimants do avail themselves of the new collective actions procedure and that the threat of a collective action has a sufficient deterrent value to prevent undertakings from breaching competition law.

Whilst the move to an opt-out collective actions regime that allows for stand-alone cases to be brought does enhance the delivery of restorative justice, it does so only to give the procedure a greater deterrent value. This is because enhancing the delivery of restorative justice necessarily means that damages awards in collective actions will be higher and bear a closer resemblance to the economic harm caused by anti-

[28] *2Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* (n 24).
[29] ibid.
[30] Department for Business, Innovation and Skills (n 15).
[31] Department for Business, Innovation and Skills (n 23).
[32] *2Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* (n 24).
[33] Department for Business, Innovation and Skills (n 5).
[34] Department for Business, Innovation and Skills (n 1) para 5.32.
[35] ibid.

competitive behaviour. However, the unavailability of exemplary damages undermines the effectiveness of the reforms. Introducing exemplary damages would strengthen the possibility of the reforms achieving their objectives and would not be overly onerous on defendants.

CONSENSUAL SADO-MASOCHISM AND THE PUBLIC INTEREST: DISTINGUISHING MORALITY AND LEGALITY

AMY KERR[*]

According to the English criminal law, in order for consent to negate criminalisation of activities which inflict actual body harm, social utility must be derived from those activities; otherwise, criminalisation is required on grounds of public interest. In this paper, the reluctance to allow consent to negate criminalisation of activities, which inflict actual bodily harm for the purpose of sexual gratification on grounds of public interest, is questioned. Specifically, the author explains how the exercise of deriving a 'public benefit' from such activities, does not strive to strike a balance between the core principles of respect of individual privacy and prevention of harm; instead, it serves as enforcement of moral views of the prosecution and the judiciary. Consequently, English law does not satisfactorily justify how such criminalisation furthers the public interest. Furthermore, sado – masochistic activities for sexual gratification are compared to boxing, which is another activity involving consensual infliction of actual bodily harm. Despite its harmful consequences, boxing still forms an exception to criminalisation, and the author purports to argue that many of the justifications which exempt boxing from criminalisation, could also be deployed for the exemption of sado-masochistic activities for sexual gratification. Finally, the paper will conclude with a suggestion for immediate reform and an examination of the possible solutions.

1 INTRODUCTION

Under English Law, a person cannot legally consent to behaviour that occasions Actual Bodily Harm (ABH) or more serious injury.[1] Once the threshold of ABH is reached, the consent to the activity in question becomes insufficient to exempt the conduct from the reach of the criminal law,[2] unless the category of the conduct is such that it has sufficient social utility to exempt it from criminalisation.[3] In other words, only if the courts or Parliament can derive some public benefit from refraining to criminalise the activity in question will the consent of the putative victim be sufficient to negate criminal liability.[4] However, the case law has made abundantly clear that

---

[*] Amy Kerr, Newcastle University, LLB (Hons) Law.

[1] *R v Brown* [1993] 2 All ER 75 [47-49] (Lord Templeman); *R v Donovan* [1934] 2 KB 498 [498] (Swift J); *Attorney-General's Reference(No 6 of 1980*) [1981] QB 715 (Lord Lane CJ).

[2] ibid.

[3] ibid; David Kell, 'Social Disutility and Consent' (1994) 14 OJLS 121; Matthew Weait, 'Knowledge, Autonomy and Consent: *R. v Konzani'* (2005) Crim, LR 763, 765; Julia Tolmie, 'Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making', (2012) Crim. LR 656; Simon Cooper and Mark James, 'Entertainment—The Painful Process of Rethinking Consent' (2012) Crim LR 188, 190.

[4] *R v Brown* [1994] 1 AC 212 [232-235] (Lord Templeman); Paul Roberts, 'Consent to Injury: How Far Can You Go?' (1997) LQR 27, 32.

inflicting injuries for reasons of sexual gratification is not in the public interest;[5] without adequately distinguishing how the public interest serves to legitimize other categories of conduct.[6] The core thesis of this paper is that the problematic concept of 'the public interest' serves to disguise a moralistic and paternalistic approach to criminalising sado-masochism.[7] The distinction between consensual violence which is legal for being in the public interest and that which is outlawed because of it arguably centres on morality, which influences the criminalisation of sado-masochism at all stages of the process.

Indeed, the decision to prosecute any suspected criminal activity is dependent upon the prosecution being 'in the public interest', as well as there being sufficient evidence so that there is a reasonable prospect of conviction.[8] However, deciding whether the public interest is served through prosecution inevitably involves discretion on the part of the prosecutor. In the case of sado-masochism, it will be argued that regrettably, the moral views about the conduct often influence the way in which discretion is exercised.[9] Not only are private consensual sexual acts prosecuted too readily, but also the resulting case law is incoherent and largely unsatisfactory.[10] Certainly, the leading case of *Regina v Brown*[11] can be seen as a missed opportunity to formally clarify the correct approach to criminalising sexual violence which occasions non-fatal offences against the person. Instead, each judgment prioritises different factors in reaching their respective conclusions, and the three to two decision in favour of convicting the defendants of offences under section 20 and section 47 of the Offences Against the Person Act 1861 (OAPA) sheds little light on when a criminal sanction is required 'in the public interest'.[12] Lord Templeman in his

---

[5] *R v Brown* (n 4); *R. v Wilson* [1997] QB 47; *R v Wilson* [1996] 2 Cr App R 241; *R v Donovan* (n 1); *Attorney General's Reference (No 6 of 1980)* [198l] 2 All ER 1057; *Emmett,* The Times, October 15 1999.

[6] Michael Allen, *Textbook on Criminal Law* (11th edn, Oxford University Press 2011) 376; Cooper and James (n 3).

[7] Kell (n 3) 133; Marianne Giles, 'R v Brown: Consensual Harm and the Public Interest' (1994) 57 MLR 101; Allen (n 6) 376; Stephen Doherty, 'Sado-masochism and the Criminal Law' (2012) 3 King's Student Law Review 119, 127; Peter Cane, 'Morality, Law and Conflicting Reasons for Action' (2012) CLJ 59; Barbara Falsetto, 'Crossing the Line: Morality, Society, and the Criminal Law' (2009) CSLR 182.

[8] Code for Crown Prosecutors, 2.9, <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/> accessed 15 November 2012; Andrew Ashworth, 'The "public interest" element in prosecutions' [1987] Crim LR 595; Roger Daw and Alex Solomon, 'Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute' Crim LR 737, 738.

[9] *R v Lee* (2006) 22 CRNZ 568 198-203, 293; Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber and Faber, 1957) 103-104; Cane (n 7); Annette Houlihan, 'When "No" Means "Yes" and "Yes" Means Harm: HIV Risk, Consent and Sadomasochism Case Law' (2011) 20 Law & Sex 31, 57.

[10] *R v Wilson* [1996] 2 Cr App R 241*; R v Slingsby* [1995] Crim LR 570*; Emmett (n 5)*; *R v Coney* (1882) 8 QBD 534; *R v Donovan* (n 1); *Attorney General's Reference (No 6 of 1980)* (n 5); R v *Lee* (n 9) [203-204]; Roberts (n 4); Ben Livings, 'A Different Ball Game - Why the Nature of Consent in Contact Sports Undermines a Unitary Approach' (2007) J Crim L 534; Houlihan (n 9) 40.

[11] *R. v Brown* (n 4).

[12] ibid [238], [247] (Lord Jauncey) ,[273]-[274] (Lord Mustill); Roberts (n 4); Doherty (n 7).

majority speech advocated for a moralistic approach,[13] in which he distinguished 'violence which is incidental and violence which is inflicted for the indulgence of cruelty.'[14] By placing sado-masochistic activity in the latter category, he held that the public interest required criminalisation, so as to protect society from such evil and uncivilised behaviour.[15] Lord Jauncey and Lord Lowry in adopting a paternalistic approach[16] speculated on how allowing the appeal may be dangerous for failing to sanction the violence of less conscientious sado-masochists.[17] Further, their paternalistic approach is evident in the weight both judgments gave to the possibility of corrupting others.[18] Conversely, the dissenting speeches, and Lord Mustill in particular, emphasised that the public interest did not require all such conduct to be subject to the law by default. Rather, a criminal sanction was justified only where factors pertaining to the particular case required it.[19] The majority approach therefore focused on the context of sado-masochistic activity in general, rather than whether the circumstances of the particular case meant that the use of the criminal law was required.[20] As the leading case in this area, it is submitted that *Brown* is an unsatisfactory precedent.[21] This is evident in the fact that almost two decades later, *Brown* retains validity as a contentious area in legal policy and debate.[22]

Under *Brown*, determining whether consent will operate as a defence requires examination of the context and category of the activity;[23] and ultimately whether that category has been recognised as one with sufficient social value to exempt it from criminalisation.[24] Thus, convictions can occur because there is no category in which the conduct can be said to provide sufficient public benefit to justify immunity from legal liability.[25] Such was the case in *Wilson,* [26] where the trial judge felt bound by the problematic precedent of *Brown* and was reluctant to create a new category of recognised exception.[27] However, by separating intentionally inflicted consensual injuries into categories,[28] the law generalises the purported public benefit and prioritises this over the benefit to the parties in the case.[29] Certainly, such an approach gives more weight to the context in which the injury was carried out than the reasons why it was carried out. For example, injuries that would otherwise

[13] ibid 127; Allen (n 6) 376.
[14] *R. v Brown* (n 4) [236].
[15] ibid [237].
[16] Doherty (n 7) 127; Allen (n 6) 376.
[17] *R v Brown* (n 4) [245-246] (Lord Jauncey),[255-256] (Lord Lowry).
[18] ibid [246] (Lord Jauncey), [255-256] (Lord Lowry); Kell (n 3) 124.
[19] ibid [270] (Lord Mustill).
[20] *R v Brown* (n 4) [270] (Lord Mustill); Catherine Elliot and Claire de Than, 'A Case for Rational Reconstruction of Consent in Criminal Law' (2007) 70(2) MLR 225.
[21] Roberts (n 4); Gilles (n 7); Doherty (n 7).
[22] Houlihan (n 9) ; Tolmie (n 3); Cooper and James (n 3).
[23] Tolmie (n 3).
[24] Kell (n 3).
[25] Roberts (n 4)
[26] *R v Wilson* [1996] 3 WLR 125.
[27] Allen (n 6); Tolmie (n 3).
[28] *R. v Brown* (n 4)*;* Tolmie (n 3).
[29] *R. v Brown* (n 4) [656-658]*;* Roberts (n 4) 32.

amount to ABH or Grievous Bodily Harm (GBH) are legally permissible if carried out in the context of sport or surgery.[30] If, however, the same injury was inflicted consensually for the purposes of sexual gratification, it is likely to be prosecuted on the grounds that failure to prosecute would undermine the public interest.[31]

Prosecuting private consensual activity on the basis that it serves to further the public interest then comes at the expense of respecting personal autonomy, as the right of the individual to decide which conduct they are willing to consent to is lost.[32] Indeed, the paternalistic approach under English law permits the state to decide the limits of which conduct is socially acceptable,[33] depriving the individual of the right to choose how far they are willing to go.[34] While undoubtedly there is social value in refusing to permit serious harm to go unpunished, punishing the individual for acting according to their own beliefs and desires ought to be proportionate.[35] Moreover, the individual's right to privacy is compromised through prosecution by making the intimate nature of the conduct and the reasons for engaging in that conduct public.[36] Engaging in private violence is surely less damaging to the public interest than publically inflicting injury while encouraging others to view and participate; yet boxing remains legally permissible for the public benefit derived from contact sports.[37]

Thus, this paper will seek to show that the approach to prosecuting consensual sado-masochism is flawed not only for being influenced by morality, but for failing to give proper consideration to how the prosecution will further the public interest. Once prosecution proceedings are initiated, it will be argued that the judicial approach to such activity contradicts fundamental principles of criminal law, by enabling the moral views about the conduct to adversely impact its legal position.[38] In so doing, the legality of boxing will be examined, and it will be suggested that many of the justifications for exempting this category of conduct from the criminal law could equally be applied to sado-masochism. The distinguishing feature is arguably that the moral views of the judiciary underpin its criminal status. As such, it will be suggested that reform of this area is necessary.

---

[30] *R. v Brown* (n 4).
[31] ibid; Tolmie (n 3).
[32] ibid 657.
[33] Allen (n 6) 369.
[34] Tolmie (n 3) , 657.
[35] *R v Wilson* (n 26); Cane (n 7) 72; HLA Hart, *Law, Liberty and Morality* (Oxford 1963) 23.
[36] *R v Wilson* (n 26) (Russell LJ); Roberts (n 4) 28.
[37] *R v Brown* (n 4).
[38] ibid [237] (Lord Templeman); *R v Lee* (n 9) [203]; Williams (n 9) 103-104; Houlihan (n 9) 57.

2 THE DECISION TO PROSECUTE CONSENSUAL SADOMASOCHISM

The prosecution of criminal activity inevitably involves the exercise of discretion.[39] Indeed, it is well-established that not all crimes for which there is sufficient evidence to prosecute merit criminal sanction.[40] Instead, the criminal law operates to sanction conduct only where such action is required 'in the public interest.'[41] However, a fundamental flaw in the English approach is that determining how the public interest is best served is a subjective process, influenced by the decision maker's own beliefs and values. This is especially the case in the context of consensual sado-masochism, in which the exercise of discretion enables the moral views about the conduct in question to impact the decision to prosecute.[42] This paper contends that sanctioning consensual sado-masochistic activity undermines both the individual's right to privacy,[43] and the public interest through attaching criminal consequences to conduct that does not necessarily warrant them.[44]

While requiring prosecution to be in the public interest is a welcome feature of modern criminal law, it is submitted that the notion of 'public interest' is ambiguous and malleable.[45] In cases of sado-masochism, it is suggested that English law intervenes too readily[46] under the guise of furthering the 'public interest', without giving adequate consideration to whether prosecution will have any measurable benefits in practice.[47] Regrettably, deciding whether or not to prosecute consensual violence is based largely on the context in which the violence occurs,[48] and it will be shown that there is a presumption in favour of prosecution where there is a likelihood of conviction. This fails to consider whether or not the public interest is best served through refraining from prosecuting, in an effort to respect individual autonomy and privacy.[49] With this in mind, it is important from the outset to question the proper function of the criminal law and how this impacts upon the problematic concept of public interest.[50] Arguably, what is and is not required in the public interest ought to reflect a balance between respect for individual autonomy and privacy on the one hand, and the prevention of harm on the other.[51] In practice, however, where sado-

[39] Ashworth (n 8).
[40] Code for Crown Prosecutors (n 8); Roger Daw and Alex Solomon (n 8).
[41] ibid; Ashworth (n 8).
[42] ibid; Cane (n 7); Houlihan (n 9) 57.
[43] A P Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs* (Hart Publishing 2011) 191-192; *R v Wilson* (n 26).
[44] ibid; *R v Wilson* (n 10) (Russell LJ).
[45] Cooper and James (n 3) 190; Allen (n 6) 376.
[46] *R v Lee* (n 9) [198].
[47] ibid; *R v Brown (n 4)* [270-271] (Lord Mustill dissenting); Giles (n 7) 108.
[48] *R v Brown* (n 4) [270-271] (Lord Mustill), [280-283] (Lord Slynn); Brian Bix, 'Assault, Sado-Masochism and Consent' (1993) 109 LQR 540; Kell (n 3).
[49] Kell (n 3).
[50] Doherty (n 7); Cane (n 7).
[51] Falsetto (n 7) 189.

masochism is concerned, the 'public interest' factor often operates to conceal a moralistic and paternalistic view of socially acceptable behaviour.[52]

A driving force behind upholding the public interest is preventing harm to others.[53] Holding the individual criminally responsible for their conduct is entirely justifiable when said conduct interferes with the liberties and freedoms of others.[54] It follows that where conduct poses a risk of harm to society, prosecution is merited for being 'in the public interest'.[55] However, where the harm in question is consented to, it is generally accepted that no crime results.[56] This sentiment is summarised in Feinberg's *volenti non fit injuria maxim* – 'to one who consents, no wrong is done',[57] and it is clear that consent alone can transform the legality of an act.[58] To this end, the law increasingly respects each individual's right to determine the scope of their own life;[59] to make decisions reflecting their own personal choices and beliefs, even if these are not the beliefs shared by the majority of society.[60] Individuals can reasonably anticipate minimal state interference with their private, autonomous decisions insofar as those decisions do not impinge upon the rights and freedoms of others.[61] As John Stuart Mill comments,

> 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others…Over himself, over his own body and mind, the individual is sovereign.'[62]

This idea of respect for individual autonomy is increasingly reflected in the law which for the most part respects the individual as supreme over their own body.[63] As noted in *R v Dica,*

> 'If adults were to be liable to prosecution for the consequences of taking known risks with their health, it would seem odd that this should be confined

---

[52] Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 Crim Law and Philos 11, 27, 26.
[53] John Stuart Mill, *On Liberty* (JW Parker and Son 1859).
[54] ibid; Andrew Ashworth, *Principles of Criminal Law* (OUP 2009) 27-31; Hamish Stuart, 'The Limits of Consent and the Law of Assault' (2011) 24 Can JL & Juris 205, 208.
[55] Code for Crown Prosecutors (n 8).
[56] *R v Brown* (n 4) [231] (Lord Templeman).
[57] Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 1: 'Harm to Others'* (OUP 1987) 115; Dempsey (n 52) 27.
[58] ibid; Sexual Offences Act 2003 s 1(1)(b); Nafsika Athanassoulis, 'The Role of Consent in Sado-masochistic Practices' (2002) Res Publica 141, 148-149; Law Commission Consultation Paper, *Consent in the Criminal Law* (Law Com No.139, 1995) para 10.32; See also *R v Brown* (n 4) [79].
[59] Sheila McLean, *Autonomy, Consent and the Law* (Cavendish Publishing Ltd, 2010) 1; Stuart (n 54) 208.
[60] Feinberg (n 57).
[61] Kim Atkins, 'Autonomy and the Subjective Character of Experience' (2000) 17 Journal of Applied Philosphy 71, 74; Simester and von Hirsch (n 43) 191-192; Stuart (n 54) 208.
[62] Mill (n 53) 9; McLean (n 59) 16-17.
[63] Recognised in *R v Dica* [2004] EWCA Crim 1103 [51].

> to risks taking in the context of sexual intercourse, while they are nevertheless permitted to take the risks inherent in so many other aspects of everyday life.'[64]

Certainly, medical law in particular has recognised the importance of self-determination,[65] through affording competent adults the right to effectuate their bodily wishes even where premature death results. [66] The criminal law also largely refrains from attaching criminal consequences to acts which physically alter the body, where they are engaged in by choice.[67] If the individual desires, for example, to injure their body through body adornment,[68] or to risk sustaining injuries through boxing,[69] their autonomous right to do so is protected through allowing their consent to negate the criminal consequences intentionally inflicting the injury would otherwise ensue.[70] Certainly, if the individual is regarded as supreme over their own body, and their decisions regarding their body do not negatively impact upon others, then it is not in the public interest to regulate those decisions.

It is therefore clear that there is a legal willingness to respect autonomy regarding physical acts over one's own body. Additionally, sexual freedom has come to the fore in recent years,[71] in which the focus has shifted away from sexual paternalism towards a liberal view of sexuality as a private matter.[72] As Simester and von Hirsch note, '[i]n a free society, a person's intimate life should be a matter for disposition by the person himself, in large part free from coercive intervention from state authorities…the intimate lives of…adults, should prima facie be exempt from state scrutiny and the intervention of the criminal law.'[73] Indeed, it is clear that the criminal law is increasingly reluctant to regulate the private, sexual activities of consenting adults, where those activities do not adversely affect parties other than the participants.[74] Yet this is not reflected in the leading case law,[75] as it will be explored in more detail in section three. Further, the Committee on Homosexual Offences and

---

[64] Ibid [51]; *R v Lee* (n 9) [209-214]; Matthew Weait, 'Knowledge, Autonomy and Consent: R. v Konzani' (2005) Crim, LR 763.
[65] *Airedale NHS Trust v Bland* [1993] AC 739 [111-112]; *Re B (adult: refusal of medical treatment)* [2002] 65 BMLR 149; *Re T* [1992] 9 BMLR 46; Mental Capacity Act 2005; Suicide Act 1961 as amended by Coroners and Justice Act 2009; *R (on the application of Pretty) v DPP* [2002] 1 All ER 1; *R (Purdy) v DPP* [2009] UKHL 45; McLean (n 59).
[66] *Re B* (n 65); *Re T* (n 65).
[67] *R v Brown* (n 4).
[68] Ibid.
[69] ibid; *Pallante v Stadiums Pty Ltd* (No 1) [1976] VR 331.
[70] *R v Brown* (n 4).
[71] *Goodwin v UK* (2002) 35 EHRR 18; *Belinger v Belinger* [2003] UKHL 21; Committee on Homosexual Offences and Prostitution , *Report of the Committee on Homosexual Offences and Prostitution,* (Parliamentary Session 1956-1957 Cmnd 247), hereafter 'The Wolfenden Report', 13-14.
[72] ibid; recognised in *R v Dica* (n 63); See also *ADT v United Kingdom* (35765/97) [2000] 2 FLR 697; Andrew Bainham, 'Sexualities, Sexual relations and the Law' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart Publishing, 2002).
[73] Simester and von Hirsch (n 43) 191.
[74] Cane (n 7), 65; The Wolfenden Report (n 71).
[75] *R v Brown* (n 4); *R v Wilson* (n 26); *R* v *Barnes* [2004] EWCA Crim 3246; *R v Dica* (n 63), [2004] QB 1257.

Prostitution ('The Wolfenden Committee') examined the purpose of the criminal law in relation to the sexual choices of others. They concluded that it ought to,

> '…preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others…It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any pattern of behaviour, further than is necessary to carry out the purposes we have outlined.'[76]

Thus it can be concluded that there is a legal willingness to regard the individual as supreme both in how he physically treats his body, and over his own sexual practices (insofar as they concern consenting adults). Yet, both the Wolfenden Committee and the House of Lords in the leading case of *Brown*[77] stipulated that a function of the criminal law was to protect against offensive and injurious conduct,[78] and to prevent the corruption of morals.[79] It must therefore be questioned – to what extent is it desirable to have a law influenced by morality?[80]

Prosecuting the private consensual sexual activities of adults may serve to protect public morals, but this is at the expense of those who are prosecuted. Indeed, undue state interference is offensive and injurious to the party whose conduct is unnecessarily regulated; as the criminal law then seeks to enforce morally acceptable standards of behaviour upon those who ought to be free to determine the boundaries of what they are willing to consent to.[81] While intentionally injuring one's partner for the purposes of sexual gratification may be frowned upon or even repudiated by the majority,[82] and may therefore merit moral sanction,[83] this does not justify disproportionate legal sanction.[84] As H.L.A Hart commented, '[l]aws enforcing sexual morality create misery of quite a special degree… it is one thing to disapprove of and criticise… but another to impose legal liability'.[85] This recognition that moral intolerance of certain conduct does not necessitate criminalisation of that conduct is reflected in the decision to decriminalise homosexuality.[86] While many may disagree with homosexual activity, this is no longer a legitimate basis for sanctioning an autonomous decision regarding how to live one's private life. It is therefore necessary

---

[76] The Wolfenden Report (n 71) [13-14].
[77] [1994] 1 AC 212.
[78] ibid [236].
[79] ibid [246] (Lord Jauncey); [255-256] (Lord Lowry); See also Giles (n 7); Tolmie (n 3).
[80] Williams (n 9) 103-104; Doherty (n 7).
[81] Tolmie (n 3) 656-657; Ashoworth (n 54) 312.
[82] *R v Brown* (n 4).
[83] ibid; Hart (n 35) 23; Cane (n 7) 72-74; Doherty (n 7).
[84] ibid; *R v Brown* (n 4) (Lord Mustill and Lord Slynn, dissenting).
[85] Hart (n 35) 23; Cane (n 7) 72-74.
[86] Sexual Offences Act 1967 s 1;The Wolfenden Report (n 71); Roger Leng, 'Consent and Offences against the Person: Law Commission Consultation Paper No.134' [1994] Crim LR 480, 487; *R v Brown* (n 4); Cane (n 7).

to question why the moral views regarding injuries inflicted for sexual gratification continue to impact upon the criminalisation process.[87]

Certainly, it is a well-established feature of English criminal law that not all crimes for which there is sufficient evidence to prosecute merit criminal sanction.[88] Thus, where a consenting recipient is injured by their partner in the course of private sexual activity, prosecution ought not to occur solely because there is sufficient evidence to do so. Rather, prosecution ought to occur only where it is required in the public interest. As Sir Hartley Shawcross famously stated, under English law suspected crimes ought not to become the subject of prosecution automatically, but only where prosecution is required in the public interest.[89] In practice, however, the English approach supports a presumption in favour of prosecution. While the Code for Crown Prosecutors provides prosecution is to be brought only where two fundamental requirements have been satisfied,[90] it is submitted that the factors are not given equal consideration in determining whether or not prosecution is merited. The first requirement, that there must be sufficient evidence to ensure a reasonable prospect of conviction,[91] is arguably dominant over the second requirement, that there is public benefit in prosecuting the conduct in question.[92] Indeed, the presumption is that where the evidential requirement is satisfied, prosecution will occur even where it may not necessarily be in the public interest. This is the case so long as there are no overarching public interest factors tending against prosecution.[93] In other words, if there is a reasonable likelihood of conviction, the criminal law will operate to sanction the conduct, irrespective of whether sanctioning is beneficial to society, provided prosecution is not actively detrimental to society.[94]

This insistence that refraining from prosecution is merited only where public policy factors deem the use of the criminal law inappropriate directly undermines the importance given to individual autonomy and privacy.[95] In addition, it serves to foster the notion that recourse to the criminal law is appropriate in sanctioning all conduct which is prima facie illegal.[96] As Kell observes, in deciding whether or not allowing consent to operate as a defence for intentionally inflicted injury, English Criminal law prioritises the social utility of permitting the conduct, over the reasons why prosecution may not be appropriate.[97] This again affirms the presumption in favour of prosecution, meaning that where behaviour is prima facie illegal, it must be

[87] Recognised by Court of Appeal in R v *Lee* (n 9) [203]; Doherty (n 7); *R v Brown* (n 4) [256-257] (Lord Mustill); Leng (n 86), 487; cf *Laskey et al v UK* [1997] 24 EHRR 39.
[88] Daw and Solomon (n 8) 738.
[89] HC Deb 29 January 1951, vol.483, cols 679, 681-682.
[90] Code for Crown Prosecutors (n 8).
[91] ibid.
[92] ibid.
[93] ibid 6.2.
[94] ibid; Kell (n 3).
[95] Ashoworth (n 54) 31.
[96] Douglas Husak, *Overcriminalization-The Limits of the Criminal law* (OUP 2008).
[97] Kell (n 3); Stuart (n 54) 206.

established in court that there is sufficient benefit to society in refraining from criminalising the conduct. This is potentially problematic, as the reluctance to permit the putative victim's consent to injury inflicted for sexual gratification to negate criminal consequences, is arguably underpinned by the moral views of the judiciary.[98] As it will be examined in more depth in the next section, the judicial reluctance to tolerate sado-masochistic behaviour[99] arguably prevails over whether or not prosecution genuinely furthers the public interest. Instead, it is submitted that the judicial focus should be on whether or not the consent to the injury was genuine,[100] and whether the conduct was intentionally engaged in with knowledge of the consequences which would inevitably ensue.[101] Where these questions are answered in the affirmative, it is necessary to question whether or not the issue is justiciable at all.

Arguably, a more appropriate approach would give more weight to the benefit to society, or lack thereof, prosecution would serve before the matter goes to court. Certainly, if it can be established in court that certain conduct has sufficient social utility to exempt it from criminalisation,[102] then the public interest is served through refraining from prosecuting. This is evident in the fact that certain categories of intentionally inflicted injuries are declared as recognised exceptions, which are immune from prosecution.[103] Such recognition that consensual conduct is prima facie exempt from state interference, where said interference is not warranted, reinforces the importance of individual autonomy and privacy. However, the current presumption in favour of prosecuting sado-masochistic activity by default results in a catch twenty two situation: prosecution occurs to protect others from the moral harm and corruption associated with the conduct, which would never have become known to them but for the prosecution.[104] The defendant then is obligated to disclose why the conduct was engaged in to satisfy the onerous 'social value' requirement,[105] thereby impinging upon his right to privacy unnecessarily.[106] As the Code makes clear, prosecutors must apply the principles of the European Convention on Human Rights (in accordance with the Human Rights Act) at all stages of the prosecution process.[107] Thus, it is arguable that the right to privacy ought to be given more weight in deciding whether or not to prosecute.[108]

---

[98] Williams (n 9) 103-104.
[99] *R v Brown* (n 4).
[100] ibid; Livings (n 10) 539.
[101] ibid; Leng (n 86) 482.
[102] *R. v Wilson* (Alan Thomas) [1997] QB 47.
[103] *R v Brown* (n 4).
[104] *Laskey v UK* (n 87);Leng (n 86); Houlihan (n 9) 31-38.
[105] Kell (n 3).
[106] *R v Wilson* (n 26) (Russell LJ); Roberts (n 4) , 28; Paul Roberts, 'Taking the Burden of Proof Seriously' [1995] Crim LR 783.
[107] Code for Crown Prosecutors (n 8).
[108] *R v Dica (n 63)*; *ADT v United Kingdom* (n 72); *Dudgeon v. United Kingdom* (1981) 4 E.H.R.R. 149; cf *Laskey v UK* (n 87).

It is therefore submitted that the English approach to prosecution of injuries inflicted for the purposes of sexual gratification is outdated and inconsistent with many fundamental principles of modern democracy. It is surely not in the public interest to promote a society in which the private autonomous sexual decisions of adults are subjected to prosecution and even criminalisation simply because they are morally questionable.[109] Rather, individuals should be free to privately determine the boundaries of their own conduct, with state regulation occurring only to prevent harm to others. Importantly, the moral compass of the prosecutor ought not to cloud decisions regarding whether or not behaviour merits legal sanction;[110] as moral disapproval does not justify disproportionate legal action. The reluctance to allow consent to negate the criminal consequences of sado-masochistic injuries is surely grounded in the paternalistic approach of English law,[111] which prioritises the morality of the conduct over whether or not prosecution is actively required in the public interest.[112] Importantly, the aforementioned problems are not limited to the prosecution process, but instead are typical of the criminalisation of sado-masochistic injury in general. Let us now examine the case law, which makes plain that the moral views of the judiciary have had a significant role in shaping the legal status of injuries inflicted for sexual reasons.[113]

3 R V BROWN AND THE PRESUMPTION OF ILLEGALITY

Not only is the English approach to criminalising sado-masochism flawed for its presumption in favour of prosecution but also the adjudication process is in itself problematic. Indeed, the judiciary have consistently asserted that it is not in the public interest to intentionally injure others, unless good reason for tolerating the conduct can be found.[114] The presumption then is that consensual injury is unlawful,[115] unless the judiciary can derive sufficient social utility from certain behaviours occasioning ABH or GBH to enable consent to successfully annul the criminal consequences.[116] However, such an approach enables the judiciary and not the individual to assess the value of the benefit derived from the conduct. [117] This is objectionable, as where the judiciary cannot morally justify the behaviour; it is likely they will fail to find legal justification for it.[118] Ultimately, it is submitted that it is more injurious to the public interest to enable the judiciary to determine the boundaries of socially acceptable conduct (without adequately considering each individual case on its merits),[119] than to

---

[109] *R v Wilson* (n 10) [128];Leng (n 86), 487; cf *Laskey v UK* (n 87).
[110] Stuart (n 54) 206.
[111] Giles (n 7) 105; Dempsey (n 52) 26.
[112]Stuart (n 54) 206 – 208.
[113] Houlihan (n 9) 57.
[114] *R v Brown* (n 4); *R v Donovan* (n 1); *R v Coney* (n 10); *Attorney General's Reference (No 6 of 1980)* (n 1); *R. v Wilson* (n 102); *R v Wilson* (n 10).
[115] Giles (n 7).
[116] *R v Brown (n 4)*; Kell (n 3).
[117]Tolmie (n 3) Richard Mullender, 'Sado-masochism, Criminal Law and Adjudicative Method: R v Brown in the House of Lords' (1993) 44 NILQ 380.
[118] Stuart (n 54) 206-208; Houlihan (n 9) 57; Cane (n 7).
[119] *R v Brown* (n 4) [270] (Lord Mustill); Giles (n 7); Tolmie (n 3).

enable consenting adults to determine the limits of their own sexual behaviour. Rather, it is arguably more appropriate to begin with a presumption of legality where the conduct is consensual, and introduce liability only where the circumstances necessitate criminal action.[120]

Central to the issue of whether the putative victim's consent will be sufficient to relieve criminal liability is establishing where the concept of consent fits into the criminality of the conduct in question. This was an issue which became apparent in *Brown,*[121] having been the focus of judicial scrutiny in the preceding case law.[122] While the judicial analysis on this point is beyond the scope of this section and will not be considered in depth, the majority judgments in *Brown* are significant in the present context for the following reason. In declaring that consent can operate as a defence to conduct which would otherwise be unlawful,[123] their Lordships altered the approach from one in which a lack of consent is an element of the offence itself.[124] This is hugely significant, as in doing so; the presumption in favour of a conduct's legality where it has been engaged in consensually is reversed.[125] Instead, it is replaced with an approach in which the starting point is to declare the conduct prima facie unlawful, and subsequently determine whether there are good reasons to refrain from criminalising it.[126]

The majority approach in *Brown* almost directly mirrors the approach taken by Lord Lane in both *Attorney General's Reference (No 6 of 1980)*[127] and in deciding *Brown* in the Court of Appeal.[128] Lord Lane effectively operated to introduce a test of 'public interest' and 'good reason' in which he rejected that lack of consent was an element of the offence.[129] Instead, his approach was premised on the assumption that at the point where ABH results, the conduct is prima facie unlawful and therefore subject to prosecution.[130] Inevitably, unless there is sufficient public interest or good reason to enable consent to amount to a defence, the conduct ultimately becomes criminal.[131] This directly contradicts the expediency principle discussed in the second section, in which the underlying assumption is that prosecution ought only to occur where the public interest requires criminal sanction.[132] Yet, the majority of the House of Lords, in accepting Lord Lane's approach, confirmed that the presumption of illegality is at the core of the issue.

---

[120] ibid.
[121] *R v Brown* (n 4) [246] (Lord Jauncey).
[122] *R v Donovan* (n 1); *R v Coney* (n 10); *Attorney General's Reference (No 6 of 1980)* (n 5).
[123] *R v Brown* (n 4) [219] (Lord Templeman), [246](Lord Jauncey), [248] (Lord Lowry).
[124] Cf Canadian Criminal Code, s 265(1)(a); See also *R v Lee* (n 9) [233].
[125] Giles (n 7).
[126] Cf Feinberg (n 57) 115; Dempsey (n 52) 27; Houlihan (n 9), 54.
[127] *Attorney General's Reference (No 6 of 1980)* (n 5).
[128] [I992] 2 All ER 552.
[129] ibid; Giles (n 7).
[130] ibid; Houlihan (n 9) 57.
[131] Gilles (n 7) 104.
[132] Code for Crown Prosecutors (n 8) ; Kell (n 3); Ashworth (n 54) 31.

Having established that under English law the commission of ABH is prima facie unlawful, notwithstanding the consensual context in which it occurs, it is clear that the judiciary have complete discretion in determining whether there is sufficient public interest in exempting that conduct from criminalisation.[133] It is therefore necessary to determine how the application of Lord Lane's tests of 'public interest' and 'good reason' have been applied to cases of injuries inflicted for sexual gratification. Giles comments that exercising discretion in this way is inevitably influenced by the decision maker's concept of what is in the public good.[134] This is entirely in keeping with the present author's submission that the moral standards of the judiciary are the ultimate factor in deciding whether or not to exempt sado-masochistic injury from criminalisation. Certainly, this is evident in the fact that the House of Lords decision was not unanimous, and that the judgments of the majority and minority prioritise different factors in assessing how the public interest is best served.

For example, the majority of House of Lords stipulated that it was necessary, in the public interest, to sanction sado-masochistic violence, with a recurring theme the judgments of Lord Templeman, Lord Jauncey and Lord Lowry being the impact that failure to criminalise the conduct could have.[135] Their Lordships considered both the consequences which *could* have resulted in the case (although they did not),[136] and additionally, how a judgment that the infliction of such violence did not amount to a criminal offence may act to undermine society's moral code, thus corrupting the vulnerable.[137] While undoubtedly these are important considerations, they must be balanced with respecting the interests of the individuals involved in the case at hand. It is therefore submitted that the majority, in adopting a 'worst case scenario' approach,[138] prioritised the apparent unlawfulness of the conduct and the potential impact such conduct may have upon others,[139] over the effect criminalisation would have on the parties in the case.[140] The defendants arguably did little more than exercise their autonomous right as consenting adults to engage in private sexual conduct;[141] yet the judicial disgust at the nature of the acts resulted in reluctance to create a new exception[142] or to allow the conduct to fall into one of the existing recognised categories of exceptions.[143] This indicates that the majority felt the public interest factor was to be used to criminalise behaviour based on its potential for societal harm.

---

[133] *R v Brown* (n 4) [228] (Lord Templeman); Houlihan (n 9) 57.
[134] Ibid.
[135] *R v Brown* (n 4) [245-246] (Lord Jauncey) [255-256] (Lord Lowry).
[136] ibid; Giles (n 7) 106.
[137] *R v Brown (n 4)* [246] (Lord Jauncey); [255-256] (Lord Lowry); see also Giles (n 7); Tolmie (n 3).
[138] Tolmie (n 3) 657.
[139] Gilles (n 7).
[140] Houlihan (n 9) 40.
[141] Leng (n 86) 487; cf *Laskey v UK* (n 87).
[142] *R v Brown* (n 4) [228] (Lord Templeman).
[143] Tolmie (n 3).

This approach was taken to the extreme in the infamous case of *R v Wilson.*[144] In initially refusing to derive sufficient public benefit in allowing Mrs Wilson's consent to the activity in question to operate as a defence to her husband's criminal liability,[145] the trial judge essentially stipulated that there was no public benefit to be derived from permitting private consensual sexual exploration between adults. However, it is clear this verdict was a direct result of the ratio laid down in *Brown*, in which the majority generalised that tolerating sado-masochistic activity was never in the public interest. On the other hand, if each case was examined on its individual merit and the circumstances of the commission of the consensual violence were adequately examined to determine whether instigating criminal proceedings was necessary, parties such as the Wilsons would not have their matrimonial activity subjected to the criminal law unnecessarily.[146] As Lord Mustill stipulated in *Brown*, 'circumstances must alter cases'.[147] The importance given to this predicament is evident in the fact that the Court of Appeal in *Wilson*[148] overturned the conviction, saying,

> '… it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not in our judgment, normally a matter for criminal investigation, let alone criminal prosecution.'[149]

This is consistent with Lord Mustill's dissent in *Brown*, in which he states that, 'I cannot accept that the infliction of bodily harm, and especially the private infliction of it, is invariably criminal absent some special factor which decrees otherwise'.[150] Taken together, these statements can be read to suggest that where violence occurs in private, and with the genuine consent of the putative victim, the law should not automatically class the conduct as criminal, unless there are factors which suggest criminal sanction is necessary. Under this approach, prosecution would not occur by default, but only where there was concern over the circumstances in which the violence occurred; for example whether the consent to the harm was genuine,[151] or whether the perpetrator of the violence acted maliciously.

As Lord Mustill suggested in *Brown*, the proper approach is not to create an exception which excludes violence inflicted in the context of sado-masochistic activity from the scope of the OAPA, but rather to read the Act in such a way that consensual behaviour does not come within its scope unless mitigating factors deem it necessary

---

[144] *R. v Wilson (Alan Thomas)* (n 102).
[145] *R v Wilson* (n 10).
[146] *R v Slingsby* (n 10)*; Lee* (2006) 22 CRNZ 568 [204-205].
[147] *R v Brown* (n 4) [271].
[148] *R v Wilson* (n 10).
[149] ibid [128].
[150] *R v Brown* (n 4) [270].
[151] *R v Brown* (n 4); Gilles (n 7) 107.

to use the Act to bring criminal charges.[152] However, the inextricable link between sex and violence in the case of sado-masochism has resulted in a legal grey area, in which it is not clear how best to approach the issue.[153] For example, the majority judgments in *Brown*[154] were able to offer support for the proposition that the purpose of the OAPA was to protect against aggression and brutality, by categorising sado-masochistic behaviour as violent rather than sexual.[155] Conversely, Lords Mustill and Slynn in viewing the case as one about 'the law of private sexual relations, if about anything at all'[156] felt the OAPA was designed to combat harms 'of a kind far removed from the appellant's behaviour'.[157] It is this very lack of a unitary approach which undermines the problematic ratio,[158] and calls into question whether it is time for this controversial case to be reformed to reflect the growing importance which ought to be given to privacy, autonomy and the parameters of legally valid consent. [159] The Court of Appeal in *Wilson* favoured the minority proposition in *Brown*, in beginning with a presumption of legality, and subsequently examining whether it was necessary, in the public interest, to extend the criminal law to the appellant's activities.[160] While, arguably, the Court of Appeal in *Wilson* were correct to advocate for a presumption of legality where the context of the case does not require interference from the criminal law,[161] it is important to note that such an approach cannot be reconciled with *R v Brown.*[162] Certainly, in examining the reasoning of the majority judgments in *Brown,* it is clear the reasons given for refusing to enable consent to amount to a successful defence are applicable to Mr and Mrs Wilson. For example, Lord Templeman's judgment focuses on the unpredictability of the conduct and the potential for more serious harm than the participants had intended to result.[163] Yet, there was considerable scope for more serious harm than the participants had foreseen to result in *Wilson.*[164] Further, Lord Jauncey and Lord Lowry focused on the issue of where to draw the line between consensual conduct which was legal and consensual conduct which was criminal, highlighting criminal liability arises between the common law offence of assault, and the offence of assault occasioning ABH under Section 47 OAPA. However, it is clear that the conduct in question in *Wilson* was capable of being an offence under section 47; yet the Court of Appeal placed the conduct on the other side of the line.

---

[152] ibid, 108; *R v Brown* (n 4) [256] (Lord Mustill).
[153]Gilles (n 7); Mullender (n 117).
[154] Allen (n 6) 369-370; Bix (n 48) 541-542; Law Commission, *Consent in the Criminal Law (*Law Com CP No 139, 1995) para 10.45.
[155] *R v Brown* (n 4) [235-237] (Lord Templeman); Tolmie (n 3) 662.
[156] ibid *R v Brown* (n 4) [256] (Lord Mustill).
[157] ibid [258].
[158] *R v Lee* (n 9) [198] Houlihan (n 9).
[159] Mullender (n 117).
[160] Roberts (n 4).
[161] ibid.
[162] ibid.
[163] *R v Brown* (n 4).
[164] Allen (n 6) 369.

Clearly, the distinguishing factor between the two cases is that the Court of Appeal in Wilson was reluctant to regulate the private conduct of married adults,[165] where criminal sanction was unnecessary. On the other hand, the majority of House of Lords in *Brown* saw it as their role to protect society against what they viewed morally repugnant harms.[166] This is evident in Lord Templeman's conclusion that, 'pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised'[167] and accordingly, 'society is entitled and bound to protect itself against a cult of violence'.[168] Yet, it is clear that there is a judicial willingness to tolerate the intentional infliction of ABH when it occurs in other contexts,[169] including in the controversial case of boxing.[170] As such, it is clear the judiciary have considerable discretion in determining which conduct merits criminal sanction, and it is submitted that in exercising that discretion, the moral standards of the judges involved often influence their decisions.

Another fundamental problem with the Court of Appeal's decision in *Wilson* is its discriminatory result.[171] In moving away from the presumption that consensual bodily harm is unlawful by default, the court recognised the importance of affording competent, consenting adults the right to privately exercise their autonomous right to act as they see fit. Yet, the application of this right was severely limited, as the court emphasised that their reluctance to sanction the conduct was based on the respect for the sanctity of marriage.[172] This is problematic, as in permitting consent to operate as a defence to injuries inflicted during matrimonial intercourse,[173] but prosecuting those sustained outside marriage,[174] the law indirectly discriminates against the unmarried.[175] This is enhanced by the fact that homosexual couples had no legal right to marry until February of this year.[176] Thus, personal autonomy is undermined further, by recognising some decisions on how to lead one's life as more socially and ultimately more legally acceptable than others.[177] This was recognised by the trial judge in *Wilson*, where it was noted,

> 'Until such time as the legislature or the European Court do something about it, we are now saddled with a law that means that anyone who injures his

[165] ibid.
[166] ibid; See also *R v Lee* (n 9) [203].
[167] *R v Brown* (n 4) [237].
[168] ibid [237].
[169] Ibid.
[170] *Pallante v Stadiums Pty Ltd* (n 69); *R v Barnes* (n 75*)*; *R v Brown* (n 4).
[171] Allen (n 6) 369-370.
[172] *R v Wilson* (n 10).
[173] *R. v Wilson (Alan Thomas)* (n 102).
[174] *R v Brown* (n 4).
[175] *Laskey v UK* (n 87); Ashworth (n 54) 313; Allen (n 6) 369-370; Bix (n 48); Houlihan (n 9) 54.
[176] See '*Gay Marriage an Important Step Forward, Says PM'* BBC News, (London, 5th February 2013) available at < http://www.bbc.co.uk/news/uk-politics-21325702> accessed 05 March 2013; '*Gay Marriage: Party Leaders Hail Vote'* BBC News, (London, 6th February 2013) available at < http://www.bbc.co.uk/news/uk-politics-21347719> accessed 5 March 2013.
[177] Stuart (n 54) 206; Houlihan (n 9) 54.

> partner, spouse, or whatever, in the course of some consensual activity is at risk of having his private life dragged before the public to no good purpose.'[178]

Importantly, this proposition is not limited to spouses; thereby recognising that it is inappropriate to interfere in the private lives of anyone whose activity does not merit the interference, regardless of their sexuality or marital status. The issue is that interference with private consensual activity is not warranted, unless the circumstances necessitate criminal sanction, as highlighted by Lord Mustill's dissent in *Brown.*

It is clear that intentionally injuring a consenting partner for sexual gratification is a legal anomaly under English law. That the Court of Appeal in *Wilson* had to take such liberties as they did to arrive at their verdict highlights the serious flaws in *R v Brown.*[179] Yet it is clear that the judiciary are reluctant to tackle the issue, preferring instead to defer to Parliament on the matter.[180] As such, the problematic ratio of the *R v Brown* stands leaving the lower courts two options- to adhere to a flawed approach, criminalising behaviour which may not merit legal sanction; or manipulate *Brown* to achieve a fair result, at the expense of legal certainty and consistency. That the lower courts even have to make such a decision shows the obvious need for reform and clarification of this area of law. Ultimately, the presumption that injurious yet consensual sexual conduct is illegal unless the judiciary decide otherwise is anomalous, in light of the judicial willingness to tolerate the same level of injury where it occurs in other contexts.[181] Certainly, automatically subjecting sado-masochistic injury to prosecution entirely contradicts to the judicial approach to consensual ABH and GBH where they occur in other categories.[182] It is therefore necessary to examine the reasons why sufficient 'public benefit' can be derived from the public infliction of brutal force in contexts such as boxing, but not in the context of private, sexual exploration.

4 CONSENSUAL VIOLENCE AND CONTEXT: A COMPARISON WITH BOXING

It is clear that the distinguishing factor between conduct occasioning ABH, which is criminal, and that which is not, is whether the public benefit associated with the conduct is sufficient to negate criminal liability.[183] However, this is largely dependent upon the category in which the violence occurs and the morality associated with that category, as the judicial approach to criminalising consensual ABH and GBH is

[178] *R v Wilson* (n 10) (Russell LJ); Roberts (n 4) 28; Elliot and de Than (n 20).
[179] Roberts (n 4).
[180] *R v Brown* (n 4) [260] (Lord Jauncey), [274] (Lord Mustill), [282] (Lord Slynn).
[181] Roberts (n 4).
[182] *Pallante v Stadiums Pty Ltd* (n 69); *R v Barnes* (n 75); *R v Brown* (n 4).
[183] *R v Brown* (n 4); *R v Donovan* (n 1); *R v Coney* (n 10); Attorney General's Reference (No 6 of 1980) (n 1); *Pallante v Stadiums Pty Ltd* (n 69); *R* v *Barnes* (n 75).

entirely reversed where such injuries are sustained in a sporting context.[184] While the case law makes clear that satisfying a sadistic libido has insufficient public benefit to merit immunity from criminalisation,[185] it has failed to provide guidance on *how* the public interest is assessed.[186] Rather, the ambiguous requirement of deriving 'good reason' from conduct to exempt it from the reach of the criminal law can be manipulated to enable the judiciary to exercise their discretion in accordance with their moral standards.[187] Let us then examine the accepted categories of recognised exceptions, in which the alleged benefit to society is such that the injurious conduct is warranted despite the harm that results.[188] This section will consider the reasoning behind failing to criminalise the injuries ensuing from contact sports, which for the purposes of this paper includes sports whereby participation requires contact capable of fulfilling the definition of assault and ABH. It will be argued that many of the justifications for permitting injury sustained in this context could just as readily be applied to consensual sado-masochism if only the judiciary were willing to apply the law in that way.[189]

Once again, it is important to note from the outset how the problematic concepts of 'public interest' and 'good reason' have shaped the leading case law. Let us consider for example the judgment of the Court of Appeal in *Attorney General's Reference* (No 6 of 1980).[190] Here, it was held that it was 'not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason'.[191] Yet the Court of Appeal failed to offer a clear explanation of what was actually meant by the phrase 'in the public interest'; and additionally, what would constitute a good reason for causing ABH.[192] Importantly, this uncertainty was not limited to the aforementioned case, having instead been a recurring theme in the case law in this area.[193] Certainly, the judiciary has been more than willing to refer to what the public interest requires[194] and how it can be undermined,[195] without specifying what it actually is and how it impacts the parameters of a legally valid consent.[196] Incredibly, the Court of Appeal in *Brown* openly asserted that it was not necessary to define the concept of good reason; yet their Lordships were nonetheless certain that the appellants' activities did not satisfy its requirements.[197] According to Lord Lane CJ,

---

[184] *R* v *Barnes* (n 75); *Pallante v Stadiums Pty Ltd* (n 69); David Kell (n 3) 124; Mullender (n 117).
[185] *Attorney General's Reference (No 6 of 1980)* (n 5); *R v Brown* [1992] 94 Cr.App.R. 302 [309]
[186] Cooper and James (n 3) 190-191; Allen (n 6).
[187] Bix (n 48).
[188] *R v Brown* (n 4); *Attorney General's Reference (No 6 of 1980)* (n 5); *R v Wilson* [1997] QB 47.
[189] Kell (n 3) 121.
[190] [1981] QB 715.
[191] ibid [719].
[192] Cooper and James (n 3) 190-191.
[193] *R v Brown* (n 4); *R v Wilson* (n 10).
[194] ibid*, R v Wilson* (n 10) [128].
[195] ibid [67] (Lord Lowry); *R v Brown* [1992] 94 Cr.App.R. 302.
[196] Cooper and James (n 3) 189.
[197] *R v Brown* (n 195) [309].

> 'What may be "good reason" it is not necessary for us to decide. It is sufficient to say, so far as the instant case is concerned, that we agree with the trial judge that the satisfying of sado-masochistic libido does not come within the category of good reason.'[198]

This clearly demonstrates that the malleability existing under the current position affords the judiciary total discretion in declaring whether conduct is included in, or exempted from this uncertain category of good reason. Lord Mustill's comment in *Brown* arguably goes to the heart of the issue in saying, 'it is unduly complicated to suggest that the public interest might annul the defence of consent in certain situations and then in the shape of "good reason" recreate it'.[199] Indeed, absent clarification on how these factors are to be applied, there is scope for the decision maker's own morals and principles to shape their final decision.

Despite failing to adequately define the concepts of good reason and public benefit, the House of Lords in *Brown* held that there was sufficient public good in permitting the individual's consent to negative the otherwise criminal consequences of boxing, body adornment and medical treatment, to name a few. However, in failing to extend this privilege to sado-masochistic activities, the majority implied that the appellants' activities could be distinguished from the permissible categories of consensual violence.[200] Yet, on closer examination of the 'public benefit' behind permitting consensual violence in the accepted recognised exception categories, it is difficult to see why the same principles did not operate to ensure that state regulation of sado-masochistic activity occurred only where aggravating factors required it.[201] The comparison with boxing will be twofold: firstly, this paper will consider the justifications for exempting the sport from criminalisation, before going on to consider how a declaration of 'good reason' impacts the adjudication process. Let us begin by comparing the justifications for exempting boxing from criminalisation with the reasoning behind deeming injuries inflicted for sexual gratification 'perverted' and 'depraved'.[202] Arguably, the principles that distinguish the two depend upon morality.[203]

In the contentious area of boxing,[204] there is alleged 'good reason' to negative criminal liability for offences against the person, [205] despite the intentional infliction of potentially deadly force.[206] The traditional justification for failing to sanction the

---

[198] ibid.
[199] *R v Brown* (n 4) [210] (Lord Mustill).
[200] Athanassoulis (n 58) 147-149.
[201] ibid; Giles (n 7) 108*;* Leng (n 86*)* 480; Law Commission Consultation Paper No.139 (n 86) [10.42-10.46].
[202] *R v Brown* (n 4) [67] (Lord Lowry).
[203] Cooper and James (n 3) 190-191; Bix (n 48) 542.
[204] David Ormerod and Michael Gunn, 'The Legality of Boxing' (1995) 15(2) LS 181.
[205] *Pallante v Stadiums Pty Ltd* (n 69); *R v Brown* (n 195)*; R v Brown* (n 4).
[206] *R v Brown* (n 4) [278]; Ormerod and Gun (n 204) 190; Cooper and James (n 3) 188-189.

intentionally inflicted brutality, which results from the sport, is that it is embedded within British culture, providing sufficient social value to exempt it from the reach of the criminal law.[207] This is hardly convincing, especially if we consider this in light of the fact that the same British culture outlawed homosexuality and abortion until relatively recently.[208] While both may remain contentious issues in the moral sense,[209] they are nonetheless accepted legal rights within modern British democracy,[210] and this aptly demonstrates the law's ability to respond to the increasing societal tolerance of the individual's right to choose.[211] Another potential explanation for boxing's 'anomalous legal status'[212] emphasises the importance given to self-expression through sport.[213] Yet, for sadomasochists, violence is a fundamental aspect of sexual expression.[214] Indeed, Bamforth notes that, 'the significance of the violence involved is analogous to that of (permitted) rough physical interaction in contact sports – it constitutes, for the participants, a vital component of the activity in issue'.[215] Thus, it can be argued that it is inappropriate for the state to use the criminal law as a mechanism to deter individuals from sado-masochistic sex and push them towards non-violent sex, as the state does not encourage boxers to involve themselves in a non-violent sport.[216] Instead, the state respects the individual's autonomous right to engage in whatever sport they chose.[217]

Even if the injuries resulting from sado-masochistic sex are not condoned by society, affording the individual the scope to pursue what they believe to be best for their own personal interests arguably ought to be a good enough reason to reduce unnecessary state interference.[218] This is evident in the fact that while many may not condone boxing, this does not hamper the rights of those who decide to participate in it, to do so. Additionally, boxing indirectly promotes a tolerance of violence within society, which is not present where sado-masochistic behaviour occurs in private. Certainly, the intention in boxing is to inflict GBH, while the intention in sado-masochistic violence is to privately engage in consensual sexual activity.[219]

---

[207] ibid; Cooper and James (n 3) 188, 193.
[208] Abortion Act 1967 s 1(1); Sexual Offences Act 1967 s 1(1).
[209] *Dudgeon v. United Kingdom* (1981) 4 EHRR 149 [60]; Steve Foster, 'Gross Indecency and the Right to Private Sexual Life' (2000) Cov LJ 77, 80.
[210] ibid.
[211] *R v Brown* (n 4); Athanassoulis (n 58); Law Commission Consultation Paper No.139 (n 86).
[212] Law Commission Consultation Paper No.139 (n 211) paras 10.42 – 10.46; Leng (n 86); Cooper and James (n 3) 191- 192.
[213] Law Commission Consultation Paper No.139 (n 86) paras 10.42-10.46.
[214] Leng (n 86) 487; Nicholas Bamforth, 'Sadomasochism and Consent' [1994] Criminal Law Review 661.
[215] ibid 663.
[216] *R v Brown* (n 4).
[217] ibid; See also Mullender (n 117).
[218] Bix (n 48) 541; Leng (n 86); Tolmie (n 3) 661.
[219] Michael Jefferson, '*Offences against the Person: Into the 21st Century'* [2012] J Crim L 472, 488; Athanassoulis (n 58).

Admittedly, a fundamental difference between the violence resulting from boxing matches and violence resulting from sadism is the regulation element. Contact sports, and boxing in particular, are highly regulated by professional bodies and standards,[220] which seek to ensure safety and minimise the risk of harm (as far as possible to do so without offending the nature of the sport).[221] However, it is important to bear in mind that while sado-masochistic sex may not be regulated by outside bodies, it is regulated by the participants themselves.[222] This is crucially important, as in the same way that sportsmen accept the agreed rules of the sport, so do sado-masochists accept the boundaries established by their partners.[223] As in contact sports, when it appears the rules have been breached and caution is sought from an independent referee;[224] sadists can rely on pre-determined 'stop words' to act as a caution,[225] where one party feels the other is going too far. The difference then is the presence of a third party to regulate the conduct.[226]

Certainly, the evidence given to the Law Commission suggests that communication, trust and advance planning all play key roles amongst sadists,[227] as their sexual gratification is dependent upon ensuring that the violence remains within the limits which both parties have set. Yet this is given considerably less weight than its sporting counterparts, as the Court of Appeal in *R v Barnes*[228] made clear that the criminal law should be reserved for grave scenarios. Thus, the role of the criminal law in regulating contact sports is to begin with a presumption of legality, and introduce criminal consequences only where the circumstances mean they are required. Consistent with Lord Mustill's dissent in *Brown*, applying this approach to sado-masochism would enormously improve sado-masochists' rights to privacy, whilst enabling criminal liability to occur where it is merited.

Athanassoulis argues it is not the regulation which impacts the legality of contact sports,[229] but instead it is the participants' consent to the possibility of injury which exempts criminal liability.[230] The regulation serves only to ensure that the participants clearly understand the boundaries of what they have consented to by participating in the sport;[231] and that injuries which cannot be said to have been reasonably consented

[220] Amateur Boxing Association of England Rules, available at <http://www.abae.co.uk/aba/index.cfm/about-boxing/the-rules-of-amateur-boxing/> accessed 10 February 2012; The International Boxing Organisation rules and regulations, available at <http://www.iboboxing.com/ibo_championship_rules_and_regulations.html> accessed 11 February 2013.
[221] Cooper and James (n 3) 190, 193.
[222] Law Commission Consultation Paper No.139 (n 86).
[223] ibid paras 10.32-34, 10.38.
[224] ibid; Falsetto (n 7) 185-189.
[225] Doherty (n 7) 126-127.
[226] Noted in *R v Brown* (n 4) [238] (Lord Jauncey).
[227] ibid.
[228] *R* v *Barnes* (n 75); Allen (n 6) 370-371.
[229] Athanassoulis (n 58).
[230] ibid, 148.
[231] *R v Billinghurst* [1978] Crim LR 553; *R* v *Barnes* (n 75).

to through participation are punished accordingly.[232] Perhaps then, it is a combination of the regulation and consent elements which together annul the criminal consequences for ABH and/ or GBH in the context of contact sports.[233] Yet this approach could be directly applied to sado-masochism, if the judiciary were only willing to develop the common law in this way. Indeed, if the approach of Lords Mustill and Slynn in *Brown* were followed, the criminal law would be used only when 'some special factor' meant its use was necessary.[234] This could include situations where one party acted maliciously or recklessly; where the recipient's consent was not genuine; or where for whatever reason a sado-masochist felt their partner had gone beyond the limits of what their consent allowed for.[235]

Certainly, Lord Mustill and Lord Slynn clearly stipulated that automatic recourse to the criminal law is not the most appropriate course of action for harm arising out of consensual sado-masochism.[236] In their view, the law should enable the participants' autonomous right to sexual expression to limit the criminality of ABH,[237] where the consent to the injury was genuine, and the injury did not exceed the boundaries of what the participants could reasonably have expected through participation in the conduct.[238] As in boxing, the criminal law could still be used as a sanctioning mechanism where malice or reckless occasioned harm of a kind which the participants viewed as unacceptable. This would follow the judicial approach to criminalising ABH and GBH in contact sports, in which the 'good reason' associated with the category of conduct provides a presumption of legality as a starting point. Legal intervention then occurs only where the circumstances are such that such regulation is required.

It is important to note the relatively brief consideration given to the concept of privacy under the current approach, as discussed in section two. It is noteworthy in this context if we consider that the majority judges in *Brown* made clear their decision not to exempt the conduct from criminalisation was based at least in part on the possibility of corrupting young men, through falsely portraying that this type of sexual activity was acceptable.[239] In any case, even if *Brown* had been decided differently, it is likely that the ratio would have suggested that private sexual affairs were not the law's concern where they were consensual (similar to the approach of the Court of Appeal in *Wilson)* – something very different from a legal stamp of approval of sado-masochism itself which the majority so feared.[240] As Kell highlights, while considering the general effect of judicial decisions is legitimate, criminalising conduct

[232] ibid.
[233] Athanassoulis (n 58) 148.
[234] *R v Brown* (n 4) [270] (Lord Mustill).
[235] Falsetto (n 7); *R* v *Barnes* (n 75); Michael Allen (n 6) 370.
[236] *R v Brown* (n 4) [270-275] (Lord Mustill).
[237] Ibid; see also Mullender (n 117).
[238] Allen (n 6) 370-371.
[239] *R v Brown* (n 4); Kell (n 3) 124; Falsetto (n 7).
[240] ibid.

on the remote possibility it would encourage others to mimic it less skilfully is inappropriate.[241] Further, unlike private sado-masochism, boxing is something others can actively view for entertainment purposes.[242] The brutal violence inflicted in the course of boxing is therefore not confined to viewing by the participants, in the way that private, sexual behaviour is. Arguably then, boxing poses an equal if not greater risk of encouraging young men to participate in intentional violence, through sending the message that it is socially acceptable to intentionally injure another under the guise of sport.

Conducted privately or not, the crucial factor in the intentional infliction of violence is the consent.[243] It is as fundamental in sado-masochistic sex as in standard sex: without consent, an act of force (penetration) becomes criminal (rape).[244] Consenting to inflict or receive pain is as fundamental to the sexual process for sadistic couples, as perhaps foreplay may be for the typical, non-sadistic couple. In both cases, the receiver consents to the contact as a means of achieving sexual gratification, and it is the lack of consent from the recipient which transforms the act from one of acceptable sexual activity into a criminal offence.[245] Therefore, when viewed in this sense, it seems reasonable to expect minimal state interference with private, sexual expression.[246] Yet as discussed in the previous section, the presumption is entirely reversed in sado-masochistic sex; and the presence of consent to the violence is irrelevant if 'good reason' for tolerating the conduct cannot be found.[247]

Ultimately, it is clear that the current approach under English law is less than perfect.[248] The guidelines by which judges determine whether or not the defence of consent is available are so ambiguous that they serve as to confuse an already complicated area of law, by failing to provide an explanation, in certain terms, of how the concepts of 'good reason' and 'public benefit' are to be applied to consensual sado-masochism. Further, by failing to consider each case on its individual merits, and instead considering each case as part of a broader category,[249] the importance given to individual autonomy is seriously compromised.[250] This is because in prioritising the benefit (or lack of) to society provided by a category of conduct, the law overlooks the benefit to the parties involved in the case and their personal

[241] Kell (n 3) 124.
[242] Cooper and James (n 3).
[243] *R v Brown* (n 4) (Lord Mustill); Athanassoulis (n 58).
[244] Sexual Offences Act 2003 section 1(1)(b); Law Commission Consultation Paper No.139 (n 86) para 10.32; See also *R v Brown* (n 4) [79]; Athanassoulis (n 58) 148-149; Dempsey (n 52) 26.
[245] Sexual Offences Act 2003 section 1(1)(b).
[246] ibid; Bix (n 48) 541; See also R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell, 1990) 167-173, cited in Nicholas Bamforth, *'Sadomasochism and Consent'* [1994] *Criminal Law Review* 661, 663; Mullender (n 117).
[247] ibid.
[248] ibid; See also Leng (n 86); Tolmie (n 3) 656; Falsetto (n 7); Law Commission Consultation Paper No.139 (n 86).
[249] Tolmie (n 3).
[250] ibid 657; Mullender (n 117).

justifications for involving themselves in the injurious conduct.[251] This is not to say that the state is not justified in restricting the amount of harm one person can legally cause another.[252] On the contrary, the harm principle is a driving force behind English criminal law and arguably ought to remain so. The issue is that as far as private sexual behaviour is concerned, the law intervenes too readily[253] and fails to afford the same respect for individual autonomy as it more readily affords to cases of intentional violence in contact sports. With this in mind, the next section will consider the way in which the issue of consensual sado-masochism has been approached in other jurisdictions, examining the possibility of reforming the current position to better reflect the increasing weight given to privacy and individual choice.[254]

5 PROPOSALS FOR REFORM

This section will argue that two fundamental changes are required in order to effectively improve the criminalisation of sado-masochism. Firstly, it is arguably necessary to introduce a presumption of legality where consensual sexual activity results in injury, which should be extended to cover both assault and assault occasioning ABH. [255] This would markedly advance the English approach, by limiting the situations in which conduct is subject to the criminal law. Importantly, not only is the law itself in need of reform, but so too is the way in which it is applied. A clear articulation of the principles governing 'good reason' and 'public benefit' would clearly be beneficial,[256] and it is perhaps time for the judiciary to outline how novel categories of consensual violence will be approached in the future.[257] Thus, the second major change is that guidance ought to be provided on *how* the public interest factor operates. A similar approach to that advocated above has been followed in New Zealand,[258] where the Court of Appeal in *Lee*[259] took the opportunity to evaluate the English approach in considering how the defence of consent ought to operate. They held that it was necessary to depart from the English authorities,[260] instead favouring a presumption of legality as the starting point.[261] Further, clear guidance on when criminalisation is appropriate has been provided, and the court held that the facts of the particular case as well as the context in which the violence occurs must be considered. [262] It will be suggested that English law could benefit from adopting a similar position.

---

[251] ibid 661.
[252] Falsetto (n 7).
[253] Recognised by the Court of Appeal in *R v Lee* (n 9) [198]; See also Bix (n 48); Leng (n86); Athanassoulis (n 58); Tolmie (n 3).
[254] *R v Brown* (n 4) [272] (Lord Mustill)*; ADT v United Kingdom* (n 72); *Dudgeon v. United Kingdom* (1981) 4 E.H.R.R. 149; Falsetto (n 7).
[255] Kell (n 3); Cooper and James (n 3).
[256] ibid 199.
[257] ibid; Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' [1997] 17 OJLS 389.
[258] *R v Lee* (n 9).
[259] ibid.
[260] ibid [291-295].
[261] ibid [300].
[262] ibid; See also Doherty (n 7) 130-131; Elliot and de Than (n 20).

It has been argued throughout that the presumption that sado-masochistic injury is illegal is an inappropriate basis for automatically criminalising such conduct. This paper contends that a fundamental aspect of improving the current position is dependent upon introducing a presumption of legality in cases of private, consensual sexual activity, as advocated by Lord Mustill in *Brown*.[263] This would afford consenting adults the privacy to determine their own sexual preferences whilst ensuring prosecution was not initiated solely due to the context in which the violence occurred. The Canadian position favours such an approach, by stipulating that a lack of consent is a necessary element of the offence of assault.[264] Importantly, approaching injurious sexual conduct in this way would serve to limit undue state interference in accordance with the proper function of the criminal law.[265] As discussed in the second section, prosecuting cases where ABH or GBH is inflicted for reasons of sexual gratification where the evidential requirements are satisfied is contentious and arguably problematic. Moreover, it is clear that the decision to prosecute is based largely on the context of the violence, as the same level of violence is not automatically subject to prosecution where it occurs in the context of contact sports.[266] Allowing the moral distaste of sado-masochism[267] to influence its legality is arguably unrepresentative of how English law ought to operate.[268] Certainly, Lord Mustill observed in *Brown* that,

> 'Many people if asked whether the appellant's conduct was wrong, would reply 'Yes, repulsively wrong'… [yet] this does not in itself mean that the prosecution of the appellants under ss.20 and 47 of the Offences against the Person Act 1861 is well founded.'[269]

This indirectly recognises that while many may hold moral reservations about intentionally injuring another for sexual reasons, sexual paternalism is in itself problematic for its impact upon autonomy and privacy.[270] Thus, it remains necessary to reform the approach to prosecuting sado-masochistic injuries in an effort to separate morality and legality. Prosecuting too readily not only violates the fundamental rights of the participants, but also undermines the legislation by stretching it to include situations, which it was never intended to cover. [271] As Allen notes, 'it is difficult to believe that the legislators in 1861 had sado-masochism in mind when they framed sections 18, 20 and 47 of the Act'.[272]

---

[263] *R v Brown* (n 1).
[264] Canadian Criminal Code, section 265(1)(a); See also *R v Lee* (n 9) [233].
[265] Roberts (n 257).
[266] *R v Brown* [1993] (n 1); Giles (n 7); Roberts (n 257) 389; Athanassoulis (n 58).
[267] Kell (n 3) 124.
[268] Recognised in *Lee* (2006) 22 CRNZ 568 [203].
[269] *R v Brown* (n 1) [116]; Leng, (n 86) 482.
[270] ibid, 486-487; Cane (n 7); Roberts (n 257).
[271] *R v Brown* (n 4) [256-258] (Lord Mustill); Roberts (n 257).
[272] Allen (n 6) 369.

Further, sexuality is now largely accepted as a personal matter, and is no longer limited to the reproductive practices of spouses. Rather, sexual expression is for many part and parcel of personal identity,[273] and this has been increasingly reflected in the case law.[274] Certainly, legal opinion has advanced in the years that have passed since *Brown,* with the Court of Appeal in *Wilson* notably declaring that private, matrimonial relations were unsuitable for consideration by the courts.[275] Further, the European Court of Human Rights in *ADT v United Kingdom*[276] recognised the importance of respecting private sexual relations, which were never intended to be made public.[277] As such, it is submitted that this ought to be reflected in the prosecution process, through introducing a presumption of legality where ABH is privately inflicted with the genuine consent of the recipient. Arguably, such a presumption is equally appropriate in sexual practices, as it is in its sporting counterparts.[278] In this way, the default position would be altered so that violent sexual practices would not be automatically subjected to the criminal law. Instead, the criminal law would be used only where something other than the context of the violence meant state intervention was necessary.[279] This could include situations where the level of violence was such that death was risked,[280] or where there was concern regarding the authenticity of the consent to the injury in question.

Where it is deemed appropriate to prosecute violent sexual activity, it then becomes necessary to consider how the law ought to be applied. While it is suggested that clarifying the legal status of harmful conduct requires examination of the category of the conduct;[281] there is also a need for residual discretion.[282] Giving precedence to the level of violence which results over the context in which it occurs would enable individual circumstances to be considered in situations where the category of conduct is unlawful, but the circumstances are such that criminal intervention is not required.[283] Crucially, it is necessary to stipulate in clear terms where the line is to be drawn between consensual behaviour and justified legal intervention and which factors influence this decision.[284] This is exactly what the House of Lords failed to do in *Brown*.

---

[273] Leng, (n 86) 487; Bamforth, (n 214) 663.
[274] *R v Wilson* (n 10); *ADT v United Kingdom* (n 72); *Goodwin v UK* (2002) 35 EHRR 18; *Belinger v Belinger* [2003] UKHL 21.
[275] *R v Wilson* (n 10); cf *Emmett*, The Times, October 15 1999.
[276] *ADT v United Kingdom* (n 72).
[277] 'Crime and Sentencing: Consensual Group Sex between Homosexuals - Proceedings for Gross Indecency' (2001) 1 EHRLR 86, 89.
[278] Roberts (n 257) 395.
[279] *R v Brown* (n 4)[113d-e].
[280] *R v Slingsby* [1995] Crim LR 570; *R v Brown* (n 4) [281] (Lord Slynn); *R v Lee* (n 9); Tolmie (n 3).
[281] cf Julia Tolmie (n 3).
[282] *R v Brown* (n 4) [258]; *R v Jobidon* [1991] 2 SCR 714 [762-763]; R v Lee (n 9) [243-236].
[283] Ibid.
[284] Falsetto (n 7); Roberts (n 257).

Let us then consider the approach towards consensual violence in New Zealand. In *Lee,*[285] the New Zealand Court of Appeal encouraged a novel approach, in which consensual violence was divided into three categories.[286] The first category considered intentional ABH, the second considered intentional GBH and the final focused on situations in which death was intended or subjectively risked. Analysis of the reasoning behind approaching consensual violence which results in death is beyond the scope of this paper; suffice to say that refusing to permit consent to amount to a defence is a sentiment likely to be shared by the majority of modern, democratic legal systems.[287] Nonetheless, it is submitted that English law could benefit from following the approach undertaken in the first two categories. Under the New Zealand approach, determining which category the conduct fell into, and ultimately its legality was dependent upon the level of harm intended or risked by the defendant. Their approach was therefore indirectly premised upon establishing the facts of the particular case, as in examining the defendant's intention, it is inevitably necessary to consider the individual case on its merits.[288] This can be contrasted with the English approach, which we have seen prioritises the implications of a not guilty verdict, over the importance of ascertaining the reasons why the conduct was consensually engaged in.[289]

In the first category, the court stipulated that where ABH is intended, the 'victim's' consent is sufficient to relieve criminal liability,[290] save for where the injury occurred in the context of fighting.[291] Significantly then, the New Zealand approach to consensual ABH is entirely the opposite of the English approach. Indeed, the Court of Appeal in *Lee* made clear that there is a presumption of legality where the consensual ABH is inflicted intentionally or recklessly, and it is for the judiciary to introduce exceptions which nullify the legality. Importantly, the court articulated the need for judicial caution when introducing additional exceptions to this rule, saying, 'judges should be very wary of creating exceptions based on their own personal views of acceptable behaviour'.[292] It is submitted that this is entirely what is lacking under English law: introducing a presumption of legality would address the issue of whether consensual sado-masochism is one which is justiciable in the first place, by ensuring cases such as *Wilson* would not come before the courts by default but only as a result of mitigating circumstances. Additionally, the separation of morality and legality would afford the individual the legal freedom to determine the limits of their own sexual behaviour, by refusing to allow moral disgust to result in automatic criminality.

---

[285] *R v Lee* (n 9).
[286] Tolmie (n 3).
[287] *R v Slingsby* (n 280)**;** *R v Brown* (n 4) [281] (Lord Slynn).
[288] Tolmie (n 3) 658-659.
[289] ibid; Roberts (n 257).
[290] *R v Lee* (n 9); Tolmie (n 3) 658-659.
[291] ibid.
[292] ibid [637]; Tolmie (n 3) 658-659.

In the second category, the starting point was a presumption that GBH was lawful where the conduct was consensual, unless public policy factors required the defence of consent to be withdrawn. What is particularly significant is that the Court of Appeal actually provided guidance on which factors the judge ought to take in to account in deciding whether 'public policy considerations' required the defence to be withdrawn. This is in sharp contrast to the approach of the English Court of Appeal in *Brown*, who were of the opinion that it was not necessary to discuss the concept of 'public interest' any more than to say sado-masochistic activity did not fulfil its requirements.[293] Conversely, in *Lee,* it was suggested that,

> 'The judge should take into account the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent and any other relevant factors in the particular case.'[294]

That the court gave direction on how the public interest was to be applied is in itself significant, when compared with the English case law. Certainly, the English judiciary have largely used their discretion in upholding 'the public interest' to disguise their personal views, where they cannot be justified with reference to existing legal principles.[295] However, the substance of the guidance provided is also noteworthy for three reasons. Firstly, the importance of personal autonomy was specifically emphasised as a right – implying that each individual is owed the freedom to determine their own behaviour.[296] This again affirms the present author's submission that prosecution by default is inappropriate for obscuring the proper function of the criminal law and for the detrimental impact upon personal autonomy.[297] Secondly, it was made clear that whether or not consent would nullify the consequences of GBH would require consideration of the individual case.[298] Finally, the level of injury intended or risked was specifically identified as an influential factor in its own right. The approach of the New Zealand Court in *Lee* directly addresses what the English approach fails to do – namely facilitating consideration of factors not limited to the context and providing guidance on how these will impact judicial reasoning.

The New Zealand approach can again be used to ameliorate our own if we examine the Law Commission's proposed Criminal Law Bill which sought to reform sections 18, 20 and 47 of the 1861 OAPA. The Commission was of the view that it was

---

[293] *R v Brown* (n 185) [309].
[294] *R v Lee* (n 9) [316]. See also O'Regan J. in *Barker* [2010] 1 N.Z.L.R. 235 CA, [136], cited in Tolmie (n 3) 659.
[295] Kell (n 3) 133; Giles (n 7); Allen (n 6) 376; Falsetto (n 7); Doherty (n 7) 127; Cane (n 7).
[296] See Leng (n 86) 486.
[297] Roberts (n 257).
[298] Tolmie (n 3).

necessary to introduce a statutory definition of intention,[299] as the defendant's intention would become an integral part of the offence.[300] While codifying key fault terms is to be welcomed for limiting the influence of discretion and thus indirectly improving consistency, a subjective approach fails to consider situations in which the defendant intends only a lesser form of harm than that which resulted.[301] In contrast, the New Zealand approach accounts for the possibility that the level of violence was not necessarily intentional at all stages, through objectively assessing the risk involved. Nonetheless, while the proposed Criminal Law Bill sought to retain the position established in *Brown,*[302] focusing on the level of injury intended could clarify the current position without relying too heavily on the context in which the violence occurs. As discussed previously, categorising sado-masochistic conduct as inherently sexual or violent serves only as a means of justifying a decision based largely on morality.[303] Yet, it is not necessary to determine whether the conduct can be categorised as sexual activity or intentionally inflicted violence.[304] As the New Zealand approach demonstrates, the focus ought to be on the level of violence intended or risked, the reasons for engaging in the conduct, and the impact criminalisation would have on personal autonomy.

With this in mind, the Law Commission's recommendation that consent should provide a defence for all but 'serious or disabling injuries'[305] goes some way towards improving the problematic ratio of *Brown.* Adopting this approach would therefore recognise that sado-masochistic injuries for the most part do not warrant criminal consequences where they are consensual.[306] Indeed, Lord Jauncey rightly observed in *Brown* that no permanent injuries had resulted from the appellants' conduct,[307] and as medical treatment was not sought, it is unlikely that any injuries, which did result, would satisfy the severity requirements. However, this approach is not without difficulties.[308] Determining whether an injury is 'serious' or 'disabling' is a subjective process, and as both terms are ambiguous, a unitary approach is unlikely. Furthermore, adopting such a presumption automatically reverses the common law presumption that conduct which has not been prohibited is lawful,[309] and has practical implications in that exceptions to this rule will necessarily become required as and

[299] Draft Criminal Law Bill, set out in Law Corn No 218**,** *Legislating the Criminal Code: Offences Against the Person And General Principles,* Cm 2370 (HMSO, 1993) Clause 1(1)(a) (Hereafter, 'Draft Criminal Law Bill'); Law Corn No 218, *Legislating the Criminal Code: Offences Against the Person And General Principles,* Cm 2370 (HMSO, 1993) [7.1-7.14].
[300] Law Commission, *Consent and Offences against the Person* (Law Com No 134, 1994) paras 7.31-7.40.
[301] cf *R v Slingsby* (n 280).
[302] Draft Criminal Law Bill, Clause 6(1)(a)(ii).
[303] ibid.
[304] ibid 130-131.
[305] Law Commission Consultation Paper No.139 (n 86) para 2.18; Roberts (n 257); Doherty (n 7).
[306] Doherty (n 7) 135.
[307] *R v Brown* (n 1) [53].
[308] Roberts (n 257) 395-405.
[309] ibid 404.

when new situations arise.[310] Conversely, the New Zealand approach is premised on a presumption of legality to statutorily defined injuries and thus is a marked improvement on the English reform attempts.

An alternative way of approaching the problem of consensual sado-masochism in English law would be to create a new category of recognised exception to shield the activity from the reach of the criminal law.[311] This would enable sado-masochism to acquire an anomalous legal status akin to that of boxing,[312] and would essentially reflect a recognition that the law ought to respect each individual as autonomous over their own sexual behaviour, whether that be sado-masochistic or not.[313] While this position would undoubtedly ameliorate the problem of state interference in to private, autonomous matters,[314] it is submitted that it is one unlikely to be adopted by the English Courts. Indeed, in refusing to concede the behaviour in question is more about sexuality than violence,[315] it is clear the majority of the Law Lords in *Brown* thought the law was merited in regulating this behaviour. Yet, it is submitted that the judicial reluctance to create a new category of exception for sado-masochism would mean automatic immunity must come from Parliament.[316] As the judiciary have many times invited Parliament to legislate to formally clarify the legal status of consensual sado-masochistic injuries,[317] and it has not yet availed of these opportunities, it is unlikely to do so.

It is highly regrettable that the Law Commission's eleventh programme of Law Reform is unlikely to re-evaluate the position of consensual sado-masochism, in their suggested reforms to the OAPA 1861.[318] The Commission intends to focus on improving the structure of the Act, so that a clear hierarchy of offences will emerge,[319] as well as updating the language used.[320] The proposal has therefore been criticised for dealing with the position of boxing and consensual sado-masochism in a 'summary fashion'.[321] Certainly, that *Brown* remains the subject of academic debate after almost twenty years highlights the need for some sort of clarification in this area. Seemingly however, the judiciary wish to defer to Parliament on the matter, and Parliament in turn has persistently enabled the courts to use their discretion as they

[310] ibid; *R v Brown* (n 1) [258-259] (Lord Mustill).
[311] Bamforth,(n 214) ; Kell (n 3) 123-124.
[312] Law Commission Consultation Paper No.139 (n 86); Leng (n 86); Cooper and James (n 3) 191-192.
[313] Bamforth (n 214), 663.
[314] Paul Roberts (n 257).
[315] Bix, (n 48) 542; Law Commission Consultation Paper No.139 (n 86) para 10.45.
[316] Doherty (n 7).
[317] *R v Brown* (n 4) [260] (Lord Jauncey), [274] (Lord Mustill), [282] (Lord Slynn).
[318] Law Commission, *Eleventh Programme of Law Reform,* Law Com. No. 330, HC 1407, available at <http://lawcommission.justice.gov.uk/docs/lc330_eleventh_programme.pdf> accessed 05 April 2013 [2.61-2.64]; Michael Jefferson, 'Offences against the Person: Into the 21st Century' [2012] J. Crim. L. 472.
[319] ibid; See also Law Commission, 'Offences against the person' <http://lawcommission.justice.gov.uk/areas/offences-against-the-person.htm> accessed 01 May 2012.
[320] ibid.
[321] Jefferson (n 318) 474.

see fit. Yet, reform must come from somewhere, and it is unfortunate that neither the judiciary nor the government are willing to take responsibility for modernizing the circumstances in which consensual sado-masochism should be criminalised. Until the matter has been formally legislated by Parliament, it is submitted there is a lot to be learned from the New Zealand position.

6 CONCLUSION

What is certain is that the criminalisation of ABH and GBH occurring in the context of sado-masochism cannot readily be reconciled with how such injuries are criminalised where they result in other contexts. The decision to prosecute such cases is largely dependent on evidence suggesting that the offences are prima facie established. The expediency principle is often overlooked in this respect, as the initiation of prosecution proceedings frequently fails to have any measurable benefits for the public interest in practice. This can be contrasted with how injuries resulting from contact sports are approached, in which the underlying assumption is that the instigation of prosecution proceedings should be reserved for grave situations.[322] Where the situation is not sufficiently grave as to justify the conduct being labelled criminal, it is expected that issues be resolved through the civil law or through the established discipline procedures associated with the sport in question.[323] This is premised on the assumption that legal intervention is necessary only where one or more participants take issue with the conduct in question. Absent complaints, it is highly unlikely that legal intervention and especially criminal regulation would be welcomed in sporting contexts. Regrettably, such an approach has not been adopted regarding sado-masochism, despite the fact it would have a measurable impact on the problematic ratio of *Brown,* through inviting legal regulation to occur in exceptional circumstances.

Once the decision has been made to prosecute sado-masochistic injuries, the judicial procedure is entirely reversed without a clear explanation as to why this is the case. The problematic presumption in favour of illegality is surely a result of the judicial distaste for sadistic conduct,[324] and it appears that sadistic violence is more susceptible to the criminal law than other types of consensual violence.[325] Rather than using the law to regulate exceptional cases, the law interferes by default.[326] Thus, sado-masochists must discharge the onerous burden of proving they had good reason for engaging in the conduct if their private sexual lives are to be free from criminal consequences.[327] Unlike those who engage in other morally contentious practices such as boxing, sado-masochists are not afforded the same respect for privacy and autonomy as the presumption of illegality erodes these rights.

---

[322] *R* v *Barnes* (n 75); Allen (n 6) 370-371.
[323] Livings (n 10).
[324] Kell (n 3) 124.
[325] Houlihan (n 9) 57-58; Douglas Husak, *Overcriminalization-The Limits of the Criminal law* (Oxford University Press, 2008).
[326] ibid.
[327] Roberts (n 106).

It is hoped that future cases regarding consensual sado-masochism will take the opportunity to expressly identify how the public interest factor is assessed and why the interests of society in general are prioritised over the interests of members of that society.[328] Certainly, the law maintains that criminalisation is necessary to protect society from harm, but fails to acknowledge how the prosecution serves to harm the participant's fundamental rights.[329] Arguably, in the interests of respecting privacy and autonomy, sado-masochists are owed the freedom to privately engage their sexual desires and to this end, it is submitted that consent should be sufficient to annul the criminal consequences of ABH.[330] Alternatively, declaring sado-masochism a recognised exception for the public good derived from respecting privacy, would be a marked improvement for addressing the presumption of illegality. Until such a time, it can be concluded that the current position leaves a lot to be desired.[331]

[328] ibid 40.
[329] Falsetto (n 7) 189.
[330] *R v Brown* (n 4) per Lord Slynn.
[331] ibid; Giles (n 7); Tolmie (n 3); Roberts (n 4).

AN ANALYSIS OF THE PRINCIPLE OF SUBSIDIARITY IN EUROPEAN UNION LAW

OLIVIA BARTON[*]

This paper consists of a thorough description of the principle of subsidiarity in accordance with an analytical consideration of its application. Such analysis is proposed with respect to three approaches; a theoretical reflection of the principle, an assessment of its formulation and a review of its implementation within EU Law. It is submitted that the principle is based on a sound premise yet the drafting of the test for subsidiarity leaves a lot to be desired. Finally, that the threat of political outrage, at the misapplication of the principle, ensures that subsidiarity is adhered to and prevents breach of it.

The principle of subsidiarity is an attempt to balance the 'historic, nationalist, sovereignty-obsessed'[1] characteristics of individual Member States against the European Union's integration objectives. It aims to reassure Member States that their right to legislate in areas of shared competence is reserved wherever possible. At the heart of subsidiarity is the premise that decisions are taken as closely to the citizen as possible.[2] In order to evaluate subsidiarity, it is necessary to review the principle on three levels. Firstly, whether the concept is honourable or indeed worthwhile on a theoretical level. Secondly, the incorporation of the principle into the treaty framework will be analysed to assess the extent to which it has been formulated in a coherent, logical manner. Finally, the execution and regulation of the principle will be evaluated in order to establish whether the principle is effectively implemented within the EU.

For Davies, subsidiarity is required to 'prevent a complete infantilization of national governments'.[3] In order to properly evaluate the principle of subsidiarity it is necessary to assess why this 'infantilization' is so undesirable. Berman outlined several factors which support localised decision making. Firstly, he highlighted self-determination and accountability as being particularly important.[4] Decisions taken at national level come under inevitably intense scrutiny by the press and, therefore, by the electorate. This places pressure upon national parliaments to produce well formulated, widely popular policies which they are then able to defend against criticism by the population. Decisions taken at Union level, however, are further

[*] Olivia Barton, Newcastle University, LLB (Hons) Law.

[1] Ronald Tiersky, 'Europe: International Crisis and the Future of Integration' in Robert Tiersky (ed), *Europe Today* (2nd edn, Rowman & Littlefield Publishers Inc. 2004) 3.

[2] Preamble to the Consolidated Version of the Treaty on European Union [2010] O.J. C. 83/49.

[3] Gareth Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 C.M.L. Rev. 63, 63.

[4] George Berman, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' [1994] 94 Colum. L. Rev. 331.

removed from citizens and the potential for individuals to have any real bearing upon them is significantly reduced. It is therefore considerably easier for citizens to hold national governments to account for their actions than it is to hold EU institutions to account. Secondly, Berman argued, subsidiarity is necessary to promote political liberty and therefore provide a check against tyranny.[5] Indeed, excessive devolution of power to any supranational body is undesirable as democratically elected national governments best represent the wishes of their people and must therefore be given as much control over legislation which affects them as possible. Also advocated by Berman was the potential for national governments to create more flexible laws which are better adapted to their individual State.[6] Whilst some issues will be better dealt with by EU-wide legislation, it is submitted that the EU consists of twenty seven very different member states and their ability to legislate adapting to their own economic, social, political and cultural circumstances wherever possible ought to be valued. For these reasons, subsidiarity's aims are honourable and the concept is theoretically justifiable and important.

In addition to those factors advocated by Berman, the legitimacy of the EU depends upon its acceptance by citizens as a tolerable legislative body which must be considered in light of its impact upon highly valued constitutional principles such as Parliamentary Sovereignty. It is therefore in the Union's own interest to preserve its image as a democratic institution. Thus, appearing concerned with the objective of reserving legislative power with individual member states where possible is one way in which the Union can claim to be upholding democratic principles. The conflict between the EU's desire to legislate centrally in order to carry out its objectives and its desire to be seen as respectful of member states' autonomy has resulted in a balancing act between these two 'complex and sometimes contradictory themes.'[7] The EU's attempt to consolidate these two conflicting aims into a formula, now set out in Article 5(3) TEU,[8] has been described as a 'textual failure'.[9] The formulated principle contains two limbs; firstly, it permits Union action 'only if and in so far as' the Member States cannot fulfil the objectives 'sufficiently'.[10] 'Sufficiently' is an intrinsically subjective term; the standard to which the Union's objectives must be fulfilled is therefore uncertain. The second limb, the comparative efficiency test, injects further confusion into the principle by stating that the Union may act if, in doing so, the objective can 'be better achieved'.[11] This is similarly 'vague and

[5] ibid.
[6] ibid.
[7] Deborah Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) 29 C.M.L. Rev. 1107, 1116.
[8] Consolidated Version of the Treaty on European Union [2008] OJ C115/52, art 5(3).
[9] Robert Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012) 178.
[10] Consolidated Version of the Treaty on European Union [2008] OJ C115/52, art 5(3).
[11] ibid.

general'[12] as the word 'better' is again subjective and provides little guidance for interpretation. The two limbs provide a test which is not only vague but 'bipolar'.[13] On one hand it declares that EU intervention may not occur unless the action cannot be achieved sufficiently by the member state but, paradoxically, if 'by reason of the scale or effects of the proposed action' Union legislation is 'better' it may still act.[14] It is therefore unclear what ought to happen in situations in which an objective can be sufficiently achieved by member states but in which Union action would be superior.

Not only is Article 5(3)[15] a failed exercise in semantics, it has also been criticised on other grounds. Estella submits that it is inevitably easier for the EU to demonstrate its competence than it is for twenty seven Member States to do the same due to the increased certainty of proposals coming from one body than from twenty seven individual countries.[16] At the outset, then, the EU is at a considerable advantage. Furthermore, whilst the principle may appear at first glance to attempt to balance the interests of Member States and the Union, it only grants Member States the right to legislate to fulfil Union objectives and thus it 'assumes that there will be no conflict between the objectives of the different levels.'[17] This is a significant issue, causing subsidiarity to be criticised as a 'masking principle'[18] as, in reality, it serves mainly to regulate the exercise of Member States' right to implement EU aims. The vagueness within the Article can be attributed to the desire to enable flexibility in each subsidiarity assessment. However, the lack of guidelines and objective criteria with which to make that assessment means that in reality the concept as drafted imposes no absolute or clearly enforceable limit upon the right of the EU to exercise its power in areas of shared competence.

Due to the lack of objective criteria by which to assess compliance with subsidiarity, the Court of Justice of the European Union (CJEU) is 'understandably reluctant to apply in a robust way a principle which is so heavily political.'[19] It is for this reason that they have taken a 'minimalist'[20] approach to decision making, merely assessing whether procedural subsidiarity has been complied with rather than investigating adherence to substantive subsidiarity. This is clearly seen in the *Working Time*

[12] Antonio Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 2002) 95.
[13] Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi and Piet Eeckhout with Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press, 2012) 220.
[14] Consolidated Version of the Treaty on European Union [2008] OJ C115/1, art 5(3).
[15] ibid.
[16] Antonio Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford, Oxford University Press, 2002).
[17] Gareth Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 C.M.L. Rev. 63, 78.
[18] ibid 77.
[19] Alan Dashwood, 'The Relationship Between the Member States and the European Union/ European Community' (2004) 41 C.M.L. Rev. 368, 36.
[20] Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi and Piet Eeckhout with Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press, 2012) 217.

Directive Case[21] in which the CJEU held that the failure to show that EU legislation was comparatively more effective than national action did not place the Directive[22] in breach of subsidiarity. The Court stated that whenever the Council seeks to fulfil an obligation through harmonization this 'necessarily presupposes [EU]-wide action.'[23] This refusal to examine whether EU action would in reality be more effective has, for Schütze, 'short-circuited the comparative efficiency test.'[24] Emiliou, however, argued on the contrary that engaging in clearly political activity would 'inevitably destroy the credibility'[25] of the Court. Indeed, the CJEU relies upon a reputation of neutrality in order to retain legitimacy; it would be extremely concerning if the court were burdened with making overtly political decisions as this would threaten its image as a politically neutral body. The Court is clearly faced with a difficult dilemma; on the one hand its reluctance to involve itself in intrinsically political issues is understandable, indeed praiseworthy, whilst on the other hand a total disregard to substantive subsidiarity hardly provides a satisfactory outcome. For this reason it is important that clear guidelines are provided to enable the court to annul legislation which breaches the principle without needing to replace the legislature's discretion with its own.

Regular annulment of legislation by the CJEU would be 'counterintuitive'[26] as it would inject uncertainty both into EU law and into national law. It is vital therefore that post-enactment scrutiny of legislation remains a last-resort based upon well formulated, clear guidelines to avoid wide judicial discretion. The Court's reluctance to substantively review legislation on grounds of subsidiarity places the main onus of scrutiny upon national parliaments who act as a 'subsidiarity watchdog'.[27] This is an appropriate 'compensation process'[28] as it is national parliaments' legislative powers which risk being eroded if subsidiarity is not properly complied with. Protocol (no 2) to the Lisbon Treaty[29] outlines the mechanisms through which this scrutiny occurs. Article 5 requires that all draft legislative acts 'shall be justified with regard to the principles of subsidiarity and proportionality' through a detailed statement.[30] The

[21] Case C-84/94 *United Kingdom v Council*[1996] ECR I- 5755.
[22] Council Directive 93/104/EC concerning certain aspects of the organisation of working time [1993] OJ L307/18.
[23] Case C-84/94 *United Kingdom v Council* [1996] ECR I- 5755, para 47.
[24] Robert Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012) 183.
[25] Nicholas Emiliou, 'Subsidiarity: An Effective Barrier against the Enterprises of Ambition?' (1992) 17 E.L. Rev. 383, 403.
[26] Andrea Biondi, 'Subsidiarity in the Courtroom' in Andrea Biondi and Piet Eeckhout with Stefanie Ripley (eds), *EU Law after* Lisbon (Oxford University Press, 2012) 220.
[27] Alan Dashwood, 'The Relationship Between the Member States and the European Union/ European Community' (2004) 41 C.M.L. Rev. 368, 370.
[28] John-Victor Louis, 'National Parliaments and the Principle of Subsidiarity - Legal Options and Practical Limits' (2008) 4(3) E.C.L. Rev. 429, 434.
[29] Protocol on the application of the principles of subsidiarity and proportionality to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/150.
[30] ibid art 5.

indication that 'qualitative and, wherever possible, quantitative' factors must be included[31] is praiseworthy as it places a burden upon the drafter to provide vital information enabling national parliaments to effectively scrutinise draft legislation. Articles 6 and 7 of the Protocol are hugely important as they contain a practical mechanism, known as the yellow card system, through which national parliaments can scrutinise draft legislation.[32] Barrett expressed concern that annulment of legislation through this mechanism would be 'highly exceptional and unusual';[33] it is true that the high threshold for required review of potential legislation is unlikely to be reached on any regular basis. The issuing of reasoned opinions by a significant number of member states, however, is likely still to have a significant impact upon legislation due to the political pressure this would inevitably exert upon European legislative bodies. Whilst there is no strict legal requirement that Member States' interests are adhered to, if they were totally disregarded it would 'be so politically unacceptable as to lead to implosion of the community.'[34] If nothing else, therefore, the existence of the yellow card system ought to act as a deterrent against legislative proposals which threaten the principle of subsidiarity. For this reason, the right of national parliaments to veto legislation should not be introduced as it would not only make EU legislation hugely inefficient but it is also unnecessary. The political impact of the yellow card system is a more balanced approach as it ensures that widely controversial matters will be avoided (or at least reviewed) in order to prevent Member State outrage, without the threat of individual Member States petulantly blocking attempts at legislation.

In conclusion, the basic premise that decisions should be taken as close to the citizens as possible is a sound one based upon solid reasoning. The EU is a unique institution and Member States' agreement to give up a part of their valuable sovereignty in certain policy areas, in order to fulfil Union objectives, must be taken very seriously. It is for this reason that establishing the correct balance between reserving the legislative autonomy of individual member states as far as possible, and enabling effective legislation at EU level only where necessary, is so vital. The treaty framework has attempted to outline this balance in a flexible test but the principle is poorly drafted and therefore unclear. This lack of clarity partly explains why the CJEU is so reluctant to substantively review legislation on subsidiarity grounds. Clear guidelines ought to be issued to the CJEU to minimise the necessity for judicial discretion whilst ensuring that, if strictly necessary, the court is able to review legislation on a more substantive basis. The role of national parliaments in pre-enactment scrutiny is far preferable to post-legislative judicial scrutiny. Whilst the mechanisms which regulate pre-enactment scrutiny are by no means watertight, the

[31] ibid.
[32] ibid, arts 6 -7.
[33] Gavin Barrett, '"The King is Dead, Long live the King": the Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty concerning National Parliaments' [2008] 33 E.L. Rev. 66, 83.
[34] Gareth Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 C.M.L. Rev. 63, 79.

political outrage which would arise from an apparent breach of subsidiarity is likely to be the most powerful deterrent upon the European Union to ensure that the principle of subsidiarity is not breached.

THE DOGGER BANK OFFSHORE WIND FARM PROPOSAL: A STUDY OF THE LEGAL MECHANISMS EMPLOYED IN THE CONSTRUCTION OF AN OFFSHORE WIND FARM

CATHERINE CAINE[*]

The United Nation's Secretary-General, Ban Ki-Moon, has described climate change as 'the greatest threat… to our planet earth… and to our development'. This paper explores the legal backdrop to offshore wind farms, a possible solution to climate change. Unlike the clear system of property rights on land, areas of the sea and its contents are not straightforward. Constructing an offshore wind farm can have widespread effects on wildlife and the marine environment. Unfortunately, marine nature conservation law in the UK is a patchwork of national and international legislation. Through a thorough investigation of the construction process, this paper considers whether environmental issues are prominent concerns for the parties involved in the decision. The individual legal mechanisms involved in the construction process must converge to form the wider process of development consent in order to balance the need to protect marine environments and the need to develop renewable energy sites. The relevant authorities should extensively consider environment protection before agreeing to commence with any construction because the environment does not have a voice of its own and cannot campaign for its interests to be fairly considered.

1 INTRODUCTION: THE NEED FOR RENEWABLE ENERGY AND HISTORY OF OFFSHORE WIND FARMS

The United Nation's Secretary-General, Ban Ki-Moon, has described climate change as 'the greatest threat… to our planet earth… and to our development'.[1] However the solution to the problem is far from clear cut. The problem of common but differentiated responsibility between states,[2] combined with its political, scientific and economic complexity,[3] has led to claims that 'as a global community, we still seem to be in a state of collective denial about the severity of [climate change]'.[4] Responses to climate change can be divided into adaptation and mitigation. One mitigation measure that has been explored within the United Kingdom is obtaining energy from renewable sources. The UK is required to increase its renewable energy production to

---

[*] Catherine Caine, Newcastle University, LLM Environmental Law & Policy (Research).

[1] Gerry Adams, 'Climate Change is a "clear and present danger" to humankind says UN Chief' (*United Nations Radio*, 19 April 2013) <http://www.unmultimedia.org/radio/english/2013/04/climate-change-is-a-clear-and-present-danger-to-humankind-says-un-chief/> accessed 23 June 2013.

[2] Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime' [2000] 9(2) RECIEL 120.

[3] Patricia Birnie, Alan Boyle, Catherine Redgwell, *International Law & the Environment* (3rd edn, OUP, Oxford 2009) 357.

[4] Stuart Bell, Donald McGillivray, *Environmental Law* (7th edn, OUP, Oxford 2008) 519.

fifteen percent by 2020 according to targets within the European Commission.[5] One source of renewable energy that is currently being explored within the UK is offshore wind farms.[6] Offshore wind farms often receive more public support compared to their onshore counterparts, which can fail to secure planning permission through public objection.[7] Offshore wind farms have been seen to overcome a number of problems that arise in onshore wind farms, including: noise, highway matters, effects on tourism, safety, electromagnetic interference, and impact on landscapes.[8] However, whilst offshore wind farms avoid these aforementioned problems, there are numerous environmental concerns attached to their construction. This paper will consider the balance that has been struck between the need to protect the marine environment with the need for increased renewable energy production from offshore wind farms.

On a global level, the UK was fairly slow to take advantage of commercial wind energy development, with Denmark and the United States leading the way in the early and mid-1980s.[9] Trinick notes how the UK began to develop wind energy immediately following the privatisation of the electricity generation, supply and distribution industries through the Electricity Act 1989.[10] Wind power and renewable energy, somewhat fortuitously, stemmed from the Non-Fossil Fuel Obligation,[11] which was originally intended to assist funding for nuclear power. This was later replaced by the Renewables Obligation[12] under the Utilities Act 2000.[13] It was not until December 2000 that offshore wind power began to form part of the UK's energy production when the Crown Estate launched round one of site leasing which resulted in thirteen leases of sites to offshore wind developers.[14] This has since been expanded, with round two in 2003 leasing seventeen sites and round three in 2008 proposing a further nine sites (see Diagram no. 1).[15] Within the on-going round three development, the Crown Estate has taken a shift in approach from a piecemeal,

[5] Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending the subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16.
[6] Press Notice, 'Carbon Trust launch £2m Project to increase energy yields from offshore wind farms' (*Carbon Trust*, 21 May 2013) <http://www.carbontrust.com/about-us/press/2013/05/carbon-trust-launch-2m-project-to-increase-energy-yields-from-offshore-wind-farms/> accessed 23 June 2013; Press Notice, 'Boost for inward investment and innovation in offshore wind' (*gov.uk*, 12 June 2013) <https://www.gov.uk/government/news/boost-for-inward-investment-and-innovation-in-offshore-wind> accessed 23 June 2013.
[7] Mark Challis, 'Offshore Wind – Planning for a New Era' [2001] 8 IELTR 180; Vikki Leitch, 'Securing Planning Permission for Onshore Wind Farms: The Imperativeness of Public Participation' (2010) 12 Env L Rev 182.
[8] Challis [n 7] 181.
[9] Marcus Trinick, 'Green on Green: Planning for Wind Energy' (2006) JPL 89, 89.
[10] Trinick [n 9] 90; Electricity Act 1989.
[11] Trinick [n 9] 90.
[12] Renewables Obligation Order 2002.
[13] Trinick [n 9] 90; Utilities Act 2000.
[14] The Crown Estate, 'The Crown Estate Role in Offshore Renewable Energy' (*The Crown Estate*) <http://www.thecrownestate.co.uk/media/387737/role-in-offshore-renewable-energy.pdf> accessed 23 June 2013, 4.
[15] ibid 4-5.

'project-by-project' approach, towards larger scale offshore wind developments in order to meet the 2020 target set by the Climate Change Act 2008.[16] Whilst the Crown Estate has significantly expanded its projections in order to meet energy targets, it is imperative that time is taken to consider, and mitigate, the impact that large scale wind farm construction of this type will have on the marine environment.

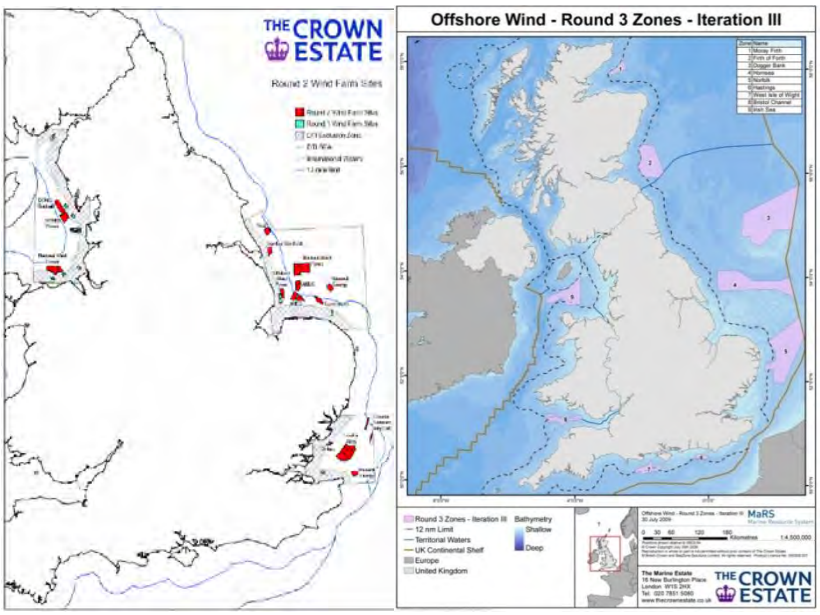

Diagram no. 1: Maps highlighting Rounds 1-3 of Crown Estate Leasing[17]

2.1 Literature Review

The individual legal mechanisms involved in construction projects have received considerable academic attention. The Environmental Impact Assessment (EIA) Directive[18] has been scrutinised throughout its existence from the time of Alder[19] predicting that English law could not adequately support the EIA, to the more recent observations of Stokes[20] who regards the application of the EIA in the UK as being extremely restrictive with limited public participation. The wording and definitions of the requirements of Articles 6 (1),[21] (2),[22] 6 (3)[23] and 6 (4)[24] Habitats Directive have

[16] The Crown Estate, 'Round 3 offshore wind site selection at national and project levels' (*The Crown Estate,* May 2012) <http://www.thecrownestate.co.uk/media/310531/round_3_offshore_wind_site_selection_at_national_and_project_levels.pdf> accessed 23 June 2013, 9; Climate Change Act 2008.

[17] Maritime & Coastguard Agency, 'Offshore Wind Farm Helicopter Search and Rescue Trials' (*Department for Transport*) <http://www.dft.gov.uk/mca/mcga07-home/shipsandcargoes/mcga-shipsregsandguidance/mcga-windfarms/offshore-renewable_energy_installations/mcga_helicopter_trials_report_title/mcga_helicopter_trials_report_rescue.htm> accessed 14 August 2013; Crown Estate (n 16) 26.

[18] Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment [1985] OJ L 175.

[19] J Alder, 'Environmental Impact Assessment – The Inadequacies of English Law' (1993) 5 JEL 203.

[20] P Stokes, 'Getting to the Real EIA' (2003) 15(2) JEL 141.

[21] Council Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L 206/7 art 6(1).

[22] ibid art 6(2).

[23] ibid art 6(3).

also received a thorough examination[25] using explanations from the European Commission, and the case law from throughout Europe. In addition to analysing the legal mechanisms, environmental and planning scholars have also focussed on a variety of problems that have arisen with the construction of offshore wind farms. For example, Plant[26] provides specific analysis of the legal problems faced in constructing an offshore wind farm, including considerations, such as the need to maintain rights of innocent passage, and the need to be cautious of those who use the sea and airspace for a variety of other purposes. Plant's analysis is far-reaching as it provides consideration of the environmental designations that affect the construction of offshore wind farms[27] – however, it is limited with regards to constructions that take place outside of a state's territorial waters. Another element of offshore wind farm construction that has been considered in existing literature is that of laying pipelines and cables. Zeuschner[28] provides an analysis of the legislation involved, providing extensive information on health and safety, and a brief exploration of the consequences of laying pipelines and cables in, or near, legally protected environmental areas. However, the overall analysis of the effects of laying pipes and cables near to environmentally protected areas is minimal.

Although there is extensive literature analysing the individual legal mechanisms involved in the construction of renewable energy projects, there is little literature that analyses how they interact together during the construction of an offshore wind farm. In addition, due to the fact that offshore wind farm construction is relatively new to the UK, existing literature is mainly aimed at projects constructed within territorial waters, and has not considered the upcoming designations of Marine Conservation Zones. This research project will therefore fill an important gap in the literature by considering the cumulative impact of legal mechanisms on the construction of an offshore wind farm outside of territorial waters.

2 THE IMPACT OF OFFSHORE WIND FARM CONSTRUCTION ON THE MARINE ENVIRONMENT

2.1 Environmental Externalities generated by the Construction of Offshore Wind Farms

As is the case with the majority of large construction projects, offshore wind farms can prove to be a significant threat to the environment. As the development of offshore wind farms in the UK is still in a very juvenile state, it has been argued that

[24] ibid art 6(4).
[25] L Krämer, 'The European Commission's Opinions under Article 6(4) of the Habitats Directive', (2009) 21(1) JEL 59; D McGillivray 'Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Article 6 of the Habitats Directive' (2012) 24(3) JEL 417.
[26] Glen Plant, 'Offshore Wind Energy Development: The challenges for English Law' (2003) JPL 939.
[27] ibid.
[28] Ruven Zeuschner, 'Pipelines and Cables – The Offshore Transportation of Oil, Gas and Renewable Energy' (2011) IELR 311.

'research is urgently needed to improve understanding of generic impacts of wind farms on the natural environment'.[29] This section will outline the main environmental externalities that are caused by the construction of offshore wind farms.

2.2 Danger to Birds

As wind farms are often best located in areas of strong wind currents, birds such as raptors and eagles that use the same currents are likely to come into contact with wind turbines.[30] Perhaps the most famous site for birds colliding with wind farms is at Altamont Pass in California where approximately 7,600-9,300 birds were killed each year, including Golden Eagles, American Kestrels, Red-tailed Hawks and Burrowing Owls.[31] The general consensus amongst literature is that the Californian case study demonstrates that when a wind farm has been poorly located, there can be disastrous consequences for birds.[32] This has resulted in governments considering the location of wind farms very carefully.[33] However, whilst the Californian case study shows the horrendous consequences of poor siting, Boyle argues that the case study occurred due to special circumstances and suggests that the use of large numbers of relatively small-diameter turbines (as opposed to current models) may have been to blame.[34] Boyle attempts to put wind turbines into context by explaining that 500,000 birds perished in the Exxon Valdez oil spill in 1989, whereas the mortality rate for wind turbines runs at 1 or 2 birds per turbine per year at worst.[35] However, whilst the severity to which wind turbines affect birds remains up for debate, it cannot be denied that the poor location of wind farms can have a detrimental effect on bird populations. Therefore development guidance for wind farms advises that developers are made aware of bird migration routes during the site location stage.[36]

2.3 Noise Pollution

Noise from the construction, operation and decommission of offshore wind farms is believed to impact the behavioural patterns of nearby marine mammals. It has been reported that extremely loud noises created during the construction phase of an

---

[29] Mike Harley, Allan Drewitt, Paul Gilliland et al., 'Wind Farm Development and Nature Conservation' (*English Nature, RSPB, WWF-UK, BWEA,* March 2001) <http://publications.naturalengland.org.uk/publication/84054> accessed 15 August 2013, 12.
[30] Robin Webster, Freya Roberts, 'Bird death and wind turbines: a look at the evidence' (*The Carbon Brief*, 10 April 2013) <http://www.carbonbrief.org/blog/2013/04/wind-farms-and-birds> accessed 15 August 2013.
[31] American Bird Conservancy, 'Wind Energy Frequently Asked Questions' (*American Bird Conservancy*) <http://www.abcbirds.org/abcprograms/policy/collisions/wind_faq.html> accessed 15 August 2013.
[32] Langston, R.H.W. & Pullan, J.D. 'Windfarms and birds: an analysis of the effects of wind farms on birds, and guidance on environmental assessment criteria and site selection issues'(*BirdLife,* September 2003) <http://www.birdlife.org/eu/pdfs/BirdLife_Bern_windfarms.pdf> accessed 15 August 2013, 3.
[33] Scottish Natural Heritage, 'Windfarms and Birds: Calculating a theoretical collision risk assuming no avoiding action' (*Scottish Natural Heritage,* 2000) <http://www.snh.gov.uk/docs/C205425.pdf> accessed 15 August 2013.
[34] Godfrey Boyle, *Renewable Energy: Power for a Sustainable Future* (2nd edn, OUP, Oxford 2004) 276.
[35] ibid, 276-277.
[36] Harley, Drewitt, Gilliland et al. (n 29).

offshore wind farm, particularly through the process of pile-driving, may be high enough to impair the hearing of marine mammals near the site.[37] Whilst the noise levels during the construction of offshore wind farms in stage one of UK developments have shown varying results,[38] a study of two offshore wind farms in Denmark has shown a decrease in harbour porpoise during the construction phase, with some continued disturbance occurring following completion.[39] Whilst a study by Diederichs[40] has revealed no significant impact on porpoise behaviour, this assessment has not considered noise above 4.5MW which may well be produced in larger wind farms.[41] From existing literature in the field of noise pollution from offshore wind farms, many uncertainties have arisen with the Scottish Strategic Environmental Assessment for wave and tidal power stating that noise from wind turbines may be a significant risk to migrating or foraging species.[42] It is therefore imperative that developers take marine mammals into consideration when planning the construction of offshore wind farms.

2.4 Disturbance to the Seabed by Laying Cables

As with noise pollution, the majority of environmental damage caused by laying cables occurs during the installation, repair and removal stages.[43] Research undertaken by the OSPAR Commission states that there can be various impacts on different components of the marine ecosystem.[44] Specific damage to the seabed can include displacement, or disturbance of flora and fauna, increased turbidity, and the release of contaminants and alteration of sediments.[45] However, whilst the laying of seabed cables has the potential to disturb and damage marine ecosystems, aggregation and the 'reef effect' may also mean that seabed cables can create new ecosystems over time; with the potential to regenerate ecosystems (see Image no. 1).[46]

---

[37] Whale and Dolphin Conservation Society, 'UK – Noise Pollution' (*Whale and Dolphin Conservation Society*) <http://www.wdcs.org/submissions_bin/uk_noise_pollution.pdf> accessed 15 August 2013.
[38] Frank Thomsen, Karin Lüdemann, Rudolf Kafemann, Werner Piper, 'Effects of offshore wind farm noise on marine mammals and fish'(*COWRIE*, 6 July 2006) <http://iwc.int/cache/downloads/7rt8qdt9k3wocsgokcwwcgw48/Thomsen_et_al._2006%20EffeEff%20OWF%20noise%20on%20marine%20mammals%20and%20fish.pdf> accessed 15 August 2013; J.R. Nedwell, A.G. Brooker, 'Measurement and assessment of background underwater noise and its comparison with noise from pin pile drilling operations during installation of the SeaGen tidal turbine device, Stangford lough' (*COWRIE*, 4 September 2008) <http://mhk.pnnl.gov/wiki/images/6/61/Nedwell_%26_Brooker_2008_COWRIE.pdf> accessed 15 August 2013; as per Whale and Dolphin Conservation Society (n 37).
[39] Whale and Dolphin Conservation Society (n 37).
[40] ibid.
[41] ibid 3.
[42] The Scottish Government, 'SEA Strategic Environmental Assessment for Wave and Tidal Energy' (*The Scottish Government*,16 April 2007) <http://www.scotland.gov.uk/Publications/2007/04/SEA-consultations> accessed 15 August 2013, as per Whale and Dolphin Conservation Society (n 37).
[43] Thomas Merck, Ralf Wasserthal, 'Assessment of the environmental impacts of cables' (*OSPAR Commission*, 2009) <http://qsr2010.ospar.org/media/assessments/p00437_Cables.pdf> accessed 15 August 2013.
[44] Merck, Wasserthal (n 43) 7.
[45] Merck, Wasserthal (n 43) 8.
[46] E.L. Wenner, D.M. Knott, R.F. Dolah, V.G. van & Burrell, Jr., 'Invertebrate communities

Image no. 1: 50 year old sub-sea cable at Vancouver Island covered with sessile encrusting organisms[47]

Whilst such benefits have been recognised, the OSPAR Commission has recommended that appropriate mitigation measures should be applied to ensure that long term ecosystem damage does not occur from laying cables for offshore wind farms, such as avoiding sensitive habitats, scheduling laying activities at certain times of year, and avoiding heavily contaminated areas of seabed.[48]

2.5 Fish Aggregation

Fish aggregation occurs when fish are attracted to solid man-made structures placed on the seabed.[49] This is a technique that has been used with artificial reefs to enhance fisheries, protect certain habitats, or to increase the recreational value of an area.[50] A

---

associated with hard bottom habitats in the South Atlantic Bight' (1983) 17 Estuarine Coastal and Shelf Science 143-158; H. Reimers, K Branden, 'Algal colonization of a tire reef - influence of placement date' (1994) 55 Bulletin of Marine Science 460-469; J Birklund, A.H. Petersen, 'Development of the fouling community on turbine foundations and scour protections in Nysted Offshore wind farm' (*Energi E2 A/S*, June 2004) <http://mhk.pnnl.gov/wiki/images/b/b4/Fouling_Community_on_Turbine_Foundations_and_Scour_Protections.pdf> accessed 15 August 2013, per Merck, Wasserthal (n 43).

[47] Merck, Wasserthal (n 43) 9.

[48] Merck, Wasserthal (n 43) 16.

[49] W Seaman, L.M. Sprague, *Artificial Habitats for Marine and Freshwater Fisheries* (Academic Press, Inc. 1991) 285, per Dan Wilhelmsson, Torleif Malm, Marcus C Őhman, 'The influence of offshore windpower on demersal fish' (2006) 63 Journal of Marine Science 775.

[50] G.J. Hucckel, R.M Buckley, B.L. Benson, 'Mitigating rocky habitat loss using artificial reefs' (1989) 44 Bulletin of Marine Science 913; J.W. Milon, 'Artificial marine habitat characteristics and participation behaviour by sport anglers and divers' (1989) 44 Bulletin of Marine Science 853; R.F. Ambrose, 'Mitigating the effects of a coastal power plant on a kelp forest community; rationale and requirements for an artificial reef' (1994) 55 Bulletin of Marine Science 694; R.E. Brock, 'Beyond fisheries enhancement: artificial reefs and ecotourism' (1994) 55 Bulletin of Marine Science 1181; C.Y.Y. Chua, L.M Chou, 'The use of artificial reefs in enhancing fish communities in Singapore' (1994) Hydrobiologia 285; J.E. Guillén, A.A. Ramos, L Martinez et al., 'Antitrawling reefs and the protection of Poisdonia oceanica (L) Delile meadows in the western Mediterranean Sea: demand and aims' (1994) 55 Bulletin of Marine Science 645; H Pickering, D Whitmarsh, A Jensen, 'Artificial reefs as a tool to aid rehabilitation of coastal ecosystems: investigating the potential' (1998) 37 Marine Pollution Bulletin 505; G Rilov, Y Benayahu, 'Vertical artificial structures as an alternative habitat for coral reef fishes in disturbed environments' (1998) 45 Marine Environmental Research 431; D Wilhelmsson, M.C. Őhman, Y Shlesinger, 'Artificial reefs and dive tourism in Eilat, Isreal (1998) 27 Ambio 764; A Jensen, 'Artificial reefs of Europe: perspective and future ICES' (2002) 59 Journal of Marine Science 3; per Wilhelmsson, Malm, Őhman (n 49) 775.

study undertaken by Wilhelmsson et al. has concluded that offshore wind turbines have the same impact, with results showing a greater abundance of fish on or near the two wind farms involved.[51] Johnson and Rodmell argue that whilst in the right location, wind farms can act as artificial reefs or fish aggregation devices, due care must be taken in the planning stages to ensure that fishermen do not suffer from paucity of fish due to aggregation.[52] Whilst the impact of fish aggregation on fishermen is beyond the remit of this paper, it is important for planners to consider the impact that increased fish populations may have on protected habitats.

2.6 Electromagnetic Interference

Studies have shown that wind farms can create their own low energy radio frequency signals.[53] On land, care must be taken to ensure that wind turbines do not interfere with radio, television and mobile phone signals. However, electromagnetic interference from offshore wind turbines and their associated seabed cables can cause disorientation amongst marine life that uses the earth's magnetic field for orientation.[54] Whilst Scottish Natural Heritage concedes that it is still very difficult to determine the specific impact on marine life, current knowledge suggests that electromagnetic interference from seabed cables can cause disorientation amongst migratory eels, having the potential to temporarily change their swimming direction, or alter their migration patterns.[55] Research has also shown that elasmobranchs (sharks, skates and rays) can be affected by electromagnetic interference.[56]

3 CONSENTING ARRANGEMENTS FOR OFFSHORE WIND FARMS

3.1 Procedure for Site Allocation

As previously highlighted, offshore wind farm development and construction has thus far taken place in three rounds of site leasing. However, before one can further analyse the environmental protections contained in the process, it is important to understand the parties involved in the site leasing procedure. Unlike the clear system of property rights on land, areas of the sea and its contents are not straightforward.

---

[51] Wilhelmsson, Mlan, Ohman (n 49) 780.
[52] Johnson, ML & Rodmell, DP (2009). Fisheries, the environment and offshore wind farms: Location, location, location. Food Ethics, 4(1): 23-24.
[53] Australian Wind Energy Association, 'Wind Farming, Electromagnetic Radiation and Interference' (*Australian Wind Energy Association*) <http://www.synergy-wind.com/documents/10Electromagnetic.pdf> accessed 15 August 2013.
[54] A.B. Gill, M Bartlett, 'Literature review on the potential effects of electromagnetic fields and subsea noise from marine renewable energy developments on Atlantic salmon, sea trout and European eel' (*Scottish Natural Heritage*, 2010) <http://www.snh.org.uk/pdfs/publications/commissioned_reports/401.pdf> accessed on 15 August 2013.
[55] ibid.
[56] R.K Adair, R.D. Astumian, J.C. Weaver, 'Detection of weak electric fields by sharks, rays, and skates' (1998) 8 Chaos 576; A.J. Kalmijn, 'The electric sense of sharks and rays' (1971) 55 Journal of Experimental Biology 371; M.G. Paulin, 'Electroreception and the compass sense of sharks' (1995) 174 Journal of Theoretical Biology 325, per Gill, Bartlett (n 54).

Barnes explains that ocean resources are a 'common pool resource',[57] which means that it is both 'costly to exclude individuals from the resource',[58] and that 'the benefits consumed by one person are subtracted from the benefits available to others'.[59] Thus, the process of site leasing for an offshore wind farm is divided into two levels: national and developer, with the Crown Estate leasing the right to develop.[60] Diagram no.2 highlights the four-stage process – two of which are undertaken at a national level, and two by the developer. At the national stage, the Department for Energy and Climate Change (DECC) undertake a Strategic Environmental Assessment (SEA) of UK waters to ascertain which areas can best support offshore wind farms. This information then passes to the Crown Estate, which grants leases for the use of the UK seabed for offshore renewable energy construction.[61] This forms a competitive tender process between offshore wind developers.[62] Once the Crown Estate has granted the lease for the use of the seabed area, the site selection process passes to the developer who uses the information provided to identify suitable areas within the leased zone. From this process, the developer will then select the most desirable area in the zone and undertake site-specific assessments, including an EIA.[63] Following this stage, the developer will submit an application for development consent to the National Infrastructure Directorate within the Planning Inspectorate, who will weigh up the benefits and impacts of the project, and will make a recommendation to the Secretary of State.[64] The Department of Climate Change's Secretary of State makes the final decision on whether or not to grant development consent for the project.[65]

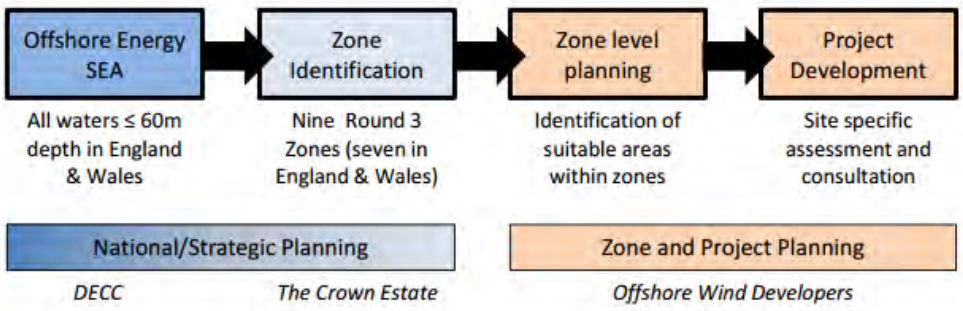

Diagram no. 2: Diagram showing stages of site identification for offshore wind farms[66]

[57] Richard Barnes, *Property Rights and Natural Resources* (Hart Publishing, Portland 2009) 1.
[58] ibid.
[59] ibid.
[60] The Crown Estate (n 16) 1.
[61] ibid.
[62] The Crown Estate (n 16) 2.
[63] ibid.
[64] ibid.
[65] ibid.
[66] The Crown Estate (n 16) 1.

3.2 National Level

3.2.1 Department for Energy and Climate Change

The Department of Climate Change undertakes the Strategic Environmental Assessment, which is the first stage of the planning process at national level. DECC undertook its first offshore energy SEA in 2009, with a second following in 2011. The Strategic Environmental Assessment was introduced within the European Commission in 2001.[67] Gao explains that the reasons for this were to rectify failings in the Environmental Impact Assessment (EIA) system, such as its lack of consideration of more diverse aspects of environmental concerns, and its inability to facilitate greater transparency and more effective public participation at the strategic decision-making level.[68] Under the Directive,[69] an SEA is required for all plans and programmes which are listed in Annex 1 and II of the EIA Directive,[70] or which fall under Articles 6 or 7 of the Habitats Directive.[71] There has been very little case law on the need to undertake an SEA to date, however the case of *Walton*[72] held that even though an SEA had not been undertaken, the plans would not automatically be struck out. Lord Carnwath, using examples from earlier case law,[73] stated that 'the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations'.[74] Fortunately the question of whether an SEA is necessary for offshore wind farms has received a confident affirmation as offshore wind farms fall within the scope of the Directive.[75] Article 5 of the Directive,[76] requires that an environmental report must be prepared which must consider the likely significant effects on the environment, and the reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme. This must then be put forward for consultation with authorities which 'are likely to be concerned by the environmental effects of implementing plans and programmes'.[77]

---

[67] Directive of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30.
[68] Anton Ming-Zhi Gao, 'Increasing Legal Certainty in the European SEA Directive: a Much-needed List Approach to Specifying Types of Plans and Programmes' [2008] 10(2) ELR 97.
[69] SEA Directive (n 67).
[70] Council Directive on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175, Sch I and II.
[71] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7, arts 6 and 7.
[72] *Walton v The Scottish Ministers* [2012] UKSC 44.
[73] *R (Wells) v Secretary of State for Transport, Local Government and the Regions* (C-201/02) [2004] ECR I-723.
[74] *Walton* (n 72) [138].
[75] SEA Directive (n 67).
[76] Directive of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30, art 5.
[77] Directive of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30, art 6(3).

'OESEA,'[78] and 'OESEA2'[79] are the two SEAs that have been undertaken by DECC in the United Kingdom. These assessments have been undertaken under an umbrella of uses that include offshore wind farms, offshore oil and gas, hydrocarbon gas, carbon dioxide storage and associated infrastructure. Whilst each individual section of the respective environmental reports deal with the impacts from oil and gas, and renewable energy separately, it is interesting to see that the 'consideration of alternatives' section of the reports has not been compiled separately for oil and gas, and renewable energy projects. Whilst perhaps somewhat pedantic, it is peculiar that the reports note a number of differences in the construction of an oil and gas project, as opposed to renewable energy projects; however do not distinguish between the two types of projects when considering alternatives. Robinson also notes uncertainty with the SEA process in later planning stages where it is unknown whether an SEA or EIA will prevail in the event of a conflict of information.[80]

3.2.2 The Crown Estate

The Crown Estate undertakes the next step in the site selection process. The Crown Estate is the owner of the seabed outside of the 12 nautical mile territorial limit and has rights under the Energy Act 2004[81] to issue licences for offshore wind power within the UK Renewable Energy Zone (REZ).[82] Using the information from the SEAs undertaken by DECC, the Crown Estate has identified large areas of seabed regarded to be suitable for offshore wind development.[83] This seabed has been leased to offshore wind farm developers in three rounds. The third round of leasing is notably different from the first two, as 'experience from earlier offshore wind projects indicated that a piecemeal 'project-by-project' approach was unlikely to deliver the required capacity of offshore wind in the UK within the 2020 target set by the Climate Change Act 2008.'[84] Therefore the round three programme aimed to facilitate larger scale offshore wind developments than had been previously been leased. The aim of leasing a larger area of seabed to the developer is to allow them sufficient certainty to invest in zone-level studies, to allow for environmental mitigation within the zone,

[78]Department of Energy and Climate Change, 'UK Offshore Energy Strategic Environmental Assessment: Future Leasing for Offshore Wind Farms and Licensing for Offshore Oil and Gas and Gas Storage' (*Department of Energy and Climate Change*, January 2009) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/194328/OES_Environmental_Report.pdf > accessed 15 August 2013.

[79]Department of Energy and Climate Change, 'UK Offshore Energy Strategic Environmental Assessment: Future Leasing/Licensing for Offshore Renewable Energy, Offshore Oil and Gas, Hydrocarbon Gas and Carbon Dioxide Storage and Associated Infrastructure' (*Department of Energy and Climate Change*, February 2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/195389/OESEA2_ER_with_NTS_Part1.pdf> accessed 15 August 2013.

[80] Patrick Robinson, 'Energy Planning in 2009 – All Systems Go?' (2009) 13 JPL 53, 63.

[81] Energy Act 2004.

[82] The Crown Estate (n 16) 4.

[83] The Crown Estate (n 16) 1-2.

[84] The Crown Estate (n 16) 9.

and to provide the ability to plan the development of multiple offshore wind projects within each zone.[85]

Within the zone selection stage, the Crown Estate used its Marine Resource System (MaRS) GIS tool to analyse the SEA information from DECC.[86] From this, a three-stage approach was adopted whereby areas containing existing or future licences or conditions were excluded, interests such as Ministry of Defence and commercial fishing were considered, and a review of areas against review datasets, such as fish spawning, National Grid connections, and oil and gas licence blocks was undertaken.[87] It is apparent from the Crown Estate's account of the procedure used to select the zones for leasing that no extensive environmental considerations are made at this stage. Whilst it is recognised that the Environmental Impact Assessment undertaken by the developer is an opportunity for environmental impacts to be considered in more depth, the Crown Estate concede that the zone allocation element of the system prevents the developer from considering alternatives, which is a major element of the Environmental Impact Assessment.[88] By allowing a process that splits the responsibility of considering alternatives away from the main EIA process, a threat is posed with regards to inconsistencies in the system, and the process of consideration of alternatives faces the risk of not being as environmentally orientated as European legislation[89] dictates that it should be. This issue will be discussed at greater length in section six.

3.3 Developer Level

National parties pass the second level of the planning process to the developer who has a number of statutory responsibilities to undertake various investigations on the site before he can obtain consent from the Secretary of State.[90] This stage allows the developer to survey the zone that he has leased and choose the most suitable area for the wind farm construction, whilst taking into account engineering, economic and environmental factors.[91] Once the developer has decided upon an appropriate area for wind farm development within his designated zone, he may be required to undertake an Environmental Impact Assessment in accordance with UK regulations.[92]

---

[85] The Crown Estate (n 16) 10-11.
[86] The Crown Estate (n 16) 12.
[87] The Crown Estate (n 16) 12-13.
[88] Directive of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1, art 5(3)(d).
[89] Directive of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1.
[90] The Crown Estate (n 16) 13.
[91] The Crown Estate (n 16) 2.
[92] Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824.

3.3.1 EIA

The EC Environmental Impact Assessment (EIA) Directive[93] was introduced in 1985, and implemented in the UK in 1988, despite the UK arguing at the time that EIA was 'unnecessary because UK planning law… already required decision-makers to take environmental matters into account'.[94] The main requirement of the Directive is Article 2.1,[95] which imposes a duty on member states to adopt a system whereby, before consent is given, projects that are likely to have a significant effect on the environment are made subject to an assessment. In the UK, the EIA requirement is enforced through both the Town and Country Planning (EIA) Regulations (TCPA)[96] for projects that require planning permission, and through various isolated legislation[97] for projects that do not. An offshore wind farm falls within Schedule 2 TCPA under 'installations for harnessing of wind power for energy production'.[98] This means that an EIA is not mandatory, however will be necessary if the development is 'likely to have significant effects on the environment by virtue of factors such as its nature, size or location'.[99] Offshore wind farms are governed by the Marine Management Organisation under section 2(1)(b) TCPA.[100] If a developer is required to undertake an EIA, there are multiple stages in the process, four of which are legally binding: the requirement to screen projects, scoping where advice can be obtained regarding the environmental statement, the creation of the environmental statement, and the review of the environmental statement.

The EIA process has experienced a turbulent entrance in the law of England and Wales with early case law such as *Beebee*[101] refusing to enforce the correct procedure. In a similar interpretation, the court in *Wychavon*[102] held that no remedy would be provided in the absence of an environmental statement if all of the information was available to the planning authority. However, the court's position changed in the House of Lord's Decision in *Berkeley*[103] where Lord Hoffman stated that, 'the Directive requires not merely that the planning authority should have the necessary

[93] Council Directive on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175.
[94] Alder (n 19) 203.
[95] Directive of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1, art 2.1.
[96] Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824.
[97] Council Directive amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1997] OJ L 073; Directive of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17.
[98] Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824, Sch 2 (2)(3)(i).
[99] Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824, s 2(1).
[100] Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824, s 2(1)(b).
[101] *R v Poole Borough Council, ex parte Beebee and others* [1991] 2 PLR 27.
[102] *Wychavon DC v Secretary of State ex parte Velcourt* (1994) 6 JEL 351.
[103] *Berkeley v Secretary of State* [2000] 3 All ER 897.

information, but that it should have been obtained by means of a particular procedure, namely that of an EIA'.[104] However, despite this clarification in the law, the later case of *Belize Alliance*[105] distinguished from *Berkeley* despite strong dissenting judgments from Lord Walker and Lord Steyn.

When considering the content of the Environmental Statement, Bell, McGillivray and Pedersen note that whilst various matters are required to be included in the environmental statement, 'there are still… limits on the amount of information that developers must provide… For example, developers are not required to outline or consider potential enhancement opportunities'.[106] In addition to the content of the Environmental Statement being the responsibility of the developer, Holder notes that the weight given to each element within the Environmental Statement is also determined by the developer.[107] She notes with concern 'the generally low priority accorded to environmental interests'[108] which means that 'no special weight is thus attributed to… environmental information'.[109] The combination of these various elements of discretion that are given to the developer when preparing the Environmental Statement for public scrutiny leads to fears that the documentation will contain an element of bias. Indeed, Holder highlights an example of, what she believes to be, this scenario occurring through the case study of the Cairngorm Funicular Railway.[110] When discussing the case study, she argues that the Environmental Statement in question departed 'from the required process and content of environmental statements'.[111] Whilst care must be taken with offshore wind energy to ensure that the area is not overwhelmed by regulations to an extent whereby the developer is put off, it is also imperative that the EIA process is undertaken in an impartial manner and is not constructed with bias by the developer.

3.4 The Final Decision

As previously stated, the final decision on whether to grant permission for the development lies with the Secretary of State. By this stage, the proposal will have been altered and moderated by a number of bodies, including the public through the consultation phases of the SEA and EIA. Once the developer has finalised his proposal through the EIA process, he will apply for development consent to the National Infrastructure Directorate within the Planning Inspectorate.[112] At this stage,

---

[104] *Berkeley* (n 103) 905.
[105] *Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment* [2004] Env LR 38.
[106] Stuart Bell, Donald McGillivray, Ole W Pedersen, *Environmental Law* (8th edn, OUP, Oxford 2013) 476-477.
[107] Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP, Oxford 2004) 267.
[108] ibid.
[109] ibid.
[110] Holder (n 107) 277.
[111] ibid.
[112] The Crown Estate (n 16) 2.

the national policy statement, EN-1,[113] will be considered in weighing up the benefits of the development against the adverse impacts. The following advice is given to the Secretary of State and National Infrastructure Directorate:

'Where (as in the case of renewables) legislation imposes a specific quantitative target for particular technologies… the [Infrastructure Planning Commission] should not reject an application for development on one site simply because fewer adverse impacts would result from developing similar infrastructure on another suitable site, and it should have regard as appropriate to the possibility that all suitable sites for energy infrastructure of the type proposed may be needed for future proposals.'[114]

This advice promotes a strong presumption in favour of renewable energy construction, and encourages development regardless of whether there are fewer adverse impacts on an alternative development site. Whilst it is not contested that renewable energy construction is a serious consideration, it is submitted that this advice could lead to a lack of consideration for adverse effects on the environment.

4 ENVIRONMENTAL REGULATION AND OFFSHORE WIND DEVELOPMENT

4.1 Introduction to Marine Nature Conservation

Marine nature conservation law in the UK consists of a patchwork of national and international legislation. Pieraccini explains that 'the physical attributes of the sea and the high scientific uncertainty surrounding marine environments in the wider context of global environmental change pose many challenges for designing and implementing effective marine conservation laws'.[115] Nonetheless, a vast array of legislation has been implemented to protect marine environments on international, European and national levels. On an international level, Birnie, Boyle and Redgwell explain that damage to the marine environment could be seen as early as 1926 as a result of international exploitation.[116] As a result, a series of international reports[117] ultimately led to the creation of the United Nations Convention on the Law of the Sea

[113] Department of Energy and Climate Change, 'Overarching National Policy Statement for Energy (EN-1) (*Department for Energy and Climate Change,* July 2011) <https://whitehall-admin.production.alphagov.co.uk/government/uploads/system/uploads/attachment_data/file/37046/1938-overarching-nps-for-energy-en1.pdf> accessed 15 August 2013.

[114] Department of Energy and Climate Change (n 113) per The Crown Estate (n 16) 16.

[115] Margherita Pieraccini, 'Establishing an ecologically coherent network of marine protected areas in English waters: what does the designation of marine conservation zones under the Marine and Coastal Access Act 2009 add to the picture?' (2013) 15(2) Env L Rev 104, 105.

[116] Birnie, Boyle, Redgwell (n 3) 379.

[117] Group of Experts on the Scientific Aspects of Marine Pollution, *The State of the Marine Environment* (UNEP, 1990); Group of Experts on the Scientific Aspects of Marine Pollution, *Reports and Studies No 50: Impact of Oil and Related Chemicals and Wastes on the Marine Environment* (IMO, 1993); Group of Experts on the Scientific Aspects of Marine Pollution, Reports and Studies No 75: Estimates of oil entering the marine environment from sea-based activities (IMO, 2007); per Birnie, Boyle and Redgwell (n 3) 379 – 382.

1982 (UNCLOS).[118] On a European level, the Habitats Directive[119] and Birds Directive[120] introduced the obligation upon states to designate Special Protected Areas (SPAs) and Special Areas of Conservation (SACs) to form a European network known as the Natura 2000 network.[121] At a national level there are numerous protected area designations that fall under the umbrella term of Marine Protected Areas (MPAs).[122] This section will analyse this legislation in light of the protection that it affords the marine environment during the planning stage of an offshore wind farm.

4.2 International Law: UNCLOS

Birnie, Boyle and Redgewell argue that UNCLOS is somewhat revolutionary as it 'attempts for the first time to provide a global framework for the rational exploitation and conservation of the sea's resources and the protection of the environment, whilst also recognising the continued importance of freedom of navigation'.[123] Prior to the Convention, freedom of the seas was enjoyed with the archaic 'cannon shot rule' (3 nautical miles) dictating how much of the sea was owned by states.[124] However, problems of states claiming more of the marine environment than they were entitled to, along with overfishing and pollution, resulted in the need for the international community to take action. UNCLOS clearly divides rights and obligations into the following maritime zones: the baseline, the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, the high seas, and the area. Diagram no. 3 highlights the relevant provisions of UNCLOS applicable to each area, up to 'the area' within the high seas. The Area is governed by Part XI UNCLOS[125] and is classed as a common resource whereby 'no state shall claim or exercise sovereignty over any part of the Area or its resources'.[126]

---

[118] United Nations Convention on the Law of the Sea 1982.
[119] Council Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L 206/7.
[120] Directive of the European Parliament and of the Council on the Conservation of Wild Birds [2009] OJ L 20/7.
[121] Eurosite, 'What is the Natura 2000 Networking Programme?' (*Natura 2000 Networking Programme*) < http://www.natura.org/about.html> accessed 8 August 2013.
[122] Natural England, 'Marine Protected Areas' (*Natural England*) < http://www.naturalengland.org.uk/ourwork/marine/mpa/default.aspx> accessed 8 August 2013.
[123] Birnie, Boyle and Redgwell (n 3) 383.
[124] R.R. Churchill, A. V. Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, Manchester 1999) 77.
[125] United Nations Convention on the Law of the Sea 1982, Part XI.
[126] United Nations Convention on the Law of the Sea 1982, art 137.

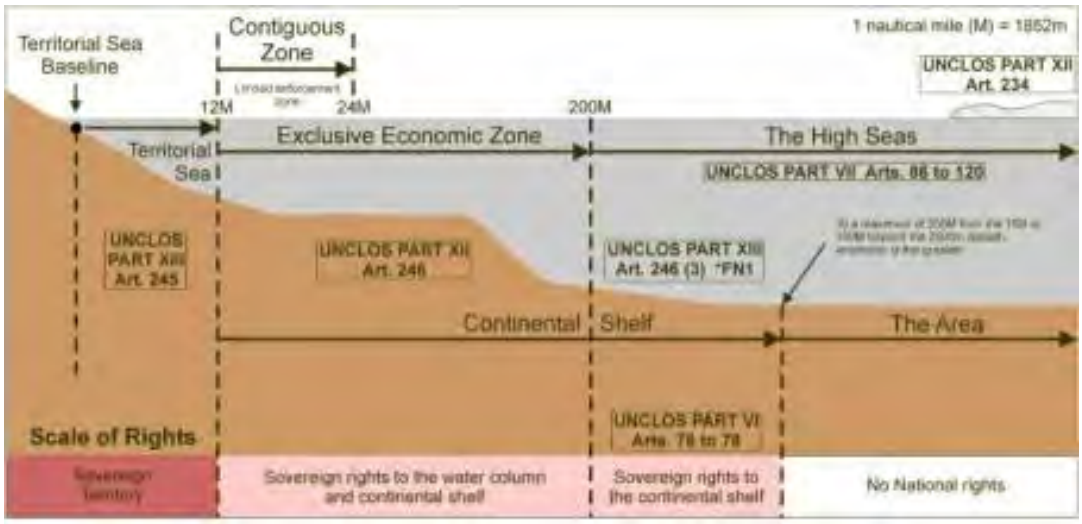

Diagram no.3: Diagram of Maritime Zones according to UNCLOS[127]

One of the most revolutionary features of UNCLOS is that of Article 192,[128] which contains a due diligence obligation upon states to protect and preserve the marine environment. This duty is elaborated upon further within Articles 193-5.[129] Birnie, Boyle and Redgewell explain that this obligation upon states 'goes beyond the older customary rule based on the *Trail Smelter*[130] arbitration, and reflects its extension to global common areas'.[131] As the UK, and the European Union, has ratified the Convention,[132] the due diligence obligation to protect and preserve the marine environment applies to the UK. Under Article 56 UNCLOS, the coastal state has the right to explore and exploit its exclusive economic zone for the use of energy production from water, currents and winds.[133] The UK has chosen to utilise this right by allowing the Secretary of State the right to designate all or part of the EEZ as a Renewable Energy Zone under section 84 Energy Act 2004.[134] However, in order for the UK to comply with UNCLOS when planning and constructing a renewable energy project within the EEZ, and its territorial waters, it must apply measures to ensure that the marine environment is protected and preserved. One of the main ways in which this has been approached by the UK is to designate Marine Protected Areas.

[127] National Oceanography Centre, 'Law of the Sea' (*National Oceanography Centre)* <http://noc.ac.uk/research-at-sea/planning-expedition/law-at-sea/law-sea> accessed 8 August 2013.
[128] United Nations Convention on the Law of the Sea 1982, art 192.
[129] United Nations Convention on the Law of the Sea 1982, arts 193-5.
[130] *Trail Smelter Arbitration (United States v Canada)* 16 April 1938, 11 March 1941; 35 *American Journal of International Law* (1941) 684.
[131] Birnie, Boyle and Redgwell (n 3) 387.
[132] Oceans & Law of the Sea United Nations, 'Chronological lists of ratifications of, accessions and successions to the Convention and the related Argeementsas at 23 January 2013' (*United Nations*, 23 January 2013) <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 8 August 2013.
[133] United Nations Convention on the Law of the Sea 1982, art 56.
[134] Energy Act 2004, s 84.

4.3 Marine Protected Areas

On a national level, marine nature conservation remains a current and developing area of law with the Marine and Coastal Access Act 2009 (MCAA)[135] recently coming into effect to add to the existing patchwork of legislation. Formerly, marine conservation was governed by the Wildlife and Countryside Act 1981[136] through Marine Nature Reserves, (MNRs) and through Sites of Special Scientific Interest (SSSIs).[137] As Pieraccini explains, a wealth of academic criticism[138] has been directed towards the earlier system of MNRs, and notes that the system made no provision to connect the protected areas, thus preventing an 'ecologically coherent network', and adds criticism to the technocratic approach taken to site designation.[139] It is contended that the MCAA has added to existing legislation[140] to provide a more coherent influence to the system of marine nature conservation, and allowed for increased stakeholder involvement.[141] To date, the network of MPAs consists of the following six area designations: Natura 2000 sites, Sites of Special Scientific Interest (SSSIs), Ramsar sites, Marine Conservation Zones (MCZs), Scottish Marine Protected Areas, and future designations arising within Northern Ireland from the Northern Ireland Marine Bill.[142] This paper will later explore the extent to which these area designations are integrated and coordinated. However, before analysing the coordination of these area designations, it is imperative to have an understanding of how each area designation functions in isolation in the event of offshore wind farm construction.

4.3.1 Natura 2000 Sites

Under Article 3 of the Habitats Directive,[143] Natura 2000 sites are comprised of Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) which are not only applicable on the territory of the Member State, but also in the marine areas

---

[135] Marine and Coastal Access Act 2009.
[136] Wildlife and Countryside Act 1981, s 36 – 37.
[137] Pieraccini (n 115) 110.
[138] C. Reid, *Nature Conservation* Law (3rd edn, W. Green, Edinburgh 2009) 213; P.J.S. Jones, 'Marine Nature Reserves in Britain: Past Lessons, Current Status and Future Issues' (1999) 23 *Marine* Policy 375; J. Gibson, 'Marine Nature Reserves in the United Kingdom' (1988) *International Journal of Estuarine and Coastal Law* 328 as per Pieraccini (n 115).
[139] Pieraccini (n 115) 110.
[140] Convention on Biological Diversity 1993; OSPAR Convention 1992; Marine and Coastal Access Act 2009, Directive of the European Parliament and of the Council establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L 164/19; Council Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L 206/7; Directive of the European Parliament and of the Council on the Conservation of Wild Birds [2009] OJ L 20/7; Wildlife and Countryside Act 1981.
[141] Pieraccini (n 115) 109; Christopher. P. Rodgers, *The Law of Nature Conservation* (1st edn, OUP, Oxford 2013) 257.
[142] Joint Nature Conservation Committee, 'Our Marine Protected Area Network' (*Joint Nature Conservation Committee*) <http://jncc.defra.gov.uk/page-4549> accessed 8 August 2013.
[143] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, art 3.

of their jurisdiction.[144] SPAs derive from the Directive on the Conservation of Wild Birds,[145]which was one of the EC's earliest environmental policies and was introduced with the focal interest of protecting wild birds and their habitats through ornithologically designated sites.[146] This ornithological classification criterion was controversial, and resulted in various cases whereby the court enforced ornithological criteria over economic and social needs.[147] Rodgers explains that this designation approach was felt to be too restrictive amongst states; therefore the Habitats Directive[148] unified the provisions for SPA designation and management to match that of SACs.[149] This allowed for consideration of economic and social concerns for the designation of SPAs and SACs, with a prescribed designation process for SACs whereby states enter into negotiation with the EC for the designation of sites, and the creation of a management regime. Whilst this new approach has weakened the strong ornithological designation originally in place for SPAs, the *Basses Corbieres* case[150] demonstrates that the European Court of Justice is willing to enforce the stronger provisions of the Wild Birds Directive on the states that have not designated the SPAs that they should have; thus providing an incentive to states that have properly designated areas, by allowing them to rely on the less stringent regulations from the Habitats Directive.[151]

As of January 2011, the Natura 2000 Network had 26,106 designated sites – out of this, the UK had designated 898 sites which equated to 7.2 per cent of the total national area.[152] Bell, McGillivray and Pedersen are sceptical of the progress of the Natura 2000 Network, noting that there has been no new nature conservation legislation for a number of years, and targets to halt biodiversity loss by 2010 have been ominously underachieved with only 17 per cent of habitats and species, and 11 per cent of key ecosystems being found in a favourable state.[153] However, despite the disappointing overall development of Natura 2000 sites, it remains that there are currently 107 SACs[154] in the UK with marine components, and 107 SPAs[155] with

[144] *Commission v UK* [2005] ECR I-9017; *Regina v Secretary of State for Trade and Industry, ex parte Greenpeace* [2000] Env LR 221, per Jan H Jans, Hans H B Vedder, *European Environmental Law: After Lisbon* (4th edn, Europa Law Publishing, Vedder 2012) 513.
[145] Directive of the European Parliament and of the Council on the conservation of wild birds [2009] OJ L 20/7 (codified version) art 4.
[146] Rodgers (n 141) 203.
[147] *Commission of the European Communities v* Germany [1991] ECR I-883 ECJ; *R v Secretary of State for the Environment ex parte* RSPB [1996] ECR I-33804.
[148] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206.
[149] Rodgers (n 141) 204.
[150] *Commission of the European Communities v France* [2001] ECR I-10,799.
[151] Rodgers (n 141) 205.
[152] European Commission, 'Update January 2011' (*European Commission*, January 2011) <http://ec.europa.eu/environment/nature/natura2000/barometer/docs/n2000.pdf> accessed 8 August 2013.
[153] Bell, McGillivray, Pederson (n 106) 739.
[154] Joint Nature Conservation Committee, 'SACs with Marine Components' (*Joint Nature Conservation Committee*) <http://jncc.defra.gov.uk/page-1445> accessed 8 August 2013.

marine components. Therefore, those planning the construction of an offshore wind farm are likely to come into contact with a marine SPA or SAC.

If an offshore wind farm development is believed to have a significant effect on a designated European site, the developer must undertake an appropriate assessment of the development's implications.[156] Krämer notes that where it cannot be certain that a plan will not have a significant adverse impact on a site; the Commission recommends the 'zero option' where the plan is revised or withdrawn.[157] However, when this is not chosen, the developer should analyse all 'feasible' alternatives for the development.[158] The Commission requires that particular attention is paid to alternatives in respect of 'their relative performance with regard to the conservation objectives of the Natura 2000 site, the site's integrity and its contribution to the overall coherence of the Natura 2000 Network'.[159] This is contrary to advice given to the Secretary of State which states that, where a quantitative target exists, such as that applied to renewable energy, an application should not be rejected due to the existence of fewer adverse impacts on an alternative site. This will be discussed in more depth in section six. After the developer has undertaken an assessment of the alternatives, he may determine that the wind farm falls within the category of 'imperative reasons of overriding public interest' (IROPI) under Article 6(4).[160] If the site in question hosts a priority habitat or species,[161] only reasons of human health, public safety, beneficial consequences of primary importance for the environment, or other imperative reasons as determined by the Commission will suffice.[162] The scope of IROPI remains uncertain with Krämer noting that the requirement of overriding public interest should be a long-term interest,[163] and McGillivray stating that 'IROPI is most often found on grounds of furthering other Community policies such as those concerning energy, transport and ports'.[164] If the project is of overriding public

---

[155] Joint Nature Conservation Committee, 'UK Marine SPAs' (*Joint Nature Conservation Committee*) <http://jncc.defra.gov.uk/page-1414> accessed 8 August 2013.
[156] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, Art 6(3).
[157] Krämer (n 25) 63.
[158] European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC* (*European* Commission, 2000) <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf> accessed 8 August 2013 per Krämer (n 25).
[159] European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC* (*European* Commission, 2000) <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf> accessed 8 August 2013, page 6 per Krämer (n 25).
[160] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, Art 6(4).
[161] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, Annex I.
[162] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, Art 6(4).
[163] Krämer (n 25) 65.
[164] McGillivray (n 25) 447.

interest, Article 6(4)[165] states that the developer must take compensatory measures to mitigate harm to the designated habitat or species. The Commission's guidance states that compensatory measures 'aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned'.[166] Both Krämer[167] and McGillivray[168] have analysed opinions that the Commission has provided to member states with regards to the compensatory measures on certain projects, and have made independent conclusions that the system of compensatory measures is somewhat flawed. McGillivray notes that three of the positive opinions provided by the Commission were given despite the fact that the compensatory measures had not been finalised.[169] In addition, excessive quantities of compensatory land were being offered as a bargaining tool, despite the fact that they did not provide adequate compensation.[170] Unfortunately no opinions have been provided with regards to offshore wind farms so it is difficult to marry any advice provided by the Commission to an offshore wind farm development.

Overall, the law governing European protected sites aims to encourage states to carefully consider, and negotiate the designation of SACs and SPAs, and requires developers to contemplate the impact that their proposed development will have upon the species and habitats present in the sites. The Marine Management Organisation has argued that 'both the "no alternative solutions" and the IROPI tests are onerous and difficult to pass',[171] thus creating a system whereby the developer must pay serious consideration to environmental interests. However, despite this, Pieraccini argues that 'marine European sites are the weakest link in the Natura 2000 network', with the Annexes of the Habitats Directive paying restricted attention to marine species and habitats.[172]McGillivray[173] and Krämer[174] have also questioned the definitions provided for various terms within the Habitats Directive,[175] and have raised concerns about the extent to which compensatory measures have compensated for damage to habitats and species.

---

[165] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, Art 6(4).
[166] European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC* (*European* Commission, 2000) <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf> accessed 8 August 2013, s 1.4.1, per Krämer (n 25) 66.
[167] Krämer (n 25).
[168] McGillivray (n 25).
[169] McGillivray (n 25) 440.
[170] McGillivray(n 25) 444.
[171] Marine Management Organisation, 'Guidance on Imperative Reasons of Overriding Public Interest under the Habitats Directive' (*Marine Management Organisation)* <http://www.marinemanagement.org.uk/licensing/supporting/documents/iropi.pdf> accessed 20 August 2013, 2.
[172] Pieraccini (n 115) 109.
[173] McGillivray (n 25).
[174] Krämer (n 25).
[175] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206.

4.3.2 Sites of Special Scientific Interest (SSSIs)

The SSSI designation was first introduced in the National Parks and Access to the Countryside Act 1949[176]whereby the Nature Conservancy Council was under a duty to notify local planning authorities of SSSIs in their area so that they could take account of them upon deciding planning applications regarding that site.[177] This protection was later extended by the Wildlife and Countryside Act 1981 (WCA 1981)[178] which aimed to control damaging activities by owners or occupiers of sites.[179]SSSIs are designated under s 28 WCA 1981[180] (later replaced with s 28-28R by schedule 9 of the Countryside and Rights of Way Act 2000 (CRoWA 2000)[181]) under the criteria that 'an area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features'.[182] If the conservation body determines that an area falls within this criteria, it has a duty to notify the owner and occupier, as well as the Secretary of State, of operations that are likely to damage the conservation interest (OLDSI) on that site.[183] The introduction of this notification process was controversial as it leaves no process to appeal against site notification.[184] Whilst the conservation body does have a duty to consider objections made to the designation, this has been challenged[185] as no independent body is involved in the appeal process.[186] In addition to designation methods, CRoWA 2000 also changed the balance of power with regards to operational consents and management agreements, whereby consent for potentially damaging operations could be refused without a time limit.[187] The impact that this has had upon property rights has been challenged[188] under human rights on the basis that OLDSIs can interfere with the right for peaceful enjoyment to property,[189] however it has been held that such interference with property rights is in the 'public interest' and is thus compliant.[190]

With regards to offshore wind farm development, the impact of SSSIs will vary greatly on a locational basis. SSSI designation only extends to the jurisdictional limit

---

[176] National Parks and Access to the Countryside Act 1949.
[177] Kathryn V Last, 'Habitat Protection: Has the Wildlife and Countryside Act 1981 Made a Difference?' (1999) 11(1) JEL 15, 16.
[178] Wildlife and Countryside Act 1981.
[179] Last (n 177) 16.
[180] Wildlife and Countryside Act 1981, s 28.
[181] Countryside and Rights of Way Act 2000, sch 9.
[182] Rodgers (n 141) 69.
[183] Rodgers (n 141) 69.
[184] Christopher P Rodgers, 'Protecting Sites of Special Scientific Interest: the Human Rights Dimension' (2005) JPEL 997, 997.
[185] *William Sinclair Holdings v English Nature* [2002] Env LR 4 QBD; *Aggregate Industries v English Nature* [2003] Env LR 3;
[186] Rodgers (n 184) 997.
[187] ibid*, 998.*
[188] *Fisher v English Nature* (2003) EWHC 1599; [2004] EWCA Civ 663; *Trailer and Marina (Leven) Ltd v Secretary of State and English Nature*[2004] EWHC 153 (Admin); [2004] EWCA Civ 1580.
[189] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 1 Protocol 1.
[190] Rodgers (n 184) 1007-1008.

of local authorities, generally the mean low water mark.[191] Therefore it is less likely for an offshore wind farm constructed in the EEZ to impact upon a SSSI with marine components, however it may be likely that cable, and onshore operations will impact SSSIs. If an offshore wind farm proposal falls within the area of a designated SSSI, and the proposed development contains one or more of the listed OLDSIs, the developer must request for consent to carry out the OLSDI from the Conservation Body,[192] which will either be Natural England, Natural Resources Wales or Scottish Natural Heritage depending upon the location of the development.[193] Rodgers explains that 'when considering a request for operational consent for OLDSIs in an SSSI, the Conservation Body will carry out an assessment of their implications for the protected features of the site'.[194] Consent can be given with conditions and time-restraints, and can be modified or withdrawn, however Natural England must compensate for losses incurred if this is the case.[195] Whilst this appears to add a strong safeguard to protect SSSIs from harmful development activities, Bell, McGillivray and Pedersen explain that in practice, 'most consents are granted unconditionally, only a small proportion are made subject to conditions, and only a handful refused.'[196]

4.3.3 Ramsar Sites

Ramsar sites are designated under the Convention on Wetlands of International Importance under Article 2(1).[197] The sites were originally intended to protect specific sites such as the waterfowl habitat, however overtime the scope of the Convention has broadened to cover all aspects of wetland conservation.[198] Parties to the Convention are required to designate suitable wetlands within their territory in accordance with their 'international significance in terms of ecology, botany, zoology, limnology or hydrology'.[199] However, as is common with international agreements, the Convention[200] is clear to state that designation of wetland does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated.[201] As a signatory of the Convention,[202] the UK has provided additional protection to Ramsar sites and, as a matter of policy, Ramsar sites are protected as European sites[203] with all terrestrial Ramsar sites also falling under the classification

[191] Joint Nature Conservation Committee, 'Protected Sites Designations Directory' (*Joint Nature Conservation Committee*) <http://jncc.defra.gov.uk/page-1527> accessed 20 August 2013.
[192] Wildlife and Countryside Act 1981, s 28E(1).
[193] Rodgers (n 141)] 85.
[194] Rodgers (n 141) 85.
[195] Wildlife and Countryside Act (as amended) 1981, s 28M, per Bell, McGillivray and Pedersen (n 106) 732.
[196] Bell McGillivray and Pedersen (n 106) 732.
[197] Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971, art 2(1).
[198] Joint Nature Conservation Committee, 'Protected sites designations directory'(*Joint Nature Conservation Committee*) <http://jncc.defra.gov.uk/page-1527> accessed 8 August 2013.
[199] Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971, art 2(2).
[200] Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971.
[201] Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971, art 2(3).
[202] Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971.
[203] The Conservation of Habitats and Species Regulations 2010 (SI No. 2010/490), s. 9(2)(c).

of SSSI.[204] Due to this increased protection provided by the UK to Ramsar sites, the developer of an offshore wind farm must adhere to the standards outlined above for SSSIs and European designations when considering the location for development. Whilst the UK requires that the same protection of European designations is applied to Ramsar sites, it is worth remembering that there will be no redress within European Courts for failure to protect Ramsar sites, as the requirement did not originate from the European Commission.[205]

4.3.4 Marine Conservation Zones

Marine Conservation Zones (MCZs) are the most recent marine nature conservation designation within England and Wales and were introduced by the Marine and Coastal Access Act 2009 (MCAA).[206] Motivation behind the MCAA[207] can be found in the Marine Bill White Paper[208] where the limitations on the ability of European law to protect the marine environment were recognised.[209] As Pieraccini explains, 'the Habitats and Wild Bird Directives do not consider the social dimension of conservation and do not contain a strong element of participatory environmental decision-making at the designation stage'.[210] In order to remedy this, MCZs aim to take a new approach through both a 'bottom-up' approach rather than wholly state-mediated with regards to site designation,[211] and use a 'network based approach' to ensure that individual sites are not isolated from one-another.[212] The first MCZ that was designated was Lundy Island in the Bristol Channel (a former MNR) in 2010.[213] However, unfortunately the Government has not been as forthcoming with designating the 127 remaining proposed MCZs.[214] Out of the 127 sites, the government only intends to designate 31 sites in 2013 (refer to Diagram no. 4).[215] The site designation process faces constant scandal and criticism within the media with claims that the Fishing Minister has recently described the creation of MCZs as the

---

[204] Natural England, 'What are Ramsar Sites?' (*Natural England*) <http://www.naturalengland.org.uk/ourwork/conservation/designations/ramsars/> accessed 8 August 2013.
[205] RSPB, 'A brief guide to nature designations' (*Royal Society for the Protection of Birds*, 15 September 2004) <http://www.rspb.org.uk/ourwork/policy/sites/naturedesignations.aspx> accessed 8 August 2013.
[206] Marine and Coastal Access Act 2009, Part 5.
[207] Marine and Coastal Access Act 2009.
[208] A Sea Change, Marine Bill White Paper, Cm 7047 (2007).
[209] Pieraccini (n 115) 112.
[210] Pieraccini (n 115) 109.
[211] Rodgers (n 141) 257.
[212] Rodgers (n 141) 260 – 262.
[213] Natural England, 'Marine Conservation Zones' (*Natural England*) <http://www.naturalengland.org.uk/ourwork/marine/mpa/mcz/default.aspx> accessed 8 August 2013.
[214] The Wildlife Trusts, 'Marine Conservation Zones' (*The Wildlife Trusts*) <http://www.wildlifetrusts.org/MCZfriends> accessed 8 August 2013.
[215] Damien Carrington, 'UK seas to gain 31 marine conservation zones' (*The Guardian*, 13 December 2012) <http://www.theguardian.com/environment/2012/dec/13/uk-marine-conservation-zones> accessed 8 August 2013.

'most banal campaign in public' life,[216] with claims that the scientific evidence for MCZ designation is not there.[217] As the political debate about MCZ designation rumbles on, the following discussion on the impact of MCZs upon offshore wind farm development will proceed on the basis that MCZ designation will take place in the proposed 127 areas in future.

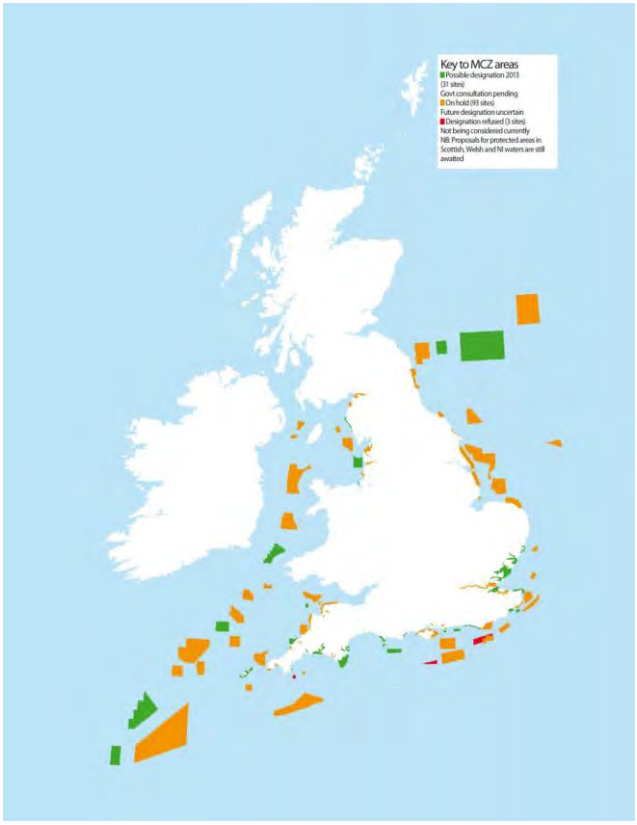

Diagram no. 4: Map of proposed MCZs in UK[218]

As previously noted, property rights in the marine environment vary significantly from rights on land.[219] The common pool resource approach, which provided open rights to its users, has slowly transformed with the introduction of licences for the exploitation of resources such as oil, gas, and fishing.[220] The MCAA[221] uses licences for the broader purpose of permitting a wide range of activities within the whole of the UK marine waters.[222] For a developer planning to construct an offshore wind

[216] Richard Ford, 'Minister rejects "banal" campaign for marine conservation zones' (*The Times*, 5 August 2013) <http://www.thetimes.co.uk/tto/news/politics/article3834234.ece> accessed 8 August 2013.
[217] Richard Benyon MP, 'Government Response: Marine Conservation Zones: Response to an article in the Times' (*UK Government,* 7 August 2013) <https://www.gov.uk/government/news/marine-conservation-zones-response-to-an-article-in-the-times> accessed 20 August 2013.
[218] The Wildlife Trusts, 'Marine Conservation Zones' (*The Wildlife Trusts*) <http://www.wildlifetrusts.org/MCZfriends> accessed 8 August 2013.
[219] Barnes (n 57) 1.
[220] Rodgers (n 141) 273.
[221] Marine and Coastal Access Act 2009.
[222] Rodgers (n 141) 273

farm in an area that contains an MCZ, a licence will be required[223] because the construction process contains a number of activities listed under the section of 'licensable marine activities' within MCAA.[224]It is a criminal offence[225] for a developer to commence development without first gaining a licence.[226] When determining the application, the licencing authority must have regard to: the need to protect the environment, the need to protect human health, the need to prevent interference with legitimate uses of the sea, and any other matters as the authority thinks relevant.[227] In addition, the licensing authority must also have regard to 'the effects of any use intended to be made of the works in question when constructed, altered or improved'.[228] A licence can be granted unconditionally, subject to conditions, or it may be refused.[229] As the system of MCZ designation remains in an early stage, there have not yet been any applications for development licences to analyse. However, an analysis of the criteria upon which a licence can be granted demonstrates that whilst the environment, human health and the need to protect the uses of the sea are three major considerations, the licencing criteria contains a major loophole whereby the licencing authority can also consider 'any other matter that it thinks relevant'. Guidance from DEFRA explains that the reason for this flexibility is to cater for a wide range of activities that may require licensing – from 'small jetties to substantial harbour developments'.[230] Unfortunately this does not provide a great deal of certainty for developers seeking to construct in an area that contains an MCZ, neither does it allow for a premeditated understanding of which matters will be regarded as 'relevant' and what weight will be given to such matters.

5 CASE STUDY – DOGGER BANK, UK

5.1 The Proposed Development

Whilst an analysis of the various individual legal mechanisms involved in the construction of an offshore wind farm has been undertaken by numerous academics, it is often difficult to understand the impact that they will have upon the parties involved, and the environment, when they operate together within the planning system. This section will therefore focus on how the law will be applied to one of the current round three offshore wind farm proposals at Dogger Bank off the east coast of Yorkshire.

---

[223] Marine and Coastal Access Act 2009, s. 65.
[224] Marine and Coastal Access Act 2009, s. 66.
[225] Marine and Coastal Access Act 2009, s. 85(1).
[226] Rodgers (n 141) 274.
[227] Marine and Coastal Access Act 2009, s. 69(1).
[228] Marine and Coastal Access Act 2009, s. 69(2).
[229] Marine and Coastal Access Act 2009, s. 71.
[230] DEFRA, 'Guidance on Marine Licensing under Part 4 of the Marine and Coastal Access Act 2009' (*Department for Environment Food and Rural Affairs,* 2011) <http://archive.defra.gov.uk/environment/marine/documents/interim2/mcaa-licensing-guide.pdf> accessed 8 August 2013.

The proposed Dogger Bank offshore wind farm is pitched to have potential to be the world's largest offshore wind farm,[231] at the equivalent size of North Yorkshire.[232] The proposed development aims to install a total capacity of 9GW of offshore wind farm projects by 2020, which could produce almost 10% of the UK's projected electricity requirements.[233] The Dogger Bank zone was put forward for competitive tender within round three of the Crown Estate's leasing programme, and was successfully bid upon by a consortium named Forewind Ltd.[234] Forewind Ltd consists of four international energy companies: RWE npower, SSE, Statkraft and Statoil.[235] It is perhaps not until one studies a map of the overall project, that the true magnitude of this development is realised. Diagram no. 5 shows the total development envelope, with the black outlined area showing the overall Dogger Bank zone that was leased in round three. The enormity of the project is unlike any other the UK has seen for offshore wind development spanning from Newcastle to Norwich.

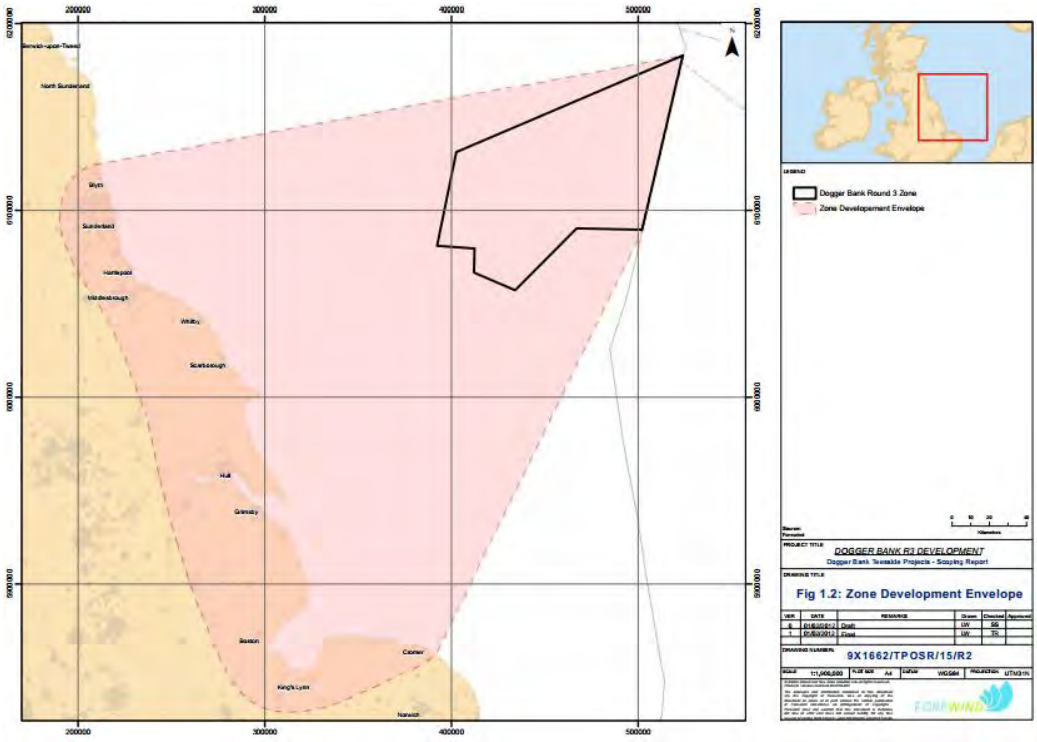

Diagram No. 5 Map of Development Area[236]

[231] Royal Haskoning, 'Dogger Bank Offshore Wind Farm EIA' (*Royal Haskoning*) <http://www.royalhaskoning.co.uk/en-gb/fields/industryandenergy/Energy/Pages/dogger-bank-offshore-wind-farm.aspx> accessed 15 August 2013.

[232] Forewind Ltd, 'Dogger Bank' (*Forewind Ltd*) <http://www.forewind.co.uk/dogger-bank/overview.html> accessed 15 August 2013.

[233] Forewind Ltd, 'Background' (*Forewind Ltd*) <http://www.forewind.co.uk/about-forewind/background.html> accessed 15 August 2013.

[234] Forewind Ltd, 'About Forewind' (*Forewind Ltd*) <http://www.forewind.co.uk/about-forewind/forewind-overview.html> accessed 15 August 2013.

[235] Forewind Ltd, 'Owners'(*Forewind Ltd*) <http://www.forewind.co.uk/about-forewind/owners.html> accessed 15 August 2013.

[236] Forewind Ltd, 'Dogger Bank Teeside: Appendix B Environmental Assessment Scoping Report – Preliminary Environmental Information (PEI1)' (*Royal Haskoning,* May 2012)

Due to the size of the project, the developer has broken down its proposals into various smaller wind farms. Initially, the project was broken down into two tranches: Dogger Bank Creyke Beck, and Dogger Bank Teeside,[237] which refer to the onshore converter stations and associated infrastructure involved. Within this, individual consent and planning permission will be required for the following wind farm developments and cable corridor operations (see Diagram no. 6):

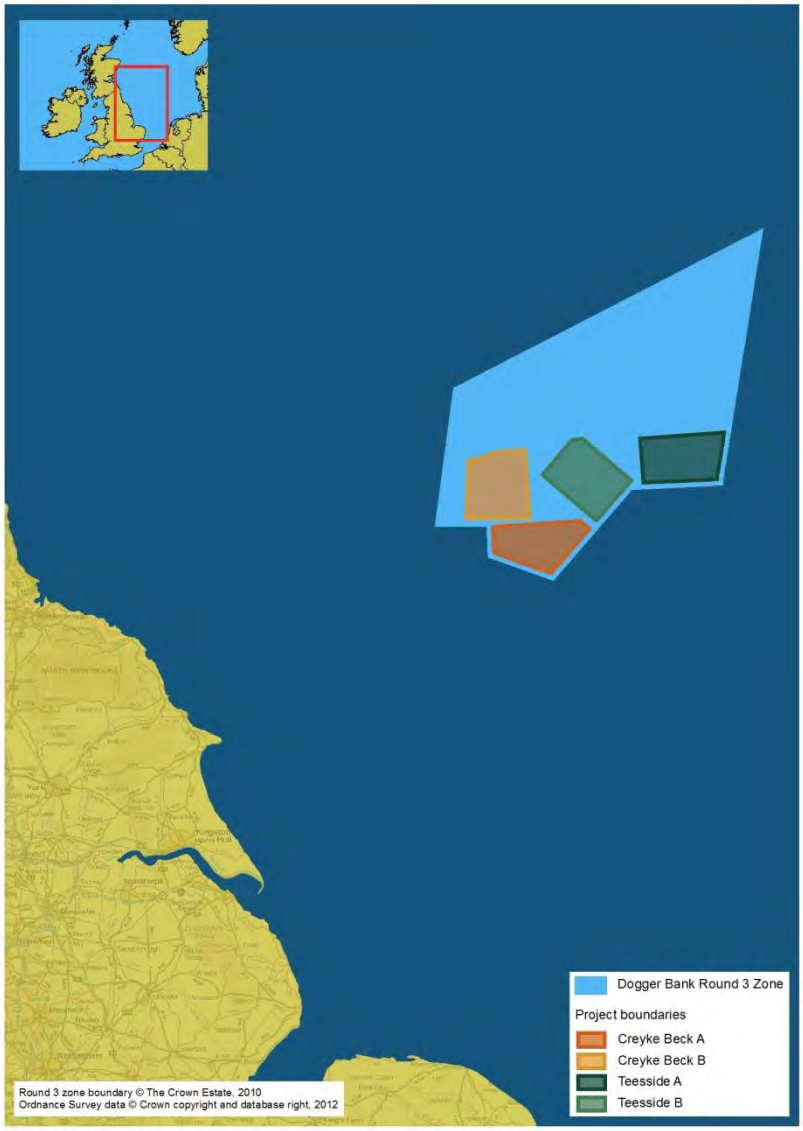

Diagram no. 6: Proposed Development Zones within the Dogger Bank Zone[238]

<http://www.forewind.co.uk/uploads/files/Teesside/Teesside%20PEI1%20Appendix%20B%20Scoping%20Report%20Lo%20Res.pdf> accessed 15 August 2013, 10.

[237] Forewind Ltd, 'Projects' (*Forewind Ltd*) <http://www.forewind.co.uk/projects/projects-overview.html> accessed 15 August 2013.

[238] Forewind Ltd, 'Forewind Announces First four Dogger Bank Project Boundaries' (*Forewind* Ltd, 15 November 2012)
< http://www.forewind.co.uk/news/60/34/Forewind-announces-first-four-Dogger-Bank-project-boundaries.html> accessed 20 August 2013.

- First stage of development: Creyke Beck A and Creyke Beck B and associated onshore and offshore power cables to connect to the existing Creyke Beck substation near Cottingham.[239]
- Second stage of development: Teeside A and Teeside B and associated onshore and offshore power cables to connect to the existing Lackenby substation in Teeside.[240]
- Third stage of development: Teeside C and Teeside D and associated onshore and offshore power cables to connect to the national grid in Teeside, just south of the Tees Estuary.[241]

5.2 Environmental Protections and the Dogger Bank Development

Dogger Bank, as an ecological feature, has been described in its Natura 2000 designation as 'sandbanks which are slightly covered by sea water all the time'.[242] Its physical characteristics include 'gravelly sand, sand, non-vegetated, full salinity, intermediate coastal influence, and sandy mounds'.[243] As a raised area of land within the North Sea that often experiences force 4-6 (moderate-strong breezes) through to 9-12 (gale-hurricane), Dogger Bank is geographically an excellent location for an offshore wind farm.[244] However, the climatic features of the area also mean that it is home to a special type of habitat, and a number of species that may suffer adversely from the construction of an offshore wind farm.

The Dogger Bank feature itself has been designated as an SAC within the UK, as well as the Netherlands and Denmark as the feature stretches beyond UK waters. Within the UK SAC form completed for the site, the vulnerability information for the site details that the Dogger Bank sandbank is moderately or highly vulnerable to 'physical loss by obstruction (installation of petroleum and renewable energy industry infrastructure and cables)'.[245] In addition, Forewind Ltd has highlighted a number of other SACs in the surrounding areas that may be affected, particularly with regards to the presence of the harbour porpoise, and bottlenose dolphin, which has a high migratory range.[246] The SACs that may be impacted by the Dogger Bank development are highlighted in Diagram no.7.

---

[239] Forewind Ltd, 'Dogger Bank Creyke Beck' (*Forewind Ltd*) <http://www.forewind.co.uk/projects/dogger-bank-creyke-beck.html> accessed 15 August 2013.
[240] Forewind Ltd, 'Dogger Bank Teeside A & B' (*Forewind Ltd*) <http://www.forewind.co.uk/projects/dogger-bank-teesside-a-b.html> accessed 15 August 2013.
[241] Forewind Ltd, 'Dogger Bank Teeside C & D' (*Forewind Ltd*) <http://www.forewind.co.uk/projects/dogger-bank-teesside-c-d.html> accessed 15 August 2013.
[242] Joint Nature Conservancy Council, 'Natura 2000 Standard Data Form: Dogger Bank' (*Joint Nature Conservancy Council*, 10 August 2011) <http://jncc.defra.gov.uk/protectedsites/sacselection/n2kforms/UK0030352.pdf> accessed 15 August 2013.
[243] ibid.
[244] Forewind Ltd, 'Dogger Bank Project One: Environment Impact Assessment Scoping Report' (*Royal Haskoning,* 2010) <http://www.forewind.co.uk/uploads/files/project-one-scoping-report.pdf> accessed 15 August 2013, 40.
[245] Joint Nature Conservancy Council (n 242) 3.
[246] Forewind Ltd (n 244) 50.

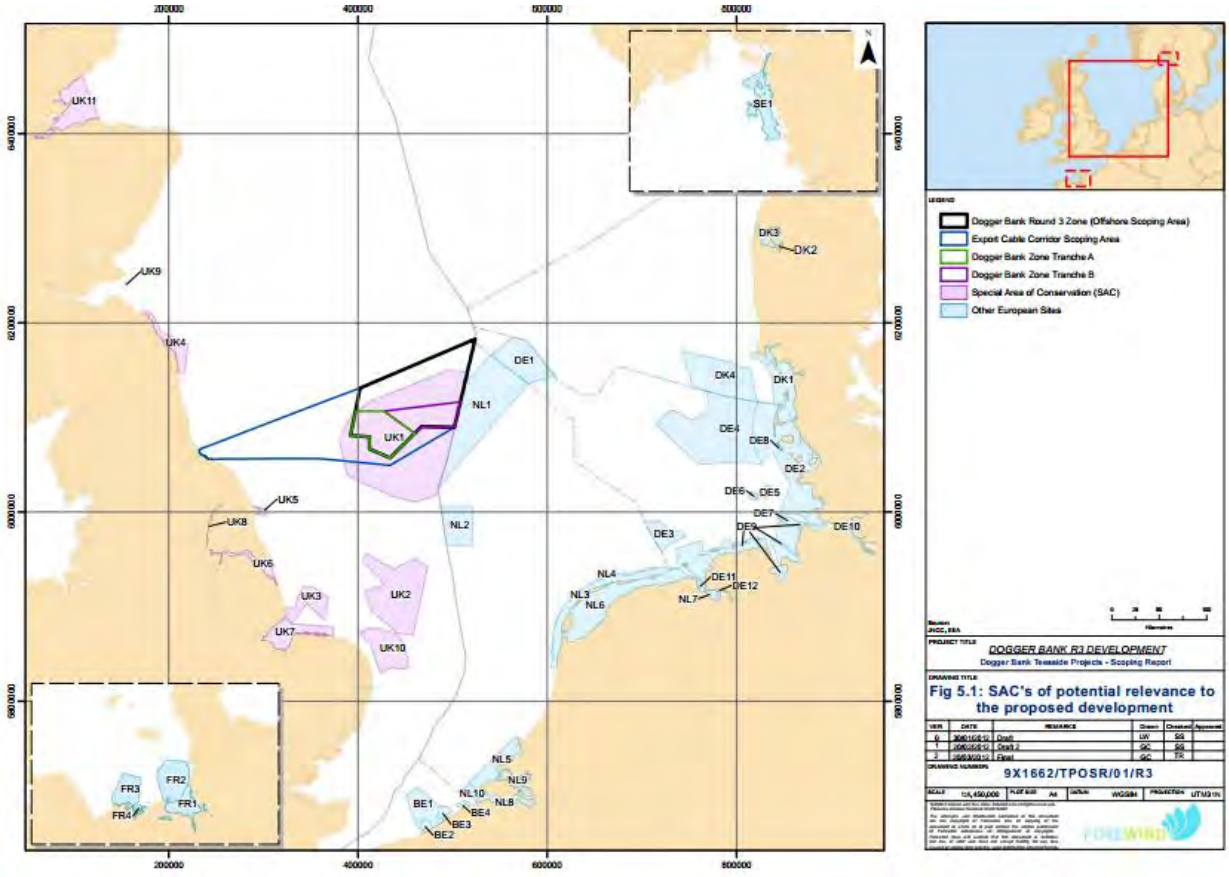

Diagram no.7: A map showing UK and international SACs near the development area[247]

Whilst the Dogger Bank feature is not itself an SPA, it is important for developers to consider nearby SPAs, and the migratory range that protected species take when planning the construction of the wind farm. As revealed in section two, it is often the case that migratory birds use strong wind currents to travel,[248] thus causing potential for a lot of bird traffic around the Dogger Bank area. In addition, cabling activities onshore must be carefully planned as these may disturb sensitive species that breed on beaches within the area, including the Little Tern *Sterna albifons* and the Sandwich Tern *Sterna sandvicensis*.[249] Diagram no. 8 shows the nearby SPAs and Ramsar sites that may be impacted by the Dogger Bank development.

---

[247] Forewind Ltd (n 236) 55.

[248] Robin Webster and Freya Roberts, 'Bird death and wind turbines: a look at the evidence' (*The Carbon Brief*, 10 April 2013) <http://www.carbonbrief.org/blog/2013/04/wind-farms-and-birds> accessed 15 August 2013; American Bird Conservancy, 'Wind Energy Frequently Asked Questions' (*American Bird Conservancy*) <http://www.abcbirds.org/abcprograms/policy/collisions/wind_faq.html> accessed 15 August 2013; Langston R H W & Pullan J D 'Windfarms and birds: an analysis of the effects of wind farms on birds, and guidance on environmental assessment criteria and site selection issues'(*BirdLife,* September 2003) <http://www.birdlife.org/eu/pdfs/BirdLife_Bern_windfarms.pdf> accessed 15 August 2013, 3; Scottish Natural Heritage, 'Windfarms and Birds: Calculating a theoretical collision risk assuming no avoiding action' (*Scottish Natural Heritage,* 2000) <http://www.snh.gov.uk/docs/C205425.pdf> accessed 15 August 2013; Godfrey Boyle, *Renewable Energy: Power for a Sustainable Future* (2nd edn, OUP 2004) 276.

[249] Forewind Ltd (n 236) 56.

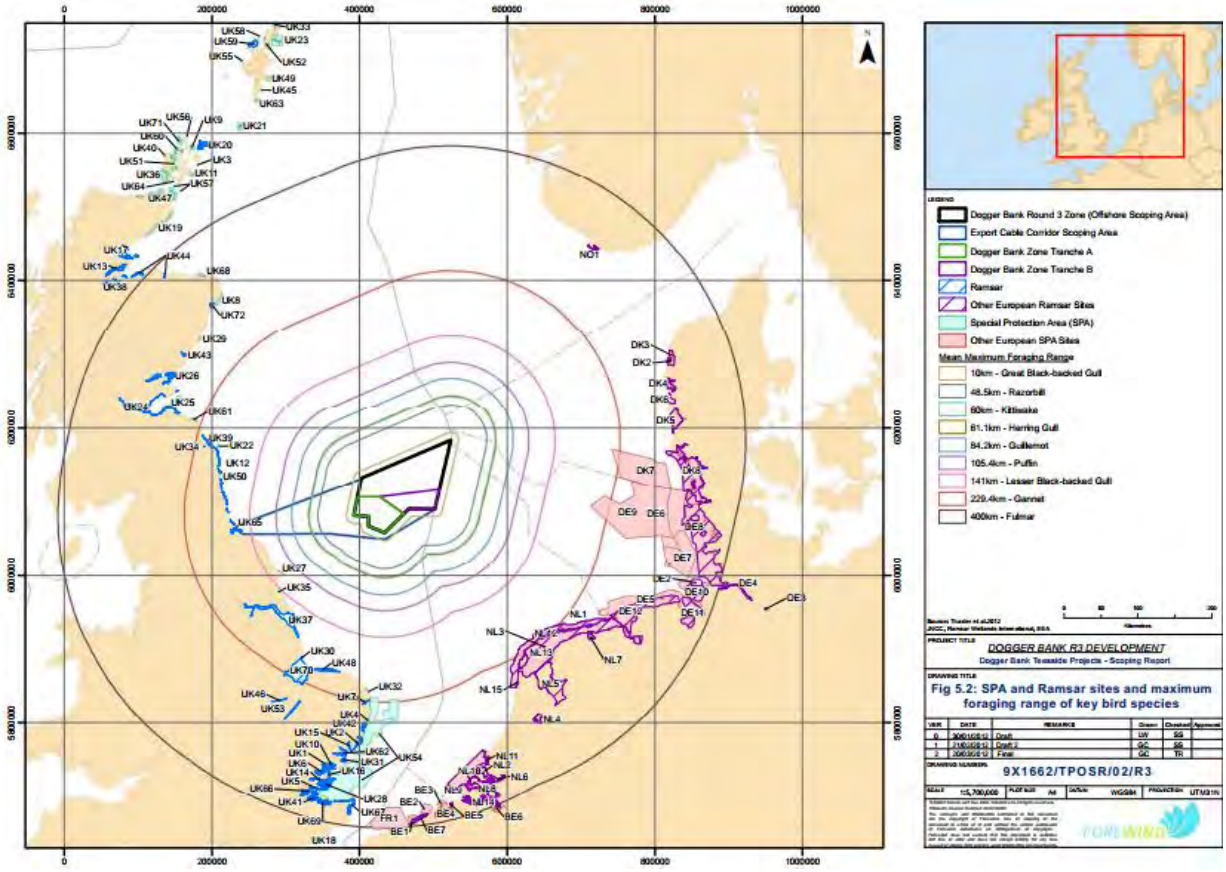

Diagram no. 8: A map showing UK and international SPAs and Ramsar sites near the development area[250]

Whilst not yet in place, it is important to understand that a number of proposed MCZ area designations within the North Sea may be impacted by the development at Dogger Bank. Diagram no. 9 shows that there are a number of proposed MCZs near to the development area, although Forewind's EIA scoping report has pre-emptively concluded that 'no aspect of the construction or operation of Dogger Bank Teeside would be expected to have a significant impact on the pMCZs identified'.[251] However, it has been recommended that the potential impacts of construction on the pMCZs are further explored within the EIA. It is also noted in the report that neighbouring states may also be implementing their own systems similar to MCZs under the Marine Strategy Framework Directive,[252] and that whilst no information is currently available on this, the developer will have to consider this when compiling the EIA for the site.[253]

[250] Forewind Ltd (n 236) 60.
[251] Forewind Ltd (n 236) 63.
[252] Directive of the European Parliament and of the Council establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L 164/19.
[253] Forewind Ltd (n 236) 63.

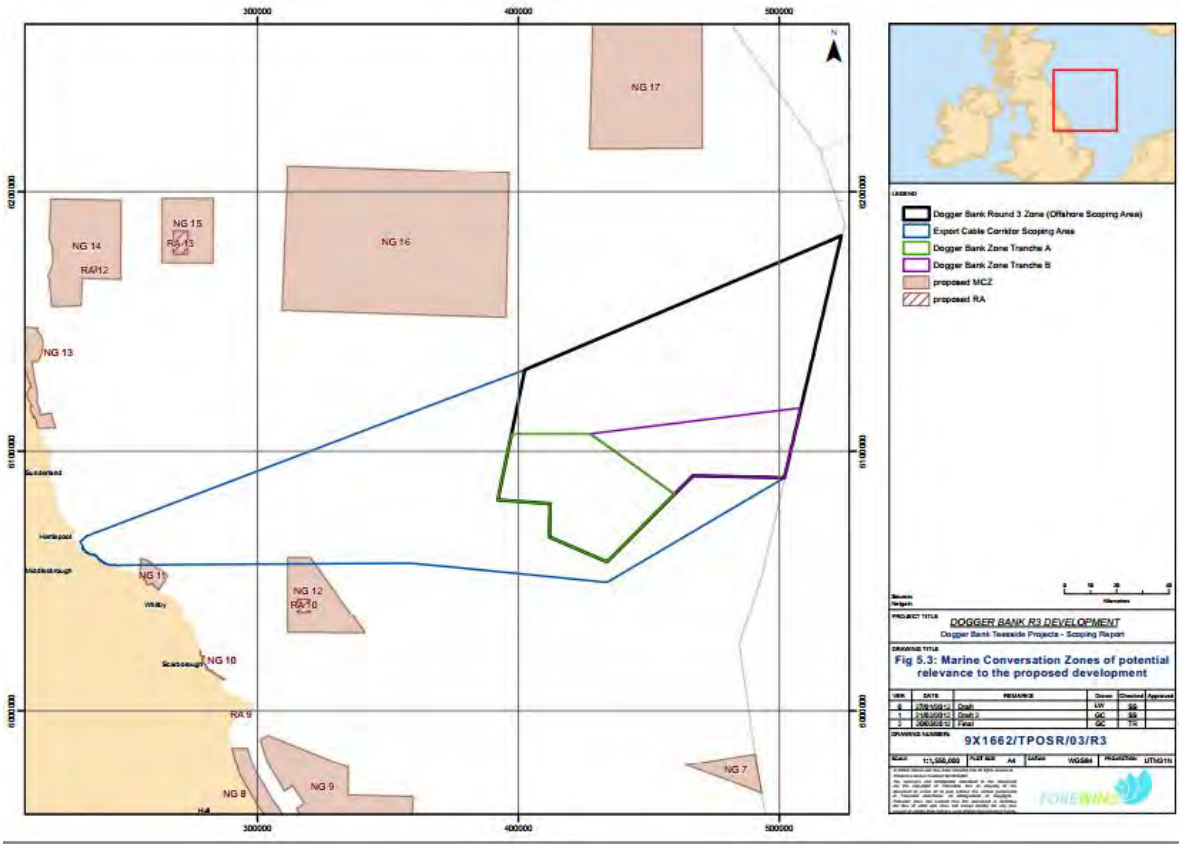

Diagram no. 9: A map showing proposed MCZs near the development area[254]

The final area designations that will impact upon the construction of the Dogger Bank wind farm, as recognised by the developer, are SSSIs, National Nature Reserves (NNRs), Local Nature Reserves (LNRs) and National Reserves. It is possible that SSSIs with marine components can affect offshore wind farm developments, however this is not the case for the Dogger Bank development, as there are no SSSIs with marine components near to the development site. However, the developer will need to consider onshore designations when planning the onshore construction works and cable laying, although the analysis of such onshore designations is beyond the remit of this thesis.

5.3 Development Progress to date and the Future

Before the Dogger Bank zone was released for competitive tender by the Crown Estate, the first offshore energy SEA was undertaken, known as 'OESEA'.[255] As part of this, two reports into the ecology at Dogger Bank were undertaken.[256] These

[254] Forewind Ltd (n 236) 62.
[255] Department of Energy and Climate Change, 'Consultation Outcome: UK Offshore Energy Strategic Environmental Assessment (OESEA)' (*gov.uk*, January 2009) <https://www.gov.uk/government/consultations/uk-offshore-energy-strategic-environmental-assessment-oesea> accessed 15 August 2013.
[256] Genevieve Leaper, 'Report on seabird and marine mammal survey from MV Vos Rambler in the Dogger Bank area of the North Sea 1-15 September 2008' (*Department of Energy and Climate Change*)

reports made conclusions that 'there was a high density of seabirds in this part of the North Sea, with 22 species recorded in total', with the majority of these birds to be found to the west of Dogger Bank.[257] A second SEA was undertaken in 2010, known as OESEA2.[258] However, it is submitted that this second assessment could not have impacted the decision making stage at national level, as the site was put forward for competitive tender in 2009. Using the information from OESEA, the Crown Estate decided to include Dogger Bank within its round three plans.[259]

The Dogger Bank wind farm development is currently in the consultation phase at developer level. As highlighted above, there are many limbs to the development, with separate consultations required for each. The first limb to follow the consultation process is the development at Creyke Beck A and Creyke Beck B, and its associated onshore and offshore power cables. In order to prepare for the creation of the Environmental Statement, Royal Haskoning (the company commissioned by Forewind Ltd to oversee the EIA process) has created a scoping report for this element of the project.[260] This report has been created in accordance with Regulation 8(3) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009,[261] in order to request a scoping opinion from the Infrastructure Planning Commission (IPC). The IPC is accordingly under a duty to provide a scoping opinion,[262] and to consult widely on the proposal before issuing the opinion.[263] In this case, a vast number of stakeholders were consulted including: a number of councils, civil aviation authority, harbour commissioners, English Heritage, JNCC and Natural England, the Crown Estate and various drainage boards.[264] Within the scoping opinion provided by the IPC, a number of recommendations were made for the developer ahead of the creation of the Environmental Statement, including the following:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/196497/OES_DB_1_Sep08_Bird_TripReport.pdf> accessed 15 August 2013; Adam Batty, 'Seabird and Marine Mammal Survey: VOS Rambler 14-27 September 2008 For Cork Ecology' (*Department of Energy and Climate Change*) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/196498/OES_DB_14_Sep08_Bird_TripReport.pdf> accessed 15 August 2013.

[257] Genevieve Leaper (n 256) 10.

[258] Department of Energy and Climate Change, 'UK Offshore Energy SEA (UK OESEA 2) Future Leasing/Licensing for Offshore Renewable Energy, Offshore Oil and Gas Storage and Associated Infrastructure' (*Department of Energy and Climate Change*, March 2010) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198229/OESEA2_Scoping_Document.pdf> accessed 15 August 2013.

[259] The Crown Estate (n 16) 25.

[260] Forewind Ltd (n 244).

[261] Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

[262] Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, Reg 8(9).

[263] Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, Reg 8(6).

[264] Infrastructure Planning Commission, 'Scoping Opinion Proposed Dogger Bank Offshore Wind Farm' (*Infrastructure Planning Commission,* November 2010) <http://infrastructure.planningportal.gov.uk/wp-content/ipc/uploads/projects/EN010021/1.%20Pre-Submission/EIA/Scoping/Scoping%20Opinion/101111_EN010021_329156_ISSUE_Dogger_Bank_Scoping_Opinion_Web%20Version.pdf> accessed 15 August 2013, Appendix 2.

- The exact location of the development must be provided, and to a higher standard of that supplied in the scoping report.[265]
- A clear description of all elements of the development must be included, such as: construction processes and methods, transport routes, operational requirements, maintenance activities, and emissions.[266]
- The main alternatives to the development must be highlighted, along with the developer's reason for their choice.[267]
- The impact of the development during construction, operation and decommissioning phases must be considered.[268]
- A clear description of the number of turbines to be used, along with their size and location must be provided.[269]

At present, Royal Haskoning[270] is due to submit its environmental statement for consultation, followed by a decision from the Secretary of State for Energy and Climate Change.[271] If permission is granted, Forewind Ltd anticipates that construction will commence in 2016 with operation occurring from 2017 onwards. The second two limbs of the development follow a slightly staggered consultation process, however if the plans are accepted by the Secretary of State, Forewind Ltd anticipate that the entire project will be completed by 2021.[272]

6 POTENTIAL CONFLICTS WITHIN THE SYSTEM AND CONCLUDING REMARKS

Thus far, this paper has considered the environmental externalities that arise from offshore wind farm construction, the stages of the planning process, and the environmental area designations that exist to protect the marine environment. Whilst it is important to understand how the various stages and elements of the process function in isolation, the actuality of the system is such that the individual legal mechanisms must converge to form the wider process of development consent. Thus, this section will analyse the extent to which these legal mechanisms are integrated and coordinated, any failings in the integration, and how the system as a whole strikes a balance between the need to protect the environment, and the need for renewable energy. Following this, a recommendations section will conclude this section, and the overall paper, by suggesting appropriate amendments in accordance with the author's views.

---

[265] Infrastructure Planning Commission (n 264) 15.
[266] ibid.
[267] ibid.
[268] ibid.
[269] Infrastructure Planning Commission (n 264) 17.
[270] Royal Haskoning, 'Royal Haskoning Awarded Lead EIA Consultant on Dogger Bank Wind Farm' (*Royal Haskoning*, 25 October 2011) <http://www.royalhaskoning.co.uk/en-gb/News/Pages/dogger-bank-eia-coordinator-lead-eia-consultant.aspx> accessed 15 August 2013.
[271] Forewind Ltd, 'Dogger Bank Creyke Beck' (*Forewind Ltd*) <http://www.forewind.co.uk/projects/dogger-bank-creyke-beck.html> accessed 15 August 2013.
[272] Forewind Ltd, 'Consenting Process' (*Forewind Ltd*) <http://www.forewind.co.uk/projects/consenting-process.html> accessed 15 August 2013.

6.1 Level of Integration of Legal Mechanisms within the Planning Process

From analysing the planning and consenting procedure for an offshore wind farm construction, it would not be a particularly astute observation to note that the process involves many parties, takes place on a variety of levels, and can take some time. However, a more in-depth insight into the manner in which the responsibility for environmental protection shifts from each party in the process is rather perturbing when one considers what elements of protection are overlooked at each stage. From the start of the procedure, the Strategic Environmental Assessment considers offshore renewable energy projects alongside oil and gas, and deals with alternatives under the same umbrella of terms.[273]

The Crown Estate attains this information, but does not consider any significant environmental considerations when determining which zones to lease.[274] The responsibility for environmental protection is then heavily passed on to the developer who is under an obligation to undertake an Environmental Impact Assessment if the project is likely to have 'significant effects on the environment'.[275] The developer may choose to request a scoping opinion from the relevant authority,[276] which provides guidance on what must be included in the environmental statement. However, full responsibility for the construction of the environmental statement lies with the developer.[277] One element of the EIA process for offshore wind farms that risks non-compliance is the requirement to consider alternatives.[278] The Crown Estate's documentation recognises that the site leasing process at national level removes the developer's ability to consider alternatives.[279] However, regrettably the Crown Estate does not take extensive environmental considerations into their site leasing guidelines. Therefore it is submitted that the SEA failing to provide exclusive consideration to the impact of offshore renewable energy projects, combined with the Crown Estate's lack of consideration during the leasing process, means that a number of environmental alternatives may have already been neglected before the developer is able to undertake an EIA.

Once it has been established that the developer is required to undertake an EIA, he is required to consider any environmental area designations that may fall within the development area, and the potential impact that the development will have upon them.

---

[273] Department of Energy and Climate Change, 'UK Offshore Energy Strategic Environmental Assessment: Future Leasing for Offshore Wind Farms and Licensing for Offshore Oil and Gas and Gas Storage' (*Department of Energy and Climate Change*, January 2009). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/194328/OES_Environmental_Report.pdf > accessed 15 August 2013.

[274] The Crown Estate (n 16) 12-13.

[275] Council Directive on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175, art 2(1).

[276] Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, reg 8(3).

[277] Council Directive on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175, art 5.

[278] Directive of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1, art 5(3)(d).

[279] The Crown Estate (n 16) 11.

As discussed in section four, the law in this area is incredibly confusing. Academics have criticised the system of area designations using statistics that show that, in spite of the law, many area designations are still in an unfavourable state.[280] It is submitted that the reason for this poor level of protection lies with poorly defined terms, and conditions that can be found in the legislation. For example, the Habitats Directive[281] has been subjected to a vast amount of criticism for the hazy definitions provided to the term 'overriding public interest', and has been criticised for the way in which its requirement to take compensatory measures has been enforced.[282] Combined with this, marine European sites have been described as 'the weakest link in the Natura 2000 network',[283] with little attention paid to marine habitats and species in the annexes of the Directive.[284] Putting European designations to one side, the other designations within the MPA network have also faced scrutiny. Whilst SSSIs require the developer to obtain consent to undertake an OLDSI on the site, it has been argued that consent is seldom refused and often granted unconditionally.[285] Ramsar sites are provided with the same level of protection as European sites by the UK, however in truth this means very little as there will be no redress from European courts if the UK fails to enforce this level of protection. Finally, the recently announced Marine Conservation Zones appear to bring about an additional level of protection, although only 31 of the 127 recommended sites have been proposed for designation this year, with no promises as to when, or whether the remaining sites will be designated.[286] Additionally, whilst environmental considerations are considered for developments within MCZs, there is a loophole whereby the licencing authority can consider 'any other matter that it thinks relevant'.[287] Thus demonstrating that, whilst requiring the developer to consider the impact that his development will have on the environment, environmental area designations are unable to project environmental protection to a level where its status is higher than other societal or economic needs.

6.2 Impact of the Failings in the Law

In theory, one can claim to understand the impact that construction can have on a sensitive marine environment. However, when the area affected is the equivalent size of North Yorkshire, and provides a home to copious amounts of protected species and habitats, the impact of such a development is somewhat more difficult to understand. As highlighted, the bulk of environmental assessment lies with the developer. When

[280] Bell, McGillivray, Pederson (n 107) 739.
[281] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.
[282] Krämer (n 25); McGillivray (n 25).
[283] Pieraccini (n 115) 109.
[284] Council Directive on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.
[285] Bell McGillivray and Pedersen (n 106) 732.
[286] UK Government, 'Marine Conservation Zones; Designating Sites' (*UK Government*, January 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218597/20121217-mcz-factsheet-designating.pdf> accessed 15 August 2013.
[287] Marine and Coastal Access Act 2009, s. 69(1).

constructing his environmental statement, it is argued that the developer is able to do so to his benefit. Holder notes how environmental statements have been constructed with special emphasis placed on the positive aspects of the development, with little weight being paid to the real environmental problems that arise from development.[288] Alongside, other academics have argued that the amount of information that developers have to provide is still very limited.[289] In addition, Johnstone claims that 'pet scientists' are used by the developer with the results of studies, more often than not, working in the developer's favour.[290]

The Dogger Bank development is unprecedented within the UK, and is foreseen to be the largest offshore wind farm in the world. At present, the environmental assessments for the site lie with Forewind Ltd, who have commissioned Royal Haskoning to undertake the EIA. Within its scoping opinion, the Infrastructure Planning Commission (IPC) has highlighted a number of issues with Forewind's scoping report, and has recommended a number of changes to be included in the Environmental Statement. Whether these amendments will be made sufficiently remains a matter up for future debate, however a few certainties within the process can be outlined now. Firstly, the IPC's scoping opinion states that alternatives should be considered in the Environmental Statement – however it has already been established that due to the leasing process at national level, this is not possible. It is also unlikely that Marine Conservation Zones will have as much of an impact on the development as they once would have threatened to. Additionally, with the continual delays imposed upon the designation of MCZs by the Government, it is unlikely that the developers of the initial tranches of the Dogger Bank development will be required to consider the development impacts on the sensitive environments contained within the recommended MCZs.

6.3 Balancing the Need to Protect the Marine Environment and the Need for Renewable Energy

Vice President Weeramantry has described sustainable development as a vital part of modern international law 'by reason not only of its inescapable legal necessity, but also by reason of its wide and global acceptance by the global community'.[291] As a concept, sustainable development infamously arose from the Brundtland Report[292] and balances economic, societal and environmental concerns. Steen explains that 'the nexus between environmental policy, sustainability and the energy industries is fraught with difficulty and contention'.[293] Offshore wind farm development is a good illustration with competing interests such as the need to prevent climate change, the

[288] Holder (n 107) 267.
[289] Bell, McGillivray, Pedersen (n 106) 476-477.
[290] Johnson, Rodmell (n 52).
[291] *Hungary v Slovakia (Gabčíkovo-Nagymaros Project)* [1997] ICJ [41].
[292] UNWCED: United Nations World Commission on Environment and Development, *Our Common Future* (1987) <http://www.un-documents.net/wced-ocf.htm> accessed 4 January 2013, 2(i).
[293] Nicola Steen, *Sustainable Development and The Energy Industries* (Earthscan Publications, Washington 1994) vii.

need to protect the environment, the need to consider the interests of society, and the need to ensure that development is economically viable.[294] With all of these competing interests, an interesting question arises as to where the law in England and Wales draws the balancing line.

Quite understandably, energy infrastructure is an extremely important topic for any government, with the UK Government being no exception. Through an analysis of the various policy documents that discuss offshore wind farms, various government bodies are eager to stress the importance of renewable energy for the UK's energy infrastructure. With constant pressure on the UK to increase its renewable energy production,[295] it is unsurprising that the Government is eager to accelerate the planning and construction of offshore wind farms. Within its explanation of the system, the Crown Estate concedes that a different approach has been taken with round three wind farm developments so that energy targets can be met.[296] Development areas have been made larger, allowing developers more discretion as to where they can develop within their leased zone. However, with this new rush to construct large offshore wind farms, it is submitted that the environment faces the prospect of neglect. The research in section two demonstrates that many uncertainties remain with regards to the impact that offshore wind farm construction has upon the environment. However, the Crown Estate continued to lease large areas for development in 2009, without receiving additional information from the second national SEA, OESEA2, which was released in 2010. In addition, advice to the Secretary of State regarding the final decision for wind farm development expressly states that, where quantitative targets are imposed (such as in the case of renewable energy), a development should not be rejected on the basis that development at an alternative site would have less adverse impacts.[297] This clearly demonstrates that the scales balancing renewable energy construction and environmental protection are heavily tipped in favour of renewable energy construction. Whilst there are a number of environmental protection mechanisms in place at the developer level of the process, a strong analysis has already concluded that within situations of 'overriding public interest', development will be allowed within protected areas. It is submitted that this combination of statements in favour of renewable energy results in the scales being broken from the start of the process with an overriding presumption in favour of renewable energy construction.

---

[294] UK Government, 'Press Release: Multi-million pound investment in offshore wind industry to unlock billions in UK economy' (*UK Government,* August 2013) <https://www.gov.uk/government/news/multi-million-pound-investment-in-offshore-wind-industry-to-unlock-billions-in-uk-economy> accessed 15 August 2013.

[295] Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending the subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16.

[296] The Crown Estate (n 16) 9.

[297] Department of Energy and Climate Change (n 113) as cited by The Crown Estate (n 16) 16.

6.4 Recommendations

This paper has explored the planning process of offshore wind farms in light of the protection that it affords the marine environment. Conclusions have been drawn that suggest that the system favours the need for renewable energy construction over the need to preserve the marine environment. It is therefore submitted that various amendments to the relevant policy and law is required in order to balance the scales. From analysis of the environmental responsibilities between the national and developer levels of the process, it is apparent that the national level of the system does not allow for extensive consideration of environment protection. Thus, it is proposed that SEAs should consider renewable energy projects in their own right, as opposed to combining an opinion with oil and gas extraction projects. As understood in section two, offshore wind turbines cause a variety of environmental externalities, and these should be awarded a sufficient level of consideration at this stage. Consequently, it is submitted that advice to the Secretary of State that favours development regardless of the existence of better alternative sites should be removed and replaced with guidance that allows for the consideration of extreme environmental damage. For legal mechanisms that affect the developer-level of the process, further guidance is required for European designations as to what constitutes an 'overriding public interest', and more stringent requirements should be applied with regards to compensatory measures to ensure that they are, in fact, compensating for the environmental damage caused by development. Finally, the designation of Marine Conservation Zones currently provides little protection for the marine environment, due to the fact that only a handful of sites have been designated. However, in addition to this, further guidance, and potential limitations, is required for what may constitute 'any other matters' that the licencing authority thinks relevant to consider when granting licences for construction. At present, this allows for an infinite amount of reasons, with an uncapped weighting applied, to determine what will allow development within an MCZ.

To conclude, it is important to remember that this paper is not suggesting that the construction of offshore wind farms should be stopped, or that environmental protection should take place over all other considerations. However, at present the balance between the two interests is not evenly weighted. Without ensuring that we regulate ourselves, we are in danger of forgetting that the environment does not have a voice of its own and cannot campaign for its interests to be fairly considered.

THE US CONSTITUTION: THE FOUNDERS' INTENTIONS AND THE COMMERCE CLAUSE

*THOMAS GORDON**

This paper discusses the importance of the creation and development of the US Constitution to ensure unity of governance across the country. It is argued that, as well as enacting the Constitution to create stability nationwide, the Founders acted to further their own interests. Furthermore, the paper demonstrates the significance of the progression of the Constitution through examining the flexibility in judicial interpretation of the Commerce Clause to illustrate and highlight the success in keeping the Constitution relevant and up to date.

1 INTRODUCTION

Thomas Paine once remarked that a government unable to preserve the peace is 'no government at all'.[1] Peaceful government requires public acceptance. In flexibly accommodating 'new responses to new challenges',[2] whilst balancing respect for differing ideologies, the Constitution created the 'perfect union'[3] desired.

2 CATALYST FOR ENACTING THE CONSTITUTION

Abraham Lincoln stated that the 'more perfect union' sought is not possible if the country does not stay together.[4] Therefore, in order to achieve the aim stated, the federal government must exercise its power in a way that continually maintains national unity. The Articles of Confederation were unsatisfactory. The lack of central regulation meant that there was a fear of potential trade barriers causing economic conflict.[5] The country was also very weak financially, due to Congress's inability to raise money and enforce taxes.[6] The potential for conflict was present, and the Constitution was, in part, formed to pragmatically deal with this weakness.[7]

3 INTERESTS PURSUED BY CONSTITUTIONAL FOUNDERS

Strong obedience to one sole political principle did not occur. Those who drafted and ratified the Constitution acted upon both ideological and selfish grounds. Silvia notes

---

* Thomas Gordon, Newcastle University, LLB (Hons) Law.

[1] Thomas Paine, *The Writings of Thomas Paine Volume 1* (Moncure Daniel Conway ed., G.P. Putnam's Sons, 1894) 96.

[2] Ezra Klein, 'Transcript: President Obama 2013 inaugural address' <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/21/transcript-president-obama-2013-inaugural-address/?print=1> accessed 23 February 2013.

[3] Preamble, 'The Constitution of the United States: A Transcription' <http://www.archives.gov/exhibits/charters/constitution_transcript.html> accessed 14 November 2013.

[4] Abraham Lincoln, 'First Inaugural Address' <http://www.bartleby.com/124/pres31.html> accessed 23 February 2013.

[5] Robert A. McGuire, 'Economic Interests and the Adoption of the United States Constitution' <http://eh.net/encyclopedia/article/mcguire.constitution.us.economic.interests> accessed 23 February 2013.

[6] ibid.

[7] ibid.

that until 1913, when Beard explained otherwise, people thought that idealism alone drove the Founders to form the new Constitution.[8] There are strong philosophical commitments within the document. The Constitution strongly adheres to the separation of powers.[9] Congress, the Executive Branch, and the Judiciary are all given different obligations under Articles I, II and III respectively. This was to prevent the potential dangers inherent in the dominance of the legislatures seen under the Articles of Confederation.[10] The Constitution formed a government built around federalism. Central government has only enumerated powers, the rest being reserved by the States or by the people themselves.[11] Federalism is seen as necessary to protect individual liberty,[12] as there is a fear that if local powers are disregarded, citizens would exercise less control over their elected representatives, thus potentially 'subverting the foundation of a free government'.[13] However, the national government was made to be stronger than it was before, so that it could survive to protect such liberties. Most importantly, it was given a taxing power,[14] and a power to regulate commerce.[15] Both are vital to securing economic stability, and preventing attritional state conflict.

As well as these ideological motives of limiting central governmental interference in citizens' lives, the Founders voted for the Constitution in order to further their own interests. Charles Beard was the first to put forward this economic theory.[16] His exact explanation is not supported nowadays, as empirical evidence has shown that the distinctions that he drew were too simplistic.[17] However, McGuire has demonstrated that a direct link existed between Founders' personal circumstances and their manner of voting. For example, at the North Carolina ratifying convention, the likelihood of delegates from non-commercial areas voting favourably was 0.002, as opposed to 0.753 for delegates residing in commercial areas.[18] Additionally, at the Virginia ratifying convention, the chance of an affirmative vote was almost doubled by the delegate not being a slave-owner.[19]

---

[8] Joseph Silvia, 'The Debate over an Economic Interpretation of the Constitution: Where has Beard taken us and where are we after McGuire's "New" Interpretation?' <http://works.bepress.com/joseph_silvia/2> accessed 16 February 2013, 1.
[9] Edward H. Levi, *Some Aspects of the Separation of Powers* (1976) 76 Colum. LR 371, 371.
[10] ibid 374-375.
[11] U.S. Constitution, amendment X.
[12] *Bond v United States* (opinion of the Court) [2012] 564 US [10].
[13] Agrippa, 'Unrestricted Power Over Commerce Should Not Be Given To The Government' <http://www.utulsa.edu/law/classes/rice/constitutional/antifederalist/11.htm> accessed 23 February 2013.
[14] U.S. Constitution. art I, §8, cl 1.
[15] U.S. Constitution. art I, §8, cl 3.
[16] Charles A Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan Pub Co, New York 1946).
[17] Silvia (n 8) 3.
[18] McGuire (n 5).
[19] ibid.

McGuire and Ohsfeldt state that the trend was clear. Those who would have economically benefited from the increase in centralised control under the new Constitution, in contrast with the Articles of Confederation, were more likely to vote in favour of its ratification.[20] This is not to say that the Constitution was a document designed wholly with interstate trading capitalists in mind. Both federalism and the separation of powers, liberal political tools to limit state control, are key features of the Constitution.

The above discussion displays a wide range of concerns that the Founders had. There was not a single driving impulse amongst the Founders. However, the above discussion displays that the Constitution's aim can be stated as the accommodation of liberal enlightenment values under an effective system of government, aiming to rectify key weaknesses found under the Articles of Confederation. The political balance sought by the Constitution has been effectuated over time by judicial manipulation of the 'penumbra of doubt'[21] surrounding the constitutional provisions, as contemporary governance has necessitated. This can be seen in the history of the Commerce Clause's interpretation by the courts.

4 THE COMMERCE CLAUSE AND CONSTITUTIONAL INTERPRETATION

The Constitution states that Congress shall have the power to 'regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes'.[22] This transferred power to the national government, to enable centralised economic control in a manner that the Articles of Confederation did not allow for.[23] The Federalist Papers noted the potential for hostility between the States under the previous Constitution. States' economic protectionism, it was feared, would 'beget discontent'.[24] Unity of government therefore required unity of commercial interests.[25] Unsurprisingly, those with commercial interests were more in favour of this clause than those without such interests. The original draft of the Commerce Clause stated that such legislation could only be passed by two-thirds of each Congressional House.[26] Bare majorities would not be enough. Those at the Philadelphia Convention who were merchants in interstate or international commerce unanimously opposed the two-thirds requirement.[27] Those from less commercial areas voted more favourably.[28]

---

[20] Robert A. McGuire and Robert L. Ohsfeldt, *Economic Interests and the American Constitution: A Quantitative Rehabilitation of Charles A. Beard* (1984) 2 Journal of Ec History 509, 515-517.
[21] HLA Hart, *The Concept of Law* (1997 Reprint 2nd edn, OUP, Oxford 1964) 123.
[22] U.S. Constitution. art I, §8, cl 3.
[23] *National Federation of Independent Business v Sebelius* [2012] 567 U.S [13] (Ginsburg J).
[24] Alexander Hamilton, 'The Federalist VII' in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Isaac Kramnick ed, Penguin 1987) 111.
[25] Alexander Hamilton, 'The Federalist XI' in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Isaac Kramnick ed, Penguin 1987) 133.
[26] Robert A McGuire, *To Form A More Perfect Union: A New Economic Interpretation of the United States Constitution* (OUP, Oxford 2003) 92.
[27] ibid.
[28] ibid.

It is not surprising that that capitalist class supported the provision allowing for more centralised economic control. This is because capitalists require a constant expansion of their market.[29] Trade barriers cannot, therefore, be sustained in the long term under such an economic system.

The Commerce Clause provides for effective government, but importantly imposes limits upon that power, thus respecting federalism. It is therefore reflective of the balancing act that the whole Constitution strives for. The debate over the correct outer limit of national governmental power over commerce has led to two centuries of jurisprudential oscillation.

Hopes of extremist state-centric application of the Commerce Clause were scuppered very quickly by *United States v The William*.[30] In this case, Congress used the Commerce Clause to justify a trade embargo that it had placed for political reasons. The embargo harmed commerce. It was held that the commerce power could be exercised at the discretion of the national government. The fact that commerce was affected negatively was held to be irrelevant.[31] This shows a large shift of power away from the states.

In 1824, Chief Justice Marshall in *Gibbons v Ogden*[32] laid down many of the doctrinal foundations utilised by the courts subsequently. In a very broad reading of the Commerce Clause, Marshall held that commerce was 'intercourse'[33] affecting 'more states than one'.[34] Congress can therefore regulate matters occurring solely within one state. However, it cannot exercise control over activities that are wholly intrastate in their effect. In such situations, the states' residual police power would prevent national action.[35] This interpretation was very lenient compared with later decisions. Importantly, though, Chief Justice Marshall placed emphasis upon the federal structure of government. The accommodation of different concerns was clear.

Between *Gibbons*, and the New Deal, the courts developed more restrictive tests to determine the balance between national and state power. Lack of a sufficiently 'direct' link between the regulated interest and interstate commerce,[36] and the relevance of the activity being part of the 'current' of interstate commerce,[37] were doctrines used to limit Congress's power. This was reflective of a time when big government was seen more suspiciously than it was post-1937.

---

[29] K Marx and F Engels, *Manifesto of the Communist Party* (Progress Publishers 1967) 46.
[30] *United States v The* William [1808] 28 F.Cas. 614.
[31] ibid 621 (District Judge Davis).
[32] *Gibbons v Ogden* [1824] 22 U.S. 1.
[33] ibid 189 (Marshall CJ).
[34] ibid 194 (Marshall CJ).
[35] ibid 205 (Marshall CJ).
[36] *Carter v Carter Coal Co.*[1936] 298 U. S. 238 [307] (Sutherland J).
[37] *Swift & Co v US* [1905] 196 U.S. 375 [399] (Holmes J).

Franklin D Roosevelt won great public support for his Keynesian economic plan to rescue the country after the Great Depression.[38] This required greater centralised power. Responding to the court-packing crisis, the Justices changed tack.[39] *United States v Darby*[40] displayed greater deference to Congress than was shown before, as the Court ignored the previously mentioned restrictive doctrines. Congress's power was most widely stated in *Wickard v Filburn*,[41] where a federal statute that regulated a farmer, who was producing wheat for his own consumption, was held to be constitutional. All that was required was that the aggregate[42] of the particular activity had a 'substantial … effect'[43] on interstate commerce.

The politically influenced judicial fluctuation is clear. This trend exhibits a tendency that is crucial to the existence of the 'more perfect union' under the Constitution. The idea that the Constitution is a fixed document, to be applied consistently throughout the ages, is clearly false. It is not that the judges can make up whatever they want. On the contrary, they are constrained by the language of the Constitution itself.[44] However, the differing interpretations of the same provision over time, especially the very sharp changes seen in the late 1930s, show that the Constitution's interpretation is an act, reflective of and influenced by, contemporary politics.[45] Accepting the normative force of this reality is to be a proponent of the Living Constitution.

Originalists disagree, and believe that the Constitution ought to be given the meaning that it had when created.[46] The reasoning for this philosophy is superficially attractive.[47] Constitutional acts of lawmaking are required to make the Constitution's provisions, and therefore the 'words should be interpreted in accordance with the … [meaning that they] had when they became law'.[48] Interpreting the Constitution by reference to its original meaning therefore prevents usurpation by the judges of values that society regards as fundamental.[49] The appropriateness of this test is often justified by reference to the 'apogee'[50] of Living Constitutionalism, *Dred Scott v Sandford*.[51]

---

[38] David M Kennedy and Lizabeth Cohen, *The American Pageant Vol 2* (15th Edn, CENGAGE Learning Custom Publishing, Boston 2012) 770.
[39] John E Nowak and Ronald D Rotunda, *Principles of Constitutional Law* (4th Edn, Thomson/West, USA 2010) 83; Bruce Ackerman, 'Constitutional Politics/Constitutional Law' (1989-1990) 99 Yale LJ 453, 511.
[40] *States v Darby* [1941] 312 U.S. 100.
[41] *Wickard v Filburn* [1942] 317 U.S. 111.
[42] ibid 127 (Jackson J).
[43] ibid 125 (Jackson J).
[44] Erwin Chemerinsky, 'The Constitution Is Not "Hard Law": The Bork Rejection And The Future Of Constitutional Jurisprudence' (1989) 6 Const Comment 29, 34.
[45] ibid 33.
[46] Randy E Barnett, 'The Original Meaning of the Commerce Clause' (2001) 68 U Chi L Rev 101, 105-108.
[47] Michael C Dorf, 'Book Review The Undead Constitution' (2011-12) 125 Harv L Rev 2011, 2015.
[48] ibid.
[49] Antonin Scalia, 'Originalism: The Lesser Evil' (1988-89) 57 Uni Cinn L Rev 849, 862.
[50] William H Rehnquist, 'The Notion of a Living Constitution' (1975-76) 54 Tex L Rev 693, 700.
[51] *Dred Scott v Sandford* [1857] 60 U.S. 393.

Meese said that this, the 'most infamous'[52] Supreme Court case of all time, displays the danger of treating the Constitution as an 'empty vessel'[53] into which each generation can pour its prejudices. However, in light of the above evidence that the Founders formed the Constitution largely out of self interest, the moral justification for the originalists' approach loses its cogency. Additionally, in refusing to apply the original meaning when *stare decisis* would make it impracticable to do so,[54] such judges are, in reality, as free as other judges.[55] This is because the approach taken will depend upon the particular judge's view as to what would be acceptable.

Originalism is merely a thin veil for achieving socially conservative results.[56] The originalist Supreme Court judges are Justices Thomas and Scalia. Both frequently reach decisions that limit centralised power, and increase states' power. This can be seen in *National Federation of Independent Business v Sebelius, Secretary of Health and Human Services*,[57] where they hyperbolically stated that allowing the individual mandate, under the Patient Protection and Affordable Care Act 2010, would signal an end to limited government.[58] They held that it exceeded federal power because the Commerce Clause only related to commercial activity, not inactivity.[59] This was also the reasoning that Chief Justice Roberts used.[60] The effects-based jurisprudence, which had developed over the past 70 years, was thus ignored. The pendulum has swung; federal power is now increasingly seen with suspicion.[61]

The conservative Justices in *Sebelius* rhetorically denied how 'novel'[62] the doctrine that they declared was, by attempting to *ex post facto* rationalise previous case law.[63] The inventiveness of the court on this occasion achieved a result reflective of the conservative political time that the country is currently in. There is a retreat from the big government of the New Deal era.[64] Advocates of Living Constitutionalism are correct in describing the fluctuation of the Constitution's interpretation. Most of them,

---

[52] Dennis J Goldford, *The American Consitution and the Debate Over Originalism* (Cambridge University Press, New York 2005) 92.
[53] Department of Justice, *Address of The Honourable Edwin MEESE III Attorney General of the United States Before The D.C. Chapter Of The Federalist society Lawyers Division* <http://www.justice.gov/ag/aghistory/meese/1985/11-15-1985.pdf> accessed 24 February 2013.
[54] Antonin Scalia, 'On Interpreting The Constitution' <http://www.manhattan-institute.org/html/wl1997.htm> accessed 24 February 2013.
[55] Dorf (n 47) 2034.
[56] Dorf (n 47) 2045.
[57] *National Federation of Independent Business v Sebelius, Secretary of Health and Human Services* [2012] 567 U.S.
[58] ibid 12 (Scalia, Kennedy, Thomas and Alito JJ dissenting).
[59] ibid 12-13 (Scalia, Kennedy, Thomas and Alito JJ dissenting).
[60] ibid 20-21 (Roberts CJ).
[61] Tom Frost, 'Our People in General Have a High Degree Of Freedom' (2013) Liverpool Law Review (forthcoming) 16.
[62] *National Federation of Independent Business v Sebelius, Secretary of Health and Human Services* [2012] 567 U.S. [18] (Ginsburg J).
[63] ibid 24-27 (Roberts CJ).
[64] Frost (n 61) 16.

as liberals,[65] would dislike the restrictive reading of the Commerce Clause in *Sebelius*. However, they would support such judicial moulding of constitutional text in order to make it acceptable to the modern day political environment.

5 CONCLUSION

The range of impulses that the Founders had when creating the Constitution explains the relevancy of discussing the Constitution's interpretation. The Constitution accommodated a variety of commercial and ideological impulses to enable effective governance, thus delivering unity. Many of the Constitution's terms enable flexible interpretation.[66] As President Obama recognised in his second inaugural address, new challenges require new responses.[67] Stephen Breyer described flexible judicial interpretation as enabling a document, made for 4 million people 200 years ago, to remain effective for modern day America's society of 300 million people.[68] The history of the Commerce Clause has shown this to be true. By remaining attuned to the times, the Constitution has remained useful, maintained respect and support, and thus preserved the Union.

[65] Dorf (n 47) 2045.
[66] William J Brennan Jr, 'The Constitution of the United States: Contemporary Ratification' (1985-1986) 27 S Tex L Rev 433, 433.
[67] Klein (n 2).
[68] Stephen Breyer, 'Antonin Scalia and Stephen Breyer debate the Constitution' <http://www.youtube.com/watch?v=_4n8gOUzZ8I> accessed 24 February 2013, at 26-27 mins.

THE BRITISH EQUALITY FRAMEWORK IS INCAPABLE OF ACHIEVING EQUALITY IN THE WORKFORCE

LOIS THWAITES[*]

Discrimination in the workforce continues to exist in Britain, where certain groups — for example, women, disabled people, and ethnic minority groups — are underrepresented or underpaid. This paper explores the effectiveness of the British legal framework in achieving equality in the workforce under the Equality Act 2010. While this Act has achieved significant improvements upon the previous legal framework, it still assumes a complaints-led approach to tackling employment discrimination. This is problematic, not only because it results in few successful cases against employers, but also because it fails to address deep-rooted systemic issues of inequality in the workforce. An examination of approaches used in other jurisdictions reveals an advantage of positive action over positive discrimination measures because they are not detrimental to non-disadvantaged groups. It is recommended that Britain should adopt a substantive equality approach similar to that of Northern Ireland and incorporate mandatory positive action provisions into the Equality Act 2010.

1 INTRODUCTION

In Great Britain (Britain), certain groups of people are disadvantaged within the workforce. Ethnic minorities and the disabled are under-represented for example, in comparison to their share of the population. Women are also under-represented and often paid less than men for equal work. These inequalities are the result of past discrimination against these groups. Prior to the Second World War, the population of Britain was predominantly white.[1] In the 1950s, industries were expanding and there was a shortage of workers so people who were regarded as 'cheap labour' were recruited from the New Commonwealth (India, Bangladesh, Pakistan, etc). British people treated the newcomers with hostility. They were excluded from society and they only found work in poorly paid occupations, which white workers did not want.[2] Disabled people were traditionally thought to be a 'burden' and considered to be unfit for work. They were classed as 'idiots' and 'lunatics' and they were segregated from society in institutional asylums.[3] With regards to women in Britain, their role was traditionally considered to be motherhood and looking after the home.[4] They were perceived to be the weaker sex; they were not educated to the same standard as men

[*] Lois Thwaites, Newcastle University, Law, LLB (Hons) Law.

[1] Deborah Phillips, 'Black Minority Ethnic Concentration, Segregation and Dispersal in Britain' (1998) 35(10) Urban Studies 1681.

[2] ibid.

[3] English Heritage, 'A History of Disability: From 1050 to the Present Day' <http://www.english-heritage.org.uk/discover/people-and-places/disability-history/> accessed 16 April 2013.

[4] Gerry Holloway, *Women and Work in Britain since 1840* (Routledge, Abingdon 2005).

and they generally held a lower status in society than men.[5] It took a long time for women to be given equal rights to men.[6] Women have been described under a Marxist theory as a pool of cheap and unskilled workers that can be tapped into when required and disposed of when there is no longer a use for them.[7] These stereotypes and negative attitudes towards these groups of people continue today. They are systemic issues of inequality, deep-rooted within British society, and within the British workforce.

This paper does not propose to address the philosophy of equality, nor does it ask whether equality should be a keystone in our society and workforce. The goal of achieving equality is clearly stated in the Equality Act 2010 and its predecessors. Rather, the question which this paper asks is whether, given the importance of this goal in the modern British polity, the system created by the 2010 Act is capable of achieving it. The argument it makes is that it is not.

Section two firstly outlines the discrimination problems in Britain and highlights that there has been no (or little) improvement in the last few decades, under the 'complaints-led' formal equality approach. A brief history of British equality legislation is then offered and it is acknowledged that the Equality Act 2010 is, in general, an improvement on the old legal framework. Yet, as the section discusses, there are serious problems with the complaints-led model (still used in Britain), and specific problems regarding the British Employment Tribunal Service and the role of the Equality and Human Rights Commission (EHRC). There is, it is argued, a strong case for adopting proactive measures under the substantive equality approach.

The third section follows by analysing the different forms of proactive measures that have been adopted in other jurisdictions, assessing three 'positive discrimination' approaches — 'affirmative action' in the United States (US) and quotas in India and the European Union (EU) — and comparing these with three instances of statutory 'positive action' duties in Canada, South Africa and Northern Ireland. As the section demonstrates, positive action has clear advantages over positive discrimination, as it is not detrimental to non-disadvantaged groups. It is also demonstrated that when positive action is implemented and enforced in a manner that gives regulators the power to punish, as well as persuade, it produces far superior results than formal equality, as the example of Northern Ireland shows.

The fourth section starts by providing a brief history of the position of positive action schemes under British legislation. It is then explained how recommendations to

[5] ibid.
[6] Patricia M. Thane, 'What difference did the vote make? Women in public and private life in Britain since 1918' (2003) 76(192) Historical Research 268.
[7] Irene Bruegel, 'Women as a Reserve Army of Labour: A Note on Recent British Experience' (1979) 3 Feminist Review 12.

impose mandatory positive action duties on employers were rejected by Parliament for being burdensome on businesses. It is argued however, that the benefits of mandatory employer duties far outweigh any burden. The section then discusses the positive action provisions provided by the new Equality Act and argues, by drawing on the experience of other jurisdictions, that they are insufficient to redress the past discrimination experienced by disadvantaged groups, as they fail to impose obligations on employers. The limitations of the 'public sector equality duty' are also discussed. The section concludes with a discussion which highlights the likely objections to positive action from employers, and responses are provided to overcome these.

Finally, the fifth section draws the threads of the argument together. The complaints-led model under the formal equality approach, it argues, is incapable of addressing systemic issues of inequality within the British workforce and thus cannot redress past discrimination of disadvantaged groups. To the extent the current positive action provisions in the Equality Act 2010 are based on this approach, they will not succeed in achieving equality. Northern Ireland, notwithstanding its very different conditions, offers a better model with its substantive approach to equality, which Britain should seriously consider adopting.

2 THE FAILINGS OF THE BRITISH APPROACH

2.1 Formal and Substantive Equality

The statistics set out in the *Cambridge Review*[8] and the more recent report of the *National Equality Panel*[9] demonstrate the extent of the discrimination problem in Britain. Over the past few decades there has been no increase in the representation of ethnic minorities and disabled people in the British workforce.[10] For example, the unemployment rate for ethnic minority men continues to be twice that of white men, and the disabled continue to be three times less likely to find work than their able-bodied counterparts.[11] The gender pay gap was reduced from 30 per cent in 1975 to 17.2 per cent in 2007.[12] However, in thirty two years there should have been a greater reduction than 12.8 per cent.[13]

[8] Bob Hepple, Mary Coussey, Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, Oxford, 2000) 12-13.
[9] National Equality Panel, *An Anatomy of Economic Inequality in the UK – Report of the National Equality Panel* (Government Equalities Office 2010).
[10] ibid; Hepple, Coussey, and Choudhury (n 8).
[11] ibid.
[12] Hepple, Coussey, and Choudhury (n 8); Sandra Fredman, 'Reforming Equal Pay Laws' (2008) 37(3) Industrial Law Journal 193, 194; H. Daniels, *Patterns of Pay: Results of the Annual Survey of Hours and Earnings 1997-2007* (Employment, Earnings and Innovation Division, Office for National Statistics).
[13] Fredman (n 12) 194; Daniels (n 12).

The ultimate goal is to achieve equality within the British workforce. There are a number of alternative approaches towards achieving this. The concept of 'formal equality' can be described as one of consistency; based on the equal treatment principle. It aims to eliminate unfair treatment by treating all individuals in the same way.[14] This is the predominant approach adopted in British anti-discrimination law.[15] Conceptual arguments in favour of formal equality include primacy of individuals, impartiality and state neutrality.[16] The formal approach has been criticised, however, as it fails to take account of the realities experienced by disadvantaged groups.[17] Treating everybody the same can result in underlying forms of discrimination being ignored.[18] The different needs of different social groups cannot be accommodated if all people/groups are treated the same.[19] The use, in Britain, of this restrictive formal approach to equality perhaps explains why there has been no significant improvement in relation to the discrimination of disadvantaged groups. Ethnic minorities, the disabled, and women for example, all have very different needs regarding employment, and the issues they face also vary.

Fredman and many other academics promote the adoption of a 'substantive equality' approach.[20] Substantive equality targets disadvantaged groups to achieve equality.[21] The substantive view takes account of past discrimination, and looks to the law to correct the results of this.[22] It goes against the equal treatment principle, but supporters of substantive equality argue that preferential treatment of certain social groups can be justified, as it is necessary to remedy past discrimination that affected those groups, in order to achieve equality.[23] They support the use of 'proactive measures'.[24] These will be discussed below. Substantive equality has two main branches; 'equality of opportunity' and 'equality of results'. 'Equality of opportunity' aims to provide a 'fair and equal starting point for all'.[25] It requires the removal of barriers to encourage participation from disadvantaged groups. It has been suggested, however, that this alone will not necessarily equip individuals to take advantage of

[14] Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59(3) Cambridge Law Journal 562; Noreen Burrows and Muriel Robison, 'Positive Action for Women in Employment: Time to Align with Europe?' (2006) 33(1) Journal of Law and Society 24; Colm O'Cinneide, 'Positive Action and the Limits of Existing Law' (2006) 13 Maastricht Journal of European and Comparative Law 351.
[15] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press, Oxford 2011).
[16] Nurul Izza Idris, 'Rethinking the Value of Preferential Treatment' (2009) 15 UCL Jurisprudence Review 45.
[17] Noreen Burrows, 'Positive Action' (2010) 96 Employment Law Bulletin 4.
[18] O'Cinneide (n 14) 351.
[19] Idris (n 16) 58.
[20] O'Cinneide, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2006) 57 Northern Ireland Legal Quarterly 57.
[21] Burrows and Robison (n 14) 27.
[22] Fredman (n 15) 236.
[23] O'Cinneide (n 14) 354.
[24] ibid.
[25] O'Cinneide (n 20) 59.

opportunities.[26] For example, educational qualifications (which can be a barrier) may be relaxed, but disadvantaged groups may still lack the practical experience necessary to do the job, and may therefore be unsuitable for the particular role.[27] Other social factors, such as child-care obligations or lack of transport, can also get in the way.[28] The concept of equality of opportunity can therefore only achieve limited success[29] unless suitable resources are provided to members of disadvantaged groups to put them in a position where they are capable of taking advantage of opportunities.[30] 'Equality of results' seeks to remedy the disadvantages faced by disadvantaged groups.[31] The past discrimination experienced by disadvantaged groups in Britain can only be corrected by the equality of results approach, which will include proactive measures being taken by employers. For the purpose of this discussion, the term 'substantive equality' will refer to the 'equality of results' branch of substantive equality.

As mentioned above, British legislation has traditionally adopted a predominantly formal approach to equality, which has been unsuccessful in remedying the problems of discrimination faced by disadvantaged groups.[32] Whilst British legislation has developed considerably over the past two decades, in terms of its structure and its scope, this has remained unchanged.[33] The focus of the reforms has been on simplification and harmonisation, rather than altering the approach. Equality legislation in Britain began almost fifty years ago, with the Race Relations Act 1965, and over the following three decades, many other anti-discrimination laws were enacted, including the Equal Pay Act 1970, the Sex Discrimination Act 1975, and the Disability Discrimination Act 1995.[34] In the year 2000, the *Cambridge Review* criticised the framework of legislation for being outdated and fragmented.[35] The law only covered race, sex and disability, and there were many inconsistencies between the protections afforded to each in terms of discrimination.[36] Other characteristics such as age, religion and sexual orientation were not protected under these laws. Employers, and even lawyers, found the framework difficult to use, as they were required to have knowledge of several domestic statutes (as mentioned above), European Community directives and principles, the Human Rights Act 1998 and the European Convention on Human Rights and Fundamental Freedoms. The review

[26] Sandra Fredman, Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) 6 European Human Rights Law Review 598.
[27] ibid.
[28] ibid.
[29] Burrows and Robison (n 14) 27.
[30] Fredman and Spencer (n 26).
[31] Burrows and Robison (n 14) 27.
[32] Fredman (n 15).
[33] Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 The Equal Rights Review 11.
[34] Bob Hepple, *Equality: The New Legal Framework* (Hart Publishing Ltd, Oxford 2011).
[35] Hepple, Coussey, Choudhury (n 8).
[36] ibid.

found the legislation to be unworkable due to the complexity of having too many laws.[37]

The Cambridge Review recommended that there should be a single Equality Act with clear fundamental principles which would adopt a unitary approach, and would cover all protected characteristics (e.g. race, sex, etc.).[38] The protected characteristics would also be extended to cover discrimination on a wider set of grounds.[39] Following the review, Lord Lester, introduced a Private Member's Bill in 2003, which encapsulated the recommendations of the review.[40] The Government acknowledged that the existing equality framework was not working as had been hoped, so it commissioned its own independent reviews.[41] In 2007, it published the *Equalities Review* which examined discrimination in Britain, and also a proposal for a single Equality Act (the *Discrimination Law Review*). In 2009, the Government's Equality Bill was presented to Parliament, and the Bill finally received royal assent in April 2010.[42] The Equality Act 2010 has updated, harmonised and simplified the previous anti-discrimination legislation. It intends to provide a workable framework, which both protects people from unfair treatment, and promotes a more equal society.[43] The new Act is a significant step forward for equality in Britain, as there are now nine protected characteristics (race, sex, disability, age, religion or belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment) rather than just three previously. However, the underlying principle of formality has not changed. Nor has the process by which discrimination is dealt with.

2.2 The Complaints-Led Process

Under the old law, issues of discrimination would be challenged by way of employees/potential employees making complaints against their employers/potential employers under a 'reactive', 'complaints-led' anti-discrimination model.[44] This remains the same under the Equality Act 2010, whereby employees/potential employees are able to bring claims before an employment tribunal to challenge an employer's alleged wrongdoing.[45] The process for dealing with discrimination in Britain has always been a reactive, complaints-led process, under the formal equality approach. It has been criticised for a number of reasons.[46]

---

[37] ibid.
[38] Hepple (n 33) 14.
[39] Hepple, Coussey, Choudhury (n 8).
[40] Hepple (n 33) 14.
[41] Lizzie Barmes, 'Equality Law and Experimentation: The Positive Action Challenge' (2009) 68(3) Cambridge Law Journal 623.
[42] Hepple (n 33) 14.
[43] Ed, 'Equality Act 2010' (2010) 16(9) Health & Safety at Work 8, 8.
[44] Hepple, Coussey and Choudhury (n 8).
[45] Equality and Human Rights Commission, 'Your Choices' <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-workers/what-to-do-if-you-believe-youve-been-discriminated-against/your-choices/> accessed 23 January 2013.
[46] Fredman (n 15).

The first problem with the complaints-led model is its individualistic core. There must be an individual victim of discrimination, and the onus is on that person to challenge the discrimination so that a step towards equality can be made.[47] The EHRC advises individuals to think very carefully about taking their complaint to an employment tribunal, as this can be very demanding on their time and emotions.[48] Many people might be put off from claiming due to the stress involved with the process. Individuals may just have to accept that they have been discriminated against and try to move on, whilst their employer gets away with it, and possibly continues to discriminate.

Another problem with the complaints-led model is that it must be possible to identify a specific perpetrator. It is recognised that discrimination is often not the fault of a specific individual, but rooted in the deep institutional structure of an organisation.[49] Even if an individual is successful at an employment tribunal, this will only give rise to a remedy for that individual, rather than addressing the systemic issues within the organisation.[50] This was the case prior to the new Equality Act 2010, and the new Act has done nothing to change this. It is noted that under Section 124 Equality Act 2010, tribunals are permitted to make recommendations to employers to remedy their wrongs. However, as employers who fail to comply with recommendations are, at worst, penalised by a mere increase in compensation, this can hardly be seen as an effective instrument with which to overcome systemic equality issues within the structure of organisations.[51] The complaints-led model only addresses the inequalities arising from employers' individual acts of discrimination (if victims actually complain). It is inadequate for addressing systemic equality issues within organisations.[52]

A third problem with the complaints-led model is that it assumes that employers will be so fearful of employees bringing claims in employment tribunals (especially if they have had action brought against them in the past), that they will be motivated to voluntarily review and improve/update their equality policies and practices.[53] In reality however, the fact that discrimination claims are adversarial in nature makes employers view equality as a cause of conflict. Instead of being motivated to improve their practices to achieve equality, claims or fear of claims from employees can actually make employers defensive and resistant to change.[54] In addition, the British

[47] Aileen McHarg, Donald Nicolson, 'Justifying Affirmative Action: Perception and Reality' (2006) 33(1) Journal of Law and Society 1.
[48] Equality and Human Rights Commission (n 45).
[49] McHarg and Nicolson (n 47).
[50] ibid.
[51] Fredman (n 15) 290.
[52] Sandra Fredman, Sarah Spencer, 'Equality: Towards an Outcome-Focused Duty' (2006) 156 Equal Opportunities Review.
[53] Fredman and Spencer (n 26) 599.
[54] Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40(4) Industrial Law Journal 315, 316; Sandra Fredman, 'Changing the Norm:

system suffers from specific procedural weaknesses arising out of the tribunal system and the role of the EHRC.

2.3 The Tribunal System

Although the discrimination problem in Britain appears to be substantial; given that certain groups are under-represented in the workforce, and the gender pay gap is still very much an issue, Employment Tribunal statistics show that the number of claims brought against organisations in tribunals is small.[55] In addition to potential claimants' concerns about the process being demanding on their time and emotions, a number of other reasons might explain the low numbers of claims. Making a claim to a tribunal can be a very lengthy process. For example, a report in 2003 highlighted that an equal pay claim could take between eight and ten years from start to finish.[56] Another factor which might deter people from claiming is the possible expense to be incurred. Claimants must bear their own expenses, and as compensation awards are generally low, even a successful claim could result in financial loss.[57] Taking these factors into consideration, it is understandable why there are low numbers of discrimination claims made to tribunals.

Statistics show that not only is there a small number of claims made to tribunals, but the number of successful claims is also very low.[58] In 2009-10 only 2 per cent of sex discrimination claims were successful at tribunal. Other grounds of discrimination produced similar figures. Only three per cent of race discrimination cases, three per cent of disability discrimination cases, two per cent of age discrimination cases, two per cent of religion or belief cases, and five per cent of sexual orientation cases were successful in tribunals in 2009-10.[59] This fact is made worse by evidence which highlighted that a considerable number of repeat alleged discriminators could be identified from a search of Employment Appeal Tribunal judgments.[60] Amongst the offenders were large organisations which have thousands of employees. These included local authorities.[61] Perhaps these employers see how low discrimination claim success rates continue to be, so they keep discriminating against employees, or potential employees, because they are unlikely to be found guilty at a tribunal.

Positive Duties in Equal Treatment Legislation' (2005) 12 Maastricht Journal of European and Comparative Law 369, 373.

[55] Ministry of Justice Tribunals Service, 'Employment Tribunal and EAT Statistics 2009-10' <http://www.tribunals.gov.uk/Tribunals/Publications/publications.htm> accessed 23 December 2013; Fredman (n 15) 281.

[56] K. Godwin, 'Equal Value Update' (2003) 117 Equal Opportunities Review 5, 8; Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40(4) Industrial Law Journal 405, 416.

[57] Fredman (n 15) 283.

[58] Fredman (n 15) 281.

[59] Ministry of Justice Tribunals Service (n 55).

[60] Anon, 'Equality Bodies Failing to Enforce Discrimination Law' (2006) 157 Equal Opportunities Review.

[61] ibid.

An attempt can be made to explain the low success rates for claimants in employment tribunals. One difficulty which claimants face relates to obtaining evidence. Relevant evidence is often in the hands of the employer and inaccessible to the claimant.[62] Research has shown that claimants with legal representation are more likely to be successful in a discrimination case, not only because a legal representative would be better at understanding the procedure, and also the relevant legislation, but that they would also be more skilled in obtaining evidence from the defendant.[63] The problem for claimants is that they often cannot afford to pay for legal representation. There is no legal aid available to claimants for representation at employment tribunals, and claimants are unlikely to be offered a 'damages-based' or 'conditional fee' agreement by a lawyer unless there is a strong chance of a large compensation award.[64] The EHRC was given the power to provide claimants with financial assistance for legal representation under Section 28 Equality Act 2006. However, due to budgetary constraints on the EHRC, it is likely that only a small number of claimants receive funding.[65]

2.4 The Role of the EHRC

In addition to the issues raised about the employment tribunal system, the role of the EHRC also raises concerns. The EHRC was established under the Equality Act 2006. Three previous equality commissions: the Commission for Racial Equality, the Disability Rights Commission, and the Equal Opportunities Commission merged to form one single Commission.[66] It covers all nine of the characteristics protected under the Equality Act 2010. The single commission has a wider remit than its predecessors. Its role is to protect, enforce and promote equality and human rights.[67]

With regards to enforcing equality law (which there appears to be a distinct lack of in the British system), the Equality Act 2006 gave the EHRC powers to conduct both inquiries and formal investigations. EHRC inquiries are more like fact-finding exercises than mechanisms for enforcing equality law.[68] The Commission might, for example, conduct an inquiry into a particular sector. It may well uncover issues of discrimination, and is entitled to publicise a report detailing inequalities found,, and is permitted to make recommendations for improvement.[69] However, because the recommendations are not legally binding, and specific organisations or individuals cannot be named in the report, the value of the EHRC inquiry, in terms of enforcing equality law, is questionable.[70]

---

[62] Fredman (n 15) 283.
[63] ibid.
[64] Hepple (n 45) 328.
[65] Fredman (n 15) 287.
[66] Equality and Human Rights Commission, 'Vision and Mission' <http://www.equalityhumanrights.com/about-us/vision-and-mission/> accessed 24 January 2013.
[67] Equality and Human Rights Commission 'About Us' <http://www.equalityhumanrights.com/about-us/index.html> accessed 24 January 2013.
[68] Fredman (n 15) 297.
[69] ibid.
[70] ibid.

The second enforcement power of the EHRC, to conduct a formal investigation, appears to be a more useful enforcement mechanism. The Commission can launch a formal investigation if it suspects that a person has committed an unlawful act. An investigation can lead to an 'unlawful act notice' which may require the person to take action to remedy any wrongdoing.[71] However, this investigative power is hindered by several procedural protections for the person suspected of discrimination. The respondent is given three opportunities to make representations. The first relates to the terms of reference of the investigation, the second relates to the subject of the investigation, and the third gives the person 28 days to make representations on the report before it is finalised.[72] It is agreed that respondents should be provided with *some* protection in the process. However, they are given too many opportunities to 'wriggle out' of a notice being served by the Commission. The investigation process is also reliant on complainants coming forward, which, as has already been discussed, does not occur in great volumes. The Commission will not suspect wrongdoing if nobody speaks out about an employer's discriminatory practices.

Further concerns over the EHRC's role result from the Coalition Government's plans to restrict the powers of the EHRC, and to make further cuts to its annual budget.[73] In 2011-12, the Commission's budget was £48.9 million, compared to £70 million in 2007.[74] The Government plans to reduce this to £26 million by 2015.[75] If the Commission's powers (which are already of questionable value) are going to be restricted, and the resources with which they conduct inquiries and investigations significantly reduced, the Commission will be even less of a force in the fight against discrimination than it is now.

2.5 The Case for Proactive Measures

It has been demonstrated that there are many issues with the complaints-led model of anti-discrimination under the formal approach, and that specifically the British system is very problematic. Despite the advances in equality law brought by the Equality Act 2010, the process for combating discrimination is still focussed on individual complaints, and thus fails to address systemic issues of inequality within organisations. Some groups of people continue to be under-represented, and unequal pay is still very much an issue.[76] If the system is not changed, how can we expect the results to change? Many commentators recommend that Britain should adopt a substantive approach to equality to combat its discrimination problem. This would mean changing to a model which is 'proactive' rather than 'reactive' or 'complaints-led'. Such a model would include proactive measures being taken by employers.

---

[71] Hepple (n 34) 151-152.
[72] ibid.
[73] Hepple (n 45) 319.
[74] ibid.
[75] ibid.
[76] Kate Godwin, 'Positive Action: Possibilities and Limits' (2007) 170 Equal Opportunities Review 22.

It should firstly be noted that proactive measures come in two main forms: 'positive action' and 'positive discrimination'. There is much confusion within the literature over the distinction between the two. Malamatenious says that positive action measures are designed to encourage members of disadvantaged groups to participate in employment, for example by offering training opportunities, whilst positive discrimination would, for example, be a mandatory requirement for employers to recruit a certain proportion of candidates from disadvantaged groups which are under-represented within their workforce.[77] Noon agrees with Malamatenious' definition of positive action. However, he defines positive discrimination as being the recognition and consideration of protected characteristics, by an employer, within their appointment and selection decision-making process.[78] For the purpose of this discussion, the EHRC's definition of positive action will be taken is as follows: '[T]he steps that an employer can take to encourage people from groups with different needs, or with a past track record of disadvantage or low participation, to apply for jobs'.[79] This can be extended to include the steps that an employer can take in the recruitment/selection decision-making process to increase the representation of disadvantaged groups in their workforce.[80] Positive discrimination will refer to mandatory requirements for employers to recruit certain proportions of candidates from disadvantaged groups.

Employers can use proactive measures to break down systemic forms of inequality within their organisations (such as under-representation of disadvantaged groups) and redress past discrimination.[81] Proactive measures can take a variety of forms, including preferential treatment, statutory duties, quotas, and contract compliance.[82] These will be discussed throughout the following two sections.

Proactive measures are controversial because they conflict with the equal treatment principle; they allow for the use of unequal treatment in order to achieve equality.[83] It is argued that although proactive measures may, for example, increase the representation of disadvantaged groups in the workforce, this may be at the expense of 'innocent third parties', particularly from the white male population, and especially where the principle of merit (which requires people to be rewarded on the basis of their skills and abilities) is disregarded.[84] Members of disadvantaged groups have

[77] David Malamatenious, 'Redressing the Balance' (2003) 153 New Law Journal 1208.
[78] Mike Noon, 'The Shackled Runner: Time to Rethink Positive Discrimination?' (2010) 24(4) Work, Employment and Society 728.
[79] Equality and Human Rights Commission 'Positive action and recruitment – What is 'positive action'?' <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-workers/recruitment/positive-action-and-recruitment/> accessed 11 April 2013.
[80] O'Cinneide (n 14).
[81] O'Cinneide (n 20); Godwin (n 76).
[82] Christopher McCrudden, 'Rethinking Positive Action' (1986) 15 Industrial Law Journal 219; O'Cinneide (n 14) 354.
[83] Fredman (n 54) 369.
[84] Christopher McCrudden (n 82) 219; Jonathan S Leonard, 'What was Affirmative Action?' (1986) 76(2) The American Economic Review 359.

been 'innocent' victims of discrimination for many years, however, and this discrimination needs to be redressed. Proactive measures can break down systemic forms of discrimination, which are the causes of the inequalities suffered by disadvantaged groups within the British workforce, and deliver justice to such groups by compensating them for the past discrimination that they have suffered at the hands of society.[85]

As has been discussed, the current complaints-led model, under the formal equality approach, is incapable of delivering this justice and redressing past discrimination. It only addresses individual acts of discrimination. The proactive model, under the substantive equality approach deals with many of the problems identified within the complaints-led model.[86] Instead of the responsibility being on the individual to make a complaint about discrimination and the employer 'reacting' to it, the initiative lies with the employer to take positive measures to combat discrimination within their workplace.[87] There is also no need to identify an individual perpetrator in the proactive model. Rather than proving fault, and punishing a specific individual, the focus is on the organisation as a whole. The employer takes action to identify systemic equality issues within the organisation's structure, and then creates policies and procedures to remedy these inequalities, and eliminate discrimination.[88] Rather than being defensive towards complaints from individuals, the employer is in control and has the opportunity to make real changes within the organisation.[89] The proactive model is capable of dealing with systemic issues as it considers the equality rights of all employees, not just the individuals who make a complaint.[90] If employers take proactive measures towards eliminating discrimination within their workforces, they should receive far fewer complaints from employees and reduce the risk of claims for compensation.[91] The proactive model, under the substantive equality approach, has been adopted in a number of jurisdictions outside of Britain. This will be discussed in the next section.

3 PROACTIVE MEASURES IN OTHER JURISDICTIONS

3.1 A Contractual Approach – the US Model

The US adopted the proactive model, and used a contract compliance system to remedy the under-representation of disadvantaged groups.[92] The US has a history of

[85] McHarg and Nicolson (n 47).
[86] Fredman (n 54).
[87] ibid.
[88] ibid.
[89] ibid.
[90] ibid.
[91] Fredman (n 12) 193.
[92] Raya Muttarak, Heather Hamill, Anthony Heath, Christopher McCrudden, 'Does Affirmative Action Work? Evidence from the Operation of Fair Employment Legislation in Northern Ireland' (2012) Sociology <http://soc.sagepub.com/content/early/2012/10/01/0038038512453799> accessed 20 February 2013.

discrimination against black people (in the US 'black people' refers to Native Americans, Africans and other ethnic minorities).[93] The US was discovered by white European settlers who oppressed the Native Americans, gained control of the land and brought black slave labour from Africa. Even after slavery was abolished, black people continued to be poorly treated and discriminated against (they were disadvantaged).[94] Blacks were under-represented in the US workforce so an Executive Order was issued by President Kennedy in 1961. This required organisations seeking or wanting to maintain government contracts to take positive action measures (there termed 'affirmative action') to increase the representation of blacks within their workforces. This involved developing affirmative action plans, including goals and timetables.[95] The process allowed employers to prefer less well qualified candidates to better qualified candidates on the grounds of race (there was no regard for the principle of merit).[96] By way of enforcement, the Office of Federal Contract Compliance Programs (OFCCP) had extensive investigatory powers, including the ability to conduct compliance reviews.[97] If the OFCCP found an employer's affirmative action plan to be unacceptable, it could issue a notice to the employer, and where the employer did not comply, the organisation could be barred from holding government contracts.[98]

The affirmative action measures under the 1961 Executive Order are thought to have been successful in increasing representation of black people in the US workforce.[99] A comparison of data from 1974 and 1980 from government contracting firms and non-government contracting firms showed that the employment growth rate for black males was 3.8 per cent faster in contracting firms, and 12.3 per cent faster for black females.[100] At the same time however, the employment growth rate for white males was reported to be 1.2 per cent slower in the contracting firms.[101] The affirmative action measures were accused of being positive discrimination against white males; the numerical targets included in the goals and timetables of affirmative action plans were perceived to be quotas (measures which require employers to recruit a certain proportion of candidates from disadvantaged groups) which were detrimental to white male employment.[102] The affirmative action measures required in government contracts in the US were abolished by the Reagan government in 1981, and the black

[93] Ashwini Deshpande, 'Affirmative Action in India and the United States' (World Bank, 2005) <https://openknowledge.worldbank.org/handle/10986/9038> accessed 20 February 2013.
[94] ibid.
[95] Jonathan S Leonard, 'The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment' (1990) 4(4) Journal of Economic Perspectives 47.
[96] Sionaidh Douglas-Scott, 'Affirmative Action in the US Supreme Court: The Adarand Case – The Final Chapter?' (1997) Spr Public Law 43.
[97] Fredman (n 15).
[98] Leonard (n 95).
[99] ibid; Muttarak et al. (n 92); Deshpande (n 93).
[100] Leonard (n 84) 359.
[101] ibid.
[102] Leonard (n 95).

economic advance, which had been experienced as a result of affirmative action, faltered.[103]

The experience in the US shows that 'mandatory' proactive measures imposed on employers can achieve the desired results of increased representation of disadvantaged groups in the workforce. However, when numerical targets are involved in the process and the principle of merit is disregarded, there can be a detrimental effect on non-disadvantaged groups. Perhaps if the principle of merit had been included in the affirmative action programme, and employers could only choose to recruit a black person over an equally qualified white person, there may not have been a detrimental effect to white male employment. The employment growth rate for blacks would perhaps have been slower; however this would have been much less controversial than the system that was used.

3.2 The Quota System – India and the EU

The US abolished the affirmative action measures in government contracts for positive discrimination. However, other jurisdictions have willingly adopted the positive discrimination approach. India has a widespread quota system which is the largest in the world.[104] Quotas are a special kind of positive discrimination, the legality of which varies widely between nations. In India, a caste system, which has now been abolished, separated the Indian people into five castes. The people in the bottom caste were considered to be 'untouchables' and they suffered disadvantages in the form of exclusion, oppression and discrimination in employment.[105] A quota system, enshrined in the Indian Constitution in 1950, targets this group of people to bring them into the mainstream, and compensate them for past discrimination. In addition to the former 'untouchables', the quota system also targets people from tribal communities who were outside of the caste system (but still excluded from the mainstream), as well as any other people who have been similarly disadvantaged.[106]

Although the Prime Minister has urged the private sector to enhance and promote the employment of disadvantaged groups, the quota system, at present, only covers the public sector.[107] Article 16(4) of the Indian Constitution reserves a percentage of jobs in the public sector for the disadvantaged groups. The quotas are proportional to the disadvantaged groups' share of the population, with a total of 49 per cent of jobs being reserved.[108] The quota system in India is described as being a partial success. Each of the disadvantaged groups has experienced a rise in monthly per capita expenditure over the last few decades. The disadvantaged groups appear to be filling

---

[103] ibid.
[104] V. K. Verma, 'Affirmative Action (Positive Discrimination)' (2008) *LBS* Journal of Management & Research.
[105] Deshpande (n 93).
[106] ibid.
[107] Verma (n 104).
[108] Deshpande (n 93).

the lower level reserved jobs. However, the jobs reserved in the upper levels of employment largely remain unfilled.[109] People from disadvantaged groups often do not have the capabilities to perform upper level jobs, and quotas do nothing to change this. 'Positive action' measures, on the other hand, can provide disadvantaged people with the capabilities they need, by offering them training opportunities for example. The quota system in India does not provide for training. There is no monitoring, no accountability to fill the reserved jobs, and no penalties. There is a Commission of some description; however, it has not been proactive in enforcing the quotas. The only way to enforce the quota system is through a writ under Articles 32 and 226 of the Indian Constitution. This is problematic, as a writ application is generally too expensive for a potential claimant, and also the judiciary is dominated by the previous upper castes.[110]

In the EU, there has been some debate over whether the use of quotas in employment is legal.[111] Three German cases illustrate the developments in the European Court of Justice (ECJ). In *Kalanke v Freie Hansestadt Bremen,*[112] the ECJ adopted a strictly formal approach, and held that a quota system, which allowed automatic preference in employment of women over men, was incompatible with Article 2(4) of the Equal Treatment Directive.[113] Two years later, in *Marschall v Land Nordrhein-Westfalen,*[114] the ECJ held that a similar quota system was consistent with EU law, provided that the measure included a 'saving clause' to balance any disproportionate disadvantages to male candidates.[115] *Badeck v Hessischer Ministerprasident,*[116]confirmed the principle in *Marschall,* as the ECJ upheld a system of 'flexible result quotas'.[117] EU law generally prohibits positive discrimination, but quotas are a special kind of positive discrimination permitted by EU law.[118]

In addition to Germany, a number of other EU member states including the Netherlands, Norway, and Sweden use quotas to increase representation of disadvantaged groups in their workforces, and some of these have been very

[109] ibid.
[110] ibid.
[111] Dagmar Schiek, 'Positive Action before the European Court of Justice – New Conceptions of Equality in Community Law? From *Kalanke* and *Marschall* to *Badeck*' (2000) 16(3) The International Journal of Comparative Labour Law and Industrial Relations 251.
[112] Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.
[113] Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions[1976] OJ L 39/40; Catherine Barnard and Tamara Hervey, 'Softening the Approach to Quotas: Positive Action after *Marschall*' (1998) 20(3) Journal of Social Welfare and Family Law 333.
[114] Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.
[115] Anke J. Stock, 'Affirmative Action: A German Perspective on the Promotion of Women's Rights with Regard to Employment' (2006) 33(1) Journal of Law and Society 59.
[116] Case C-158/97, *Badeck v Hessischer Ministerprasident* [2000] ECR I-1875.
[117] Daniela Caruso, 'Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives' (2003) 44(2) Harvard International Law Journal 331.
[118] Employment Equality Directive 2000/78; Lisa Waddington and Mark Bell, 'Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity' (2011) 48 Common Market Law Review 1503.

successful.[119] These quotas have mainly been imposed in the public sector, however, and there appears to be a lack of political will to extend them to the private sector.[120] Quotas are, evidently, controversial positive discrimination measures.[121] The US abolished the use of affirmative action in government contracts, as it was deemed to have led to quotas, and yet EU law allows them, and several member states have adopted this positive discrimination approach. A quota system in Britain was abolished in 1996.[122] This illustrates Britain's resistance to mandatory proactive measures. The European Commission recently approved, however, a proposal for a mandatory quota, which aims to allow for forty per cent of non-executive directors on the boards of listed companies to be women.[123] If the European Council of Ministers approves the plans, Britain may have no choice but to implement quotas.[124] What can be learned from the experiences in the US and India, is that if the EU does impose mandatory quotas on Britain, the quotas must be effectively regulated, monitored, and enforced, in order to achieve the desired results, and that the principle of merit should still be adhered to in the recruitment/selection decision-making process, in order to avoid detrimental effects on non-disadvantaged groups.

Positive discrimination proactive measures, such as quotas, are much more successful in breaking down systemic inequalities, and increasing representation of disadvantaged groups in a workforce, than the complaints-led system. This is evidenced by the lack of success in Britain of increasing representation of disadvantaged groups (the statistics have not changed in the last few decades) compared to the significantly increased employment experienced by disadvantaged groups in the US and India. However, positive discrimination is very controversial. Positive action measures are less controversial. These have been adopted in a number of jurisdictions.

3.3 Statutory Duties in Canada and South Africa

Canada and South Africa have adopted proactive measures in the form of statutory duties. These duties are 'mandatory', as they are codified in legislation. However, they are not 'mandatory' in the positive discrimination sense. The statutory duties in these jurisdictions are compulsory. However, they do not go as far as setting targets as to the percentage of candidates to be recruited from under-represented groups. They are regarded as positive action provisions.

In Canada, women, people with disabilities aboriginal people, and other minorities, are thought to be disadvantaged. They are under-represented within the workforce,

[119] Idris (n 16); Caruso (n 117).
[120] Stock (n 115).
[121] ibid.
[122] Godwin (n 76).
[123] Lucy Money, 'One, two, three, four...' (2012/2013) Employers Law 12.
[124] ibid.

and often receive lower rates of pay.[125] Canadian equality legislation was previously complaints-led. This system was found to be limited so a proactive approach, including voluntary positive action measures, was adopted instead.[126] The Abella Commission Report, *Equality in Employment,* found however, that these voluntary measures, on the part of employers, were ineffective in reducing the inequalities faced by the disadvantaged groups.[127] Canadian law now includes mandatory positive action provisions.[128]

The Employment Equity Act 1995 places obligations on employers to remedy under-representation of disadvantaged groups within their workforces.[129] Under the Act, employers with more than 100 employees are required to review their workforces to determine the degree of representation of disadvantaged groups, and also to review all employment policies and procedures.[130] They must draw up an employment equity plan, specifying goals and timetables for implementation,[131] and file annual reports with the appropriate government body.[132] The Canadian Human Rights Commission (CHRC) receives copies of all reports, and it is authorised to conduct audits of each employer.[133] In cases of non-compliance, the Commission can request a written undertaking from the employer, and if that fails, the Commission can issue directions.[134] If an employer ignores the Commission's directions, the case can be referred to the Employment Equity Review Tribunal.[135] Fines of up to $50,000 can be imposed on employers.[136]

Statistics show that there has been an increase in women's representation in recent decades. In 2004, fifty eight per cent of women were in employment, an increase of 16 per cent since 1976.[137] This undoubtedly signals progress in the right direction; however, it is slow progress, and the other disadvantaged groups have not experienced

[125] Penny Hartin and Phillip C. Wright, 'Equal Opportunities International Canadian Perspectives on Employment Equity' (1994) 13 Equal Opportunities International 12.
[126] Mary Cornish, 'Employment and Pay Equity in Canada--Success Brings Both Attacks and New Initiatives' (1996) 22 Can-USLJ 265.
[127]Hartin and Wright (n 125).
[128] Cornish (n 126).
[129] Nicole Busby, 'Affirmative Action in Women's Employment: Lessons from Canada' (2006) 33 Journal of Law and Society, 42.
[130] Employment Equity Act 1995, s 9.
[131] ibid s 10.
[132] ibid s 18; Nicole Busby (n 129).
[133] Employment Equity Act 1995 (n 130) s 23.
[134] ibid s 25.
[135] ibid s 28; Busby (n 129).
[136] Employment Equity Act 1995 (n 130) s 36; Harish C. Jain, Frank Horwitz, Christa L. Wilkin, 'Employment equity in Canada and South Africa: a comparative review' (2012) 23 The International Journal of Human Resource Management 1.
[137] Stephanie Bernstein, Marie-Josée Dupuis, Guylaine Vallée, 'Beyond Formal Equality: Closing the Gender Gap in a Changing Labour Market–A Study of Legislative Solutions Adopted in Canada' (2009) 15 The Journal of Legislative Studies 481.

the same increases in representation.[138] A number of problems can be identified with the Canadian legislation, which might explain why the progress has been slow. Canadian law has two streams: federal law and provincial law. The 1995 Employment Equity Act only applies to employers whose activities fall under federal jurisdiction.[139] This poses a problem, as eighty eight per cent of Canada's workforce falls under provincial jurisdiction, and most of Canada's provinces do not have alternative employment equity legislation in place.[140] Where provinces do have such legislation in place, it can be limited in scope; such as in Quebec, where the legislation only covers public bodies.[141] If the 1995 Act applied to all employers, there may have been more success.

Another problem with Canadian employment equity relates to enforcement. The legislation does not provide the CHRC with a clearly defined role, and as the standards used by the Commission are not specifically outlined within the legislation, employers can easily challenge the Commission's directions and referrals to the Employment Equity Review Tribunal.[142] There is also a problem with the Commission's resources. They are unable to carry out effective monitoring and auditing of all employers covered by the legislation, due to a lack of investment in the resources they require.[143] The CHRC needs a clearly defined role as well as adequate resources to be able to enforce employment equity legislation.[144]

South African employment equality law is largely modelled on Canadian law. The features of the South African Employment Equity Act 55 of 1998 are very similar to Canada's 1995 Act.[145] The South African Act includes mandatory positive action measures which aim to redress disadvantages in employment resulting from past discrimination during a period of apartheid, which involved widespread segregation and inequality for certain groups.[146] The Act defines the disadvantaged groups as being black people, women and people with disabilities,[147] and it aims to ensure that suitably qualified people from these groups are equally represented in the South African workforce.[148] The Act covers both public and private sector employers.[149] The Act does not appear to provide a threshold regarding the number of employees an

[138] Harish C. Jain, Frank Horwitz and Christa L. Wilkin, 'Employment Equity in Canada and South Africa: A Comparative Review' (2012) 23(1) The International Journal of Human Resource Management 1.
[139] Bernstein et al. (n 137).
[140] Busby (n 129).
[141] Bernstein et al. (n 137).
[142] Busby (n 129).
[143] ibid; Jain et al. (n 138).
[144] Busby (n 129).
[145] Jain et al. (n 138).
[146] Saras Jadwanth, 'Affirmative action in a transformative context: the South African experience' (2003) 36 Conn L Rev 725..
[147] Employment Equity Act 55 of 1998, s 1.
[148] ibid s 15; Jadwanth (n 146).
[149] Jadwanth (n 146).

organisation must have; however, it does say that employers that run 'small businesses' will not be obligated to adopt positive action measures under the Act.[150]

Under the South African Act, employers are required to conduct analyses regarding the representation in their workforces,[151] prepare an employment equity plan,[152] and submit annual reports to the Commission of Employment Equity, and the Department of Labour.[153] When employers fail to comply with the positive action requirements, labour inspectors can request written undertakings[154] and issue compliance orders[155] which the Department of Labour can enforce through the courts, resulting in fines[156] for infringing employers.[157] It is difficult to determine from the literature whether the legislation has resulted in an overall increase in the representation of disadvantaged groups; however, progress towards equality is thought to be slow.[158] Black people and women are still largely recruited at lower levels, whereas white able-bodied males are mainly recruited into top and middle-management.[159] Following the apartheid, it is likely that the disadvantaged groups will not have the skills necessary to perform higher level jobs. South African employers could remedy this by taking specific positive action to give members of disadvantaged groups the capabilities they need, for example, by providing training opportunities.

It is noted that the damage done by apartheid will take some time to redress.[160] However, a number of issues in the employment equity legislation can be identified which will hinder its success. Firstly, the South African Act is ambiguous in parts (such as defining employers as those which do not run 'small businesses'), and it fails to provide employers with clear guidelines as to what they must do to comply with the provision.[161] There also appears to be a problem with enforcement. The roles of the Employment Equity Commission and the Department of Labour are unclear, and hence they fail to properly audit and monitor employers.[162] It appears, however, that these monitoring bodies are allocated insufficient financial and human resources to perform their roles effectively.[163] In addition, it is thought that the eventual sanction of a fine being imposed by the courts is an ineffective means of enforcement, as many businesses are in a position to pay such fines easily.[164]

---

[150] Grete S Bosch, 'Restitution or discrimination? Lessons on Affirmative Action from South African Employment Law' (2007) 1 WEB Journal of Current Legal Issues.
[151] Employment Equity Act 55 of 1998 (n 147) s 19.
[152] ibid, s 20.
[153] ibid, s 21; Bosch (n 150); Jadwanth (n 146).
[154] Employment Equity Act 55 of 1998 (n 147), s 36.
[155] ibid, s 37.
[156] ibid. s 50.
[157] Jain et al. (n 136); Saras Jadwanth (n 146).
[158] Jain et al. (n 136).
[159] ibid.
[160] ibid.
[161] Bosch (n 150).
[162] Jain et al. (n 136).
[163] Jadwanth (n 146).
[164] Bosch (n 150).

Evidently, mandatory positive action measures have achieved some success in Canada and South Africa (more success than the complaints-led model in Britain), but the potential of the legislation in these jurisdictions is hindered by a number of problems, including the scope of the legislation; vague provisions and unclear guidelines for employers; undefined roles and lack of resources for the enforcement authorities, and ineffective sanctions. Similar to Canada and South Africa, Northern Ireland has adopted proactive measures in the form of statutory duties. The mandatory positive action provisions in the Northern Irish legislation have, however, proved to be more successful.

3.4 The Northern Irish Approach

In Northern Ireland, Catholics have been under-represented in the workforce compared to Protestants for several decades, with the Catholic unemployment rate being up to 2.6 times that of Protestants.[165] It is thought that Catholics have been excluded from work by discriminatory practices rooted in religion-based segregation.[166] The Fair Employment (Northern Ireland) Act 1989 aimed to achieve fair participation in employment by remedying this under-representation, and promoting religious integration within workplaces via mandatory positive action obligations placed on employers.[167] The previous 1976 legislation, which did not require any significant positive action from employers (the measures were voluntary in nature) had been unsuccessful.[168] The Fair Employment and Treatment Order 1998 (FETO) consolidated and replaced the 1976 and 1989 Acts. The practices required of employers in Northern Ireland are much the same as in Canada. Employers are required to register with the enforcement agency;[169] review their workforce and employment practices every three years;[170] create a plan to remedy any under-representation, including goals and timetables, and submit annual monitoring reports to the Equality Commission for Northern Ireland (ECNI).[171] The ECNI also has similar powers to the Commission in Canada. It can monitor employers, make recommendations as to how positive action should be taken, investigate employers,[172] request written undertakings,[173] serve notices containing directions on non-complaint

[165] Christopher McCrudden, Robert Ford and Anthony Heath, 'Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment' (2004) 24 Oxford Journal of Legal Studies 363.
[166] Editorial Team European Roma Rights Center, 'Equality Policies: Examples of Good Practice Outside Central and South Eastern Europe' (2007) European Roma Rights Center-Research Papers 59.
[167] McCrudden et al. (n 165).
[168] Muttarak et al. (n 92).
[169] Fair Employment and Treatment (Northern Ireland) Order 1998, s 48.
[170] ibid s 55.
[171] ibid s 52; Christopher McCrudden, 'Affirmative Action and Fair Participation: Interpreting the Fair Employment Act 1989' (1992) 21(3) Industrial Law Journal 170.
[172] Fair Employment and Treatment (Northern Ireland) Order 1998 (n 169) s 11.
[173] ibid s 12.

employers,[174] and refer cases to the Fair Employment Tribunal,[175] which can impose fines on employers of up to £40,000.[176]

The mandatory positive action measures in Northern Ireland have been successful in redressing under-representation of Catholics in the workforce.[177] In 1990, Catholic employees constituted 34.9 per cent of the monitored workforce, which was 5.1 percent less than the estimated 40 per cent who were available for work.[178] By 2010, Catholics represented 45.9 per cent of the monitored workforce. This is a 37 per cent increase since the monitoring began, and it is very close to the percentage of Catholics that are available for work.[179] The statutory positive action duties in Northern Ireland have been more successful than those in Canada and South Africa. A number of reasons may explain this.

Firstly, the Fair Employment and Treatment Order 1998 applies to all public and private sector employers with more than ten employees.[180] The scope is much wider than in Canada, for example, where employment equity legislation only applies to employers under federal jurisdiction, and public sector employers in some of the provinces. The amount of employees an organisation must have is also much lower in Northern Ireland than in Canada, thus further extending the scope of the Northern Irish legislation. Secondly, in Northern Ireland, the legislation is clear, and guidelines regarding the positive action provisions are published and distributed to employers by the Commission.[181] This contrasts with South Africa, for example, where the legislation is ambiguous in parts, and no guidelines are issued to employers.

A third difference between Northern Ireland and Canada/South Africa is that in addition to its monitoring and investigatory powers, the Commission in Northern Ireland is able to reach positive action agreements with employers, which include 'review of progress' clauses, so that Commission officers can liaise with employers to ensure that agreed positive action measures are in place, and that progress is being made towards fair participation in their workforces.[182] The Commission uses the results of an employer's triennial reviews to decide whether to work towards an

[174] ibid s 14.
[175] ibid s 16.
[176] ibid s 17; McCrudden (n 171).
[177] Editorial Team European Roma Rights Center (n 166); Muttarak et al. (n 92); McCrudden et al. (n 165).
[178] Anon, 'How vigilance keeps bias out of workplace: As the Equality Commission publishes its annual report, Chief Commissioner Bob Collins argues that fair employment measures are still relevant today' *Belfast Telegraph* (Belfast, 7 December) 2010.
[179] Russell R.T, 'Fair Employment in Northern Ireland: the decades of change (1990 – 2010)' (*Northern Ireland Assembly,* 2012) <http://www.niassembly.gov.uk/Documents/RaISe/Publications/2012/general/12112.pdf> accessed 8 April 2013.
[180] Fair Employment and Treatment (Northern Ireland) Order 1998 (n 169) s 48; Muttarak et al. (n 92).
[181] Editorial Team European Roma Rights Center (n 166).
[182] Evelyn Ellis, 'The Fair Employment (Northern Ireland) legislation of 1989' (1990) Summer, Public Law 161; McCrudden et al. (n 165).

agreement with them.[183] There are three kinds of agreements possible between the Commission and employers: voluntary agreements, negotiated with Commission officers; formal agreements, approved by the Commission's Board, and legally enforceable agreements, which are backed by sanctions, under Article 13 FETO.[184] In practice, the majority of agreements have been voluntarily entered into by employers. The Commission will generally only attempt a legally enforceable agreement when it is unable to negotiate a satisfactory voluntary agreement with an employer.[185] It has been suggested that the willingness of employers to enter into voluntary agreements could be due to fear of the possible sanctions in legally enforceable agreements.[186] It was found that by the year 2000, Catholic representation in firms which had entered into agreements was greater than in those that had not.[187] Further research by Anthony Heath et al. in 2009 confirmed the success of Commission agreements in achieving fair employment.[188] Positive action measures aimed at improving under-representation are more successful in firms which the Commission regularly liaises with under an agreement than in firms which simply review their workforces, and submit annual reports etc.[189] The Northern Irish Commission appears to have much more involvement in the positive action practices of employers than the Commissions in Canada and South Africa, and this could explain the differences in success.

A fourth possible reason why Northern Ireland has been more successful in combating under-representation is that in Northern Ireland, annual monitoring reports, which identify employers by name, are published and made available to the general public. These reports detail the number of Catholics and Protestants in the employer's workforce.[190] This 'naming and shaming' strategy could also explain employers' willingness to enter into voluntary agreements, so that they can (with the Commission's involvement) more effectively combat under-representation within their workforces.[191] This policy does not exist in Canada or South Africa, which again could explain the difference in levels of success. John Braithwaite has argued that in some cases, the power of persuasion can be an effective tool with which to achieve compliance to regulation.[192] The naming and shaming device in Northern Ireland could be regarded as the Commission 'persuading' employers to comply. By publishing annual monitoring reports, the Commission is appealing to the good will, or better nature of those employers who are failing to take the necessary positive action, to increase representation of Catholics within their workforces. The

[183] Muttarak et al. (n 92).
[184] ibid.
[185] ibid.
[186] Fredman (n 54).
[187] McCrudden et al. (n 165).
[188] Hepple (n 34) 153.
[189] Muttarak et al. (n 92).
[190] ibid.
[191] ibid.
[192] John Braithwaite, *To punish or persuade: The enforcement of coal mine safety* (SUNY Press 1985) 94-118.

Commission is giving offending employers a warning, and a second chance to comply, before it progresses to the disciplinary stage.[193] It has been noted that in South Africa, the punishment of employers with fines is regarded as an ineffective tool with which to achieve compliance, as employers can often easily pay the fines. It is suggested that the power of persuasion, used by the Northern Irish Commission in their naming and shaming policy, is a more effective means to achieving compliance from employers than relying on an employer's fear of potential punishment. Sanctions should still be available as a backup, but persuasion should be attempted first.[194]

A final factor which may explain why the Northern Irish positive action measures have been more successful than those in Canada and South Africa, relates to Commission resources. It is not possible to determine each of the Commission's budgets from the literature. However, considering the fact that the Northern Irish Commission carries out functions over and above those of the Canadian and South African Commissions, such as publishing and distributing guidelines to employers, drawing up and maintaining agreements with employers, and publishing annual monitoring reports, suggests that the Northern Irish Commission has more resources than the Canadian and South African Commissions; since the carrying out of such tasks requires sufficient financial and human resources. The Commissions in Canada and South Africa seemingly do not have adequate resources to conduct even their basic functions of monitoring and auditing etc., so it is unlikely that they would be able to carry out these additional, seemingly beneficial functions performed by the Northern Irish Commission. The lack of resources allocated to the Canadian and South African Commissions prevents them from successfully enforcing their positive action legislation, in contrast to the Northern Irish Commission, which has been more successful.

The success in Northern Ireland shows that proactive positive action measures can be extremely effective in breaking down systemic equality issues within a workforce, much more effective than the complaints-led system in Britain. Over two decades in Northern Ireland, Catholics have become equally represented in the workforce. In Britain, there has been no change in the representation of disadvantaged groups over the last three decades. It is recognised that Northern Ireland has a different kind of discrimination problem to Britain (religion-based segregation). However, there is no reason why the Northern Irish substantive approach to equality could not be adopted in Britain. Britain already has the necessary organisations in place (the EHRC and the Tribunal Service), and there is nothing about the Northern Irish institutional arrangements which are unique to Northern Ireland. There have been small steps in Britain over the years to move towards a substantive approach. However, as will be discussed in the next section, these have been unsuccessful.

[193] ibid.
[194] ibid.

4 POSITIVE ACTION IN BRITAIN

4.1 Pre-Equality Act Positive Action

As already discussed, British legislation has traditionally adopted a formal approach to equality, and the system for dealing with discrimination has always been a reactive, complaints-led system. However, a look back over the history of British equality legislation shows that there have been positive action provisions in existence for many years. These could be regarded as small steps towards substantive equality, but in practice, they have proved to be unsuccessful. The Sex Discrimination Act 1975 (SDA)[195] and the Race Relations Act 1976 (RRA)[196] allowed employers (both in encouraging individuals to take advantage of opportunities, and also in the provision of training) to favour a person on the basis of his/her sex or race, where under-representation of that particular sex or race could be identified in their workforce in the past twelve months.[197] These provisions gave employers the power to take positive action, although there was no obligation to use that power. It would be used entirely voluntarily (unlike in Northern Ireland, where the positive action provisions impose mandatory duties on employers). The *Cambridge Review* found that the positive action provisions in the SDA and RRA were ineffective and little used.[198] Employment Equality Regulations[199] from EU law widened the scope of positive action in Britain. They provided similar positive action provisions to the SDA and RRA for a number of other protected characteristics. These regulations were less restrictive than the provisions in the SDA and RRA, as they did not include a requirement of under-representation in the past twelve months. There was still no obligation for employers to use them, however, and they still only applied to training and the encouragement of individuals to take up opportunities.[200] The British legislature (until recently) failed to take advantage of EU law, which permitted member states to introduce positive action provisions, which would allow employers to favour a person from a disadvantaged group, in decisions about appointments and promotions.[201] Although again, such provisions would still not necessarily have imposed an obligation on employers to use positive action (such as in Northern Ireland); they would have merely provided a power, not an obligation.

There was also a distinct lack of clarity in the law's positive action provisions. Employers who wanted to use the positive action provisions were confused by what

---

[195] Sex Discrimination Act 1975, ss 47-48.
[196] Race Relations Act 1976, ss 37-38.
[197] James Hand, Bernard Davis, Pat Feast, 'Unification, simplification, amplification? An analysis of aspects of the British Equality Act 2010' (2012) 38 Commonwealth Law Bulletin 509.
[198] Hepple (n 34) 128.
[199] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, Employment Equality (Age) Regulations 2006 implementing Council Directive 2000/78/EC, SI 2006/1031.
[200] James Hand, 'A decade of change in British discrimination law: positive steps forward?' (2008) 34 Commonwealth Law Bulletin 595.
[201] Hand et al. (n 197) 525; Case C-409/95 (n114); Case C-158/97 (n 116).

was legally permissible, and what was not.[202] In 2006, the Avon and Somerset Constabulary introduced a positive action campaign, to recruit officers which reflected the diversity in the communities they served. They were advised that the campaign may have breached the SDA and RRA. They had attempted to be proactive in achieving equality, but in turn, may have been guilty of discrimination.[203] In 2007, the *Equalities Review* reported that employers were frustrated with equality legislation, as some of them actually wanted to be proactive towards achieving an equal workforce, but the constraints within the existing positive action provisions made this difficult.[204] The lack of clarity and the constraints within the positive action provisions made them ineffective, and subsequently they were little used by employers.

4.2 Recommendation for mandatory employer duties

In the Cambridge Review, Hepple had recommended the adoption of statutory duties similar to those in Northern Ireland, Canada and South Africa. He recognised that Britain had continuing problems of under-representation of disadvantaged groups, and unequal pay for women.[205] He reported that the 'voluntary' approach to positive action, along with the complaints-led formal equality model, was ineffective at breaking down systemic inequalities within the British workforce.[206] He proposed a system of mandatory employer duties under the substantive equality approach. Employers with more than ten employees in both the public and private sectors would be required to conduct reviews once every three years, to identify any issues of under-representation, or unequal pay within their workforces. Similarly to the Northern Irish, Canadian and South African approaches, employers would be required to draw up employment equity, or pay equity plans (or both if necessary) to address any issues found, and those who were non-compliant would be subject to Commission notices, and possible sanctions at an employment tribunal.[207]

As mentioned above, the recommendations from the Cambridge Review made their way into a Private Member's Bill, and eventually became part of the Equality Bill in 2009. The Bill was heavily scrutinised by the House of Commons over one year, but was then rushed through the House of Lords with little debate. Lord Lester was keen to ensure that the Bill was passed before the looming general election.[208] Subsequently, however, many clauses fell without scrutiny from the House of Lords. The clause relating to mandatory reviews was one of them.[209] The main objection to

[202] Lizzie (n 41).
[203] ibid.
[204] ibid.
[205] Hepple et al. (n 8).
[206] ibid.
[207] ibid.
[208] Hepple (n 33) 14.
[209] Hand et al. (n 197).

mandatory reviews was that they would be costly and time-consuming, and in a time of recession, this would be very burdensome on businesses.[210]

There is never a *good* time to impose new requirements on businesses. There will always be some objection or another, and requirements will always seem burdensome when they are first introduced. Achieving equality should not be seen however, as an inconvenience that can be delayed until a more suitable time. Asking employers to conduct reviews of their workforce once every three years, and if necessary, to take steps to remedy any issues of systemic discrimination, can hardly be regarded as overly costly or time-consuming. It is also questionable as to why a requirement regarding equality should be regarded as any more burdensome on businesses than other requirements, such as completing tax returns, or abiding by health and safety regulations. The reviews involved in health and safety regulations have been described as 'box-ticking' exercises of no real value.[211] However, it has been proven that where these reviews are well designed, they can achieve valuable, positive outcomes, such as fewer accidents, less threat of legal action, lower employee absence and turnover rates, and reduced costs.[212] Equality reviews may also initially be regarded as burdensome exercises. However, as has been seen in Northern Ireland, mandatory positive action reviews have helped to achieve successful results of equal employment of the previously under-represented Catholics. In addition to achieving the goal of equality in workforces, a number of other benefits can be experienced by employers. Taking positive action can result in a more diverse workforce, with a wider range of skills and experience, which can respond well to changes, better understand the needs of a wider range of customers/clients, provide a better quality of service, and which is more productive.[213] There are great benefits to mandatory positive action measures which outweigh any burden on businesses.

4.3 Positive Action in the Equality Act 2010

Although the Government refused to allow mandatory reviews to be part of the Equality Act 2010, Part 11 of the Act ('advancement of equality') does include several positive action provisions. Section 158 relates to positive action in general, as it is applicable to all people, not just employers. It brings together, and extends, the positive action provisions provided by the old framework of legislation, and it is applicable to all nine protected characteristics.[214] In the employment context however,

---

[210] HC Deb 11 May 2009, col 568.
[211] Nikki Bell, Nick Vaughan, Jane Hopkinson, 'Factors Influencing the Implementation of RPE Programmes in the Workplace' (*Health and Safety Laboratory,* 2010) <http://www.hse.gov.uk/research/rrpdf/rr798.pdf> accessed 17 April 2013.
[212] Health and Safety Executive, 'Benefits and costs' <http://www.hse.gov.uk/leadership/benefits.htm> accessed 11 April 2013.
[213] Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice: Employment Statutory Code of Practice' 2011) <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf> accessed 19 April 2013; McHarg and Nicolson (n 47).
[214] Hand et al. (n 197) 524.

under section 158, if an employer reasonably believes that people who share a protected characteristic (such as race, sex or disability) suffer a disadvantage in relation to that characteristic, or that they have a different set of needs to others, or where there is under-representation of people with a particular characteristic in a certain activity, they are permitted to take action to deal with any of these issues, provided that it is proportionate as a means of remedying these issues.[215] The Act's explanatory notes advise that for positive action to be proportionate, it must be appropriate to remedying the particular issue. Employers must consider such things as 'the seriousness of the relevant disadvantage; the extremity of need or under-representation, and the availability of other means of countering them'.[216] Section 158 could be used by an employer to, for example, offer training, mentoring or bursaries to under-represented groups, or to increase a woman's wage to remedy a gender pay gap without being accused of unfair treatment, or discrimination.[217] This is a useful provision as it remedies the issues experienced by the Avon and Somerset Constabulary by allowing those employers who want to be proactive in achieving equality to do so without being accused of discrimination. The provision provides greater clarity, removes the constraints of the previous provisions (there is now no requirement for under-representation to have been identified in the last 12 months), and widens the scope of positive action to nine protected characteristics.

Section 159 of the 2010 Equality Act is a brand new concept which finally takes advantage of the discretion in EU law allowing positive action measures in recruitment and promotion.[218] Under section 159, when an employer is involved in the recruitment or promotion of employees, they are permitted to favour a candidate with a protected characteristic over another candidate without that characteristic, if they reasonably believe that people who share that characteristic, either suffer a disadvantage in relation to that characteristic, or are under-represented within their workforce.[219] This provision is conditional however, in that the candidate with the protected characteristic must be equally qualified compared with the other candidate; the employer should not have a general policy of treating people with protected characteristics more favourably, and the action taken must be a proportionate means of remedying the disadvantage suffered, or the under-representation in the workforce.[220] This provision provides employers with an extra mechanism with which to achieve equality in their workforces.

Sections 158 and 159 have the potential to be valuable instruments with which to break down systemic inequalities within the British workforce; increasing the representation of disadvantaged groups and remedying the gender pay gap. The

[215] Equality Act 2010, s 158; Hand et al. (n 197) 524.
[216] Equality Act 2010 (n 215) c.15 – Explanatory Notes, para 512.
[217] Jackie Cuneen, 'Positively Negative?' (2011) March *Employers Law* 14-15.
[218] Hand et al. (n 197) 525.
[219] Equality Act 2010 (n 215) s 159; Jackie Cuneen (n 217).
[220] ibid.

problem is that there are no mandatory requirements for employers to use them. The use of the provisions is entirely voluntary, just like in the old framework of British equality laws. Voluntary positive action provisions in both Canada and Northern Ireland proved to be unsuccessful, and sections 158 and 159 will (on their own) be unsuccessful too. The new framework under the Equality Act lacks all of the elements that have made the Northern Irish approach successful. British employers are not required to review their workforces or employment practices; they are not required to create positive action plans, and they are not required to submit annual reports to the EHRC. Unlike the Northern Irish Commission, the EHRC does not have the power to monitor employers regarding positive action; it cannot request undertakings from, or serve notices on, employers who fail to take positive action towards achieving equality; is unable to reach positive action agreements with employers, and is not permitted to 'name and shame' offending employers. Employment tribunals in Britain also do not have the powers of the Northern Irish tribunals to impose fines on employers who do not, where necessary, take positive action. Sections 158 and 159 will be unsuccessful without mandatory employer duties to use them, and enforcement from the EHRC and the Tribunal Service.

The only proactive measure in the Equality Act 2010 that could possibly be regarded as 'mandatory' is the public sector equality duty under section 149. 'Duty' suggests that it is a mandatory requirement; however, its likely effectiveness is questionable. Under section 149, when exercising its functions (including its role as an employer), a public authority must 'have "due regard" to the need to eliminate discrimination', and also 'advance equality of opportunity' and 'foster good relations' between people who share a protected characteristic, and people who do not.[221] The duty covers public bodies and private bodies exercising public functions ('public functions' being those as described in the Human Rights Act 1998). Private bodies exercising purely private functions are not subject to the duty. The experiences in Canada and Northern Ireland, when compared, highlight that employment equality legislation needs to apply to employers across both the public and the private sector in order to be successful. In Canada, the legislation does not cover a large percentage of the workforce, and this hinders its success. In Britain, over 80 per cent of the workforce is employed in the private sector, so it is unlikely that a 'public sector' equality duty will be sufficient to achieve the equality goal.[222] The duty would need to apply to both public and private sector employers, like the duties in Northern Ireland.

However, it is not only the scope of the duty which is an issue. Its strength is also a concern, as it does not appear to impose any 'mandatory' requirements on public authorities. Under the duty, the public authority need only have 'due regard' to the need to combat discrimination. The wording suggests that it would be sufficient for

[221] Equality Act 2010 (n 215) s 149.
[222] Hepple (n 33) 22.

the authority to give consideration to the need to take action, but then do nothing. The requirement to have 'due regard' gives the authority wide discretion to decide (once it has considered the equality impact) whether to take action at all.[223] Again, as has been seen in Northern Ireland and Canada, duties must be strictly 'mandatory' in order to achieve results.

4.4 British Employers – Reactions to Positive Action

The Equality Act 2010 has, as has been discussed, provided positive action provisions which employers have the option of using when making decisions regarding equality. There are likely to be varying reactions from employers. Some will welcome the provisions, and others will not.[224] It is up to them whether they choose to use them. Some employers will view the provisions as providing clarity to a complex area of the law, and also as a mechanism which allows them to be flexible in their actions.[225] The positive action provisions will assist employers who are really committed to achieving equality, as it will be easier for them to use positive measures without being accused of discrimination.[226]

Other employers will likely object to the positive action provisions because they want to protect the principle of merit. Such employers say that the principle of merit must be preserved, in order to motivate employees and keep productivity high.[227] They also argue that candidates want to be given a job, or a promotion, on their merits, rather than being labelled as someone who was selected because they belong to a disadvantaged group.[228] There is, however, no quantifiable evidence to suggest that disadvantaged groups would object to positive action.[229] It is also argued by Noon that even if positive action *does* make disadvantaged groups feel stigmatised for a period, this is a better alternative to the continuing disadvantage that they will suffer if proactive measures are not taken to tackle under-representation.[230]

Another concern relates to the effect of positive action on non-disadvantaged groups where the merit principle is disregarded.[231] It is understandable why employers have this concern, given the experience in the US, where merit was disregarded and non-disadvantaged groups suffered detrimental effects. In Northern Ireland, however, employers are required to have regard to the principle of merit under the positive

[223] Fredman and Spencer (n 26) 600; Hepple (n 33) 19.
[224] Cuneen (n 217).
[225] Burrows (n 17) 6.
[226] Dianah Worman, Tom Hadley, Jackie Cuneen, 'Have Your Say... Positive Action Provision' (2011) Feb *Employers Law* 11.
[227] Kate Hilpern, 'A Question of Positive Motives' (2007) Oct *Employers Law* 12-13.
[228] Daniel Thomas, 'First Among Equals?' (2010) June *Employers Law* 12-13; Worman et al. (n 226).
[229] Noon (n 78).
[230] ibid.
[231] Hilpern (n 227).

action scheme,[232] and in Northern Ireland, equality in the workforce has been achieved without such detrimental effects.[233] Section 159 Equality Act 2010 requires that candidates be equally qualified before any consideration can be made of protected characteristics, so there is no reason for British employers to object to positive action based on this concern.

Another objection from employers regarding the positive action provisions, and their reluctance to use them is likely to stem from a fear of discrimination claims from unsuccessful candidates.[234] It is noted that affirmative action in the US brought about much litigation from aggrieved members of non-disadvantaged groups.[235] The affirmative action programme was, however, the result of an Executive Order rather than a statutory provision (like sections 158 and 159 Equality Act). Executive Orders in the US are generally documents from the President to executive branch officials, instructing them on how to carry out their duties. They are not ratified by Congress; they can be challenged by the public, and they can be (and have been) struck down by the courts.[236] In comparison, sections 158 and 159 are cemented in statute; they have been consented to by Parliament, and they are much less vulnerable to challenge. Although sections 158 and 159 do not expressly state that those who use them will be immune from litigation, they do imply that, provided an employer can demonstrate that they have complied with the requirements set out in the provisions, they will be safe from potential discrimination claims from aggrieved candidates.[237] The US affirmative action Executive Order contained no implicit immunity from suit. It should also be noted that as the US approach disregarded the principle of merit, there would have been more reason for unsuccessful candidates to complain than there will be under the Equality Act, where an unsuccessful candidate will only lose out to an equally qualified person.

Another concern about the positive action provisions from employers is that positive action, either is, or will lead to 'positive discrimination'. The Government has tried to reassure employers that the positive action provisions are not the same as positive discrimination.[238] Section 159 also clearly makes positive discrimination unlawful, by stating that employers must not have a policy of automatically treating people with protected characteristics more favourably than others. There are a number of reasons why employers will object to positive action; however, as has been demonstrated,

---

[232] Equality Commission for Northern Ireland, 'Fair Employment in Northern Ireland: Code of Practice' <http://www.equalityni.org/archive/pdf/fecopfinalwebversion@09.07.pdf> accessed 29 April 2013.
[233] McCrudden et al. (n 165).
[234] Ed, 'Equality Bill' (2009) 16(3) Health & Safety at Work 8; Worman et al. (n 226).
[235] Douglas-Scott (n 96).
[236] Todd F. Gaziano, 'The Use and Abuse of Executive Orders and other Presidential Directives' (*The Heritage Foundation,* 2001) <http://www.heritage.org/research/reports/2001/02/the-use-and-abuse-of-executive-orders-and-other-presidential-directives> accessed 14 April 2013.
[237] Money (n 123).
[238] Cuneen (n 217).

these can be overcome, and they are no justification for failing to take positive action. As has been discussed, positive action under the substantive equality approach is needed to address systemic issues of inequality within the British workforce. Maintaining the current individual complaints-led model will not address these issues.

5 THE WAY FORWARD FOR BRITISH EQUALITY LAW

It is acknowledged that the complaints model should undoubtedly still play a part within the British system, as individuals still need a process by which to complain about discrimination they may experience. It has been demonstrated, however, that the current model of anti-discrimination in Britain, which is 'led' by complaints under the formal equality approach, is incapable of redressing past discrimination suffered by disadvantaged groups. It is only geared to compensate individual victims of discrimination, and, as has been seen, this happens only rarely. Under the current system there has been little progress towards achieving equality over the past few decades. The complaints-led system fails to address deep-rooted systemic issues of inequality within the British workforce, and it is only by addressing these issues that equality will be achieved.

The substantive equality approach is capable of breaking down these systemic issues, and it can 'lead' the way to equality. This has been proven by the experience in Northern Ireland, where a proactive approach towards fair employment has resulted in equal representation of a previously under-represented group. The positive action provisions provided by the Equality Act 2010 are an improvement upon the positive measures provided under the old framework of equality legislation, and they have the potential to be valuable instruments with which to break down systemic equality issues within the British workforce. However, as there is no statutory duty for employers to use them, they will be unsuccessful in achieving the equality goal.

Commentators on equality criticise the British framework, but they fail to suggest an alternative. It is suggested here that the British Government should learn from the experiences in Canada and Northern Ireland, and bypass the voluntary positive action stage. It should commit to the substantive equality approach, and incorporate mandatory positive action provisions into the Equality Act 2010. As the Northern Irish statutory duties have achieved successful results, the British legislature should model the mandatory provisions on the Northern Irish legislation. Part 11, chapter 1 of the 2010 Act, which includes section 149 ('public sector equality duty') should be replaced by a framework of provisions like those in Northern Ireland, imposing mandatory duties on employers with more than ten employees in both the public and private sectors. Sections 158 and 159 should be maintained, and employers should use these provisions to help them achieve the objectives in their positive action plans. The EHRC should be provided with the same powers given to the Northern Irish Commission regarding monitoring, requesting undertakings, and serving notices on employers. The EHRC should also be able to 'persuade' employers to comply, like the Northern Irish Commission, by 'naming and shaming' those who fail to take necessary positive action. The EHRC should also have the ability of the Northern

Irish Commission, to enter into agreements with employers. The Employment Tribunal Service in Britain should continue in its role as an adjudicator for individual discrimination complaints. However, it should also have the power, like the Northern Irish Tribunal Service, to impose fines on employers for failing to comply with positive action duties should the EHRC's persuasion tactics fail.

It is acknowledged that some employers may be reluctant at first, and may have concerns about mandatory positive action provisions. The success in Northern Ireland should be used to highlight the benefits of positive action, and to encourage employers to get on board. The process might seem burdensome to businesses initially, but any new requirement will seem this way at first. It is evident, however, in Northern Ireland that businesses increasingly enter into voluntary agreements with the Commission, so perhaps businesses in Britain will not be as resistant as has been thought.

The reality of the situation is, however, that until the British Government gets behind the goal of equality, and shows real commitment towards achieving it, there will be no redress of past discrimination experienced by disadvantaged groups, and no changes in the statistics. On the one hand, the Government looks to be supportive of the equality goal by enacting the Equality Act 2010, and providing positive action provisions for employers to use. On the other hand, however, it continues to reduce the EHRC's budget, take away its powers, and refuses to impose obligations on employers to act. Equality within the British workforce will only be achieved once the Government gives serious consideration to the currently flawed equality framework and institutional arrangements.