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THE EDITORIAL BOARD
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FOREWORD

I am delighted to be asked to write the Introduction to the first edition of the Leeds Student Law and Criminal Justice Review. The School of Law at the University of Leeds is proud to be home to this new journal that showcases the outstanding work of our final year undergraduates. All of the articles originated as excellent final year dissertations, revised in the light of feedback from an editorial board made up of postgraduate research students. The final year dissertation is the culmination of a research based undergraduate degree that actively develops students' independent research skills. The authors of these articles devised their own research questions, delving deep into a subject that they had become interested in in the course of their degree, benefitting from one to one supervision by a faculty expert in the field. The result, as this journal demonstrates, is a rich breadth of cutting edge research questions and diversity of methodological approaches that build on and speak to the strengths of three of the School's Research Centres in Business Law and Practice, Criminal Justice Studies and Law and Social Justice.

Busuioc's excellent paper addresses the important and topical question of the extent to which the introduction of blockchain in the democratic processes of the European Union can improve the quality of democracy. She concludes that it would increase democratic empowerment, and create a system that would reach a larger number of citizens that would limit the impact of social and economic factors on their ability to vote. This paper demonstrates an impressive understanding of new technology and its potential to promote social justice in the form of improved access to the democratic process. Tyson's carefully researched and thorough paper addresses an issue of concern to all consumers, namely the ever increasing use of personal data despite consumer concerns. To this extent she investigates whether the General Data Protection Regulation's Reformed Consent Requirements improve Consumer Protection in this regard. The protection of our liberties through law also come to the fore in Rehan Chaudhuri's article. This addressed a hugely important constitutional question: namely to what extent Parliament can restrict or reduce judicial powers, and examines this in the context of an ouster clause that sought to restrict the High Court's supervisory jurisdiction over the Investigatory Powers Tribunal. His detailed paper challenges a number of preconceptions about the British constitution. Showmir Chowdhury meanwhile presents an impressive analysis of how the Eurozone crisis and the European Migrant crisis had different integration outcomes for the European Union. His conclusion is insightful an challenging, namely that whilst 'European elites' depoliticised 'the Eurozone crisis as one with 'no alternative' but further integration; populist entrepreneurs during the Migrant crisis were able to galvanise nationalist identities against supranational delegation. Oluwamitoke Debo-Aina's excellent and interesting qualitative study examines how the link between drill music and gang and knife crime has been distorted and this has contributed to the marginalisation of urban black South Londoner, silencing their discussions of marginalisation, and undermining their efforts to address it. It legitimises the perception of black culture as criminal culture. This is a timely paper that speaks to

wider issues that have come to the fore in our society and it also serves to illustrate the breadth of research methodologies that students in the Law School can master.

These papers should be of interest to a wide audience and their authors are to be congratulated on their achievement.

The quality of this journal also owes itself to a hardworking editorial board of postgraduate research students. Led by Maariyah Islam, as Managing Editor, Kisby Dickinson & Clare James as Assistant Managing Editors, and Ananya Banerjee, Atif Bostan, Amy Gainford, Natasha Gooden, Ibukunoluwa Iyiola-Omisore, Peter Ochieng, Tu Tran as editors, chose the papers, gave feedback on them, rigorously edited them, and supported the authors in arriving at the polished final version. This was a time consuming job that was professionally done and the School and the authors are grateful to the editorial team for the commitment and skill they have shown in bringing this first edition of the journal to completion.

I want to thank Dr Colin Mackie who originally conceived the idea of the journal and who has supported the team as they have worked on it. He was absolutely key to the project and I know the students are grateful to him.

The excellence of the research in this journal is something that the School of Law at Leeds, as one of the top 10 Law School's in the UK, can be proud of. The journal demonstrates something that is core to the identity of the School of Law, which is our community, and the willingness of the members of that community to contribute to it and work together. This is an endeavour in which undergraduates, postgraduate researchers and staff collaborated to produce something that, like our School, incorporates a diversity of subject specialisms, methodologies, approaches, and voices. It is an endeavour that all involved can feel very proud of, just as the School also is proud of their efforts and what they have, together, produced.

Professor Joan Loughrey
Interim Head of School
School of Law
University of Leeds
February 2021

INTRODUCTION TO INAUGURAL ISSUE

The idea to establish a Student Law and Criminal Justice Review at the University of Leeds was initiated by Dr Colin Mackie in 2020. Following this, Dr Mackie selected ten PGRs from the School of Law to create the Leeds Editorial Board and create this first edition of the Leeds Student Law and Criminal Justice Review.

In creating this journal, we have endeavored to include articles on a broad range of subjects. The wide areas covered in our students' scholarship is reflective of the research centers of the Law School; The Center for Business Law and Practice, the Centre for Law and Social Justice, and the Center for Criminal Justice Studies.

The submissions have been carefully selected from dissertations written by students in the final year of their undergraduate degree. The benefits of the journal, particularly in online form via HeinOnline allows the culmination of the undergraduate studies, the dissertation, to be disseminated internationally. The journal provides an opportunity for our graduates to benefit from the feedback provided by the Editorial Board of PGRs to polish an already truly outstanding piece of work and to take it to the next level.

There has been an immense amount of work put into the dissertation by the student and publication is a reward for that effort. The journal allows us to showcase the strength of our students, and their analytical skills, enhancing the reputation and standing of the School. We hope that other undergraduates, and even experienced academics, may come across the work when conducting research and cite it in their own work. All in all, the journal presents an opportunity to aid the employability of our undergraduate and post graduate students and enhance their student experience. We thank all those that have allowed us to publish their articles, the supervisors and others who supported the students in undertaking their dissertations. We relish the opportunity to produce more volumes of this journal in the future.

A great number of people have assisted us from the starting stages of this project to the completion of this inaugural issue. We would like to thank Dr Colin Mackie for his vision in creating the journal and support throughout the creation of this edition. We would also like to thank Professor Joan Loughrey for her support towards the journal and proving a Foreword.

We hope that you enjoy the inaugural issue of the Leeds Student Law and Criminal Justice Review.

The Editorial Board January 2021

Contents

Blockchain: Use of Technology to Increase Citizens' engagement with European Union Democracy

Maria-Anda Busuioc

Abstract

The paper aims to provide an analysis of the extent to which the introduction of blockchain in the democratic processes of the European Union can improve the quality of democracy, empower citizens and encourage active democratic engagement. Focusing on the criticisms of the European Parliament elections and the European Citizens' Initiative, the discussion will demonstrate, through unpicking underlying themes, the current shortcomings and where these processes fail to adequately engage citizens. Recognizing the current drive toward increasing the use of technology, especially blockchain, to improve public services the paper will discuss the application of this technology to both the elections and the European Citizens' Initiative. It will assess the extent to which blockchain could address the previously identified shortcomings and improve both the processes and the current level of citizen engagement. The paper will finish by discussing the possible limits of blockchain in achieving an improved democratic system that is citizen-centric. As part of this analysis, the paper will attempt to offer some suggestions as to how these limitations could be solved so that the ultimate goal of modernisation and citizen empowerment through the use of technology can be realized.

1. Introduction

The European Union (EU) has gradually evolved from a community focused on market unification and economic goals, to a union aiming for political cohesion and a common identity between its members. As the ambition for a bigger European project became more engrained, it became clear that without actively engaging Member States in the political life of the Union, the goal of reaching a superior level of integration would not fully materialise.[1] It follows that the importance of citizens for the European project has developed together with the aims that the Union sought; the recognition of the importance of this identity becoming a fundamental piece of the foundation on which future phases of integration would rest.[2]

The Union has taken steps to demonstrate its dedication to its people which culminated with the introduction of European citizenship in the Treaty of Maastricht.[3]

[1] Olivier Costa, 'The history of European electoral reform and the Electoral Act 1976 Issues of democratisation and political legitimacy' (2016) (EPRS Study, PE 563.516) 12

[2] Patricia Mindus, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 8

[3] Treaty on European Union (Treaty of Maastricht on European Union) [1992] OJ C 191/ 1, Art.8

This status was created with the intent to bring a new layer of legitimacy to the Union, with an emphasis on the benefits which Europe provides for its citizens.[4] Although European citizenship was additional to national citizenship, it arguably gave citizens from Member States a new legal status in the Treaty and the highest confirmation that the Union had become focused on fostering a common identity and the rights that derive from it.[5] Importantly this new identity iterated in its encoded form, the enjoyment of political rights in the Union, within two separate political processes.

Firstly, as an expression of representative democracy, citizens enjoy the right to vote and stand in elections as provided for in Article 10.[6] The creation of a directly elected European Parliament reinforces the importance of citizens' involvement for the legitimacy of the European project and addresses [7] Secondly, citizens were given a new role in the political life of the European Union when the European Citizens' Initiative (ECI) was introduced by the Treaty of Lisbon.[8] This tool, which has been described as a hybrid that combines traditional participation with a novel means of direct democracy,[9] enables citizens to invite the Commission to propose a legislative change.[10] Consequently, this instrument was suggested to open new avenues for engagement and diminish the divide between citizens and the Commission.[11]

However, neither the creation of a directly elected supranational Parliament nor the introduction of the ECI have achieved the aims intended. Contrary to initial hopes, the elections for the European Parliament have been identified as failing to effectively mobilise citizens.[12] The elections have a national focus, rather than European,[13] and engagement is limited to a single act of voting every five years. [14] The ECI, instead of filling the gaps created by electoral shortcomings, by 'injecting a dose of participatory

[4] Richard Bellamy and Alex Warleigh, 'Introduction: The Puzzle of EU Citizenship' in R Bellamy and A Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum 2001) 3
[5] Alex Warleigh, 'Purposeful Opportunists? EU Institutions and the Struggle over European Citizenship' in R Bellamy and A Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum 2001) 27
[6] Consolidated version of the Treaty on European Union [2012] OJ C 326/ 13, Art.10
[7] Yves Mény (eds) 'Building Parliament:50 Years Of European Parliament History 1958 – 2008'(Luxembourg: Office for Official Publications of the European Communities 2009) available at < https://cadmus.eui.eu/bitstream/handle/1814/11573/Building_Parliament.pdf > accessed on 25 January 2020
[8] Commission Of The European Communities 'Green Paper on a European Citizens' Initiative' (Green Paper), COM(2009) 0622 final available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0622> accessed 29 April 2020
[9] Erik Longo, 'The European Citizen's Initiative: Too much democracy for EU polity (2019) 20 German Law Journal 181
[10] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Art.11
[11] Christian Salm,' The added value of the European Citizens' Initiative (ECI), and its revision' (EPRS Study, European Added Value Unit 2018)
[12] Sara B Hobolt, 'The 2014 European Parliament Elections: Divided in Unity?' (2015) 53 JCMS 6.
[13] Karlheinz Reif and Hermann Schmitt, 'Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results' (1980) 8 European Journal of Political Research 3
[14] Lani Guinier, 'Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger'(2008) 71 The Modern Law Review 1

democracy in Europe',[15] became associated with low rates of success and a distrust for the mechanism.

To combat potential limitation in traditional participatory democracy, governments started to test how technology could be used in voting and other government and administrative processes. Blockchain has been used to manage and access health records in Estonia, manage educational certification in Cyprus and manage electronic identity in Switzerland.[16] Estonia has taken an additional step and, through internet voting, has highlighted the fact the technology could be an effective aid in encouraging and facilitating greater engagement with democratic processes,[17] giving rise to the question: given the increased use of digitalisation in various sectors, to what extent could the use of blockchain in the European elections and ECI provide the solution for increasing citizens' engagement with the European democracy?

The aim of this contribution is to assess to what extent the use of blockchain, a technology initially associated with cryptocurrencies and finance, could facilitate increased citizens' democratic engagement. The literature in this area has addressed the potential of including blockchain in the electoral process[18] or its potential use for furthering direct democracy.[19] This paper, having these sources as a starting point, will attempt to go further by focusing on assessing the impact the use of blockchain in European democratic processes could have on the level of citizens' empowerment and the overall quality of democracy. The paper will advance the argument that technology could be beneficial for improving the existing types of engagement. It will highlight that if a real and beneficial improvement is to be achieved, only a holistic approach which combines technological advancements with political changes should be pursued. Both are necessary to successfully engage and integrate European citizens in the core aspects of legislative and political life.

In order to conduct this assessment, the following structure will be adopted: the initial section will provide a detailed account of the criticism that exists regarding the current state of the elections for the European Parliament and ECI respectively. In the second part, the paper will focus on discussing blockchain and how it has been used so far in the area of democracy and governance. The third section, which will mirror the structure of the first, will initially explore the application of blockchain to the two facets of European democracy and then test how it can address the current criticism and improve the democratic processes for citizens. Finally, the last section will look at

[15] Andres Auer, 'European Citizens' Initiative: Article I-46.4 Draft Convention' (2005) 1 European Constitutional Law Review 79

[16] Tom Lyons, Ludovic Courcelas and Ken Timsit, 'Blockchain For Government And Public Services' (The European Union Blockchain Observatory & Forum, December 2018) available at < https://www.eublockchainforum.eu/sites/default/files/reports/eu_observatory_blockchain_in_government_services_v1_2018-12-07.pdf> accessed 30 September 2020

[17] Anna-Greta Tsahkna, 'E-voting: lessons from Estonia' (2013) 12 European View 59

[18] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785

[19] Desmond Johnson,' Blockchain-Based Voting in the US and EU Constitutional Orders: A Digital Technology to Secure Democratic Values?' (2019) 10 European Journal of Risk Regulation 330

some limitations in these uses of blockchain and suggest potential solutions for going forward.

2. Democratic processes in the EU

The EU has become focused on increasing the level of democratic engagement, primarily through offering its citizens the ability to decide, every five years, who they wish to represent their interests in the European Parliament,[20] and opening the possibility for citizens to play a role in the legislative process, through the ECI.[21] However, in spite of their perceived potential, these two avenues have consistently failed in empowering citizens and have not made them an integral part of the legislative or the political processes that currently exist within the European Union.
This section is divided into two subsections. The first will begin by addressing the specific limitations found in the European elections. The section with then argue that despite, initial optimism, the ECI has also failed to empower citizens. This analysis is necessary to identify specifically where and why these processes are failing to empower citizens, and to enable assessment of whether the application of blockchain could be a feasible method for improvement.

A. Elections for the European Parliament

Representative democracy is at the core of the EU, its functioning being ultimately dependent on this fundamental value.[22] Furthermore, it offers the primary tool for including citizens in the life of the Union and, thus, legitimising the European project. It also legitimises the institutions that are directly impacted by suffrage, such as the European Parliament, and arguably, after the introduction of the changes brought by the Treaty of Lisbon, the Commission.[23] However, this fundamental aspect of the EU which benefits both the institutional setting and people was not linked with the idea of citizen involvement until the introduction of the European Parliament.

The creation and consolidation of a directly elected European Parliament is argued to have provided the necessary step towards the realisation of another phase of the European project, political integration.[24] If deeper integration was to be truly achieved, popular support rather than elitist consensus was a prerequisite.[25] This approach has, in turn, facilitated the creation and ambitious development of the European Parliament into a unique and fully elected supranational body that is tasked

[20] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Art.14
[21] Ibid Art.11(4); Consolidated version of the Treaty on the Functioning of the European Union [2012] *OJ C 326/47,* Art.24(1)
[22] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Art.1
[23] Olivier Costa, 'The history of European electoral reform and the Electoral Act 1976 Issues of democratisation and political legitimacy' (2016) (EPRS Study, PE 563.516)
[24]Ibid 9
[25] Patricia Mindus, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 8-10

with representing the interests of European citizens,[26] moving away from its origins as a Common Assembly which was removed from people.[27]

Initially, the European Parliament was given powers of political oversight, the strongest power coming from its need to approve appointment of the Commissioners and the President of the European Commission.[28] Furthermore, having undergone several transformations in terms of competences since its formation, the parliament has gradually become a key partner in the legislative and budgetary function of the Union,[29] roles previously reserved for institutions only indirectly linked to citizens. Consequently, it could be argued that, through the use of direct elections to determine its composition and given the gradual increase in competences, this system has managed to partially correct the missing link between citizens and institutions and also reduce the suggested inherent 'democratic deficit' that has plagued the legitimate growth of the Union.[30] But despite these efforts and initial hopes of improving the Union's legitimacy, direct elections have not achieved the desired level of citizen empowerment.

Firstly, the most evident problem that has been highlighted in respect to the European electoral system is that the elections lack a truly European character.[31] Indeed, the electoral law that governs European elections has few provisions that give a harmonised and truly trans-European nature, leaving most of the procedures to be determined by each individual Member State.[32] Furthermore, there has been a constant lack of truly pan-European parties, further accentuating the lack of unity in the electoral exercise.[33] In this sense, Reif and Schmitt have demonstrated that the effect of the lack of coherence in the European electoral system has led to the transformation of this suffrage into a national contest and, consequently, a 'second-order' electoral exercise.[34] This 'second-order' nature, it has been further argued, facilitates the development of the feeling that there is 'less at stake' in these elections which, subsequently, removes the determination to actively participate as a citizen

[26] Pat Cox, '40 Years of European Parliament Direct Elections :A European Parliament Election of Consequence 'available at < https://www.iiea.com/publication/40-years-of-european-parliament-direct-elections-an-election-of-consequence/ > accessed on 26 January 2020

[27]Udo Bux 'The European Parliament: Historical Background' (2019) available at < https://www.europarl.europa.eu/factsheets/en/sheet/11/the-european-parliament-historical-background> accessed on 25 January 2020

[28] Iyiola Solanke, *EU Law* (Pearson Education 2015) 41-41

[29] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Art.14

[30] Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 European Law Journal 460

[31] Andreas Follesdal and Simon Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik'(2006) 44 JCMS 533, 536

[32] Act concerning the election of the members of the European Parliament by direct universal suffrage [1976] OJ L 278/5 as amended by Council Decision [2002] OJ L 283/1

[33] Iyiola Solanke, *EU Law* (Pearson Education 2015) 45-46

[34]Karlheinz Reif and Hermann Schmitt 'Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results' (1980) 8 European Journal of Political Research 3

and express your preference.[35] This inherent limitation and the perception that there is less at stake results in citizens that do not feel motivated enough to go and cast their vote, reducing citizen engagement.[36]

The theme of 'less at stake' is of great importance, as it represents a unique lens through which another criticism of the current electoral exercise is revealed. It has been observed that since the introduction of elections for the European Parliament in 1979, there has been a constant decrease in turnout,[37] the lowest being recorded in the 2014 elections.[38] Using this theory, the more obscure reasons why there is a continual decrease in the number of citizens voting in the European elections could be identified and understood. It has been increasingly argued that decreasing turnout is a consequence of factors such as lack of information and awareness about the political workings of the European Parliament reducing motivation to get involved with the European democratic structure.[39] However, the most recent Eurobarometer study revealed that, despite the increased awareness of what Europe does for its citizens, there was still a number of 'soft abstainers' who decided not to vote as the cost or ability to travel to the polling station outweighed the benefit of the perceived democratic empowerment.[40] Following the result of this data and in spite of the disagreement as to the true root of low electoral turnout, as it was identified by Franklin and Hobolt,[41] for the purpose of this paper these less evident reasons will be the focus of analysis as, when judged in the broader context of the 'less at stake' theory described above, they form the necessary background for understanding why and where technology could bridge the gap left by the failure of traditional voting.

The impact of illness, disability or the overall cost associated with voting as a factor reducing turnout, is becoming increasingly indicative of the fact that, besides the lack of a trans-European exercise which would further strengthen the European identity, the current state of elections for the European Parliament does not align with the realities of its citizens and fails to provide effective means through which they can exercise their rights. The Eurobarometer study of the 2014 elections, for example, revealed that there was a considerable number of citizens who did not vote due their schedule conflicting with the electoral timeframe, this number being close to those

[35] Ibid 9-13
[36] Sara B Hobolt, 'The 2014 European Parliament Elections: Divided in Unity?' (2015) 53 JCMS 6.
[37] Olivier Costa, 'The History of European Electoral Reform and the Electoral Act 1976 Issues of democratisation and political legitimacy' (2016) (EPRS Study, PE 563.516) 31
[38] DG for Communication, Public Opinion Monitoring Unit, '2014 post-election survey- European Elections 2014: Analytical Overview' (Brussels, October 2014) available at < https://europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2014/post-election-survey-2014/analytical-synthesis/en-analytical-synthesis-post-election-survey-2014.pdf > accessed on 11 April 2020
[39] Sara B Hobolt, 'The 2014 European Parliament Elections: Divided in Unity?' (2015) 53 JCMS 6.
[40] Eurobarometer Survey 91.5 of the European Parliament A Public Opinion Monitoring Study 'The 2019 Post-Electoral Survey: Have European Elections Entered A New Dimension?' (September 2019)
[41] Mark N Franklin and Sara B Hobolt, 'The legacy of lethargy: how elections to the European Parliament depress turnout' (2011) 30 Electoral studies 1

that believed voting in European elections has no consequence.[42] Furthermore, the same study showed that some categories of citizens were less likely to vote. Students, workers, homemakers and, in terms of gender, women,[43] arguably due to their lifestyle conflicting with the electoral timeframe. Although these reasons are not specific to Europe alone and are a feature of other established democracies,[44] this does not limit the validity of the argument in the context of the European space. It in fact pushes forward the theory that the electoral system is not catering for all citizens who have the right to decide who shall take decisions in their name. Consequently, this data provides some validity to the argument that the current state of this process reduces, rather than promotes, an increased level of 'dialogue, debate and diversity'.[45] This is especially the case in the European Union, where there are persisting issues with democratic legitimacy and a growing sense of a lack of trust in the Union from its citizens.[46] Addressing these problems and making elections more accessible and inclusive could be argued to represent an essential part of the wider efforts seeking to address the European political crisis.

Furthermore, most member states, except Ireland, the United Kingdom[47] and Malta,[48] do generally allow their citizens to vote European Parliament elections even if they are no longer resident in their state of origin. More modern voting arrangements would be advantageous in such situations. Although, postal voting is available in some member states but its lack of universal availability and ineffectiveness when used it is not an adequate solution. In the most recent European elections, issues such as delays in the arrival of the ballot papers have surfaced and have resulted in strong dissatisfaction of citizens who ultimately felt they had been robbed of their right to vote.[49] Similarly, a study conducted after the 2019 elections revealed that postal voting and placement of polling stations were the most common difficulties encountered by

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[42] DG for Communication, Public Opinion Monitoring Unit, '2014 post-election survey- European Elections 2014: Analytical Overview' (Brussels, October 2014) available at < https://europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2014/post-election-survey-2014/analytical-synthesis/en-analytical-synthesis-post-election-survey-2014.pdf > accessed on 11 April 2020

[43] DG for Communication, Public Opinion Monitoring Unit, '2014 post-election survey- European Elections 2014: Analytical Overview' (Brussels, October 2014) available at < https://europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2014/post-election-survey-2014/analytical-synthesis/en-analytical-synthesis-post-election-survey-2014.pdf > accessed on 11 April 2020

[44] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785

[45] Iyiola. Solanke, *EU Law* (Pearson Education 2015) 8

[46] Jurgen Habermas, 'Why Europe Needs a Constitution'(2001) 11 NLR 5.

[47]Eva-Maria Poptcheva, 'Disenfranchisement of EU citizens resident abroad Situation in national and European elections in EU Member States' (2015) (EPRS Study, PE 564.379)

[48] European Union- Your Europe,' Home Country Elections- Malta' available at <https://europa.eu/youreurope/citizens/residence/elections-abroad/home-country-elections/malta/index_en.htm> accessed on 30 April 2020

[49] 'European elections 2019: Expats fear postal votes will not count' (*BBC NEWS*, 22 May 2019) available at < https://www.bbc.co.uk/news/uk-politics-48351281 > accessed 25 January 2020.

expatriate citizens who wanted to vote.[50] Consequently, the current alternatives still fail to bring an effective solution that would promote greater engagement by offering easier means to elect European representatives.

However, it is not the case that no steps have been taken towards remedying the situation. Recently, there has been an attempt to modernise and bring some homogeneity to the law that governs the European elections. The current reform recognises the need to increase the visibility and, consequently, the legitimacy of the Union's decision-making processes by increasing citizens' participation and, importantly, bringing the Members of the European Parliament closer to their voters.[51] The agreed changes seek to raise awareness and, arguably, remove the elections from the 'second-order' realm by adding on the ballot paper the political grouping that the national party belongs to.[52] This, in turn, could be seen as a compromise which seeks to partly address the persistent calls for creating trans-European parties.[53] It would consequently make the elections a Europe-wide phenomenon rather than a national contest held between national parties that would later affiliate to European political families.[54] Furthermore, the reform seeks to reiterate the importance of bringing citizens closer to the Union, through both the extension of voting rights to citizens that reside outside European Union and, importantly, the introduction of electronic and internet voting as alternatives to the paper ballot or other forms of in person voting.[55]

This aim of introducing internet voting constitutes the next aspect to be analysed. As highlighted above, a constant low turnout to the European elections stems from a combination the general feeling among voters that the effort required to cast their vote is not worth the result of the elections. This is compounded by the reliance on traditional electoral systems which inherently fail to accommodate the needs of citizens who are unable due to social or economic factors.[56] This, in turn, leads the discussion organically towards seeking alternative methods that would reduce the

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[50] DG for Communication European Parliament 'The 2019 Post-electoral survey among European expatriates' (Brussels, February 2020) available at <https://www.europarl.europa.eu/at-yourservice/files/be-heard/eurobarometer/2019/2019_post-electoral_survey_among_european_expatriates/en-post-election-expats-2019-report.pdf> accessed on 25 April 2020

[51] European Parliament: Constitutional Affairs – AFCO, *Reform of the Electoral Law of the EU* (2019) available at < https://www.europarl.europa.eu/legislative-train/theme-constitutional-affairs-afco/file-reform-of-the-electoral-law-of-the-eu> accessed on 28 January 2020

[52] Ibid

[53] Stefan Lehne and Heather Grabbe, '2019 European Parliament Elections Will Change the EU's Political Dynamics' (*Carnegie Europe*, December 2018) available at <https://carnegieeurope.eu/2018/12/11/2019-european-parliament-elections-will-change-eu-s-political-dynamics > accessed on 25 January 2020

[54] Ibid

[55] European Parliament 'Parliament backs a modernised EU electoral law' (04/07/2018) available at < https://www.europarl.europa.eu/news/en/press-room/20180628IPR06818/parliament-backs-a-modernised-eu-electoral-law > accessed on 28 January 2020

[56] Scott Orford, Colin Rallings, Michael Thrasher and Galina Borisyuk, 'Changes in the probability of voter turnout when resisting polling stations: a case study in Brent, UK' (2011) 29 Environment and Planning C: Politics and Space 149, 150-151

effort and cost associated with voting as well as the issues of accessibility and efficiency, not well catered for by traditional voting systems.

In this sense, the Estonian experience has already demonstrated that there is a link between the wide use of internet voting and a rise in turnout at subsequent rounds of elections.[57] The use of internet voting has been perceived as an adequate tool to remedy the issues of cost and accessibility inherent in traditional voting.[58] Following from this, internet voting has the potential to address the problems citizens faced with postal voting at the previous elections and, furthermore, presents a promising prospect to materialise the ambition of adequately extending voting rights to European citizens that reside outside the Union's space. However, this raises the question as to how internet voting can be successfully implemented without endangering the electoral process.

This question is legitimate given that current methods of internet voting lack the adequate level of security necessary to generate the required level of trust in the process.[59] They lack the necessary infrastructure required to carry out such a fundamentally important democratic process due to their susceptibility to electronic attacks, data leaks and the possibility of vote tampering.[60] Consequently, the current process of internet voting would provide citizens, with inadequate privacy and security, aspects which are fundamental to the democratic process of voting.[61] Furthermore, the potential for fraud can undermine trust in democracy and its processes even further, rather than the addressing the deficiencies the technology is trying to remedy. [62]

It follows that, given its importance for the expression of citizenship and the functioning of democracy, modernisation of the elections for the European Parliament would be desirable. This would require a stable platform that ensures the protection of electoral values and effectively reduces the risk of acts which would lead to the undermining of trust in democracy.[63] Consequently, rather than simply negating this wish to modernise the electoral process through the use of technology due to the above mentioned limitations which may negatively impact citizens' desire to engage in this new means of electing representatives, it may be more beneficial to assess if other technologies available could offer a better solution. Such solutions would keep

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[57] Anna-Greta Tsahkna, 'E-voting: lessons from Estonia' (2013) 12 European View 59

[58] Florian Marcus, 'What's so special about online voting?' (*E-Estonia,* May 2019) available at < https://e-estonia.com/whats-so-special-about-online-voting/ > accessed on 25 January 2020

[59] Georg Aichholzer, Gloria Rose, Leonhard Hennen, Ralf Lindner, Kerstin Goos, Iris Korthagen, Ira van Keulen, Ramus Øjvind Nielsen, 'Prospects for e-democracy in Europe: Literature review' (2018) (EPRS Study, - PE 603.213) 72-74

[60] Martin Russell and Ionel Zamfir, 'Digital technology in Elections Efficiency Versus Credibility' (2018) (EPRS Study, PE 625.178)

[61] Thad Hall, 'Electronic voting' in N. Kersting (ed.), *Electronic Democracy* (Verlag Barbara Budrich, 2012)

[62] Ibid

[63] Martin Russell and Ionel Zamfir, 'Digital technology in Elections Efficiency Versus Credibility' (2018) (EPRS Study, PE 625.178)

the advantages of internet voting but add the necessary level of security to increase, both the trust of the users and the engagement with the new form of e-democracy. This, in turn, represents the context in which the application of blockchain to the electoral process will be analysed in section 4 and the problems that the use of this technology will seek to address.

B. European Citizens' Initiative

The previous section identified that representative democracy is the default form of governance within the EU. However, as the Union became more established, it became increasingly evident that limiting citizens' involvement to casting their vote every five years did not lead to a substantial increase in democratic legitimacy or bring citizens closer to European institutions. This situation was anticipated by Guinier, who argued that reducing democratic expression to just a vote carries with it the risk of diminishing citizens' ability to engage with their representatives and institutions to just casting their ballot and tilting the balance of who is to win.[64] This, as she further highlights, leads to the creation of 'electocracy', which is primarily defined by the dissatisfaction and distrust in the political system from voters who feel increasingly powerless and left out of the political process.[65] Furthermore, this serious problem from the perspective of legitimacy was, arguably, accentuated by the fact that the Union, despite its development, was still not providing the necessary space where the holders of citizenship could voice their opinions in respect to the direction taken by the Union.[66] Habermas supports this assertion, arguing that the Union lacks an adequate forum that could foster debates and enable real communication between members, which is necessary if a strong level of legitimation and coordination is to be achieved.[67] It was within this context and in an attempt to improve these issues that the Treaty of Lisbon introduced the ECI in 2009.

The ECI represents an instrument which enables European citizens to become involved in the legislative process of the European Union.[68] The details of the ECI were provided in a regulation in 2011. [69] Organisers, who are citizens of the Union and of age to vote in the EU can form a committee of citizens,[70] and raise a proposal for legislation within the competencies of the EU.[71] The committee requires membership of citizens from seven different Member States. [72] It then must gather a million signatures from natural persons who are citizens of EU states and entitled to vote in

[64] Lani Guinier, 'Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger' (2008) 71 The Modern Law Review 1, 2-3
[65] Ibid
[66] Erik Longo, 'ECI: Too much democracy for EU polity' (2019) 20 German Law Journal 181.
[67] Jurgen Habermas 'Why Europe Needs a Constitution' (2001) 11 NLR 5
[68] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Art.11.
[69] Regulation of the European Parliament and of the Council on the Citizen's Initiative COM(2010) 119 final
[70] Regulation (EU) 2019/788 of the European Parliament and of the Council on the Citizen's Initiative L130/55, Article 5
[71] Ibid, Article
[72] Ibid Article 5(2)

European Parliament elections,[73] with the signatures coming from citizens from at least a quarter of the member states. [74] These targets have to be reached within 12 months. [75] These requirements clearly demonstrate that a high level of coordination and monitoring is required for the committee of citizens to create a successful ECI proposal.

escribed as a hybrid instrument which enables a soft form of direct democracy to be manifested at European level,[76] its introduction in the Treaty of Lisbon was seen as a means to protect the principle of representative democracy. However, it simultaneously provides another medium through which electoral shortcomings could be solved.[77] The elections and ECI were seen as complementing each other, the latter being viewed as a potential tool which could 'inform and influence' citizen's engagement with the former.[78] Establishing this system was seen as a positive move towards the achievement of a working balance that would reduce the democratic deficit by offering avenues for engagement which would reflect both the complex nature of the Union and the pressing need to involve citizens in decision-making.[79] However, it gradually became evident that in practice, rather than empowering and engaging European citizens and increasing dialogue, this tool seems to have achieved the reverse, increasing instead dissatisfaction and distrust in the participatory tools provided by the Union.[80]

The dissatisfaction and distrust arose due to citizens encountering challenges when engaging with the ECI at the signature collection stage and with the use of the online system. Firstly, those that used the online collection system made available by the Commission have complained repeatedly that this system is difficult and fails to provide an effective medium that would enable an effective campaign.[81] Secondly, the lack of harmonised approach to the amount of data that was required when expressing support was identified to add to the lack of engagement of citizens and

[73] Ibid Article 2(1)
[74] Ibid Article 3(1)(b)
[75] Ibid Article 8(1)
[76] Andres Auer, 'European Citizens' Initiative: Article I-46.4 Draft Convention' (2005) European Constitutional Law Review 79
[77] Dorota Szeligowska and Elitsa Mincheva, 'European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis' (2012) 13 Perspectives on European Politics and Society 270
[78] Emmanuel Sigalas,' The European Citizens' Initiative. A New Era for Democratic Politics in the EU' (2012) XXV(2) *The Federalist Debate* available at < http://www.federalist-debate.org/index.php/current-issue/books-reviews/item/776-the-european-citizen%E2%80%99s-initiative> accessed on 19 September 2020
[79] Emmanuel Sigalas,' The European Citizens' Initiative. A New Era for Democratic Politics in the EU' as referenced in Pawel Glogowski and Andreas Maurer, 'The European Citizens' Initiative- Chances, Constraints and Limits'(IHS Political Science Series, Working Paper 134, April 2013) available at <https://irihs.ihs.ac.at/id/eprint/2199/1/pw_134.pdf > accessed on 25 January 2020
[80] Manès Weisskircher, 'The European Citizens' Initiative: Mobilization Strategies and Consequences' (2019) Political Studies 1, 11-12
[81] Erik Longo, 'The European Citizen's Initiative: Too much democracy for EU polity (2019) 20 German Law Journal 181

struggles of organisers.[82] Furthermore, the fact that the Commission is invited, but does not have to, launch a legal change further instils potential for disappointment and distrust in the collaborative power of this tool.[83]

Another limitation of this tool comes from the system used for launching initiatives, as it maintains a separation between the actors involved. The consequence is that signatures gathered need to be sent for validation to each individual office within the Member States from where they originated.[84] As a result, although having the power to create cohesion and include citizens in the legislative area, the current system has failed to offer a streamlined process and to create a true dialogue between the parties involved. The process has become one full of risks for citizens who do not want to invest resources, go through the subsequent steps and wait around 20 months for a process that may, in fact, not render any result given that the number of signatures received is under the threshold.[85] In fact, only five initiatives gathered the required number of signatures and were successful,[86] the last one being the 'Minority SafePack - one million signatures for diversity in Europe' which concerns protection for those belonging to a national or linguistic minority.[87]

Similar to the situation in the sphere of European elections, in light of this consistent lack of effectiveness,[88] a legislative reform has been adopted and came into effect on 1 January 2020.[89] The new regulation seeks to improve the ECI by changing a number of aspects in the way in which an initiative is launched; such as a reduction in the data that is required when citizens support an initiative, the start of the signature collection period, the possibility of partial registration and the introduction of a central online collection system as the default mechanism.[90]

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[82] Bruno De Witte, Alexander Trechsel, Dragana Damjanovic, Elin Hellquist, Josef Hien and Paolo Ponzano 'Legislating after Lisbon: New Opportunities for the European Parliament' (2010) (EUDO Observatory on Institutional Change and Reform (Institutions) Study) available at https://core.ac.uk/download/pdf/45678409.pdf> accessed 30 September 2020

[83] Dorota Szeligowska and Elitsa Mincheva, 'European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis' (2012) 13 Perspectives on European Politics and Society 270

[84] Christian Salm,' The added value of the European Citizens' Initiative (ECI), and its revision' (EPRS STUDY, European Added Value Unit 2018)

[85] Pawel Glogowski and Andreas Maurer 'The European Citizens' Initiative- Chances, Constraints and Limits' (2013)(HIS Political Science Series, Working Paper 134) available at < https://irihs.ihs.ac.at/id/eprint/2199/> accessed on 25 April 2020

[86] Udo Bux, 'European Citizens' Initiative'(European Parliament, Factsheet on the European Union, 2020) available at < https://www.europarl.europa.eu/ftu/pdf/en/FTU_4.1.5.pdf > accessed 12 April 2020

[87] European Citizens'' Initiative, 'Minority SafePack – one million signatures for diversity in Europe' (ECI(2017)000004) available at <https://europa.eu/citizens-initiative/initiatives/details/2017/000004_en> accessed on 9 February 2020.

[88] Christian Salm,' The added value of the European Citizens' Initiative (ECI), and its revision' (EPRS STUDY, European Added Value Unit 2018)

[89] Regulation (EU) 2019/788 Of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative PE/92/2018/REV/1 [2019] OJ L 130/ 55.

[90]Ibid

However, despite the introduction of these changes, it is not clear to what extent these will improve the process for citizens and further improvements are still possible. This is particularly so as, given the way the reforms are drafted, the issue of fragmentation that has been identified between the actors is retained and, consequently, so is the time it takes for a proposal to reach the Commission stage. Furthermore, even if the reform can address all these problems, the ECI could still benefit from the introduction of blockchain. Consequently, given that these systems are complementary, and both add to the improvement of the overall quality of democracy enjoyed within the European Union,[91] this dual assessment is of benefit in revealing how technology would make an impact in each respective area as well as understanding the potential of linking two sides of democracy through the use of a similar underlying technology in improving citizens' awareness as to these processes.

To conclude, this section has demonstrated the reasons why these democratic processes exist in the European Union and where they failed to pave the way towards a modern and qualitative democracy. The themes of lack of unity, inadequate reflection in the electoral exercise of citizens' lives, inability to facilitate access to a wide sector of population, as well as maintaining separation and administrative burdens in tools that were supposed to bring citizens closer to institutions represent the key failings which the application of blockchain would seek to address. These could be argued to represent structural factors which lower the quality of democracy and leave citizens unable to take part in a real and diverse democratic debate and where technology could adequately be used for improvement.

3. Blockchain technology and its uses

Having discussed in the previous section the problems that exist within both the elections for the European Parliament and the ECI, the analysis will turn to consider the extent to which they could be addressed efficiently through the use of blockchain and how citizens could be empowered through technology. However, in order to provide an accurate analysis, this section will first describe blockchain technology, its key aspects that set it apart and why it could be effective technology to address some of the problems that have been highlighted in EU democratic processes. Furthermore, this section will also highlight some uses of blockchain outside the sphere of finance considering aspects of security, accessibility and users' trust.

A. What is a blockchain?

[91] Pawel Glogowski and Andreas Maurer 'The European Citizens' Initiative- Chances, Constraints and Limits'(IHS Political Science Series, Working Paper 134, April 2013) available at <https://irihs.ihs.ac.at/id/eprint/2199/1/pw_134.pdf > accessed 7 March 2020

A blockchain is a type of distributed ledger technology,[92] essentially encompassing a new form of database that is decentralised and permanently maintained by a network of computers.[93] In contrast to the typical type of database that is centralised and requires some form of intermediary storing and processing the data, blockchain relies heavily on its community of users.[94] Most widely used blockchains have replication inherent in their structure, meaning that each computer that is part of the network, known as nodes, stores and updates all the information recorded, irrespective of what other participants may be doing.[95] Subsequently, there is potential for using blockchain in democratic processes, given that this type of technology seems to address any potential issues posed either by technological failures or by external forces who may wish to break into the system in order to undermine its functioning and the validity of recorded data.[96]

The validity of the data recoded on a blockchain is another feature that makes this system stand out and arguably demonstrates why this technology presents an advantage when used in public services. As already discussed, once data is added on a blockchain, every node stores and updates the information. Simultaneously, each previous record is linked to the future one, which may be a new or an updated one.[97] This not only provides a secure platform in terms of users, but also a medium that highlights any attempt at tampering with the records.[98] This, as a result, shows that a blockchain has the capacity to record an accurate log of information and to signal when and how the information was altered, ultimately making a blockchain more transparent than other systems.[99]

Another key aspect that sets blockchain apart as a technology, is the manner in which transactions take place on the network. A blockchain-enabled transaction is cryptographically secure and benefits from pseudo-anonymity, this being facilitated by its reliance on 'digital signatures and public-private key cryptography',[100] which is

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[92] Jamie Berryhill, Théo Bourgery and Angela Hanson 'Blockchain Unchained: Blockchain Technology and its Use in the Public Sector' (2018), *OECD Working Papers on Public Governance*, No. 28, OECD Publishing, Paris available at <https://www.oecd-ilibrary.org/governance/blockchains-unchained_3c32c429-en> accessed on 29 April 2020

[93] Primavera de Filippi and Aaron Wright, B*lockchain and the Law: The Rule of Code (Harvard* University Press 2018) 13

[94]Tom Lyons, Ludovic Courcelas and Ken Timsit, 'Blockchain For Government And Public Services' (The European Union Blockchain Observatory & Forum, December 2018) available at < https://www.eublockchainforum.eu/sites/default/files/reports/eu_observatory_blockchain_in_government_services_v1_2018-12-07.pdf> accessed 30 September 2020

[95] Primavera de Filippi and Aaron Wright, Blockchain *and the Law: The Rule of Code (Harvard* University Press 2018) 35-36

[96] Michèle Finck *Blockchain Regulation and Governance in Europe* (CUP 2019) 7

[97] Kevin Werbach, *The Blockchain and the New Architecture of Trust* (MIT Press 2018) 101-102.

[98] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785

[99] Kevin Werbach, *The Blockchain and the New Architecture of Trust* (MIT Press 2018) 105.

[100] Primavera de Filippi and Aaron Wright, Blockchain *and the Law: The Rule of Code (Harvard* University Press 2018) 38-39

preserved on the public ledger.[101] These aspects, in turn, are automatically something that will interest governments especially as they could deploy the technology for the benefit of citizens, making democratic and administrative processes more transparent without compromising the security of the system or putting the sensitive data provided by users at risk.

B. Blockchain applications

Initially, this technology was solely associated with financial technology, facilitating the functioning of cryptocurrencies, such as Bitcoin,[102] and in the beginning, only a small group of people knew about blockchains, with little discussion about its potential applications outside the financial sphere. However, awareness increased through the controversy that surrounded the use of cryptocurrencies. People started to become more familiar with blockchain which became a new buzzword, permeating many industries and increasingly being perceived as the optimal solution for shortcomings in different sectors.[103]

With this growing awareness, it became clear that this technology could be used outside the financial sphere to modernise and secure other types of processes, especially those that require trust in the system and need a high level of security. Attempts to use blockchain in spheres outside finance started in 2013 not only in industry but also increasingly in administration and governance.[104] This drive towards digitalisation through blockchain has been argued to have stemmed precisely from its inherent structure which creates trust and transparency in areas that seemed to be removed from citizens generally.[105]

Estonia serves as an indicative case from the EU as to how blockchain could be implemented in order to facilitate citizens' engagement and access to administration. Estonia has implemented and relied on blockchain in various public services, including securing and allowing transparency of health records and for also for wills.[106] Sweden has also assessed the benefits of using blockchain more widely, testing the feasibility of using this technology for completing some processes in the area of land registries.[107] Moreover, and importantly in the context of the implementation assessed in this paper, at the European level there has been a move towards integrating blockchain in the transmission and management of health

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[101] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785

[102] Michèle Finck, *Blockchain Regulation and Governance in Europe* (CUP 2019) 8

[103] Ibid 1-2

[104] Doug Galen and others 'Blockchain For Social Impact' (Stanford Graduate Business School - Centre for Innovation, 2019) 1-2 available at < https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/csi-report-2019-blockchain-social-impact.pdf > accessed on 11 April 2020

[105] Tom Lyons, Ludovic Courcelas and Ken Timsit, 'Blockchain For Government And Public Services' (The European Union Blockchain Observatory & Forum, December 2018) available at < https://www.eublockchainforum.eu/sites/default/files/reports/eu_observatory_blockchain_in_government_services_v1_2018-12-07.pdf> accessed 30 September 2020

[106] Ibid 12

[107] Ibid 28

records, through a network that functions on a blockchain and is called MyHealthMyData.[108] This project seeks to lower cost and to enable citizens to access their medical data, thus improving the way in which citizens communicate with health providers.[109] What these case studies show is that, slowly, the benefits of using blockchain for the advantage of governments and, importantly, citizens have become more prevalent. Indeed, the EU has shown a great interest in how this technology could be used and has taken proactive steps to further the understanding of this technology, setting up dedicated centres which are tasked with the study of blockchain and the effects of its implementation.[110]

Aside from these potential uses, there has been a recent focus on assessing how blockchain could also be used as a means to implement internet voting. Indeed, the European Commission has identified e-voting as a potential area in which the use of blockchain could benefit Europe.[111] This is due to key features of the technology, such as being tamper-proof, transparent and, simultaneously, able to maintain anonymity which improve on the current means of internet voting.[112] There have also been arguments made for the introduction of blockchain in elections particularly as this technology has the potential to allow for dynamic participation of people in the course of democratic processes.[113] This is particularly so, as it was recognised that the nature of blockchain would allow for a greater level of self-governance and a greater role for the citizen in not only exercising their right to vote, but also in controlling and monitoring the electoral process itself.[114]

These discussions have not remained purely theoretical and some steps have been taken to assess the implementation of blockchain in the electoral process and the possibility of modernisation of representative democracy. Johnson has described the process of trialling blockchain for midterm elections in West Virginia[115] In this instance, the introduction of blockchain voting was made as an attempt to enable overseas US citizens to cast their vote and avoid problems with delays in postal ballots.[116]

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[108] European Commission- CORDIS, 'My Health My Data' available at < https://cordis.europa.eu/project/id/732907> accessed 1 May 2020

[109] 'Why MHMD' available at < http://www.myhealthmydata.eu/why-mhmd/> accessed on 12 April 2020.

[110] 'The EU Blockchain Observatory & Forum' available at <https://www.eublockchainforum.eu/about> accessed on 24 April 2020

[111] European Commission, 'Blockchain Technologies' as referenced in David Allessie, Maciej Sobolewski, Lorenzino Vaccari and Francesco Pignatelli (Editor), 'Blockchain for digital government' (EUR 29677 EN, Publications Office of the European Union, Luxembourg, 2019) 11

[112] T Tom Lyons, Ludovic Courcelas and Ken Timsit, 'Blockchain for Government and Public Services' (The European Union Blockchain Observatory & Forum, December 2018), 13-14

[113] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785

[114] Desmond. Johnson,' Blockchain-Based Voting in the US and EU Constitutional Orders: A Digital Technology to Secure Democratic Values?' (2019) 10 European Journal of Risk Regulation, 330

[115] Ibid

[116] Brian Fung 'West Virginians abroad in 29 countries have voted by mobile device, in the biggest blockchain-based voting test ever' (*The Washington Post*, November 2018) available at

Increased security and the promise of a more dynamic and participatory exercise are strong reasons why there should be a more targeted assessment of the use of blockchain for the improvement of democracy, especially in the European Union. Given the previously highlighted limitations in European democracy and that using blockchain could represent the first step towards overall improvement, it follows that this represents the adequate context for assessing why and how the architecture and the innovations brought by blockchain could benefit citizens at large and help them play more of a dynamic role in the democracy of the European Union.

4. The use of blockchain in the EU democratic processes

Previous sections have demonstrated that European democracy is continuously failing to enable citizens to play a more active role in both the political and legislative sphere. Subsequently, the discussion moved to address the continuous trend towards digitalisation and the use of blockchain in democratic structures, specifically given its identified benefits in terms of security and privacy and its potential in increasing the transparency of democratic processes and the level of democratic participation. This section will focus on bringing these arguments together in order to provide a targeted application of blockchain to the European parliamentary elections and ECI. It will address the extent to which blockchain could improve the current processes which fail to integrate citizens to the fullest extent. It will highlight the impact technological advances could have in improving engagement with democratic processes.

A. Blockchain and European parliamentary elections

The analysis will begin with the application of blockchain to the elections for the European Parliament. Having identified in the second section the current shortcomings of the elections, this section will focus on applying blockchain to those issues in order to advance the argument that blockchain-enabled voting would represent a feasible and significant step towards improving the process for the benefit of citizens. This section will demonstrate that the benefits identified when implementing this technology are varied, with technical advantages that would impact the process of voting, but which would also ultimately lead to an overall improvement of the quality of democracy.

Fraud

Blockchain could provide a feasible alternative for carrying out future rounds of elections firstly due to its ability to protect from attempts at fraud. Unlike current means of internet voting, which can be subject to cyber-attacks, fraud and subsequent invalidation of votes,[117] a blockchain has the ability to provide a stronger level of

<https://www.washingtonpost.com/technology/2018/11/06/west-virginians-countries-have-voted-by-mobile-device-biggest-blockchain-based-voting-test-ever/ > accessed on 9 February 2020

[117] Martin Russell and Ionel Zamfir, 'Digital technology in Elections Efficiency Versus Credibility' (2018) (EPRS Study, PE 625.178)

security preventing such fraud. Blockchains are tamper proof and immutable, as it is very hard to change the copies recorded on the system without the fraud being traceable. Kshetri and Voas support this assertion, arguing that as tampering is nearly impossible on a blockchain, votes would always be stored securely and recorded accurately, thus avoiding fraud as well as increasing transparency and security from a procedural point of view.[118] Thus, they conclude that this particular aspect of blockchain is an undeniable strength in the debate concerning the introduction of this technology to enable secure internet voting.[119] This prospect of accuracy and novel ways to protect from fraud from third parties or users are thus key benefits of using blockchain. Ultimately, adequately fostering the required levels of security and trust identified in section 2 is necessary if member states and the wider public are to be motivated to exploit to the fullest extent the advantages that come with blockchain-enabled internet voting.

Privacy and data protection

At the European Union level, analysis of the legal requirements for data protection and voting standards indicates that blockchain has the ability to both safely handle the sensitive data of the citizens that engage in the electoral process, as well as uphold the electoral standards which make the elections a pillar of the democratic structure. The specialised literature has consistently recognised the inability to safeguard users' data to be one of the arguments against widely using internet voting.[120] However, this is not a fundamental issue when blockchain is used, given that this system has the capacity to preserve the anonymity of the users whilst also storing a verifiable record,[121] due to the pseudo-anonymity through which the system operates.[122] Importantly, this also demonstrates that the introduction of blockchain elections in the European system would uphold the common norms of the electoral process itself. Specifically, given that voter's secrecy is a fundamental feature of every suffrage[123] and is specifically recognised in respect to European parliamentary elections,[124] it follows that this technology could be employed widely as it upholds and furthers one of the pillars of this democratic process through its inherent ability to keep private the identity of the voters.

Transparency

The use of blockchain in the European parliamentary elections has the ability to offer users an increased level of transparency. This could facilitate the introduction of a

[118] Nir Kshetri and Jeffrey Voas, 'Blockchain-Enabled E-voting '(2018) 35(4) *IEEE Software* 95 available at < https://ieeexplore.ieee.org/document/8405627> accessed on 29 April 2020

[119] Ibid

[120] Martin Russell and Ionel Zamfir, 'Digital technology in Elections Efficiency Versus Credibility' (2018) (EPRS Study, PE 625.178). 9

[121] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785

[122] Primavera de Filippi and Aaron Wright, B*lockchain and the Law: The Rule of Code (Harvard* University Press 2018) 20-21

[123] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art.25

[124] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Art.14

layer of dynamism which would arguably boost the empowerment of citizens and, consequently, create a growth in engagement within European democracy. The technology primarily functions as a database, and so has the ability to keep votes public so that everyone that has access can check the records and follow their vote without revealing the identity of the remote voters.[125] This public-private component, facilitated by a blockchain's architecture, is an undeniable benefit of using blockchain for conducting subsequent rounds of elections. Specifically, it would encourage a greater level of transparency and would allow citizens to take more of an active role than simply casting their vote. They would be able to monitor the entire process and understand what really happens to their vote. Coupled with the previous arguments, it is realistic to say that these benefits would provide the necessary context which would lead citizens to trust both the process and the system, both of which have been identified as necessary if the wide usage of blockchain in these sectors is to become a reality.[126]

Increased quality of democracy

The use of blockchain could enable the introduction of a new level of dynamism in European elections, which would enable citizens to take more of an active role in casting their vote, helping them overcome the static and momentary power to hold to account facilitated only by the moment of decision.[127] This level of a dynamic engagement stems from the fact that people would be able to change their vote and update their preference as the events unfold, similar to current systems of internet voting used in some countries.[128]

In order to give substance and generate a better understanding as to why this could benefit citizens and improve the status they currently enjoy. This development could be considered in terms of 'electocracy' described in section two.[129] Consequently, this dynamic approach can partly remedy the current situation perceived to further distance citizens from institutions. This exercise has the capacity to turn the static and momentary vote into a period of reflection and, arguably, the perfect ground for inviting grater dialogue between the electorate and political forces. This, in turn, could bring the electoral exercise closer to the ideal of 'dialogue, debate and diversity'[130] which would put the citizens in a more powerful position than is currently enabled by traditional voting.

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[125] Nir Kshetri and Jeffrey Voas, 'Blockchain-Enabled E-voting' (2018) 35(4) *IEEE Software* 95 available at < https://ieeexplore.ieee.org/document/8405627> accessed 29 April 2020

[126] Svein Ølnes, Jolien Ubacht and Marijn Janssen 'Blockchain in government: Benefits and implications of distributed ledger technology for information sharing' (2017) 34 Government Information Quarterly 355

[127] Lani Guinier, 'Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger' (2008) 71 The Modern Law Review 1, 7

[128] Anna-Greta Tsahkna, 'E-voting: lessons from Estonia' (2013) 12 European View 59, 62

[129] Lani Guinier, 'Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger' (2008) 71 The Modern Law Review 1, 2-3

[130] Iyiola Solanke, *EU Law* (Pearson Education 2015) 86

However, one may argue that the ability to change one's vote may, in fact, trivialise what is a fundamental process for democracy and, subsequently, give rise to more problems rather than solve the issues which lead to the lack of engagement and empowerment of European citizens. Some have voiced the sentiment that using the option of internet voting generally would undermine the symbolism of 'voters heading to the polling station as public expression of citizenship',[131] decreasing rather than increasing citizen engagement with democratic processes and undermining the importance of voting. However, if these arguments are accepted, the reasons why and the manner in which blockchain voting would be introduced in the first place would be misunderstood.

Firstly, this technology would be introduced as a voting alternative to existing systems in the European Union, as recognised not only in the literature that supports application of blockchain in the electoral process,[132] but also, in the electoral reforms that clearly state internet voting would constitute an alternative voting arrangement rather than replacing ballots.[133] Consequently, the suffrage is not at risk of being trivialised or losing any symbolism. Secondly, the fact that a voter may change their vote during the set timeframe should not be perceived as a power which would diminish the importance of the elections, but rather as mechanism which promotes not only the active engagement that follows the development of events, but also a security measure against potential risks, such as voter coercion. Indeed, having this ability would allow those that feel pressured to vote in a certain way to express their real choice.[134] This overcomes the concern of those who see internet voting of any kind as a means for voters to be coerced into voting in a certain way, as opposed to a solution for increasing citizen participation.[135] Thus, having the ability to change your vote in the course of blockchain-enabled elections could be argued to act as an extra security measure to counter the fears of those that oppose the broader introduction of e-democracy, due to risks of coercion or devaluation of the voting process.

Increased accessibility

Using blockchain to enable internet voting brings all previously mentioned layers of security, transparency and dynamism but, importantly for the purpose of mobilising a wider number of citizens, does so without eliminating those benefits associated more generally with the introduction of internet voting. Blockchain-enabled elections still have the ability to increase turnout by offering accessibility and a system that would be responsive to the realities of citizens' lives, as is the case with traditional

[131] Martin Russell and Ionel Zamfir, 'Digital technology in Elections Efficiency Versus Credibility' (2018) (EPRS Study, PE 625.178) 10

[132] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785, 809

[133] European Parliament: Constitutional Affairs – AFCO, *Reform of the Electoral Law of the EU* (2019) available at < https://www.europarl.europa.eu/legislative-train/theme-constitutional-affairs-afco/file-reform-of-the-electoral-law-of-the-eu> accessed on 8 March 2020

[134] Anna-Greta Tsahkna, 'E-voting: lessons from Estonia' (2013) 12 European View 59, 62

[135] Martin Russell and Ionel Zamfir, 'Digital technology in Elections Efficiency Versus Credibility' (2018) (EPRS Study, PE 625.178) 10

internet voting.[136] Increased accessibility is arguably vital for the improvement of the European electoral process for the benefit of European citizens and ultimately to increase the overall democratic quality within the EU.

This theory is supported by the fact that using this technology still reduce the cost and time generally associated with traditional voting, similar to standard internet voting. This decreases the number of people that do not engage in this democratic process due to factors, such as being ill, disabled, far away from a polling station or being a senior citizen.[137] This argument becomes even clearer when the 'second-order elections'[138] theory and less at stake lens are used.[139] Blockchain-enabled voting would provide an alternative way to express democratic will for those groups that struggled or felt that their efforts were not worth the end result of the elections. Blockchain-enabled voting would allow citizens to vote using their computer or phone when they wish to do so, irrespective of the time of the day,[140] thus increasing accessibility. Use of technology could produce a system that better accommodates the realities of all citizens, which may in turn further reduce voter 'apathy' in the elections for the European Parliament.[141]

This argument also demonstrates that blockchain-enabled elections are a feasible alternative to facilitate the aim of extending the right to vote to citizens that reside outside the Union's space. Blockchain-enabled elections have the inherent ability to avoid the problems associated with postal voting or other alternatives that carry the risk of not fully and adequately allowing democratic engagement.[142] As a result, given that every vote would be cast online within a pre-set time frame, there would be no risk of paper ballots being lost. Using this technology and increasing accessibility will ultimately increase the diversity and, through this, the overall quality of the democracy within the European Union. Security and trust in the system combined with the above identified benefits would, as a result, provide the adequate context for recording an increase in the number of citizens that successfully vote and determine the composition of the European Parliament.

Unity

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[136] Anna-Greta Tsahkna, 'E-voting: lessons from Estonia' (2013) 12 European View 59, 63-65

[137] Eurobarometer Survey 91.5 of the European Parliament A Public Opinion Monitoring Study 'The 2019 Post-Electoral Survey: Have European Elections Entered A New Dimension?' (September 2019)

[138] Karlheinz Reif and Hermann Schmitt, 'Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results' (1980) 8 European Journal of Political Research 3, 8-9

[139] Sara B Hobolt, 'The 2014 European Parliament Elections: Divided in Unity?' (2015) 53 *JCMS* 6.

[140] Thad Hall, 'Electronic voting' in N. Kersting (ed.), *Electronic Democracy* (Verlag Barbara Budrich, 2012)

[141] Alexander. Trechsel, Vasyl Kucherenko and Federico Silva 'Potential And Challenges Of E-Voting In The European Union' (EUDO STUDY 2016, PE 556.948) available at<https://cadmus.eui.eu/bitstream/handle/1814/44926/EUDO_REPORT_2016_11.pdf?sequence=1 > accessed on 8 March 2020

[142] Abigail Abrams 'Smartphone Voting Could Expand Accessibility, But Election Experts Raise Security Concerns' (*TIME*, November 2019) available at < https://time.com/5717479/mobile-voting-accessibility/> accessed on 11 April 2020

Blockchain voting could potentially bring a level of unity in the political sphere within the EU. Blockchain enables the creation of a consortium, the existence of a select number of parties which enable access on the network.[143] Consequently, the network would still benefit from the decentralised nature and the advantages that a blockchain has, but the system itself would be somewhat controlled, a viable compromise which would allow for its use in elections.[144] However, instead of being seen as a negative, this aspect has been argued to have a great potential in promoting a greater level of participation and promotion of a shared voting system in which countries in the Union could come together and collaborate.[145] If this was to happen and the possibility exploited, there is potential to improve not only the process, but also increase the cohesion that has been absent due to the lack of European parties.

It has been recognised that the existence of political parties is necessary if the electoral process and citizen engagement was to improve, but their development has been met with resistance, and even the most recent efforts that were debated failed to make a real change.[146] Although it is acknowledged that technology cannot provide the holistic answer that is needed to fully address this problem,[147] it can be argued that using blockchain could achieve an increased level of cohesion between different sets of elections and strengthen the partnership between Member States. This could further pave the way towards debating the necessity of developing pan-European parties following from the technological collaboration, which would provide a starting point for infusing separate member state parliamentary elections with a greater European character.

To summarise, blockchain has the ability to maintain the advantages of traditional internet voting such as speed, reduction of cost and increased accessibility but, at the same time, infusing the process with a higher level of security, transparency and accuracy. They also provide the possibility of allowing Member States and ultimately citizens to engage in a more coherent and united electoral exercise, and so could be a feasible alternative towards modernisation and the improvement of this process for the benefit of European citizens.

B. Blockchain and the ECI

[143] Primavera de Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code (Harvard* University Press 2018) 31

[144] Ibid

[145] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785

[146] Stefan Lehne and Heather Grabbe, '2019 European Parliament Elections Will Change the EU's Political Dynamics' (*Carnegie Europe*, December 2018) available at <https://carnegieeurope.eu/2018/12/11/2019-european-parliament-elections-will-change-eu-s-political-dynamics > accessed on 25 January 2020

[147] Georg Aichholzer, Gloria Rose , Leonhard Hennen, Ralf Lindner, Kerstin Goos , Iris Korthagen, Ira van Keulen ,Rasmus Øjvind Nielsen 'Prospects for e-democracy in Europe- Part I: Literature review' available at < https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603213/EPRS_STU%282018%29603213%28ANN1%29_EN.pdf > accessed on 12 April 2020

Having assessed the extent to which applying blockchain in the electoral process would benefit citizens and bring an improvement to the current state of representative democracy, the analysis will continue with the application of blockchain to the ECI in order to determine the extent to which it can improve engagement in this area. Despite the existence of an electronic centralised system for collecting signature, there are merits in exploring the extent to which blockchain technology could improve and promote a better level of civic participation, and dialogue between citizens and European institutions. This is a result of the decentralised nature of a blockchain allowing for greater levels of cooperation between the parties involved.

Administrative efficiency and transparency

It could be argued that the main area in which the application of blockchain could bring an improvement to the current state of citizen engagement with the ECI is at the administrative stage. This is where, instead of a streamlined level of communication between different actors involved in the process, separation and lack of real time development have gradually become consistent themes. A study conducted in 2018 on the added value of the ECI revealed that usually campaigners need to collect twice as many signatures out of fear that, when different organisations verify and certify the statements of support,[148] some could be declared invalid; thus, the initiative would fail to reach the target.[149] Consequently, this leads to dissatisfaction with the system, and also additional financial burdens on campaigners. However, using blockchain for the purposes of collecting signatures could correct this, as it can enable different organizations in the member states to validate and certify the statements of support as they are recorded. In this way, the administrative stage would benefit from a shorter time frame and the ability of those gathering the signatures to monitor and know in real time how close they are to reaching the requirement for 1 million signatures.

Furthermore, the use of blockchain could lead to an increase in transparency. Firstly, using the technology could increase transparency as to why and when signatures are declared invalid. The whole process will benefit from real time development, which has real potential to reduce the cost and anxiety of collecting supplementary signatures and, furthermore, foster the appropriate climate for increasing the trust in the tools that Europe has devised to promote citizen participation in the legislative process. Consequently, this could have the effect of giving the users a supervisory role and further reemphasise the underlying theme that the ECI has originally tried to promote, this being bringing citizens and institutions closer and creating a multi-faceted approach to law-making.[150]

[148] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] PE/92/2018/REV/1 OJ L 130/55, Art.12

[149] Christian Salm,' The added value of the European Citizens' Initiative (ECI), and its revision' (EPRS Study, European Added Value Unit 2018)

[150] Erik Longo, 'The European Citizen's Initiative: Too much democracy for EU polity (2019) 20 German Law Journal 181

It has been acknowledged that in order to conduct a successful ECI campaign, different kinds of individual activists and organisations need to be involved.[151] The ECI reform makes it clear that statements need to be provided so that the source of funding for campaigns is identified.[152] However, the problem of complexity and fragmentation also arises in this area, stemming from the fact that multiples websites and platforms are used for these purposes, ultimately risking failure to deliver a fully comprehensive account of all the aspects of an initiative. This limits citizen ability to make an informed decision, and where necessary, have a debate about why they may no longer support an initiative. Consequently, as it was described in section 2 of this paper, the transparency and the ability to provide verifiable public records could be helpful in this scenario, as the campaigners would have to use just one platform for all the necessary steps in launching and carrying out the initiative. This, in turn, would not only benefit them, but will also add another dimension to the multi-institutional dialogue. Importantly, it would allow all citizens involved to really understand who supports an initiative financially, transforming the ECI through the use of blockchain, as all the details would be provided in just one space, allowing a greater level of 'checks and balances' from both institutions and citizens.[153]

Increased dialogue

Dialogue and the necessity of contestation have been reiterated as key features in the creation of a public sphere and,[154] arguably, were the reasons the ECI was created in the first place.[155] However, the current system does not allow for this possibility. Essentially, once a statement of support has been provided, citizens are unable to change their mind in the face of additional information. Arguably, the system is again limiting citizens' ability to have their input at the moment of choice, and not make subsequent changes, similar to the traditional form of election.[156] As already discussed, the use of blockchain in elections would allow citizens to have more of a dynamic vote and change their vote as events unfold. Similarly, using blockchain for the ECI, as well as providing transparency with all the documents, including those that concern sponsorships,[157] in one place and open for inspection, would facilitate changes in support for initiatives. Implementation of blockchain would provide all

[151] Manès Weisskircher, 'The European Citizens' Initiative: Mobilization Strategies and Consequences' (2019) Political Studies 1

[152] European Parliament –AFCO, 'Parliament makes it easier to organise a European Citizens' Initiative'(Press Release, March 2019) available at <https://www.europarl.europa.eu/news/en/press-room/20190307IPR30743/parliament-makes-it-easier-to-organise-a-european-citizens-initiative> accessed on 20 April 2020

[153] Desmond. Johnson,' Blockchain-Based Voting in the US and EU Constitutional Orders: A Digital Technology to Secure Democratic Values?' (2019) 10 European Journal of Risk Regulation, 330

[154] Jurgen Habermas 'Why Europe Needs a Constitution'(2001) 11 NLR 5

[155] Justin Greenwood and Katjo Tuokko, 'The European Citizens' Initiative: the territorial extension of a European political public sphere?' (2017) 18 European Politics and Society 166

[156] Lani Guinier, 'Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger'(2008) 71 The Modern Law Review 1, 7

[157] European Parliament –AFCO, 'Parliament makes it easier to organise a European Citizens' Initiative'(Press Release, March 2019) available at <https://www.europarl.europa.eu/news/en/press-room/20190307IPR30743/parliament-makes-it-easier-to-organise-a-european-citizens-initiative> accessed on 20 April 2020

the aspects necessary for contestation and by providing the means to do this would increase the quality of democracy and place citizens at the centre of the mechanism.

Compliance with legal requirements

Whilst it is evident from the above analysis that blockchain has the potential to improve the current ECI process, there is a need to assess whether introduction of blockchain would conform to the legal requirements found in the amended Regulation.[158] The introduction of blockchain that further reinforces security as demonstrated above, would not endanger the sensitive data that is stored and verified. It also clear that it would not create an issue with the manner in which the data is processed. Furthermore, the use of such system still has the ability to remain free of charge,[159] and so, its introduction would not impose a financial burden on users and, consequently, would not run counter to the current established practice. Moreover, the technology is likely to be made available in most of the languages spoken within the Union,[160] so, the system could still be used by all those that wish to support an initiative and enable them to do so in their own language. Blockchain has also been identified as a technology which has the potential to extend accessibility,[161] enabling people with disabilities to engage with it.[162]

There is the potential for improvement and a more streamlined and transparent level of civic participation in the European Union through the introduction of blockchain in the ECI. This represents, as Johnson has suggested in his article, another avenue through which the European Union could implement the use of blockchain in the area of democracy and governance.[163] To conclude, this section has demonstrated that the use of blockchain could correct and increase the level of engagement European citizens currently enjoy. It has proven that the architecture of this system can uphold the legal requirements necessary for these processes and further advance the underlying aims of giving citizens an increased and, perhaps, more dynamic role in the democratic processes provided within the European Union.

5. Limitations in the use of blockchain

Having demonstrated in section 4 the extent to which the application of blockchain would improve the ability of citizens to engage with the democratic setting in the

[158] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] PE/92/2018/REV/1 OJ L 130/55

[159] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] PE/92/2018/REV/1 OJ L 130/55, Art. 10

[160] Jane Susskind, 'Decrypting Democracy: Incentivizing Blockchain Voting Technology for an Improved Election System ' (2017) 54 San Diego L Rev 785, 808

[161] Nir Kshetri and Jeffrey Voas, 'Blockchain-Enabled E-voting '(2018) 35(4) *IEEE Software* 95 available at < https://ieeexplore.ieee.org/document/8405627> accessed 1 May 2020

[162] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the Europeans citizens' initiative [2019] PE/92/2018/REV/1 OJ L 130/55, Art. 10

[163] Desmond. Johnson,' Blockchain-Based Voting in the US and EU Constitutional Orders: A Digital Technology to Secure Democratic Values?' (2019) 10 European Journal of Risk Regulation, 330, 354-55

European Union and, at the same time, the extent to which the democratic processes themselves could benefit from technological advancements, this final section will focus on discussing some limitations that could arise from digitalisation and how these could be remedied so that the blockchain could be adopted.

A. Democracy and private actors

The first potential limitation that can be identified with the introduction of blockchain in democratic processes is that the implementation would have to be largely carried out by private actors. This will be specifically the case if, as Johnson has identified, permissioned blockchains would be used for these processes.[164] It has been recognised and accepted that, especially in the implementation of technology in administrative services, outsourcing is a normal step.[165] However, implementation of such technology in the European democratic setting would raise potential question in terms of the transparency and how these commercial entities would be regulated so that the process remains open, transparent and covert in terms of the elections.[166]

However, these may not represent the fatal blow for adopting or testing the feasibility of this option for citizens' engagement in the long run. Firstly, appropriate regulation could be devised, and the technology could be developed in such a way to address concerns about oversight and how to hold to account private entities engaged in facilitating the application, especially given the emphasis that exists in the Union for working with industry to achieve the best result. Furthermore, looking at real case studies of successful application in different member states, such as Estonia who have achieved a working balance in their use of blockchain for e-health records,[167] or the way in which the West Virginia blockchain-enabled midterm elections could offer ideas about different management strategies that the European Union could use for adequate oversight.

B. Blockchain and General Data Protection Regulation (GDPR)

The previous section has revealed that blockchain, through its encryption and immutable structure, can offer an adequate medium through which democratic processes can be carried out without endangering the data or the values that citizens and institutions have for democratic systems. But despite this, there has been an ongoing debate as blockchain may not comply with all data protection requirements. Finck has argued that there may be some concerns in the way the architecture and the

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[164] Johnson (n163) 330

[165] Alexander Trechsel, Vasyl Kucherenko and Frederico Silva 'Potential And Challenges Of E-Voting In The European Union' (EUDO STUDY 2016, PE 556.948), 16 available at <https://cadmus.eui.eu/bitstream/handle/1814/44926/EUDO_REPORT_2016_11.pdf?sequence=1 > accessed on 8 March 2020

[166] Anne-Maria Oostveen,' Outsourcing Democracy: Losing Control of E-Voting in the Netherlands' (2010)2(4) Policy & Internet 201, 204-205

[167] e-Estonia, 'e-health records' available at <https://e-estonia.com/solutions/healthcare/e-health-record/> accessed on 16 September 2020

sought-after qualities of a blockchain can adapt and uphold the principles found in the GDPR.[168] Specifically, it has been highlighted that because a blockchain is immutable, there may be serious questions about how the data that is put on the nodes that allow the network to function, will allow the right to be forgotten to be enforced.[169] To introduce blockchain as a way to increase the quality of democracy, these apparent tensions would need to be addressed. A balanced solution which incorporates both the benefits of the technological innovation as well as citizens' rights over their data would have to be found. This would not be impossible given that, as Finck concludes, the right to be forgotten has seen different standards of interpretation which do not point towards 'absolute deletion' as the only available solution.[170]

C. Novel technology

The novelty of this technology was highlighted in this paper to be the force that has pushed governments to try and introduce its application more broadly in public services and assess its potential in providing a platform which could lead to the realisation of a functioning e-democracy. However, this novelty and perhaps the architecture may also present one of its shortcomings. Firstly, as Kshetri and Voas have highlighted, blockchains at this stage are quite slow in validating transactions, so in this current form they may not be ready to roll out for elections.[171] However, the technology could be developed and modelled or, perhaps, the existing technologies could be analysed so the best solution found, allowing the technology to be implemented.

Secondly, trust has been reiterated throughout this paper as a necessary ingredient for both introducing blockchain in democratic processes and encouraging citizens to use this system. It follows that, to achieve this, citizens as users would need to understand how to use this technology and why this is better than its alternatives so that they are persuaded to exploit the advantages of using blockchain. Consequently, without providing accessible information about how to use the system and, importantly, why its usage will benefit those that engage with it, all the previously identified benefits will remain unlocked. However, this limitation is unlikely to affect future implementation given that the EU has increasingly been providing information about its processes and how these impact citizens.[172] It is hard to see that such course of action would not be followed when implementing blockchain; this trust in the system would be created through communication with citizens.

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[168] Michèle Finck, *Blockchain Regulation and Governance in Europe* (Cambridge University Press 2019) 103-104

[169] Ibid 106-107

[170] Ibid 108

[171] Nir Kshetri and Jeffrey Voas, 'Blockchain-Enabled E-voting '(2018) 35(4) *IEEE Software* 95 available at < https://ieeexplore.ieee.org/document/8405627> accessed 1 May 2020

[172] 'What Europe does for me' available at < https://what-europe-does-for-me.eu/en/portal> accessed on 29 April 2020.

Lack of electronic identifications could also be seen as a current limitation that would restrict the broader application of this technology. In Estonia, which actively uses blockchain for a number of public services, although not voting, it is clear that these processes rely on the use of electronic identification methods.[173] If this was necessary for implementation at EU level, it could complicate the processes rather than ease them and further create differences between member states. However, this should not be the case in the long term and, in fact, blockchain could be used by the EU to develop the necessary infrastructure, the technology offering the means for harmonising identification methods which would pave the way towards wider blockchain adoption for democratic purposes.[174]

D. Political changes

One final limitation that needs to be addressed, if the aim of increasing citizens' participation is to be fully achieved, is that the introduction of blockchain itself would not completely remedy all the criticisms of democracy and participation in the EU. Even with the use of blockchain, there is still a need to create more cohesion in elections so that they would represent a truly European exercise. It may be that through the addition of blockchain, as it was described in section 4, some level of coordination and unity between Member States could be achieved and it would make the process more likely to encourage people to engage in elections. However, other factors that limit engagement would persist. The ongoing lack of European political parties, which have been identified as a way to add a deeper dimension and aid citizens to understand and engage with the democratic settings of the European Union, is a particular issue. The introduction of blockchain may pave the way for political debate in this area which, after seeing how the unity provided by technology has the potential to improve the current situation and pre-empt a political shift to more Europe wide political parties.

Similarly, the ECI needs to undergo some changes in order to fully increase the empowerment of citizens and encourage a more active engagement. These changes should aim to reduce the power the Commission has over this process, especially the way in which it deals with a successful proposal. Although it has been recognised that the purpose of ECI is that of an 'agenda-setting' tool rather than legislative per se,[175] the fact that the Commission can choose not to launch any legislative change[176] will continue to discourage citizens from engaging confidently with this tool, even in the light of the advantages allowing the ability to withdraw a statement of support would

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[173] Anna-Greta Tsahkna, 'E-voting: lessons from Estonia' (2013) 12 European View 59, 60.

[174] David Allessie, Maciej Sobolewski, Lorenzino Vaccari and Francesco Pignatelli (Editor), 'Blockchain for digital government' (EUR 29677 EN, Publications Office of the European Union, Luxembourg, 2019) 61.

[175] Pawel Glogowski and Andreas Maurer 'The European Citizens' Initiative- Chances, Constraints and Limits' (2013) (IHS Political Science Series, Working Paper 134) available at <https://irihs.ihs.ac.at/id/eprint/2199/ > accessed on 25 April 2020.

[176] Jasmin Hiry 'The European Citizens' Initiative: no real right of initiative but at least more significant that a petition to the Parliament' (*European Law Blog*, 5 February 2020) available at < https://europeanlawblog.eu/2020/02/05/the-european-citizens-initiative-no-real-right-of-initiative-but-at-least-more-significant-than-a-petition-to-the-parliament/> accessed on 7 March 2020.

be an important improvement in the process. Although it may make it more difficult for a threshold to be reached, if people can withdraw their support at any time, a possible solution would be to allow for a change of statement in support during a set timeframe.

6. Conclusion

To conclude, this paper has assessed the extent to which the introduction of blockchain, in both the representative and participatory democratic processes that exist within the European Union, can address and improve the current limitations faced by citizens. It has been identified that the introduction of blockchain-enabled voting in elections for the European Parliament has the potential to address criticisms that the traditional electoral exercise does not acknowledge the realities of the lives of citizens and allow the exercise of the rights that come with the European citizenship. The introduction of blockchain in elections has been proven to offer a feasible alternative which would improve the process and, simultaneously, benefit citizens, offering a more dynamic system of voting which can reach a larger pool of citizens and adapt to their lifestyle, limiting the impact of social and economic factors on their ability to vote. Furthermore, it has identified that the nature of this technology could also impact the manner in which the de facto democratic processes are carried out, shifting the debate towards the merits of adopting a more dynamic democratic representation as an additional means to mobilise citizens.

Similarly, the use of blockchain in the ECI has the potential to improve the manner in which citizens engage with this instrument and, consequently, increase democratic empowerment. It has been identified that there are benefits in placing this process on a blockchain, given that the current system keeps separate and distant, actors that should be collaborating. Furthermore, the use of this technology could start a debate about potential changes to the process itself, which would further increase citizens' trust that, by using ECI their collective actions could make a real change. Using blockchain in ECI could also enable engagement in discussion about problems of European rather than local interest.

Some limitations have been identified in the potential implementation of blockchain technology. However, these are not fatal to the possibility of introducing blockchain, given that necessary infrastructure and legislative framework could be consolidated so that these concerns are adequately addressed. Ultimately, working to address these challenges is desirable, especially in the light of the real potential the use of blockchain would have in increasing in citizens' engagement with European democracy and reshaping the overall quality of this democratic setting.

To What Extent Have the General Data Protection Regulation's Reformed Consent Requirements Enhanced Consumer Protection Regarding Non-Sensitive Personal Data?

SOFIA INGA TYSON

Abstract

Within the European Union (EU), data processing continues to rise at an unprecedented rate, despite consumers expressing concern about the ubiquity of personal data processing. This paradoxical behaviour provokes concern about the meaningfulness of the consent provided by consumers and thus the protection afforded to consumers by existing frameworks. This is a profound failure considering consent is the most common basis for legitimising personal data processing and is an integral tool for consumer protection. However, the recent incision of the General Data Protection Regulation (GDPR) promised to enhance the control possessed by consumers over their personal data and protect their ability to make autonomous, informed and transparent decisions. However, due to the recency of this legal framework, this claim has lacked sufficient exploration thus far. Therefore, this paper seeks to critically examine whether the GDPR's reformed consent requirements have truly enhanced consumer protection regarding non-sensitive personal data. It will critically review the doctrinal distinctions between consent under the GDPR and the Data Protection Directive (DPD) and wide bodies of interdisciplinary literature to conclude that whilst the law has made inherent improvements to the position of the consumer under the guise of consumer protection theory, the transformative and protective effects of the GDPR are largely illusory and overstated in practice because the GDPR remains contingent on the same flawed perceptions that led to the demise of the DPD. On this basis, regulatory interventions beyond black letter law are advocated and further research into these are prompted.

1. *Introduction*

A. Impetus of Research

Within the European Union (EU), data protection has been elevated to a stand-alone fundamental right[1], evidence of its growing recognition and importance as distinct to the pre-established right to privacy. This status is largely justified by the integral objectives of separating private and public spheres; including the intimacy and freedom from social and institutional control that such a right seeks to protect[2]. Despite this recognition, an alarming trend has simultaneously ensued amongst individuals, whereby 'volunteered' data has rapidly become ubiquitous[3], particularly due to our increased reliance on the Internet of Things and social media. Most problematic of all, it has been demonstrated that consumers fail to acknowledge that they are even volunteering this data to others[4], which appears to heavily undermine the fundamental role of consent within the context of data protection. Events in recent decades have clearly portrayed a newfound distrust among consumers in the protection afforded to them by both intermediaries and the law. The Cambridge Analytica revelation detailed how 50 million Facebook users had been unknowingly subject to an unprecedented scale of data harvesting and that their data had subsequently been used to exploit their political preferences[5]. Not only did the scandal function as clear evidence of a failure to protect consumer interests and rights on this occasion, but it triggered a heated debate on the adequacy of the law on data processing by demonstrating that too often, consumers are largely uninformed, disempowered and demonstrate paradoxical tendencies by permitting processing contrary to their true wishes[6].

[1]Charter of Fundamental Rights of the European Union [2012] C 326/02, Article 8

[2] Stephen Margulis, 'Privacy as a Social Issue and Behavioural Concept' (2003) Journal of Social Issues 59(2)

[3] Experian, '70% of Consumers Would Share More Data If There Was A Perceived Benefit, With Greater Online Security and Convenience At The Top Of The List' *CISION PR Newswire* (29 January 2019) <https://www.prnewswire.com/news-releases/70-of-consumers-would-share-more-data-if-there-was-a-perceived-benefit-with-greater-online-security-and-convenience-at-the-top-of-the-list-300785756.html>accessed 27 February 2020

[4] David Lyon, 'Surveillance, Snowden and Big Data: Capacities, Consequences, Critique' (2014) Big Data and Society 1(2)

[5] Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 Million Facebook Profiles Harvested For Cambridge Analytica In Major Data Breach' *The Guardian* (17 March 2018)<https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>accessed 27 February 2020

[6] Patricia Norberg, Daniel Horne and David Horne, 'The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviours' (2007) 41(1) Journal of Consumer Affairs

Fittingly, the General Data Protection Regulation[7] (GDPR) - the focus of this paper- came into force at the height of the discussion and promised a gold standard regulatory tool[8] and to extend on the protection afforded by its predecessor: The Data Protection Directive (DPD). One of the core improvements to the law was the provision of stricter, further clarified and more onerous obligations imposed on data controllers and processors when requesting consent from consumers, which is the most popular way of legitimizing personal data processing[9]. This paper takes a critical approach and assesses the extent to which, in both theory and practice, the GDPR's developed consent requirements have enhanced the protection afforded to consumers when managing their non-sensitive personal data by comparison to those requirements previously operating under the DPD.

B. Methodology

This paper examines the doctrinal consent requirements for processing **non-sensitive personal data** under both the DPD and GDPR and a vast range of literature to assess whether the GDPR's consent requirements have enhanced protection for consumers. Notably, it will not examine the consent requirements for sensitive or special categories of data as these differ considerably. Whilst being a doctrinal analysis orientated upon legal acts, this paper goes beyond a purely doctrinal approach since it addresses whether black letter law has reformed to enhance consumer protection in **both theory and practice**. Whilst a common limitation of purely doctrinal research is that there is often a disconnect from reality and the practical application of the law[10], this paper sought to address this challenge by referring to and integrating interdisciplinary discussion and critically reviewing literature throughout, thus allowing for a comprehensive analysis - both pragmatic and theoretical.

C. Aims and Objectives

The paper begins with a foundational discussion of what effective consumer protection entails and the rationales that comprise it, as this is necessary to enable the paper to measure advancement throughout. It will then draw upon the similarities of data protection and consumer protection and use these as the rationale for applying consumer protection standards to data protection frameworks and framing this research question.

For legal background, Chapter Two engages with the broader history of data protection law within Europe and proceeds to briefly discuss the two legal frameworks this paper critically examines: the GDPR and its predecessor, the DPD.

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[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (GDPR 2018)

[8] Giovanni Buttarelli, 'The EU GDPR As A Clarion Call For A New Global Digital Gold Standard' (2016) International Data Privacy Law 6(2) 77-78

[9] Bert-Jaap Koops, 'The Trouble With European Data Protection Law' (2014) 4(4) 250-261

[10] Dawn Watkins and Mandy Burton, *Research Methods In Law* (Routledge 2013)

Moving forward, Chapter Three entails a doctrinal, critical comparison, examining the former and reformed consent requirements against one another. It seeks to evaluate the extent to which each change has enhanced the provision of consent to afford greater consumer protection in both theory and practice.

Chapter Four introduces relevant considerations external to the doctrinal changes of the law, such as the lack of redress opportunities for consumers to enforce their rights and the likely shift to a separate legal basis for processing. These considerations will allow the paper to construct a more realist and comprehensive answer to the research question.

Finally, the paper concludes that the improvements proposed by the GDPR's more expansive approach to consent offer little more than a theoretical benefit to consumers and continue to largely fail them in practice. It will further conclude that more extensive consumer protection naturally requires a review of the law's perception of the ideal consumer, particularly considering the findings from behavioural economics which render the current perception deeply flawed. Research conducted throughout leads the paper to advocate for 'nudging' mechanisms to be embedded by code to promote 'better' decisions and guide consumers. It also argues that far greater research must first be conducted by regulators for such a regime to be possible.

1. The Relationship Between Consumer Protection and Data Protection

To evaluate the extent to which the GDPR's consent requirements have enhanced consumer protection, it is imperative to first understand what effective consumer protection entails and the rationales which comprise it, since these provide the foundations against which the consent requirements will later be measured.

A. What Is Consumer Protection?

Despite the absence of a single, established definition, consumer protection is broadly understood as a response to consumer risks[11], harms and detriment[12]. More specifically, it is proposed that contentions arise where consumer sovereignty is threatened or impeded on, primarily by restrictions imposed on a consumer's ability to exercise choice[13]. Averitt and Lande's neoclassical view is predicated on the idea that an ideal market is determined by consumers, thus making them sovereign. Any impediment to a

[11] Rhonda Smith and Stephen King, 'Does Competition Law Adequately Protect Consumers?' (2007) European Competition Law Review 28(7) 412-424

[12] Office of Fair Trading, 'Consumer Detriment Under Conditions Of Imperfect Information' (1997) Research Paper p.60

[13] Neil Averitt and Robert Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) Antitrust Law Journal 65

consumer's freedom to decide is rendered a threat to the consumer and the market, so necessitates a response[14]. However, this is notably an expansive definition and one which more contemporary literature has sought to refine further to situations where consumer welfare has been lost at the expense of either the activity or inactivity of traders[15]. Whilst this diversity of opinion portrays a blurred line regarding what specifically constitutes a consumer protection problem, there is a vague consensus that consumer protection seeks to safeguard consumers from detriment and disparity, and the rationales sought to achieve this aim are much more firmly established in both theory and practice.

B. Principles of Effective Consumer Protection

One dated, yet core tenet of consumer protection policy is the principle of party autonomy. Whilst being subject to divergent interpretation itself, autonomy largely refers to the freedom of natural persons to determine and regulate their own relationships and contracts freely from substantive intervention[16]. Despite consensus on the broad definition of autonomy, variance in interpretation of this principle has been notable, particularly due to the different implications that such variations entail and what these mean for the role of consumer protection policy.

Early commentary construes autonomy traditionally and substantively by suggesting that both parties - including the consumer - are expected to act entirely self-reliantly and forage for the information that they deem relevant before concluding any contracts[17]. Substantive autonomy justifies exempting the trader from information and disclosure duties on the basis that, under the guise of autonomy, the consumer is burdened with acting entirely alone and protecting themselves[18] - part of which involves taking the initiative to retrieve the information necessary to do so. Contrastingly, more contemporary and liberal interpretations pursue autonomy through the lens of fairness. Willett posits that, contrary to early perceptions, true autonomy can only be achieved where the consumer is *sufficiently empowered* to provide their informed consent[19]. This approach naturally imposes greater duties on traders to be transparent and disclose relevant information rather than expecting consumers to obtain this independently[20]. Such an approach is adopted by the EU, who consistently seek to empower consumers through the provision of transparency and information. This is evident from their

[14] Ibid
[15] Smith and King (n 11)
[16] Michael Coester, 'Party Autonomy and Consumer Protection' (2014) Journal of Consumer and Market Law 3(3) 170-177
[17] Ruth Sefton-Green, 'Duties To Inform v Autonomy: Reversing The Paradigm (From Free Consent To Informed Consent)? - A Comparative Account of French and English Law' in Geraint Howells and Reiner Schulze (eds) *Information Rights and Obligations - The Impact on Party Autonomy and Contractual Fairness* (Ashgate: 2005)
[18] Ibid
[19] Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Routledge 2016).
[20] Ibid

emphasis in numerous directives on making contract terms[21], pricing[22], hidden charges[23] and relevant information[24] clear, intelligible and timely to better protect consumers.

Transparency is evidently another significant objective of consumer protection, since not only is it recognised as an effective protective tool by regulators, but academia has also rendered information duties as instrumental to facilitating self-determination and maximising opportunities for autonomous consumer choice[25]. The underlying rationale is that, as observed by the European Commission, individuals make suboptimal decisions in the absence of transparency[26] and thus outcomes of decisions often fail to align with their intentions and expectations, undermining their autonomy. Moreover, it is accepted across wide consumer protection matters that transparency enables consumers to make value decisions on products with greater accuracy.

Additionally, a compelling wealth of literature detailing the detrimental impact of information asymmetries in commercial relationships blames opacity for causing bargaining power disparity[27] and making individuals susceptible to greater pressure from traders[28]. Cartwright observes that consumers that benefit from fewer options and less knowledge are most likely to be subject to the greatest pressure from the select number of traders dealing with them since these can exploit such circumstances[29]. The UK credit sector is a prime example of this correlation, whereby financially worse off individuals who lack access to mainstream financial credit services due to their backgrounds and knowledge are therefore forced to accept disproportionately high

[21]Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/29

[22] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers [1998] OJ L80/27

[23]Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64

[24]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22

[25] Hans Micklitz, Jules Stuyck and Evelyn Terryn, *Cases, Materials and Text on Consumer Law* (Oxford: Hart 2010)

[26] European Commission, 'Commission Staff Working Paper: Consumer Empowerment In The EU' (2011) p 14 para 31 <https://ec.europa.eu/info/sites/info/files/consumer_empowerment_eu_2011_en.pdf> accessed 13 March 2020

[27] Jacob Ziegel, 'The Future of Canadian Consumerism' (1973) Canadian Bar Review 51(2)

[28] Peter Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) Journal of Consumer Policy 32(2) 119-138

[29] Peter Cartwright,'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (2011) Nottingham University of Business School Research Paper 78 <https://www.nottingham.ac.uk/business/businesscentres/gcbfi/documents/researchreports/paper78.pdf> accessed 16 March 2020

interest rates to in order to meet their needs and demands[30]. Indeed autonomy, transparency and empowerment are overriding themes in consumer protection and each objective engages deeply with one another given that asymmetries in both power and information fundamentally threaten the prospect of autonomous consumer choice.

Imperatively, whilst policy aspires to these rationales, contemporary discourse has proven critical of these objectives due to their contingency on the consumer as an entirely rational economic actor - a perception which has been convincingly contested by findings from behavioural economics[31]. These critiques have permeated recent consumer protection literature[32], with the success of the information paradigm being particularly heavily undermined by evidence of heuristic limitations and inconsistent cognitive abilities of consumers[33]. The ramifications of this will be further explored throughout the paper's analysis of legal frameworks and it will be found that on this basis, many legal developments make theoretical progress in terms of protection, but are undermined in practice as they falsely construe the consumer as one with unbounded rationality and so protect only the ideal consumer.

C. The Commonalities of Consumer Protection and Data Protection

Importantly, data protection rationales bear considerable likeness to those just described. In fact, both fields of law possess the mutual aim of *'redressing imbalances between the individual and powerful companies[34]'*, simply in different contexts. Impetus for data protection regulation continuously refers to individuals regaining control over their personal information as a central aim[35]. With subjective interpretations understanding control as self-determination and an extension of empowerment[36], it is clear that data protection and consumer protection share the same broad goal.

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[30] Paul Ali, Cosima McRae and Ian Ramsay, 'Payday Lending Regulation And Borrower Vulnerability In The UK And Australia' (2015) Journal of Business Law 3 223-255

[31] Richard Posner, 'Rational Choice, Behavioural Economics and The Law' (1998) Stanford Law Review 50(5) 1551-1575

[32] Jacqueline Minor, 'Consumer Protection In The EU: Searching For The Real Consumer' (2012) European Business Organisation Law Review' 13(2)

[33] Geraint Howells and Thomas Wilhelmsson, 'EC Consumer Law: Has It Come of Age?' (2003) European Law Review 28(3) 370-388, Annette Scholes, 'Behavioural Economics and the Autonomous consumer' (2012) 14 297-324

[34] European Data Protection Supervisor, 'EDPS Calls For Closer Alignment Between Consumer and Data Protection Rules in the EU' (8 October 2018) <https://edps.europa.eu/press-publications/press-news/press-releases/2018/edps-calls-closer-alignment-between-consumer-and_en> accessed 13 March 2020

[35] European Commission, 'It's Your Data - Take Control' (2018) Publications Office of The European Union <https://op.europa.eu/en/publication-detail/-/publication/fe2cb115-4cea-11e8-be1d-01aa75ed71a1> accessed 15 March 2020

[36] Luc Wathieu, Lyle Brenner, Ziv Carmon, Aimee Drolet, John Vourville, Nathan Novemsky, Rebecca Ratner, George Wu, Amitava Chattopadhyay and Klaus Wertenbroch, 'Consumer Control and Empowerment: A Primer' (2002) Marketing Letters 13(3) 197-305

Despite these similarities, the decision to apply consumer protection rationales to data protection regulation is a topical one. The distinctiveness of both consumer law and data protection law has led some to describe the two fields as disparate and independent[37]. Such can be evidenced by the lack of regard paid by data protection law to consumer protection and vice versa. For example, Rhoen details how the GDPR mentions consumer protection on only one occasion and how consumer protection agendas are similarly silent on the topic of data protection[38]. Additional authority has likewise noted the absence of collaboration between the two fields' regulators[39], which only further appears to support the conclusion that the fields are segregated rather than cohesive.

However, the grounds for distinction are relatively weak since ample evidence demonstrates that the protection of data necessarily protects consumers too - thus advocating that consumer protection rationales are of immense relevance to data protection. Foremost, the subject matter of both the DPD and GDPR is refined solely to personal data, meaning data that *'relates to an identified individual[40]'*. By drawing such a strong correlation between the commodity and the consumer, it persuasively suggests that protecting data personal to a consumer will necessarily protect the consumer also. In fact, the protection of personal data is arguably a wider quest to protect the dignity and autonomy of natural individuals[41] - a goal that is coherent with the rationales of consumer policy discussed earlier.

Additionally, it remains widely acknowledged that individuals often act simultaneously as both a consumer and a data subject due to the expanding role of data in the field of commerce. Mayer-Schönberger and Cukier's discourse on the increasingly prevalent trend of datafication[42] further supports this assertion by describing how data controllers are increasingly collecting data within the fields of practically all existing consumer activities[43] - a tendency that inevitably merges the two fields of data and consumption. In

[37] Natali Helberger, Frederik Borgesius and Agustin Reyna, 'The Perfect Match? A Closer Look At The Relationship Between EU Consumer Law and Data Protection Law' (2017) Common Market Law Review 54 p1427

[38] Michiel Rhoen, 'Beyond Consent: Improving Data Protection Through Consumer Protection Law' (2016) Journal on Internet Regulation 5(1)

[39] European Data Protection Supervisor, 'Privacy And Competitiveness In The Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection In The Digital Economy' (2014) Preliminary Opinion Of The European Data Protection Supervisor <https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf> accessed 16 March 2020

[40] GDPR 2018, Article 4(1)

[41] Francisco Costa-Cabral and Orla Lynskey, 'Family Ties: The Intersection Between Data Protection and Competition in EU Law' (2017) Common Market Law Review 54(1) 11-50

[42] Viktor Mayer-Schönberger and Kenneth Cukier, 'The Rise of Big Data: How It's Changing The Way We Think About The World' (2013) 92 Foreign Affairs 28-40

[43] Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think* (John Murray Publisher 2013)

light of the globalisation of core economic activities[44] and the fact that *'almost every online transaction requires the disclosure of personal data[45]'*, the applicability of consumer protection rationales to data protection issues is evident - in fact, increasingly so.

Finally, distinctions have been made on the basis that consumer policy governs transactions involving monetary value and thus consumer protection does not stretch to those who receive digital services at the expense of data instead. Buttarelli contests this fiercely, arguing that consumer protection ought to be extended beyond monetary exchanges to include the processing of personal data[46]. Although not an established currency, personal data undoubtedly possesses monetary value[47], which fundamentally undermines the need for such a distinction. Research has frequently recognised the economic value of personal data[48] and contemporary examples of wildly successful data-driven business models support such an assertion. For example, the profitability of business giants such as Google, which generate income primarily from advertising and selling third party data[49] indicates the growing economic value of data, the growth of which has even resulted in claims that data has overtaken oil as the most lucrative resource[50].

Even upon considering the distinctions between consumer and data protection, the overlap between and theoretical connections of consumer protection and data protection are strong enough to render it fitting to apply consumer protection rationales to the GDPR, particularly since consumer protection is widely acknowledged as affording more comprehensive protection[51]. For this reason, this paper measures the progress made by consent under the GDPR in terms of the consumer protection it affords.

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[44] Manuel Castells, *The Power of Identity: The Information Age - Economy, Society and Culture* (Wiley-Blackwell 2nd Edn 2009)

[45] Costa-Cabral and Lynskey (n 41) p1

[46] European Data Protection Supervisor, 'EDPS Calls For Closer Alignment Between Consumer and Data Protection Rules in the EU' (8 October 2018) <https://edps.europa.eu/press-publications/press-news/press-releases/2018/edps-calls-closer-alignment-between-consumer-and_en> accessed 14 March 2020

[47] Costa-Cabral and Lynskey (n 41)

[48] Asunción Esteve, 'The Business of Personal Data: Google, Facebook and Privacy Issues in the EU and the USA' (2017) 7(1) International Data Privacy Law

[49] Channel 4, 'If Google Is Free, How Does It Make So Much Money? *Channel 4 News* (27 November 2012) <https://www.channel4.com/news/if-google-is-free-how-does-it-make-so-much-money> accessed 13 March 2020

[50] The Economist, 'The World's Most Valuable Resource Is No Longer Oil, But Data' *The Economist* (6 May 2017)<https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed 24 February 2020

[51] Rhoen (n 38)

2. Introducing the Legal Frameworks

A. The History of European Data Protection Law

Data protection regulation has a dated history within Europe, with the first legislative framework passed by Germany in 1970[52]. The Hessisches Datenschutzgesetz was a federal act and was briefly followed by the first national data protection law: the Swedish *Datalagen*[53]. Following these efforts, data protection remained increasingly topical, with the OECD issuing guidelines that reflected their concern surrounding the increasing use of computers to process business transactions[54]. The guidelines emphasised the need for greater harmonisation amongst member states and the need to uphold human rights without interrupting data flow[55]. Whilst this illustrates the long-existing desire to protect individuals' data, the face of data protection law within Europe has changed considerably, particularly following the European Data Protection Directive in 1995 (DPD)[56] which was created with the objective of delivering this greater legislative harmonisation within member states.

The directive was a pivotal development and is commonly deemed reflective of the technological advancements that occurred in the years leading up to its incision[57]. However, as this chapter will go on to discuss, the fast progression of data harvesting, volunteering and processing invited a much more harmonic and elaborate framework than that which the directive was capable of, a framework later delivered in the form of the GDPR. Globally, both scholars and lawyers have commended the new legal framework, regarding it as something for other jurisdictions to work towards[58]. It is this 'landmark' development from the DPD to the GDPR that this paper seeks to assess, with a focus on the development of consent and its increased potential to protect consumers.

B. The European Data Protection Directive 1995

The DPD was designed and adopted as a result of the European Commission's motivation of an 'ever closer union' and it sought to harmonise data protection law across the EU member states. The union anticipated that the directive would encourage those states which lacked a comprehensive protective framework, such as Italy, Spain and

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[52] Bundesdatenschutzgesetz (BDSG) 1970

[53] Datalagen (1973: 289)

[54] OECD, 'Guidelines on The Protection of Privacy and Transborder Flows of Personal Data' (1980) <https://www.oecd.org/internet/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm> accessed 12 March 2020

[55] Ibid

[56] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281 (DPD 1995)

[57] Andrew Murray, *Information Technology Law: The Law and Society* (Oxford University Press 2019)

[58] Sabine Muscat, 'How GDPR is Driving the US Privacy Legislation Debate' (2019) Green European Journal

Greece to establish them[59]. Adopted in October 1995, the legal act took the form of a directive, meaning that under EU law, member states were obliged to transpose the directive into their national legislation, yet were given an extent of flexibility and discretion in doing so. European law merely requires that directives are transposed in a form that achieves the core goals embodied by the directive but authorises member states to self-determine how to achieve these mutual aims[60]. Demonstrably, the UK implemented the directive through the Data Protection Act 1998[61], which referred to consent but did not define it, leaving the UK courts and tribunals under the obligation to interpret the statute in accordance with the DPD's wording and purpose.

The directive sought to regulate the processing of *'any information relating to an identified or identifiable natural person[62]'* and took an expansive interpretation of personal data in doing so. It also adopted an expansive definition of processing, defining it as *'any operation or set of operations … performed upon personal data, whether or not by automatic means[63]'*. In light of these constructions, the directive had a far-reaching scope and made data controllers who act under a private or public guise[64] responsible for their own compliance with the union rules. Although the DPD embodied principles which retain relevance today, as will be described, various aspects of the DPD grew outdated - making it unfit for purpose.

C. The Driving Force of the GDPR

The need for a new legal framework to replace the DPD was rife and thus the GDPR's developments were responsive to the directive's weaknesses[65]. Most indicative of this was the age of the DPD, something that scholars have eagerly noted in their work, even rendering it archaic[66]! The DPD was negotiated and drafted in the period between 1992 and 1995, prior to the introduction of some of society's most prevalent modern comforts such as the Internet, social media and data-driven business models[67] - all of which quickly

[59] Lee Andrew Bygrave, *Data Privacy Law: An International Perspective* (Oxford University Press 2014)
[60] Iyiola Solanke, *EU Law: Longman Law Series* (Pearson Education 2015)
[61] The Data Protection Act 1998
[62] DPD 1995, Article 2(a)
[63] Ibid Article 2(b)
[64] DPD 1995, Article 2(d)
[65] Gabriela Zanfir, 'Forgetting About Consent. Why The Focus Should Be On 'Suitable Safeguards' in Data Protection Law' in Serge Gutwirth, Ronald Leenes and Paul De Hert (eds) *Reloading Data Protection* (Dordrecht: Springer Netherlands 2014) 237-57
[66] Simon Davies, 'The Data Protection Regulation: A Triumph of Pragmatism over Principle' (2016) European Data Protection Law 3 p.293
[67] Gill Press, 'Facebook, Google, Apple, Other Data-Driven Firms, Defy The Global Move To Strong Privacy Regulations' *Forbes* (26 June 2019)< https://www.forbes.com/sites/gilpress/2019/06/26/facebook-google-apple-other-data-driven-firms-defy-the-global-move-to-strong-privacy-regulations/#68fb74cb1ae0 > > accessed 27 February 2020

made it poorly-equipped for contemporary use[68]. Within the dynamic and evolving digital atmosphere the DPD was, or at least would naturally become, a dysfunctional approach to regulation.

Additionally, commentators have reported numerous occasions whereby both the CJEU and nation states had made the DPD subject to creative and divergent interpretation[69], failing to unify the law in the way intended by the EU. The CJEU had been forced to approach cases generously and creatively, as exemplified by the Google Spain case[70] which produced the seminal ruling on the right to be forgotten. The case involved the right of an ordinary citizen to request for search engines to remove content relating to and involving their personal information when it is *inadequate, irrelevant, no longer relevant or excessive'*[71]. Despite not being a right already enshrined in the DPD, the CJEU held that search engine operators owed a responsibility for the processing of third parties and thus that a right to erasure was secured by the data subject[72]. The court's reasoning emphasised the increasingly complex privacy rights of consumers and the need to construe law in a flexible way to strike a more adequate balance[73]. This appears to function as sturdy evidence that reform was entirely necessary to ensure the law was fit for the digital age whilst also not jeopardising the principle of legal certainty in the future. These vulnerabilities of the DPD paved the way neatly for its successor, the GDPR.

D. The General Data Protection Regulation 2018

In January 2012, three heated years of debate were followed by the European Commission's decision to replace the DPD with a regulation, with anticipations that this would create greater legal certainty and cohesion as a result[74]. Albrecht is among various scholars who suggest that the change from a directive to a regulation '*is in and of itself a revolutionary change*[75]', with other commentators making coherent arguments, going as far to say that the greatest merit of the new law is the '*way it is enacted*[76]' or the '*choice of instrument*[77]. Such views are highly indicative of the shift in power of the legal acts towards significantly diminished discretion, less fragmentation and greater harmonisation. The GDPR provides a newly directly applicable response to regulatory questions and leaves minimal scope for discretionary powers afforded to member states

[68] Eugenia Politou, Efthimios Alepis and Constantinos Patsakis, 'Forgetting Personal Data and Revoking Consent Under The GDPR: Challenges and Proposed Solutions' (2017) Journal of Cybersecurity 4(1)
[69] Davies (n 66) p.293
[70] C 131/12 *Google Spain v AEPD and Mario Costeja Gonzȧlez* [2014]
[71] Ibid
[72] *Google Spain* (n 70)
[73] Orla Lynskey,'Control Over Personal Data In A Digital Age: Google Spain v AEPD And Mario Costeja Gonzales' (2015) Modern Law Review 78(3)
[74] Eleni Kosta, *Consent in European Data Protection Law* (Leiden: Martinus Nijhoff Publishers 2013).
[75] Jan Philipp Albrecht, 'How The GDPR Will Change The World' (2016) European Data Protection Law Review 2(3) 287
[76] Murray (n 57)
[77] Politou, Alepis and Patsakis (n 66)

- such as media laws, national security and public interest[78]. Naturally, directives carry greater clarity than many other forms of law and thus the GDPR was promised to enhance individual rights and protection by creating more detailed, further specified and more onerous obligations on processors and controllers - particularly regarding consent. Overall, the GDPR was largely deemed to be corrective of the core deficiencies evident in the DPD and is widely regarded to present a step change in data protection law internationally. The extent to which this is true with regard to consumer protection and consent will be measured in the next section.

4. Critical Comparison of the Two Provisions of Consent

Unlike the US and Canada which authorise personal data processing unless it has been expressly forbidden, both the GDPR and the DPD hold the opposite - that personal data processing is unauthorised unless an appropriate lawful basis permits it[79]. Both Article 7(1)[80] of the DPD and Article 6(1) outline these various legal bases', meaning that the obligation on organisations to find a lawful basis remains unchanged. Principally, no single basis is prioritised since they are all equal in value[81]. However, most commonly, processing relies on the first condition of consent in order to be legitimized[82], meaning that the reformed consent requirements that this paper focuses on have a profound reach and impact.

Although the GDPR has not materially changed the principle that consent serves as a lawful basis and condition for processing, this research project found that the GDPR has created more onerous requirements for this consent to be deemed valid. Only through the critical analysis of each of these reformed provisions can a conclusion be reached on the matter of whether the GDPR has reformed consent requirements in a way that has enhanced consumer protection as a result. The findings are as follows:

A. Introduced the Requirement for a 'Statement or Clear Affirmative Action'

Arguably the most significant way in which the consent requirements have evolved is that the GDPR appears to adhere to a more active model of consent - a model '*sought to directly counter the user passivity that had undermined both the presumed and informed*

[78] Albrecht (n 75) 287
[79] Edward Dove, 'The EU General Data Protection Regulation: Implications for International Scientific Research In The Digital Era' (2019) The Journal of Law, Medicine and Ethics
[80] DPD 1995, Article 7(1)
[81] Paul de Hert, Serge Gutwirth, Yvonne Poullet, Cecile de Terwangne and Sjaak Nouwt, *Reinventing Data Protection?* (Springer 2009)
[82] Murray (n 57) p.589

conceptions of consent by encouraging the active engagement of the consumer[83]'. In contrast to the Directive, which was permissive of an opt-out approach to obtaining consent, the GDPR qualifies that indications of the data subject's wishes must be made either: *'by statement or by a clear affirmative action[84]'.*

The Data Protection Directive 1995

It has been widely accepted within literature that the GDPR's predecessor's relaxed threshold as to what could validly constitute consent posed significant threats to individual control and self-determination[85] - the very foundations of consent and consumer protection. These assertions are premised on the idea that consumers too frequently rely on and accept defaults to protect their interests. The ramifications of failing to prohibit defaults is a matter of fierce interdisciplinary discussion, with defaults described as a factor that controls consumer choice in almost every domain[86]. Despite dating back to 1957, Packard's seminal ideas appear to permeate the reality we face today. Positing that *'large scale efforts are being made, often with impressive success, to channel our unthinking habits'*, he convincingly describes the innate battle between hidden persuasion and consumer sovereignty[87]. Packard's discussion is primarily on the topic of advertising, however, the various psychological manipulation techniques that his work refers to are notably comparable to those used within the consumer context more widely - inclusive of inviting consent to data processing. The integration of defaults is a useful example of these manipulations in practice.

Defaults are an explicit form of choice architecture[88], often designed to establish pervasive preferences on behalf of consumers where they do not explicitly specify otherwise[89], and its influence ought to not be understated as a result. Johnson, Bellman and Lohse's research demonstrates that consumers under the active obligation to opt-out of an email marketing list are twice as likely to comprise the list than those given the explicit choice[90]. More seminal and contemporary research presents similar findings, but on the matter of organ donation. Although relatively unrelated to data protection, this example is particularly strong in its illustration of the dominance of defaults, finding that the rate of participation in the organ donation programmes differs considerably between

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[83] Eoin Carolan, 'The Continuing Problems With Online Consent Under The EU's Emerging Data Protection Principles' (2016) 32(3) Computer Law and Security Review p.466

[84] GDPR 2018, Article 4(11)

[85] Iris Van Ooijen and Helena Vrabec, 'Does The GDPR Enhance Consumers' Control Over Personal Data? An Analysis From A Behavioural Perspective' (2019) 42 Journal of Consumer Policy 91-107

[86] Vance Packard, *The Hidden Persuaders* (Penguin Books 1957)

[87] Ibid 11

[88] Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press 2008)

[89] Christina Brown and Aradhna Krishna, 'The Skeptical Shopper: A Metacognitive Account For The Default Options On Choice' (2004) 31 Journal of Consumer Research

[90] Eric Johnson, Steven Bellman and Gerald Lohse, 'Defaults, Framing and Privacy: Why Opting In ≠ Opting Out' (2002) 13(1) Marketing Letters 5-15

states that share ideological views on such issues, simply on the basis that some operate a opt-in approach while others do the opposite[91]. Despite differing in context, these examples are convincing evidence of not only the pervasive power of defaults, but also our natural reliance on these.

The tendency for consumer reliance on defaults has largely been attributed to three main, persuasive reasons within academic commentary. Foremost, numerous studies find that consumers typically assume that defaults are indicative of relevant information about a product value or that they signal the most desirable decision for all parties[92]. This perspective can be taken to further maintain that an element of trust is vested with service providers and intermediaries to act within our best interests. These arguments certainly appear to support the possibility that consumers likely act under the false pretense that they are afforded greater protection by the law, unaware that consent is largely a model of self-reliance.

Research also observes that consumers make heuristic use of defaults in a bid to *'reduce the cognitive effort required to reach a decision[93]'*. Given the length and unintelligibility typical of data protection notices[94], as will be discussed later, this reason for reliance is particularly persuasive and supports such a tendency. At their most minimal, the use of defaults attract attention to the benefits rather than detriments of a decision, favouring immediate gratification and being largely ignorant to the long-term costs[95] - a phenomenon coined as hyperbolic discounting[96]. Sociological theories of conformity and endowment explain this; the idea that we conform to the default or norm as means of loss aversion[97]. Representations of the default as synonymous to the norm is deemed predictive that all lesser alternatives are losses[98]. All of these reasons for reliance appear to demonstrate that consumers utilise defaults with the common belief that the default option is the most optimal and suitable for them - discouraging them to act autonomously.

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[91] Eric Johnson and Daniel Goldstein, 'Do Defaults Save Lives?' (2003) 302 Science Mag Policy Forum and Shai Davidai, Thomas Gilovich and Lee Ross, 'The Meaning Of Default Options For Potential Organ Donors' (2012) 109(38) Proceedings of the National Academy of Sciences of the United States of America

[92] Drazen Prelec, Birger Wernerfelt and Florian Zettlmeyer, 'The Role of Inference in Context Effects: Inferring What You Want From What Is Available' (1997) 24(1) Journal of Consumer Research 118-125

[93] Johnson, Bellman and Lohse (n 90)

[94] Ooijen and Vrabec (n 85)

[95] Alessandro Acquisti, 'Privacy in Electronic Commerce and The Economics of Immediate Gratification' (2004) IEEE Security and Privacy 24-30

[96] Ian Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing 2012)

[97] Ena Inesi. 'Power and Loss Aversion' (2010) Organisational Behaviour and Human Decision Processes 112 58-69

[98] Daniel Kahneman, Jack Knetsch and Richard Thaler, 'The Endowment Effect, Loss Aversion and Status Quo Bias' 5 Journal of Economic Perspectives 193-206

The stated effects of defaults on human choice are increasingly concerning considering precisely who designs and implements this choice architecture and for what purposes. Although some scholars have described how defaults can promote consumer welfare and 'nudge' individuals to make the most healthy, safe or beneficial decisions[99], this same paternalistic approach is used counter-intuitively. Carolan has been prominent in advocating this, noting that human bias can be manipulated to afford service providers *'enormous practical influence over what will be permitted to occur under the guise of user consent.[100]'*. This opportunity for exploitation in conjunction with the financial and strategic benefits of data processing for businesses meant that the DPD's provision of consent was subliminally negating the control of consumers regarding their own data, rather than strengthening it. This criticism is prevalent amongst scholars, on both the topic of data protection and other consumer activity more widely.

This aggregated review of literature strongly suggests the following: foremost, that defaults are immensely pervasive on consumer choice and secondly, that consumer tendencies can be, and are frequently exploited by defaults to provide the creators with their desired outcome. Calo goes as far as to insist that because these opportunities to exploit the interface often work favourably to data closure, the consumer is left in an innately vulnerable position[101]. It logically follows that by permitting silence as a form of consent, the DPD largely failed to protect consumers from the pervasive effects of defaults on their autonomy and choice, despite the weight of both empirical and theoretical evidence calling for greater protection to an innately vulnerable group.

The General Data Protection Regulation 2018

The failure of the DPD in this respect portrays the GDPR's consent requirements as an inherent improvement. The GDPR particularised the permitted forms of consent, with Article 4(11) defining consent as '*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she,* ***by a statement of clear affirmative action, signifies agreement to the processing'***[102]. This additional clarification of the acceptable forms of consent has profound implications on the protection afforded to consumers since silence and defaults are no longer rendered sufficient under the new legal framework. In light of the above discussion on the danger of defaults, prohibiting these appears to represent a substantial improvement in providing consumer protection.

The GDPR appears to adhere to a more active model of consent[103], distinct from the passive model provided for by the DPD. By nature, Carolan deems the active model to be indicative of greater user engagement and subsequently more informed consent to the

[99] Brigitte Madrian and Dennis Shea, 'The Power of Suggestion: Inertia in 401(K) Participation and Savings Behaviour' (2001) 116(4) The Quarterly Journal of Economics 1149-1187
[100] Carolan (n 83) p.470
[101] Ryan Calo, 'Digital Market Manipulation' (2013) 82 George Washington Law Review 995
[102] GDPR 2018, Article 4(11)
[103] Carolyn (n 83)

relevant practices[104]. Recital 32 of the GDPR appears to support this assumption, explicitly prohibiting the use of pre-ticked boxes and also silence in the absence of some other, convincing and positive inference of signification[105]. Despite the non-binding nature of recitals, it is likely that they maintain authority. Additionally, although the general rule under the GDPR is that silence is insufficient, academics have qualified this further, describing that when combined with other actions of the data subject, such as an earlier positive indication of his consent, then it could suffice as consent[106]. Logically, adherence to an active model of consent appears to directly remedy the dangers of consumer inertia, suggesting that the reformed provision has enhanced consumer protection by allowing them to regain control over their consent by making it more meaningful. Prima facie, this is a strong proposition, however, as research found - a simplistic one also.

Whilst it appears common for literature to frequently fail to recognise the significant limitations of the law's development - instead praising and overstating its merit - certain scholars have pursued a leading role in scrutinising this particular new provision. Foremost, it is highlighted that choice architecture and its influential effects are not exclusively found in defaults and that there are many alternative psychological and environmental manipulations which can be successfully used to exploit consumer decision-making[107]. Carolan boldly advocates that the continuance of other framing manipulations wholly undermines the value of the reformed requirement for affirmative action, claiming that *'from the perspective of the inertia bias, there is little, if any, qualitative difference between default settings of which the user is unaware and the default settings to which a user is invited to 'click' their unthinking approval[108]'.*

Her argument is both credible and clear - insofar as our cognitive limitations and tendencies are exploited by other, discrete architecture and framing, the issue of inertia cannot reasonably be said to have been remedied by the GDPR's reformed provision of consent. Practical examples qualify this argument further, with Facebook's interface designed to promote self-disclosure[109] and Google's inventive research as to what shade of blue was most appealing to consumers, enticing them to act a certain way[110]. Such findings make it likely that the GDPR has made only a fraction of the impact necessary

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[104] Ibid

[105] GDPR 2018, Recital 32

[106] Christopher Kuner, *European Data Protection Law : Corporate Compliance and Regulation* (Oxford University Press 2nd Edn 2007)

[107] Gavan Fitzsimons, Wesley Hutchinson, Patti Williams, Joseph Alba, Tanya Chartrand, Joel Huber, Frank Kardes, Geeta Menon, Priya Raghubir, Edward Russo, Baba Shiv and Nader Tavassoli, 'Non-Conscious Influences on Consumer Choice' (2002) 13 Marketing Letters 269-279

[108] Carolyn (n 83)

[109] Erin Hollenbaugh and Amber Ferris, 'Facebook Self-Disclosure: Examining The Role of Traits, Social Cohesion and Motives' (2014) 30 Computers in Human Behaviour

[110] Laura Holson, 'Putting a Bolder Face on Google' *The New York Times* (28 February 2009) <https://www.nytimes.com/2009/03/01/business/01marissa.html> accessed 17 March 2020

to protect consumers. With variations still permitted and unregulated, the most compelling argument stands that soon the activity of opting in will instead become the default as a result of the continuance of choice architecture, simply in alternative guises.

Various authors have also suggested that the frequency of these consent requests will similarly see active affirmation as little more than the norm or default, with some referring to the creation of 'consent desensitisation[111]'. This is the phenomenon largely described as 'overchoice[112]' - the notion that too much choice paradoxically leads to poorly calculated or incoherent decisions. Fundamentally, this undermines the understanding that affirmative choice aligns better with consumer interests and preferences. Discourse noting 'consent fatigue' or 'opt-in fatigue' can even be construed to suggest that the GDPR has only increased the pace at which this will happen by making these opportunities to consent even more commonplace[113]. In fact, following the incision of the GDPR, media articles consistently captured consumers' exhaustion and frustration at the influx of consent requests they received: *'Among some consumers, GDPR is perhaps best known as a bothersome series of rapid-fire, pop-up privacy notices[114].* Evidently the constant firing of consent opportunities is having a very adverse impact on the way consumers perceive, value and respond to their role of self-determination.

Theories that note the psychological costs of decision-making highlight the effort required and how, as with any activity, long and frequent decision-making diminishes individuals' abilities to exercise self-control[115]. Schermer also addresses this deficiency on the topic of consent to online services more generally, however, his theory has direct relevance to the GDPR, even despite its development. Correlations have been drawn within many contexts and by many scholars, all indicative that 'consent fatigue' or 'consent transaction overload' dilutes the psychological effect of being provided the opportunity to self-determine altogether[116]. Moreover, the reality of heightened and more populated protection may be adverse - making active participation ultimately as futile and disengaging as the prohibited default option.

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111 Bart Schermer, Bart Custers and Simone van der Hof, 'The Crisis of Consent: How Stronger Legal Protection May Lead To Weaker Consent In Data Protection' (2014) Ethics and Information Technology Journal 16, 171-182

112 Alvin Toffler, *Future Shock* (Random House 1970)

113 Schermer, Custers and van der Hof (n 111)

114 Kate Fazzini, 'Europe's Sweeping Privacy Rule Was Supposed To Change The Internet, But So Far Its Mostly Created Frustration For Users, Companies, and Regulators' *CNBC* (5 May 2019) <https://www.cnbc.com/2019/05/04/gdpr-has-frustrated-users-and-regulators.html> accessed 5 January 2020

115 Kathleen Vohs, Roy Baumeister, Brandon Schmeichel, Jean Twenge, Noelle Nelson and Dianne Tice, 'Making Choices Impairs Subsequent Control Self-Control: A Limited Resource Account of Decision Making, Self-Regulation and Active Initiative' (2008) 94(5) Journal of Personality and Social Psychology 883-898

116 Schermer, Custers and Van Der Hof (n 111)

In summary, it has been demonstrated from the review of this element of the frameworks that the permitted use of defaults has serious ramifications upon an individual's capacity and ability to actively consent to processing. This form of choice architecture within the consumer context prevails for a variety of reasons and evidently has significant pervasive effects. However, it can be even more accurately argued that although the prohibition of these defaults by the GDPR does constitute an inherent improvement, such improvement must not be overstated given the variety of commonplace framing techniques that remain permitted under the new framework and will likely be implemented to achieve similar commercial motivations. Moreover, it appears that the ability for this aspect's reformation to enhance consumer protection remains naturally limited without prohibiting these also.

B. Introduced Extra Steps for Making Consent Informed

A second area of the reformation of the consent requirements is the long existing principle established in both law and other arenas, that for consent to be valid, it must be '***informed***'. Within both frameworks, failing this, the consent provided will not be binding. This is the idea that consumers must be provided with the relevant and sufficient information which enables them to understand the consequences of and determine whether they wish to provide their consent. Whilst the provision on the need to be informed doesn't differ too significantly between the former and current legal framework, the additional clarity delivered in the GDPR's accompanying recitals and articles provides for a more expansive obligation on controllers and processors to be transparent and a precise list of information which must be provided to consumers.

The Data Protection Directive 1995

The DPD's mere statement that consent had to be informed in order to be valid is a basic yet valuable requirement, since being informed entails the comprehension of both risks and benefits, allowing consumers to balance expected and possible consequences and sacrifices that are a product of personal data disclosure. The ability to balance these factors is most likely to result in a decision which aligns neatly with a consumer's personal attitudes and preferences and so ought to deliver at least marginally more meaningful consent. In fact, the right to be informed fits neatly within the GDPR's broader adherence to the broader principle of transparency[117]. This can be interpreted to indicate that the framework's expectation that consent will be informed is naturally going to empower consumers' capacity for informational self-determination and simultaneously afford strong consumer protection by best enabling consumer self-reliance. Fung, Graham and Weil develop this argument, using it to reason why mandatory information disclosure is among the most utilised and accepted elements of public policy widely and favoured as a preferred alternative to harder forms of consumer

[117]GDPR 2018, Article 5(1).

protection regulation[118]. Prima facie, therefore, the requirements existence within the directive is fairly uncontroversial and entirely necessary in theory to protect consumers.

Notably, however, significant bodies of literature find the success of informational self-determination to be attractive in theory, but unworkable in practice. This is primarily because the model too readily accepts that consumers will absorb all information provided to them, despite there being a lack of evidence to date substantiating this claim. Instead, research commissioned by LSE contradictingly concluded that consumers are not giving informed consent to sharing financial data, even when they have expressed a favourable attitude to privacy[119]. There are various potential explanations for this paradox offered by literature. Most usefully, Ooijen and Vrabec are vocal in their argument that there are various pragmatic threats to consumer control within what they label the 'Information Receiving Stage'[120]. Notably, their analysis is somewhat deficient since it fails to directly and explicitly refer to the DPD's application and provisions on informed consent to substantiate these threats. Instead, their concerns are largely about the nature of privacy policies more broadly and the limitations of information-based models of consent in providing consumer protection. The vast majority of literature is similarly weak in this regard. However, despite such limitations, their arguments still carry some merit and value in scrutinising the consumer protection afforded in practice by the DPD's reliance on disclosure models to protect consumers.

The most successful criticisms suggest that the requirements laid down by the law often fail to equate to their desired effect in practice[121] for numerous reasons ranging from the potential cognitive deficiencies of humans to the characteristics specific to the contemporary online environment[122]. These challenges to information-based consent models unfortunately find that consumers are seldom engaged with the terms or information provided, or they simply do not fully comprehend it, even despite their attempts to be engaged. As will be discussed now, these failures arise from the quantity and complexity of the information delivered to consumers and the law's reliance on the fallistic assumption that these afford satisfactory protection to consumers.

Foremost, commentators and practitioners have similarly expressed concern about the complexity of privacy disclosures which are designed with the purpose of providing consumers with terms under which their personal information will be used, sharing the

[118] Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promises of Transparency* (Cambridge University Press 2013)
[119] Edgar Whitley, 'Consumers Are Not Giving Informed Consent Before Sharing Their Financial Data' *LSE News* (30 April 2018) <<http://www.lse.ac.uk/News/Latest-news-from-LSE/2018/04-April-2018/Consumers-are-not-giving-informed-consent-before-sharing-their-financial-data> accessed 24 February 2020
[120] Ooijen and Vrabec (n 85)
[121] Irene Pollach, 'What's Wrong With Online Privacy Policies?' (2007) *Communications of the ACM* 50(9) 103-108
[122] Ooijen and Vrabec (n 85)

view that this is often unproductive and deters individuals from engaging with terms of data processing. Shore and Steinman have elaborated on these findings and suggest that amidst our contemporary environment of digital transformation, the information disclosed is only increasing in length and complexity[123] and they use their review of Facebook's privacy policy progression over time to illustrate this pattern[124]. These findings, although fixated on Facebook, appear indicative of a wider, increasing challenge to disclosure models in modern day especially and will likely give rise to increased consumer vulnerability as a result. They are also especially alarming in the context of data processing and in light of the immensely complex mechanisms used for these practices as they progress with time. For example, Pasquale describes data processing to resemble a black box since both its operation and outcomes are often uncertain and unpredictable[125]. Moreover, it follows that the likelihood or even possibility of this abstract information being presented in a clear and intelligible manner is low. This further highlights the existence of information asymmetries and an inherent demise of consumer informational control as a result[126].

There are also innate cognitive limitations as to how well consumers can read jargon and legalese, with research demonstrating that variations in both expertise and literacy undermine the consumer's capacity for informational self-determination[127]. Park, for example, examined consumer literacy levels applied to general data policy comprehension and found that overall, participants failed to correctly answer less than 2/7 questions, despite having read the policy[128]. It highlighted older age brackets and females to be the demographics which fared worse under the experiment and so appear especially vulnerable and unprotected[129]. These findings are comparable to other studies too, such as that of Jensen and Potts which analysed 64 privacy policies of leading names such as Ebay and Google and determined their readability in accordance with Flesch Reading Ease scores. The results are troubling, finding only 6% to be sufficiently accessible to those with a high school education or lower, 54% accessible to those who boast 14 years of education and 13% remaining too difficult to comprehend even by those with a postgraduate education[130]. This demonstrates that it is potentially detrimental to assume that consumers who do read the policies or disclosures necessarily understand

[123] Jennifer Shore and Jill Steinman, 'Did You Really Agree To That? The Evolution of Facebook's Privacy Policy' (2015) Journal of Technology Science
[124] Ibid
[125] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2015)
[126] Ooijen and Vrabec (n 85)
[127] Estzer Hargittai, 'Whose Space? Differences Among Users and Non-Users of Social Network Sites' (2007) Journal of Computer Mediated Communication 13(1)
[128] Yong Jin Park, 'Digital Literacy and Privacy Behaviour Online' (2011) Journal of Communication Research
[129] Ibid
[130] Carlos Jensen and Colin Potts, 'Privacy Policies As Decision-Making Tools: An Evaluation of Online Privacy Notices' (2004) CHI 2004 Conference on Human Factors in Computing Systems

them, as empirical evidence suggests this perception is deeply flawed and fails to acknowledge diversity of literacy, education and demographics which has been recognised to render large fractions of the consumer population more susceptible to information asymmetry than others[131]. Not only do these results promote the need for consumers to be treated as a heterogeneous group opposed to a homogeneous one, but it is also highly indicative of the need for consumer protection efforts which protect all consumers better, accounting for their vulnerabilities when framing regulations - a view which aligns neatly with Cartwright's suggestions that those who suffer particularly harshly from information asymmetry are the most vulnerable and thus in the greatest need for additional attention and protection[132]. Given that the GDPR appears silent on the issue of disparity and fails to provide this additional protection, it is reasonable to argue that the GDPR's amendment has not enhanced consumer protection, particularly not for the portions of consumers regarded especially vulnerable or 'less privileged[133]'.

The length of policies has also raised concern. Böhme and Köpsell's experiment highlights a correlation between cognitive strains and reluctance in the presence of lengthier and more detailed disclosure models, therefore depicting the commonplace view that more is more to be a fundamental misconception adopted by data protection law. Although their research goes into little detail explaining these findings, explanations to support their findings have been offered by many other scholars. Illustratively, a 2016 experiment by a Norwegian campaign-group found that it would take 32 hours to read the terms and conditions of the average number of smartphone apps (33) that Norwegians had on their phone[134]. Similarly, McDonald and Cranor estimate that if data subjects were to devote time to reading all privacy policies they are presented, this would cost them 244 hours per year[135]. These findings commonly demonstrate the burdensome and time-consuming cost of being informed, particularly given that these numbers measure only the time it took to read these texts, excluding the time taken to comprehend and reflect on the consequences of agreement.

Having reviewed the DPD's simplistic requirement of ensuring consent is informed, the discussion has drawn upon several both persuasive and alarming failures of disclosure models which further indicates a broader failure to protect consumers on the basis that it operates on the presumption of a self-reliant consumer, who can protect themselves insofar as they are informed - which makes theoretical sense. However, the practical

[131] Cartwright (n 28)
[132] Ibid 121
[133] Thomas Wilhelmsson, 'The Informed Consumer V The Vulnerable Consumer in European Unfair Commercial Practices Law - A Comment' (2007) The Yearbook of Consumer Law p.213
[134] Chiara Palazzo, 'Consumer Campaigners Read Terms and Conditions of Their Mobile Phone Apps...All 250,000 Words' *The Telegraph* (Sydney: 26 May 2016) <https://www.telegraph.co.uk/technology/2016/05/26/consumer-campaigners-read-terms-and-conditions-of-their-mobile-p/> accessed 10 March 2020
[135] Aleecia McDonald and Lorrie Cranor, 'The Cost of Reading Privacy Policies' (2008) Journal of Law and Policy for the Information Society

reality is inconsistent with this presumption, meaning that insofar as the GDPR replicates the disclosure model in this way, it cannot be justly argued that this element of the GDPR has enhanced consumer protection.

The General Data Protection Regulation 2018

Purely doctrinal analysis will likely find an innate improvement by the GDPR in this area, on the basis that although under Article 2(h) of the DPD already required that consent be 'informed', the DPD omitted to provide any guidance or elaboration on this requirement. Comparatively, the GDPR clarified the obligations on data processors and controllers further, introducing several new steps for the corresponding consent to be deemed valid. Naturally, this greater clarification imposes more onerous duties on those responsible for the processing of consumer data, affording consumers greater transparency and opportunity for self-determination as a result.

Demonstrably, Articles 13[136], Article 14[137] and Recital 42[138] of the GDPR describe the bare minimum information that must be delivered, including but not limited to the identity of the controller and the purposes for which the personal data will be processed. It logically follows, therefore, that by creating a requirement for a greater quantity of and more specific information to be granted to consumers, consumers will be better placed and more capable of making autonomous and calculated decisions.

However, as was explored in the previous section, this seemingly logical assumption is strongly opposed by anecdotal evidence which paradoxically finds that stronger, lengthier and more explicit consent dialogues may adversely result in less-informed decisions instead[139]. The findings strongly undermine the desirable link between information quantity and consumption and instead determines that: *'the more information individuals have access to about what happens with their personal data, the less information they are able to filter, process and weigh to make decisions[140]'*. Consequently, the GDPR's increased emphasis on delivering more information offers very little opportunity to enhance consumer protection. In fact, it is possible that the new framework has further diminished consumer control over their data by demanding greater amounts of information be delivered - a mistake that regulatory models appear to frequently make under the pretense that consumers will and can process extensive amounts of information.

Furthering this argument, some particularly insightful commentators posit that the GDPR imposes greater costs for non-compliance in organisations, making them more risk-averse and subsequently likely to detail often unnecessary information in their

[136]GDPR 2018, Article 13
[137]GDPR 2018, Article 14
[138]GDPR 2018, Recital 42
[139] Rainer Böhme and Stefan Köpsell, 'Trained To Accept?: A Field Experiment on Consent Dialogues' (2010) Proceedings of the SIGCHI Conference on Human Factors in Computing Systems 2403-2406
[140] Ooijen and Vrabec (n 85)

disclosures to avoid liability[141]. Given the wealth of evidence that depicts a correlation between lower engagement and larger quantities of text, such an argument is persuasive. The literature, therefore, appears to reverse the logic that more information equates to more informed consent, finding instead that the new legal framework's increased reliance on this flawed logic can actually result in a decrease of consumer protection afforded, rather than an increase. It seems that the initiative taken by the GDPR is largely counter-productive as a result.

There is, however, a possibility that the GDPR might propose a solution to the issue of unintelligibility discussed previously through its recommendation of tools such as standardised icons to replace descriptive and detailed privacy information[142]. Despite not being a legal requirement, the GDPR permits the provision of privacy information to be accompanied by *'standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing[143]'.* Ooijen and Vrabec insist that the use of standardised icons will dramatically reduce the otherwise unrealistic amount of time necessary to consume the information and the overload of information consumers are persistently shown to fail at comprehending[144].

The simplicity of this potential fix is attractive and if implemented will almost certainly make notices more intelligible and manageable for consumers, increasing the likelihood that they are more informed than they would otherwise have been in the absence of these. However, their success does remain contingent on various factors. Foremost, the icons must be standardised in order to alleviate further opportunities for choice architecture manipulation that may arise from the use of non-standard cues or private logos. Hoofnagle and Urban warn that the permission of these might otherwise indicate trustworthiness of sites and their terms, often unjustly[145]. Fortunately, the European Commission was tasked with clarifying and detailing guidelines following the GDPR's incision, evading the possibility of further manipulation.

Their comprehensiveness must also be investigated since the information provided through this mechanism will inherently be simplistic and generalised, delivering only partial information to consumers as a result. Despite our earlier findings indicating that consumers engage better with this, Nissenbaum expresses concern that these icons could contribute to greater invisibility and undermine the principle of transparency, particularly as he believes that it is often the hidden and intangible details in the data economy which are most significant[146]. Perhaps, therefore, their success is contingent on

[141] Böhme and Köpsell (n 139)
[142] Ooijen and Vrabec (n 85).
[143] GDPR 2018, Article 12(7)
[144] Ooijen and Vrabec (n 85)
[145] Chris Hoofnagle and Jennifer Urban, 'Alan Westin's Privacy Homo Economicus' (2014) Wake Forest Law Review 261
[146] Helen Nissenbaum, 'A Contextual Approach To Privacy Online' (2011) Daedalus 140(4).

the icons being compounded with accessible explanations where necessary and clear guidance on this in order to protect from greater issues of invisibility and consumers being misled or uninformed altogether.

To summarise, ensuring consumers are informed of the consequences of their decision is an imperative component of true informational self-determination, particularly with regard to ensuring transparent practices and allowing consumers to make theoretically better decisions when it comes to consent. Equally, however, there are evidently some potent limitations of disclosure models which risk fundamentally undermining the possibility of this informed consent being achieved either in part or at worst, altogether. Unfortunately, the GDPR's framers yet again failed to recognise these practical defects and so were unsuccessful in remedying and responding to them, choosing to replicate and emphasise them instead. The consequence of this is that consumers are self-reliant, without the necessary support and tools to be, leading us to conclude that once again the GDPR has not substantially enhanced the protection afforded to them, likely even worsening it.

C. Provided Greater Clarification on What 'Freely Given' Entails

A final, less substantial yet still significant way that the GDPR has arguably enhanced the consumer protection afforded regarding consent is by delivering greater clarification on the requirement that consent must be ***'freely given'.*** The underpinning concept of both the GDPR and its predecessor remain the same: that consumers must have genuine choice to refuse or later withdraw their consent to data processing and that failure to ensure this free choice will necessarily render the consent as invalid. Although linguistically this requirement is simple, the elaboration provided by the GDPR in comparison to the relative silence of the DPD makes a substantial difference to the position of the consumer. Despite the DPD already stating that consent must be given freely in order to be valid[147] , the directive largely failed to provide any further substantive guidance explaining, supporting or qualifying this legal expectation - an omission characteristic of the vague nature of directives in EU law. Comparatively, the GDPR appears to mandate the requirement further through various supplementary articles and recitals, all of which purport to deliver greater clarity as to the requirement's interpretation. Broadly speaking, this inherently advances the consumer protection afforded to subjects, as clarity will restrict member state discretion, prevent lenient interpretations and construct a clearer and more certain set of criterion which advertently gives consumers more secure and certain rights and subsequently, protection.

The Data Protection Directive 1995

Portraying the importance of the role of this requirement in practice for consumers in turn emphasises the need for uniformity and clarity when relying on the provision. Such analysis functions to highlight the DPD's insufficient approach by not delivering this

[147] DPD 1995, Article 2(h)

clarity and moreover renders the GDPR's provision as advantageous from a consumer protection perspective.

The requirement that consent must be freely given in order to be deemed valid is a vital response to long-existing concerns that the consent provided by consumers is otherwise *'engineered*[148]*'* or reluctantly provided as a product of unjustified coercion[149] - coercion which does not seek to advance consumer welfare. These concerns, if accurate, fundamentally undermine the respected principles of autonomy and self-determination - two central rationales of consumer protection.

Discourse widely recognises some extent of disparity between consumers and traders as innate and unavoidable[150]. However, it is compellingly found that the absence of effective participation opportunities for consumers is especially staggering in transactions which are inescapable, such as banking, transport and communications[151]. Rhoen's observation is particularly relevant to the field of data protection - in fact, increasingly so upon the recognition that the vast majority of digital services have become so heavily integrated within our daily lives that they have grown into a necessity[152] - a phenomena referred to as the 'digital decade' by Ofcom[153]. Well-renowned studies show that 87% of adults used the internet as often as daily in 2019[154] and so demonstrate this point about reliance. These sources all appear to render claims of '*an unprecedented power imbalance between transacting parties*[155]*'* - specifically online - as very credible, since the conditions of the virtual market certainly appear to hold traders and service providers favourably. This is further exacerbated by the advancements of technology which are increasingly enabling traders to influence consumer choices, seemingly legitimately through framing as discussed with regard to the earlier requirements. In light of such points, the need for a balancing mechanism is particularly blatant in the realm of data protection, hence imposing a duty on the DPD to have delivered such balance.

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[148] Ian Kerr, Jennifer Barrigar, Jacqueln Burkell and Katie Black, 'Soft Surveillance, Hard Consent: The Law and Psychology of Engineering Consent' in Ian Kerr, Valerie Steeves and Carole Lucock (eds) *Lessons From The Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press 2009)

[149] John Stuart Mill, *On Liberty* (Boston: Collier and Son 1909) p.13

[150] Geraint Howells, Hans Micklitz and Thomas Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive (*Routledge 2016) p.184

[151] Michiel Rhoen, 'Big Data and Consumer Participation In Privacy Contracts: Deciding Who Decides On Privacy' (2015) Utrecht Journal of International and European Law 31(80) p.53

[152] Mark Holden, 'Life With Or Without The Internet: The Domesticated Experiences of Digital Inclusion And Exclusion' (2012) Media@LSE

[153] Ofcom, *Communications Market Report* (London : Ofcom 2010)

[154] Office for National Statistics, 'Internet Access - Households and Individuals, Great Britain: 2019' (2019) <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2019> accessed 16 March 2020.

[155] Eliza Mik, 'The Erosion of Autonomy in Online Consumer Transactions' (2016) Law, Innovation and Technology 8(1) 1

The argument that the lack of clarification on the requirement under the DPD prejudiced traders at the expense of consumers is unfortunately hindered by a lack of supporting statistics and case-law demonstrating how the position of consumers changed, thus weakening it considerably. However, established practitioners such as Watts have argued that the imbalances of power under the previous framework have become *'more acute'* since the inception of the GDPR provisions[156]. He suggests that by providing clarity through examples of problematic relationships and introducing the principle of conditionality, the GDPR has alleviated ambiguity. As will be discussed in the next section, these developments place individuals in a better stead than previously, since it appears that the GDPR's construction of *'freely given'* is predominantly in favour of the consumer.

The General Data Protection Regulation 2018

The GDPR provided numerous clarifications to mandate the requirement that consent is freely given, each of which prove advantageous to empowering consumers to have greater control and autonomy over their personal information in some way. In particular, consent which is 'bundled' amidst a variety of other terms or conditions has been prohibited on the basis that it hinders free and genuine choice from being achieved, with Recital 32 expressing that *when processing has multiple purposes, consent should be given for all of them*[157] - also called the need for granularity. Secondly, the GDPR specifies that consent should not be a prerequisite of accessing a service unless the processing of personal data is necessary for the achievement of a contract[158] - a separate legal basis for processing[159]. This rule is largely the expectation that consumers must necessarily be capable of either refusing or later withdrawing their consent without suffering any detriment[160] in order for their consent to be 'freely given' under the law. Finally, the GDPR has described how considerations of power imbalances between the subject and controller must be made, referring to requests made by public authorities and employment relationships as problematic examples[161] likely to restrict freedom to choose.

Although the GDPR has delivered greater technical clarity and expectations on processors and controllers, many commentators have highlighted some discouraging limitations of the new provision. Foremost, the clarity provided by the GDPR ought not be overstated. Legal expert Dibble has fundamentally challenged the assumption that the criteria newly provided by the GDPR's guidance is absolute[162]. Critiquing the idea that consent will certainly not be freely given where access to a service is conditional on

[156] Mark Watts, 'Consent vs Legitimate Interest: Part 1' (2018) Privacy and Data Protection 19(2) 7-9
[157] GDPR 2018, Recital 32
[158] GDPR 2018, Recital 43
[159] GDPR 2018, Article 6(b)
[160] GDPR 2018, Recital 42
[161] GDPR 2018
[162] Suzanne Dibble, 'GDPR and Conditional Consent' (11 April 2018) <https://www.youtube.com/watch?v=RM8ep2_Ouwo#action=share> accessed 6 March 2020.

consent despite data processing being unnecessary for the performance of a contract, she describes how such a scenario is merely a consideration[163]. These considerations will likely be balanced amongst the others mentioned, such as clear imbalances of power, available market alternatives and consent granularity. Her critique is firmly grounded in opinion, practical examples and case law, affording it great merit. Foremost, the ICO have already vocalised their dismay at the continued possibility for organisations to incentivise consent without infringing the legal requirements[164]. Their concern is further confirmed by the Planet49 case[165], whereby the CJEU failed to clarify whether, even after the GDPR, entry into a promotional lottery conditional on consent was incompatible with the requirement for consent to be freely given[166]. Given that the success of the GDPR's requirement was the clarity it supposedly delivers, uncertainty as to where the line is conclusively drawn diminishes the degree of certainty it has been purported to provide, therefore undermining the extent of protection it affords to consumers.

Some scholars have convincingly posed the argument that consent cannot reasonably afford sound protection in cases where both: the permissions are incentivised, and the organisation incentivising it poses a unique offer, because this eliminates the element of choice involved[167] given the lack of alternative market options[168]. Additionally, permitting incentivised consent is even more contentious due to the wealth empirical evidence demonstrating a consumer tendency to discount the value of a reward arising later (data protection) and value the immediate gratification they receive for providing their information (discounts etc) as disproportionately high[169]. With the latter demonstrating the pervasive impact of incentivising consent, it poses the insurmountable question of how their consent can be truly freely given or autonomous in such circumstances.

A second limitation is that whilst the GDPR does refer to imbalances of power with greater specificity and outlines various inherently unequal relationships to guide these considerations, this guidance appears to neglect consumer-to-trader relationships by referring only to public bodies and employment scenarios as the most relevant examples[170]. This finding comes despite theories of 'pressure vulnerability' in consumer and trader relationships - a theory which observes how heavily susceptible to pressure consumers are, particularly when we perceive them as a heterogenous group rather than

[163] Ibid
[164] Watts (n 156)
[165] C673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände v Planet49 GmbH* [2019].
[166] Ibid
[167] Yoan Hermstrüwer, 'Contracting Around Privacy: The (Behavioural) Law and Economics of Consent and Big Data' (2017) Journal of Intellectual Property, Information Technology and E-Commerce Law 8(1).
[168] Koops (n 9) p.252
[169] Ted O' Donoghue and Matthew Rabin, 'Doing It Now Or Later' (1999) American Economic Review 89(1) 103-124
[170] GDPR 2018, Recital 43

a homogenous one[171]. Cartwright makes the insightful point that certain categories of consumers are especially susceptible to pressure either due to their characteristics, the physical presence or behaviour of traders and even temporary circumstances that they find themselves weaker as a result of[172]. On this basis, it is arguable that the GDPR ought to have actively included this as an exemplary problematic relationship or that it should not have omitted to include it upon referring to others as this could passively suggest that these relationships require less substantive protection when interpreting whether consent has been freely given.

Summatively, doctrinal analysis has found numerous areas upon which the GDPR's authorities have provided greater clarity and legal certainty to the rights of data subjects, thus supporting Watts' observation of an improvement in terms of consumer protection. However, equally notably there remain significant grey areas of the law which both the CJEU and the regulation's framers have left unclear, therefore limiting the extent of the improvement slightly. Due to such limitations, the clarity and certainty of the right must not be overstated in this project's conclusion.

5. Broader Considerations

The realist approach adopted by this paper also requires that two broader, pragmatic issues be considered in order to reach a more comprehensive and accurate conclusion on the state of consumer protection post GDPR. Such considerations, it is found, pose even further pertinent limitations on the practical extent of consumer protection achieved by the new framework.

A. The Lack of Consumer Opportunities for Redress

Foremost, a commonly acknowledged lack of consumer empowerment to access and achieve redress thoroughly undermines the GDPR's potential to protect consumers. Contrary to depictions of the perfect market whereby consumers have complete access to redress, Cartwright insists this is an unrealistic perception and rather that consumers lack redress opportunities - something he attributes to a lack of awareness of legal rights and resolution mechanisms, but also the exertion of pressure on consumers that often feel powerless[173]. Ramsay similarly argues that opportunities for redress are not as rife as we would like to believe, especially not due to the imbalance of power arising from enforcement and litigation fees[174]. These persuasive points are highly indicative that even

[171] Cartwright (n 28) p.121
[172] Ibid
[173] Cartwright (n 28)
[174] Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Bloomsbury Publishing 2012)

where a consumer's consent has been obtained in breach of these 'stricter' requirements, the likelihood is that either individuals are unaware altogether of what each requirement entails or do not feel empowered to enforce their newly granted rights even if they are aware, therefore creating greater disparity.

Coherently, a study commissioned by the European Agency for Fundamental Rights discusses the '*rational apathy*' of consumers[175] as a main reason for consumer decisions to not seek redress and they relate this to the perceived disproportionality of the harm compared with enforcement[176]. The likelihood is that the inability to put a clear price on data harms and the intangible nature of data as stated earlier only discourages consumer action further, meaning that the lack of redress opportunities for consumers are even worse on the topic of data protection. This, in turn, further undermines the GDPR's potential to enhance consumer protection because without enforcers, the changes made by the law carry little weight in practice, irrespective of their merit - a notable observation for the conclusion of this paper.

B. Potential Departure from Consent to Legitimate Interests

Another likely implication of creating more onerous consent requirements is that organisations will likely now be deterred from relying on consent and will instead be encouraged to rely on an alternative legal basis for processing, predominantly that of 'legitimate interests[177]'. This is a significant possibility to consider if reliance on an alternative basis eradicates the consumer's opportunity to decide whether to disclose their personal information altogether, thus eliminating any existing - albeit suboptimal - autonomous choice.

Even despite its contingency on a three-fold test requiring: firstly, that a legitimate interest can be identified, secondly that the processing is entirely necessary to achieve the legitimate interest and finally that the data subject's interests, rights and freedoms are balanced appropriately[178], the ICO have labelled this basis the '*most flexible*[179]'. Kotschy acknowledges both positions and posits that although there is merit in the formulation of the balancing test, pragmatically speaking the protection it affords is weak[180]. This is because it is widely accepted by practitioners, courts and consumers alike that we remunerate 'free' digital services with data[181], likely making said balance

[175] European Agency for Fundamental Rights, 'Access to Data Protection Remedies in EU Member States' (2013) Publications Office of the European Union
[176] Ibid
[177] Watts (n 156), Mark Watts, 'Consent Versus Legitimate Interests: Part 2' (2019) Privacy and Data Protection 19(3) 6-9
[178] GDPR 2018,Article 6(1)(f)
[179] Information Commissioner's Office, 'Guide To The General Data Protection Regulation' (2019) p.81
[180] Waltraut Kotschy, 'The Proposal For A New General Data Protection Regulation - Problems Solved?' (2014) International Data Privacy Law 4(4)
[181] Ibid

uncontroversial. The purpose of this paper is not to engage with the balancing test, however, legitimising the processing of personal data without consumer consent is a problematic by-product of the GDPR's more onerous consent requirements and certainly results in an unsatisfactory conclusion, particularly in the eyes of consumer protection. Not only does this detract opportunities for self-determination, it also does not require the same degree of transparency about processing that the basis of consent does. Hence this is a significant danger of the GDPR's new consent requirements and arguably one which threatens some of the most fundamental principles of consumer policy, rather than enhancing the protection afforded.

6. Concluding Comments

Having reviewed literature widely and engaged with both the doctrinal changes, the implications and some broader pragmatic considerations, this paper reaches a nuanced conclusion and recommends a potential course of action accordingly.

A. Conclusion

The GDPR has largely been credited as a landmark change, with consequences to match[182]. Some have gone as far as to advocate that the new legal framework possesses the potential to change the traditional paradigm for most businesses by requiring an entirely new way of thinking about the consumer[183]. However, it is observed that perspectives which advance either that consumers derive greater control or that organisations will have to work harder to obtain and demonstrate consent as a result of the GDPR lack adequate qualification. Our review of literature finds too regularly that these arguments - although optimistic - omit to critically examine the practicality and reliability of such claims. Hence this paper has taken a realist approach to research, findings and analysis to answer the overarching question: ***To what extent have the GDPR's consent requirements enhanced consumer protection?***

The standard of consent has grown considerably, as has been demonstrated throughout by doctrinal analysis. Having found silence from the DPD on many matters of great protective importance, the extra clarity and additional prohibition on defaults has inherently afforded greater certainty to consumers, enforced the need for transparency and emphasised their right to free choice, thus advancing the notion of an autonomous and empowered consumer. In particular, the linguistic changes posed by the GDPR

[182] Consumers International, 'GDPR: Will It Be The Global Standard For Data Protection?' <https://www.consumersinternational.org/news-resources/blog/posts/gdpr-will-it-be-the-global-standard-for-data-protection/> accessed 17 March 2020

[183] Sam Del Rowe, 'Businesses Need To Know GDPR' (2018) 22(1) *Customer Relationship Management Magazine*

certainly present more elaborate consent requirements. However, the extent to which these are found to work in practice has proven discouraging.

Drawing upon the findings, one point is both more concerning, recurring and pertinent than any other: that there is an obvious disconnect between the legal theory and practical reality of consent-based models, especially concerning data protection and the digital environment in which it operates. It transpires too often that legal frameworks presuppose and favour the neoclassical economic perception of the consumer as an entirely rational actor capable of making complex decisions, balancing risks and gratification to make calculated decisions, thus protecting themselves. However, the practical reality appears to vary considerably. Interdisciplinary discussion has proven particularly influential in this regard; asserting and affirming a more accurate perception of the consumer as one with bounded rationality[184]. Such perceptions depict the consumer, even considering this new framework, as largely vulnerable and disempowered - contrary to the central aim of consumer protection[185].

These conclusions hold unfortunate implications for the GDPR's success because the failures go beyond what mere lexical changes can resolve. Insofar as the GDPR has failed to move beyond flawed and outdated perceptions of the consumer and their cognitive abilities, the new requirements were set to replicate the DPD's deficient provision of consumer protection. Given that research conducted on behalf of the EU has similarly recognised the unworkability of models fixated on the neoclassical perception of the consumer[186], it is contradicting that the GDPR does little to respond to these. Instead, the GDPR's framers have inadvertently rejected the large and credible findings from both consumer protection and behavioural economics literature and implemented measures which are either incomprehensive or even counter-intuitive as a result. True protection, it can be credibly argued, can only be created by a law which is constructed according to these cognitive deficits[187] and seeks to understand consumers to be the heterogeneous group that they are, rather than the homogeneous one that they are not[188]- an advancement yet to be seen.

The contribution of broader considerations causes greater concern. It is clear that either overly burdensome consent has deterred processors and controllers from allowing consumer choice altogether or that even if these new requirements are not met, there is a lack of redress opportunities for consumers to enforce the law.

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[184] Herbert Simon, *Models of Bounded Rationality* (Cambridge, Mass MIT Press 1982)
[185]Len Wright, Andrew Newman and Charles Dennis, 'Enhancing Consumer Empowerment' (2006) European Journal of Marketing 40(9/10) 925-935
[186] Jana Valant, 'Consumer Protection in the EU: Policy Review' (2015) European Parliamentary Research Service p.13
[187] Adam Hirsch, 'Cognitive Jurisprudence' (2002) California Law Review
[188] Cartwright (n 28)

Overall, the analysis finds the GDPR to have been fairly stagnant in many areas that were in dire need of a progressive and better-informed reform. Unfortunately, it's over-reliance on the notion of rational actors and self-reliance leads this paper to disappointingly conclude that whilst the GDPR's consent provisions can be deemed a significant enhancement in the protection afforded to consumers, this is predominantly theoretical and far less significant in practice than its framers and the media initially led us to believe. Therefore, greater efforts are required if consumers are to benefit from adequate protection of their non-sensitive personal data, leading us neatly into the final section of this paper - recommendations.

B. Recommendations

Various recommended models of regulation might be better placed at enhancing consumer protection within the context of personal data protection proposals will be evaluated in turn. Although it is the most obvious response to the continuing deficiencies of the law, the need to re-evaluate legal perceptions of the consumer in light of behavioural economics will not be discussed in this section owing to the fact that changing the entire foundations on which consumer and data protection law is predicated is an ambitious and complex task, one which this paper is not equipped for. Instead, a more feasible course of action will be justified and recommended: finding the retention of consent as a legal basis, but supplemented with a multi-faceted effort to be the most feasible and sensible solution to the evident defects of the legal frameworks - both old and new.

The Retention of Consent

Building upon the discussion and findings of this paper, consent is presented as unworkable and affords weak protection to consumers as a legal basis, particularly given the motivations of controllers in choosing it as their preference. However, regulators must not be too complacent in leaving it to the other grounds as the elimination of consent sees authorisation fall to legitimate interests instead, as the last chapter explored.

Charney is likely the most outspoken advocate on consent's inability to protect consumers' data, adhering to the recurring argument in this paper that consent models are burdensome and ineffective as consumer protection tools[189]. He describes how virtual evolution will naturally displace the value of consent and its suitability as a protective tool[190]. Charney's argument is compelling given the quality and quantity of research reviewed suggesting that the model is already being undermined today, as these lead to pressing questions about its appropriateness for a future of digital transformation. Despite this, Charney does not suggest dismissing consent altogether, instead he proposes increased organisational accountability and oversight but is unclear about

[189] Scott Charney, 'The Evolving Pursuit of Privacy' The Huffington Post (06 December 2017) <https://www.huffpost.com/entry/the-evolving-pursuit-of-p_b_5120518> accessed 21 March 2020

[190] Ibid

specifics, indicating a need for greater research. Comparatively, more radical recommendations have invited particular types of data processing to be banned altogether[191] to better protect consumers. But such recommendations are highly controversial, with various undesirable effects, thus affirming Cartwright's view that whilst mandatory disclosure has been subject to grave criticism - the idea of abandonment has been unpopular also[192].

Foremost, a more paternalistic approach may jeopardise the balance between privacy and informational free-flow and threaten innovation through overly restrictive legislation. This fundamentally undermines the suitability of this model in a progressive modern day. A second, more relevant risk posed is to personal autonomy because it would diminish opportunities to exercise informational self-determination, as suggested by Solove[193]. Behavioural economics, as discussed, portrays consumers as poorly equipped to truly be successful in self-determination, yet the conceptual value of self-determination must not be dismissed. The right to informational self-determination has long been acknowledged as necessary, due to its noted important role in freedom, democracy and personality development[194]. Moreover, replacing consent would be potentially costly to those it is designed to protect, albeit sub-optimally. The model's feasibility must also be considered. Despite the credibility and quantity of behavioural challenges, consent remains prevalent within many contexts. Perhaps smaller, less radical changes could be more efficient in enhancing consumer protection regarding consent - particularly if we want this enhanced protection sooner rather than later.

The Libertarian Paternalism and 'Nudging' Approach

Another approach is ensuring the retention of the established role of consent but providing a multi-faceted approach to consumer protection. It has been noted that a libertarian paternalistic approach to protecting consumers can be achieved by implementing regulation by code, a model coined by Lessig[195]. This can be done in one or both of the following ways:

Foremost, greater coded restrictions can be created on choice architecture and dark patterns to monitor and regulate the ways in which content might have manipulative effects and hinder informational self-determination. Achieving this would potentially eliminate some of the clearly troubling opportunities for consumers to be exploited by framing techniques. Although this would see many flaws of data protection law persist, these manipulations are deeply pervasive, and so this would pose a substantial improvement to the protection of consumers.

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191 Schermer, Custers and van der Hof (n 111)

192 Cartwright (n 28) p.126

193 Daniel Solove, 'Conceptualizing Privacy' (2002) California Law Review 90

194 Brendan Alsenoy, Eleni Kosta and Jos Dumortier, 'Privacy Notices Versus Informational Self-Determination: Minding The Gap' (2014) International Review of Law, Computers and Technology 28(2)

195 Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York Basic Books 1999)

A second possibility which should be further investigated is combating poor choice architecture with counter mechanisms such as 'nudging', a phenomenon made known by Sunstein and Thaler[196]. Nudging is described to be paternalistic in the sense that it stimulates welfare enhancing choice for individuals, but libertarian because the liberty of individuals is preserved as they are nudged, not commanded to make better decisions[197]. Illustratively, Thaler and Sunstein says that positioning fruit at eye level constitutes a nudge, but simply banning junk food does not[198]. This is likely the most progressive approach available as it encourages law to utilise the behavioural research made available throughout this essay rather than remain stagnant in the face of it. Although progressive, nudging can be criticised for being applicable only in simplistic situations and it is possible that the same scrutiny is especially significant in the context of data protection whereby numerous interests are being balanced and no single choice is necessarily more 'right' than another. Moreover, data protection is distinct from Thaler and Sunstein's common example of obesity, because there is a lack of concrete, scientific and established work which determines the best course of action for consumers in this context. Furthermore, for this possibility to be moved forward, greater research into what the optimal decision for consumers is must first be developed. Imperatively, regulation by code has great potential so long as it has been consolidated by further research in this area, which this paper concludes by encouraging.

[196] Cass Sunstein and Richard Thaler, *Nudge Theory* (Yale University Press 2008)
[197] Murray (n 57)
[198] Sunstein and Thaler (n 196)

Parliamentary Curtailment of Judicial Powers: Emanation or Abuse of the Rule of Law and Democracy?

REHAN D CHAUDHURI

Abstract

In 2019, the Supreme Court rendered its highly anticipated decision in Privacy International v IPT [2019] UKSC 22, which involved the applicability of an 'ouster clause' that purportedly immunized the Investigatory Powers Tribunal from judicial review. An ouster clause is a legislative provision that seeks to restrict or preclude the High Court's supervisory jurisdiction over inferior courts, tribunals and other administrative bodies. Privacy International affirmed in strong terms, the principles laid down by the House of Lords in Anisminic v FCC [1969] 2 AC 147, regarding the constructive requirements for such clauses to be effective. But, more importantly, it reignited the contentious debate on whether the United Kingdom's putatively supreme Parliament has the authority to restrict or totally strip the judiciary's powers by way of statute.

This paper argues that despite popular conceptions of parliamentary sovereignty, Parliament both does and should have limited competence to curtail the judicial role through mechanisms like ouster clauses. Initially framing this issue as one concerning Parliament's own sovereignty, this research analyses some of the underlying rationales for the statutory interpretation approach currently adopted by judges when faced with an excessively restrictive or preclusive provision. More controversially, this paper also examines the more novel theme of whether primary legislation such as a total ouster clause may be inconsistent with the rule of law and, accordingly, be declared unconstitutional by the UK judiciary. Finally, this research explores the wider effects that restricting the judicial role may have on fundamental democratic structures, rights and values.

1. Introduction

Over the past few decades, statutory provisions seeking to excessively restrict or preclude the ordinary jurisdiction of the courts appear to have increased in frequency and in force.[1] These have seldom, if ever, been in the form of sweeping or highly visible constitutional reforms. Instead, they have been carefully inserted provisions that seek to disrupt the judiciary's interpretative or supervisory role,[2] in a manner unlikely known to the general public. The most notorious of these is the 'ouster clause' which in the English context, aims to partially or totally exclude the supervisory jurisdiction of the High Court over inferior courts and tribunals that are often created by the same statute containing the clause.[3] Interestingly, however, these attempts to interfere with judicial power have found little success, as judges have consistently been able to limit the effect of preclusive clauses. But if as a matter of fundamental constitutional principle, Parliament is sovereign,[4] then how is it that the courts have legitimately resisted exercises of that sovereignty?

The answer to this lies in the approach adopted by the House of Lords in the seminal *Anisminic* judgment.[5] The case concerned the applicability of an ouster provision[6] that sought to insulate the decisions of the Foreign Compensation Commission from the superintendence of the High Court. Through a stringent and almost 'surgical' statutory interpretation,[7] the majority held that the construction of the clause in question was inadequate to demonstrate that Parliament intended to oust judicial review for errors of law. Therefore, the provision was found to not have that effect but, as the majority emphasised, was not interpreted out of existence.[8] This approach enabled the Appellate Committee to preserve the regular jurisdiction of the courts while still overtly maintaining its subservience to Parliament.[9] In the process, the majority crystallised two further principles: Firstly, it confirmed that if a clause is reasonably capable of having two meanings, then judges should take the meaning which maintains the ordinary jurisdiction of the courts.[10] This finding is based on a strong and consistently reaffirmed

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[1] William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 608
[2] ibid
[3] ibid 612–613
[4] *R (Jackson) v Attorney-General* [2005] UKHL 56, [9]; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [43]
[5] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147
[6] Foreign Compensation Act 1950, s 4(4)
[7] Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in Jeffry Jowell and Dawn Oliver (eds), *The Changing Constitution* (5th edn, OUP 2000) 58–59
[8] *Anisminic* (n 5) 170
[9] Elliott, 'Parliamentary Sovereignty' (n 7) 58
[10] *Anisminic* (n 5) 170

common law presumption dating back to the 17th century[11] that Parliament could not intend to exclude the courts' jurisdiction to quash decisions reached out of an error of law.[12] Accordingly, in order to rebut this presumption, a clause must be drafted with the clearest and most explicit words possible,[13] leaving it incapable of having more than one meaning. Secondly, *Anisminic* made obsolete, the distinction between jurisdictional and non-jurisdictional errors of law, meaning that a decision reached out of either form of error would render it a nullity.[14] Previously, only jurisdictional errors could be quashed by *certiorari* issued by the courts. However, the judgment in *Anisminic* effectively created a single class of legal error which would result in an *ultra vires* decision.[15] As such, an inadequately constructed clause cannot preclude the review of either form of error.

Beyond ouster clauses, Parliament has sought to enact various other forms of direct and indirect restrictions on the judicial role. Some examples considered in this paper include the exercise of statutory powers that resulted in the impediment of access to justice,[16] the statutory authority to veto tribunal decisions, post-judgment,[17] and the competence to enact delegated legislation 'as if enacted' in primary legislation.[18] Nevertheless, through rigorous statutory interpretation and, in some instances, the application of the *Anisminic* principles, all were eventually limited in practice. In the past, while some statutes have successfully restrained the judicial role, this has only been minimally through time-limit clauses[19] or the limitation of the grounds for review[20] neither of which sought to entirely remove supervision. Naturally, the fact that legislation had not been able to entirely preclude or significantly restrict the judicial role raised questions as to whether Parliament has any real authority in this area.

In 2019, however, the Supreme Court in *Privacy International v IPT*[21] was faced with an ouster provision that many believed was unambiguous and expansive enough to withstand this standard of judicial scrutiny. Two years prior, the organisation 'Privacy International' sought to review a decision of the Investigatory Powers Tribunal (IPT) which is the only Tribunal capable of hearing complaints about surveillance by public

[11] *Smith, Lluellyn v Comrs of Sewers* (1669) 1 Mod 44, 86 ER 719, 720; *R v Plowright* (1685) 3 Mod 94, 87 ER 60, 61
[12] *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 2 WLR 498, 502–505
[13] ibid 503; *Anisminic* (n 5) 170, 199, 208, 215
[14] *O'Reilly v Mackman* [1983] 2 AC 237, 278; *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, 701–702
[15] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [66]
[16] *R (UNISON) v Lord Chancellor* [2017] UKSC 51
[17] Freedom of Information Act 2000, s 53(2); *R (Evans) v Attorney-General* [2015] UKSC 21
[18] *Minister of Health v The King, ex p Yaffe* [1931] AC 494
[19] *Smith v East Elloe Rural District Council* [1956] UKHL 2, 4; *R v The Secretary of State for the Environment, ex p Ostler* [1976] EWCA Civ 6
[20] *R (Cart) v Upper Tribunal* [2011] UKSC 28
[21] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

authorities.[22] The High Court held that it was unable to do this as the Act that established the IPT,[23] also completely insulated the tribunal from supervision by way of an ouster clause[24] that was distinguished from the clause in *Anisminic*.[25] Later that year, the Court of Appeal reached the same conclusion, albeit by a different route.[26] This left commentators concerned that the Supreme Court would do the same, thus conceding final legal authority on delicate constitutional matters to an unsupervised tribunal.[27] However, by a majority of four to three, the highest court found that the Administrative Court and Court of Appeal had erred in their judgments and that the ouster provision in question was not materially different from the one in *Anisminic*.[28]

Lord Carnwath delivering the leading judgment, reemphasised the high constructive threshold required for such provisions, finding that the words of the purported ouster clause were only intended to cover decisions not reached out of an error of law.[29] But, more strikingly, he briefly answered the appeal's second certified question in his *obiter* on whether, as a matter of principle, a statute could ever wholly oust the High Court's supervisory jurisdiction. His judgment answered this emphatically in the negative, stating, '…consistently with the rule of law, binding effect cannot be given to a clause which purports to wholly exclude the supervisory jurisdiction'.[30] Of course, this question only arose as a hypothetical as it was no longer relevant once the majority was able to find that the clause did not wholly oust the supervisory role. Moreover, this was only an opinion held by three of the judges in the majority, with Lord Lloyd-Jones not expressing an opinion on the matter. Nonetheless, the force of Lord Carnwath's *obiter* is derived from its background and context as it is, arguably, the extension of two important cases. It is, firstly, the ideological extension of Lord Hope's and Baroness Hale's famous *obiter* in *Jackson* concerning the rule of law,[31] and secondly, the logical extension of Baroness Hale's majority opinion in *Cart* where it was asked 'what level of independent scrutiny…is required by the rule of law.'[32] Accordingly, this reignited the contentious debate on whether the United Kingdom's supposedly supreme Parliament has the power, even through clear and express words, to disrupt the judicial role, and if so, whether it should

[22] GCHQ, 'The Investigatory Powers Tribunal' (GCHQ, 20 March 2019) <https://www.gchq.gov.uk/information/investigatory-powers-tribunal> accessed 06 April 2020
[23] RIPA 2000, ss 65–69
[24] RIPA 2000, s 67(8)
[25] *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin)
[26] *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868
[27] Mark Elliott, 'Privacy International in the Court of Appeal: Anisminic distinguished – again' (*Public Law for Everyone*, November 2017) <https://publiclawforeveryone.com/2017/11/26/privacy-international-in-the-court-of-appeal-anisminic-distinguished-again/> accessed 1 May 2020
[28] *Privacy International* (n 21) [105] – [112]
[29] ibid
[30] ibid [144]
[31] *Jackson* (n 4) [107], [159]
[32] *Cart* (n 20) [51]

ever exercise that power given the potential implications to the British constitution and democracy.

This paper seeks to answer these questions from a normative and theoretical perspective. Throughout, it will be argued that despite popular conceptions of Parliamentary sovereignty, Parliament both *does* and *should* have limited competence to curtail the judicial role through mechanisms like ouster clauses. In unravelling this argument, the paper proceeds in the three parts: To begin with, Part 2 will analyse this issue in the context of its effects on Parliamentary sovereignty by exploring the underlying rationales for the 'statutory interpretation approach' usually adopted by judges when faced with preclusive or excessively restrictive clauses. Following this, Part 3 will focus on the 'unconstitutionality approach' to a hypothetical preclusive provision that is unambiguous enough to withstand statutory interpretation, in order to determine whether the rule of law may in theory and practice limit Parliamentary sovereignty. Lastly, Part 4 will more deeply analyse the effect and legitimacy of preclusive clauses with relation to democratic institutions, principles and values to understand if there is an overarching and compelling basis to check Parliamentary authority.

2. *The Statutory Interpretation Approach*

This part explores some of the rationales underlying why the judiciary has exhibited and has been able to exhibit so much resistance to provisions like ouster clauses through strict statutory interpretation, with the aim of gaining a better understanding of Parliament's authority in this area. Accordingly, it will be argued that Parliament *does* and *should* have limited competence to curtail the judicial role, because an essential component of the doctrine of Parliamentary sovereignty is the existence of an independent court of unlimited jurisdiction to give effect to that sovereignty. If Parliament were able to automatically strip the courts' ordinary jurisdiction, it would effectively erode its own supremacy. The first section of part 2 explores the effect of preclusive clauses on the judiciary's relationship with Parliament, starting with provisions that indirectly or directly curtail the courts' interpretative role, followed by clauses seeking to oust the High Court's supervisory jurisdiction. Subsequently, the second section explores the judiciary's role in relation to executive accountability and the potential issues arising from the restriction of this role. Finally, the last section will analyse the limitations of this approach.

A. The Judicial Role and Parliament

Before examining the well-researched area of ouster clauses and the supervisory role, it is important to first analyse the generally overlooked legislative restrictions on the courts' interpretative role and the basis of the judicial resistance that often ensues.

The primary function of the judiciary in relation to Parliament, common to all areas of the law, is this interpretative role. The legislative branch exercises its sovereignty by enacting primary legislation in accordance with its own rules and procedures.[33] But once that legislation leaves the walls of Westminster, its words and corresponding rights and obligations require a separate body (the judicial branch) to effectuate them.[34] Succinctly put, 'Parliament makes the laws, the judiciary interpret them'.[35] Therefore, the problem arising from Parliamentary limitations on this role is axiomatic: If the courts are disabled from interpreting and giving meaning to a statute then that statute is rendered nugatory.

Two cases decided by the Supreme Court are illustrative of this point.[36] The first is *Unison*,[37] wherein the Lord Chancellor exercised a statutory power[38] to issue a 'Fees Order',[39] imposing an application fee for the Employment and Employment Appeals Tribunal which were previously accessible for free. The Fees Order was challenged on the grounds that it impeded access to justice as the fee was disproportionately high and the tribunals are the only place where an individual can enforce most of their employment rights. Lord Reed, concurring with this submission delivered the unanimous judgment of the court. Relying on the constitutional principle of the rule of law, the decision found that the power to issue the order was incorrectly construed by the Lord Chancellor and was, therefore, exercised unlawfully.[40] Notably, the decision emphasised that statutory powers which, in turn, impede access to justice, prevent judges from being able to provide guidance on the application and meaning of a statute, leaving 'laws… liable to become a dead letter'.[41] This judgment affirms that resistance to even the most indirect statutory restrictions on the courts, partly rests on the recognition that excessive interference with the judicial-interpretive space results in the exercise of Parliamentary sovereignty becoming meaningless and ineffective.

Likewise, in *Evans*,[42] the Attorney-General exercised a statutory veto power[43] to dispense of a decision of the Upper Tribunal, which like the High Court, is a superior court of

[33] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 38, 273
[34] ibid
[35] *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157
[36] Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution' (2018) University of Cambridge Faculty of Law Research Paper 4/2018, 5-7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097074> accessed 05 January 2020
[37] *UNISON* (n 16)
[38] Tribunals, Courts and Enforcement Act 2007, s 42(1)
[39] Employment Appeal Tribunal Fees Order 2013, SI 2013/1893
[40] *UNISON* (n 16) [86]–[89]
[41] ibid [68], [72]
[42] *Evans* (n 17)
[43] Freedom of Information Act 2000, s 53(2)

record.[44] The relevant Tribunal decision[45] found that the Freedom of Information Act[46] when correctly interpreted, obliged the Government to disclose certain information requested by the Applicant. However, once the Attorney-General issued a Certificate waiving the decision, it resulted in what Elliott terms '*ex-post*' (after the event/ fact) ouster.[47] Eventually, the Supreme Court quashed the Certificate finding that the Attorney-General could only exercise this power lawfully in a few exceptional circumstances and not simply when the executive disagrees with a Tribunal decision.[48] The court further found that for such a statutory veto power to ever have the effect that the Attorney-General claimed it did, the relevant provision would have to be drafted with 'crystal clear language'.[49] *Evans*, perhaps even more so than *Unison*, is firstly demonstrative of how statutory powers may be used to directly usurp the interpretative role, and secondly, how an illegitimate and erroneous interpretation of legislation undermines Parliament's supremacy as it fails to give effect to the correct legislative intention. The judgment, accordingly, indicates that far from undermining Parliamentary sovereignty, stringent statutory interpretation of restrictive provisions is largely based on upholding the principle.

These cases also highlight other issues of much deeper significance. For instance, if the court had determined that the exercise of statutory powers in the aforementioned cases was lawful, it would do away with our understanding of the accepted 'relative institutional competencies' in the United Kingdom. This is a concept that assumes that the three branches of government each have a special competence or expertise that makes them best suited to perform particular governmental functions.[50] In several cases, it has been reaffirmed that adjudicative and interpretative matters fall squarely to the judiciary.[51] Therefore, any executive attempt to seize this power would disregard established precedent on the appropriate division of institutional expertise. Of course, one could argue that the use of preclusive provisions may lead to greater administrative efficiency[52] and could even prevent judicial decisions from creating an excessive burden on the executive.[53] Nonetheless, one branch of government appropriating another branch's special competency without the requisite expertise would obscure the

[44] Tribunals, Courts and Enforcement Act 2007, s 3(5)
[45] *Evans v Information Commissioner* [2012] UKUT 313 (AAC)
[46] Freedom of Information Act 2000
[47] Elliott, 'Through the Looking Glass' (n 36) 5
[48] *Evans* (n 17) [71]–[79]
[49] *Evans* (n 17) [58]
[50] Henry M Hart, Albert Sacks and others, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press 1994) ix
[51] *Re Racal Communications Ltd* [1980] 3 WLR 181, 193; *Privacy International* (n 21) [131]–[132].
[52] *UNISON* (n 16) [86]
[53] *Evans* (n 17) [44]–[45]

separation of powers[54] and, in practice, lead to poor and ineffective government[55] (See Part 4 for further discussion).

More importantly, Allan notes that the process of statutory creation and subsequent interpretation, maintains an essential constitutional dialogue between the legislative and judicial branches.[56] He argues that the abstract dialogue not only allows individual statutes to be effective but, is the foundation on which the whole legislative process rests.[57] In fact, this underlying interlocutory relationship has a longstanding basis in British constitutional history. Dating back to the 12th century, the legislative and judicial roles, as well as some executive functions were amalgamated in the work of the *Curia Regis* (King's Court).[58] Over many centuries the legislative and supreme judicial authority remained fused as the *Curia Regis* developed into the 'High Court of Parlyament' sitting as part of the House of Lords, eventually forming into the specialist Appellate Committee.[59] While, indeed, the passage of the Constitutional Reform Act[60] created an institutional separation between the legislative branch and highest appellate court (the Supreme Court), the latter still, arguably, retains its essentially parliamentary character.[61] Accordingly, if judges were stripped of their interpretative competence and left unable to maintain this historical constitutional dialogue, it would irreparably weaken the legislative process and, consequently, the supremacy of Parliament.

Aside from the interpretative role, courts of unlimited jurisdiction perform a further function in the interest of safeguarding Parliamentary sovereignty – that is, the supervisory role. Though less obvious in its relationship to Parliament, the High Court's supervisory jurisdiction over inferior courts and tribunals is at the heart of the debate surrounding Parliament's authority to restrict judicial powers as it is often the target of preclusive provisions.[62]

Like any public authority, a tribunal of limited jurisdiction is susceptible to making *ultra vires* decisions, regardless of the quality of the decision-maker or the faith in which they

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[54] Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 228–229

[55] HM Hart and others (n 50)

[56] TRS Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' (2004) 63(3) Cambridge Law Journal 685, 690–691

[57] Ibid

[58] Glenn Dymond, 'The Appellate Jurisdiction of the House of Lords' (House of Lords Library, Library Note LLN 2007/008, 15 November 2007) 1

[59] ibid 9

[60] Constitutional Reform Act 2005, s 23

[61] Tom Spencer, 'The Sovereignty of Parliament, the High Court of Parliament, and Privacy International' (UK Constitutional Law Blog, 18 July 2019) <https://ukconstitutionallaw.org/> accessed 25 March 2020

[62] National Insurance (Industrial Injuries) Act 1946, s 36(3); Foreign Compensation Act 1950, s 4(4); Access to Justice Act 1999, s 54(4); RIPA 2000, s 67(8)

were acting. For example, in *H v The Police*,[63] the Investigatory Powers Tribunal (IPT) ordered the payment of compensatory damages to the Applicant and the destruction of video evidence collected by the Respondent. However, soon after, in *C v The Police*[64] the IPT found that it did not have the jurisdiction to hear the kind of claim in *H*, let alone order the payment of damages or destruction of evidence. This clearly demonstrates how a tribunal may make a decision in excess of its jurisdiction and, accordingly, why it is necessary for a court of unlimited jurisdiction to oversee and correct jurisdictional errors of law. If a tribunal is able, without supervision, to act in excess of its statutorily qualified competence, then Parliament can no longer be said to be sovereign in any sense as it would ignore the express intention of the drafter.

Additionally, even if an unsupervised tribunal decides an issue within its jurisdiction, it may still render an *ultra vires* decision by making a non-jurisdictional error of law, thereby, still frustrating the sovereignty of Parliament. To elaborate, a tribunal judge must, like any other judge, interpret and apply the law. But if their interpretation or application to the facts is erroneous, then it leaves any decision they reach out of that mistake, a nullity.[65] Such an error may arise from something as simple as a tribunal reaching a different interpretation of a statute from the Supreme Court. But, without supervisory or appellate correction, it could result in the catastrophic formation of 'islands' or 'pockets' of erroneously interpreted law.[66] This would not only circumvent the will of Parliament by failing to observe the correct interpretation of a statute, but would also allow a tribunal to unaccountably grant itself arbitrary powers, thereby subverting the principle of legality and the rule of law.[67] Therefore, the obvious need to protect these underlying constitutional principles is plainly why judges do and must construe ouster clauses so rigorously, particularly in circumstances where there is limited[68] or non-existent[69] appellate supervision.

Robert Craig makes several assertions that could call into question, the legitimacy of this judicial resistance.[70] He suggests that the ordinary words of many ouster clauses did, in reality, confer an intention to permit these 'islands' of law, as Parliament sought to grant specialist tribunals the final interpretative authority on certain legal matters.[71] Therefore, in his view, the judiciary's resistance to preclusive clauses by raising a high constructive

[63] *H v Police Federation of Great Britain* [2005] IPT/03/23/CH
[64] *C v The Police and Home Secretary* [2006] IPT/03/32/H, [87]–[89]
[65] *Anisminic* (n 5)
[66] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, [99]
[67] TRS Allan, 'Questions of legality and legitimacy: Form and substance in British constitutionalism' (2011) 9(1) International Journal of Constitutional Law 155, 158
[68] *Cart* (n 20)
[69] *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738.
[70] Robert Craig, 'Ouster clauses, separation of powers and the intention of Parliament: from Anisminic to Privacy International' (2018) 4 Public Law 570
[71] ibid 577, 582

threshold amounts to judicial legislation.[72] Nevertheless, even the most orthodox conception of Parliamentary sovereignty propounded by Dicey recognised the fundamental need for 'ordinary law courts' to keep inferior courts within their statutory limits.[73] Moreover, Laws LJ's analysis in *Cart* (Divisional Court)[74] indicates that the supervisory role of the King or Queen's Bench is also a by-product of the work done by the *Curia Regis* in the 12th century, suggesting that the maintenance of this role is hardly a modern judicial construct as Craig contends. Aside from this, Aronson highlights that the unqualified power to abuse jurisdiction could allow everything from breaches of natural justice to providing judicial sanction to manifestly unlawful acts.[75] Though Craig's work is illustrative of the issues that may arise from excessive defiance by judges, many of these arguments are based on the assumption that ordinary supervisory jurisdiction necessarily works against rather than for Parliamentary sovereignty. The reasoning above strongly indicates that without the High Court's superintendence over inferior tribunals, significant constitutional disarray would ensue which would both, directly and indirectly, undermine Parliament's authority.

Finally, Lord Sumption's dissent in *Privacy International*,[76] suggested that tribunals such as the IPT do not require any additional supervision as they themselves are applying the principles of judicial review, and consequently, Parliament simply delegated rather than stripped the judicial role. However, adopting this approach would have been problematic as, logically, applying a certain standard to other bodies does not mean that the tribunal would apply them to itself. And legally, without any appellate supervision, this would have allowed the tribunal to set the limits of its own competence which is, of course, incompatible even with Dicey's traditional view of legislative supremacy.[77]

Therefore, though some suggest that the courts' rigorous statutory interpretation of preclusive and restrictive provisions undermines legislative authority, evidence suggests that this is not the case. In fact, it has been shown that by curtailing the judicial branch's interpretative and supervisory functions, Parliament undermines its own sovereignty. This, accordingly, serves as a strong justification for why Parliament must have limited competence in this regard and why the judiciary's resistance to such provisions is appropriate and necessary.

B. The Judicial Role and Executive Accountability

[72] ibid 580
[73] Dicey (n 33) 120
[74] *R (Cart) v Upper Tribunal* [2011] QB 120, [44]-[45]
[75] Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th edn, Thomson Reuters Australia 2009), para 1.90
[76] *Privacy International* (n 21) [182], [190]
[77] Dicey (n 33) 224–225

Cases like *Evans*[78] and *Unison*[79] are revealing of how the executive branch may, through statute, limit Parliamentary sovereignty by compromising the relationship between Parliament and the courts. However, upon closer analysis, there is a further dimension to this issue. When the Government exercises preclusive statutory powers over the judicial system, it may have the direct or indirect effect of curbing its own legal accountability which would inevitably allow the executive to frustrate legislative supremacy. This is especially valid because the United Kingdom's constitution has shifted from one being largely dominated by political constitutionalism to one characterised by a greater equilibrium between political and legal constitutionalism.[80] While proponents of the former contend that the executive is best held accountable through political mechanisms such as parliamentary select committees and voting procedures, legal constitutionalists maintain that this function is most effectively achieved through judicial review.[81]

Academics such as Cohn[82] and Griffith[83] both suggest that this shift to a greater dependence on judicial review is the result of 'activism' and disobedience within the judiciary. Nevertheless, as Elliott and Thomas observe, it is merely reactive to the practical needs of the constitution with a consistent decline in the effectiveness of political checks on the Government.[84] For example, mechanisms like select committees have the power to call for persons and papers allowing them to gather evidence on, for example, the subject matter of a particular Bill.[85] However, these committees have no competence to hinder or veto legislation that the Government wishes to push through Parliament.[86] Consequently, while they may be useful to increase administrative efficiency and improve the quality of legislation,[87] they are minimally effective in holding the Government to account. In fact, over one hundred years ago, Farewell LJ eluded to this mechanism's partly illusory nature, suggesting that ministerial accountability is no more than a 'shadow of a name'.[88]

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[78] *Evans* (n 17)
[79] *UNISON* (n 16)
[80] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, OUP 2017) 480 – 484
[81] Wil Waluchow, 'Constitutionalism' (*The Stanford Encyclopedia of Philosophy*, 2018) <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/> accessed 25 March 2020
[82] Margit Cohn, 'Judicial Activism in the House of Lords: A Composite Constitutionalist Approach' (2007) 2007 Public Law 95, 111–12
[83] John Aneurin Grey Griffith, 'The Common Law and Political Constitutionalism' (2001) 117 LQR 54; John Aneurin Grey Griffith, 'The Brave New World of Sir John Laws' (2000) 63(2) MLR 159
[84] Elliott and Thomas (n 80) 480–484
[85] Liaison Committee, *The Effectiveness and Influence of the Select Committee System* (HC 2017–2019, HC 1860)
[86] ibid 170-178
[87] ibid 1-3
[88] *Dyson v Attorney-General* [1911] 1 KB 410, 423

Similarly, the use of internal voting procedures to keep a check on the Government, though more concrete, may be ineffective when the executive seeks to abuse its power. With more than one hundred in-built votes from government ministers, and the likelihood of party-cohesive voting by non-ministerial members of the majority due to a latent fear of punishment or expulsion,[89] it is questionable whether the opposition would have any real power to hold the Government accountable. Indeed, one could cite the series of defeats experienced by former Prime Minister May while attempting to attain Parliamentary approval of her EU exit deal,[90] but it is important to remember that all these defeats were experienced by a Government with an increasingly weakening working majority. One may further attempt to argue that the House of Lords can keep the executive to account by withholding its vote when necessary. However, with the Parliament Acts of 1911 and 1949,[91] as well the ruling in *Jackson*,[92] ministers in practice, could simply bypass the approval of the upper chamber. Accordingly, though these mechanisms are important especially given the constitutional status of Parliamentary sovereignty, they are clearly insufficient to keep an effective check on Government power alone, which is why judicial review is needed to complement this system.

There is perhaps, no better illustration of this reactive shift as well as the equilibrium between these forms of constitutionalism than the recent *Miller*[93] and *Miller/Cherry*[94] judgments. In both these cases, for the executive to be accountable and remain accountable to Parliament, it first required the intervention of the courts. This was especially important in *Miller/Cherry*, as the executive had entirely removed their Parliamentary accountability by unlawfully proroguing Parliament. This, of course, undercut the sovereignty of Parliament as it was effectively an attempt by the executive to dictate when Parliament could exercise that sovereignty.[95] Therefore, had the judiciary not held the Government legally accountable for this, they would have remained politically unaccountable, and the supremacy of Parliament would have remained frustrated. This demonstrates the system of complementarity between the two forms of constitutionalism that is now characteristic of the British constitution.

In addition to this, Wade and Forsyth note the important role that the court plays in maintaining the separation of powers between the executive and legislative despite their

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[89] Meg Russell, 'Parliamentary party cohesion: Some explanations from psychology' (2014) 20(5) Party Politics 712, 713

[90] 'Brexit votes: MPs fail to back proposals again' (BBC News, 2 April 2019) <https://www.bbc.co.uk/news/uk-politics-47781009> accessed 27 March 2020

[91] Parliament Act 1911, s 2; Parliament Act 1949, s 1

[92] *Jackson* (n 4)

[93] *Miller* (n 4)

[94] *R (Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

[95] Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' (2019) Oxford Legal Studies Research Paper 57/2019, 27-28 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477487 > accessed 20 February 2020

lack of institutional separation.[96] They take the example of, *ex parte Yaffe*,[97] which involved a statutory power held by the executive to create delegated legislation 'as if enacted' in the Act that granted the power. The statutory formulation seemed to imply that even the enactment process of delegated legislation arising from the Act would be immune from judicial review like any other primary legislation. However, the House of Lords held that executive could only exercise its power strictly *intra vires* of the limits set by the statute granting it.[98] The judgment not only prevented actions in excess of competence, but also ensured that the executive did not encroach on the legislative role beyond what was permissible. Accordingly, this further highlight how legal constitutionalism complements the interests of political constitutionalists by working to preserve the supremacy of Parliament.

With this in mind, it is apparent why removing the judiciary's ability to check the executive would be problematic in this context. If the Government were able to escape legal accountability by immunizing its actions through statute, it could result in weak political accountability through systems like select committees, no accountability at all like in *Miller/Cherry* or diminished accountability due to a blurring of the separation of executive and legislative powers. Common to all these outcomes, is the potential weakening of Parliament's supremacy over the executive. Therefore, while this is not often an express consideration that judges make in cases concerning preclusive clauses, it does add considerable force to the resistance the judiciary displays to any attempt to limit its regular functions.

C. Limitations of the Statutory Interpretation Approach

Statutory interpretation has enabled judges to effectively limit preclusive provisions without overtly undercutting Parliament's authority even in cases where some believed the ouster clause in question to be adequately constructed.[99] However, an approach that requires the dissection of a provision in search of any fragment of ambiguity, is simply unsustainable. What happens when the executive passes through Parliament, an extensive clause that fully satisfies the constructive and intent requirements in *Anisminic*?[100] In fact, while establishing the Asylum and Immigration Tribunal, Clause 11(5) of the relevant Bill[101] read, 'There will be no further appeal from the Tribunal, and no statutory or judicial review of the Tribunal's decisions by the higher courts'.[102] As

[96] Wade and Forsyth (n 1) 611–612
[97] *ex p Yaffe* (n 18)
[98] ibid
[99] Mike Gordon, 'Privacy International, Parliamentary Sovereignty and the Synthetic Constitution' (UK Constitutional Law Blog, 26 June 2019) <https://ukconstitutionallaw.org/> accessed 29 March 2020
[100] *Anisminic* (n 5)
[101] Asylum and Immigration (Treatment of Claimants, etc) HC Bill (2003 – 2004)
[102] ibid, cl 11 (5)

many concurred,[103] had this clause survived legislative scrutiny and become part of the current law, not even the most creative statutory interpretation would have been able to find a lack of intention to wholly strip the High Court's supervisory jurisdiction.

The clear shortcomings of this approach would not change the answer to whether Parliament *should* have limited competence to strip the judicial role. If the courts' interpretative function or superintendence over inferior tribunals and the executive were removed, it would likely result in the demise of Parliamentary sovereignty and the rule of law for all the reasons previously detailed. However, if one were to conclude that Parliamentary intention is ultimately determinative of a preclusive clause's applicability then this may change the answer to whether Parliament *does* have the competence to curtail judicial powers.

One approach to this question is the one advanced by Dicey who suggested that the only limitation of a statute is its own words.[104] This a form of the principle of legality which is at the core of the judicial approach in *Anisminic*[105] and cases concerning ouster clauses since.[106] However, the rigour with which judges interpret preclusive provisions seems to suggest that the limitation on Parliament's authority extends beyond the orthodox Diceyean approach. In fact, Elliott argues the constructive threshold the courts have imposed on such provisions is extraordinary and incomparable to the interpretation of most other legislation.[107] In this sense, Parliament does, indeed, have limited competence as its words must be so clear that it 'squarely confronts what it is doing and accepts the political cost';[108] an outcome that prevented the passage of Clause 11 of the Asylum Bill.[109]

And even this right held by Parliament to enact an unambiguous clause does not appear to be absolute. As early as the 17th century and even in the 19th century, after the solidification of Parliamentary Sovereignty, the case law reveals that judges have been willing and able to disapply clauses expressly precluding *certiorari* against an inferior court.[110] More recently, in *Privacy International*,[111] three judges within the majority appeared to reiterate this willingness to do the same if they were faced with an unambiguous ouster clause. Therefore, the limitation on Parliament's authority in this area may extend beyond a high constructive requirement and political repercussions. The following part will, accordingly, explore this matter in further detail.

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[103] Constitutional Affairs Committee, *Asylum and Immigration Appeals* (HC 2003 – 2004, 211–I), paras 20, 61–66
[104] Dicey (n 33) 273
[105] *Anisminic* (n 5)
[106] *Privacy International* (n 21)
[107] Elliott, 'Through the Looking Glass' (n 36) 11
[108] *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, 131
[109] Constitutional Affairs Committee (n 103)
[110] *Foster's Case* (1615) 11 Co Rep 56, 64; *R v Cheltenham Commissioners* (1841) 1 QB 467, 113 ER 1211, 1214; *ex p Bradlaugh* (1878) 3 QBD 509, 512–513
[111] *Privacy International* (n 21) [144]

3. *The Unconstitutionality Approach*

Part 3 is premised on a hypothetical: What happens if the executive successfully passes through Parliament, an expansive preclusive clause that entirely removes its own or another institution's legal accountability on certain matters? One potential answer lies in Lord Carnwath's *obiter* in *Privacy International*, where it was suggested that consistent with the rule of law, binding effect would not be given to an unambiguous total ouster clause.[112] The opinion seemed to propose a form of constitutional review, and therefore, a limitation on Parliament's authority that has never been expressly seen in the United Kingdom, likely because the courts have not yet been faced with a 'crystal clear' clause that is entirely inconsistent with the rule of law. Lord Carnwath's conclusion though blunt did not elaborate on how this outcome would be achieved, leaving its theoretical and practical viability open to debate.

Developing this conclusion, it is submitted that Parliament *does* and *should* have limited competence to curtail the judicial role as devices like ouster clauses are repugnant to the rule of law and are, therefore, unconstitutional. To this end, the first section examines what 'the rule of law' actually requires and whether provisions like ouster clauses comply with these requirements. The second section then explores the constitutional foundations of judicial review in the United Kingdom to determine whether non-compliance with the rule of law could render primary legislation constitutionally invalid. And finally, the third section determines how one would remedy an unconstitutional provision in practice.

A. Ouster and the Rule of Law

The 'rule of law', like Parliamentary sovereignty, is a foundational constitutional principle within the United Kingdom. Its central objective is to prevent the arbitrary exercise of individual or institutional authority over other individuals' liberty.[113] The question arising from this, that has been the source of extensive political and academic debate across liberal democracies, is what the rule of law requires in order to achieve this outcome.

Perhaps the least contentious theory is the formal conception of the rule of law which emphasises the form of law rather than its content, meaning or substance.[114] Lon Fuller,

[112] *Privacy International* (n 21) [144]
[113] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) 3 Public Law 467
[114] ibid 467

a noteworthy proponent of natural law theory, argued that in order to bridge the gap between morals and the positive law, law-making has to observe eight fundamental requirements that he termed the 'inner morality of law': Namely, generality; publicity; prospectivity; intelligibility; consistency; practicability; stability; and congruence.[115] Many writers have since cited these principles as the eight formal requirements of the principle of legality within the rule of law[116] as they serve as a useful evaluative tool to examine whether the law or a legal action was properly authorised, in a properly authorised manner.[117] Therefore, this is commonly regarded as the starting point from which the judiciary enforces the rule of law by inquiring whether a public authority's action has a basis in law,[118] and whether the construction of statute is adequate to have the effect that it purports to.[119]

Though a purely formalistic approach provides a convenient checklist, its biggest flaw is that it may, ironically, create law devoid of any morality. Hart, writing in response to Fuller, acknowledged these principles' importance to good law-making, but noted that they could only make the law as moral as the institutions that establish and enforce them.[120] In fact, the Atlantic slave trade, the South-African apartheid and even the mass atrocities in Nazi Germany were sanctioned by positive law that technically observed these principles,[121] and by that logic observed the rule of law – and yet, no logical person could ever come to this conclusion.

In response, some argue that the rule of law contains a procedural element that complements its formal aspects' inadequacies. Waldron, for instance, contends that the rule of law mandates that any exercise of authority be guided by procedural safeguards such as open and impartial judicial oversight and the observance of the rules of natural justice and due process.[122] He further suggests that the rule of law and the separation of powers (a concept that will be explored further in Part 4) are inherently linked, as a body administrating powers of oversight must be wholly independent.[123] Arguably, these requirements do, to some degree limit the potential for capricious exercises of authority as it is often a lack of procedural rights that allow individuals and institutions to abuse their power.[124] However, the problem with this position is that even procedural

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115 Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39

116 John Rawls, *A Theory of Justice* (Harvard University Press 1999) 208 – 210; Jospeh Raz, 'The Rule of Law and its Virtue', in J Raz (ed), *The Authority of Law: Essays on Law and Morality* (OUP 1979) 214–218

117 P Craig (n 116) 467

118 *Entick v Carrington* [1765] EWHC KB J98

119 *Anisminic* (n 5) 170; *Privacy International* (n 21) [105]–[117]

120 Herbert Lionel Adolphus Hart, 'Book Review: Lon Fuller, The Morality of Law' (1965) 78 Harvard Law Review 1281

121 ibid 1287–1288

122 Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1, 8

123 Jeremey Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 BC L Rev 433

124 ibid; Azadeh Datsyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (CUP 2015) 184–192

safeguards insufficiently rectify the potential immorality of law as it is often the law's contents that result in arbitrary exercises of power. Lord Bingham argued that 'a state which savagely represses or persecutes sections of its people cannot… be regarded as observing the rule of law' even if that repression was the result of scrupulously enacted laws.[125] Likewise, simply having access to an impartial court that is anyway bound to enforce an oppressive statute, does not in any way prevent the rule of law from being subverted.[126]

Therefore, several notable legal scholars have suggested that the rule of law contains a substantive dimension, in addition to its formal and procedural ones. For example, Lord Bingham further argued that the rule of law must contain elements such as respect for human rights and democracy, in addition to formal requirements, in order to truly prevent capricious exercises of authority.[127] Likewise, both Allan[128] and Jowell[129] support this admixed approach, arguing that aside from formal requirements like legality, certainty and rationality the law should respect substantive equality and civil and political rights. The need and basis for a substantive conception of the rule of law is threefold: Firstly, it overcomes the significant limitation of the formal approach in that it requires scrutiny of the law's content, meaning a repressive law would not be regarded as compliant with the rule of law simply because it has been enacted properly. Secondly, as Elliott and Thomas note,[130] there are some fundamental substantive rights that have arisen from the common law such confidential communication with one's lawyer[131] and free expression[132] that cannot be classed as formal or procedural. Thirdly, it more effectively captures the increasing recognition that the constitution must not just regulate government through intergovernmental checks but also through citizens being able to directly condition their relationship with the state through constitutional rights.[133] Therefore, though there is scepticism of this substantive approach, it is possibly the only way to fully and effectively regulate the unprincipled exercise of power.

While this analysis hardly settles the debate on what the 'rule of law' truly means, it does give one a strong sense of what it, and therefore, the constitution requires of the three branches of government; Namely, that the law is enacted and enforced with certain formal requirements like consistency and intelligibility, that individuals be afforded procedural safeguards and, in some theorists' view, that individuals have certain

[125] Tom Bingham, *The Rule of Law* (London: Allen Lane 2010) ch 7
[126] ibid
[127] ibid
[128] TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 142; TRS Allan, *Constitutional Justice, A Liberal Theory of the Rule of Law* (OUP 2001)
[129] Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (5th edn, OUP 2000) 19–23
[130] Elliott and Thomas (n 80) 74
[131] *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26
[132] *Simms* (n 108)
[133] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [62]

fundamental substantive rights recognised as essential to the rule of law. The question that remains then, is whether a clause that wholly removes the courts' supervisory role complies with these requirements.

If, for instance, Parliament had successfully enacted an ouster clause that entirely insulated a public body like the IPT from judicial review, this would, arguably, have disregarded the formal aspects of the rule of law for many of the reasons detailed in Part 2. Most notably, if a tribunal is able to freely abuse its jurisdiction without appellate or supervisory correction it would result in the formation of islands of non-general, inconsistent and special law only applying to a special class of people, thus subverting formal requirements such as generality and consistency.[134]

This could further lead to the elimination of procedural safeguards. For instance, if a tribunal judge, insulated by an unambiguous clause, illegally imprisons a party for contempt of court, even mechanisms like *habeas corpus* would be unavailable.[135] This is just one of many procedural rights that an immune public authority would be free to dispense of. More importantly, restrictions on judicial authority would diminish the procedural values that connect the rule of law and the separation of powers,[136] like in the *Evans* case where the executive granted itself the legislative power to dispense of certain judicial decisions that they did not agree with.[137]

Lastly, limiting judicial oversight would inexorably pave the way to breaches of the substantive requirements of the rule of law because judicial review is the avenue through which most substantive rights are enforced and maintained.[138] Aside from ordinary courts being tasked with hearing cases concerning fundamental rights, there are also specialist tribunals that have been granted the sole jurisdiction to entertain certain matters. For example, the IPT holds exclusive competence to hear Human Rights Act[139] complaints on Government surveillance[140] meaning without any supervisory correction, the tribunal would be free to authorise manifest breaches of democratic liberties and ECHR rights under the veil of legitimate judicial sanction. In fact, the *Privacy International* case initially arose as a judicial review of an IPT decision that found mass surveillance and bulk data collection by the GCHQ to be lawful despite some arguing that this was

[134] *Kirk* (n 66) [99]; Allan, 'Questions of legality and legitimacy' (n 67) 158; Mark Elliott and Robert Thomas, 'Tribunal Justice and Dispute Resolution' (2012) 71(2) CLJ 297, 308;
Tom Hickman, 'The Investigatory Powers Tribunal: A Law unto Itself?' (2018) 4(October) PL 584
[135] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (8th edn, OUP 2018) 585–586
[136] Waldron, 'Separation of Powers' (n 123)
[137] *Evans* (n 17)
[138] Joint Committee on Human Rights, *Enforcing Human Rights (tenth report)* (2017-2018, HL 171, HC 669) 23
[139] Human Rights Act 1998, s 7
[140] RIPA 2000, s 65(2); *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [9]

ultra vires of its statutory power.[141] Therefore, any provision seeking to disrupt the ordinary jurisdiction of the courts would likely result in the substantive elements of the rule of law being subverted.

Notably, Dicey's work in this area seems to suggest that the rule of law arises from the limits of authority established by sovereign Parliamentary enactments.[142] If this is the case, it would mean that the Parliament would be free to enact laws that are arbitrary in nature or that authorise arbitrary actions, and this would not undermine the rule of law because it would be a product of the source of the rule of law. Nonetheless, this view does not appear to be consistent with the doctrine or modern literature on this matter. Aside from theorists like Allan identifying that Parliamentary sovereignty and the rule of law are capable of being at cross purposes,[143] the judgments in *Jackson* and *Privacy International* clearly distinguish these principles and imply that they are capable of conflicting in practice.[144] Even in Lord Reed's more conservative judgment in *Unison*, it was recognised as an independent principle that the courts are tasked with maintaining.[145] Finally, Parliament itself has recognised the rule of law as being separate from its own sovereignty in section 1 of the Constitutional Reform Act.[146] Lord Bingham argued that Parliament intentionally did not seek to define the rule of law, and instead simply accepted its existence as it intended to leave the principle open to judicial interpretation.[147] Consequently, while Parliamentary sovereignty and the rule of law will most often work in collaboration, both principles are distinct and are susceptible to conflict.

It is, therefore, clear that devices like ouster clauses are, and have the potential to be inconsistent with the rule of law. Regardless of which model or conception of this constitutional principle one adopts, the evidence strongly suggests that such parliamentary enactments would one way, or another pave the way to individuals and institutions arbitrarily exerting their competence.

B. Unconstitutionality in the British Context

Having determined that devices like ouster clauses are incompatible with the rule of law, one may then question what this means. The traditional view would be that as a consequence of legislative supremacy, Parliament is free to breach the rule of law through statute as it pleases.[148] However, both the cogency of this argument, and equally, opposing arguments that primary legislation may be invalid if it contravenes the rule of

[141] *Privacy International (Admin)* (n 25) [1]–[3]
[142] Dicey (n 33) 38, 107–110
[143] Allan, *Sovereignty of Law* (n 128) ch 5
[144] *Jackson* (n 4) [107]; *Privacy International* (n 21) [144]
[145] *UNISON* (n 16) [66]–[72]
[146] Constitutional Reform Act 2005, s 1
[147] Bingham (n 125) 8
[148] Elliott and Thomas (n 80) 76

law, depends on the constitutional basis of judicial review within the United Kingdom. This is because, the foundation of judicial review ultimately determines when the courts are authorised to intervene and the scope of what matter they may intervene on.[149]

The most widely accepted approach is the *ultra vires* doctrine. In brief, the doctrine suggests that a public body cannot lawfully act outside the limits of the authority that Parliament has granted it by way of statute.[150] If the body does act *ultra vires* – that is, beyond the scope – of its competence, then that action will generally be amenable to legal challenge. If this is, indeed, the basis of judicial review, then it would mean two things: first, that Parliament through a total ouster clause has, paradoxically, granted a body of limited jurisdiction the freedom to act outside that jurisdiction (the position that Robert Craig takes, as discussed in Part 2).[151] And second, that any attempt by the High Court or any other court to interfere with this would in itself be an *ultra vires* action.

Nonetheless, the doctrine fails to address some important logical and legal fallacies that may render its utility limited. To begin with, if, as *ultra vires* theorists suggest, judicial review may only correct a public authority's decisions that are not expressly permitted by Parliament then a broad range of grounds for judicial review that appear nowhere in statute, simply should not exist. For example, the duty to consider all relevant considerations and exclude irrelevant ones,[152] the duty to act reasonably[153] and the prohibition on the abuse of power,[154] are all purely judicial constructs that are widely accepted limits on the exercise of public authority. Additionally, this line of argument fails to address how the courts have been able to apply standards of review to non-statutory powers that Parliament did not create, and so, has not set the boundaries of (such as the prerogative).[155] Accordingly, this already begins to suggest that Parliamentary limits on power may not be the true basis for judicial review.

In response, proponents of the *ultra vires* doctrine argue that these grounds for review are a result of Parliament impliedly conferring and limiting an authority's power.[156] However, this seems illogical. If Parliament is silent on the limits of a public body's authority then how is a judge supposed to know of this implied limit?[157] Indeed, as seen in cases like *Anisminic*,[158] judges are often tasked with deciphering legislative intention,

[149] Elliott and Thomas (n 80) 485
[150] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001) 23–24
[151] R Craig (n 70)
[152] *R v Home Secretary, ex p Venables* [1998] AC 407; *R v Gloucestershire County Council, ex p Barry* [1997] AC 584
[153] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223
[154] *Porter v McGill* [2001] UKHL 67; *Miller v Prime Minister* (n 94)
[155] Elliott and Thomas (n 80) 487
[156] Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55(1) CLJ 122
[157] John Laws, 'Law and Democracy' (1995) Public Law 72, 78–79
[158] *Anisminic* (n 5)

but statutory interpretation only aids judges in finding Parliament's will from the construction and formulation of words used in a statute and, not simply, an abstract intention that is derived from no express material. Moreover, this still fails to answer how Parliament could have intended to set limits on power that it never created. Particularly since the *GCHQ case*,[159] the courts have been increasingly willing[160] to apply standards of review to the prerogative which strongly indicates that the basis for review does not come from Parliamentary limits on authority.

There is a final line of defence for the *ultra vires* doctrine. Following the ruling in *Miller/Cherry*[161] where the Supreme Court decided that the power to prorogue Parliament is amenable to judicial review, Ekins argued that the justiciability of prerogative powers in its current form is a novel and, potentially illegitimate judicial construct.[162] If this is accurate then it would mean that only the enforcement of express and, supposedly implied Parliamentary limits on authority would be constitutionally sound. However, upon closer examination, Ekins' position does not appear to be well-founded. As far back as the early 17th century, the King's Bench in the *Case of Proclamations*[163] held that the King could not lawfully alter the law of the land through his prerogative powers. Again, during the late 18th century, in *Entick v Carrington*[164] it was held that the Secretary of State could not use his prerogative to enter or search private property without authorisation from Parliament or the courts. These cases demonstrate the courts' historical willingness and ability to set limits on non-statutory powers.

In addition to this, Lord Neuberger's *obiter* in *Shergill v Khaira*,[165] provides a detailed account of the modern doctrine in this area. It illustrates that only exercises of the prerogative that are purely political in nature, outside the competence of the judiciary or where there is no standard for review applicable (such as Government conduct at the United Nations), are non-justiciable. Accordingly, the review of non-statutory powers in its current form cannot be considered novel, exceptional or illegitimate, meaning the deficiencies of the *ultra vires* doctrine remain valid. This, therefore, suggests that the traditional position that Parliament may freely abrogate the rule of law does not necessarily apply because if Parliament is not the only determiner of the limits of legal authority, then there is still scope for Parliament's own authority to be subject to limits.

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[159] *Council for Civil Service Unions v Minister for the Civil Service (GCHQ)* [1985] AC 374

[160] *Shergill v Khaira* [2014] UKSC 33, [41] – [43]

[161] *Miller v Prime Minister* (n 94)

[162] Richard Ekins, 'Protecting the Constitution' (Policy Exchange, 2019) 12–13 <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf> accessed 1 May 2020

[163] *Case of Proclamations* (1611) 12 Co Rep 74, 76

[164] *Entick v Carrington* (n 118)

[165] *Shergill* (n 160) [41]–[43]

The opposing perspective on this matter is the common law theory which argues that powers of judicial review are not a result of express or implied statutory authority, but rather, are a construct of the common law.[166] Superficially, this seems to bypass many of the inadequacies of the *ultra vires* doctrine. If a judge reviews a procedurally unfair or unreasonable ministerial decision, then according to this theory, that judge is simply enforcing the common law principle that public authorities must act fairly and reasonably.[167] By separating this constitutional basis from parliamentary intention, it also explains how the courts apply these principles to non-statutory powers. But, of course, common law theory may not sit well with parliamentary supremacy.[168] For example, if a provision expressly allows a tribunal judge to make an irrational decision, common law theory would suggest that ordinary courts may divest the tribunal of its power to do so, despite statute expressly permitting it,[169] which some argue would be unconstitutional.[170]

Nevertheless, examining this theory in the wider context of common law constitutionalism, there may be a sound explanation for how to reconcile these seemingly conflicting ideals. Wade suggests that the question of whether a judge may legitimately disobey an Act of Parliament depends on whether Parliament may, through statute, oblige the judiciary to act contrary to the common law rule that they should enforce primary legislation.[171] To expand, Salmond argues that while all rules ultimately have a historical source, not all have a legal source.[172] For example, an Act of Parliament may be traced legally and historically to an exercise of Parliamentary sovereignty, but Parliamentary sovereignty itself cannot be traced to a legal source.[173] From this, Wade contends that since Parliament's supremacy logically pre-exists an exercise of that sovereignty, no statute may ultimately oblige the courts to not comply with another statute because that would be to act on the power that is being conferred.[174] Therefore, it follows that judicial obedience to Parliament and the ensuing decision to enforce legislation, both of which enable Parliament's continuing sovereignty, are purely a construct of the common law and not of Parliamentary authority.[175] This means that if judges were faced with a provision entirely inconsistent with the rule of law such as a total ouster clause immunising a tribunal, there is no ultimate rule that prevents judges from taking the common law theory approach and still divesting the tribunal of its ability to act contrary to the grounds for review.

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[166] Laws 'Law and Democracy' (n 157) 72
[167] Elliott, *Constitutional Foundations* (n 153) 87–95
[168] Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58(1) CLJ 129
[169] Elliott and Thomas (n 80) 493
[170] ibid 488 – 489
[171] Henry Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) CLJ 172, 186.
[172] Glanville Williams, *Salmond on Jurisprudence* (11th edn, Sweet & Maxwell 1957) 137–138
[173] Ibid 137
[174] Wade (n 171) 187
[175] Ibid 188

There is another perspective on the constitutional basis of judicial review that reaches a similar conclusion, but by a different route. While even common law theory is premised on some relationship with Parliament, albeit an indirect one, Allan rejects the notion that Parliament is sovereign at all and, consequently, suggests that there is no necessary connection between Parliamentary sovereignty and the grounds for judicial review.[176] Instead, he argues that grounds such as fairness and reasonableness arise from aspects of the rule of law that fundamentally ingrained within the constitution as constraints upon Parliamentary sovereignty.[177] When Parliament fails to do this, judges are empowered to read the statute in line with the requirements of the rule of law which may result in the law itself being invalidated;[178] An outcome that would likely be seen with a total ouster provision.

Elliott and Thomas further suggest that evidence of this theory's validity arises from cases where courts have considered a hypothetical, unambiguous clause where it would be impossible to claim that Parliament did not intend to curtail judicial powers.[179] In these cases, judges have consistently indicated that they would still actively resist this[180] (See Section 3 for further discussion). Notably, Allan does not view this as a conflict or potential conflict between the rule of law and Parliamentary sovereignty, but rather a deliberative process of making laws that upholds democratic values.[181]

Some may contend that this anyway results in the rule of law becoming hierarchically superior to Parliamentary sovereignty and would, therefore, make judges more powerful than legislators.[182] However, this is inaccurate. Nothing in the application of the rule of law gives the judiciary the competence to create new powers or to entirely alter constitutional rights and structures because this in itself would breach the rule of law.[183] It only gives judges the ability to ensure that Parliamentary supremacy is not used as a veil to authorise expansive and arbitrary executive exercises of authority. While the line between these is fine, the existing case law on this matter indicates that the judiciary is only concerned with maintaining the ordinary jurisdiction of the courts[184] rather than appropriating power in an unprincipled manner.

Accordingly, it can be deduced from the common law theory or Allan's theory of the constitutional basis of judicial review that it is wholly plausible for primary legislation that does not comply with the rule of law, to be regarded as unconstitutional, despite

[176] TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?' (2002) 61(1) CLJ 87
[177] Ibid
[178] Ibid
[179] Elliott and Thomas (n 80) 493
[180] *Jackson* (n 4) [107], [159]; *Moohan v Lord Advocate* [2014] UKSC 67, [35]; Privacy International (n 21) [144]
[181] Allan, *Sovereignty of Law* (n 128) ch 5
[182] Laws (n 157) 76–78
[183] ibid 78
[184] *Anisminic* (n 5) 170; *Cart* (n 20) [51]

popular notions of absolute parliamentary sovereignty. The traditional *ultra vires* doctrine that purportedly disproves this is characterised by logical and legal deficiencies that render it largely implausible.

C. Remedies to Unconstitutionality

Finally, in order to fully assess the scope of Parliament's authority, one must examine whether the judiciary has any power to limit unambiguous, unconstitutional clauses in practice. Ask any lawyer about remedies to unconstitutional legislative provisions, and immediately the concept of 'strike down' powers will come to mind. As a natural consequence of having an established constitutional hierarchy, appellate judges in other common law jurisdictions like the United States have the power to invalidate primary legislation that is violative of their constitution.[185] Of course, matters are not this straightforward in the context of the United Kingdom's uncodified constitutional framework. Judges are still, as a starting point, under a duty to respect parliamentary sovereignty,[186] meaning even if they are considering legislation that plausibly falls outside the ambit of legitimate legislative authority, they cannot simply invalidate it.

Therefore, drawing inspiration from section 4 'declarations of incompatibility' under the HRA,[187] Jenkins argues that administrative courts bear the inherent power to make nonbinding 'common law declarations of unconstitutionality'.[188] To elaborate, in his analysis, Jenkins proposes that as the protector of common law rights (including those characteristic of the rule of law), courts like the Queen's Bench are able to inform Parliament when their exercise of sovereignty disproportionately encroaches on other rights.[189] With no precedent disallowing this power, it would, theoretically, be the ideal remedy as it would alert Parliament to their error, while still respecting their supremacy. However, in practice, it would likely make matters worse. Previous sections have revealed that the question of unconstitutionality only arises in this context when Parliament actively intends to legislate contrary to the rule of law. Accordingly, a declaratory judgment may simply serve to reaffirm that legislators successfully drafted an ouster clause[190] and confirm for future Parliaments what the appropriate 'formula' is to diminish the judicial role.

Applying the common law theory or Allan's theory of judicial review,[191] perhaps the only effective remedy would be (as a last resort) to partially or wholly disapply a preclusive

[185] *Marbury v Madison*, 5 U.S. 137 (1938)
[186] Wade (n 171) 186
[187] Human Rights Act 1998, s 4
[188] David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7(2) International Journal of Constitutional Law 183
[189] Ibid
[190] Jo Murkens and Roger Masterman, 'The New Constitutional Role of the Judiciary' (LSE Policy Briefing Series, 2014)
[191] Allan, 'Constitutional Foundations' (n 176)

provision if it is repugnant to the rule of law. This is, in some sense, similar to the judiciary's approach when faced with conflicting EU and domestic law.[192] Moreover, this is distinguishable from statutory interpretation because disapplication means law is no longer validly applicable, while interpretation still, technically, allows judges to rely on a provision in future cases.[193] Allan and Jowell reject that there is any difference between these as the outcome is often the same,[194] but there is, at least a symbolic distinction in that statutory interpretation is premised on respect for absolute Parliamentary sovereignty whereas disapplication removes this veneer.

Though this may seem out of touch with reality, there is, in fact, a considerable body of doctrine that supports this approach. For example, Baroness Hale in *Jackson* (writing soon after the Government published clause 11 of the Asylum Bill)[195] stated, 'The courts will treat with particular suspicion [and might even reject] any attempt to subvert the rule of law'.[196] Likewise, various hypothetical scenarios in other House of Lords and Supreme Court cases such as *Simms*[197] and *Moohan*,[198] have demonstrated the willingness of judges to consider legislation invalid if it undermines human rights and democratic principles. And finally, linking back to the source of this analysis is Lord Carnwath's assertion in *Privacy International* that binding effect would not be given to unambiguous clauses.[199] Indeed, these examples largely consist of obiter. However, they are strongly indicative of how the judicial branch would react if they were faced with a manifestly unconstitutional clause.

There is little doubt that this outcome would result in a constitutional crisis. Judges in inferior courts would be torn between respecting principles of *stare decisis* and maintaining their subservience to Parliament, as would lawyers seeking to apply the law. Nevertheless, there would be an equally, if not more devastating crisis, if the courts are ever faced with an expansive clause and they choose not to exercise their inherent authority to remedy this constitutional breach. It, therefore, boils down to a question of whether judges and lawyers are prepared to show broad deference to legislation often passed by the executive's Parliamentary majority that may seek to sanction the arbitrary and immoral exercise of authority over democratic structures and freedoms. Thus, the following section will more closely examine these potential issues.

4. The Judiciary and Democracy

[192] *R (Factortame Ltd) v Secretary of State for Transport* [1990] UKHL 7; *Thoburn* (n 136).
[193] *Anisminic* (n 5) 170
[194] TRS Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 LQR 443, 447; Jowell (n 129) 59
[195] Asylum and Immigration Bill (n 104) cl 11(5)
[196] *Jackson* (n 4) [159]
[197] *Simms* (n 108) 131–132
[198] *Moohan* (n 180) [35]
[199] *Privacy International* (n 21) [144]

Though the most valid theories of judicial review indicate that that the courts are empowered to find preclusive clauses unconstitutional, this does not mean that judges would, necessarily, feel comfortable exercising that power. Parliament is still popularly conceived as bearing broad sovereignty, so the judiciary may fear their actions being perceived as democratically illegitimate even if this is not the case. This section explores a further hypothetical; that the courts are unable to use the statutory interpretation approach and unwilling to determine the constitutional validity of an unambiguous, totally preclusive clause, thereby, setting no practical limits on Parliament's authority.

It will be argued that Parliament *does* and *should* have limited competence to curtail the judicial role because devices like ouster clauses are detrimental to democratic institutions, principles and values. This will be done by examining the effect of preclusive provisions on wider structures and rights that are characteristic of British liberal democracy, such as the separation of powers and the maintenance of civil rights and liberties.

A. The Judicial Role and Constitutional Democracy

To begin with, a theme that has arisen throughout this paper is the concept of the separation of legislative, executive and judicial power but its importance as the basis of the constitution and liberal democracy requires further exploration. Though the United Kingdom has a parliamentary democracy where the Government sits as part of the majority within the legislative branch, their powers and relative competencies (See Part 2) are, theoretically, separate irrespective of how hard it may be to distinguish them.[200]

Undoubtedly, there are some benefits to having this lack of institutional separation. Bagehot, for instance, argued that it is the 'efficient secret' of the constitution that there is a near total fusion of the executive and legislative.[201] This is, to some extent, a valid position. By commanding the majority within Parliament, the executive is far more effective in implementing the legislative agenda that it was elected to implement.[202] This administrative efficiency is especially visible when comparing this system to a presidential democracy where opposing parties may be elected to the two branches, rendering the executive, limited in its ability to productively govern.[203] Nevertheless, there is also a significant problem with this. Influential political philosophers like John Locke[204] and Montesquieu[205] have illustrated how the fusion of legislative and executive

[200] MJC Vile, *Constitutionalism and the Separation of Powers* (OUP 1967) 319
[201] Walter Bagehot, *The English Constitution* (2nd edn, Chapman and Hall 1873) 48
[202] Ibid
[203] Anibal Perez-Linan, 'Democracies' in Daniele Caramani (ed), *Comparative Politics* (5th edn, OUP 2017) 91
[204] John Locke, *Second Treatise of Civil Government* (London 1764) ch XII
[205] Montesquieu, *The Spirit of the Laws, Book XI* (first published 1748, OUP 1967) ch 6

power may enable the executive to exempt itself from the obligation to obey the law and may, consequently, pave the way to the arbitrary and despotic exercise of power.

Several previously discussed examples demonstrate the relevance of these arguments to the present context; Namely, the power to enact delegated legislation 'as if enacted' in primary legislation,[206] the authority to dispense of judicial decisions, post-judgment[207] and the ability to exercise authority with limited or non-existent supervision.[208] In each of these cases, the executive had, through their majority in Parliament, either directly or indirectly granted themselves legislative and judicial authority which, in turn, gave them the legal ability to act unlawfully; The precise outcome that Locke predicted would occur from a lack of institutional separation.[209] The judiciary, of course, cannot change the fact that Parliament and the executive are fused, but it is capable of maintaining the theoretical separation between their respective powers by checking the Government.[210] If the courts had been unable or unwilling to enforce the rule of law by rigorously scrutinising the executive in any of these cases, it would have resulted in a 'destructive breach'[211] of the separation of powers, allowing elements of authoritarianism to corrupt an otherwise democratic system. This argument is no less applicable to an unambiguous provision that seeks to strip the judicial role which is plainly why common law theorists and Allan assert the need to judicially review primary legislation if necessary.[212]

Writers like Poole, nevertheless, vehemently oppose this idea, contending that it is unelected judges who would be acting undemocratically if they resisted the sovereign exercise of an elected Parliament.[213] Though seemingly valid given the obvious connection between elections and democracy, there are three key flaws with this assertion: Firstly, it assumes that the executive will necessarily work in the interests of Parliament. Secondly, it assumes that members of an elected body will necessarily act in the best interests of the electorate. And, thirdly, it is, arguably, based on an outdated and majoritarian conception of democracy.

Briefly on the first issue, Part 2 demonstrated in great detail how when the executive, through Parliament, disrupts the ordinary jurisdiction of the courts, it undermines Parliamentary sovereignty.[214] This is relevant here because if the executive undermines the body from which it gains its supposed democratic legitimacy then, logically, the enactment of preclusive provisions is undemocratic.

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[206] *ex p Yaffe* (n 18)
[207] *Evans* (n 17)
[208] *Privacy International* (n 21)
[209] Locke (n 207)
[210] Elliott and Thomas (n 80) 94–95
[211] Ibid 95
[212] Laws (n 157) 84–87.
[213] Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 (3) MLR 1, 16.
[214] Elliott, 'Through the Looking Glass' (n 36) 16

Proceeding then to the second issue, the demise of the English Republic and the restoration of the Monarchy in the mid-17th century resulted in the constitutional settlement that solidified the supremacy of Parliament over the crown.[215] Accordingly, rather than broad discretionary power being held by the monarch, executive power was vested in the members of a democratically elected Parliament who commanded a majority.[216] Though this settlement was, indeed, an improvement on the previous arrangement of power, many have recognised that a system that places absolute executive power in an elected body may result in an 'elective dictatorship',[217] capable of abrogating the most foundational rights under the veil of purported democratic legitimacy. Beatty highlights how events in Nazi Germany during the 20th century magnify the democratic frailty of this kind of system.[218] The Nazi government that carried out some of the gravest mass atrocities in modern European history was, in fact, an elected government that commanded the majority in their legislature.[219] As such, by Poole's logic, these gross deprivations of civil liberties and rights would be regarded as democratic as they were a product of elected officials enacting laws through an elected body – and yet, no person could ever reasonably come to this conclusion. This further demonstrates how weak enforcement of the constitution may pave the way to a breakdown of democratic government.

This also begins to illustrate the third issue with Poole's argument. The fact that an authoritarian regime may sit as the majority in an elected body, means that a majority of the electorate, at least initially, wants that regime in power. While historically, majoritarianism in democracy was associated with a way to prevent the elitist minority from ruling,[220] events in Nazi Germany and the dawn of the human rights movement, led to a recognition of the fundamental importance of ensuring that minorities are not deprived of their personhood or their ability to fully participate in society based on inherent characteristics such as ethnicity or religion.[221]

Based on this, Beatty asserts that the judicial branch plays two key roles in the context of democracy.[222] Firstly, it is tasked with preventing the executive from forming an elective dictatorship that is free to subvert the rule of law by arrogating itself power through its majority in Parliament. And secondly, it serves as the avenue through which a member

[215] Laws (n 157) 91–92
[216] Ibid
[217] Quintin Hogg, *Elective Dictatorship (The Richard Dimbleby Lecture)* (BBC 1976) 4
[218] David Beatty, *The Ultimate Rule of Law* (OUP 2004) 1–2
[219] Richard Bessel, 'The Nazi Capture of Power' (2004) 39(2) Journal of Contemporary History 169.
[220] J Madison, 'Federalist No. 10 (1787)' (Bill of Rights Institute) <https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/> accessed 04 May 2020
[221] Beatty (n 218)
[222] Ibid 2–4

of a minority is able to enforce legal protections and prevent a ruling majority from inhibiting their full and equal participation in society. Therefore, far from undermining democracy, the judiciary is, in reality, the institution that helps preserve democratic structures and rights when the other branches of government fail to do so. This strongly reaffirms that the preservation of democracy mandates that the judiciary resist legislative attempts to curtail the judicial role even if that curtailment arises from a sovereign, elected body.

In fact, this is an ideal that is recognised across the commonwealth, even in countries where courts have faced similar constitutional impediments. For example, India has a codified constitution,[223] but contrary to popular belief this has not always made it easier for the judiciary to resist the legislative restriction of their power. In 1975, Prime Minister Gandhi's election was voided by a state High Court for corrupt electoral practices.[224] Gandhi appealed this decision to the Indian Supreme Court which temporarily stayed the High Court's order. Following this, the Prime Minister, using her supermajority in Parliament, amended the constitution to immunise the election of key officials including her own post from judicial review.[225] Naturally, the courts did not have any statutory hierarchy that they could rely on as the limitation on judicial power now arose from the constitution itself. Nonetheless, the majority struck down the amendment, finding that it breached the 'basic structure' of the Constitution.[226] Established through previous case law, the 'basic structure' doctrine consists of abstract principles like the rule of law and judicial independence that cannot be altered even through a constitutional amendment.[227]

Likewise, though the original jurisdiction of the United States Supreme Court can only be altered by amending the Constitution,[228] its appellate jurisdiction is not afforded the same protection, as lower federal courts are established by ordinary Acts of Congress.[229] In *Hamdan v Rumsfeld*,[230] the Supreme Court was faced with a 'jurisdiction-stripping' clause[231] that retroactively removed the federal courts' jurisdiction to hear *habeas* petitions from individuals detained in Guantanamo Bay on the President's authority. Again, the Supreme Court was not empowered by any domestic statutory hierarchy to limit the provision's effect, so instead, the plurality judgment limited the clause by finding that it violated Article 3 of the Geneva Conventions requiring due process for prisoners of war.

[223] The Constitution of India (1950)
[224] *State of Uttar Pradesh v Raj Narain* (1975) AIR 865
[225] The Constitution (Thirty-ninth Amendment) Act, 1975
[226] *Indira Nehru Gandhi v Raj Narain* (1975) SCC (Supp) 1
[227] *Kesavananda Bharati v State of Kerala* (1975) AIR 1973 SC 1461, [316]
[228] *Marbury v Madison* (n 188)
[229] The Constitution of the United States (1787) art 1
[230] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2004)
[231] Detainee Treatment Act of 2005 (DTA) §1005

These cases demonstrate the lengths that judges may go to in order to prevent executive abuses of competence from eroding fundamental structures and rights. Despite being superficially limited by the supreme law of their lands, the courts were still able to legitimately exercise their power beyond what was commonly regarded as possible, in order to keep the Government in check. Likewise, if British courts exercised their inherent common law powers to scrutinise a preclusive provision, this would be well within the ambit of valid democratic authority as it would merely work to keep the executive within the bounds of its democratic mandate.

5. Conclusion

Through an extensive normative and theoretical analysis, this paper has demonstrated that notwithstanding popular conceptions of Parliamentary sovereignty, Parliament both *does* and *should* have limited competence to curtail the judicial role through devices like ouster clauses.

Thus far, when faced with preclusive or excessively restrictive legislative provisions, the judiciary has shown significant resistance through rigorous and surgical statutory interpretation. As a result, while still respecting Parliamentary sovereignty, this has raised a particularly high constructive threshold for legislators to successfully demonstrate their intent to enact a wholly preclusive provision. By examining the underlying rationales for this form of judicial resistance this paper has found that the use legislative power to disrupt the ordinary jurisdiction of the courts results in Parliament undermining its own supremacy. This is because by inhibiting the judiciary's interpretative role, courts are unable to provide guidance on the application and meaning of a statute, which may render Acts of parliament nugatory. Moreover, by curtailing the High Court's superintendence over inferior tribunals, tribunal judges would be free to form islands of local law by abusing their statutorily limited jurisdiction, thus frustrating the sovereignty of Parliament. Likewise, removing the courts' supervisory role over the Government would result in weak, or even non-existent legal and political accountability. Though these are compelling reasons, justifying why Parliament should have limited competence in this area, an apparent deficiency of this approach is that through adequate wording, Parliament may preclude the ordinary jurisdiction of the courts. Thus, the only real 'limitation' on Parliament's authority that arises through the statutory interpretation approach is the strict constructive requirement imposed by judges.

This is not to say, however, that Parliament's authority to enact an unambiguous total ouster provision is absolute. By developing the *obiter* of several key judgments of the highest court, this paper has further found that wholly preclusive provisions are inconsistent with the rule of law and may, accordingly, be constitutionally invalid. Having dissected the formal, procedural and potential substantive requirements of the

rule of law, it has been shown that wholly preclusive provisions do not comply with any of them as they result in the creation of a special class of inconsistent and non-general law and prevent the enforcement of procedural and substantive rights, all of which would culminate in the arbitrary exercise of power. Following on from this, an analysis of the constitutional foundations of judicial review within the United Kingdom reveals that the *ultra vires* doctrine which may disprove this unconstitutionality argument is riddled with logical and legal fallacies. Most notably, it fails to reconcile its assertion that Parliament ultimately sets all limits on authority with the reality that courts are able to judicially review powers like the prerogative that Parliament has no role in creating. Instead, relying on common law theory or Allan's theory of judicial review, it can be determined that primary legislation that is inconsistent with the rule of law may be found unconstitutional in theory and may be disapplied in practice. Though this section is limited by the fact that it is premised on a hypothetical, there is a considerable body of doctrine that supports the conclusions made throughout. The fact that an ouster provision is unconstitutional not only suggests that Parliament's authority is limited but also that it should be limited.

Finally, a further finding of this research is that a failure to limit Parliament's authority, resulting in the successful curtailment of the judicial role, would be detrimental to democratic institutions, principles and values. This is because there is already a lack of institutional separation between the executive and legislative which enables the Government, in theory, to use its majority to grant itself broad powers. This demonstrates the compelling need for a separate institution – that is, the judicial branch – to keep a check on the executive. Though there are assertions that a judge would be acting undemocratically by interfering with the will of an elected body, this paper has shown that such assertions are based on incorrect assumptions and an outdated majoritarian view of democracy. More importantly, the jurisprudence of other common law jurisdictions demonstrates that it is widely accepted that the judiciary may have to operate on the outer limits of its authority in order to preserve democratic institutions and rights.

The implications of these findings are significant. Most notably, in a nation where Parliament is supposedly sovereign, and that sovereignty may be used to shield the executive's undemocratic actions, a determination that primary legislation is capable of being constitutionally invalidated challenges many assumed facts about the British constitution. Given the importance of preventing executive breaches of the rule of law, the viability of the unconstitutionality approach is something that must be researched more frequently and in greater depth. By increasing the discourse in this area, it could, perhaps, begin to normalise the notion of constitutional rather than institutional supremacy within the United Kingdom's uncodified constitutional framework which may allow judges to more comfortably exercise their inherent power to challenge manifestly unconstitutional legislation.

A Crisis in Europe: Why Have Integration Outcomes of the Eurozone Crisis and the European Migrant Crisis Differed?

Showmir Chowdhury

Abstract

This paper will use integration theory to explore why integration outcomes between the Eurozone crisis and the European Migrant crisis have differed despite similar functional pressures. Both crises were triggered by exogenous tensions: a subprime mortgage crisis in the US causing global recession and conflict in the Middle-East causing a humanitarian crisis. Although the European law is more supranational about migration and less with the Eurozone, responses to the crises have seen the reverse. To unpick this paradox, this paper will undertake a comprehensive assessment of major integration theories. Neofunctionalism sets out pre-existing transnational interdependence, the supranational capacity of institutions and politicisation of the crises as variables to consider when understanding integration outcomes. Transnational interdependence will be discussed to determine the extent to which pre-existing interdependences set out by the regulatory frameworks within which the Eurozone and the Common European Asylum System operate have encouraged integration. Then, the pre-existing supranational capacities of each institution will be outlined to determine their increased mandate. Considering integration outcomes of the European Migrant crisis do not meet neofunctionalist expectations, the politicisation of both crises will be discussed to conclude that whilst European elites were successful in depoliticising the Eurozone crisis as one with 'no alternative' but further integration; populist entrepreneurs during the Migrant crisis were able to galvanise nationalist identities against supranational delegation.

1. *Introduction*

The last decade has been labelled by European integration theorists as a 'decade of crises' calling into question the very fundamentals of the European project.[1] Following the collapse of the US subprime-mortgage market, transnational links between the US and European banking industry exposed the consequences of banking deregulation. When

[1] Frank Schimmelfennig, 'European Integration (theory) in times of Crisis: A Comparison of the Euro and Schengen crises' (2018) 25 Journal of European Public Policy 969

Greece faced sovereign default, in part due to its large structural deficit, financial market pressures forced Member States ("MS") to further integrate.

Previously an intergovernmental area of law, the macroeconomic framework underpinning the European Monetary Union ("EMU") was significantly strengthened when MS delegated supranational competences to the European Central Bank ("ECB") and unwittingly the Commission,[2] making the former the 'most powerful supranational institution in the world'.[3] By incorporating the European Stability Mechanism ("ESM") with a lending capacity of over €700 billion under the supervisory jurisdiction of the ECB, the supranational institution was empowered to act as a lender of last resort as per the traditional role of a central bank.[4]

The unprecedented influx of refugees fleeing war and persecution in the Middle-East during the European Migrant crisis ("EMC") pushed the regulatory framework of the Common European Asylum System ("CEAS") to its breaking point. Overwhelmed with the influx, Italy and Greece temporarily applied a 'wave through approach' allowing unregistered migrants to make secondary movements.[5]

Whilst similar exogenous tensions existed during both crises, Commission proposals in transforming the European agency for the Management of Operational Cooperation at the External Borders ("FRONTEX") into a European Border and Coast Guard ("EBCG"); and the European Asylum Support Office ("EASO") into a stronger European Union Agency for Asylum ("EUAA"), have fallen on deaf ears.[6] Only following circulation of the washed-up body of the 3-year-old Syrian boy Alan Kurdi did Angela Merkel declare the Dublin Regulation 'obsolete', choosing to open Germany's borders to 1.1 million refugees. However, following criticism from political opponents, the Chancellor reintroduced temporary controls.[7]

Thus, a paradox emerges. Although the European Union ("EU") law concerning migration is more heavily regulated than concerning the Eurozone, response to the crises has seen the reverse. This paper seeks to unpick this paradox by exploring both *how* and *why* responses to the crises have differed.

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[2] Stefan Becker *et al*., 'The Commission: Boxed in and Constrained, but still an engine of integration' (2016) 39 West European Politics 1011

[3] Erik Heldt, 'The (self-)empowerment of the European Central Bank during the sovereign debt crisis' (2020) 42(2) Journal of European Integration <https://doi.org/10.1080/07036337.2020.1729145> accessed 21 February 2020

[4] Schimmelfennig, 'European Integration' (n 1)

[5] Felix Biermann *et al*., 'Political (non-)Reform in the Refugee Crisis: A Liberal-Intergovernmentalist explanation' (2017) 26 Journal of European Public Policy 246

[6] Ibid

[7] Biermann *et al*., (n 5)

Providing a comprehensive account of both crises through the lens of neofunctionalism, Schimmelfennig defines crises as open decision-making situations, in which shocks can trigger reform activities leading to more integration.[8] His contribution places emphasis on the relative strength between market actors and migrants as transnational actors in furthering integration; he dismisses the impressive supranational autonomy of the ECB in advancing its mandate – the crux of neofunctionalism.[9] Consequently, this paper will take a different approach by emphasising the supranational autonomy of each institution to better explain integration outcomes. Furthermore, Schmitter's contribution to neofunctionalism will be drawn upon to explore the difference in the politicisation of each crisis to provide a complete response. Additionally, whilst Schimmelfennig focuses on the Schengen crisis, this paper will focus squarely on the EMC and the Dublin system.

The second section will undertake a wide assessment of neofunctionalism, intergovernmentalism and postfunctionalism integration theory in explaining *why* integration outcomes have differed in the respective crises. Neofunctionalism assumes a progressive integration dynamic driven by functional pressures on institutions which leads to spillover; processes of transnational-linkage and supranational institutionalisation.[10] Although commentators have frequently limited neofunctionalism as a framework in understanding the Eurozone crisis, in actuality, earlier neofunctionalist contributions have allowed politicisation to be used as a co-theory in explaining unexpected outcomes in exceptional circumstances.[11]

The third section will focus on the transnational interdependence of Member States according to the EMU and the CEAS. 'Transnational interdependence' is defined as the 'process in which integration progresses when organised interests, whether economic or political, pressure governments to manage interdependence to their advantage by centralising policies and institutions'.[12] Consequently, it will outline the regulatory framework of both EMU and CEAS to determine the extent to which each is intergovernmental, or supranational as the basis of discussion.

The fourth section will consider the pre-existing supranational capacity of the ECB, FRONTEX and EASO in negotiating extensions to their mandates. The ECB, a Union institution, was able to further its competence. Commentators have argued that the Commission was significantly weakened during the Eurozone crisis and therefore largely ignored when managing the EMC.[13] The opposite is true. The Commission was

[8] Schimmelfennig, 'European Integration' (n 1)
[9] Schimmelfennig, 'European Integration' (n 1)
[10] Arne Niemann and Demosthenes Ioannou, 'European Economic Integration in times of Crisis: a case of Neofunctionalism?' (2015) 22 Journal of European Public Policy 196
[11] Phillipe Schmitter, 'A Revised Theory of Regional Integration' (1970) 24 International Organisation 836
[12] Andrew Moravcsik, 'The European Constitutional Compromise and the Neofunctionalist Legacy' (2006) 12 Journal of European Public Policy 349
[13] Becker *et al* (n 2)

strengthened in the aftermath of the Eurozone crisis and so according to neofunctionalist expectations, its proposals should have been heeded.

Subsequently, the final section of this paper will use politicisation as a co-framework to analyse the difference in political salience between the two areas. Following this, an assessment will be made of political entrepreneurship in mobilising previously unearthed tensions. Whilst the Eurozone crisis was framed in economic terms, allowing elites to depoliticse responses; the EMC was framed as one of 'belonging' by populist parties, thus constraining integration.[14]

2. *European Integration and Crisis*

European integration is defined as a 'mix of expansion of Community competences and the centralisation with EU institutions'[15] and forms the defining traits of major integration theories. Consequently, European integration leads to a process of supranationalism: governance arrangements whereby actors shift their responsibilities and activities to a new centre which stands above the nation-state.[16]

This section will use European integration theory to create a rationalist framework, employed to designate a set of variables that permit disaggregation of the respective Eurozone and EMC.[17] First, the 'classic' integration theories of neofunctionalism; liberal-intergovernmentalism and postfunctionalism will be outlined to identify key differences concerning the necessities of this paper, followed by a discussion of the limitations of each in application to the EMC and the Eurozone crisis.

Contrary to criticism, this paper submits that neofunctionalism is most applicable theory in explaining integration outcomes following the EMC and Eurozone crisis; whilst the former theory, liberal-intergovernmentalism has been unable to provide an explanation. Likewise, postfunctionalism does not explain the rapid increase in integration seen following the Eurozone crisis.[18] It will be concluded that critics like Börzel fail to recognise revisions to neofunctionalism, whilst surprisingly making adjustments to their preferred theories.[19] Subsequently, this leads to a less-rounded assessment of neofunctionalism.

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[14] Tanja Börzel, 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics' (2016) 54 Journal of Common Market Studies 8

[15] Marco Scipioni, 'Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis' (2018) 25 Journal of European Public Policy 1359

[16] Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1st edn, Routledge 1999)

[17] Ibid

[18] Börzel, 'From EU Governance' (n 14)

[19] Ibid

A. Integration Theory

Developed by Haas, neofunctionalism seeks to explain how and why states interacted with their neighbours whilst losing 'factual attributes of [their] sovereignty' when acquiring new techniques for resolving conflicts between themselves.[20] This provides a framework to understand how and why states delegate competences to supranational institutions at the detriment of their factual sovereignty.[21]

The process starts with deficient or incomplete initial integration steps which reflect the lowest common denominator of national preferences.[22] A positive integration dynamic ensues from these 'incomplete' steps due to a process of path-dependency and spillover. Path-dependency refers to a historical perspective of institutionalisation in which the development of institutions and shared-policy is likely when initial integration steps have been taken.[23] 'Spillover' refers to cycles of integration in which a given action related to a specific goal, creates conditions in which the original goal can be assured only by taking further actions.[24]

Factors which encourage integration in a forward direction include high sunk and exit costs.[25] Sunk costs refer to the investment Members have made in configuring their domestic institutions to an integrated policy and exit costs refer to the cost of leaving a shared policy area.[26]

Additionally, Schmitter's macro-hypotheses contends that strong exogenous tensions and powerful internal contradictions can lead to the involvement of more national actors in an expanding variety of policy areas.[27] Under these conditions, the costs and resistance to integration are likely to increase and interrupt spillover.[28] Due to this widened audience of actors concerned with integration, a 'manifest redefinition of mutual objectives'[29] will occur in which the course of integration could change. Therefore, if after considering the transnational interdependence between MS and the pre-existing supranational capacity of Union institutions, integration outcomes do not meet neofunctionalist expectations; politicisation can be considered as a framework.

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[20] Moravcsik (n 16)
[21] Ian Bache, *Politics in the European Union* (3rd edn, OUP 2011)
[22] Schimmelfennig, 'European Integration' (n 1)
[23] Francesco Nicole, 'Neofunctionalism revisited: integration theory and varieties of outcomes in the Eurocrisis' (2019) Journal of European Integration <https://doi.org/ /10.1080/07036337.2019.1670658> accessed 21 February 2020
[24] Bache (n 21)
[25] Niemann and Ioannou (n 10)
[26] Schimmelfennig, 'European Integration' (n 1)
[27] Schmitter (n 11)
[28] Ibid
[29] Ubid

Liberal-intergovernmentalism focuses on hard-bargaining driven by the economic preferences of national governments.[30] The 'preference intensity' is the power of each government, inversely proportional to the relative value that it places on an agreement compared to the outcome of its best alternative policy. The greater the interdependence between states, the greater the demand for policy co-ordination.[31] The terms of integration are dependent on the fiscal position of the bargaining party, with differences in positions creating unequal bargaining positions. Likewise, the stronger the interdependence between the Member States, the deeper the integration outcome.[32] Thus, the focus on integration is placed on the Member States and their governments.

When contrasting intergovernmentalism with neofunctionalism, Hooghe and Marks note that intergovernmentalism is limited in its explanation for institutional development as it explains the particular bargaining outcomes as discrete episodes.[33] Due to this, intergovernmental negotiations during the Eurozone crisis were key in producing institutions which were controlled exclusively by Member States such as the European Financial Stability Facility ("EFSF") and thus integration has favoured intergovernmental organisations rather than supranational, as neofunctionalism would expect.[34] Lastly, postfunctionalism is based on the assumption that organisations like the EU represent communities of individuals with different cultures and identities, each holding a fundamental interest in the collective self-determination of their community.[35]

In recent years, European integration has become more politicised domestically than ever before, with integration shifting from the 'interest group arena' of European elites, to the 'mass arena' of domestic publics based on an identity logic in part due to growing polarisation between economic and cultural integration, winners and losers.[36] Thus, whilst neofunctionalism argues that integration comes from supranational actors; intergovernmentalism argues the impetus is from national actors; postfunctionalism argues that regional integration is connected to domestic political conflict, not *sui generis*.[37]

When issues are politicised, a 'permissive consensus' must exist in which a majority of European citizens with inclusive national, or Europeanized identities, support

[30] Moravcsik (n 12)
[31] Ibid
[32] Frank Schimmelfennig, 'Liberal Intergovernmentalism and the Euro area Crisis' (2015) 22 Journal of European Public Policy 177
[33] Lisebet Hooghe and Gary Marks, 'Grand theories of European integration in the twenty-first century' (2019) 26 Journal of European Public Policy 1113
[34] ibid.
[35] Frank Schimmelfennig and Thomas Winzen 'Grand theories, differentiated integration' (2019) 26 Journal of European Public Policy 1172
[36] Ibid
[37] Lisebet Hooghe and Gary Marks 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 Journal of Political Science 1

integration.[38] These matters are then depoliticised through supranational delegation which leads to further integration. More recently, Hooghe and Marks note that the permissive consensus has gradually been replaced by a 'constraining dissensus' that limits decisions of EU friendly elites seeking to deepen integration, as strategic positioning is constrained by reputational and electoral considerations.[39]

B. Application

In applying these theories to the relevant crises, this section will contend that neofunctionalism is best suited in explaining integration outcomes regarding the crises. During both crises, initial integration steps were deficient in dealing with the 'functional' pressures at hand: a mounting sovereign-debt crisis in Greece and an influx of refugees on the shores of Italy.[40]

First, incomplete integration regarding the EMU in the form of a 'no bailout' clause prescribed in Article 125 TFEU restricted the ECB from acting as a lender of last resort,[41] the traditional role of a central bank. Due to the common currency, Member States were unable individually to devalue the euro, whilst the ECB's mandate was formally restricted to that of monetary policy. Through the supranational autonomy of the ECB under the leadership of Mario Draghi, the President reluctantly implemented its Outright Monetary Transactions ("OMT") programme, inadvertently purchasing secondary-market bonds. Furthermore, when the ESM was incorporated into Treaty law, the ECB was granted supervisory jurisdiction over the mechanism.

A clear analogy can be drawn between neofunctionalism and the Eurozone crisis, nonetheless, Börzel asserts that despite neofunctionalism's position in explaining the substantial deepening of European fiscal integration resulting from the euro crisis, it cannot give *satisfactory* answers as to the lack of integration during the EMC.[42] This claim has some merit. Following huge influxes of migrants, the administrative capacities of Italy and Greece were quickly overstretched. Biermann *et al.* submitted that the refugee crisis marked an external shock, which the existing CEAS regulatory framework was 'ill-equipped to absorb'.[43]

The Dublin system of registering migrants at their first country of entry was quickly dismissed as 'obsolete' in dealing with a crisis. Nonetheless, when the Commission

[38] Hooghe and Marks, 'Grand Theories' (n 33)
[39] Ibid
[40] Scipioni (n 15)
[41] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1
[42] Börzel, 'From EU Governance' (n 14)
[43] Biermann *et al.,* (n 5)

proposed a 'centralised relocation mechanism' supported by the German, Italian, Spanish and Greek governments,[44] its proposals were watered down significantly.[45]

Unfortunately, the Central and Eastern Europe ("CEE") countries refused to accept a mutualisation of burden, choosing instead to shift any adjustment costs on Southern European countries of first entry, as per the requirements of Dublin.

These MS opposed increasing visibility of Islam in Europe and preferred sharp restrictions on immigration and refugees in violation of the international refugee regimes.[46] Indeed, right-wing populist parties such as the French *Front Nationale* and the Polish Law *PiS* sung praises of a 'fortress Europe' in the form of the Schengen, a citadel against immigration, protected by fences and warships and monitored through surveillance technologies. This demonstrates a politicisation of refugees and migrants which mainstream political elites have been unable to overcome.

Ironically, Börzel fails to consider the revised formalisation of Hass' initial neofunctionalist framework, submitted by Schmitter, whilst she makes revisions to postfunctionalism to relate it to the Eurozone crisis. Schmitter concedes that Haas' original submission shows 'no sensitivity' to the likelihood of different integration outcomes, thus Börzel is correct in her assertion to some extent, as applying the original framework to the EMC would not explain the lack of integration.

Neofunctionalism assumes that integration is a rational process whereby actors calculate 'anticipated returns from various alternative strategies of participation in joint-decision making structures';[47] Schmitter's revision allows some irrationality in the form of politicisation. Politicisation refers to a 'process whereby the controversiality of joint decision-making goes up',[48] thus, the EMC and compartmentally, migration, prove highly politicised as evidenced by the rise of populist parties across Europe.

In applying liberal intergovernmentalism to the Eurozone crisis, Moravcsik argues that to understand the substantial deepening of financial and fiscal integration designed to stabilise the euro, one must analyse the substantive bargaining positions of governments.[49] The fiscal interdependence between member states of the EMU became clear. During the crisis, the 'financial market shifted large balance-of-payment surpluses generated in the north to the south', fuelling public sector debt.[50]

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[44] Scipioni (n 15)
[45] Biermann *et al.,* (n 5)
[46] Börzel, 'From EU Governance' (n 14)
[47] Schmitter (n 11)
[48] Ibid
[49] Moravcsik (n 12)
[50] Schimmelfennig, 'Liberal Intergovernmentalism' (n 32)

Governments undertook financial sector bailouts that increased their sovereign credit risk, which increased the 'vulnerability of banks invested in sovereign bonds'.[51] This forced huge debts onto governments in Ireland and Spain whom previously had balanced budgets; while Greece, unable to devalue its shared currency, faced sovereign default.[52] Naturally, the productivity-led economies of the North feared the prospects of financial markets losing trust in the euro leaving their banks heavily exposed.

In terms of national preferences, the nature of integration were dependent on the fiscal position of the state. Solvent northern countries like Germany and Austria preferred 'national adjustment', whilst the debt-ridden southern countries of Italy and Greece preferred 'mutualised adjustment'.[53] Nonetheless, the relative bargaining power between the countries was wide; when Greece asked for financial assistance in March 2010, the German government denied any need for 'concrete commitments' to aid Greece, insisting instead on unilateral austerity measures and threatened to exclude Greece from the Eurozone in its in entirety should it not comply.[54] It was only after Greece's credit rating was reduced to 'junk status' by Standard & Poor that the Eurozone countries finally granted Greece a €110 billion bailout, establishing the European Financial Stability Facility outside the Treaty framework.[55]

Despite this, Scipioni submits intergovernmentalism fails to account for trends in integration following the EMC and thus provides a poor framework in analysing *both* crises.[56] An estimated 1.4 million migrants sought asylum in the EU in 2015 spurred by war in Libya and Syria.[57] The Dublin system, pushed over the brink, was eventually abandoned by Greece in the summer of 2015 following an unprecedented number of migrants crossing the Mediterranean Sea. In response, the German government formally suspended the Dublin regulation, allowing refugees to travel directly to their country of choice, and then partially reversed their course just weeks later by temporarily reinstating border controls with Austria.

Hooghe and Marks note this 'set of a chain of unilateral moves' in which the CEE MS closed their borders.[58] Biermann *et al.* rebut Scipioni, by submitting the 'lowest common denominator' outcome are consistent with intergovernmentalism, in that 'defectors get their cake and eat it by blocking reform that would impose a common framework'.[59] In

[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid
[55] Lefteris Papadimas and Dave Graham, 'S&P cuts Greek debt to junk, downgrades Portugal' (Reuters, 27 April 2010) <https://www.reuters.com/article/idINIndia-48042020100427> accessed 1 March 2020
[56] Scipioni (n 15)
[57] Gurminder K Bhambra, 'The current crisis of Europe: Refugees, colonialism, and the limits of cosmopolitanism' (2017) 23 European Law Journal 395
[58] Hooghe and Marks, 'Grand Theories' (n 33)
[59] Biermann *et al.,* (n 5)

this sense, the CEE MS have blocked reform and achieved their policy preference. Nonetheless, this amounts to a poor interpretation of liberal intergovernmentalism which 'expects the integration to move forward when MS share a preference in avoiding welfare losses.'[60]

Instead, the CEE MS made an irrational choice to reimpose national borders, rather than opt for a centralised mechanism – against liberal intergovernmentalist expectations. It appears instead Biermann is attempting to have his cake and eat it in trying to fit the EMC into a liberal intergovernmental explanation.

A key dimension to Bickerton's 'new intergovernmentalism' is a change in behavioural norms, from hard bargaining toward consensus-seeking to encourage further integration.[61] With respect, this assessment is dispelled when considering the hard brinkmanship which characterised Eurozone negotiations. Schimmelfennig counters, arguing Sarkozy threatened to 'abandon talks and walk away' if the German government did not agree to a Greek bailout.[62] Furthermore, the approach fails to recognise the integral role of supranational institutions and their respective leaders in integration.[63]

When Mario Draghi circumvented fundamental Treaty constraints of the ECB to implement Quantitive Easing, he subsequently demanded harsh austerity programmes which were met with hostility from leaders in Greece and Spain.[64] Furthermore, if only intergovernmental negotiations are being considered a false conclusion could arise that only the preferences of national governments have shaped the outcomes.[65] This demonstrates the importance of using an institutionalist approach, such as neofunctionalism in analysing the response to the Eurozone crisis.

Schimmelfennig notes that the EMC was a 'postfunctionalist moment'[66] for the EU, and thus the approach is useful in understanding the EU's response during the crisis. During the EMC, the EU saw an influx of over a million refugees which fuelled debates about the cultural and economic capacities of MS and the fortification of the EU's external borders. Initially, the European response included €10 billion in legal resources to help register and process migrants, as well as €6 billion to help Turkey provide temporary protections

[60] Börzel, 'From EU Governance' (n 14)
[61] Dermot Hodson & Uwe Puetter, 'The European Union in disequilibrium: new intergovernmentalism, postfunctionalism and integration theory in the post-Maastricht period' (2019) 26 Journal of Public Policy 1153
[62] Schimmelfennig, 'Liberal Intergovernmentalism' (n 32)
[63] Nicole Scicluna, 'Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis' (2018) 25(12) Journal of European Public Policy 1874
[64] Tobias Tesche, 'Supranational agency and indirect governance after the Euro crisis: ESM, ECB, EMEF and EFB' (2019) 28(1) Journal of Contemporary European Studies 114
[65] Fritz W Scharpf, 'Legitimacy in the multilevel European polity' (2009) 1 European Political Science Review 173
[66] Börzel, 'From EU Governance' (n 14)

for Syrians. Perhaps, the most significant adjustment was the relocation of 120,000 'persons in clear need of international protection' from camps in Italy and Greece.[67] Each MS allocates individual migrants' different levels of funding; the EU average ranges upwards to €12,000.[68] Despite this lowly figure, Börzel notes the majority of persons have not been relocated by MS due to fears of a public backlash by their electorates.[69]

Hooghe and Mark argue that 'one must probe beyond economic preferences' to understand the course of European integration,[70] suggesting cultural factors account for Eurosceptic views challenging the predominantly economic preference of intergovernmentalism. Börzel furthers this view by arguing that depoliticisation during the EMC backfired due to the mobilisation of citizens with exclusive national identities by Eurosceptic populist parties. The language of the Eurozone crisis was marked by solidarity, debates about migrants and refugees are framed on a distinction between the 'self' and 'other'.

During the crisis, public discourse concerning refugees was characterised less as an economic issue and more as a 'clash of competing for European and national identities. Dunn notes that the debate of Turkish EU membership, before Erdogan's autocratic turn, can be characterised by the same anti-liberal language,[71] demonstrating a discomfort between national identities and the prospects of non-European migration.

Postfunctionalism is less equipped to understand the events of the Eurozone crisis, one which despite an increase in politicisation, has seen an increase in integration. Kriesi and Grande submit that this is due to national elites framing concerns in 'economic terms' rather than identity or race.[72] Risse submits that this is due to the supranational capacity of the ECB during the crisis.[73] Nonetheless, both postfunctionalist arguments seem to take from liberal intergovernmentalism and neofunctionalism respectively. As postfunctionalism does not distinguish between types of politicisation such as migration and economics, it cannot fully explain the variation in response like Schmitter's neofunctionalist revision does. Thus, Schmitter's incorporation of politicisation provides a nuanced framework in which the actions of European elites in framing the respective crises can be assessed.

C. Conclusion

[67] Ibid
[68] Tim Ross, 'Migrants cost up to 8k each in NHS care, schools and welfare' (Telegraph, 8 December 2013) < https://www.telegraph.co.uk/news/politics/10503178/Migrants-cost-up-to-8k-each-in-NHS-care-schools-and-welfare.html> accessed 1 March 2020
[69] Börzel, 'From EU Governance' (n 14)
[70] Hooghe and Marks, 'Postfunctionalist Theory' (n 37)
[71] Börzel, 'From EU Governance' (n 14)
[72] Ibid
[73] Ibid

Neofunctionalism explains integration as a process of supranational institutionalisation and transnational linkage, which arises by virtue of spillover between institutions due to incomplete supranational agreements. Liberal-intergovernmentalism focuses instead on the relative bargaining power between MS and the distributional conflict which arises from asymmetrical interdependence. Postfunctionalism explains integration by way of politicisation of issues by domestic publics which are then depoliticised by the supranational delegation in times of permissive consensus. Although liberal-intergovernmentalism can help explain the EU's response to the Eurozone crisis and postfunctionalism explains the response to the EMC; neofunctionalism explains as to the cause and response of both crises as Schmitter's contribution acknowledges that integration is limited by politicisation.

3. Transnational Interdependence

'Transnational interdependence' is defined as the process in which integration progresses when organised transnational actors, whether economic or political, pressure governments to manage interdependence to their policy preference by centralising policies and institutions.[74] Historically, the Union was tasked in creating an internal market in which MS economies were integrated by market actors. Subsequently, although asylum policy under the CEAS is more highly regulated, transnational interdependence remains low as human rights organisations like the UNHCR are comparatively weaker transnational actors.[75]

This section will outline the legislative framework of the EMU and the CEAS to determine, the extent to which each is intergovernmental or supranational, but also the extent to which the role of transnational actors is supported by legislation. Then, the role of transnational actors and their relative bargaining positions regarding each crisis will be assessed. It will be argued the integral role of market actors to the functioning of the EMU encouraged integration, whilst frictions existed between MS and human rights organisations which meant they were less able to pressure governments.

A. The Framework of the EMU and the CEAS

With the initial aim of economic integration, the EEC was created under the Treaty of Rome in 1957, as a regional organisation to create a common market and customs union. Conversely, the EU began working to achieve the CEAS from 1999 and by their admission, it is still incomplete.

First, through the application of a historical perspective in analysing the framework of the EMU, Borger notes that the interlocking of exchange rates implemented through the

[74] Moravcsik (n 12)

[75] Schimmelfennig, 'European Integration' (n 1)

former Articles 4(3) and 123(4) of the Treaty of Maastricht on the transition to EMU commenced the financial integration of Member State economies,[76] much before that of the CEAS.

Key to the discussion is the ECB's primarily policy goal of 'price stability' which centres transnational interdependence within the EMU and its relevant prohibitions. Under Article 123(1) TFEU the ECB is denied the right to allocate credit,[77] or directly purchase Member State bonds.[78] Furthermore, the ECB is unable to 'bailout' Member State governments even when facing sovereign default under Article 135(1) TFEU.[79] Due to this, MS are expected to finance themselves on the market by selling government bonds, without the support of the ECB in case of over-spending. Consequently, Genschel and Jachtenfuchs observe that bond markets reinforce compliance with conservative budgetary spending, or else face high-risk premiums for 'fiscally profligate' MS.[80]

In doing so, Niemann and Ioannou note a dependency exists between the EMU and national credit institutions which exposes balance sheets across national borders.[81] Accordingly, market actors are integral to the functioning of the EMU as MS depend on them for finance, explaining why transnational interdependence is strong within the EMU. Nonetheless, financial market integration remains intergovernmental as no centralised oversight mechanism exists to monitor cross-border services.

Moreover, the Stability and Growth Pact ("SGP") adopted in 1997 provides a 'fiscal surveillance framework'[82] in which MS agree to comply with rules under Article 126(1) TFEU on government deficits. The Pact provides obligatory deficit and debt thresholds of 3% and 60% GDP, and relevant consequences for not complying with those thresholds.[83]

The 'preventative' arm requires MS to submit their budgets for review by the Commission and the Council, ensuring their fiscal positions are balanced or in surplus.[84] Although, this suggests some supranational oversight, Genschel and Jachtenfuchs argue that the SGP's exclusive focus on fiscal imbalances is now considered 'a contributing

[76] Vestert Borger, 'How the debt crisis exposes the development of solidarity in the euro area' (2013) 9(1) European Constitutional Law Review 7
[77] TFEU, art. 123(1)
[78] Borger (n 76)
[79] TFEU, art. 135(1)
[80] Philipp Genschel and Markus Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory' (2017) 56(1) Journal of Common Market Studies 178
[81] Niemann and Ioannou (n 10)
[82] Marco Buti and Nicolas Carnot, 'The EMU debt crisis: early lessons and reforms' (2012) 50(6) Journal of Common Market Studies 899
[83] Ibid
[84] Ibid

cause to the debt crisis'.[85] For example, the Greek government sought to compromise their balance sheets before joining the Euro, thus gaining entry without meeting the necessary requirements.[86]

Mariotto attributes this to the use of qualified-majority voting ("QMV") in the Council, as when the Commission would demand tougher policy actions from countries with high debt, governments would negotiate to weaken the recommendations or else lose credibility with their electorates due to excessive spending.[87] Additionally, the authors note that the problems within the Spanish economy were not rooted in public over-indebtedness, but huge private debts fuelled by cheap credits facilitated by financial market lenders.[88]

Regarding the CEAS, Scipioni suggests migration policy at both national and international level are prone to failure.[89] Since their inception, EU policy on asylum has been incomplete concerning emergency measures and thus has been inadequate in dealing with the EMC.[90] This claim has some merit. Rather than adopting a centralised supranational asylum system, the EU has adopted a policy of layering texts to harmonise reception standards in a bid to safeguard its 'core' policy of the Dublin Regulation.[91] It is questionable whether this sufficiently empowers the transnational actors who are beneficiaries of this framework.

First, the Dublin Regulation described as the cornerstone of the CEAS, prescribes that responsibility for the examination of an asylum seeker's application rests with the Member State in which the asylum seeker first seeks entry.[92] In doing so this restricts transnational interdependence for refugees as the pressure they can apply on governments is mostly that of resource sharing in the Member State who is registering them. In doing so, the care of refugees falls disproportionately on peripheral states like Greece, Italy and Hungary. Although a mechanism for burden-sharing does exist under Article 15, it can only be activated through the volition of MS in 'exceptional' circumstances.[93]

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[85] Genschel and Jachtenfuchs (n 80)
[86] Buti and Carnot (n 82)
[87] Camilla Mariotto, 'Negotiating implementation of EU fiscal governance' (2018) 41(4) Journal of European Integration 465
[88] Genschel and Jachtenfuchs (n 82)
[89] Scipioni (n 15)
[90] Ibid
[91] Florian Trauner, 'Asylum policy: the EU's "crises" and the looming policy regime failure' (2016) 38(3) Journal of European Integration 311
[92] Council Regulation (EC) 604/2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection (Dublin Regulation) [2013] L180/31, art 7(3)
[93] Ibid, art 15.

A second emergency mechanism for adopting provisional measures for the benefit of MS faced with sudden inflows exists under Article 78(3) TFEU,[94] working around the Dublin system by relocating asylum-seekers to less burdened MS.[95] Thus, the process of allocating responsibility takes place at the moment of the first application. The Regulation also outlines that should an asylum seeker leave 'the territory of the responsible Member State' and enter another, the responsible Member State must take the asylum seeker back.[96] Under this Regulation, refugees are essentially restricted to the mercy of the individual MS' asylum system and rules.

Furthermore, the 'Mechanism for Early Warning, Preparedness and Management for Asylum Crises' under the Dublin Regulation establishes an alert system which prompts the Union through EASO when a Member State's reception facilities are overwhelmed, thus jeopardising the Union as a whole.[97] To some extent then, an influx of refugees would pressure MS to integrate through bilateral arrangements between MS and their national asylum agencies for resources and staff.

To strengthen interdependence between MS, the Temporary Protection Directive (TPD) was actioned as a result of the Yugoslavian war with the aim of 'promoting a balance of effort between MS in receiving and bearing the consequences of a mass influx of refugees.[98] To achieve this, the Directive allows for financial transfers through a European Refugee Fund as well as physical relocations based on dialogue between MS.[99] Nonetheless, Marin *et al.* have criticised the measure for lacking substance, as MS have no incentive to comply, nor the Commission has any power to enforce the mechanism.[100]

Furthermore, although Dublin's aim is to provide efficiency in asylum registrations, it works less well due to horizontal differentiation of reception conditions for asylum-seekers.[101] Consequently, The Reception Conditions Directive (RCD) 2003,[102] was the first effort to establish minimum standards in reception conditions, qualifications for international protection status, and procedures to be followed in granting such status.[103] It ensures applicants have access to vital necessities.

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[94] Nika Selanec, 'A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation' (2015) 11(1) Croatian Yearbook of European Law and Policy 73
[95] TFEU, art 78(3)
[96] Dublin Regulation, art 20
[97] Ibid, art 33
[98] Selanec (n 94)
[99] Ibid
[100] Lusia Marin, Simone Penasa and Graziella Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22(1) Journal of Migration and Law 1
[101] Scipioni (n 15)
[102] Council Directive (EC) 9/2003 laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive) [2003] L31/18
[103] Scipioni (n 15)

Although offering some guarantees for asylum-seekers, Scipioni criticises the Directive as premised on an assumption that asylum-seekers are utility-maximising individuals, who can spread evenly throughout the EU receiving equal treatment everywhere, eliminating disproportionate pressures on peripheral MS.[104] Kang supports Scipioni, arguing that this premise ignores the distinction between a refugee, someone who has been forced to flee his or her country due to war or violence, and an economic migrant who seeks a higher income.[105] Furthermore, if refugees were able to travel on to other MS with more favourable conditions, this could encourage MS to adhere to hostile and minimum standards rather than encouraging, better standards.

In sum, additional policy layers have heavily regulated asylum conditions and encouraged dialogue between MS. By working to reinforce the Dublin Regulation, MS have retained the intergovernmental nature of asylum policy. Furthermore, although the regulatory framework of the EMU actively encourages the participation of market forces in financial transfers, the Dublin Regulation restricts the agency of refugees as transnational actors.

B. The Role of Transnational Actors in the Crises

Neofunctionalists argue the impetus for regional integration comes from both supranational and transnational actors.[106] The role of transnational market actors, such as national banks, and relevant human rights organisations is imperative in understanding the variation of integration outcome following the crises. While transnational actors and linkages were strong in the euro crisis, Schimmelfennig fails to explain why international human rights organisations are comparatively weak transnational actors.[107] Accordingly, this section will first outline the strong role of market actors in encouraging integration during the Eurozone crisis, followed by a discussion of the comparatively weak role of refugees and international human rights ("IHR") organisations.

Transnational Actors in the Eurozone crisis

As outlined, due to the inability of the ECB to allocate credit or purchase Member State bonds, market actors in the form of national banks were imperative in purchasing government bonds and facilitating cross-border financial flows, integrating the economies of export-led economies in the North, and demand-led economies in the South.[108] The formation of the Euro created 'favourable conditions' in allowing large balance-of-payment surpluses generated in the North to move to the South, fuelling

[104] Ibid

[105] Yoo-Duk Kang, 'Refugee crisis in Europe: determinants of asylum seeking in European countries from 2008-2014' (2020) Journal of European Integration <https://doi.org/10.1080/07036337.2020.1718673> accessed 01 December 2019

[106] Hooghe and Marks, 'Grand Theories' (n 33)

[107] Schimmelfennig, 'European Integration' (n 1)

[108] Heldt (n 3)

public sector debt and real-estate 'bubbles' in which housing costs boomed.[109] This encouraged growth as increased finances in the South allowed for higher public borrowing, whilst bond-interest payments benefitted Northern economies.[110]

Schimmelfennig argues that despite rising public debt, Southern markets were considered safe due to their membership of the Eurozone and the likelihood that Northern Members would intervene if necessary, or face their banks failing.[111] This claim has some merit. When the spread of Greek and German 10-year bonds substantially increased to 650 basis points, interests skyrocketed to over 38% with Barclays Capital reporting that German and French financial institutions held over $100 billion in Greek government bonds.[112] Whilst this can be interpreted as a sign of successful integration of capital markets, Members later recognised that liabilities were invested in current consumption, in housing and construction, rather than productive investments, leaving borrowers and lenders exposed.[113] Although initially, Members avoided further integration by opting for bilateral loans, market actors pressured MS to integrate and adopt a supranational bailout mechanism by increasing interest rates to unsustainable levels.[114] Indeed, with concrete plans for fiscal-integration, the markets would feel 'more relaxed' demonstrating the inextricable link between market pressures and integration.[115]

For Neofunctionalists, the salience of the original goal determines the strength of the functional pressure for integration. Subsequently, Börzel correctly observes that transnational interdependence during the Eurozone crisis was so strong because safeguarding the euro was inextricably linked to protecting the European project.[116] According to Wolfgang Schauble, the German Finance Minister, the event of the collapse of the Eurozone would "call into question… the common market" whilst sovereign default of any euro country would be "incalculable".[117] Indeed, estimated exit costs associated with Eurozone breakdown for the Northern Members were estimated at a 25% retraction in their economies.[118] Arguably knowing this, market actors were able to pressure MS to achieve their preferred policy preference in a supranational bailout mechanism, or else risk failure of the entire EU.

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[109] José Carlos Vides, Antomio Golpe and Jesús Iglesias, 'How did the Sovereign debt crisis affect the Euro financial integration? A fractional cointegration approach' (2017) 45(4) Empirica: Austrian Institute for Economic Research 685

[110] Jeffry Frieden and Stefanie Walter, 'Understanding the Political Economy of the Eurozone Crisis' (2017) 20(3) Annual Review of Political Science 371

[111] Schimmelfennig, 'Liberal Intergovernmentalism' (n 33)

[112] Jale Tosun, Anne Wetzel and Galina Zapryanova, 'The EU in Crisis: Advancing the Debate' (2014) 36(3) Journal of European Integration 195

[113] Buti and Carnot (n 84)

[114] Schimmelfennig, 'Liberal Intergovernmentalism' (n 33)

[115] Niemann and Ioannou (n 10)

[116] Börzel, 'From EU Governance' (n 14)

[117] Ibid

[118] Schimmelfennig, 'European Integration' (n 1)

Transnational Actors in the EMC

In contrast with transnational actors of the Eurozone crisis, relevant transnational actors of the EMC were not sufficiently empowered through the CEAS as the Dublin Regulation restricted asylum-seekers to their first country of entry. Schimmelfennig submits that refugees are 'weak transnational actors'[119] as the only pressure refugees can apply to MS exists within their human rights obligations via the UN Convention relating to the Status of Refugees ("UNCR").[120] Any recommendations produced by the UN High Commissioner for Refugees (UNHCR) are non-binding and instead act as guidance in fulfilling any human rights obligations.[121] These issues will be discussed in turn to conclude that despite obvious human rights obligations, MS have pivoted from burden-sharing mechanisms aiding peripheral States.

First, refugees are weak transnational actors by definition of their destitute and so rely on other transnational actors in pressuring MS governments. Lang correctly submits that refugees rarely have the knowledge or resources to seek judicial protection and can only be adequately protected through the political will of EU and national policy-makers.[122] Although Article 80 TFEU prescribes solidarity and fair sharing of responsibility as a framework for applying EU law, even the European Parliament has acknowledged the contours of this obligation remains abstract.[123] As such, no judicial legal obligation can be deduced from Treaty law due to its vagueness. Furthermore, any decisions taken by QMV in the Council to share burden are not 'bound by any concrete obligations' and instead a Member must indicate in general terms their capacity to receive refugees via quotas. Implementation of any decision is made through the volition of MS, a perceived flaw in EU policy-making.[124]

Costello supports Lang, linking weak functional pressure to weak access to justice, as whilst there has been substantive harmonization of reception conditions, this has been prescribed without detailed procedural harmonization.[125] Though the Recast Asylum Procedures Directive aims to ensure that asylum decisions are made efficiently with similar cases resulting in the same outcome, in reality, several national systems restrict access to courts. Even in *NS*, where the court acknowledged that a connection existed

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[119] Ibid

[120] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

[121] UNHCR 'Observations on the Current Situation of Asylum in Bulgaria' (Geneva 2014)

[122] Iris Lang, 'No Solidarity without Loyalty: Why do Member States violate EU Migration and Asylum Law and What Can Be Done' (2020) 22(1) European Journal of Migration and Law 39.

[123] European Parliament 'Setting up a Common Asylum System' (22 August 2010) EP Doc PE/425.622

[124] Scipioni (n 15)

[125] Cathryn Costello and Emily Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught Between the Stereotypes of the Abusive Asylum-seeker and the Vulnerable Refugee' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani, Reforming the Common European Asylum System (Brill Nijhoff, 2016)

between poor reception conditions and the Dublin Regulation, the CJEU held that an asylum-seeker would have to face a 'real risk' of being subjected to degrading treatment in order to prevent a Dublin transfer.[126] Although this demonstrates disapproval of the Dublin Regulation, the Court was obliged to give effect to EU asylum acquis, demonstrating the limits to judicial discretion.[127]

In short, refugees are weak transnational actors as the primary functional pressure that they place on MS is through domestic judiciaries that are bound to apply an already inherently flawed EU asylum acquis. Therefore, unless judges are to illegitimately usurp the role of legislators, refugees are unable to act independently of the competence the EU chooses to grant them.[128]

Arguably, refugees can apply 'pressure' to MS through existing human rights obligations such as those in the UNCR and non-government organisations (NGOs).[129] Nonetheless, recommendations by organisations are non-binding, rendering them weak in comparison to market actors.[130] Furthermore, Romeo correctly submits a tension exists between human rights organisations, NGOs and MS governments which restricts integration. In 2016, the UNHCR published a report recommending a change in Hungarian law so that refugees could no longer be arrested for arriving under false documentation.[131]

Although the Hungarian government supposedly implemented the UNHCR's recommendation, Trauner holds reservations at the breadth of its reforms.[132] Accordingly, a report published by the Hungarian Helsinki Committee found that over 40% of male first-time asylum-seekers in Hungary were detained and that 'judicial review of asylum detention was ineffective'.[133] In response to repeated calls to ban transfers of asylum-seekers to Hungary, the Hungarian government enacted laws restricting freedom of expression, 'silencing NGOs' and stopping them from 'carrying out vital human rights work'.[134]

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[126] C-411-10 and C-493-10 Joined cases of N.S. v United Kingdom and M.E. v Ireland [2011] ECR C-865, paras 82-88
[127] Lang (n 122).
[128] Ibid
[129] Schimmelfennig, 'European Integration' (n 1)
[130] Ibid
[131] UNHCR 'Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016' (Geneva 2016)
[132] Trauner (n 94)
[133] Hungarian Helsinki Committee, 'Annual Report 2014' (HHC, 7 August 2014) < https://helsinki.hu/wp-content/uploads/HHC-annual-report-2014-final.pdf> accessed 10 February 2020
[134] Hungarian Helsinki Committee, 'Annual Report 2014' (HHC, 7 August 2014) < https://helsinki.hu/wp-content/uploads/HHC-annual-report-2014-final.pdf> accessed 10 February 2020

This nonchalant attitude toward NGOs has been mirrored by other MS, helping to understand why they are comparatively weak transnational actors. In 2019, Italian Minister, Matteo Salvini accused the NGOs, Doctors Without Borders and SOS Mediterranee as 'interfering' with Libyan coastguard operations, by rescuing migrants who would otherwise have been handled by Libyan authorities.[135] To combat this, the Minister ordered the closure of Italian ports carrying migrants, including rescue boats operating in search-and-rescue zones – a derogation of IHR obligations.[136] Therefore, friction existed between transnational actors during the EMC, which did not exist during the Eurozone crisis - an impediment to integration.

Biermann submits during the European Refugee Crisis, no 'common bad' existed that needed to be jointly averted. Unlike during the Eurozone crisis, MS acted unilaterally in the de facto suspension of the Dublin system, and by temporarily reinstating border controls.[137] In comparison to the 25% economic retraction presented through Eurozone exit; Efurhievwe submits that the cost of unilateral action in reinstating border controls amounted to just 0.2% GDP.[138] Although financial solidarity existed between Members in the €3.1 billion Asylum, Migration and Integration Fund, this figure pales in comparison to the €6.1 billion allocated to the resettlement of migrants by the Swedish government alone.[139]

In sum, whilst MS in the Eurozone crisis were pressured to integrate by strong market actors responsible for market integration of their economies, refugees, by comparison, made weaker transnational actors. Although MS were pressured to create a centralised bailout mechanism or face their banks fail, during the EMC the cost-benefit of no integration generally outweighed the recommendations of the UNHCR to address 'fragile' asylum systems within Europe.

4. Supranational Capacity

Neofunctionalism assumes a positive integration dynamic through incomplete integration dynamics created through processes of path-dependency and spillover.[140] In doing so, supranational institutions gain sufficient autonomy to negotiate their self-empowerment. By 'self-empowerment' this paper refers to the ability of supranational

[135] Crispian Balmer, 'In new migrant standoff, Italy's Salvini blocks two NGO boats' (Reuters, 13 August 2019) <https://www.reuters.com/article/us-europe-migrants-italy-idUSKCN1V315R> accessed 1 March 2020

[136] ibid.

[137] Biermann *et al.*, (n 5)

[138] B Efurhievwe, 'Asylum 122 a critical analysis of crisis management under CEAS' (2018) 32(2) Journal of Immigration, Asylum and Nationality Law 99

[139] Scipioni (n 15)

[140] Nicole (n 23)

institutions to broaden the scope of their decision-making authority by increasing their funding and ability to negotiate with MS to exert influence on institutional changes.[141] In contrast to Schimmelfennig, this section will argue that the pre-existing supranational capacity of institutions has been integral in determining integration outcomes of the crises.[142]

This section will first outline the role each institution played in its self-empowerment including an assessment of the competences gained. Then, in explaining the difference in self-empowerment, this paper will dispel the argument that the credibility of the Commission was severely weakened during the Eurozone crisis, resulting in MS dismissing its proposals during the EMC.

A. Institutional Framework

The previous section discussed the macroeconomic framework underpinning the EMU introduced first by the Maastricht Treaty. This section will focus on institutional developments post-crisis. The ECB formally replaced the European Monetary Institute in 1998 under the aforementioned Treaty with the primary objective of maintaining price stability and supporting the economic policies of the EU.[143] De Grauwe criticises the ECB's hesitation in acting during the initial stages of the crisis, forcing MS to take bailouts from domestic banks and increasing their risk of sovereign default.[144] Nonetheless, the author ignores the prominent prohibitions under Article 123 and Article 125 prohibiting monetary financing of public debts which restricts the ECB's ability to act as previously mentioned.[145]

Initially, European leaders undertook a preventative approach in response to the failings of the SGP. To ensure budgetary discipline, the Six-Pack, Two-Pack and Fiscal Compact required MS to implement budgetary frameworks coupled with strengthened sanctions for fiscal recklessness.[146]

Tosun *et al.* highlight the Greek debt crisis as a 'catalyst' for genuine institutional change during the Eurozone crisis.[147] When bilateral loans by France, Germany and the IMF to the sum of €110 billion failed to quell Greece's mounting debt crisis; European leaders including the French President, Nicholas Sarkozy, pleaded with the ECB to 'stop hesitating' and offer relief to Members.[148] Although initially reluctant, Mario Draghi, the

[141] Heldt (n 3)
[142] Schimmelfennig, 'European Integration' (n 1)
[143] Mariotto (n 90)
[144] TFEU, art 123
[145] TFEU, art 125
[146] Christopher Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2014) 53(4) Journal of Common Market Studies 703
[147] Tosun, Wetzel and Zapryanova (n 112)
[148] Niemann and Ioannou (n 10)

President of the ECB soon confirmed it would do 'whatever it takes' to preserve the Euro, thus launching the OMT programme which manoeuvred around the Article 123 prohibition and allowed the bank to purchase bonds from secondary markets.[149]

In condition to the relief provided through the OMT, Draghi advocated the need to supervise all banks at European level to prevent fragmentation. To 'break the feedback loop between banks and their sovereigns',[150] the President supported a single European banking supervision and common deposition insurance framework' existing directly under ECB supervision.[151] In doing so, the Single Supervisory Mechanism ("SSM") was established, substantially increasing the capabilities of the ECB with the recruitment of over 900 new supervision experts and the power to supervise 128 banks.[152] Furthermore, it gave the ECB the power to supervise any of the 6,000 banks of the euro area should the bank's default.[153] This frames accordingly with neofunctionalist expectations, as supranational integration of banking policy is owed to the spillover of functional pressures from monetary integration.

Although the OMT programme quelled market panics and reduced bond rate spread across the Eurozone, Italian and Spanish bond yields continued to rise.[154] Subsequently, Mario Rajoy warned that at current interest rates it was unlikely that the Spanish economy would sustain.[155] In comparison to Greece, the much larger economies of Italy and Spain were too burdensome to bailout, even by the German government.[156] To respond to the crisis efficiently, the EFSF was created under Luxembourgian law as a special purpose vehicle ("SPV") after lengthy negotiations by European leaders.[157] Each Eurozone country was to contribute proportionally to the total of €440 billion in guarantees.[158]

As the initial EFSF funds proved insufficient to contain the crisis, the ESM was created as a permanent lender with a capacity of over €500 billion.[159] Initially created as an intergovernmental resolution, the main ESM decision-making body initially consisted of Member State finance ministers forming a Board of Governors.[160] Furthermore, Germany,

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[149] Scicluna (n 63)
[150] Agnès Bénassy-Quéré, Benoît Coeuré and Pierre Jacquet, *Economic Policy: Theory and Practice* (first published 2010, Oxford University Press 2012) 314
[151] Heldt (n 3)
[152] Ibid
[153] Ibid
[154] Genschel and Jachtenfuchs (n 82)
[155] Schimmelfennig, 'Liberal Intergovernmentalism' (n 32)
[156] Michael Bechtel, Jens Hainmueller, Yotam Margalit, 'Preferences for International Redistribution: The Divide over the Eurozone Bailouts' (2014) 58(4) American Journal of Political Science 835
[157] Borger (n 76)
[158] Borger (n 76)
[159] Genschel and Jachtenfuchs (n 82)
[160] Borger (n 76)

France and Italy as the major donors each obtained a de facto veto of any decision to lend – a traditional feature of an intergovernmental institution.[161] Unlike the EFSF, the ESM required upfront capital from its signatories.[162]

To grant the ESM legal legitimacy, the European Council proposed an amendment of Article 136 TFEU with approval from the European Parliament.[163] The amendment formally integrated the stability mechanism under Treaty framework, allowing financial assistance subject to strict conditionality – set by the ECB, European Commission and IMF as part of the 'Troika'.[164] When applying for assistance, the Troika's role is to assess the eligibility for precautionary credit lines attached to the financial assistance in receiving countries, with regular reviews quarterly.[165] Conditional to the receipt of financial assistance, Draghi prescribed the ratification of the Fiscal Compact. For this reason, despite the EFSF and ESM initially existing under an intergovernmental framework, the EU has slowly institutionalised both mechanisms under the supranational supervision of the ECB.[166]

In contrast to the self-empowerment displayed by the ECB, reforms proposed by the Commission of the institutions within the framework of the CEAS were watered down significantly during the EMC. Efurhievwe describes the EU's existing approach to asylum policy as 'broken and unworkable' due to the reluctance of MS to work outside the confines of the Dublin Regulation.[167] During the EMC, Italy and Greece were particularly affected due to the Dublin Regulation restricting asylum-seekers to their first country of entry. Overwhelmed with the sheer number of asylum-seekers, Italy applied a 'wave through' approach, refusing to fingerprint and register new migrants entering the State.[168]

Early approaches to tackling the EMC amount to ad-hoc proposals. Initially, the Commission proposed the temporary resettlement of 40,000 asylum-seekers from Italy and Greece, followed by the resettlement of a further 120,000 from the aforementioned MS and Hungary.[169] Although this seemingly demonstrates solidarity between MS, Hungary, alongside Slovakia, Romania and the Czech Republic voted against the proposal. Following this, in September 2015, the Commission presented its European Agenda on Migration, hoping to incorporate a permanent crisis relocation mechanism

[161] Bechtel, Hainmueller, Margalit (n 163)
[162] Tesche (n 65)
[163] Niemann and Ioannou (n 10)
[164] Ledina Gocaj and Sophie Meunier, 'Time Will Tell: The EFSF, the ESM, and the Euro Crisis' (2013) 35(3) Journal of European Integration 239
[165] ibid.
[166] Steve Peers, 'Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework' (2013) 9(1) European Constitutional Law Review 37
[167] Efurhievwe (n 137)
[168] Biermann *et al.,* (n 5)
[169] Genschel and Jachtenfuchs (n 82)

under the Dublin Regulation, a transformation of FRONTEX into the EBCG and EASO into the EUAA.[170]

First, the Commission's proposed a Regulation on a permanent crisis relocation mechanism under the Dublin system. This mechanism would be used by the Commission to assess crisis situations and necessary corrective measures.[171] This represents a 'tinkering of the edges' rather than a radical overhaul of the Dublin System.

As the proposal is premised under the Dublin system, Selanec observes that the mechanism would fail to reverse the underlying rule that frontline States like Italy and Greece are always initially responsible for asylum-seekers.[172] Additionally, as relocations are limited to refugees who have sought asylum in accordance with the Dublin Regulation, this ignores the reality of numerous unrecorded asylum-seekers whose details have not been recorded.[173] The author observes inconsistencies in registering new asylum-seekers even before the crisis.[174] Furthermore, considering just Malta and Norway (a non-EU state) have taken their full share of the temporary proposals for refugees, it is questionable whether the mechanism would be made more efficient by it simply being made permanent.

Moreover, Efurhievwe recognises a catch-22 scenario exists under the new proposals, as asylum-seekers are penalised for irregular entry, despite the inherent necessity for refugees to access MS with more favourable conditions.[175] Indeed, by choosing to work within the confines of the Dublin system, the Commission has shown a lack of appreciation for the variety of factors in which refugees make secondary movements – such as not wanting to resettle in a hostile host country.[176]

Next, FRONTEX was established in 2006 to reinforce EU maritime border surveillance and coordinate cooperation between MS in external border management.[177] Following the transformation of the agency into the EBCG, Peers argues the changes 'promote FRONTEX from the job of the tea lady to the role of a chief executive' with an upgraded role in organising and co-financing joint returns operations.[178] Nonetheless, whilst the

[170] Commission (EC), 'A European Agenda on Migration' (Communication) COM (2015) 240 final.
[171] ibid.
[172] Selanec (n 94)
[173] Börzel, 'From EU Governance' (n 14)
[174] Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (first published 2009, Oxford University Press 2010) 290
[175] Efurhievwe (n 137)
[176] Ibid
[177] Council Regulation (EC) 2007/2004 on establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX Regulation) [2004] L349/1
[178] Peers (n 165)

Agency's new mandate has been expanded, no qualitative change has been made in its decision-making powers.

First, new Rapid Return Intervention Teams have been created to help MS on issues such as identification and consular co-operation, thus centralising MS responses.[179] Any return must be made in accordance with the Return Directive,[180] and pertinent human rights obligations which have since been codified through the adoption of a fundamental rights strategy and code of conduct for joint return operations. Whether this amounts to a significant promotion as Peers argues is doubtful, considering just less than 5% of unwanted migrants returned in 2015 were moved through this mechanism. Thus, the practical use of any new decision-making power has been limited.[181]

Mathiason *et al*. attribute the small number of effective returns operations to the limited funds of the agency.[182] Since the EMC, the agency's annual budget has dramatically doubled to €281.3 million with over 600 staff.[183] Nonetheless, this pales in comparison to the €23 billion spent by Germany alone on refugee relocation costs.[184] On balance, without the necessary funds to operate, any additional competencies gained by the agency appear useless.

In aid of Peers' argument, Börzel recognises a significant competence granted to the EBCG is the ability to deploy Border and Coast Guard teams to MS who have failed to control their borders.[185] Although the author claims a similarity exists between the role of the EBCG, and the ECB's supervision of the SSM,[186] action taken by the former can only be granted with the approval of the Council. [187]

[179] Peter Slominski and Florian Trauner, 'How do Member States Return Unwanted Migrations? The Strategic (non-)use of 'Europe' during the Migration Crisis '(2018) 56(1) Journal of Common Market Studies 101

[180] Council Directive (EC) 115/2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive) [2008] L348/98

[181] Slominski and Trauner (n 178)

[182] Nick Mathiason, Victoria Parsons and Ted Jeory, 'Frontex resource limitations put agency in straitjacket' (euobserver, 15 September 2015) accessed 25 March 2020

[183] Henk van Houtum and Rodrigo Bueno Lacy, 'The auto-immunity of the EU's Deadly B/ordering Regime; Overcoming its Paradoxical Paper, Iron and Camp Borders' (2020) Geopolitics < DOI: 10.1080/14650045.2020.1728743> accessed 25 March 2020

[184] Slominski and Trauner (n 178)

[185] Council Regulation (EC) 1624/2016 on the European Border and Coast Guard (EBCG Regulation) [2-16] L251/1, art 19

[186] Börzel, 'From EU Governance' (n 14)

[187] Martin Deleixhe and Denis Duez, 'The new European Broder and Coast Guard Agency: Pooling sovereignty or giving it up?' (2019) 41(7) Journal of European Integration 921

Borders are audited through annual vulnerability assessments,[188] by which the agency reviews the 'capacity and readiness to face upcoming challenges at external borders' and subsequently provides binding recommendations to introduce.[189] Despite the agency's reliance on objective data, the topic of border control is so politicised, that 'no policy recommendation can ever be apolitical'.[190] As such, the agency is granted with a powerful political role – more so than most traditional supranational institutions. Nonetheless, despite intelligence being centralised and processed by the Agency, it is first collected and submitted by MS - leading Jeandesboz to conclude that data is often misrepresentative.[191] Furthermore, considering the agency's Management Board contains the heads of each national service of border guards, the agency remains largely intergovernmental.[192]

Thus, Deleixhe and Duez offer a balanced conclusion: despite the agency's best efforts to reinforce its authority, its new mandate has only confirmed the EBCG's role as a subordinate technical agency to recalcitrant MS.[193] To rebut Peers' earlier remark, the EBCG remains the tea lady, *not* the chief executive despite its 'transformation'.[194]

Last, throughout the crisis, the EASO has continued to support and monitor MS authorities in the implementation of asylum acquis.[195] Despite the Commission's aim to transform the agency into a EUAA, plans have yet to come to fruition. Schimmelfennig notes the agency lacks both the competence and resource to compensate the poor administrative capacity of some MS.[196] In 2015, following an overwhelming number of migrants arriving in Greece, EASO launched combined calls for over 2,000 asylum specialists to be sent to Greece to support local staff.[197]

Whilst playing an important role in dealing with the effects of the EMC, EASO was unable to intervene earlier as its role is limited to monitoring implementation of EU asylum acquis, rather than cases of faulty implementation.[198] Indeed, there had been inconsistencies in the Greek asylum system in the year before the EMC.[199]

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[188] Council Regulation (EC) 1624/2016 on the European Border and Coast Guard (EBCG Regulation) [2016] L251/1, art 13(4)
[189] Deleixhe and Duez (n 187)
[190] Ibid
[191] CEPS, 'Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and EUROSUR' (Report, 2008) <https://www.ceps.eu/ceps-publications/reinforcing-surveillance-eu-borders-future-development-frontex-and-eurosur/> accessed 25 March 2020
[192] Deleixhe and Duez (n 187)
[193] Deleixhe and Duez (n 187)
[194] Peers (n 165)
[195] Scipioni (n 15)
[196] Schimmelfennig, 'European Integration' (n 1)
[197] European Parliament 'Setting up a Common Asylum System' (22 August 2010) EP Doc PE/425.622
[198] Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (first published 2009, Oxford University Press 2010) 290
[199] ibid.

B. Explaining the Difference in Self-empowerment

In explaining the difference in self-empowerment from a neofunctionalist perspective, theorists have centred on the Commission's weakened position following the Eurozone crisis as the logical basis for insufficient supranationalisation of asylum policy following the EMC.[200] Although it is true that as subordinate technical agencies, FRONTEX and EASO were less equipped than the ECB in negotiating extensions to their mandate and so relied on the Commission; the argument that the Commission lost credibility during the Eurozone crisis is without fact.[201] Rather, as a Union institution, the ECB possessed the autonomy to both negotiate its own mandate and frame the Eurozone crisis as a technical crisis and thus self-empower accordingly. In contrast, the EMC was not a technical crisis but a political crisis.

The Role of the European Commission

Following the *en masse* resignation of the Santer Commission, commentators have argued the European Commission has continued to lose institutional authority even in the years preceding the crisis.[202] Intergovernmentalist commentators have attributed the Commission's lame handling of the SGP in allowing Greece and Italy to reach unsustainable debt-GDP ratios of 146% and 132% respectively as the basis for the Commission's discrete role during the Eurozone crisis.[203]

Subsequently, the EFSF and the ESM were initially created as intergovernmental agreements outside of Treaty framework, resulting in a limited role for the Commission. Indeed, Bickerton *et al.* argue that the Treaty Establishing the European Stability Mechanism ("TEESM") and the Fiscal Compact has empowered the Commission 'to a limited degree in one case' and 'not at all' in the other. Additionally, Gocaj and Meunier suggest the SPV structure of the ESM was to avoid the difficulties associated with using the Commission as the receiving body for guarantees.[204] In aid of Bickerton, Valle-Flor contends the Treaties represented a loss for the Commission of its traditional monopoly over policy initiation, as for the first time MS made formal proposals.[205]

Heldt rebuts this argument stating the European Commission has used this opportunity to adopt a 'more proactive role by centralising power and implementing new rules at the European level'.[206] Scipioni concurs, noting under the reformed Six and Two Pack the

[200] Schimmelfennig, 'European Integration' (n 1)
[201] Frank Schimmelfennig, 'What's the News in New Intergovernmentalism: A Critique of Bickerton, Hodson and Puetter' (2015) 53(4) Journal of Common Market Studies 723
[202] Daniela Schwarzer, 'The Euro area crisis, shifting power relations and institutional change in the European Union' (2012) 3(1) Global Policy 28
[203] Mariotto (n 87)
[204] Gocaj (n 163)
[205] Maria Valle-Flor, 'The Six-Pack as a Test for the New Intergovernmentalism and Supranationalism Theories' (2018) 61(1) Revista Brasileira de Politica Internacional 21
[206] Heldt (n 3)

Commission is now authorised to undertake several monitoring tasks and as such now have discretion over enforcement.[207] Subsequently, Valle-Flor concedes that as part of the Troika, the Commission has been successful in imposing its recommendations regardingausterity programmes conditional to support from the ESM.[208] Furthermore, Heldt dismisses supposed tensions between the ECB and the Commission, noting the Commission's role in creating the SSM under the ECB's supervision.[209] As such, far from a 'diminished role', the Commission has been integral in empowering other supranational institutions throughout the Eurozone crisis.

Linking to the EMC, Börzel is correct in her assertion that MS erected national borders due to the absence of working European solutions.[210] Subsequently, commentators have argued the lacklustre Agenda on Migration is evidence of the Commission's weakened position following the Eurozone crisis. Efurhievwe criticises the proposal for focusing largely on monetary assistance, rather than any radical overhaul of the Dublin Regulation.[211] Indeed, the only significant supranational proposal was for the creation of a permanent EU resettlement scheme.[212] Even then, the proposals advocate for the resettlement of just 50,000 vulnerable migrants by 2019.

As previously discussed, the Commission was empowered during the Eurozone crisis, rather than ignored as intergovernmentalist commentators have argued. Instead, a more plausible explanation for the lacklustre Agenda is that MS governments were reluctant to deviate from the Dublin Regulation, knowing that they would receive political backlash form their domestic publics should they support further integration. When the temporary relocation scheme expired in September 2017, less than a quarter of the planned 120,000 had been relocated demonstrating unwillingness for governments to cooperate.[213] As such, whilst the Commission played an integral role in negotiating supranationalisation of decision-making powers during the Eurozone crisis, it was less equipped during the EMC.

Autonomous Self-empowerment

Neofunctionalism attributes differences in integration outcomes to differences in pre-existing supranational capacities between institutions.[214] Although plain, as a Union institution defined under Treaty law,[215] the ECB was better able to negotiate its mandate than either FRONTEX and EASO as subordinate technical agencies or '*de novo* bodies'.[216]

[207] Scipioni (n 15)
[208] Valle-Flor (n 204)
[209] Heldt (n 3)
[210] Börzel, 'From EU Governance' (n 14).
[211] Efurhievwe (n 137).
[212] Commission (EC), 'A European Agenda on Migration' (Communication) COM (2015) 240 final.
[213] Börzel, 'From EU Governance' (n 14).
[214] Schimmelfennig, 'European Integration' (n 1).
[215] TFEU, art 13
[216] Bickerton, Hodson and Puetter (n 151)

The independence of the ECB from both EU institutions and Member State governments provides a better bargaining position than that of the Commission, as it is isolated from political pressures.[217] Moreover, both equipment and personnel are contracted to the agencies by MS governments, creating an uneasy relationship in which the agencies must keep in good stead with MS or else risk losing necessities.[218]

Withal, Heldt attributes the 'autonomous emergency empowerment' of the ECB to the strength of its leaders, Jean-Claude Trichet and then, Mario Draghi in negotiating for further supranationalisation of competences.[219] By contrast, José Barroso and Jean-Claude Juncker struggled to establish themselves as credible leaders during the crisis years.[220]

In the early months of the crisis, Trichet reacted strongly against calls for the ECB to intervene, stating that the ECB Governing Council would react 'very negatively' to such pressures.[221] Instead, the ECB became directly involved in encouraging MS to implement austerity reforms to their economies. In a leaked letter between Trichet, Draghi and Italian Prime Minister, Silvio Berlusconi, the Presidents set out detailed reforms for the Italian Republic despite offering no monetary assistance.[222] Thus, Trichet and Draghi were able to exert influence in fiscal policy, an area typically reserved for the discretion of MS.[223]

Controversially, the ECB's intervention in Cyprus demonstrates its ability to influence MS to adopt its austerity-linked programmes. When the Cypriot Parliament initially rejected a €10 billion bailout negotiated between the government and the Troika due to its imposition of tax on all Cypriot deposits, the ECB famously offered an ultimatum to coerce the government into adopting its preferred positions.[224] After threatening to withdraw emergency liquidity assistance, the Cypriot government finally conceded despite huge public backlash.[225] In doing so, the ECB demonstrated its ability to act autonomously without fear of MS governments.

Technical Deference

[217] Alexander Thiele, 'The Independence of the ECB: Justification, Limitations and Possible Threats' (2018) 6(1) Journal of Self-Governance and Management Economics 98

[218] Sergio Carrera, 'Towards a Common European Border Service' (2010) CEPS Working Document 331/2010, <https://www.researchgate.net/publication/4563627_Towards_a_Common_European_Border_Service_CEPS_Working_Document_No_331_June_2010> accessed 25 March 2020

[219] Heldt (n 3)

[220] Carnegie Europe, 'How the Refugee Crisis will Reshape the EU' (Stefan Lehne, 4 February 2016) <https://carnegieeurope.eu/2016/02/04/how-refugee-crisis-will-reshape-eu-pub-62650> accessed 25 March 2020

[221] Niemann and Ioannou (n 10)

[222] Schwarzer (n 201)

[223] Heldt (n 3)

[224] Schimmelfennig, 'Liberal Intergovernmentalism' (n 32)

[225] ibid.

Supranational contends a tendency toward technocratic governance based on centralised expertise and information, consequently, MS took heed of the ECB's technical expertise throughout the Eurozone crisis.[226] Even Germany with its strong economy succumbed to the ECB's superior knowledge on monetary and supervisory mechanisms when creating the SSM, despite initially favouring a lax approach to the banking union.[227] Additionally, the Commission's lack of experience in the field of financial stability could explain why it refrained from presenting bold integration ideas during the crisis, instead choosing to support the ECB's proposals.[228]

Following Draghi's intervention through the OMT programme, Scicluna argues that the President's willingness to 'act in the absence of explicit legal authorisation' was instrumental in stabilising the euro.[229] By interpreting its Art. 127(6) TFEU remit to 'specific tasks relating to prudential supervision' broadly,[230] the ECB circumvented prohibitions on debt-financing whilst demonstrating the might of its supranational autonomy. Consequently, when the legality of the ESM was brought to the Court in *Pringle*,[231] the CJEU demonstrated a willingness to interpret the Treaties widely when determining the bank's discretion due to the ECB's technical expertise.[232] In contrast, when the Commission proposed granting EASO an autonomous 'right to intervene' when MS failed to implement EU *asylum acquis*, legal opinion of the MS was that this would infringe upon their Art. 72 right of responsibility for internal security.[233] Evidently, EASO, nor the Commission held enough expertise to sway MS.

In contrast, Deleixhe and Duez argue that despite FRONTEX and EASO operating as technical agencies, the issue of borders and identity cannot be separated from their political nature.[234] Although the agencies aim is to 'pool technical material and border exports' and to conduct 'intelligence-led policing',[235] MS are reluctant to supranationalise aspects of border policy to the agencies due to concerns of sovereignty and public backlash.

C. Conclusion

To finish, the ECB has emerged as one of the 'most powerful supranational institutions in the world' with an expanded remit to include both lending and banking supervision, in contrast to the ECBG and EUAA.[236] Having advanced that the Commission was

[226] ibid.
[227] ibid.
[228] Valle-Flor (n 204)
[229] Scicluna (n 63)
[230] TFEU, art. 127(6)
[231] Case C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012] ECL I-756
[232] Scicluna (n 64)
[233] TFEU, art. 72
[234] Deleixhe and Duez (n 195)
[235] Schimmelfennig, 'European Integration' (n 1)
[236] Genschel and Jachtenfuchs (n 82)

strengthened by the Eurozone crisis, the institution was unable to persuade MS to supranationalise border policy by creating an autonomous 'right to intervene' and a centralised relocation mechanism. Although pre-existing supranational capacity has been useful in explaining the ECB's self-empowerment during the Eurozone crisis, the next section will use politicisation as a co-theory to explain why MS' were reluctant to further supranationalise asylum and border policy despite the policy preferences of the Commission.

5. Politicisation

Despite similar functional pressures, this paper has found that the Eurozone and EMC have seen different integration outcomes. Politicisation refers to the process whereby the controversiality of decision-making is heightened.[237] Whilst the Eurozone crisis was mobilized as an issue of burden-sharing and economic redistribution, the EMC was mobilized as one of 'belonging' and 'national identity'.[238] First, a politicization framework will be outlined within the context of neofunctionalism. A comparison will be made of the salience of integration for both crises, followed by a discussion of the mobilization of tensions.

Having considered neofunctionalism's traditional scope, this section will use politicisation as a co-framework to argue that integration of migration or asylum policy in comparison to economic policy produces more salient politics due to the ability of political entrepreneurs to mobilise pre-existing nationalist and xenophobic tensions against integration.

A. Politicisation and Neofunctionalism

Hooghe and Mark submit that crises constitute such critical moments in European Integration that this contributes to their politicisation.[239] In determining whether an issue has been politicised, first one must consider the salience of tensions.[240] That being, whether the increase in the scope and depth of European integration unearths notable tensions. Considering both crises concern core state powers, an integration field which raises salient issues of statehood, it is likely that they would be politicised.[241]

Second, an analysis must be made on the extent to which political entrepreneurs have mobilized the tensions. Crucially, as the scope of conflict expands, so too does the volume

[237] Schmitter (n 11)
[238] Börzel, 'From EU Governance' (n 14)
[239] Hooghe and Marks, 'Postfunctionalist Theory' (n 37)
[240] Hooghe and Marks, 'Postfunctionalist Theory' (n 37)
[241] Genschel and Jachtenfuchs (n 80)

of ideological debate along more polarized lines.[242] As such, newer parties are likely to emerge due to their flexibility in targeting disparaged voters, as the politicization of issues manifests an increase in electoral importance.[243] Thus, politicisation shares some commonality with populist ideology, whereby political entrepreneurs mobilise cultural, economic and political discontent to their advantage.[244]

Once an issue becomes politicised, public dissensus restricts governments' room to manoeuvre, making them less inclined to relinquish sovereignty.[245] Despite variance across MS, a common baseline for populist parties can be established along the lines of xenophobia, nationalism and exclusive identity politics.[246] By their very nature, these issues arise more frequently in migration and asylum policy than economic policy and so it is understandable that the EMC was far more politicised by political entrepreneurs than the Eurozone crisis.

Salience of Tensions

This section will argue that politicisation of the EMC was more salient due to the 'components' or themes of politicisation it unearthed; those of identity and nationhood.[247] In contrast, the tensions unearthed by the Eurozone crisis concerned those of burden-sharing and economic redistribution.[248] Furthermore, whilst MS were able to 'depoliticise' the tensions of the eurozone crisis by framing them as regulatory issues of technical expertise, the EMC could not be framed as such.[249]

Hooghe and Marks note that European integration has become measurably more contentious since the Maastricht Treaty;[250] as more democratic control ensued over EU decision-making with stronger national parliamentary oversight and more EU referendums, political parties and the public were subsequently brought into EU decision-making.[251] This growing interest culminated in the Eurozone crisis, in which

[242] Michal Krzyzanowski, Anna Triandafyllidou and Ruth Wodak, 'The Mediatisation and the Politicisation of the "Refugee Crisis" in Europe' (2018) 16(1) Journal of Immigrant and Refugee Studies 1
[243] Pieter De Wilde, 'No Polity for Old Politics? A Framework for Analysing the Politicisation of European Integration' (2011) 33(5) Journal of European Integration 559
[244] Nicolas Jabko and Megan Luhman, 'Reconfiguring sovereignty: Crisis, politicisation and European integration' (2019) 26(7) Journal of European Public Policy 1037
[245] Hooghe and Marks, 'Postfunctionalist Theory' (n 37)
[246] Margarita Gomez-Reino and Ivan Llamazares, 'The Populist Radical Right and European Integration' (2013) 36(4) Journal of West European Politics 789
[247] Börzel, 'From EU Governance' (n 14)
[248] Ibid
[249] Swen Hutter and Hanspeter Kriesi, 'Politicising Europe in times of crisis' (2019) 26(7) Journal of European Public Policy 996
[250] Hooghe and Marks, 'Postfunctionalist Theory' (n 37)
[251] Sabine Saurugger, 'Sociological Approaches to the European Union in Times of Turmoil' (2015) 54(1) Journal of Common Market Studies 70

citizens blamed both European integration and their governments for their perceived difficulties.[252]

As a starting point, Börzel submits that support for EU membership has not substantially declined between 2005 and 2015.[253] Just over 15% of EU citizens hold negative opinions of EU institutions with over 50% wholeheartedly support EU membership. Although there has been an average 10% decline in support for institutions in Greece and Italy, over 56% of EU citizens still support the EMU.[254] Börzel finds that the more citizens view their identity as European, the more likely they are to support integration.[255] This view is limited. In a survey of German citizens, results proved that solidarity with MS was conditional upon whether they would implement recommended austerity policies.[256]

Despite this, public opinion surveys have shown a steep drop-in public support. Between 2012 and 2013, positive views of EU membership dropped from 60% to 45% in 2013,[257] the 'highest level of euro glooms ever observed' in the last quarter-century.

Regarding the EMC, data shows that immigration, whilst not specifically asylum policy, evokes more negative feelings than positive ones.[258] Nonetheless, the principle of common European migration policy is approved by a majority of European citizens.[259] In September 2015, a Eurobarometer question on the EU's primary issues found over 58% of citizens rated immigration as the most important issue.[260]

Furthermore, the immigration of people from outside the EU gathered 59% negative feelings from participants. When asked whether their country should help refugees, 65% of citizens agreed with the sentiment.[261] Variance exists amongst MS with 87% German citizens opting to help refugees, whilst citizens of the centre-east MS of the Czech Republic, Hungary and Slovakia disagreed with an average of 70%.[262]

Moreover, McLaren finds a significant negative relationship between the attitudes of the dominant national group towards minority groups such as refugees and support for

[252] Ibid
[253] Börzel, 'From EU Governance' (n 14)
[254] Ibid
[255] Ibid
[256] Ibid
[257] Schimmelfennig, 'European Integration' (n 1)
[258] Jacques Delors Institute, 'European Public Opinion and the EU Following the Peak of the Migration Crisis' (Daniel Debomy and Alain Tripier, 4 July 2017) <https://institutdelors.eu/wp-content/uploads/2018/01/europeanpublicopinionandtheeu-debomy-june2017.pdf> accessed 25 March 2020
[259] Ibid
[260] Ibid
[261] Ibid
[262] Ibid

European integration.[263] As such, although the support of citizens during the Eurozone crisis was conditional upon austerity programmes, it can be deduced that citizens with nationalist identities condition their support on those whom they deem 'belong'.

Mobilisation of Tensions

As the previous section outlined, the salience of tensions during both crises were high. Nonetheless, different themes of tensions were unearthed with each respective crisis. This section will argue that whilst European elites were successful in depoliticising the Eurozone crisis, they were less successful during the EMC. Subsequently, populist parties were able to mobilise tensions relating to identity successfully against further integration.

In determining the extent to which Eurosceptic parties mobilised tensions during the Eurozone crisis, empirical data found by Schimmelfennig demonstrates failure. The author counts just two countries within the Eurozone, Finland (True Finns) and Greece (SYRIZA), which saw openly Eurosceptic parties gain significantly in their elections.[264] Furthermore, in Greece, although the rise of SYRIZA and Alexis Tsipras was characterised by opposition to further austerity measures by the people of Greece, in actuality any anti-Euro stance was carefully avoided.[265] SYRIZA instead called for 'another' Europe where solidarity and democratic accountability were constitutive features.[266] Thus, even Greece considered the primary tension unearthed by the Eurozone crisis as one of burden-sharing and economic redistribution.

During the Eurozone crisis, political elites were able to depoliticise policy choices through legal improvisations. Initial bailouts were situated 'between hard and soft law' in the interstices of technical law and public international law' as the austerity conditions which were contingent on aid did not amount to contractual obligations according to the legal opinion of international financial institutions because they were themselves set by the government requesting aid.[267] Although the violation of certain conditions would affect the disbursement and rate of interest, any austerity plans indicated political and economic targets rather than set rules.[268]

Saurugger notes that this 'aura of ownership'[269] eases implementation in MS, as political elites can frame the implementation of austerity conditions as decisions made by their own volition under regular budgetary proposals. Famously, the Spanish Prime Minister Rajoy bargained with the EU as he considered a European austerity programme was

[263] Lauren McLaren, 'Public Support for the European Union: Cost/Benefit Analysis or Perceived Cultural Threat?' (2002) 64(2) Journal of Politics 551

[264] Schimmelfennig, 'European Integration' (n 1)

[265] Raffaele Borreca, 'Political Crisis in Greece and Italy: a comparative analysis of SYRIZA and 5 Stars Movement' (DPhil thesis, University of Peloponnese 2014)

[266] Ibid

[267] Saurugger (n 250)

[268] Ibid

[269] Ibid

inapplicable to the Spanish economy and needed to be adjusted.[270] Consequently, EU rules are adapted to national circumstances and can be framed as domestic choices.

Schimmelfennig supports Saurugger by noting the absence of major treaty revisions and ratification in MS through a referendum, despite major advancements in monetary integration.[271] By implementing major policy choices through intergovernmental treaties, European elites have de-politicised crisis management as domestic publics no longer have the option in constraining integration by voting against the preferred policy choice of government.[272]

As previously mentioned, both the TEESM and the Fiscal Compact were created under Luxembourgian law to allow an expeditious response to the crisis.[273] European elites avoided referenda which could have constrained integration as in Ireland following a referendum on the Treaty of Nice. Furthermore, under TEESM the ESM could be launched with just 90% of initial capital stock, meaning just 8 of the largest Eurozone countries needed to ratify the Treaty.[274]

In contrast, Börzel claims that depoliticisation efforts of the ERC were less successful because populist entrepreneurs were able to mobilise tensions, particularly of those with exclusive national identities.[275]

The Commission and other MS hoped to depoliticise the EMC by supranationally delegating powers to a new European Union Agency for Asylum and an EBCG to replace Frontex as discussed in the previous section.[276] Rather than depoliticising the crisis by implementing a centralised relocation system to do away with the Dublin rule; MS like Poland and Hungary have instead refused to take their allocated share of refugees from camps in border states.[277]

In the aftermath of the EMC, Hobolt observes a discernible trend in voters rejecting traditional parties and turning instead to challenger parties who seek to challenge the mainstream political consensus.[278] These include the AfD, Germany's biggest opposition

[270] Ibid
[271] Frank Schimmelfennig, 'European Integration in the Euro Crisis: The Limits of Postfunctionalism' (2014) 36(3) Journal of European Integration 321
[272] Ibid
[273] Gocaj (n 163)
[274] Saurugger (n 250)
[275] Börzel, 'From EU Governance' (n 14)
[276] Ibid
[277] Bhambra (n 57)
[278] Sara Hobolt, 'The Brexit vote: a divided nation, a divided continent' (2016) 23(9) Journal of European Public Policy 1259

party securing 12.6% of the vote and entering the Bundestag for the first time and the conservative Law and Justice (PiS) returning to power in Poland with 43.6% of the vote.[279]

Challenger parties on the right have focused on desires to 'reclaim national sovereignty' and to control immigration, rejecting pleas for European integration.[280] In doing so a 'constraining dissensus' has emerged in which party leaders must now concern themselves with domestic griefs when negotiating European issues – constraining integration.[281]

B. Explaining the Tensions

In analysing the tensions unearthed by the EMC, the components of nationalism and xenophobia have emerged. Far from being unrelated, the two components relate to a core factor of sovereignty which has emerged throughout this paper. As the previous section has outlined, the issues raised by European integration are not *sui generis* and are instead related to domestic conflicts.[282]

Börzel probes how national identity has affected attitudes towards European integration, finding the more exclusively an individual identifies with their domestic community, the more hostile they are to individuals joining.[283] Fligstein *et al.* dub this as an issue of 'collective identity' in which a group of people accept a 'fundamental and consequential similarity' engendering solidarity between each other, and so by definition excluding an 'other'.[284]

This frames accordingly with the actions of the CEE MS. In 2015, just days after their initial proposal, the Commission made an emergency decision for an extra 120,000 asylum-seekers to be reallocated from Italy, Hungary and Greece.[285] When Romania, Slovakia, Hungary and the Czech Republic were outvoted in a QMV in the European Council, commentators were surprised that Hungary had rejected relocations for its benefit.[286]

Senior politicians from the CEE MS argued that they 'did not want to open their countries' doors for Muslim refugees from the Middle East' effectively protecting the homogenous

[279] Ibid
[280] Krzyzanowski, Triandafyllidou and Wodak (n 241)
[281] Hooghe and Marks, 'Postfunctionalist Theory' (n 37)
[282] Hooghe and Marks, 'Postfunctionalist Theory' (n 37)
[283] Ibid
[284] Neil Fligstein, Alina Polyakova and Wayne Sandholtz, 'European Integration, Nationalism and European Identity' (2011) UC Berkeley Working Paper Series 1/2011, <https://escholarship.org/uc/item/1h47s4ck> accessed 25 March 2020
[285] Selanec (n 94)
[286] Diana Ivanova, 'Migrant Crisis and the Visegrád Group's Policy' (2016) 22(1) International Conference Knowledge-Based Organisation 35

identity of their domestic publics.[287] Bhambra suggests this practice suggests that these MS regard the borders of European culture and identity as coinciding with the idea of a Christian Europe.[288]

Ivanova supports this suggestion, observing that in a joint statement released on 4th September 2015, the leaders of the Visegrad countries urged members to "preserve the voluntary nature of EU measures",[289] arguing that "effective management" is the key element in any solution. This policy choice mirrors the integration outcomes achieved from the crisis, a somewhat strengthened European border through the EBCG and tightened border controls along the Balkan route.[290]

This nationalist attitude toward migration is rooted in a traditional perspective of sovereignty, as asylum-seekers have been framed as commodities which carry an identity and culture that can be instrumental in shaping the identity of their host MS following relocation.[291] Rather than viewed in the context of their destitute, MS governments are continually sceptical of asylum-seekers, whether it be by conflating them with economic migrants as per the RCD or type-casting them as an 'other'.

Rosenau contends that to the extent people need the community, the maintenance of sovereignty for their nation serves human inhibitions and is not inherently xenophobic.[292] Control over migration is inherently linked to domestic sovereignty as without appropriately socialising migrants toward a European way of life, commentators contend that the existence of the state itself can be threatened.[293] Considering the majority of the CEE MS are new democracies, it is understandable why their domestic publics may be concerned with migration.

Nonetheless, sovereignty is multi-faceted. Interdependence sovereignty exists in which states willingly cede aspects of sovereignty in exchange for bolstered domestic sovereignty, such as through culturally-rich citizenship. Additionally, by framing the EMC with reference to Muslim extremism and one linked to 'terrorism and crime', the CEE MS have discouraged European integration to their detriment considering. Additionally, considering territorial borders are the most important markers of national sovereignty, it remains questionable whether an autonomous 'right to intervene' and supranationalisation of external border policy will ever be possible within the EU.

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[287] Trauner (n 91)
[288] Bhambra (n 57)
[289] Ivanova (n 299)
[290] Ibid
[291] Christopher Rudolph, 'Sovereignty and Territorial Borders in a Global Age' (2005) 7(1) International Studies Review 1
[292] Ibid
[293] Ibid

C. Conclusion

In sum, whilst both the Eurozone crisis and the EMC have seen considerable politicisation. European elites were able to depoliticise the Eurozone crisis through the backing of a majority of European citizens. In contrast, during the EMC, populist entrepreneurs were able to mobilise previously unearthed tensions of nationalism. This acted as a constraining factor to European integration due to its inherent link with domestic sovereignty and nationhood.

6. Conclusion

To close, this paper has established neofunctionalism as an appropriate framework in analysing the variation in integration outcomes following both crises. Considering the historical origins of the EU as an economic institution, levels of transnational interdependence within the framework of the EMU has been considerably stronger than that of the CEAS.

Whilst transnational market actors are empowered through their role in cross border financial flows, refugees by definition of their very destitute make comparatively weaker transnational actors. In distinguishing this paper from other neofunctionalist authors; the pre-existing supranational capacity of the ECB was integral in its empowerment to become one of the most powerful supranational institutions in the world.[294] Furthermore, having dispelled the popular argument that the Commission was significantly weakened during the Eurozone crisis,[295] it becomes clear that proposals by the Commission were uninspired due to the reluctance of MS to deviate from the Dublin Regulation.

Lastly, through the use of politicisation as a co-framework, this paper has explored the salience of politics in both crises. As European elites were able to depoliticise the Eurozone crisis by framing it in technical terms; in contrast, the EMC was highly politicised by populist entrepreneurs thus stifling European integration. Although the concern for one's nationhood is inherent in citizenship, the framing of the EMC as one of anti-Muslim sentiment has marred this argument in a xenophobic vantage. In view of Angela Merkel's plea for government leaders to remember the European values of human dignity and solidarity enshrined in Treaty law, the EMC has uncovered both a crisis facing Europe and a moral crisis within.

[294] Heldt (n 3)
[295] Hodson and Puetter (n 61)

Silencing the Story of the Streets: An investigation into How the Media and Political (Mis)r Representations of UK Drill Music Affects the Lives and identities of Black Youth in South London

Oluwamitoke Debo-Aina

Abstract

Drill music's emergence in the mid-2010s coincided with increases in knife-related crime and gang violence; the relationship between the two has been distorted and reported on extensively since. Drill artists have been subjected to increased police surveillance, criminal behaviour orders, and lyrics have been used successfully to bring criminal convictions. Existing research explores the relationship between drill music and crime; often assuming the significance of the genre for its producers and audiences, leaving the actual significance of the genre for this community empirically unexplored. Consequently, the impacts of the genre's misrepresentations: prohibitionist political campaigns and increased use of formal criminalization tactics, remain poorly understood.

A semi-structured interview and thematic analysis were undertaken to investigate the participants' (aged 18 to 22) relationships with drill and their subjective experiences of misrepresentation. Mainstream misrepresentations of drill aggravate the existing marginalisation of urban black South Londoners, but participation within the drill subculture mitigates against deviant labelling. Disproportionately black disadvantage is understood within a framework of racial neoliberalism. Structural issues are de-racialized and the black community are blamed for their marginalisation, and punished for their efforts to escape it. Criminalising drill subculture removes opportunities from black youth, silences their discussions of marginalisation, and undermines their efforts to mitigate its effects. Subsequently, this dissertation suggests that local authorities should focus on providing licit activity within urban communities in order to counter gang and criminal involvement. The police should refrain from the excessive criminalisation of the genre and subculture as this exacerbates the issue of urban crime and violence.

1. Introduction

Black urban music genres have a long history of being constructed as dangerous and viewed with suspicion within the UK (Fatsis, 2019). UK drill has not escaped this. Political figures, such as Metropolitan Police Commissioner, Cressida Dick, and former Home Secretaries Amber Rudd and Sajid Javid, have called for the prohibition of the genre and its removal from social platforms (Malik, 2019; Abiade, 2018; Dearden, 2019). In June 2019, South London rap duo Krept and Konan were joined in the House of Commons by Brixton duo Skengdo and AM to debate the potential ban of UK drill music. In January 2019, Skengdo and AM were given a nine-month suspended sentence for performing a drill song; the first time in British legal history that such a sentence had been passed for performing a song (Ball, 2019).

Media outlets have depicted the genre poorly, with the Times describing it as 'demonic' and 'ultra-violent', after connecting the murder of a 15-year-old boy in 2017 to drill lyrics (Mararike et al., 2018). Drill has been used as a platform to taunt rival gangs; however, research has repeatedly maintained that music cannot be held responsible for ensuing violence (Pinkney and Robinson-Edwards, 2018). UK drill's stylistic predecessors and its own explicit nature attracted police and media attention leading to increasing constructions of drill as *causing* or *glorifying* violence and crime.

UK drill music emerged from grime and Chicago drill music, genres heavily linked to criminality and violence, attributable to their aggressive and explicitly violent delivery, lyrics and music videos. UK drill borrows heavily from Chicago drill, often discussing violence, crime, and deprivation in a blunt and provocative manner over a stripped-down beat (Ilan, 2012). As a result of its parent genre's established link with crime and violence, drill's emergence in South London in the mid-2010s was met with suspicion and controversy. This was exacerbated by its emergence coinciding with rising knife crime (Pinkney and Robinson-Edwards, 2018).

Konan argues that, "creativity was [his] way out of the violence that surrounded [him]. It's deprivation, not music, that devastates communities" (Konan, 2019). Drill discusses disadvantage and the harsh realities of urban black life. As such, prohibition arguably renders a community voiceless and aggravates issues of urban violence and criminality (Konan, 2019). Empirically investigating the significance of the genre for its producers and consumers would help in discovering the actual relationship between drill and crime. Unpicking this relationship would aid in preventing unnecessary criminalisation,

drawing attention to the disadvantage the genre often discusses, and hopefully providing some answers to the rising violence in urban communities. As the drill subculture is being targeted and lyrics increasingly utilised as formal evidence in criminal prosecutions, it is crucial that research endeavours to understand the true significance of the genre, what the music means for the community, and the impacts misrepresentation and criminalisation may be having on an already marginalised and over-criminalised minority.

The government's efforts to address rising gang violence and knife-related crimes has seen it respond to drill with criminalisation: utilising criminal behaviour orders which can include conditions that prevent drillers (drill rappers) from performing drill, being in music videos, wearing hoodies, or entering certain areas, and breaches can lead to prosecution (Fatsis, 2019). The formal criminalisation and legal censure of drill music is a new phenomenon in mainstream British Society's response to black culture. However, the informal sanctions those in the drill community face, as a result of negative media representations also require investigation as it is these which disadvantage the urban black community indiscriminately.

As UK drill first emerged in South London and still exists as a popular musical style, this article investigates the significance of drill music for the black youth communities in South London who predominantly consume and produce it. It also examines how media representations and police and political responses to the genre have impacted the identities of those involved with drill music. Increasingly more black youth are entering the criminal justice system because of their proximity to drill, and dominant representations work to justify this. Entering individuals into the criminal justice system stigmatises them and increases the likelihood of future criminality (Fatsis, 2019). The aim of the research is to investigate the way drill's (mis)constructions impact young black South Londoners. Consequently, qualitative research will be conducted in order to gain deeper insights into black South London youth's attitudes, experiences, and perceptions of drill. The impacts of the distorted connections between violent criminality and drill are poorly understood as previous research made assumptions about the impacts without empirical investigation.

The field of cultural criminology, concerned with how the dynamics of cultural meaning inform crime and its control, should endeavour to understand not only how drill subculture is connected to criminality or deviance, but how representations of it, by those far removed from the culture, may also be connected to criminality and criminalisation

(Ilan, 2020; Ferrell, 1999). The process of criminalising a culture generates images of images and it is the impact of these images, on members of a culture who have little say in how they are portrayed, that this research wishes to explore (Ferrell, 1999). Following this introduction, Chapter 1 reviews relevant literature. Exploring what previous research has stated about the relationship between drill and crime, the media and crime, and the effects of the longstanding tradition of problematising blackness, highlighting the importance of this research in addressing the existing gap. Chapter 2 discusses the chosen methodology, exploring the strengths and limitations of the methodological approach employed and navigating exactly how the research was conducted, as well as briefly stating the results. Chapter 3 discusses these results and situates the resulting themes in context of the research question, utilising direct quotes from the participants to gain deeper insight into the meanings of the responses for those who produced them. Lastly, Chapter 4 will draw final conclusions and assess the role of this research in addressing the aforementioned gap in existing research, its potential impacts on future research, and the questions that remain yet to be answered.

2. Literature Review

A. The problematization of black culture

Black British culture has been pathologized throughout history, and its musical exploits framed as "symbols of trouble" (Cohen, 1988, cited in Fatsis, 2018, p.451). The trend of criminalising predominantly black-produced and black-consumed music genres within the UK has been a persistent feature in the media and political efforts to police black people, since the influx of black migration during the 1950s Windrush era (Fatsis, 2018). Black participation within the sphere of creativity is seen through a lens of suspicion, apprehension and synonymised with gang activity. This occurred as the result of the shift from black culture being criminalized to blackness itself being criminalized (Fatsis, 2018). The producers and consumers of rap music are constructed as co-conspirators in the spread of the black aesthetic and influences (Rose, 1991). This attitude has existed historically to other predominantly black genres, prior to them becoming accepted into mainstream white music culture, such as jazz, rock 'n' roll, and the blues, which were all portrayed as leading white youth towards sexual promiscuity and deviance (Rose, 1991).

Deviance and criminality committed by black youth are constructed as fundamentally different to 'regular' youth crime, which is often depicted as juvenile immaturity (Gilroy, 2008). The trend of police overstaffing at Notting Hill Carnival, the creation of multiple Metropolitan Police Operations and the Promotion Event Risk Assessment Form 696 are

some of the examples referred to in literature highlighting how black culture has been criminalised (Fatsis, 2018; Fatsis, 2019). 'Sus laws', which allowed the police to search and arrest individuals they believed to be acting suspiciously, were disproportionately used against members of the Afro-Caribbean community in Brixton in the 1970s and 1980s (Fatsis, 2018). The 1981 Operation Swamp and the introduction of Special Patrol Groups are historical examples of how issues arising from structural disadvantage in black communities were met with a state response of criminalisation and surveillance. Currently the Metropolitan Police have employed a Gang Matrix which creates a database of suspected gang members in London, this alongside with Form 696, has been criticised for operating on a standard which deems black activity as suspicious (Fatsis, 2018).

Black British culture marks out the collective action of the black community to create an alternative sphere outside of the colour lines drawn by hegemonic white society (Gilroy, 1987). The black community has historically utilised musical endeavours as a performative space through which they can express their values and realities as a marginalised group (Ilan, 2012). Black music, such as grime, acts as a public counterculture (Fatsis, 2018; Rose, 1991). Dominant white culture has a reluctance to distinguish between depicting and promoting violence; choosing to represent black music as forms of literal testimony (Ilan, 2020). Grime MCs are not criminals who glorify violence, nor is grime a problematic genre, they expose the realities of their existence through their lyrics, while also hinting at the social and political violence perpetrated on those represented in the lyrics through the criminalization of their music (Ilan, 2020). Although Ilan's discussion and analysis pertains to drill's stylistic predecessor, grime, he crucially hints at the social and political impacts that representations of black culture have on the black community beyond just the formal criminal sanctions (2020). By directly exploring the attitudes, thoughts, and experiences of black youth who participate in the drill subculture, the social and political impacts felt by the black community as a result of their consumption and production of drill music can be used to understand the wider context of black representation and how it impacts the community as a whole.

Grime has been argued to be ethnographic in nature: "urban worlds as they are seen through the eyes of those who live within these social environments" (Barron, 2013, p.532). Often black musical exploits are examples of ethnography exploring the subcultural nature of the producers and intended audience, for example Negro Spirituals discussed the realities and aspirations of black slaves in the 18th and 19th centuries and hip-hop's emergence in the 1970s juxtaposed the hopes, concerns and aspirations of black

youth with the impoverished high-crime New York inner cities (Dunbar, 2019; Aprahamian, 2019). While useful, these studies give us an incomplete picture of what drill music means and does for urban black youth in South London. The content analysis the research is centred around are interpreted outside of the necessary context by individuals far removed from that subculture and are consequently 'street illiterate' (Ilan, 2020).

B. The role of the media

The content of drill arguably discusses the life experiences of many of the artists and their audiences: describing the poverty, social exclusion and inequality that black communities disproportionately face. However, the media have framed it as "the soundtrack to London's murders" (Knight, 2018, cited in Fatsis, 2019, p.1300), while the police and politicians call for its prohibition and censorship (Fatsis, 2019).

In order to validate the idea that structural problems within the black community are not the government's fault or responsibility, they invest in tools which undermine and misrepresent black narratives. Media constructions of black culture as dangerous, and its criminalisation, through disproportionate policing and political tactics, are such tools (Ilan, 2020). The media has (mis)represented the relationship between UK drill music and criminality through sensationalized and emotive language (Fatsis, 2019; Lynes et al., 2020).

As a result of drill music's representations, black youth are constructed as a threat to white British society's values and interests. Cohen's research on moral panics and folk devils highlight how the media exaggerate and distort the facts surrounding a particular situation or community in order to disseminate their status as threatening to wider society (Cohen, 1972). Black youth have become folk devils, as a result of the condemnation of black youth subcultures, such as the drill subculture (Williams, 2014 cited in Fatsis, 2019, p.1301). Despite having been published almost forty years ago, Cohen's work remains relevant as recent research has supported that media-driven moral panics surrounding deviant music, from any culture, are tools of social control (Deflem, 2019). Hall's research on mugging in the UK in the 1980s demonstrates how the media can be used to demonise a marginalised group and amplifies the long-standing trend for problematising black behaviour (Hall et al., 1978). Hall's work has been criticised as contradictory however, as it simultaneously claims that black crime actually increased as a result of marginalisation, and that the perception of the increase is due to moral panics surrounding black activity (Waddington, 1986). In response to being labelled and

constructed as folk devils the marginalised community may react in a manner which may amplify the deviance they were constructed as committing (Cohen, 1972). A recurring trend in some of the literature on the relationship between black music and criminal behaviour is the presumption, rooted in Becker's research on the labelling perspective (1973), that the criminalisation of black music within the media is internalised by black youth and consequently criminality is perpetuated (Tatum, 1999; Ilan, 2012; Barron, 2013).

If "social representations constitute social identities", (Angus and Jhally, cited in Rose, 1991, p.284), then it is crucial to understand how the social representations of drill, by those outside the drill subculture, impact the social identities of black youth constructed through their creation and consumption of drill music.

C. The history of drill music and its emergence in the UK

Drill music stems from UK grime music and Chicago drill music; two genres which have been represented within politics and the media as criminogenic (Pinkney and Robinson-Edwards, 2018). Southside Chicago, where Chicago drill originated, is notorious for high homicide rates and gang violence (Ilan, 2020). Chicago drill music highlighted the realities of life in Southside Chicago; discussing the violence, poverty, and disadvantage in a direct and aggressive manner (Ilan, 2012). The government feared that drill's emergence in South London in the mid 2010s would replicate Chicago's high crime environment in London. Increases in gun and knife related crimes in major UK cities, such as London and Birmingham since the mid 2010s have led to authorities increased concern that UK drill has the same impact on urban communities as Chicago drill had in the Southside (Pinkney and Robinson-Edwards, 2018).

The line between actual crime and its mediatised representations can often be blurred when those in power draw literal links between lyrics and reality, as a result of their 'street illiteracy', when the lyrics are arguably metaphorical or allegorical (Ilan, 2020). Drill subculture is heavily rooted in 'street culture' (Ilan, 2020) or 'road logic' (Ilan, 2012), which helps drillers navigate the often violent, urban environments they live in (Briggs, 2010). Street culture is heavily rooted in slang, hypermasculinity, braggadocio, and materialism; drill music discusses urban realities but through the lens of these themes. The blunt and graphic lyrical content has been found to be performative, evoking the hypermasculinity and aggression which is lauded during performance but unacceptable when committed in reality (Ilan, 2020). Those who exist within the sphere of street culture would be able to decipher the meanings, truths, and fictions of the songs.

Drill subculture highlights the extent to which black urban youth believe that they can only achieve success, wealth, and respect through the adoption of criminal personas, whether real, fictional or historical (Ilan, 2020). Briggs focuses on self-reported narratives of life "on road", seeking the specific perspective of at-risk black youth, however the research does not explore how the existence and perception of road culture affects the wider black community as a whole (2010). In some cases, 'cultural criminalization' is an end in itself as it successfully delegitimizes the target without formal charges being brought against them, in other cases it serves to create a perpetual environment in which formal criminal sanctions can follow (Ferrell, 1999). The research which exists draws too heavily on the relationships between drill music and formal criminal sanctions, failing to realise the extent of the informal sanctions faced as a result of the criminalization.

D. Policing drill

The criminalization of grime music showcases the continuity and evolution of how black musical forms are criminalized, continuing through the disproportionate policing and representations of drill music and culture within the media and political debate (Fatsis, 2019). The recurring criminalization of black music exists within a context of problematising black culture and subsequently denying the potential impacts this may have on the black community through the adoption of neoliberal post-racial attitudes (Fatsis, 2019). The ideals of racial neoliberalism are highlighted within media and political representations of minority groups and their culture. British society is rooted in capitalism which disenfranchises minority groups by disinvesting in or excluding them from state support and welfare yet expects these marginalised communities to take sole responsibility for problems which are actually rooted in structural disadvantage (Fatsis, 2019). The debates surrounding UK drill music serve as a populist distraction from dealing with root causes such as poverty, social inequality, amongst others. As drill music is disproportionately created by and for urban South London black communities, they are criminalised for their creation and consumption of it, a trend present with grime: drill's stylistic predecessor (Ilan, 2012).

Increased policing and police militarisation are presented as the effect of rising street crime caused by deviant black culture. In accordance with the history of black cultural exploits, drill music has been represented as a genre which glamorises and normalises criminal behaviours such as gang affiliation, drug dealing and knife carrying (HM Government, cited in Fatsis, 2019, p.1301). Operation Domain, introduced in 2015, continued the Metropolitan Police's trend of viewing black culture as suspicious. It

utilises drill music videos and lyrics as sources of intelligence and evidence when building cases against, disproportionately black, "gang members" and "criminals". Drill music videos and drill's graphic lyrical content have been presented as evidence on numerous occasions in cases ranging from inciting violence to homicides (Dunbar, 2019; Fatsis, 2019). Presenting these as evidence risks elevating the bragging associated with drill to the status of truth (Ilan, 2020). Many artists have received Criminal Behaviour Orders because of their creation of drill music, which includes conditions such as not wearing hoodies, using social media, or releasing music, arguably treating significant cultural aspects of urban blackness, and the means of creating and distributing drill, as criminal (Fatsis, 2019).

Drill rappers and their audiences are overwhelmingly young, male, black and underprivileged, yet the relationship between the decision to criminalise their marginalisation and the effect this has on black youth, is just one part of a larger gap in the empirical research exploring the complexities and differences of black British urban existence (Gutner, 2008; Fatsis, 2019). Banning the production and distribution of drill music has been argued to be counterproductive and based on a 'street illiterate' reading of drill music and drill culture which results in the perception of black youth as criminal (Ilan, 2020). However, the effects of prohibition, or representing drill music as something to be prohibited, are yet to be explored.

E. Gaps in existing research

Existing studies investigating specifically black music and criminality acknowledge the recurring theme of black music represented as deviant; they focus on using the self-reported experience of black youth to investigate the relationship between black music and crime (Tatum, 1999), problematic behaviour (Epstein et al., 1990), violence (Tanner et al., 2009), or deviance and misogyny (Johnson et al. 1995). Empirical research on the impacts of rap music on behaviour tend to support that the effects are non-existent or minor, often maintaining instead that causation cannot be established, and rap music likely reflects pre-existing ideals, attitudes and behaviours (Tatum, 1999). However, these studies focused on American youth and were conducted too long ago to conclusively define the relationship between modern UK drill and its potential impacts on behaviour. Furthermore, they neglect to explore how, despite the research finding weak relationships between the two, repeated connections drawn between rap music and violence may affect the participants. Tatum distinguishes that there are multiple sub-genres of rap music, stemming from two categories: hardcore rap (or 'lifeline' rap) and

soft (or commercial) rap (1999). However, the majority of research conflate all sub-genres as one homogenous genre.

Current research on drill music fails to explore what it means for the black community from the perspective of those who participate in the drill subculture and who might invariably be affected when it is represented as problematic. The criminalisation of drill music remains largely under-researched, especially from the perspective of those within the subculture, consequently the empirical research, which does exist, often assumes that these representations affect the black community and the ways in which they affect them. It is crucial to understand from the perspective of those who are members of the black community, especially members of the drill subculture, how and if these representations affect their personal lives and communities. Understanding the importance of drill music and its subculture to the community which disproportionately consumes and produces it will highlight the severity of these representations and censures. However, no research specifically seeks to understand the sentiments of the black community towards drill music, how these feelings are undermined or impacted by media and political representations, and the wider scale effects this might have on black communities and culture. This research seeks to investigate drill music, its significance, and the effects it's (mis)representations have on producers and consumers, within the context of the South London urban drill scene. The following section discusses the methods employed to facilitate this investigation.

3. Methodology

A qualitative method was employed as this research is exploring the "life-world" of the participants and their subjective experiences and attitudes towards it (Lune and Berg, 2016). As it is the social actions, interpretations and attitudes of the participants' that this research explores, it adopted an epistemologically interpretivist approach (Matthews and Ross, 2010). Navigating and understanding these attitudes will provide greater insight into how drill music is represented in the media and politically, as well as the extent to which these representations may impact urban black youth, who disproportionately produce and consume drill music.

A. Data collection

A qualitative interview was carried out to explore the cultural relationships and contexts surrounding UK drill music, the participants' attitudes to it and how its

(mis)representations impact their experiences as consumers and producers of the genre. This allowed the researcher to view these directly from the perspective of individuals from and within the relevant cultural context. A semi-structured interview format was employed.

B. Participants

The target population was black youth, aged between 18 and 25, who currently reside in or are from South London. As a sampling frame for South London black youths who listened to drill music was not accessible to the researcher, seven individuals aged between 18 and 22, from South London, who identified as black or black-mixed race, were selected using convenience sampling (Matthews and Ross, 2010). Three were female and four were male, and the mean age of the participants was 19.3 years. The sample derived from personal contacts of the researcher who had expressed a willingness to participate within the research. This sample contained black youth from a variety of different cultural, socio-economic, educational, and ethnic backgrounds. As drill music is predominantly produced and consumed by black youth, a sample of exclusively black or black-mixed individuals under 25, who consumed drill, was necessary.

C. Data Analysis

The recorded interview was transcribed verbatim and then commonly recurring responses, emotions or attitudes were turned into codes. These were then systematically considered and combined with similar codes to create overarching themes, which aided in understanding the participants' combined experiences and perspectives (Fielding, 2008). These themes were used to support and provide insight into the analyses of the attitudes towards drill music and its representations. The responses were combined in order to conduct a wider scale analysis of black youth's attitudes to drill music and the wider societal representations of the genre.

D. Results

Five overarching themes were discovered through extensive analysis of the participants' responses and the numerous codes they yielded: 'Subculture', 'Social Exclusion', 'Expression of Identity', '(Mis)Representations of Drill', and 'Drill as a Way Out'. These five themes were considered essential in fully understanding the relationship the seven participants had with drill music. These themes will be discussed further in the findings section, using verbatim quotes from participants to greater understand and examine the participants' perceptions and subjective attitudes.

4. Findings and Discussion

This section discusses the overarching themes found in the interviews: Social Exclusion, Expression of Identity, Subculture, (Mis)representations of Drill, and Drill as a Way Out. Direct quotes from the interviews will be used to demonstrate what the genre means for the participants and respond to the original question of what impacts the misrepresentations of the genre have on black South London youth. Discussion of these themes has been placed within the context of existing research.

A. Social Exclusion

The interviews presented the recurring concept that the government is inadequate in effectively assisting disadvantaged black youth from urban communities, disproportionately affected by poverty, poor housing, lower educational attainment, and unemployment; arguing these conditions leave black youth few opportunities but illicit activity (Gutner, 2008).

> *"They'll be like gang violence is on the increase just cos of drill, it's not, like it's really not, it's because there's been cuts to housing, to people's benefits, people can't afford to live in their houses, they see their mum crying because she's getting no job or she's getting dropped from her work and now they have to go help out and make money so they have to go and trap [deal drugs] on the streets and it's not because they're listening to drill it's because of poverty, social housing, like even cuts to police because there's less safety so they have to find ways to protect themselves."* (Participant 1)

Many who experience this disadvantage use UK drill not only as a platform to discuss these experiences but as a mode of escaping both the social exclusion they faced, and the danger posed by the criminality they may have previously engaged in. Contemporary debates surrounding drill's impact on youth violence have been argued to be a populist distraction from directly dealing with the root causes of the offending that may be occurring within urban communities such as, trauma, untreated mental health issues, poverty, inequality, poor parenting, and inadequate state provision (Youth Violence Commission, 2018, p.5, cited in Fatsis, 2019, p.1304). Black drill artists have become "victims of the neoliberal social order" (Fatsis, 2019, p.1301) in which an increasingly capitalistic UK society disenfranchises minorities through disinvestment and social exclusion, and other forms of structural violence (Galtung, 1969) while denying responsibility and blaming the marginalisation on individual or cultural "flaws" (Fatsis, 2019). Urban black youth and their creative endeavours act as scapegoats providing those

in power with excuses, absolving them from finding solutions to structural problems (Gilroy, 2008). This is highlighted in numerous interviews:

> *"They wanna blame the music instead of the government saying 'yeah we could have funded this sector, put more into youth clubs, put more into education, try foster better police relationships with black communities' – blaming drill is cheap, finding the actual problem means money [will] need to be spent and this country already wants to privatise the NHS innit so who cares if a couple more black kids get stabbed cos they don't wanna find the actual issue?"* (Participant 5)

Blaming drill music is an easy choice, especially for those wishing to be viewed as doing something about crime but are simultaneously unwilling to discuss the relevant structural issues and government austerity policies which have cut youth services (Fatsis, 2019).

Drill music acts as a window into the social exclusion and inequality that urban black youth are disproportionately facing; as rap and blackness become characterized as disruptions and threats, the story being told about their marginalization, discrimination and deprivation goes ignored (Rose, 1991). Misrepresenting a genre which serves such a purpose arguably has the effect of forcing marginalised communities to stay silent in their marginalisation. Institutional racism is central to explaining motives behind the criminalisation of black music genres and the victimisation of artists and audiences, because police are policing based on harmful cultural stereotypes (Fatsis, 2019). This sentiment is expressed by Participant 1*:*

> *"it's because of racism in this Britain, especially recently, this Britain in 2019, Boris' Britain (laughs) it's quite difficult to be young and black and not labelled as a gang member just off those two characteristics".*

The choice to interpret drill's violent lyrics as an individual's desired lifestyle, instead of an ugly social reality, is an expression of racial neoliberalism (Fatsis, 2019). Drill artists are victimised by the same violence that they are accused of promoting (Fatsis, 2019). In their songs many drill artists speak of being stabbed or witnessing the stabbing of friends or family members. Participant 2, the only self-identified driller and an adherent to 'road logic' (Ilan, 2020), discussed his own experiences with victimisation:

> "*I can't speak for everyone but me becoming more violent or aggressive was from people being aggressive and violent towards me, it wasn't me just waking up and deciding to bang*

> *[hurt] someone, it's kinda like a bullying thing and you wake up and you're angry and so you're like 'fuck it, I'm angry now and you've done this to me so let me be angry now'".*

Black youth are disproportionately victims of violence and brutality, sometimes at the hands of the police and the State (Hall et al., 1978). The belief that the consumption of rap music causes violence or criminality is a historical one, however adhering to this logic allows some of the most marginalised and victimised members of society to go unprotected as the violence they rap about is deemed more problematic and more newsworthy than the violence that victimises them (Campbell and Muncer, 1989).

Drill music is one aspect of a complex process through which black people have attempted to create meaning about their everyday lives and struggles, yet their marginalisation, as well as the drill genre, have been subject to politicization and sensationalism (Rose, 1991). However, participants criticised the genre for focusing too heavily upon marginalisation and the negative aspects of urban blackness. Arguably the disproportionate focus on this overrepresents blackness within the sphere of disadvantage:

> *"They don't talk about popping to Tesco and buying some onions or helping their mum cook. So it's music that might be shedding too much light on just one aspect of poor urban life while saying nothing about the things that take up most of their time."* (Participant 6)

B. Expression of Identity

Drill holds enormous cultural significance for consumers and producers. Participants generally agreed that UK drill highlighted their unique identities as urban black youth in a manner unlike predominantly white genres.

> *"People that make drill music come from areas where poverty is higher, a lot of them are black, and it makes it a lot more relatable […] artists like Katy Perry, Ed Sheeran […] you can't relate to them"* (Participant 1)

> *"drill music is just like talking about the hardships that seem to hit black people more than anyone but in music"* (Participant 4)

Some music has existed historically as an example of ethnography, exploring the subcultural nature and realities of the producers and intended audience (Barron, 2013). Hip-hop emerged in New York in the 1970s, and grime emerged in the early 2000s in

London; both provided critical social commentary surrounding the experiences of the black community (Aprahamian, 2019). Participants acknowledged the story-telling aspect of drill music; maintaining that lyrics express the realities of some of the black, economically disenfranchised youth who disproportionately produce and consume the genre, despite being explicit and blunt in its delivery and discussion of criminality. (Lynes et al., 2020). Fatsis supports this arguing drill is "a music genre which naturalistically *broadcasts* but does not *cause* violent crime" (2019, p.1301).

> *"if I did a drawing and all I'd known is violence, gangs, abuse, my art will reflect that, it's not gonna be rainbows and unicorns. I think drill music is that, it's just 'I've been through this' even if in your videos you're carrying a machete […] it's because people around you are doing that or you need to protect yourself not because you're telling people this is the way life should be"* (Participant 1)

Participants suggested due to the street culture that drill exists within, and artists' realities, drill must be graphic in order to be an honest expression of their identities:

> *"when you have your own way of expressing yourself why should you have to change it. If you went through extreme violence why not just be upfront about it […] you saw a stabbing and you say you saw a stabbing and you talk about how that's negatively affected you upfront […] why should you have to waste your time stepping around the edges instead of telling your story like it happened?"* (Participant 5)

Urban dwellers disproportionately experience poverty, unemployment, lower educational attainment, and racial discrimination; factors linked to criminality (Hall et al., 1978). Their opportunities for licit activity are limited by their disadvantage and therefore the only profitable avenue is criminality, including gang affiliation and violence (Ilan, 2012). The State's reluctance to deal with the structural issues that urban communities face, forces them to find solutions to their own problems by adhering to 'road logic' and the 'rules of the street' (Ilan, 2020). Therefore, it is not necessarily drill music *causing* criminality, but drill involves individuals whose disproportionate marginalisation may have influenced a relationship with criminality; as supported by Participant 6:

> *"I think it's not the drill music related to the crime but the crime related to the drill music […] people who are already in gangs and acting in this manner are listening to or making drill just cos that's their life but the white media has basically mashed up [distorted] the*

> *connection […] so like criminals listen to drill but they were already criminals anyway."* (Participant 6)

'Badness' refers to a social world linked to road logic, characterized by "hyper aggressive/hyper masculine modes of behaviour, incorporating violent and petty crime, fraud/personal identity theft and low-level drug dealing" (Gutner, 2008, p.352). Badness is a lifestyle choice, adopted in its totality by a minority of young black males, while the majority select aspects of it whilst still attempting to fit into mainstream society (Ilan, 2012). Participant 2 expressed how many black males only flirt with aspects of badness, possibly in order to garner respect within their community, without the commission of violence or criminality (Kubrin, 2005):

> *"what we wear or like how I've got gold teeth and tattoos, [black youth] get attracted to it even if they're not really to do with the lifestyle but then they will now still get targeted by the police because it represents the drill scene. Cos to the police that's what a thug looks like."* (Participant 2)

This is supported by Dabney et al. who found that black individuals displaying characteristics associated with rap were three times more likely to be arrested (2017). Similar behaviour by white youth would be constructed as regular adolescence, yet badness culture is problematised because it converges with blackness, thus requiring coercive solutions (Gilroy, 2008).

Drill lyrics are 'phatic': part of social exchange as opposed to evidence of real intention or factual events (Miller, 2008). Constructing a perception of themselves as criminal is intended to boost their 'street capital' (Ilan, 2012). This was highlighted by Participant 3:

> *"it's kinda like showing people what they can do or 'what I have done' like 'why I need to be shown respect' […]a tally of their "crimes", like their list of achievements on the streets"* (Participant 3)

This is achieved through exaggerating one's relationship with criminality and disadvantage or, uncommonly, the commission of crime (Kubrin, 2005). However, participants highlighted their apprehension in taking lyrics as fact:

> *"not everyone that's in the drill scene is a gangster, in fact most of them aren't even but they use it to try and up their cred [reputation] or to make them look tougher."* (Participant 2)

> *"they could be lying or stunting [pretending] for the audience[…] and here PC Smith is arresting him for pretending he stole a car."* (Participant 5)

For a significant proportion of black youth who participate within the subculture, drill provides a source of entertainment. In many circumstances, it does provide an important platform that discusses the labelling and social inequalities that urban black youth face, however many within the subculture understand it to be music first. These individuals recognise drill's contexts in crime and deprivation without always internalising them during consumption. Drill is a creative outlet, often utilised by black youth as entertainment; "hyping" them up and leaving them energised:

> *"It's very like loud and vibrant kinda music so if I'm like in the gym or if I'm like feeling down I wanna pump myself up and motivate myself for the day"* (Participant 7)

Today's black youth often utilise the creative sphere to express their frustrations and drill exists as an example of this. Additionally, its graphic nature provides controversy which has always been attractive to youth (Pinkney and Robinson-Edwards, 2018). The music does not incite criminality because following its consumption, the hype fades, and the music has no after-effects:

> *"when I've had enough of it I just feel regular…go about my day innit…it doesn't really have an after effect"* (Participant 6)

C. Subculture

A significant proportion of consumers and producers of drill music exist within a subculture. It creates a space where a community of young people who are labelled as deviant can minimise this stigmatisation; finding peers who identify with their marginalisation whilst understanding the structural disadvantages they face (Pinkney and Robinson-Edwards, 2018). Participant 2 expresses this sense of belonging within the London drill scene:

> *"what ties us together is that we're all London based doing drill, we all grew up here, so we all become one"* (Participant 2)

Music plays a significant role in youth subculture as it often provided a crucial identifying aspect of many youth subcultures in history. It was used to convey the values

and ideals of a particular subculture and how these may differ from that of mainstream society. Furthermore, it was used by the youths within a subculture to communicate and express their identities amongst each other (Laughey, 2006). Participants discussed the influence of their peers in how they started consuming, and continue to consume, drill music.

> *"when [drill] came over here it was just a thing that my friends were listening to, you know everyone was listening to. That's how I really got into it […]I listen to [drill] on my ones [alone] but it's like more when I'm with my friends and that, that's when I'm most likely to listen to it."* (Participant 4)

Youth subcultures offer members an identity outside those dictated by hegemony, such as work, school, or home (Campbell and Muncer, 1989), or in drill's case, their apparent deviance. As a genre predominantly created and consumed by black males under 30, it not only rejects mainstream white values, but also adult values, which oppose drill's principles. Black youth face an extra dimension of exclusion within society due to their age (Gilroy, 2008) and the drill subculture provides an environment specifically for black youth to express themselves. Older rappers rapping about similar content are viewed as failed adults lacking street capital, and consequently removing opportunities from black youth (Ilan, 2020). Participant 2 expresses displeasure at the idea of older rappers still participating in drill subculture:

> *"it's just mainly young people, when older people are making drill I don't really listen unless they're rapping about their old life, but if they're just old and still living that life and rapping about it I don't really rate [respect] them rapping drill […] it's mainly young people expressing themselves and other people around, the youth as a whole, like what we're going through and what they're going."* (Participant 2)

Participant 7 expressed that by virtue of their friends listening to drill, negative perceptions, resulting from the misrepresentations, have no impact:

> ***"Has it changed how other people perceive you?***
> *No because a lot of my friends already listen to it"* (Participant 7)

This alludes to the concept of a drill subculture existing, where the genre is appreciated as creative expression, and membership within it provides symbolic resistance to dominant white narratives (Laughey, 2006; Fatsis, 2018).

Six participants mocked the idea of representations of drill, by far-removed media institutions, having an impact on their self-perception and choice to consume drill. They were arguably not affected because they were constructed by white-dominated media, whose opinion held little importance. While the 'street illiteracy' of the mainstream media and politics facilitates the dissemination of misrepresentations surrounding drill music, it simultaneously undermines the legitimacy of these representations within the urban black community (Ilan, 2020):

> "*positive portrayals only come from people within the community and the negative from those outside the community cos they [outside the black drill consuming community] don't know"* (Participant 6).

Black youth are not ignorant of their marginalization, nor their negative portrayals within the media and wider society. This awareness makes them hostile to the venues and public institutions which reaffirm and perpetuate hegemonic values (Rose, 1991). These youth consequently create, and exist within, a subculture which rejects dominant constructions of blackness; instead choosing to prioritise their own (Ilan, 2020).

Drill and its significance are entangled in local systems which form the foundation of its cultural production, these systems are often invisible to the powerful individuals and institutions which play a significant role in how drill music has been misrepresented. It is publicly disseminated however only those who understand these local systems: the street corners, chicken shops, and council estates reflective of urban subculture, will understand the genre in its entirety (Barron, 2013). Otherwise, the music represents "a jagged, disenfranchised world alien to the experience of most Britons" (Campion, 2004), lacking the relevant cultural and spatial awareness (Barron, 2013). Drill has repeatedly rejected the mainstream. Where much of blackness remains disenfranchised and invisible to mainstream society, the drill subculture provides a space for black youth to exist, express themselves creatively, and shed light on mutual experiences. It is a cultural space where those frequently labelled as deviant have a platform where they can discuss this and its impacts (Lynes et al., 2020). Grime previously also existed in this capacity (Fatsis, 2018).

D. (Mis)Representations of Drill

The media's (mis)representation of drill legitimises the claim that it is causing violence or being used by drill artists to incite violent crime (Lynes et al., 2020). Black cultural endeavours have a history of being labelled negatively. The marginalisation that the black community experience as a result of their race makes it difficult to reject this label (Ilan, 2020).

> *"seeing the media saying "this is causing all this" then actually you might start listening to the lyrics a bit more and then it might actually start getting you more involved so it could actually have a negative impact and worsen the situation"* (Participant 7)

Media representations of drill fall into what Ferrell described as 'culture as crime', where popular culture is publicly labelled as criminogenic and the cultural producers are criminalized through legal or media channels (1999). UK drill has suffered criminalization through both (Hamm and Ferrell, 1994). Cohen noted that media representations of youth subcultures are frequently overexaggerated and censorious (1972), further aggravated when the subculture involves ethnic minority youth (Ilan, 2012).

Hall et al. investigated a phenomenon where media representations surrounding street crime in Britain in the 1970s fuelled a racialized moral panic surrounding 'mugging', constructed to be a new wave of black crime (1978). This does not differ much from moral panics surrounding Caribbean labour migrants during the 1950s Windrush era: constructed as bringing violence and moral decay through their racial difference (Barron, 2013). Exaggerated fears surrounding black cultural activity and portraying them as a "threat" have not disappeared but evolved to apply to today's black youth (Barron, 2013). Images of black youth as gang members and perpetrators of knife crime dominate modern media representations of Black British youth (Barron, 2013). Participants acknowledged that the representations of drill music were negative:

> *"it's got a negative light every time it's portrayed in the media because if there's a stabbing they'll find a way to link drill to it"* (Participant 3)

However, there was a varied response when asked "Have these types of representations of drill music affected you?", showing a small but noticeable disparity between how the

representations of the genre impacted their individual lives. Participant 2 was the only participant who produced drill music and who stated that its representations negatively affected him.

> *"my son has to deal with the way that the world sees me and probably him as well because of me. […] now I also have to deal with police and that because of these videos too and because I do drill and I know that if it continues it will affect him especially when he's older"* (Participant 2)

Participant 2's views on drill's representation may be connected to his self-reported low-level criminality and associations with criminal characters, not production of drill itself. Past experiences and his lifestyle may play a role in his targeting and how his family are perceived.

Other participants, solely consumers, believed the genre was creative expression, and misrepresentations in the media do not add anything different to what they already experienced. This is highlighted by Participant 6 who said: *"I'm a black guy so I don't think drill added anything new that didn't already exist"*. The misrepresentations do not add to the existing marginalisation; however, they do not help: "*I still have the white women holding their purses tight and crossing the street if it's night-time*".

Media campaigns criminalizing drill existed long before criminal justice agencies began using the genre to bring formal charges against individuals, nevertheless these campaigns constructed the perpetual context in which criminal charges could successfully follow (Ferrell, 1999). UK drillers expressing their realities represent a threat to social norms, consequently prominent figures and institutions make efforts to undermine them (Deflem, 2019), and at the extreme silence the political critiques they present (Ferrell, 1999). Media (mis)representations have created an environment allowing the Metropolitan Police to redefine what it means to incite violence, allowing individuals to be found guilty of incitement without inciting a specific violent act (Malik, 2019). Participant 2 describes how the representations of drill music have brought close friends into contact with the criminal justice system because of their own production of drill:

> *"My friends like they've been posted out there [branded negatively on social media] because of what is being said about drill and how like authorities have chosen to respond to it."* (Participant 2)

This response to drill music has legitimised the construction of black culture as criminal culture, exposing black youth to the coercive arm of the State, entering them into the criminal justice system because of, often baseless, suspicions (Fatsis, 2018). Participants expressed experiences of this excessive policing:

> *"I know people around me who cos they are known to make drill they can't go certain areas or they've been banned from doing certain things […] cos the police think that they're preventing stabbings or gang violence."* (Participant 4)

Drill's representations have seen it constructed not as creative expression, but indisputable evidence of gruesome acts (Dunbar, 2019): "*It's only black music that they want to start taking literally […] white music will never be criticised*" (Participant 6). Consequently, drill lyrics and music videos have increasingly been used in court proceedings as evidence in cases from inciting violence to homicide. Successful convictions have been brought against those in music videos without any proof that they were linked to specific acts of violence (Fatsis, 2019), made evident in Participant 2's interview:

> "*One of my friends[…] was rapping before but because in his past he was on a case for a murder, he [beat] the case, and because in the track he mentioned the boy's name and then in his ad-libs he started laughing […] he's back in jail for that murder, he has to do the whole sentence*" (Participant 2)

Where predominantly white genres, no matter how controversial, are given creative license to exaggerate, black music, particularly UK drill, has been denied such creative privilege (Dunbar, 2019). Participant 7 highlighted the inconsistency:

> *Blurred Lines by Robin Thicke, isn't that to do with like him raping someone and that was played on the radio […] they're not monitoring people who listen to Robin Thicke now. They had a problem with the song, rightly so, criticised the song, the artist and the team who allowed it to be produced but they didn't start saying it was gonna cause people to rape anyone. Now suddenly drill music is different, to be honest it's probably cos Robin is white."* (Participant 7)

When compared with other genres, even those that similarly discuss violence and criminality, it is viewed as uniquely dangerous (Deflem, 2019). Numerous studies demonstrated that deviant white music is seen as self-destructive and consumers are constructed as victims (Rose, 1991). Whereas rap is viewed as socially destructive and audiences are constructed as offenders (Fried, 2003).

E. Drill as a Way Out

Despite the unsavoury and blunt discussions of criminality, drill music provides licit routes for financial success for individuals whose only route to financial freedom was once criminality. It is also arguably an attractive route for young people, as it potentially grants them fame and wealth whilst telling their story (Stuart, 2020).

> *"the drill scene has pushed us to rap about what we are doing or what we are going through and it's making us money, we don't have to do as much crimes as before, we're making money doing shows […] that's quite useful money to people like me."* (Participant 2)

The misrepresentations of drill music arguably cause further harm as the ethnographic nature of the lyrics may be acting indirectly as a deterrent from criminality: "*It's taking people away from crime basically*" (Participant 2). Drill artists, disproportionately from disadvantaged backgrounds, often represent the harsh realities of people left with few options but crime. Those who use drill as a platform to narrate their realities often condemn previous violent behaviour or highlight the lasting damage that similar actions cause. This is highlighted by Participant 2:

> "*they're either warning or telling you 'like this is negative', it's not the artist saying 'go out and do stabbings' it's them saying 'yeah my friends were doing stabbings but now they're in jail for life' so he's telling a story basically saying there's consequences that come with these crimes […] you can hear clearly through the story that whatever bad they'd done came back to hit them so it's not something they promote*."

Efforts to ban drill music are futile if the intention is to reduce violence and crime in London. If it acts as an alternative to crime, keeping at-risk youth off the streets and occupied in the studio, prohibiting it would remove a path to make money and stay occupied (Ilan, 2020). Negative representations have even less of an impact on those who are already involved in criminality. This is highlighted by Participant 4:

> *"with music it's another route for them. It's taking time. It's making them go studio instead of them being out on the streets. So if you were to ban drill or ban them from making music you're basically putting them back onto whatever they were doing before. So that could potentially even increase it in a way."* (Participant 4)

When asked about the impact the representations of drill music are having on the crimes disproportionately linked to drill music, participants argued the representations are not reducing criminality as claimed. Instead they held that these misrepresentations do anything but reduce criminality:

> *"If they are from that community already and you just limited their source of income, they're going to turn to what they knew before. A life of being out there, involved in drugs, involved in postcode wars."* (Participant 3)

> *"but to those who, like, this [criminality] is their life, nothing's gonna happen, they'll hear it [negative representations] and just like dismiss it."* (Participant 3)

Recurring demonization of the genre and those associated, might lead individuals to internalise the label of 'deviant' and manifest deviant behaviour (Becker, 1973). This is problematic when understood in conjunction with the fact that misrepresentations of the genre may already be removing licit opportunities from those most at risk. With already limited opportunities further limited by a deviant label, individuals may feel they have no choice but to participate in the deviance that society condemned them for apparently committing.

> *"Some of them wasn't good in school so they failed their GCSE's, ain't got no education so it's harder for them to go out and get a good job. So instead of choosing life on the streets they turn to drill but if they're making it seem like drill and crime are like all one and the same, then this makes these kids, who already had little chance to live life and make money, even worse off cos their opportunities are closed off again."* (Participant 2)

It is important to note that drillers also work within an industry. Selling records and having successful shows is important because it is lucrative for them. To assume that all drillers speak about criminal and deviant acts because it represents their own personal history is an overstatement (Stuart, 2020). Participant 6 stated, "*sometimes it's just about saying such madness that you get publicity from it […] There's no such thing as bad publicity. Graphicness sells records.*", later adding "*a lot about drill is persona, so to me it's ridiculous that people do not separate the two when they can easily do so for white music*".

As a result of existing constructions of black youth as a threat, large gatherings of them are seen as dangerous events that must be stopped (Rose, 1991). Drill events have been securitized and cancelled because of Metropolitan Police pressure on venues and licensers (Fatsis, 2019). Participant 1 highlighted this theme: "*a bunch of black boys standing*

around together it must be gang violence, no it's not, because if Sam and Josh [Caucasian males] were standing together in a large group no one would be like 'oh no, violence!'". Drill music has a strong urban following within London communities, consequently preventing live performances in major public spaces and venues (Ilan, 2012), has a detrimental impact on rappers' profits and their principal method of reaching their audiences (Rose, 1991).

5. Conclusion

Existing literature makes assumptions about how the misrepresentations of drill impact the producers and consumers of these genres, and the black community who are represented within them. As the drill subculture is being targeted and lyrics increasingly utilised as formal evidence in criminal prosecutions, it is crucial that research understands the significance of the genre, and the impacts misrepresentation and criminalisation may be having on the already marginalised and over-criminalised minority. The methods employed have facilitated a deeper understanding into the research question set out at the beginning, which endeavoured to understand how the misrepresentations of UK drill impact the lives of the young, black, South Londoners who produce and consume it. The qualitative interviews uncovered 5 crucial and interconnected themes: Social Exclusion, Expression of Identity, Subculture, Drill as a Way Out, and (Mis)Representations of Drill.

The negative representations impact the realities of urban communities, entrenching them in their existing marginalisation, and reinforcing this distorted image of them in the minds (and media) of those outside the community. The misrepresentations do constitute the social identities of urban black youth, but only for the street illiterate individuals outside the subculture. However, drill subculture is one of resistance; resisting the deviant label hegemony has attached to black youth and refusing to allow this label to silence them in their efforts to publicly demonstrate their exclusion and deprivation. For those within the subculture, the social (mis)representations of drill may remove opportunities and maintain their deprivation but have little impact on how they construct their own social identities.

The misrepresentations of drill music reinforce existing stigmas surrounding blackness, but rarely aggravate it. This links to the idea that drill music subculture provides a platform for black youth, connected through their collective social exclusion, to tell their

stories and relate to each other's similar experiences. Consequently, the platform provides mitigation against the labels and potential marginalisation, providing a sphere where they can exist and express as themselves, outside of the white-only hegemonic modes of existing. Drill music is less about actual deviance than responding to being labelled as deviant and discussing the impacts this has.

Banning the genre or constructing it as criminal leaves black youth stuck in often dangerous environments with no licit route out. Furthermore, this serves to distract mainstream society from the themes of victimisation, disadvantage and regret dominant in the music, instead highlighting the fictional narratives or exaggerated bragging. This constructs endemic deprivation as self-inflicted, and opens, often innocent, black youth to entry into the criminal justice system. The criminality and violence these misrepresentations purport to be fighting against, are potentially increased as the deviant label, paired with limited opportunity, is internalised. This affects the wider urban black community who find themselves misrepresented as dangerous regardless of their consumption or proximity to the genre. The findings uncover more about not just the misrepresentations of drill music, which do not differ much from longstanding constructions of black culture and blackness in general, but also about how they work to undermine its significance for an already marginalised community, intending to further marginalise them.

A. Social Implications

Racial neoliberalism has seen the urban black community blamed for their own disadvantage and then criticised for their efforts to escape it. Based on the findings of this research, local government and police should endeavour to engage directly with urban communities to tackle structural issues and criminality, as censuring cultural exploits and criminalising music designed to express lived realities appears to increase criminality. It is crucial that they understand the racialized nature of these communities' deprivation, as well as how their own responses, racialized themselves, worsen the problems they seek to remedy. Investments should be made into disadvantaged communities, directed specifically at educating the youth, promoting healthy creative expression, and occupying their time, in order to prevent idleness on the streets and protect them from victimisation or gang recruitment. Perhaps, more controversially, efforts should be made to endorse and support the drill music industry, as these findings suggest it is doing more to keep black youth safe from victimisation and deterring its listeners from participating in criminality.

B. Future Research

The sampling strategy employed limits the generalisability and the ability to investigate the attitudes of producers of drill. Future research should consider more closely how producers of the genre are impacted by the misrepresentations of drill. As producers often act as representatives for disadvantaged communities through their music, it is useful to know how attempts to silence them and misrepresent their craft truly affects them, as well as the wider community they represent. As drill is being increasingly used to formally criminalise, further research should investigate the impacts on prosecuted individuals, the British legal system, and freedom of expression, where formal criminalization has been permitted in response to music.

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