



## Divergent perceptions of new marine protected areas: Comparing legal consciousness in Scilly and Barra, UK



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### ABSTRACT

The legal establishment of protected areas is often associated with a situation of conflict arising between conservation and other human activities in particular spaces. This is primarily due to the fact that protected areas law requires changes in the behaviour of resource users. Conservation conflicts arising from the establishment of protected areas are well documented in the social science literature and attempts are made to find ways to reduce such conflicts. Yet, what of cases in which the establishment of protected areas serves to officialise existing sustainable practices and may contain an element of future proofing? Do they still generate practices of resistance and conflict? These questions are answered in this paper comparing two case studies where the authors conducted primary qualitative research: the designation of new Marine Conservation Zones under the Marine and Coastal Access Act 2009 in the Isles of Scilly (South West of England) and the designation of a new Special Area of Conservation under Council Directive 92/43/EEC (the Habitats Directive) in Barra (Scottish Outer Hebrides). Both protected areas are highly unlikely to impose changes in local sea-users' behaviour, as in both cases they validate existing practices and are future proofing, in the sense that they offer tools that can be used to minimize the effects of potential future shocks and stresses, presently unknown. Yet, while in Scilly the new Marine Conservation Zones have been perceived as a positive addition to the seascape, in Barra the Special Area of Conservation has been heavily contested by the local community. The islanders' different perspectives towards protected areas law can be described as divergent 'legal consciousness'. 'Legal consciousness' is a socio-legal concept concerned with the ways in which the law is experienced, interpreted and re-shaped by ordinary people. In our case studies, legal consciousness is a dependent variable, being the product of three main causes: history, power relationships between regulators and regulatees and risk.

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### 1. Introduction

The establishment of protected areas is often associated with a situation of conflict arising between conservation and other human activities in particular spaces. This is primarily due to the fact that protected areas law imposes itself on a complex social texture and, to fulfil its objectives, it requires changes in the behaviour of resource users. Conservation conflicts arising from the establishment of protected areas are well documented in the social science literature. Political ecologists have demonstrated the ways in which

the establishment of protected areas sometimes amounts to instances of dispossession in controlling the management of resources and in curtailing resource users' activities. In reviewing this literature, West et al. (2006: 257) conclude that "the overwhelming impression protected-area creation leaves, is of restricted access and use for rural peoples through legislation, enforcement, and privatization". The literature is wide, ranging from the early 1990s critiques of state appropriation of conservation discourses and technologies at the expenses of local populations (Peluso, 1993) to current discussions of neoliberal conservation resulting in the commodification of nature and the empowerment of the market and private actors in an attempt to economically value resources at the expense of other values and engagements with the environment (Igoe and Brockington, 2007; Brockington et al., 2008). In a recent paper, Vaccaro et al. state that the "act of declaring and

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implementing a conservation policy is a paradigm example of this competition for environmental control" (Vaccaro et al., 2013:255). Conflict between environmental regulation and pre-existing human practices and rights seems to be endemic to the establishment of many protected areas. As a consequence of this, attention has been paid to ways to manage and minimise such conflicts. For example, it has been suggested to strengthen participatory management (Jentoft et al., 2007; Leader-Williams et al., 2010; Redpath et al., 2013), to increasing strategic planning, financial support and balancing responsibilities between top-down and bottom-up management in multiple-use MPAs (Ma et al., 2013) and to consider the contextual interplay between different types incentives (economic, interpretative, knowledge, legal and participatory) to build effective and resilient governance systems (Jones, 2014).

These accounts, however, tend to describe situations where environmental regulation, embodied in the establishment of protected areas, is an exogenous mechanism requiring changes in the behaviour of resource users. A classical view of environmental regulation is therefore at the roots of these accounts. Regulation, in its classical form, is defined as "the intentional activity of attempting to control, order or influence the behaviour of others" (Black, 2002). Yet, what of cases in which protected areas law is not regulation *stricto sensu* but serves to officialise existing sustainable practices and may contain an element of future proofing? Does the establishment of this type of protected area that codifies existing practices still generate practices of resistance and conflict among local communities? Do local resource-users prefer to continue to manage their environment through effective means outside protected area law, or do they accept such codification and why?

These questions are answered in this paper using two case studies: the designation of new Marine Conservation Zones (MCZs) under the Marine and Coastal Access Act 2009 in the Isles of Scilly, in the South West of England, and the designation of a new Special Area of Conservation (SAC) under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206/7 (hereafter "Habitats Directive") in Barra, in the Scottish Outer Hebrides. According to the statutory nature conservation bodies interviewed (25 Feb 2014 and 25 April 2014), both protected areas are highly unlikely to impose changes in sea-users' behaviour, as in both cases they validate existing practices and aim to maintain existing biodiversity in the long run through "future proofing". Indeed, the designations offer management tools (such as bylaws) that could be activated in the future to minimize the effects of presently unknown human and environmental shocks and stresses, such as those produced by climate change. Yet, while in Scilly the new MCZs have been perceived as a positive addition to the seascape, in Barra the SAC has been heavily contested by the local community.

After introducing the methods, case study areas and the results of the research, the article draws on the concept of legal consciousness to frame the results in the discussion. Legal consciousness' studies are a sub-field of law and society scholarship focussed on documenting ordinary citizens' experiences, understandings and making of law and legality. They move beyond a monochrome and traditional understanding of the law as the official law of the state and witness the mundane aspects of law, its emergence, change and contradictions as experienced by ordinary citizens. Law therefore becomes a complex social phenomenon rather than a technocratic policy instrument. Using ethnographic methods, these studies consider the role of law in everyday life, documenting relationships between the production and interpretation of legal meaning and social practices (see for instance Sarat, 1990; Merry, 1990; Yngvesson, 1993; Ewick and Silbey, 1998; Nielsen, 2000; Engel and Munger, 2003; Cowan, 2004; Fritsvold, 2009; Halliday and Morgan, 2013). This paper argues that the different attitudes

towards the new marine protected areas are manifestations of different types of legal consciousness in Scilly and Barra, produced by different histories, power relations and perceptions of risk.

## 2. Methods

The primary qualitative data underpinning this paper was collected by the authors in 2014 during fieldwork in the Isles of Scilly and the Isle of Barra for an Economic and Social Research Council-funded project on the designation and governance of marine protected areas (see: <http://www.ecologiesandidentities.com/>). The bulk of the fieldwork consisted of 15 face-to-face semi-structured interviews in the Isles of Scilly and 16 semi-structured interviews with Scottish stakeholders in relation to Barra, using a questionnaire template with open questions. Purposive sampling was used to identify the interviewees so to make sure that all stakeholders' views were considered. The stakeholders interviewed in both case studies belonged to the same categories, including fishermen, regulators, statutory conservation bodies, local authorities, non-governmental organisations and local activist groups. The interviews were complemented by informal conversations with members of the local community and participant observation of fishermen's practices and attendance in meetings of fisheries, conservation and community institutions. Next to primary qualitative research, a stakeholder workshop was conducted in Barra in July 2014 and another in the Isles of Scilly in January 2015 to discuss the findings collectively. In order to maintain the anonymity and confidentiality of the research subjects in small island communities, when directly quoting from interviews extracts or field notes, it has been decided not to specify the actual institutions/associations to which they belong. The four categories used to code the interviews are: regulators (e.g. Inshore Fisheries Conservation Authorities, Marine Management Organisation, Marine Scotland), nature conservation bodies (e.g. Natural England, Scottish Natural Heritage and environmental NGOs), sea-users (recreational sea-users and commercial fishermen) and local residents (individuals or community representatives with an interest in nature conservation).

## 3. Case studies

This section of the paper outlines the social and economic background of the local communities, their previous engagements with conservation law and the processes of designation of the new marine protected areas.

### 3.1. The Isles of Scilly

"Nowhere else in the whole wide world does the sea enter more in one's life than here in Scilly. A dinner, a church fête, a marriage or a funeral be what it may, but the local tide table must always be consulted" (Jenkins, 1982)

The Isles of Scilly lie some 45 km south-west of Land's end in Cornwall. They are comprised of five inhabited islands (St. Mary's, Tresco, Bryher, St. Martins and St. Agnes) and a myriad of uninhabited isles and rocks surrounded, and at times covered, by shallow sea. The Duchy of Cornwall owns the majority of the islands with the exception of freehold pockets in St. Mary's – notably Hugh Town where the main harbour is located – and Tresco, which is leased to the Dorrien-Smith estate. The marine environment surrounding the Isles of Scilly has attracted the interest of many for its seascape beauty, the copiousness of sea-bird species, its biodiversity richness and the shipwrecks, products of the difficult

encounter between a forceful and unpredictable Atlantic weather and an energetic naval history. Consequently the marine environment has been captured in photography (Arlott, 1973), literature and natural history accounts (Lewes, 1858; Parlson 2007), poetry (Maybee, 1973) and archaeology (Thomas, 1985) for over a century. Inshore fishing is deeply embedded in the cultural history of the place, though it has never been the primary or only occupation of the islanders, so that the history of local fishing in the place is predominantly one of subsistence and barter rather than of large-scale commercial ventures (Isles of Scilly Museum, 2011).

Due to the adverse weather conditions, fishing in the winter months is not possible so “if you can't go fishing, you've got to find something else to do ... a lot of the fishermen had agricultural interests as well” (regulator interview 2014, April 25). In the past, fishing and flower farming were indeed interrelated, with Scillonians mastering both activities. If today tourism is the main driver of the Scillonian economy, “everybody [still] messes around with boats, everybody has one or two crab pots, a few nets” (regulator interview 2014, April 25). The total number of commercial fishers is however small, totalling 24 in a population of 2,200, and many of these are part-time fishers. The type of gear used is static (pots and some nets) primarily used to catch lobsters, crabs and crawfish during the summer months on under 10 m boats, mostly single-handed.

Although the number of local byelaws is low with only two in place (see <http://www.scillyifca.gov.uk/da/116023>), there are a number of voluntary agreements, agreed en-bloc in 2011 that all the members of the Fishermen's Association have signed up to. Some of these voluntary agreements put in written form are pre-existing customary practices such as the v-notching of berried lobsters, while others, such as the prohibition to cut kelp for commercial reasons within MCZs, or the setting up of a local recording zone where commercial and unlicensed fishermen would record the species taken and returned, have been decided during the discussions of the Scilly Marine Protected Areas Working Group, a local group created to support the designation of Marine Conservation Zones, as discussed later.

According to both a regulator and a representative of sea-users interviewed (regulator interview 2014, April 22 and sea-user interview 2014, April 14), the commercial fishers are a cohesive community and are self-policing. This is generally the case also for the recreational fishers, though at present there is some discussion about turning one voluntary agreement into a byelaw. Under the voluntary agreement, recreational fishermen have agreed to work no more than ten pots and mark their gear. The findings of the IFCA, also echoed by the sea-users interviewed, is that very few are actually marking their gear, making it difficult to differentiate between commercial and recreational pots and therefore creating obstacles for enforcement. As a result, a Crustacean byelaw may be introduced in the near future with a section limiting the number of hobby pots and specifying their catch at five crabs and one lobster landed or retained on board, prohibiting store-pots and requiring tags displaying the recreational fisher's name and phone number on each pot.

Overall, Scillonian fishing industry has a low impact on the environment, thereby permitting the preservation of the rich biodiversity of the Isles, as evidenced by multiple conservation and landscape designations. There are 26 Sites of Special Scientific Interest (SSSIs) under the Wildlife and Countryside Act 1982, a Ramsar site designated in 2001 under the Convention on Wetlands of International Importance, especially as Waterfowl Habitat 1971, a Special Protection Area (SPA) under Directive 2009/147/EC under the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20/7 also classified in 2001 and the whole area is an Area of Outstanding Natural Beauty. The conservation importance of the Isles of Scilly's marine habitats and

species has been confirmed by the designation of the Isles of Scilly Special Area of Conservation Complex under the Habitats Directive in 2005. The Special Area of Conservation (SAC) covers a surface of 26850.95 ha. The Annex I habitats that are a primary reason for designation are reefs and sublittoral sandbanks and intertidal sandbanks supporting seagrass beds and rich animal communities. Shore dock is an Annex II specie that is a primary reason for the designation, while grey seal is an Annex II specie present as a qualifying feature. Noticeably, the management scheme of the SAC (see: [http://www.scillyifca.gov.uk/sitedata/pdfs/IOS\\_SAC\\_Management.pdf](http://www.scillyifca.gov.uk/sitedata/pdfs/IOS_SAC_Management.pdf)) states that all the protected features are in favourable conditions and therefore put the conservation objectives as “maintain”, rather than “recover”, thereby confirming the high level of sustainability of existing marine practices.

11 new Marine Conservation Zones were designated under the Marine and Coastal Access Act 2009 in 2013, covering a total area of over 30 km<sup>2</sup> and clustered under one designation order (The Isles of Scilly Marine Conservation Zone Designation Order 2013 (2013, no.10)), though they maintain distinct conservation objectives and protect different features (boundary map available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/259328/mcz-map-isle-of-scilly-sites-boundary-overview.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/259328/mcz-map-isle-of-scilly-sites-boundary-overview.pdf)). All the MCZs are contained within the SAC except for one (Bristows to the Stones), and complement the protection given by the SAC by protecting new features. “Marine Conservation Zones give you that kind of added layer, really of being a little bit more specific” (local resident interview 2014, April 24). Similarly to the SAC, most of the draft conservation objectives for the MCZs are “to maintain” the features in the current conditions (Lieberknecht et al., 2011). Features with a draft conservation objective set as “recover” are spiny lobsters in all the MCZs where this feature is present, and fragile sponge communities, pink-sea fan and infralittoral and circallittoral rocks in the Bristows to the Stones' MCZ. The reason for this difference in conservation objectives for Bristows to the Stones is not unsustainable practices by Scillonian fishermen, as primarily scallopers from the Cornish mainland have a track record of working in the area (interview with regulator 22 April 2014).

This means that, according to the regulators and conservation bodies interviewed (interview 22 April 2014 and interview 25 April 2014), most of the existing practices of Scillonian fishermen can continue after designation, rendering the MCZs a future-proofing tool rather than a regulatory means to stop current local practices. The boundaries of the 11 MCZs were primarily defined by the locally constituted Isles of Scilly Marine Protected Area (MPA) Working Group, based on local knowledge and photographic evidence from a diver and trustee of the wildlife trust and a number of survey data, some of which commissioned at the time of designating the SAC and approved by Finding Sanctuary, the regional stakeholders group for the South–West. Finding Sanctuary, like the other three regional groups (Net Gain for the North–East, Balanced Seas for the South–East and Irish Seas for Irish seas) had to present the evidence to a Scientific Advisory Panel, a national panel of experts reviewing the recommendations of all English regional groups (for the process of designation see [Natural England and JNCC, 2010](#)). The environmental knowledge presented by the Scilly MPA Working group, endorsed by Finding Sanctuary, was such that the Scientific Advisory Panel gave the scientific evidence underlying Scilly's proposed MCZs a score of 5 out of 5. Compared to other cases of MCZ designation in England, the scientific base was strong in Scilly and strengthened by the diving surveys, but an even more unique element that distanced Scilly from other English MCZ designations was the bottom–up nature of the process and the high level of consensus between all stakeholders involved in deciding the boundaries of the MCZs and the draft conservation objectives. In other parts of the country, the process of MCZ

designation was not so bottom–up and generated conflicts between stakeholders (Pieraccini, 2015).

In Scilly the local group was able to play such an active role and to propose an entirely self-made list of MCZs, all of which were designated in the first tranche of the designation process. Although local groups like the Scilly MPA Working Group were set up all over England and were an important input to the four wider regional groups that were to send a report with final recommendations to the government, not many were so successful as the Scilly. This is demonstrated by the fact that of the 127 MCZs that the four regional groups proposed, only 27 saw designation in the first tranche on the 21 November 2013 (see: <https://www.gov.uk/government/collections/marine-conservation-zone-2013-designations>). Therefore, what made the process of designation of MCZs in Scilly successful can only partially be attributed to the Marine and Coastal Act 2009 and national implementation documents as in other areas the same legal pathway produced very different results. It was the ability of the Scillonians to draw on their knowledge and exploit the procedural openings of the law to fulfil their collective interests that played an important role in a successful designation process.

### 3.2. The Isle of Barra

Barra is one of the most southerly inhabited islands of the Scottish Outer Hebrides, with a population of just over 1000 people. It is relatively remote, separated from the mainland by a five hour ferry journey, or a beach-landing flight from Glasgow, the schedule of which is dictated by the tides. Another 40 min ferry journey joins Barra to the other Hebridean islands to its north. This sound that rests between Barra and the Hebridean islands of Uist and Eriskay to the North is the site of a candidate SAC, submitted to the EU in 2013 under the Habitats Directive. The candidate SAC covers 12507.46 ha (boundary map available at: <https://data.nbn.org.uk/Reports/Sites/GA000327UK0012705/Groups>). Annex I habitats that are a primary reason for designation are sandbanks slightly covered by sea water all the time and reefs. Harbour seal is an Annex II species presented as a qualifying feature.

Unlike in Scilly, Barra islanders fought the selection of the SAC fiercely. The role played by locals in the selection of the site was a largely antagonistic one. Barra residents resisted the selection of the SAC for thirteen years, from first proposal in 2000 to eventual selection in 2013. Local opposition to the designation of an area cannot however be a ground for non-designation under the Habitats Directive, as Member States are under a duty to designate areas if the ecological prerequisites are there. Socio-economic considerations do not play a role in designation.

Similarly to Scilly's MCZs, however, the SAC does not threaten any existing practices of the Barra islanders, and is considered by a conservation body (interview 2014, February 25), to be simply a case of future proofing a healthy and well-managed environment against any currently unknown potential threats.

The economy of Barra is largely dependent on tourism, with a fish processing plant to the north of the island and a Toffee factory in the capital, Castlebay, being the main industries. Fishing and crofting (a traditional Scottish form of mixed farming) are also important contributors to the economy. The majority of Barra fishers work inshore and operate from small, static gear vessels fishing for shellfish. Relatively recent data from the European Commission state that fisheries dependency, as a proportion of total employment is around 11.1% (European Commission, 2006).

A small number of trawlers, primarily fishing for prawn (langoustine), operate further afield. These trawlers do not fish in the Sound of Barra SAC area. The majority of fishers operating in the Sound of Barra are small-scale shell fishermen, and a small number

of scallop vessels, originating from Uists to the north. The fishing practices in Barra are largely low-impact and sustainable, which can go some way to explain the excellent health of the marine environment around the island, which is largely considered to be pristine. As is the case in many island communities, the people of Barra often have multiple working identities, and cross into many different fields of employment. It is usual for a Barra resident to be both a fisher and crofter, often with a tourism business (such as operating a bed and breakfast, self-catering accommodation, or island tours) during the busy summer season.

Barra has an ambivalent history of conservation. As mentioned above, both the land and sea of Barra are in excellent environmental condition, thanks in large part to the long-term low impact activities of Barra residents. There are currently two land-based conservation areas in Barra, both of which are on the peninsula of Eoligarry, which extends out into the Sound of Barra to the north of the island. The first of these, to the south of the peninsula, is an SSSI covering 441.45 ha of machair and sand dunes. The second of these, to the north of the peninsula and jutting into the Sound, is a SPA to protect aggregations of breeding Corncrake. At 144.04 ha, the SPA is smaller than the SSSI to its South. The protected areas are situated close to one another but have no geographical overlap.

Unlike in Scilly, the people of Barra, and particularly Eoligarry, have a history of conflict with these protected areas. As crofters, the islanders often take an active approach to local land management, and have a unique relationship with government regulation. These issues mean that Eoligarry residents regularly brush up against restrictions put in place as part of the SPA. In order to access crofting grants, government funds which are commonly offered to traditional crofters across Scotland, crofts within a protected area must first have permission for any plans and projects from Scottish Natural Heritage, Scotland's statutory nature conservation body. In general, it appears to be this extra layer of bureaucracy, and related delays that causes issues with protected areas' designation for islanders.

## 4. Results

The interviews with Scillonian sea users and regulators conducted in April 2014 revealed a sense of accomplishment in having been able to take the process into their own hands: *“making sure that we grabbed it and made the decisions and pushed it along ... so we just spoke with Natural England people and tried to get an understanding of what they were pushing for and come up with something that was acceptable to everybody.”* (sea-user interview 2014, April 18).

The same feeling of empowerment was reiterated by many, including regulators and statutory nature conservation bodies, as these quotes demonstrate:

*“I was on the Steering Group of Finding Sanctuary, which is the regional group and I, almost at the very first meeting I said, well look this is what we're doing in Scilly and they were saying ‘oh that's miles ahead from the rest of us, we haven't even thought about it yet’. I said, ‘well that's what we're doing’.”* (regulator interview 2014, April 22).

*“It [the MCZ process] has sort of given them a lot of local pride, you know, they are very proud of their MCZs and they are proud of the work that they put into getting them designated.”* (conservation body interview 2014, April 25)

The example of the Isles of Scilly shows that the local residents were able to take conservation law with them, making sure it would integrate with their practices not only by choosing

boundaries for the MCZs that would fit the existing protected seascape but also by considering the conservation objectives and management measures all at once during the designation. The choice of the management measures and the drafting of the 11 voluntary measures during the process of MCZ designation gave to the local community a sense of security. Marine conservation law was not risky for the Scillonians because they could shape it. As a representative of a conservation body, “*I don't think they [the fishermen] would have agreed to these areas if they were unsure of what it might mean*” (conservation body interview 2014, April 15).

Other conservation bodies reiterate this point: “*I think nothing really had to change particularly because, you know, a lot of what they wanted was already in place anyway*” stressing the future proofing character of Scilly's MCZs (regulator interview 2014, April 22). Both statutory nature conservation bodies and environmental non-governmental organisations noted in interviews that the MCZs offer a wider range of mechanisms and protect a wider range of species and habitats compared to the SAC, so in the event in which the ecological balance might change in the future, mechanisms would be available to address the issue.

The unknown nature of potential MCZ management measures were a particular problem encountered by other stakeholders participating in the designation process elsewhere in England. The law itself does not require management and designation to be discussed simultaneously, and the official literature was clear that site management would not be decided until designations were in place. This gave a sense of uncertainty to the stakeholders involved in MCZ designation, as clearly summed up by a regulator: “*in many other areas one of the criticisms of the process was precisely that management measures were not discussed, the management objectives, and as a consequence people felt like ‘well we would like to designate this one, but if we don't know what's going to happen in this one, how are we going to with it?’ you know.*” (regulator interview 2014, April 22).

This sense of uncertainty about the potential risks associated with unknown regulation can be considered as the other side of the ‘future-proofing’ coin. Designations carry with them a risk of future disempowerment as new rules and restrictions are brought in. Where designations can minimise the potential of currently unknown, externally derived future environmental damage (i.e. reducing environmental risk), they can also lead to currently unknown, externally imposed limitations and controls being inflicted on islanders in the future (i.e. increasing regulatory risk). This regulatory risk was circumvented in Scilly thanks to the ability of the local stakeholders to work with the law in a way that minimised the risk that regulation posed to their current practices, and to re-define what should be discussed during the designation process of MCZs so as to include firm discussions about future management.

In Barra, the interviews with locals produced very different results. One local resident, who played a central role in the fight against the Sound of Barra SAC selection, put it like this:

“[The SPA is] very restrictive. Most of the crofting communities can qualify for financial aid, which is normally between 30 and 70% of the total costs [of projects]. But if we want to do it in this area, we have to get prior permission from Scottish Natural Heritage, which often took several weeks. And in one case we needed prior permission for drainage, emergency drainage, which choked up at high tides, around the 20th December one year, and of course Scottish Natural Heritage happened to go on holiday on the 21st, and never responded to our request – the area was flooding the whole time, over three weeks – they never responded until the 10th of January. It wrecked the [corncrake] habitat ... So after three weeks we then got a response to go ahead. So then we had to wait another number of

days, perhaps weeks, to put an application in for the funding, but in that particular time we couldn't wait, we weren't prepared to wait, because people's crops were getting damaged, their livestock was in danger, so at that particular time and other times we've lost out on financial aid because of inaccessible red tape.” (local resident interview 2014, February 17).

Regulatory risk was an important aspect of the SAC designation for Barra islanders. Interestingly, the position of the Barra islanders regarding designations cannot be seen as simply anti-conservation, as it has often been painted. Indeed, some of the same islanders that campaigned most vehemently against the SAC also take an active role in the management of the existing protected areas, and have campaigned for more investment in the SSSI. It was not the prospect of conservation itself, but the management methods proposed by Scottish Natural Heritage that they disagreed with:

“On top of this village being an SPA, we're also an SSSI at the other end. I've twice written to Scottish Natural Heritage after their report – every six years they produce a report saying it's in acceptable condition – we've written twice to Scottish Natural Heritage saying ‘we beg to differ’. And they've come back and said ‘no, we're happy with it’ – basically, ‘go away’ ... but it needs constant work. And this is what we were telling them for the SSSI. Because [protecting the sand is] just a small part of it – it's flora, fauna, and if that's totally sand swept, the flora and fauna is not going to last. As we've discovered through this campaign, the likes of Scottish Natural Heritage, they don't listen to reason, they just have a set of rules.” (local resident interview 2014, February 17).

The poor communication between Scottish Natural Heritage (who formally makes decisions about conservation designations) and the Barra community is an ongoing threat in the perspective of the large number of Barra residents who oppose the Sound of Barra SAC. Here, it is interesting to note that there are no Scottish Natural Heritage offices on the island of Barra, the closest office being an approximate two-hour journey away in the Uists, to the north. The Uists and Eriskay, share a border with the Sound of Barra SAC (Eriskay sits completely within it), and a number of Uist fishers work within the SAC – more so than from Barra, to the south. Similarly to Barra, these islands also have significant areas covered by land-based designations. Yet the long fight against the SAC has been primarily undertaken by Barra residents and not by locals of the other affected islands. Notably, the Uists and Eriskay have an accessible local Scottish Natural Heritage office staffed by islanders (Eriskay is connected to Uist by a land bridge).

In Barra, by comparison, the environmentalists of Scottish Natural Heritage are usually seen as outsiders, imposing limitations from afar. The SAC is consistently seen as externally imposed:

“The people who live out here live out here. Live, eat, work, breathe the place. And when you get people, whoever they may be, bureaucrats, politicians, scientists or whatever who come out here and tell them things, tell them what to do or what not to do, it doesn't come across very well at all.” (sea-user interview 2014, February 17).

The reasons for having the SAC are called into question, even by Barra residents with an explicit interest in environmental protection: “*It's only being designated because it fulfils the EU quota. That is what the feeling is from people. We're just being used, basically.*” (sea-user interview 2014, February 17). The most significant driver for the antagonism towards the SAC is consistently given as one of risk.

Although it is likely that little (if any) current activity would be stopped by the SAC designation, locals fear that designation wrests control away from the island, and that central governments (in Edinburgh, London and Brussels) and external environmental bodies cannot be trusted:

“With Europe, you don't know. Because it only takes one person to suggest that a specific activity is damaging the environment, and it's up to the person that's being accused of doing the damage to prove that they are not. So it's guilty until proven innocent. So how can one individual fisherman or a group or a community continue to do this time after time? So this was another great fear. Within the Habitats Directive it's so restrictive.” (local resident interview 2014, February 18)

“Our experiences of all of these designations are: we go on with our lives. We have little understanding, or little discussion, historically, of what they are for, why they are there, and the implications they have for us. We go about our lives in the conventional manner, we try to get on with elements of our work and we are told ‘you can't do this’, and ‘you can't do that’. And it's creeping ... every day there is another ‘you can't’ ... Removing the power from the very people that have been responsible for [protecting the environment] I find particularly offensive. And that is what we see designations as removing, making us the enemy, and removing any influence or control we might have.” (local resident interview 2014, April 20).

Islanders' antagonism toward the Sound of Barra SAC was played out in lengthy struggles against the selection, a process that began in 2000 and ended with the official designation of the site in 2013. There has been little suggestion of ignoring or contravening EU legislation now that it is in place. Instead, for over a decade, the people of Barra have used different aspects and languages of legality to fight the selection.

Locals studied the wording and requirements of the Habitats Directive and associated UK law, and attempted to mobilize these legal frameworks to fight the selection, by querying the strength of the scientific evidence produced by the statutory nature conservation body, and that the proper procedures for designation had been followed. The language and tenets of human rights law were also adopted, with residents argued that their human rights, as laid out in the European Convention on Human Rights, were being infringed. Official enquiries were requested, and Freedom of Information requests made, searching for a legal loophole that would prove the designation did not properly meet Habitats Directive requirements. Even the United Nations Declaration on the Rights of Indigenous Peoples was called upon to support their claims that the SAC should not legally be designated (see: <http://www.sams.ac.uk/ruth-brennan/belonging-to-the-sea>).

The Barra campaigners against the SAC immersed themselves in the law; looking for ways they could use it as a tool to protect their rights. As one community member put it:

“[I had to] root around [in legislation] ... to find out what the planks of our arguments would be. So that required a lot of not just reading but actually thinking. But we did come up with some pretty good arguments, which I do genuinely feel we could actually go to court and actually probably win a case on.” (local resident interview 2014, February 18).

Barra anti-SAC campaigners become very legally literate, and had an intimate knowledge of not just the Habitats Directive, but also the minutes of Government meetings, the duties and responsibilities of conservation bodies, and the procedures for site

selection and designation. They took an active role in the legal process, albeit of a very different type to that taken in Scilly, grounded in animosity and in attempts to prevent the protected area from being designated. Their legal literacy served to resist interference from outside, dissenting against the SAC designation for collective interests.

## 5. Discussion

This paper argues that the different perceptions of marine protected areas in the local communities of Barra and Scilly manifest different types of legal consciousness, produced by three interlinked factors (history, power and risk). In this sense the legal consciousness of the islanders of Scilly and Barra is a response to memories of conservation (e.g historical negative experiences with land-based protected areas for the crofting community in Barra), present power relationships between the regulators and regulatees governing the establishment of new marine protected areas and different perceptions of regulatory risk regarding potential management measures. Below, we discuss the legal consciousness of the two islands by reference to the literature's typologies.

As mentioned in the introduction, legal consciousness studies focus on everyday experiences and understanding of law and legality (for a critical introduction, see Mezey, 2001; Cowan, 2004; Silbey, 2005). Legality is defined as “an emergent structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings. Legality operates, then, as both an interpretive framework and a set of resources with which and through which the social world (including that part known as law) is constituted” (Ewick and Silbey, 1998: 23). Using empirical case studies and ethnographic methods, legal consciousness scholars have documented the ways in which lived experiences relate to the law and have considered how people's subjectivities shape and are shaped by legal ideology. Legal consciousness scholars are more interested in the way law and legality operate and emerge, than on laws' formal substance, documenting what law and legality do and how they are made and re-made in everyday life (Silbey, 2005). Consciousness is both a deliberative, intentional action and a habitual practice developed by living within a legally pregnant social landscape. The dichotomy between agency and structure therefore collapses.

One key framework to define different types of legal consciousness comes from the work of Ewick and Silbey (1998). In the *Common Place of Law*, stories narrated by ordinary New Jersey citizens are categorised by Ewick and Silbey within three types of legal consciousness: “before the law”, “with the law” and “against the law”. “Before the law” is a type of consciousness that embodies the formal understanding of the law as an objective, detached, impartial, fair and authoritative sphere of control. At the opposite side of the spectrum lies the “against the law” type of legal consciousness where people perceive law as a powerful and arbitrary system that does not represent them or it is inaccessible to them and therefore they violate conventional laws using subterfuges or exploiting cracks in the system. The law is no longer seen as an external, detached form of authority but as a colonizing force of the everyday. Finally, “with the law” is a form of legal consciousness in which the “law is described and ‘played’ as a game” to fulfil individual gains (Ewick and Silbey, 1998: 48). In this game, which is morally neutral, individuals are expected to strategically deploy their resources in order to use the law to their own advantages.

One of the key arguments made by Ewick and Silbey is that actors do not necessarily fall in to one of the three categories as they can display a multi-faceted legal consciousness, blending the different types, like one of the research subjects of their book, Millie Simpson. Ewick and Silbey show the different engagements of

Millie with the law, sometimes taking the form of conformity and acquiescence, other times of resistance, and other times of strategic, instrumental mobilization to achieve personal objectives. Over the years there have been a number of constructive criticisms to Ewick and Silbey's framework. Two are especially pertinent to our case studies.

The first is by Hertogh (2004), who injects some insights of legal pluralism into the legal consciousness scholarship. Indeed, Hertogh argues that legal consciousness scholars have primarily considered individuals' engagements with official state law and in doing so have made of law an independent variable, which is not part of the empirical analysis. Legal pluralism adds to legal consciousness literature the problematization of what counts as law and the analysis of subjects' definitions of law and right. The distinction between legal consciousness a la Ewick and Silbey and legal pluralism a la Ehrlich is, for Hertogh, a difference between official law in action and living law. Living law is understood as a set of obligatory norms shared and bounding a community but not necessarily sanctioned by official legal sources. As Hertogh puts it, "legal consciousness in this sense essentially refers to people's own ideas about the law, regardless of any 'official' law" (2004: 474–475). Law therefore becomes a dependent variable and part of the empirical analysis. For Hertogh, legal consciousness scholarship should study situations in which law is both an independent and dependent variable. Hertogh's analysis is relevant in this context because legal consciousness in both Scilly and Barra is responsive to historical variables, regulatory power relationships and understanding of regulatory risk regarding management measures. It is therefore a dependent, rather than independent variable.

Other interesting critiques pertinent to our case studies have emerged from studies concerned with the legal consciousness of collective interests of radical environmental activists. In this context, Fritsvold (2009) has added to Ewick and Silbey's tripartite distinction a fourth dimension—"under the law"—to account for cases in which the law is perceived as a veil to protect an illegitimate social order and Halliday and Morgan (2013), drawing on the cultural theory of the anthropologist Mary Douglas, have emphasised the multi-faceted orientations to legality of dissident groups and argued for a re-contextualisation of legal consciousness, avoiding a general theory of hegemonic power. Halliday and Morgan argue that radical environmental activists carry out a collective anti-hegemonic struggle by being "under the law" in Fritsvold sense, while simultaneously also being "with the law" and "below the law", albeit a law that does not equate with official state law. The concept they employed is that of dissenting collectivism, meaning these authors explore groups' orientations towards legality, rather than individuals' orientations as Ewick and Silbey did. It is exactly this attention to forms of collective agency through which orientations towards legality unfolds that is also at the basis of our analysis.

Applying the analytical tools of legal consciousness to our study, we can conclude that if Scillonian are close to the "with the law" typology of Ewick and Silbey, Barra islanders are closer to the dissenting collectivism articulated by Halliday and Morgan. Playing a key role in the decision-making and governance of MCZs, Scillonians use the law to express and validate existing environmental relationships. In so doing, protected areas' law serves to officialise existing collective practices and to gain a sense of control of regulation, engaging in "anticipatory decision-making" (Ewick and Silbey, 1998:147). In Scilly, being with the law happens through forms of pragmatic appropriation but what the Scillonians have that Ewick and Silbey's "with the law" subjects lack is a non-individualistic bias as they are playing with the law to obtain collective benefit. In Scilly, being "with the law" happens through collective forms of appropriation.

As for Barra, similarly to Scillonians, the islanders want to pursue collective empowerment, but do so through resisting interference from top-down regulation, hence approximating to the dissenting collectivities of Halliday and Morgan. They dissent against a particular instance of law, the establishment of the SAC. In Barra, at first inspection the locals may appear to be "against the law" in the Ewick and Silbey sense, but theirs is not a subversive move: quite the contrary. They do not contest law as such but they do contest the way it applies to their own lives. Due to the negative historical experiences of other types of designation, the sense of disempowerment arising from conservation measures decided from the top with little local involvement in decision-making and the uncertainty regarding management measures, Barra locals contest the selection of that particular SAC, not the legitimacy of law itself. Indeed, they articulate their claims using legal terms, call upon other legal frameworks to support their arguments and collective interests, and they are interested in understanding the law and mobilising it in a way that can foster their aims. This was not only visible during the face to face semi-structured interviews but also during the stakeholder workshop organised in Barra. Here, the stakeholders as a group were very interested in better understanding the nuances of the Habitats Directive and its Scottish transposition in order to mobilise parts that could lead to more local control. They were attempting to use law to "try to alter the structures of power in law", as Halliday and Morgan (2013:13) put it. Local antagonism towards the new protected area is therefore a response to their past and present experiences of disempowerment and perception of future regulatory risk, not a counter-hegemonic effort.

Though both the Scilly MCZs and the Barra SAC are unlikely to have a serious impact on local sea users activities (they are not regulation *sensu stricto* as they are not fundamentally re-shaping locals' environmental behaviour) the reactions of the locals towards these new protected areas are dramatically different due to the histories of conservation shaping their experience of and attitude towards them, the different procedural requirements for the establishment of MCZs and SACs leading to different degrees of local decision-making power in nature conservation law, and the (un)certainly related to the management measures (regulatory risk).

Indeed, Barra islanders started from a position of mistrust towards conservation law due to negative impacts of previous conservation designations on resource users. Differently, in Scilly, islanders did not consider pre-existing conservation measures as having negative effects on their practices. At the time of the introduction of new marine protected areas therefore Barra and Scilly locals had different historical lenses through which they saw conservation designations, influencing the way they related to the new ones. Next to this factor, the differences in the procedural openings regarding the establishment of MCZs and SACs need to be considered as they lead to different degrees of decision-making power in nature conservation law. Although both MCZs and SACs are nature conservation designations, MCZs offer the opportunity for a higher degree of engagement with the local community compared to SACs, leaving more freedom for some communities to shape their conservation strategies through participatory decision-making at the designation stage as evidenced by the stakeholders' working groups created to provide recommendations in relation to MCZs and by s 117(7) that allowed socio-economic interests to be considered at the designation stage. This is different to SACs, whose designation is a technocratic exercise and it is solely based on scientific grounds (Pieraccini, 2013). Moreover, Scilly's interaction with the MCZ process allowed for discussion of management measures during the designation, localising the process and minimising the sense of risk associated with uncertain regulation. As

considered above, however the MCZ process was not a process empowering local communities everywhere. It was the Scillonians' ability and context that made it possible to exploit its procedural openings.

As a consequence, in Scilly, new MCZs came to be perceived as future proofing tools minimising future environmental risk. In Barra, due to the SAC's clearer divorce between designation and management measures, and the fact that the former was imposed from outside with no clue as to future management, local residents felt a sense of disempowerment and saw conservation law and policy as a risk in and of itself. This risk is not an environmental risk but a regulatory risk: their activities were perceived at risk of being stopped, and their island way of life at risk of being regulated away or controlled from outside.

As explained by reference to histories of conservation, decision-making power and consequently perceptions of environmental or regulatory risk, this different positioning towards protected areas law is not the manifestation of a fixed legal consciousness. As mentioned above, [Ewick and Silbey \(1998\)](#) point out that a person's legal consciousness is not static as individuals move from being with the law to being against or before the law and as [Halliday and Morgan \(2013\)](#) discuss groups can manifest simultaneously different types of legal consciousness depending on their cultural environment and cultural biases. Legal consciousness is not an unchangeable trait of an individual or a group but it is context dependent and emergent from specific situations. This is a point also captured by [Merry \(1990\)](#) in her account of how working class Americans' legal consciousness, developed through individual life experiences, changes when they go to court. Attitudes to the law therefore are not constant but develop through experience and positioning within specific contexts. Lived encounters with the law re-shape consciousness, offering a sense of dynamism. It is precisely the contingency of the law, produced by people's engagements with it, that is at the core of the legal consciousness work. Therefore, it would not be surprising that Barra islanders' current antagonism or Scillonians' enthusiasm diminished in the future, and new forms of legal consciousness were to develop depending on the procedures and substance of new management measures responding to new environmental challenges. As the cases of Barra and Scilly demonstrate, in spite of the fact that new protected areas are unlikely to require changes in the environmental practices of local residents, they are perceived in a very different way. Such perceptions have been explained in this article by reference to the concept of legal consciousness, which has so far not been considered in scholarly accounts of conservation law and policy. Legal consciousness, a product of complex dynamics between agency and structure to be studied empirically, brings forth a constructive understanding of the law in society by considering the way ordinary people appropriate, interpret, shape and/or reproduce legal frameworks.

## 6. Conclusion

Conservation law strategies that do not impose changes in behaviour of resource users are not necessarily uncontested, as the case of Barra demonstrated. Paying attention to the variables/causes producing particular legal consciousness helps us to understand different reactions to the setting up of new protected areas and different manifestations of collective agency, as considered in the case studies above. But to what extent does a socio-legal analysis of this kind also assist us in producing conservation policies that are supported by local communities? The legal consciousness literature avoids this reformist tone as its aims are primarily analytic-descriptive rather than prescriptive. Differently, in the context of conservation studies, much space is dedicated to attempts at

offering solutions to resolve/manage environmental conflicts. If we want to retain the policy aims of the conservation literature, to what extent can shedding light on legal consciousness help in devising conservation solutions?

Taking legal consciousness seriously means constructing a cultural bridge between local communities and conservation policy-makers. Legal interventions in conservation would benefit from being responsive to the different kinds of legal consciousness that are the result of lived experience and interaction with the law. This however raises a series of issues that could form the basis of future research. First of all, attention to legal consciousness requires a definition/categorisation of it. What counts as legal consciousness? Who should decide what types of legal consciousness should be considered in environmental decision-making? Legal consciousness literature is already divided on the meaning of the term, with some scholars focussing for instance on legal consciousness as legal ideology ([Sarat, 1990](#)) whilst others exploring more the subjective experiences of individuals, considering issues of identity and the evolution of the self, due to different legal encounters ([Engel and Munger, 2003](#)). This highlights the conceptual fluidity of the term and its openness to different interpretations. This is because, as [Silbey notes \(2005\)](#) drawing on Bourdieu, intellectual schemas, such as that of legal consciousness, are themselves socially constructed and subject to and representative of particular inclinations. In this sense, the search for legal consciousness and the way it relates to conservation law and policies could contain a hidden risk, by becoming a politically manipulated cultural representation, fitting pre-existing conservation goals without being a strategy of empowerment or at least inclusion.

What legal consciousness is, what it does and how it is produced should not merely be of academic interest to rethink the meaning and boundaries of the law or to highlight situations of inequality in the distribution of legal powers or resources, but should also be of interest in environmental policy-making and policy implementation circles for what it can offer in the minimisation of environmental conflicts. In our case, Scilly was a quick and easy designation, while Barra an expensive, long and drawn out one. So from a policy perspective, legal consciousness matters in the achievement of government conservation objectives. Understanding how ordinary people relate to the law serves to understand how effectively and efficiently environmental measures can be implemented.

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