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Constitutional Supremacy: National Constitutions vs. European Law

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Abstract:

Almost 50 years after the European Court of Justice clearly established the supremacy of Community law, the question regarding the primacy of law within the European context remains unresolved. By exploring the perspectives of the ECJ and the German Federal Constitutional Court, this article seeks to outline the controversies relating to constitutional supremacy and analyses the theoretical underpinnings of this difference. It will be suggested that by focussing only on select liberal democratic principles, each court not only constructs their respective claims to supremacy, but they do so in opposition to each other. Thus rather than creating constitutional integration throughout the European Union, the supremacy discourse has created fault lines along which further tension may arise. By drawing on Kumm's theory this paper will conclude by suggesting an alternative lens through which such conflicts may be resolved.

Key words: Constitution conflict, Costa, European Court of Justice, European legal integration, European Union, Solange

Since the beginnings of European economic integration, in the aftermath of the Second World War, the European Union (EU) has evolved to become a new type of polity which cannot be categorised as either a sovereign state or an international organisation.² This political and economic union has posed unique challenges to European and national institutions as they attempt to navigate this new territory using traditional conceptual tools. One such challenge that has been the subject of significant intellectual debate, is that of the relationship between EU law and national law. Almost 50 years after the European Court of Justice (ECJ) clearly established the supremacy of Community law, the question regarding the primacy of law within the European context remains unresolved.

This article will explore the controversy surrounding constitutional supremacy by comparing the perspectives of the ECJ and the German Federal Constitutional Court (FCC) on this issue. By outlining the conceptual foundation on which claims to constitutional primacy lay, this paper will reveal an alternative method for addressing such issues. Firstly it will be argued that the European monist position of the ECJ is grounded in a desire to promote the rule of law at a European level. In contrast, the German FCC's position may be termed a democratic statist approach, as it invokes its own constitution as the ultimate source of legitimacy, which is derived from the German demos. However by analysing the theoretical underpinnings on which this approach rests, this article will reveal its weaknesses. It will be suggested that by focussing only on select liberal democratic principles, each court not only constructs their respective claims to supremacy, but they do so in opposition to the

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² P. Craig and G. De Burca (eds), *EU Law: Text, Cases and Materials*, Oxford, Oxford University Press, 2008.

other. Thus, rather than creating constitutional integration throughout the European Union, the supremacy discourse has created fault lines along which further tension may arise. Accordingly, this paper will draw on Kumm's theory to suggest an alternative lens through which such questions may be explored. By debunking the theories on which the current approaches rest, Kumm draws on the common normativity of both legal orders to create a holistic framework in which courts can engage with conflict issues through the balancing of relevant principles.

Although there were no provisions dealing with supremacy of Community law over national law in the European Economic Community (EEC) Treaty, the ECJ addressed this issue early in its jurisprudence.³ The court enunciated the conceptual basis of EU law supremacy in the case of *Costa*,⁴ before subsequently expanding its ambit.

In *Costa*, the court adopted a European monist position by arguing that supremacy of Community law was necessary to ensure its effective and uniform application, so as to maintain the coherent legal order that the treaties sought to establish.⁵ It was held that through the ratification of the EEC Treaty, Member States created a new legal order by transferring to the new Community institutions "real powers stemming from a limitation of sovereignty."⁶ Moreover, given the Treaty's aims were integration and co-operation between members, to accord primacy to domestic law would be to undermine those aims. Accordingly this case may be understood as the ECJ drawing on the notion of an autonomous legal order, which promotes the realisation of the rule of law beyond state boundaries, as a conceptual basis for granting EU law supremacy.

This idea of EU supremacy was subsequently extended in the cases of *Internationale Handelsgesellschaft*⁷ and *Simmenthal*⁸. In *Handelsgesellschaft* the ECJ rejected the argument that fundamental rights enshrined in the German constitution could be invoked to invalidate EU law. The court indicated that allowing recourse to national rules would impede the uniform applicability and efficacy of Community law.⁹ Consequently, the ECJ maintained that not even fundamental rights expressed in a national constitution could provide a limit to EU law.

The court reaffirmed this position in *Simmenthal*, by upholding the primacy of EU law over the Italian constitution. However the ECJ also broadened the ambit of this doctrine by requiring all national courts that apply EU law to set aside conflicting national legislation.¹⁰ This is of particular significance for many member States as often, only the national Constitutional Court has the power to decide on the constitutionality of national law. However in *Simmenthal* the ECJ held that any court with jurisdiction to apply Community law is under a duty to give full effect to those

³ *Ibid.*, p. 344.

⁴ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

⁵ M. Kumm 'Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice,' *Common Market Law Review*, Vol. 36, 1999, pp. 354-355.

⁶ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

⁷ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

⁸ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

⁹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁰ P. Allot, 'Supremacy of European Community Law,' *The Cambridge Law Journal*, Vol. 38, No. 1, 1979 p. 21.

provisions, and must refuse to apply national legislation in the event of a conflict.¹¹ Thus inferior courts are not required to conform to national processes and submit questions of conflicting legislation to the Constitutional Court for judgment.

Accordingly, by 1978 the ECJ had firmly established the primacy of EU law. The court has used the skeletal provisions in the foundation treaties to consistently maintain the supremacy of EU law over national law, whatever its nature, so that national constitutions could not be invoked as a limitation on the applicability of European legislation.¹² Moreover national courts at every level were granted the power, by the ECJ, to set aside national legislation in the event of a conflict with EU law, despite existing national court hierarchies that reserved such a role for the highest constitutional court. The ECJ justified the supremacy of EU law by drawing on the liberal ideal of the rule of law at a supranational level, and the necessity of effective and uniform application of EU law to ensure a functional common market.

Yet can it be accepted that the ECJ has settled the issue? To unquestioningly accept its decisions regarding supremacy would be to impute to it a normative authority to decide such issues. However any justification of such imputation would resurrect the question of the proper interpretation of the Treaty-constituted order, and in turn resurrect the issues which the ECJ has been said to have authoritatively determined.¹³ While self-referentiality is a characteristic of most legal orders, in that the highest legal authority can appeal to no higher confirmation of its authority than that expressed in its own jurisprudence, such circularity of reasoning provides little guidance in a situation in which the very position of highest legal authority is itself at stake.¹⁴ Given that the highest tribunals of Member States also belong to normative orders in which they claim ultimate legal authority, the intersection of these legal orders necessarily creates a bi-dimensional framework in which questions of supremacy arise.¹⁵ Accordingly, the ECJ's elaboration of EU supremacy is but the first dimension. It is only when the courts of Member States accept the ECJ's perspective that the primacy of European law can be held to be settled.¹⁶ Consequently this article will now explore the position of Member State courts to determine whether the second dimension of the bi-dimensional framework of supremacy is met. This analysis will proceed along the four lines of potential constitutional conflict between EU law and national law. That is, contention about the supremacy of EU law can arise in four different areas from the perspective of Member States. Firstly, the Member State court must determine whether it accepts the general primacy of EU law over national law. Secondly, should it accept this general proposition, the conceptual basis on which it is accepted must be identified. Contention will occur if the national court accepts EU supremacy for reasons other than those expressed by the ECJ in *Costa*.¹⁷ Thirdly, conflict may arise should the Member State court impose limits on its acceptance of supremacy, so that its national constitution restricts the application of conflicting EU law. Finally constitutional conflict may manifest itself in questions of judicial review. While the

¹¹ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

¹² N. MacCormick, 'Risking Constitutional Collision in Europe?', *Oxford Journal of Legal Studies*, Vol. 18, No. 3, 1998, p. 520.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 521.

¹⁵ J. Weiler, 'The Community System: the Dual Character of Supranationalism,' *Yearbook of European Law*, Vol. 1, 1981, pp. 275 - 276.

¹⁶ *Ibid.*, pp. 275-276.

¹⁷ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

ECJ maintains that it has the exclusive power to review and invalidate Union acts which are *ultra vires*,¹⁸ a national court claiming that it is the ultimate arbiter of such questions will lie in opposition to the ECJ perspective.

Having established the framework of potential constitutional conflict through which a court's jurisprudence may be understood, this article will now use this framework to examine the position of the German FCC. The German position has been identified as an informative example for this analysis as Germany has not only been a Member State since the inception of the European legal order, but its highest court has also developed a rich body of doctrine dealing with supremacy issues.¹⁹ Accordingly, German case law engages with each of the four lines of constitutional conflict outlined in the above framework. Therefore it provides a pertinent example of how such issues are resolved, thereby illuminating the concerns faced by other Member States. This is of particular value given that even original Member States, such as France, have not yet been required to adjudicate conflicts in all four areas.²⁰

The original position of the German FCC was expounded in the case of *Solange I*,²¹ in response to the ECJ ruling in *Handelsgesellschaft*.²² As outlined above, in *Handelsgesellschaft* the ECJ held that the supremacy of Community law applied to all national law, notwithstanding its status. As such a fundamental principle under the German constitution could not be invoked to challenge the primacy of Community law. On receiving this ruling, the German Administrative Court submitted the case to the German FCC on the grounds that article 24 of the German Constitution, which allows for the transfer of legislative power to international organisations, could not provide the basis for an inter-state organisation to override the Constitution. The FCC held that even though article 24 of the Constitution permits the transfer of sovereign rights to inter-state institutions through treaty ratification, it does not leave open the opportunity to amend the Constitution by foregoing the formal process.²³ Accordingly article 24 nullifies any amendment to the EEC Treaty which would destroy the identity of the German Constitution, by denying citizens the protection afforded to them by the basic rights enshrined in their Constitution.²⁴ In reaching this conclusion the FCC emphasised the need for national courts to act as a check on Community law, in light of the limited protection of rights provided at the European level.²⁵ Therefore the highest German court refused to recognise the unconditional supremacy of EU law, but rather emphasised the primacy of fundamental rights enshrined in the Constitution in cases of conflict.²⁶

¹⁸ Case 314/85 *Firma Foto Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

¹⁹ Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 352.

²⁰ Craig and De Burca, op. cit., p. 354.

²¹ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.

²² Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

²³ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.

²⁴ W. Roth, 'The application of Community Law in West Germany: 1980-1990,' *Common Market Law Review*, Vol. 28, 1991, pp. 137, 142.

²⁵ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.

²⁶ N. Reich, 'Judge-made 'Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation,' *European Journal of International Law*, Vol. 7, 1996, pp. 103-104.

While the *Solange I* decision illustrates the strong position the German FCC adopted in relation to the first expressions of EU law supremacy, case law since has demonstrated that the court has assumed a more deferential stance. In 1987 the court passed its *Solange II* decision in which it reconsidered the primacy issue.²⁷ The distinguishing factor in this case was the extent to which the Community institutions, including the ECJ, had adopted a fundamental rights discourse through which basic rights were adequately protected.²⁸ The FCC held that:

*“in view of these developments, so long as the European Communities and in particular the case law of the European court, generally ensured an effective protection of fundamental rights...which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, the FCC will no longer exercise its jurisdiction to...review legislation by the standard of the fundamental rights contained in the Constitution.”*²⁹

Accordingly, while this statement indicates that the FCC has retreated from its original position in relation to the primacy of EU law, it cannot be understood as the recognition of unconditional supremacy. The court is cautious not to surrender its jurisdiction, it merely states that it will not exercise this jurisdiction, provided rights protection at the EU level is maintained.³⁰ The court preserves its final authority to use the German Constitution as a means of nullifying EU legislation.³¹

The *Maastricht* decision reiterated the position outlined in *Solange II* in relation to fundamental rights protection, albeit in slightly different terms.³² This case concerned a challenge to the constitutionality of Germany’s ratification of the Treaty of the European Union (TEU). While the FCC held that ratification was compatible with the Constitution, it made several important comments regarding the relationship between the national court and the ECJ. It affirmed Germany’s status as a sovereign state and emphasised that it would not relinquish its power to decide on the compatibility of Community law with the fundamental rights outlined in the German Constitution.³³ However it replaced the “no jurisdiction, so long as”³⁴ test expressed in *Solange II*, with the “jurisdiction, but exercised in a relationship of co-operation with the ECJ” formula.³⁵ However the practical significance of this amendment is limited in relation to the question of supremacy.³⁶ The new test preserves the FCC’s jurisdiction, provided for in *Solange II*, to review and nullify EU law in situations of conflict.

²⁷ *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.

²⁸ Roth, op. cit., p. 143.

²⁹ *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.

³⁰ Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 363.

³¹ Craig and De Burca op. cit., p. 359.

³² *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

³³ *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

³⁴ *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.

³⁵ *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

³⁶ Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 369.

Moreover the court also used this case to describe its perception of its own role within the European legal order. It stated that national courts are to exercise a power of review over Community competences, so that should the Community act *ultra vires*, that is, attempt to exercise powers which are not clearly provided for in the treaties, a national court may rule that the Community had no legal basis to perform such act.³⁷ Accordingly, the act would be held void for lack of competence. Of particular importance is the German court's retention of its power of review of the ECJ's decisions. So that should the ECJ itself act *ultra vires* in handing down a decision which would qualify as an amendment to the Treaty, the FCC retains the position as the ultimate arbiter of constitutionality, empowered to strike down the ECJ's finding as applicable law in Germany.³⁸

Having established the German FCC's position in relation to supremacy, it is now possible to contrast this perspective with that of the ECJ using the lens provided by the above constitutional conflict framework. While the FCC accepts the primacy of EU law, it does so only where there is no conflict with the German Constitution and in circumstances where there is no question relating to competence. Accordingly it does not accept the view, propounded by the ECJ, that EU law is unconditionally supreme. Moreover, where it does accept the primacy of EU law, the conceptual basis on which this acceptance derives, is article 24 of the German Constitution.³⁹ Thus it is not that Germany's ratification of the treaty created an autonomous European legal order, as put forward by the ECJ in *Costa*,⁴⁰ but rather it is Germany's internal legal regime which creates the foundation on which supremacy is grounded.⁴¹

Furthermore the FCC's stance in relation to supremacy also diverges from the ECJ's view with regards to the two final lines of potential conflict. Firstly, it has continued to assert its jurisdiction where EU law impinges on fundamental rights protection by the Constitution. This is so notwithstanding the ECJ's judgment in *Handelsgesellschaft*⁴² which maintained that EU law supremacy applied even to national constitutions. Finally the FCC has asserted itself as the ultimate arbiter of constitutional conflict so that it retains the power to review and adjudicate questions of ECJ jurisdiction.

Accordingly the second dimension of the bi-dimensional framework of supremacy is not met. Although the German FCC accepts the primacy of EU law generally, its understanding of what constitutes this supremacy stands in contrast to the position of the ECJ. Germany's acceptance of EU law primacy is not only limited by constitutional constraints, but the conceptual foundation for such acceptance is firmly rooted in the German legal regime. Thus while the practical consequences of the German FCC's decisions may not differ dramatically to the ECJ's, because the national court has accepted EU law primacy, it does so only by accommodating the concept of supremacy within its own national legal framework. Accordingly the theoretical backgrounds, against which each court develops its understanding of

³⁷ *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

³⁸ Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 364.

³⁹ Roth, op. cit., p. 142.

⁴⁰ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

⁴¹ N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999, p. 110.

⁴² Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

supremacy, stand in opposition to each other, thus creating a tension at the theoretical level which has the potential to evolve into practical manifestations of the conflict in the future.

By exploring the differing perspectives of EU law primacy held by the ECJ and the German FCC, this paper has identified the conceptual sphere as the locus for constitutional conflict. However it is only by moving beyond the identification of the differing approaches of these courts, to reveal the theoretical underpinnings of such difference, that the source of the conflict may be understood, and thus resolved.

Accordingly this article will examine the traditional theoretical approach to supremacy to determine whether the underpinnings on which it rests provide a strong foundation for national courts to mount their primacy arguments. Kumm argues that the position reached by the German FCC is the “consequence of adopting a conception of democratic statism as a normative framework and constructive starting point.”⁴³ This traditional approach of democratic statism does not provide a judge, faced with constitutional conflict, with a toolkit to address such issues, but rather points to the national constitution as the framework within which such questions are to be resolved. This position is adopted because supremacy of the national constitution is said to be a defining feature of the practice of national law.⁴⁴ Therefore judges are required to determine outcomes within the internal system by reference to the constitution which is the ‘ultimate legal rule.’ Questions about whether the constitution should in fact be the ultimate legal rule, lie beyond the scope of legal decision making.⁴⁵

It may be questioned whether it is valid to maintain that legal practice is defined by national constitutional supremacy as the ultimate legal rule, so that judges cannot engage with constitutional conflict issues.⁴⁶ National constitutional supremacy may only be a defining feature of the practice of national law, if the set of rules which determine what is to count as law, includes the rule of national constitutional supremacy. However law is not a practice that is defined by its rules.⁴⁷ The ultimate legal rule is a defining feature of legal practice “only so long as it is recognised as such by its participants.”⁴⁸ Therefore if the participants of the German legal practice begin to recognise European constitutional supremacy, the national constitution will become displaced as the defining rule of the German system.

This argument appears to refute the idea that judges must accept the framework in which they operate, without questioning why such a framework should be adopted. However if legal reasoning is to be defined as the application of rules, which are constituted by an ultimate set of rules, to resolve issues, then the decision about what should be the ultimate rule cannot be resolved through legal reasoning.⁴⁹ By framing the resolution of constitutional conflict as the search for an ultimate legal rule, it

⁴³ Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 365.

⁴⁴ N. Walker, ‘The Idea of Constitutional Pluralism,’ *The Modern Law Review*, Vol. 65, No. 3, 2002, pp. 317, 340.

⁴⁵ M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty,’ *European Law Journal* Vol. 11, No. 3, 2005, p.270.

⁴⁶ *Ibid.*, p. 271.

⁴⁷ Walker, op. cit., 340.

⁴⁸ Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 273.

⁴⁹ *Ibid.*, p. 273.

becomes conceptually impossible for the law to provide guidance as to whether national constitutional supremacy or European supremacy should be the ultimate legal rule.⁵⁰ It is a legal non-issue according to this theory.

Consequently the traditional approach of searching for an ultimate source of legitimacy puts the question of which constitutional supremacy to adopt, beyond the scope of legal reasoning. Firstly, it denies judges the opportunity to engage with the issue by requiring them to resolve issues by reference to the internal legal order, as confined by the national constitution. But even a critique of this approach, which questions the blind adoption of a particular ultimate legal rule, defines itself out of resolving constitutional conflict issues within the legal sphere, because the critique itself sees the resolution of the issue as stemming from the adoption of some form of ultimate legal rule.

Accordingly the democratic statist approach is forced to identify an alternate ultimate source of legitimacy for the national constitution, if it is to continue to assert national constitutional supremacy. This approach has sought to locate this source of legitimacy of the national system by reference to the idea of 'we the people' as the original constituent power establishing the constitution.⁵¹ The demos is understood as the normative basis for the supremacy of the constitution as it is the entity which firstly creates the constitutional system and then practices self-determination within the constitutional framework it established.⁵² Thus the people are the source of legitimacy on which national constitutional supremacy is said to rest.

Applying this theory to the German context, the FCC asserts its jurisdiction to nullify EU law on the basis that it is either inconsistent with German fundamental rights enshrined in the German constitution, or that it is *ultra vires*, thus beyond the scope of the treaties which were ratified through the power conferred by the Constitution. It is the German Constitution, as the supreme law of the land, that legitimises the court's stance. The democratic statist approach provides the foundation on which Germany can adopt this position, as the theory identifies national constitutional supremacy as the defining feature of the national legal order, derived from the ultimate source of legitimacy of the demos.

However does this theoretical foundation provide adequate grounding to sustain the FCC's position, in opposition to the ECJ? There are two critiques of the traditional approach to supremacy which undermine the two theoretical bases on which it stands. Firstly, democratic statism requires national courts to confine themselves to the doctrine of national constitutional supremacy on the basis that the constitution is the defining feature of national law. However if the quest is not framed in terms of a search for the 'ultimate legal authority,' this position cannot be maintained. If instead one adopts Kumm's position that constraint on legal reasoning defines the institutional limits of the role of courts, then the supremacy of national constitutions does not necessarily follow.⁵³ It is only if national constitutional supremacy could be

⁵⁰ Ibid., p. 274.

⁵¹ J. Weiler, 'The European Courts of Justice: Beyond 'Beyond Doctrine' or the Legitimacy Crisis of European Constitutionalism' in A. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* 1998, p. 381.

⁵² Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 367.

⁵³ Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 282.

identified as such a constraint, that the claim that EU law takes precedence over national constitutional law would be so at odds with existing practice that it would disqualify such a claim as being within the confines of the practice of national law.⁵⁴ However given the realities of the current system, in which EU law has penetrated national legal orders to the point that it is unquestionably superior to at least the national statutes, it is implausible to claim that asserting the supremacy of EU law is not an identifiable claim within the national practice of law.⁵⁵ It would be merely another step towards legal integration. Consequently by framing the practice of law as being institutionally constrained by certain features, rather than a practice governed by an ultimate legal rule, national constitutional supremacy cannot be presented as a defining constraint of national law, thus it cannot be adopted to assert that constitutional conflicts are legal non-issues. A national constitution is not supreme merely by virtue of its position as a constitution.

While democratic statism overcomes this argument by relying on the ultimate source of legitimacy being derived from the demos, the second critique demonstrates that this justification does not support an argument for national constitutional supremacy alone. According to democratic statism, if a polity may only qualify as a state if the demos establishes its sovereignty through the adoption of a constitution, then “the concept of demos is analytically tied to the constitution of a sovereign state establishing a supreme legal authority.”⁵⁶ Consequently, there can only be one demos, otherwise the legal authority it established could not be supreme. Therefore in a multi-polity, such as the EU and Germany, the question becomes at what level is the demos located?⁵⁷ By framing it in this manner, it becomes evident that those advocating European supremacy may also use this conceptual justification to support their claim. Just as the German demos may be said to have willed the German constitution into existence, the EU may be established by a European constituent power, based on the a European demos.⁵⁸ Accordingly, the notion of a constitution, derived from the will of the people, cannot provide the necessary theoretical underpinning for national constitutional supremacy.

An exploration of the traditional approach to supremacy reveals the tenuous theoretical grounds on which it rests. Rather than providing judges with the conceptual tools to deal with constitutional conflict, this theory denies them access to such inquiries, by confining them to resolving such conflicts within the boundaries of the constitution. However, while democratic statism lacks a strong theoretical foundation, the practical implications of this theory cause greater concern. By framing questions as a search for the ‘ultimate legal rule,’ this theory necessarily requires the resolution of constitutional conflict to be in terms of the domination of one legal order over the other. As such, select liberal democratic principles are invoked by both courts to bolster their claim to supremacy to the exclusion of other relevant considerations. Accordingly notions of fundamental rights and democratic self-governance are used by national courts to promote their claim to primacy, while the ECJ focuses on the importance of establishing the rule of law at a supranational

⁵⁴ *Ibid.*, p. 283.

⁵⁵ *Ibid.*, p. 285.

⁵⁶ Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 367.

⁵⁷ *Ibid.*

⁵⁸ Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 275.

level. Yet neither court incorporates the principles relied on by the other. Thus the current conceptual foundations on which the supremacy discourse is based, necessarily place national courts in direct conflict with the ECJ, in which the “competitive dynamic”⁵⁹ has been said to give rise to a potential “revolt or revolution.”⁶⁰

Given the traditional approach to supremacy is neither strongly theoretically grounded, nor practically desirable, an alternative conceptual approach to constitutional conflict should be adopted. This article will outline Kumm’s alternative approach which draws on the limitations revealed from democratic statism as a foundation for creating a more holistic conceptual framework.

The foundation for this approach stems from the first critique of democratic statism. Rather than searching for an ultimate legal rule, this theory adopts the idea that the institutional role of courts is defined by constraint. However this constraint is neither national nor European constitutional law, but rather ‘legal practice as a whole.’⁶¹ That is, judges are not confined to either constitutional order, but rather they seek guidance from them both. By framing constraint in this manner, this theory appeals to the common normativity between all legal practices. It is based on the principles underlying domestic constitutional practices in liberal democracies which are considered universal.⁶²

While at first glance it may appear impossible to identify the universal ideals underlying legal practice in the EU and its Member States because political decision making is inextricably linked to a state’s pursuit of its national interest, closer analysis unveils the source of such ideals. Although political actors may pursue national interest, the legal principles applied to adjudicate such acts operate within the legal sphere.⁶³ The legal principles at the EU and national level are informed by the same normative principles as acknowledged in the TEU.⁶⁴ They share a commitment to principles of liberty, equality, democracy, the rule of law, liberal democratic constitutionalism and self-governance, to the point that new members may not be admitted until they have incorporated these principles domestically.⁶⁵ Thus it is these principles, from which the individual legal orders derive, that should form the conceptual basis of the resolution of constitutional conflict.

Having established the constraining principles of this alternate theory, it is now necessary to determine how they interact to resolve constitutional conflict. Importantly, this theory does not provide judges with a resolution to apply in each case, but rather equips them with the conceptual tools necessary to engage with such issues in a holistic manner.⁶⁶ Thus the principles are not a clash which leads to the

⁵⁹ K. Alter, *Establishing the Supremacy of European Law: The making of an international rule of law in Europe*, Oxford, Oxford University Press, 2001, p. 60.

⁶⁰ D. Rossa Phelan, *Revolt or Revolution*, Dublin, Round Hall Sweet & Maxwell, 1997, p. 430.

⁶¹ Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 286.

⁶² *Ibid.*, p. 287.

⁶³ *Ibid.*, p. 286.

⁶⁴ Arts 6 and 49.

⁶⁵ TEU Arts 6 and 49.

⁶⁶ Walker, op. cit., p. 323.

supremacy of one order over the other. Instead they are to be balanced against one another, imbuing in each the relevant degree of importance in the particular case.⁶⁷

The value of this theory becomes evident when compared with the traditional approach. Rather than conceiving of constitutional conflict as a clash of absolutes in which national constitutional supremacy, with its emphasis on certain liberal democratic principles, is pitted against the European legal order, based on the supranationalism of the rule of law, all these principles are drawn together and balanced against each other in a contextually sensitive manner. In this way, the benefit derived from the effective and uniform enforcement of EU law is incorporated in the strong presumption that national courts are required to enforce EU law.⁶⁸ However, the concern for liberal democratic principles currently expressed by national courts, work as a counterweight to the presumption, allowing it to be rebutted should the EU law fail to meet the requisite standard. Accordingly, the presumption may be rebutted if the EU protection for fundamental rights lacks in important respects, if the EU engages in acts which are *ultra vires* and if an EU law violates a clear and specific constitutional norm that reflects an essential value in the domestic community.⁶⁹

Therefore, not only does this theory provide judges with a conceptual toolkit to resolve constitutional conflict, but it does so based on a holistic understanding of the liberal democratic principles which underpin the EU and Member State legal orders. Thus it is a framework which incorporates the concerns of all participants, rather than one that requires the domination of a legal order over the other. The hierarchical relationship provided for under democratic statism is transformed into a sphere of mutual deliberative engagement between all courts, fostering a legal network in which conflict is reduced.⁷⁰

Although the supremacy of EU law was firmly established by the ECJ by 1978, Member States have not embraced the ECJ's perspective. This paper has sought to unravel the jurisprudence in relation to primacy, to ascertain the theoretical foundation on which this tension rests. It was argued that the current approach adopted by the German FCC is emblematic of the democratic statist position. This theory draws on the idea that the constitution is the ultimate legal authority, deriving legitimacy from the demos. As such, constitutional conflicts are to be resolved within the national constitutional framework, without reference to the European legal order. By exposing the weak underpinnings of this conceptual framework, as well as its adverse practical consequences, this article sought to demonstrate the need for an alternative approach. With the increase in competences being transferred to the EU, coupled with the expansion of the Union beyond the Western European nucleus, existing tensions are likely to be exacerbated. Therefore a theory in which the resolution to conflict is the ultimate domination of one legal order over another, will do little to further European coherence and integration. Accordingly it is only by drawing on the common normativity of Member States that the currently split sphere may be conceptually fused. In challenging the hierarchical approach to constitutional conflict, by synthesising all liberal democratic principles into a single package, this

⁶⁷ Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 299.

⁶⁸ Ibid.

⁶⁹ Ibid., p. 300.

⁷⁰ Ibid., p. 302.

alternate paradigm equips judges with the conceptual tools necessary to resolve such tensions, thereby creating a sphere of mutual deliberative engagement which in itself renders such conflict less likely to occur.

Euroscepticism and the Treaty of Lisbon: Why did the size of the No vote change so dramatically between the first and second referenda in Ireland?

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Abstract

This paper demonstrates that the existing literature on voter preference formation in European referenda is insufficient to explain the shift in support for Lisbon in just 16 months. Building on a range of existing work to classify different Eurosceptic attitudes within Ireland, it focuses on why so many 'soft' Eurosceptics switched their votes from No to Yes between Lisbon I and II. Mainstream scholarly attention has converged around two distinct accounts of the way voters form preferences in European referenda, focusing on either domestic politics or the contents of individual treaties as the primary determinants of results. However, these explanations fail to describe for the significant role played by the worsening economic environment in Ireland between Lisbon referenda, as demonstrated by both polling data and immediate media reaction. This highlights a significant gap in the current understanding of European referenda, and points to an important future research agenda.

Key Words: European Union (EU), Euroscepticism, Ireland, Lisbon Treaty, Referenda, Preferences

The concept of Euroscepticism has become central to debate over the institutional structure of the European Union (EU), an issue which has caused heated and at times rancorous argument amongst European publics and policy-makers over the past decade of its history. Coming at the end of an extended period of debate begun with the Laeken Declaration of 2001, the Irish referenda over ratification of the Treaty of Lisbon in July 2008 and October 2009 provide a unique means of studying these competing beliefs and the key factors which underpin change in popular attitudes. In the only referenda to have been held on ratification in any EU member-state, the Irish electorate initially rejected its adoption by a margin of 53.4% to 46.6%. However, just 16 months later a second vote saw over two-thirds of voters supporting ratification, with a national rise in the Yes vote of approximately 20% and double-digit gains in all areas of the country.² The dramatic extent of this turnaround raises important questions about the motivations of the Irish electorate in particular, as well as broader issues surrounding voter behaviour in European referenda across the continent.³

¹ Benjamin Power graduated from the Australian National University in 2010 with a Bachelor of Philosophy (Honours) and a University Medal for Political Science. This paper is an edited version of the winning entry in the Honours category of the 2010 CESAA essay contest.

²Referendum Ireland, "Current Referendum", referendum.ie <<http://www.referendum.ie/referendum/current/index.asp?ballotid=79>>, October 2009, accessed 10 October 2009; Noel Whelan, "Resounding Yes result reflects change in economic conditions", Irish Times <<http://www.irishtimes.com/newspaper/ireland/2009/1005/1224255889586.html>>, 5 October 2009, accessed 20 October 2009.

³ In this paper, 'European referenda' will refer to national referenda over the ratification of EU treaties. It will employ the term 'referenda' as the plural of 'referendum,' rather than the more correct but less common 'referendums.' See Oxford English Dictionary, "Referendum," Oxford English

This paper argues that the primary factor underpinning the changed preferences of so many Irish citizens between 2008 and 2009 was the troubled economic environment in Ireland during October 2009. Employing the concept of Euroscepticism to explore the nature of popular opposition to European integration, it first uses polling data and the results of past referenda to demonstrate the relatively low level of firm or 'hard' Euroscepticism in the Irish electorate as a whole. Subsequent investigation of why so many 'soft' Eurosceptics changed their votes from No to Yes in October 2009 reveals a gap in the existing literature on voter preference formation in European referenda, with its bifurcated emphasis on either domestic political affiliation or the specific contents of individual treaties. While both factors played a role in shaping voter preferences, this swing cannot be fully explained without reference to the broader economic situation in which Ireland found itself at the time of the second referendum. This conclusion reinforces the need for integration of broader concepts such as economic security into the literature on voter preferences in EU referenda, and points towards a new research agenda on the concept of Euroscepticism.

The most influential definition of Euroscepticism was put forward in 2000 by Szczerbiak and Taggart, who broke down anti-European sentiment amongst the continent's political parties into 'hard' and 'soft' categories.⁴ Hard Euroscepticism indicates a fundamental opposition to the principle of European integration, expressed through advocacy of complete separation from the EU or insistence on such stringent conditions for membership that participation becomes unfeasible. By contrast, soft Euroscepticism is not based upon rejection of European integration *per se* but instead comprises opposition to one or more specific policies being pursued at a European level. While this hard/soft distinction is quite basic, it serves as the jumping-off point for most comparative analysis of Eurosceptic beliefs and has been adopted with minimal qualification by a number of other authors.⁵

This definition has been challenged by a group of authors who emphasise why individuals or parties adopt Eurosceptic attitudes, distinguishing different forms of Euroscepticism based on reasons for opposition to Europe rather than solely strength of conviction. For example, Tiersky breaks down anti-European sentiment into Euro-scepticism (complete rejection of European-level governance), Euro-pessimism (doubts over the eventual success of integration), Euro-cynicism (suspicion of an eventual European super-state), and Euro-phobia (belief that the EU is inherently wasteful, anti-democratic and anti-national).⁶ In a similar vein, Sørensen reduces popular Euroscepticism to six categories based upon primary

Dictionary

<http://dictionary.oed.com.virtual.anu.edu.au/cgi/entry/50200737?single=1&query_type=word&queryword=referendum&first=1&max_to_show=10>, September 2009, accessed 7 November 2009.

⁴ A. Szczerbiak and P. Taggart, 'Opposing Europe: Party Systems and Opposition to the Union, the Euro and Europeanisation,' Working Paper No. 36, Sussex European Institute, 2000. Although this study is focused on sentiment towards Euroscepticism at the individual rather than party level, definitions which are party-based but still applicable to individuals will be included in this review of Eurosceptic literature.

⁵ See, for example, K. Henderson, 'Euroscepticism or Europhobia: Opposition Attitudes to the EU in the Slovak Republic,' Working Paper No. 50, Sussex European Institute, 2011 and C. Lees, 'Dark Matter': Institutional Constraints and the Failure of Party-Based Euroscepticism in Germany,' *Political Studies* Vol. 5, No. 2, 2002, pp. 244-67.

⁶ R. Tiersky (ed.), *Euro-skepticism: A Reader*, Lanham, Rowman & Littlefield, 2001.

reason for mistrust of the EU. These range from poor political performance, a perceived threat to national sovereignty, and on to principled opposition to the European project as a whole. Harmsen has developed a single-axis scale to deconstruct the underlying reasons behind the attitudes of major political parties towards European integration, which range from simple criticism of individual EU policies through to single-issue anti-Europe parties such as the UKIP. Kopeck and Mudde propose a two-dimensional approach which classifies parties or individuals as Europhiles or Europhobes along one axis according to their broad 'support for the ideas of European integration,' while distinguishing between EU-optimists and EU-pessimists based on their 'support for the European Union' along the other.⁷ These types of descriptive definitions highlight the particular outcomes that individual actors desire from the European project, offering a flexible alternative to simply measuring strength of sentiment.

However, the tight focus of this group of scholars on categorising objections to the European project as a whole weakens their ability to explain attitudes towards individual issues, as it does not leave room for the individuals or parties to deviate from a generally pro- or anti-European stance on one or more key subjects. For example, during negotiations over the introduction of a binding target for new-car CO₂ emissions in 2007 and 2008, the broadly pro-European parties of the German governing coalition adopted a Eurosceptic approach to the Commission's proposed legislation on the basis that it was against their perceived national interests.⁸ As a result, these approaches have limited utility in the highly issue-specific area of European referenda.

Of more practical benefit is the sophisticated approach proposed by Flood and Usherwood, whose method allows a distinction to be drawn between general attitudes towards Europe and positions on individual issues. They present a six-point continuum which encompasses outright Rejectionism, more moderate but still sceptical Reformism and Minimalism, cautiously positive Gradualism, and finally committed Reformism and Maximalism.⁹ Using this system, a party may, for example, be described as Minimalist in terms of its attitude towards European integration in general, but Maximalist in its support for the development of Europe-wide legislation in one particular area. By enabling researchers to track attitudes towards individual policies as well as the EU itself, this definition provides a more nuanced understanding of Euroscepticism than the models provided by Tiersky, Sørensen and Harmsen.

⁷ C. Sørensen, 'Danish and British Euroscepticism Compared: A Sceptical Assessment of the Concept,' Working Paper 2004/25, Danish Institute for International Studies, 2004; R. Harmsen, 'Euroscepticism,' in Y. Déloye (ed.), *Dictionary of European Elections*, Basingstoke, Palgrave, 2005; P. Kopeck and C. Mudde, 'The Two Sides of Euroscepticism: Party Positions on European Integration in East Central Europe,' *European Union Politics* Vol. 3, No. 3, 2002, pp. 299-304. See also M. Spiering, 'British Euroscepticism,' in R. Harmsen and M. Spiering (eds.), *Euroscepticism: Party Politics, National Identity and European Integration*, Amsterdam, New York, Rodopi, 2004, pp. 127-150.

⁸ For more background on this issue see EuActiv, 'Merkel and Sarkozy 'breakthrough' on car emissions,' Euractiv.com <<http://www.euractiv.com/en/transport/merkel-sarkozy-breakthrough-car-emissions/article-173199>>, 10 June 2008, accessed 14 August 2009; S. Mulvey, 'EU car CO2 fight only beginning,' BBC News <<http://news.bbc.co.uk/2/hi/europe/6337057.stm>>, 7 February 2007, accessed 14 August 2009.

⁹ C. Flood and S. Usherwood, 'Positions, Dispositions, Transitions: A Model of Group Alignment on EU Integration,' Paper presented at the 55th Annual Conference of the Political Studies Association, Leeds (5-7 April 2005).

In order to balance between convenience and accuracy in analysing the Irish referenda on Lisbon, this paper will employ a combination of Flood and Usherwood's work and the hard/soft definition of Szczerbiak and Taggart. To this end Rejectionism, Reformism and Minimalism will be grouped together as broadly 'hard' Euroscepticism, while Gradualists and Reformists who voted against ratification of Lisbon will be described as 'soft' Eurosceptics.

The Irish electorate is characterised by a high level of support for the EU, with little hard Euroscepticism in the form of Rejectionist, Revisionist or Minimalist sentiment. This is reflected in the successful ratification of all five European treaties put to the electorate in referenda since 1987, albeit with the need for secondary votes in the case of the Nice and Lisbon Treaties.¹⁰ Despite the No result, surveys in the wake of the first Lisbon referendum showed a high level of support for the EU itself.

Eurobarometer's post-polling results found that only 5% of No voters rejected Lisbon due to mistrust of a unified Europe, while just 8% of participants in a simultaneous Milward Brown IMS survey felt EU membership was a bad thing.¹¹ Given such low support for complete withdrawal from the EU, less than 10% of the Irish electorate can be categorised as Rejectionist Eurosceptics.

This basic indication of sentiment towards Europe can be refined through an analysis of Ireland's voting history in EU referenda since its accession in 1972, in which at least 30% of voters have rejected each proposal. Given the range of issues at stake across these five primary treaties, this indicates that approximately one-third of Ireland's population are hard Eurosceptics who will not support any European treaties seen to strengthen the influence of the EU.¹² In turn, this provides strong evidence that approximately 20% of the electorate are Minimalist or Revisionist Eurosceptics, their desire not to increase the power of the EU guaranteeing a No vote despite not desiring withdrawal from the EU altogether.

However, although these results evidence the limited extent of hard Euroscepticism in Ireland, they reveal little about why so many soft Eurosceptics from 2008 were eventually persuaded to vote for the Treaty 16 months later. In order to fully understand the driving factor behind this conversion, it is necessary to investigate

¹⁰ D. Hierlemann, 'Ireland's second attempt,' Spotlight <http://aei.pitt.edu/11578/01/spotlight_europe_-_Ireland's_Second_Attempt.pdf>, September 2009, accessed 7 October 2009 2

¹¹ Eurobarometer, "Post-referendum survey in Ireland: Analytical Report," Eurobarometer <http://ec.europa.eu/public_opinion/flash/fl_245_full_en.pdf>, July 2008, accessed 2 October 2009 pp. 22, 24; M. Brown IMS, 'Post Lisbon Treaty Referendum Research Findings September 2008,' Irish Department of Foreign Affairs <http://www.dfa.ie/uploads/documents/Publications/Post%20Lisbon%20Treaty%20Referendum%20Research%20Findings/post%20lisbon%20treaty%20referendum%20research%20findings_sept08.pdf>, September 2008, accessed 2 October 2009 3. The Milward Brown IMS report found that 18% of the electorate believed Ireland should dilute its involvement with the EU, but that only 8% thought EU membership was a bad thing entirely (ibid., 3 & 19-20). Sinnott et al find that 13% of No voters thought Lisbon was a bad idea in general, whereas 18% focused specifically on the loss of sovereignty/independence as a result of the Treaty. While this combination of figures is slightly different to those found by Eurobarometer and Milward Brown IMS, the overall figure of 31% lends support to the theory that about one-third of the Irish population are 'hard' Eurosceptics (Richard Sinnott et al, "Attitudes and Behaviour in the Referendum on the Treaty of Lisbon," Foreign Affairs <[http://www.foreignaffairs.gov.ie/uploads/documents/ucd%20geary%20institute%20report\).pdf](http://www.foreignaffairs.gov.ie/uploads/documents/ucd%20geary%20institute%20report).pdf)>, 6 March 2009, accessed 2 October 2009.

¹² D. de Brédún, 'Economic adversity a key player for Yes campaign,' Irish Times <<http://www.irishtimes.com/newspaper/ireland/2009/1005/1224255888477.html>> 5 October 2009, accessed 20 October 2009; see also Hierlemann, op. cit., pp. 3-4.

what factors most affect the preferences of swinging voters who are neither hard Eurosceptics nor ardent Europeanists in EU referenda.

Studies of voter behaviour in European referenda draw upon a broader body of research on referenda in general, which has produced a large volume of comparative literature.¹³ However, comparative studies of European referenda are considerably rarer, in large measure due to the relatively small number of referenda to provide data for analysis. Those comparative studies which do exist can be divided into three distinct categories. Scholars such as Svensson argue that the outcomes of European referenda are primarily determined by the attitudes of voters towards the particular Treaty in question, and that issues rise above partisan political orientation in shaping voter preferences. Through analysis of the five EU referenda in Denmark between 1972 and 1998, Svensson concludes that European polls 'reflect more than the popularity of the government ... the beliefs, opinions and attitudes of voters did play a role in explaining their behaviour.'¹⁴

A slight modification of this approach is proposed by Gabel, who argues that voters determine their personal attitudes towards individual European referenda through a rational cost/benefit analysis of their own economic interests. The issues which most affect these beliefs, opinions and attitudes can vary widely between different countries, meaning that different factors are likely to take centre stage in each individual referendum.¹⁵ Svensson and Gabel's strategy is consequently closely entwined with the broader research agenda of Euroscepticism, with a shared focus on explaining the nature of voters' views towards Europe and the source of these opinions. This 'issue-based' theory of vote formation is therefore a very fluid approach, without a universally applicable formula for assessing the key factors in referenda outcomes.

A different strategy is adopted by scholars who argue that European referenda are not really about European issues at all, but instead reflect the domestic political views of the electorate. This view draws upon the concept of 'second-order elections,' first developed by Reif and Schmitt to describe elections to the European parliament. They argue that "European" elections are simultaneous national elections in each of the EC-member nations,' and that 'many voters cast their votes in these elections ... on the basis of factors in the main political arena of the nation.'¹⁶ Scholars such as Franklin have adopted the concept of second-order elections to explain voting patterns in European referenda, arguing that individuals base their vote primarily on domestic political considerations rather than the issue titularly at hand. Specific

¹³ For a summary, see L. LeDuc, 'Opinion change and voting behaviour in referendums,' *European Journal of Political Research* Vol. 41, 2002, pp. 711–732. One of the key conclusions of this research is that voter choice in referendums is frequently not rational or objective. In limiting its focus to explaining only the reasons why voters swapped from No to Yes votes, this paper bypasses this problem by focusing only on the reasons for this swap rather than whether they were rational or not.

¹⁴ P. Svensson, 'Five Danish referendums on the European Community and European Union: A critical assessment of the Franklin thesis,' *European Journal of Political Research* Vol. 41, 2002, pp. 733–750.

¹⁵ See M. Gabel, 'Public Support for European Integration: An Empirical Test of Five Theories,' *Journal of Politics* Vol. 60, No. 2, 1998, pp. 333–54; Svensson, *op. cit.*; A. Szczerbiak and P. Taggart, 'The Politics of European Referendum Outcomes and Turnout: Two Models,' *West European Politics* Vol. 27, No. 4, September 2004, pp. 557 – 583, p. 564.

¹⁶ K. Reif and H. Schmitt, 'Nine second-order national elections – a conceptual framework for the analysis of European election results,' *European Journal of Political Research* Vol. 8, No. 1, 1980, pp. 8–9.

motivation for voting behaviour varies between different cases, with loyalty towards a particular political party most influential in some situations and satisfaction with the current government dominant in others.¹⁷ However, regardless of these variations, Franklin *et al* argue that 'partisan attachments are almost certainly the primary factor in referendum voting.'¹⁸

In 2002 Franklin introduced a substantial revision of his original argument, which attempted to synthesise this approach with that of Svensson *et al*. This revised approach centres on a distinction between referenda of high and low importance to voters. In his latter guise Franklin argued that referenda put to a largely disengaged population would be fought primarily on domestic terms, while in referenda of higher salience to voters 'the standing of the government can still influence the outcome of a referendum whose result would otherwise have been close.'¹⁹ With turnout of above 50% and a winning margin of only 6.8%, the first Irish referenda on Lisbon would certainly appear to fall into this latter category. Franklin and other advocates of the primacy of domestic politics maintain that partisan preferences play a key role in determining the outcome of referenda, and only become a secondary factor when an issue of even greater salience arises in a passionate and closely-contested referendum.

The third major school of thought is exemplified in the work of Hobolt, who argues that voter behaviour is shaped by the information which they absorb during the campaign rather than a single independent variable. This information may take the form of partisan cues from political parties relating primarily to domestic politics, or alternatively comprise more general knowledge of European integration and the consequences of the proposed treaty. Attitudes towards a specific referendum are shaped by the relative weight which is placed on each of these in any given campaign, leading to a dynamic relationship between the different factors which affect voter behaviour.²⁰

However, the utility of Hobolt's approach is limited by its failure to distinguish between general attitudes towards Europe and opinion of specific treaties. For example, a broadly Reformist individual may oppose a complex treaty such as Lisbon due to just one of its major components, such as the inclusion of the Charter of Fundamental Rights. This flaw is addressed by Szczerbiak and Taggart, who hold that voter preferences are informed both by their attitudes towards the particular integration measure being proposed as well as the direction, strength and clarity of elite cues.²¹ Such a model recognises that preferences can be determined by general

¹⁷ M Franklin et. al, 'Attitudes to Europe and Referendum votes: A response to Siune and Svensson,' *Electoral Studies* Vol. 13, No. 2, 1994, pp. 117–121; M. Franklin et al, 'Uncorking the Bottle: Popular Opposition to European Unification in the Wake of Maastricht,' *Journal of Common Market Studies* Vol. 32, No. 4, 2002, pp. 455–72.

¹⁸ See Szczerbiak and Taggart, 'The Politics of European Referendum Outcomes and Turnout,' *op. cit.*, p. 564.

¹⁹ M. Franklin, 'Learning from the Danish case: A comment on Palle Svensson's critique of the Franklin thesis,' *European Journal of Political Research* Vol. 41, 2002, pp. 751–757.

²⁰ Sara Hobolt, *Europe in Question: Referendums of European Integration*, Oxford, Oxford University Press, 2009.

²¹ Szczerbiak and Taggart, 'The Politics of European Referendum Outcomes and Turnout,' *op. cit.*; A. Szczerbiak and P. Taggart, 'Conclusion: Towards a Model of (European) Referendums,' *West European Politics* Vol.27, No. 4, September 2004, pp. 749 – 777. In this latter work, Szczerbiak and Taggart analyse only the 2003 referenda on EU accession in Eastern European nations. As a result,

attitudes towards Europe, partisan political positions, as well as opinions on a specific treaty, in a similar manner to the comprehensive definition of Euroscepticism put forward by Flood and Usherwood. Nevertheless, as recognised by Sczerbiak and Taggart themselves, the predictive capabilities of this model are restricted by its inability to indicate which of these influences will have the greatest effect on the outcome of any given referendum. In order to determine the ability of these models to explain voter preference formation, it is to an investigation of the most important factors in the Irish referenda on Lisbon that this paper now turns. The broad, cross-party increase in support for the Lisbon Treaty between the first and second referenda strongly suggests that the changed outcome was not a result of partisan political affiliation.²² Lisbon I attracted support from the governing Fianna Fáil party, opposition Fine Gael and smaller groups such as Labour and the Greens, with only Sinn Féin advocating its rejection. At this first vote 95% of Sinn Féin supporters followed the party line by voting No, while between 40% and 60% of those affiliated with pro-Lisbon parties voted against the Treaty.²³ However, this trend was reversed in Lisbon II, when more followers of pro-Lisbon parties voted Yes and only two-thirds of Sinn Féin supporters committed to voting No.²⁴ Although there was undoubtedly a strong correlation between support for Sinn Féin and a No vote in both referenda, the increase in Yes sentiment amongst party supporters before the second vote indicates that many soft Eurosceptics were willing to change their voting preferences despite a consistent No message from the party. Many of those who did not are likely to have been hard Eurosceptics anyway, standing against the expansion of powers for the EU in almost any circumstances. Indeed, Sinn Féin has opposed every European referenda in Ireland since 1972.²⁵ As a result, it is very difficult to say that allegiance to Sinn Féin caused many more people to vote No than they would have otherwise, or that it was a sudden renewal of partisan loyalty which induced such a large portion of the electorate to change their minds between Lisbon I and II.

Further evidence that the 2009 referendum was not determined by the domestic political preferences of the Irish electorate comes from the fact that it did not degenerate into a 'second-order' national election based on domestic politics. Opponents of the Treaty worked to portray the referenda as a proxy vote on the leadership of Taoiseach Brian Cowen and Fianna Fáil, displaying posters claiming 'the only job Lisbon saves is Cowen's' and attempting to associate the economic

their survey uses the criteria of 'general levels of support for EU membership.' Their suggested revision to 'attitudes towards the particular issue at hand' is contained on page 772 of Sczerbiak and Taggart, *Ibid*.

²² The EU has provided its own summary of the contents Lisbon Treaty at European Union, "The Treaty of Lisbon: Taking Europe into the 21st century", Europa.eu <http://europa.eu/lisbon_treaty/index_en.htm>, 23 October 2009, accessed 30 October 2009. An independent summary is provided by Euractiv, "The 'Treaty of Lisbon'", euractiv.com <<http://www.euractiv.com/en/future-eu/treaty-lisbon/article-163412>>, 21 September 2009, accessed 30 October 2009.

²³ Eurobarometer, *op. cit.*, p. 17.

²⁴ S. Collins, 'Relief for Yes side but opponents can take heart too,' *Irish Times* <<http://www.irishtimes.com/newspaper/ireland/2009/0925/1224255209220.html>>, 25 September 2009, accessed 20 October 2009.

²⁵ S. Collins, 'Recession focused minds on how vital EU is to our fortunes,' *Irish Times* <<http://www.irishtimes.com/newspaper/opinion/2009/1005/1224255886295.html>>, 5 October 2009, accessed 20 October 2009.

policies of the Lisbon Treaty with those that caused the economic crisis.²⁶ However, despite these attempts to whip up a protest vote against the unpopular incumbent government, the decisive endorsement of Lisbon in the second referendum demonstrated the ability of the electorate to rise above these domestic political considerations. Opposition parties such as Fine Gael and the Greens chose not to turn the referendum into a proxy vote on the performance of Cowen's government, instead advocating acceptance of the Treaty on the basis that it was in their perceived national interest.²⁷ For example, although opposition leader Enda Kenny recognised that 'Brussels has propped up our economy,' he did not use this to attack the government during the referendum campaign but rather advocate support of the Treaty.²⁸ Given the drop in popularity of Fianna Fáil from 42% in the 2007 general election to less than 25% by September 2009, the result of the second referendum demonstrated 'the ability of voters to distinguish between an unpopular Government and the issue of the treaty.'²⁹

While opposition to the government or support of Fianna Fáil may have played a role in shaping the preferences of some Irish voters, the decisive swing towards the Yes camp without a corresponding change in the attitudes of major political parties suggests that these were primarily 'hard' Yes or No voters who would not have changed their position on Lisbon even if elite cues were different. Particularly in light of Franklin's revised thesis of 2002, it is evident that the high political salience of the Lisbon debate in Ireland ensured domestic political preferences were not the decisive factor in either Lisbon I or II. Other, more significant factors must have played a greater role in shaping the outcome of the Irish referenda.

The search for these factors begins with the other key theme in the debate over the formation of voter preferences; attitudes towards the content of the Treaty itself. According to the theses of scholars such as Svensson, the most important factor in explaining the swing from No to Yes votes between Lisbon I and II must have been growth in approval of its most controversial provisions. These key features can be identified through post-polling survey data from the 2008 referendum.

Eurobarometer found that 12% of No votes were motivated by a desire to protect Irish identity, with fears about the loss of Ireland's neutrality, the consequences of not having a commissioner, and abolition of control over the tax system being cited

²⁶ M. Simpson, 'Job woes colour Irish treaty vote,' BBC News <<http://news.bbc.co.uk/2/hi/europe/8285473.stm>>, 2 October 2009, accessed 21 October 2009; Sinn Féin, "Alternative Guide to Lisbon 2", Sinn Féin <<http://www.sinnfein.ie/contents/17382>>, September 2009, accessed 24 October 2009; D. Finnan, 'Lisbon debate turns sour before referendum,' Radio France Internationale <http://www.rfi.fr/anglais/actu/articles/117/article_5287.asp> 30 September 2009, accessed 21 October 2009.

²⁷ J. Dymond, 'New Irish test looms for Lisbon,' BBC News <<http://news.bbc.co.uk/2/hi/europe/8256356.stm>>, 15 September 2009, accessed 21 October 2009.

²⁸ D. Finnan, 'Recession likely to decide Irish referendum,' Radio France Internationale <http://www.rfi.fr/anglais/actu/articles/118/article_5317.asp>, 2 October 2009, accessed 21 October 2009; Collins, 'Recession focused minds on how vital EU is to our fortunes;' M. Lord, 'Downbeat finale for Fianna Fáil and the frontman no one wants to see,' Irish Times <<http://www.irishtimes.com/newspaper/ireland/2009/1001/1224255612373.html>>, 1 October 2009, accessed 20 October 2009.

²⁹ de Brédún, op. cit.; Red C Research, "Voting Intention Opinion Poll, 27 September 2009", Red C Research <<http://www.redcresearch.ie/documents/SBP27thSeptElectionandLisbonPollReport.pdf>>, 27 September 2009, accessed 24 October 2009 pp. 6-8.

by 6% of respondents each. The results of Milward Brown IMS (MBI) broadly mirror these findings, while Sinnott *et al* find a slightly higher figure expressing concerns over neutrality with less focus on the commissioner and taxation issues.³⁰ In addition to these specific concerns about the consequences of ratifying Lisbon, a major cause of the No vote in 2008 was a more general lack of understanding about the contents of the Treaty. The No campaign placed a great deal of emphasis on encouraging those confused about the Treaty to vote against it, with heavy use of the slogan 'If in doubt, vote No.' Eurobarometer concluded that the most often-cited reason for voting No was a lack of information about the Treaty, while MBI found that 42% of No voters identified a knowledge deficit as the primary factor contributing to their decision. The latter survey concluded that 'Across all focus groups the level of understanding of the Lisbon Treaty is best described as fairly poor, but was probably most pronounced and most likely to explain voter behaviour among Soft No voters.'³¹ Without being certain of its consequences Irish voters were understandably reluctant to vote in favour of Lisbon, and '[a] lack of information was the reason why the majority of the non-voters did not go to the polls and the most commonly given reason for voting no.'³²

Attempting to attract those soft Eurosceptics who initially voted against Lisbon based on fear about its effects, the Yes campaign made a deliberate attempt to allay both specific and general concerns amongst the Irish public. EU member-states provided a guarantee that Lisbon would not threaten the key interests identified in the wake of Lisbon I, reinforcing Ireland's right to decide its own stance on abortion, tax rate and foreign policy. In addition, the European Council agreed to maintain the existing system of one commissioner for each member-state.³³ These guarantees provided greater certainty to the Irish electorate that their concerns had been both heard and accepted. On top of these concrete changes, supporters of the Treaty such as Taoiseach Cowen and Ryanair Chief Executive Michael O'Leary worked to enhance popular knowledge of the Treaty, assisted by the autonomous Referendum Commission.³⁴ This two-pronged strategy of allaying specific concerns as well as

³⁰ Eurobarometer, *op. cit.*, p. 19; M. Brown IMS, *op. cit.*, p. 12; Sinnott *et al*, *op. cit.*, p. 14.

³¹ Eurobarometer, *op. cit.*, pp.18-20; Sinnott *et al*, *op. cit.*, pp.13-14. During both Lisbon referenda the main players in the No campaign were Sinn Fein, the non-profit organisation Coir, and independent activists such as businessman and Libertas founder Declan Ganley.

³² U. Schneider, *The Treaty of Lisbon: Reasons for the Irish No Vote*, Munich, Ravensburg: GRIN Verlag, 2009, p. 7; M. Brown IMS, *op. cit.*, pp. 7 and 12. The Milward Brown IMS survey also concludes that 'lack of knowledge was the deciding issue in the campaign' (*Ibid*, p. 12).

³³ European Council, 'Decision of the Heads of State or Government of the 27 Member States of the EU, Meeting Within the European Council, on the Concerns of the Irish People on the Treaty of Lisbon,' Irish Department of Foreign Affairs <<http://www.dfa.ie/home/index.aspx?id=34239>>, 11 December 2008, accessed 14 October 2009. While the legal status of the country-specific guarantees given to Ireland are somewhat unclear until they are added to a further EU treaty. The guarantee to maintain one commissioner per country, however, is only a verbal commitment by EU member-states and can be changed at any point by unanimous agreement. See Euractiv, 'EU summit gives in to Irish demands on Lisbon Treaty,' Euractiv.com <<http://www.euractiv.com/en/future-eu/eu-summit-gives-irish-demands-lisbon-treaty/article-178004>>, 12 December 2008, accessed 8 November 2009.

³⁴ de Brédún, *op. cit.*; T. Barber, 'From No to Yes: Switch Voters Hold Key to Ireland's EU Poll,' *Financial Times* <<http://blogs.ft.com/brusselsblog/2009/10/from-no-to-yes-switch-voters-hold-key-to-irelands-eu-poll/>>, 2 October 2009, accessed 14 October 2009; D. Finnan, 'Why are the Irish voting on the Lisbon treaty again?,' *Radio France Internationale* <http://www.rfi.fr/anglais/actu/articles/117/article_5262.asp>, 29 September 2009, accessed 21 October 2009. According to the survey by Milward Brown IMS, those who voted No in 2008 were far less likely to have received their information about Lisbon from independent sources than those voting Yes. The role of impartial sources such as the Referendum Commission was consequently of

reducing general wariness was designed to increase the knowledge of voters about the consequences of ratification, and consequently increase their comfort with the Treaty itself.

The success of this push to increase public understanding of the Treaty can be seen in both the polling data and turnout figures from each referendum. Two weeks before the second vote 63% of Irish citizens felt they had some understanding of the Treaty, as compared to only 44% in 2008. Just 19% of the electorate remained undecided as to whether to vote for or against the Treaty a week out from the second Lisbon referendum, while at an equivalent stage of the first vote 35% professed indecision. And the increase in turnout of 201,000 people in 2009 indicates a greater level of engagement with the Treaty than was the case 16 months earlier, providing a strong indication that knowledge of the contents and consequences of the Treaty was enhanced between referenda.³⁵ The effect of this greater understanding on voting behaviour was shown by a number of informal surveys conducted in the lead-up to the second poll. For example, an Irish Times doorknock of 250 homes one week before the poll found the most significant factor driving in prompting a switch from No to Yes was a greater understanding of the issues at hand, while surveys conducted for the BBC found similar evidence that voters 'seem to have become more educated on Lisbon this time and realise it will not affect abortion, taxation, neutrality and the commissioner issue.'³⁶ Both polling data and turnout figures indicate that the Irish electorate showed a markedly enhanced understanding of the contents of the Lisbon Treaty in 2009, an increase which appears to be strongly linked to the dramatic rise in support for the Yes campaign by informal survey data. As a result, Svensson's proposition that perception of the Treaty itself would be far more important than domestic political preference in shaping voter behaviour appears to be borne out.

great importance. See Milward Brown IMS, *op. cit.*, pp. 9-10; Finnan, 'Lisbon debate turns sour before referendum,' *op. cit.*; D. Finnan, 'Yes voters optimistic on Lisbon Treaty,' Radio France Internationale <http://www.rfi.fr/anglais/actu/articles/118/article_5332.asp>, 3 October 2009, accessed 21 October 2009.

³⁵ Finfacts, "Lisbon Treaty: Irish Referendum Commission confirms high public understanding of the key elements of Treaty", Finfacts.ie <http://www.finfacts.ie/irishfinancenews/article_1017934.shtml>, 21 September 2009, accessed 14 October 2009; Collins, 'Relief for Yes side but opponents can take heart too,' *op. cit.*; Referendum Ireland, *op. cit.*; Noel Whelan, 'Resounding Yes result reflects change in economic conditions,' Irish Times <<http://www.irishtimes.com/newspaper/ireland/2009/1005/1224255889586.html>>, 5 October 2009, accessed 20 October 2009. The EU's Eurobarometer survey in the wake of the 2008 referendum found that 55% of the electorate had made up their minds how to vote on the Treaty in the last three weeks of the campaign, were more likely to commit to the No than Yes camp. See Eurobarometer, *op. cit.*, 14. See also the similar conclusions of Milward Brown IMS, *op. cit.*, p. 6. Red C data analysis of both the 2008 and 2009 referenda clearly demonstrates the smaller number of vacillating voters late in the second campaign compared to the first as well as the way these broke primarily for the No position in 2008. See Red C Research, 'Voting Intention Opinion Poll, 8 June 2008,' Red C Research <www.redcresearch.ie/documents/SBP8thJunePollReport.pdf>, 8 June 2008, accessed 24 October 2009.

³⁶ BBC News, "Lisbon Treaty vote: Irish voices", BBC <<http://news.bbc.co.uk/2/hi/europe/8272802.stm>>, 29 September 2009, accessed 29 October 2009; Harry McGee, 'Evidence on the doorstep suggests slight swing to Yes,' Irish Times <<http://www.irishtimes.com/newspaper/ireland/2009/1001/1224255613292.html>>, 1 October 2009, accessed 20 October 2009.; M. Fitzgerald, "Second time around: how Dublin South-West voters are seeing it this time", Irish Times <<http://www.irishtimes.com/newspaper/ireland/2009/0928/1224255368185.html>>, 28 September 2009, accessed 20 October 2009.

However, while the large swing between 2008 and 2009 can be strongly linked to a greater understanding of the Treaty, it does not prove that this enhanced level of knowledge was the only or even the primary factor behind the final result. Further analysis of both popular and media opinion from the 2009 referendum indicates that the fundamental reason so many citizens swapped No for Yes votes was not partisan affiliation nor the specific contents of the Lisbon Treaty, but a recognition that Ireland's parlous economic situation necessitated the maintenance or even strengthening of close ties to the EU.

In 2008, less than half of Yes voters and only 17% of No voters felt the rejection of Lisbon would adversely affect the economy. However, the global economic crisis hit particularly hard in Ireland, with unemployment rising to nearly 13% and the budget deficit blowing out by almost 11% between the first and second referenda.³⁷ This economic downturn had a significant effect on perceptions of the consequences of rejecting the Lisbon Treaty. These changed opinions were evident in the informal surveys carried out by the *Irish Times* and *Wall Street Journal* in the pre-election period, which found many Irish felt obliged to support the treaty 'under protest.'³⁸ Similarly, polling by *Radio France Internationale* and the BBC revealed a recognition that the economy would be the key determinant of the referendum's result, regardless of whether they supported ratification or not.³⁹ This data strongly suggests that economic concerns played at least as high a role as changed perceptions of Lisbon's contents in driving the 2009 upturn in the Yes vote.

This conclusion was also drawn by a majority of media analysts covering the Irish referendum, who saw the eventual success of the referendum as primarily due to popular fear of negative economic consequences should Lisbon be rejected. Two weeks before the poll Hewitt from the BBC observed that the key argument was likely to be economic recovery, while the *Irish Times'* Whelan concluded immediately after it that '[t]his swing was all about the changed economic context ... [the Irish] have now out of economic desperation decided this time they had no option but to vote Yes.'⁴⁰ *Der Spiegel* held that 'the recession was plainly the deciding factor in the sharp turnaround,' a sentiment echoed by the *Economist* and *Financial Times*.⁴¹ And Dutch newspaper *de Volkskrant* argued that "The financial crisis has taught the "Celtic Tiger" that it is safer to be in the EU harbour during a storm.'⁴² This sample

³⁷ Eurobarometer, op. cit., p. 26; Shane Harrison, 'Close treaty poll result forecast,' BBC News <<http://news.bbc.co.uk/2/hi/europe/8281602.stm>>, 30 September 2009, accessed 21 October 2009. See also Milward Brown IMS, op. cit., 22; Simpson, op. cit.

³⁸ McGee, op. cit.; see also Mary Fitzgerald, 'Arguments linking treaty with jobs gain traction in Tallaght,' *Irish Times* <<http://www.irishtimes.com/newspaper/ireland/2009/0928/1224255368102.html>>, 28 September 2009, accessed 20 October 2009.

³⁹ Finnan, 'Yes voters optimistic on Lisbon Treaty,' op. cit.; BBC News, op. cit.; Simpson, op. cit.; Cathy Grieve, 'EU treaty stirs Irish grassroots,' BBC News <<http://news.bbc.co.uk/2/hi/europe/8273712.stm>>, 26 September 2009, accessed 21 October 2009.

⁴⁰ Whelan, op. cit.

⁴¹ *Economist*, 'The future's Lisbon,' *The Economist* 10-16 October 2006, pp. 23-25; Siobhán Dowling, 'Irish Lisbon Vote IS 'A Cry For Help,' *Spiegel Online* <<http://www.spiegel.de/international/europe/0,1518,653282,00.html>>, 5 October 2009, accessed 21 October 2009.

⁴² Deutsche Welle, 'Press review: Ireland and the Lisbon Treaty,' DW-World.de <<http://www.dw-world.de/dw/article/0,4758321,00.html>>, 5 October 2009, accessed 20 October 2009. On global reaction to the referendum result see Kathy Sheridan, 'World's media circus moves on having come to Ireland's big top to hear the lion roar No,' *Irish Times*

reflects a broad consensus amongst the European media that the key determining factor in the second Lisbon vote was fear over the economy. Despite the lack of formal opinion surveys or academic analysis of the second Irish referendum, the shared opinion of so many prominent media outlets provides a strong indication that changed economic circumstances played a highly significant role in explaining the large swing in voting behaviour between Lisbon I and II.

The changed results of the Irish referenda on Lisbon cannot be explained by the theoretical approaches of either Franklin (1994 or 2002) or Svensson, as neither domestic politics nor the specific contents of the Treaty were the key factor underpinning voter preferences. The flexibility of Szczerbiak and Taggart's methodology provides it with greater explanatory power, as it incorporates the effect of general attitudes towards Europe into its analysis.⁴³ However, the central role which Ireland's broader economic context played in the result of Lisbon II points to a gap even in this analysis of the way citizens vote in European referenda. In the Irish case, the need to maintain close links to the EU in difficult economic times did not necessarily change voters' perception of the particular effects of the Treaty or view of their domestic politicians. Nevertheless, it did alter the perceived importance of being close to Europe, and consequently had a significant effect upon the outcome.⁴⁴ Such external concerns could conceivably play a similar role in other European referenda. For example, a major terrorist attack or military confrontation immediately before a referendum could push security concerns to the forefront of the electorate's attention, dramatically reducing the role of partisan affiliation or Treaty minutiae in determining its outcome. More work needs to be done on exploring what type of issues can have this transformative effect on European referenda, and investigating how they can be integrated into existing models of voter preference formation.

Euroscepticism can be best understood as a combination of opinions towards European integration in general as well as attitudes towards a specific issue or treaty. Consequently, the most analytically useful definition of Euroscepticism is Flood and Usherwood's six-point continuum. This model is therefore applied here to classify the different Eurosceptic attitudes within Ireland, and identify the beliefs of those voters who switched from No to Yes between 2008 and 2009. While the existing literature on preference formation is divided over whether domestic political

<<http://www.irishtimes.com/newspaper/ireland/2009/1005/1224255888493.html>>, 5 October 2005, accessed 20 October 2009.

⁴³ Szczerbiak and Taggart also differ from Franklin and Svensson by focusing not just on political figures but also a broader definition of 'elites,' including non-party actors such as heads of state and religious organisations. The Irish example demonstrates the important role which these elites had in reducing the knowledge deficit amongst the electorate about the contents of the Treaty, lending further explanatory power to their approach.

⁴⁴ Brian Coll, 'The E.U.'s Future: Back in the Hands of Irish Voters,' *Time*

<<http://www.time.com/time/world/article/0,8599,1926522,00.html#ixzz0W4rztAY>>, 29

September 2009, accessed 29 September 2009; Anne Jolis, 'How the EU Got the Irish to 'Yes.', *Wall Street Journal*

<<http://online.wsj.com/article/SB10001424052748704471504574451720408422980.html>> (4 October 2009) accessed 20 October 2009. Milward Brown IMS argue that the economy also played a significant role in ensuring the initial rejection of the Lisbon Treaty in 2008, with the onset of economic downturn leading to an increase in protectionist sentiment that only transformed into support for closer ties with Europe and Treaty ratification once the scale of the crisis became evident. This also appears to lend support to the proposition that external concerns such as the economy do play a key role in a broad range of referenda. Milward Brown IMS, op. cit., pp. 12-3.

affiliation or the specific contents of a particular treaty are more important in shaping preference formation in European referenda, the Irish example highlights the important role of broader economic and security contexts in shaping voter choice. These external factors need to be incorporated into a more integrated model of vote formulation, so that all three factors are recognised as contributing to the adoption of a soft Eurosceptic position. The logical place to start such a synthesis is with the pre-existing work of Szczerbiak and Taggart.

More detailed research is also needed to fully understand the results of the 2009 Lisbon referendum. For example, the role of the press in influencing public opinion has been little analysed to date, while widespread resentment at the government's decision to hold a second referendum despite its initial defeat played a significant but ill-understood role in encouraging No voters. Particular quirks of the Irish electorate may also give deceptive results which are not broadly applicable to the EU as a whole.⁴⁵ Such research into the causes of the swing from No to Yes votes in 2009 would serve to supplement and refine the preliminary conclusions drawn here.

⁴⁵ For example, R. Sinnott argued in 2003 that of the 23 referenda held up to that point only four entailed major conflict between political parties, despite at least 16 relating to underlying cleavages within society on which there were substantial divisions amongst the population. This points to a long-standing tendency of Irish political parties to adopt the same position on issues raised in referenda, even if such a stance does not reflect the variety of views at a non-elite level. The explanation for this anomaly may be the historical division of Irish parties and citizens along religious rather than political or class-based lines. See R. Sinnott, 'Attitudes and behaviour of the Irish electorate in the second referendum on the Treaty of Nice: Results of a survey of public opinion carried out for the European Commission Representation in Ireland,' Working Paper, University College Dublin <<http://www.ucd.ie/dempart/workingpapers/nice2.pdf>>, 26 February 2003, accessed 10 September 2009; Michael Holmes (ed.), *Ireland and the European Union: Nice, enlargement and the future of Europe*, Manchester, Manchester University Press, 2005.

Mastering the Unmasterable? *Vergangenheitsbewältigung* of Germany's National Socialist past

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Abstract

*“The question about what nations should do about a difficult past is one of the great subjects of our time.”² This essay engages with the process of *Vergangenheitsbewältigung* and asks the thorny question: how close is Germany to mastering a Nazi past notoriously described as “unmasterable”?³ Following discussion defining the scope of Holocaust victims and what overcoming the past entails, focus turns to the ‘Memorial to the Murdered Jews of Europe.’ Drawing insight from prominent discourse, its commemorative aims and functions are examined. Ultimately, it is concluded that whilst the memorial has brought Germany somewhat closer to coming to terms with its past by ensuring the Holocaust does not pass from public consciousness; it also consolidates a hierarchy of victims.*

Without seeking to diminish or challenge the suffering of the six million Jews killed in the Holocaust, this essay highlights the exclusive nature of commemorative practice in Germany, impeding its ability to come to terms with all of its Nazi crimes.

Key words: Germany, Holocaust, memorial, Nazi, past, unmasterable.

“The question about what nations should do about a difficult past is one of the great subjects of our time.”⁴ It is a question that touches all of humanity, yet presents no simple answers. It is amidst a backdrop of memory discourse engaging with this question that Germany’s struggle to master its National Socialist past has commanded global attention. This essay engages with the process of *Vergangenheitsbewältigung* and asks the thorny question: how close is Germany to mastering a past notoriously described as “unmasterable”?⁵

Following a discussion of what *Vergangenheitsbewältigung* entails and the various actors involved in the associated debates, the aims and functions of German public memory work in the new millennium will be examined. Particular focus will be placed on the controversial ‘Memorial to the Murdered Jews of Europe,’ unveiled in 2005 in Berlin. The fulfilment of the memorial’s primary aims suggest that Germany is making undeniable progress in coming to terms with its past. Indeed, argument will be made that the end goal of mastering the past is to be encouraged; however, it will be proposed that the aims of *Vergangenheitsbewältigung* are narrow in their

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² T. G. Ash, ‘Trials, Purges and History Lessons’, in *History of the Present: Essays, Sketches and Despatches from Europe in the 1990s*, London, 1999. p.294.

³ C. Maier, *The unmasterable past: History, holocaust, and German national*, Harvard University Press, Cambridge, Mass, 1988.

⁴ Ash, op. cit.

⁵ Maier, op.cit.

scope of commemoration. This creates a hierarchy of victims, functioning as a substantive obstacle to mastery of Germany's National Socialist past, in its entirety.

Vergangenheitsbewältigung: An Overview

In discussing coming to terms with the National Socialist past, it is necessary to delineate, for the present purpose, exactly which past it encompasses. This essay focuses on the Holocaust aspect of National Socialism; however, the definition of the Holocaust, or more specifically the scope of its victims, remains hotly contested.⁶

The definition adopted here incorporates all minority and "racially motivated German crimes and all their victims" and, although exact figures are impossible to produce, there is suggestion that the tally of victims may have approached seventeen million.⁷ The victims are taken to include, among others, the European Jewish community, the Sinti and Roma, the handicapped, homosexuals, Polish and Soviet civilians, prisoners of war and political and religious dissenters. The reasons for this "expansive conceptualisation"⁸ will be evidenced in a later discussion of the hierarchisation of victims.

A further concept requiring clarification is *Vergangenheitsbewältigung*. Combining the German words for 'past' and 'overcoming', it is a term that conceptualises 'coming to terms with the past,' ordinarily within a framework of politics, policy and culture.⁹ Once again, a more expansive definition will be adopted in this essay; one that superimposes conventional politics with *Erinnerungspolitik*¹⁰ (memory politics) to allow for a better analysis of working through the past through commemorative practice.¹¹

In arguing that Germany's past is indeed masterable, it is also useful to elucidate what the process does not involve. It does not and should not entail an "*Aufrechnung* (reckoning up or settling of accounts), drawing a line below the ledger of moral accountability or laying the past to rest."¹² It does not involve drawing a *Schlussstrich*¹³ but rather a continually evolving dialogue and an active practice of commemoration. Mastering the past is not about achieving justice or "seeking moral closure".¹⁴

⁶ For example, see multiple definitions in: D. Niewyk. 'The Colombia Guide to the Holocaust,' Colombia, Colombia University Press, 2003, pp.51-52.

⁷ Ibid.

⁸ Ibid.

⁹ A. Beattie. *Playing Politics with History: The Bundestag Inquiries into East Germany*, Berghahn Books, New York, 2008, p.9.

¹⁰ P. Reichel. *Politik mit der Erinnerung: Gedaechtnisorte im Streit um die nationalsozialistische Vergangenheit*, (revised edition), Frankfurt am Main, 1999. Cited in: Andrew H. Beattie (2008) 'Playing Politics with History: The Bundestag Inquiries into East Germany', Berghahn, p.20.

¹¹ Beattie, op. cit., p.9.

¹² R. Moeller, 'The Politics of the Past in the 1950s: Rhetorics of Victimisation in East and West Germany', in *Germans as Victims: Remembering the Past in Contemporary Germany*, B. Niven (ed.), Houndmills, Palgrave Macmillan, 2006, p.27.

¹³ H. Köhler: quoted in R. Wittlinger, 'Collective Memory and National Identity in the Berlin Republic: The Emergence of a New Consensus?', *Debatte: Journal of Contemporary Central and Eastern Europe*, Vol.14, No. 3, 2006, p. 209.

¹⁴ M. Friedman, cited in: Neill, W. J. V., 'Berlin Babylon: The Spatiality of Memory and Identity in Recent Planning for the German Capital,' *Planning Theory and Practice*, Vol.6, No.3, 2005, p.351.

In this essay it is taken to mean moving on from a paradigm dichotomising victim and perpetrator, as the passage of time begets a generation of Germans not culpable for the crimes of their forebears. '*Vergangenheitsbewältigung*', 'mastering the past' and 'coming to terms with the past' will be referred to interchangeably under this unifying definition.

The real difficulty posed by the concept, however, lies deeper than semantics. It is, in part, due to the absence of normative criteria, the fulfilment of which satisfies the requirements of a mastered past. The real test and ultimate judge is public perception, which is unlikely to achieve homogeneity. But before it can even approach consensus, commemorative practice needs to honour all victims if it indeed seeks to come to terms with the Holocaust, in its entirety.

For this reason, groups representing victims are amongst the primary actors involved in *Vergangenheitsbewältigung* discourse. The Jewish voice, with notable advocates such as Lea Rosh and the Central Council of Jews in Germany¹⁵ has a strong presence. Offering, at times, dissenting perspectives is the General Council of Sinti and Roma. They are joined by a long list of victim lobby groups, politicians, members of the public, designers and prominent figures. Historians also lend valuable insight to the debate, with renowned works having been published by Charles Maier, James E. Young and Bill Niven, amongst countless others. One of the most prominent aspects of their discourse turns on the multitudinous aims and functions of *Vergangenheitsbewältigung*.

Aim vs. Function

Consideration of what *Vergangenheitsbewältigung* seeks to do and what it actually achieves is a weighty factor in conjecturing how close Germany is to mastering its past. This is, however, by no means a simple task. *Vergangenheitsbewältigung* casts an expansive net through multiple facets of public, and not to mention private, life. Recent projects of relevance include; "public discussions, political debates in the *Bundestag*, preservation of former concentration camps, memorials, commemorative days... museums, documentaries, compensation for victims"¹⁶ and reform to the school curriculum. In light of the sheer scope of these projects, continuing discussion here in broad empirical detail presents too extensive a venture. For this reason, aims and functions will be analysed with respect to the controversial 'Memorial to the Murdered Jews of Europe,' revealed in Berlin, 2005. An additional reason for focussing on the prominent memorial is that memory and identity interact substantially with physical space; "the German word for being alive, '*Dasein*' literally meaning 'being there'. The common view is that cultural or collective memory is produced through and reflected in object, images and representations."¹⁷

¹⁵ G. Knischewski, 'Remembering in the Berlin Republic: The debate about the central Holocaust memorial in Berlin,' *Debatte: Journal of Contemporary Central and Eastern Europe*, Vol.13, No.1, 2005, p.26.

¹⁶ E. Langenbacher, 'The Mastered Past? The Impact of Collective Memories on Contemporary German Political Culture and Public Opinion' *Working Paper*, August 30, 2010, Georgetown University, Department of Government. Available at SSRN: <http://ssrn.com/abstract=1668917>, Accessed 1 September 2010, p.22.

¹⁷ L. Heidenreich, '*Collective Memory, Identity and Place Making in Reunified Berlin*', Workshop on Urban Conflicts, Identities and Architecture, Available at Irmgard Coninx Stiftung: <http://www.irmgard-coninx->

Designed by Peter Eisenman and spanning 19 000 square metres at the metropolitan heart of Berlin, it is a powerful presence featuring thousands of concrete stellae. Generating heated debate since the memorial's inception by Lea Rosh in 1989, the memorial has continued to attract controversy through its dedication, design and international reception.

Aim and functionality intersect at different levels of the generated debates, demonstrating a complex interdependence. According to James E. Young, "if the reason for these memorials is 'never to forget,' then we ask precisely what is not forgotten... for what is remembered here depends on how it is remembered; and how events are remembered depends in turn on the shape memorial icons now lend them."¹⁸ Memorial discourse draws attention to a confusing interplay of the what, the how and by whom.

Ethically, there is undeniable merit to the quest for justice following a wrong. Yet, there is arguably little place for true justice in post-millennial *Vergangenheitsbewältigung*. Germany is approaching a time where victims and perpetrators are no longer amongst the living. Timothy Garton Ash suggests that those who never faced the Third Reich have no right to condemn those who did and, likewise, those who were themselves not victims have no right to forgive.¹⁹ Furthermore, the argument may be advanced that justice can never be achieved for such horrific crimes, by sheer virtue of their gravity. So, setting the quest for justice aside, it must be asked what other aims motivate commemorative work such as the 'Memorial to the Murdered Jews of Europe.'

Critics such as Michael Friedman²⁰ and Michael Naumann²¹ speak out against an unspoken aim of "moral closure,"²² allowing perpetrators to jettison responsibility and receive atonement. There is, however, no substantive evidence to suggest this to be a bona fide aim and certainly not on an official level. However, there are fears that this is a functional consequence of the project. A related claim is that Germany abdicates responsibility by not mentioning who it was that murdered the Jews.²³ Aside from the perhaps superficial argument that the nationality of perpetrators is made implicit by its location in Berlin, the call for Germany to identify those culpable, as demonstrated by the Nuremberg Trials, is a task fraught with difficulty, producing what some claim to be limited justice. It also raises other questions such as whether the statuses of victim and perpetrator are mutually exclusive; an issue debated following the proposed Centre against Expulsions.

stiftung.de/fileadmin/user_upload/pdf/urbanplanet/identities/ws2/082%20Heidenreich.pdf>, accessed 16 September, 2010, p.2.

¹⁸ J. E. Young, 'After the Holocaust: National Attitudes to Jews' - The Texture of Memory: Holocaust Memorials and Meanings.' *Holocaust and Genocide Studies*, Vol.4, No.1, 1989, p.64.

¹⁹ T. Garton Ash, op. cit., p.301.

²⁰ Cited in: Neill, W. J. V. (2005) 'Berlin Babylon: The Spatiality of Memory and Identity in Recent Planning for the German Capital', *Planning Theory and Practice* Vol.6, No.3, p.351.

²¹ Cited in: Ibid, p.347.

²² M. Friedman, cited in: Ibid, p.351.

²³ S. Mangos, Thesis: 'The Construction of the National Holocaust Memorial in Berlin', 2010, <simonemangos.com/Thesis_Holocaust_memorial_06_02-2010_senza_abstract.pdf>, accessed 10 September 2010, p. 282.

A similar criticism focuses instead on the function of the memorial. Apprehension was voiced by Allan Cochrane at the prospect of the memorial functioning as a “place of forgetting rather than remembering.”²⁴ Cochrane put forward the idea that “there is nothing as invisible as a monument.”²⁵ suggesting that memorials make the past invisible and easier to forget, thus creating redemption through forgetting. Yet the axiomatic counter-argument is that there is indeed something more invisible and more conducive to forgetting than a memorial; namely the lack of one. Still, the German media embraced the concern, questioning the memorial’s potential to degenerate into a *Kranzabwurfstelle* (a place where wreaths are ‘dumped’) and tourist attraction.²⁶ The latter is debatably unavoidable but if tourism is a corollary of broader awareness, perhaps it should be welcomed, so long as it generates more discourse and consolidates public memory.

A more positive aim of the memorial favoured by such commentators as James E. Young and Brian Ladd is to “engage people in an active process of remembering”²⁷ the Holocaust, in which “an inescapable partnership grows between a people and its monuments.”²⁸ In his design, Eisenman aimed to trigger dialogue; “It stands there silent. The one who has to talk is you.”²⁹ This is an instance where function undeniably follows the aim; constant debate and discussion still persist, consolidating public memory. By generating debate and discussion, this memorial project, amongst countless others, brings Germany closer to coming to terms with its past. Regardless of whether dialogue is critical or favourable, the key point is that the event doesn’t pass from public consciousness. A notable publication, “*Das Denkmalstreit – das Denkmal*,” supports this by implying that the memorial debate is (of) itself the memorial.³⁰ The essential fact is that Germany has instituted commemorative practices that intersect with other endeavours listed above as part of the overarching *Vergangenheitsbewältigung* process. The primary achievement of the ‘Memorial to the Murdered Jews of Europe’ is that it is there, that it is accessible and thought-provoking and that there is information available for those who seek it. According to James E. Young, “this is finally all we can ask of Germany’s national attempt to commemorate the Nazi’s murder of European Jewry”³¹ – which prompts the question; what of the ‘others’?

James E. Young’s statement, *prima facie*, suggests that Germany is indeed very near to coming to terms with the Holocaust. However, the lesser representation of the ‘other’ victims presents something of an obstacle. Are the aims for Holocaust commemoration too exclusively focussed on ‘primary’ victims?

²⁴ B. Ladd, ‘Center and Periphery in the New Berlin: Architecture, Public Art and the Search for Identity,’ *Journal of Performance and Art*, Vol. 22, No. 2, 2000.

²⁵ Huyssen quoted in: A. Cochrane. ‘Making up Meanings in a Capital City: Power, Memory and Monuments in Berlin,’ *European Urban and Regional Studies* Vol.13, No.5, 2006, p.12.

²⁶ Frankfurter Allgemeine Zeitung cited in: Caroline Gray, *The politics of cultural remembrance: The holocaust monument in Berlin*, 1999, p.160.

²⁷ J. E. Young, see Jan Fischer, ‘The Ghosts of Berlin; Confronting German History in the Urban Landscape,’ *Harvard Design Magazine* No.7, 1999, p.349.

²⁸ J. E. Young. ‘After the Holocaust: National Attitudes to Jews’, op. cit., p.74.

²⁹ S. Quigley, ‘Holocaust Memorial: Architect Peter Eisenman,’ <<http://www.war-memorial.net/Holocaust-Memorial--Architect-Peter-Eisenman,-Berlin-2005-2.66.->>, accessed 10 September, 2010.

³⁰ U. Heimrod, G. Schlusche und H. Seferens, “*Der Denkmalstreit – das Denkmal? Die Debatte um das “Denkmal für die ermordeten Juden Europas”*”, Philo Verlag, Berlin, 1999.

³¹ J. E. Young cited in: ‘The Ghosts of Berlin’, op. cit., p.350.

How close is Germany to mastering its Nazi past?

It is this question of the 'other' victims of Nazi crimes, it will be argued, that functions as one of the primary barriers to Germany's mastery of its past. But before this statement can be justified, it is worth examining whether the past can be mastered at all and whether it should be encouraged.

Holocaust discourse is heavy with opinion firmly rooted against such a position. Ernst Nolte summarised this sentiment clearly with his article in the *Frankfurter Allgemeine Zeitung*, "*Die Vergangenheit, die nicht vergehen will*"³²(the past that will not pass). Similarly, Charles Maier wrote a book about Germany's "Unmasterable Past",³³ to which the title of this essay makes reference. This academic culture may be due, in part, to a lack of agreement on what coming to terms with the past entails. The definition delineated earlier, involving moving on from a paradigm dichotomising victim and perpetrator whilst continuing commemorative practice, finds support amongst academic commentators such as Eric Langenbacher.

Langenbacher tentatively claims that Germany's Nazi legacy "may be overcome,"³⁴ intimating that "perhaps it is time to ask whether Germany's past finally has been worked through – not in a manipulative or evasive sense – but rather in light of good intentions and because of the power of time."³⁵ His use of the subjunctive mood and general reluctance to make a definitive statement on this highly controversial topic comes as little surprise. Although seemingly confident that mastering the past is possible, he too appears to hold reservations about the process being complete.

Langenbacher's hesitation notwithstanding, his confidence in Germany's theoretical capacity to come to terms with its past is shared. The Western legal tradition holds that criminal responsibility will only be attributed to those with *mens rea* (the guilty mind). In the present day, the third and fourth generations since the Holocaust are reaching adulthood. The vast majority of Germans today have no *mens rea* for Nazi crimes and yet "continue to take their self-representation very seriously. Expressions of national ambition, self-assertion or ego inspire suspicion."³⁶ Although it is nowhere written that the current generation of Germans are responsible for the crimes of their forebears, the damaging conceptualisation of the European Jewry as victims and Germans as perpetrators remains. Without compromising commemoration of the Holocaust, there ought to come a time when Germans can "represent (their) own interests (internationally) in a more uninhibited manner."³⁷ There is support for the view that a time when Germany is "no longer paralysed by the memory of crimes perpetrated in its name"³⁸ is very close. James E. Young asserts that Germany's involvement in NATO's 1999 intervention in Serbia is

³² E. Nolte, *Vergangenheit, die nicht vergehen will*. Eine Rede, die geschrieben, aber nicht gehalten werden konnte, in: *Frankfurter Allgemeine Zeitung*, 6. June 1986.

³³ C. S. Maier, op. cit.

³⁴ E. Langenbacher, *Still the Unmasterable Past?*, op. cit., p.24.

³⁵ *Ibid*, p.36.

³⁶ J. Fischer, op. cit., p.5.

³⁷ G. Schröder, "Eine offenen Republik", *Die Zeit*, 1999 quoted in: Ruth Wittlinger. (2006) 'Collective Memory and National Identity', p.208.

³⁸ J. E. Young, *Germany's Holocaust memorial problem – and mine*, op. cit., p.80.

demonstrative that “endless debate and memorialisation are no longer mere substitutes for actions against contemporary genocide but reasons for action.”

“Germany has gone furthest in commemoration”³⁹ having “transformed utterly the values, institutions and social structures that made the Third Reich and Holocaust possible.”⁴⁰ There is even recent suggestion that Germany’s *Vergangenheitsbewältigung* “could be instructive and even exemplary for Europe.”⁴¹ However, despite such positive reception, there exist flaws in Holocaust commemorative practice.

Positively answering the question of whether mastery of the Nazi past is possible, or even desirable, is not to say that Germany has succeeded. Analysis must instead be directed towards a final inquiry; what is preventing completion of the process? The question has attracted much speculation with suggested impediments including the flat impossibility of morally coming to terms with such heinous crimes, the re-emergence of Germans-as-victims discourse, the overshadowing of commemoration by “political bickering”⁴² and the hierarchisation of victims. Opinion on the subject is diverse and, at times, highly emotional. Unfortunately, substantial discussion cannot be dedicated to all potential impediments to mastering the past. For this reason, attention in this essay will focus on the hierarchisation of Holocaust victims, tending towards the ultimate conclusion that Germany cannot master its Nazi legacy, in its entirety, without adequately commemorating all of its victims without preferential treatment.

Perhaps the most resounding backlash surrounding the ‘Memorial to the Murdered Jews of Europe’ comes from activist groups and scholars representing the millions of other victims that suffered as part of the Holocaust. The argument was advanced that by dedicating the largest and most significant memorial in Berlin solely to Jewish victims killed, a hierarchisation of victims was created. Not only does it exclude Jewish victims who survived the torment but countless people of other race and identity. As, arguably, Germany’s flagship memorial to all the world, the exclusion created the sentiment that ‘other’ victims are less worthy of commemoration. Controversially deemed the “second selection process conducted by the Germans,”⁴³ some were quick to remind “it was the Nazi state that started dividing its victims into different groups. Why does this have to be continued sixty years after the downfall of the regime?”⁴⁴

Much discourse focussed on the uniqueness of the Jewish experience. Lea Rosh head of the Foundation for the Memorial to the Murdered Jews of Europe maintained that “the Jews are the most important victim group and therefore have priority.”⁴⁵ “Other victim groups,” she added, “can legitimately expect memorials of their own.”⁴⁶ It

³⁹ T. G. Ash, op. cit., p.309.

⁴⁰ E. Langenbacher, *Still the Unmasterable Past*, op. cit., p.37.

⁴¹ A. Beattie, ‘Learning from the Germans,’ *Journal of Multidisciplinary International Studies*, Vol 4, No 2, 2007, p.3.

⁴² J. E. Young cited in: *The Ghosts of Berlin*, op. cit., p.21.

⁴³ G. Knischewski, ‘Remembering in the Berlin Republic’, p.39.

⁴⁴ *Die Welt*, quoted in: <<http://news.bbc.co.uk/2/hi/europe/4533463.stm>>, accessed 10 September, 2010.

⁴⁵ K. E. Till, op. cit., p.126.

⁴⁶ L. Rosh, quoted in Neill, *Memory and Identity in Recent Planning*, op. cit., p.348.

must be asked whether such dialogue is constructive for the task of coming to terms with the past. Other victim groups can expect commemoration but this is not to say that they will receive it; it is not the place of victims to construct memorials for themselves. Following much public discussion, subsequent memorials to homosexual victims and the Roma and Sinti were erected nearby but their lesser size suggested lesser significance, not to mention that further victim groups were left unmentioned. Bill Niven takes the argument further by asking, “does the fact that six million Jews were killed, but ‘only’ 500, 000 Sinti and Roma, make the individual death of a Jew more significant than that of a Sinto?”⁴⁷ The answer must surely be in the negative, justifying in turn a more expansive definition of the Holocaust to avoid a damaging hierarchisation.

The argument presented here does not seek to diminish or challenge the suffering of the six million Jews killed in the Holocaust. Instead, it aims to reveal discrimination ingrained in the scope of memorial practice with vision to make it more inclusive and comprehensive. Commemoration is, after all, not a zero sum game where the remembrance of additional victims compromises that of other victim groups. If Germany seeks to eventually come to terms with all of its Nazi past and move on from a dichotomisation of victims and perpetrators, it needs to commemorate all of the victims without preferential treatment. The cost of an individual human life should be deemed no greater or lesser in significance than any other. “With the Memorial for the Murdered Jews of Europe used as Germany’s world wide advertisement of its recognition of its crimes... and as the official ‘national memory of the Holocaust,’ a grave injustice has been cemented in place for all of the victims.”⁴⁸ Perhaps the dedication of the memorial site should be broadened to include all victims of Nazi crimes like the *Neue Wache* memorial in Berlin. Whether this could be achieved with sensitivity and without inciting uproar, however, is a question perhaps no one is in a position to answer.

Conclusion

The conclusion drawn here regarding Germany’s post-millennial process of *Vergangenheitsbewältigung* is bitter-sweet. Germany has demonstrated great commitment to consolidating commemorative practice and generating awareness about the Holocaust. Indeed, in this respect Germany’s efforts may be exemplary for the rest of Europe. The combination of this success with the passage of time may suggest that the legacy of the Nazi past is close to being overcome. This would allow Germany to move beyond the dichotomisation of victim and perpetrator and, whilst maintaining active commemoration, assert itself without censure or suspicion.

The reluctance of scholarship and commentary to declare that this process has been completed, with public opinion being the ultimate judge, suggests there to be an obstacle impeding mastery of the past. Although it is impossible to discern a single and definitive reason from the complex interweave of Holocaust discourse, it is asserted in this essay that a significant unresolved factor is the hierarchisation of victims. The commemoration of some victim groups in preference to others consolidates segregation and the dichotomisation of victim and perpetrator. Were

⁴⁷ B. Niven, *Facing the Nazi Past: United Germany and the Legacy of the Third Reich*, London, Routledge, 2001, p.214.

⁴⁸ S. Mangos, op. cit., p.286.

this issue to be addressed, Germany would progress far closer to its ultimate goal of coming to terms with its Nazi past, in all of its entirety.