International Journal of the Commons
Vol. 9, no 2 September 2015, pp. 552–572
Publisher: Uopen Journals
URL:http://www.thecommonsjournal.org
URN:NBN:NL:UI:10-1-117245

ISSN: 1875-0281

Democratic legitimacy and new commons: examples from English protected areas

Margherita Pieraccini
University of Bristol, UK
m.pieraccini@bristol.ac.uk

Abstract: This paper explores the relationship between protected areas and commons arguing that protected areas can be seen as a form of new commons because of the different objectives and beneficiaries compared to traditional commons. If the purpose of traditional commons is sustainable resource exploitation, the primary objective of these new commons is the conservation of nature/protection of biodiversity. And if on traditional commons local resource users are the key beneficiaries, in new commons the public at large and future generations are the key beneficiaries as biodiversity is the common concern of human kind. Because of new commons' different purposes and different set of beneficiaries, normative questions need to be asked regarding who should have a say in their management and who is able to better represent the interests of nature. To answer these questions, the paper draws on deliberative democratic theory. To ground the theoretical insights empirically it presents a comparison between English protected areas at sea and on land designated under national law.

Keywords: Conservation, England, new commons, protected areas

Acknowledgement: I acknowledge the support of ESRC (Economic and Social Research Council UK) Grant n. ES/K001043/1. I wish to thank also Prof Erling Berge, Prof Meg McKean, Prof Tony Prosser and the Reviewers for very useful feedback on earlier versions of this paper.

1. Introduction: new commons and protected areas

The literature on commons positions protected areas within the "new commons" category because they are tools to protect the common interest of humankind that is wildlife/nature (Berge 2006; Hess 2008). This paper considers the relationship between protected areas and new commons from the context of English protected

areas law and policy. It unfolds along comparative lines considering two key protected areas designations: one on land and the other in the territorial sea (i.e. sea stretching out to 12 nm from the coast as defined by the United Nations Convention on the Law of the Sea 1982). The land based designation is the Site of Special Scientific Interest (SSSI), whose contemporary form has been delineated by the provisions under s. 28 of the Wildlife and Countryside Act 1981, as amended substantially by the Countryside and Rights of Way Act 2000 and the Natural Environment and Rural Communities Act 2006. The marine designation is the Marine Conservation Zone (MCZ), recently established by Part V of the Marine and Coastal Access Act 2009. Comparing SSSIs and MCZs therefore allows us not only to move geographically (from land to sea) but also temporally, assessing the development of conservation law in England over the past three decades.

The analysis starts off by arguing that these two protected areas can be considered 'new commons' because of their different objectives and beneficiaries compared to traditional commons. If the purpose of traditional commons is sustainable resource exploitation, the primary objective of these new commons is the conservation of nature/protection of biodiversity. And, if on traditional commons local resource users are the key beneficiaries, in new commons the public at large and future generations are the key beneficiaries considering that biodiversity is the common concern of humankind, as stated in the preamble of the Convention on Biological Diversity 1992. Because of their different purpose and different set of beneficiaries, normative questions need to be asked regarding who should have a say in their management, and who is able to better represent the interests of wildlife/nature when protecting this common concern of humankind. Neither nature nor future generations are able to speak for themselves, so who should represent their interest? To answer this question, the paper draws on insights from deliberative theories of regulation[1] and, following Habermas, argues that environmental decision-making processes should be as democratic and as open as possible to incorporate a wide range of interests. The 'new commons' characteristics of protected areas will therefore be assessed in relation to the capacity for the participatory decision making processes to facilitate the sharing of rights and duties in the managing and governance of the resource. Importantly, this does not necessarily mean that more participation will lead to better ecological management. The relationship between procedural legitimacy and the system's effectiveness is a complex one that cannot be addressed in this paper.[2] This paper will focus on the issue of legitimacy from the angle of participation in environmental decision-making, rather than effectiveness.[3]

Examples of English protected areas demonstrate that "who *can* participate" in the governance does not necessarily equate to "who *should* participate" in a

[1] For an introduction to different theories of regulation see Morag and Yeung (2007).

[2] Papers exploring this topic are, inter alia, Reed (2008) and Newig and Fritsch (2009).

[3] For an interesting critique of Habermasian ideals and a more instrumental understanding of protected areas governance, see Jones (2013). However, not all scholars choose between answering normative and effectiveness questions. For example, the link between procedural and distributive justice concerns and protected areas' effectiveness is made by Paavola (2004) in relation to Habitats Directive.

deliberative decision-making process, especially on land. As will be shown, this is due to the choice of legal instruments used to govern the resource, influenced by different contextual variables (e.g. time, number of users and uses) and especially by an orthodox understanding of property rights in English law.

2. Protected areas as new commons: insights from existing bodies of literature

The literature on the commons has grappled with the concept of new commons for more than a decade. Under this umbrella term, we find a heterogeneous set of studies concerned, inter alia, with knowledge commons (e.g. Fennell 2004; Hess and Ostrom 2007), cultural shared resources (e.g. Bertacchini et al. 2012) and global environmental commons (Buck 1998; Stern 2011). Hess' 2008 review of the new commons' literature presents a comprehensive map to navigate this complex academic territory. She defines new commons as "various types of shared resources that have recently evolved or have been recognized as commons. They are commons without pre-existing rules or clear institutional arrangements." (Hess 2008, 1) So, as traditional commons, new commons are types of shared resources but they are often younger in origin and require new governance institutions or institutional changes if they evolve from traditional commons. Although the concept of new commons is employed by scholars and activist movements in different ways, according to Hess at the roots of these definitions "one can read a commitment to future generations, to communities beyond the local sphere, to working for both the local and the global common good" (2008, 36). New commons scholars therefore are often concerned with questions of governance and calls for participatory processes and "there is a groundswell of interest in shared values and moral responsibility" (Hess 2008, 37). In her review, Hess identifies both a number of sectors, and a number of what she terms "entry points", i.e. ways in which, and reasons behind, the classification of a resource as new commons, ranging from political attempts at counteracting the commodification and privatization of socio-economic systems, to reactions against modern enclosures (such intellectual property rights) etc.

Hess includes protected areas in the list of new commons, citing the work of Berge (Hess 2008, 4). Berge's analysis (2006) is in fact the first to have explicitly considered the links between protected areas and new commons both theoretically and empirically, using the example, among others, of the Geiranger-Herdalen protected landscape area from Norway. Protected areas are policy tools for the protection of important environmental resources that are the common interest of humankind, such as wildlife. Berge writes that "instituting regulations of environmental protection to govern values of common interest for a group can be seen as creating new types of commons" (2006, 65). The Norwegian example brought by Berge concerns the establishment of a protected area on privately owned land. In this sense, the protected area has a "commoning effect" by circumscribing the exercise of property rights of private Norwegian landowners. Before carrying out new activities on their land that have an impact on the protected aspects of the area, private landowners must get a permit from the state.

Berge points out that the establishment of a protected area redistributes power from private landowner to the state for the purpose of protecting the newly recognised shared nature of the 'environmental common'. In this sense protected areas are a new commons because certain elements of the designated (land) space are re-characterised to meet the basic definition of a common pool resource (i.e. relating to subtractability and excludability) but this may generate conflicts between traditional uses of the land and new ones. Along similar lines is a contribution by Short (2008), who considers how traditional common land in England and Wales is often subject to new uses (e.g. rights of access on all commons under the Countryside and Rights of Way Act 2000, and on some commons, nature protection designations) and must fulfil new functions due to the designation of protected areas on it. Reconciling the traditional and the new commons is also a theme permeating Contested Common Land (Rodgers et al. 2011), a monograph stemming out of a 3 year long research project on the development of environmental governance of common land in England and Wales from manorial times to the present age. An important section of the book is dedicated to exploring the complex relationship between commoners' existing property rights and the legal requirements of environmental legislation on commons that lie within protected areas.

By sketching the development of modern nature conservation law in England, the present article frames protected areas as new commons and adds to the existing literature a focus on procedural governance challenges from a normative perspective. After briefly introducing the general lines of protected areas policy in England and circumscribing the analysis to specific legal examples, the paper draws on deliberative theories of regulation literature and advances in environmental law to consider the way in which protected areas, as new commons, require the participation of a broader set of interests to enhance their legitimacy, and the extent to which SSSIs and MCZs are capable of doing this.

3. Protected areas law and policy in England: introductory points

England is an industrialised country with a long history of nature conservation law and policy. The conservation of habitats and species in England happens in a variety of ways and through a variety of means. De Sadeleer (2008) has argued in fact that the UK has one of the most elaborate systems of biodiversity law, and Reid (2011) has pointed out its fragmented character due to a variety of factors: from devolution – the responsibility for the administration of conservation matters lies primarily within the devolved authorities – to the need to transpose EU conservation law into domestic law (for example, via secondary legislation in the form of Regulations).

Protected areas are a vital element in the conservation toolbox in England.[4] Although protected areas laws have been shaped by EU conservation law covering

[4] For a consideration of other conservation tools, see Reid (2011) and Rodgers (2013).

both terrestrial and marine environments (for example, the 1992 Habitats Directive and the 2009 Wild Birds Directive, the latter being a codified version of the 1979 Wild Birds Directive as amended) and also influenced by a number of international conventions (e.g. the Ramsar Convention), this paper will primarily focus on an assessment of nationally-driven protected areas policy in land (focussing on SSSIs) and in the territorial sea (focussing on MCZs). References to EU conservation law will be made as there are some overlaps between domestic protected areas and European protected sites, as explained below. The analysis will primarily focus on the provisions for protected areas to be found in the Wildlife and Countryside Act 1981 (hereafter the 'WCA'), as amended by the Countryside and Rights of Way Act 2000 and the Marine and Coastal Access Act 2009 (hereafter the 'MCAA'). Although a full assessment of the Acts would require a consideration of their implementation as well as of the provisions, implementation issues are only partially addressed in this paper as the implementation of the MCAA is still in its early stages and therefore it is impossible to provide a full assessment.

There is almost a thirty year gap between the WCA and the MCAA, which allows for a temporal exploration of the modern evolution of legal thinking around protected areas in England. Also, as the WCA contains provisions on terrestrial protected areas, and the MCAA on marine protected areas, the discussion below moves geographically as well as temporally. A further specification is required before the legal analysis can begin. Part II of the WCA includes several different designations: Sites of Special Scientific Interest (SSSIs), National Nature Reserves, Marine Nature Reserves and National Parks, though the latter are more a landscape designation than a conservation one. This paper focuses on SSSIs whose establishment is provided for under Section 28 of the WCA. This is because SSSIs are the most widespread type of protected areas, representing the country's most valuable wildlife sites[5] (England has over 4100 SSSIs, covering around 8% of the land) and they underpin all the European conservation sites,[6] i.e. the protected areas under the two European Conservation Directives cited above (the 1992 Habitats Directive and the 2009 Wild Birds Directive). In relation to marine conservation, Part V of the MCAA contains provisions for nationally-important marine protected areas, known as Marine Conservation Zones (MCZs). Some of these MCZs overlap with European marine sites but the overlap between MCZs and European marine site is weaker than that between SSSIs and European terrestrial protected sites as some MCZs serve precisely to fill the gaps left by European marine protected sites, in order to create an ecologically coherent network of MPAs, as required by Section 123(1) of the Marine and Coastal Access Act 2009.

[5] SSSIs can also be notified for the geological interest of the sites.

[6] To clarify the relationship between SSSIs and European sites, it shall be stated that though all European terrestrial sites are designated on top of SSSIs, the reverse is not true as there are a number of SSSIs that are not European designations because they host species and habitats that do not fall within the Annexes of the European Directives.

3.1. SSSIs and MCZs as new commons

This part sets out the conceptual links between English protected areas and new commons. The purpose of both SSSIs and MCZs is the conservation of nature. Although the WCA does not offer a statutory definition of the purpose of SSSIs, the Code of Guidance of the Department for the Environment, Food and Rural Affairs states that "the purpose of SSSIs is to *safeguard, for present and future generations,* the diversity and geographic range of habitats, species, and geological and physiographical features*,* including the full range of natural and semi-natural ecosystems and of important geological and physiographical phenomena throughout England." (Defra 2003- emphasis added). As for MCZs, their purpose can be found in the MCAA, s. 117(1) outlining the grounds for designation. The section states that the appropriate authority may make a designation order if "it thinks that it is desirable to do so for the purpose of conserving (a) marine flora or fauna; (b) marine habitats or types of marine habitat; (c) features of geological or geomorphological interest."

Both SSSIs and MCZs can therefore be considered new commons in the sense that they are established with the purpose of conserving nature/biodiversity that is a resource of common concern to humankind. This means that the public at large and future generations are the primary human beneficiaries of protected areas, rather than local resource users as in traditional commons. It could be argued therefore that the purpose and beneficiaries of protected areas are transforming local resources into global commons. This argument is validated by the fact that biodiversity protection is included in the global commons sector in the map of new commons proposed by Hess (31–32). However, it must be specified that protected areas are global commons not in the sense proposed by Buck (1998) who defined global commons as commons not falling within the jurisdiction of any countries but to which all countries have legal access (that is to say outer space, Antarctica, the atmosphere and the high seas). The protected areas here considered do fall within national boundaries but have a global dimension in so far as they are spaces of public interest as the loss of biodiversity at the local scale has transboundary effects.

Because protected areas as new commons are of global interest to humankind, this paper explores the question of how such interest is best represented for two types of commons resource (land and sea) operating under different legislative frameworks. From a procedural perspective, identifying who is best suited to represent the biodiversity interests of humankind, i.e. who should participate in the governance of protected areas, is a key issue that results in varying levels of stakeholder representation in environmental-decision making on the ground. Both the International Union for the Conservation of Nature and the Convention on Biological Diversity identify four different broad governance categories for protected areas: governance by government (type A), shared governance (type B), private governance (type C) and governance by indigenous peoples and local communities (type D) (Borrini-Feyerabend 2013, 29). The plurality of protected

areas governance, coupled with the commons' scholars caution against one 'panacea' preferring contextual design of governance institutions (Ostrom et al. 2007; Nagendra and Ostrom 2012), makes the task of answering the question of who should participate in the governance of protected areas extremely difficult. As Jentoft et al. point out (2007) "MPAs are complex systems that, from a governance perspective, raise serious challenges with regard to their effectiveness".

However, as stated in the introduction, the aim of this paper is not to consider effective governance arrangement but to consider the question of participation in protected areas governance from a normative perspective. This is often a neglected aspect in discussions of protected areas governance, due to the fact that protected areas have developed as a practice-driven area of environmental management (Paavola 2004). It is from this normative angle, which builds on the deliberative regulation theories and advances in environmental law that the question on participation is answered below.

4. The question of participation in environmental decision-making

Environmental issues cannot be characterised as a matter of individual autonomy and choice. As Fisher et al. (2013, 24) argue "decision-making about the environment is not an exercise that individuals can take in isolation. This is because the causes and solutions to environmental problems are not solely the product of individual actions and choices…In other words, environmental problems are collective in nature". This collective dimension of environmental issues triggers the question of who is best suited to make choices regarding the environment. In England, the state has assumed a central role in environmental decision-making. This is in part due to the inadequacy of private law, more specifically tort law, to address environmental damage. Some of the shortcomings of tort law regard its reactivity (damage needs to occur before an action can be triggered), its individualistic character (the action is under the control of the claimant so what about the un-owned environment? What about the interests of future generations?), and its purpose (the landowner affected by the damage is compensated rather than the environmental damage per se being rectified). The *Cambridge Water* case (1994) is a classic example to illustrate the limits of tort law for environmental protection. In that case, solvent produce by the works of a leather company spilled into an aquifer used by Cambridge Water Company to abstract water. Initially, the water company sued the leather works in nuisance but was unsuccessful. Importantly, however, even if successful, the damages would have been paid to the water company in the form of the relocation of its borehole rather than for the rectification of the contaminated aquifer, though there was a public interest in the clean-up.

Due to the inadequacies of tort law, public law has come to be perceived as a better tool to address society's interest in the environment. But whether the state should be the central and sole representative of the public interest is a

question yet to be fully resolved. As Eckersley writes, "the state is potentially the most legitimate, and not just the most powerful, social institution to assume the role of 'public ecological trustee', protecting genuine public goods such as… biodiversity" (Eckersley 2004, 12). However, the centrality of the state in protecting public environmental goods can be questioned for a number of reasons. First, because there is an inherent tension in the state as it also has a role in promoting development and capital accumulation that are often at odds with environmental protection goals. Secondly, because the state risks reducing the pluralism of values and perceptions of the environment existing in complex societies by providing a single representation of the collective good. Thirdly, because the 'command and control' wave of environmental regulation from the 1970s onwards has proved to be ineffective in a number of respects as demonstrated by the development of new tools in the form of self-regulation, market-based mechanisms, meta-regulation, and others, which have opened up the arena to a wider variety of actors. Such openings are depicted in the regulation literature as the 'hollowing out' of the state (Rhodes 1994) because the state now is only one actor in a polycentric governance structure. As Yeung explains "most scholars of regulation agree that the regulatory state 'governs at a distance', no longer able to employ unilateral, discretionary control via command, necessitating reliance on more arm's lengths forms of oversight" (Yeung 2010, 67).

Processes opening up regulatory mechanisms to a variety of actors are in line with insights of the deliberative strand of regulation theory that considers participation to be intrinsically valuable, arguing that what counts as public interest should be collectively decided in fora that are participatory. The intellectual shadow of Habermas' deliberative democracy is clearly felt here, for example by regulatory scholars such as Prosser (1986) or Black (2000), who, following a deliberative approach to decision-making, stress that participatory decision making spaces should be more than trade-off rooms where different interests, exogenously formed, are negotiated. Instead, the core of the deliberation is that all positions are rationally discussed and participants are able to transcend their individual positions with the aim to pursue the common good/interest.

The nature and role of participation has not only come to occupy the theoretical regulatory field but it has become an accepted component of environmental law in the last few decades. The move towards 'participatory democracy' is mostly visible in law with the ratification of the Aarhus Convention 1998, which is built on the three pillars of access to environmental information, participation in environmental decision-making and access to justice. Participation has increased in a number of specific sectors of environmental law to account for the range of environmental values held within society at earlier stages of decision-making: examples include the 1985 Environmental Impact Assessment Directive, as amended and the 2000 Water Framework Directive (Steele 2001). Clearly however participation can take different forms and involve different actors. Participation can range from stakeholder participation (i.e. those interests affected by the decision-making procedures have a say in the decision-making) to more

representative forms of participation (for example when environmental NGOs speak on behalf of individuals who may or may not have a direct 'stake' in the issue). A number of scholars have attempted to classify different typologies and stages of participation (Arnstein, 1969; Pimbert and Pretty 1995; Reed 2008) and there is no need to reproduce this well-known literature here. For the purpose of this article, drawing on Habermas (1996), participants are defined as all those who are affected by an action or proposal and, through processes of deliberation, they are able to achieve a discursively agreed common aim. In the case presented here, the common aim of the protected areas under consideration is wildlife/nature conservation. Following Habermas, this common aim would be achieved most legitimately through the participation in decision-making of all those affected. As Habermas (1996) stresses, democratic legitimacy is reached through consensus in decision-making of all those affected by a decision. The law should therefore facilitate those legal mechanisms that stimulate inter-subjective communication to achieve consensual agreement. The extent to which selected English laws fulfil this procedural requirement and therefore qualify as capable of giving democratic legitimacy to "new commons" is discussed below.

4.1. Participation and SSSIs

The WCA (1981) is the basis for the designation and management of SSSIs. Although SSSIs have existed since 1949, the early regime was very weak and confined primarily within planning law.[7] Supra-national law was influential in the strengthening of the regime in 1981 under the WCA as the UK needed to comply with the Bern Convention 1979 and the Wild Birds Directive 1979 (codified version is of 2009), both placing importance on wildlife protection.

Under the WCA, in contrast to the 1949 Act, all owners and occupiers, the planning authority and the secretary of state must be served a notification by the nature conservation body (in England, this is known as Natural England[8]) that the area is of special interest by reasons of any of its flora, fauna or geographical and physiographical features. The notification as well as the final site selection is in the hands of the nature conservation body. Natural England is therefore afforded a wide discretion in this instance, rendering the establishment of SSSIs a technocratic exercise with little room for participation. This has led to a number

[7] SSSIs were first introduced in 1949 under the National Parks and Access to the Countryside Act, section 23. Under the 1949 Act, though, the regime for SSSIs was weak-there was no duty to notify the landowners and occupiers and the role of the nature conservation body was minimal.

[8] Natural England is an executive non-departmental public body, sponsored by the Department for Environment, Food and Rural Affairs. Their general purpose, stated under section 2 of the Natural Environment and Rural Communities Act 2006, is "to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development". Natural England plays a key role in the designation and management of protected areas in England. For more information, see: https://www.gov.uk/government/organisations/natural-england.

of human rights challenges raised by the owners/occupiers of the notified sites. A notable example is the case of *R. (Fisher and others) v English Nature,* where the claimants sought judicial review of the conservation body's decision to confirm the notification on their land as an SSSI on a variety of grounds, including that it was incompatible with the landowners' rights to the peaceful enjoyment of their possession under Art 1 Protocol 1 of the European Convention of Human Rights as it was a disproportionate interference. The High Court however dismissed their claims on the basis that the WCA required the conservation body to designate SSSIs if the statutory conservation criteria were satisfied. Under Section 6 (2) of the Human Rights Act 1998, the public authorities comply with the Convention if the authority could not have acted differently as a result of following primary legislation.

In notifying a site, Natural England should also specify why the site is of special interest and identify a list of Operations Likely to Damage (OLDs) the scientific interest. OLDs are specified for each SSSI and vary from one to another but typically relate to activities such as the cultivation of land, the dumping of materials, the application of fertilisers and changes to the grazing regime. The lists of OLDs are typically very detailed and are again, at the discretion of Natural England. The OLDs place some constraints on the exercise of property rights, and the owners and occupiers must ask Natural England for consent before carrying out these operations. This seems to mirror the situation described by Berge in relation to the Geiranger-Herdalen protected area. However, the strength of the SSSIs, and their ability to protect the common resource, is more questionable than in the Norwegian example because under the WCA, the OLDs are not prohibited operations. Under the 1981 WCA the legal requirement was that the owner/occupier must give written notice to the nature conservation body of his/her intention to carry out an OLD. The owner/occupier could not carry out the operation unless the nature conservation body had given consent or the operation was carried out in accordance with a management agreement. However, if a management agreement had not been reached within four months, the owner/occupier could then lawfully carry out the operation, with Natural England having no power to stop the operation even if it considered it to be damaging to the conservation objectives of the site. This four-month waiting period was the reason why Lord Mustill in *Southern Water Authority v Nature Conservancy Council* criticised the regime for being toothless. Therefore, under the 1981 regime, SSSI management fell short of being a democratic endeavour, due to the prominence of private property interests able to overrule biodiversity conservation's ones.

Schedule 9 of the Countryside and Rights of Way Act 2000 (hereafter CRoW), amendments to the WCA to abolish the four month statutory consultation period, and empowering Natural England to refuse consent to OLDs without time limit, thereby attempting to rebalance the relationship between the property rights of landowners/occupiers and the public interest in environmental conservation. Management schemes have also been introduced to allow Natural England to bring neglected or mis-managed land into better management. Management

schemes can be enforced by serving notice, with Natural England requiring reasonable measures to ensure that the land is managed in accordance with a proposed scheme. The reforms brought about by CRoW also establish new duties on the general public so that a person intentionally or recklessly destroying the special interest features of a SSSI is guilty of an offence.

It is essential to stress, however, that despite these new measures, management agreements between Natural England and the owner/occupier remain the preferred option[9] for SSSI management and under Section 7 of the Natural Environment and Rural Communities Act 2006 there is now a general power for Natural England to enter into management agreements. Thus, SSSI governance remains primarily underpinned by a contractual logic and does not really foster wider participation in environmental decision-making, while CRoW imposes duties rather than new participatory rights on the public. By assigning managerial responsibility to only two actors (private interests and statutory conservation bodies), they fall short of including all those affected by the decision, and secondly, by privileging the instrument of the management agreements, rather than deliberation, they reinforce an understanding of participation as a trade-off between two exogenous and distinct interests: nature conservation on the one hand, and private property rights on the other. The role of other interests also remains marginal because of the lack of environmental information available to the public. Indeed, the owner/occupier willing to carry out an OLD need only notify Natural England, which does not need to publicise the fact, meaning that negotiations related to the environmental management of SSSIs remains private.

4.2. Participation and MCZs

Statutory protected areas in the sea, except for those designated as requirements of supra-national law, only existed in the form of marine nature reserves under the WCA before the advent of the MCAA. Marine Nature Reserves however were not widespread (only one was designated in England and three in total in the UK), they covered only a minor section of the marine environment (they could stretch up to 3 nautical miles from the coast) and their conservation value has been questioned extensively in the literature (Reid 2009; Pieraccini 2013; Rodgers 2013).

The MCAA has altered the situation, affording marine conservation a more central role with provisions for the establishment and management of MCZs. Unlike other protected areas, such as the special areas of conservation under the 1992 Habitat Directive, the law on MCZs does not list a precise number of species and habitats to be protected but puts the emphasis on MCZs to conserve the *diversity* of marine fauna and flora (with special attention to rare or threatened species)

[9] It should be noted, though that Natural England has powers to compulsory purchase sites if it cannot conclude a management agreement on reasonable terms or a management agreement has been breached in a way that renders the management unsatisfactory.

and marine habitats for conserving features of geological or geomorphological interest (Section 117(1) and Section 117(4)).

With regard to the designation of sites in the marine environment "socio-economic consequences" may be taken into account when deciding whether to designate a MCZ (Marine and Coastal Access Act 2009, Section 117(7)). The interests of sea users are therefore considered in drawing up the boundaries of the marine protected areas. In order to designate the MCZs, a participatory decision-making process was developed in England: 4 regional projects were set up involving a variety of stakeholders to decide the boundaries of the MCZs taking into account the effect that a certain designation may have on their economic activities or social practices. By involving stakeholders at the designation stage, marine conservation law has departed from the technocratic approach of terrestrial conservation law approach as described above for SSSI designation. The rationale behind this choice was not to dilute the conservation aims of the protected areas but to contribute to the creation of a sense of ownership over decision-making for all the stakeholders, improving compliance with the conservation measure of the sites once in place.

The extent to which this has been achieved in practice is, however, more debatable primarily because participatory techniques have been framed within pre-determined categories hindering deliberative processes that might otherwise unfold. Participants have come to the decision-making table as representatives of particular 'stakes' (whether the fishing industry, renewable energy, conservation groups and so on), rather than as affected parties pursuing a common goal. As a consequence, the participatory forum has become a trade-off space where socio-economic and ecological interests have remained antagonistic (Pieraccini, 2015). This situation has been exacerbated by the government decision to designate MCZs in different tranches. The first tranche designated in 2013 has seen the establishment of only a small number of MCZs (27) compared to that put forward by the four regional groups (127).

With regard to the management of MCZs, a twin system is developed depending on whether an operation likely to damage the site is a work that requires an administrative authorisation before it can be carried out. Section 126 of the MCAA outlines the procedure to be followed by the public authority to determine whether to grant authorisation for the doing of an act that is capable of affecting, other than insignificantly, the conservation objectives of an MCZ. Decisions will be made on a case by case basis. For controlling all the activities that do not require administrative authorisation, the Marine Management Organisation (the key regulatory authority under the MCAA) and the Inshore Fisheries Conservation Authorities for inshore sites (for protected areas extending up to 6 nm) have the power to impose bylaws (s. 129). Bylaws can be made, inter alia, to prohibit or restrict the entry into or movement by a person, animal, or vessel into a MCZ. The secretary of state must confirm them before they become operational unless the regulatory body thinks there is an urgent need to protect the MCZ. In that case the Marine Management Organisation or the Inshore Fisheries Conservation

Authorities can make an emergency bylaw (s 131) for sites up to 6 nm. Finally, bylaws can be made even before designation of an MCZ occurs if the public authority thinks that there are or may be reasons for the Secretary of State to consider whether to designate the area as an MCZ, and that there is an urgent need to protect the feature (s 132).

Institutionally speaking, MCZs extend the management of the sites to a wider array of actors, compared to SSSIs. This is especially visible if we take a closer look at the Inshore Fisheries Conservation Authorities, the successors of Sea Fisheries Committee, whose establishment is provided for by Part 6 of the MCAA. Inshore Fisheries Conservation Authorities' membership is highly inclusive. Each Inshore Fisheries Conservation Authority's governing committee is made up of a representative from Natural England, one from the Environment Agency and one from the Marine Management Organisation; elected representatives of local authorities in the area and MMO appointees. Each member is given one vote. The MMO Guidance[10] on MMO appointees states that committee members are selected for their knowledge of local community's needs and opinions and their understanding of marine environmental matters. It also puts the accent on the participation skills required to be part of the Inshore Fisheries and Conservation Authority committees pointing out that the members are required to be able to express their views in a way that is understandable for those of a different background and be open to the point of view of others in an attempt to find reasonable solutions to local marine governance challenges.

By including nature conservation bodies, elected councillors and MMO appointees chosen for their local knowledge, and by adhering to a deliberative understanding of participation as the emphasis is on reaching an inter-subjective decision on sustainable fisheries, the committees have the potential to constitute a good example of participatory decision-making. At present, there are ten Inshore Fisheries Conservation Authorities in England, representing different districts. Inshore Fisheries Conservation Authorities have the duty to manage the exploitation of fishing resources within their district and to protect MCZs falling within their district. Section 154 of the MCAA requires that Inshore Fisheries Conservation Authorities to further the conservation objectives of MCZs and powers to make byelaws and emergency bylaws to fulfil this duty are granted to the Inshore Fisheries Conservation Authorities under Section 155 and Section 157 respectively. Byelaws can relate to a wide range of issues including: the prohibition/restriction of sea fisheries resources, the methods and gears that can be used, the monitoring of the exploitation of resources, the granting of permits, the protection of fisheries for shellfish and even the request of information from

[10] MMO. Appointment of inshore fisheries and conservation authority members by the Marine Management Organisation. Information for Candidates. 26 August 2014 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/347496/20140826_Information_for_candidates.pdf

those involved in the exploitation of sea fisheries resources (Section 156 of the MCAA).

The Inshore Fisheries Conservation Authority clearly have a strong and wide-ranging decision-making power. Considering that their membership is very inclusive allowing for a variety of interests to participate in decision-making, it follows that the management of MCZs for inshore sites within the 6 nm has the potential to be more participatory and better responds to environmental democracy compared to SSSIs management. This is also because the committees are set up as deliberative fora, not as spaces where different participants trade their interests.

MCZ designation and management (at least for MCZs within the 6 nm) are built on the premises of sharing responsibilities among all those affected. Differently, SSSIs are built on the logic of a private partnership between the conservation body and the private owners/occupiers, whose negotiations are not very transparent. Is this an inner deficiency of the SSSIs system or are there historical, institutional or governance reasons for this difference? This question is explored below.

4.3. Explaining the difference between the degree of democratic legitimacy in SSSIs and MCZs

A number of variables can be identified to explain the different degree of democratic legitimacy between SSSIs and MCZs. First, the 30-year gap between the development of the SSSIs and MCZs regimes, mentioned above, partially explains why MCZs are more responsive to the participatory ethos compared to SSSIs. The bulk of the SSSIs regime was developed before the shift from government to governance (to use Stoker's terminology)[11] was consolidated and before participation became a key element of environmental law. As commentators point out, the SSSIs regime seems outdated in modern regulatory terms (Bell et al. 2013, 279). A second variable is the difference in number of pre-existing users and potential uses: if on land the existing and potential users are a well-defined number, in the sea there is a wider range of users with potential conflict of interests. A third variable relates to the different degrees of evidence at the basis of designation for SSSIs and MCZs: the scientific uncertainty related to marine ecosystems[12] has led, at least in theory,[13] to push towards a recognition of scientifically-robust evidence from sea-users during the four MCZs regional projects.[14]

[11] In a seminal article in 1998 Stoker differentiated between government and governance arguing that though both aim at creating ordered rules and instruments for collective actions, they differ in the processes used to achieve such aims. With the governance turn, the actors involved are a complex mix of private and public actors and we witness, as Rhodes put it (1996), the state "hollowing out".

[12] See Jones (2001).

[13] For a critical consideration of the consideration of sea-users' knowledge/evidence in the designation process of MCZs in South-East England, see Pieraccini (2015).

[14] Project delivery guidance (NE and JNCC) http://jncc.defra.gov.uk/PDF/Project%20Delivery%20Guidance%20FINAL%20020710%20secure.pdf

Perhaps, though, the most important argument that could be advanced to explain the difference between the "democratic" degree of these two protected areas is the fact that the two sit at different ends of the property spectrum. While many[15] SSSIs are designated on private land and seem to represent a 'taking' from the state, limiting what the owner/occupiers can do, MCZs are designated on top of a more open access resource, as such they are places where it is clearly more effective to create participatory decision-making. Indeed, if MCZs embed commons/fisheries resources in the new commons, SSSIs embed primarily private resources in new commons. However, where does this leave us in relation to protected areas, new commons and democratic legitimacy? Does it mean that protected areas on privately owned land are never capable of achieving democratic legitimacy because of the irreconcilable interest between the private interests of the landowners and the public interest in conservation to be resolved only by contractual arrangements between these two parties that defy wider public participation? This view assumes a traditional view of property rights, which has its roots in the enclosure movement during the Tudor dynasty and that finds its articulation in Blackstone's Commentaries of the Law of England (Blackstone 1770). As Valguanera argues (2014, 199–200) this conception of property perpetuates a view of land/nature as a commodity that can be owned and traded, disabling future generations interests to be accounted for.

However, this is not the only view of private property out there. Both jurisprudential and anthropological examinations of the concept of property point out in different ways that property is a fluid concept, specific to the socio-ecological and historical context in which it develops. Anthropologists have documented multiple ways of owning and perceiving ownership across different cultures (Verdery and Humphrey 2004; von Benda-Beckmann et al. 2006; Strang and Busse 2011) and jurisprudential writings have considered how new forms of environmental property rights are emerging (Gray and Gray 1999; Rodgers 2003; Graham 2011). For example, because of the move towards payments for positive land management visible with the reform of the CRoW, some commentators argue that environmental measures do not any longer constitute a 'taking' of property, imposing property-limitation rules but they are a species of property-duty rules, allowing for the development in the landowners of an environmental stewardship's ethics (Rodgers 2003). Property is therefore reconceptualised as encompassing also environmental responsibility. As Gray and Gray put it, "the former over-emphasis upon the totality of individual control has long been eroded by wider conceptions of the public good" (32–33).

However, to what extent existing contractual mechanisms, such as those available for the management of SSSIs, have the capacities to imbue conceptions of the public good and environmental responsibility in the understanding

[15] Some SSSIs are owned or managed (often under a lease or other agreement) by conservation sector organisations, that is, voluntary and public bodies for which the protection of biodiversity and our natural heritage is a key objective.

and exercise of property? Are existing contractual arrangements too reliant on a traditional/orthodox view of property? There are two issues that can be identified: first, using the contractual means, the landowner becomes the provider and the nature conservation body the purchaser. So, rather than fostering the development of an environmental stewardship ethics and extending the concept of property from that of rights to that of duties, these mechanisms belong to a market-based approach to conservation as they really amount to payments for ecosystem services, criticised in social sciences' literature for commodifying and neoliberalizing nature (Kosoy and Corbera 2010; Büscher et al. 2012). Aside from the commodification point, even assuming that the concept of property is reframed incorporating public good aims in land management practices, management agreements continue to fall short of fostering environmental democracy and of allowing participatory environmental decision-making that, as argued in this paper, should from a normative perspective be a key characteristic for rendering protected areas successful new commons. Indeed, the relationship remains one between the property rights holder and the conservation body, with little room for the public to have a say in decision-making and to bring forth values that may not be represented by these parties. From this argument it can be deduced that the key barrier to participatory decision making on SSSIs is not the existence of pre-existing property rights per se but of the preference towards governance tools, like contracts that have a well-defined and limited number of parties.

5. Conclusion

This paper began with noting that the existing commons' literature locates protected areas within the new commons umbrella as their aim is the protection of a common interest of humankind. Considering the question from an English nature conservation law's perspective, a comparison of two nationally important terrestrial and marine protected areas has revealed that, though both designations deliver new commons as their purpose is the conservation of nature for present and future generations, their 'commoning' potential triggers the question of which actors should be involved in their governance. Employing a deliberative democratic approach, owning to Habermas, the common good should be decided by all affected parties in participatory fora where individual interests are transcended.

It has been concluded that MCZs better incorporate elements of participatory decision-making, compared to SSSIs. Both at the designation stage and at the management one, MCZs open up the decision-making space to a plurality of actors. A number of variables have been identified to explain such difference. First, the temporal gap between the two pieces of legislation that contain provisions for the establishment of the protected areas: the MCAA is much more recent than the WCA and it has been able to reflect the participatory ethos that has permeated in the latest decades much of environmental law. Secondly, the greater number of uses and users in the sea compared to that on land supports the move

towards more participatory governance mechanisms in MPAs to encompass the plurality of perspectives and interests. Third, the different property framework of these two resources have been identified as an explanatory variable: if SSSIs have been established on land that was predominantly privately owned, MCZs are established in the sea, a resource closer to open access. However, it has been argued that it would be misleading to solely blame the existence of private property for the lack of public participation in the management of SSSIs. Indeed, this lack of participation is more to do with the use of contractual arrangements between the property rights holder and the nature conservation body that are rooted in a traditional, Blackstonian understanding of property, rather than to the pre-existence of property relations per se. This is not to say that SSSIs are necessarily less successful protected areas[16] but that they are less capable of securing democratic legitimacy.

The paper has not considered the practical implementation of protected areas' governance because the implementation of MCZs' management is in its early stages and it is too soon to provide a definitive assessment, though it was possible to insert a note on the implementation of the process of designation of MCZs that brought into question the link between the protected areas and deliberative democracy. Needless to say, the ways in which the legal texts are translated on the ground (Do the authorities use the powers granted by the Act? How do stakeholders perceive the protected areas? How are the participatory spaces set up?) are fundamental issues to provide a more complete picture of the way protected areas can be associated to new commons. As briefly discussed, the designation process of MCZs has fallen short of providing a deliberative space but, in places, has reinforced antagonism between different affected parties. Therefore, though theoretically the participatory provisions of MCZs confer to these new commons more democratic legitimacy, in practice it remains to be seen.

Literature cited

Arnstein, S. R. 1969. A Ladder of Citizen Participation. *JAIP* 35(4):216–224.

Bell, S., D. McGillivray, and O. Pedersen. 2013. *Environmental Law*. Oxford: Oxford University Press.

Berge, E. 2006. Protected Areas and Traditional Commons: Values and Institutions. *Norsk Geografisk Tidsskrift – Norwegian Journal of Geography* 60(1):65–76.

Bertacchini, E., G. Bravo, M. Marrelli, and W. Santagata, eds. 2012. *Cultural Commons: A New Perspective on the Production and Evolution of Cultures.* Cheltenham: Edward Elgar.

Black, J. 2000. Proceduralizing Regulation: Part I. *Oxford Journal of Legal Studies* 20(4):597–614.

[16] Evidence from Natural England suggests that many SSSIs meet their ecological targets. See: http://www.sssi.naturalengland.org.uk/special/sssi/reportAction.cfm?Report=sdrt15&Category=N&Reference=0

Blackstone, W. 1770. *Commentaries on the Laws of England (1765–1769), Book III (1st ed.)*. Oxford: Clarendon Press.

Borrini-Feyerabend, G. 2013. Governance of Protected Areas: From Understanding to Action. IUCN. http://cmsdata.iucn.org/downloads/governance_web.pdf [searched 12th December 2014].

Buck, S. 1998. *The Global Commons: An Introduction*. Washington, DC: Island Press.

Büscher, B. 2012. Payments for Ecosystem Services as Neoliberal Conservation: (Reinterpreting) Evidence from the Maloti-Drakensberg, South Africa. *Conservation and Society* 10(1):29–41.

De Sadeleer, N. 2008. EC Law and Biodiversity. In *Biodiversity, Conservation, Law + Livelihoods: Bridging the North-South Divide*, eds. M. I. Jeffery, J. Firestone, and K. Bubna-Litic, 181–192. Cambridge: Cambridge University Press.

Defra. 2003. Sites of Special Scientific Interest: Encouraging positive partnerships. London. At: http://archive.defra.gov.uk/rural/documents/protected/sssi-code.pdf [searched 11th of January 2014].

Eckersley, R. 2004. *The Green State: Rethinking Democracy and Sovereignty*. Cambridge, MA: The MIT Press.

Fennell, L. A. 2004. Common Interest Tragedies. *Northwestern University Law Review* 98(3):907–990.

Fisher, E., B. Lange, and E. Scotford. 2013. *Environmental Law: Text, Cases and Materials.* Oxford: Oxford University Press.

Graham, N. 2011. *Lawscape: Property, Environment, Law*. Oxon: Routledge.

Gray, K. and S. F. Gray. 1999. *Land Law*. Oxford: Oxford University Press.

Habermas, J. 1996. *Between Facts and Norms*. London: MIT Press.

Hess, C. 2008. *Mapping the New Commons*. Presented at the 12th Biennial Conference of the International Association for the study of the commons, Cheltenham, UK.

Hess, C. and E. Ostrom, eds. 2007. *Understanding Knowledge as a Commons: From Theory to Practice.* Cambridge, MA: MIT Press.

Jentoft, S., van Son, T. C., and Bjorkan, M. 2007. Marine Protected Areas: A Governance System Analysis. *Human Ecology* 35(5):611–622.

Jones, P. J. S. 2001. Marine Protected Area Strategies: Issues, Divergences and the Search for Middle Ground. *Reviews in Fish Biology and Fisheries* 11(3):197–216.

Jones, P. J. S. 2013. Governing Protected Areas to Fulfil Biodiversity Conservation Obligations: From Habermasian Ideals to a More Instrumental Reality. *Environment, Development and Sustainability* 15(1):39–50.

Kosoy, N. and E. Corbera. 2010. Payments for Ecosystem Services as Commodity Fetishism. *Ecological Economics* 69:1228–1236.

Morag, B. and K. Yeung. 2007. *An Introduction to Law and Regulation*. Cambridge: Cambridge University Press.

Nagendra, H. and E. Ostrom. 2012. Polycentric Governance of Multifunctional Forested Landscapes. *International Journal of the Commons* 6(2):104–133.

Newig, J. and O. Fritsch. 2009. Environmental Governance: Participatory, Multi-level and Effective? *Environmental Policy and Governance* 19:197–214.

Ostrom, E., M. A. Janssen, and J. M. Anderies. 2007. Going Beyond Panaceas. *Proceedings of the National Academy of Sciences* 104(39):15176–15178.

Paavola, J. 2004. Protected Areas Governance and Justice: Theory and the European Union's Habitats Directive. *Environmental Sciences* 1(1):59–77.

Pieraccini, M. 2013. Establishing an Ecologically Coherent Network of Marine Protected Areas in English Waters: What Does the Designation of Marine Conservation Zones Under the Marine and Coastal Access Act 2009 Add to the Picture? *Environmental Law Review* 15:104–120.

Pieraccini, M. 2015. Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England. *Journal of Environmental Law* 27(1):45–67.

Pimbert, M. P. and J. N. Pretty. 1995. Parks, People and Professionals. Putting "Participation" into Protected Area Management. UNRISD-IIED-WWF, Geneva. Discussion Paper No. 57.

Prosser, T. 1986. *Nationalized Industries and Public Control: Legal, Constitutional and Political Issues.* Oxford: Blackwell Pub.

Reed, M. S. 2008. Stakeholder Participation for Environmental Management: A Literature Review. *Biological Conservation* 141(10):2417–2431.

Reid, C. T. 2009. *Nature Conservation Law*. 3rd ed. Edinburgh: W. Green.

Reid, C. T. 2011. The Privatisation of Biodiversity?: Possible New Approaches to Nature Conservation Law in the UK. *Journal of Environmental Law* 23(2):203–231.

Rhodes, R. A. W. 1994. The Hollowing Out of the State: The Changing Nature of the Public Service in Britain. *The Political Quarterly* 65(2):138–151.

Rodgers, C. P. 2003. Agenda 2000, Land Use, and the Environment: Towards a Theory of 'Environmental' Property Rights? In *Law and Geography*, eds. J. Holder and C. Harrison. Oxford: Oxford University Press.

Rodgers, C. 2013. *The Law of Nature Conservation.* Oxford: Oxford Universiy Press.

Rodgers, C. P., E. A. Straughton, A. J. L. Winchester, and M. Pieraccini. 2011. *Contested Common Land: Environmental Governance Past and Present.* London: Earthscan.

Short, C. 2008. The Traditional Commons of England and Wales in the Twenty-first Century: Meeting New and Old Challenges. *International Journal of the Commons* 2(2):192–221.

Steele, J. 2001. Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach. *Oxford Journal of Legal Studies* 21(3):415–442.

Stern, P. C. 2011. Design Principles for Global Commons: Natural Resources and Emerging Technologies. *International Journal of the Commons* 5(2):213–232.

Strang, V. and M. Busse, eds. 2011. *Ownership and Appropriation*. New York: Berg.
Valguanera, F. 2014. Access to Nature and Intergenerational Justice. In *Protecting Future Generations Through Commons*. eds. S. Bailey, G. Farrell, and U. Mattei, 189–213. Council of Europe.
Verdery, K. and C. Humphrey. eds. 2004. *Property in Question: Value Transformation in the Global Economy.* Oxford: Berg Pub.
Von Benda-Beckmann, K., F. Von Benda-Beckmann, and M. Wiber, eds. 2006. *Changing Properties of Property*. New York: Berghahn.
Yeung, K. 2010. The Regulatory State. In *The Oxford Handbook of Regulation.* eds. R. Baldwin, M. Cave, and M. Lodge. Oxford: Oxford University Press.

Legislation cited

(i) International
United Nations Convention on the Law of the Sea 1982 (entered into force in 1994).
Convention on the conservation of European wildlife and natural habitats 1979 (entered into force in 1982) (known as the Bern Convention).
Convention on Biological Diversity 1992 (entered into force in 1993).

(ii) European
Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26/1.
Directive 2009/147/EC on the conservation of wild birds (the codified version of Council Directive 79/409/EEC as amended), OJ L20/7 (known as the Birds Directive).
Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206/7 (known as 1992 Habitats Directive).
Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156/17.
Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy" (known as the Water Framework Directive), OJ L 327/1.
Treaty on the Functioning of the European Union
European Convention of Human Rights
(iii) Domestic
Wildlife and Countryside Act 1981
Countryside and Rights of Way Act 2000
Human Rights Act 1998

Marine and Coastal Access Act 2009
Natural Environment and Rural Communities Act 2006
National Parks and Access to the Countryside Act 1949
The Conservation of Habitats and Species Regulations 2010, S.I. 2010/490

Case Law cited

Southern Water Authority v Nature Conservancy Council [1993] 1 WLR 775
R (Fisher and others) v English Nature [2004] 1 WLR 503.
Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264.