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Privatising fishing rights: the way to a fisheries wonderland?

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***P.L. 481** Overfishing is higher on the political agenda than it ever has been, spurred on by polemic films such as *The End of the Line*¹ and by campaigns such as *Hugh's Fish Fight*.² On both sides of the Atlantic fisheries managers are reacting to a perceived environmental crisis by significant changes to fisheries management. In the United States, the National Oceanic and Atmospheric Administration (NOAA) has supported "catch shares",³ while in the European Union the proposed reforms of the Common Fisheries Policy (CFP) called for the adoption of transferable fishing concessions.⁴ All of these methods of allocation have the same central concepts. Administrators set an annual quota on each species, which is then distributed to fishermen on a long term basis. The annual amount those fishermen can land will vary, but an individual's proportion of the total catch which can be landed will remain the same. Fishermen are then permitted to buy in quota from others or sell unused quota. The market regime enables fishermen to buy quota rather than run the risk of landing fish illegally. These fledgling markets need to be formed around a workable legal framework. The aim of this paper is to introduce the theory of market based fisheries management, contextualise that management by an analysis of the UK quota management system, and investigate the major public law issues such as legitimate expectation, vires and human rights issues, which have been thrown up by what is becoming a de facto privatisation.

The creation of rights for fishermen

Costello et al, in their seminal paper⁵ on market based fisheries management measures set out the reasons for over-fishing in *Science* as follows:

"... why are actively managed fisheries systematically overexploited? The answer lies in the misalignment of incentives. Even when management sets ***P.L. 482** harvest quotas that could maximize profits, the incentives of the individual harvester are typically inconsistent with profit maximization for the fleet. Because individuals lack secure rights to part of the quota, they have a perverse motivation to 'race to fish' to outcompete others. This race can lead to poor stewardship and lobbying for ever-larger harvest quotas, creating a spiral of reduced stocks, excessive harvests, and eventual collapse."

Even where a firm annual quota has been placed on the whole fleet, the individual fishermen within the fleet will continue to race each other for fish, and that will be the overriding feature of the industry; stewardship and sustainable business planning are not given opportunities to flourish by the frenzied shape of the market, which encourages fishermen to extract as much as they can as quickly as possible. The misshapen market also leads to fishermen lobbying for a greater year on year award of quota rather than accept that fisheries need to operate within scientific limits. This is particularly important as fishermen in the United States, the United Kingdom and many other countries have consistently had an extremely powerful voice in the corridors of power, given the relatively small size of the industry. This is echoed by John Gummer, the UK Fisheries Minister under Mrs Thatcher:

"The Industry has too much political clout. The lawn mowing industry employs more people but does not have four ministries, England, N. Ireland, Wales and Scotland."⁶

The solution proposed by Costello (and many other fisheries economists)⁷ is as follows:

"Rather than only setting industry-wide quotas, fishermen are allocated individual rights. Referred to as catch shares or dedicated access privileges, these rights can be manifest [sic] as individual (and tradable) harvest quotas, cooperatives, or exclusive spatial harvest rights; the idea is to provide to fishermen, communities, or cooperatives a secure asset, which confers stewardship incentives ..."

The proposed solution is to allocate quota on an individual basis as well as on a national basis. Fishermen can then trade that quota between them, this will deflect market attention away from lobbying to expand quota to accommodate the race. Instead a market structure around the quota itself is created, incentivising stewardship as well as introducing greater economic rationality into fishing fleets,⁸ tradability serves this latter purpose.

As the Duchess said in Alice in Wonderland:

"If everyone minded their own business the world would go around a great deal faster than it does."
***P.L. 483**"⁹

The collective term for these approaches is known as rights based management. It is the purpose of this paper to investigate how easily tradable quota can be achieved in law and the issues which arise as a result.

Is "rights based management" rights based management?

Ab initio, the Costello solution leaves the lawyer with something of a headache. The quote above has used the terms quota, privilege, right, share and asset as if they were all the same thing, but each of these has a subtly different legal definition, giving a different suite of rights and obligations, and existing within differing administrative frameworks. These issues are amply exemplified by taking just one term from the list: a privilege. A privilege in the law of England and Wales is a form *profit à prendre*,¹⁰ a clear property right which permits the taking of produce or soil from another's land. The removal of a privilege by the state would require compensation under art.1 of the First Protocol of the European Convention on Human Rights, as a result it would also need to be in the public interest and need specific statutory authority. In the United States, the Magnusson Stevenson Fishery Conservation and Management Act enables the grant of "limited access privileges" by the fisheries administrators. The US legislation expressly states that the limited access privilege can be cancelled without compensation for a taking under the Fifth Amendment. So in the United Kingdom a privilege is a compensable property right while in the United States it is not.

The differing definitions of the term privilege are a particularly stark example, but lumping a loose aggregation of legal terms together is fraught with danger. Great care needs to be taken as economists and lawyers can use the same terms to mean different things. It is quite possible that an economist would loosely use the term right, when they do not realise the implicit permanence of a property right, and the difficulties that creates should the administrators which to subsequently alter their policy.

Those wishing to apply the Costello solution need to ensure they are aware of the essential features of the rights they will be creating, rather than relying on poorly used legal terminology. It is those key features which will build a well functioning market, not whether something is an asset, a privilege or a concession, but what are those key features?

According to the theory all that is needed is an allocation of quota on an individual basis, for that allocation to be tradable and for it to be "secure". Such a brief set of management criteria is too cursory to meet the requirements of a disposal of state assets and the introduction of a proper rights based management regime in law.

Under international law ownership of commercial fishing rights vests in the coastal state,¹¹ so the legal relationship between the state as potential owner of the resource and its fishermen is fundamental to the management of the resource. It is an analysis of this relationship which provides the real strength of rights based management; an exploration of the extant rights between the parties should reveal ***P.L. 484** where the legal issues lie and provide a pathway to implement successful management.

The United Kingdom example

The United Kingdom is a good place to undertake such an analysis. It has a large exclusive economic zone of 737,000km²,¹² one of the largest in the European Union, and it has a sizeable commercial fishery.

The United Kingdom (in tandem with the European Union) has developed a secondary market in the sale of quota¹³ for many species. It is at least some way to implementing a tradable quota system and at the forefront of the changes proposed to the CFP.

The United Kingdom has three tiers of management, with fisheries policy being controlled under the CFP and implementation of policy being left to the UK Government, and to the devolved administrations of Scotland, Wales and Northern Ireland.

This makes the United Kingdom a particularly useful case study as it combines the developing body of EU law in this area with a system based on the common law principles of the United States, Canada, Australia, New Zealand and other jurisdictions.

How is quota allocated in the United Kingdom currently?

EU legislation governing the allocation of quota

The European Union operates on the basis of shared access to EU Member States' waters. The EU allocates fishing opportunities among its members within those waters; this is principally decided upon the basis of "relative stability".¹⁴ Relative stability is a mechanism for allocating a proportion of total allowable catch (TAC) between EU Member States; it does not guarantee a fixed amount of fish but sets a defined share for each Member State of the total catch available. That share does not change, although the actual amount of TAC may vary each year. This feature of the CFP is a derogation from the core principles of the European Union,¹⁵ which otherwise would allow equal conditions of access under EU competition law.

Once the level of TAC has been set for each quota species it is shared out between Member States. TACs and quota for stocks of fish are set out in an annual regulation.¹⁶ Each Member State then decides, for vessels flying its flag, on the method of allocating the fishing opportunities assigned to that Member State, in accordance with EU law. Member States are free to choose anything from a first *P.L. 485 come first served basis, a system of equal distribution to all undertakings concerned, or an auction.¹⁷

Article 27 of the original proposed replacement to the Basic Regulation recommends significant changes to Member State's' quota allocation: Each Member State shall establish a system of transferable fishing concessions.¹⁸

This position is very much up for debate and decisions over the allocation of quota have created what the UK's National Federation of Fishermen's Organisations calls a febrile atmosphere.¹⁹

UK legislation governing the allocation of quota

UK fisheries authorities have two functions in the administration of the United Kingdom's fish stocks: firstly an ownership role and secondly an administrative one. For historic reasons the United Kingdom, like many common law jurisdictions, has an exceptionally complex ownership and management system.

Ownership of the United Kingdom's fisheries

Any public body purportedly granting fishing rights must own them in the first place²⁰; it must have the ability to give good title. Unfortunately the ownership of the United Kingdom's fisheries is a murky area which has only recently begun to be explored by academics,²¹ and been left well alone by legislators despite significant changes in legislation in recent years.²²

Fish²³ are *ferae naturae*, or wild by nature, and as such are ownerless until captured, whereupon they become the property of the captor.²⁴ A captor only has possessory title to fish, so if they escape they become, once again, ownerless until recaptured.

By the Fishery Limits Act 1976,²⁵ the United Kingdom declared an exclusive fishery zone (EFZ) up to the 200 nm limit. The declaration of the EFZ claimed sovereignty over fishing rights. Unfortunately the Act was silent²⁶ as to ownership vehicle of the United Kingdom's new fishing rights, and it must be left to a review of the common law and legal treatise to work out what has happened.

At least to the 12 mile limit,²⁷ and probably for the whole of the EFZ,²⁸ there is a public right to fish which operates in UK waters. *P.L. 486

The ownership of the public right to fish is a question that has not been frequently examined by the courts. Justice Heath in the early 19th century case of *Kelcey v Baker*²⁹ stated that the King was, prima facie, seized of the public right to fish in trust for his subjects. This is also confirmed in the Irish case of *Murphy v Ryan*,³⁰ and is supported by the Victorian fisheries lawyers Charles Stewart³¹ and Hubert and Stuart Moore³² when quoting *Lord Hale in De Jure Mare*:

"But though the King is the owner of this great wast [sic], and as a consequent of his propriety, hath the primary right of fishing in the sea and the creeks and the arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof ..."

Precedent indicates that ownership of the public right to fish rests in some aspect of the Crown. The next question is which Crown entity do those rights vest in? It is possible that the UK Fisheries Minister exercises ownership rights on the basis of Crown prerogative, but it is also possible that the right sits within the Crown Estate, and is therefore administered by a separate public body, the Crown Estate Commissioners.

There is a potential constitutional muddle with two potential public bodies having ownership rights, but none of them expressly doing so. Devolution to Scotland, Wales and Northern Ireland makes this an even more complex problem. For instance, the public right to fish was imported into Scottish waters, after the Union of the Crown with England and Wales, under the Fisheries (Scotland) Acts of 1705 and 1756,³³ so has a shorter history. The Scottish Government has a management function in respect of fishing rights in its water and the Lord Advocate of Scotland has an additional role as guardian of public rights³⁴; the Scots therefore have four government offices with a nebulous interest in ownership of the right.

Whichever state body is the de jure owner of the public right to fish a key limitation placed on this ownership function is that the Crown is unable to "sever" (or privatise) the public right to fish without express statutory authority. The case of *Malcolmson v O'Dea*³⁵ held that the prohibition on privatising tidal fisheries stems from the Magna Carta.

For customary reasons the United Kingdom has very few private sea fisheries. Those that exist are either very old and are thus confined to estuarine areas or are created under the Shellfish Acts³⁶ where only the shellfishery can be privatised; it is still possible to capture other fish in these areas. De facto privatised fisheries have also been created around fish farms, but together these private fisheries comprise a very small total of the available area. *P.L. 487³⁷

UK sovereign rights to coal, oil, aggregates³⁸ and the construction of offshore wind farms³⁹ are clearly defined, in contrast fishing rights are extremely vague. As a result, UK authorities have managed fisheries and quota by regulatory tools. This has a number of rather odd effects in the way management has developed. The UK fisheries management regime has arisen out of series of ad hoc reactions. The result is a system akin to controlling the whole of UK land law through the planning process, and an *Alice Through the Looking Glass World*, where the regulatory system has had to invent quasi-proprietary rights to keep pace with the quite reasonable demands of it by every-day fishermen. For an economist, whether a property right is created through property law or is a quasi-property right made under administrative law is of no real significance, but for lawyers this difference is fundamental and hugely problematic; public law has its own checks and balances regarding the behaviour of government and these vary greatly from the constraints on government when disposing of public property. Using administrative processes in a way for which they were not designed can easily result in a horrible muddle. Unfortunately, a good example of the resultant mess is the UK quota allocation system.

The allocation of quota in the United Kingdom

Domestic quota management arrangements should be straightforward. In some countries the national grants of commercial fishing rights explicitly limits the amount of fish that can be landed by species, weight and other dimensions.⁴⁰ In the United Kingdom, the position is more complex. All commercial fishing is authorised under the public right to fish and quota is created by the regulatory method of attaching restrictions to fishing vessel licences,⁴¹ which accord to the allocation of that vessel's quota.

Quota allocation is at no charge based on historic landings attaching to each vessel. In contrast to the initial free allocation, a secondary or derivative market has evolved in the sale of quota between quota "holders"⁴² and fishermen. It developed at first informally, then latterly with the tacit approval of fisheries authorities and the establishment of state supported mechanisms to transfer quota.⁴³ The

result is that fishing vessel licences have become incredibly complex⁴⁴ and quite valuable creatures.⁴⁵ In 1999, the combined value of quota a vessel licence was estimated to be over one billion pounds.
*P.L. 488⁴⁶

Quota is transferred in two ways:

For fishing vessels where the owners are not members of a Fish Producer Organisation (FPO),⁴⁷ known as non-sector vessels, and for the under-ten-metre fleet, a separate condition is placed on each fishing vessel, which sets a limit on that vessel's catch. Quota can be "traded" between vessels and with FPOs but this needs to be orchestrated via the Marine Management Organisation (MMO).

For vessels over ten metres which are members of an FPO, quota is allocated to the FPO, which reallocates quota via its own set of rules.⁴⁸ A condition is then placed on the fishing vessel licences of the FPO members requiring compliance with the FPO's quota management rules. Within FPOs quota is allocated on the basis of a fixed quota allocation (FQA). Each FPO is allocated their quota, which accords to the "track records" of all the vessels that are members of their organisation. Track record is accorded to each vessel owner originally with reference to fishing between certain years of landings by that vessel. FPOs then decide internally how that quota should be allocated to their members. This is all a little odd. FPOs are not public bodies but they inhabit a strange quasi-public world where they have some authority for their activities emanating from EU law in ensuring that fishing is carried out along rational lines and that conditions for the sale of their member's' products improve.⁴⁹ In the United Kingdom, the supervising government department, the Department for the Environment, Food and Rural Affairs, (Defra) has made it their policy to allow FPOs to manage their member's' quota and to allow the trade of quota between FPOs and more recently non-sector fishing vessels.⁵⁰

Implications of the United Kingdom's quota management system

Defra has made it plain on its website that it does not intend to create property rights and reserves the right to make alterations to the allocation system, although after full consultation.⁵¹ This trading system has also recently been subjected to close Parliamentary scrutiny as there is no central record of who holds the United Kingdom's quota, and rumours abound. These have even included unconfirmed stories that Manchester United Football Club has joined ranks of fisheries speculators derisively known as "slipper skippers".⁵² Some fishermen's groups in the United Kingdom have been calling foul over this arrangement as they claim that 75 per cent of the United Kingdom's fishermen have been allocated just 4per cent of the United Kingdom's quota.⁵³ The UK fisheries authorities initially refused to publish details of quota holders in the United Kingdom citing reasons of *P.L. 489 commercial confidentiality⁵⁴ but have announced the creation of a register of quota.⁵⁵ At present it is impossible to independently verify quota ownership, but this is clearly an important issue, if the success of the quota market is to be independently verified. It leaves a very uncomfortable taste in the mouth that a public right is being allocated free of charge to an unknown group of people who then can rent it out.

Furthermore the lack of definition of the nature, extent and term of quota holdings has become a real issue. In response to a Freedom of Information Act request regarding disclosure of the details of who held the United Kingdom's quota the MMO responded that the industry had an "established legitimate expectation" for access to quota.⁵⁶ This is a strange claim, since there has been no court case. It certainly requires some further investigation, because if the current arrangements are made permanent this would mean that the primary harvesting right over an area of land two and half times the size of the United Kingdom has been accidentally privatised; it would amount to one of the largest single acts of squatting which has ever taken place.

This important point is before the courts. In 2012, after consultation, Defra decided to reallocate unused quota from the FPOs to the inshore fleet.⁵⁷ The UK Association of Fish Producer Organisations sought leave to appeal the decision, which was granted in August 2012, and the case came to court in May 2013.⁵⁸

Legitimate expectation and quota management

Legitimate expectation is one of a number of grounds where an affected party may seek to judicially review the exercise of discretion by a decision-maker, through the courts. Like claims for estoppel, it is viewed as something of a forlorn hope, as the courts have put high hurdles in place, lest decision makers have their discretion unduly fettered. The author does not have copies of any claim made to

MMO supporting a claim of legitimate expectation, but the law in this area is not particularly complex and it is worthwhile to speculate where a cause of action may lie.

A legitimate expectation may arise in two circumstances: first, from an express promise given on behalf of the public authority; or, secondly, from the existence of a regular practice, which the claimant can reasonably expect to continue.⁵⁹

In the case of *R. (on the application of Bibi) v Newham LBC (No.1)*⁶⁰ the court set out the current-three part test:

- whether by practice or by promise, has the public authority committed itself; ***P.L. 490**
- whether the authority has acted or proposes to act unlawfully in relation to its commitment; and
- what should the court do.

Those benefitting from the regime may claim that the system of allocating quota to the existing recipients free of charge has become permanent, either through some promise or through regular practice. Lodging a successful action for legitimate expectation requires more than that though. A promise needs to have been made by the fisheries authorities which is clear, unambiguous and devoid of relevant qualification.⁶¹

It would be an impossible task to review all the communications between the commercial fishing sector and the UK fisheries authorities, but it is plain from the information available that there have been consistent efforts to retain discretion on quota allocation for the Minister. For example, the current quota allocation rules⁶² state in their short introduction: "The rules are reviewed annually in consultation with the fishing industry and reissued prior to the start of each quota year." Moreover, on page one they state: "Ministers may, *at their discretion*, agree to issue quota allocations for the stocks covered by these rules ..."

It is true that regular practices have been established in the allocation of quota in the United Kingdom. However, there are a number of reasons why an expectation for that practice to continue may be flawed:

- Quota is part of fisheries management policy in general, which is constantly changing as it responds to the changing socio-economic and environmental needs.⁶³
- Free allocation of quota is a permissible form of subsidy to the UK fleet, it is not a policy that is carried out throughout the European Union.⁶⁴
- The EU and UK fisheries policies are also subject to permanent review, it is possible that stocks may cease to require quota once they have recovered sufficiently.
- Fishermen have effective representation such as the FPOs, the National Federation of Fishermen's Organisations ("NFFO") and the Scottish Fishermen's Federation ("SFF"). They have strong lobbying and legal representation and are fully aware of the changing administrative environment in which they operate.

Even if quota allocation can be regarded as a regular practice or that some form of promise has been made by the UK fisheries authorities, there is still a further hurdle to a successful claim.

The current arrangement is that fishing vessel licences are allocated at no cost to fishermen. These licences are short term but there is an understanding that they ***P.L. 491** will be renewed and can be transferred. The Defra guidance on fishing vessel licences is contradictory. On one hand it states:

"All licences are issued at the discretion of Ministers and can be revoked or varied at any time for the purposes of regulating sea fishing."⁶⁵

On the other hand, earlier in the same document it states:

"If you wish to license a vessel for the first time you need to arrange for a transfer of a licence 'entitlement' from an existing licence holder."

It is difficult to reconcile a system which strongly represents that licences are purely temporary and at the same time permits the transfer of "entitlements", thus inferring some sort of permanent right attendant to a fishing vessel licence. The use of inverted commas around the term entitlement is

important; they are possibly used to imply that entitlement to a licence is not a formal relationship but one permitted by current fisheries policy. This interpretation is supported by the context of the rest of the document:

"The licence enables UK Fisheries Administrations to control fishing so that the United Kingdom does not exceed the quotas set under the EU Common Fisheries Policy. The licence allows Fisheries Administrations to set specific conditions and requirements, such as arrangements for the landings of stocks."

The most extreme claim possible for fishermen under this system is that the vessel licensing and quota regime has created permanent rights for existing fishermen. One of the key weaknesses to this argument is that there does not appear to be any statutory authority for the UK fisheries authorities to privatise part of the fishery; there are three issues with this in terms of vices.

First, the UK's Marine Management Organisation (which controls the English fishing fleet) describes the quota management system for FPOs as follows:

"The producer organisations manage their quotas as they see fit, and take responsibility for ensuring that they do not overfish their allocations. They also can arrange quota swaps either domestically with other producer organisations, the 10 metre and under fleet or the non-sector, or internationally with other member states." ⁶⁶

The delegation of the management function of quota to FPOs by UK fisheries authorities may not be permissible under the doctrine of *delegatus non potest delegare* or unlawful delegation. The Sea Fish (Conservation) Act 1967 grants authority to Defra to draft licence conditions, not the FPOs; this could be a delegation too far.

Secondly, a policy which used vessel licences to limit quota made some sense because there was a direct relationship between the vessel and the limitation on its catch. However, quota management practice has changed leading to trades in quota itself, resulting in a perception that a formal right has been created. The **P.L. 492* mechanics of quota trades has led to the creation of virtual or "dummy" vessels⁶⁷ to "hold" quota paving the way for slipper skippers.⁶⁸ This is an odd arrangement; s.4 of the Sea Fish (Conservation) Act 1967 prohibits fishing by British fishing vessels without a licence, it does not endorse the creation of fishing vessel licences without a vessel.

To make matters more confusing the English Marine Management Organisation recently⁶⁹ sent out a press release entitled: "Under 10 metre leasing scheme 2011–2012". This may seem innocuous enough but the term leasing is the intimate language of property law.⁷⁰ A tradable condition on a licence cannot be leased as it is not a property right, there is little doubt that whatever discretion is permitted by the Sea Fish (Conservation) Act, it did not extend that far.

Thirdly, the case of *Malcolmson v O'Dea*⁷¹ makes the point that the Crown is not entitled to dispose of the public's fishing rights without statutory authority. The transformation of the vessel licence into a mechanism which severs the public right is merely a means to circumvent this prohibition and is, perhaps, fundamentally flawed. While the Crown owns the fishing rights, the Sea Fish (Conservation) Act grants no title to the fishery to Defra and it cannot of dispose property it does not own.

So whether there is sufficient statutory authority for the UK quota regime is in question. It has, however, been argued that a compensable claim for legitimate expectation may arise even where the public authority has made an illegal promise if there is sufficient justification and it is proportionate.⁷²

Leaving the vices issues for a moment, there is an explanation which might just give rise to a legitimate expectation. The FQA system commenced in 1999 and the vessel licensing regime in the late 1980s; in both cases the introduction was incremental, as not all vessels required licences and not all stocks were quota species (that is still the case). In the *Council for Civil Service Unions v Minister for Civil Service*,⁷³ a case involving the peremptory de-unionisation of GCHQ, 35 years of prior practice was deemed sufficient for a legitimate expectation to arise. If, for argument's sake, quota and vessel licence allocation had been hived off from the general renegotiations of fisheries policy and subsidy, there would be a chance that the allocation of fisheries in this way would have become regular practice. Furthermore, if the Defra publications casting doubt on any permanent arrangement have somehow been ignored by the fishing sector or overridden elsewhere in communications between the UK fisheries authorities and the fishing sector it is possible that some form of legitimate expectation may have arisen.

Even if somehow the hurdles of vires can be overcome and the courts find a legitimate expectation, a successful claim is not automatic. In the case of *R. v North and East Devon Health Authority Ex p. Coughlan*⁷⁴ Lord Woolf held that even if there was legitimacy of expectation the court has the task of weighing the *P.L. 493 requirements of fairness against any overriding interest relied on for changing practice and disappointing the legitimate expectation without compensation. There may be many reasons for such an overriding interest to exist. Here are two:

Quota stocks now account for a sizeable proportion of UK landings. Quota controls access to much of these landings yet, if the legitimate expectation claim succeeded, the rights to this massive and valuable resource would have been the subject of a *de facto* privatisation. Such a huge and unregulated transfer of public property to the private sector is not in the public interest, particularly at a time of significant economic uncertainty.

A successful claim would restrain the Minister's ability to conduct fisheries policy both at a UK and EU level, particularly in the context of rapidly declining fish stocks. It would involve severe limits being placed on quota policy, which is a macro-level regulatory tool. Courts are far less likely to support a legitimate expectation in the context of high-level policy⁷⁵

On the available evidence the grounds for litigation to maintain the current allocation do not look particularly strong, and there is certainly no call to label the legitimate expectation as established.

To put this all into context, there has been an action for legitimate expectation taken in the past by the fishing sector. In the case of *R. v Minister of Agriculture, Fisheries and Foods Ex p. Hamble (Offshore) Fisheries Ltd*⁷⁶ fishermen tried to claim a right to aggregate vessel licences on the basis of established practice.⁷⁷ The court held that it was in the overriding public interest to permit changes to fisheries policy because of decline in fish stocks and changes to EU policy. The failure of the Hamble case speaks volumes.

Other legal issues associated with quota management arrangements

A number of other legal issues are raised by the allocation method in respect of competition and human rights law.

FPOs have a strong connection with the regional fisheries around the United Kingdom. They have undoubtedly been very helpful to the UK fisheries authorities, but this has come at a cost of creating entities within the private sector which have the potential to control the quota market and fishing opportunity within their areas. Such a dominant position, although not necessarily illegal in itself, is open to claims of abuse under competition legislation.⁷⁸ It is easy to envisage a position under the current regime where new entrants to the market or others such as the under-10-metre vessels or non-sector vessels felt that they were at a competitive disadvantage.

The issue of competitive disadvantage for quota allocation based on track record also raised issues under the International Covenant of Civil and Political Rights leading to the case of *Haraldsson & Sveinsson v Iceland*.⁷⁹ In 1984, Iceland *P.L. 494 introduced a quota management system that allotted quota to operators of ships for demersal (bottom feeding) species. This quota was granted to those operators who could show a track record during the period November 1980 to October 1983; quota was allocated free of charge. In 1990, that allocation was made permanent. The claimants, although they had worked on demersal fishing boats during the requisite period, acquired their vessel afterwards. They found themselves excluded from quota and had to rent quota at high prices from others. Their initial actions in the Icelandic courts failed and in 2003 they sought relief from the United Nations Human Rights Committee on the basis of unfair discrimination. This action was successful, as the permanent allocation of quota in this way was found to be unreasonable and discriminatory to new entrants.

Another key human rights issue is whether UK quota amounts to a compensable interest, in the event of a redistribution or other curtailment by the state. Art.1 of the First Protocol of the European Convention of Human Rights protects "possessions" from unreasonable interference by the state without compensation. The case law on this is mixed. In the ECJ case of *Jaderow*⁸⁰ although the case was decided on other grounds the Finnish Government compensated fishermen when they altered the arrangements governing their "lease" of quota, while in the United Kingdom case of *R. v Minister of Agriculture, Fisheries and Food Ex p. Bostock*⁸¹ no compensation was paid for the extinguishment of milk quota rights, even though the UK Government subsequently introduced a compensation scheme.⁸² This is a hugely important grey area. In advance of a major policy decision

concerning changes in allocation the appropriate fisheries authority must be able to have some relatively clear idea of potential cost. The quiet shift of quota allocation from being a policy to a possession is potential powder keg.

Consequence of a weak legal system

The United Kingdom has developed exceptionally poor foundations to its quota management system. The use of administrative rather than property law to undertake the distribution of a public right has weakened the hand of strong management, and created a complex and vulnerable system, which has pushed the UK administrators into a downward spiral of ever more creative regulation. It is difficult to see how a properly functioning market can be developed, which balances both public and private interests without moving quota away from vessel licences and into a direct Crown licensing system, and a system where the rights and responsibilities of quota holders are properly understood at the start.

One of the key areas where this weakness has been demonstrated is the allocation of quota on the basis of track record. The rationale behind track record is well explained by the National Federation of Fishermen's Organisations in a press release:

"The ultimate basis for quota allocations in the UK both before 1999 and for the introduction FQAs in that year was historic access to the resource. Those with a demonstrable track record of participation in the fishery received an **P.L. 495* allocation proportionate to the level of that participation. This core principle is the same basic starting point as the principle of relative stability in EU and in other international fisheries agreements."

This is a fascinating statement; the justification for the allocation would appear to be that the European Union runs on the concept of relative stability and nations have negotiated the continued access on the basis of "grandfather rights" and so the practice should be permitted to continue at an individual level. It is an assertion which does not stand up terribly well. Unless there is some momentous change a sovereign state does not change its legal personality, age or retire. A permanent allocation therefore amounts to a type of national border over fisheries resources; it is a very desirable state of affairs for sovereign states. It does not automatically follow that the same should be true for individual fishermen within the sovereign state. An obvious issue with permanent allocation to a class of fishermen is that those who benefit from the initial windfall will age, retire, sell their quota and allow consolidation of the industry. Over time it is natural for quota holders to become separated from the remaining fishermen, and this could easily create a class of rentiers, while the public lose control of their right. Even those within the industry find it potentially divisive. In a recent paper by Cardwell one of the winners from the system is quoted as saying:

"It's not right, the way things are now. We were lucky, that's all, just lucky. Families just can't get into it now, and it's a real shame. It's killing the fishing. I'd change it all back if I could."⁸³

Allocation of quota is a form of privatisation and needs to be tightly managed.

The current trade of quota at full market value in a derivatives market by those who have themselves received it free, does not indicate that the public are getting full value for their fishery, or that all fishermen are being treated fairly. A privatisation should follow the usual tried and tested rules of public property disposal, so that the market functions properly; there is no rush, fishing rights deserve a well orchestrated asset disposal, not a fire sale, however well intentioned.

Comparison of quota allocation with the disposal of property by UK state bodies

The Office of Government Commerce published extensive guidance on the disposal of public property. The key objective is for UK authorities to achieve an open market valuation upon the disposal of any asset.⁸⁴ There may be reasons for the disposal of an asset at below market value, if the disponent has some sort of social purpose. Such purposes were identified in a review carried out by Barry Quirk into the disposal of public assets for community management. His report *Making Assets Work*⁸⁵ details many examples of the successful management of public property by community groups and social enterprises. The report then goes on to set out the criteria for good risk management to ensure that public assets continue **P.L. 496* to be managed in the public interest.⁸⁶ These include keeping close control of the contracts that permit the asset's disposal and managing the expectations of the recipient parties properly. There is a danger that in allocating a public

resource at no cost, UK fisheries authorities are in the process of losing control of public fishing rights. This could easily lead to a position where already profitable commercial companies are receiving a free gift of public property for no justifiable reason. This compares very unfavourably with the tight controls over the disposal of public assets practised, almost universally, elsewhere in government.

Concluding remarks on the United Kingdom case study

Even the relatively well-developed regime in the United Kingdom gives rise to some fairly significant legal issues. It is a rights based management system in that there is a public right to fish; there is no clear vesting of fishing rights in UK fishermen yet UK administrators purport to "lease" quota. This not only pushes the limits of vires, but this ripples into other legal issues ranging from legitimate expectation to human rights claims. It is no wonder there is a febrile atmosphere within the industry; this stems from having very poorly defined arrangements in the first place, and is a breeding ground for internecine politics. Property rights surrounding fisheries need to be adequately vested in an appropriate government body, and quota should be issued according to the laws of contract and property as well as administration. Appropriate legal frameworks need to be in place to support rights based management. These are the same lessons for any state sell off. With fishing rights being worth in excess of a billion pounds and the fate of numerous charismatic communities riding on them the allocation of fishing rights in the UK needs to be undertaken properly.

The Costello solution and the UK example

So how well does the Costello solution map onto UK position, particularly as the United Kingdom is seen by some commentators⁸⁷ as having a rights based management system? Looking at the three key issues identified by Costello: individual allocation, security and tradability, it is easy to see why a non-lawyer would be interested in these issues in particular. It is true that in the United Kingdom there has traditionally been annual reallocation of quota to the same holders, so that quota at present would appear secure, and there has been the development of a derivative market in quota. However, while that may be the de facto position, looks may be deceptive; the de jure position is very different. Defra have always maintained that allocation via track record is only a policy decision, and indeed the current consultation on changes to allocation looks to challenge that arrangement. As to tradable quota there are doubts whether the current trade in quota is, in fact, legal for reasons ranging from the Magna Carta, to human rights, to vires, to illegal delegation. If a robust legal framework is to be created, which the Costello solution needs, a number of things need to happen: **P.L. 497*

- The UK's fishing rights need to be vested in a recognisable form in a public body, which has the express right to dispose of those fishing rights;
- Some form of consideration needs to be paid by fishermen to the public for quota. There may be cause to dispose of the public fishing rights at below the market value for social and environmental reasons, but these reasons need to be carefully considered and there needs to be adequate contractual safeguards to manage expectations;
- A non-discriminatory process needs to be designed to allow new fishermen to buy quota. Express measures need to be included to ensure the system does not breach competition (anti-trust) provisions;
- Clear and certain terms (including the length of term and explicit requirements on tradability) need to be established.

It will take primary legislation in the United Kingdom to cover these points, but in the long run it will be worth it if the race to fish can be tamed.

Conclusion

It is a common tragedy that the disciplines of law and economics share so much but yet can be divided by a gulf of detail. However enthusiastic a group economists may be on the use of the invisible hand of the market to resolve entrenched problems, the UK fisheries administration system is a stark example of the dangers of neglecting proper due diligence in the implementation of an economic solution. There are plenty of existing templates in the laws of property and contract for the acceptable sale of state resources, and although security, tradability and individual allocation are three major issues in these templates they are not the only ones: issues of sale price, competition,

length of term, restrictions on sale, tender process and many other practical issues are all essential for a properly functioning market and to ensure a fair deal for the public. Most of the time the state disposes of public assets transparently and effortlessly; somehow fisheries management has become needlessly complicated and stepped through the looking glass into a strange world of a quasi-property rights and dummy vessels. With the issue live in the courts at the moment, it will be interesting to see how the law in this area develops.

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- *. The author would like to express his thanks to the late Geoffrey Marston of the University of Cambridge, whose patient scholarship provided the key to unlocking this puzzle, and Seth Macinko of the University of Rhode Island.
- 1. Based on the book by *Charles Clover, The End of the Line: How overfishing is changing the world and what we eat*, (Ebury Press, 2004).
- 2. See <http://www.fishfight.net/> [Accessed April 22, 2012].
- 3. *National Oceanic and Atmospheric Administration, NOAA Catch Share Policy*, see http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/noaa_cs_policy.pdf [Accessed April 22, 2012].
- 4. Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy COM. 2011/425, art.27.
- 5. C. Costello, S. Gaines and J. Lynham, "Can Catch Shares Prevent Fisheries Collapse?" (2008) 19 *Science* 321, 1678–1681.
- 6. Gummer J. quoted in *Fishing News*, November 23, 2001.
- 7. See, e.g. R. Arnason, "Advances in Property Rights Based Fisheries Management: An introduction" (2007) *Marine Resource Economics* 22, 335–346.
- 8. For further discussion see *R. Barnes, Property Rights and Natural Resources* (Hart, 2009), Ch. 8 and COM (2011) 425, pp 7–8 and 15–16 (recitals 29–32).
- 9. *Lewis Carroll, Alice in Wonderland* (Macmillan & Co, 1920), p.84.
- 10. *Halsbury's Laws of England, 5th edn* (LexisNexis, 2008), Vol.2 para.714.
- 11. United Nations Convention on the Laws of the Sea (December 10, 1982), art.56.
- 12. *Royal Commission on Environmental Pollution, Turning the Tide*, (London: TSO, 2004), p.30.
- 13. *MRAG Consortium, Rights Based Management Catalogue* (2009, European Commission) (FISH/2007/03 EU 2009), p.82.
- 14. Other issues like climate change also are a factor.
- 15. For a fuller discussion on the principles of EU quota allocation see *R. Churchill and D. Owen, The EC Common Fisheries Policy* (Oxford: OUP, 2010), pp.149–164 and pp.195–202.
- 16. Council Regulation 57/2011 on fixing for 2011 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in certain non-EU waters [2011] OJ L24/1 is an example of one such regulation.
- 17. *Lootus Teine Osauhing (Lootus) v Council (T-127/05)* [2007] E.C.R. II-245.
- 18. Note the introduction of yet another quasi-legal descriptor.
- 19. *National Federation of Fishermen's Organisations, "Battle Lines Drawn on Transferable Fishing Concessions"* (News Headlines, August 11, 2011). NFFO at http://www.nffo.org.uk/news/battle_lines.html [Accessed April 22, 2012].
- 20. Nemo dat quod non habet.

21. For a full explanation see R. Barnes, "Revisiting the Public Right to Fish in British Waters" (2011) I.J.M.C.L. 26, 433–461, See also T. Appleby, "The public right to fish, is it fit for purpose" (2005) 16 Water Law 201, and T. Appleby, "Damage by fishing in the UK's Lyme Bay—a problem of regulation or ownership" (2007) 18 Water Law 39.
22. Marine and Coastal Access Act 2009 and Marine (Scotland) Act 2010.
23. The definition of fish includes shellfish, see *Halsbury's Laws (2007 Reissue) Vol.1(2) para.801*, but not whales, see Statute Edward II Prerogativa Regis 1324.
24. *Halsbury's Laws of England, 5th edn (2008), Vol.2 para.711*.
25. Fishery Limits Act 1976 s.1.
26. This must be contrasted with the approach to oil rights where it is plain that the exploration rights vest in the Crown under Continental Shelf Act 1964 s.1.
27. *Commonwealth v Yarmirr* [2001] H.C.A. 56; (2001) 08 C.L.R.1.
28. See R. Barnes, "Revisiting the Public Right to Fish in British Waters" (2011) I.J.M.C.L. 26, 433–461.
29. *Kelcey v Baker* (1803) unreported cited by *G Marston, The Marginal Seabed: United Kingdom Legal Practice (Oxford: Clarendon Press 1981), pp.17–21*.
30. *Murphy v Ryan* (1873) 11 M. 309.
31. *C. Stewart, A Treatise on the Law of Scotland relating to Rights of Fishing, 2nd edn (T. and T. Clark, 1892), p.20*.
32. *H. Moore and S. Moore, The History of the Law of Fisheries, (Stevens and Haynes, 1903), p.98*.
33. *The Laws of Scotland: Stair Memorial Encyclopaedia (LexisNexis, 1993) Vol.18 para.521*.
34. *Scottish Law Commission, Discussion Paper on the Law of the Foreshore and the Seabed (Edinburgh: TSO, 2001), p.26 para.4.33*.
35. *Holroyd v Marshall* 11 E.R. 999; (1862) 10 H.L. Cas. 191.
36. Sea Fisheries (Shellfish) Act 1967.
37. There is another method of privatising fisheries via a peculiar charitable arrangement established in the case of *Goodman v Saltash Corp* (1882) 7 App. Cas. 633, but those circumstances were exceptional.
38. Continental Shelf Act 1964 s.1.
39. Energy Act 2004 s.84.
40. *MRAG Consortium, Rights Based Management Catalogue (European Commission, 2009) (FISH/2007/03 EU 2009)*.
41. The statutory authority for the imposition of these conditions is Sea Fish (Conservation) Act 1967 s.4(5), which states: "A licence under this section shall be granted to the owner or charterer in respect of a named vessel and may authorise fishing generally or may confer limited authority by reference to, in particular... the descriptions and quantities of fish which may be taken."
42. This word holder is chosen deliberately; there is no generic legal term for the holder of a tradable permission.
43. The National Federation of Fishermen's Organisations give a clear explanation of their view of the development of UK quota at: NFFO at http://www.nffo.org.uk/news/battle_lines.html [Accessed April 22, 2012].
44. A quick glance at the Marine Management Organisation's website will show quite how complex. [MarineManagement.org at http://www.marinemanagement.org.uk/fisheries/management/licences_current.htm](http://www.marinemanagement.org.uk/fisheries/management/licences_current.htm) [Accessed April 22, 2012].
45. See, e.g. FAFB at <http://www.findafishingboat.com/ukcommercial-fishing-licences-for-sale-over-10m> [Accessed April 22, 2012]. These figures may also not include the quota itself.
46. *Agriculture Select Committee Eighth Report —Sea Fishing, HC 141 (1999) at 81*. [Parliament.uk at http://www.publications.parliament.uk/pa/cm199899/cmselect/cmagric/141/14108.htm#a18](http://www.publications.parliament.uk/pa/cm199899/cmselect/cmagric/141/14108.htm#a18) [Accessed April 22, 2012].
47. See above for full description of FPOs.
48. See [MarineManagement.org at http://www.marinemanagement.org.uk/fisheries/management/quotas_allocations.htm](http://www.marinemanagement.org.uk/fisheries/management/quotas_allocations.htm) [Accessed April 22, 2012].
49. Council Regulation 104/2000 on the common organisation of the markets in fishery and aquaculture product [2000] OJ

L17/22 art.5(1)(b).

50. *Department for Food the Environment and Rural Affairs, Fisheries Quota Management, (Defra, 2006), p.4.*

51. For information regarding the consultation see DEFRA at <http://www.defra.gov.uk/consult/2011/04/05/fisheries-1104/> [Accessed April 22, 2012].

52. See <http://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news/news/> at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news/news/> [Accessed April 22, 2012].

53. See NUTFA at <http://www.nutfa.org/#/fisheries-management/4543399029> [Accessed April 22, 2012].

54. Anon, "Are Whitby Skippers Selling Fish Quota?—DEFRA Wont Give Us The Truth" *Real Whitby Magazine* at <http://www.real-whitby.co.uk/are-whitby-skippers-selling-fish-quota-defra-wont-give-us-the-truth> [Accessed April 22, 2012].

55. F. Harvey, "Defra to publish fishing rights register after widespread anger" *The Guardian* at <http://www.guardian.co.uk/environment/2011/aug/15/defra-publish-fishing-rights> [Accessed May 27, 2013].

56. D. Sanders, email dated February 1, 2012, Marine Management Organisation.

57. MMO at <http://www.marinemanagement.org.uk/news/news/120224.htm> [Accessed April 22, 2012].

58. *R. v Secretary of State for Environment, Food and Rural Affairs and Marine Management Organisation (Ex p. United Kingdom Association of Fish Producer Organisations) CO/4796/2012*

59. *Council for the Civil Service Unions v Minister for Civil Service [1985] A.C. 374* at 401 per Lord Fraser.

60. *R. (on the application of Bibi) v Newham LBC (No. 1) [2001] EWCA Civ 607; [2002] 1 W.L.R. 237.*

61. *R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd [1990] 1 W.L.R. 1545* at 1569.

62. *Fisheries Administrations in the UK, Rules for the management of the UK's fisheries quotas in areas I, II, IV, VI and VII (and associated areas) and in Faroese waters (Vb) for 2012 (MMO, February 2012) (emphasis added).*

63. *R. v Ministry of Agriculture, Fisheries and Food Ex p. Jaderow Ltd (C216/87) [1990] 2 Q.B. 193; [1989] E.C.R. 4509* at 47.

64. *MRAG Consortium, Rights Based Management Catalogue (European Commission, 2009) (FISH/2007/03 EU 2009).*

65. *Department for Environment, Food and Rural Affairs, Fishing Vessel Licensing: an introduction (London: TSO, 2005).*

66. See MMO at http://www.marinemanagement.org.uk/fisheries/management/quotas_how.htm [Accessed April 22, 2012].

67. A. Hatcher, R. Banks and R. Arnason, *Future Options for UK Fish Quota Management, (University of Portsmouth, 2002), p.52.*

68. These are now used to hold 20% of the UK's quota, see *Hansard, HC Vol.532 col.1258W (November 15, 2011) (Richard Benyon MP).*

69. See MMO at <http://www.marinemanagement.org.uk/news/news/111012.htm> [Accessed April 22, 2012].

70. *Street v Mountford [1985] A.C. 809.*

71. *Malcolmsen v O'Dea (1862) 10 H. L. Cas. 593.*

72. *Rowland v Environment Agency [2003] EWCA Civ 1885* per Gibson L.J at 92.

73. *Council for Civil Service Unions v Minister for Civil Service [1985] A.C. 374.*

74. *R. v North and East Devon Health Authority Ex p. Coughlan [2001] Q.B. 213.*

75. *R. v Secretary of State for Education and Transport Ex p. Begbie [2001] 1 W.L.R. 1115* per Laws L.J. at [1130].

76. *R v Minister of Agriculture Fisheries and Foods [1995] 1 All E.R. 714.*

77. This case has been partially overruled but if anything the subsequent tests for legitimate expectation introduced by *R. v Secretary of State for the Home Department Ex p. Hargreaves [1997] 1 W.L.R. 906; [1997] 1 All E.R. 397* would have made the case even harder for the fishermen to win.

78. See *Office of Fair Trading, Abuse of Dominant Position (OFT, December 2004).*

- [79.](#) Communication 1306/2004, Haraldsson and Sveinsson v Iceland (October 24, 2007) 91st Session.
- [80.](#) *R. v Ministry of Agriculture, Fisheries and Food Ex p. Jaderow Ltd (C216/87) [1990] 2 Q.B. 193;; [1989] E.C.R. 4509.*
- [81.](#) *R. v Ministry of Agriculture, Fisheries and Food Ex p. Bostock (C2/92) [1994] E.C.R. I-955.*
- [82.](#) See M. Cardwell "Milk quotas and livestock quotas as private property"[2000] Edin. L. R. 4(2), 168.
- [83.](#) E. Carwell and R. Gear, "Transferable quotas, efficiency and crew ownership in Whalsay, Shetland" [2013] Marine Policy 40, 160.
- [84.](#) *Office of Government Commerce Guide for disposal of surplus property (2005).*
- [85.](#) *Department of Communities and Local Government, Making Assets Work: The Quirk Review of community management and ownership of public assets (London: HMSO, 2007).*
- [86.](#) *Department of Communities and Local Government, Making Assets Work: (2007), Appendix A.*
- [87.](#) *MRAG Consortium, Rights Based Management Catalogue (European Commission, 2009) (FISH/2007/03 EU 2009), p.82.*

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