The Public Administration of Land: A Legal History of National Parks in England and Wales



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Abstract

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This is the study of the legal history of national parks in England and Wales, as legally provided for by the National Parks and Access to the Countryside Act 1949 (NPACA). National parks in England and Wales are often overlooked as legal spaces, with understandings of these landscapes focusing on their physical features. Yet it is only through the legal processes contained within the NPACA 1949 that these spaces exist. This thesis considers the legal framing of national parks by the NPACA 1949, exploring how the legislation was contingent upon historic legal evolutions in planning law, administrative law, and land law which proceeded the Act, determining its scope in the specific context of English law. It was the culmination of evolutions in each of these areas, during the 19th and 20th centuries, which determined how the NPACA 1949 legally framed national parks. In particular, the rise of planning law, the evolution of local, regional and national governance capacity, and the adaption of old form land rights, created legal principles through which land could be publicly administered. The NPACA 1949 created national parks in light of this capability, integrating them within its statutory framework.

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Table of Contents

TABLE OF ABBREVIATIONS ..... **VIII**

TABLE OF CASES ..... **IX**

TABLE OF STATUTES ..... **XIV**

TABLE OF REPORTS ..... **XXIV**

INTRODUCTION **1**

1. WHAT ARE NATIONAL PARKS? **3**

1.1 The national park provisions of the NPACA 1949 ..... *3*

1.2 The NPACA 1949 and the legal construction of national parks *8*

1.3 Defining planning law, public administration and land rights *10*

2. OBJECTIVES OF THE THESIS **12**

2.1 To provide a legal history of national parks *12*

2.2 To show how national parks were the product of changing legal ideas about the public administration of land *16*

3. GUIDE THROUGH THE THESIS **18**

4. SCOPE **21**

5. BEFORE BEGINNING… **23**

INTRODUCING THE NATIONAL PARK PROVISIONS OF THE NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT 1949 ..... **25**

1. INTRODUCTION **25**

2. 'UNPACKING' SECTION 5 OF THE NPACA 1949 ..... **29**

3. IMAGINING NATIONAL PARKS IN THE ENGLISH LANDSCAPE **30**

3.1 A cultural return to nature *31*

3.2 The global national parks movement *35*

3.3 A political call for national parks *39*

4. FIRST PROPOSING A LEGAL FRAMEWORK FOR NATIONAL PARKS **40**

4.1 The Addison Report *44*

4.2 Responses to the Report *50*

5. A TRIAD OF REPORTS **52**

5.1 The Dower Report *54*

5.2 The Hobhouse Report *59*

5.2.1 The administration of national parks *60*

5.3 The Huxley Report *63*

6. DRAFTING A NATIONAL PARKS ACT **67**

7. CONCLUSIONS: SETTING THE LEGAL LANDSCAPE **73**

PLANNING LAW AND THE LEGAL PROCESSES FOR ADMINISTERING LAND ... **76**

1. INTRODUCTION **76**

2. 'UNPACKING' SECTIONS 8-10 OF THE NPACA 1949 ..... **80**

3. HOUSING, HEALTH, AND EARLY PLANNING **82**

3.1 The Housing and Town Planning etc Act 1909 ..... *84*

3.2 Town planning as a 'discrete activity' *88*

3.3 World War One and the Housing and Town Planning Etc Act 1919 ..... *96*

4. THE RISE OF TOWN *AND* COUNTRY PLANNING LAW **102**

4.1 The agricultural countryside *109*

4.2 Urban sprawl *116*

4.3 The Addison Report 1931 ..... *121*

5. THE CONSOLIDATION OF PLANNING LAW AS THE ACTIVITY FOR ADMINISTERING LAND **124**

5.1 Criticisms of the TCPA 1932 ..... *125*

5.2 Wartime planning *129*

5.3 Post-war planning *141*

5.4 Planning and the NPACA 1949 ..... *150*

6. CONCLUSIONS **152**

THE CAPACITY OF PUBLIC ADMINISTRATORS AND THE EVOLUTION OF NATIONAL PARKS **154**

1. INTRODUCTION **154**

2. THE EVOLUTION OF LOCAL GOVERNMENT **158**

2.1 The emergence of local government ***160***

2.2 The Local Government Acts ***175***

2.3 Local government and planning ***188***

2.4 The legal capacity of local government in the NPACA 1949 ..... ***199***

3. REGIONAL GOVERNANCE AND COLLABORATIVE ADMINISTRATION **205**

3.1 The emergence of joint governance ***207***

3.2 Joint committees and the Town and Country Planning Acts ***210***

3.3 Collaborative administration in the NPACA 1949 ..... ***217***

4. NATIONAL PLANNING AND ADMINISTRATION **220**

4.1 Developing centralised oversight ***221***

4.2 Centralised machinery and expanding capacity ***225***

4.3 Centralised oversight in the NPACA 1949 ..... ***229***

5. CONCLUSIONS **231**

PROPERTY RIGHTS AND THE RISE OF A PUBLIC INTEREST IN LAND **233**

1. INTRODUCTION **233**

2. THE EXCLUSIONARY NATURE OF INTERESTS IN PROPERTY IN LAND **236**

2.1 Introducing exclusionary rights ***239***

2.2 Compulsory purchase for activities of a 'public nature' ***245***

2.3 Purchase provisions and planning law ***250***

2.4 Compulsory purchase in the TCPA 1947 and the NPACA 1949 ..... ***255***

3. A 'PUBLIC INTEREST' IN AMENITIES IN LAND **258**

3.1 Introducing public rights in Land ***263***

3.1.1 Rights of passage *264*

3.2 Public interest and the amenity value of commons and rights of way ***266***

3.2.1 Rights of way litigation *267*

3.2.2 Commons and the public interest *269*

3.2.3 The National Trust: A national public interest in land *279*

3.3 Public interest in the amenity of land and the NPACA 1949 ..... ***285***

4. THE PUBLIC ADMINISTRATION OF LAND **289**

4.1 Statutory nuisance and the public administration of land ***290***

4.2 Old form rights and the regulation of land use ***295***

4.2.1 Statutory agreements for controlling land use *299*

4.3 Integrating land rights into the NPACA 1949 ..... ***301***

5. CONCLUSION **302**

EARLY NATIONAL PARKS AND THE PUBLIC ADMINISTRATION OF LAND **304**

1. INTRODUCTION **304**

2. GENERAL CONSIDERATIONS IN INTERPRETING THE NPACA 1949 ..... **306**

2.1 Agriculture and national parks ***307***

2.2 Access and national park ***311***

2.3 The different objectives under s 5 ..... ***313***

3. THE PEAK DISTRICT **316**

4. THE LAKE DISTRICT **324**

5. DARTMOOR **330**

6. EYRI/SNOWDONIA **336**

7. CONCLUSION **340**

CONCLUSIONS **342**

1. INTRODUCTION **342**

2. PROVIDING A LEGAL HISTORICAL ACCOUNT OF NATIONAL PARKS **344**

3. CHANGING LEGAL IDEAS ABOUT THE PUBLIC ADMINISTRATION OF LAND **349**

4. WHY A LEGAL HISTORY OF NATIONAL PARKS AND PUBLIC LAND ADMINISTRATION MATTERS **350**

BIBLIOGRAPHY **355**

Table of Abbreviations

BL	Bodleian Libraries Archives
BSP	Bristol Selected Pamphlets
ESBHRO	East Sussex and Brighton Hove Record Office
MERL	Museum of English Rural Life Archives
ODNB	Oxford Dictionary of National Biography
TNA	The National Archives
USNA	United States National Archive
WMRC	The University of Warwick Modern Records Centre

Table of Cases

AG v Barnes Corporation and Ranelagh Club, Limited [1939] Ch 110 301

AG v Birmingham, Tame, and Rea Drainage Board (1881) 17 Ch D 685 292

Re Bradford City Premises [1928] Ch 138 287

AG v Brown (1847) 1 Legge 312 (PC) 38

AG v Council of the Borough of Birmingham (1858) 4 K&J 528; [1858] 70 Eng. Rep 220 292

AG v Esher Linoleum Co Ltd [1901] 2 Ch 647 245

AG v Gaskill (1882) 20 Ch D 519 267

AG v Guardians of Poor of Union Dorking (1882) 20 Ch D 595 292

AG v Manchester Corporation [1931] 1 Ch 254 289

Re An Arbitration between Ellis and the Ruislip-Northwood Urban District Council [1920] 1 KB 343 297

Arlidge v Tottenham Urban District Council [1922] 2 KB 719 (KB) 101

Anon (1552) B&M 225 241

Arnold v Holbrook (1872-73) LR 8 QB 96 267

Bailey and Another v Jamieson and Others (1876) 1 CPD 329 267

Ball v Herbert (1789) 3 TR 253, 106 ER 564 264

Bedfordshire County Council [1920] 2 KB 465 109

Bermondsey BC v Mortimer [1926] P 87 249

Blackpool Corp v Starr Estate Co Ltd [1922] 1 AC 27 251

Blout v Layard (1888) [1891] 2 Ch 681 245

Bradford v Eastbourne Corp [1896] 2 QB 205 294

Brown v Dunstable Corp [1899] 2 Ch. 378 294

Burman v St. Albans Corporation (1961) 12 P & CR 360 300

Burnett v Berry [1896] 1 QB 641 186

Bury v Epping Rural District Council and Essex County Council [1941] 1 KB 212 (KB) 127

Butler v Turley (1827) 2 C & P 585 244

Cambridge City Council v Minister of Housing [1955] 1 WLUK 61 149

Church v Inclosure Commissioners (1862) 11 CB 262

Collins v Feltham Urban District Council [1937] 4 All ER 189 108

R v The Commissioners for Inclosing Land in the Parish of Dean (1813) 2 M&S 80 262

Commissioners of Sewers v Glasse (1874-1875) LR 19Eq 134 ..... 262, 263, 278, 279

Conron v London County Council [1922] 2 Ch 283 (HC).....99

Consett UDC v Crawford [1903] 2 KB 183.....295

R v Cornwall County Valuation Committee Ex P. Falmouth Rating Authority [1937] 2 KB 222 (CA).....131

Dartmoor National Park Authority v Darwall and another [2023] EWCA Civ 927.....352

Darwall & Anor v Dartmoor National Park Authority [2023] EWHC 35.....336

Darwall v Dartmoor National Park Authority [2023] EWHC 35 (Ch), [2023] Ch 141 [39].....28

Davies v Williams (1851) 16 QB 546.....267

Dean of Ely v Bliss (1852) 2 DM&G 477.....238

Deane v Clayton (1820) 7 Taunt 489.....243

Dee & Dee v Secretary of State for Levelling Up Housing and Communities & New Forest National Park Authority [2022] EWHC 2166 (Admin).....352

Earl De La Warr v Miles (1881) 19 Ch D 80.....280, 281

Earl Fitzwilliam's Wentworth estates Co v Minister of Town and Country Planning and Others [1951] 1 KB 203.....256

Earl of Harrington v Corporation of Derby [1902] 1 Ch 205.....292

Farquhar v Newbury RDC [1909] 1 Ch 12.....245

Fawcett Property Ltd v Buckingham CC [1958] 1 WLR 1161, [1958] (Ch), 3 All ER 521 [1166].....150

Fielden v Cox (1906) 22 TLR 411.....266

Re Forsey and Hollebone's Contract [1927] 2 Ch 379 (HC), [1927] 7 WLUK 67.....104

Galloway v Corporation of London (1865) 34 Beav 203.....183

Gardner v Mansbridge (1887) 19 QBD 217.....244

Gayford v Chouler [1898] 1 QB 316.....244

George Wimpey & Co Ltd v Middlesex County Council [1938] 3 All ER 781.....299

Graham v Wroughton [1901] 2 Ch 45.....295

GT Hodges & Sons v Hackbridge Park Residential Hotel ltd [1940] 1 KB 404 (CA).....131

Hall v Byron (1877) 4 Ch D 667;.....262

Heap v The Rural Sanitary Authority of the Burnley Union (1884) 12 QBD 617.....181, 182

Higgins v Green (1842) 10 M & W 703.....161, 166

Higham v Havant and Waterloo Urban District Council [1951] 2 KB 509.....300

Horn v Minister of Health [1937] 1 KB 164 (CA).....131

Hornby v Silvester (1888) 20 QBD 797.....267

Huddart v Rigby (1869) LR 5 QB 139.....267

R v Huntingdonshire Justices (1865) LR 1QB 36……267

Ilott v Wilkes (1820) 3 B&Ald 304 243

R v The Inhabitants of Hatfield (1835) 4 Ad & E 156 262

Jackson v Knutsford Urban District Council [1914] 2 Ch 686 87

Jones v Williams (1837) 2 M&W 331 243

Krehl v Burrell (1878) 7 Ch D 551 267

Kruse v Johnson [1898] QB 91 186

Lancaster v Barnes DC [1898] 1 QB 855 295

Land Realisation Co, v Postmaster-General [1950] Ch 435 256

Lane v Capsey [1891] 3 Ch 41 267

Llandudno UDC v Woods (1899) 2 Ch 705 266

Lord Advocate v Lord Blantyre (1879) 4 App Cas 791 243

Lord Rivers v Adams, Issac, and Ferrett (1878) 3 Ex D 361 ....263, 281

Mabo v Queensland [1992] HCA 23, [1992] 175 CLR 1; and *Wik Peoples v Queensland* [1996] HCA 40, [1996] 187 CLR 1 38

MacPherson v Scottish Rights of Way and Recreation Society, Limited, and Others (1888) LR 13 App Cas 744 266

Maddock v Wallasey Local Board (1886) 55 LJQB 267 265

Mann v Brodie (1885) 10 App Cas 378 ....245, 265

Mantle v Jordan [1897] 1 QB 248 186

Markham v Derby Corporation [1935] Ch 320 (HC) 127

Melwich v Luter (1588) 4 Co Rep 26 241

Mercer v Woodgate (1869-70) LR 5 QB 26 267

Metropolitan Water Board v Berton [1921] 1 Ch 299 252

Mills & Rockleys Limited v Leicester City Council [1946] KB 316 289

Regina v Minister of Housing and Local Government [1958] 1 WLR 1093 256

Newcomen v Coulson (1877) 5 Ch D 133 267

Nixon v Erith Urban District Council [1924] 1 KB 819 99

North London Railway Co v Vestry of St Mary (1872) 27 LT 672 265

Northwood v London County Council [1926] 2 KB 411 252

O'Ferrall, Limited v Harrow Urban District Council [1947] KB 66 289

Patrick v Greenway (1796) 1 Wm Saund 346 266

Peter Holmes & Son and Others v Secretary of State for Scotland and Glasgow Corporation [1965] SLT 41..256

Quigley v Clough (1889) 53 NE 884 243

R v Petrie (1855) 4 B & El 737....265

Racecourse Betting Control Board v Secretary of State for Air [1943] Ch 198 (Chancery)....132

Ransom & Luck Limited v Surbiton Borough Council [1949] Ch 180....301

Repton School Governors v Repton Rural DC [1918] 5 WLUK 5....182

RH Galloway v The Mayor and Commonalty of London (1866) LR 1 HL 34 247

Ricket v Metropolitan Railway Co (1865) 5 B & S 156, [1865] 2 WLUK 9....265

Robertson v Hartopp (1889) 43 Ch D 484....280, 281

Robertson v King [1901] 2 KB 265 296

Salford Corporation v Hale [1925] 1 KB 503 (CA) 101

Saunders and Another (1883) 11 QBD 191....295

Seal v Merthyr Tydfil Urban District Council [1897] 2 QB 543 294

Self v Hove Commissioners [1895] 1 QB 685 295

Slater v Mayor of Ashton under Lyme (1852) 18 QB 398....161, 166

Smith v Earl Brownlow (1869-1870) LR 9 Eq 241....244, 262, 274

Steel v Houghton et Uxor (1788) 126 ER 32 264

Strickland v Hayes [1896] 1 QB 290....186

Stubbs v Lake District National Park Authority [2020] EWHC 2293 (Admin)....352

Symes and Jaywick Associated Properties Ltd v Essex River Catchment Board [1937] 1 KB 548 (CA)....131

The Banbury Urban Sanitary Authority v Page (1881) 8 QBD 97....295

The King v Tribunal of Appeal under the Housing Act, 1919 [1920] 3 KB 334....100

Tottenham UDC v Williamson and Sons Limited [1896] 2 QB 353 294

Tyne Improvement Commissioners v Churchwardens of Chirton (1859) 1 El & El 516 166

UDC v Kent CC (1898) 79 LT 425; *Tyne Improvement Commissioners v Imrie* (1899) 81 LT 174 265

Vestry of Bermondsey v Brown (1865) LR 1 Eq 204....263

Wallasey Local Board v Gracey (1887) 36 Ch D 593....295

Wanstead Local Board v Wooster (1884) 12 QBD 617....294

Warick v Queen's College, Oxford (1870-1871) LR 6 Ch App 716 ....262, 275

Webb v. *The Manchester , &c. , Railway Company* (4 Myl. & Cr. 116) 183

Wells v Partridge (1596) Cro Eliz 469 241

Wild v Holt (1842) 9 M&W 672....243

Willingale v Maitland (1866) LR 3 Eq 103 277

Winterbottom v Lord Derby (1866) LR 2 Ex 316 265

Woking Urban District Council v Spanton (Unreported) 287

Woodyer v Hadden (1813) 5 Taunt 125 265

Worthing BC v Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 2044 352

Yevance v Holcombe (1566) CP 40/1238 291

Table of Statutes

Access to the Mountains Act 1939, 2 & 3 Geo 6, c 30……. 268, 300
s 1…… 287
s 2…… 288
Acquisition of Land (Authorisation Procedure) Act 1946, c 49…… 255, 257
s 1…… 255
Acquisition of Land (Assessment of Compensation) Act 1919, c 57…… 251-252
s 1…… 251
s 2…….. 251
Agricultural Holdings Act 1948, 11 & 12 Geo 6, c 63……..…… 144
Agricultural Land (Utilisation) Act 1931, Reginal 21 & 22 Geo 5, c 41…… 113-114, 118
s 1…… 113
s 5…… 113
s 6…… 113
s 7…… 113
s 12…… 114
Agriculture Act 1920, 10 & 11 Geo 5, c 76…… 110-112, 332
s 2…… 110
s 4…… 111
Agriculture Act 1947, Reginal 10 & 11 Geo 6, c 48……..…… 332
s 2…… 332
Allotments Act 1950, Regional 14 Geo 6, c 31…… 144
Appleton and Lymm Inclosure Act 1765 Cheshire 3 Geo 3, c 45…… 260
Artisans' and Labourers' Dwellings Act 1868, c 130…… 83-84
s 7…… 83
Artisans' and Labourers' Dwellings Improvement Act 1875 38 & 39 Vict, c 36……..…… 84
Bedford Level Act 1663, 15 Cha 2, c 17…… 259
Bourton Warwickshire Inclosure Act 1765 5 Geo 3, c 35…… 260
Building Act 1774 4 Geo III cap 78…… 244
Commons Act 1876, Reginal 39 & 40 Vict, c 56……..…… 279
s 2…… 279
s 7…… 279
Commons Act 1899, Reginal 62 & 63 Vict, c 30……..…… 279
Compulsory Acquisition Act 1919, c 57…… 132
Corn Production Act 1917, c 46…… 110, 332
Countryside Act 1968, c 41…… 4-5
Dartmoor Commons Act 1985, c37…… 335
Defence of the Realm Act 1914, 4 & 5 Geo 5, c 29……..…… 227
s 1…… 5, 7
s 2…… 5
Emergency Powers (Defence) Act 1939, 2 & 3 Geo 6, c 62……..…… 136, 331
Environment Act 1995, c 25…… 7-8

Epping Forest Act 1878, c 213……. 279
s 63…… 7
s 64…… 7
Forestry Act 1919, 9 & 10 Geo 5, c 58…….…….……. 23, 42-43
General Inclosure Act 1801, 41 Geo 3, c 109…….…….……. 260
s I …… 260
s II…… 260
s VIII…… 260
Housing (Additional Powers) 1919 9 & 10 Geo 5, c 99…….…….……. 260
Housing (Financial Provisions) Act 1924, 14 & 15 Geo 5, c 35…….…….……. 102, 105
Housing (financial Provisions) Act 1946, 9 & 10 Geo 6, c 48…….…….……. 144
Housing Act 1925, 15 & 16 Geo 5, c 14…….…….……. 103, 105-106, 195
s 6……. 105
Housing Act 1930, 20 & 21 Geo 5, c 39……..…….……. 106-108
Housing for the Working Classes Act 1890, c70…….…….……..… 83-84, 98, 190, 251, 295
s 4…… 83, 87
s 5…… 83
s 6…… 83
s 21…… 294
s 32…… 294
Part III…….. 250
Housing, Town Planning, &c Act 1919, c 35…….…….…. 39, 48, 97-104, 112, 190, 197, 212, 226
Part I…… 98-102, 250-251
s 1…… 98-101, 112, 116
s 3…… 226
s 4…… 226
s 11…… 99-100
s 12…… 250
s 12(1) …… 100
s 15…… 285
s 25…… 295
s 28…… 101, 112
Part II…… 98-100, 103
s 42…… 99, 101-104, 108, 116, 125, 194, 226, 295
s 43…… 226
s 45…… 100
s 46…… 102, 116, 194
Housing, Town Planning, etc Act 1909, 9 Edw 7, c 44…….…….……. 78, 84-89, 94-95, 96-99, 191-194, 197, 212, 250
Part I…… 87

s 2…… 250
s 4…… 97
s 6…… 87
s 10…… 88
s 12…… 190
s 17…… 192-193
s 54…… 87, 191-192
s 57…… 87-88
s 59…… 295
s 60…… 250
s73…… 285
Inclosure Act 1845, 8 & 9 Vict, c 118…… 260-261, 267
s XXV …… 261
Joint Stock Companies Act 1844, 7 & 8 Vict, c 110…… 281-282
Knaresborough Inclosure Act 1789, 29 Geo 3, c 76…… 259
Land Clauses Consolidation Act 1845, Reginal 8 & 9 Vict, c 18…… 245-247, 260
s I …… 246
s VI…… 246-247
Law of property Act 1925, Reginal 15 & 16 Geo 5, c 20…… 241-242
s 193…… 285-286, 288, 331
S 194…… 286
schedule I, part V …… 285
Levelling-Up and Regeneration Act 2023, c 55…… 349
s 245…… 349
Local Government Act 1858, 21 & 22 Vict, c98…… 176-186, 240
s II…… 176, 181
s IV…… 176
s VIII…… 224
S XV…… 177
s XLV…… 177
Local Government Act 1888, 51 & 52 Vict, c 41…… 185-188, 190, 195, 197, 325
s 3…… 186
s 10…… 186
s 11…… 186
s 18…… 186
s 23…… 186
s 28…… 186
s 31…… 186
s 38…… 211
s 40…… 210
s 41…… 214
s 57…… 211

Local Government Act 1894, 56 & 57 Vict, c 73 ..... 188, 190-195, 197, 211, 214, 248, 325
s 8 189
s 25 191
s 26 191
s 27 191
s 31 189
Local Government Act 1929, c 17 ..... 196-200, 214-215, 320
s 1 196
s 4 197
s 21 196
s 40 214
s 42 198
Local Government Act 1933, c 51 ..... 196, 218, 220, 323, 338
s 85 ..... 218, 325, 337
s 85(1) 218
s 85(2) 218
s 85(3) 218
s 85(4) 218
s 252 322
Local Government Act 1972, c 70 8
s 184 8
Local Government Board Act 1871, c 70 ..... 179, 225
s 4 179
s 6 179
s 7 179
Metropolis Water Act 1902, c 41 252
Metropolitan Commons Act 1866, 29 & 30 Vict, c 122 262
s 5 262
s 6 262
Metropolitan Commons Act 1878 41 and 42 Vict c 71 ..... 262-263, 279
s 2 263
Metropolitan Open Spaces Act 1877, 40 & 41 Vict, c 35 247
Metropolitan Open Spaces Act 1881, 44 & 45 Vict, c 34 247
Ministry of Town and Country Planning Act 1943, 6 & 7 Geo 6, c 5 ..... 55, 68, 124, 135-137, 141, 230
s 1 137
s 6 137
Municipal Corporations Act 1835, 5 & 6 Will 4, c 76 169-173
s XXIX 172
s L 172
s LXIV 172
s LXVI 172

s XC 171
s XCVI 172
s XCVII 172
National Parks and Access to the Countryside Act 1949, 12, 13 & 14 Geo 6, c 97… *Passim*
Part I..... 4, 58, 74, 222-223, 232-234, 310
s 1..... 7
s 1(b) 307
s 2..... 232
s 3..... 5, 9, 232-233
Part II..... 58
s 5..... 3-4,7-9, 23, 25-26, 28-31, 33, 35, 47, 57-58, 67, 74, 80, 148-149, 159, 205-206, 234, 236, 256-257, 288, 301-302, 306-315, 317, 321-323, 328, 332, 339-340, 342, 345
s 5(1) 29
s 5(2) 58, 235
s 5(3) 29, 90, 313
s 6..... 322
s 6(4) 233
s 7..... 6, 157, 301, 304, 323-324
s 7(1) 159, 312, 337
s 7 (5) 320
s 8..... 7-10, 71, 76-79, 147, 152, 157, 159, 190, 206, 208, 216, 236, 312, 323, 326-327, 339-340, 345
s 8(2) 79, 207, 216, 221, 236, 330, 336-337
s 8(3) 79, 216, 330, 333
s 8(4) 221
s 8(5) 80, 207
s 8(6) 80, 207
s 9..... 7, 71, 76-80, 84, 148, 151-152, 159, 190, 233, 236, 256, 312, 316, 323, 326-327, 334, 337-339, 345

s 9(2) …….. 80
s 10…… 7, 71, 76-79, 148, 152, 157, 159, 190, 236, 323, 327, 338-339, 345
s 10(1) …… 81
s 10(5) …… 80-81
s 11…… 7, 71, 80, 157, 159, 175, 179, 190, 201, 205-207, 257, 312, 323, 345
s 11(3) …… 205
s 12…… 80, 157, 309, 338, 345
s 14…… 235
Part III…… 58, 314
Part IV…… 75
s 36…… 310
s 37…… 256
s 40…… 310
s 43…… 310
Part V…… 75, 306, 311-312, 319
s 59…… 300-301, 331, 334
s 60…… 301, 310
s 64…… 8-9, 289, 335
s 65…… 8-9, 301,310, 333
s 68…… 8-9
s 76…… 235-236, 244, 256, 309-310
s 77…… 236, 256, 309-310
s 84…… 71, 114, 256, 306-311, 333
s 87…… 58
s 88…… 58
s 90…… 340
s 103…… 256, 310
s 106…… 322, 323
s 107…… 310
schedule I, Part I…… 5
National Parks (Scotland) Act 2000, asp 10…… 23
National Trust Act 1907, 7 Edw 7, c 36……..…… 283-284

s 4(1) …… 284
s 4(2) …… 284
s 6…… 284
s 31…… 284
s 32…… 284
National Trust Act 1937, 1 Edw 8 & 1 Geo 6, c 57…… 284
s 3…… 284
New Forest (Sale of Land for Public Purposes) Act 1902, 2 Edw 7, c 198…… 40
New Forest Act 1877, 40 & 41 Vict, c 21…… 40
New Towns Act 1946, c 68…….. 130, 144-145
s 1…… 145
s 2…… 145
s 3…… 145
s 4…… 145
North Wales Hydro Electricity Act 1952, 16 Geo and 1 Eliz 2, c 46…… 339
Nuisance Removal Act 1848, c 122…… 293
Nuisance Removal Act 1849, c 122…… 293
Nuisance Removal Act 1855…… 293
Nuisances Removal and Diseases Prevention Act 1855, c 121 293
s 7…… 293
s 8…… 293
Open Spaces Act 1890…… 247
Open Spaces Act 1906, 6 Edw 7, c 25…… 247-249
s 10…… 248
s 14…… 248-249
s 20…… 248
Poor Relief Act 1601, 43 Eliz 1, c 2…… 164
Public Health Act 1848, c 63…… 82, 173-178-184, 190, 346
s 4…… 224
s 6…… 82, 225
s 7…… 292
s 8…… 82
s 10…… 82
s 12…… 173
s 13…… 173
s 37…… 292
s 62…… 176
s 115…… 292-293
Public Health Act 1875, 38 & 39 Vict, c 55…… 83, 179-186, 225, 248, 346
s 6…… 182
s 9…… 182, 225

s 10…… 182
s 11…… 182, 256
s 12…… 257
s 17…… 293
s 18…… 293
s 32…… 83
s 33…… 225
s 42…… 225
s 44…… 183
s 47…… 183
s 90…… 182
s 94…… 293
s 102…… 294
s 134…… 225-226
s 176…… 83
s 276…… 183
s 299…… 180
s 305…… 83
Recreation Grounds Act 1859, c 27…… 247-248
Representation of the Peoples Act 1932, 2 & 3 Will 4, c 45…… 162, 168-169, 223
Representation of the People Act 1867, c 102…… 181, 184-185
Restriction of Ribbon Development Act 1935, c 47…… 118, 297
Rollright, Oxfordshire Inclosure Act 1777, 15 Geo 3 c 41…… 260
Rights of Way Act 1932, 22 & 23 Geo 5, c 45…… 287-288, 311, 318
s 4…… 287
Rural Communities Act 2006, c 16. …… 5
Statute of Bridges 1530, 22 Hen 8, c 5…… 164
Statute of Merton 1235, 20 Hen 3……
Transport Act 1947, c 49…… 144
Town Improvement Clauses Act 1847, 10 & 11 Vict, c 34…… 244
Town and Country Planning Act 1932, c 48…… 78, 106-130, 135-137, 141, 197, 215, 220-222, 231, 253, 286, 325, 346
s 1…… 109, 115, 120, 124, 197,200, 218, 286, 296, 317
s 2…… 199-200, 202
s 3…… 215, 220
s 4…… 326
s 6…… 120, 124, 126, 216
s 6(5) …… 127, 140
s 7…… 124, 126, 216

s 8 ..... 124, 126
s 9 ..... 124, 126, 216, 317
s 10 ..... 115, 126, 216
s 10(6) 127, 253
s 16 ..... 124, 138, 296
s 16(2) 121
s 18 ..... 127-128, 133, 297
s 19 128
s 19(2) 115
s 20 128
s 21 128-129
s 25 ..... 124, 253
s 26 121
s 32 136
s 33 136
s 34 ..... 217, 300-301, 318, 320
s 38 126
s 41 136
s 46 ..... 136, 253, 286
s 47 286
s 51 200
schedule I 138
schedule III, part I 286
Town and Country Planning Act 1944, 7 & 8 Geo 6, c 47 ..... 124, 135, 138-144, 230
s 1 ..... 138, 140
s 2 138
s 3 138
s 5 ..... 138-139, 317
s 10 139,254
s 11 140
s 57 139
schedule II 145
Town and Country Planning Act 1947, c 51 ..... 63, 67, 75-77, 81, 88, 124, 130, 144-150, 203-205, 220-222, 345
s 2 147
s 4 ..... 69, 80, 159, 205, 330, 337
s 5 ..... 148-151, 204, 255, 312, 315
s 7 204
s 8 298

s 9 298
s 12 147-148, 152, 204, 298, 301, 312, 321, 327, 339
s 13 148
s 14 204, 312
s 15 148, 328
s 16 148, 298
s 17 312
s 26 150
s 37 255
s 38 255
s 41 151
s 50 147
s 51 147
s 57 147
part VI 133
schedule I, part I 159, 207, 220-221, 327, 337
schedule I, part III 220-221, 327
Town and Country Planning Act 1962, 10 & 11 Eliz 2, c 38 328
s 1 328
Town and Country Planning Act 1990, c 8 8
s 4 8
Town Planning (Interim Development) Act 1943 129, 135-137, 218
s 9 219
Town Planning Act 1925 15 & 16 Geo 5, c 20 102-107, 122, 127, 194-196, 214
s 1 103, 120, 212-214, 220, 252, 286, 296
s 2 296
s 3 296
s 7 105
s 8 252
Workhouse and Poor Law Amendment Act 1834, 4 & 5 Will 4, c 76 169-173
s V 171
s X 171
s XV 171

Table of Reports

Commission for inquiring into the State of the several Municipal Corporations in England and Wales, *First Report of the Commissioners Appointed to Inquire into the Municipal Corporations in England and Wales* (parliamentary papers XXIII 1835).....165, 166, 168

Edwin Chadwick, *Report on the Sanitary Condition of the Labouring Population of Great Britain* (HMSO 1842).....171

Epping Forest Commission, *Final Report of the Epping Forest Commission* (HC 187, 1877).....279

John Dower, *National Parks: Preliminary Report to the Minister of Town and Country Planning* (Cmd 6628, 1945).....27, 54, 55, 56, 57, 58, 60, 141, 200, 308, 312, 315, 337, 344

Lord High Chancellor Viscount John Lord Sankey, *Report of The Committee On British Parliament Ministers' Powers* (Cmd 4060, 1932).....227, 228

Manchester and District Joint Town Planning Advisory Committee, *Report upon the Regional Scheme* (Blacklock & Co limited 1926) 209, 212

Minister of Works and Buildings *Final Report of the Expert Committee on Compensation and Betterment* (Cmd 6291, 1942) 130, 131, 132, 260, 299

Minister of Works and Buildings *Report of the Committee on Land Utilisation in Rural Areas* (Cmd 6378, 1942).....130, 133

Ministry of Agriculture, *Minutes of Evidence of the Royal Commission on Agriculture* (HMSO September 1919).....48

Ministry of Health, *Royal Commission on the Distribution of the Industrial Population* (Cmd 6153, 1939-1940).....130

Ministry of Town and Country Planning, *Conservation of Nature in England and Wales* (Cmd 7122, 1947) 27, 54, 63, 65

Ministry of Town and Country Planning, *Control of Land Use* (Cmd 6537, June 1944).....145, 148

Ministry of Town and Country Planning, *Report of the National Parks Committee* (England and Wales) (HMSO 1947).....6, 27, 54, 59, 61, 62, 141, 146, 200, 201, 202, 218, 230, 308, 309, 325, 337, 344

Real Property Royal Commission, *Report of the Royal Commission into Real Property* (1st Report HC 263, 1829).....238, 265

Real Property Royal Commission, *Report of the Royal Commission into Real Property* (2nd Report HC 575, 1830).....238

Real Property Royal Commission, *Report of the Royal Commission into Real Property* (3rd Report HC 484, 1831).....238

Real Property Royal Commission, *Report of the Royal Commission into Real Property* (4th Report HC 226, 1833).....238

Select Committee on Railways, *First Report* (HC 1844).....246

The Commissioners for inquiring into the administration and practical operation of the poor law, *Poor Law Commissioners Report of 1834* (Cd 2728, 1834).....164, 168, 171

The National Park Committee, *The Report of the National Park Committee* (HMSO 1931).19, 27, 44, 45, 46, 47, 48, 49, 51, 79, 121, 151, 200, 218, 230, 269, 290, 308, 309, 312, 315, 318, 325, 337, 344

Preface

'Here in Britain, nature is under management. The countryside for the most part is like a garden, not a wilderness. This country is farmed and afforested over most of its area, right up close to the towns, and even on mountains and marshes the land is used as much as possible, as you can see by the walls, dykes and hedges and the pastures of cattle and sheep.

The countryside is largely what men have made of it through many centuries of toil and care. We of the present hold it in trust for future generations.'

- *First draft of the Countryside Code (1950)*

1

Introduction

The year 2024 marks the 75th anniversary of the National Parks and Access to the Countryside Act 1949 (NPACA), which provided the legislative framework for the creation of national parks in England and Wales. It is perhaps for this reason that national parks have recently attracted increased media attention. On the 13th September 2024 the Guardian published 'How National Parks Failed Nature – And How to Fix Them'.[1] Alternatively, the BBC on the 12th September 2024 claimed 'national parks are being held back because nearly 90% of their land remains in the hands of private owners […] national parks are not, in fact, owned by the nation'.[2] Similar articles have been published to this effect, collectively reflecting a sense that national parks fail to meet the modern expectations placed upon them.[3]

This doctorate does not consider whether these claims are correct, drawing no conclusion on whether national parks today are failing. Instead, this research seeks to

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[1] Damian Carrington, 'How national parks failed nature – and how to fix them' (*The Guardian*, 13th September 2024) <www.theguardian.com> accessed 22nd September 2024.

[2] Malcom Prior, 'National Parkland in public hands 'would help nature' (*BBC News*, 12th September 2024) <www.bbc.co.uk/news> accessed 22nd September 2024.

[3] See Damian Carrington, 'England's national parks overseen by 'bloated', mostly white male boards' (*The Guardian*, 13th September 2024) <www.theguardian.com> accessed 22nd September 2024; Sarah Ryan, 'Park strife: does the UK really need more National Parks? (*Live for the Outdoors*, 5th April 2024) <www.livefortheoutdoors.com> accessed 22nd September 2024; Adam Vaughan, 'Cuts threaten national park paths and rights of way access' (*The Times*, 1st April 2024) <www.thetimes.com> accessed 22nd September 2024.

reframe popular understandings of national parks by emphasising the legal nature of these spaces by examining the legal context of the legislation. In doing so, I promote an understanding of national parks not only as natural landscapes but also as legal ones, forged through common law evolution and statutory reform during the 19th and 20th centuries. There has not yet been a distinctly legal account of national parks in England and Wales which explains how and why these spaces were legally framed under the 1949 Act.

Indeed, legal scholarship on national parks is decidedly limited, with the few existing accounts focusing on national parks as part of broader systems for modern countryside or landscape management.[4] This is noteworthy given national parks are entirely legal constructs. Whilst historians have provided accounts of the origins of national parks, these analyses leave unnoticed the legal details which framed the creation of these legal spaces.[5] In light of this, this thesis provides a legal history of national parks in England and Wales, explaining these landscapes both in the context of their own statutory creation and against the evolving legal background which framed them. In turn, this account provides a more complete understanding of what national parks are.

[4] Ben Pontin and Jade Jones, *A legal review of the National Park and Access to the Countryside Act 1949* (University of Cardiff and the Blue Marine Foundation 2023); Brian Jones, Julian Palmer, and Angela Sydeham, *Countryside Law* (4th edn, Shaw and Sons 2004); Tim Bonyhady, *The Laws of the Countryside: The Rights of Way of the Public* (Professional Books 1987).

[5] Josh Blunden and Nigel Curry, *A Peoples Charter?* (HMSO 1989); Ann and Malcom MacEwen, *National parks: Conservation or Cosmetics* (George, Allen and Unwin 1982); Ann and Malcom MacEwen *Greenprints for the Countryside: The Story of Britain's National Parks* (Allen & Unwin 1987); John Sheail, *Nature in Trust* (Blackie and Son Limited 1976); John Sheail 'John Dower, National Parks, and town and country planning in Britain' (1995) 10 Planning Perspectives 1; Gordon Cherry, *Environmental Planning 1939–1969, Volume II, National Parks and Recreation in the Countryside* (HMSO 1976).

1. What Are National Parks?

It is important before considering the purposes of this thesis to set out what national parks legally are. Nearly every country in the world has national parks and these spaces exist because of the laws which created them.[6] As a result, whilst many national parks are legally framed in similar ways, how exactly national parks exist and are administered is unique to the jurisdiction which enacted the legislation to create them. The NPACA 1949 was relatively late in the global context of national park statutes, with 58 countries having enacted national park legislation prior to 1949. Despite this, the NPACA 1949 was particularly unique in how it framed national parks when compared to other jurisdictions. Consequently, as an introductory matter, it is important to explore in detail the provisions of the 1949 Act to understand the precise legal scope of national parks in the specific legal context of England and Wales. Given my focus on the legal history of national parks in England and Wales, for the clarity of this work, the provisions of the NPACA 1949 are presented in the form originally enacted, unless otherwise noted. Thus, they are described in the past tense, despite some of these provisions still being operational today.

1.1 The national park provisions of the NPACA 1949

The statutory definition of a national park can be found in s 5 of the NPACA 1949, which determined the purpose of national parks. National parks are 'extensive tracts of country' which the National Park Commission regarded as deserving preservation or enhancement due to their 'natural beauty' and their

[6] 184 of 197 countries have enacted specific national park legislation, 'countries' refers to the 195 Member States of the United Nations, plus Kosovo, Palestine, and the Vatican City. United Nations, 'Official Names of the United Nations Membership' (*United Nations*, rolling renewal) <www.un.org/en/about-us/member-states> accessed 24th September 2024.

ability to provide for 'public enjoyment'. Specifically, as defined in s 5(2), the Commission could designate landscapes as national parks by reason of –

> '(a) their natural beauty, and
>
> (b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population'.

Thus, as is reflected in s 5, the Act did not create specifically any national parks, in so far that the statute made no reference to which regions should be designated. Instead, the Act established the legal processes for designating and administering national parks as legal spaces. Consequently, since the enactment of the NPACA 1949 thirteen national parks have been legally designated by statutory order.[7] These are The Peak District (1951), The Lake District (1951), Eryi/Snowdonia (1951), Dartmoor (1951), Arfordir Penfro/Pembrokeshire Coast (1952), The North York Moors (1952), The Yorkshire Dales (1952), Exmoor (1954), Northumberland (1956), Bannau Brycheiniog/Brecon Beacons (1957), The Broads (1989), The New Forest (2005), and The South Downs (2009).

Part I of the Act established a National Parks Commission, which was responsible for ensuring the effective implementation of the Act.[8] Although the National Parks Commission was subsequently replaced by the Countryside Commission in 1968, and later the Countryside Agency in 1999, before

[7] NPACA 1949, schedule 1, part I, s 1 details the process for issuing orders.

[8] The NPACA 1949, s 1(b).

becoming part of Natural England in 2006, the respective duties of these bodies remained materially similar, in so far that the same statutory oversight functions in relation to national parks continued to exist. [9]

The process described in s 5 granted the Commission seemingly broad powers to determine which landscapes should be designated as national parks. There were however statutory limitations to the power of the Commission, and these are important in understanding how national parks were legally framed. The first of these was that the final order for designation did not come from the Commission itself, but instead the Minister who, under s 3, could direct the Commission and its recommendations. Thus, from the designation of the first national parks in 1951 a standard practice emerged, where the designation of any national park required government approval.[10] This meant that the objectives of s 5, which were balanced against each other, were also balanced against the variety of socio-political demands which existed in the same natural landscapes and required consideration by the government.

This balancing can be illustrated in considering an example of the designation process. The South Downs were initially proposed as potential national park

[9] The Countryside Act 1968 expanded the functions of the National Parks Commission, rebranding it as the Countryside Commission. The Act gave the Commission greater administrative independence from the central government compared to the original wording of the NPACA 1949, empowering the Commission to employ its own staff under s 1(4)-(6). This expanded the functions of the Commission, giving it, under s 2, greater administrative oversight. These new functions empowered the Commission to carry out independent expenditure and have greater oversight of local authority national park administration. Following this, the Countryside Commission was integrated with the Countryside Agency in 1999, resultant from a merger of the Commission with the Rural Development Commission. The Natural England and Rural Communities Act 2006 dissolved the Agency, with its environmental functions and associated statutory duties, including those under the NPACA 1949, being merged with English Nature to form Natural England.

[10] TNA/HLG 92/94 (1949-1957) 'The South Downs Preservation'; HC Deb 23 June 1959, vol 607, cols 1160-1166; NPACA 1949, schedule 1, part I, ss 1-3.

site in 1947.[11] However, following the enactment of the NPACA 1949, the designation of the area proved politically controversial. The British Electricity Authority sought to extend the infrastructure of the national grid to meet the growing energy demands of the towns of Sussex.[12] The erection of pylons however would both limit public access to the area, and alter the landscape itself, going against the legal purposes of national parks under s 5. This led cabinet ministers from the Treasury, Ministry of Agriculture and Fisheries, and the Ministry of Fuel and Power to reject the Commission's proposal, prioritising the pylons ahead of national park designation.[13] The Minister of Town and Country Planning was then obligated to refuse the Commission's recommendation and not issue the order for designation.[14] The Downs were eventually designated as a national park in 2010, following on from a recommendation of the Countryside Agency in 2003.[15]

The second limitation on the power of the Commission to designate national parks was the requirement of consultation set out in s 7 of the Act. Before recommending the designation of a national park, the Commission had to ensure appropriate consultation had taken place. In particular, the Commission had a statutory duty to consult all the local government bodies which would be impacted by the designation of the landscape. This limitation existed

[11] Ministry of Town and Country Planning, *Report of the National Parks Committee* (England and Wales) (HMSO 1947) 10.

[12] TNA/HLG 92/94 (n10).

[13] ibid.

[14] ibid.

[15] The South Downs National Park Authority (Establishment) Order 2010, SI 2010/497; HC Deb 9 April 2003, vol 403, col 20WS.

because, as set out under s 1 of the NPACA 1949 (and subsequently reiterated under s 1 of the Countryside Act 1968), the Commission only had a supervisory role with respect to the administration of national parks. This meant that whilst the Commission was able to 'advise and encourage' to ensure the purposes of s 5 were fulfilled, the Commission did not have any direct control over the daily management or administration of a national park once it had been designated.

Instead, this responsibility was vested in local authorities. Under ss 8-11, existent local government bodies were expected to administer national parks, either collaboratively or independently. Although this has changed following the Environment Act 1995, which allowed for the creation of specific local park management bodies, these bodies are still expected to collaborate with local governments in an area, and are themselves a form of local, not national administration.[16] The process of consultation was thus fundamental in ensuring the effective creation of a national park, given that the collaboration of local governments was, and to some degree still is, essential to the administration of the park.

The duties of local governments with respect to the administration of national parks were also set out in the NPACA 1949, which provided for the specific processes of administration, expressing clearly how local authorities were expected to carry out the administrative tasks associated with national park management. Section 8 of the NPACA 1949 provided that national parks would

[16] Environment Act 1995, ss 63 and 64 outline the process for creating National Park Authorities, explaining how they replaced and interacted with the existent bodies administering national parks. Section 65 set out the respective powers of these Authorities, defining them within the context of the powers previously held by local authorities and joint planning boards. National Park Authorities thus acquired similar powers to those held by local authorities under s 8 of the NPACA 1949.

be administered through the powers granted to local authorities under the Town and Country Planning Act 1947. In particular, local authorities were to use their planning powers, which enabled them to control and regulate development, to administer the different uses of land within a national park. This was done with the purpose of effectuating s 5, by enabling the conservation of, and public access to, national parks. As part of this, local authorities were granted statutory powers to facilitate the public recreational aspects of s 5. Section 64, for example, empowered local authorities to enter into agreements with existing landholders to guarantee public access over privately-owned land. Moreover, under s 65 and s 68, local authorities had additional powers to compel the granting of access to fulfil the public recreation aspect of s 5. As with s 8, these powers were legally underpinned by the ability of the local authority to control land use through its planning powers. Although s 8 has subsequently been repealed, with s 184 of the Local Government Act 1972, s 4 of the Town and Country Planning Act 1990, and the Environment Act 1995 changing the legal duties of local authorities with respect to the administration of national parks, the general principle, established in s 8, that national parks would be administered locally through the legal processes of town and country planning, remains true.

1.2 The NPACA 1949 and the legal construction of national parks

Having outlined the provisions of the NPACA 1949 with respect to national parks, there are a few points which need emphasising in determining what national parks legally are. The first of these is that the language of 'park' is misleading in the statutory context of the NPACA 1949. The Oxford English Dictionary defines 'park' as 'any large, enclosed piece of ground used for

recreation, and often for keeping deer, cattle, or sheep'.[17] It is the use of 'enclosed' which is of particular note. As can be seen in looking at the national park provisions of the NPACA 1949, there is no legal provision for enclosing those spaces. Indeed, as is highlighted by s 64, s 65, and s 68 of the NPACA 1949, national parks were comprised of multiple different landholders, each of whom were able to use their land in broadly similar ways to land anywhere else in the country. Thus, as can be seen in considering s 5 and s 8 of the NPACA 1949, national parks in England and Wales are defined not by a fenced perimeter but through the creation of administrative boundaries during their designation.

The second point of note is that national parks, under the NPACA 1949, legally exist at the intersection between already existent areas of law. This is important because it highlights the legal nature of national parks in England and Wales, with these spaces existing through the same legal processes which facilitate town and country planning, local governance administration, and private land ownership. In particular, as highlighted through s 3 and s 8, national parks exist as a type of town and country planning law, carried out by local and national administrators. Alongside this, as illustrated by ss 64-65 and 68, national parks were designated over landscapes which contained existent private land rights. The national park provisions within the NPACA 1949 can thus be seen to statutorily encompass a series of different legal principles and frameworks. National parks, as legal spaces, sit conceptually at the intersection between administrative law and land law, with town and country planning law

[17] OED, 'park (n.), sense 1b', (*OED*, December 2023) <doi.org/10.1093/OED/9725573103>accessed 18th September 2024.

providing the legal processes through which national parks were defined. Although these legal typologies are further expanded upon throughout the body of this thesis, it is useful to define these terms, alongside determining what national parks legally are.

1.3 Defining planning law, public administration and land rights

For the purposes of this research, town and country planning law is understood as the legal frameworks and processes created by the planning legislation of the early 20th century, namely the ability of public bodies to both make plans and spatially organise physical places. As s 8 of the NPACA 1949 illustrates, national parks in England and Wales were legally framed as a form of planning activity. Conceptually underpinning town and country planning is the law relating to public administration, and the law relating to land use. Public administration is difficult to define,[18] with scholarly discussions about the legal role of public administration often being excluded from administrative law.[19] At its broadest public administration refers to the powers of public bodies,[20] with such powers being any legal duty of a public body which 'relate to the people as a whole'.[21] Thus, within public administration there are two distinct limbs of legal activity. First, there is the system of laws which prescribe the powers of the public body, this can be understood as their capacity to

[18] William Hatcher, *The Curious Public Administrator* (Routledge 2023) 11.

[19] Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, CUP 2022) 2-3.

[20] ibid, 4.

[21] This is taken from the definition of public, 'Of or relating to the people as a whole; that belongs to, affects, or concerns the community or the nation.' OED, 'public (adj.), sense 2.a', (*OED*, June 2024) <doi.org/10.1093/OED/7166526642> accessed 18th September 2024.

administer. [22] Second, is the broader system of balances and controls which exist to ensure that public administration is being conducted within its prescribed legal limits.[23] It is this second limb which is often the focus of administrative law scholarship. However, as Elizabeth Fisher and Sid Shapiro acknowledged, administrative law is about both of these limbs, with the resultant effect being the competence of the public body to publicly administer.[24]

The law relating to land use is similarly comprised of many components, reflecting the multitude of ways in which land has been legally conceptualised.[25] As Simon Gardner and Emily Mackenzie suggested –

> Legal Rules are propositions about human behaviour, and nearly all human behaviour takes place on land, 'land law' in this sense would comprise almost the entire law'.[26]

Acknowledging this, the law of land use relates to the specific forms of interest, or right, that exist in land. These rights and interests determine human interactions with land, enabling land to be used in a legally definable way.[27] It was private land rights in this sense that were reconciled with systems of public

[22] Julia Beckett and Heidi O Koenig, *Public Administration and Law* (Routledge 2015) ix.

[23] HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014) 4.

[24] Elizabeth Fisher and Sidney A Shapiro, *Administrative Competence: Reimagining Administrative Law* (CUP 2020) 3, 12-13.

[25] Alain Pottage 'The Measure of Land' (1994) 57(3) MLR 361, 362; Simon Gardner and Emily MacKenzie, *An Introduction to Land Law* (4th edn, Hart Publishing 2015) 1.

[26] ibid.

[27] ibid, 3-9; AW Brian Simpson, *A History of the Land Law* (2nd edn, Clarendon 1986) 29-40.

land controls, through planning law. Thus, the NPACA 1949, created national parks as a form of planning activity, underpinned by the legal concepts of administrative law and land law., with all three legal areas being important themes within this thesis.

2. Objectives of the Thesis

This thesis explores how town and country planning law, administrative law, and land law provided the legal context for the statutory creation of national parks. In doing so the thesis provides an account of national parks which explains why these spaces were legally created as they were. To achieve this, this thesis can be understood as having two primary objectives; first to provide a legal history of national parks in England and Wales, explaining how such spaces came to legally exist; and second to illustrate how national parks, under the NPACA 1949, were the product of changing legal ideas about the public administration of land. These objectives will be considered in turn.

2.1 To provide a legal history of national parks

This thesis provides a legal history of national parks in England and Wales, seeking to explain both the statutory origin of these spaces, and their broader legal context. In particular, I will consider how legal evolutions in the period 1828-1949 reimagined the roles of administrative law and land law, providing for the first time a system through which land could be planned. These legal changes then came to frame how national parks could exist in English law. My research uses the NPACA 1949 to structure my explorations of these different statutory reforms and common law evolutions, using them to contextualise the national park provisions within the legislation itself. Thus, within this research

there are two overlapping legal historical inquiries which need to be considered to illustrate the value of legal history in understanding the legal creation of national parks.

The first form of legal historical inquiry undertaken in this research is one into the process of statutory reform, both with respect to the NPACA 1949 and the multitude of administrative, land, and planning statutes which proceeded the Act, ultimately providing its legal context. Statute is often overlooked in legal scholarship, with case law typically acquiring more scholarly attention.[28] One need look no further than most law journals to see a breadth of case analyses, compared to the rather limited commentary on legislation alone. In legal history too, it seems the focus is primarily on case law, with landmark case books being plentiful. Part of this approach to statute can be attributed to how legislation is understood, with statute often being viewed as isolated instances of parliamentary legal intervention.[29] This can lead to a sense that statutory context is not legal at all, but instead socio-political, with singular Acts of parliament appearing to lack the continuity and precedent associated with the doctrinal study of case law.

Yet, to pick an example, if Brian Simpson's *Leading Cases in Common Law*,[30] provides a 'vehicle to understand the social context of English law-making and

[28] Jeremy Waldron, *The Dignity of Legislation* (CUP 1999) 9-11; Eloise Scotford 'Legislation and the Stress of Environmental Problems' (2021) 74 CLP 299, 299-301; PJ Fitzgerald, 'Are Statutes Fit for Academic Treatment' (1971) 3 JSPTL 142.

[29] Waldron (n28) 7, 10-11; See also William Blackstone and Stanley Katz (eds), *Commentaries on the Laws of England* (Volume I, UCP 1979) 5.

[30] AW Brian Simpson, *Leading Cases in the Common Law* (OUP 1995).

to demonstrate the extreme contingency of the classical legal authorities',[31] then statutory histories must also play an important role in understanding the context of English law-making. To frame this differently, the interplay between statutory frameworks is as important as the doctrinal study of case law in understanding the context of the English legal system, more so perhaps than understanding its own contingency. Thus, whilst I would not go as far as suggesting that this research is 'doing a Simpson',[32] if the term can even be applied to a statutory history, it is motivated by a similar desire to appreciate the nuances and significance of statutory reform within their own social and legal context, separate from the broader constitutional discourses which have emerged about statutory reform in the 19th and 20th centuries.[33] In doing so, I afford closer attention to the specific role that statute has played in formulating the legal principles of administrative law and land law during this period.

This leads on to the second legal historical enquiry of this research, to provide a contextual understanding of national parks in England and Wales, showing how these legal spaces were created with an awareness of wider legal developments. In particular, the legal histories of town and country planning law, administrative law, and land law need to be appreciated to understand the legal history of national parks. This form of legal historical enquiry is one

[31] Joshua Getzler 'Brian Simpson's Empiricism' (2012) 3(2) TLT 127,130.

[32] ibid, 131.

[33] See Albert Van Dicey (edited by John Allison), *The Law of the Constitution* (OUP 2013); William Robson, *Justice and Administrative Law* (Macmillan & Co 1928); John Willis *The Parliamentary Powers of English Government Departments* (CUP 1933); Martin Loughlin, *Public Law and Legal Theory* (Clarendon Press 1992); TRS Allen, *Law, Liberty and Justice: The legal foundations of British Constitutionalism* (Clarendon Press 1993); Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015) 23-82.

perhaps more familiar to the legal historian, but one that still begets questions by the modern lawyer. Namely why does legal history matter, particularly when addressing express statutory provisions that exist in an amended form today?

In a recent article, Elizabeth Fisher adopted a passage from the fiction author Ursula Le Guin. Le Guin, quoting from the introduction to Howard A Norman's *Collection of narrative poems from the Swampy Cree Native Americans* said –

> 'He goes backward, looks forward.' The porcupine consciously goes backward in order to speculate safely on the future, allowing him to look out at his enemy or the new day. To the Cree, it's an instructive act of self-preservation.' [34]

Fisher went on to highlight the importance in environmental law of legally going backwards when determining 'how law can contribute [to] the cognitive resources for an 'inhabitable future'.[35] In doing so, she emphasised the importance of acknowledging the past in trying to create robust environmental law for the future.

[34] Ursula Le Guin, 'A Non-Euclidean View of California as a Cold Place to Be' in *Dreams Must Explain Themselves* (Gollancz 2018) 109-110, cited in Elizabeth Fisher, '"Going Backward, Looking Forward": An Essay on How to Think About Law Reform in Ecologically Precarious Times' (2022) 30 NZULR 111, 114.

[35] ibid, 112.

By comparison, legal historians are often cautious about presentist analyses, concerned that such scholarship may overlook the details of the past in making overarching arguments about its relevance to the present or future.[36] Yet what both approaches emphasise is the importance of fidelity to historic legal materials, particularly in seeking to understand complex legal problems. National parks in England and Wales are one such area of legal complexity and this research, in considering both audiences, presents an exploration of the NPACA 1949 grounded in its primary legal and contextual sources. In doing so, this research shows the value of an environmental legal historical enquiry for understanding the context of English law-making, illustrating how different forms of law can co-exist within one legal landscape. The hope is that this will empower both modern lawyers and legal historians to engage with statute, particularly the NPACA 1949, differently.

2.2 To show how national parks were the product of changing legal ideas about the public administration of land

The second objective of this thesis is to use this legal historical analysis to illustrate how national parks were the product of changing legal ideas about the public administration of land. This idea of the public administration of land first requires deconstruction. At its broadest, the public administration of land denotes the particular way in which town and country planning law, administrative law, and land law came to intersect during the late 19th and early 20th centuries, enabling land to be administered by public bodies for public

[36] Charles Donahue JR 'The hypostasis of a prophecy': legal realism and legal history' in Matthew Dyson and David Ibbetson (eds), *Law and Legal Process* (CUP 2013) 5.

purposes, without these bodies necessarily having any private rights in the land. This transformation was not resultant from any singular legal change or statutory intervention, but instead, a series of small legal evolutions which occurred simultaneously during the 19th and early 20th centuries. These evolutions changed the nature of each of these areas of law, facilitating new kinds of doctrinal interactions between them, ultimately leading to a more general legal ability to publicly administer land. The creation of national parks by the NPACA 1949 statutorily reflected this ability to publicly administer land.

The language of landscapes is helpful in thinking about this intersection between the different legal principles within the legal context of national parks. A landscape is 'a view or prospect of natural scenery, such as can be taken in at a glance from one point of view.'[37] Consequently, a landscape is comprised of many individual features; mountains, fields, the sky, all of which are important in shaping the landscape as a whole. This is not to say that mountains are not independently interesting, instead it is to acknowledge that in considering the mountain alone it is impossible to view the rest of the landscape. The same is true in a legal landscape. Just like the mountains, town and country planning law, administrative law, and land law are each important legal features within the landscape of national parks that are independently interesting. To take any of these legal areas alone however would not present a full understanding of the broader legal context into which national parks were created. Instead, each of these features forms part of the viewing point

[37] OED, 'landscape (n.), sense 2.a', (*OED*, March 2024) <doi.org/10.1093/OED/6169173872> accessed 18th September 2024.

through which national parks are legally understood, being considered collectively 'at a glance' to represent the different legal principles and structures which facilitated the legal creation of national parks.

3. Guide Through the Thesis

The difficulty with landscapes then is that they are comprised of a series of different features each of which are equally important in understanding the scene as a whole. Conversely, it is impossible to fully understand a singular landscape feature without the context of the wider landscape. To frame this differently, from one perspective, it is only possible to see what a particular perspective allows.

Acknowledging this, this thesis takes the reader through a series of legal landscape features, exploring each as they independently exist. This may at times leave the reader feeling like they have an incomplete picture, with specific legal details missing from the analysis conducted in one chapter of one landscape feature. I thus encourage the reader to keep in mind the broader legal landscape which this thesis charts. To assist with this, statutory provisions from the NPACA 1949 are used to frame each chapter, grounding the creation of national parks in the respective legal evolutions discussed therein.

Chapter Two introduces the legal landscape of national parks, exploring the drafting of the NPACA 1949. In doing so, the chapter charts the evolution of national parks, from their first conceptualisation in 1810,[38] through to the final enactment of the NPACA 1949. This introduction highlights that national parks were not legally created to reflect a singular idea of what national parks should be. Instead, they were

[38] William Wordsworth, *Guide to the Lakes* (originally published 1810, OUP 2023) 68.

formed through a series of compromises about the different legal values which informed how public bodies were able to manage land for the benefit of the public. These different values reflected the different legal features which formed the legal landscape of national parks, primarily; town and country planning law, administrative capacity, and land-based legal rights.

In introducing national parks and the NPACA 1949, Chapter Two proceeds in four parts. First it considers how the language of national parks emerged in the British context, considering the different cultural changes which created a demand for national parks. The chapter then discusses the first report into creating national parks as legal spaces within England and Wales.[39] The third part of the chapter explores how the recommendations of this first Report were further expanded upon in three subsequent enquiries into the legislative possibility of national parks. The chapter concludes by examining the passage of the NPACA 1949 through Parliament, considering further the key provisions within the legislation, as outlined in this introduction.

From here, the subsequent three chapters then consider in turn three of the main landscape features which exist within the legal landscape of national parks. These are town and country planning law (Chapter Three), administration and capacity (Chapter Four), and land-based legal rights (Chapter Five). In each case, the chapters explore the legal evolution of these areas of law, seeking to relate how statutory changes and case law transformed the respective area, incorporating into it an increased ability to publicly administer land. This shaped how the NPACA 1949

[39] The National Park Committee, *The Report of the National Park Committee* (HMSO 1931) [The Addison Report].

legislated for national parks. The three chapters are organised to reflect how the different aspects relate to the legal landscape of national parks. Town and country planning law is addressed first, as, alongside the NPACA 1949 discussed in Chapter Two, it provided the legal framework through which national parks were created. Administrative capacity and land-based legal rights are then explored in Chapters Four and Five respectively, to illustrate the broader legal considerations which led to the emergence of planning law as the legal process through which land was administered. Whilst this may be an unconventional approach to legal history, with a chronological analysis being more typical, it is only through examining each of these aspects of the legal landscape individually that the connections between them become apparent.

The chapters draw upon the case law, statutory provisions, and archival research to combine legal analysis with a broader contextual study of the socio-political circumstances which informed the legal evolutions discussed therein. In particular, the chapters consider the impact of industrialisation and urbanisation in creating new pressures on land use, in part facilitating this transition towards a system in which land could be publicly administered.[40] The chapters conclude by considering how these legal evolutions created a system for publicly administering land, influencing how the NPACA 1949 framed the creation of national parks.

[40] For purposes here industrialisation encompasses both 'the development of industries in a country or region on a wide scale', OED, 'industrialization (n.)' (*OED*, July 2023) <doi.org/10.1093/OED/4014850903> accessed 18th September 2024, See also Asa Briggs, *A Social History of England* (Book Club Associates, 1983) 196-200. Urbanisation, the process of areas becoming increasingly populous and developed, can be seen as the primary land-based socio-economic effect of industrialisation Gordon Cherry, *Cities and Plans: The Shaping of Urban Britain in the nineteenth and twentieth centuries* (Edward Arnold, 1988) 16-48; Avner Offer, *Property and Politics 1870-1914* (CUP 1981) 221-283.

Chapter Six then returns to the NPACA 1949, once each of the landscape features has been independently explored. In doing so, the chapter draws together these different features, bringing them back into the legal landscape of national parks and seeking to explain their effect in framing the legislation. This chapter achieves this by reflecting on the early application of the NPACA 1949, considering how the legislation was constructed in the actual creation of the early national parks in 1951. By drawing together how town and country planning law, administrative capacity, and land-based legal rights manifested in the application of the NPACA 1949, it becomes possible to see the importance of understanding the NPACA 1949 in the context of its broader legal landscape. This legal context explains why the NPACA 1949 framed national parks as it did.

The thesis concludes by reflecting upon how ideas about the public administration of land framed national parks as administrative legal spaces, considering the legal existence of national parks as a direct product of these broader legal evolutions. In doing so, the chapter reflects on the role of a legal historical analysis in contextualising the NPACA 1949, explaining why the legislation framed national parks in the way that it did. This in turn highlights the importance of a statutory legal history in contextualising and explaining the contingency of statute within the English legal system.

4. Scope

Before beginning the substantive chapters of this thesis, it is essential to make two clarifications about the scope and intentions of this research. The first of these is that the NPACA 1949 addresses numerous different parts of countryside administration. Consequently, this research, whilst touching on the other aspects of the NPACA 1949,

should not be seen as a legal history of the legislation, in so far that it does not engage substantively with some of the parts of the Act. Instead, this is a thesis about national parks in England and Wales, meaning the NPACA 1949 is only relevant where its provisions relate to the legal framework of national parks.[41]

The second clarification of scope is that this research is primarily about national parks in England and Wales. This is important to emphasise for two reasons. The first of these is that the legal arrangements for the designation and management of national parks in England and Wales are relatively unique. As is explored further in Chapter Two, national parks elsewhere in the world adhere to a more classical definition of 'park', with national parks existing as enclosed spaces through a system of land ownership. This is a different legal understanding of national parks to that created by the NPACA 1949. In addition to this, English and Welsh national parks are not recognised as national parks by the International Union for the Conservation of Nature (IUCN), who instead classify national parks under the NPACA 1949 as protected landscapes.[42]

Second to this, this is not a legal history of national parks in the United Kingdom, and national parks in Scotland and forest parks in Northern Ireland are deliberately excluded from this research. In the case of the latter, forest parks, although sharing some common attributes with national parks, were founded for different legal purposes when compared to those set out in s 5 of the NPACA 1949. Namely, forest parks were initially created with a dual purpose of protecting forests from unlicensed

[41] Part I established the National Park Commission, part II established the processes associated with the designation and management of national parks, and part V established how access would be provided.

[42] IUCN, Nigel Dudley (eds), Guidelines for Applying Protected Area Management Categories (IUCN Resources 2013).

deforestation, and promoting afforestation, which was regarded as economically essential.[43] Consequently, forest parks exist in a legally distinct way to national parks. This is equally true of forest parks in England and Wales, which were initially administered by the Forestry Commission.[44] Scottish national parks are also excluded from this thesis. This is to reflect the conscious decision made in the drafting of the NPACA 1949 that Scotland would have its own separate legal framework for national parks due to its own unique legal landscape.[45] Scottish laws relating to access and land ownership were (and indeed are) different to those in England and Wales, making it legally illogical for national parks in Scotland to exist through the same legislation as those in England and Wales. Instead, national parks in Scotland were not legally provided for until the National Parks (Scotland) Act 2000, long after the enactment of the NPACA 1949.

5. Before Beginning…

This research reflects on national parks as products of law, seeking to understand them on their own terms and within the unique legal context they were created. In doing so, this thesis celebrates the legal complexity of national parks, seeing them as a legislative product of changing legal ideas about the public administration of land during the 19th and early 20th centuries. This research has been pulled together from a variety of legal sources, reflecting the plethora of materials that shaped the creation of

[43] Forest parks were formally created by byelaws under the Forestry Act (Northern Ireland) 1953 however the Forestry Commission had been managing forests since 1919. Note Douglas Pringle, *The First 75 Years: A Brief Account of the History of the Forestry Commission, 1919-1994* (Forestry Commission 1994).

[44] John Sheail, *Nature in Trust* (Blackie and Son Limited 1976) 83. See also TNA/HLG 93/24 (14th November 1946) 'National Parks Commission, Forestry and National Parks by Mr LK Elmhirst'.

[45] TNA/T 227/44 (13th November 1947) 'National Parks: Scotland' is internal correspondence following the circulation of the Hobhouse Report discussing the issue of national parks legislation for Scotland.

national parks in England and Wales. These materials highlight the many different legal considerations which shaped and informed how national parks were legally created, illustrating the difficulties in legally understanding national parks in a singular way. Instead, as this thesis shows, national parks were created in the context of a legal landscape, and it is only through understanding this context that national parks as legal constructs can too be fully understood.

2

Introducing the National Park Provisions of the National Parks and Access to the Countryside Act 1949

5. National Parks

(2) The said areas are those extensive tracts of country in England and Wales as to which it appears to the Commission that by reason of—

(a) their natural beauty, and

(b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population.

(National Parks and Access to the Countryside Act 1949)

1. Introduction

Beginning with the general use of the term 'national park' in Britain, this chapter charts how 'national parks' became legal constructs under the National Parks and Access to the Countryside Act 1949 (NPACA). In charting this development, the chapter highlights how national parks were not a singular coherent idea which came to legislative fruition, but instead the culmination of a series of different legal ideas about how land could be publicly administered. It is important at the outset of this chapter to emphasise that a legislative account of national parks does not explain *why*

national parks were legally framed as they were, with this explanation being presented in the subsequent chapters. Instead, the purpose of this legislative account is to introduce *how* the NPACA 1949 legally framed national parks, particularly in the context of s 5 of the Act. To achieve this, the chapter proceeds in five parts.

The first part of this chapter considers how the NPACA 1949 legislatively defined national parks by analysing the language of s 5 of the Act. Section 5 sets out two different purposes for national parks; providing a space for recreation; and the preserving natural beauty. Section 5 thus demonstrates how the national park provisions within the NPACA 1949 were a fusion of different legislative expectations which the Act encapsulated to transform existing places into national parks. Thus, to understand s 5 it is important to understand the legal context which led to national parks to be defined by these two purposes under s 5 of the Act.

It is the exploration of the context behind the s 5 definition which is the focus of this chapter. The second part of this chapter explores how an interest in legally establishing national parks initially emerged. There was no singular social or political call for the creation of national parks in England and Wales. Instead, the desire for national park legislation came from a renewed national interest in the countryside. This was in part motivated by the increased urbanisation of localities due to industrial growth. Alongside this, national parks had been created in other jurisdictions, providing inspiration for how rural spaces could be legally preserved and enjoyed. It was in this context that the aspiration to create national parkland first emerged in

England and Wales, emphasised by the first British parliamentary use of 'national park' in 1919.[1]

Following this, the concept of national parks gained increased political attention, but what a national park would be remained largely undefined. Thus, the third part of this chapter explores how different contextual motivations shaped the legal definition of national parks. In particular, the section considers the recommendations of the first report into national parks in 1931 (The Addison Report),[2] which proposed a different legal conceptualisation of national parks to that in other jurisdictions.[3]

Although the Addison Report proposed a legal framework for national parks, the proposal was not easily translatable into legislation, because national parks would need to be legally integrated with existing English law. Following on from this, the fourth part of this chapter explores how the proposals of the Addison Report were further qualified in three subsequent Reports; The Dower Report 1945;[4] The Hobhouse Report 1947;[5] and the Huxley Report 1947.[6] These reports were foundational in the

[1] HL Deb 17 July 1919, vol 35, cols 775-776.

[2] The National Park Committee, *The Report of the National Park Committee* (Cmd 3851, 1931) [The Addison Report].

[3] For example, The National Park Service Organic Act 1916 (USA); The National Parks Act 1930 (Canada); The National Park Act 1914 (Switzerland). There were also many Acts which created singular national parks, see Addo Elephant National Park 1931 (South Africa); Nyanga National Park 1926 (Zimbabwe); Matura National Park 1927 (Trinidad & Tobago).

[4] John Dower, National Parks: Preliminary Report to the Minister of Town and Country Planning (Cmd 6628, 1945) [The Dower Report].

[5] Ministry of Town and Country Planning, *Report of the National Parks Committee (England and Wales)* (Cmd 7121, 1947) [The Hobhouse Report].

[6] Ministry of Town and Country Planning, *Conservation of Nature in England and Wales* (Cmd 7122, 1947) [The Huxley Report].

drafting of the NPACA 1949, providing a full consideration of the legal provisions which came to exist therein.[7]

The final part of this chapter then turns to the drafting of the NPACA 1949, showing how the final legislation encapsulated different values in providing a legal framework for national parks, particularly in defining the purpose of these spaces under s 5. The drafting of the NPACA 1949 thus showed a careful consideration of the contextual evolution of 'national parks', and their creation as a form of public land administration.

Before beginning this chapter, it is important to note the role of key individuals and organisations in the legal creation of national parks and the wider transition towards a legal ability to publicly administer land. These different individuals and organisations will be formally introduced throughout the chapters, where their contributions provide context to specific legal changes. There are two organisations which deserve preliminary introductions due to their *passim* appearances throughout this work. The first of these is the National Trust which was chartered as a private non-profit organisation in 1895. The foundations of the Trust is further explored in Chapter Five but at the outset it is worth noting that the Trust existed to 'promote the permanent preservation, for the benefit of the nation, lands and tenements of beauty or historic interest'.[8] The second organisation, which is further explored in Chapter Three, is the Council for the Preservation of Rural England (CPRE) which was a collection of societies and individuals formed in 1926 with the purpose of controlling

[7] *Darwall v Dartmoor National Park Authority* [2023] EWHC 35 (Ch), [2023] Ch 141 [39].

[8] Note Matthew Kelly, *The Women who Saved the English Countryside* (Yale University Press 2022) Chapter 1 'Octavia Hill Gathering in the Givers', 11-73.

rural development to preserve the countryside.[9] Both of these groups, along with many other integrated organisations and individuals, played an important role in directly and indirectly shaping the legal creation of national parks.

2. 'Unpacking' Section 5 of the NPACA 1949

Section 5 of the NPACA 1949 sets out the legal purpose of national parks, defining these legal spaces as 'extensive tracts of country' preserved 'for their natural beauty and, the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population'. Whilst national parks themselves are legal constructs, the language of national parks was first mentioned in the English and Welsh context long before the term acquired a specific statutory meaning. Thus, contained within this definition are a series of different motivations which shaped how national parks evolved into a legal concept in England and Wales. Two of the main motivations that can be deduced from this definition are a desire to preserve rural landscapes and a desire to facilitate public recreation, with there being an express statutory presumption in s 5(3) favouring the second of these purposes.

Section 5, in setting out the legal purposes of national parks, thus goes some way to defining what national parks legally are. This is apparent in considering the language of s 5(1). The purpose of a national park is to 'preserve' and 'enhance' an area, which is a 'tract' of country, due to its 'natural beauty'. In this definition the Act does not require that the national park is enclosed, as the language of 'park' may suggest. This is further emphasised in considering the two purposes of national parks, which do not explicitly require enclosure. Thus, in this conceptualisation, the creation of a physical

[9] John Sheail, *Nature in Trust* (Blackie and Son Limited 1976) 20-21.

park space (with a fenced perimeter) is not essential to the creation of a national park under the Act.

A second point of note within s 5 is the prioritisation of public recreation over the preservation of natural beauty within national parks, accompanied by the requirement that national parks are designated in consideration of their 'relation to centres of population'. Indeed, it may be so that the greatest areas of natural beauty are not proximate to 'centres of population' at all. Thus, underpinning the definition of national parks were considerations beyond the identification of beautiful landscapes deserving of protection. Thus, to understand why s 5 defined the purposes of national parks as it did, it is essential to consider how the language of national park was formed in the English and Welsh context during the period pre-dating the NPACA 1949.

3. Imagining National Parks in the English Landscape

In 1810, William Wordsworth wrote that the Lake District was a 'sort of national property, in which every man has a right and interest who has an eye to perceive and a heart to enjoy'.[10] It was this first expression of land as something of national value due to its beauty which became foundational in the national parks' movement, both domestically and internationally.[11] Yet, as Josh Blunden and Nigel Curry noted in their 40th anniversary reflections on the NPACA 1949, 'Wordsworth was just one person in

[10] William Wordsworth, *Guide to the Lakes* (first published 1810, OUP 2023) 68.

[11] Ann and Malcom MacEwen, *National Parks: Conservation or Cosmetics* (George, Allen and Unwin 1982) 6.

For an exploration of how Wordsworth was connected to other figures within the global national park movement see; Andrea Wulf, *Magnificent Rebels* (John Murray 2023) 169 and 343; Andrea Wulf, *The Invention of Nature* (John Murray 2016) Chapters 21 (283-297) and 23 (315-334).

a wider movement' which marked a cultural shift in how rural places were being understood.[12] I use rural in this context to describe the range of non-urban spaces within Britain. It was through this wider cultural shift, and the renewed attention it brought to the relationship between rural spaces and human enjoyment, that the call to create national parks first emerged. This led to the legal realisation of national parks, as defined in s 5 of the NPACA 1949.

3.1 A cultural return to nature

The 19th and 20th centuries saw a marked shift in attitudes to rural places, as imagery of Britain as a 'green and pleasant land' became increasingly dominant.[13] Whilst, as historian Keith Thomas noted, attitudes towards the English countryside had been changing since the 1500's (if not earlier), what differentiated attitudes in the 19th century was a romanticised nostalgia for a lost rural past.[14] It was this renewed appreciation of the countryside as a place of beauty for recreation which was ultimately captured in s 5 of the NPACA 1949. This rural nostalgia was particularly pertinent given the combined effects of industrialisation and urbanisation. Industrial expansion consumed much of the rural life which had existed prior to the industrial revolution, with the rural population declining

[12] Josh Blunden and Nigel Curry, *A Peoples Charter?* (HMSO 1989) 9.

[13] Originally from William Blake, 'Jerusalem: a Preface to *Milton'* (first published 1810) but later popularised in Sir Hubert Parry's 'Jerusalem' hymn in 1916. The hymn was initially commissioned by Poet Laureate Robert Bridges to 'brace the spirit of the nation' during the war, and its use in this context reflects how an appreciation of the rural character of England dominated national psyche. See Carol James, *Jerusalem, Jerusalem: how the ancient city ignited our modern world* (Houghton Mifflin Harcourt 2011) 235-236.

[14] Contrast the narrative in Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500-1800* (Allen Lane 1983) to Jan Marsh, *Back to the Land* (Quartet Books Limited 1982), David Cannadine, *Aspects of Aristocracy: Grandeur and Decline in Modern Britain* (YUP 1994) 9-54; Note also Jeremy Burchadt, *Paradise Lost: Rural idyll and social change in England since 1800* (Bloomsbury Academic 2021).

between 1861-1921.[15] This led urban housing to sprawl out from cities and towns over previously rural areas, causing what George Cruikshank caricatured in 1829 as the 'March of Bricks and Mortar'.[16] In turn, suburban land values also increased to reflect the new demand for land around urban areas, with landowners increasingly enclosing open spaces to sell the land for development.[17] This marked the end of what had been in cultural terms (although perhaps not legally) a relatively unrestricted ability to roam over vast areas of countryside.[18] The shared effects of industrialisation and urbanisation led to what Jan Marsh described as a 'sudden rush of nostalgia for rural life'.[19] Beginning in the early 19th century this nostalgia slowly grew, eventually leading to the first parliamentary reference to national parks in 1919, as a legal mechanism for preserving rural character.

Marsh suggested that this 'nostalgia' was embodied in what she described as the 'back to the land movement', which was a collection of notions cultivating a lifestyle which prioritised a return to nature.[20] Back to the land, as Marsh stated, was not defined by a singular ideal, but encompassed a flexibility which allowed

[15] R Lawton 'Rural Depopulation in nineteenth century England' in DR Mills *English Rural Communities* (Palgrave 1973) 195.

[16] Marsh (n14) 2.

[17] Although the practice of enclosure had roots in the Statute of Merton 1235, the motivation for enclosure changed during the 19th century, with urban enclosures being increasingly motivated by development. See George John Shaw-Lefevre, *English commons and forests: the story of the battle during the last thirty years for public rights over the commons and forests of England and Wales* (Cassell 1894) 27-38. Avner Offer, *Property and Politics 1870-1914: Land Ownership, Law, Ideology and Urban Development in England* (CUP 1981) 50-52. Note also RC Allen, 'The Price of Freehold Land and the Interest Rate in the Seventeenth and Eighteenth Centuries' (1988) 41 EHR 33.

[18] Blunden and Curry (n12) 21.

[19] Marsh (n14) 4.

[20] ibid 7.

individuals to choose to re-embrace the rural however they were able.[21] Fundamental to this re-embracing was the existence of rural spaces and the associated ability of individuals to access such spaces, the two values which later defined national parks in s 5.

One aspect of the back to the land movement was a Romantic sense that the imagination could only be engaged through natural landscapes, with Romantic referring to the 18th-19th century cultural movement which rejected previous ideas of neoclassicism, in favour of a more imaginative, emotional and transcendental understanding of life.[22] For Romantics, it was only in the perceived wilderness of rural places, that one's self was understandable. Thus, a connection with natural environments has been characterised as a defining feature of the Romantics movement, with Andrea Wulf suggesting that it was this connection which diversified the thinking of the early Romantics from other intellectual thought.[23] What is perhaps more noteworthy within the English context of Romanticism was how the movement facilitated nature-based radical thought, which in turn shaped cultural attitudes to rural places.

This can be seen through the focus of reformers on providing rural solutions to social problems. In a lecture titled *Arts and Socialism* delivered in 1884, William Morris spoke of the relationship between the environment and industrialisation, stating:

[21] ibid.

[22] See Greg Ellerman, *Thoughts in Wilderness: Romanticism and the Apprehension of nature* (SUP 2022) 17; Tim Blanning, *The Romantic Revolution* (Weidenfeld & Nicolson 2011) 15-47; Michael Ferber, *Romanticism: A very short introduction* (OUP 2010).

[23] Andrea Wulf, *Magnificent Rebels* (John Murray 2023) 196.

> '[Industrialisation is] swallowing up with its loathsomeness field and wood and heath without mercy and without hope, mocking our feeble efforts to deal even with its minor evils of smoke-laden sky and befouled river; the black horror and reckless squalor of our manufacturing districts, so dreadful to the senses.'[24]

His solution to the 'squalor' was a return to nature and a reimagining of urban life which emphasised the importance of natural spaces.[25] Morris was not alone in this sentiment, and other social reformers championed the importance of the countryside in providing an alternative lifestyle for urban industrial workers. John Ruskin, for example, expressed that the greenness of a landscape was 'essential to the healthy life of a man'.[26] Working alongside individuals like garden city founder Ebenezer Howard and urban planner Raymond Unwin, Ruskin helped raise awareness about poor-quality urban housing, championing the inclusion of green landscapes in urban redevelopment.[27] Alternatively, National Trust co-founder Octavia Hill took a more direct approach, attempting to acquire a stretch of fields to the south of Hampstead, to provide her Marylebone tenants with access to a rural open space in urban London.[28] What united each of these endeavours into social reform was the emphasis on rural places as the mechanism for achieving

[24] William Morris 'Arts and Socialism' in May Morris, *The Collected works of William Morris* (Longman, Green and Co. 1910-1915) XXIII, 192. See also Raymond Williams, *The Country and the City* (first published 1973, Penguin Vintage Classics 2016).

[25] ibid, 3.

[26] Marsh (n14) 9.

[27] Denis Hardy, *From Garden Cities to New Towns: Campaigning for Town and Country Planning 1899-1946* (Routledge 1991) 24.

[28] John Gaze, *Figures in a Landscape* (Barrie & Jenkins and the National Trust 1988) 27.

societal improvement, thus embedding a sense of Britain as a 'green and pleasant land' within progressive thought.

The relationship between rural places and social reform was also experienced at a grassroots level, with natural spaces playing an important role in popular protest.[29] This in turn gave rural places a special status to the communities around them, again reflecting what Marsh described as a renewed appreciation of the countryside.[30]

3.2 The global national parks movement

This cultural shift towards nature did not only occur in Britain, and in presenting the broader context of national parks it is important to consider how national parks legally developed internationally in the late 19th and early 20th centuries. As I explain later in this chapter, the legal framing of English and Welsh national parks was different to that of national parks legislated for in other jurisdictions, with s 5 of the 1949 Act conceptualising national parks differently. Acknowledging this, national parks elsewhere in the world predated the NPACA 1949. Thus, the language of national parks in other jurisdictions shaped domestic discourse by demonstrating the potential of statutory land controls as a legal approach to rural preservation.

[29] Katrina Navickas 'Moors, Fields, and Popular Protest in South Lancashire and the West Riding of Yorkshire, 1800–1848' (2009) 46 Northern History 93; Bryony McDonagh, *Elite Women and the Agricultural Landscape, 1700–1830* (Routledge 2018); Harold Sculthorpe, *Freedom to Roam* (Freedom Press 1993) 20; Timothy Bonyhady, *The law of the Countryside* (Professional Books limited 1987) 47-70. Note also the use of moorland preceding the Peterloo Massacre in Manchester, 1819 – TNA/TS 11/1056, (16th August 1819) 'Copy of Major Dynley's account of events'.

[30] Marsh (n14) 7.

In 1864, American philologist and diplomat George Marsh published *Man and Nature*. The expression of the work was clear; man had to live with, not against, nature to ensure that life could continue at all. This expression was one which came to characterise American conservationism, shaping the nature scholarship which occurred in the years after his death.[31] John Muir, who has later been credited as the father of national parks, was particularly influenced by Marsh's writing.[32] Muir was born in Scotland in 1838, spending his childhood on the heaths and moorlands above Dunbar, experiencing a similar sense of wilderness to that of Wordsworth in the Lake District.[33] Muir moved to the United States at age eleven, and continued to be guided by his love of nature.[34] Into adulthood Muir became particularly passionate about the Yosemite State Park in California, charting and publishing on its flora and fauna.[35]

Yosemite itself had been granted in perpetuity by the US Government as a public park for the people of California in 1864.[36] As the First Commissioner of the park Frederick Olmsted expressed, the intention behind the grant was to provide for the 'preservation of a place, and the public's use of the place [as] part of the same landscape ideal.[37] Olmstead furthered this understanding of public parks when he

[31] Andrea Wulf, *The Invention of Nature* (John Murray 2016) 296.

[32] See Charles Norman, *John Muir: Father of our National Parks* (Julian Messer 1957).

[33] Wulf, *The Invention of Nature* (n31) 315.

[34] ibid 324.

[35] See John Muir, *Nature Writings* (Penguin Books USA 1997).

[36] MacEwen, *National Parks: Conservation or Cosmetics* (n11) 4.

[37] Rolf Diamant 'Lincoln, Olmsted, and Yosemite: Time for a Closer Look' (2014) 31(1) The George Wright Forum 10, 13.

was consulted in the context of establishing what is generally regarded as the world's first national park.[38]

Yellowstone National Park was established by a Congressional Bill in 1872, with the language of the Bill mirroring that used in the 1864 Yosemite land grant. The designation of Yellowstone as a national park saw the enclosure of the area with the intention to protect the landscape from exploitation.[39] It was this legal model for the creation of national parklands, alongside the scholarship of John Muir, that led to the establishment of a more general legal framework for national park administration in the United States.[40] This began with the designation of Yosemite as a national park in 1890, through a second land grant, but was fully realised with the establishment of the United States National Park Service in 1916.[41] The service oversaw the administration of these nationally-owned parks which, as with Yellowstone and Yosemite, continued to be established through singular congressional Acts and grants.[42]

This model for designating natural spaces gained increased international popularity, with singular national park Acts being used to grant national parks in places like Canada (from 1887) and Australia (from 1879). Alongside this, each

[38] There is popular debate that the first national park could be Bogd Khan in Mongolia, established in 1783.

[39] Aubrey Haines, *Yellowstone National Park: Its Exploration and Establishment* (Executive Agency Publications 1974).

[40] Wulf, *The Invention of Nature* (n31) 326.

[41] For a more detailed account of the American movement see Simon Shama, *Landscape and Memory* (Harper Perennial 2004).

[42] Examples include 'An Act to set aside a portion of certain lands in the State of Washington, now known as the 'Pacific Forest Reserve, as a public park, to be known as the 'Mount Rainier National Park''(March 1899); 'An Act Reserving from the public lands in the State of Oregon, as a public park for the benefit of the people of the United States, and for the protection and preservation of the game, fish, timber, and all other natural objects therein, a tract of land herein described, and so forth' (March 1902) and; 'An Act To establish the Zion National Park in the State of Utah' (November 1919).

jurisdiction enacted general national park legislation, like the American National Park Service Act 1916.[43] Each of these legal frameworks for national parks replicated the American model, with the state designating land, already within its ownership, as a national park through a land grant in perpetuity accompanied by a statutory framework for its administration.

This was possible due to the particular relationship the state had to land within that jurisdiction. For example, in Australia, the state as the successor of the British Crown was understood in 1879 to have *ultimate hæres* with *dominium directum* in the soil, thus empowering the state to grant land which had previously been held by the Crown.[44] What is noteworthy here, is that national parks existed on enclosed state-owned land which had been granted to the public. These grants were then accompanied by legislation specifically outlining the administration and functions of the park. This reflected a different understanding of national parks to that encapsulated in s 5 of the NPACA 1949, which did not provide for the enclosure of national parks and instead created a general set of purposes for what national parks would do. Although the reasoning for this departure is explored throughout this thesis, what I want to emphasise here is that the language of 'national parks' was becoming increasingly synonymous with landscape protection, leading individuals in Britain to look to the international parks' movement for inspiration in how to legally protect the countryside.

[43] For example, The National Parks Act 1930 (Canada); The National Park Act 1914 (Switzerland).

[44] Although this legal understanding has been subsequently challenged in the context of indigenous land rights *Attorney General v Brown* (1847) 1 Legge 312 (PC) 316 although this decision has been qualified in the Australian context in *Mabo v Queensland* [1992] HCA 23, [1992] 175 CLR 1; and *Wik Peoples v Queensland* [1996] HCA 40, [1996] 187 CLR 1; John O'Connell 'A case for recognition: A fiduciary relationship between the Crown and Indigenous Australians' (2021) 18(2) Canb LR 233.

3.3 A political call for national parks

It was in this context of rural nostalgia, landscape conservation, and outdoor recreation that explicit reference to national parks, as a legal mechanism for achieving these aims, first occurred in Britain. This position was further influenced by the establishment of the National Trust in 1895, which, as is explored in Chapter Five, began to acquire land and property on behalf of the public.[45] The Trust thus demonstrated the merits of dedicated public rural land administration as a mechanism for promoting preservation and recreation in rural places.

The first political call for national parks in Britain occurred in the House of Lords, during a debate on the Housing and Town Planning Bill 1919.[46] The Bill proposed a series of reforms which aimed to improve slum housing and legally provide for the planning of urban spaces. During the debate, the Earl of Meath challenged cl 35 of the Bill, which empowered local authorities to acquire land for achieving sanitation.[47] The Bill set out how cl 35 would apply to the New Forest, and Lord Meath sought to insert an amendment which limited the extent of acquisition to no more than 20 acres of the Forest.[48] Justifying this position, Meath described the New Forest as a 'magnificent national park', claiming 'America has its national park; Canada has its national park. We have nothing except the New Forest'.[49] He reminded the House that numerous pieces of legislation, namely the New Forest

[45] James Lees Milne (eds), *The National Trust A Record of Fifty Years Achievement* (3rd edn, BT Batsford Ltd 1949); In 1939 the property of the National Trust was described as creating a sort of 'national park' in *National Trust for Scotland v Assessor for Argyllshire* [1939] SC 291.

[46] HL Deb 17 July 1919, vol 35, cols 775-776.

[47] ibid.

[48] ibid.

[49] ibid, col 777.

Act 1877, and the New Forest (Sale of Land for Public Purposes) Act 1902, had been enacted to ensure continued access to and the preservation of the area. For Meath, an amendment to cl 35 was the only way to continue to guarantee this.[50]

What is interesting is that to Meath areas like the New Forest, despite being legally no different to any other portion of land, were beginning to acquire this separate status as 'national' property. Indeed, the use of the term 'national park' by Meath is particularly illustrative, showing both a public demand for national parks, and the flexibility in how the term was understood and applied in these early debates. Meath thus highlights the essential role that national park legislation would come play in clearly defining in law what national parks as legal spaces would be.

4. First Proposing a Legal Framework for National Parks

The question of national parks arose again in Parliament in 1927, similarly in the context of the New Forest. Lord Montagu of Beaulieu, brought a petition before the House following an incident of 'ornamental timber cutting' within the Forest.[51] He sought to require the government to treat the forest as a 'national park' for the enjoyment of the public, moving its management out of the hands of the Forestry Commission and into those of the Office of Works, who were in charge of maintaining Crown parks, such as Hyde and St James's.[52] The proposal sparked a broad debate within the House, with Lord Clinton commenting on the 'excited state of public opinion' which accompanied Lord Montagu's petition.[53] This excitement was in part

[50] ibid.

[51] HL Deb 6 July 1927, vol 68, col 184.

[52] ibid, col 185.

[53] ibid, col 200.

attributed to the many parliamentary members who were affiliated with pressure groups that were also calling for rural conservation and access.[54]

These debates attracted Government attention when the Minister of Agriculture and Fisheries, Lord Bledisloe, used his Cabinet position to promote the creation of national parks in Britain, following on from his visit to the United States and Canada.[55] Bledisloe had previously promoted the creation of national parks in 1925, during a Royal Society of Arts lecture, suggesting them as a mechanism for preserving what he described as relatively 'wild' areas of countryside.[56] Bledisloe thus proposed that the Forest of Dean should be designated the first national park in Britain, offering portions of his Estate at Lydbrook to help secure the land required to designate the park. For both Bledisloe and Montagu then, national parks were being conceptualised as legally enclosed spaces, similar to the other types of parkland which existed in Britain, or the national park model which had emerged elsewhere in the world. This is evident in Bledisloe's offer of his private property to secure the park, suggesting that for him a national park, as a form of public land control, could not exist without some form of public land ownership.

Putting his words into action, one year after Lord Montagu's petition, Lord Bledisloe wrote to the Prime Minister, Stanley Baldwin, proposing the Forest of Dean as a national park, offering parts of his own Estate to ensure suitable public access to the

[54] Kristian Mennen, 'One movement, three clusters: the national parks movement in England and Wales, 1929-1949' (2023) 37(2) Contemporary British History 266, 270; note also coverage of the debate in The Journal of the Commons and Footpaths Preservation Society (1928) 97.

[55] Roderick Nash 'The American Invention of National Parks' (1970) 22(3) The American Quarterly 726, 735.

[56] Mair J and Delafons J, 'The policy origins of Britain's National Parks: The Addison Report 1929-1931' (2001) 16 Planning Perspectives 293, 295.

area.[57] As with Montagu's proposals however, both the Office of Works and the Forest Commission rejected the proposal, with the Office of Works suggesting this endeavour fell beyond the scope of their administrative jurisdiction, which at this time saw them primarily empowered to manage Crown land and estates like the London parks. The Office's board were also reluctant to accept Bledisloe's offer of land to establish the park, with the board seeming to have an internal policy against accepting land on public trust. [58]

The Forestry Commission was equally unreceptive to the proposals, viewing the objectives of national parks as identified by Bledisloe and Montagu as counter to their own purpose.[59] The Commission was initially established in 1919, with the single aim to promote forestry in response to the British timber crisis.[60] Although the Commission had established some forest parks, as areas for recreation, these were secondary to its primary purpose. Consequently, the work of the Commission had already become a source of tension[61] and the Commission sought to stay within its statutory duties.[62]

Despite these setbacks however, the idea of national parks continued to attract political attention, with the Labour Party promoting the public ownership of land as

[57] John Sheail, 'The Concept of National Parks in Great Britain 1900-1950' (1975) 66 Transactions of the Institute of British Geographers 41, 42.

[58] TNA/TS 27/738 (1928) 'Precedents and Past Advice'.

[59] Forestry Act 1919, Preamble.

[60] Sheail, *Nature in Trust* (n9) 83.

[61] ibid, notably, afforestation by the Commission had proved particularly contentious in the Lake District where residents viewed the exercise as a form of enclosure.

[62] Forestry Act 1919, ss 1-2.

a mechanism for countryside management in their 1929 election manifesto.[63] Indeed, it was following Lord Bledisloe's persistent correspondence that the 1929 Labour government agreed to form a committee to inquire into the legal feasibility of national parks.[64] On the 26th September 1929, Prime Minister Ramsay Macdonald issued formal notice of the Committee, appointing the Parliamentary Secretary to the MAF, Dr Christopher Addison, as its Chair.[65]

Addison may have been an unusual choice, being neither a government minister, nor particularly vocal in the call for national parks. Addison however had a long parliamentary history, having served as an MP since 1910. Beyond this, in his role as Minister of Reconstruction and as President of the Local Government Board, Addison had helped establish the Ministry of Health in 1919. It was Addison's push for greater centralised controls over land use within his role as Minister of Health that led Liberal Prime Minister Lloyd George to drop Addison from the Party in 1921.[66] Outside of his political career, Addison was a trained physician, and his own rural childhood led him to advocate for the health benefits of open air-recreation.[67] Addison's experiences thus reflected the different considerations in the creation of national parks. In particular Addison understood the need to reconcile private property rights with the legal mechanisms of governance to provide a framework for publicly administering land use. Macdonald recognised Addison's relatively unique understanding of the

[63] WMRC/36/L41/3/37, (March 1929) 'Labour's appeal to the nation' 3.

[64] Mair and Delafons (n56) 296.

[65] ibid, 297.

[66] BL/MSS Addison dep c 3, fols 441-442; c 4, fols 245, 248.

[67] ibid, c 142.

different legal ideas involved, and believed that this, coupled with Addison's own parliamentary experience, made him the ideal candidate for Chair.[68]

Alongside Addison, the Committee consisted of seven other members, representing a variety of government departments and the different administrative interests that existed therein.[69] Over a period of two years the Committee met on 28 occasions, receiving evidence about the possibility and desirability of national parks from 34 groups of witnesses, with each group representing the different interests in the legal creation of national parks.[70] After two years, in 1931, the Committee produced the first report into national parks, presenting for public scrutiny a nuanced account of the legal possibility of national parks and the complexity that such a legal framework would have to address. The Report was thus monumental in proposing an alternative approach for creating national parks, different to that which existed in other jurisdictions.

4.1 The Addison Report

The Addison Report consisted of nine chapters, each addressing a different factor which needed to be considered in the legal creation of national parks. These factors can be broadly divided into five themes; the purpose of national parks; the procedures for operation; the selection of areas to become national parks; the administrative machinery of national parks; and the interaction of national parks

[68] ibid, dep c 181; Maurice Cornforth 'Labour's Policy for Our Countryside' (*The Country Standard* February 1931).

[69] Alongside Addison, the Committee included: Henry Leon French OBE (Ministry of Agriculture and Fisheries), Arthur Stretton Gaye OBE (Commissioner of Crown Lands), Dr Ioan Gwilym Gibbon (Ministry of Health), Sir Robert Greig (Scottish Department of Agriculture), Sir Ernest Holderness (Home Office), Frederick Raby (HM Office of Works), and Sir John Stirling-Maxwell (Forestry Commission). 'Addison Report' (n2) 3.

[70] ibid, 4.

with the existent land rights of others. It is from this broad base of considerations that the Committee determined the statutory creation of national parks would be a challenging task for any government.[71]

The Report began by addressing 'what possibilities the notion of 'National Park' [held] for [Britain]', establishing a comparison between rural places in Britain and those areas already designated as national parks elsewhere in the world.[72] The Report asserted that much of the land in Britain was already used privately for nationally productive purposes, namely agriculture, making the American model for creating national parks impractical in the context of the British legal and physical landscape.[73] Underpinning this suggestion was an increased awareness by the Committee that it would not be possible to close off large rural areas as enclosed parks, due to the different land rights which already existed, determining the utilisation of those spaces. By comparison, this approach was possible in countries where the state was still regarded as the primary landholder, like the United States, because it was possible to grant land already in public ownership. Even where this granting model had been adapted, as in Switzerland, the state still leased land from the respective local municipality who owned the land, with national parks legally being publicly owned enclosed spaces.[74]

[71] ibid, 43.

[72] ibid, 7.

[73] ibid.

[74] ibid; TNA/HLG 93/20 (undated) 'The Swiss National Park'.

The Addison Report recommended a diversification from this approach, suggesting that the protection of larger rural areas from disfigurement would be more desirable than the creation of smaller enclosed parks.[76] This conclusion was broadly supported by the different witnesses consulted in the Report, with representatives from the National Trust highlighting the fiscal and community difficulties with the enclosure of spaces for public purposes. Instead, the Trust advocated for a national park legal framework that encompassed larger tracts of country.[77] The Report thus concluded that the purpose of national parks would be-

> '(I) To safeguard areas of exceptional natural interest against disorderly development and spoilation.
>
> (II) To improve the means of access for pedestrians to areas of natural beauty.
>
> (III) To promote measures for the protection of flora and fauna.'[75]

It was these purposes which were encapsulated in s 5 of the NPACA 1949. What is interesting in each of these objectives is the shift in language from the prevailing American model. Instead, of 'protecting' and 'preserving' as was the language used in the United States national park land grants,[78] the Committee focused on a

[75] ibid, 12.

[76] ibid, 8.

[77] ibid, 52-55.

[78] See 'An Act to set apart certain tracts of land in the State of California as forest reservations' (1890) U.S. Statutes at Large, vol 26, chap 1263, pp 650-52; 'An Act to set apart a certain tract of land lying near the headwaters of the Yellowstone River as a public park.' (1872) S 2 General Records of the United States Government; Record Group 11 (digitised by William H. Jackson).

collaborative approach to land management, which would ensure the maintenance of rural areas. It was thus agreed that any national parks legislation should focus on promoting good practice within rural places, not enclosing them or making them subject to strict measures. To reflect this departure, the Report proposed calling these spaces 'national reserves',[79] although the language of national parks prevailed in the discourse after the Report.

This approach to national parks became further explained as the Report detailed how these spaces would legally exist. The Report proposed that national parks would exist as an administrative overlay on the places regarded as 'nationally valuable' for the purposes set out above.[80] The Report suggested that this overlay would be formed through the production of collaborative schemes between landowners and respective national park authorities, setting out how the national park could be used.[81] These schemes would exist through similar legal processes to those emerging in planning legislation, namely the Housing and Town Planning Act 1919, which Addison had brought before Parliament. Alongside these schemes, local authorities would be empowered to enter into agreements with private landholders to arrange access over their land within the park. In instances where such agreements were not possible, the Committee proposed a statutory relaxation of common law trespass within park areas.[82]

[79] Addison Report (n2) 7.

[80] ibid, 42.

[81] ibid.

[82] ibid, 39; the exact nature of relaxation was not decided upon, with the Report considering a penalty system for 'less serious' forms of trespass, 47; a Scotland-style removal of liability for simple trespass within national parks, 89; or, byelaw regulation enforced through public notices, 65.

This approach was regarded as most suitable for several reasons. First, the Report accepted that landowners in potential national park areas had demonstrated good stewardship of the land, with many having already engaged in public access arrangements over their estates.[83] This position was further supported by the witnesses who emphasised how existing legal procedures could be adapted to the context of national parks.[84] In particular, it was suggested that town planning could play a significant role in continuing to ensure the 'good practice' of landholders. Second, as the Report acknowledged, there was little land not already being used for some form of national purpose.[85] As a consequence, the Report regarded it as both expensive and unnecessary to compulsorily acquire and maintain the land needed for an enclosed model of national parks.[86] Beyond this, the Committee suggested that the acquisition of land may not be in the public interest due to the difficulties it would create in securing agriculture.

Collaboration between the Committee, the Treasury, and the MAF partially influenced this reasoning, with the Government more generally wanting to ensure the continued agricultural utility of land within national park boundaries.[87] The Report thus promoted farming continued within national parks, consulting witnesses on how farming and national parks could coexist.[88] Finally, the Report

[83] TNA/HLG 52/594 (14th January 1933) 'Section 34'; (23rd February 1933) 'Section 34 Agreements', illustrates the existence of formal agreements for rural access prior to the Addison Report in 1931, and the expansion of the power of local authorities to enter into these agreements in 1933.

[84] Addison Report (n2) 51.

[85] ibid, 7.

[86] Addison Dep (n66) c 179 fols 198-222, 'Minutes of the National Park Committee'.

[87] Ministry of Agriculture, *Minutes of Evidence of the Royal Commission on Agriculture* (HMSO September 1919)

[88] Addison Report (n2) 94.

accepted that there were a series of existent legal frameworks through which land was administered for different purposes and that these legal frameworks would need to be integrated within any proposed legislation.[89] These included the processes of town planning law which facilitated public controls of land use,[90] and existing private land rights.[91]

The Report concluded-

> 'The task of National Authorities will not be an easy one. They will be attacked by those who think that any expenditure on the preservation of the natural beauties of the country is unjustifiable; assailed by the enthusiasts who wish to press their own fancies or look for action on more heroic lines; importuned by private individuals who see the proposals as an opportunity for private gain; and opposed by others who resent interference with private interests. In many cases they will be called upon to hold an even balance between conflicting interests and at all times they must be prepared to take the long view. But if the task is likely to be difficult it should also provide an enviable opportunity of conserving for all time some of the most glorious examples of nature in this country.'[92]

In this conclusion, the Committee expressed the particular challenge of legislating for national parks; the need to create a piece of legislation that robustly

[89] ibid.

[90] ibid, 12-15.

[91] ibid, 29.

[92] ibid, 43.

safeguarded rural areas,[93] whilst being suitably flexible that it balanced the variety of legal interests which already existed therein.

4.2 Responses to the Report

The Addison Report was generally well received, being viewed favourably by the Government.[94] Despite this, action in implementing the proposals of the Report was slow, being further delayed by both a General Election in 1931 and the subsequent economic depression which dominated much of the 1930's.[95] The recommendations of the Report however remained politically live, with enquiry into the progress of the Report being debated eight times between 1931-1936.[96] This demonstrated a sustained political interest in legislating for national parks, despite the government's hesitancy in doing so.

One of the biggest achievements of the Addison Report was that it provided a formal platform from which pressure groups could campaign for the legislative creation of national parks.[97] One example of this was the establishment of the Standing Committee on National Parks (SCNP) in 1936. The Committee worked to ensure the Report, and more generally the idea of national parks, continued to attract political attention.[98] The Committee itself was comprised of many of the

[93] HC Deb 12 November 1931, vol 259, col 249.

[94] Blunden and Curry (n12) 38.

[95] Asa Briggs, *A Social History of England* (Book Club Associates 1983) 264.

[96] HC Deb 12 May 1931, vol 252, col 976; HC Deb 8 June 1931, vol 253, col 624; HC Deb 25 June 1931, vol 254 col 623; HC Deb 12 November 1931, vol 259, col 249; HC Deb 9 December 1936, vol 318 col 2106; HL Deb 1 April 1936, vol 100, col 388.

[97] MacEwen, *Conservation or Cosmetics* (n11) 7.

[98] Blunden and Curry (n12) 39.

witnesses who participated in the Addison Report, notably, the Ramblers Association, the CPRE and CPRW, and the Youth Hostel Association (YHA).[99] Although the different groups within the SCNP reflected a variety of different interests, they worked collaboratively in campaigning for the creation of national parks.[100] To ensure this homogeneity, the SCNP worked to a clear statement of policy which facilitated collaboration even where the different groups disagreed on particular points as to how national parks would legally exist.[101] The statement of policy set out that the purpose of the Committee was to 'achieve the objective put forward in the 1931 Report', by compelling the government to; first, legislatively create national parks; second, establish a parks body for their administration; and third, set aside appropriate funds to financially facilitate this.[102] These compromises of the SCNP membership highlight the continued disunity, following on from the Addison Report, as to how national parks would legally exist, illustrating further to the conclusion of the Report that legislation would not 'be easy'.[103]

From its conception, the Committee began advocating for national parks, acting as a centralising force in the call for legislation. The Committee wrote repeatedly to the Government, successfully ensuring the issue of national parks legislation was tabled for parliamentary debate numerous times between 1936 and 1939,

[99] The CPRE was a conglomerate of the National Trust, The Royal Institute of British Architects, The Planning Institute, The Commons Preservation Society and the Women's Institute.

[100] As Mennen (n54) discussed, the interests of the groups within the SCNP could be separated out to reflect three clusters of interest: good planning, conservation, and open space access. In doing so however, this overlooks the overlap between these groups and the multifaceted nature of the SCNP.

[101] As was apparent from the witness statements in the Addison Report (n2) 52-119.

[102] TNA/T 161/1183 (1936) 'Standing Committee on National parks: Statement of Policy'.

[103] Addison Report (n2) 43.

proposing at all times to work collaboratively with the Government to overcome the challenges detailed in the Addison Report.[104] The Committee also published on national parks legislation, producing pamphlets which summarised the findings of the Addison Report for popular consumption.[105]Alongside this, the Committee gave a voice to local movements like the Friends of Lake District, who were able to present more clearly the local challenges which existed due to the lack of legislation guiding the administration of the area.[106] Thus at the outbreak of World War II, there was a functioning proposal for how national parks could be legally created but a resistance in transitioning that into draft legislation, due to the different values and legal concepts it would have to incorporate.

5. A Triad of Reports

It was against this backdrop of government inaction that CPRE and SCNP member John Dower and his wife, Pauline, drafted the first attempt at a National Park Bill in 1939.[107] Dower himself was born in the moorland town of Ilkley, Yorkshire.[108] Self-trained as an architect, Dower ran his own practice which in his words 'accidentally' specialised in housing and town planning.[109] Pauline was the daughter of Liberal MP Sir Charles Trevelyan, a staunch political supporter of the access to the countryside

[104] TNA/T 161/1183 (May 1938) 'Letter and Memorandum to MPs'.

[105] Blunden and Curry (n12) 67.

[106] In the context of the Lake District, it was hoped that national park designation would better equip the locality to manage tourism. TNA/T 161/1183, (5th January 1938) 'Lake District and National Parks'.

[107] Blunden and Curry (n12) 67.

[108] John Sheail 'John Gordon Dower' (ODNB 2008).

[109] ibid.

movement.[110] Alongside this, her uncle was president of the YHA and an established benefactor of the National Trust. Pauline's role in Dower's work has historically been overlooked, however recent research and archival records demonstrate her significant contribution.[111]

The draft Bill, titled 'a summary of provisions for a national parks bill', was intended to be a drafting guide for the legislative creation of national parks.[112] Dower did not seek to introduce the Bill privately however, instead taking his proposal directly to the Government, believing that national parks could not be legally created without their support.[113] As a consequence, alongside the Bill, Dower also produced a series of pamphlets, mirroring the objectives of the SCNP pamphlets, to bolster public enthusiasm for the creation of national parks.[114]

By 1939, the government was broadly convinced of the need to legislate for national parks but the outbreak of the Second World War prevented any opportunity for a Bill to be debated before Parliament.[115] Instead, a different approach was taken, with the issue of national parks, and land utilisation more generally, being hallmarked as

[110] Trevelyan was involved in the proposing of an Access to the Mountains Bill in 1931. HC Deb 13 May 1931, vol 252, col 1192.

[111] Kelly (n8) 154. See also TNA/HLG 93/38.

[112] John Sheail, 'John Dower, National Parks, and town and country planning in Britain' (195) 10 Planning Perspectives 1, 3.

[113] ibid, 3.

[114] The pamphlets included 'The case for national parks in Great Britain' (1937) and 'National Parks: an appeal' (1935). Kelly (n8) 164.

[115] MERL/SR CPRE C/1/102/23 (November 1938) 'National Park, Peak District'; HC Deb 1 February 1939, vol 343, col 207; Sir Lawrence Chubb 'Editorial Notes' (1937) 5(1) The Journal of the Commons, Open Spaces and Footpaths Preservation Society 1, 1-4.

matters for discussion by the post-war Reconstruction Planning Committee.[116] Between 1942-1948 three major Reports were published, each concerned with an aspect of the legislative creation of national parks. These were the Dower Report 1945,[117] the Hobhouse Report 1947,[118] and the Huxley Report 1947.[119] These publications provided a broad contextual overview of the legal, financial, and contextual issues which could arise in legislating for national parks. Without these Reports it is possible that the NPACA 1949 may not have existed at all. Thus, to understand the legislative creation of national parks, it is essential to explore the findings of these Reports in more detail.

5.1 The Dower Report

Following on from his proposed Bill, John Dower was appointed to the Civil Service in 1942, tasked by the Reconstruction Committee with inquiring into the feasibility of national parks legislation in England and Wales.[120] Over the subsequent year, Pauline and John travelled the country, surveying both landscapes and people to obtain a comprehensive understanding of how the legal structure of national parks could exist.[121] In doing so, the Dowers expanded upon the proposals of both the Addison Report and the SCNP, presenting a more detailed understanding of national parks in the physical and legal context of the places they would be established in. The Preliminary Report

[116] TNA/BD 28/473 (March 1945) 'Internal Information Service'.

[117] Dower Report (n4).

[118] Hobhouse Report (n5).

[119] Huxley Report (n6).

[120] TNA/HLG 92/46 (September- December 1942) Correspondence between Sir Graham Vincent and John Dower.

[121] W Holford, Obituary Notice Journal of the Royal Institute of British Architects (1948) 38-39.

was first circulated interdepartmentally in 1943,[122] before being formally published by the newly established Ministry of Town and Country Planning in 1945.[123] The Dower Report followed broadly the same structure as the Addison Report, detailing the purpose, process, and costs associated with legally establishing national parks.[124] The Report began by defining national parks, arriving at a broadly similar definition to that in the Addison Report.[125] Dower challenged the use of the language of park in this context, stating that park itself implied a form of enclosure that would not be possible or necessary within the British physical or legal landscape.[126] Instead, Dower defined national parks as-

[122] TNA/HLG 92/49 (12th November 1943) 'John Dower, National Parks: Preliminary Report to the Minister of Town and Country Planning'.

[123] Established under the Ministry of Town and Country Planning Act 1943.

[124] HLG92/49 (n122) 'Preliminary Report', 1.

[125] ibid, 6.

[126] ibid.

> 'An extensive area of beautiful and relatively wild country in which, for the nation's benefit and by appropriate national decision and action-
>
> I) The characteristics are strictly preserved.
>
> II) Access and facilities for public open-air enjoyment are amply provided.
>
> III) Wildlife and buildings and places of architectural and historical interest are suitably protected.
>
> IV) Established farming use is effectively maintained'[127]

Parts of this definition were reflected in s 5 of the NPACA 1949, which integrated the language used by Dower into the statutory purposes of national parks. What is interesting is how Dower reached this definition. Unlike the Addison Report, which was derived from witness statements, Dower personally surveyed the country, physically mapping the different forms of land use and 'relative wilderness' in all the rural places in England and Wales.[128] As a consequence, the national park sites recommended by the Report were detached from historic attitudes about what should be preserved,

[127] ibid.

[128] ibid.

instead proposing parks that purely reflected the spaces in Britain as they existed in that moment.

This holistic approach was a unique proposal for designating national parks, with the prevailing global model being more ad hoc in granting and legislating for parks on an individual basis. By comparison, Dower took a country-wide approach, balancing the different needs and interests which existed in different regions to determine *all* the appropriate sites for national parks.[129] This approach was reflected in s 5(2)(b), requiring the establishment of national parks near to 'centres of population'.

Dower's Report also identified potential alternative categories for statutory rural management, namely Division B sites (nature reserves) and Division C sites (amenity areas).[130] These alternative sites reflected areas with either important landscape features or specific flora and fauna that were either too small, or too enclaved, to make for an effective national park. Dower proposed that rural protection legislation should exist in different forms of designated space to reflect the different characteristics of real places: National parks could not be a one model fits all approach to the countryside. This approach to legally managing different landscapes in different ways was ultimately incorporated into the NPACA 1949, with part III creating nature reserves, ss 87-88 creating AONBs, and parts I and II providing for national parks, with s 5 defining their purpose.

[129] ibid, 7.

[130] ibid 9-10.

Dower also considered the framework for the administration and management of national parks, stating that if parks were a national objective, they had to be nationally secured, and that this could be achieved in two ways.[131] First, the management of national parks would have to be coordinated through planning law, with a centralised national park authority acting as the primary administrator of these spaces. Second, the funds needed for national parks would have to be provided at the national level and not be dependent upon local rates.[132] Dower believed this proposal would best provide for national parks because it would build upon the existent planning legal framework, which, as is explored further in Chapter Three, empowered local authorities to administer land in rural areas. However, the financial burden and the required landscape expertise needed for national parks would be coordinated through a centralised body, ensuring national parks were consistently funded and administered.[133]

The Report concluded by setting out provisional draft clauses for national parks legislation, reflecting on different aspects of contention which the Dowers had witnessed first-hand during their survey. In doing so, Dower provided a variety of solutions to the perceived problems relating to private land ownership, pedestrian and transportation access, damages, and farming.[134] These solutions proposed different statutory mechanisms for

[131] HLG92/49 (n122) 'Preliminary Report', 13.

[132] ibid.

[133] ibid 14.

[134] ibid, 14-40.

integrating existing land-based interests into the legal framework for national parks.[135]

5.2 The Hobhouse Report

Political support for national parks was sustained throughout the war, with the publication of the Dower Report in 1945 only furthering the call to legislate.[136] This continued pressure led to the appointment of a National Parks Committee within the newly established Ministry of Town and Country Planning (MTCP) in July 1945. [137] The Committee was chaired by Sir Arthur Hobhouse, a retired Liberal politician of little success. Hobhouse had subsequently committed himself to rural affairs, serving as both the president of the Open Spaces Society[138] and as an Alderman for Somerset County Council, giving him first-hand experience of the debates which had been delaying national parks legislation.

The Committee had the responsibility of producing a White Paper ahead of legislative reform, developing upon existing departmental research for national parks legislation. Indeed, there is clear archival evidence to suggest that the Civil Service were working towards national parks legislation

[135] TNA/COU 1/ 603 (1956) and TNA/COU 1/605 (1953) Correspondence between Pauline Dower and the National Park Commission established under the NPACA 1949 regarding complexities identified under the Dower Report; HC Deb 16 July 1946, vol 425, cols 1021-1022.

[136] For example, Sir Geoffrey Mander MP often raised the issue of national parks during Prime Minister's Question Time, demanding evidence from the Dower Report as part of his Questioning. HC Deb 18 January 1945, vol 407, col 359; HC Deb 20 March 1945, vol 409, cols 774-779.

[137] Hobhouse Report (n5) 4.

[138] Originally the Commons Preservation Society (CPS).

throughout the war.[139] As was noted in the final report, the Committee's work would have been impossible without the research of planning officers, staff in the mapping department, and staff within the MTCP.

The Hobhouse Report was the longest of the national park reports, combining the recommendations of the Addison and Dower Reports with the national land management proposals of the Reconstruction Committee. The Hobhouse Report used the Dower Report to frame its inquiry, with John Dower sitting on the Committee.[140] The Report however addressed in more detail how national parks would be legally administered, considering the integration of a national parks legal framework with other post-war statute and policy.

5.2.1 The administration of national parks

The Dower Report, following the recommendations of the Addison Report, promoted the administration of national parks through a centralised commission. This body would have both the expertise and funding needed to effectively manage national parks through the legal processes which already existed in town planning law.[141] This proposal was rejected by the Hobhouse Committee, who instead suggested that a multi-layered governance structure would better integrate the

[139] TNA/MAF 144/2; MERL/SR CPRE C/1/102/23. There is a collection of correspondence between civil servants and organisations such as the SCNP and the CPRE. Hansard debates suggest that the information from this correspondence did not flow directly to or from the Minister himself. For example, HC Deb 11 May 1943, vol 389, cols 500-522; HC Deb 20 March 1945, vol 409, cols 774-782.

[140] TNA/HLG 125/1 (4th May 1945) 'National Park Exhibition Committee'.

[141] Dower Report (n124) 13.

administrations of national parks with existing legal frameworks.[142] The structure would consist of a centralised organising body, the National Parks Commission, who would have the responsibility of creating a policy framework for national parks that would evolve alongside other national developments.[143] Fundamentally however this statutory body would only have an advisory capacity, acting as a centralised co-ordinator, not a direct administrator, of national parks.[144]

Instead, the administration of national parks would occur at the local level by local authorities through the interrelated activities of 'planning' and 'management'.[145] Planning referred to the powers granted to local authorities by the town planning legislation, empowering them to create development plans and regulate land use. The Hobhouse Report proposed that the planning of national parks should be administered through this framework, meaning that whilst the objectives of planning would be established by the Commission, the legal action of planning would be carried out by local authorities, in the same manner as for other land.[146] The concept of 'management' would be similarly grounded in the growing body of planning law, with the Commission

[142] Hobhouse Report (n5) 15.

[143] ibid, 13.

[144] This position was formalised upon considering whether other jurisdictional models for national park administration would be adaptable to the unique governance structure in England and Wales as is explored further in Chapter Four, TNA/HLG93/20 contains correspondence on national park administration with New Zealand, Canada, Australia, Ireland, Denmark, Switzerland, Sweden and the USSR.

[145] Hobhouse Report (n5) 15.

[146] ibid.

working collaboratively with respective local authorities to ensure a national park was operating within its purposes.[147] This would be achieved through agreements with landowners, compulsory acquisition and specific protection orders, all of which were then legally possible through town planning law.[148] A second perceived advantage to this approach was that national parks would be administered in the broader context of the places they existed in, being planned and managed alongside other non-national park areas within the same locality.

The decision in the Hobhouse Report to reduce the role of the National Park Commission, compared with the Dower Report was controversial. The SCNP and the CPRE both objected to the change.[149] The choice however seemed to reflect a broader policy shift within the Ministry of Town and Country Planning, who was at this time also engaged in the process of reforming the planning system. The new Town and Country Planning Act 1947 (TCPA) gave local authorities broad planning powers, extending the existent legal framework of planning by making authorities solely responsible for the local and regional planning of most parts of the country. There was a strong sense from within the Ministry that if national parks were to exist effectively, their legal framework could not detract from the new planning powers proposed by the new planning Bill. To this end, the Minister of Town and Country Planning, Lewis Silkin, had publicly stated that any National Park Commission

[147] ibid, 17.

[148] ibid.

[149]David Evans, *A history of Nature Conservation in Britain* (Routledge 1992) 72.

would only have advisory powers, prior to the Hobhouse Report even being published.[150] It can thus be suggested that the findings of the Report in this regard were influenced by the broader policy of the Ministry, thus seeing the creation of national parks being integrated into other legal and policy frameworks.[151]

5.3 The Huxley Report

The final report which requires attention is the Huxley Report into wildlife conservation.[152] Although the Report was not directly related to the final legislative creation of national parks, the Huxley Committee was established as a subset of the Hobhouse Committee, appointing committee member Julian Huxley to act as the subcommittee's chair. Huxley himself was a zoologist who had a long interest in the relationship between conservation and national parks, particularly in Africa.[153]

A question that remained unanswered following the Addison Report was whether specific conservation legislation could be integrated into the same legal framework as national parks, as was the case in other jurisdictions. The Addison Report initially proposed the creation of conservation reserves within

[150] Sheail, 'The concept of national parks' (n57) 49.

[151] TNA/HLG 93/10 (16th October 1945) 'Notes for Talk with National Parks Committee on Town and Country Planning Legislation- Existing and Proposed'.

[152] Huxley Report (n6).

[153] Following this work, Huxley dissatisfied with the legislative proposals for conservation in Britain, became the first Director of UNESCO and found World Wildlife Fund. Huxley was not without controversy, acting as President of the British Eugenics Society, and acknowledgement of him here is purely in the context of the Huxley Report. Robert Olby 'Sir Julian Sorrell Huxley' (ODNB 2012).

national parks, purposed with protecting flora and fauna.[154] What was unclear however was whether these conservation reserves could be suitably reconciled with the intentions of agricultural practice and public recreation in national parks, as these activities could degrade unique flora and fauna.[155] Thus, one proposal of the Addison Report was the creation of national nature reserves, which would exist alongside national parks but would be physically enclosed spaces existing purely for the protection of nature. The purpose of the Huxley Committee was to determine whether nature reserves could be legally created and how, if at all, they would fit within national parks.[156]

The question of nature reserves, although often considered alongside the question of national parks, had a slightly different point of origin and this is important in understanding why the NPACA 1949 ultimately distinguished these two forms of public land control. The call for nature reserves in Britain reflected what Dudley Stamp described as the 'awakening of ecology', with the study of botany, ornithology, and zoology becoming increasingly prominent, particularly amongst the upper classes.[157] This in turn led to the formation of a series of local and national societies who campaigned for the legal protection of different forms of wildlife.[158] Alongside this, many landholders of large rural

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[155] Herbert Smith 'Nature Protection in Britain' (*Nature* October 1947) 457.

[156] See 'An Act to set apart a certain tract of land lying near the headwaters of the Yellowstone River as a public park (1872) s 2; 'An Act Respecting the Rocky Mountains Park of Canada' (1887) SC 50-51 Vic c 32, s 4.

[157] Dudley Stamp, *Nature Conservation in Britain* (Collins 1969) 10. Note also Wulf (n31); Peter Marren, *England's National Nature Reserves* (English Nature 1994) 7-11.

[158] The creation of the RSPCA (1838), the RSPB (1889) and the Norfolk Naturalists Trust (1926) are some examples. Note Evans (n149) 46-49; Sheail (n57) 22-28, 102-158; Stamp, ibid 10-12.

estates had begun to engage in activities of environmental stewardship, using their private property to promote activities such as afforestation and habitat protection.[159] These activities, whilst similarly concerned with preservation, reflected a different form of interest to the wide-scale public access proposed in the Addison Report for national parks, a point emphasised by the Society for the Promotion of Nature Reserves established in 1912.[160]

The Huxley Report proposed the creation of 'nature reserves', which were sites selected by virtue of their geological, or physical scientific interest.[161] This proposal drew on the recommendations of the Nature Reserves Investigation Committee, who had been exploring the possibility of designated conservation sites since 1942.[162] Consequently, the perspective of the Huxley Committee on the relationship between national parks and nature reserves shifted radically. The Addison Report expressed that nature reserves could be a subset of land regulation within national parks and this approach originally determined the scope of the Huxley Committee's inquiry. The final Report however departed from this position, stating instead that nature reserves should exist in a legally distinct way, administered independently by a wildlife conservation council.[163]

[159] Evans (n149) 53-62; TF Chipp and AG Tansley *Aims and Methods in the Study of Vegetation* (CUP 1926); Sheail (n9) 45-55; Marren (n159) 6-7. It has been suggested that this was underpinned by a more general conception of land as trust, note Ben Pontin 'Environmental Law-Making Public Opinion in Victorian Britain: The Cross-Currents of Bentham's and Coleridge's Ideas' (2014) 34(4)OJLS 759, 778-780.

[160] MERL SR CPRE C/1/72 'correspondence with the Addison Committee' (1929-1930); Addison Report (n2) 67.

[161] Huxley Report (n6) 1.

[162] Mennen (n54) 285.

[163]TNA/HLG 93/49 (17th April 1946) 'Memorandum on the constitution and functions of a Biological Service'.

This position was further supported by the Government's Scientific Advisory Committee, who published independently to support the outcome of the Huxley Report.[164]

The Report was presented to the MTCP independently of the Hobhouse Report, with the Minister then taking the proposal to Cabinet, suggesting it to be a unanimous expression of scientific opinion.[165] This led to the creation of the Nature Conservancy, an independent council for wildlife conservation, which was chartered in March 1949. The Conservancy existed as an independent body with powers to advise on the conservation and control of flora and fauna, develop research, and manage nature reserves.[166] Although the legal provisions needed to establish nature reserves were set out under part III of the NPACA 1949, it is clear through the establishment of the Nature Conservancy and the distinct administration of these spaces, that nature reserves were not legally part of the same regulatory framework as national parks. Thus, for my purposes here, there will be no further discussion of national nature reserves.

As can be seen through the exploration of all three of these Reports, the considerations made in deciding to legislate for national parks were multifaceted and varied, with each Report considering different conceptual, legal and practical issues which could arise in legislating for national parks. It was the culmination of all of these reports which framed the first legislative draft of the NPACA 1949. Considering s 5 of the NPACA 1949, it was through

[164] ibid, (1st March 1946) 'Note on Meeting with the Scientific Advisory Committee of the Cabinet'.

[165] Mennen (n54) 286.

[166] HC Deb 3 July 1973, vol 859, col 456.

these reports that the specific purposes of national parks were decided upon, with all three reports emphasising the importance of a legal framework for preserving beautiful landscapes for the enjoyment and recreation of the public.

6. Drafting a National Parks Act

Despite these comprehensive enquiries, the process of drafting national parks legislation was slow, taking over a year from the publication of the Hobhouse Report for a first draft of the Bill to be circulated. This led to a general sense of frustration, which, as Lord Merthyr remarked in April 1948, was due to the collective disappointment that the Hobhouse Report recommendations had not been implemented.[167] The SCNP were similarly frustrated but acknowledged how the triad of reports had revealed a 'difficulty in legislating for the constitutional arrangements' of national parks.[168] This was particularly true following the enactment of the Town and Country Planning Act 1947 (TCPA) which granted local authorities large powers to plan and control land use.

The MTCP was caught between the recommendations of the Reports and the local authorities they had just empowered, with national park legislation potentially reducing the planning controls of authorities over 25% of the land in England and Wales.[169] This concern was becoming increasingly apparent with the Friends of the Lake District publishing a satirical pamphlet titled 'National Parks or Local Authority

[167] HL Deb 8 April 1948, vol 154, cols 1251- 1258.

[168] Blunden and Curry (n12) 66.

[169] TNA/BD 28/473 (March 1948) SCNP correspondence 'National parks and the prospect of legislation'.

Parks?', which challenged the perceived powers *local* planning authorities would have in administering *national* parks. [170]

The first memorandum on national parks legislation in April 1948 reflected these tensions, with the document itself also trying to navigate the new inter-departmental relationships which had emerged following the creation of the MTCP in 1943.[171] Prior to the creation of the Ministry, legislating for national parks was the shared responsibility of the MAF and the Ministry of Health, with oversight from the Treasury. The MTCP had to navigate the concerns of these different departments in proposing national park legislation.[172] Despite this, Lewis Silkin, the Minister of Town and Country Planning, pursued an initial draft of the Bill. The Bill was presented before the Lord President's Council early in the summer of 1948, where, as the Minister's permeant Secretary Evelyn Sharpe commented, the Bill was dismissed as 'half-baked' by the other Ministries.[173]

Silkin persevered, drafting a new memorandum for the Bill, which set out both the functions of national parks and an overview of their administrative machinery. In particular, the drafting instructions emphasised how the role of any National Parks Commission would be within the Ministry, with the purpose of securing the effective management of national parks.[174] This position developed in the drafting of the Bill,

[170] TNA/HLG 90/174 (August 1948) Communication with the Friends of the Lake District.

[171] Minister of Town and Country Planning Act 1943.

[172] TNA/HLG 90/174 (April 1948) 'National Parks and Access to the Countryside Bill: Explanatory Financial Memorandum'.

[173] Blunden and Curry (n12) 70.

[174] TNA/MT 39/120 (1948) 'National Parks and Access to the Countryside Bill: Summary of Main Provisions to Be included in the Bill'.

with a proposed cl 2 detailing how the Commission would advise local planning authorities (under s 4 of the TCPA 1947) on how to exercise their planning powers for the purpose of national parks.[175]

The first full draft of the Bill received significant criticism from both the MAF and the Treasury who challenged the administrative scope of the Commission which was set out in part I of the Bill. In particular, the Treasury were concerned over the constitutional relationship between the 'independent body corporate', which cl 2 proposed the Commission would be, with the Ministry, and the Government.[176] The Treasury also emphasised the difficulty in issuing public funding to the body without it having direct scrutiny from a Ministry.[177] This led to the Commission's proposed administrative powers under the Bill being further curtailed, with both its constitution and its financial powers becoming the responsibility of the MTCP.[178]

The provisions of the Bill continued to change significantly through the parliamentary process, with few being satisfied with the proposed legislation. Silkin re-introduced the Bill before Parliament for its second reading, celebrating it as a 'peoples charter for the open-air'. [179] Despite this, as Barbara Castle MP noted, frustration emerged over the powers of the Commission and their limited capacity as advisors.[180] There was a

[175] TNA/CAB 124/445 (1948) 'National Parks and Access to the Countryside Draft Bill'.

[176] TNA/HLG 90/174, (5th January 1949) 'Access to the Countryside Bill: Notes of a discussion with BD Fraser and EC Wood, Treasury); (24th January 1949) 'Lord President' Committee: National Parks and Access to the Countryside Act 1949'.

[177] TNA/HLG 90/174 (February 1949) Correspondence between the Treasury and the Ministry of Town and Country Planning.

[178] TNA/CAB 124/445 (1949) 'National Parks and Access to the Countryside Draft Bill', cl 2.

[179] HC Deb 31 March 1949, vol 463, col 1461.

[180] ibid, cols 1509-1512.

sense of frustration that local authorities would always be balancing the need for development in their locality against that of the national park, with the Commission having no formal powers in the Bill to prevent this. Despite Silkin's efforts to emphasise how planning was the only legal process through which national parks could exist, reminding the house that under cl 9 of the Bill, national park development plans would be separate documents to development plans under s 5 of the TCPA 1947, these assurances failed to satisfy the House.[181]

Discontent outside of parliamentary debate was also apparent, with both Silkin and the Treasury Counsel being inundated with proposed amendments to the Bill from both MPs and external pressure groups alike. By the end of the Committee stage, 67 of the 115 clauses of the Bill had received multiple proposed amendments.[182] Although space does not allow for each amendment to be considered in turn, the broad themes of these amendments can be divided into three categories; amendments as to the administrative machinery of national parks, amendments as to the relationship between national parks and agricultural land, and amendments about access provisions. In each of these cases, amendments came from all directions pushing the Bill simultaneously to be more restrictive and more relaxed. Moreover, many amendments overlooked the specific purposes of national parks as proposed in early drafts of what became s 5. This can be understood by looking at some of the proposed amendments with respect to agriculture.

[181] ibid, col 1463; this tension persisted following the enactment of the legislation with memorandum and circulars being sent to emphasise the difference between general planning controls under the TCPA 1947 and national park planning controls under the NPACA 1949, TNA/COU 1/356 (27th November 1957) 'Powers and duties of local planning authorities in ordinary areas contrasted with their powers in National Parks and Areas of Outstanding Natural Beauty'.

[182] A comparison of the Second and Third drafts of the Bill reveals the extent of reform that occurred during the committee stage, TNA/MT 39/120 (21st December 1948) 'Access to the Countryside Bill' and (29th January 1949) 'Access to the Countryside Bill'.

Both the National Farmers Union (NFU) and the MAF encouraged greater protection for agricultural land, seeking to amend cl 102, which set out the circumstances under which agricultural land could be subject to open access requirements and compulsory acquisition. The MAF proposed to amend the clause to require their consultation ahead of any change in use to agricultural land, whilst the NFU sought to amend cl 2(2) to introduce a statutory requirement that NFU members were directly represented on the Commission.[183] Conversely, a visit by the Parliamentary Secretary to West Sussex revealed a different demand, with a proposed clause requiring landowners seek local authority permission to change the use of their land to agricultural purposes in national parks.[184] As such, Silkin and the Parliamentary Counsel were required to balance these concerns in choosing which amendments to accept and reject, often reaching compromises like the final s 84 which created a duty to consider agriculture in the administration of national parks.

This was difficult given how national parks legislation would intersect with existing legal interests. The frustrations of this are apparent in the archives, with scribbled comments about acting in 'everyone's interest' being 'impossible', appearing on the back of correspondence.[185] Similarly, a rather blunt letter from the Treasury Solicitor responded to a proposed amendment to cl 89 on interferences with private land use. The letter stated the whole point of the legislation was that it was suitably broad to cover 'all the forms of interference' the amender had been concerned over.[186]

[183] TNA/MAF 144/2 (February 1949) 'National parks and Access to the Countryside Bill Note 163'.

[184] ibid, 'Note from the Parliamentary Secretary's visit to West Sussex'.

[185] ibid.

[186] Note 163 (n183).

Despite this, there was a growing sense of understanding that national park legislation would have to compromise on these different ideas for national parks, particularly given that legislation was for the first time looking achievable. This sentiment was expressed by Silkin's predecessor and opposition, William Morrison, who congratulated the Ministry on formulating legislation which captured a sense of the countryside belonging to the people.[187] This encouraged others to support the Bill, accepting that the finer points of administration would be fully realised under the operations of the Act. In light of this, the Bill passed to the House of Lords in the summer of 1949.

Although key advocates for national parks were present within the Lords, including the now Lord Addison, the debate reflected a greater hesitancy about how the Bill would interact with existent land rights.[188] There were three proposed amendments that require particular attention. The first of these was that a new definition for 'open country' was set out in cl 48 of the Bill, limiting the extent to which grazing land was considered 'open'. Second, it was proposed that cl 50 of the Bill was amended to include a rather convoluted definition of trespass.[189] Although the Treasury Solicitor resisted the amendment, choosing to leave defining trespass out of the Act, the move to amend reflected some of the broader discourse from the Lords pertaining to the access, or recreation, provisions within the Act, in relation to how the Bill integrated

[187] HC Deb 31 March 1949 (n179) col 1486.

[188] HL Deb 8 November 1949, vol 165, cols 336-398; HL Deb 15 November 1949, vol 165, cols 666-706.

[189] Anyone who strayed from open country was a trespasser but was not liable for this provided they adhered to any restrictions set out in the byelaws by the park's planning authority. Where an individual failed to do so this would not be punishable of itself but admissible in evidence for damages, TNA/MT 39/120 'Draft of a Bill to Provide for the Establishment of a National parks Commission…'

existing land rights into its statutory framework.[190] The third shift was an increased focus on the educational value of national parks, with the Commission, despite its limited powers, acquiring a statutory responsibility to promote the good use of the countryside, educating people on how to care for it. One expression of this was the Countryside Code, first drafted in 1950.[191]

On the 16th of December 1949 the NPACA passed into law, having received 140 amendments from when the Bill was debated. The extent to which the Bill was amended reflects the different legal landscape features which had to be considered and integrated into national parks legislation. The NPACA 1949 was thus the product of thirty years of careful consideration, with the statute reflecting many of the compromises that were required to legally create national parks in England and Wales. Section 5 reflects these compromises by defining national parks through their broad purposes, thus maintaining a flexibility in how these spaces were statutorily defined.

7. Conclusions: Setting the Legal Landscape

As was set out at the start of this chapter, the NPACA 1949 created national parks in England and Wales, determining their legal purpose under s 5 by defining these legal spaces as 'extensive tracts of country' preserved 'for their natural beauty and, the opportunities they afford for open-air recreation'. Thus, the NPACA 1949 can be understood to have provided for the legal possibility of national parks in four ways. The first of these was in defining national parks, giving them a specific legal purpose

[190] TNA/CAB 124/445 (29th January 1949). Annotated copy of 'The Access to the Countryside Bill'

[191] TNA/MAF 144/2 (1949) 'A Draft of the Countryside Code'.

as set out in s 5. The task of defining what national parks would be in English and Welsh law was a difficult one, with the NPACA 1949 departing from the statutory definition of a national parks as used in other jurisdictions.[192]

Second, the NPACA 1949 determined the legal processes through which national parks would exist. Sections 8-10 of the NPACA 1949 in particular determined how development control and development schemes, as statutorily provided for in the TCPA 1947, would be foundational in how national parks were legally created, with planning law playing a fundamental role in providing the legal processes for controlling land use to fulfil the objectives of s 5 of the NPACA 1949.

Third, the NPACA 1949 provided for the administration of national parks. This was separate to the planning processes used to legally demarcate the spaces, and instead through part I on the Commission and ss 10-11, referred to the capacity of both national governance bodies and local planning authorities to administer the land within national parks, as part of their regular statutory functions. In particular, these sections of the NPACA 1949 provided for how these different levels of governance would interact, determining their spheres of competence with respect to national parks.

Fourth, the NPACA 1949, particularly in part IV on Rights of Way and part V on 'open country' considered how land-based rights which already existed would be integrated with the national park legal framework. In doing so, the Act determined the statutory relationship between national parks, as an administrative form of land management,

[192] See 'An Act to set apart a certain tract of land lying near the headwaters of the Yellowstone River as a public park (1872) s2; 'An Act Respecting the Rocky Mountains Park of Canada' (1887) SC 50-51 Vic c 32, s4.

and the management of land that resulted from the land-based rights therein. It is through the combined effect of these four considerations that national parks were legally created in English and Welsh law.

As this chapter shows, the legislative creation of English and Welsh national parks, from their initial notation in 1919, to a final legislative framework in 1949, was a considered process which integrated existing legal principles into the final provisions of the statute. Consequently, the legislative account presented in this chapter considers just one form of landscape feature within the legal landscape of national parks, the statutory defining of national parks themselves. In doing so, this chapter also acknowledges that the legal framework of national parks consisted of different components, drawing on legal principles which existed outside of the NPACA 1949's own statutory provisions. National parks existed through the processes of town and country planning law, against the conceptual backdrop of administrative capacity and private land rights. It was through the culmination of these different legal sources that national parks came to exist as an exercise in the public administration of land. Thus, to understand the legal framing of national parks in the NPACA 1949, each of these landscape features needs to be understood.

3

Planning Law and the Legal Processes for Administering Land

9. Development plans relating to National Parks

(1) In preparing a development plan, or proposals for any alterations of or additions to a development plan, for any area being or including the whole or any part of a National Park, the local planning authority shall consult with the Commission and take into consideration any observations made by the Commission.

(2) Provision may be made by regulations under the Act of 1947 for enabling proceedings preliminary to the confirmation of orders designating a National Park and to the making of orders varying such orders to be taken concurrently with proceedings required under that Act to be taken in connection with the submission, making or amendment of development plans.

(National Parks and Access to the Countryside Act 1949)

1. Introduction

Sections 8-10 of the National Parks and Access to the Countryside Act 1949 (NPACA) set out the legal processes through which national parks are administered. In particular, the sections determined that national parks exist through the town and country planning functions of local planning authorities, as statutorily provided for in the Town and Country Planning Act 1947 (TCPA). This chapter explores the specific planning legal processes set out in the NPACA 1949, considering contextually how these emerged and why they were relied upon for the legal creation of national parks.

This chapter thus has two aims; first, to illustrate how the emergence and evolution of town planning law created a set of legal processes for controlling land use in England and Wales; and second, to show how these legal processes played a fundamental role in providing a legal basis for the public administration of land, ultimately leading these processes to be incorporated into the NPACA 1949. The language of legal processes, although not perfect, has been chosen to reflect how town planning law created a new set of legal principles which determined how public bodies could interact with land. It was through these processes that land was reconceptualised as something capable of administered, outside of specific rights in land.

In exploring these aims, the chapter proceeds in four parts. The first part of the chapter considers explicitly the statutory provisions in ss 8-10 of the NPACA 1949, which determined that national parks would be administered through the legal processes of town and country planning law, as set out in the Town and Country Planning Act 1947 (TCPA). This illustrates that behind the legal creation of national parks is a broader statutory context about the emergence and evolution of planning law.

It is this contextual evolution of planning law, culminating in its inclusion in the NPACA 1949, which is the focus of this chapter. In particular, the emergence of different planning statutes is considered, demonstrating how these statutes created new legal mechanisms for land control, conceptually reimagining legal interactions with land. At the outset of this chapter, planning has a deliberately loose meaning to accommodate how the legal etymology of the term shifted with statutory development. Acknowledging this, planning will be broadly understood as the

combined activities of 'plan-making'[1] and 'spatial organisation', [2] considering the relationship of those activities to control land use. [3]

The second part of this chapter considers the rise of planning, from ordinary language to legislative term, by reflecting on how legal ideas of planning emerged against a broader context of urban problem solving during the industrial revolution.[4] Although planning was not regarded as a *legal term* until the early 20th century, from the mid-19th century the verb 'to plan' was increasingly referenced in statute relating to urban land use. This ordinary use of planning was expanded upon through a series of legislative provisions, ultimately leading to the first Planning Act in 1909.[5]

Following 1909, planning continued to evolve, increasingly being understood as a discrete activity with its own system of legal processes for controlling land use. In particular, the statutory scope of planning law increased to include rural areas and national land management. This transition redefined how planning acted as a legal framework for administering spaces, with the focus of planning shifting from urban problem solving towards a broader system of statutory land controls. The third part of the chapter culminates in considering the Town and Country Planning Act 1932

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[1] OED, 'To arrange in advance; to devise, contrive or formulate; to lay out in a plan', 'plan (v) sense 1a' (*OED*, December 2023) <doi.org/10.1093/OED/3199521983>accessed 20th March 2024.

[2] Defined as the process of 'providing structure to space;' OED, 'spatial (adj)' (*OED*, December 2023) <doi.org/10.1093/OED/1041530482> accessed 20th March 2024; OED, 'organize (v)' (*OED*, June 2024) <doi.org/10.1093/OED/1082798005> accessed 20th March 2024.

[3] Chiara Armeni, 'Place, participation and planning law in a time of climate change' in Maria Lee and Carolyn Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022) quoting from David Seamon at 111.

[4] On industrial urbanisation see, David Cannadine, *Victorious century: 1800-1906* (Penguin Books 2018) 202-204; or Asa Briggs, *A Social History of England* (Book Club Associates 1983) 185-204.

[5] The Housing and Town Planning Act 1909.

(TCPA), which occurred one year after the Report of the National Park Committee 1931 (the Addison Report).[6] The legislation addressed some of the recommendations of the Report, framing them in the context of planning law.

The final part of this chapter then considers the reforms to planning law immediately preceding the NPACA 1949, placing national parks within this context. As planning was increasingly relied upon to determine land utilisation, planning law also expanded to include a discrete scheme of legal principles for facilitating this control. This affirmed planning as the legal process for administering land use. Consequently, ss 8-10 of the NPACA 1949 utilised planning law to create national parks as a form of land control.

At the outset of this chapter, it is important to remind the reader that town planning is just one landscape feature in the legal landscape of national parks. Throughout this chapter references are made both to 'public administration' and 'land-based rights',[7] as defined in the introduction of this thesis. In particular, the chapter discusses *passim* the local governance bodies who were empowered by planning statute. Whilst the capacity of local government to administer land is the focus of the next chapter, it is worth highlighting that public administrative activities occurred locally during the 19th and early 20th centuries. Planning legislation was no exception to this.

[6] The National Park Committee, *The Report of the National Park Committee* (Cmd 3851, 1931).

[7] As noted in the introduction, this thesis defines public administration as the combined legal activities which give public bodies the power to act for the benefit of the whole, and the system of balances which ensures those actions are within the powers prescribed.

2. 'Unpacking' Sections 8-10 of the NPACA 1949

The provisions for administering national parks were set out primarily in ss 8-10 of the NPACA 1949. Section 8 determined that national parks would be administered by local authorities, either independently (s 8(3)) or in collaboration with other local authorities through a joint planning board (s 8(5-6)). Joint planning board was a term directly imported from the TCPA 1947, with s 8(2) of the NPACA 1949 determining that local planning authorities under s 4 of the TCPA 1947 would administer national parks. Moreover, s 8(4) stated that the legal processes for administering national parks would follow the same 'exercise of all functions under the Act of 1947'.

The motivations behind this decision are apparent in s 10 of the Act, with s 10(5) stating that local authorities were to use any of their ordinary planning powers to manage national parks. In particular, authorities had to use their powers under the TCPA 1947 to secure the purposes of s 5 of the NPACA 1949. Therefore, within the legal framework for national parks, there was a core dependency on existing legal processes established in the TCPA 1947.

This utility of existing processes from planning law in the administration of national parks is emphasised in s 9 of the NPACA 1949. Section 9 empowered local planning authorities to create development plans for national parks, determining how the space therein could be used. Under s 9(2) these development plans broadly followed the same format and processes as set out under s 5 of the TCPA 1947. Section 5 of the TCPA 1947 determined that development plans could be far-reaching, regulating any form of land use, including, construction and development, agricultural utility, and the protection of open spaces or amenities. This was accompanied by a national restriction upon changes in land use under s 12 of the TCPA 1947. Development plans

were thus the primary process for determining how land could be used, with the NPACA 1949 incorporating this into its framework for national parks.

Indeed, as s 10(1) affirmed, development plans were to be the focal policy document for ensuring that national park land was used to effectuate the purposes of s 5. This meant that national parks existed through the same processes of land control as land elsewhere in the country, with planning law enabling land administration. Furthermore, the Ministry of Town and Country Planning (MTCP) regarded the legal creation of national parks as a form of planning control, with Lewis Silkin emphasising the close connection between the TCPA 1947 and the objective of national parks during the second reading of the 1949 Act.[8] This was because the TCPA 1947 drew no substantive distinction between rural or urban areas, instead utilising general restrictions and permissions to control all forms of land use.[9]

Thus, in thinking about the legal processes through which national parks were administered, it becomes essential also to think about the legal role of town and country planning during the same timeframe. In doing so, it is understandable why the NPACA 1949 depended heavily on legal processes of the TCPA 1947. To frame this differently, town and country planning law is a notable landscape feature in the legal landscape of national parks.

[8] HC Deb 31 March 1949, vol 463, col 1482.

[9] TNA/HLG 93/10 (16th October 1945) 'Notes for talk with National Parks Committee on Town and Country Planning legislation: Existing and Proposed' – 'this legislation [the 1947 Act] will widen the statutory aims of planning to embrace all the objects which are now considered to be part of the essence of planning' The paper goes on to suggest the creation of national parks to be one such objective.

3. Housing, Health, and Early Planning

In an essay exploring the etymology of 'planning', Tony King suggested there is a relationship between the intention of a word and its rise to use in common vocabulary.[10] He argued that the concept of planning was born out of the combined intentions of individual property development, 'suburban expansion', and state intervention.[11] Given the breadth of these intentions, it is perhaps unsurprising that ideas of planning in English law existed long before planning itself became a legal concept. For example, as TJ Barnes suggested, evidence from the 17th century showed that urban zoning was used in London to prevent industrial interferences with property.[12] From the first Public Health Act in 1848, the verb 'to plan' was given increased statutory effect, facilitating the control of land use for a particular purpose.

Section 6 of the 1848 Act, for example, established a General Board of Health which had the authority to inquire into the sewerage and burial arrangements within a 'Town, City, Borough, Parish or Place' to ensure they were not causing nuisance.[13] Whilst the use of nuisance in statute like the Public Health Act 1848 is further explored in Chapter Five, what is noteworthy here is the ability of the Board to rely upon plans to 'order', or control, land use in a specific way for the purposes of public health.[14] The Act used plan-making to legally understand physical urban spaces, making plans part of the legal process for implementing sanitation reform under the Act. The Public

[10] Tony King ''Town Planning': A note on the origins and use of the term' (1982) 4 PHB 2, 15.

[11] ibid.

[12] TJ Barnes 'The Prerogative and Environmental Control of London Building in the Early Seventeenth century: The Lost Opportunity' 58(6) CLR 1332.

[13] Public Health Act 1848, s 8.

[14] ibid, s 10.

Health Act 1875 further relied upon the language of plan-making. Sections 32, 176 and 305 all required the production of plans as part of the statutory empowerment of local governance bodies to control land use for the broader purposes of public health. Section 32 for example required the production of an urban plan before developing new sewerage works.

Linking back to King's etymology, this shift towards understanding places through plans gained prominence, particularly in legislation which promoted the use of land for housing development. This can be evidenced in the Artisans and Labourers Dwelling Act 1868, which framed the redevelopment of unfit dwellings through the language of plan-making.[15] For example, s 7 set out a requirement that local authorities produce a plan of Works, detailing the location, object and expense for the Works, alongside a report by a surveyor. More generally, the Act sought to address the issue of unfit housing, and it was hoped the production of plans by local governance bodies would lead to more detailed consideration by landlords and developers about how to improve their properties.[16] 'To plan' in this sense was further provided for in a subsequent housing Act, the Housing of the Working Classes Act 1890, which empowered local governance bodies to create housing development schemes.[17] These schemes had to plan 'Work' provisions for the improvement of unfit dwellings, as well as address questions about the proximity and utility of different neighbouring developments.[18]

[15] Artisans and Labourers Dwelling Act 1868, ss 7-8.

[16] HC Deb 10 March 1865, vol 177, cols 1526-1528.

[17] Housing for the Working Classes Act 1890, ss 4-6.

[18] ibid, s 4.

As this shows, the 1890 Act combined the two senses of planning which existed in the Artisans and Labourers Dwelling Act and the Public Health Acts. On the one hand, there was plan-making, the production of physical schemes for the completion of Works. On the other, plans for spatial organisation provided recommendations for how different developments should be laid out within one place. In of all these Acts however, the explicit language of planning was missing, and it would be anachronistic to call these provisions planning law. Instead, I want to highlight how these early instances of public land administration relied upon an understanding of plan-making as being fundamental in controlling land use for a particular purpose. This is important in understanding how planning law became the process for publicly administering land, because it shows that plan-making provided legitimacy to increasing public controls over land. It is in this context that national parks were ultimately framed within planning law, as they too were an exercise in controlling land use, as s 9 of the NPACA 1949 illustrates.

3.1 The Housing and Town Planning etc Act 1909

The independent activity of planning was first proposed in England by Birmingham City Councillor John Nettlefold, who adopted the term from the German *planung*, which referred to a zoning model for urban layout.[19] Similarly, philanthropist Thomas Horsfall first used 'town plan' in a 1904 speech on 'eliminating slum housing'.[20] These first uses of planning were also tied to a broader intention to control land use to improve urban environments,

[19] Anthony Sutcliffe, *Towards the Planned City: Germany, Britain, the United States and France 1780-1914* (Blackwell 1981) 72.

[20] King (n10) 15.

particularly housing. In light of this, the first statutory use of planning, which captured both the practice of plan-making and a broader intention to organise spaces, occurred with respect to urban housing legislation: The Housing and Town Planning etc Act 1909.

The 1909 Act followed on from the legislative housing reforms of the previous century, using the language of planning to further statutory controls over the development of urban dwellings. The Act set out to:

> 'Amend the law relating to the housing of the working classes' (amending the Housing of the Working Classes Act 1890); 'Provide for the making of town planning schemes'; [and] 'to make further provision with respect to the appointment and duties of county medical officers of health and to provide for the establishment of public health and housing committees of county councils'.[21]

The three parts of the Act reflected these objectives, with part II on 'Town Planning' being notably shorter than the housing provisions contained within parts I and III. The limited scope of part II, alongside its voluntary nature, led the Act to be criticised by its contemporaries for not giving full legislative effect to the idea of planning as envisaged by Horsfall and Nettlefold.[22] Yet, as Phillip Booth and Margo Huxley explored in their centenary reflections on the 1909 Act, the 'first town planning Act' framed the activity of planning as a legal

[21] The Housing, Town Planning etc Act 1909, 'Introduction'.

[22] Phillip Booth and Margo Huxley, '1909 and all that: reflections on the Housing, Town Planning Act 1909' (2012) 27(2) Planning Perspectives 267, 275.

mechanism for securing housing development, similar to plan-making in the schemes which existed under the Housing for the Working Classes Act 1890.[23] This meant that planning was merely the process through which the use of land for housing reform could be controlled.

Improving housing conditions for the working classes was particularly prominent during this period, with the Liberal Party promising to end urban overcrowding and unsanitary conditions in their 1906 election manifesto.[24] The 1909 Act was thus seen to represent an 'epoch in the social legislation of this country' utilising the statutory language of planning to formulate a legislative response which regulated urban housing development by introducing controls over urban land use.[25] Thus, planning in its early existence reflected a different type of activity to that which shaped ss 8-10 of the NPACA 1949.

[23] ibid, 268.

[24] WMRC (Liberal Publication Department, 1906) 'Leaflets published by the Liberal Publication Department for the General Election of 1906'.

[25] Chas Leach, *The Housing, Town Planning, & c Act 1909* (The Local Government Press Company 1911) 3.

The limited legal scope of planning in this context was evidenced in the political rhetoric surrounding the passage of the Act, with planning advocate John Burns stating-

> 'The main essential feature of the Bill [1909] is that Part III of the Housing of the Working Classes Act 1890, which enables local authorities to provide new houses for the working classes, and which is now only adoptive, shall be put into force throughout the country.'[26]

By comparison, the planning provisions within the Act were supplementary to the main objective of housing reform, illustrating how the use of the language of planning within the 1909 Act only created a legal process through which this broader purpose could be achieved. This position is apparent in examining the planning provisions within part II. Section 54, for example, empowered local authorities to create town planning schemes, framing them similarly to housing schemes under s 4 of the 1890 Act, as a statutory process for securing proper sanitation and providing adequate housing.[27]

Similarly, s 57 enabled local authorities, through planning schemes, to remove or improve existing buildings. This was tied closely to the slum clearance provisions in part I of the Act. In particular, s 6 stated that housing should be laid out with suitable space for 'public streets and roads'. Local governance bodies were empowered under s 10 to seek orders from the Local Government

[26] HC Deb 5 April 1909, vol 734, col 3.

[27] Although the court did hold that 'building' in s 46 of the Act (part II) did not just refer to housing but any building, *Jackson v Knutsford Urban District Council* [1914] 2 Ch 686.

Board (LGB) to remove dwellings which existed counter to the requirements of the Act, making s 57 a fundamental part of this process. Thus, whilst the 1909 Act can be seen as the first Town Planning Act, planning itself, at least legally speaking, was only a statutory process through which the urban housing objectives of the Act could be achieved, similar to plan-making in the legislation of the previous century. To link back to King's etymology, the legal intention of planning in this context was the provision of housing, not a more general legal control on land use.[28]

3.2 Town planning as a 'discrete activity'

The limited application of the language of planning to specific statutory purposes, like housing or public health, did not reflect how planning was beginning to be understood. In particular, an emerging body of professional planners sought to expand the legal scope of planning to include spatial organisation and centralised land control.[29] It was planning in this expanded sense that was captured in the TCPA 1947 and used to legally create national parks. It is thus useful to explore some of the ways in which the activity of planning went beyond its specific legal definition under the 1909 Act. These activities later influenced the expansion of the legal scope of planning, allowing it to become the primary legal process for controlling land use, as opposed to a secondary legal mechanism which controlled land use for broader statutory purposes, such as housing.

[28] King (n10) 15.

[29] H Chaloner Dowdall and SD Adshead 'The Law of Town Planning' (1910) 1(1) TPR 39, 40.

The emergence of town planning as a discipline outside of its legislative meaning can be attributed to three interconnected movements: the model town movement, the garden city movement, and the creation of the Planning Institute. These three movements are interconnected due to the actors involved, with a shared group of individuals shaping planning on multiple fronts. Beyond this, they were each underpinned by shared social values and an appreciation of the activities of plan-making and spatial organisation, as mechanisms for administering land outside of traditional ownership rights.

As Helen Meller noted, the value of the 'ideal' played a fundamental role in the rise of planning as a 'discrete activity'.[30] The model town movement can be seen as one expression of this search for the ideal city. The origins of the model town movement are complex, with the concept finding its roots in religious and colonial experiences of land administration, as a mechanism for creating 'perfect societies'.[31] This was often accompanied by an Edenic appreciation of natural or 'wild' spaces as part of that administration.[32] Similarly, Robert Owen's experiment at New Lanark provided a starting point for the development of model town spaces for industrial communities.[33] The purpose of the experiment was to satisfy an entire population by balancing the working

[30] Helen Meller, *Towns, Plans and Society in Modern Britain* (CUP 1997) 31.

[31] See, John Minster Morgan, *The Christian Commonwealth* (Edinburgh 1845); James Buckingham, *National Evils and Practical Remedies* (first published 1849, CUP 2011); and Robert Pemberton, *The Happy Colony* (Saunders and Otley 1854).

[32] Richard Grove, *Green Imperialism: Colonial expansion, tropical island Edens and the origins of environmentalism*, 1600-1860 (CUP 2003); Tim Bonhyhady, *The Colonial Earth* (Melbourne University Press 2002).

[33] William Ashworth, *The Genesis of Modern British Town Planning: A Study in Economic and Social History of the Nineteenth and Twentieth Centuries* (Routledge & Paul 1954) 120-121.

demands of industrialisation within an urban space, by providing both necessities and comforts for its inhabitants.[34] In particular, space for outdoor recreation was emphasised. As with the other examples, the interplay between the 'ideal city' and social engineering in New Lanark was apparent, with Owen aiming to 'better' a whole population.[35]

The model town movement in the English context was also influenced by the rise of the housing estate, which saw developers construct high density housing to maximise profits over a limited plot of land.[36] This was seen as undesirable by social reformers, like Horsfall and planner Raymond Unwin, because high density housing developments left little space for other forms of urban infrastructure or open spaces.[37] Thus, the English model town movement reflected these two influences, endeavouring to provide towns which had the infrastructure to promote individual welfare but also to demonstrate the feasibility and profitability of low-density housing, which could be accompanied by urban green spaces and infrastructure. Thinking about the legal creation of national parks then, it is possible to draw parallels between these aspirations for urban spaces and the s 5(3) purpose of national parks in providing for outdoor recreation close to population centres.

[34] Robert Owen 'New Lanark' (London 1849) para 10-11.

[35] ibid, para 7.

[36] John Bryson and Philippa Lowe, 'Storytelling and history construction: rereading George Cadbury's Bournville Model Village' (2002) 28(1) Journal for historical geography 21, 21.

[37] Josephine P Reynolds 'Thomas Coglan Horsfall and the Town Planning Movement in England' 1952) 23(1) The TPR 52.

Early examples of the model villages are plentiful, with industrialists in places like Halifax, Bradford, Swindon, and Merseyside creating village settlements which provided their employees with housing and infrastructure.[38] Of particular note were the Price Village in Merseyside and the Saltire Village in Bradford, both founded in 1853. Both villages were privately owned and constructed by industrialists who, guided by ideals of working-class betterment, sought to create an urban environment for their employees.[39] The proved success of these early model villages spurred further experiments on a larger scale, leading to model towns. These towns provided both accommodation and amenities for their inhabitants, constructed on a vision of the ideal urban space. Three notable examples include Port Sunlight (established in 1888 at Ellesmere Port), the Bournville Village Trust (established in 1900 in South Birmingham) and New Earswick (established in 1902 in North York).

A crucial aspect of these model towns was the planned nature of the urban space, which provided residents of the town with both the practical amenities needed to live and the opportunity for greater fulfilment or enrichment, typically through providing space for outdoor recreation.[40] As noted in Chapter Two, this partially resulted from the application of nature-based thinking to social problems.[41] Consequently, these model towns became an example of how

[38] Ashworth (n33) 131.

[39] Gordon Cherry, *Cities and Plans: The Shaping of Urban Britain in the Nineteenth and Twentieth Centuries* (Edward Arnold 1988) 36.

[40] Port Sunlight Village Trust, 'Port Sunlight Conservation Management Plan 2018 – 2028' (PSVT 2017) 'Chapter 2, The History of Port Sunlight', 28.

[41] Jeremy Burchadt, *Paradise Lost: Rural idyll and social change in England since 1800* (Bloomsbury Academic 2021) Jan Marsh, *Back to the Land* (Quartet Books Limited 1982).

the improved design of a place could better include the natural features and amenities of that place within the urban environment. This promoted the value of spatial organisation as a mechanism for determining land use. This could be achieved through the creation of plans which worked with the characteristics of the proposed town.[42] For example, Port Sunlight was constructed on marsh land, which required careful piecemeal development, with large portions of the town being left undeveloped.[43] Similarly, the Bournville Village began as a housing estate to preserve the green spaces around the associated chocolate factory.[44] As Bournville developed into a model town, the local necessities of schools and recreational facilities made the design, or plan, of Bournville increasingly important.[45]

A second movement which also promoted this sense of the 'ideal' was the garden city movement first proposed by Ebenezer Howard in 1898.[46] Howard proposed the 'garden city' as a model for national land organisation, aimed at countering the extensive urban sprawl of city suburbs.[47] The model proposed the creation of a series of independent satellite towns which would radiate from a major city hub, preventing the uncontrolled expansion of that city.[48] These satellites would be self-financing, established through trust committees and

[42] Anthony Sutcliffe, *British Town Planning: The Formative Years* (St Martin's Press, 1981) 22.

[43] Port Sunlight Village Trust (n40) 24.

[44] Bryson and Lowe (n36) 28.

[45] ibid, 34.

[46] Ebeneezer Howard, *To-morrow: A peaceful path to real reform* - first published 1898, republished as *Garden Cities of To-morrow* (swan Sonnenschein & Co 1902).

[47] ibid, 53-54.

[48] ibid, 21-23.

sustained through rent payments, ensuring the town would only expand in line with its affordability.[49] Howard originally intended to call these towns Unionvilles, but adopted the term garden city following a recommendation from William Morris.[50] Howard established the Garden City Association in 1899, bringing his vision to life.

Although Port Sunlight and Bournville were separate from the garden city movement, an exchange of ideas was apparent, with both model towns emphasising the essential role of the garden within the urban environment.[51] Bournville even acted as host for the first Garden City Association's conference in 1901, with George Cadbury, the founder of Bournville, closely associating his model town with the garden city movement.[52]

The label of 'garden city' however came to dominate the scope of Howard's proposal, with the 'environmental dimension' of these planned towns being dominant.[53] This could in part be attributed to the influence of Morris in naming garden cities, reflective of his own agenda to produce a housing scheme with generous open spaces.[54] Howard's model provided a practical template for Morris's vision of children playing and kitchen gardens.[55] This was reflected in

[49] ibid, 28-31, 38-42.

[50] Steven Ward, 'The Garden City Re-examined' (1990) 5 Planning Perspectives 249, 250.

[51] Gordon Cherry, *Urban Change and Planning* (Alden Press 1972) 105.

[52] Bryson and Lowe (n36) 36.

[53] Ward (n50) 251.

[54] Marsh (n41) 15.

[55] ibid.

the development of Letchworth Garden City as the first garden city in 1903. Many of Howard's social visions for his satellite towns failed to materialise in Letchworth,[56] however Letchworth did provide an opportunity to plan a complete town, inclusive of infrastructure, private gardens, and green open spaces.[57] This experience and its embodiment within the garden city movement allowed for planning (at least academically) to be experienced as a discrete activity from the purpose of housing development. This relationship between garden cities and planning was apparent in the rebranding of the Garden City Association, which administered Letchworth, into the Garden City and Town Planning Association (GCTPA) in 1909.[58]

Following on from the establishment of Letchworth, the Association acted as a pressure group campaigning for the principles of planning to be given a statutory basis, through the creation of specific planning laws. This was influenced by the lawyers involved in drafting Letchworth's internal governance structure, who stressed the importance of creating a formal legal framework for controlling land use. This was a more expansive vision of what planning could legally be when compared to the use of the term in the 1909 Act.[59] Consequently, the demand for planning to have its own specific legislation was supported by the Law Society.[60]

[56] Meller (n30) 36.

[57] Cherry, *Urban Change* (n51) 122.

[58] Denis Hardy, *From Garden Cities to New Towns: Campaigning for Town and Country Planning 1899-1946* (Routledge 1991) 1.

[59] Meller (n30) 36.

[60] Gordon Cherry, *The Evolution of British Town Planning: A History of Town Planning in the United Kingdom during the 20th century and of the Royal Town Planning Institute 1914-1974* (Leonard Hill Books 1974) 44.

However, the first town planning Act in 1909 did not meet the expectations of the GCTPA, nor did it satisfy the growing professional interest in legislating for town planning.[61] This was because the Act only statutorily provided for planning as a legal mechanism for controlling land use to facilitate housing development. The legislation failed to capture the broader possibilities of land use control that planning offered.

This dissatisfaction led to the establishment of the Planning Institute in May 1914.[62] The formation of the Institute was influenced by the earlier experiences of planning in model towns and garden cities, with the GCTPA, the Law Society, and the Institute for Chartered Surveyors being part of the Institute's 'inter-professional nucleus'.[63] Indeed alongside Burns, Unwin, Horsfall, Cadbury, and Howard, the Institute had a strong legal membership, including Stanwell Birkett who drafted the legal arrangements for Letchworth.[64] It was the establishment of the Institute which provided an intellectual centre for the promotion of planning as a discrete activity which required its own body of law. This led the Institute to criticise the 1909 Act for failing to legally provide for planning in this wider sense.

[61] The limited legal scope of planning can be partially explained through the initial failure of the Bill in 1908, which led many of the provisions within the Act to be scaled-back in their reintroduction in the 1909 Act, Leach (n25) 3.

[62] Company status was granted under the Companies Act as an alternative to Royal Chartership for a professional body.

[63] Cherry, *Evolution of Planning* (n60) 48.

[64] ibid, 60.

In thinking about these three movements in tandem, planning was emerging as a discrete professional activity, in need of its own legal processes. In particular, planning needed a statutory framework for the purposes of re-framing land as something capable of being administered as in model towns or garden cities. This was a separate understanding of planning to that expressed in legislation, with planning being limited to specific forms of activity, like housing. It was planning in this wider sense which was eventually relied upon in the legal creation of national parks. This was because the legal activity of planning had expanded to encompass the processes of land control, which had first been experienced in the context of model towns and garden cities.

3.3 World War One and the Housing and Town Planning Etc Act 1919

Criticism of the 1909 Act was sustained throughout World War I, with the demands of reconstruction providing a legislative opportunity for planning reform.[65] From a legal perspective however, the language of planning continued to be used to explain the processes for controlling urban land use, so that housing developments could be regulated.[66]

Preparations for post-war reconstruction began with the 1917 memorandum, in which Government Minister Christopher Addison, working alongside Unwin, costed plans for the development of 500,000 homes.[67] This figure was then relied upon in the Tudor Walters Report into housing reform, which

[65] Meller (n30) 52.

[66] Housing and Town Planning Act 1919.

[67] On post-war housing note LF Orbach, *Homes for heroes: a study of the evolution of British public housing, 1915-1921* (Seeley, Service & Co 1977); Mark Swenarton, *Homes fit for heroes: the politics and architecture of early state housing in Britain* (Routledge 2018).

proposed the incorporation into statute or local byelaws a series of requirements for the layout of a 'good home'.[68] Notably the Report recommended planning out streets prior to the construction of houses to ensure that appropriate space was left for dwelling construction.[69] These wartime recommendations were given political momentum in the 'homes for heroes' campaign during the 1918 election, with the campaign promising to develop housing fit for those returning from war.[70] Underpinning this promise was an acknowledgement that legislation would be required to coordinate development on the scale proposed.

After the war, town planning became the administrative responsibility of the newly founded Ministry of Health, with Addison being appointed the first Minister of Health in 1919. Prior to his appointment, Addison had acted as President of the LGB, giving him a primary role in administering planning schemes under s 4 of the 1909 Act. It is worth noting that Addison's role as the Minister of Health was his last government Ministry position prior to his appointment as Chair of the National Park Committee in 1929, as discussed in Chapter Two.[71] As Minister of Health, Addison believed that healthy dwellings led to healthy people, and the new Ministry continued to rely upon the language of planning to facilitate greater statutory control of land use for

[68] Christopher Powell 'Fifty Years of Progress' (1974) 3(10) Built Environment 532, 532.

[69] ibid.

[70] Hardy (n58) 116.

[71] Prime Minister Lloyd George prevented Addison from running as a Liberal candidate due to his desire to increase national land control, BL, MSS Addison dep c. 3, fols 441-442; c. 4, fols 245, 248.

housing development.[72] This position became apparent in Addison's Housing and Town Planning Act 1919.

The 1919 Act consolidated the provisions of the 1909 Act together with those from the Housing for the Working Classes Act 1890. The Act followed broadly the same structure as the 1909 Act, with part I of the 1919 Act similarly providing for the redevelopment of slum housing. Section 1 created a legal obligation on local authorities to prepare housing schemes, which had to detail the required number of houses within an area, alongside the location, size, and number of houses to be constructed per acre. These housing schemes became an important aspect of urban housing administration by legally obliging local authorities to plan housing, thus better securing low-density developments.[73] The compulsory nature of s 1 also marked a legal shift in how the process of plan-making was conceived, transforming plans or schemes into an obligatory function of local authority administration, making them a pre-requisite to housing development. Thus, whilst the legal purpose of planning was still closely tied to housing construction, the process of plan-making was given increased legal status under the 1919 Act. This understanding of planning enabled it to further provide the legal processes for specific forms of land administration.

The spatial organisation component of planning was also given increased statutory effect under the Act. This can be seen in part II, 'Town Planning', which set out the specific legal functions of planning as a legal process for

[72] ibid, c. 142.

[73] Housing and Town Planning Act 1919, s 1(1).

controlling urban land use. Of note was s 42, which made the production of a planning scheme an obligatory part of local administration. This enabled a local authority to determine local land use by producing a scheme which designated land as either under development or likely to be built upon, namely for residential or industrial purposes. As with the 1909 Act however, these planning schemes were still closely tied to the housing provisions in part I of the 1919 Act. Section 45, for example, which was in part II of the Act, enabled a local authority to approve the development of a housing estate, separate to a s 1 housing scheme.

Similarly, the legislation granted greater powers in the context of planned housing under s 1, as opposed to planning schemes, under s 42 of the Act.[74] This can be seen in the compulsory acquisition powers of local authorities under s 11, which defined compulsory acquisition as the process through which local authorities could forcibly purchase land to fulfil the objectives of the Act. This disparity in compulsory acquisition powers between the different parts of the 1919 Act was illustrated in *Conron v London County Council*.[75]

Conron considered whether a local authority had the statutory power to compulsorily acquire a pub (which would continue to be such) as part of a 3000-acre acquisition for the development of new houses, in line with the creation of a housing estate under s 45. The Court found in favour of the authority, but what is interesting is that the authority's powers to acquire the pub only existed

[74] Due to the scope of part I, powers of contract were greater in relation to housing, note *Nixon v Erith Urban District Council* [1924] 1 KB 819.

[75] [1922] 2 Ch 283.

because of the attached acquisition for new housing, despite the pub itself being subject to a planning scheme. The Court emphasised how acquisition of the pub occurred under s 1 and s 12(1) of the 1919 Act, making it part of the housing scheme, not an acquisition to effectuate the planning scheme, which the s 45 housing estate was part of. The court rejected reliance on the planning scheme as a justification for the acquisition, instead focusing only on the statutory sections relating to housing development.

Further to this, local authorities were slow to propose town planning schemes, showing the general process of town planning to be a secondary purpose within the Act when compared to the provision of housing.[76] Although planning schemes no longer needed to be approved by the LGB, delays from the Minister in reviewing plans only furthered this issue. To set this into context, only 94 schemes, as submitted by 50 local authorities, had been actioned by 1932, despite over 740 local authorities being obligated under ss 42 and 47 to prepare schemes.[77] By comparison, 213,000 houses were built between 1919 and 1924 under part I of the Act.[78] This shows that whilst town planning had conceptually gained legal status, with many areas proposing schemes for development, planning was still primarily a legal process for facilitating housing construction, with housing being the primary focus of the 1919 Act. Moreover, as the case law suggests, local authorities were opting to enact s 1 housing schemes, instead of town planning schemes under s 42. One

[76] This was in part due to the analogous Housing (Additional Powers) Act 1919 which created additional acquisition powers in the context of housing, *The King v Tribunal of Appeal under the Housing Act, 1919* [1920] 3 KB 334.

[77] Cherry, *Evolution of Planning* (n60) 86.

[78] Simon Pepper and Peter Richmond 'Homes unfit for Heroes: The Slum Problem in London and Neville Chamberlain's Unhealthy Areas Committee 1919-1921 (2009) 80(2) TPR 142, 165.

explanation for this was that local authorities could recuperate costs for effectuating a housing scheme in a way which was not possible for costs under a planning scheme. In *Arlidge v Tottenham Urban District Council*,[79] *Salford Corporation v Hale*,[80] and *Paddington Borough Council v Finucane*, [81] local authorities successfully recovered costs for Works planned within a housing scheme under s 28 of the Act. The 1919 Act did not confer the same powers with respect to town planning schemes under s 42.

It can thus be seen that whilst the 1919 Act extended town planning provisions, there was still little legal separation between planning and housing, with planning being a process through which housing construction could be controlled. This did not reflect the wider sense of planning as a form of general land control which had been experienced in model towns and the garden city movement. The consequence of this being that planning, following on from the 1919 Act, was not regarded as a discrete legal activity for administering different forms of land use. Instead, planning was a process with statute-specific outcomes. This is apparent in thinking about the scope of planning powers, with s 46 of the 1919 Act setting out that planning schemes were only obligatory in urban districts of over 20,000 inhabitants, which were inferred to be experiencing urban housing problems due to increased urbanisation.[82] Thus, whilst the 1919 Act further developed what planning law was, the intention requirement in King's etymology still viewed planning as a legal process for

[79] [1922] 2 KB 719.

[80] [1925] 1 KB 503.

[81] [1928] Ch 567.

[82] Avner Offer, *Property and Politics 1870-1914* (CUP 1981) 221-283.

facilitating housing development, not as a discrete 'legal activity' for controlling land use.

4. The Rise of Town *and* Country Planning Law

It was following on from the 1919 Act that planning became the general legal process for controlling different forms of land use, with planning being seen as a discrete legal activity. It was also at this stage in the evolution of planning law that planning processes were first proposed to be used to create national parks in the Addison Report. This was all possible through the statutory expansion of the legal scope of planning.

The Town Planning Act 1925 empowered local authorities to produce town planning schemes for the purpose of laying out the use of land, conceptually providing for planning as a discrete legal activity. The new Act thus separated out planning schemes, under part II of the 1919 Act, from housing schemes under part I. These were then encompassed in separate legislation, namely the Wheatley Act 1924,[83] and the Housing Act 1925.

The Town Planning Act 1925 simplified the legal process for creating planning schemes, with s 1 setting out what the purpose of a planning scheme would be. In particular, s 1 established that a planning scheme could encompass any land to be used for development purposes, and existed to ensure such land had proper sanitary conditions, amenities (including open spaces) and a considered layout. This was a notable expansion in the scope of planning law compared to planning schemes under

[83] Housing (financial provisions) Act 1924.

part II of the 1919 Act, reflecting the changed status of planning as a discrete legal activity. The scope of s 1 however was still limited, with 'development' in s 1 only referring to the construction of buildings. This meant local authorities had minimal powers to control non-construction-based forms of land use, with development regulation being the primary focus of the Act. This limitation was further apparent in the guidelines produced by the Ministry of Health in 1928, which detailed model clauses for the use in planning schemes.[84] Of the 44 model clauses recommended, over half referred explicitly to construction, a further 10 clauses related indirectly to the development of housing.[85] Thus, whilst planning had become a discrete legal activity under the 1925 Act, the scope of this activity was relatively limited, with the legal processes of planning being confined to urban construction.

In light of this, it was only weeks after the enactment of the 1925 Act that the question of planning, and thus planning law, once again sparked debate.[86] During one Prime Minister's Statement in 1925, Liberal MP Trevelyan Thompson emphasised that only 70 local authorities had submitted schemes for slum clearance since the 1919 Act, suggesting the town planning had introduced unnecessary legal processes which had slowed the development of urban housing.[87] The uptake in planning schemes had been equally poor, with only 267 urban authorities having operational schemes in

[84] TNA/TS27/738 Ministry of Health Town Planning, *Model Clauses for use in the Preparation of Schemes* (HMSO 1928).

[85] ibid.

[86] HC Deb 18 Dec 1925, vol 189, cols 1838- 1845.

[87] ibid, cols 1841-1845.

1926.[88] To set this into context, 289 authorities had not even begun to draft planning schemes,[89] despite s 42 of the 1919 Act making planning schemes mandatory.

This slow uptake in producing planning schemes also created legal issues because a scheme could only be regarded as an encumbrance on a property once it had received final approval from the Minister. This meant that although a local authority may have passed a resolution to include a development within a planning scheme, the effect this had on the property rights of the owner was unclear until the scheme was made operational by the Ministry. If planning was to be understood as an independent legal activity, the statutory processes of planning needed to be sufficiently robust to provide for effective land administration.

This issue was discussed in *Re Forsey and Hollebone's Contract* [1927] 2 Ch 379 (HC), [1927] 7 WLUK 67 [90] where it was held that the inclusion of a property within a resolution under the 1925 Act was not an incumbrance on the property for the purposes of sale. Instead, the encumbrance began when the resolution became a scheme, marking when the local authority assumed development control of the land under s 7 of the 1925 Act.[91] This created ambiguity about if and when a planning scheme became legally enforceable, leading to further delays in the scheme drafting process. Similar delays did not exist for housing schemes, with the Wheatley Act 1924 and the Housing Act 1925 giving increased financial support to local authorities

[88] HC Deb 11 February 1926, vol 191, col 62.

[89] ibid.

[90] [1927] 2 Ch 379 (HC), [1927] 7 WLUK 67.

[91] ibid, 384-386.

enacting schemes, expediting the process.[92] Thus, if planning were to be a discrete legal activity, then it needed the legal processes to ensure its effective operation.

As the Minister of Health, Neville Chamberlain expressed on the issue, 'I cannot keep on nagging the local authorities, but I am watching the work, and I am very much convinced of the importance of it'.[93] This idea of the importance of planning is interesting in considering the transition of planning into a discrete legal activity which provided the processes for controlling different forms of land use. By the 1920s it was accepted that old mechanisms for land management could not address the demands being placed on land in the early 20th century.[94] As was similarly acknowledged by the nature-based social reforms discussed in Chapter Two, new legal structures were needed to facilitate greater public controls over land use.

It was in this context that planners were increasingly identifying ways in which planning could 'safeguard the public interest', with the Planning Institute undertaking a new political role in actively campaigning for national town and country planning policy, alongside an expansion of the legal scope of planning beyond the provisions of the 1925 Act.[95] In particular, the Institute sought to make planning the primary process for controlling land use, bringing issues like rural land utilisation within the scope of planning.[96] This reflected the practical work of the

[92] Housing Act 1925, s 6.

[93] HC Deb December 1925 (n88).

[94] As Harold MacMillian noted 'Planning is forced upon us therefore not for idealistic reasons but because the old mechanism which served us is no longer adequate', Harold Macmillan, *A Plea for a National Policy* (Macmillan 1933) 18. see also Arthur Marwick, *Britain in the century of Total War* (Penguin Books 1970).

[95] Cherry, *Evolution of Planning* (n60) 108-109.

[96] ibid.

Institute, with many of its members acting as voluntary consultants for regional planning committees, helping them to create multi-district town planning schemes, which crossed both urban and rural areas.[97] These schemes however were not legally enforceable due to the limitations of the 1925 Act. Joint planning arrangements were also procedurally difficult, with only London having specific joint planning legislation.[98] There was a growing sense that the legal framework for planning was insufficient to meet the demands of planning practice. It was this desire for more expansive planning law that gave rise to the Town and Country Planning Act 1932 (TCPA).

As planning historian Gordon Cherry suggested, the 1932 Act had a 'particularly protracted history'.[99] Initially being proposed by the Labour Government, as complimentary legislation to the Housing Act 1930, the fall of the government in the 1931 election similarly led to the fall of the Town and Country Planning Bill.[100] Significant pressure on the new Conservative majority National Government saw the reintroduction of the Bill.[101]

The 'Town and Country Planning Bill: Memorandum and notes on clauses' was presented by the Minister of Health to Parliament in 1931, setting out:

[97] ibid, 94.

[98] The Greater London Regional Planning Committee formed in 1927 was empowered explicitly through byelaws of the London Borough Council to regionally plan. David Thomas 'London's Green Belt: The Evolution of an Idea' (1963) 129(1) the Geographical Journal 14.

[99] Cherry, *Evolution of Planning* (n60) 89.

[100] ibid, 74.

[101] HC Deb 12 November 1931, vol 259 col 249.

> 'The general objective of the Bill is to extend the planning powers of local authorities to built areas and to rural areas. At present their powers are (with minor exceptions) confined to land which is in the course of development or appears likely to be used for building purposes. Provisions are also included for facilitating the making of regional planning schemes […] for checking sporadic and ribbon development; for enabling local authorities to obtain the whole betterment relating to a scheme'.[102]

As this passage shows, what became the TCPA 1932 had a much broader scope than its predecessor the 1925 Act, providing substantive planning law to legally support the activities of planning. Of particular note was how the new Act extended planning law to include all forms of land use, in both urban and rural areas, with rural areas being previously excluded from planning law.[103] The Act also introduced legal mechanisms for regional planning.[104] The TCPA 1932 was thus the first planning Act to not only provide for the legal processes of plan-making and spatial organisation, but also to give substantial effect to planning as the more general legal activity of administering land use. Thus, following on from the TCPA 1932, planning was a discrete legal activity within English law.

The nature of planning as a discrete legal activity was further apparent because the 1932 Act was the first planning legislation to contain no housing provisions. Instead,

[102] TS27/738 (n84) (April 1931) 'Ministry of Health, Town and Country Planning Bill: Memorandum on Notes and Clauses'

[103] TCPA 1932, s 1.

[104] ibid, ss 3-5.

the Housing Act 1930 contained the laws on slum clearance and housing redevelopment. Although it was hoped by the Government in 1930 that the Town and Country Planning Bill and the Housing Act would 'pass through the house at the same time', making them siblings, the prolonged enactment of the 1932 Act separated the TCPA 1932 from the Housing Act. This further emphasised planning as a separate legal activity for general land administration, with the legislation being framed against political discussions about land nationalisation, not the housing shortage.[105]

The TCPA 1932 was however criticised by its contemporaries, as the new Act seemingly reduced the legal weight of planning procedures, when compared to previous legislation. For example, s 6 of the Act removed the obligatory duty for local authorities to produce a planning scheme, which had previously existed under s 42 of the 1919 Act. Similarly, the Act was criticised for offering little by means of direct reform to housing or sanitation.[106] Instead, the new legislation was regarded as hampering housing development by 'place[ing] the paralysing hand [of Town planning] upon a whole area'. [107] Moreover, the provisions of the TCPA 1932 were seen to restrict work under the Housing Act 1930, preventing housing schemes which conflicted with a requirement of the 1932 Act from being implemented. In *Collins v Feltham Urban District Council*[108], for example, a developer was prevented from erecting houses on a plot of his land due to an open spaces order under the 1932 Act.

[105] Minister of Health (Arthur Greenwood), HC Deb 10 April 1930, vol 237, col 77.

[106] Meller (n30) 60.

[107] HC Deb 2 February 1932, vol 261 col 57.

[108] [1937] 4 All ER 189.

Many of these criticisms however mischaracterise what s 1 of the TCPA 1932 achieved in reframing planning as the legal process for controlling all forms of land use. Consequently, to understand the effect of the 1932 Act, it is important to consider specifically the different ways in which the legislation extended the scope of planning law and what the contextual motivations for this were. For example, the Act reformed regional government powers and public access to private land which are explored in Chapters Four and Five respectively. For the purposes of this chapter however, there is one fundamental feature of the 1932 Act which needs highlighting to best explain the relationship between planning and national parks: The extension of planning provisions to rural areas. The explanation for this extension of the legal scope of planning can be explored on three fronts: through increasing public control over agriculture, through a desire to limit urban sprawl, and through the influence of the Addison Report. It is through each of these influences that planning became the primary mechanism for land administration under the TCPA 1932 which provided a statutory framework for public land administration.

4.1 The agricultural countryside

Prior to the TCPA 1932, rural areas were excluded from planning law. Indeed, national agricultural policy was the main mechanism through which rural areas were administered, although such policy was usually limited.[109] The nature of agricultural policy changed however during the early 20th century and, as Gail Savage noted, the Ministry of Agriculture and Fisheries (MAF)

[109] Gail Savage, 'Friend to the Worker: Social Policy at the Ministry of Agriculture between the Wars' (1987) 19(2) Albion: Journal of British Studies 193, 193. This was in part due to the formal establishment of the Ministry in 1919 under the Ministry of Agriculture and Fisheries Act 1919, which replaced the previous Board of Agriculture and Fisheries. The Ministry had more direct control over rural affairs compared to the Board who were often competing for power with local governance bodies, *Rex v Bedfordshire County Council* [1920] 2 KB 465.

during the inter-war period increasingly introduced policies which promoted rural social reform.[110] This new 'social reforming' approach to agricultural policy influenced the drafting of the TCPA 1932 and the incorporation of rural areas into planning law. This ultimately had an obvious impact on the relationship between planning and national parks given the role of agricultural land within those spaces, as noted in Chapter Two. To understand the relationship between the TCPA 1932 and the agricultural countryside, it is important to consider the evolving nature of agricultural policy leading up to the 1932 Act. This explains how the legal activity of planning came to encompass aspects of agricultural management, with planning becoming the legal process for administering the use of land for agricultural purposes.

The Agriculture Act 1920 (continuing from the wartime Corn Production Act 1917) began this shift towards socially minded agricultural policy. Although the Act was repealed in 1921, it changed the relationship between farming and state intervention, allowing for the national administration of farmland. For my purposes here, there are two sections of the Act which are particularly noteworthy. The first is s 2 which, continuing from the war-time Corn Production Act 1917, guaranteed farmers fixed prices for wheat and oats. This in turn had the effect of securing set wages for agricultural labourers, creating prosperity for rural agricultural workers. The second section of note, s 4, granted the MAF and the newly established local agricultural committees the power to compel the cultivation of land in the national interest. This enabled direct interference over crops, bringing this aspect of land utilisation under the administration of the MAF. Even when the Act was repealed in 1921, subsidies

[110] Ibid, 195.

continued to exist for farmers who cultivated crops which the MAF declared national necessities.[111]

In the context of national planning legislation, the influence of the Agriculture Act 1920 and its repeal were twofold. First, the Act showed that rural affairs management could be planned within the scope of national administration, a point which had previously been contentious. Prior to the 1920 Act, national interference with agricultural land was strongly resisted as an infringement of landholder rights.[112] The powers under the 1920 Act however showed that interference was not only possible, but preferential where it related to the national interest, in this context the post-war economic strain in agriculture.[113] Even once the 1920 Act was repealed, administrative structures remained in place with local agricultural committees continuing to impose cultivation requirements on regional farmers.

The second impact was the subsequent economic depression faced by rural workers following the repeal of the 1920 Act, marking the end of guaranteed prices. The repeal led wages for agricultural labourers to fall by 40% and tenant or mortgaged farmers increasingly struggled to pay land rates, causing a decline in the quality of rural housing.[114] The Housing Acts however were limited to urban areas, with rural housing not being included as a potential

[111] Alun Howkins, *The Death of Rural England: A Social History of the Countryside Since 1900* (Routledge 2003) 45-46.

[112] ibid, 45.

[113] Alan F Wilt, *Food for War: Agriculture and Rearmament in Britain before the Second World War* (OUP 2001) 18-19.

[114] Howkins (n111) 46.

land use in s 1 housing schemes under the 1919 Act. This in part was due to many rural properties existing as tied properties, meaning they were tied to the employment of the labourer by the estate owner.[115] Closure orders, under s 28(1) of the 1919 Act could not be issued on rural cottages because 'owner' in the context of the Act meant, in instances of tenure, the person receiving the rack-rent. The relationship between the employee and the employer in tied cottages fell outside of the landlord-tenant relationship provided for in the legislation. A second difficulty is that the Housing and Town Planning etc Act 1919 was ambiguous as to what constituted a local authority, with many rural areas not having district councils, as referred to in the Act. Although the nature of rural local government is explored in the next chapter, in the context of planning law there was no public body in a rural area which had been empowered by statute to engage in the legal processes of planning or housing reform.

The difficulties in agricultural areas were initially addressed apathetically, with Prime Minister Bonar Law suggesting in 1923 that interference in agricultural affairs went beyond the perceived role of government.[116] Similarly, the Housing and Town Planning Acts were centred on providing for the legal administration of urban districts, with rural areas being excluded from the legislation.[117] Neville Chamberlain's Agricultural Report in 1929 however further transformed how agricultural land was understood, further enabling

[115] Savage (n110) 198.

[116] Howkins (111) 50.

[117] Housing, Town Planning Etc Act 1919, s 46.

the legal administration of that land.[118] The Report suggested that the current stop-gap approach to agricultural policy was inadequate. The only way to save the agricultural industry would be through a complete restructure. In reframing agriculture away from private farming and instead as a fundamental facet of the national economy, Chamberlain overcame Bonar Law's concerns about the scope of government power, allowing for legal interference with agricultural land.

The incorporation of ideas of national planning into agriculture by Chamberlain should not be surprising, given his honorary membership to the Planning Institute.[119] Yet in proposing that planning and agricultural policy were akin, Chamberlain transformed the countryside into something capable of being spatially organised and subject to plan-making. Chamberlain's proposals received cross-party support, resulting in the Agricultural Land (Utilisation) Act 1931. Section 1 of the Act empowered the Minister to acquire and recondition land and ss 5-7 allowed for the designation of rural land as a small holding or allotment for financially assisting agricultural workers. Section 12 also granted county councils powers similar to their urban counterparts with respect to housing reform, extending the legal processes of plan-making to rural areas, allowing for the redevelopment of tied cottages.[120] All of this had to be done in conjunction with a rural plan for the area. This further expanded the legal scope of planning by making rural areas subject to plan-making.

[118] Andrew Fenton Cooper, *British Agricultural Policy 1912-1936* (MUP 1989) 94-97.

[119] Cherry, *Evolution of Planning* (n60) 60.

[120] Agricultural Land (Utilisation) Act 1931, s 12.

The evolution of agricultural policy during this period transformed how rural places were legally understood, opening them up to the possibility of planning. The question emerged whether to include rural areas and the agricultural countryside in the TCPA 1932. This would then provide the statutory basis for considering agriculture in determining land utilisation. Although there was apprehension that the inclusion of rural areas would result in 'overplanning',[121] for many there was a growing sense that agricultural planning needed a statutory base within the growing sphere of planning law to enable its inclusion in discussions about local, regional, and national spatial organisation.[122] Outside of this, the growing public interest in rural spaces, discussed in Chapter Two, meant that there was increased interest in how rural land was being used for agricultural purposes.[123] Indeed agricultural considerations came to play a prominent role in managing national parks under s 84 of the NPACA 1949.

Thus, the TPCA 1932 expanded the legal activity of planning to include the agricultural countryside, with s 1 granting local authorities the power to include 'rural portions' within planning schemes, thus extending the legal scope of planning to these landscapes. Beyond this, the planning of agricultural land was also specifically provided for. Section 19(2), for example, set out the

[121] A sense that too much planning would be more restrictive than it is helpful. See, HC Deb 2 February 1932, vol 261, col 78 on the conversion of agricultural land into development land in Welwyn Garden City.

[122] HL Deb 28 June 1932, vol 85, col 260.

[123] David Evans, *A history of Nature Conservation in Britain* (Routledge 1992) 43-62; Dudley Stamp, *Nature Conservation in Britain* (Collins 1974) 7-22.

circumstances for betterment with respect to proposed developments on agricultural land. The section only allowed for betterment where the agricultural land was being usefully cultivated, tying plan-making, spatial organisation and agricultural policy into one objective.

It was also apparent in the case law that the intention of the Act was not to preserve agricultural land until a 'better development' was proposed but to include rural areas and agricultural land in the legal sphere of planning. The case of *R v East Kesteven Rural District Council. Ex Parte Sleaford & District White City Sports Stadium Co* highlights this.[124] The case explored the powers of the Minister of Town and Country Planning in hearing appeals of local authorities' decisions under s 10(5) of the TCPA 1932. The case held that the local authority, and in turn the Minister, were entitled to refuse permission for the development of agricultural land. The Court explained that the decision by the authority that there was an 'over-riding need to preserve agricultural land from use in non-essential developments', was within the scope of its powers under the 1932 Act. The case demonstrates how the extension of planning law to include the countryside actively changed how land was being engaged with, enabling the administration of land outside of the context of development. Therefore, it becomes possible to understand how planning became an essential landscape feature in the legal landscape of national parks, because the legal scope of planning was quickly becoming the primary legal process through which land could be administered for a variety of public purposes.

[124] [1947] 1 All ER 310 (HC).

4.2 Urban sprawl

The inclusion of rural areas in the TCPA 1932 also statutorily reflected the broader objectives of the activity of planning with there being a cultural objection to urban sprawl as urban expansion overtook rural spaces.[125] It was hoped that in expanding the legal activity of planning to also include rural areas, there would be a statutory basis for preventing urban expansion through the procedures of planning.[126]

Uncontrolled urban expansion had been a focal point for both the Institute and the GCTPA for much of their existence. [127] Despite their efforts, prior to the 1932 Act the legislative focus of planning was rooted in urban plan-making. This furthered the issue of urban sprawl by reinforcing the centrality of urban areas in overcoming issues like overcrowding and housing quality, leading rural districts to be subsumed into neighbouring towns and cities, as urban areas expanded further into the countryside.[128] As a result, local authorities used their planning powers under s 1 and s 42 of the 1919 Act to allow for developments at the ever-growing boundaries of their urban district, proposing local Acts to expand their areas, and encompass these new developments.[129] The result of this was that major cities had developed sprawling suburbs with populations

[125] Note Clough Williams-Ellis, *England and the Octopus* (originally published 1928, CPRE 1996).

[126] Patrick Abercrombie, 'The preservation of Rural England' 12(1) The TPR 5.

[127] Ashworth, *Genesis of Modern British Town Planning* (n33) 172.

[128] TNA/HLG8/99 (5th December 1921) 'Borough Extensions'; Ministry of Heath, *Report on Procedure for the Extension of Boroughs* (Cmd, 1113).

[129] ibid, (5th May 1922) 'Leeds and Bradford Extension Areas'; 'Leeds and Bradford Borough Extension' HC Deb 3 November 1920 vol 133, cols 377-379.

of over one million inhabitants.[130] It was feared without some form control such expansion would continue.

For planners this was regarded as a problem for two reasons; first, sprawling urban areas did not make for coherent towns because they often lacked the basic public infrastructure needed to make a town functional. It would be impossible to include such infrastructure within these sprawled areas without further expanding them and thus recreating the same issue.[131] The second problem, which is more relevant for purposes here, was that such expansion was increasingly encroaching on rural spaces, because local authorities lacked the legal controls to plan for anything other than development.[132] This made it increasingly difficult to determine where an urban space finished and the countryside began. Not only was this a social problem but also a legal one because it made the determination of administrative boundaries, and thus the regions provided for by legislation, (primarily urban areas of a certain size, under s 46 of the 1919 Act) difficult to determine.

A key example of this issue can be seen in the parliamentary and legislative discussion around ribbon developments and the emerging idea of green belt. Ribbon developments refer to the development of property alongside a road or highway, which usually connected two towns or a city to a town. Once a ribbon development had begun, it could easily expand into urban sprawl, leading the once separate towns to touch, creating both practical and administrative

[130] Thomas Sharp, *Town and Countryside* (OUP 1931) 166.

[131] Hardy (n58) 174.

[132] Sharp (n130) 169.

difficulties. The problem with these developments were becoming increasingly pronounced and in a debate on rural amenities legislation in 1930 it was suggested that ribbon developments were a 'social evil' which could only be overcome through planning and national land controls.[133] Although ribbon developments fell outside the scope of what became the Rural Amenities Act 1931, the complaint about ribbon developments represented a broader tension over urban sprawl.[134]

In the previous year, during a discussion about open spaces in Greater London, the idea of a 'green belt' was first formally proposed. The term was used to express frustrations over the lack of legal power that local authorities had to designate a peripheral green space, marking the perimeter of their urban area.[135] What both examples demonstrate is an acute awareness of the difficulties in determining the boundaries between urban areas and the countryside within the existing legal scope of planning. In response to the legal inability of local authorities to proactively designate rural areas as non-developable, several localised civil societies were founded which endeavoured to keep the entire country under planning review, through applying pressure to the respective local authorities.[136] These civil societies regarded an extension in the legal scope of planning as essential for controlling urban expansion and protecting rural England from the 'maximum destruction' of urban sprawl.[137]

[133] HC Deb 21 February 1930, vol 235, cols 1794-1796.

[134] Ribbon developments were expressly legislated against under The Restriction of Ribbon Development Act 1935.

[135] HC Deb 17 April 1929, vol 227, cols 18.

[136] Sheail, *Nature in Trust* (n60) 70.

[137] Patrick Abercrombie, 'The preservation of Rural England' 12(1) The TPR 5, 20.

Although there was some coordination of these localised efforts through the establishment of the National League for the Preservation of Rural England (later the CPRE noted in Chapter Two), these societies were broadly autonomous, working within local communities.[138]

The League however did have some influence at the national level, due to its broad membership and association with other bodies who also believed planning should be given greater statutory effect.[139] Notably, the founder of the League, Patrick Abercrombie, petitioned that the 'clumsy' language of '*town* planning' within the legislation failed to acknowledge the need for '*rural* planning'.[140] Relying on the examples of Oxford and Bath, Abercrombie argued for the possibility of planning legislation as a mechanism for 'preserving the existing character […] and features of a locality'.[141] The League's desire to preserve amenities gained political traction, with the need to 'preserve rural amenities' featuring in the King's Speech in 1930.[142]

From the earliest drafts of the TCPA 1932 preservation, particularly in the context of urban sprawl, played a prominent role.[143] Indeed, in describing the scope of local authority planning powers, the memorandum for the 1932 Bill

[138] Sheail, *Nature in Trust* (n60) 70-71.

[139] Notably the Planning Institute and the Royal Institute of British Architects, See Cherry, *Evolution of Planning* (n60) 94-95.

[140] Abercrombie, 'Preservation of Rural England' (n137) 38.

[141] As facilitated under the Bath Corporation Act 1925, s28; or the South and East Oxford planning sub-committee, ibid 32. Note also Alan Crossley and CR Elrington (eds), *A History of the County of Oxford: The City of Oxford*, (Volume IV, British History Online 1979).

[142] HC Deb 28 October 1930, vol 244, cols 5-7.

[143] TS27/738 (n84) Ministry of Health, *Town and Country Planning Bill: Memorandum on Notes and Clauses* (1931).

made explicit reference to the need for new planning powers to extend to the protection of rural amenities, expanding on the previous amenity protection in s 1 of the 1925 Act, which only included urban amenities.[144] In turn, this expanded the legal scope of planning, making it the primary legal mechanism for administering land in both urban and rural areas.

This carried through to the final Act, which markedly expanded the legal scope of planning. Section 6 of the Act, set out a framework for the preparation and adoption of a planning scheme, determining that schemes could instead encompass 'any land within, or in the neighbourhood of, the district of the authority'. This enabled local authorities to designate different portions of land for different purposes under a planning scheme regardless of where that land was within their administrative district. This designation could be for construction, an existent land use, or preservation, and plan-making for specific designations provided further detail to the spatial organisation under the scheme. In the context of national parks this was the first national legislation which facilitated the designation of rural areas for specific preservation or access purposes.

This can be evidenced in considering how the role of planning schemes was expanded under the 1932 Act. Section 26 empowered local authorities to compulsorily acquire green spaces as part of a planning scheme, to maintain a character of openness within their area.[145] This gave weight to the ability of a local authority to plan spaces, as the inclusion of an area within a planning

[144] ibid, 2.

[145] Note the provision for open spaces under s 26 of the 1925 Act was limited to urban areas; TNA/HLG 95/18 (1931-1932) 'Planning Schemes submitted to the Ministry of Health'.

scheme had real repercussions for how the local authority could interact with that land. Alternatively, s 16(2)(b) allowed for a scheme to restrict development where it would 'seriously injure' the 'amenity' of a locality. This expansion in the legal activity of planning also legally allowed for the administration of the countryside in a manner not previously possible, providing a potential legal framework for the creation of national parks, as a type of land administration.

4.3 The Addison Report 1931

The final factor which influenced the inclusion of rural areas in the TCPA 1932 was the publication of the Addison Report in 1931. As noted in Chapter Two, the Addison Committee was formed in 1929.[146] The publication of the Report in April 1931 coincided with the early drafting of the original Town and Country Planning Bill, which was first proposed in Parliament on the 20th March 1931.[147] The overlapping timeframe was not the only shared feature between the Report and the proposed Bill, with both promoting a similar legal reconceptualization of rural land administration.

Part III of the Report dedicated considerable attention to town planning procedures, outlining the scope of planning procedures and their potential application to 'national reserves'.[148] The Report set out:

[146] Addison Report (n6).

[147] HC Deb 20 March 1931, vol 259, col 2285.

[148] Addison Report (n6) 12-20.

> 'The preservation of the natural beauties of large areas of national importance would involve, as a speaker at the National Conference, 1929, for the Preservation of the Countryside, pointed out, a power to control the whole area so that no development could take place unless approved by the proper Authority. The necessity here contemplated could probably be met in a large proportion of cases by a planning scheme in which the future development of the areas would be regulated.'[149]

What is interesting about this assertion is the presumption that planning, even in its form under the 1925 Act, would be the right legal activity through which national parks could be created, providing rural areas were incorporated into planning law. The Report continued by suggesting a series of reforms to the existent planning system, including the establishment of regional committees, which are explored in Chapter Four, and the creation of planning agreements, which are explored in Chapter Five. What is of note here is how many of the recommendations of the Report, with respect legal scope of planning, were given legislative effect in the TCPA 1932. This linked the creation of national parks to planning procedure from when they were first formally proposed.

One example of this can be seen in the extension of the legal activity of planning to include rural areas. The Report concluded by emphasising the importance of 'the preservation of the natural beauties of the country', describing the difficult task of 'national authorities' in convincing others of the importance of this aim

[149] ibid, 12.

amidst 'short sighted pursuits' of development.[150] This rhetoric was similarly mirrored by Arthur Greenwood in presenting the original Town and Country Planning Bill before Parliament for its second reading in 1931. Greenwood stated, 'desecration threatens today not merely the towns but the countryside of England, with all that quiet beauty to which all of us are attached'.[151] He continued by noting the work of Addison's Rural Amenities Bill in 1930, highlighting it as a clear expression of the solidarity of opinion in extending planning law to include rural areas.[152]

The impact of the TCPA 1932 in facilitating the NPACA 1949 should thus not be understated, and there is clearly an important overlap between the recommendations of the Report and the extension of the legal activity of planning under the TCPA 1932. This is particularly noteworthy given the specific recommendations of the Report, as explored in Chapter Two, took nearly twenty years to be effectuated. Whilst it may be a stretch to suggest the TCPA 1932 aimed to fulfil all of the recommendations of the Addison Committee, the Act itself can be seen as a bridging point between expanding planning law and legally creating national parks.

More broadly, the evolution of planning law resulting in the enactment of the TCPA 1932 saw planning become an independent legal activity, concerned with providing the legal framework for controlling different forms of land use. Following on from the TCPA 1932, planning law became the primary legal

[150] ibid, 43.

[151] HC Deb 15 April 1931, vol 251, col 193.

[152] ibid, col 197.

mechanism for administering land, through the legal processes of plan-making, as provided for in s 6-9 of the TCPA 1932. In particular, s 6 set out the specific procedure for preparing and adopting a planning scheme, outlining how a local authority could use resolutions and planning schemes to achieve the purposes of planning defined in s 1. Similarly, s 16 and s 25 empowered local authorities to prevent developments or acquire land for specific developments, in both instances empowering the local authority to actively control land use and organise spaces. It was this status of planning as the legal mechanism for administering land use that made it essential in legally framing national parks under the NPACA 1949.

5. The Consolidation of Planning Law as the Activity for Administering Land

The planning legislative reforms which immediately preceded the NPACA 1949 became most fundamental in framing the legal creation of national parks. This was not because these reforms were revolutionary - indeed much of the content of the legislation following on from the TCPA 1932 consolidated the legal processes of planning law. Instead, this legislation, namely the Ministry of Town and Country Planning Act 1943, and the Town and Country Planning Acts 1944 and 1947, provided planning law with the legal detail necessary to affirm its position as the primary legal framework through which land use could be administered. This was because the planning legislation prescribed the processes for controlling different forms of land use by empowering a broad range of public bodies to administer these controls.

In this context, it is unsurprising that the Minister of Town and Country Planning, Lewis Silkin, emphasised in 1948 how national parks would have to exist within the

context of planning,[153] because planning law was the legal activity which provided for any form of land administration. The final part of this chapter thus explores the consolidation of planning law prior to the NPACA 1949, thinking about how this consolidation framed the statutory provisions of the NPACA 1949 itself, particularly ss 8-10 on the administration and management of land within national parks, which were outlined at the start of this chapter.

5.1 Criticisms of the TCPA 1932

Following on from the enactment of the TCPA 1932, three notable criticisms emerged about the legal scope of planning. These criticisms shaped the subsequent legislative reforms to planning law which preceded the creation of national parks by the NPACA 1949. The first criticism was that the new legislation ceased to make the production of planning schemes a mandatory function for local authorities. This was a reversal of the previous position under s 42 of the 1919 Act. The change was introduced due to mounting criticisms about the extent of local authority power, and it was believed if the 1932 Act was to increase the legal scope of planning to rural areas, the obligatory nature of planning needed to be relaxed, to better facilitate the expansion of planning law.[154] Instead, the newly established Chief Planning Inspector (a permanent position which was appointed following the creation of planning inspectors under s 38 of the TCPA 1932) relied upon the status of planning law to 'cajole' local authorities into producing schemes.[155] Notably however, the SCNP were particularly critical of the removal of this obligatory function, fearing that local

[153] HLG 93/10 (n151), 'Notes for talk with National Parks Committee'.

[154] HC Deb 2 February 1932, vol 261, col 56-58.

[155] Sheail, *Nature in Trust* (n60) 80.

authorities would refuse to create planning schemes if they did not have a legal duty to do so. This was particularly a concern in rural areas which prior to the 1932 Act were unable to be legally planned. Indeed, the SCNP raised the Lake District as an area of concern, suggesting that the region needed to be forced to adopt a planning scheme to better administer and conserve the region.[156] As an aside, this insistence also illustrates the growing conceptualisation of national parks as a legal form of planning.

A second criticism which emerged following on from the 1932 Act was that planning processes, particularly the procedural requirements in ss 6-10, were not always clear or consistent. A particular example of this was the rules surrounding interim development orders. Interim development orders were provided for under s 10 of the Act and were a process through which planning authorities were able to create intermediate restrictions on development prior to a planning scheme being approved by the Ministry. What was unclear however was the extent to which interim orders were legally binding on proprietors. By this I mean that the legislation did not express whether development orders existed similarly to an injunction, providing a pause on changing land use until a scheme was in place, or whether such orders independently constituted an enforceable process of plan-making. This was particularly important in the context of land value and compensation, as it would determine whether land would be capable of future development, or whether the order operated in the context of the statute, as a form of planning scheme, thus generating compensation if the order changed the valuation of the land as under s 6(5). This was further confused because s 10(6) did set out

[156] ibid.

a statutory time limit of six months for local authorities to compulsorily acquire open spaces designated under an interim order.

The courts initially sought to maintain their understanding of the relationship between interim resolutions and schemes which existed prior to the 1932 Act. This understanding held that a local authority resolution under the Planning Act 1925 did not count as an infringement of property rights capable of compensation. Instead, compensation only arose when a scheme was fully effective.[157] This position was upheld with respect to the TCPA 1932 by Lord Caldecote in *Bury v Epping Rural District Council and Essex County Council*,[158] who set out that s 18(1), which provided for compensation, must only apply when the scheme was fully operational.[159] There was however a strong dissent from Hawke J who stated the proper construction of the Act meant that compensation under s 18 was possible from the moment of the injurious effect, meaning interim development orders could result in compensation.[160] In light of these confusions, it was generally accepted that the legal procedures of planning required further clarification.

The final criticism also related to the legal processes of planning but reflected a more substantive concern about how the Act provided for compensation and betterment under ss 18-26. Section 18 allowed for compensation to be claimed by any person whose property was injuriously affected by the implementation

[157] Clauson J in *Markham v Derby Corporation* [1935] Ch 320 (HC).

[158] [1941] 1 KB 212 (KB).

[159] [1941] 1 KB 212 (KB), 218.

[160] ibid at 221.

of a planning scheme, provided they made their claim known within the limitation period under s 20(4)(b). Similarly, s 21 empowered local authorities, in enacting a planning scheme, to recover from landholders any increased value to their land which resulted from the implementation of a scheme. It was originally intended that compensation and betterment would counter-balance, limiting the cost of compensation for local authorities and thus incentivising them to produce planning schemes.[161] There was however much debate about what the appropriate percentage rate recovery would be for both compensation and betterment, with the final legislation offering a compromise that satisfied nobody.[162]

Although the Minister of Health could exclude compensation in some instances under s 19, this was limited to more regulatory components of development size or utility, as opposed to the prevention of development more generally. As a result, many local authorities were deterred from creating schemes which limited development, due to the potential compensation costs of their implementation.[163] Similarly in the case of betterment, s 21 limited recovery to only 75% of the increased value. This was following on from strong political pushback from landowners, who objected to recovery being 100% of the increase in land value.[164] This 75% thus reflected a compromise which was criticised by all, with some suggesting that betterment of the kind proposed by

[161] TNA/TS 27/738, Ministry of Health, *Town and Country Planning Bill Memorandum on Notes and Clauses* (Cmd 3844, 1931), page 1 and 15 annotations.

[162] HC Deb 6 June 1932, vol 266, cols 1616-1654; HL Deb 30 June 1930, vol 85, cols 366-398.

[163] Sheail, *Nature in Trust* (n60) 81.

[164] HC Deb 2 February 1932 (n154) col 47.

s 21 was unheard of.[165] Others criticised the provisions for not being the most effective mechanism for recovering the increased land values which resulted from planning schemes.[166]

As can be seen with each of these criticisms, the issues did not demand a planning revolution, with the legal scope of planning being uncriticised. Instead, legislative reform was needed to further consolidate the legal processes of planning through the introduction of procedural reforms, which would shape how planning operated in practice. As Minister without Portfolio, Sir William Jowitt, said in the context of the Town and Country Planning (Interim Development) Bill in 1943, planning reform provided an opportunity 'to improve upon our original idea', with that 'original idea' being the 1932 Act.[167]

5.2 Wartime planning

The legal activity of planning was further developed by specific government wartime activity, with both plan-making and spatial organisation playing a prominent role in wartime governance.[168] Beyond this, similar to the 'Home for Heroes' campaign following World War One, the demand for reconstruction presented an opportunity, and indeed the necessity, for planning reform, to provide the legal processes for delivering a 'better' post-war Britain.[169] This was

[165] ibid, cols 86 and 107.

[166] ibid, col 122.

[167] HC Deb 26 January 1943, vol 386, col 418.

[168] Cherry, *Evolution of Planning* (n60) 122.

[169] Meller (n30) 67.

particularly prominent given that the nature of post-war reconstruction would be different to 1919, due to the extent of domestic wartime damage.[170] This damage generated an 'interest in the possibilities of reconstruction', with the notion of the 'ideal' once again playing an influential role in shaping discussions about planning law. [171] Ideal towns with low-density housing and access to green spaces became prominent in discussions, leading to the enactment of a trifactor of planning legislation: the New Towns Act 1946, TCPA 1947, and the NPACA 1949.[172] Of importance was the work of Lord Reith's Reconstruction Committee in exploring the possibilities of planning and reconstruction, reporting on how these should be provided for both through policy and in legislation.[173]

For the purposes of understanding the relationship between planning law and the NPACA 1949, there were two Committees, and subsequent Reports, which require attention: The Scott Report,[174] and the Uthwatt Report.[175] Alongside the Barlow Commission, established in 1937, which reported on the utility of land for industrial purposes,[176] the work of these Committees was understood to

[170] See Briggs (n95) 268-269.

[171] Cherry, *Urban Change* (n51) 162.

[172] ibid.

[173] Cherry, *Evolution of Planning* (n60) 122.

[174] Minister of Works and Buildings *Report of the Committee on Land Utilisation in Rural Areas* (Cmd 6378, 1942) [Scott Committee].

[175] Minister of Works and Buildings *Final Report of the Expert Committee on Compensation and Betterment* (Cmd 6291, 1942) [Uthwatt Committee].

[176] Ministry of Health, *Royal Commission on the Distribution of the Industrial Population* (Cmd 6153, 1939-1940).

'cover most aspects of physical planning […] in this country'.[177] In particular, both the Scott Report on land utilisation and the Uttwatt Report on compensation focused not only on the legal scope of planning but also developed the legal procedures of planning, facilitating the legal creation of national parks as a form of planning activity.

This focus on legal procedure should perhaps not be surprising, given that both Committees were chaired by judges with explicit experience in legal planning procedure. Indeed, Scott LJ had considerable experience of the legal ambiguities of planning law and acquisition from his experiences in the Court of Appeal.[178] Notably, in *Horn v Sunderland Corp*, Scott LJ commented extensively on the common law 'disturbance rule' for assessing compensation under the Compulsory Acquisition Act 1919.[179] This was noteworthy given the broader facts of the case addressed the acquisition of agricultural land for a housing development, highlighting Scott LJ's legal awareness of the procedural difficulties surrounding rural land utilisation, planning and agriculture. Similarly, Uthwatt J after fourteen years at the Chancery Bar, was appointed as a High Court Justice in Chancery in 1941, the same year he was appointed to Chair the Committee.[180] As a consequence, Uthwatt was addressing issues of

[177] L Dudley Stamp 'The Scott Report' (1943) 101(1) RGS 16, 16.

[178] See cases *Horn v Minister of Health* [1937] 1 KB 164 (CA); *Symes and Jaywick Associated Properties Ltd v Essex River Catchment Board* [1937] 1 KB 548 (CA); *R v Cornwall County Valuation Committee Ex P. Falmouth Rating Authority* [1937] 2 KB 222 (CA); *GT Hodges & Sons v Hackbridge Park Residential Hotel ltd [1940] 1 KB 404* (CA).

[179] [1937] 1 KB 164 (CA).

[180] Alongside Uthwatt J the Committee also included Raymond Evershed K.C who later became Master of the Rolls; See Mills & Reeves 'The Uthwatt Report: Briefing' (8th September 2010).

statutory interpretation and ambiguous procedure within planning law, whilst simultaneously reporting on the possibility of reform to these same statutes.[181]

This legal expertise influenced the nature of the inquiry in both Reports. For example, the opening section of the Scott Report provided an overview of the general legal principles which existed within planning, relating them to a broader geographical understanding of land utilisation.[182] Similarly, the Uthwatt Report began with an overview of the legislative provisions which existed in relation to different forms of development.[183] The recommendations of the Reports were similarly centred on reforms to the legal processes within planning, making planning more robust.[184] The Uthwatt Report proposed a revised process for planning schemes, in which the valuation of land for compulsory acquisition would be encompassed in the scheme, before any development took place.[185] This marked a departure from s 18 of the TCPA 1932 which only allowed for a retrospective assessment of compensation once the planning scheme had been enacted. This had previously made it difficult to determine the true impact of the scheme on land values.

Beyond this, the Report recommended the creation of a general compensation fund, with the procedural burden of administering compensation being a

[181] Note *Racecourse Betting Control Board v Secretary of State for Air* [1943] Ch 198 .

[182] TNA/LCO/2/2749 (1942) 'Recommendations of Lord Justice Scott's Committee on Land Utilisation in Rural Areas'.

[183] Minister of Works and Buildings, Expert Committee on Compensation and Betterment Interim Report (Cmd 6291, HMSO 1941)

[184] Austin Robinson 'The Scott and Uthwatt Reports of Land Utilisation' (1943) 53 the Economic Journal 28, 33.

[185] ibid, 33-36.

matter for the central planning authority, not individual local authorities.[186] This proposal later became the National Land Fund under part VI, TCPA 1947, which was used to fund land acquisition within national parks. This shows, as Sir Gwilym Gibbon published in response to the publication of the Uthwatt Report, that 'the general temper of the Report [was] the proposals on procedure', referring to Report's explicit focus on further developing the legal processes of planning.[187]

The Scott Report also centred on procedural recommendations to the legal framework of planning, despite the broader focus of the Report being the substantive issues surrounding land utilisation.[188] The Report argued that national planning would be a fundamental component of achieving greater controls over land use, proposing an extension in the legal scope of planning to include greater provisions for collaborative planning over whole areas, alongside the creation of national planning statements.[189] In particular, the Report recommended the establishment of an inter-ministerial standing committee for all government departments concerned with land development.[190] It was intended that this committee would ensure the consistent application of planning law and policy between the different Ministries, in effect producing a form of national planning policy.[191] The Report

[186] ibid, 41-42.

[187] Sir Gwilym Gibbon, 'Reconstruction and Town & Country Planning: With an examination of the Uthwatt and Scott Reports' (The Architect and Building News 1943) 13.

[188] Described by Gibbon as 'of lighter metal' ibid, 23.

[189] Scott Report (n174).

[190] ibid.

[191] ibid.

also proposed extending planning powers to give local authorities greater control over land utilisation within their locality.[192] These Reports are important because they illustrated the consolidation of planning as the primary legal activity for controlling land use, with both Reports recommending increased procedural detail in planning law to address the variety of situations which arose in the process of planning.

The procedural proposals of these Reports were first given partial legislative effect in the Ministry of Town and Country Planning Act 1943, the Town and Country Planning (Interim Development) Act 1943 (TCPID), and most substantially in the Town and Country Planning Act 1944 (TCPA). The TCPID 1943 aimed to overcome the difficulties surrounding interim development orders which existed under the TCPA 1932. Thus, the relationship between the TCPA 1932 and TCPID 1943 requires exploration, given the 1932 Act was understood as the 'principal Act' which the 1943 Act gave further effect to.[193] This co-dependency is illustrated in the Circulars produced after the 1943 Act was passed, which explained the new legislation within the statutory context of the 1932 Act.[194]

To quote 'it has been found that the most satisfactory course is to follow the sections in the principal Act, bringing in the [new] sections, as they are

[192] Gibbon (n187) 28.

[193] TNA/HLG 71/267 (undated) 'Memorandum B: Detailed Comments on the Town and Country Planning Act 1932 and the Town and Country Planning (Interim Development) Act 1943'.

[194] ibid, 'Circular to All Local Authorities in England and Wales: Town and Country Planning (Interim Development) Act 1943' 1.

relevant'.[195] It is because of this that the 1943 Act should be understood as responsive to the identified criticisms of the 1932 Act. This is particularly apparent, given the purpose of the 1943 Act was to improve the administrative machinery of planning.

The circular explained-

> 'The aim of planning should not be to lay down hard and fast, detailed rules for land use in the area to which it relates, but to design a broad framework based on a thorough understanding of present conditions and future possibilities'.[196]

Considering this objective, the 1943 Act can be seen to further clarify the provisions of the 1932 Act by introducing more procedural detail to planning law, further enabling the public administration of land. In particular, ss 32-33 clarified the operation of interim development orders, with a separate memorandum being circulated to emphasise, as set out in s 32, that any appeal relating to an interim development order was to be heard by the Minister.[197] The TCPA 1943 continued these improvements, with s 41 and s 46 providing more detail about the operation of planning schemes, expanding the scope of them to facilitate their enactment as a form of emergency wartime power, under the Emergency Powers (Defence) Act 1939. This had the two-fold effect of improving the legal procedures relating to the production of planning

[195] ibid.

[196] ibid, 3.

[197]HLG 71/267 (n193) 'Memorandum B' 3; TNA/HLG93/35 'Statutory Rules and Orders: Town and Country Planning Interim Development' (1945, No 349).

schemes and illustrating the national importance of the legal activity of planning as the only mechanism through which land could be legally administered for public purposes.[198]

Further illustrating this, the government produced model planning clauses to help local authorities structure and enact schemes. This enabled authorities to 'benefit from [the] practical experience' of producing a planning scheme, without having to employ or consult professional planners, thus further encouraging local authorities to utilise their powers in planning law.[199] Consequently, model clauses covered the variety of situations which could arise during planning. Model clause 78 for example set out how to exclude compensation claims for areas of land within a scheme.[200] Alternatively, model clause 30 provided an example clause for structuring temporary restrictions under a general development order.[201]

One of the reasons the Ministry was able to undertake a more active role in local planning was because of a second piece of legislation, the Ministry of Town and Country Planning Act 1943. The Act replaced the Ministry of Health as the central planning authority, establishing a dedicated Ministry 'charged with the duty of securing consistency and continuity in the framing and

[198] Note the discussion on the interpretation of this section by the Treasury Solicitor which emphasised that the language of the section reflected the 'seriously advanced' nature of the planning scheme at the time when an interim order was enforced. – TNA/HLG 93/35 (27th August 1945) 'Opinion of the Law Officers of the Crown on the TCPA 1943'

[199] ibid, 'Memorandum A: General notes on the Town and Country Planning (Interim Development) Act 1943 and the Town and Country Planning Act 1932' 5.

[200] TNA/HLG 71/267 (undated) 'Memorandum B: Detailed comments on the Town and Country Planning Act 1932 and the Town and Country Planning (Interim Development) Act 1943' 4.

[201] ibid.

execution of a national policy with respect to the use and development of land throughout England and Wales.'[202] Although the specific administrative capacity of the Minister and the government under the Act is explored in more detail in the next chapter, the 1943 Act also had a notable impact on planning as the legal process for controlling land use. In particular, s 6 of the Act transferred the government planning powers under schedule I of the TCPA 1932 to the new Ministry, thus consolidating in one department the variety of centralised planning powers which existed. This furthered the legal activity of planning because it made centrally produced planning instructions, or circulars, a primary function of the Ministry. By comparison, these circulars had previously been one of many activities within the Ministry of Health and the MAF.

The third of the wartime planning Acts, the TCPA 1944, has been described by Gordon Cherry as a 'fundamental breakthrough in planning', with the Act creating detailed statutory provisions for how local authorities should proceed with reconstruction, following on from wartime damage.[203] Beyond this, the Act began to provide, in detail, for specific legal processes like plan-making. This further provided a legal framework for planning at the regional and national level.[204]

The first Part of the 1944 Act extended both the procedural and substantive scope of planning law, with ss 1-8 providing explicitly for wartime

[202] Minister of Town and Country Planning Act 1943, s 1.

[203] Cherry, *Evolution of Planning* (n60) 124.

[204] Town and Country Planning Act 1944, s 40.

reconstruction.[205] Substantively, s 1(2) empowered local authorities to relocate industry, residential areas, and open spaces which existed in war damaged areas. These powers mirrored those under s 16 of the 1932 Act, which enabled authorities to move developments, but were more extensive to account for the large amount of relocation that was necessary as part of reconstruction.[206] Procedurally, s 5 set out a grant scheme to support local authorities with the costs of compulsory acquisition in war damaged areas. In turn, this provided greater legal clarity about the processes for acquisition in relation to planning, with s 10 determining what planning purposes constituted a sufficient justification for acquisition.[207]

This focus on providing better procedure for acquisition and compensation reflected the recommendations of the Uthwatt Report, with ss 9-18 of the Act specifically addressing how authorities were able to compulsory acquire land to facilitate the reconstruction of war-damaged areas. In addition, part II of the Act established a broader framework for compensation with respect to any land acquired for planning purposes, with s 57 establishing a process for determining the rate of compensation for land acquired in connection with a

[205] Section 1 empowered the local authority to designate an area as 'extensively war damaged'. Following this designation, the authority was able to purchase war-damaged land for redevelopment (s 2); apply for grants to help cover the cost of repairing war-damage (s 5); and reconstruct highways the help with the relocation of war-damaged areas (s 3).

[206] It is estimated 475,000 dwellings were destroyed between 1940 and 1941.

See Cherry, *Cities and Plans* (n39) 113; 'Bombsight: Mapping the World War 2 Bomb Census' <bombsight.org>accessed February 2024.

[207] Section 10 empowered local authorities to order the purchase of land '(a) as a site for development of any class which is needed for the proper planning of the area of the authority, whether in its existing state or as intended, in order to secure a proper balance of development; (b) for use as a public open space or a playing-field; (c) as a site for development for a purpose the furtherance whereof is in the public interest […]; (d) under- takings who are for the time being living or carrying on business or other activities elsewhere by reason of war circumstances, but who would be likely to return or come to the area of the authority, or to a particular part of their area.'

planning scheme. What this demonstrates is that the legislative priorities within planning during the war were two-fold; first to ensure the planning system could adequately address the demands of reconstruction; and second, to provide greater procedural detail to the legal activity of planning, better enabling its utility as the primary legal mechanism for public land administration.

This procedural shift in the language of planning was also reflected in the case law. In *Robinson v Minister of Town and Country Planning*, Plymouth CC sought to compulsorily acquire a plot of 'war damaged' land to execute a reconstruction scheme under s 1 of the 1944 Act.[208] The Minister, unsatisfied that the area met the requirement of a reconstruction scheme under s 1, which was to 'lay out the area as a whole', directed a public inquiry under s 11 into the extent of the damage. The ability of the Minister to direct a planning inspector to carry out an inquiry was a new power under s 11 of the 1944 Act, which better enabled the Minister to address potential planning appeals (under s 6(5) of the TCPA 1932) before a planning scheme became operative, making the process of planning more efficient. Following on from the inspector's report, the Minister approved Plymouth CC's reconstruction scheme. The case of *Robinson* itself was concerned with a group of residents from the proposed area who sought to quash the approval, alleging the Minister's considerations of the inspector's report to be *ultra vires*. Lord Greene MR held that the approval

[208] [1947] KB 702 (CA).

of the scheme had been made in an *intra vires* way, in line with the new statutory procedures for planning under the 1944 Act.[209]

What is interesting about this case is less the outcome of the judgment and more the change in judicial reasoning which emerged in planning cases following on from the 1944 Act. Lord Greene discussed at length the procedural processes for obtaining an order, detailing the gazetting process, application to the Ministry, and the Ministry's entitlement to an enquiry.[210] In doing so, he highlighted the important functionality of ensuring 'procedures were duly carried out' under the Act.[211] He concluded by stressing the importance of the procedural statutory framework in planning and the central role it played in facilitating the Minister's functions to administer land for the purposes of town and country planning.[212] This case shows how the 1944 Act, and its focus on procedure, facilitated a different form of legal interaction with planning, which in turn allowed planning to evolve its own legal principles for the discrete legal activity of administering land use. In thinking about the legal creation of national parks under the NPACA 1949, it becomes apparent, as Cherry suggested, that planning was 'ubiquitous' with a 'national system of development control'.[213] Planning had become the primary legal mechanism for understanding how land could be administered, with planning law providing

[209] ibid, 704-717.

[210] ibid, 706-708.

[211] ibid, 707.

[212] ibid, 717.

[213] Cherry, *Cities and Plans* (n39) 116.

the legal processes to administer land in a variety of ways. National parks became another form of this land administration within planning law.

5.3 Post-war planning

By the end of the war in 1945, the legal processes of both plan-making and of spatial organisation had been given a definitive frame in English law, first under the TCPA 1932 and subsequently developed in ss 9-14 of the TCPA 1944. Beyond this, the activity of planning itself had become the legal framework through which land could be administered through the legal processes and procedures of planning law. In thinking about national parks, as set out in Chapter Two, it is clear from this why both the Dower and Hobhouse Reports proposed the legal creation of national parks as a form of planning activity.[214]

Acknowledging this, the planning provisions within the 1944 Act were still not regarded as sufficient to give full legal effect to the activity of planning as envisaged by the reconstruction committees. Indeed, the passage of the 1944 Act through Parliament was particularly fraught. The drafting of the Act had been difficult, requiring extensive consultation with both local authority representatives and the Treasury to produce an affordable framework for reconstruction.[215] This was further complicated by attempts to effectuate the recommendations of the Scott and Uthwatt Reports into the legislation, which were, for the large part, later postponed.[216]

[214] John Dower, *National parks: Preliminary Report to the Minister of Town and Country Planning* (Cmd 6628, 1945) 86-92; Ministry of Town and Country Planning, *Report of the National parks Committee (England and Wales)* (Cmd 7121, 1947) 91-178.

[215] JB Cullingworth, *Environmental Planning Volume I: Reconstruction and Land Use Planning 1939-1947* (HMSO 1975) 120.

[216] TNA/HLG71/267 (24th December 1942) 'Minute Sheet from Mr Pepler (MTCP)'.

In summary, the 1944 Act was both expected to achieve extensive reform to planning, providing detailed legal procedures for planning activity, whilst also needing to be enacted quickly to provide the statutory powers needed to facilitate reconstruction. As became apparent, it was impossible for the legislation to fully achieve both objectives. These complications continued when the Bill was presented before Parliament, with the issues of compensation and betterment continuing to be contentious.[217] Moreover, as J.B Cullingworth suggested, these parliamentary debates were not isolated, reflective instead of the disagreements within Whitehall about planning procedure.[218] In particular, as Raymond Cocks noted, the creation of the Ministry of Town and Country Planning in 1943 had created tensions within Whitehall, with growing concerns from other Ministries about the extent of influence and power that the MTCP would have.[219] This created pressure around expanding the legal scope of planning, with many equating it to a more general extension of the Ministry's oversight.[220] Conversely, the necessity for land reform had never been as pressing as it was following on from the war, and the push for radical change was also very apparent within Government.[221] Consequently, the final 1944 Act was a compromise between a detailed consideration of the legal processes of planning and the need to legislate quickly for reconstruction. As Gordon

[217] HC Deb 11 July 1944, vol 401, cols 1598-1695.

[218] Cullingworth (n215) 130-131.

[219] Raymond Cocks 'Enforced Creativity: Noel Hutton and the New Law for Development Control, 1945-47' (2001) 22(1) JLH 21-24, 22.

[220] TNA/CAB124/1112 (14th, September 1944) Discussions with the Lord President regarding inter-departmental planning and the role of Planning Officers.

[221] Cocks (n219) 24.

Cherry suggested, the 'pressing nature of reconstruction was what enabled the so-called 'Blitz and Blight' Act of 1944' to pass into law at all,[222] with cross-party dissatisfaction at the Act reflecting that further planning reform was needed soon.[223]

The challenge of planning reform became the responsibility of the Labour Party following the general election of 1945. The Party won an overwhelming majority, achieving support from across the class spectrum.[224] Whilst it would go beyond the scope of my arguments here to analyse the nature of the Labour Party victory in 1945, it is worth highlighting how Labour Party leaders had played a dominant role in domestic wartime policy, particularly planning. [225] Indeed, both Arthur Greenwood, the Deputy Leader of the Party, and Herbert Morrison, the Leader of the House of Commons, had previously been involved in drafting planning legislation: Greenwood as the Minister of Health who drafted the original TCPA 1932, and Morrison as the first Minister of Town and Country Planning under the 1943 Act. Given these earlier occupations, it is unsurprising that the Labour Party election manifesto had a deliberate focus on creating 'a full programme of land planning',[226] for the administration of land within England and Wales.

[222] Cherry, *Evolution of Planning* (n60) 124.

[223] Cullingworth (n215) 142.

[224] Henry Pelling 'The 1945 General Election Reconsidered' (1980) 23(2) The Historical Journal 399, 408.

[225] Meller (n30) 69.

[226] Labour Party Election Manifesto, 'Let Us Face the Future: A Declaration of Labour Policy for the Consideration of the Nation' (The Labour Party,1945).

This 'full programme of land planning' existed across thirteen pieces of legislation which addressed housing,[227] agriculture,[228] highways,[229] town planning, and the establishment of national parks, all of which were different forms of land control or administration. Planning reform began with the New Towns Act 1946 which, as Helen Meller suggested, demonstrated the extent of what planning could achieve.[230] What was particularly noteworthy about the New Towns Act was how it built upon the practices established during the development of garden cities, providing, under ss 1-2, a legal framework through which new urban town developments could be coordinated on a national scale.[231] As such, New Town Schemes under s 3 of the Act were a stand-alone process, separate from planning schemes, with the purpose of providing a legal procedure for planning an area from scratch, as was the case with the original garden cities. Although these schemes were not always popular, both with the residents of designated new towns[232] and in the scholarly attention they attracted,[233] what is noteworthy is how the legal processes within planning were expanded to further support planning as the primary mechanism for

[227] Housing (financial Provisions) Act 1946, Landlord and Tenant Act 1949, Housing Act 1949

[228] Hill Farming Act 1946, Agriculture Act 1947, Agricultural Holdings Act 1948, Allotments Act 1950

[229] Transport Act 1947.

[230] Meller (n30) 71.

[231] New Towns Act 1946, ss 2-4.

[232] The residents of old Stevenage for example were particularly disgruntled at the designation of Stevenage as a New Town, see *Franklin v Minister of Town and Country Planning* [1948] AC 87.

[233] The New Towns Act 1946 can be understood as the embodiment of the different models for creating towns which had previously been experimented with. Section 2, for example, allowed for the creation of development corporations which were empowered to lay out new towns (s 2 (2)), through similar processes as the two garden city bodies (Letchworth and Welwyn). Alternatively, s 3 encouraged the rolling planning of the new town as it developed, similar to the experience of planning at Port Sunlight.

See C Ward, *New Town, Hometown: The Lessons of Experience* (Gulbenkian Foundation 1993).

legally administering land. This is similarly evident in s 4 of the Act, which detailed the role of plan-making as a facilitator of compulsory acquisition, enabling the purchase of land for the development of a New Town, through the legal processes in schedule II of the TCPA 1944.

The New Towns Act 1946 was not the only legislation which consolidated previously existent practices and legal processes to meet the new post-war demands placed upon planning, with the TCPA 1947 providing a 'universal' system for the 'control of land use'.[234] In introducing the Bill, Lewis Silkin explained the legislation provided a statutory framework for 'balance[ing] between the competing demands for land, so that all the land of the country is used in the best interests of the whole people.'[235] For Silkin, the Bill reflected a final extension in the legal scope of planning law, affirming it as the legal frame for controlling any form of land use within the broader public interest.[236] The Bill began as legislation predominantly occupied with implementing the recommendations of the Uthwatt Report, which had not been adopted in the 1944 Act.[237] As a result, Silkin regarded the Bill as creating an 'administrative framework', equipped with the appropriate 'procedural machinery' needed for planning.[238] Whilst much of the debate of the Bill centred on its compensation and betterment provisions, the final legislation in contextualising these reforms was multifaceted, providing a new legal mechanisms through which the public

[234] TNA/PREM 4/92/5 (June 1944) Ministry of Town and Country Planning, *Control of Land Use* (Cmd 6537, June 1944) 18. For further discussion see HL Deb 27 September 1944, vol 133, cols 172-214.

[235] HC Deb 29 January 1947, vol 432, col 947.

[236] *Control of Land Use* (n234) 18.

[237] Cullingworth (n215) 185-186.

[238] HC Deb 29 January 1947 (n235) col 962.

and private use of land could be controlled.[239] Thus, as with the TCPA 1932, the final 1947 Act developed the legal scope of planning on numerous fronts, including; its administrative machinery (part I); compulsory acquisition (part IV); compensation and betterment (part V); and finances and charges (parts VI and VII). It was within this extended scope of planning law that national parks were conceived, with ss 8-10 of the NPACA 1949 relying explicitly on the legal processes set out in the TCPA 1947.

Section 2 of the Act established a Central Land Board which would work alongside the MTCP to determine the valuations of compensation and betterment with respect to development plans. In addition to this, the Board would administer the Central Land Fund which, under ss 58-64, was money allocated by the Treasury to account for the depreciation in land values resulting from development plans. In the context of national parks, as discussed in the Hobhouse Report, the Central Land Fund would also finance the creation of national parks, with £50 million being aside in the fund for that purpose.[240] As part of the establishment of the Central Land Board, the Act also reformed the planning procedures associated with compensation, further implementing the recommendations of the Uthwatt Report. Section 50 removed the 1939 standard for compensation which, under s 57 of the TCPA 1944, determined the amount of compensation that could be awarded following the national land valuation in 1939. Section 51 determined the new framework for awarding compensation, empowering the Central Land Board with the discretion to vary and conduct new land evaluations as required.

[239] See Cocks (n219) 27-28; MERL/CPRE 1/5/102 (24th February 1947) 'Notes on the Town and Country Planning Bill 1947'
[240] Hobhouse Report (n214) 67.

The Act also made substantive reforms to the legal processes of planning law, legally re-conceptualising how development control operated when compared to the TCPA 1932. In particular, s 12(2) of the TCPA 1947 introduced a general restriction on development, preventing any change in land use within England and Wales following on from the enactment of the legislation. Instead, as set out in s 12(1), explicit permission would be needed from the relevant local authority empowered under the Act (which in s 4 had been re-titled as local planning authorities). It was this general land control, which was used to designate national parks, under ss 7-8 of the NPACA 1949.

Planning authorities, within the oversight of the MTCP under ss 15-16 of the TCPA 1947, were also empowered under s 13 to approve or deny developments, thus granting them near complete administrative control over land use within their locality. It was intended that these new powers of approval would be used in conjunction with the creation of development plans under s 5 of the Act. Development plans were a new form of planning procedure, like the planning schemes under the TCPA 1932, but with broader scope for controlling a variety of different forms of land use.[241] Development plans, whilst obligatory (unlike 1932 planning schemes), were more flexible, empowering local authorities under s 5 to set out potential future uses of land regardless of any proposed developments. Thus, under ss 12-13, new land use proposals could be considered in the context of the s 5 development plan. This process for creating development plans was later adopted in the NPACA 1949,

[241] TCPA 1947, part II.

with s 9 requiring the production of a development plan to secure the purposes of national parks in s 5. As s 9 stated, this plan was to be created through the same processes as set out in the TCPA 1947.

These reforms marked a significant shift in how land administration was understood, bringing all land legally within the scope of planning, arguably reflecting some of the broader political discussions about land nationalisation.[242] This was because the new Act provided a comprehensive framework of development control powers which facilitated the regulation of all forms of land.[243] This was achieved through expanding upon the existent procedures within planning law, providing greater legislative detail about how land regulation could take place. For example, the process for creating a development plan became statutorily prescribed, standardising what had been a broadly discretionary practice under the TCPA 1932. First, under s 5(2)(a), an authority had to conduct a survey of their area, identifying sites for proposed roads, buildings, parks, nature reserves, agriculture, industry, and residential housing. From there, under s 5(4), the authority had to submit the proposed development plan to the Minister of review, who would then approve or modify the development plan, in collaboration with the Central Land Board. Once a plan was operational, the authority had to conduct regular surveys for submission to the Minister to ensure the plan was both effective at administering land use and being adhered to.

[242] *Control of Land Use* (n234).

[243] Cherry, *Urban Change* (n51) 163.

This reflected a far more detailed statutory approach to planning procedure, consolidating the mechanisms of planning law within the context of complete administrative control over land use. This can similarly be evidenced in the case law, which increasingly emphasised both the substantive and procedural aspects of the legal activity of planning. In *Cambridge City Council v Minister of Housing* [244] , for example, the Court affirmed the standardised process set out in s 5 of the TCPA 1947 for producing a development scheme. A local planning authority challenged whether a development plan was effective where it had been submitted to the Minister under s 5(4), but the planning authority itself had not passed a formal resolution to enact the scheme. The Court held that the language within s 5 was clear, with s 5(4) stating that a development plan was approved and submitted, ready for implementation once it had been received by the Minister. The planning authority's own internal administrative processes, namely voting on an explicit resolution, did not matter in the context of implementing a development scheme because the TCPA 1947 itself set out a singular standardised process for their enactment.[245]

The TCPA 1947 also consolidated the planning provisions pertaining to amenities, introducing a series of controls which Cherry suggested were motivated by the desire to empower planning authorities to maintain the aesthetic of their locality.[246] Under s 26, for example, the 'interests of the amenity' of an area became a 'material consideration' in how the authority exercised its development controls for allowing or preventing developments.

[244] [1955] 1 WLUK 61.

[245] ibid.

[246] Cherry, *Urban Change* (n51) 165.

'Material consideration' was defined at this time (although later distinguished) by Roxburgh J in *Fawcett Property Ltd v Buckingham CC*. to mean 'any other consideration material to the development in connection with local planning'.[247] Thus, where a planning authority sought to protect an amenity by designating it within the development plan, this became a consideration in determining future developments. This consolidated the rural amenity protection provisions under s 1 of the TCPA 1932, furthering how amenities could be protected in the context of future development. Moreover, under s 41 of the TCPA 1947, the Minister could authorise a planning authority to compulsorily acquire amenity areas, where they were not being sufficiently preserved or maintained through the s 5 development plan. This delimited all forms of amenity protection as an activity within the legal scope of planning, as part of its broader ability to administer different forms of land use.

5.4 Planning and the NPACA 1949

It was within the context of the TCPA 1947, and the evolution of planning law as the primary legal process for controlling land use, that national parks were legally created under the NPACA 1949. It is because of this that the NPACA 1949 was regarded as the third statutory element of post-war national land planning.[248] This can be seen in revisiting some of the statutory provisions outlined at the start of this chapter. As already noted, s 9 determined that land uses within national parks would be controlled through the creation of development plans. These plans would be produced by the local planning authorities (as defined under s 4 of the TCPA 1947) within the national park

[247] [1958] 1 WLR 1161, [1958] (Ch), 3 All ER 521 [1166].

[248] HC Deb 19th July 1949, vol 467, col 1218-1220.

area. Under s 9(2), these development plans would follow the same format and processes as under s 5 of the TCPA 1947, but with the express objective of ensuring that the purposes of national parks, under s 5 of the NPACA 1949, were achieved.

The control of land use in national parks under the NPACA 1949 reflected a departure from the processes of land administration used in national parks in other jurisdictions, as discussed in the previous chapter.[249] Thus, in considering how national parks were legally framed, it becomes apparent that much of their administration was not through specific national park processes, but instead as a form of planning activity, legally provided for in planning law. As was made clear in s 12 of the TCPA 1947, all land in England and Wales was subjected to the planning controls imposed by the legislation. Thus, national parks, as a form of land use, would automatically exist within this system of controls regardless of how they were legally constituted. The legal creation of national parks as administrative spaces, over physical parks, reflects this. Returning to the language of the three national parks reports, it was not necessary to create enclosed parks, because land could be publicly controlled for the purposes of national parks at the administrative level.[250] Thus, it was through planning law that national parks were legally conceptualised as a form of land administration. This utilised planning law processes from the TCPA 1947, which were applied specifically to national parks in ss 8-10 of the NPACA 1949.

[249] For example, the National Park Organic Service Act 1916 (USA) created a specific federal body for the administration of national parks, whose legal powers only existed within the context of the Service Act.

[250] The idea of necessity is particularly interesting in the Reports, note the Addison Report (n2) 12-13; Dower Report (n214) 17.

6. Conclusions

In explaining the evolution of planning law prior to the NPACA 1949, a series of conclusions can be drawn about the relationship between planning and the legal creation of national parks. The first of these, although seemingly obvious, requires reiteration; planning, and more importantly planning law, pre-dates national parks. This is important in thinking about how national parks came to be framed as an activity within the broader legal scope of planning law, which by 1949 had become the primary legal mechanism through which land was administered. The framing of national parks as a type of planning activity was not only resultant from the enactment of the TCPA 1947, two years prior to the NPACA 1949, but a more general evolution of ideas about legal land administration through the processes of planning law, dating back to the late 19th century.

This leads on the second conclusion which can be drawn from this chapter. Planning law was a specific type of legal activity which facilitated the administration of land, in a way that other areas of law could not. Although, as will be explored further Chapter Five, the administration of land itself was not a novel concept, what this chapter demonstrates is that the approach taken by planners, as effectuated through planning law, was responsive to the specific circumstances of the early 20th century. Planning law for the first time encapsulated the variety of intentions and needs within real spaces in a legislative framework. In doing so, planning became the only legal activity in which all forms of land use could be considered, through processes like plan-making and of spatial organisation.

The third conclusion of this chapter is that in thinking of national parks purely as products of the NPACA 1949, much of the legal evolution which was required for the

legislation to exist is overlooked. Thus, the legal evolution of planning law shows part of the legal context needed to fully understand how national parks were created. As such, the creation of national parks cannot be understood as a single legal development under the NPACA 1949 but should be seen as part of a legal landscape, comprised of different evolving legal landscape features.

It is in this broader landscape then that this chapter draws its final conclusion. The language of 'administration' and of 'land' have been used countless times throughout this chapter, describing the broader set of legal principles which in turn framed the legal development of planning law. Thus, just as the legal process through which national parks were created required contextualisation within the broader legal evolution of planning, planning itself was underpinned by broader legal developments in both administrative law and land law. Consequently, to understand why the NPACA 1949 created national parks as it did, it is important, as the next chapters illustrate, to also consider the broader legal principles which were conceptualising land and administration.

4

The Capacity of Public Administrators and the Evolution of National Parks

11. General powers of local planning authorities in relation to National Parks

> *(1) A local planning authority whose area consists of or includes the whole or any part of a National Park shall have power, subject to the provisions of this section, to take all such action as appears to them expedient for the accomplishment of the purposes specified in subsection (1) of section five of this Act in relation to their area or so much thereof as is comprised in the Park.*

(National Parks and Access to the Countryside Act 1949)

1. Introduction

Conceptually underpinning the legal creation of national parks as a type of planning activity was a broader legal evolution of public administration, underpinned by administrative law. It was because of this expansion that first, national parks were able to be publicly administered, and second, that the administrative structures within the National Parks and Access to the Countryside Act 1949 (NPACA) were framed as they were. In light of this, the chapter explores the legal evolution of public administration during the 19th and 20th centuries, explaining how the legal capacity of local and national administrators expanded during this period. This expansion restated the relationship between local and central governance, creating doctrines

which were ultimately incorporated into the administrative provisions of the NPACA 1949.

This chapter thus has two aims: First, to explain how the legal capacity to publicly administer evolved locally, regionally, and nationally preceding the NPACA 1949. Second, to illustrate how this changing understanding of legal capacity, and its more general relationship to the emerging ideas of administrative law, was fundamental in framing national parks as an exercise in public administration. This in turn illustrates how the legal capacity to administer had a direct influence on how the NPACA 1949 legally structured the administration of national parks.

The chapter proceeds in three parts. The first part considers the evolution of local government, exploring how the capacity of local governments to publicly administer spaces evolved during the 19th and 20th centuries. Starting with the popularly termed 'reformation' of local government,[1] the chapter illustrates how the legal capacity of local governance structures expanded between 1832 and the enactment of the NPACA 1949, as a result of increased pressure to oversee the socio-economic changes of industrialisation and urbanisation, as defined in the introduction of this thesis.[2] This led to the emergence of a formalised system of local government, which was coordinated through centralised statute and an emerging body of administrative law

[1] Derek Fraser, *Power and Authority in the Victorian City* (Basil Blackwell 1979) 21.

[2] Industrialisation encompasses both 'the development of industries in a country or region on a wide scale', OED, 'industrialization (n.)' (*OED*, July 2023) <doi.org/10.1093/OED/4014850903> accessed 18th September 2024, See also Asa Briggs, *A Social History of England* (Book Club Associates, 1983) 196-200; David Cannadine, *Victorious century: 1800-1906* (Penguin Books 2018) 43. Urbanisation, the process of areas becoming increasingly populous and developed, can be seen as the primary land-based socio-economic effect of industrialisation Gordon Cherry, *Cities and Plans: The Shaping of Urban Britain in the nineteenth and twentieth centuries* (Edward Arnold, 1988) 16-48; Avner Offer, *Property and Politics 1870-1914* (CUP 1981) 221-283.

principles.[3] Local government, for purposes here, is defined as in the Local Government Acts, referring to the democratically elected council bodies (including corporations) which existed in both urban and rural areas. Local governance is used to denote any bodies which predated or existed outside of this statutory definition. Local authority is a statutory term used to refer collectively to different forms of local government.

The second part of this chapter then explores how a system of regional governance emerged, as a form of collaborative public administration between different local governments. In particular, it considers how the emergence of regional systems for public administration required local authorities to have different legal powers to collaboratively oversee public activities outside of their defined administrative boundaries.[4] This transition allowed public land administration to reflect physical landscapes, with regional governance being fundamental in the administration of national parks.

The final part of this chapter reflects on how the legal capacity of central government also changed, with both its administrative functions and oversight expanding notably in the period preceding the legal creation of national parks. In particular, ideas of the 'planned state' led central government to expand its own administrative capacity by expanding its statutory oversight and its internal administrative machinery. [5] This

[3] NPACA 1949, ss 7-12.

[4] Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (OUP 1996) 12-13.

[5] See Arthur Marwick, *Britain in the century of Total War* (Penguin Books 1970).

better allowed for the proactive administration of the country, particularly in administering land.

Before beginning it is important to briefly revisit the definitions from the introduction of this thesis, particularly with respect to how public administration, administrative capacity, and administrative law are being understood. At its simplest, administration refers to the 'action of carrying out or overseeing tasks' usually with respect to the running of a broader system.[6] Public administration then is the overseeing of the 'business of government' for the purposes of a community, 'the public'.[7] This process of oversight is explicitly provided for primarily through statute or other legal regulatory sources. It is these sources of legal regulation which give those who are overseeing 'the business of government' the ability, or capacity, to do so. The discussion of the laws pertaining to this administrative capacity is something often excluded from modern administrative law scholarship.[8] Yet in the context of the 19th and early 20th centuries, many of the emerging legal doctrines associated with public administration, were not centred on trying to 'control government power', as is sometimes the sense in modern administrative law,[9] but instead on understanding what legal structures were required to legitimise the ability of public administrators to administer.[10] This chapter thus considers the specific relationship between the increased *statutisation* of public administration and the growth in administrative

[6] OED, 'administration (n) sense 3a,' (*OED*, June 2024) <doi.org/10.1093/OED/5084092661>accessed 8th May 2024.

[7] Julia Beckett and Heidi O Koenig, *Public Administration and Law* (Routledge 2015) ix.

[8] Elizabeth Fisher and Sidney A Shapiro, *Administrative Competence: Reimagining Administrative Law* (CUP 2020) 3, 12-13.

[9] HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014) 4; Timothy Endicott and Andrew Orville, *Administrative Law* (5th edn, OUP 2021).

[10] Fisher and Shapiro (n**24**) 15; Brian Tamanaha, *A Realistic Theory of Law* (CUP 2017) 122-126.

capacity that this resulted in. In doing so, it becomes possible to understand why the NPACA 1949 distributed power between local and central governance bodies as it did.

2. The Evolution of Local Government

Section 11 of the NPACA 1949 sets out the general powers of local authorities in relation to national parks. Local authorities are defined in s 7(1) as any county council, county borough, or county district within the boundary of the national park. In addition to this, under s 8, local authorities also include planning authorities (defined in s 4 of the Town and Country Planning Act 1947 (TCPA)) and joint planning boards (schedule I, part I, TCPA 1947). Section 11 extends the existing powers of these different local authorities to the specific purposes of administering national parks, in line with the objectives of these spaces in s 5 of the NPACA 1949. In particular, s 11 states that any local authority, which lies partially or wholly within a national park, is able to use any of its existing powers to achieve s 5. These existing powers, as ss 8-10 illustrate, refers primarily to the capacity of local authorities to use planning law. This legal framework gave local authorities a primary role in the administration of national parks.

The reliance upon local authorities, and their existing powers in other statutes, for the creation of national parks was contentious. As noted in Chapter Two, there was sizable pushback against these *national* spaces being *locally* managed.[11] Yet, as was emphasised by Lewis Silkin, the Minister of Town and Country Planning who proposed the NPACA 1949, s 11 of the Act reflected the broader constitutional arrangements with respect to local and central government. In particular, it was local

[11] TNA HLG 90/174 (August 1948) Friends of the Lake District 'National Parks or Local Authority Parks?'; HC Deb 31 March 1949, vol 463, col 1461-1463.

authorities, not the central government, who had been empowered to carry out most administrative activities, making them the body with the suitable administrative capacity to manage national parks. Indeed, at the start of the 20th century Jurist Edward Jenks commented 'England is pre-eminently the country of local government'.[12] Thus to understand why the NPACA 1949 empowered local authorities to administer national parks, it is important to consider the more general 'pre-eminence' of local government.

The centrality of local government in public administration and thus in administrative law is overlooked, with many modern commentaries isolating their understanding of a public authority to that of the central government.[13] Even historic accounts of administrative law predominantly emphasise the relationship between the courts, citizens, and the Crown as shaping the foundations of administrative law.[14] Yet, as Redlich and Hirst noted, in their 1903 commentary on local government, a 'fundamental antithesis between centralisation and autonomous decentralisation runs through the whole history of English government and its organisation'.[15] To put this more simply, centralised public administration would not have existed, if local governance did not have the legal capacity to effectuate that administration. In the

[12] Edward Jenks, *An Outline of English Local Government* (5th edn, Metheun 1921) 9.

[13] This can be evidenced in considering most modern administrative law textbooks which exclude specific consideration of local governments as a form of public authority, instead understanding administrative law against a constitutional context of state and citizen relations. For example, see Wade and Forsyth (n9); Elliott, Mark, Jason Varuhas, and Jack Beatson, *Administrative Law: Text and Materials* (5th edn, OUP 2017); or Endicott and Orville (n9).

[14] Paul Craig 'English Administrative Law History: Perception and Reality' in S Jhaveri and M Ramsden (eds), *Judicial Review in the Common Law World: Origins and Adaptations* (CUP 2015); Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the seventeenth century* (HUP 1963); Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015) 23-82; even accounts that do explore the functionality of more localised administrative bodies emphasise the role of these bodies in connection to broader executive powers Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024).

[15] J Redlich and FW Hirst, *Local Government in England* (London 1903) vol I, 10.

context of the previous chapter, there would have been no point in having centrally devised legal processes for planning, if no public body was empowered to use those processes. It is this relationship between centralisation and decentralised local governance which characterised the administration of national parks as a type of planning activity. Thus, to understand the legal creation of national parks under the NPACA 1949, it is essential to first consider how local government came to have administrative powers at all.

2.1 The emergence of local government

As historian Derek Fraser suggested, by the 19th century local governance was a 'remarkable patchwork' of 'historical, religious and administrative traditions', reflective of Britain as a country which was predominantly governed at the local level.[16] From the Great Reform Act in 1832 however this began to change, with the responsibilities and powers of local administration becoming increasingly formalised through a series of statutory reforms, which expanded the ability of these bodies to administer. This is not to suggest that there was no centralised oversight of these bodies prior to 1832, with statute already existing to regulate local administrative activity.[17] Instead, this period following 1832 saw the specific legal transformation of local governance into a formalised notion of local government and thus the characterisation and effect of administrative statutes changed. In charting this evolution, I will not provide a historical account of all the components which formed this 'patchwork' of

[16] Fraser (n1) 1.

[17] For example, 43 Eliz 1 c. 2 (1601) (Coordinated the administration of poor law relief); 22 Hen 8 c. 5 (1530) (empowered Justices of the Peace to order repairs for broken bridges); or, Reg 24 Geo 2 c 44 (1750) protected Constables in the course of their duty from being liable; Craig (n14) 25-61.

local government but instead highlight the major local governance structures which were formalised to become 'local governments'.

Prior to the Great Reform Act in 1832, systems for local administration could be best understood dependent upon whether the area was regarded as urban or rural. Urban areas were primarily governed through two distinct means, determined by whether the town was incorporated or unincorporated.[18] Unincorporated towns existed as a facet of the county bench, often evolving from smaller systems of local governance, which consequentially lacked fiscal and policy independence from the broader county.[19] Some unincorporated towns were however more independent than others, with the creation of town estates providing a process through which unincorporated towns could gain some administrative and proprietary independence from the county.[20] Similarly, the establishment of local boards for aspects of community management, like sewerage and markets, further gave unincorporated towns an administrative capacity which was distinct from the county bench.[21]

[18] Fraser (n1) 1.

[19] In particular, unincorporated towns did not have the capacity to appoint Justices of the Peace independently of the County; Sidney and Beatrice Webb, *English Local Government from The Revolution to the Municipal Corporations Act: The Manor and The Borough* (Longmans Green 1908) 261-266.

[20] A town estate existed through the granting of land and properties within the boundaries of a town to the people of the locality, this was usually accompanied by a trust, which ensured the longevity of the grant. Although the Town was still unincorporated and could not make statutory appointments, the grant gave the townspeople greater independence to determine local rates. An example of a town estate can be seen in Melton Mowbray, see Dorothy Pockley, 'The Origins and the Early History of the Melton Mowbray Town Estate: A Study in the Government of an unincorporated Town' (PhD Thesis, University of Leicester 1964).

[21] *Higgins v Green* (1842) 10 M & W 703; *Slater v Mayor of Ashton under Lyme* (1852) 18 QB 398; TNA/HLG 120/134 'National Market Survey'

Incorporated towns were different, existing independently of the county bench under the management of a group of incorporated individuals who had a proprietary interest in the land which comprised the town. The corporation had fiscal and policy control over local affairs due to its proprietary status. Although it was traditionally accepted that incorporated towns existed through a Royal Charter, the existence of a Charter was not necessarily apparent in all instances.[22] Indeed, many incorporated towns could not necessarily prove their chartered status,[23] and instead their capacity to administer was based on the evolution of privileges and custom which were subsequently upheld by the courts.[24] This meant that whilst incorporated towns had, as Janet McLean noted, a 'great deal of autonomy',[25] corporations too lacked a formalised or standardised structure through which they could administer their localities.[26] Moreover, many corporations understood their administrative capacity as purely proprietary due to the corporate ownership of the land which compromised the incorporated town. This meant that social policy aspects of local administration were not a financial priority, when compared to ensuring the solvency of the corporation.[27]

[22] JA Chandler, *Explaining Local Government: Local Government in Britain since 1800* (MUP 2007) 12.

[23] Many incorporated towns had their Charters revoked by James II and never restored, see HA Street, *A Treatise on the Doctrine of Ultra Vires* (Sweet & Maxwell 1930) 12.

[24] CT Carr, *The General Principles of the Law of Corporations* (CUP 1995).

[25] Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2015) 102.

[26] Many enacted local improvement Acts but there was no requirement of standard clauses until the Town Improvement Clauses Act 1847. Private Bills for town improvement were also often difficult to pursue.

[27] FW Maitland, *Town and Borough: The Ford Lectures 1897* (CUP 1898) 95.

Local governance in rural areas was less prescribed, with a series of different overlapping local governance structures existing variedly across the different counties. Acknowledging this lack of uniformity in rural administration, there were however two dominant mechanisms through which rural governance took place prior to 1832: Administration by Justices of the Peace (JPs) and parish councils. The existence of JPs can be traced to the 13th century, with Justices being appointed by the Crown to maintain peace in collaboration with local communities and parishes.[28] Over the centuries, the administrative capacity of JPs gradually expanded with their central purpose extending beyond their magisterial capacity of ensuring law and order to include broader administrative activities relating to sanitation or public health.[29]

Who JPs were also changed, reflecting more societal shifts in rural populations, as noted in Chapter Two. Given the voluntary nature of the position, JPs had always been landowners, financially enabled by their estate to hold the position.[30] By the 19th century however many major landowners had left the agricultural management of their rural estates in hands of stewards, instead choosing to pursue activities like finance or politics, typically in London.[31]

[28] KB Smellie, *A History of Local Government* (3rd edn, Allen and Unwin 1957) 9. For a history of the evolution of JPs see JP Eddy QC, *Justice of the Peace* (Cassell & Company LTD 1963). Note also 18 Edw III, c 2 (1344).

[29] Some examples include- 22 Hen 8 c. 5 (1530) (Statute of Bridges), which made JPs responsible for overseeing bridges and highways or the 43 Eliz 1 c. 2 (1601) (Poor Relief Act) which made JPs responsible for administering parish taxes and poor relief.

[30] Chandler (n21) 8.

[31] David Cannadine, *Aspects of Aristocracy: Grandeur and Decline in Modern Britain* (YUP 1994) 20-22.

Consequently, JPs were increasingly appointed from the selection of smaller country landholders who remained in rural areas. This is noteworthy because where larger estates often employed or tenanted much of the local community, there was not the same relationship between this new class of JPs and their communities. This tension was furthered due to an influx in the number of JPs, with landowners often being insulted if they were not appointed. This meant that by the 19th century JPs predominantly governed the countryside, with many county quarter sessions having more JPs than needed for the administrative powers they had.[32]

Parishes had a similar administrative role to JPs, also being statutorily required to administer the poor law and maintain law and order within their locality.[33] parish governance was however widely varied, with over 15,000 parishes existing in 1832.[34] Consistent amongst them however was a legal right for residents to participate in the administrative business of the parish, including through a right to hold office.[35] Thus, whilst vestries were a form of popular assembly for all rate-payers (including women) within a locality, the respective JPs, along with the office holders within the parish benefitted from a notable power imbalance within these meetings.[36] This impacted the extent to which

[32] Sidney and Beatrice Webb, *English Local Government from The Revolution to The Municipal Corporations Act: The Parish and the County* (Longmans Green 1908) Chapter II, Part a.

[33] Chandler (n21) 9; note the powers of JPs in both 3 Will & Mar c. 11 (1691) (Poor Relief Act) and 9 Geo 1 c.7 (1723) (Poor Relief Act).

[34] The Commissioners for inquiring into the administration and practical operation of the poor law, *Poor Law Commissioners Report of 1834* (Cd 2728, 1834).

[35] Smellie (n28) 11.

[36] Webb, *The Parish and the County* (n32) 15.

parish administration saw the 'faithful discharge of duties' done with 'confidence and good-will' for the communities which were governed.[37]

In outlining these different structures through which local governance took place prior to 1832, it becomes possible to see that these approaches to local governance had advantages and but also tensions, both constitutionally and practically. As WJM Mackenzie identified, an 'ethical commitment to an extremely vague notion of local self-government' underpinned the English and Welsh constitutional understanding of local governance prior to 1832.[38] Consequently, the diversity of the local governance 'patchwork' reflected this sense that localities had a constitutional right to self-determination. Practically, this meant that governance structures often reflected the unique physical and social parameters of the locality, highlighting a strong connection between administration, place, and communities. This was equally reflected in the composition of the local governance structures, with administrators having either a fiscal, landed, or personal connection to the locality with local bodies often viewing themselves as private entities. Conceptually, as Rudolf Gneist suggested, there was a degree of cohesion between local governance structures and ideas of sovereignty at the constitutional level.[39] This can be illustrated through the sovereign's role in facilitating the appointment of JPs or in granting corporation charters. As FW Maitland acknowledged in the context of municipal corporations, to deny self-governance to such bodies would be to

[37] Commission for inquiring into the State of the several Municipal Corporations in England and Wales, *First Report of the Commissioners Appointed to Inquire into the Municipal Corporations in England and Wales* (parliamentary papers XXIII 1835) para 73.

[38] WJM Mackenzie, *Theories of Local Government* (LSE 1961) 7.

[39] Rudolf Gneist, *The History of the English Constitution* (PA Ashworth trans 1886) vol II 428, 438.

deny the 'moral personality' of the corporation, tying ideas of local self-determination to broader conceptions of corporate identity.[40]

Conversely, there was a growing sense that this 'patchwork' of local governance was inadequate to meet the new socio-economic challenges of the 19th century, in particular, those associated with industrialisation and the rapid expansion of towns through urbanisation.[41] Moreover, the increased constitutional role of parliament during the previous century, and its expanded legislative ability, had created pressure for extending parliamentary oversight of local governance bodies.[42] Indeed, as was noted in the Royal Commission on Municipal Corporations in 1835, corporations could not be relied upon for good government, with much of their administrative capacity already being carried out independently by statutory boards under local Acts.[43] As the issues of sewerage, public health, and town layout were becoming increasingly important in the context of a town, it was also becoming increasingly apparent that existing local governance structures lacked the suitable legal capacity to administer these problems consistently between different localities.[44] This limited the role of central government in legislating for broader social reforms because there was no public body able to effectuate these reforms. This led local

[40] Maitland (n27) 95.

[41] Sidney Webb and Beatrice Webb, *English Local Government: Statutory Authorities for Special Purposes* (Longman 1922) at 236 suggest there was no building regulation, but TJ Barnes challenges this assertion Barnes 'The Prerogative and Environmental Control of London Building in the Early Seventeenth century: The Lost Opportunity' 58(6) CLR 1332. The reality is that regulation was dependent on the locality and its ability to pursue private Bills and byelaw powers.

[42] *Municipal Corporations Commission* (n37) 30.

[43] ibid, 17.

[44] Smellie (n28) 23; Contrast the role of Commissioners in *Higgins* (n21); *Slater* (n21); *Tyne Improvement Commissioners v Churchwardens of Chirton* (1859) 1 El & El 516

governance structures to be vilified by liberal and radical social reformers, who saw the landed interest in local governance as a primary cause of social inaction.[45] Whilst, this statement misses the nuance of whether governance structures could even engage in statutory local administration (due to diversity of their character), these criticisms reflected frustrations about the relationship between local governance and the franchise.[46]

Indeed, the period preceding the local government reformation which began in 1832, was politically tense, punctuated by a series of popular protests which reflected a general sense of dissatisfaction over enfranchisement.[47] Whilst it would go beyond the scope of my purposes here to detail the passing of the Great Reform Act 1832, what is important to note is that the legislation also triggered a watershed in local governance. In particular, the 1832 Act reformed the political representation of urban areas, removing parliamentary representation from 56 boroughs and redistributing those seats to 22 of the larger industrialising towns.[48] Although the reforms of 1832 were not without criticism,[49] the reform extended the franchise so significantly that the relationship between local governance bodies, parliament, and the broader electorate was redefined. In particular, concerns about the effects of

[45] Chandler (n21) 31-33; McLean (n25) 101.

[46] Cannadine, *Victorious Century* (n2) 154.

[47] ibid; see Antonia Fraser, *Perilous question: the drama of the Great Reform Bill* 1832 (Weidenfeld & Nicolson 2013); Nancy LoPatin, *Political unions, popular politics and the great Reform Act of 1832* (Macmillan 1999).

[48] Eric Evans, *The Great Reform Act of 1832* (Routledge 1994) 76.

[49] See John Phillips, *The Great Reform Bill in the Boroughs: English Electoral Behaviour, 1818–1841*. (Clarendon Press 1992) 30; Eric J Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (CUP 2012) 83.

industrialisation in urban towns were politically represented due to the greater proportion of parliamentary seats in expanding urban areas. This promoted, at the national level, a general sense that local governance was not sufficiently empowered to administer their localities.[50]

Following the 1832 Act, the formalisation of local governance bodies began with the Workhouse and Poor Law Amendment Act 1834 and the Municipal Corporations Act 1835. Both Acts reconstituted understandings of the role of local governance, with the legislation transforming local governance from a system of self-determination into a more standardised system of administrative oversight. This was the first legislative step in establishing a system of local government which had the responsibility of administering localities through specific statutory powers.

Both the Poor Law Amendment Act 1834 and the Municipal Corporations Act 1835 were the product of Royal Commissions, which enquired specifically into the legal capacity of the different forms of local governance, aiming to understand whether legislative intervention and increased formalisation would improve local governance, better enabling those bodies to engage in social reform mandated by legislation.[51] Moreover, the Reports represented a preliminary effort at ensuring centralised oversight of local governance, which became key in the legislative reforms of the subsequent century.[52] The resultant

[50] Asa Briggs, *A Social History of England* (Book Club Associates 1983) 200-203; Chandler (n21) 27-29.

[51] See *Municipal Corporations Commission* (n37); *Poor Law Commission* (n34); note also GBAM Finlayson 'The politics of Municipal Reform, 1835' (1966) 81 English Historical Review 673.

[52] Martin Loughlin identified the influence of Bentham as a partial explanation of this approach, Loughlin (n4) 29-30, although the influence of Bentham on statutory reform more generally has been

legislation was similarly framed, emphasising the principle of utility as the constitutional justification for extending the legal capacity of local governance structures in line with the broader administrative aspirations of the central government.[53] Consequently, as Loughlin identified, the overall effect of the reform 'was to institute a new set of organising principles underpinning local governance and, through central action [establishing] a modern system of local government.'[54] It was this relationship between central and local governance that became fundamental in the administration of national parks.

The Poor Law Amendment Act 1834 created Poor Law Commissioners, a centralised board for overseeing the administration of poor relief, removing that responsibility from the JPs. In doing so, the Poor Law Commissioners grouped the 15,000 parishes into 700 local Unions which had the administrative capacity to grant poor relief in the respective locality.[55] Beyond this, the legislation ensured a consistency in the application of poor law relief between different unions, with s V requiring that all Commissioners produced an annual Report for the Secretary of State, and s X limiting the years' service of a Commissioner to five years. This had the effect of bringing the parishes, at least with respect poor relief, into one statutory administrative structure, replacing

debated. See Christopher John Wallace Allen 'Non-Benthamite influences on the English law of evidence: 1828-1898' (PhD Thesis, UCL 1994).

[53] E Halevy, 'Before 1835' in HJ Laski, WI Jennings and WA Robson (eds), *A century of Municipal Progress* (London 1935) 35.

[54] Loughlin (n4) 30.

[55] Poor Law Amendment Act 1834, s XV.

the tapestry of custom and statute which had previously determined how the JPs administered the poor law, with a uniform system for administration.[56]

The effects of the Municipal Corporation Act 1835 similarly began the process of bringing the different municipal corporations into uniformity, ensuring their administrative capacity was determined by a singular parliamentary statute not their own corporate charters or constitutions. In particular, the legislation sought to transition the municipal corporation away from being purely proprietary, into a governance structure which had an administrative capacity for local welfare.[57] This can be seen in s XC of the 1835 Act which empowered the corporation to make byelaws for ensuring 'good rule' and the 'prevention of nuisances'. This was justified on an understanding that the municipal as a corporate body did not exist 'independently of the community'.[58] Consequently, the 1835 Act transformed 178 of the 250 municipal corporations into elected local councils, who had an administrative capacity to manage property (s XCVII), employ officials (ss L-LXIV), develop public infrastructure (s LXCVI), and generally manage the municipality.[59] Beyond this, unincorporated towns were able to petition to be incorporated, bringing further uniformity to urban local governance.[60]

[56]Timothy Besley, Stephen Coate, and Timothy Guinnane, *Incentives, Information, and Welfare: England's New Poor Law and the Workhouse Test* (Russell Sage Foundation 2001); David Roberts, *Victorian Origins of the British Welfare State* (YUP 1960) 130-135.

[57] This could previously only be achieved through a specific local Act.

[58] WI Jennings 'The Municipal Revolution' in J Laski, WI Jennings, and WA Robson (eds) *A century of Municipal Progress* (Allen & Unwin 1935) 58.

[59] Many of the other municipal towns financially collapsed resultant from the boundary redistributions under the Great Reform Act 832.

[60] This can be seen in Birmingham, see Fraser (n1) 78-110.

In considering both Acts what is important is how they redefined the relationship between local governance, the ability to administer, and central government. Prior to the legislation, local governance bodies had notable independence, however limited statutory powers. This can be illustrated through the Liverpool Corporation. Prior to the 1835 Act, the Corporation was generally regarded as managing its private affairs well, appointing magistrates and regulating the borough.[61] Yet as Ramsey Muir noted, the Corporation lacked any formal power to provide for local welfare, with the effects of increased urbanisation being particularly pronounced in Liverpool.[62] Following the 1835 Act, the independence of the Corporation as a body corporate had decreased, with its members having to be elected, under s XXIX of the 1835 Act, and its management becoming statutory. However, the administrative capacity of the Corporation to engage in social reform increased, with the Corporation having greater statutory responsibilities for the social administration of the locality as well as being able to introduce byelaws without breaching the proprietary nature of its charter. This can be seen in how the Liverpool Corporation was one of the first municipal councils to adopt the sanitation recommendations of the Chadwick Report in 1842, using its powers under s XCVI of the 1835 Act.[63]

[61] *Municipal Corporations Commission* (n43) 2706.

[62] Ramsey Muir, *A History of Liverpool* (1907) 309.

[63] Edwin Chadwick, Report on the Sanitary Condition of the Labouring Population of Great Britain (HMSO 1842).

This process of local government formalisation continued throughout the 19th century, as local government powers became more standardised. This can be seen in the Public Health Act 1848 which, as noted in the previous chapter, incorporated plan-making into public health legislation to facilitate greater control over urban land use. The Act created a General Board of Health as a centralised body empowered to advise local governance bodies on health issues, thus beginning the process of standardising health practice. [64] The capacity to administer public health at the local level also changed, with s 12 empowering districts and boroughs to create local boards of health, who were empowered to oversee sanitation and urban layout for the purposes of improving public health. [65] This duty could be exercised independently of the General Board, although corporations were able to consult the Board if needed. Alongside this, s 13 allowed the General Board to establish local boards of health, in areas where the death rate exceeded 23/1000, with 700 local boards being established.[66] These local boards were overseen by the General Board, who could ensure adherence to their statutory purpose.

As the Public Health Act 1848 illustrates, the expansion of the legal capacity of local governance was incremental, arguably making the conception of these changes as a 'revolution'[67] or 'reformation'[68] overstated. What the language of

[64] Public Health Act 1848, s IV.

[65] ibid, ss-VIII, ss LXXII.

[66] JF Wilson, *Lighting the Town: A Study of Management in the Northwest Gas Industry 1805-1880* (Paul Chapman 1991) 204.

[67] Fraser (n1) 21

[68] Loughlin (n4) 28.

'revolution' or 'reformation' highlights however is the huge conceptual reimaging which underpinned this transition. By this I mean that the incremental legislative expansion of local governance powers preceding the existence of a formalised local government system reflected a broader transformation in the relationship between centralised and decentralised administration. This was only possible because as the central government assumed greater responsibility in legislating for social provisions and infrastructure, the actual capacity to carry out these provisions was further entrusted at the local level. This had broader implications for the constitutional principles which determined the balance between local and central administration.

Prior to 1832 the constitutional justifications for local governance had an uncertain legal foundation, drawing on medieval ideas of *communitas* alongside the emergence of towns as a form of body corporate.[69] As Maitland suggested, there was a degree of fiction in understanding these entities as resulting from an act of sovereign power.[70] This made the legal relationship between local governance and central government complicated. On the one hand, central government had been shaping local governance through statutory interventions for centuries, with the role of JPs being just one example of this.[71] On the other, it seemed counter to the legal fiction of local governance and self-determination if central government were to statutorily abolish the old system in favour of a new one, particularly given the often proprietary status of these

[69] Maitland, *Towns and Boroughs* (n27) 13-14.

[70] FW Maitland 'introduction' in Otto Gierke, *Political Theories of the Middle Age* (Cambridge 1900).

[71] Other examples include 23 Hen VIII c5 (1532) which established the sewers Commission; An Act for Rebuilding the City of London 1666; or the County Rates Act 1738.

bodies.[72] What the legislation following on from 1832 illustrates however is the reconstitution of local governance in a way which protected constitutional notions of self-determination, whilst providing for centralised statutory oversight to ensure a uniformity of approach.[73] It was these constitutional principles which ultimately framed the division of administrative powers in the NPACA 1949, as exemplified in s 11.

This transition also saw centralised administrative bodies take on an increasingly 'judicial function' in so far that they were empowered to ensure local governance bodies remained within the scope of their statutory duties by determining what constituted those duties. This can be seen in *R v Burslem Local Board of Health*[74] where a local board caused damage to housing whilst carrying out sewerage works under the Public Health Act 1848. Under the Act, the Board was required to pay compensation to the owner but denied liability for the damage, leading to an order of *mandamus*. The question before the court was whether *mandamus* was the appropriate outcome. Although Williams J ultimately held that *mandamus* was appropriate because the remedy sought to compel a public body to perform a public duty, the case considered the statutory role of the Central Board of Health in obliging the local board to pay compensation. Thus, by the late 19th century, whilst no formalised system of

[72] HC Deb 21 February 1848, vol 96, col 1022; HC Deb 18 May 1848, vol 98, cols 1172-1182. More generally see McLean (n25) 100-106; Gneist (n39); F Pollock 'Has the Common Law Received a Fiction Theory of Corporations?' (1911) 27 LQR 219.

[73] Loughlin (n4) 13; This transition was not necessarily popular being viewed by some as a threat to the rule of law, see HW Arthurs, '*Without the Law': Administrative and Legal Pluralism in Nineteenth century England* (UTP 1985) Chapter 4, 89-131.

[74] (1860) 24 JP 563.

local government existed, local governance powers were becoming more standardised, with s 62 of the 1848 Act empowering them to engage in the legal process of plan-making, as discussed in the previous chapter.

2.2 The Local Government Acts

The Public Health Act 1848 was seen as radical, owed in part to how it reconceptualised the relationship between local governance and central administration. Consequently, application of the Act was limited, with many local areas voting not to effectuate the terms of the legislation, viewing it as a 'power grab' by central government.[75] It was in this context that the Local Government Act 1858 (LGA) was first proposed. The Act has previously been understood as retroactive,[76] merely amending the Public Health Act 1848, to reduce the extent of centralised oversight, by reframing the role the General Board of Health, which under s IV had less capacity to directly engage with the Local Boards.[77] Yet this understanding overlooks how the 1858 Act marked the first statutory use of the term 'Local Government', changing how local governance structures were being legally understood by beginning the transition towards defining them within a singular legal term. This had the effect of making the previously existent 'patchwork' of systems more legally homogenous, particularly in urban areas which were explicitly defined in s II of the Act.[78] Moreover, the language of local

[75] Notably, in Ryde a public poll outright rejected adoption of the legislation. Similarly, in Newchurch parish councillors regarded the Act as 'the incarnation of Whig iniquity', choosing again not to engage with the legislation. See John Prest, *Liberty and Locality: Parliament Permissive Legislation, and Ratepyers' Democracies in the Nineteenth century* (OUP 1990) 167-168.

[76] See SE Finer, *The Life and Times of Edwin Chadwick* (Routledge 1952) 209-230.

[77] HC Deb 30 April 1858, vol 149, col 2095.

[78] LGA 1858, s II states 'Borough,' or 'Corporate Borough,' when used in this Act, or in any Act conferring Powers of a public Nature on the Corporate Bodies of Boroughs by their Council, shall include all Cities, Ports, Cinque Ports, or Corporate Towns'.

government reflected changes to constitutional values about how local governance should take place, drawing upon concerns about the balance between local and central administrative powers, by statutorily formalising what local government was.

This can be highlighted in considering the provisions of the legislation. The 1858 Act provided local governance bodies with greater flexibility in adopting public health provisions, empowering local bodies to regulate public health independently of the centralised recommendations of the General Board.[79] As a consequence local governance bodies were able to adopt as many parts of the Act as deemed relevant in the context of their own circumstances, without having to submit entirely to the health schemes of the General Board.[80] This gave localities more discretion in exercising administrative powers, supporting the constitutional principles of self-determination which underpinned local governance. Prior to the 1858 Act, local governance bodies had a choice between pursuing private bills, as London did, to specifically regulate health in the locality or to adopt the 1848 Act and the oversight of the General Board.[81] Following on from the 1858 Act however these bodies had more flexibility, and choice about how to use their statutory powers to regulate public health.

[79] ibid, s XV.

[80] Ibid, s XLV.

[81] See Prest (n75) (Clarendon Press 1990) 171-174. The process of Private Members Bills also created difficult questions with respect to weather local governance was acting *ultra vires* when comparing the private bill, to general legislation. This issue is explored in *Attorney-General v West Hartlepool Improvement Commissioners* (1870) LR 10 Eq 152.

This change has been criticised for being retroactive, returning the relationship between local governance and central government to that which existed prior to the Public Health Act 1848.[82] This however oversimplifies what the LGA 1858 achieved. The 1858 Act maintained the existence of a centralised body for coordinating health which still had oversight of local health provisions.[83] Consequently, centralised accountability was maintained, determining how local governance engaged in public health administration.[84] The Act instead gave local governance greater discretion as to how to exercise public health powers, achieving this by increasing the administrative capacity of localities to engage in public health regulation, by empowering local bodies to only effectuate the portions of the 1848 Act most relevant to the public health considerations of their locality.[85] Consequently, the idea of local government as an empowered regulator effectuating centralised statute came to legislative fruition, an idea which, as s 11 of the NPACA 1949 shows, was later incorporated into the creation of national parks. Thus whilst, the LGA 1858 offered no definition of what 'Local Government' was or did, the Act provided a legislative sense of how this formalised understanding of local governance as local government would exist and what its role would be in overseeing public tasks.

The provisions of the 1858 Act were further consolidated, first in the enactment of the Local Government Board Act 1871, and second, in the Public Health Act 1875.

[82] See Finer (n76) 230-243.

[83] LGA 1858, s VIII, note also R J Lambert, 'Central and Local Relations in Mid-Victorian England: The Local Government Act Office, 1858–71' (1962) 6(2) Victorian Studies 121, 123-124.

[84] Notably s VIII stated that local commissions or boards could still seek 'Consent, Direction, or Approval' from the General Board.

[85] Section VI empowered local board to 'have all the Powers, Rights, Duties, and Liabilities of Local Boards of Health constituted under the Public Health Act, 1848, and the Acts incorporated therewith'.

The Local Government Board Act established a department in Whitehall with explicit oversight of Local Boards, replacing the General Board of Health and the Poor Law Board.[86] The President of the Local Government Board (LGB) could have (although did not need) a parliamentary seat, and the position itself came with an ability to vote in Parliament.[87] The explicit functions of the LGB however were undetermined by the legislation, with the Act merely conferring existent General Board powers from other Acts onto the LGB.[88] Thus it was not until the Public Health Act 1875 that the LGB acquired explicit oversight powers in relation to local administration.

The Public Health Act 1875 introduced more discrete administrative powers for local governance bodies in effectuating national health policies. These were overseen by the LGB which ensured that local bodies were engaging in effective regulation.[89] Christine Bellamy has suggested that the distribution of powers between central and local bodies was 'strategically incomplete', creating a legal situation where central and local governance became equally dependent on the other in effectuating social interventions.[90] In support of this assertion, Bellamy explored the number of instances in which an inquiry by a central body into local governance practice resulted in an order of *mandamus* with respect to s 299 of the

[86] Local Government Board Act 1871, s 7.

[87] ibid, s 4.

[88] ibid, s 6.

[89] Simon Szreter, *The Silent Revolution in Nineteenth-century Government: The Rise of Local Government Expertise* (Health and Wealth vol 6, Boydell & Brewer 2005) 286.

[90] C Bellamy, *Administering Central-Local Relations 1871–1919. The Local Government Board in its Fiscal and Cultural Context* (Manchester 1988) 10-11.

1875 Act.[91] She determined that whilst 114 inquiries took place, only five resulted in *mandamus*.[92] This illustrates that whilst new legislative interventions were aimed at formalising the system of local government in line with national policy, the intention was that much of the administrative capacity for effectuating policy would be granted to local governance structures, who would have some flexibility, or discretion, in applying the provisions. The centralised LGB thus rarely mandated an administrative power be effectuated in a particular way. To frame this differently, local bodies were broadly empowered to engage with the administrative possibilities of the legislation how they saw best reflected the needs of their locality.

This was apparent in how the 1875 Act reframed the different local governance structures which existed, integrating them further within a more general legal category of local government. This was important because in the years preceding the 1875 Act a series of different administrative distinctions had been used to divide up the country, with different pieces of legislation drawing different administrative boundaries. For example, in 1870 a series of school districts, administered by school boards had been agreed upon, these boards had different administrative boundaries to the local boards of health under the 1848 Act. These again were different to the political boundaries of the Representation of the People Act 1867. As KB Smellie noted, this made the local government map of England and Wales relatively messy, with different administrative districts lacking clear boundaries.[93] This influenced the ability of local governance bodies to administer

[91] ibid, 218.

[92] ibid.

[93] Smellie (n24) 37.

because it created confusion as to where different local governance bodies had jurisdiction and what that jurisdiction statutorily consisted of. This confusion can be seen in the case law with local governance boundaries being raised alongside questions about whether actions under the LGA 1858 were *intra* or *ultra vires.* As seen in both *The Queen v The Ratepayers of Northowram and Clayton*,[94] and T*he Queen v Hardy*,[95] questions arose as to whether the respective local governance body was able to adopt the LGA 1858, on the grounds of whether they were or were not a local government as defined in s II of the Act. In both instances, the definition of local government was complicated due to the respective boundaries of the localities which were used to determine their compatibility with the LGA 1858. The Act itself only referred to 'Boroughs' and 'Corporate Boroughs'.

The Public Health Act 1875 also introduced some more general administrative titles which could be used to define the jurisdiction of different forms of local governance. Section 6 of the Act defined 'urban districts and authorities', amalgamating the previous administrative categories of boroughs, improvement districts and local government districts, into one homogenous group. In doing so, the Act explained the governance structures of these new urban districts, detailing in ss 10-11 the specific powers they had.[96] The provisions for rural areas however were less complete, with s 9 of the 1875 Act creating the administrative category of 'rural union' as a means for increasing centralised oversight of the parishes which

[94] (1865) LR 1 QB 110.

[95] (1867) LR 4 QB 117.

[96] Urban authorities were granted 'rights, duties, capacities, liabilities, and obligations' with respect to any existing urban administrative legislation, notably the Artisans and Labourers Dwellings Act 1868; Rural authorities were empowered to administer with respect to the Public Health Act 1875 and the Bakehouse Regulation Act 1863, ss 10 and 11.

did not fall within an urban district and thus under s 9(3) would be, for administrative purposes, subsumed into it. Beyond this however, administrative reorganisation of the local governance structures within rural areas remained relatively unchanged, in part due to the perceived necessity of public health provisions in urban over rural areas.[97] This made the task of implementing public health measures in rural areas more difficult, as parish councils were not empowered by all sections of the 1875 Act. For example, it was difficult for parish councils to produce byelaws to regulate lodging housing, with s 90 of the Act focusing primarily on the relationship between the LGB and urban districts.

These difficulties relating to the administrative capacity of rural areas under the Public Health Act 1875 can also be evidenced in the case law. In *Heap v The Rural Sanitary Authority of the Burnley Union* , for example, the plaintiff, Heap, sought to challenge whether byelaws created by the Burnley Union were an abuse of power in the context of s 44 and s 276 of the Public Health Act 1875.[98] The Burnley Union had gained permission from the LGB to introduce a byelaw related to the distance from a dwelling house at which swine could be kept, setting the distance at 50ft.[99] Heap sought to challenge whether this byelaw contradicted s 47 of the 1875 Act, which stated that byelaws relating to animals were to prevent livestock from being a nuisance and thus could not impose unreasonable restrictions, having to have regard 'to the state of things existing in country districts'.[100] Cockburn CJ, relying

[97] Note Chris Day 'The Law of The Board of Health'? Rhetoric, Failure and Public Health in the English Periphery, C. 1848–1875' (2023) 26(3) Family and Community History 218.

[98] (1884) 12 QBD 617, 617-618.

[99] ibid, 618.

[100] ibid, 619.

upon the judgment of Blackburn J in *Wanstead Local Board v. Wooster*[101] reminded the court of Blackburn's distinction between populous and rural places, despite the legislation itself in s 47 drawing no such distinction.[102] In doing so, Cockburn CJ stated that the capacity to make byelaws relating to animals under Act was to prevent 'nuisance' or injury to health, thus the circumstances of rural areas meant these issues were less of a concern than in populous places. He concluded by stating that the Burnley Union's byelaws were unreasonable in the context of the statute.[103]

I highlight this case because it illustrates the tensions that existed between the more formalised local government which was emerging in urban districts compared to the system of local governance which still dominated in rural areas. This created practical difficulties in applying legislation which was ambiguous about which administrative categories equated to a local government under the Act.[104] This was particularly important in rural areas where much of the legal identity of the locality was tied to the local governance structure which administered it.[105] The case is also important in illustrating how increased *statutisation* of local government powers

[101] (1874) 38 JP 21; note also Stuart Anderson 'judicial review' in William Cornish, Stuart Anderson, Ray Cocks, Michael Lobban, Patrick Polden, and Kieth Smith (eds), *The Oxford History of the Laws of England Volume XI: 1820-1914: English Legal System* (OUP 2010) 520-521.

[102] *Heap* (n98) 619.

[103] This was also considered in *Repton School Governors v Repton Rural DC* [1918] 5 WLUK 5 and *Kruse v Johnson* (1898) 2 QB 91.

[104] Public Health Act 1875, s 4 and s 6 defined rural districts, urban districts, Boroughs, Unions and Local authorities but ascribed quite different powers to these different bodies, despite where two statutory categories were seemingly similar within the Act's definition. It also left some forms of local governance body without clear categorisation under the defined headings, grouping them instead as local government districts.

[105] John Prest, *Liberty and Locality: Parliament Permissive Legislation, and Ratepyers' Democracies in the Nineteenth century* (OUP 1990) 167-168.

allowed the courts to consider questions of reasonableness in constructing statutory power.[106]

The obscurity of rural governance arrangements in rural areas became increasingly pronounced in the years following the 1875 Act. This was in part owed to the political tensions which surrounded more general electoral reform. As JA Chandler noted, Disraeli's Conservative government 1874-1880 were dependent upon the support of JPs, who had their parliamentary seats because of their role in rural governance structures.[107] From an electoral basis however, this system was strained following the Representation of the People Act 1867. It was similarly becoming difficult to justify the administrative position of the quarter session in rural areas, given the increased statutory formalisation of local governments in urban districts.[108] This was particularly true given that social provisions relating to the poor or health, were now specific statutory functions of the local government in urban areas.

In 1885 Jospeh Chamberlain (President of the Poor Law Board) recognised the need to statutorily reform rural local governance of elected municipalities, townships, and districts as the only administrative categories of local government.[109] This suggestion was supported by the President of the LGB Charles Ritchie, who

[106] *Galloway v Corporation of London* (1865) 34 Beav 203; *Webb* v *The Manchester Railway Company* (4 Myl & Cr 116).

[107] Disraeli commented in 1876 that he would do 'nothing in the way of improvement or simplification of local government' Chandler (n14) 98.

[108] HC Deb 19 March 1888, vol 323, col 1642.

[109] NM Harris, *Joseph Chamberlain* (Hutchinson 1900) 217.

wanted to increase the oversight of the LGB with respect to rural governance.[110] By 1888 these proposals were adopted in the first iteration of the County Council Bill,[111] which Ritchie proposed before Parliament in March 1888.[112] The legislation sought to restructure the system of local governance, establishing for the first time a nation-wide formalised system of local governments.[113] The passage of the Bill through Parliament was not without its challenges, with one commentator remarking how Ritchie 'lightened the ship by throwing overboard almost everything to which, when the Bill was first introduced, we took objection'.[114] Despite this, it was generally accepted that the Bill, notwithstanding its criticisms, provided 'a good start' for the process of local government reform, creating a framework through which the capacities of local bodies to administer could grow.[115]

The LGA 1888 thus restructured rural local governance, establishing the county councils, whose powers broadly mirrored those of the municipal boroughs under the LGA 1858 and the Public Health Act 1875.[116] Consequently, county councils replaced the Quarter Session and JPs in rural areas, with councils having powers to issue licences, engage in the legal process of plan-making, and engage in public

[110] Chandler (n14) 99.

[111] University of Birmingham Cadbury Research Library, JC3/1/88 (1st February 1888) letter between Ritchie and Neville Chamberlain.

[112] HC Deb 12 March 1888, vol 323, col 821.

[113] John Chapman (eds) 'Local Government Act 1888' (1888) 130(1) Westminster Review 265, 266.

[114] ibid, 265.

[115] HC Deb 17 April, vol 324, col 1332.

[116] LGA 1888, ss 10, 11, 18 and 23.

infrastructure.[117] Beyond this, the LGB was able, through statutory orders, to increase the administrative capacity of county and borough councils, giving them more powers to control the operations of parishes and rural unions.[118] The impacts of the LGA 1888 however were not limited to rural areas and the legislation further qualified the emerging system of local government in urban districts. In particular, part II of the Act provided for larger boroughs to transition into county boroughs, which would grant the borough, similar powers to that of a county council in rural areas.[119] This enabled larger and expanding districts to obtain greater administrative power from the LGB, giving the new county borough controls over other smaller local governments within its administrative boundary. Similarly, the Act also set out special provisions for London, establishing the metropolis as the county of London, with statutory powers to then administer the individual district councils within the county, independently of the LGB.[120]

Thus, the effects of the 1888 Act were two-fold. Practically, the Act restructured the systems of local governance which existed across England and Wales, creating a more formalised system of local government. Conceptually, the Act addressed the balance of administrative power between central government and the localities. It did this by re-framing the role of the LGB, particularly with respect to the county councils, giving the Board an increased advisory capacity whilst still limiting its ability to actually mandate local government activity. This was possible

[117] ibid, s 3.

[118] ibid, s 28.

[119] ibid, s 31.

[120] Ibid, ss 40-45; note JFB Firth and Edgar Simpson, *London Government under the Local Government Act 1888* (Knight and Co 1888).

as local governments became increasingly underpinned by what Janet Mclean described as the values of 'good rule', which can more simply be understood as the creation of democratic process and functions.[121] As John Morley, William Gladstone's biographer, commented in 1889 the devolution of administrative decisions to local governments enabled the people to determine what change was best in the context of their own communities.[122] Central oversight was however still maintained, with legislation prescribing the specific duties of local governments, with plan-making, health, and public infrastructure being a statutory obligations.

The case law too can be seen to uphold this distinction between local and central governance, with the cases of *Kruse v Johnson* ,[123] *Mantle v Jordan* [124] *Burnett v Berry*,[125] and *Strickland v Hayes* ,[126] seeing the court adopt the language of 'reasonableness' to determine whether local government byelaws reflected the broader powers ascribed to a local government under the 1888 Act. In each of these cases, the courts relied on the specific prescriptive language of the central legislation, to then determine the extent to which local byelaws were upholding the 'good rule' intended for by the 1888 Act. In each of these instances, the nature of the local government's administrative capacity was shaped and defined by both the central oversight of the LGB and through how the courts interpretated the specific statutory powers of local governments under the LGA 1888.

[121] Mclean (n25) 105.

[122] DA Hamer, *John Morley* (OUP 1968) 308-309.

[123] [1898] QB 91.

[124] [1897] 1 QB 248.

[125] [1896] 1 QB 641.

[126] [1896] 1 QB 290.

The LGA 1894 built upon this position, integrating into the local government legal framework the provisions which Ritchie had 'thrown overboard' in the debating of the 1888 Act. In doing so, the 1894 Act provided the final 'revolutionary' change to local governance, completing the creation of a formalised system of local government.[127] The Act, colloquially dubbed 'the Parish Council Act', transformed larger parishes, into rural districts, granting them an administrative capacity similar to that of urban districts.[128] This transformation brought with it new obligations for these reformed parishes, in particular duties with respect to sanitation and health.[129] Beyond this, the Act further formalised parish proceedings by providing a statutory framework through which the administrative functions within parishes would be conducted.[130] This moved away from the 'patchwork' of customs which had previously shaped parish governance.

Thus, at the close of the 19th century, the 'patchwork' of local governance systems which had previously existed, had been replaced by a singular system of local government. In rural areas local government was administered by the county councils, with rural districts sitting beneath the county councils. In urban areas county boroughs existed with corporations or urban districts operating alongside. This structure reflected a changed attitude to both public administration and administrative capacity. Compared with prior to 1832, the central government by

[127] Portland Akerman and Percy Ford, *Parish Councils: A Handbook to the Local Government Act 1894* (Routledge and Sons limited 1916) 5.

[128] Edward Jenks, *An Outline of English Local Government* (Methuan & Co 1894) 25.

[129] LGA 1894, s 8.

[130] ibid, s 31.

1900 played a more active role in public administration, legislating for health, sanitation, housing, and public infrastructure. Conversely, the localities who had previously been optionally responsible for such matters, had new statutory powers to administer these centralised concerns. Underpinning these powers was the constitutional value of self-determination, with local governments having significant flexibility to experiment in balancing different local concerns, using their local expertise.[131] This administrative capacity was then expanded in the early 20th century, notably for purposes here, to include an increased ability to administer land. In the broader context of this thesis, it was the evolution of this administrative capacity which ultimately became important in shaping the role of local governments with respect to national parks, as set out in ss 8-s11 of the NPACA 1949.

2.3 Local government and planning

Having now outlined how a formalised system of local government evolved through the early LGAs, it is important to think specifically about how these bodies acquired the administrative capacity to administer land as later reflected in s 11 of the NPACA 1949. Consequently, to understand the legal capacity of local governments to administer land, it is important to consider how the subsequent Local Government Acts, alongside the planning legislation explored in the previous chapter, not only provide for land administration through the legal activities of planning law, but also determined the capacity of local governments to oversee the tasks involved in that administration.

[131] Prest (n81) 219-220.

As already illustrated, in considering the Public Health Act 1848 there is a strong correlation between the growth of planning law as the legal activity of administering land, and the capacity of local authorities to carry out and oversee that administration. Whilst this relationship may seem obvious, what is interesting is how the LGAs typically *preceded* planning legislation. This meant that the legal capacity to administer was first increased under an LGA, and then specifically applied to planning under a planning Act. Although this pattern was not unique to planning law, it highlights the symbiotic relationship between the growth of planning law as the legal activity of administering land and the changing legal capacity of local governments to oversee the task of administration.

This symbiotic relationship can be seen in considering the LGAs 1888 and 1894 which established the county councils, alongside rural and urban districts, granting most localities the ability to use statutory administrative provisions. Following on from this, the Housing of the Working Classes Act 1890, and the Housing and Town Planning Acts of 1909 and 1918, further qualified the administrative capacity of local governments in urban areas, explaining how their existent legal capacity under the LGA 1894, could be applied in the context of housing and planning. In particular, the 1909 Act strengthened the role of local government to provide housing, by authorising county and borough councils, under s 12, to be involved in the provision of working-class dwellings.[132] This expansion in power thus applied the existing capacity of county and borough councils to regulate urban health to the specific function of housing reform. This

[132] Note Chas Leach, *The Housing, Town Planning, & c. Act 1909* (The Local Government Press Company 1911) 5.

can be further evidenced through a closer examination of the provisions within the Housing and Town Planning Act 1909, considering how they relate to the LGAs.

Under s 54 of the 1909 Act local governments were granted the power to implement planning schemes, enabling them to explicitly consider the spatial organisation of their locality.[133] This power however fell within the more general legal capacity of the local government to administer the public infrastructure of the district, as set out in ss 25-27 of the LGA 1894. Moreover, just as local governments fell within the supervisory oversight of the LGB, as evidenced throughout the LGA 1888, s 54(2) of the 1909 Act required that local governments gained approval from the LGB before enacting a planning scheme. This process for implementing planning schemes was inefficient. As the statistics show, of the 172 schemes which were submitted to the LGB, only 13 were approved and successfully adopted, meaning that LGB approval substantially slowed the process of planning. [134] A more efficient way to effectuate the planning purposes of the 1909 Act would have been to empower local governments to approve their own schemes, yet this would have been an expansion of their powers beyond those provided for in the LGA 1888. Thus, the s 54(2) requirement for approval from the LGB was not a clause which went to the purpose of the 1909 Act. Instead, it reflected how the legal capacity of local governments to administer public infrastructure was defined by the supervisory role of the LGB, as under the Local Government Acts.

[133] Section 55 set out that town planning schemes could include provisions for the execution of any work which a local authority was statutorily empowered to undertake.

[134] Gordon Cherry, *Cities and Plans: The Mapping of Urban Britain in the Nineteenth and Twentieth Centuries* (Edward Arnold 1988) 72.

This was also apparent in the case law, with the courts emphasising the administrative nature of the supervisory role of the LGB. In *R v Local Government Board ex Parte Arlidge*,[135] for example, a landlord sought to challenge decision of the LGB to dismiss his appeal with respect to a closure order made by Hampstead County Borough under s 17 of the 1909 Act. In particular, the landlord argued that the LGB had a judicial relationship to the local government and was thus bound by the principles of natural justice. Whilst for purposes here, I am not interested in whether the LGB should have been regarded as judicial or administrative, what is interesting in the case is how the Court rationalised the relationship between the LGB and local government bodies.[136]

Viscount Haldane LC highlighted the 'stringent powers of inspection' which were granted to the LGB with respect to closure orders under the 1909 Act, suggesting such powers to be an executive administrative function alongside those of the local government to make orders.[137] Similarly, Lord Shaw, turning to the statutory provisions of the Local Government Board Act 1871, emphasised how the capacity of the local government to make plans under the 1909 Act was an administrative function which fell under the administrative jurisdiction of the LGB.[138] In both remarks the judges sought to emphasise how the administrative capacity of the local government was not separate to the LGB, but dependent upon it. The comment which summarises this best is that of the appellants counsel Sir John Simon, A-G, and Sir Stanley Buckmaster S-G, who expressed -

[135] [1915] AC 120 (HL).

[136] Note also *Ryall v Hart* [1923] KB 464.

[137] ibid, 131-132.

[138] ibid, 138.

> 'The holding of local inquiries by the Local Government Board is directed by many statutes, and it has always been the practice of the Board to treat the reports of their inspectors on such inquiries as confidential documents for their own use. This Act contains nothing to alter that practice.'[139]

This was a sentiment reflected in much of the early case law, where decisions by administrative boards rarely resulted in judicial orders.[140] *Arlidge* thus emphasised that the 1909 Act determined the application, not the extent of, of local government power and how it related to the central government in planning law. Although the Housing and Town Planning Act 1919 gave local government's further control over planning by removing the requirement that the LGB had to grant permission to a local government to prepare a scheme,[141] the powers of local governments with respect to planning were still subject to centralised oversight, with s 46 of the 1919 Act requiring that all schemes were submitted to the LGB within a three-year window from the enactment of the legislation. This preserved the oversight of the LGB as set out in the LGA 1888, but better applied it to ensure planning was effectively carried out.

This need for explicit oversight continued under the Town Planning Act 1925, with the Ministry of Health assuming the oversight role of the LGB with respect to planning schemes. As discussed in previous chapter, the 1925 Act was the first

[139] ibid, 122.

[140] Bellamy (n90) 114-123.

[141] Housing, Town Planning etc Act 1919, s 42.

independent legislative scheme for planning, detaching planning from other urban administrative considerations like housing. Consequently, the statutory expansion of the legal activity of planning, meant that the existing legal capacity of local governments to engage in planning (under the Local Government Acts) was stretched. This led to two fundamental issues as to how local governments were able to apply planning law under the 1925 Act.

The first of these was a practical concern over local government finances. With the issues of housing and planning being separated under the 1925 Act, local governments increasingly struggled to balance internal personnel between the two tasks. This was in part because the 1925 Act did not explicitly provide the procedures for effective planning, nor did the Act provide any financial structures or support. Consequently, local governments prioritised the production housing schemes, utilising the financial subsidies under ss 81-90 of the Housing Act 1925.[142] A second, more conceptual issue, followed on from this; local governments were legally better equipped to administer housing as opposed to land more generally. In urban areas much of the administrative capacity of local governments had historically been underpinned by instances of specific statutory empowerment, aimed at resolving singular social issues. The scope of planning law under s 1 of the Town Planning Act 1925 was broader than this. Local government itself thus needed to be reformed and further empowered to proactively manage localities to engage in this form of planning activity. Furthermore, rural local governments were still excluded from planning legislation, with county councils under the LGA

[142] Gordon Cherry, *The Evolution of British Town Planning A History of Town Planning in the United Kingdom during the 20th century and of the Royal Town Planning Institute 1914-1974* (Leonard Hill Books 1974) 86.

1888 having no increased statutory power to engage in planning under the 1925 Act.

Local governments were thus ill-equipped to oversee the tasks of administration which were statutorily provided for. This was particularly so because the general capacity of local governments had not changed since the LGA 1894, despite their number of administrative tasks increasingly notably. Thus, where local governments lacked the capacity to administer, no amount of legal or socio-political pressure could overcome that lack of legal ability. It was this tension which catalysed further local government reform under the LGAs 1929 and 1933.

The LGA 1929 explicitly acknowledged the link between administrative capacity and effective public administration, with contemporaries understanding the effects of the Act as increasing the 'organising ability' of local government.[143] Consequently, whilst the structure of local government established under the previous LGAs remained broadly unchanged, the administrative functions of local government were expanded, creating further statutory obligations for local government administration. In particular, the 1929 Act removed any final areas of informality from the local governance system, replacing any existing local boards, such as for education and poor law, with formalised powers vested in statutory local government. This can be seen in s 1 which transferred the functions of the poor law authorities to county councils and county boroughs, or in s 21 which made county and borough councils responsible for local registers. This formalisation of local government was not necessarily popular, with

[143] IG Gibbon 'Local Government Act 1929: Administrative Measures' (1931) 9(2) Public Administration 120, 120.

commentators and politicians alike, criticising the centralising nature of the 1929 Act. This was because the Act increased the number of powers vested in the larger county boroughs and county councils, instead of the smaller districts.[144] This enabled local governments to act in a proactive not reactive way. Indeed, the socio-economic circumstances of the post-war period, particularly the economic and budgetary concerns which faced government at all levels, were in part attributable for the perceived need for pro-active local governance.[145]

This can be illustrated in considering s 4 of the 1929 Act, which created a statutory duty that local governments created an administrative scheme, identifying key aspects of their administrative agenda. This obligated local governments to consider which administrative tasks were most essential in their locality. Although, as Sidney Webb acknowledged, these schemes did not empower a local government to bind itself,[146] what is interesting is the incorporation of proactive administrative planning into the statutory duties of local government. This change shifted the emphasis of the administrative capacity of local governments, allowing them to forward-plan their localities not just respond to singular instances of pressure which the legislation catered for.

As with the LGA 1894 and subsequent planning Acts in 1909 and 1919, the 1929 Act created a broader basis for administration which could then be applied specifically to the context of land administration through planning law. This was

[144] See HC Deb 27 November 1928, vol 223, col 271-276; Sidney Webb, *The Local Government Act 1929 – and how to make the best of it* (The Fabian Society 1929).

[145] Loughlin (n4) 53; TNA/HLG 8/99 (7th December) 'County Council Association minutes'

[146] ibid, 4-5.

because as local governments were empowered to engage in proactive administrative planning, the planning of land was also brought further within local government capacity. As was noted in the previous chapter, the Town and Country Planning Act 1932 (TCPA) was the first planning Act to extend the powers of planning to rural governance bodies, bringing rural areas into the legal scope of planning.[147] This extension of planning was only possible because of the local government reforms in the LGA 1929 which preceded the 1932 Act. This can be best understood by considering the statutory language of the 1929 and 1932 Acts in tandem. This is particularly important given that the two Acts were initially part of the same scheme of reforms before the change of government delayed the enactment of the TCPA 1932.[148]

As already noted, the LGA 1929 emphasised the role of the larger local governance structures, in particular the county council and county borough. In doing so, the Act subsumed many of the smaller administrative units, which by this time predominantly existed in rural areas, into these larger administrative bodies.[149]

This increased the capacity to administer rural areas in two ways; first, the county and borough councils had been given greater statutory duties when compared to the smaller rural districts or parishes, meaning many of the administrative activities of these smaller units were slowly being subsumed by the county councils. By means of an example, s 42 the 1929 Act, allowed county councils to

[147] TCPA 1932, s 1.

[148] Other legislation in this scheme includes the Housing Act 1931, Hansard HC 7 April 1930, vol 237, col 1804, and the Agricultural Land Utilisation Act 1930, Hansard HC 18 November 1930, vol 245, col 333.

[149] Sections 41 and 42 allowed smaller administrative units to delegate their town planning powers to the county or borough council in which they existed.

constitute a 'responsible authority' for the purposes of producing a planning scheme. This in turn extended the administrative oversight of county councils to engage in the legal processes of planning to produce the scheme. Consequently, the county councils also sought to assume responsibility for any planning schemes which had already been prepared by smaller districts prior to the 1929 Act, writing to the Treasury Solicitor to confirm the legal possibility of those arrangements.[150] The county councils believed that following on from the 1929 Act, they were legally best placed to act as the planning authority for multiple smaller administrative districts.

This leads to the second change, county and borough councils had more resources which could be used for specific types of administration, when compared to the smaller governance bodies. This was both practically from a financing perspective but also in the context of the legal ability of these larger bodies to plan for multiple districts at once, allowing for a greater degree of coordination in managing vast rural areas.

These two changes are important in considered how the 1932 Act extended the legal scope of planning to rural areas. Section 2 of the 1932 Act, defined what constituted an authority for the purposes of creating a planning scheme, extending what was meant by authorities to include local government structures excluded from the previous planning legislation, namely rural districts and county councils. Furthermore s 2(2), allowed smaller districts to relinquish their statutory planning powers under the 1932 Act, to an associated county council or county borough.

[150] TNA/HLG 52/594 (21st December 1932) 'Town and Country Planning Act, 1932'.

This made rural planning possible, because it empowered county councils to engage in both town planning and highway planning, extending planning to any land that fell within any form of administrative boundary. Moreover, the county councils had the administrative power to oversee the planning of all the land within their boundary, being able to employ planning officers under s 51 of the 1932 Act. Second to this, the transition towards proactive administration, under the 1929 Act, was further applied to the legal activity of planning, with planning schemes under s 1 of the TCPA 1932 encompassing more forms of land control than planning schemes in the previous planning legislation. In particular, as noted in the previous chapter, the new planning schemes were applicable to all forms of land use not just land designated for development, allowing local governments to use their proactive powers under the LGA 1929 to forward plan land use within their locality. This prioritised the futurity of land administration, making it not just about how land was being used in a particular moment, but about the legal possibility of land uses in the future.

This marked a shift in how local governments could administer land, with the legal activity of planning reflecting the existence of local governments as formalised bodies with statutory duties to conduct local land administration. Parliamentary debates however reveal criticisms of the Act, with one MP suggesting the expansion of local authority powers would create a 'Frankenstein' which [could] never [be] control[led]', especially given that local authorities were regarded as having sufficient powers for planning in the housing context.[151] Further to this, it

[151] HC Deb 2 February 1932, vol 261, col 56.

was argued that these new reforms would continue to hamper construction by giving local authorities more choice about whether or not to build housing.[152] These suggestions overlook how the TCPA 1932 reconceptualised planning law due to the expanded administrative capacity of local governments, providing the first legislative template for public land administration. The NPACA 1949 used this template in legally framing the land administration of national parks, as evidenced in s 11.

2.4 The legal capacity of local government in the NPACA 1949

As noted in Chapter Two, a defining feature of English and Welsh national parks, under the NPACA 1949, was this sense that national parks were not national at all, instead existing as facets of local government land administration.[153] The final part of this analysis of the changing role of local governments then is to consider how the legal expansion of local government capacity led to the legal framing of national parks as local government activity. This illustrates that the NPACA 1949 vested much of the administration of national parks in local authorities because they were the only administrative body which had the legal ability to oversee the tasks involved in administering national parks.

The idea that local government would be the predominant administrator of national parks was first proposed in part V of the Hobhouse Report in 1947. Where both the Addison Report and the Dower Report emphasised the necessity of creating a centralised commission which would administer national parks in

[152] ibid, col 112.

[153] Friends of the Lake District published a pamphlet in 1948 titled 'National Parks or Local Authority Parks?' TNA/HLG 90/174 (August 1948) Communication with the Friends of the Lake District.

collaboration with local government structures,[154] the Hobhouse Report instead took a different approach. As already noted in Chapter Two, the Hobhouse Report proposed that the 'local organisation' of national parks would be as central to their administration, as any national organising body.[155] The Report thus proposed that county and borough councils, as local governments capable of planning under s 2 of the 1932 Act, would have a primary role in the administration of national parks. This role would be expressed through an extension of their planning statutory duties, obliging authorities to produce planning schemes to give effect to the purposes of national parks.[156] Alongside this, it was intended that local governments would be empowered explicitly to determine all forms of land use within a national park, under the new planning reform (what became TCPA 1947).[157] The role envisaged for local governments under the Hobhouse Report attracted criticism, with the SCNP writing to the Ministry of Town and Country Planning (MTCP), warning that the proposals of the Report over-complicated the administration of land within proposed national parks.[158] Yet when the suggestions of the Hobhouse Report are considered against the context of local government administration, it becomes apparent why the Reports could not legally envisage an alternate mechanism for national park administration that would fit within English constitutional arrangements.[159]

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[140] John Dower, *National parks: Preliminary Report to the Minister of Town and Country Planning* (Cmd 6628, 1945) 13; The National Park Committee, *The Report of the National Park Committee* (Cmd 3851, 1931) [Addison Report] 42.

[155] Ministry of Town and Country Planning, *Report of the National parks Committee (England and Wales)* (Cmd 7121, 1947) [Hobhouse Report] 15.

[156] ibid, 16.

[157] Ibid.

[158] TNA/HLG 90/174 (13th November 1947) 'National Parks'

[159] Hobhouse Report (n155) 1-2.

By 1947, local authorities had the sole statutory responsibility of effectuating the legal activity of planning, with this responsibility being substantially expanded by the TCPA 1947. Alternately put, local governments were the only administrative bodies which had both direct experience of, and the statutory power to, administer land. By comparison, the central government whose administrative capacity is explored later in this chapter, had instead been coordinating the administration of land indirectly by creating statutory duties for local governments. Consequently, it would run legally counter to this existing framework of land use administration, for a centralised body to be given the legal power to administer national parks, which were ultimately spaces within local government administrative boundaries. This would be problematic because it would create two competing regulatory systems for administering the same land.

Second to this, as highlighted in the previous chapter, national parks were created as a form of planning activity, making them an administrative overlay onto existing legal uses of land.[160] Given local governments were the only administrative body empowered to engage in planning, it would be legally difficult for a central body to acquire part of the statutory power that was already granted to local governments, without creating a series of *vires* challenges between the two bodies.[161] Thus, the Hobhouse Report recommended that national parks legislation 'make full use of local experience and local interest, to evolve a local

[160] Hobhouse Report (n155) 18.

[161] Martin Loughlin considers the role of 'statutisation' in demarcating local and national government duties and the relationship of these to the emerging *ultra vires* doctrine. Loughlin (n4) 45.

planning organisation which will fit into the normal framework of town and country planning'.[162]

This proposal was supported by the MTCP, who too believed that local authorities were the only public body with the legal capacity to administer national parks, suggesting it would not be 'practicable to confer on the Commission instead of the local authorities, either all the planning functions (both existing and proposed) in national parks or a limited selection of those functions.'[163] This was particularly true, given the increased administrative role for local governments under the TCPA 1947. As noted in the previous chapter, the TCPA 1947 further developed the 'procedural machinery' of planning law, providing local governments with absolute control over land use through a permissive limitation on development under s 12 and the power to create development plans under s 5. In doing so, the Act expanded the administrative capacity of local governments, giving them wide powers to control land use within their administrative boundaries, for example s 14 of the TCPA 1947 required developers obtained local authority permission to begin construction. These powers, whilst supported through centralised finances, were entirely vested in the local authorities, reimagining how local authorities were able to engage with land.[164] Thus, whilst the 1947 Act did increase the central oversight of planning, with the MTCP having a pronounced role in shaping national planning policy under s 7, the ultimate legal duty to plan was vested in local governments.

[162] Hobhouse Report (n155) 18.

[163]HLG 90 (n158) (11th June 1948) 'Notes for the Chancellor's talk with Mr Silkin'.

[164] TNA/T227/1204 (August 1951) 'National Parks and Access to the Countryside Act 1949 Grants to local authorities'.

Consequently, in thinking about national parks, the NPACA 1949 did not create a new administrative scheme for national parks as was the case with other national parks in other jurisdictions.[165] Instead, the NPACA 1949 ensured that local governments could effectively utilise their existing statutory powers (under the LGAs and the TCPA 1947), to manage national parks effectively.[166]

This can be evidenced in considering the statutory provisions within the NPACA 1949. Section 11(1) empowered all local planning authorities, which had been defined in s 4 of the TCPA 1947 as the 'council for any county or county borough', with the power to 'to take all such action as appears to them expedient' to accomplish the purposes of national parks as set out in s 5. This wording of s 11 thus does not give planning authorities new powers in relation to national parks, instead, ascribing a more general capacity to planning authorities to achieve s 5 through the application of existing powers. This is further qualified in s 11(3) which states that this application of planning powers is specific to the legal creation of national parks. The effect of this being that s 11 applies the existing ability of local planning authorities to administer land to the specific context of national parks.

In considering the drafting notes preceding this clause, it seems the intention was to ensure first that local authorities prioritised their functions of administering national parks as something separate to their general oversight of land use, and second, to ensure that the management of national parks by local planning

[165] For example, The National Park Service Organic Act 1916 (USA); The National Parks Act 1930 (Canada); The National Park Act 1914 (Switzerland).

[166] TNA/T 227/43 (July 1948) 'Amenities Bill: Instructions for Parliamentary Counsel' 6.

authorities was suitably independent of their capacity to administer, meaning it could not be reduced by statutory reform outside of the NPACA 1949. Instead, only direct reform to the Act itself could reduce this capacity.[167] This is particularly important given that under s 8 of the Act, much of the legal procedure associated with the creation and management of national parks exists in planning law, it was thus important that the more general ability of the authority to administer the national park, was tied to the purposes of s 5 itself, not just to their broader planning powers.

This structure for national park administration under s 11 of the NPACA 1949 was also constitutionally justifiable through the understanding of local governments as being grounded within communities, underpinned by the constitutional principle of self-determination. J Prest suggested that central to the system of local government administration was the constant gradual empowerment of local governments through the 19th and early 20th centuries, arguing that local governments were statutorily given increased power to engage in social infrastructure. This allowed local authorities to prioritise and determine what was best for their specific localities.[168] Loughlin developed upon this assertion, suggesting that these powers were interlaid with a capacity at the local level to create byelaws, and at the national level to oversee how local government powers were being exercised, all of which was minded towards an emerging doctrine centred on preventing abuses of power.[169]

[167] TNA/CAB 124/445 (11th March 1948) 'National Parks and Access to the Countryside Bill Draft financial notes and memorandum'.

[168] Prest (n81) 219-220.

[169] Loughlin (n4) 66.

I highlight this because it is important in understanding the conceptual legal ideas which were underpinning the central role of local government in the legal creation of national parks. National parks, through planning law were an administrative overlay, by this I mean that the regulatory structure of national parks had to exist alongside the other mechanisms of administration which were occurring in the same legal and physical spaces. These had evolved over the previous century and were only legally possible due to the ability of local government to oversee administrative activity. In structuring national parks as part of the existing capacity of local governments to administer land use, the legislation empowered local governments to balance the different demands within national parks guided by the statutory purposes in s 5, alongside the oversight of the Commission. This approach allowed for national parks to be administered in the context of their own locality.

3. Regional Governance and Collaborative Administration

The first part of this chapter has explored the legal evolution of local government, considering how, through the LGAs and planning law, local governments developed the administrative capacity to publicly administer land. It was this capacity which later came to frame the role of local authorities as administrators of national parks under s 11 the NPACA 1949. Yet s 11 did not set out the specific structures for national park management. Instead, these were set out in s 8 of the Act. Section 8(2) set out that where a national park fell within the administrative boundary of multiple local authorities, those authorities should form a joint planning board (under schedule I, part I of the TCPA 1947) for the purposes of administering the park. This was expanded upon in s 8(5)-(6) which emphasised that the joint board would exist purely

in the context of the national park and had to fairly represent the different local authorities within the national park.

In framing national park administration in this way, s 8 acknowledged a disadvantage of the increased formalisation of local governments, the increased detachment of these public bodies from the localities they represented, with administrative boundaries being unable to capture the reality of physical spaces. An important feature of historic local government was the connection between the administrative body and the locality which it administered, reflecting the constitutional principle of self-determination. Yet the formalisation of local government had artificially overlayed onto the previously existing 'patchwork' of localities, distinct administrative boundaries that did not necessarily mirror the physical spaces beneath them. Consequently, local government boundaries were imperfect, with it being impossible to neatly carve the country up into non-overlapping local entities. Thus, just as local governments were granted the powers to independently administer, local governments too needed the ability to administer collaboratively. This became an important aspect of maintaining the values of local knowledge in local governance, despite the increased formalisation of administrative boundaries.[170]

This transition towards regional governance was gradual, only possible as local governments became increasingly formalised. Yet this process reimagined how administrative bodies interacted with land and space, allowing for the governance of places to be determined by their physical features, as well as the imposed administrative boundaries. The inclusion of collaborative planning reflected an

[170] The Local Government (Boundaries) Act 1887 created boundaries commissioners for reviewing and establishing the boundaries between different local governments.

extension of local government powers beyond those discussed in the first part of this chapter. Thus, to understand how the NPACA 1949 was able to frame the administration of national parks in this way, it is important to consider how regional governance became a fundamental activity in local government.[171]

3.1 The emergence of joint governance

FW Maitland suggested that historically an intrinsic relationship was identifiable between the city or borough and the broader county, suggesting 'the shire maintains the burh; the burh defends the shire.'[172] Whilst, it is true that systems of regional governance are perhaps able to trace their lineage back to this historic sense of town and county governance, it would be anachronistic to understand joint governance in this context. Instead, joint governance reflects the formalisation of local government through the LGAs. This is because as local governments became increasingly formalised, both with respect to their powers and their jurisdiction, the issue of interpolating administrative boundaries onto physical spaces became increasingly pronounced. Beyond this, ideas of formalisation moved local government, as a concept, further from its previous relationship to local areas, with local governance often having a proprietary or customary element that tied the local governance to a specific place. Thus, as local governments were increasingly formalised, this explicit legal connection to place was eroded. This meant there was a greater need for more formalised mechanisms through which local governments could collaborate to administer physical spaces.

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[171] Loughlin (n4) 69.

[172] To support this claim FW Maitland drew on the examples of Oxford and Oxfordshire, Stafford and Staffordshire, and Bedford and Bedfordshire; Maitland (n27) 37.

The first sense that collaborative regional governance might, in some areas, be the most effective mechanism for administration emerged in the Metropolis provisions of the LGA 1888. Section 40 of the Act established that portions of the counties of Kent, Middlesex, and Surrey which fell within the perceived boundaries of London would be severed from their historic counties and instead merged to form the new county of London.[173] Section 40(3) stated that the county of the city of London would continue to exist separately to this new county but that, provided the 'mayor, commonalty, and citizens' consented, aspects of the jurisdiction of the City County could be shared or wholly transferred to the new county of London. This empowered the City County and the County of London to administer finances, byelaws, and the former jurisdiction of the quarter session collaboratively. This transition to administer London in a way which reflected its socio-geographical shape, not the administrative boundaries therein, reflected a growing sense that governance of the metropolis along traditional county lines, was leading to the ineffective administration of London as a physical place.[174]

The 1888 Act also provided for some collaboration between grouped parish councils and the broader county council whose boundary encompassed these smaller administrative units. This relationship was expanded upon under the LGA 1894 which formalised the relationship between parishes, groups of parishes, and the county council, detailing the administrative role of each in relation to the others. Section 36, for example, stated that all parishes should fall wholly within

[173] The perceived boundaries of London were those defined under Metropolis Local Management Act 1855, which defined London as the City itself along with a list of Parishes from Kent Middlesex, and Surrey. See Firth and Simpson (n120) 3.

[174] Multiple private members bills had been introduced over the previous decades to encourage a more homogenous administration of London, ibid, 3; HC Deb 19 March 1888, vol 323, col 1662-1664.

the administrative district of a county council or borough, with parishes that were currently split between county councils being assigned singularly to the jurisdiction of one county. Where this was not possible due to other administrative boundaries, namely poor law boards, the 1894 Act developed on the provisions of s 57 of the LGA 1888, to enable county councils to form joint committees for the administration of parishes that could not be assigned into one county council. Similarly, under s 38 where parish councils were grouped for ecclesiastical management, parish councils in different counties were to be administered through joint committees.

This transition towards using joint committee governance to circumnavigate the difficulties in drawing boundaries became important as the administrative capacity of local governments was expanded to include the public administration of land. Both the 1888 and 1894 Acts thus provided templates through which collaborative governance could take place. This encouraged local authorities to experiment with regional governance. This was particularly pertinent in planning law, where local governments sought to coordinate different aspects of spatial organisation in different administrative boundaries which existed over singular geographic regions. One example of this can be seen in Greater Manchester. In 1920, the Manchester Corporation hosted a conference of the 76 urban districts and county boroughs which existed in a fifty-mile radius of the geographical space of Manchester city. [175] The intention was that the conference would facilitate the creation of a collective planning scheme for the area, enabling highways and

[175] Manchester and District Joint Town Planning Advisory Committee, *Report upon the Regional Scheme* (Blacklock & Co limited 1926). 12-20.

housing to be coordinated across the region.[176] The lack of formalised statutory provisions to engage in regional planning however meant the planning schemes produced were never formally recognised because the local governments lacked the legal ability to collaboratively plan under the 1919 Planning Act, making the plans created not legally enforceable.[177] Thus statutory change was needed to extend the administrative capacity of local authorities to facilitate joint or regional oversight, particularly for land dependent aspects of administration, like planning.

3.2 Joint committees and the Town and Country Planning Acts

A difficulty which emerged under the early Town Planning Acts was that the administrative capacity of local authorities to plan was often tied to the administrative boundaries which determined their jurisdiction. This meant that land administration under the 1909 and 1919 Acts was tied more closely to administrative boundaries than it was to geographical spaces. This represented a shift when compared to the earlier systems of local governance which were closely linked to their respective localities. This created issues for planning because authorities lacked the administrative capacity to use planning powers in the context of physical spaces. For example, s 1 of the Town Planning Act 1925 empowered local authorities to include amenities within planning schemes. Often however natural amenities were situated in rural areas which fell outside of the administrative boundaries of the local authority. Consequently, even where an amenity was culturally considered as part of a locality, the local authority, due to

[176] ibid, 20-21.

[177] Cherry, *Evolution of Planning* (n142) 88.

its administrative boundary, lacked the capacity to incorporate the amenity into a planning scheme.

One example of this can be seen in Hastings, where Hastings County Borough proposed a development scheme which included the protection of the neighbouring coastline from development.[178] The coastline was regarded as falling outside of the administrative boundary of the County Borough, making any attempt to include it within a development plan an abuse of power. This was not because the protection of the amenity itself was legally impossible, (s 1 of the 1925 Act explicitly provided for the planning of amenities) but because the coast fell beyond the Borough's administrative jurisdiction. The development scheme was rejected by the Ministry of Health, who suggested the proposal went beyond the powers of the Borough, with parts of the coastline falling within the administrative boundary of East Sussex County Council.[179] Given no development had been proposed for the coastline, meaning Hastings County Borough could not use their powers under s 1 of the Planning Act 1925 to plan the coastline as an amenity.

The existence of administrative boundaries created further issues for the administration of land through planning law, particularly where the land concerned fell within a no-longer existent rural district or parish council. The nature of industrial growth had allowed multiple towns to emerge over large geographic regions, yet local authority planning powers under the 1925 Act were limited to urban areas alone. This created administrative issues for planning urban

[178] HC Deb 22 December 1925, vol 189, cols 2187-2188.

[179] ibid.

spaces which were flanked by countryside because the local authority did not have the administrative capacity to incorporate the bordering countryside into their planning schemes.[180] A further complexity within this issue was where rural areas fell between two local authorities, as could be seen in the Hastings case. This meant that collaboration between local governments would be necessary to plan the rural area. This was a particular problem in towns which had emerged rapidly due to industrial expansion because quasi-urban pockets surrounded by countryside, did not have clear boundaries between them.[181]

The LGA 1929 overcame some of these difficulties, with part III extending the power of the county council with respect to town planning. Section 40 of the Act enabled a county council to act jointly with another local authority in preparing a planning scheme under the Town Planning Act 1925. This collaborative endeavour or 'joint committee' existed within the context of ss 57-58 of the Local Government Act 1894 but would be 'joint' purely on matters of planning. This enabled county councils, who alone lacked the administrative ability to plan, to engage in planning by virtue of their relationship with an urban district.[182] Furthermore, s 41 allowed the Minister to mandate that a county council and district form a joint committee where a collaborative approach would be in the best interests of an area. These reforms overcame some of the difficulties experienced by local governments in effectuating planning schemes across quasi-urban spaces because collaboration

[180] See Manchester Report (n175) 22-23.

[181] ibid, 19.

[182] TNA/HLG 71/267 (undated) 'Draft Circular to all local authorities in England and Wales', 3.

allowed rural districts to be brought into town planning schemes in conjunction with their neighbouring urban districts.[183]

One fundamental problem however continued to exist; the legislation did not grant local authorities' the power to carry out regional planning. Thus, whilst different local governments could collaborate on matters of planning, it was not legally possible for them to consider the landscape of the region which encompassed them and plan that in a holistic way. This was particularly problematic in places where large stretches of 'open country' existed because the land did not fall within a specific administrative boundary. This issue, along with the explicit incorporation of the LGA 1929 into the planning legal framework encouraged further reforms to planning legislation to enable regional planning through collaborative governance.

It is against this backdrop that the 1932 Act transformed how local governments publicly administered land, giving them the power to engage in regional planning. Section 3 of the TCPA 1932 allowed for the creation of joint committees between two or more local authorities of any nature, enabling them to prepare a collaborative planning scheme which covered 'open country', rural areas, and urban districts. Beyond this, joint committees had the power to delegate and levy different parts of the scheme in proportion to the different expertise and resources that different authorities had.[184] This had the effect of encouraging more authorities

[183] Ibid, 4.

[184] There was discussion in the drafting of the Bill about whether joint committees could be formed with non-local government bodies. Early drafts of s 25(1), for example, allowed the Office of Works to be incorporated into a joint committee where Crown land was likely to be included in a planning scheme. TNA 27/737 (10th February 1931) A letter from Stuart King, Treasury Solicitor, sent during the drafting of the 1932 Act.

to enter into joint schemes due to the reduced financial risk in doing so, this was particularly the case for smaller districts who were collaborating with county councils or county boroughs.[185] Furthermore, ss 6-9 of the TCPA 1932 enabled the creation of regional schemes, which empowered local authorities to plan collectively both the urban and rural districts within a particular geographic area. Not only did this re-envisage the legal process of spatial organisation, but it also facilitated the administration of land in the context of its own physical features, not the administrative boundaries imposed therein. It was this approach to the administration of land, as facilitated through collaborative planning, which came to frame the administration of national parks under s 8 the NPACA 1949.

This relationship between the ability to create joint committees under s 3 of the 1932 Act and the collective administration of national parks under s 8(2)-(3) of the NPACA 1949, can be illustrated in considering the joint planning in areas that became national parks. Prior to the 1932 Act, what became the Peak District existed across twenty-five different administrative boundaries, with different local governments having different administrative capacities to engage in planning. Following on from the 1932 Act however, the administrative units formed an advisory joint committee, under s 3 of the TCPA 1932, to coordinate planning in the area. The committee balanced the preservation of the Peaks physical landscape with planning the urban towns which bordered it.[186] This committee worked collaboratively, utilising resources from all the authorities to create planning schemes for the whole area. This homogenous approach to land administration led

[185] John Sheail, *Nature in Trust* (Blackie and Son Limited 1976) 81-82.

[186] MERL/SR CPRE 1/102/56 (1951) 'The Peak District National Park: Proposals for the enlargement of the Park' 1.

the joint committee to refer to itself as the Peak District as early as 1944, five years prior to the NPACA 1949.[187]Alongside this, the committee engaged in other national park like activities which had been recommended under the Addison Report.[188] In particular, the committee entered into a series of 'section 34' access agreements with landowners to improve public access to parts of the District.[189] Although the scope of these agreements is explained in the next chapter, for the purposes of considering joint administrative capacity, the desire by the committee to promote access in the Peaks, illustrates how the power to joint plan allowed for unofficial national parks, in line with the purposes of national parks under the Addison Report, to exist in the area.

The Peak District was not the only future national park governed by a joint committee under the 1932 Act. In 1939 a joint committee of eleven local governments, calling itself 'the North Ridings of Yorkshire', submitted a joint planning scheme to the Ministry of Health.[190] In 1942 the committee and scheme were extended to encompass an additional eight authorities. The proposed scheme balanced the industrial interests of the urban districts in the area, against maintenance of the moorland character of the ridings.[191] The land encompassed by this joint committee was later designated as the Yorkshire Moors National Park and the Dales National Park under the NPACA 1949. A final example of joint

[187] Ibid 1-2; (1944) 'Joint Committee for the Peak District, *The Peak District: A National Park*'.

[188] HC Deb 2 December 1938, vol 342, col 750-752; HC Deb 20 March 1945, vol 409, col 775-777.

[189] TNA/HLG 52/594 undated) 'Section 34 Memorandum'; Harold Scunthorpe, *Freedom to Roam* (Freedom Press 1993) 19-20.

[190] TNA/HLG 107/65 (undated) 'Joint Planning Boards (Town and Country Planning Act 1932)' A table detailing the different joint planning arrangements in the North Ridings of Yorkshire.

[191] ibid.

planning in a future national park can be seen in the Lake District, where the Minister of Health mandated that the local authorities of Lancashire County Council, Cumberland County Council, and Westmorland County Council formed a joint committee for the planning of the Lakes.[192] It was hoped by the Ministry that joint planning would better coordinate the management of the Lakes, preserving its landscape under s 1 of the TCPA 1932. [193] In each example, this collaborative approach to regional planning would not have been possible without the reforms of the 1932 Act, which provided the legal ability to regionally plan.

The capacity to enter into joint committees was further provided for in the subsequent year, with the LGA 1933 expanding upon the joint committee provisions of the 1894 Act. In particular, s 85 of the 1933 Act extended the administrative responsibilities of county councils, creating a more robust system for joint governance, enabling rural districts to collaboratively plan with the newly empowered county council. This made the creation of joint committees for planning purposes under the 1932 Act easier because s 85 of the LGA 1933 established a clear legal process through which joint committees could be created. In particular, s 85(1) set out that authorities had the power to create a joint committee where they believed it would lead to more expedient management, with s 85(2)-(4) then establishing the procedural requirements for constituting a valid joint committee, including the number of members, appointment process, and financing. This was further developed in the Town and Country Planning (interim Development) Act 1943, with an internal memorandum on the drafting of

[192] Sheail (n185) 76.

[193] TNA/HLG 93/37 (30th July 1946) 'Joint Executive Planning Committee' (A letter from the SCNP to Arthur Hobhouse about the Lake District Joint Planning Committee).

the Act, emphasising that 'it is desirable that the powers of cooperation should be fully used to allow the representation of various interests' in preparing a planning scheme.[194]

This came to be reflected in s 9 of the Act which set out that joint committees could form sub-committees for the purpose of planning different aspects of a locality, for example the reconstruction of war damaged areas that fell across multiple administrative boundaries. Similarly, s 9(1) expanded the planning powers of joint committees, allowing them to produce interim development orders, which, as noted in the previous chapter, were a short-term planning restriction imposed prior to the implementation of a planning scheme. Consequently, by the formation of the Hobhouse Committee in 1947, the utilisation of joint committees for administering land in the context of its geographical landscape was a well-established practice within public administration. Moreover, this process was already being used in some form to effectuate the recommendations of the Addison Report.

3.3 Collaborative administration in the NPACA 1949

The idea that collaborative planning would play a fundamental role in the administration of national parks was first proposed in the Addison Report in 1931. Drawing on the examples of existing advisory committees in the Lake District and Brighton, the Report highlighted how collaborative planning allowed for the administration of physical landscapes despite these landscapes often being

[194] TNA/HLG 7/267 (undated) 'Memorandum B Detailed Comments on the Town and Country Planning Act 1932 and the Town and Country (Interim Development) Act 1943', 1.

divided up between different administrative boundaries.[195] The Report thus recommended an expansion of the joint planning provisions as under the Town Planning Act 1925 to give local authorities greater capacity to engage in regional land administration.[196] These recommendations were adopted in the TCPA 1932 and the LGA 1933.

Joint planning also formed the basis of the administrative recommendations of the Hobhouse Report, which relied upon drafts of the TCPA 1947, to illustrate how the legal structures of joint planning could be applied to the matter of creating national parks.[197] In particular, the TCPA 1947 proposed two different processes for joint planning; joint planning boards (schedule 1, part I); and joint advisory committees (schedule 1, part III). Planning boards were constituted by the Minister as a body corporate comprised of two or more local authorities.[198] The local authorities would cede their independent planning powers, with the planning board acting as the planning authority for the area. By comparison, advisory committees were like joint committees under s 3 of the 1932 Act, with multiple planning authorities agreeing to work collaboratively in the production of their own separate development plans. This two-part system provided local authorities with the flexibility to engage in regional and joint planning to varying degrees dependent

[195] Addison Report (n154) 14.

[196] ibid 15.

[197] Hobhouse Report (n155) 15.

[198] TCPA 1947, s 4.

on the specific nature of their locality and the relative administrative bodies therein.[199]

Schedule I, parts II and III of the TCPA 1947 were incorporated into the NPACA 1949 under s 8(2), which provided that where a national park existed across multiple local planning authorities a joint board would be formed for the administration of the park. As the section set out, this joint board would be formed through the procedures and mechanisms of the 1947 Act. In addition to this, s 8(6) set out that no more than a third of the members from one planning authority could be represented on the joint board. This ensured that the joint board was a collaborative process, with no planning authority dominating the administration of a particular national park. Beyond this, s 8(4) also allowed for the creation of joint advisory committees for managing national parks. This was particularly noteworthy because, under schedule I, part III of the TCPA 1947 allowed for bodies or individuals from outside of the represented planning authorities to also participate in the advisory committee. In the context of national parks, this created the possibility for public interest groups like the Rambling Association or the CPRE to advise on the production of plans within a national park.

Although, as already noted, the governance of national parks by local authorities through planning did receive notable pushback, there was surprisingly little criticism from outside of the local governments about the constitution of national park authorities as joint planning boards between the different local governments in the region. One explanation for this could be that collaborative governance

[199] TNA/HLG 107/65 (28th February 1947) letter from regional controller Tetlow to the ministry of TCP 'Joint planning arrangements'.

structures already existed in these areas under the TCPA 1932, for example the joint boards in the Peak District, Lake District and North Ridings. There seemed to be a general acceptance that the management of natural spaces required both administrative collaboration and the local knowledge which came from the variety of voices represented in a joint committee.[200] Alternatively, given the extent to which the TCPA 1947 reformed joint planning, many of the issues with regional governance had been debated at length during the passing of that Act.[201] Thus, there was limited debate in the context of the NPACA 1949. What both explanations highlight however is that the decision to administer national parks through collaborative governance was resultant from evolving ideas about how local governments could administer land in the context of physical localities. Joint planning reflected the capacity of these bodies to work with physical landscapes not just within their administrative boundaries.

4. National Planning and Administration

The final part of this chapter turns to consider the role of the central government and its administrative capacity with respect to national parks. As has already been alluded to, the administrative role of the central government with respect to national parks under the NPACA 1949 was relatively minimal.[202] Instead, through both the MTCP and the National Parks Commission created in part I of the NPACA 1949, the administrative capacity of the central government was more advisory, providing mechanisms of accountability for local administrators outside of litigation. Thus, the

[200] JB Cullingworth, *Environmental Planning Volume I: Reconstruction and Land Use Planning 1939-1947* (HMSO, 1975) 229, 235.

[201] ibid, 241-249.

[202] TNA/HLG 52/594 letters from the CPRE about the minimal role of the National Park Commission.

final part of this chapter considers how and why this central advisory role emerged, with central government using legislation and regulation to ensure the competency of local government and consistent practice.

4.1 Developing centralised oversight

The constitutional and administrative evolution of central government during the 19th and 20th centuries is well documented and I do not intend to set out that legal history here.[203] Instead, using some key examples from the legislation explored elsewhere in this chapter, I want to illustrate the advisory nature of central government's administrative role, when compared to the direct administrative capacity which was granted to local authorities during this same period. This is not to suggest that the central government was not an administrator but instead to consider how administrative powers were divided between local and central bodies. This is important in understanding the role of the National Park Commission set out in part I of the NPACA 1949.

Alongside the reformation of local government which occurred following on from the Great Reform Act 1832, central government also began to evolve, increasing its own administrative ability to meet the new demands of an extended and increasingly industrialised franchise.[204] Yet unlike the administrative capacity of local governments, which was characterised by

[203] See Paul Criag, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) especially 104-132; Harry W Arthurs 'Rethinking Administrative Law- A slightly Dicey Business' (1979) 17(1) Osgoode Hall Law Journal 1; Phillip Murray 'Process, substance and the history of the Error of Law Review' in John Bell, Mark Elliott, Jason Varuhas, and Phillip Murray (eds) *Public Law Adjudication in Common Law systems: Process and Substance* (Hart Publishing 2016); and Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015) 23-82; Joanna Bell, *The Anatomy of Administrative Law* (Hart Publishing 2020) 25-57.

[204] John Field, *The Story of Parliament in the Palace of Westminster* (Politicos 2002) 199.

flexibility and local knowledge,[205] the changed role of central government was characterised by increased dependence on statute to effectuate broad national administrative objectives. This can be seen in considering the early Public Health Acts. Where for local governments the statutory powers granted under the legislation marked a new ability to actively administer public health, the legislation also transformed the administrative ability of the central government. Conceptually, the legislation marked a change in the values underpinning central government, with social reform through statutory intervention becoming a primary function of the state.[206] More relevant for purposes here however is how the legislation legally changed the role of the central government to oversee administration. This can be understood by taking a closer look at the centralised provisions of the Acts.

The creation of the General Board of Health under s 4 of the Public Health Act 1848 provided explicitly for the existence of a centralised body for overseeing the implementation of public health provisions by local health boards. This oversight capacity was further expanded by the LGA 1858, which reduced the direct interaction between the General Board and local boards under s VIII. The Act also led to the establishment of a centralised Local Government Office in Whitehall, tasked with facilitating the relationship between the central government and the local governance bodies for the purposes of the Act. Thus, whilst under the LGA 1858 the central government imposed on local governance bodies a legislative scheme for ensuring public health, the actual

[205] Szreter (n89) 285-290.

[206] William Cornish, Michael Lobban, and Kieth Smith 'Sources of Law' in *Oxford History of the Laws of England* (n101) 41-50.

role of the central government in applying that policy was minimal when understood in the context of the statutory duties created. As Tom Taylor, Head of the Local Government Office noted at the time 'all that government [could] properly be called upon to do is to place the means of local improvement as cheaply and simply as possible within reach of the population'.[207] The Local Government Office was later transformed into the more formalised LGB under the Local Government Board Act 1871. Thus, by the enactment of the Public Health Act 1875, a series of centralised oversight mechanisms were introduced into the legislation to ensure that local authorities were upholding their statutory responsibilities.

Section 6 and 9 of the Public Health Act 1875 granted the LGB the power to determine what forms of local governance body constituted the different types of local government under the Act, marking areas as urban districts or rural unions. Alternatively, s 33 required that sanction was needed from the LGB for non-district local governance bodies to engage in the construction of sewerage works. Even the more formalised local governments were required to subject themselves to the oversight of the LGB with s 42 empowering the LGB to order local authorities to engage in public health activities, like street cleaning and waste disposal. In each instance however, the LGB was not carrying out the administrative task, instead it was ensuring that administrative tasks were carried out by the local body, creating a form of accountability in how local governments exercised their wide discretionary power. This can be further illustrated in s 134 of the 1875 Act, which empowered the LGB to introduce

[207] Royston Lambert 'Central and Local Relations in Mid-Victorian England: The Local Government Act Office, 1858-71' (1962) 6(2) *Victorian studies* 121, 128.

regulatory frameworks for local authorities who risked an endemic. What is interesting is how s 134 framed this as a centralised power. The LGB itself could not assume the powers of a local authority to administer, instead it could regulate further how the local authority should act in specific circumstances. It was this advisory nature to the administrative capacity of central governments which characterised how the central government engaged in public administration.

This process of centralised oversight also applied in the context of the public administration of land, with the early Planning Acts emphasising the supervisory role of central government. The Housing and Town Planning Act 1919 for example, vested sizeable powers in the newly established Ministry of Health to oversee the production and implementation of planning schemes, giving the Minister a notable advisory capacity with respect to planning law. Where local governments were empowered under the 1919 Act to engage in the legal processes of plan-making and land acquisition, the powers granted to the Minister and the LGB were more procedural. For example, under s 42 they could approve plans, under ss 3-4, they could transfer the planning powers of authorities who failed to meet their statutory duties, or under s 43 they could introduce regulations and statutory instruments to shape local authority practice. In each of these examples the role of central government was not as an administrator but in overseeing the activities of administration. Loughlin suggested that underpinning this framework was a desire to 'establish a broad framework of interdependent relations' with the central government acting as

a 'power conferrer'.[208] In this sense there remained a suitable distinction between parliament as a constitutional entity, and the physical administration of national interests, which could have been seen as overreach.[209] Thus, from the reformation of local government beginning in 1832, the central government characterised its role in statute as supervisory of subordinate administration, not as a direct administrator itself.

4.2 Centralised machinery and expanding capacity

This procedural expansion of the administrative capacity of central government was expedited during the First World War, with the Defence of the Realm Act 1914 granting the central government broad powers to produce regulation and create duties and powers for other administrative actors.[210] This transition is often regarded as 'pivotal' in the framing of government power, with 'administrative schemes' being introduced on an unprecedented scale.[211] Yet in considering the structuring of the role of central government in the legislation of the previous century, what remains consistent is how central government understood its administrative powers, acting not as a direct administrator but as a coordinator and organiser of the administration by others. In this understanding, the procedural nature of the regulatory powers granted to central government reflected the system of oversight which had emerged in the housing and public health legislation of the previous century.

[208] Loughlin (n4) 63.

[209] See Sedley's discussion of Arlidge's Case, Sedley (n203) 26-28.

[210] Cecil Carr, *Concerning Administrative Law* (OUP 1941) Chapter 1, 1-30.

[211] Section 1 read 'His Majesty in council has power during the continuance of the present war to issue regulations as to the powers and duties […] for securing the public safety and defence of the Realm'.

It is this consistency (albeit rapidly expanded compared to the central government's previous oversight capacity) which explains why these procedural regulatory powers were maintained after the repeal of the 1914 Act.

The nature of central government administration thus gained increased commentary, with the first formalised texts on administrative law being published during the inter-war period.[212] Central to these discussions was a debate about the role that statutory administrative provisions played in English law, with legal and political rhetoric promoting increased scrutiny of growing administrative capacity.[213] What these discussions sometimes overlooked however was how the expanded powers of the central government were balanced against a similarly growing administrative capacity which was vested in local authorities, creating a system in which each body provided a form of political accountability for the other.[214] Despite this, these tensions over central administrative powers continued to exist, leading the government to appoint the Donoughmore Committee in 1929 to report on the nature of ministerial powers, in the context of the growing administrative system.[215]

The Donoughmore Report, published in 1932, re-focused these discussions, thinking exclusively about the relationship between legislative power and

[212] See William Robson, *Justice and Administrative Law* (MacMillian & Co 1928); Lord Gordon of Hewart, *New Despotism* (Ernst Benn Ltd 1929); or FJ Port, *Administrative Law* (Longmans & Sons 1929).

[213] Hewart (n212) 153.

[214] WI Jennings, *Local Government in the Modern Constitution* (London 1931) 31' contrast with John Gaus, 'The Report of the British Committee on Ministers Powers' (1932) 26(6) American Political Science Review 1142, which criticised these debates as 'dramatized'.

[215] David Williams, 'The Donoughmore Report in Retrospect' (1982) 60 Public Administration 273, 281.

administrative capacity.[216] In particular, the Report emphasised that 'if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires'.[217] Thus, the purpose of the Report was to consider the forms of accountability, or 'safeguards', which could exist to ensure statutory powers were properly exercised.[218] It was determined that safeguards, would exist in two forms. The first of these would be parliamentary safeguards which created accountability for the enactment of statute and the extent to which it contained delegated powers.[219]

Second, was ensuring that decision-making was underpinned by the principles of natural justice, with the Report considering the differences between judicial, quasi-judicial, and administrative decisions.[220] It was this second component to the Report which became important in considering the nature of the advisory role of the central government with respect to local government administration. The Report detailed the 'intermingled' nature of judicial and administrative decisions, emphasising that the former required, through statutory duty, various weights and considerations to be made, whereas the latter only considered the 'procedure' of decision-making.[221] In drawing this distinction, the Report highlighted how the advisory role of central government often had

[216] Gaus (n214) 1142.

[217] Lord High Chancellor Viscount John Lord Sankey, *Report of The Committee On British Parliament Ministers' Powers* (Cmd 4060, 1932) [Donoughmore Report] 23.

[218] Williams (n215) 277.

[219] Donoughmore Report (n217) 41-50.

[220] ibid, 71-88.

[221] ibid, 81.

a judicial component, and was not always only administrative.[222] Thus, the oversight nature of central government meant that it would have to adhere to the broader principles which underpinned judicial decision-making the courts.

The findings of the Report thus shifted the relationship between local governments and central governments, changing the nature of the central government's oversight. This had two important effects; first, it was accepted that the machinery of central government would need to be increased to ensure it had the practical capacity to act judicially in its accountability role with respect to local administration.[223] Second, the increased emphasis on the judicial nature of ministerial decision-making further entrenched the idea that the central government had an accountability and advisory role with respect to administration, as opposed to being empowered to administer itself. In the context of the public administration of land this can be seen through the creation of the MTCP under the Ministry of Town and Country Planning Act 1943. Similarly, following on from the post-war reforms, it was required that any cabinet member whose department had been dramatically affected by post-war reform participate in a review of the machinery of government.[224]

The creation of the new MTCP thus considered criticisms which had emerged out of the TCPA 1932 regarding the lack of dedicated planning infrastructure

[222] The Report highlighted Public Health Act 1875, s 268, as an example of this judicial nature, with the Minister having powers to hear appeals with respect to local authority orders.

[223] Following the Report, government departments explicitly considered their internal machinery. TNA/CAB 124/1111 contains a series of documents looking at departmental restructuring.

[224] This review reflected in British government practice, comparing it that detailed in the President Committee Reports in the United States of America, TNA/CAB 124/1111 (27th June 1949) 'The Central Machinery of Government and British Practice'.

within central government for overseeing and coordinating regional and local planning.[225] In particular, the process from a local authority passing a resolution to producing a planning scheme was lengthy. For example, by 1938, 530 authorities had made resolutions to produce a scheme, but only 208 schemes had been submitted to the Ministry. Of this 208, only 92 had been approved and were operational, illustrating the slowness of this process.[226] Resultant from this, a centralised oversight body, the MTCP, was established in 1943. The new Ministry, under s 2 of the Act, had the ability to appoint designated planning officers within the Civil Service and under s 4 had an official capacity within the House of Commons. This provided a new form of centralised oversight for local government land administration.

4.3 Centralised oversight in the NPACA 1949

By the drafting of the NPACA 1949, the central government had a clear supervisory relationship to local governments. Thus, whilst central government was able to regulate the actions of local government, or hear appeals against them, it was the local government who was empowered to carry out the tasks of administration.[227] This relationship between local and central governance is one which was embodied in the NPACA 1949. In understanding that this system was not specific for national parks, but instead captured the constitutional relationships between these two limbs of

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[225] TCPA 1947, s 16; TNA/HLG 52/594 (17th February 1933) 'Town and Country Planning Regulations' (A letter from the CPRE criticising the lack of formal procedure for appealing planning schemes to the Ministry under the TCPA 1932).

[226] Cherry, *Evolution of Planning* (n142) 98.

[227] An internalised understanding of this role can be seen in the internal documents produced as part of the post-war review of central government power which express the 'organisational nature [of] executive [authority]'. TNA/CAB 124/1111 (May 1946) 'The Machinery of Government'.

governance, the administrative framework for national parks in the NPACA 1949 becomes clear. Under both the Addison and the Dower Reports, it was proposed that a central national parks commission was established for the administration of national parks.[228] The Hobhouse Report and subsequent NPACA 1949 however took a different approach, framing the Commission as an advisory body under the more general supervision of the MTCP.[229]

This was reflected in the statutory language of the NPACA 1949. Part I of the Act established the National Parks Commission, which under s 2 was a body corporate appointed by the MTCP. Similarly, the funding and personnel of the Commission were also determined by the Ministry, which, under s 3, was regarded as having the machinery, or capacity, to fulfil the Commission's statutory purposes. Under s 1, the Commission itself would be responsible for ensuring the purposes of the NPACA 1949, as set out in s 5, were upheld in the management of national parks undertaken by the respective local planning authorities. The Commission itself was accountable to the Ministry, who under s 3 had a supervisory role in ensuring the 'general character' of the Commission and its purposes. This statutory framework mirrored the broader relationship between local governments and the Ministry with respect to planning.[230] This was further emphasised in s 6(4), which gave the Commission mandatory oversight of the production of s 9 development plans, requiring that the local planning authorities consult the Commission in the production of the plan. This

[228] Addison Report (n154) 26; Dower Report (n154) 83-97.

[229] Hobhouse Report (n155) 13; NPACA 1949, part I.

[230] This mirroring was deliberate with an empowered National Parks Commission not fitting into 'ordinary planning law' TNA/CAB 124/445 (1948) 'National parks' A letter from Mr Crombie and Sir Gilbert.

approach to the administrative capacity of the Commission reflected the more general oversight function provided by centralised bodies across the spectrum of public administration, particularly in the context of planning law as the legal activity for facilitating the public administration of land.

5. Conclusions

In explaining the evolution of public administration at the local, regional and national level, it is possible to draw a series of conclusions about how different forms of administrative capacity shaped the creation of national parks under the NPACA 1949 as a form of public land administration. The first of these is that the nature of administrative capacity changed notably during the 19th and early 20th centuries. In particular the ability of local governance bodies, which were increasingly formalised under the LGAs, to administer increased, brining different aspects of administrative activity, including land control, within the scope of their powers. This was accompanied by an extension in the capacity of central government to oversee and coordinate this administration.

This leads on to the second conclusion which can be drawn from this chapter, that the NPACA 1949, in how it structured the relationship between the national parks commission, the central government, and local authorities, assimilated an existent distribution of administrative powers between local and central actors, applying this distribution to the specific circumstances of national parks. More simply, this is to say that the NPACA 1949 did not revolutionise land administration, merely extend the existent administrative parameters of land administration to the task of national parks.

The final conclusion is that the administrative structures within national parks cannot be understood purely as products of the NPACA 1949. Instead, the administration of national parks is part of a broader administrative landscape, which from the reformation of local government, beginning in 1832, redefined public administrative relationships to land. This sense that the administrative structures of the NPACA 1949 have a deeper legal history than the legislation alone suggests is particularly pertinent in considering the schemes of regional governance which emerged following the TCPA 1932, namely the unofficial national parks in the Peaks, Lakes and North Yorkshire. As such, national parks cannot be understood through the NPACA 1949 alone but should be seen in the context of a broader legal landscape, comprised of different evolving legal features, which provided the legal processes and concepts for how national parks were legally created.

5

Property Rights and the Rise of a Public Interest in Land

64. Access agreements

(1) A local planning authority may with the approval of the Minister make an access agreement with any person having an interest in land, being open country, in the area of the authority whereby the provisions in that behalf of this Part of this Act shall apply to the land.

(2) An access agreement may provide for the making of payments by the local planning authority of either or both of the following descriptions, that is to say in consideration of the making of the agreement and by way of contribution towards expenditure incurred by the person making the agreement in consequence thereof.

(National Parks and Access to the Countryside Act 1949)

1. Introduction

The earliest draft of the Countryside Code, an educational document created to guide conduct in national parks, observed 'the countryside is what men have made of it, through many centuries of toil and care'.[1] To frame this differently, the National Park and Access of the Countryside Act 1949 (NPACA) did not legally create national parks in a vacant landscape, but overlayed them onto existing land-based relationships that were encompassed within the administrative boundary of a park. Consequently, much of the legal framing of national parks by the NPACA 1949 focused on how to relate this new form of land administration to the land-based rights which already

[1] TNA/MAF 107/94 (1950) early draft of the Countryside Code.

existed within the same space. Thus, to understand the legal creation of national parks by the NPACA 1949, it is important to consider how this existing system of land-based legal rights was integrated with the legislation itself. This chapter thus has three aims: to introduce the land-based legal rights which existed in the spaces which later became national parks; to illustrate how legal ideas of 'public interest' and 'public purpose' emerged in the context of land; and to show how these existent land-based rights, through the language of 'public interest' were integrated into the legal framing of national parks under the NPACA 1949.

To achieve these aims the chapter proceeds in three parts. Each part considers a different form of land interest which existed prior to the enactment of the NPACA 1949, considering how legal changes to that interest led to its eventual integration into 1949 Act. Considering this, this chapter does not offer a comprehensive legal history of the different land-based rights considered. Instead, the chapter explores the relationship between these three different forms of land interest and the changing legal ideas about the public administration of land, as facilitated through the legal processes of planning law, and the expansion of the administrative capacity of public bodies. This in turn illustrates the broader context against which national parks were legally created in England and Wales.

The first part of the chapter considers the exclusionary nature of interests in property in land, exploring the transition towards a more 'rights-based' conceptualisation of property. During the 19th century, interests in land were increasingly expressed as entitlements or rights of the landholder, changing the language through which

relationships with land were understood.[2] This linguistic change emphasised the control associated with land ownership, with public administrative legislation developing legal processes to facilitate the acquisition of land by public bodies. The part thus considers how these acquisition rights, relied on traditional conceptions of ownership to promote different forms of public activity. In doing so, the part reflects on the expansion of these acquisition powers, ultimately leading to their inclusion in s 14 or s 76 of the NPACA 1949.

The second part of this chapter considers the existence of public rights and public interests in land as an amenity. Amenity reflects the existence of a pleasant feature within a locality such as a recreation space, nature, or a historic site or monument.[3] As discussed in Chapter Two, the specific social circumstances of the 19th century, led to a cultural 'nostalgia' for rural spaces.[4] This nostalgia saw an increased appreciation of the amenity value of land, creating a sense that the public had some form of interest in amenity spaces. This part thus considers how this public interest in land legally manifested, considering both case law and statute relating to the provision of public amenities. This conception of amenities in land as having public value ultimately came to be reflected in s 5(2) NPACA 1949.

The final part of this chapter considers the relationship between land-based rights and public administration, exploring how controls on land use, as developed in the

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[2] Robert C Allen 'The Price of Freehold Land and the Interest Rate in the Seventeenth and Eighteenth Centuries' (1988) 41 EHR 33; Avner Offer, *Property and Politics 1870-1914: Land Ownership, Law, Ideology and Urban Development in England* (CUP 1981) 11-22; Allain Pottage 'The Measure of Land' (1994) 57 MLR 361.

[3] This is the meaning attached to the term in the relevant legislation, note Housing and Town Planning Act 1919, s 1(3); Town Planning Act 1925, s 1; Town and Country Planning Act 1932, s 1.

[4] Jan Marsh, *Back to the Land* (Quartet Books Limited 1982) 2.

planning laws discussed in Chapter Three, were integrated with land-based rights. In particular, the part considers how nuisance and mandatory covenants were given a statutory basis to facilitate the public administration of land. This was mediated through an elaborate statutory scheme for compensation and betterment. It was this process of integration, as evidenced primarily in planning law, which legally framed national parks in the NPACA 1949, leading to statutory provisions which related the purposes of national parks back to this underlying system of land-based rights.

2. The Exclusionary Nature of Interests in Property in Land

The NPACA 1949 contains seven different provisions which enabled land to be compulsorily acquired for fulfilling the purposes of the Act.[5] In particular, ss 76-77 empowered park planning authorities to compulsorily acquire land to fulfil the recreation purpose of national parks in s 5, by allowing land to be acquired to provide for public access. This process allowed the park planning authority to become the owner of the land and thus determine the use of the land through those ownership rights. This reflected a different form of land control to the planning powers of the park planning authority in ss 8-10 of the Act. To understand why the NPACA 1949 empowered park planning authorities to own land, it is important to consider the legal value of land ownership during the late 19th and early 20th centuries, especially for the purposes of public land administration.

[5] Sections 17 and 18 with respect to nature reserves, s 40 on rights of way, ss 76 and 77 for public access, and ss 103 and 107 providing supplementary acquisition powers.

The 19th century marked an accelerated period of change for the laws relating to land, with the use of statute to simplify the common law being a dominant theme.[6] Lawyers, backed by politicians, came to believe that codification could make sense of the 'dense thicket' of land law which had evolved over the previous century.[7] This may have been promoted by the perceived success of the extensive statutory enclosure of land, which produced a concentration of ownership rights going beyond the resources of the common law.[8] These transitions resulted in a change in the rhetoric used to describe proprietary interests, with the language of *rights in land* becoming prominent.

At the start of the 19th century land law existed as a series of complex interactions between common law principles, equity, and statute.[9] Whilst some treatises had been written striving to re-state the subject on rational lines, there was little sophisticated commentary, outside of legal judgments, demarcating what types of right existed in association with land or property. Consequently, as AWB Simpson noted, land law 'harboured many ghosts' which had been formed centuries earlier.[10] Although there had been attempts at statutory reform to land law prior to the 19th century,[11] these had been relatively piecemeal. By the 1800s however there was a growing desire for

[6] AV Dicey, *Law and the Public Opinion in England During the 19th Century* (Macmillan and Co 1905) 1-16.

[7] Offer (n2) 27. This has been challenged by David Lieberman who emphasise the extent of legislative reform in the 18th century, David Lieberman, *The Province of Legislation Determined* (OUP 1989).

[8] 'Property' lacked legal definition prior to the 18th century, Nicholas Blomley 'Making Private property: Enclosure, Common Rights and the Work of Hedges (2007) 18 Rural History 1, 4.

[9] Mary Sokol 'Jeremy Bentham and the Real Property Commission of 1828' (1992) 4(2) Utilitas 225, 226.

[10] AWB Simpson, *A History of Land Law* (OUP 1961) 271.

[11] Note the establishment of a general registry in 1739; ibid, 272; the formalisation of conveyancing mechanisms, B Abel Smith and R Stevens, *Lawyers and the Courts a Sociological Study of the English Legal System, 1750-1965* (Heinemann 1967) 19-24; Offer (n2) 11-22.

comprehensive reform to clarify both use rights and rights of transfer and security.[12] This reflected wider changes in land use driven by agricultural development, industrialisation and urban expansion, which further commercialised understandings of property. This made clarifying and simplifying the processes for transferring property a primary objective for reformers. The drive to reform land law also had roots in the Great Reform Act in 1832, as parliamentary seat holders became increasingly diverse and open to the modernisation of the basic institutions connected to property such as Poor Laws, franchise, taxes and tithes. In the context of proprietary legal reform, the reduction of JPs with parliamentary seats began to lessen the influence of those holding country estates in shaping legislation, creating the possibility for legal reform.[13] This possibility manifested first through the four Reports of the Real Property Commission (1829-1833),[14] and subsequently in the broad statutory reforms of the 19th century which led to the increased formalisation of land law, particularly with respect to transfer and land registration.[15] Both of these were

[12] Simpson (n10) 273.

[13] Note Henry Brougham, *A Speech on the Present State of Law* (1828); HC Deb 29 February 1828, vol 18, cols 834-923; HC Deb 18 February 1830, vol 22, cols 650-678.

[14] The Commission produced four Reports between 1828-1832. Real Property Royal Commission, *Report of the Royal Commission into Real Property* (1st Report HC 263, 1829) into real property; Real Property Royal Commission, *Report of the Royal Commission into Real Property* (2nd Report HC 575, 1830) into the legal instruments associated with land; Real Property Royal Commission, *Report of the Royal Commission into Real Property* (3rd Report HC 484, 1831); Real Property Royal Commission, *Report of the Royal Commission into Real Property* (4th Report HC 226, 1833). Note also Simpson (n10) 275; Stuart Anderson, *Lawyers and the Making of English Law 1832-1940* (Clarendon Press 1992); Bernard Rudden 'James Humphreys' (ODNB, 23rd September 2004); Bernard Rudden, 'A Code Too Soon. The 1826 Property Code of James Humphreys: English Rejection, American Reception, English Acceptance', in Peter Wallington and Robert Merkin (eds), *Essays in Memory of FH Lawson* (Butterworths 1986).

[15] The Inheritance Act 1833, The Real Properties Limitation Act 1833, and the Fines and Recoveries Act 1833 simplified the system of property transfer, whether it occurred through entails or sale, providing a clear process through which conveyancing could occur, note John Lightwood, *A Treatise on Possession of Land with a Chapter on the Real Property Limitation Acts 1833 and 1874* (Stevens and Sons limited 1894) 181-182; Simpson (n10) 277-278; Sokol (n9) 237; *Dean of Ely v Bliss* (1852) 2 DM&G 477. Alternatively, the Land Registry Office was established in 1862 bringing greater clarity to the rules surrounding the priority of interests in land, with a distinction between title and deeds becoming increasingly pronounced, Jean Howell 'Deeds, Registration in England: A Complete Failure?' (1999) 58(2) CLJ 366, 368-370; Anderson (n14); Offer (n7) and Avner Offer 'Lawyers and Land Law Revisited' (1994) 14(2) OJLS 269.

important in legally framing the nature of proprietary rights in the 19th and early 20th centuries.

2.1 Introducing exclusionary rights

In 1896 Frederick Pollock observed that 'the laws and usages which govern the tenure of land in England are, as a whole, unique'.[16] Much of this uniqueness results from the 'long story' of land which has evolved since the earliest conceptions of custom within England,[17] and there is much scholarship dedicated to understanding this 'story'.[18] As a consequence, there is no neat starting point for describing the nature of exclusionary rights in the 19th century. By means of an introduction, the ownership of land was understood to be derived from the 'feudal system', which drew a distinction between forms of immovable property like land and buildings (*tenements*), with other forms movable property like livestock (*goods and chattels*).[19] The feudal system itself was premised on the theory that the ability to hold land was derived originally from a grant by the Crown, secured through a series of obligations and duties which determined the relationship between the Crown and the landholder.[20] This relationship was understood as 'the tenure of land'.[21] Yet during the 19th century this traditional understanding of ownership was being seen as

[16] Frederick Pollock, *The Land Laws* (MacMillian and Co 1896) 1.

[17] ibid.

[18] Kenelm Digby *An introduction to the History of the law of Real Property* (Clarendon Press 1897); Simpson (n10); Paul Brand, *The Origins of English Land Law: Milsom and After* (Bloomsbury 1992).

[19] Joshua Williams, *Principles of the Law of Real Property* (Sweet 1862) 6. John Baker has subsequently challenged the term 'feudal system' instead suggesting it to be a modern label for specific legal relations, not an independent legal concept. Sir John Baker, *An Introduction to English Legal History* (5th end, OUP 2019) 241.

[20] Stephen Martin Leake, *An Elementary Digest of the Law of Property in Land* (Stevens and Sons 1874) 11.

[21] ibid.

increasingly antiquated with one textbook writer, Joshua Williams warning against the prominence of this 'history' in 'the study of modern law'.[22] This expression reflected the general sense that land law during this period was caught between old legal doctrines and new reforms, both shaping equally the state of the then current law.[23]

A starting point then for considering exclusionary rights which existed in the 19th century is to begin with the notion of absolute ownership. There is no concept of the absolute ownership of land in English law, instead land ownership is understood as temporal, with an individual (tenant) being able to hold an interest in land for a demarcated period of time.[24] The greatest interest which could be held in land was the estate in fee simple, which allowed a tenant to hold land to *him and his heirs*, giving the tenant an unfettered right to alienate the land.[25] The other primary form of estate which was recognised during the 19th century was the estate in copyholds.[26] Originally copyhold estates were understood to exist at the will of the Lord, remaining part of the Lords manor. By the 19th century this, in practice, had broadly disappeared with copyhold estates existing independently of a manor and attracting legalistic defence by

[22] Williams (n19) 7.

[23] This balance between old and new concepts for understanding land law characterised much of the discussion up until the enactment of the Law of Property Act 1925. Although as Lorren Eldridge 'Whatever happened to Tenure?' (2024) 3 Conv 251, 254 notes the 1925 Act did not mark a 'clean break'. One explanation for this balance could be that the transition away from feudal relationships removed what was perceived as the intrinsic purpose of land, with tenure establishing a relationship where land was held for a specific service. In maintaining the language of 'tenure' this intrinsic purposing of land continued to exist, albeit through a fiction.

[24] ibid, 17; Leake (n20) 22; See Martin Wright, *Introduction to the Law of Tenures* (3rd edn, Skinner Row 1750) 29.

[25] The implications for this with respect to property transfer have been discussed at length, see Williams (n19) 57-60, 89-104; Leake (n20) 29; Blackstone (n24) 104.

[26] Williams (n19) 319.

the Court of Chancery, displacing unsupervised manorial or customary jurisdiction.[27] By comparison to a freeholder however some distinctions still remained, primarily the ability of a copyholder to alienate their estate was somewhat limited, with conveyancing requiring that the copyholder surrendered the Estate in the respective Manorial Court.[28] Similarly, in some manors, the Manorial Lord still engaged in custodial practices, although the process of enclosure alongside the Real Property Limitation Act 1833, had broadly removed manorial customs from most estates, leaving the proprietary relationship between copyholders and manorial lords largely similar to that between two neighbouring freeholders., this was furthered under the Law of Property Act 1925, which effectively abolished copyhold estates.[29]

Other interests in property in land also existed, of particular note in this context was the 'term of years'. Williams emphasised the importance of two different forms of term of years which existed in the 19th century. The first of these was the 'ordinary lease' which could run for a maximum of ninety-nine years and was typically subject to an annual rent.[30] The second of these was a term of years created by a settlement, will, or mortgage deed which ran for a long period of time ('frequently a thousand years').[31] These terms of years were not typically subject to annual payment but often existed to secure a long-term payment to the landowner.

[27] ibid. The common law clarified copyhold over time. See Baker (n19) 327; *Wells v Partridge* (1596) Cro Eliz 469; *Anon* (1552) B&M 225; *Melwich v Luter* (1588) 4 Co Rep 26.

[28] Williams (n19) 337-349.

[29] Baker (n19) 328; Simpson (n10) 151-155.

[30] ibid, 352.

[31] ibid.

In all instances, these different forms of proprietary title could be held either by the individual who enjoyed the benefits of such land, or through a trust, where the trustees held the title on behalf of the beneficiary. This type of arrangement was particularly prominent in rural land, with the Settled Land Act 1882, creating a series of procedural requirements in relation to the functioning of this type of trust.[32]

Underpinning each of these was a conceptualising frame that interests in property in land were defined by tenure or the 'slice of time' during which such interests existed.[33] As Lorren Eldridge noted however, in a study of tenure and the Law of Property Act 1925, this conceptualisation of property in land through tenure, was not wholly compatible with modern understandings of property in land, existing with respect to the associated rights it granted.[34] It can thus be suggested that the late 19th century was caught between these two conceptualisations, with property in land still being legally understood through a doctrine of tenure, but with a notion of rights in land becoming increasingly prominent.[35] This was particularly the case in thinking about the

[32] Note Simpson (n10) 283-286, Offer (n7) 106, 109-110; J Bateman, *The great landowners of great Britain and Ireland* (4th edn, LUP 1883) 515; Edward Parker Wolstenholme, *The Settled Land Act, 1882 : With Notes and Forms and Precedents Adapted for Use under the Act, and Rules* (W Clowes 1883).

[33] SFC Milsom, *Historical Foundations of the Common Law* (OUP 1969) 103; note also Peter Birks, 'Before We Begin: Five Keys to Land Law' in S Bright and J Dewar (eds) *Land Law: Themes and Perspectives* (OUP 1998) 457-486.

[34] Eldridge (n23). Note also M Dixon, J Bignall and N Hopkins (eds) *Megarry & Wade: The Law of Real Property*, (10th edn, Sweet & Maxwell 2019) 2-030 'for all practical purposes ownership in fee simple differs from the absolute dominion of a chattel in nothing except the physical indestructibility of its subject'.

[35] This can be evidenced in considering texts from the period, in C Sweet (ed) and H Challis, *Law of Real Property*, (3rd edn, Butterworth & Co 1911) 2, it is suggested '[tenure existed] in a decayed state of general application and importance'. Similarly, the practical importance of 'tenure' had decreased following on from the broad statutory reforms which occurred, for example Barrister J E Hogg

exclusionary rights associated with property, which became increasingly emphasised during this period.

Despite this conceptual mid-point between traditional ideas of tenure and a notion of rights of property in land, a series of principles can be deduced which reflect that a general doctrine of the exclusionary rights of landholders was well-established by the end of the 19th century. Having a tenured interest in land carried with it a 'right' or 'fact' of possession, entitling the owner to enjoy their property in land uninterruptedly.[36] The same was true for those whose interest in land existed through a time of years arrangement, although the ultimate owner was, in some circumstances, able to assert their own real property interest over the personal interest of the 'leasee'.[37] One crucial component of this possession was the ability of the possessor to exclude others from the land, with possession itself over a part of the land indicating proof of ownership of the whole, showing the emphasis on this exclusivity.[38] As a consequence, landholders were able to erect barriers or fences to maintain the boundaries of their property in land, facilitating the exclusion of others.[39] Part of this physical ability to exclude stems from the nature of the legal ability of landholders to bring legal action against those who committed trespass, with

considers the effect of the Settled Lands Acts on ideas of tenure and rights-based ownership (1919-1920) 64 Solicitor's Journal 474-475.

[36] John Lightwood, *A Treatise on Possession of Land with a Chapter on the Real Property Limitation Acts 1833 and 1874* (Stevens and Sons limited 1894) 7.

[37] Leake (n20) 44-51; Baker (n19) 319-322.

[38] As was stated by Best J in *Ilott v Wilkes* (1820) 3 B&Ald 304, 317; 106 ER 674, 679, the ability to exclude others was 'essential to the rights of property'. See also *Jones v Williams* (1837) 2 M&W 331; *Wild v Holt* (1842) 9 M&W 672 and *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 791.

[39] Provided such barriers were not concealed, owners faced no civil liability for any harm incurred in ensuring the exclusivity of their proprietary interest, *Deane v Clayton* (1820) 7 Taunt 489; 129 ER 196; *Quigley v Clough* (1889) 53 NE 884.

the law primarily protected against trespass where it caused property damage, leaving 'bare' trespassers often unpunishable.[40] This experience of exclusivity was similarly replicated where the actual owner of the property in land was a trustee, holding the land for a beneficiary. Here the trustee, as title holder, exercised their proprietary rights to ensure the purpose of the trust was fulfilled. Although this created some procedural differences in how suits of trespass were brought, the experience of ownership was broadly similar with the beneficiary benefitting from the trustee's rights of ownership.[41]

Second to this, the exclusivity of the owner of property in land also extended to the utilisation of the land, with an owner being empowered to generally use or dispose of the land for reasons of their choosing. The most pertinent example in this context was the ability of an owner to develop their own land or sell their land for the purpose of development. Although, by the 19th century, there were some instances where statute attempted to control or regulate the exclusive ability of a landowner to develop their property or land, examples of this were often limited to specific purposes ascribed in legislation.[42] In this context then it is worth emphasising that this ability to use land exclusively, existed regardless of who the landowner was. Consequently, the purchase of

[40] HC Deb 18 February 1876, vol 227, col 528, Sir William Harcourt refers to members of the public accidentally straying onto the property of another without causing damage and as 'dispunishable trespassers'. Similarly, Best CJ in *Butler v Turley* (1827) 2 C & P 585 said malicious injury or damage was not caused to property in land by walking across such land. Alternatively, injuries that did not result in damage (*injuria sine damno*) were sometimes fictitiously applied leading to damages for the 'malicious' bending of the grass etc see *Gayford v Chouler* [1898] 1 QB 316; *Gardner v Mansbridge* (1887) 19 QBD 217.

[41] Note *Smith v Earl Brownlow* (1869-1870) LR 9 Eq 241; *Warrick v Queen's College, Oxford* (1870-1871) LR 6 Ch App 716 where trustees assert the exclusivity of ownership of property in land on behalf of a beneficiary.

[42] For example, Town Improvement Clauses Act 1847, s LXVII, or 4 Geo III cap 78 (The Building Act) (1774) required that property was cladded to be fireproofed. More generally note; Chaloner Dowdall and SD Adshead, 'The Law of Town Planning' (1910) 1(1) The Town Planning Review 39, 39.

land by local governance bodies was an effective mechanism for securing specific forms of land use. Thus, the predominant legal process through which exclusivity could be limited was either by an explicit dedication or agreement which permitted the use of the land by another, or through prescription, the implicit process by which continual use amounted to a dedication, allowing another to use the land.[43]

2.2 Compulsory purchase for activities of a 'public nature'

Throughout the 19th century the purchase of land by public bodies was increasingly facilitated by statute. This was underpinned by a legal understanding that ownership was accompanied by an exclusivity of use, which would enable public bodies to determine the use of land for broader public purposes. Indeed, the language of 'public nature' itself was used in legislation during this period to facilitate the purchase and acquisition of land by public bodies for some general form of community improvement.[44] In the broader context of this thesis, the statutory processes which were developed to facilitate this were included in the NPACA 1949, notably in s 76, reflecting one way in which the legislation integrated existent land-based legal interests into the statutory creation of national parks. In light of this, it is useful to consider the development of how the purchase of land by public bodies was statutorily facilitated during this period.

[43] Williams (n19) 295; Baker (n19) 456-457; See *Blout v Layard* (1888) [1891] 2 Ch 681; *Farquhar v Newbury RDC* [1909] 1 Ch 12. As Blackburn J emphasised in *Mann v Brodie* (1885) 10 App Cas 378 however it was not practically necessary to rely on prescription as the justification for the existence of a right through continued use. This was reiterated in *AG v Esher Linoleum Co Ltd* [1901] 2 Ch 647, which highlighted that it was the dedication, not user that was the crucial component.

[44] David Lawrence, *Compulsory Purchase and Acquisition* (The Estates Gazette Ltd 1952) 1-3.

The most pertinent example of legislation for the purposes of facilitating public purchase was the Land Clauses Consolidation Act 1845 (LCCA), which consolidated, all the clauses typically found in legislation which provided for the 'taking of Lands for undertakings of a public nature'.[45] Indeed, the LCCA 1845 was part of a systematic move towards general public Bills which were intended to make specific legislative drafting easier and more cost effective, by providing a general template for private members bills which could only be departed from if justifiable before Parliament.[46] In particular, it was hoped the LCCA 1845 would simplify the variety of land acquisition clauses which had emerged in private railway Bills to facilitate the acquisition of land for track-laying.[47] More generally the Act reflected a deliberate consideration of the utility of public body ownership for effectuating different public purposes, empowering public bodies to forcibly purchase land to effectuate a broader public purpose. This can be seen in considering the provisions of the legislation.

The Act created a series of model clauses that could be copied into subsequent Acts, with the specific legislation 'filling the blanks' contained within the LCCA 1845 clause.[48] For example, s VI of the Act set out a general clause for empowering a body to enter into agreements with landholders for the sale and

[45] Land Clauses Consolidation Act 1845, Preamble and s 18.

[46] Frank Sharman 'The History of the Land Clauses Consolidation Act 1845 -2' (1986) 7(2) Statute Law Review 78, 80-82. The LCCA 1845 was understood to bind previous legislation making it 'just as if they had been enacted in it for the first time' *Re Wood's Estate* (1886) 31 Ch D 607, 608.

[47] Select Committee on Railways, *First Report* (HC 1844), The reports of this committee ultimately led to the enactment of the Railway Clauses Consolidation Act 1845, HC Deb 8 July 1844, vol 76, col 465-530.

[48] For further on model clause legislation see Frank Sharman 'The History of the Land Clauses Consolidation Act 1845 -1' (1986) 7(1) Statute Law Review 13; Sheila Lambert, *Bills and Acts Legislative Procedure in Eighteenth-century England* (CUP 1971).

conveyance of their land, where it was needed to fulfil the purposes of 'the Act'. 'The Act' pertained to the future legislation the clause was copied into, with purpose denoting the requirement that there was a direct link between the activity of a public nature, which 'the Act' was created for, and the ability of a public body to force the sale of property in land.[49] In the context of compulsory purchase then, this reflected a limitation on the exclusivity of the public body as landholder, where the property in land had been acquired through statutorily forced purchase. This requirement can be seen in *RH Galloway v The Mayor and Commonalty of London* ,[50] where it was stated that when statute conferred powers for a 'particular purpose', those powers, could not be exercised 'for any purpose of a collateral kind'.

The court held that where an LCCA 1845 clause was used for a specific purpose, like a railway, the court would be strict in its statutory interpretation of the purpose of the Act. By comparison, as was the case in *Galloway*, where a public body had been empowered through multiple pieces of statute to 'to make certain public improvements' the courts would construe purpose more widely, empowering the body to acquire land for one public reason but ultimately use it for another form of public improvement that had been provided for in different statutes. As *Galloway* illustrated the Court relied heavily on the language of 'purpose' within s VI to determine where the activity of a public nature was deemed suitably proximate to allow for the forced acquisition of the land.

[49] LCCA 1845, s I.

[50] (1866) LR 1 HL 34.

As already set out, a fundamental part of the exclusivity of ownership is the ability to alienate land. Forced acquisition clauses, like those modelled in the LCCA 1845 reflected a direct limitation on this more general right. The use of public nature in this context is thus noteworthy, illustrating that the statutory justification for limiting the exclusive right to alienation, could be balanced in statute against broader public utility. Thus, whilst acquisition clauses, like those modelled in the LCCA 1845 still relied upon the values of exclusive ownership to empower public bodies to determine land use, the legislation introduced the general possibility that the exclusivity of alienation could be conditional on broader societal interests.[51] This integrated traditional conceptions of the exclusivity of land ownership, with emerging ideas that law needed to provide for controls on the use of land for the benefit of the public.

This use of land acquisition to facilitate the control of land for the public benefit can be more explicitly seen in the Open Spaces Act 1906. The 1906 Act consolidated the existent open spaces legislation, which provided for the creation of open spaces in urban areas, aligning the provisions of the Recreation Grounds Act 1859, and the Open Spaces Acts 1871-1890 with the Local Government Act 1894 (LGA).[52] The 1906 Act however extended upon the provisions of the 1859 Act, which empowered local governance bodies to become (through gift or grant) trustees of public recreation grounds,[53] by

[51] The LCCA 1845 went on to be the principal Act for a series of Land Clauses Acts, Lawrence (n44) 15-19.

[52] The government wanted to ensure the Act did not address matters 'foreign to the scope of the Bill' namely enclosure, TNA/MAF 48/122 (27th July 1906) Correspondence between Carrington and Lord Alwyn.

[53] There were four Open Spaces Acts prior to the 1906 Act (1877, 1881, 1887 and 1890) the four Acts made provisions for local authorities to hold land as trustees or owners for localities. See TNA/MAF 48/122 (25th July 1890) 'Draft Bill Open Spaces Act 1890'.

empowering local governments to compulsorily acquire land for that same public purpose. This was also an extension of the powers ascribed in s 164 of the Public Health Act 1975 which only facilitated the purchase of land for public recreation where it came up for sale. By comparison, the 1906 Act incorporated provisions from the LCCA 1845, to enable local governments to acquire land specifically for the purpose of having a public open space. In doing so, the legislation granted local governments increased management powers with respect to open spaces, making them responsible for their maintenance and upkeep.[54]

This was illustrated in *Attorney-General v Poole Corporation*,[55] which discussed the application of s 10 of the Act which provided for the statutory maintenance of the open space in the context of erecting a workman's hut for the storage of maintenance tools. Lord Greene MR emphasised that whilst s 20 prevented the enclosure of the open space through construction, the maintenance hut went directly to enabling the Poole Corporation to fulfil its statutory duty of maintenance. This duty was not grounded in the Corporation as landholder, but through their position as a local government.

This had two important consequences in understanding the relationship between ownership, land control, and public benefit, in the broader context of using the exclusivity of ownership to facilitate the control of land by public bodies. The first of these relates to the issue of administrative capacity, as

[54] Open Spaces Act 1906, ss 10 and 14. See also the discussion around a maintenance tool shed not being a building under s 4 of the Open Spaces Act 1906, as it would prevent the maintenance required by the Act, *Bermondsey BC v Mortimer* [1926] P 87.

[55] [1938] Ch 23.

discussed in the previous chapter. Whilst local governments still had to become the legal owners of land to determine its use as a public recreation ground, the legislation envisaged a changing role for local government with respect to open spaces, giving these public bodies explicit statutory duties to maintain them. This reflected a different method through which public bodies could control land, separate from the capacity of land-owning corporations where the land owned by the public body directly reflected the constitutional ability of the public body to administer the locality.

By comparison, the maintenance provisions in the Open Spaces Act 1906, required the local government to maintain the public open space, not only as a landholder, but as a public administrator whose duty it was to provide open spaces. This was evidenced in s 14 which stated that the maintenance of the acquired open space was not a legal right of the public body as exclusive owner, but a legal administrative responsibility or duty. Thus, the new statutory language of 'public nature' allowed for the integration of the legal doctrine of exclusionary use, with broader administrative powers to control land use for the public benefit. This developed as planning law emerged as the primary legal process through which land could be publicly administered.

2.3 Purchase provisions and planning law

The new law thus integrated conventional instruments of land control through exclusive proprietary rights with the new powers of public administration. This integration was facilitated through the inclusion of acquisition and purchase clauses like those modelled the LCCA 1845, in the Planning Acts. In the Housing, Town Planning Act 1909, for example, s 60 empowered local

authorities to compulsorily agree to the sale of land (with approval from the Local Government Board (LGB)) to effectuate portions of a planning scheme related to sanitation, as defined in part III of the Housing of the Working Classes Act 1890. Alternatively, s 2, empowered local authorities to acquire land, through an order of the LGB, as part of the provision of housing. In both instances the local authority, under the justification of the public nature of housing or sanitation, was empowered to force others to sell their property in land, so that the local authority could control the use of the land as the exclusive owner. Thus, exclusivity, as modelled through private rights, was being obtained and used by local governance bodies for the purposes of public administrative activity.

These powers were expanded upon in the Housing, Town Planning Act 1919, with s 12 providing local authorities with additional powers to acquire land and housing. In particular, s 12 set out that local authorities were able to acquire land to construct housing for the working classes or to improve existing housing to meet the requirements of part I of the Act.[56] Accompanying this, the Acquisition of Land (Assessment of Compensation) Act 1919 provided a new statutory framework for determining the valuation of land which was compulsorily acquired, updating the model provisions in the LCCA 1845, to better address the more extensive compulsory acquisition powers that public bodies were exercising.[57] Section 1, for example, created a tribunal for assessing

[56] Section 1 required that local authorities prepared and implemented housing schemes which provided for working class housing (or the redevelopment of), these schemes detailed that housing had to have proper sewerage and be limited to a specific number per acre (as determined by the Local Government Board).

[57] *Blackpool Corp v Starr Estate Co Ltd* [1922] 1 AC 27.

compensation where land had been compulsorily acquired for 'public purposes', reflecting how acquisition limited the exclusive right of landowners to alienate their interest in land. Section 2 then set out the rules for assessing compensation, detailing that compensation would take account of the value of land, its special suitability for a particular purpose, as well as any existing legal limitations over the land, for example injunctions or covenants.

The purpose of the Act was to ensure the agreement of a reflective price for both public bodies and landholders, with the court closely adhering to these three criteria, as well as the broader purpose of the Act under which the land was being acquired. In *Northwood v London County Council* ,[58] for example, the court held that where a licensed public house was acquired under part II of the Housing of the Working Classes Act 1890 and part I of the Housing, Town Planning Act 1909 respectively, as part of an improvement scheme, the owner of the public house was not entitled to compensation for the cost of the licence or the value of the trade. Similarly, the courts defined 'public authority' under the Acquisition Act 1919 broadly, allowing anybody with a statutory public function that did not result in profit, to only be subject to compensation against the three criteria within the Act. In *Metropolitan Water Board v Berton*,[59] for example, the Court held that given the water board derived its powers from the Metropolis Water Act 1902, it was a public authority for the purposes of assessing compensation under the 1919 Act. Thus, as with *Northwood*, the statutory provisions were constructed in acknowledgment of the broader statutory purposes of the legislation in empowering the body to carry out

[58] [1926] 2 KB 411.

[59] [1921] 1 Ch 299.

public works. This was underpinned by an appreciation of the utility of the doctrine of the exclusivity of use, in empowering public bodies to use land for specific purposes.

As both the legal processes of planning, and the capacity of local authorities to plan, increased, so did the compulsory acquisition provisions within planning legislation. This reflected more generally the increased ability of public bodies to control land use, with acquisition being just one process through which land use could be determined because it gave public authorities the exclusive rights of ownership. The Town Planning Act 1925 separated the processes of housing construction from the broader legal activity of planning, in doing so allowing for the scope of compulsory acquisition to also expand. This can be seen in s 8 of the Town Planning Act 1925 which expanded the power of local authorities to purchase land, either through agreement or compulsorily, for the purposes of effectuating a planning scheme. This was a broader purpose than under the 1919 Act, with the effectuation of a planning scheme (not a specific component of that scheme like housing or sanitation) being a suitable activity of a public nature to allow for acquisition. The legislation also empowered local authorities to compulsorily acquire urban amenities under s 1 of the Act, for the purpose of protecting or preserving them, due to the public value of these spaces explained in the next part of this chapter.

The role of exclusive ownership in the context of local authority acquisition was further expanded under the Town and Country Planning Act 1932 (TCPA) which, as noted previously, extended the legal scope of planning activity to rural areas. Indeed, the legislation was the first Planning Act to have a part

dedicated to compulsory purchase, with s 25 detailing the procedures through which land could be acquired as part of a planning scheme. In particular, authorities were empowered to compulsory acquire land to effectuate any portion of the Act, including the preservation of amenities as set out in s 1 and s 46. What is interesting however is how purchase and exclusive ownership were integrated with aspects of the planning process. Section 10(6) set out that where land which had been deemed suitable for immediate development had been marked as a 'public open space' within a development order, then the landholder, after appealing the limitation would be entitled to 'dispose of the fee simple of the land with vacant possession'. Upon doing so, the local authority (under the instruction of the Minister) would have the first claim on whether to purchase the land at the agreed price, for securing the public open space.

The South Lancashire and North Cheshire Advisory Committee relied on this provision extensively, obtaining permission from the Ministry and the Treasury Solicitor to use s10(6) to secure a series of playing fields and recreation grounds around the perimeter of Manchester. It was intended that the county council's exclusive ownership of these fields, coupled with the broader development controls at the periphery of the city would create a 'green belt' around the city.[60] This illustrates how the rights of exclusive ownership were used by local authorities to facilitate land administration, alongside the statutory controls in the Planning Acts.

[60] TNA/HLG 93/35 (21st June 1945) 'Manchester and District Green Belt'.

Another notable example of the integration of private exclusive ownership rights with planning processes can be found in s 10 of the Town and Country Planning Act 1944. Section 10 empowered local authorities to acquire war-damaged land for redevelopment, expanding the circumstances in which a public authority was able to acquire land compulsorily as part of the process of planning. Section 10 (1)(a)-(d) set out that land could be compulsorily acquired for 'a development of any class which [was] needed for the proper planning of the area' (s 10(1)(a)); 'for use as an open space or playing field' (s 10(1)(b)); as a site for development in the public interest (s 10(1)(c); or for accommodating those who worked or lived in an area compromised by war-damage (s 10(1)(d). This created a broad basis from which land could be acquired as part of the planning process, making local authority land ownership an integral part of the land controls that planning law afforded these public bodies.

2.4 Compulsory purchase in the TCPA 1947 and the NPACA 1949

The Town and Country Planning Act 1947 (TCPA) further affirmed compulsory acquisition as a planning process, with the drafting memorandum requiring that the purchase sections of the Bill empowered local planning authorities to purchase any land required for the legal activity of planning, regardless of whether it had a specific purpose within the development plan (later set out in s 5).[61] This was reflected in ss 37-38 of the final Act, which incorporated the provisions of the Acquisition of Land (Authorisation Procedure) Act 1946 into the legislation. This had the effect of granting the planning authorities broad statutory discretion to compulsorily purchase land

[61] TNA/HLG 93/10 (24th January 1946) 'Outline of proposals in connection with town and country planning'.

for any planning purpose.[62] In particular, s 1 of the 1946 Act set out the process for compulsory acquisition by local authorities, with s 37 of the TCPA 1947 then cross applying this specific power and process to the context of land control and planning activity. Thus, local authorities had a broad ability to compulsorily acquire land, provided it related to some form of planning purpose under the TCPA 1947.

The value of compulsory acquisition and exclusive ownership was also realised in the statutory creation of national parks. Although the parks themselves would not be enclosed tracts of public land, there was a general acceptance during the drafting of the legislation that exclusive ownership by park planning authorities would offer a degree of control over land use that could not be achieved through planning administration alone.[63] In particular, it was expected that the provision of some aspects of 'open country', along with park facilities could only be provided if the park planning authority had exclusive ownership of the land.[64]

The NPACA 1949 reflected this, with s 76 permitting acquisition to provide 'open country' for public open-air recreation, particularly where that access could not be secured through agreements or administrative processes as

[62] See *Land Realisation Co, v Postmaster-General* [1950] Ch 435; *Earl Fitzwilliam's Wentworth estates Co v Minister of Town and Country Planning and Others* [1951] 1 KB 203; *Peter Holmes & Son and Others v Secretary of State for Scotland and Glasgow Corporation* [1965] SLT 41 Although the Court did limit acquisition where proper procedure had not been followed *Regina v Minister of Housing and Local Government* [1958] 1 WLR 1093, Note also Lawrence (n44) 9-13 on the 1946 Act.

[63] TNA/HLG 93/8 (June 1946) 'National Parks Policy'.

[64] TNA/HLG 93/56 (December 1944) 'National Parks the Creation and Administration'; these two heads for acquisition later got approval from the Treasury TNA/HLG 90/174 (undated) National Parks Exchequer Grants'.

provided for elsewhere in the Act.[65] Unlike the general acquisition powers of local authorities under s 37 of the TCPA 1947 however, land acquired by a planning authority under s 76 could only be used for promoting public-recreation, with the planning authority being limited in changing the use of the land for other planning purposes.[66] In addition to this, under s 77, compulsory purchases of agricultural land had to be approved by the Minister, with the intention that this would safeguard agricultural interests from access, as was a requirement in s 84.[67]

Park planning authorities were also able, under s 103, to acquire land in line with the s 9 park development plan, as would be possible under the TCPA 1947 but the s 9 plans still had to effectuate the s 5 purposes of the Act, meaning recreation, alongside the conservation of natural beauty, still underpinned the ability of the park planning authority to acquire land. The same was true under s 11, which allowed for acquisition to provide public facilities. Acquisition in this sense would only be permissible in line with the Acquisition of Land (Authorisation Procedure) Act 1946, meaning that compensation would be assessed in the same manner as under the TCPA 1947. It was intended that this general power could be used to fulfil the s 12 requirement that the planning authority provide public facilities within parks, for example camping grounds, bathroom facilities, and car parks. Thus, in the creation of national parks,

[65] Note s 9 development plans and s 10 which empowered the park planning authority to use their general administrative powers in the context of the park. Note also ss 64-65 which allowed park planning authorities to enter into agreements or order access to portions of private land within the national park.

[66] Drafters sought to limit acquisition to the promotion of 'open country' access note the internal memorandum TNA/MAF 144/2 (undated) 'Clause 62: Acquisition of land by local authorities for public access).

[67] TNA/MAF 144/2 (undated) 'Clause 63 Acquisition by Ministers of Land'.

traditional concepts of exclusive ownership were integrated into the administrative provisions of the NPACA 1949 to provide local planning authorities with alternate mechanisms for land that were derived from the more general private rights afforded to a land holder, but adapted specifically to the purposes of national parks, as set out in s 5 of the Act.

3. A 'Public Interest' in Amenities in Land

The doctrine of exclusivity also shaped land administration indirectly, particularly in how the doctrine related to public rights in land, and the emerging public interest in land as an amenity. This relationship between the public and land was defining in the legal creation of national parks, with the NPACA 1949 being described as 'a peoples' charter'.[68] Indeed, as acknowledged in Chapter Two, s 5 of the NPACA 1949 emphasised a public interest in access to and the preservation of natural spaces. It is thus important to consider how these ideas of a public interest in land emerged and interacted with existing private and public land-based rights, especially in light of the doctrine of exclusivity. as discussed above.

From the mid-fifteenth century England and Wales were in a state of near constant agricultural change, which transformed and characterised the English landscape.[69] In particular, the systematic enclosure of the open-field system, which reinforced an exclusionary sense of ownership, redefined rural spaces both physically and legally.[70]

[68] HC Deb 31 March 1949, vol 463, col 1461.

[69] Note Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500-1800* (Allen Lane 1983); Robert C Allen, *Enclosure and the Yeoman: The Agricultural Development of the South Midlands 1450-1850* (OUP 1992); Briony McDonagh, *Elite Women and the Agricultural Landscape, 1700–1830* (Routledge 2018) 'Beyond the (park) pale 159-165.

[70] On changing landscape note WG Hoskins, *The Making of the English Landscape* (Book Club Associates 1977) 186-187; Christopher Jessel, *The Legal History of the English landscape (*Wildy,

As a consequence of this enclosure commons and wastelands were closed-up, being absorbed into the exclusive ownership of the manorial Lord, leading to the extinguishment of many local land rights that existed therein.[71] These rights, collectively referred to as commoners rights, are complex and varied by region,[72] but typically included rights of pasture, turbary, estovers, and extraction of minerals and soil.[73]

The legal ability to enclose land had its roots in the Statute of Merton 1235, which enabled Lords to enclose commons and waste land, provided sufficient land remained available for his tenants.[74] The pace of enclosure however began to increase from 1606, partially attributable to changing agricultural practices in the 17th century.[75] The rate of enclosure then further increased first during the technical agricultural revolution of the 18th century,[76] and second with the inflation of land prices especially in proximity

Simmonds & Hill 2011) 129-138; the extent of legal change is noted in WE Tate, *A Hand List of English Enclosure Acts and Awards* (Titus Wilson & Son 1943).

[71] Pollock (n16) 36; Frank Sharman 'An Introduction to the Inclosure Acts' (1989) 10(1) JLH 45; Hoskins ibid, 137-147; Briony McDonagh 'Negotiating Enclosure in sixteenth century Yorkshire: the South Cave Dispute 1530-1536' in Jane Whittle (eds), *Landlords and Tenants in Britain 1440-1660* (CUP 2013) 52-53.

[72] JM Neeson, *Commoners: Common Right, Enclosure and Social Change 1700-1820* (CUP 2010) 1-3. Alternatively for a 19th century contemporary see Pollock (n16) 36.

[73] Commons Act 1876, s 4.

[74] Eva Hemmungs Wirtén, *From Time Immemorial: Customary Rights and Rights of Custom* (UTP 2008) 13.

[75] Allen (n69) draws the distinction between the yeoman agricultural revolution and the landlord agricultural revolution, each of which varied the intensity and nature of enclosure; Robert C Allen 'The Two English Agricultural Revolutions, 1450–1850' in B Campbell and M Overton (eds) *Productivity Change and Agricultural Development* (MUP 1991) 236; John Barton 'Review of Kerridge, Agrarian Problems in the Sixteenth century and After' (1971) 86 EHR 618.

[76] Note Richard Tawney, *The Agrarian Problem in the Sixteenth Century* (Longmans, Green and Co 1912); D Chambers and GE Mingay, *The Agricultural Revolution 1750-1880* (Batsford 1966); Allen (n69); Robert C Allen 'The Efficiency and Distributional Consequences of Eighteenth-century Enclosures' (1982) 92(1) Economic Journal 937; WHR Curtler, *The Enclosure and Redistribution of our Land* (OUP 1920); Michael Turner, *Enclosures in Britain, 1750–1830* (Macmillan 1984). This position has been challenged, see Whittle (eds) (n71); Neeson (n72) 'The Question of Value' 15-52; Hoskins (n71) 151-152; McDonagh 'Sixteenth Century Yorkshire' (n71); Briony McDonagh 'Making and Breaking

to urban centres during the rapid urban expansion of the 18th and 19th centuries.[77] The socio-economic explanations for enclosure however are not the primary focus here, instead, this thesis considers the experienced effects of enclosure, particularly in relation to the public enjoyment of amenities.

During the period 1606-1845 over 4000 enclosure Acts passed through Parliament, enclosing great swathes of the English countryside.[78] Many of the early Enclosure Acts were enacted as private members' bills, giving statutory effect to the agreements between manorial lords and their respective commoners to extinguish their rights and close-up commons and wastelands.[79] From the 18th century however Parliament increasingly supported enclosure policies, with 4280 Enclosure Acts being enacted between 1700 and 1845, closing-off 4.5 million acres of open land, commons and waste.[80] The extensive legislation made Enclosure Acts increasingly formulaic, leading to what Frank Sharman described as a standard form approach, with Enclosure Acts requiring the appointment of a Board of Commissioners to compile a 'true and perfect survey' of the land being enclosed. [81]

Property: Negotiating Enclosure and Commoners Rights in the Sixteenth century' (2013) 76 History Workshop Journal 32.

[77] Allen 'The Price of Freehold Land' (n3); Minister of Works and Buildings, *Final Report of the Expert Committee on Compensation and Betterment* (Cmd 6291, 1942) [Uthwatt Committee], 'Overdevelopment due to the inflation of land prices' 7-14.

[78] Carolyn Lesjak, *The Afterlife of Enclosure: British Realism, Character, and the Commons* (SUP 2021) 20; Hoskins (n70) 185. Statutory examples include Bedford Level Act 1663, 15 Cha 2 c 17; Knaresborough Inclosure Act 1789, 29 Geo 3 c 76.

[79] Allen (n69) 26-27; Chambers and Mingay (n76) 79.

[80] Sharman (n71) 48; Hoskins (n70) 180-184, note in particular the map of Enclosure Acts reproduced from EK Gonner, *Common Land and Enclosure* (Macmillan 1912);

[81] Sharman (n71) 49; note the similarities between the Acts of Appleton and Lymm Inclosure Act 1765, Cheshire 3 Geo 3 c 45; Rollright, Oxfordshire Inclosure Act 1777 15 Geo 3 c 41; Bourton Warwickshire Inclosure Act 1765 5 Geo 3 c 35.

This process was further consolidated by 'an Act for consolidating in one Act certain provisions usually inserted in Acts of Enclosure' (The General Inclosure Act) 1801.[82] The legislation prescribed model clauses for use in Inclosure Acts, which Prest has subsequently described as a 'ratepayers do it yourself kit'.[83] This was reflected in the Preamble, with the Act reducing the time and expense of Enclosure.[84] The Act detailed a standard process through which a landowner would appoint a Board of Commissioners, who under oath, would conduct the practical steps needed to enclose the land.[85] Commissioners had to serve notice to concerned others about the proposed enclosure,[86] as well as conduct a detailed survey of the physical land and legal rights therein.[87] The completed survey would then be 'executed at a meeting of the proprietors' before being 'enrolled at a court of Westminster'.[88] Although this process seemingly provided opportunity to oppose an enclosure, in reality, public notice was more of a formality.[89] Similarly, the parliamentary committees which debated the enrolment of the enclosure were usually comprised of interested parties.[90] Although it is uncertain the extent to which this influenced the enactment of Inclosure Acts, it

[82] 41 Geo 3 c109.

[83] John Prest, *Liberty and Locality: Parliament Permissive Legislation, and Ratepyers' Democracies in the Nineteenth century* (OUP 1990) 8.

[84] 41 Geo 3 c109, Preamble.

[85] ibid, s I.

[86] ibid, s II.

[87] ibid, s VIII.

[88] ibid, s XXXV; Quoting Hammonds, Sharman (n71) 49; WE Tate 'The Commons Journals as sources of information concerning the Eighteenth century Enclosure Movement' (1944) 54 TEJ 75, sets out in detail the parliamentary process through which Inclosure Acts were passed.

[89] Lesjak (n78) 25-26 highlights the disparities in power between land holders and rural communities in the context of enclosure.

[90] Sharman (n71) 53, suggested that the representation of interested parties was in part resultant from the influx of Bills generally going before Parliament. It was difficult for a Bill to attract a committee that was uninterested in the Bill.

contributed to the perceived sense of public 'unfairness' which accompanied the legislation.[91] In particular, poor labourers and marginalised rural communities were affected, with legislative efforts to make enclosure fairer, namely the Inclosure Act 1845, still requiring that those with a claim to enclosed land self-identify, with many rural communities being unable to prove the existence of their rights.[92]

This was different in urban areas, particularly around London. Here many commoners were more affluent, including both landed elites and members of parliament, well able to engage with the statutory processes to resist enclosure.[93] Urban enclosure presented a new set of legal issues, involving the challenge of demarcating between local public interest and commoners right. In rural areas, commoners' rights were understood to belong to a community, with the courts upholding these rights where an individual, by residence within a specific parish, qualified for commoner rights.[94] This led to a fiction of local residence as a basic mechanism for proving commoners rights,[95] though being local of itself did not guarantee an individual rights of common, which were ultimately a form of

[91] See WE Tate 'Members of Parliament and the Proceedings upon Enclosure Bills' (1942) 12 Economic History Review 66.

[92] The Inclosure Act 1845, s XXV established a permanent Board of Commissioners who oversaw all enclosures; however, it was still the responsibility of the interested party to make their claim to the enclosed land known to the Commission. Outside of this process it was also possible to challenge the conduct of the Inclosure Commissioners but again rural labourers were often excluded from this process with influential office holders perusing the litigation; *Church v Inclosure Commissioners* (1862) 11 CB 612; *R v The Commissioners for Inclosing Land in the Parish of Dean* (1813) 2 M&S 80; *R v The Inhabitants of Hatfield* (1835) 4 Ad & E 156.

[93] For example, the enclosure of Wimbledon Commons and Hampstead Heath were resisted in Parliament, HC Deb 28 June 1864, vol 176, cols 431-435; HC Select Committee 21 February 1865, vol 177, cols 501-515; HC Deb, 24 June 1863, vol 171, cols 1420-1423.

[94] *Smith v Earl Brownlow* (1869-1870) LR 9 Eq 241; *Warrick v Queen's College, Oxford* (1870-1871) LR 6 Ch App 716.

[95] Discussed in *Hall v Byron* (1877) 4 Ch D 667; *Commissioners of Sewers v Glasse* (1874-1875) LR 19Eq 134. See also the discussion of proposed litigation over Dartford Commons, George John Shaw-Lefevre, *English commons and forests: the story of the battle during the last thirty years for public rights over the commons and forests of England and Wales* (Cassell 1894) 179-180.

proprietary interest in theory lying in grant. This created legal difficulties in London, where the public had a collective interest in the commons but no specific individual right.[96] This public interest was premised on the use of the commons as open spaces in urban areas, offering urban residents' places for outdoor recreation.[97] Commons thus acquired status as a public amenity. This was also reflected in statute, with the Metropolitan Commons Acts 1866 and 1878 beginning the process of securing a more general public interest in urban commons, outside of specific common law rights.[98] Section 5 of the 1866 Act, for example, prevented the Board of Commissioners from entertaining applications for enclosure within the metropolitan police district of London, with s 6 creating a management body for each metropolitan common to ensure its upkeep through byelaws. These provisions were extended in the 1878 Act, which granted the Metropolitan Board of Works (MBW) management powers over all the commons in London, again furthering the public amenity interest in common land regardless of the existence of explicit rights.[99]

3.1 Introducing public rights in Land

Whilst there was no legal public right at common law underpinning the growing public interest in common land as an amenity, there were separate forms of public right which existed over certain lands.[100] These were the collection of ancient customary rights which enabled the public to pass over,

[96] *Sewers v Glasse*, ibid; *Lord Rivers v Adams, Issac, and Ferrett* (1878) 3 Ex D 361.

[97] In Octavia Hill, *Our Common Land (and other short essays)* (MacMillian 1877) Hill discussed the essential nature of open spaces for working people, emphasising the increasingly crowded nature of urban areas.

[98] John Gaze, *Figures in a Landscape* (Barrie & Jenkins and the National Trust, 1988) 28-29.

[99] Metropolitan Commons Act 1878, 41 and 42 Vict c 71, ss 1-2.

[100] *Vestry of Bermondsey v Brown* (1865) LR 1 Eq 204.

ramble through, or use the products of, land. As acknowledged by Frederick Pollock in *The Land Laws* in 1887, the existence of public rights became topical during the 19th century, as landowners increasingly sought to exclude these rights from their property.[101] This was possible due to the 'vulnerable' nature of public rights at common law, which were understood to reflect the customary use and access of land by local communities.[102] Consequently, whilst in medieval times it would have been possible to perceive a series of public rights in land, these had been significantly reduced by the courts over the subsequent centuries. Indeed, Pollock suggested the 'legal theory which denied the possibility of public rights over land was only the formal expression of the dispositions and habits of society'.[103] Despite this, it is possible to identify a small collection of public rights at common law which existed during the 19th century.[104] These, alongside a more general public interest in land as an amenity, became important in shaping how the NPACA 1949 integrated existent land rights into the creation of national parks.

3.1.1 Rights of passage

The public had (and continue to have) certain rights of passage over 'footpaths, bridleways, and carriageways' which enabled them to 'pass

[101] *Steel v Houghton et Uxor* (1788) 126 ER 32 'The Great Gleaning Case', resulted in wide public debate about the nature of public rights, particularly the common law right to glean from a private field, see Peter King 'Legal Change, Customary Right, and Social Conflict in Late Eighteenth-century England: The Origins of the Great Gleaning Case of 1788' (1992) 10(1) LHR 1; Peter King, *Crime and Law in England 1750-1840* (CUP 2006) 281-307. Alternatively, the enclosure of Snake Path in the Peak District in 1877, Harold Sculthorpe, *Freedom to Roam* (Freedom Press 1993) 20; Or *Ball v Herbert* (1789) 3 TR 253, 106 ER 564 saw the courts deny a public right to use riverbanks for navigation.

[102] Pollock (n16) 17.

[103] ibid, 18.

[104] Timothy Bonyhady, *The Law of the Countryside* (Professional Books limited 1987) 3.

and repass over a defined route'.[105] These rights were contingent on a process, either at common law or through statute, which demarcated the passage route.[106] As identified in *Eyre v New Forest Highway Board*,[107] a crucial component of a right of way was that the landowner designated the right over their land, thus agreeing to limit their exclusionary use. As Timothy Bonyhady identified however, explicit consent was often a legal fiction, with many implied designations arising out of repeated use, making continued use an essential component of maintaining the right of way.[108] This created various evidentiary challenges, with the common law having no required usage length, meaning landowners could extinguish the right by interrupting use. The courts however increasingly only upheld these interruptions where the threat of damage was disproportionate to the public right of use.[109] Beyond this, these rights did not surmount to a more general right to ramble, and although the court did in some instances support the use of rights of way for recreation, this was not equivalent to an actual right to recreation.[110] Thus, by the late 19th century, there was a general acceptance that an increase to the statutory

[105] ibid, 27.

[106] ibid 29, 49; (1532-1533) 24 Hen. 8 c 5 being one of the earliest statutory identifications of a highway.

[107] (1892) 56 JP 517.

[108] Marshall Freeman, *Rights of Way: A review of the law relating thereto, with an exposition of The Rights of Way Act 1932* (The Solicitor Law Stationary Society Limited 1934) 7; note also the Real Property Commission (1829) identified that 60 years of proven use were required for a right of way to be an easement and 20 years of consecutive use was required for the right to be established by prescription *First Report of the Real Property Commission* (n14) 51-52; *Mann v Brodie* (1885) 10 App Cas 376 a specific period was not required to find a dedication existed.

[109] See *Woodyer v Hadden* (1813) 5 Taunt 125; *R v Petrie* (1855) 4 B & El 737; *North London Railway Co v Vestry of St Mary* (1872) 27 LT 672; *Winterbottom v Lord Derby* (1866) LR 2 Ex 316, upholding the rule in *Ricket v Metropolitan Railway Co* (1865) 5 B & S 156.

[110] *Maddock v Wallasey Local Board* (1886) 55 LJQB 267, 270; *UDC v Kent CC* (1898) 79 LT 425; *Tyne Improvement Commissioners v Imrie* (1899) 81 LT 174, 179.

protection of public rights would be essential to stop their extinguishment.[111]

3.2 Public interest and the amenity value of commons and rights of way

As evidenced through the existence of commoners' rights, community interests in land often existed, with attempts to extinguish those rights being resisted.[112] The public interest in the amenity value of land however was a particular product of the increased industrialisation of towns, which led to the rapid urban expansion of the 19th century, leading what Jan Marsh called a general 'nostalgia' for rural life. Beyond this, social concern about urban health and overcrowding elevated the societal value of 'open spaces', with some form of relationship to nature underpinning most progressive thought during the period.[113] This led to a general desire to use existing legal processes and public rights, alongside new statutory frameworks, to protect 'open spaces' for the purpose of amenity and public enjoyment. This became particularly pertinent as landholders increasingly closed-off spaces that had been used for some form of public enjoyment.[114]

[111] Pollock (n16) 178-179; Lefevre (n95) 313.

[112] Christian D Liddy, 'Urban Enclosure Riots: Risings of the Commons in English Towns, 1480–1525' 226(1) Past & Present (2015) 41; McDonagh, 'Making and Breaking Property Negotiating Enclosure and Common Rights in Sixteenth-century England' (2013) 76 (76) HWJ 32; Roger B Manning, 'Patterns of Violence in Early Tudor Enclosure Riots' (1974) 6(2) Albion 120.

[113] Denis Hardy, *From Garden Cities to New Towns: Campaigning for Town and Country Planning 1899-1946* (Routledge 1991) 24. William Morris 'Arts and Socialism' in May Morris, *The Collected works of William Morris* (Longman, Green and Co. 1910-1915) XXIII, 192. See also Raymond Williams, *The Country and the City* (first published 1973, Penguin Vintage Classics 2016). Mark Norman *Saving the People's Forest: Open Spaces, Enclosure and Popular Protest in Mid-Victorian London* (UHP 2021).

[114] *Patrick v Greenway* (1796) 1 Wm Saund 346; *Llandudno UDC v Woods* (1899) 2 Ch 705; *Fielden v Cox* (1906) 22 TLR 411; *MacPherson v Scottish Rights of Way and Recreation Society, Limited, and Others* (1888) LR 13 App Cas 744, note Earl of Seabourne, 749-751; *Newcomen v Coulson* (1877) 5 Ch D 133; *Bailey and Another v Jamieson and Others* (1876) 1 CPD 329; *Arnold v Holbrook* (1872-73) LR 8 QB 96; *Huddart v Rigby* (1869) LR 5 QB 139; *Mercer v Woodgate* (1869-70) LR 5 QB 26, note particularly Cockburn CJ.

3.2.1 Rights of way litigation

One way in which the amenity value of land was asserted was through specific litigative attempts to enforce public rights of way, particularly in areas used for rambling or recreation. For example, *Krehl v Burrell*,[115] *Attorney-General v Gaskill*,[116] and *Lane v Capsey*,[117] all considered the possibility of an injunction against development, where the construction would result in the closing-up of a public right of way. Indeed, in *Davies v Williams,*[118] cited in *Lane v Capsey*, the Court suggested that to abate the obstruction of a right of way, it would be possible for the court to mandate the removal of the completed development. Alternatively, the cases of *R v Huntingdonshire Justices*,[119] and *Hornby v Silvester*,[120] discussed the stopping-up of a public highway, under the Inclosure Act 1845. In both instances, the Court emphasised the general interest in allowing claims to be made with respect to public highways, construing the 1845 Act to allow claims for part of a highway, or routes that were not entirely within enclosed land, to constitute a viable claim before the Enclosure Commission.

Similarly, throughout the 19th and 20th centuries, a series of footpath associations were formed as organised local groups who maintained

[115] (1878) 7 Ch D 551.

[116] (1882) 20 Ch D 519.

[117] [1891] 3 Ch 411.

[118] (1851) 16 QB 546.

[119] (1865) LR 1QB 36.

[120] (1888) 20 QBD 797.

rights of way. These groups would often engage in 'mass trespasses' aimed at re-asserting the uninterrupted usage of footpaths which had been blockaded by landowners attempting to close-up public rights of way.[121] These footpath associations represented an organised community effort to assert public rights, reflecting more generally the growing public interest in the amenity value of land. One of the most famous examples of this was the mass trespass on Kinder Scout on the 24th April 1932. The British Workers Sports Federation (BWSF) was a sports organisation which, as one of its activities, ran rambling and cycling camps for young workers. On one such camp a group of ramblers, seeking to reach the summit of Bleaklow, in the Peaks, were turned away by gamekeepers, sparking the idea for a mass trespass. The trespass itself saw over 400 individuals from local rambling groups set off from Bowden Bridge, near Hayfield, with the intention of summiting Kinder Scout.[122] The ramblers were stopped mid-way by gamekeepers, but a group broke through the erected barriers and continued to the Kinder Scout Plateau. On their descent, six of the group were arrested and later tried before the Derby Assizes for unlawful Assembly and a Breach of the peace.[123]

Part of the reason why the Kinder Scout Trespass was so significant, results from the political and legal context against which it arose. From

[121] Early examples include the mass trespasses to re-open Snake Pass between Glossop and Heyfield 1897-1917, Harold Sculthorpe (n101) 20; The trespasses of the Melbourne Footpaths Group Derbyshire 1739-1848, Barry Thomas, *The Old Ways of Melbourne* (2020); New Forest riots 1831, Ian Wright, *The Life and Times of Warren James* (3rd edn, Bristol Radical Pamphlet 2023).

[122] Melanie Tebbutt 'Rambling and Manly Identity in Derbyshire's Dark Peak, 1880s–1920s' (2006) 49(4) the Historical Journal 1125.

[123] Anon ('our own journalist'), 'Derbyshire Assizes: Heavy calendar but no case of Really Great Gravity' (*Derbyshire Times*, July 2nd 1932); Anon 'Keeper's story of a mob' (*Derby Daily Telegraph*, 7th July 1932).

1884 a series of general legislative attempts had been made to better protect access and public rights of way. In particular, the failure of six private members bills for providing Access to Mountains had attracted notable public attention, affirming the existence of a general interest in land as a public amenity.[124] Alongside this, the Addison Report 1931 was published a year prior to the trespass, with the Peak District being recommended as a proposed national park site.[125] Similarly, it was at the time of the trespass that the TCPA 1932 had been re-introduced before Parliament for its second reading, with the inclusion of access provisions within the legislation being heavily debated.[126] It is against this context that the Kinder Scout Trespass acquired notoriety, being seen as an attempt by the public to assert its interest in access to land, when legislative mechanisms were failing to recognise that such an interest existed.

3.2.2 Commons and the public interest

Footpaths were not the only spaces in which a public interest to land were being asserted, with publicly minded commons litigation becoming increasingly frequent during the 19th century. This was achieved through coordinated efforts to litigate against enclosure by identifiable commoners,

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[124] Access to Mountain Bills 1884 (Scotland), 1908, 1926, 1927, and 1931. An Access to the Mountains Act was eventually enacted in 1939; TNA/HO 45/18382 'Access to Mountains Bills 1908 to 1939 and Act'. Note Sir Lawrence Chubb 'Access to the Countryside: The substance of a paper read at the National Countryside Conference at Buxton' (The Journal of the Commons and Footpaths Preservation Society 1933) 121-128.

[125] The National Park Committee, *The Report of the National Park Committee* (Cmd 3851, 1931) 20-21.

[126] HC Deb 5 April 1931, vol 251, Cols 193-321; HC Deb 2 February 1932, vol 261, cols 45-47; HC Deb 7 June 1932, vol 266, col 1854.

with a mind to the larger community benefit that commons preservation would have. The most pertinent example of this can be seen through the work of the Commons Preservation Society (CPS) founded in 1865.[127] In 1864, Earl Spencer, the Lord of the Manor of Wimbledon, proposed to enclose and sell-off parts of Putney Heath for residential development, with the funds from the sale being used to buy-out the commoners rights over the rest of the Manor of Wimbledon, so that 680 acres could be granted, through a trust, to the public at large.[128] The Commoners of Wimbledon (many of whom were lawyers and businessmen) rejected the proposal, making claims before the Inclosure Commission to prevent the extinguishment of their rights.[129] The Wimbledon enclosure attracted public attention, leading the Liberal MP for Lambeth, Frederick Doulton, to propose a committee to enquire into the commons of London, noting that many of them were either neglected or threatened by enclosure.[130] It was out of the recommendations of this Committee that the Metropolitan Commons Act 1866 was enacted, limiting the enclosure of commons within the Metropolitan Police District of London.

The Act broadly reflected the recommendations of the Committee's report, which suggested that no open space within 15 miles of London could be enclosed, with the intention of maintaining the open spaces of London for

[127] Lefevre (n95) 39.

[128] ibid, 28.

[129] BSP 'Further papers and proceedings relating to the proposed enclosure of Wimbledon Common' (Second Series, January 1865).

[130] HC Deb 21 February 1865, vol 177, cols 502-505.

the public.[131] This recommendation had notable consequences, with many manorial lords instituting enclosure procedures before the 1866 Act came into force.[132] Resulting from this, a group of lawyers and political actors formed the CPS, purposed with 'securing for the use and enjoyment of the public, open spaces, situated in the neighbourhood of towns'. [133] In particular, the society supported strategic litigation aimed at getting court recognition of existent commoners' rights, as a mechanism for preventing enclosure and thus maintaining open spaces for the enjoyment of the broader public. In doing so the CPS asserted the existence of a public interest in land as an amenity.

In 1866 the CPS were consulted over the enclosure of Berkhamsted Commons in the Chilterns. Beginning in 1862 the trustees of the manorial estate of Berkhamsted, which belonged to Lord Brownlow, sought to encompass the commons into the manor estate as a deer park.[134] This became possible through the sale of the commons by the Duchy of Cornwall, who had acquired the estate after Lord Bridgewater, the tenant for life, died without an heir.[135] The Duchy sold the land to the Trustees who began to extinguish the commoners' rights. The Trustees obtained an

[131] Parliamentary Archives HC/CL/JO/10/96/57 'Inclosure Commission (Metropolitan Commons Act 1866) Report'.

[132] Notably enclosures occurred in Epping Forrest, Berkhamsted, Plumstead, Tooting, Bostall Heath and Hampstead Heath.

[133] Founding members included Barrister and politician George John Shaw-Lefevre, Solicitor PH Lawrence, Lawyer Charles Pollock (son of Frederick Pollock), lawyer Mr Burrell, John Stuart Mill, Charles Buxton and Lord Mount Temple. MERL/SR OSS AD1 'Minute Meetings' (19th July 1865).

[134] MERL/SR/OSS/CO7/1/3; Ben Cowell 'The Commons Preservation Society and the Campaign for Berkhamsted Common, 1866–70' (2002) 13(2) Rural History 145.

[135] ibid.

agreement from the parish council to divert a track away from the commons and began buying out copyhold tenants.[136] The Trustees then proceeded to close up access along the track, digging ditches and placing fences along its perimeter. Neighbouring the commons were freehold tenants, who enjoyed rights of grazing and access. It was this group who sought advice from the CPS, after the Trustees' lawyer had informed them that their proximate residency did not amount to a legal right to the commons.[137] In 1866 the Trustees erected large fences around the land, shutting off over half of the commons and closing-up any existing public rights of way. The Trustees' solicitors justified this, stating 'the public has no more right to pass over a common than a stranger has to pass through a private garden'.[138]

The CPS solicitor PH Lawrence advised that the enclosure was illegal and done without regard for the public interest, but litigation would be best pursued by an individual with undisputed commoners' rights. Mr August Smith, the Lord of Scilly, was found to be a suitable plaintiff and, under advice from the CPS, set out to abate the enclosure. On the 6th March 1866, Smith arranged for 120 'navvies' to tear down the fencing overnight.[139] With the navvies being under contract with Smith, Lord Brownlow's Trustees pursued legal action against Smith alone for the trespass. The case

[136] Lawrence suggested the parish council misunderstood the relocation of the driveway as an addition to the commons, not as a mechanism for excluding use MERL/SR/OSS/CO7 1/5 'draft submissions'.

[137] ibid.

[138] Grover and Stocken, 'The Hertfordshire Commons: To the Editor of the Times' (*The Times*, 16th February 1866).

[139] Lefevre (n95) 63.

of *Smith v Earl Brownlow*[140] was heard before Lord Romilly who expressed in *obiter* that the violence of Smith in removing the fences was proportional to the act of their erecting.[141] Lord Romilly was quick to find that the rights of commoners, where they existed, had not been properly extinguished, either through agreement or statute, by the Trustees.[142] Moreover, Lord Romilly traced the history of the estate, explaining how the commons had previously existed under separate Manors.[143] Relying upon this history, Lord Romilly went on to state –

> 'The evidence of user relates to twenty-nine different properties, and in eighteen of these cases it is admitted that the property constitutes either a freehold or copyhold tenement of the manor; assuming that I am right in coming to the conclusion that these tenements of either manor (if then there be two manors) have indiscriminately commonable rights over the whole waste.'[144]

He concluded by ordering an equitable injunction, protecting both the commoners' rights and the interest of local residents to use the commons, until the Enclosure Commission reached a decision.[145] It was during the

[140] (1869-1870) LR 9 Eq 241.

[141] ibid, 252.

[142] ibid, 253.

[143] ibid, 251-255.

[144] ibid, 256.

[145] ibid, 257.

Commission's inquiry that it was determined that since the town neighbouring the commons was suitably incorporated to 'satisfy the rule of law as to prescription', individuals within the locality had a legal interest in the commons.[146]

Lord Romilly determined the existence of commoners' rights over Berkhamsted by using the evidence of specific a commoner's rights as proof of rights existing over the entire area. This position was further supported by the decision of the Commission in acknowledging the incorporated status of the town. The court thus created a legal assumption that unless the encloser could prove otherwise, any existence of unextinguished commoners' rights was sufficient proof of unlawful enclosure, even where they did not relate to the exact land being enclosed. This was reiterated in *Warrick v Queen's College, Oxford*,[147] which followed on from the decision in *Earl Brownlow*. The case stated that in determining enclosure the court would first acknowledge the standing of one freehold tenant who could bring the suit on behalf of all commoners. Then, where rights of common had a customary history, the court would attempt to find their legal origin. Where such rights were enjoyed both by local residents and freehold tenants, the court would assume that local residents derived their rights from freehold tenancies.[148] Thus, whilst specific rights of commons were needed for standing, the courts' approach acknowledged a non-legal community and public interests in maintaining commons as open spaces.

[146] Lefevre (n95) 75.

[147] (1870-1871) LR 6 Ch App 716.

[148] ibid.

This was similarly illustrated in a case relating to Epping Forest that the CPS were also consulted over. Epping had been gradually enclosed to prevent damage done by ornamental deer.[149] In 1866 however a major attempt to enclose the forest occurred, with the Rector of Loughton, Rev Maitland, seeking an arrangement with local copyholders to enclosure 1300 acres of the forest, leaving just 9 acres open specifically for public recreation. This had a particular impact on local residents, who exercised an immemorial right to collect firewood during the winter months.[150] This enclosure followed on from the closing-up of the neighbouring Hainault Forest where a similar right had been enjoyed.[151]

To maintain the immemorial right a local labourer, Thomas Willingale, accompanied by his two sons, entered the enclosed forest at midnight on the eve of St Martins (the date from which collecting firewood was traditionally permitted), tearing down the fences to resume the practice.[152] Willingale and his sons were arrested and sentenced to hard labour by the JPs, resulting in the death of one of the sons.[153] The culmination of these events captured public attention, and the CPS, funded by local residents, were called upon to advise. Whilst attempts were made by Rev Maitland to settle the dispute outside of

[149] MERL/SR OSS/CO8/1 'Extracts from the court rolls at the manor of Loughton' research papers collated by PH Lawrence (CPS Solicitor)

[150] ibid.

[151] Gaze (n98) 25.

[152] Lefevre (n95) 126.

[153] Anon, 'Epping Forest' (The Times, 4th May 1882); Steven Willingale, Thomas Willingale, Lopping Rights and the saving of Epping Forest (Willingale Family Society 2013).

court, Willingale pursued the litigation through to his death in 1870.[154] Of note, in *Willingale v Maitland* ,[155] Willingale obtained, from Lord Romilly, the appropriate standing to bring the litigation, with the immemorial custom being understood as a grant from the Crown because Loughton Estate was previously held by Queen Elizabeth I.[156] In particular, Romilly stated that this type of grant would not only apply to copyholders but also to the residents of the locality, who would be entitled to equitable relief.[157] Romilly thus granted permission for a merits hearing.[158]

Unfortunately, before the hearing, Willingale died, leaving the CPS to find a new plaintiff to challenge the enclosure. Since 1863 there had been growing concern from the City Corporation of London (CCL) about the enclosure of open spaces around the city, with the enclosure of Epping Forest going beyond the limits recommended by the Metropolitan Commons Committee in 1865.[159] The CPS thus approached the CCL to act as the new plaintiff, with the city solicitor, Robert Hunter, agreeing to take the case.[160] Hunter was employed as junior to PH Lawrence, the CPS's own solicitor, and had a long-standing interest in commons preservation and public assess.[161] Indeed, on

[154] Lefevre (n95) 127.

[155] (1866) LR 3 Eq 103.

[156] ibid, 109-110.

[157] ibid, 109.

[158] ibid 110.

[159] *Inclosure Committee Report* (n131).

[160] MERL/SR/OSS/CO8/1 'Extracts from the court rolls at the manor of Loughton'

[161] In 1866 Hunter won an essay competition on commons preservation which established his position as a specialist in the area. Gaze (n98) 19.

Lawrence's retirement in 1882, Hunter replaced him as the in house solicitor for the CPS.[162]

In *Commissioners of Sewers v Glasse*,[163] the CCL present the lineage of commons rights in Epping Forest through to the medieval period, asserting that a web of different rights existed across the whole area.[164] This had the practical implication of empowering residents who could assert a commoners right somewhere in the forest, to assert them specifically against what Rev. Maitland sought to enclose.[165] This web of rights was upheld by Jessel MR, who issued an injunction against not only Maitland's enclosure but other the enclosures which had taken place in the forest, suggesting they closed-up land without proper consideration of existing rights.

Alongside this judgment, public opinion led Parliament to instruct a Royal Commission to inquire into the Forest.[166] The proposals of the Commission were debated at length, with statutory intervention over enclosure of the forest being highly contested by the law officers for its legal feasibility.[167] Proceeding Jessel MR's judgment however the Commission published its final Report in 1877, recommending the open spaces within the forest remain

[162] Lefevre (n95) 41.

[163] (1874-1875) LR 19Eq 134.

[164] ibid, 141; Lefevre (n95) 135.

[165] Lefevre (n95) 134-136.

[166] HC Deb 14 Feb 1870, vol 199, cols 246-268; HC Deb 24 Deb 1870, vol 199, cols 769-770; HC Deb 6 July 1871, vol 207, cols 1223-1224.

[167] Willis Bund and Charles Appleton, 'A Review of the Preliminary Report of the Epping Forest Commission Dated February 27, 1875' (Originally published 1872, Academy Publishing Co 1902); Parliamentary Archives, HL/PO/PU/1/1875/38& 39V1n6 (1875) 'An Act to extend the Time for the Epping Forest Commissioners to make their Final Report'.

unenclosed to provide space for public recreation.[168] After much negotiation, the CCL came to manage the forest entirely from 1878.[169] This was possible through the coordination of the CPS, who during the statutory drafting of the Epping Forest Act 1878, promoted the incorporation of ideas of public interest into the legislation.[170]

This case again illustrates the use of specific rights in asserting a public interest over land as an amenity. As in *Warrick* and *Earl Brownlow*, the court extended how rights in common were understood, placing emphasis not only on the strict requirement of a freehold or copyhold claim to the commons, but also the more general interest that a locality had in the commons, as it had evolved over time. Indeed, Jessel MR in *Commissioners of Sewers* emphasised that it was not the parish as a corporation which determined the rights of commoners over different commons within the forest, in a *common pur cause de vicinage*, instead the rights belonged to the 'poor people' identified historically by the forest courts, who had used the forest for personal means.[171] This again pushed at what forms of right or interest the court was willing to consider in the assertion that an enclosure was unlawful, emphasising the collective public interests in these spaces.

[168] Epping Forest Commission, *Final Report of the Epping Forest Commission* (HC 187, 1877); MERL SR OSS/P2/B/8 'Reports on Epping Forest'

[169] Lefevre (n95); HC Deb 28 May 1878, vol 240, cols 885-857. Negotiations determined how existent landholders within the forest, particularly the manorial Lords, would be compensated under the Epping Forest Act 1871. This was mainly a problem where development of illegally enclosed spaces had begun to occur. For further see TNA WOK 9/42.

[170] The purpose of the Act was not to protect commoners' rights but to ensure 'the recreation and enjoyment of the public' HL Deb 11 July 1878, vol 241, cols 1201-1206; HC Deb 4 July 1878, vol 241, cols 766-777. This was not the first instance that the CPS had been involved in shaping legislation, with the Chairman of the society (George Shaw-Lefevre) being involved in the drafting of the Metropolitan Commons Act 1866 and the Commons Act 1876.

[171] (1874-1875) LR 19Eq 161.

Thus, whilst litigation did not go as far to assert any form of public rights, with the fiction of locality playing a fundamental role in asserting commoners rights, [172] the case law presented the legal possibility of a broader public interest in land due to its amenity value. This was then given statutory effect in legislation like the Epping Forest Act 1878, or later the Metropolitan Commons Act 1878, which empowered the MBW to hold commoners' rights on behalf of residents within its administrative boundary. Outside of London, the Commons Act 1876, empowered the Enclosure Commissioners to limit enclosure, ensuring portions of wasteland and commons remained open spaces.[173] This was expanded upon by the Commons Act 1899 which introduced formalised mechanisms for creating commons regulation, allowing those with a one-third interest in the commons to form management committees and produce schemes to regulate use of the commons. These were particularly important where customary rights were being exercised alongside general public enjoyment.[174] In all instances, the legislation made the public a consideration in deciding whether to permit enclosure.[175]

3.2.3 The National Trust: A national public interest in land

The most explicit expression of a public interest in the amenity value of land can be attributed to the National Trust which was co-founded by Octavia Hill, Robert Hunter, and Hardwicke Rawnsley in 1895, with the purpose of

[172] Note *Robertson v Hartopp* (1889) 43 Ch D 484; *Earl De La Warr v Miles* (1881) 19 Ch D 80.

[173] Commons Act 1876, ss 2 and 7.

[174] TNA/HLG 71/1695 (8th December 1944) 'Commons Regulation and Maintenance'.

[175] As was noted in *The Times* on the 31st January 1887 'there are now almost as many Bills aiming at the preservation as at the appropriation of open spaces'.

'promot[ing] the permanent preservation, for the benefit of the nation, lands and tenements of beauty or historic interest'.[176] Prior to the formation of the Trust, Octavia Hill worked to secure property and green spaces for her working-class tenants in Marylebone, London, challenging the existence of poor quality housing in the area.[177] Concern over the enclosure of open spaces, led Hill to join the CPS in 1875, becoming a member of its executive committee.[178] It was through the CPS that Hill met the society's solicitor Robert Hunter.[179] The two worked closely together, exploring the feasibility of the Society purchasing commons at risk of enclosure to ensure their preservation, an endeavour that was eventually determined to be beyond the internal constitutional purposes of the CPS.[180] Consequently, the CPS encouraged private landholders to purchase small plots of land, granting public rights of passage and use over them.[181] This too was not ideal because it placed an administrative burden on the society in identifying and managing the purchase of property by individuals, leading the society to continue to prioritise legal activism over land acquisition. [182]

[176] See Matthew Kelly, *The Women who Saved the English Countryside* (YUP, 2022) Chapter 1 'Octavia Hill Gathering in the Givers', 11-73.

[177] ibid, 47-49; Gaze (n98) 14-15.

[178] Kelly (n176) 42.

[179] Gaze (n98) 20.

[180] The Committee was established following growing concerns about the development of Hamstead Heath, as parts of the commons kept appearing on the market for development, Gaze (n98) 28-29.

[181] Kelly (n176) 60.

[182] Note the subsequent litigation of *Earl De Le Warr v Miles* (1881) 17 Ch D 535; *Robertson v Hartopp* (1889) 43 Ch D 484; *Lord Rivers v Adams* (1878) 3 Ex D 361. Or the passing of the New Forest Act 1877.

Hill and Hunter however believed that an expansion of ownership, over the litigation of extant rights, would be most effective in securing land for the public, and it was this belief which led Hunter to first propose a corporate body which could own land for the public in 1884.[183] Hill had been contacted about a plot of land at Sayers Court, which the owner wished to bequest to public for recreation.[184] The issue however was that there was no local governance body empowered by statute to accept the gift or manage it, as fiduciaries, on behalf of the public. Similarly, as noted in Chapter Two, the Office of Works were reluctant to accept lands for the public, viewing this type of project as beyond their specific role.[185]

Hunter proposed that a corporate body could be registered under the Joint Stock Companies Act 1844 and would be suitably empowered to accept gifts of land.[186] Moreover it was believed that the holding of property by a body corporate would facilitate the creation of public rights over the land, by allowing the public to engage in uninterrupted access and enjoyment, thus conveying rights by prescription and dedication. Although this idea was not immediately acted upon, Hunter and Hill returned to it over the proceeding decade until, in 1893, an opportunity emerged.[187]

[183] Ben Cowell 'For the benefit of the nation: politics and the early national Trust' in Elizabeth Baigent and Ben Cowell (eds.) *'Nobler Imaginings and Mightier Struggles': Octavia Hill, Social Activism and the Remaking of British Society* (Institute of Historical Research 2016).

[184] Gaze (n98) 32-33.

[185] Graham Murphy, *Founders of the National Trust* (2nd edn, National Trust enterprises 2002) 20.

[186] Section XXX.

[187] Octavia Hill, 'The Open Spaces of the Future' (July 1899); Robert Hunter also published a paper in 1884, Kelly (n176) 60.

Beginning in 1885, the CPS worked alongside the Lake District Defence Society (LDDS) to prevent enclosures in the Lakes, which were becoming increasingly common as landowners sought to sell portions of their land for railway development.[188] Leading the LDDS was Clergyman Hardwicke Rawnsley, who had, since being posted to the Lakes in 1877, worked to preserve the region from development.[189] Consequently, Rawnsley had amassed notable public support and funding for the LDDS.[190] The CPS continued its approach of strategic litigation, pursuing legal action against specific enclosures in the area.[191] Hunter however became convinced that litigation and legislation would not be sufficient to preserve open spaces on the scale required in the Lake District. This sentiment was shared by Hill, who in '*Our Common Land*' called upon landowners to give 'every atom of open space [they] have left to these people in need'.[192] Thus in 1893 when Rawnsley contacted them about the sale of Lodore Falls in Keswick, the three set in motion the establishment of a body corporate capable of holding land on behalf of the public, with Rawnsley providing the initial funding to purchase the Falls.[193] The National Trust for places of Historic Interest or Natural Beauty was chartered two years later in 1895, as a charitable body under the Companies Act 1894.

[188] Gaze (n98) 30.

[189] Murphy (n185) 76.

[190] John Ruskin had met Rawnsley at the University of Oxford when Rawnsley was a student, with Ruskin holding the Slade Professorship of Art. The friendship led Ruskin to financially support to the LDDS, alongside introducing Rawnsley to Hill. HD Rawnsley 'The power of personal service- A sermon in memory of Octavia Hill (preached Southwark Cathedral 21st August 1912, published Faber & Faber 1935) 10.

[191] Gaze (n98) 30.

[192] Octavia Hill, *Our Common Land (and other short essays)* (MacMillian 1877) 536-537.

[193] Marsh (n4) 56.

The registering of the organisation as a charity, reflected a departure from Hunter's original proposal to create a listed body corporate under the Joint Stock Companies Act 1844. Hunter envisaged the establishment of the Trust as a non-profit private company, chartered on the condition that it had 'no right to divide [its] property among the members in the event of winding-up'.[194] Hunter adopted this approach following consultation with Charles Eliot and the Appalachian Mountain Club who had drafted similar constitutional provisions in founding the Trustees of Public Reservations in Massachusetts (TPR). The TPR was a statewide non-profit private corporation which was governed by a Board of Trustees to 'hold land, free from taxes, for the benefit of the public'.[195] The TPR was empowered to do so by specific legislation, the Trustees of Public Reservations, Massachusetts Act 1891. Hunter believed a similar organisation could be established in England and Wales, with its own constitution and byelaws providing the same governance structure as the 1891 Act had done in Massachusetts. In 1894 however, Hunter presented his proposal at a public meeting where it was suggested the Trust should be constituted as a charity, to better appeal to the public.[196] The Trust was registered with the Board of Trade the subsequent year. Despite the decision to register the body as a charity, the language of trust is still interesting here, reflecting the integration of traditional property concepts to serve new public interests, with the public in this sense becoming the beneficiary of the trust.

[194] Gaze (n98) 33.

[195] For further on the AMC see Charles E Fay 'The Appalachian Mountain Club' (1910) 35(2) The Annals of American and Political Science 117.

[196] Many of the Trusts early acquisitions were obtained through gift or grant, as opposed to direct purchase, consider the examples in James Lees Milne (eds), *The National Trust A Record of Fifty Years Achievement* (3rd edn, BT Batsford Ltd 1949).

This can be tied to broader instances, where both private and statutory trusts were being used to secure public benefit.[197]

The legal provisions for the Trust were further formalised by the National Trust Act, 1907, which determined the regulatory capacity of the trust, framing its existence similarly to that of town corporations, furthering the status of the Trust as a quasi-public body.[198] The Act set out the specific duties of the Trust with respect to the management and administration of the land and property it acquired, providing in statute how the public trust would operate.[199] Section 4(1), for example, set out the purposes of the Trust as ensuring the 'permanent preservation for the benefit of the nation, of lands and tenements of beauty of historic interest', with s 4(2) stating that the Trust would have the full powers of ownership only in so far as they were required to fulfil the purpose of s 4(1). Similar provisions, which adapted traditional ownership rights for this new public purpose can be seen elsewhere in the Act, with s 6 setting out that the Trust was exempted for the requirement of a licence in Mortmain, enabling the Trust to hold any property or easements which gifted unto them free of this restriction. Similarly, ss 8-11 constituted the specific trustee arrangements of the Trust, determining its liabilities and the relationship of trustees to the assets of the Trust. It was within this governing framework that the Trust began to

[197] Recreation Grounds Act 1859; Ben Pontin 'Environmental Law-Making Public Opinion in Victorian Britain: The Cross-Currents of Bentham's and Coleridge's Ideas' (2014) 34(4)OJLS 759, 778-780.

[198] Sections 13-24 of the Act determined the Trusts own constitution; this was a similar approach to that taken in the Municipal Corporation Acts which provided town corporations with a public body identity.

[199] Sections 31 and 32 empowered the Trust to produce by-laws for regulating against nuisance and for how the public would interact with the lands held by the Trust. These powers were similar to the ability of local governments to produce byelaws under s16 Local Government Act 1888.

acquire property on the part of the public, either through direct purchase or gifts.[200]

The Trust's statutory purposes were further expanded under the National Trusts Act 1937, following on from a Report by the Attorney General into the functioning of the body as a public trust.[201] The Report recommended an expansion of the Trust's purposes to specifically include 'the promotion of access and enjoyment by the public', which was then affirmed in s 3 of the Act. The decision to include this in the National Trust Act 1937 could be seen as another example of the piecemeal enactment of the recommendations of the Addison Report 1931, showing again that by the outbreak of World War Two, there was a desire to create some form of national park land, but still legal uncertainty about what exact form this parkland would take. The Trust thus came to reflect, both through its charitable existence, and in the property in land it held, the presence of a public interest in land due to the opportunities it offered for recreation and openness.

3.3 Public interest in the amenity of land and the NPACA 1949

The amenity value of open spaces and commons was also integrated into planning legislation from the first Planning Act in 1909, with s 73 of the Act, requiring parliamentary approval for the acquisition of open spaces by local authorities for the purpose of development. As part of this process, under s 73(2) the LGB was required to give public notice and opportunity for public objection for the acquisition of an open space. Similarly, under s 15 of the 1919

[200] Merlin Waterson, *The National Trust: The First Hundred Years* (BBC Books 1994).

[201] TNA/TS 27/454 (22nd April 1937) 'Report of the Attorney-General on the National Trust for Places of Historic Interest or Natural Beauty Bill (HL).

Act, where land had been acquired for housing, local authorities were obliged to consider the creation of open spaces, as part of their broader duty in laying out the streets and highway of the new development.

Open spaces also received substantive protection within land law itself, with the Law of Property Act 1925 clarifying the legal status of open spaces and commons. Schedule I, part V, for example, determined the legal position of ownership and access with respect to open spaces vested in public trustees.[202] Similarly, s 193 provided a right of public access for 'air and exercise' to any commons included in the Metropolitan Commons Acts or that were partially or wholly situated within the administrative boundary of a county borough or urban district. This was supported by s 194 which explicitly prevented the building of fences or construction on urban commons which would have the effect of enclosing those spaces. Thus, whilst s 1 of the Town Planning Act 1925 provided for the inclusion of commons as open spaces in development plans, thus limiting their development in an administrative way, the Law of Property Act 1925 also statutorily increased public land rights over commons to create the same limitation, thus legally protecting commons as an amenity for public enjoyment.[203] This protection of commons was further expanded, as planning schemes were extended to rural areas under the TCPA 1932, with internal memorandums emphasising the importance of planning schemes as a

[202] This is further discussed in relation to Town planning in *Re Bradford City Premises* [1928] Ch 138.

[203] *Woking Urban District Council v Spanton* (Unreported).

mechanism for securing commons, protecting them from development and thus reducing the likelihood of enclosure.[204]

The language of amenity itself also started to be incorporated into statutory provisions for land regulation. Section 1 of the Town Planning Act 1925 for example, referred explicitly to the ability to create development schemes which provided for urban amenities, with the legislation marking the first statutory use of the term in conjunction with planning. The incorporation of 'amenity' into the 1925 Act was in part consequential of conversations between the Planning Institute, the CPS, and the National Trust about how planning processes could be used to preserve open spaces and amenities.[205] Indeed, the concept of legal amenity protection was notably written about by Octavia Hill, in association with the CPS, in 1877.[206] Hill used the language of amenity to conceptualise the different forms of interest that existed in land outside of its commercial or private property value. In doing so, she implied into such spaces an inherent public interest capable of statutory protection, commenting how this protection was part of the duty of local authorities.[207]

Amenity protection was also expanded in the extension of planning procedures to rural areas under s 1 of the TCPA 1932, with ss 46-47 granting local

[204] TNA/HLG 71/1695 (17th July 1942) departmental correspondence between the Post-War Reconstruction Committee, the Ministry for Health, and the Open Spaces Society. Similar discussions were had about the provisions for village greens, with the administrative capacity of parish councils needing to be expanded to facilitate the incorporation of those spaces into planning schemes.

[205] These groups formed the CPRE one year later. John Sheail, *Nature in Trust* (Blackie and Son Limited 1976) 70-71.

[206] Hill, *Our Common Land* (n192) 536.

[207] Robert Whealan (eds), *Octavia Hill's Letters to Fellow Workers 1872-1911: Together with an Account of the Walmer Street Industrial Experiment* (Kyrle Books 2005) 405.

authorities specific powers relating to trees and advertisements, aimed at preserving the amenity of an area.[208] Beyond this, in schedule III, part I of the Act, acquisition was further limited, introducing a general restriction on acquiring open spaces or amenities for development.[209] The legislation was also accompanied by attempts to further protect access to such amenities, with the Rights of Way Act 1932 extending the legal protection of existing rights of way, with s 4 making it easier for new rights of way to be created and documented. In addition to this, the eventual enactment of an Access to the Mountains Act in 1939, provided for the first time general access provisions over a category of land. Section 1 of the Act set out that pedestrian access could not be limited over, what s 2 defined as, 'mountain, moor, heath, down or cliff; unless it was already being used for arable farming (s2(2)(b)), or an industrial purpose (s2(2)(a). This had the purpose of further extending the existence of land as a public amenity in which the public had a general interest.

It is against this context of a public interest in land and its amenity value, alongside the growing legal protection offered to that interest, that the framing of s 5 of the NPACA 1949 can again be considered. Section 5 set out that national parks would be dual purpose, providing spaces both for protecting natural beauty and providing public recreation. It was understood from the Addison Report that national parks, if effectuated, would cover much of the

[208] See also *Mills & Rockleys Limited v Leicester City Council* [1946] KB 316; *O'Ferrall, Limited v Harrow Urban District Council* [1947] KB 66.

[209] This was in part a response to the Court upholding the ability of a local authority to acquire an open space and then some years later use that space for a different public purpose, *Attorney-General v Manchester Corporation* [1931] 1 Ch 254.

non-urban landscape in England and Wales.[210] Whilst urban open spaces had the possibility of protection through development plans, and urban commons were explicitly protected as open spaces under s 193 of the Law of Property Act 1925, there was no similar legal basis for the general use of amenities in the countryside. Thus, whilst rights of way protection, under the 1932 Act, and the Access to the Mountains Act 1939 went some way providing the general public interest in outdoor recreation with a legal basis, s 5 of the NPACA 1949 can be seen as the first explicit statutory expression of this interest in rural areas. Section 5 should thus be understood against the broader context of a growing public interest in land, which could no longer be provided and protected through the creative application of common law land rights. Instead, s 5 gave the possibility of public interest, as it existed at common law, a statutory basis within the boundaries of national parks. It was in this sense that Lewis Silkin described the Act as 'a people's charter'.[211]

4. The Public Administration of Land

Land interests were also integrated into the emerging framework for public land administration less explicitly, with legislation utilising old forms of right to facilitate statutory controls over land use. This type of arrangement can be seen in s 64 of the NPACA 1949, which empowered park planning authorities to enter into land use agreements with landholders, enabling authorities to open land up for public access without acquiring the land. Alternatively, as was explored in previous chapters, the establishment of national parks as a type of planning activity, reflected the adaptation of 'old form' rights into a new regulatory approach to land control. It is this latter sense

[210] The National Park Committee, *The Report of the National Park Committee* (Cmd 3851, 1931) [The Addison Report] 37-39.

[211] HC Deb 31 March 1949, vol 463, col 1461.

which made the integration of land interests perhaps less explicit because unlike the use of the doctrine of exclusivity, which remained broadly similar but with the public body as landholder, other forms of land interest were specifically applied to the purpose of land administration. This meant that these interests no longer existed as to interact with other private rights, but instead, through statute, existed as part of the processes of administration which had been layered over those private rights. This was particularly true in statutory nuisance and through the process of statutory land controls.

4.1 Statutory nuisance and the public administration of land

Nuisance, contentious with the Roman idea of *nocumentum* or *nocere*, has since the 14th century provided a legal mechanism for protecting against the 'wrongful disturbance of the enjoyment of real property', protecting the exclusivity of owning property in land.[212] Even as nuisance became more closely understood as a personal legal right, the principles associated with nuisance still maintained a distinctly proprietary character.[213]

During the 19th century the legal principles of nuisance were increasingly developed as more pressures on land use occurred resulting from mass

[212] Baker (n19) 451; for example, (1330) YB Trin 4 Edw III, fo 36, pl 26; 4 Lib Ass which discusses material damage to fruit trees consequential of noxious substances produced by a neighbour. For further see Robert Palmer, 'Common Law Environmental Protection: The Future of Private Nuisance, Part I.' (2014) 6(1) International Journal of Law in the Built Environment 21.

[213] During the 16th century ideas of nuisance came to be bundled with other property rights, following on from the abolition of the assize in 1601. Nuisance then acquired two distinct meanings. The King's Bench viewed nuisance as a neighbourly matter for the lower courts. To bring actions for the Kings Bench a series of writs or 'actions on the case' emerged. This led to conflict between the Court of Common Pleas and the Kings Bench. This was ultimately resolved with the abolition of the Assize. See *Yevance v Holcombe* (1566) CP 40/1238 in Sir John Baker, *Baker and Milsom Sources in Legal History: Private Law to 1750* (2nd edn, OUP 2013) 648; Janet Loengard 'The Assize of Nuisance: Origins of an Action at Common Law' (1978) 37(1) CLJ 144.

urbanisation.[214] This was particularly pertinent given administrative regulatory spaces, like planning or public health legislation, had yet to emerge to regulate the shared use of land.[215] Consequently, 19th century nuisance had an inherently regulatory role which was justified through common law principles about proprietary enjoyment. It is nuisance in this regulatory sense which was later integrated into the statutory processes for publicly administering land. 'Regulatory' here refers to how claims in nuisance were often brought to control land use.[216]

The increased regulatory nature of nuisance during the 19th century has been reflected on in scholarship, but is worth restating these arguments here through the example of a popular case.[217] In *AG v Council of the Borough of Birmingham* [CBB], [218] Charles Adderley brought a claim in nuisance against the CBB, claiming that their sewage management had led to the deterioration of the River Tame which flowed through his property, causing damage to, and

[214] Prior to this, nuisance was more a 'general maxim' than legal doctrine, Baker (n19) 455-456.

[215] As noted in chapters three and four the first Public Health Act was in 1848, with the adoption of its provisions being optional. John Prest, *Liberty and Locality: Parliament Permissive Legislation, and Ratepyers' Democracies in the Nineteenth century* (OUP 1990) 25-47, although some introduced private members bills under the Town Improvement Clauses Act 1847.

[216] See Ben Pontin, Nuisance law and environmental protection a study of nuisance injunctions in practice (Lawtext Publishing 2013).

[217] Ben Pontin, Nuisance law and environmental protection a study of nuisance injunctions in practice (Lawtext Publishing 2013); Ben Pontin 'Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence' (2012) 75(6) MLR 1010; Ben Pontin 'The Common Law Clean Up of the 'Workshop of the World': More Realism About Nuisance Law's Historic Environmental Achievements' (2013) 40 (2) JLS 173; Leslie Rosenthal, 'Economic Efficiency, Nuisance, and Sewage: New Lessons from *Attorney-General v Council of the Borough of Birmingham*, 1858–95' (2007) 36(1) JLS 27; Joel Franklin Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3(2) JLS 40; John P S McLaren, 'Nuisance Law and the Industrial Revolution - Some Lessons from Social History' (1983) 3(2) OJLS 155.

[218] (1858) 4 K&J 528; [1858] 70 Eng. Rep 220. Similar cases include *Earl of Harrington v Corporation of Derby* [1902] 1 Ch 205; *AG v Guardians of Poor of Union Dorking* (1882) 20 Ch D 595; *AG v Birmingham, Tame, and Rea Drainage Board* (1881) 17 Ch D 685.

preventing the enjoyment of, his gardens. Adderley sought, through Chancery, an injunction against the CBB to prevent them from depositing further sewerage into the Tame.[219]

The Court found in favour of Adderley, declaring a contingent injunction if the CBB did not improve its sewerage management.[220] Over the subsequent decades, the Borough invested £325,000 in improving its sewerage infrastructure, implementing new filtration systems and sewerage pipes.[221] Adderley however continued to litigate, claiming the interventions of the CBB did not abate the nuisance. The contingent injunction was eventually dissolved by the Attorney-General in 1881, with Adderley being awarded £5000 in lieu of real protection. The decision to not enforce the injunction has led to academic doubt over the effectiveness of 19th century nuisance law.[222] What is interesting however was how the legal principle of nuisance was used as a mechanism for challenging the administration of local governance before local governments were fully empowered by statute to address local administrative concerns. Thus, instead of bringing litigation that the Borough was not meeting its public health obligations under the Public Health Acts 1848, and later 1875, Adderley instead relied upon his propriety interest to regulate the use of land by the CBB, showing the regulatory potential of nuisance to improve the administration of land use.

[219] See Rosenthal (n217) 27.

[220] Adderley was not the only individual bringing nuisance claims against CBB with an existent suspended injunction also being in place, see ibid, 48.

[221] Jules P Gehrke, 'A Radical Endeavor: Joseph Chamberlain and the Emergence of Municipal Socialism in Birmingham' (2016) 75(1) the American Journal of Economics and Sociology 23.

[222] See Brenner (n217) and McLaren (n217). This understanding has been challenged in Ben Pontin 'Nuisance Law and the Industrial Revolution (n216).

This idea that nuisance could regulate different forms of land use became increasingly apparent in legislation, with the idea of a statutory nuisance emerging as a form of public administration. This was different to public or private nuisance at common law because it was not dependent on the disruption of the peaceful enjoyment to property in land with this instead providing a legal fiction to justify the intervention.[223] This can be evidenced in considering s 115, Public Health Act 1848 which empowered Local Boards to make byelaws for the regulation of corpse storage, sewerage, highway maintenance, and housing to prevent the creation of nuisances. This power could be exercised in so far that byelaws were deemed necessary by the Inspector of Nuisances, under s 37 of the Act.[224] Thus instead of nuisances being alleged due to them infringing a second party's proprietary interest, nuisance here was determinable through the administrative processes of the Inspectors.[225] The old form conception of nuisance abatement then as an exception to proprietary exclusivity, was used somewhat fictitiously to fulfil the broader purpose of a public statute, in this case public health.[226] The application of nuisance in this context existed further under the Nuisance Removal Acts, which statutorily defined a series of public health issues, like

[223] *Tottenham UDC v Williamson and Sons Limited* [1896] 2 QB 353.

[224] The role was created by the Nuisances Removal and Diseases Prevention Act 1848. Inspectors had the responsibility of travelling round localities surveying nuisances under s 7.

[225] Nuisances Removal and Diseases Prevention Act 1855, s 7. Nuisance was defined in s 8 as 'any state as to be a nuisance or injurious to public health'.

[226] This can be seen in the case of *Wanstead Local Board v Wooster* (1884) 12 QBD 617, discussed in the previous chapter. Alternatively, see for further examples of the Courts framing statutory nuisance in the same way as common law private nuisance: *Brown v Dunstable Corp* [1899] 2 Ch. 378; *Seal v Merthyr Tydfil Urban District Council* [1897] 2 QB 543; *Bradford v Eastbourne Corp* [1896] 2 QB 205. Note also James Hanley 'Parliament, Physicians, and Nuisances: The Demedicalization of Nuisance Law, 1831–1855' (2006) 80(4) Bulletin of the History of Medicine 702 which notes the decline public health 'nuisance' as health administration powers are expanded.

river pollution, abattoir maintenance, and offensive trades as nuisances capable of removal under the Acts by the Nuisance Removal Committee.[227]

Sections 17-18 of the Public Health Act 1875, also used a similar conception of nuisance, requiring local governance bodies to maintain sewerage drains so 'not to be a nuisance or injurious to public health'. Alternatively, as explored in *Wincanton Rural District v Parsons*,[228] s 94 of the Public Health Act 1875 empowered local authorities to serve notice requiring the abatement of a nuisance'. Wincanton RD exercised this power with respect to pipes running from the defendants' house over his land, albeit parallel to a highway. The Court upheld the ability of the authority to abate the nuisance, stating that the use of the pipes for sewerage regardless of whether it was on the defendants' land, was a statutory nuisance under s 94 and did not constitute a private sewer.[229] Similarly in in *Consett UDC v Crawford*,[230] it was held that local authorities, under s 102 of the 1875 Act, had the right to enter property belonging to another in seeking to abate a nuisance without the action surmounting to a trespass. In both cases, the language of 'abating the nuisance' empowered the local authorities to interfere with exclusive property rights in much the same way permitted by common law nuisance, but with the statute, not proprietary enjoyment, providing the justification for this interference.

[227] Namely the Nuisance Removal Acts 1848, 1849, and 1855. Note Gerald Fitzgerald, *The Law Relating to Public Health and Local Government as contained in the Public Health Act 1875* (Stevens and Sons 1876) 4-5.

[228] [1905] 2 KB 34.

[229] Similar cases which discuss the regulation of private land use by statutory nuisance include *Graham v Wroughton* [1901] 2 Ch 45; *Wallasey Local Board v Gracey* (1887) 36 Ch D 593; *Saunders and Another* (1883) 11 QBD 191; *The Banbury Urban Sanitary Authority v Page* (1881) 8 QBD 97.

[230] [1903] 2 KB 183, see also *Lancaster v Barnes DC* [1898] 1 QB 855; *Self v Hove Commissioners* [1895] 1 QB 685.

Statutory nuisance was also used to regulate land use in the context of housing and planning. Section 21 of the Housing of the Working Classes Act 1890 referred to houses being of such ill-repair that they caused a 'nuisance'. Alternatively, *Robertson v King*,[231] considered s 32 of the Act which empowered local authorities to prevent the use of 'dwelling houses' which were 'unfit for human occupation'. The Court construed dwelling-house broadly suggesting that definition should not curtail the ability of a local authority to prevent the use of buildings that were unfit, illustrating again how the language of 'nuisance' was used to effectuate some broader form of statutory regulation, not simply to protect the implied rights of proprietary enjoyment.

4.2 Old form rights and the regulation of land use

It was through the evolution of statutory nuisance, that more general processes for controlling land use emerged. These were underpinned by a similar understanding that an infringement of proprietary enjoyment could be remediated through compensation, where necessary, as opposed to the maintenance of the specific interest. In other circumstances, statutory provisions for public utility, similar to those in statutory nuisance, mitigated any need for compensation at all. This can be illustrated in considering s 25 of the Housing, Town Planning & c Act 1919, which further regulated land use for housing, as first established in the Housing of the Working Classes Act 1890.

Section 25 empowered local authorities to give specific consent for the development of housing, enabling them to impose conditions on that consent,

[231] [1901] 2 KB 265.

requiring that housing be constructed in a certain way. Given that this limitation was prior to property development or redevelopment, local authorities were not liable to pay compensation for this limitation, even where the conditions proved injurious to property that was non-compliant or led to a decrease in land value. In *Re An Arbitration between Ellis and the Ruislip-Northwood Urban District Council* ,[232] for example, the Court upheld the ability of the District Council to impose a building line as part of a planning scheme under s 59 of the 1909 Act, and s 42 of the 1919 Act respectively. The Council was not liable to pay compensation to those whose land fell beyond the building line, even where landowners could prove they had intended to develop. This gave local authorities significant power to regulate land use, under the general purposes of providing adequate housing. There was a form of administrative function, or overlay, which existed 'on top of' the private interests of landholders with respect to their specific property in land.

This concept of administrative control, existing outside of private land interests, was further developed as the legal processes of planning expanded. Section 1 of the Town Planning Act 1925, for example, expanded the statutory purpose of planning to 'the general object of securing proper sanitary conditions, amenity, and convenience in connection with the laying out and use of the land, and of any neighbouring lands'. This had the effect of also extending the scope of administrative regulation, beyond housing purposes alone, as was the case in the 1909 and 1918 Acts.[233] This was further emphasised

[232] [1920] 1 KB 343.

[233] Phillip Booth and Margo Huxley, '1909 and all that: reflections on the Housing, Town Planning Act 1909' (2012) 27 Planning Perspectives 2, 275.

by s 3 of the Town Planning Act 1925 which empowered local governments to exercise development controls over urban amenities, thus enabling local governments to prevent or refuse possible development over a category of land, without having to directly interact with the specific individual rights of landholders to determine the use of their land. This was particularly used in the context of commons, which could be marked as non-developable in a planning scheme (s 2), overcoming some of the difficulties in protecting commons through the assertion of private rights.[234]

This ability to demarcate areas as development-free was further expanded under s 1 of the TCPA 1932 to include rural areas, with s 16 of the Act granting local authorities the ability to resist development that would likely seriously injure, or its operations seriously injure, 'the amenity of a locality', within schedule III, part I of the Act. This further brought all forms of land within the general regulatory control of administrative bodies. Thus, whilst this did not reflect a general administrative restriction on land use (that came later in the TCPA 1947) it did illustrate how administrative regulation was increasingly being overlayed onto a variety of forms of private land use, allowing for the control of that land. Alongside this, as set out in s 18, where such controls were directly injurious to existing property in land, thus interacting with private legal interests, compensation was awarded to remediate the injury. Compensation could be granted where 'property is injuriously affected' by the infringement or curtailment of existing legal rights through development control. Thus, as was upheld in *George Wimpey & Co Ltd v Middlesex County*

[234] TNA HLG 71/1695 (11th July 1942) 'Minute Sheet: Mr Hill and Mr Pepler' discussing the relationship between the Planning Acts and commons.

Council,[235] compensation would not be awarded for pecuniary injury or lost potential.

This relationship between administrative land control and compensation became prominent, with more extensive planning controls ultimately raising questions about whether more extensive compensation was required.[236] This question was addressed by the Uthwatt Committee, first noted in Chapter Three, which attempted to separate out the statutory process of development control from land valuation.[237] It was proposed this could be achieved by establishing first a general restriction on development, and second a centralised board for determining land valuation.[238] It was hoped that this would reduce the pressure of compensation for injurious effect, because it would prevent rapid 'overdevelopment' in response to a proposed development scheme, which the Report identified consequently triggered an inflation in land values.[239]

These proposals were adopted in the TCPA 1947 which cross-blended proprietary legal concepts with the new planning framework. Section 12 of the TCPA 1947 introduced a general restriction on land use, effectively preventing

[235] [1938] 3 All ER 781.

[236] This issue became particularly emphasised in the debates predating The Restriction of Ribbon Development Act 1935. As Marshall Freeman noted 'it has been justifiably said that [the Act] has carried the power of state interference with the liberty of the subject to the highest point ever reached by legislation' Marshall Freeman, *The Restriction of Ribbon Development Act 1935* (The Solicitor Law Stationary Society Limited 1936) 1.

[237] Uthwatt Report (n77) 4-7.

[238] ibid, 7-14.

[239] ibid 8-9.

land from being used for any purpose other than that already established. This restriction could then be lifted with the consent of the local planning authority under s 12, with private landholders having an administrative appeals process to the Minister of Town and Country Planning under s 16. This appeal process was dependent on the appellant having a proprietary interest in the land, but instead the appellant had to have proposed a development. This further separated out the private land interests of landowners at one level, from the administrative relationship between those using land and public authorities, as it provided a remedial process that was not grounded in the assertion of land rights, or the interpretation of the doctrine of exclusivity by the courts.[240]

4.2.1 Statutory agreements for controlling land use

The creation of a general land control was not the only process through which proprietary legal concepts were cross blended with the new planning framework and the creation of statutory agreements under s 34 of the TCPA 1932 also requires consideration. Section 34 empowered local authorities to enter into land usage agreements with landholders, with the agreement being binding upon the land itself.[241] These agreements saw a local authority or joint committee agree with the landowner a set of prescribed uses for an area of land under the expectation that the planning scheme would then uphold these designated uses in the administration of that land. Unlike dedication or

[240] Courts emphasised that planning restrictions were not an infringement on proprietary interests which could be litigated. Note *Burman v St. Albans Corporation* (1961) 12 P & CR 360; *Higham v Havant and Waterloo Urban District Council* [1951] 2 KB 509.

[241] It is unclear whether these agreements were intended to be like easements or covenants with the statutory process creating something more akin to an easement, but the courts using the language of covenanter and covenantee in discussing the parties involved in this form of agreement.

prescription however these agreements were often mutually beneficial, they provided landowners with certainty as to how the administrative planning scheme would interact with their property in land, whilst also empowering local authorities to grant specific rights of access or development in land without having to compulsorily acquire it.[242] What is noteworthy here however is that the local authority was understood to be the 'covenantee', giving the local authority the ability to enforce the s 34 agreement against the landholder and the land more generally. A landholder however could not use a s 34 agreement to contractually limit a local authority's ability to regulate development under the TCPA 1932, as it was regarded as *ultra vires* for a local authority to restrict its own statutory planning powers.[243]

Section 34 agreements had particular application in the context of open spaces, where they were used both to prevent development and also to secure access. In the Peaks for example, the Peaks Joint Planning Committee entered into numerous access agreements to re-open extinguished rights of way, with the Committee agreeing to support landowners in restricting access on shooting days.[244] Section 34 agreements thus facilitated a dialogue between landowners and public

[242] Although the case is concerned with *ultra vires* actions on the part of joint owners in entering a s 34 agreement, *Attorney-General v Barnes Corporation and Ranelagh Club, Limited* [1939] Ch 110, illustrates s 34 agreements as mutually beneficial. Similarly, see TNA, HLG 52/594 (26th February 1936) 'Town and Country Planning- Private open Spaces'. See also John Clarke 'Town and Country Planning: Powers of Authorities and Owners to Enter into Agreements Restricting the Use of Land' (1942) 18(4) TPR 246.

[243] *Ransom & Luck Limited v Surbiton Borough Council* [1949] Ch 180.

[244] MERL, 232/11 SR CPRE C/1/102/23

authorities, enabling administrative land regulation to exist alongside private land rights.

4.3 Integrating land rights into the NPACA 1949

The NPACA 1949 continued this approach of cross-blending existing land rights with new regulatory processes, integrating these interests in land in proposed national park spaces with the new administrative framework for designating national parks. This can be illustrated in considering some of the provisions of the Act. Section 59 drew a distinction between 'open country' and 'access land', with open country referring to the portions of land within national parks generally regarded as open for recreational use, either through statutes like the Access to Mountains Act 1939 or through customary use. 'Access land' by comparison was land that was available for use for public recreation due to a specific access agreement, under s 64, between the landholder and the national park planning authority. These agreements followed broadly the same format as access agreements under s 34 of the TCPA 1932, but existed for the specific purpose of public recreation under s 5 of the NPACA 1949. These powers were given greater weight under s 65 of the Act, which empowered the park authority, where no collaboration could be achieved, to force an access agreement onto a landowner through an access order. This had to be done on the recommendation of the Commission (s 65(5)), with approval from the Ministry (s 65(6)).

Under s 60, both access agreements and access orders, created specific rights of access for the public, enabling them to engage in open-air recreation as well as pass through the area and any gates or fences therein without incurring liability

as a trespasser. This access could be subject to periodic revocation for example during livestock husbandry or infancy, but it could not be extinguished entirely. Even in non-access areas there was a statutory presumption against liability for trespass unless malicious interference could be proven, due to the national park purposes under s 5.

Outside of specific agreements, the NPACA 1949 more generally created a separate restriction on land use outside of that under s 12 of the TCPA 1947. Where s 12 introduced a general restriction on land use which could be removed through permission from the local planning authority, the designation of a national park under s 7, NPACA 1949 created an additional general restriction on land use. This restriction was that land within the designated area could only be used in so far that usage supported the purposes of s 5, whilst considering agricultural practice and forestry, under s 84. This meant that national parks existed as a form of administrative overlay, existing at a separate legal level to the private land rights of individuals who held property within the park boundaries. More broadly, this illustrates how the administration of national parks was achieved not through the displacement of old form land rights but the integration of those rights into its framework for public land administration. This mirrored the similar types of integration that had occurred in both planning and local government legislation.

5. Conclusion

In considering how extant land-based rights were integrated into the statutory frameworks for publicly administering land, through concepts of 'public interest' and 'public nature', it is possible to understand why the NPACA 1949 framed its

interactions with property rights in land as it did. Acknowledging this, two main conclusions can be drawn about how land rights were integrated into the statutory framework of the NPACA 1949 in the legal creation of national parks.

First, the traditional conceptualisations of property in land based on exclusivity played a fundamental role in shaping how land came to be publicly administered. Land-based rights were utilised during the 19th century to create cultural and statutory public interests in land. These interests illustrated that the public administration of land need not conflict with existing proprietary rights but instead could build on those rights to achieve public administrative goals. This is particularly noteworthy in considering the work of the CPS or National Trust in using land-based rights to assert broader public claims. Similarly, as the statutory reliance on compulsory acquisition illustrated, there were some forms of administrative activity best achieved through exclusive ownership.

The second conclusion is that whilst land-based rights were an effective legal mechanism for creating a public interest in land, they could not do so through common law enforcement alone without added statutory intervention; common-law ownership rights could only go so far, even in the hands of a publicly oriented organ such as the National Trust. Thus, the story of the legal creation of the national parks is not just about a new administrative overlay on land; it was also about a fresh conceptualisation of older forms of right and integrating these into a new form of public amenity.

6

Early National Parks and the Public Administration of Land

7. Designation and variation of National Parks

(1) Before making an order designating a National Park the Commission shall consult with every joint planning board, county council, county borough council and county district council whose area includes any land in the area to be designated a Park.

(2) Any such order shall describe the area to be designated a Park by reference to a map and such other descriptive matter as may appear to the Commission to be requisite.

(3) The provisions in that behalf of the First Schedule to this Act shall have effect as to the making, confirmation, coming into operation and validity of any order designating a National Park

(The National Park and Access to the Countryside Act 1949)

1. Introduction

Section 7 of the National Park and Access to the Countryside Act 1949 (NPACA), alongside schedule 1, part I, determined the process for designating national parks. The section set out that to create a national park, a demarcated area, identifiable on a map or through other descriptive material, was, by order of the Minister, designated as a national park, following a process of consultation. Throughout this thesis so far, I have explored both the legal framing of national parks in the NPACA 1949 and through the evolution of town planning legislation, alongside the legal

conceptualisation of national parks in the broader legal contexts of administrative law and land law. Through each of these landscape features it has been possible to understand how national parks resulted from changing legal ideas about the public administration of land.

As Jeremy Waldron noted, legal realists, in understanding statute, draw a distinction between legislation as a *source of law* and legislation as *law*.[1] Where the former refers to the existence of statute as 'a piece of paper with the stamp of parliamentary approval', the latter reflects the unknown role that legislation will play as it comes to be used by a society.[2] Whilst it would go beyond the scope of this research to discuss the philosophical merits of this distinction, there is a reflective truth that 'statute in action' can have a different lived reality to the 'possibility of action' which the statutory language permits. To frame this differently, legislation lacks a certainty of use until the legislation is used, thus providing that certainty. Having considered so far the legislation in this *source of law*, or uncertain, sense, it is also important to consider the actual role that legislation came to play. This is not to argue whether legislation has been constructed correctly, but instead to illustrate how the legal possibility of national parks materially manifested.

The purpose of this chapter then is to consider the variety of ways in which the statutory language of the NPACA 1949, and the powers granted therein, were interpreted in the context of the first four national parks: The Lake District, The Peak District, Dartmoor, and Eryi/Snowdonia. This illustrates how the NPACA 1949 more

[1] Jeremy Waldron, *The Dignity of Legislation* (CUP 1999) 10.

[2] ibid.

broadly reflected a new legal ability to publicly administer land, by considering how the statutory language was being used for that purpose in the different national parks.

The chapter begins by outlining three of the general legal considerations that emerged in applying the statutory language of the NPACA 1949; the role of agriculture in national parks under s 84; the provisions of access and private land rights within part V, and the competing purposes for national parks under s 5. These three legal considerations have been chosen because they reveal instances where the Act grants discretion to park authorities and the Commission to balance different legal provisions contained within the legislation. This created the possibility for different legal interpretations in different national parks, varying how land was publicly administered therein.

The subsequent four parts of this chapter then each consider a particular national park as a case study of legal possibility in action, exploring how the national park provisions within the NPACA 1949 were interpreted in context. By exploring each of these parks, it is possible to see the specific legal operations of the NPACA 1949 in each of their localities. This illustrates how the application of the Act, as an exercise in the public administration of land, gave rise to a variety of legal possibilities for the designation and administration of national parks.

2. General Considerations in Interpreting the NPACA 1949

As explored in Chapter Two, the enactment of national park legislation was slow, taking twenty years from the formation of the Addison Committee in 1929 before national parks were statutorily created by the NPACA 1949. As identified first by the Addison Report, then later in the Dower and Hobhouse Reports, part of this slowness

came from the conceptual difficulties of legally framing national parks in a way that that robustly ensured the statutory protection of and access to rural areas, whilst also being suitably integrated with existing legal interests in land therein.[3] This led the final legislation to introduce a series of discretionary provisions which allowed park authorities and the National Park Commission to balance and determine exactly how these different statutory priorities would interact. This created a multitude of legal possibilities for the exact nature of the land administration which the legislation provided for.[4] Thus during the period leading to the designation of the first national park in 1951, the Commission used its powers under s 1(b) of the Act to consider explicitly how these different exercises of discretion might materially manifest.[5] In particular there were three different provisions within the Act which required further consideration; the relationship between agriculture and national parks; the relationship between access rights and private property; and the relationship between the access limb and the preservation limb of s 5 of the Act.

2.1 Agriculture and national parks

Section 84 of the NPACA 1949 set out that 'in the exercise of their functions under this Act it shall be the duty of the Commission and local authorities to have due regard to the needs of agriculture and forestry.' Conversely, the

[3] The National Park Committee, *The Report of the National Park Committee* (Cmd 3851, 1931) 43-44; John Dower, National parks: Preliminary Report to the Minister of Town and Country Planning (Cmd 6628, 1945) 55-57; Ministry of Town and Country Planning, *Report of the National parks Committee (England and Wales)* (Cmd 7121, 1947) 74-82; HC Deb 31st March 1949, vol 463, col 1461; TNA/MT 39/120 (21st December 1948) 'Access to the Countryside Bill' and (29th January 1949) 'Access to the Countryside Bill'; TNA/MT 39/120 'Draft of a Bill to Provide for the Establishment of a National parks Commission…'

[4] Note Waldron's discussion of morality and primary rules to see the distinction between perceived effect and legislative content, Waldron (n1) 12-14.

[5] TNA/CAB 124/445 ((1949) Annotated copy of the Access to the Countryside Bill (version 29th January 1949); TNA/MT 39/120 'Draft of a Bill to Provide for the Establishment of a National parks Commission…'; MT 39/120 (n3)

purposes of national parks under s 5, to preserve landscapes and provide access, did not necessarily lend themselves to the continued existence of agricultural practice within national parks.[6] Indeed, from the Addison Report in 1931, it had been acknowledged that whilst much of the land in Britain was already 'put to some economic or productive use', the inclusion of farmland within a national park would reflect a significant departure from other jurisdictional models for the legal creation of national parks.[7] Despite this, the Addison Report considered how exactly national parks could be integrated with existing agricultural land uses, proposing the creation of a legal framework which integrated agricultural practice with the management of national parks, making farmers a form of custodian within those parks.[8]

This recommendation was further developed in both the Dower Report and the Hobhouse Report, with the latter regarding agricultural management within national parks as a core function of the National Park Commission in advising on land utilisation.[9] Beyond this, the Report also recommended that any legislative framework for the expansion or preservation of rights of way (which was incorporated in part IV of the NPACA 1949) would have to give 'due

[6] Addison Report (n3) 61, 78, and 108.

[7] ibid, 7.

[8] This position was further emphasised in the witness accounts collected alongside the Report, ibid. The Ramblers Federation stated that the use of land for public recreation and farming need not be in conflict, with a collaborative advisory body being able to negotiate the balance between access and grazing (73); Similarly, both the Manchester Advisory Joint Planning Committee and the Commons Preservation Society illustrated the role the Minister of Agriculture played in regulating both pastoral rights and public recreation rights (under s193 of the Law of Property Act 1925) with respect to metropolitan commons. Both suggested that similar mechanisms of statutory regulation and policy could be used to balance agriculture and national parks 982-83 and 98-99).

[9] Hobhouse Report (n3) 14.

regard to agriculture'.[10] This notion of 'due regard to agriculture' prevailed in early drafts of the NPACA 1949, with drafts of cl 35 and cl 40 (which were later incorporated into s 76 and s 77 on compulsory acquisition for access) requiring that the Ministry of Agriculture and Fisheries (MAF) had to give approval for the acquisition of agricultural land for the provision of access (s 76) or national park facilities (s 12).[11]

Similarly, another early draft of the Bill, held by the Ministry of Town and Country Planning (MTCP), was heavily annotated. A colour coded chart at the top of the document revealed that the annotations reflected recommendations from the National Farmers Union (NFU), the Country and Land Business Association, and the MAF.[12] These annotations existed throughout the draft Bill, proposing amendments to over 30 clauses to better relate them to the continuation of agriculture in national park spaces.[13] Although many of these proposed amendments were ultimately rejected by the Treasury Solicitor, who instead opted for the creation of a broad discretionary power, which obligated the Commission and park authorities to consider agriculture: This provision became s 84. [14]

[10] ibid, 2.

[11] TNA/CAB 124/445 (1949) Annotated copy of the Access to the Countryside Bill (version 29th January 1949).

[12] ibid, marked in red, blue and typed tabs.

[13] These included cl 39 empowered farmers to complain directly to the Ministry where a right of way disrupted agricultural practice, cl 56 limited access land on farms, cl 60 additional compensation for disrupted agricultural practice cl 67 introduced a statutory fine for deliberate interference with farming within access areas.

[14] NPACA 1949, s 10 empowered local planning authorities to manage the park within the scope of their planning powers for the purposes of s 5, additionally requiring them to consult the Commission regularly.

Following on from the enactment of the legislation, the Commission dedicated notable resources to consider how the objectives of s 5 could be related to the statutory duty to consider agriculture under s 84. [15] One example of this was the publication of 'national parks and the farmer' by the Secretary of the Commission, HM Abrahams.[16] The paper began by setting out the universal benefit of national parks, alongside their statutory conceptualisation in the NPACA 1949, as a form of planning law. Following on from this, Abrahams acknowledged some of the fears that farmers had, particularly about the 'public wandering over their property' and 'interfering with cultivation'.[17] The paper then addressed public rights of way, property damage, and town planning, explaining in an accessible way what exactly the NPACA 1949 changed in each of these areas. [18] In particular, the paper emphasised the role of the Commission, as set out under part I of the Act, as mediating and advising on the different land uses within national parks.[19]

Similarly, the Commission began to devise a Countryside Code, aimed at ensuring access, under s 5 and part V of the Act, did not cause unnecessary damage to agricultural land. In doing so, the Commission also emphasised that it would ensure the more obligatory access powers local authorities had (primarily under s 40 and s 65 of the Act) would only be deployed in extreme circumstances. This reflected the more general guidance offered by the

[15]TNA/MAF 144/2 (4th January 1956) 'National Parks and Access to the Countryside Act' Enquiry whether national parks were 'leading to serious complaints […] on behalf of the farming community'.

[16] TNA/ALS /1/ LU (16th August 1952) HM Abrahams 'national parks and the farmer'.

[17] ibid, 1.

[18] NPACA 1949, ss 36, 40, 43, 60, 65, 76, 77, 103 and 107.

[19] Abrahams (n16) 1-2.

Commission in how to balance agricultural practice with the objectives of national parks.[20] The Commission emphasised that a collaboration between themselves, farmers and local planning authorities would be the only way to avoid conflict in ensuring both s 84 and s 5 were given their full statutory effect.

2.2 Access and national parks

Parts IV and V of the NPACA 1949 provided for different forms of access in national parks. Part IV expanded upon the Rights of Way Act 1932, allowing local authorities to guarantee the existence of public rights of way and the preservation of footpaths. Part V then referred explicitly to access within national parks, creating a system of 'open country', 'access land' and restricted land, which determined what areas of a national park the public had access to. This system was needed because private land rights continued to exist, with national parks existing as an administrative overlay which sat 'on top' of private land rights.[21] Thus, parts IV and V can be seen to integrate those existing private rights with a framework for ensuring public access, as was a purpose of national parks under s 5.

It was this understanding of private land rights which framed the statutory provisions within the NPACA 1949. This was possible through the application

[20] This approach which had been recommended by the Scott Committee on land utilisation as the best mechanism for balancing amenities and agriculture, TNA/MAF 48/665 (undated) 'Agriculture and Amenities'.

[21] This was discussed in both the Addison Report and the Dower Report. Addison concluded from witness evidence that the attitude of most landowners towards rural public access was generally liberal, with the public only being excluded where access would be inconsistent with the existent form of land use Addison Report (n3) 10; Dower expanded upon this position, suggesting that national parks were inseparable from the 'normal activities of existing public and private landholders'. Consequently, Dower proposed that part of the 'executive power' to determine land use remained with landholders. Dower Report (n3) 40. How this balance would be structured was then debated at length during the enactment of the Bill, HL Deb 8 November 1949, vol 165, cols 336-398; 15 November 1949, vol 165, cols 666-706; HC Deb 19 July 1949, vol 467, cols 1165-1332.

of existing statutory town planning processes to the particular purpose of national parks. Unlike the statutory planning controls of the Town and Country Planning Act 1947 (TCPA), which placed the entire country under planning review, subject to compliance with a local development plan and approval from the local planning authority (s 12),[22] the nature of national park planning controls, as determined in ss 8-10 of the NPACA 1949, were more specific to the purposes of national parks under s 5. Section 9 of the NPACA 1949, for example, required that development plans within national parks effectuated the purpose of national parks under s 5, going further than being a form of general land control.

The Commission and park authorities thus had a more difficult task than general planning authorities because there was a third consideration which had to be accounted for in considering how planning would limit the use of land by landholders. Instead of just balancing private property rights against the boarder concerns of public land administration, under the NPACA 1949 these also had to be explicitly balanced against ensuring the purposes of s 5 were fulfilled, including the granting of access under part V of the Act. To ensure a balanced exercise of this discretion, the Commission used its statutory powers to educate landholders, encouraging them to actively participate in the designation process, allowing them to advocate for their own interests. As with agriculture then, the Commission emphasised to landholders the legal possibilities for collaboration and consultation within s 7 and s 9 of the NPACA 1949, which statutorily required open and inclusive consultation as part of the

[22] TCPA 1947, ss 5, 14, and 17.

designation and national park planning process.[23] How landowners chose to engage with this legal process however would ultimately shape how local authorities exercised their discretion, having consequences for how land was publicly administered within a national park.

2.3 The different objectives under s 5

Section 5(2) of the NPACA 1949 set out that-

> The said areas are those extensive tracts of country in England and Wales as to which it appears to the Commission that by reason of—
>
> (a) their natural beauty, and
>
> (b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population.

In doing so, the section created two different, and not wholly complementary, legal purposes of national parks. In preserving the natural beauty of these areas there would have to be limitations on their development. However, a lack of proper footpaths, facilities or transportation links would ultimately limit accessibility. Although s 5(2) went on to say that 'it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection', giving statutory priority to open-air recreation, the

[23] COU 1/2 (30th September 1951) '2nd Annual Report of the National Park Commission' 35-38.

wording of the section still required a degree of balancing by the Commission and park authorities.

The tension between outdoor recreation and conservation was one which had been realised long before the enactment of the NPACA 1949, with all three of the National Park Reports, as well as the Huxley Report on Nature Conservation, identifying that different legal structures would be needed for specific conservation, by comparison to the overarching landscape control offered by statutory national parks. The Addison Report, for example, recommended the creation of small, publicly owned, enclosures within national parks to protect flora and fauna.[24] The Dower Report went further than this, proposing three different categories of landscape protection, each of which struck a different balance between outdoor-recreation and conservation.[25] Through the Hobhouse Report and the Huxley Report these divisions were further developed with three forms of statutory landscape management being proposed, national parks, Areas of Outstanding Natural Beauty (AONB), and nature reserves. Each of these were legislated for in the NPACA 1949, demonstrating within one legal framework how conservation and public recreation could be balanced.

Nature reserves, under part III, were created as enclosed areas of land, managed independently by the Nature Conservancy which had been established by charter in March 1949. These spaces emphasised the 'control' of 'suitable conditions' to preserve and provide opportunities for the study of

[24] Addison Report (n3) 12.

[25] Dower Report (n3) 8-11.

flora, fauna, geological, and physiographical features:[26] They prioritised conservation. Unlike Nature Reserves, AONBs were under the shared administration of the National Park Commission and local planning authorities, again however their primary focus was landscape protection. There was no duty for local planning authorities to provide specifically for public access to these areas, nor did authorities need to write specific AONB development plans as with national parks. Instead, under s 5 of the TCPA 1947, development plans had to emphasise the conservation of those landscapes, preventing their disfigurement through development. I illustrate these different forms of statutory landscape management within the NPACA 1949 because they highlight how, for the legislators', different legal frameworks existed for different forms of land management and conservation, with the idea being that not all landscapes had to be both conserved and available for public access. Despite this, and perhaps due to the language of national parks as discussed in Chapter Two, there were still difficulties in balancing conservation and outdoor recreation under s 5.

To help with this balancing, the Commission worked closely with the Ramblers Association and the Commons, Open Spaces, and Footpaths Preservation Society (formerly the CPS), who had been actively involved in securing national parks legislation, as to how to proceed in best securing access for public recreation. The Association advised against the 'urbanisation of footpaths', suggesting it would ruin the experience of 'loneliness and wilderness', making national park landscapes unnaturally refined.[27] Similarly,

[26] NPACA 1949, s 15.

[27] TNA/COU 1/1031 (23rd July 1951) 'Letter from The Ramblers Association to the Commission'.

the Commission also consulted with the Caravan Club to determine how best to open national parks up to caravans and campers, without vehicles damaging the terrain or, by sheer quantity, causing an eyesore.[28] It was determined that planning controls under s 9 would be most effective in regulating caravan usage, with caravan sites being limited to the perimeter of parks.

These different exercises of discretion, coupled with the specific interpretation of statutory provisions by different local authorities, influenced how the legal possibility of national parks materially manifested. This was because there were a variety of legal possibilities for how land could be administered within a national park that were justifiable under the statutory language of the NPACA 1949. This led to different national parks using the statutory provisions differently. This can be considered through four case studies; The Peak District, the Lake District, Dartmoor, and Eyri/ Snowdonia, all of which were designated as national parks in 1951.

3. The Peak District

The Peak District was the first national park designated in England and Wales, on the 17th April 1951. The area encompassed the hilly region at the south of the Pennines range, originally bordering Macclesfield Borough Council to the west, Leek District Council to the South, Sheffield County Borough to the east, and Saddleworth Urban District to the north.[29] The area had been recommended for designation in all three of the National Park Reports, owed to its proximity to the population centres of

[28] TNA/COU 1/4 (30th September 1953) '4th Annual Report of the National Parks Commission', 13.

[29] TNA/TS 27/1450 (December 1950) 'Treasury Solicitor Map of Reference for the designation of the Peak District National Park'.

Manchester, Leeds, Derby and Sheffield, alongside its relatively wild uphill moorland landscape, both of which fulfilled s 5.[30] Consequently, the Ministry and the Commission acted quickly to designate the area, with an interim development order, under s 9 of the NPACA 1949, being proposed before Parliament on the 8th May 1950,[31] before becoming effective on the 28th December that same year.[32] This meant the legal processes of planning, namely the provisions that would form the s 9 development plan, were in place, ahead of the designation order, which came early in the subsequent year.

It is perhaps unsurprising that the Peak District was designated first, given the area had been administered in a national park-like way in the decade preceding the 1949 Act. As noted in previous chapters, following the enactment of the Town and Country Planning Act (TCPA) 1932, the Peak District was administered for planning purposes through a joint planning committee, with the express purpose of preserving the area from extensive development. In achieving this, the Committee implemented a joint planning scheme under s 1 and s 9 of the 1932 Act. As noted in Chapter Three, a planning scheme was the statutory process for controlling development prior to the creation of development plans under s 5 of the TCPA 1947. The two forms of development plan were broadly similar, both empowering public authorities to produce a plan for the control of urban and rural land use. Thus, whilst development plans under s 5 of the TCPA 1947 were more encompassing than their 1932

[30] Addison Report (n3) 72-73; Dower Report (n3) 10-11; Hobhouse Report (n3) 10, 99.

[31] MERL/SR CPRE C/1/53/26 (11th May 1950) 'Statutory Instrument: Town and Country Planning Landscape Areas Special Development Order'.

[32] MERL/SR CPRE 1/102/56 (20th August 1951) 'Statutory Instruments: Parks and Countryside, The Peaks Planning Board Order 1951'.

predecessor,[33] the legal intentions of these planning processes were similar in establishing a statutory power to control land use. This is important because s 10 of the NPACA 1949 stated that land use would be controlled in national parks for the purposes of conservation and public access (as under s 5),[34] through development controls which were provided for in the TCPA 1947. This meant that the Peak District, prior to its national park designation, had been using similar legal processes to those within the NPACA 1949 to regulate land use.

Beyond this, the joint planning committee had also been using other powers under the TCPA 1932 to improve public access to the Peaks. In particular, a series of s 34 agreements, which as noted in Chapter Five empowered local authorities to enter into land use agreements with landholders, had been entered into, re-opening parts of the Peak which had previously been enclosed.[35] Alongside this, there was greater footpath protection within the region, with the shared effects of the TCPA 1932 and the Rights of Way Act 1932 further empowering the Committee to maintain and manage footpaths. In particular, the Rights of Way Act improved the legal protection of existing rights of way,[36] with the Committee supporting local footpath societies in maintaining access.[37] The Committee similarly worked in collaboration with the Voluntary Joint Committee for the Peak District National Park (JCPD), which was a

[33] In particular the TCPA 1947 extended the role of newly established local planning authorities, allowing development plans to both broadly zone different types of activity as well as designate the land use of specific activities s 5(2)(a) -(2)(c).

[34] NPACA 1949, s 5.

[35] This practice continued following on from the enactment of the NPACA 1949, with the Peak Board re-opening 39 square miles of moorland by 1959 through access agreements. TNA/COU 1/877 (28th May 1959) 'Conference of National Park Planning Authorities held at Bakewell: Address by Lord Strang'.

[36] Rights of Way Act 1932, s1 (2)-(3).

[37] Peak and Northern Footpath Society, *A century of Footpath Preservation* (Peak and northern Footpath Society 1994) 11.

regional division of the Standing Committee on National Parks (SCNP), established in 1936. The bodies worked together, with the JCPD advising how the Committee should use its planning powers under the 1932 Act to control the expansion of industry in the Peaks, namely in the context of reservoir construction and mining works.[38] The JCPD also assisted the Committee in liaising with landholders to better secure public use of the Peaks.[39]

This context is important because a series of parallels can be drawn between the ongoing administration of land within the Peak District and the proposed new administrative powers created under the NPACA 1949, which would administer the area following on from its designation as a national park. In particular, the work of the Joint Planning Committee in planning and controlling land use within the area reflected the proposed framework for administering national parks under ss 8-10 of the NPACA 1949. Similarly, the interest in access provided a starting point from which the 'open country' provisions in part V of the NPACA 1949 could be effectuated. It was this context which made the realisation of the legal possibility of national parks in the Peak District particularly interesting.

The designation of the Peak District National Park, in placing the Peaks under planning control for the purposes of s 5 of the NPACA 1949, was relatively uncontentious, with landowners being accustomed to increased controls over their land use within the region. Indeed, it was generally accepted that the legal processes of planning most effectively managed the area for all interested parties, with

[38] CPRE 1/102/56 (n32) (undated) 'The Peak District National Park: Proposals for the enlargement of the Park by the Voluntary Joint Committee for the Peak District National Park', 1.

[39] ibid, 2.

landowners often choosing to enter into s 34 agreements under the TCPA 1932 to secure favourable terms in permitting access.[40]

As set out under s 7(5) of the NPACA 1949, in designating a national park, the Minister had to consult with every board and council, whose administrative operations may be affected by the creation of the park. In the case of the Peak District, this consultation was carried out through a series of public cross-council inquiries, where each local authority inside, or bordering, the proposed boundary was able to comment on the proposed designation. What was interesting in this process was that local authorities which were already part of the Peak Joint Planning Committee raised relatively few objections during the consultation process. These local authorities were often county councils (CC) or borough councils (BC), meaning they were the larger forms of local governance body consolidated under the LGA 1929. By comparison, the smaller rural and urban district councils (DC), which were not directly part of the Committee, were more hesitant about national park designation and their own subsumption into the National Park Joint Planning Board. Cheadle Rural DC, for example, objected to 'any portion of their area being included in the proposed national park' stating that 'further sterilisation of the area [was] unnecessary' due to the land in the area already held by the National Trust.[41] Similarly, the DC suggested that they had made infrastructure investments using funding from ratepayers which could not be enjoyed were the area included in a national park.[42] More specifically on the issue of administration, Leek Rural DC also objected to being included within a joint board, stating their internal

[40] Notably landowners inserted clauses into the agreements to close of access on certain days to facilitate grouse shooting.

[41] TNA/COU 1/695 (2nd November 1950) 'Staffordshire: Meetings with local authorities'.

[42] ibid.

planning controls were sufficient to preserve the area and that the parish council had objected to the designation.[43] In these instances there is an apparent tension between the local authority and the proposed administration of their area, which would be associated with the national park through the subsumption of the governance body (and its independent planning powers) into the joint board.

The Commission was keen to resist these alterations to the proposed boundary, marking the areas in question as 'essential areas for landscape protection'.[44] The Commission were also confronted by areas asking to be included within the national park instead of on its boundary, with the Colne Valley CC, pushing for the inclusion of part of Holmfirth Urban DC and Saddleworth Urban DC within the park.[45] The Commission were wary of the inclusion of too many urban districts within national parks, following advice from the MTCP who emphasised the other planning considerations urban districts needed to consider, under s 12 of the TCPA 1947.[46] In thinking about the legal realisation of national parks as provided for under the NPACA 1949, there are two obvious but important observations. The first of these was that s 5 of the NPACA 1949 was not the perfect watermark by which national parks were determined, and as the examples of Leek and Cheadle show, local authority politics played a notable role in determining national park boundaries. This was particularly the case in areas where district councils had sizable populations and notable autonomy from their associated county council. The second observation relates to the perceived value of national parks as legally framed under the NPACA

[43] ibid.

[44] ibid.

[45] TS 27/1450 (n29) 'Treasury Solicitor map of Reference'.

[46] ibid. 'Treasury Solicitor discussion of maps of reference'.

1949. Given that national parks were ultimately a form of planning control, different local authorities perceived the value of this control differently, with some (like Leek) believing their existent planning controls to suitably achieved the aims of s 5. In thinking about the legal realisation of national parks then, understandings of the relationship between the TCPA 1947 and the NPACA 1949 shaped the legal operations of national parks as either more planning or something similar but separately robust.

Outside of these disputes relating to local authority inclusion, a second aspect of national park administration also became important in framing how the NPACA 1949 was legally realised in the Peak District. Under s 6 and s 106, national park planning boards were empowered to produce byelaws to regulate land use within the national park. As explained in s 6, this power was similar to those already held by local authorities under s 252 of the LGA 1933. Consequently, different local authorities had different approaches to writing byelaws, making the collaborative drafting of byelaws between different local authorities difficult. This was because different local authorities attributed different values to the existence of byelaws and had different ideas about what should be regulated through these. This can be seen in considering the documents which arose during the byelaw drafting process. The Peak District Planning Board in general expressed a tendency to over-regulate, producing a series of draft byelaws for over 20 different forms of activity.[47] Indeed, both the Ramblers Association and the Commission appealed the Board to not go beyond the recommendations of schedule II of the NPACA 1949, suggesting that byelaws should not be overly restrictive.[48] There were also internal disputes about the extent to which

[47] TNA/COU 1/1098 includes eight different draft variations of a scheme of possible byelaws.

[48] ibid, (3rd November 1954) 'National Parks Commission: Revised draft byelaws to access land'.

byelaws should introduce new restrictions, with the larger county councils promoting adherence to the 'good rule and government byelaws' document produced following the LGA 1933.[49] By comparison, smaller authorities petitioned for more specific byelaws, relating explicitly to agriculture and access, often writing to the Commission for support in compelling the Joint Board to take up their suggestions.[50]

The drafting of byelaws may not seem directly linked to the legal realisation of national parks under the NPACA 1949, with national parks being able to exist without any byelaws at all. Byelaws were how the respective national park planning board provided the regulatory detail needed to practically administer national parks. Thus, the process of determining byelaws also reflected the process of determining to what extent s 5 of the NPACA 1949 would be realised. An early version of byelaw 11, for example, created a fineable offence for deliberately leaving gates open within the Peak District National Park, having the twofold effect of encouraging landholders to permit access due to the possibility of recourse for damage, and also regulating the nature of access within the park.[51] Similarly, an early draft of byelaw 15 sought to restrict 'wild camping' as a form of public recreation in the Peak District, although the clause was later resisted by the Home Office who suggested it would be more appropriate to limit wild camping to access land, or to only create an offence where an owner has asked the camper to leave.[52] In each of these examples, it is possible to see how the realisation of s 5 of the NPACA 1949 was shaped through engagement with these byelaw powers

[49] ibid, (undated) 'Good rule and Government Byelaws: Forms of Byelaws'; (undated) 'discussion of the previous document by the Peaks Planning Board'.

[50] ibid.

[51] ibid, (3rd January 1956) 'Peak Park Planning Board, Byelaws for behaviour on access land'

[52] ibid, (2nd June 1954) 'Draft Byelaws relating to Access Land' (2nd April 1954) 'The Ramblers Association, letter to the Home Office and the National Park Commission on the issue of wild camping'.

under s 106. The Peak District is thus a useful case study in illustrating how ss 7-10 of the NPACA 1949 were practically realised, by comparison to the legal possibilities for administration that these provisions offered within the Act.

4. The Lake District

The Lake District was the second national park designated in England and Wales on the 9th May 1951. The area encompassed the north-west peninsular of England, inclusive of the Cumberland Mountains and portions of the north-west coastline. The administrative boundary of the national park bordered Penrith urban DC to the north-east, Lancashire CC to the south, and the Municipal Borough of Barrow-in-Furness to the south-west. As with the Peak District, the area had been recommended for designation in all three of the National Park Reports,[53] reflecting a more historic desire to preserve the region from spoilation, with the National Trust already owning sizable amounts of property in land in the region.[54] The Lake District had long been regarded as an area of natural beauty,[55] and its designation as a national park was recommended both due to its wild scenic quality and its special attraction to visitors as a space for outdoor recreation.[56] Although it was hoped that the Lake District would be the first national park, delays in the designation process, under s 7, prevented this.[57] It is the

[53] Addison Report (n3) 53; Dower Report (n3) 10-11; Hobhouse Report (n3) 10.

[54] James Lees Milne (eds), *The National Trust, A Record of Fifty Years' Achievement* (3rd edn, BT Batsford Ltd 1948) inside cover matter a map of 'national trust properties owned or protected by covenant in 1948'.

[55] William Wordsworth, *Guide to the Lakes* (originally published 1810, OUP 2023) 68.

[56] Hobhouse Report (n3) 84-85.

[57] TNA/MAF 107/94 (30th September 1950) 'Proposed Lake District National Park' a letter to the Commission encouraging that greater notice be given to investigate the proposed designation and its effects'.

source of these delays which is interesting in considering how the legal possibility of national parks was realised in the region.

Unlike the Peak District, the Lake District did not have the same prior experiences of planning, with many of the areas within the region being legally excluded from the scope of planning law until the TCPA 1932. Even following on from the 1932 Act, there was not the same interest in the regional planning of the area, with many local authorities prioritising the production of their own planning schemes over more collaborative planning.[58] This issue was further exacerbated through how the region was divided up into administrative districts. Prior to the LGAs 1888 and 1894, much of the Lake District was administered through parish councils, with only a handful of larger townships, like Keswick, having more formalised local governments under the Public Health Act 1848. Following on from the LGA 1894 a series of urban districts were established within the region, reflecting the rapid population growth in industrialised areas like Barrow-in-Furness,[59] alongside a growth in other activities, like tourism, which led Keswick to become Keswick urban DC.

Alongside this, three county councils were established in the region under the LGA 1888: Lancashire CC, Westmorland CC, and Cumberland CC. As discussed in Chapter Four, the three county councils had oversight of the districts and parish councils within their respective administrative boundaries, particularly where, under s 85 of the LGA 1933, the smaller administrative units had consented for their planning powers to be held by the county council instead. The characteristics of the districts

[58] See TNA/HLG5/2762 (1937) 'North Westmorland Rural District'; HLG4/3928 'Westmorland Joint Planning Committee'.

[59] Note Ruth Mansergh, *Barrow-in-Furness in the Great War* (Pen & Sword Books limited 2016) 15-23.

which formed each county council were decidedly different, leading the different county councils to have different administrative priorities including their planning agendas. Lancashire CC was the largest of the three counties, stretching as far south as the urban districts of north Manchester, up to Barrow-in-Furness. Much of Lancashire had a decidedly industrial and urban character, making town planning essential in regulating land use. Cumberland CC had similarly industrial concerns, with Penrith UDC and Carlisle UDC both falling within its boundary. Alongside this, Cumberland CC contained large portions of the north-west coastline and relied upon its planning powers to balance industry against its more scenic portions. Westmorland CC was primarily agricultural, based in Kendal and predominantly consisting of rural districts. By comparison to other counties, planning was perceived as less essential to its administration. In light of these differences, the three councils refused to form a joint planning committee under the TCPA 1932, and only eventually did so after the Minister of Health ordered them to in 1938, using his powers under s 4 of the TCPA 1932.[60]

This made planning a source of contention between the different administrative bodies within the Lake District and this tension continued to exist during and after the designation of the area as a national park. Consequently, the realisation of national parks, as legally facilitated through planning under ss 8-9 of the NPACA 1949, was shaped by this more general tension about planning controls. Similarly to the Peak District, the Lake District was subject to a special development order prior to its designation.[61] The order prevented the construction of any non-movable structure in

[60] TNA/T 161/1183 (5th January 1938) 'Lake District and national parks discussion between the Treasury and the Ministry of Health'; TNA COU 1/549 (18th May 1951) 'Lancashire County Council' letter to the National Park Commission in 1951 discussing joint planning in the region.

[61] CPRE/ 1/53/26 (n31).

portions of Westmorland CC and Cumberland CC for the purpose of regulating the landscape before a formal national park development plan, under s 9, was in place.[62] Furthering this, an explanatory note attached to the order stated that other changes in land use, such as in agriculture, also required explicit Ministerial permission (not just permission from the local planning authority as was the case under s 12 of the TCPA 1947).[63]

The implementation of the order triggered notable correspondence on how exactly planning would be conducted within the region, with Westmorland CC objecting to the joint planning of the Lake District.[64] Lancashire CC were equally resistant to the creation of a joint planning board, under schedule I, part I of the TCPA 1947 and s 8 of the NPACA 1949 respectively, but open instead to the idea of a planning advisory committee under schedule I, part II, TCPA 1947.[65] Part of this disagreement arose from who would practically carry out the activity of planning the new national park, with Westmorland CC pushing heavily for the national park to have its own planning staff.[66] By comparison Lancashire CC pushed for the board to be staffed with existing planning officers, proposing to cover a third of the cost of these new activities.[67] On the 27th February 1951 the MTCP intervened, issuing an order to constitute a joint planning board between the three councils, setting out the constitution of the board as a body corporate under schedule I, and the division of financing and staffing

[62] ibid.

[63] ibid, 2.

[64] COU 1/549 (n60).

[65] ibid; (16th April 1953) 'Disadvantages of a Shared Lake District Plan (Lancashire Guardian).

[66] ibid, (15th August 1953) 'Lake District National Park' (Manchester Guardian).

[67] ibid.

therein.[68] The national park was designated not long after, with the Commission and Ministry assisting to coordinate the production of a development plan under s 9 of the NPACA 1949.[69]

The Lake District Planning Board had little experience of collective planning, often internally disagreeing in approving planning decisions. Consequently, many of the Board's decisions were appealed to the Ministry under s 15 of the TCPA 1947, which was incorporated into the NPACA 1949 under s 10. For example, on the 22nd March 1966 a case was referred to the Ministry (now the Ministry of Housing and Local Government under s 1 of the Town and Country Planning Act 1962), about whether housing could be erected in Borrowdale near Keswick.[70] The Planning Board accepted that more dwellings were needed in the area, but also feared the dwelling could be in a conspicuous position, ruining the natural beauty of the landscape as had to be considered under s 5.[71] The appellants argued that other permeant and impermeant dwellings existed in the same area, providing no more of a distraction from the landscape then the proposed building, which would provide staff accommodation. The Minister concluded that the site would be conspicuous and created a risk of the dwelling being sold separately to the business, rejecting the appeal.[72]

[68] ibid, (27th February 1951) 'The Lakes National Park Draft Memorandum'; (13th August 1951) 'The Lake District National Park Planning Board Order 1951'.

[69] ibid, (13th August 1951); TNA/COU1/994 (15th November 1951) 'Lake District Planning Board: Memorandum on Administration' set out that the three county councils each submitted a development plan to the Ministry, with the Commission and Ministry then helping to compile them into a singular development plan for the planning board.

[70] TNA/COU1/202 (22nd March 1966) 'Lake District Planning Board, Cockermouth Rural District Council Appeal', 2.

[71] ibid.

[72] ibid, 5.

Alternatively, on the 2nd February 1966 a decision to refuse the conversion of a barn into dwelling was referred to the Ministry.[73] The Planning Board argued that the barn did not readily lend itself to conversion and was situated alongside land owned by the National Trust, threatening the character of that land.[74] The Appellant submitted that the proposed conversion would be an internal change of land use, thus not interfering with the scenic character of the area, making the refusal of permission outside of the powers of the Board, in light of its purposes under s 5 of the NPACA 1949. Although the Minister agreed with resisting the application, this was based on a different justification to that of the Board, suggesting instead that the distance of the dwelling from other residential areas ran counter to the purposes of town planning under the 1947 and 1962 Acts. There were other examples to this effect, with notably more appeals being referred to the Minister than in the Peak District during the same period.[75]

In thinking then about the Lake District, the legal possibility for local administration and planning, under the NPACA 1949, was realised differently to that in the Peak District, with the national park having notable oversight from both the Ministry and the Commission. This extended oversight meant that much of the administrative machinery for the national park was established through statutory instruments, creating a different framework for the division of administrative powers between the different planning authorities engaged in the planning of the area when compared to the Peak District Joint Planning Board. Thus, the law in action in the Lake District

[73] TNA/COU1/202 (2nd February 1966) 'Lake District Planning Board Appeal, Mr VC Haines'.

[74] ibid, 2.

[75] TNA/COU1/202 contains 15 different planning appeals for the Lake District and only 7 for the Peak District.

created a different reality to the law in action in the Peak District, despite the legislative framework for both being the same.

5. Dartmoor

Dartmoor national park was designated on the 30th October 1951, making it the third national park to be designated in England. The area designated was entirely within the administrative boundary of Devon CC, which was formed in 1889 under the LGA 1888. Unlike the other national parks which have been discussed in this chapter, Dartmoor did not require the formation of a joint planning board under s 8(2) of the NPACA 1949 and schedule I, part I of the TCPA 1947 respectively. Instead, under s 8(3) of the NPACA 1949, the administration of Dartmoor occurred entirely within the unitary powers already ascribed to the county council in its identification as a local planning authority under s 4 of the TCPA 1947. There were however two limitations on this administrative power. The first of these was that Devon CC, under s 3 of the LGA 1888, would have to administer in conjunction with the smaller local governance structures which existed within its administrative boundary, these were namely rural district councils and parish councils.[76] This was not an overly onerous limitation given that the County Council had been collaborating with these bodies on planning matters since the TCPA 1932. Second, Devon CC, under s 8(3) of the NPACA 1949, would be required to form a sub-committee for the specific purpose of administering the national park, providing separation between administration of the park and the ordinary planning business of the council. This would have been relatively straightforward, with local planning authorities often having internal sub-committees for different aspects of the legal activity of planning, such as highways.

[76] In 1949 Devon County Council was the local planning authority for 42 district councils.

Despite the relative administrative simplicity in applying the NPACA 1949 to Dartmoor, the designation of a national park in the area was surprisingly slow, with notable local resistance in the period prior to the designation. This can, in part, be attributed to the different legal arrangements which already existed in Dartmoor prior to its designation. In particular, in 1949 an estimated 58% of the land in the proposed park area was privately-owned, with a further 37% of the land being commons, which had not previously been opened up to the public under s 193 of the Law of Property Act 1925.[77] This percentage was much higher than in the other national parks discussed in this chapter, which had notable amounts of private land and commons within their boundaries, but also had notable portions of 'open country', as defined under s 59 of the NPACA 1949.[78] In addition to large private ownership in Dartmoor, 30% of the land (including portions of the commons) had been acquired by the Ministry of Defence under the Emergency Powers (defence) Act 1939 as part of domestic wartime policy.[79] Although negotiations between the National Park Commission, the MTCP, and the Ministry of Defence, managed to reduce this percentage to 14% by the time of designation, the Ministry of Defence still held a significant land interest in the area.[80]

The different land rights which already existed within Dartmoor prolonged the designation process, with the creation of a national park being perceived as a direct

[77] Dartmoor National Park Authority 'Commons Fact Sheet' (DNPA 2006).

[78] Although in some instances open country encompassed privately-owned land, access agreements were already in place, meaning for the purposes of the NPACA 1949 the designation of the land as a national park proved less contentious.

[79] TNA/ADM 1/22701 (1948) 'Dartmoor Training Area'.

[80] TNA/HLG 71/1622 (1948-1955) Ministry of Town and Country Planning Dartmoor representations and correspondence.

threat to other forms of land rights. Indeed, as author Beatrice Chase wrote in the context of Dartmoor, national parks will invade 'our private peaceful countryside' forcing landowners to 'pay to lose their possessions' and mandating the 'horror' of providing 'hostels and refreshment places' onto landowners.[81] As can be seen in considering the explicit provisions of the 1949 Act, many of these fears were exaggerated because they were impossible under the legislation. That being said, it would be unfair to characterise these complaints as hyperbolic, given they represented a genuine concern by landowners about the futurity of their property.

One explanation for why the potential effects of designation were so strongly resisted within Dartmoor relates to another piece of legislation enacted by the post-war government: The Agriculture Act 1947. Sections 1 and 2 of the Act offered notable financial support to assist farmers in maximising their production and improving efficiency, with the general intention of improving domestic agricultural productivity following on from the Second World War. Indeed, interventionist agricultural policy on this scale had not existed since World War One, as discussed in Chapter Three.[82] Consequently, farmers were encouraged to rely upon the legislation to maximise their profitability.[83] For them, the objectives of national parks, as set out in s 5 of the NPACA 1949, were difficult to reconcile with this push for more efficient agricultural practice. This was noted in the preliminary survey for designating the national park, which commented on how much of the woodland and peat land in the area was used for

[81] Beatrice Chase 'Told to leave his own land' (27th June 1949). Chase herself moved to Devon in her thirties using the area as inspiration for her novel *the heart of the moor*. This led her to self-refer to herself as 'my lady of the moor'.

[82] Namely the Corn Production Act 1917 and the Agriculture Act 1920.

[83] Adrian Colston 'Stakeholder narratives of Dartmoor's Commons: tradition and the search for consensus in a time of change Stories from Dartmoor - hill-farming, wildlife, peatlands, historic landscapes and re-wilding: whither the Commons? (PhD Thesis, University of Exeter April 2021) 14.

rough grazing.[84] Similarly, it can be seen in objections raised during the consultation process that whilst agriculture was protected under s 84, other forms of industry, such as mineral extraction, were not despite being equally effected by national park designation.[85] These concerns led the proposed national park area to be dramatically reduced prior to its designation, making the national park notably smaller than the Lake and Peak Districts.[86] Despite this, the reduced area was eventually designated in October 1951.

Following on from its designation, tensions within Dartmoor continued to exist, with the legal provisions of the NPACA 1949 being viewed with hostility by landowners and farmers within the area, particularly regarding access under part V of the NPACA 1949. Access agreements between landowners and the national park subcommittee of Dartmoor CC were not forthcoming, with the council being politically criticised for prioritising its role as county council over its position as a national park planning authority under s 8(3) of the NPACA 1949.[87] In light of these allegations, the Commission encouraged the subcommittee (known as Dartmoor National Park Planning Authority (DNPPA)), to rely upon s 65(1) to force access orders over portions of the national park.[88] The DNPPA were hesitant to engage, stating that the national park had sufficient facilities and access to meet the objectives of s 5,[89] however the

[84] MERL/SR CPRE1/102/70 (May-June 1950) 'Dartmoor National Park Area'.

[85] ibid, (30th October 1951) collated correspondence leading to the designation of Dartmoor National Park.

[86] ibid, (15th October 1951) 'Dartmoor national Park Designation Order Confirmed'.

[87] ibid. (19th May 1952) 'The working of the 1949 Act, Instances of unsatisfactory Administrative Powers'.

[88] TNA/COU1/1187 (26th May 1955) 'Dartmoor National Park: Access to Open Country'

[89] ibid.

discussion of possible access orders led an increased number of landowners to erect fences on their land, seeking to extinguish any possible right of way which could be used to justify a s 65 access order.[90]

These tensions came to a head in 1957, with the Commission organising a public inquiry into access in Dartmoor, inviting local landowners, the local branch of the National Farmers Union, the DNPPA, the Ministry of Defence, Rambling Associations, and the Dartmoor Preservation Society all to make representations.[91] It was hoped that the public inquiry would provide a platform for negotiating access without the need for s 65 orders, which were a compulsory form of access agreement. The public inquiry however was less than productive, with the Dartmoor Preservation Society accusing the DNPPA of deliberately obstructing public access requirements in s 5 of the NPACA 1949.[92] The DNPPA rejected these claims, stating that adequate open country existed under s 59 of the NPACA 1949 to satisfy the purposes of s 5, referring to a Report they conducted on the issue in 1955 as part of reviewing their s 9 development plan.[93] Although the inquiry did allow for some compromises over access to be achieved, similar tensions continued to exist, with fencing being a regular occurrence in the national park.[94] Despite the DNPPA attempting to balance the interests of both landowners and the National Park,[95] their efforts were less than

[90] ibid, (7th September 1956) 'Access'.

[91] MERL/CPRE C/1/102/72 (22nd October 1957) 'Access to Open Country Notes on Public Inquiry'.

[92] ibid.

[93] ibid; (23rd March 1955) 'Devon County Council, Report of the Survey on some aspects of the provisions of Open Country within park areas'.

[94]ibid, (29th July 1971) 'Dartmoor Land Use Group'

[95] DNPPA Planning Officer Reports in particular show these efforts of balancing and consideration; ibid, (September 1971) 'Reports of the County Planning Officer'.

successful, with the authority often being criticised for poor administration of the area, particularly because tensions on this scale had not occurred in other designated national parks.[96]

Tensions over the application of the NPACA 1949, especially with respect to access and land utility, have continued to the present within Dartmoor National Park,[97] despite subsequent statutory interventions seeking to better regulate the different interests within the area.[98] The intention here however is not to critique the application of the NPACA 1949 in the context of Dartmoor. Instead, Dartmoor offers an alternative insight into how the legal possibility of national parks as a legislative structure manifested within a designated landscape. This is important in understanding that the legislative possibilities of national parks, under the NACA 1949, were not always reflected in practice, with the use of ss 64-65 in Dartmoor being both limited and contentious. Moreover, the realisation of the legal possibility of national parks was different in different localities, with the experience of national parks under the NPACA 1949 being very different in Dartmoor to that in the Peak District. This difference assists in understanding the legal creation of national parks under the NPACA 1949, as it illustrates the opportunity for disparity in giving effect to the legislation, in particular, the difficulties which arise in construing broad discretionary powers.

[96] ibid, (2nd February 1971) 'Failures of Administration and Denials of Public Participation'.

[97] Note *Darwall & Anor v Dartmoor National Park Authority* [2023] EWHC 35 (Ch); [2023] EWCA Civ 927 (CA); Rhiannon Ogden-Jones 'Narrative and story-telling in *Darwall & anor v Dartmoor National Park Authority*' (2023) 35(3) JEL 437; Colston (n83).

[98] The Dartmoor Commons Act 1985 for example reflected a collaborative effort between different stakeholders to create legislation for determining use of the commons, although the final legislation did not resolve the conflicts therein, see Ogden-Jones (n97) 444-446.

6. Eyri/Snowdonia

Eyri/Snowdonia national park was the first national park to be designated in Wales on the 18th October 1951. The area originally existed within the administrative boundaries of Caernarfonshire/Caernarvonshire CC, Merioneth CC, and Montgomeryshire CC, all of which were county councils established in 1889 following on from the LGA 1888. Consequently, similarly to the Lake District and the Peak District, joint planning arrangements had to be instituted to facilitate the administration of a national park, under s 8(2) of the NPACA 1949.

The discussion of joint planning arrangements became fundamental in determining the boundary of the national park itself, marking a departure from the established practice used in the Lake District, Peak District and Dartmoor, where a broadly established boundary was agreed upon in Hobhouse Report, long before the question of designation emerged.[99] Whilst in other national parks the proposed boundary line moved during the process of designation, this was different to the process of joint planning actually determining where the boundary fell. Indeed, earlier proposals for Eyri/Snowdonia, namely in the Addison Report, focused on the designation of the park to only include the Snowdon mountain range.[100] By comparison, the Dower Report expanded upon this, to include the entire region of 'Snowdonia',[101] and the Hobhouse Report went even further providing scope for the park to encompass much of North Wales.[102] Although the final designated area reflected a compromise between

[99] Hobhouse Report (n3) 36.

[100] Addison Report (n3) 77 'the mountain park in Snowdonia'.

[101] Dower Report (n3) 11.

[102] Hobhouse Report (n3) 88-90.

the Dower and Hobhouse Reports, what is interesting is how the joint planning provisions of s 8(2) of the NPACA 1949 were used to determine the park boundary. This was in part due to the specific relationship that the three county councils had with the district councils within their administrative boundary.

Unlike elsewhere, many of the rural and urban districts in North Wales had refused, under s 85 LGA 1933, to allow for their administrative functions to be fully subsumed by the county councils. Many of the urban and rural districts in the area produced their own planning schemes under s 1 of the 1932 Act, as opposed to entering into joint planning arrangements.[103] Thus, whilst the majority of parish councils within the region did fall under the administrative control of the county councils, there were sizeable pockets of land which smaller local governments planned and administered separately. Consequently, under s 7 of the NPACA 1949, 22 local governments were consulted as part of the designation of Eyri/Snowdonia, with the national park's boundary being broadly drawn in relation to their response to consultation.[104] Given this process for determining the park's boundary, there was notable resistance from the smaller local governments in the region that a joint planning board be formed between the three county councils under s 8(2) of the NPACA 1949 and schedule I, part I of the TCPA 1947 respectively, as this would exclude them from the process of park planning under s 9. Instead, many of the urban districts and county boroughs pushed for the constitution of an independent park authority, empowered equally to a county council under ss 2-16 of the LGA 1933 and s 4 of the TCPA 1947, but with the

[103] Notably Carnarvon municipal borough and Conwy municipal Borough produced planning schemes.

[104] TNA/COU1/2 (30th September 1951) 'National Park Commission Second Annual Report' 1.

specific purpose of effectuating s 5 of the NPACA 1949.[105] Although the existence of independent national park authorities was not realised for some time,[106] the administration arrangements for Eyri/Snowdonia marked a different approach to that in other national parks, with a joint advisory committee (under schedule I, part II of the TCPA 1947) being established instead of a joint planning board.[107] In doing so, the respective local authorities also invited the Nature Conservancy, the Council for the Preservation of Rural Wales (CPRW), and a Welsh expert from the Forestry Commission to be represented on the Committee.[108] This reflected the realisation of the legal possibility of national parks under the NPACA 1949 in a different way to that in other national parks, with the boundaries of the park itself being far more dependent on the legal processes of s 8(2). Moreover, the diversity of Committee members allowed for different opinions and expert assessments to form a core part of the planning and administration of the national park, which had not been part of the capacity of the other national parks established at this point.

The management of Eyri/Snowdonia under the NPACA 1949 also saw some noteworthy realisations of the legal possibilities contained within the Act, particularly with respect to infrastructure within the region. As already noted, one of the primary purposes of national parks under s 5 was the 'preservation and enhancement' of the 'natural beauty' of these spaces. Consequently, s 10 of the Act emphasised that the application of planning powers had to be aimed towards this primary purpose, with the Committee having the power to reject development proposals which were counter

[105] TNA/COU1/1600 (March 1951-June 1951) 'Snowdonia National Park Designation, local inquiry'.

[106] Sections 63-64 of the Environment Act 1995.

[107] TNA/COU1/877 (undated) 'A note on the administration of national parks'

[108] ibid, (28th-29th May 1959) 'Formal Opening of the first National Park Planning Authority Conference'.

to the purposes of s 5. Conversely, many national parks encapsulated rural areas which had previously been excluded from local and national planning, making public infrastructure, namely highways and electricity, often limited. The Committee in Eyri/Snowdonia used their powers under s 10, in collaboration with the Commission, to balance these two interests. The Advisory Committee, supported by the Commission, petitioned Parliament to insert a clause into the North Wales Hydro Electricity Act 1952 to require their explicit consultation with respect to the development of electricity in North Wales.[109]

The Act was passed following on from the nationalisation of the British Electricity Authority (BEA) to incorporate and extend Dolgarrog power station into their network. The clause allowed the Advisory Committee and the Commission to require that the BEA appoint a landscape consultant for the development of electricity infrastructure within Eyri/Snowdonia. The close collaboration between the different authorities, the landscape consultant, and the engineers allowed for the construction of a hydro-pump and reservoir in Ffestiniog that was built into the landscape, in a way which did not risk the natural beauty within the park or disrupt public access, ensuring the effective implementation of s 5. Thus, the Advisory Committee in Eyri/Snowdonia could be seen to use the broad discretion it had to control development under ss 8-10 of the NPACA 1949, not to limit development entirely, but through the process of planning applications in s 12 of the TCPA 1947, to control land development, ensuring infrastructure projects adhered to the broader purposes of the NPACA 1949.

[109] ibid, (28th-29th May 1959) 'Speech by Lord Strang at the Conference of National Park Planning Authorities held in Bakewell', 5.

7. Conclusion

This chapter has explored how the legal possibility of national parks, as provided for by the NPACA 1949, materially manifested in the context of four different national parks. In doing so, the chapter has not attempted to provide a comprehensive history of each of these places, to do so would be a different thesis entirely. What this chapter has shown however is the variety of different ways in which national parks under the NPACA 1949 could be created and administered, illustrating the diversity of statutory possibility when applying the law to physical spaces.

In thinking about this chapter in the broader context of this thesis, what I have illustrated is that a legal history of the creation of national parks under the NPACA 1949 is a legal history of statutory possibility. By means of an example, it is helpful to consider the discussion around s 8 of the NPACA 1949 in this chapter. Section 8 created the statutory possibility to administer national parks, developing on existent legal concepts and processes in planning law, administrative law, and land law, to grant local planning authorities within the administrative boundary of a national park broad discretionary powers to administer land for the purposes of s 5. In the Peak District this saw a formalised administration through the establishment of a Joint Planning Board, which extensively created byelaws, under s 90 of the Act, to control land use within the park. By comparison in Eyri/Snowdonia, s 8 led to a less formulaic administrative structure, with different local authorities carrying out their own separate planning processes in collaboration through an Advisory Committee. Section 8 in the Lake District led to the Joint Planning Board having independent planning staff, separate from the planning staff within the three planning authorities which comprised it, due to their different approaches to planning law. Alternatively in

Dartmoor, s 8 provided a statutory justification for establishing a national park subcommittee within Devon CC as the broader planning authority.

None of these realisations of s 8 were outside of the legal possibilities of the statutory language, yet each of them created a very different administrative structure for the management and oversight of land within the respective national park. This in turn made each of the national parks not only physically different due its unique features, but also legally different due to the application of the NPACA 1949 therein. Thus, the final component of the legal landscape of national parks is not an additional area of contextualising law, but instead a reflection on how the realisation of law, outside of the language of law itself, plays in role in shaping how legislation is understood. This is not to imply, as the legal realists might, that legislation requires utility to be law,[110] but instead to say that if the law is about legal possibility, that it is only through the application of the law that the scope of those possibilities can be seen.

[110] Waldron (n1) 10.

7

Conclusions

Preamble

> *An Act to make provision for National Parks and the establishment of a National Parks Commission ; to confer on the Nature Conservancy and local authorities powers for the establishment and maintenance of nature reserves; to make further provision for the recording, creation, maintenance and improvement of public paths and for securing access to open country, and to amend the law relating to rights of way; to confer further powers for preserving and enhancing natural beauty; and for matters connected with the purposes aforesaid.*

(National Parks and Access to the Countryside Act 1949)

1. Introduction

The National Parks and Access to the Countryside Act 1949 (NPACA) was 'an Act to make provision for national parks'.[1] In doing so, the Act introduced statutory provisions for maintaining and enhancing public footpaths and rights of way, securing access to open country, and empowering local authorities to preserve and enhance natural beauty. Indeed, one need look no further than the Preamble of the NPACA 1949 to see that the legal creation of national parks depended upon a series of other legal considerations that needed to be addressed for national parks to fulfil their purposes under s 5 of the Act.

[1] NPACA 1949, Preamble.

Concluding this thesis with the Preamble of the Act to which the research pertains may seem a slightly backwards approach - to end at the beginning. Yet to tie back to the introduction, as Elizabeth Fisher noted in quoting Ursula Le Guin, there is considerable value in 'going backwards' before 'looking forwards'.[2] To consider Le Guin's point in its entirety - 'I don't think we are ever going to get to utopia again by going forward, but only round about or sideways'.[3] Now a comparison with utopia may be stretching what the NPACA 1949 attempted to achieve, but as Lewis Silkin expressed in proposing the Bill before Parliament-

> 'This is not just a Bill. It is a people's charter—a people's charter for the open air, for the hikers and the ramblers, for everyone who loves to get out into the open air and enjoy the countryside. Without it they are fettered, deprived of their powers of access and facilities needed to make holidays enjoyable. With it the countryside is theirs to preserve, to cherish, to enjoy and to make their own.'[4]

It is fitting then that Silkin and the writers of the three National Park Reports,[5] in looking forwards to the legal creation of national parks, found themselves going backwards, round about, and sideways to understand how these spaces could fit within the existing landscape of English law. It is only through understanding the

[2] Elizabeth Fisher, '"Going Backward, Looking Forward": An Essay on How to Think About Law Reform in Ecologically Precarious Times' (2022) 30 NZULR 111, 114.

[3] Ursula Le Guin, 'A Non-Euclidean View of California as a Cold Place to Be' in *Dreams Must Explain Themselves* (Gollancz, London, 2018) 124.

[4] HC Deb 31 March 1949, vol 463, col 1485.

[5] The National Park Committee, *The Report of the National Park Committee* (HMSO 1931) [The Addison Report]; John Dower, National parks: Preliminary Report to the Minister of Town and Country Planning (Cmd 6628, 1945) [The Dower Report]; Ministry of Town and Country Planning, *Report of the National parks Committee (England and Wales)* (Cmd 7121, 1947) [The Hobhouse Report].

different legal landscape features which formed national parks under the NPACA 1949, that the Preamble of the Act, as a forward-looking declaration of intent, is truly understandable.

At the start of this thesis, I set out two purposes for the work; first to provide a legal historical account of the creation of national parks in England and Wales; and second to show through that account how national parks resulted from changing legal ideas about the public administration of land. It is now helpful in the closing pages of this research to draw some conclusions about these purposes, considering the importance of them in understanding the legal creation of national parks in England and Wales.

2. Providing a Legal Historical Account of National Parks

This thesis provides a legal historical account of national parks in England and Wales, presenting the legal creation of these spaces both in the context of the statutory development of the NPACA 1949, and through a doctrinal study of the broader English legal system into which the legislation was enacted. The culminative effect of these considerations illustrates the specific role that statute plays in formulating legal principles, particularly in the context of planning law, administrative law, and land law during the 19th and early 20th centuries. Despite this centrality of legislation to the 'contingency' of English-law making,[6] legislation has a seemingly poor reputation amongst legal scholars.[7] This has led to what Jeremy Waldron described as the 'indignity of legislation'.[8] Whilst Waldron rationalises for legislation's dignity through

[6] Joshua Getzler 'Brian Simpson's Empiricism' (2012) 3(2) TLT 127,130

[7] Eloise Scotford 'Legislation and the Stress of Environmental Problems' (2021) 74 CLP 299, 299-301; PJ Fitzgerald, 'Are Statutes Fit for Academic Treatment' (1971) 3 JSPTL 142.

[8] Jeremy Waldron, *The Dignity of Legislation* (CUP 1999) 7-11.

political philosophy, such an argument has not been my intention here. Acknowledging this, I do assert a similar claim: that there is an intrinsic value, or dignity, in how legislation is situated in the context of English law.[9] In particular, as the careful crafting of the provisions of the NPACA 1949 illustrate, legislative enactment is thoughtful and legally contextual process.This can be reflected in revisiting the sections of the NPACA 1949 which have been emphasised throughout this work.

Section 5 of the NPACA 1949 defined the purpose of national parks, setting out that these legal spaces exist to conserve extensive tracts of natural beauty, and to provide access to those places for public enjoyment. This two-fold purpose was developed through the three National Park Reports, which sought to reconcile the possibility of national parks in English law with legal conceptions of these spaces from other jurisdictions.[10] As part of this enquiry, the Reports consulted a variety of organisations, each of which promoted rural preservation and recreational access to open spaces across England and Wales.[11] Section 5 thus reflected two different contingencies within English law-making. First, s 5 reflected attempts to formulate a statutory definition of national parks which could sit within legislation. This definition had to be suitably flexible that it could be cross applied to the different physical localities the Act would designate. Second, s 5 reflected the broader formulation of new principles in English law, primarily the emergence of a 'public interest' in land.

[9] OED 'dignity (n.) sense 1a' (*OED*, March 2024) <doi.org/10.1093/OED/2893239936> note 'personal will' or 'whim'

[10] TNA/HLG93/20 contains correspondence on national park legislation and administration with New Zealand, Canada, Australia, Ireland, Denmark, Switzerland, Sweden and the USSR, all of which have a different approach to that in the NPACA 1949.

[11] Notably the Reports consulted the Councils for the Preservation of Rural England and Wales; The National Trust; The Ramblers Association; The Commons and Footpath Preservation Society; and The Planning Institute.

Through the litigation of the Commons, Open Spaces, and Footpaths Preservation Society (formerly the CPS), the public trustee role of the National Trust, and the increased ownership of open spaces by local authorities, a public interest in land use emerged. Crucial to this interest was public enjoyment. Section 5 thus also reflected the reconceptualization of land as something that could be controlled, or administered, within the public interest.

A similar pattern can be demonstrated when considering the administrative provisions within the NPACA 1949. Sections 8-11 of the Act set out the processes through which national parks would be managed. Section 8 imported the different procedural mechanisms for establishing a planning committee from the Town and Country Planning Act 1947 (TCPA), into the NPACA 1949. This was supported, in s 9, by an explicit extension of planning powers, namely the requirement to produce a development plan specifically for national park management. Beyond this ss 10-11 then incorporated any other local authority powers into the national park legal framework, allowing those powers to be used in the administration of national parks. Complementing this, in part I of the Act, was the creation of a National Park Commission who had an advisory capacity to coordinate the activity of these different local authorities, to ensure the purposes of s 5 were properly achieved.

These provisions can thus be seen to reflect both the circumstances in which the legislation was passed, and the broader integration of that legislation with other statutory frameworks and procedures. The National Park Reports all recognised the possibility of using existing planning law to legally create national parks, with many proposed national park sites, following on from the Addison Report, using their planning powers under the Town and Country Planning Act 1932 (TCPA) to attempt

just that. For Lewis Silkin, in proposing the final legislation, national parks were a form of planning activity, created alongside the TCPA 1947.

The provisions within the TCPA 1947 however also reflected the consolidation of a century of legal evolutions in planning law, with the Act itself further detailing processes for controlling land use first established in the Public Health Acts of 1848 and 1875. Similarly, the existence of planning processes would not be possible without a body to apply them, and thus underpinning the evolution of planning law was a more general expansion of the capacity of local, regional, and national governance bodies. The gradual formalisation of local governments, overseen by central bodies, empowered these bodies to publicly administer land. The administrative provisions within ss 8-11 of the NPACA 1949 can thus be seen to directly implement the recommendations which emerged during the development of national parks legislation, as well as integrating into the NPACA 1949 the wider legal principles which had emerged in planning law and public administration. This shows how the statutory creation of national parks was in binary with the development of other doctrines in English law, particularly where those doctrines related to the public administration of land.

This brief summation of the legislation thus reiterates how the legal creation of national parks did not occur all at once or in isolation. Instead, it was through the slow and multifaceted evolution of a variety of different legal principles, alongside the careful consideration of the statutory drafting itself, that national parks came to exist at all. An indictment often faced by legislation is that it is arbitrary, introduced to

reflect whatever whim occupies socio-political discussion in any given period.[12] Waldron suggests that it is this arbitrariness which can lead legislation to be viewed as 'undignified', lacking the honorific qualities often attributed to the slow evolution of common law.[13] In reflecting on these provisions of the NPACA 1949 however, it is possible to see how the creation of national parks was anything but *whimful*. Instead, the NPACA 1949 carefully carved national parks out of an existing legal landscape, taking 20 years to ensure the seamless integration of this new landscape feature. Analogous to this, was the reformation of those existing landscape features, creating new legal opportunities for land to be envisaged, and ultimately administered, in new ways.

To link back to the Preamble at the start of this chapter, the NPACA 1949 is often regarded as the starting point in considering the legal existence of national parks and countryside preservation more generally. By going backwards, roundabout and sideways, it is possible to see that national parks were not only the beginning of new legal ideas about environmental management, but also the conclusion of a series of different legal evolutions which had then been specifically applied in the NPACA 1949 to legally create national parks. The NPACA 1949 thus provides a bridging point between old and new legal ideas about public land administration, with the longevity of the Act again illustrating the intentional nature of the legislation itself.

[12] OED 'arbitrary (adj.), sense 4' (*OED* December 2024) <doi.org/10.1093/OED/1738948957>; Waldron (n8) 126-128; Note also the discussion of Benthamite, Diceyian and Coleridgean views in Ben Pontin 'Environmental Law-Making Public Opinion in Victorian Britain: The Cross-Currents of Bentham's and Coleridge's Ideas' (2014) 34(4)OJLS 759.

[13] Waldron (n8) 8.

3. Changing Legal Ideas about the Public Administration of Land

This leads on to the second purpose of this thesis, to illustrate how national parks, as legally created by the NPACA 1949, were embedded in changing legal ideas about the public administration of land. Through the exploration of planning processes, administrative capacity, and the adaptation of existing land rights to perform new public purposes, legal interactions with land changed during the late 19th and early 20th centuries. This led to a reimagining of the possibilities for controlling land use, detached from existing conceptions about the relationship between different proprietary interests.

In particular, this thesis advanced that by the mid 20th century, land had come to be understood in two senses. The first of these was the series of privately held interests in land which had existed for centuries and determined how land was understood. These interests were enforceable against any other person or body holding, or seeking, the same kinds of interest. For example, it did not matter whether a landholder sought to enforce the doctrine of exclusivity against another private citizen seeking to enter their land, or a public body, the doctrine still applied. Through statute however, a second method for conceptualising land emerged. This existed at a different "legal level", or as an administrative overlay, onto these private interests. This administrative overlay did not interact directly with the specific interests of landholders through the same relationship as a private citizen. Instead, imbued by a broader statutory purpose, this new overlay imposed blanket regulations, or controls, on land use that were not specific to individual private rights, but to land as a whole. This overlay was possible through the processes of planning law, as conceptualised against the growth of administrative capacity and the integration of 'old form' land rights into that system, underpinned by the recognition of a 'public interest' in land

use. To frame this differently, the creation of this administrative overlay, and thus a new set of principles in English law, was possible because of the considered integration of new statutory provisions, with the existing landscape of English law.

This created a legal landscape in which statute was able to rely upon these different legal principles and processes to regulate land use for a variety of purposes. The legal creation of national parks under the NPACA 1949 was just one purpose created in this broader legal landscape. As the language of landscape implies, this administrative overlay did not exist because of any one singular statutory or common law development, but instead the culminative effect of a series of legal features being combined in one legal space. National parks legislation thus reflected one legal possibility of this new conceptualisation of land as something capable of being publicly administered.

4. Why a Legal History of National Parks and Public Land Administration Matters

It is often dangerous in legal historical scholarship to begin to justify why something matters, leading to the threat of conducting presentist analysis. The language of 'danger' and 'threat' are perhaps hyperbolic, but they do reflect the very real risk of either misconstruing legal historical materials in line with modern understandings or trying to squeeze those materials to prove some greater point that might not necessarily be apparent therein. For the administrative lawyer, the environmental lawyer, or the planning lawyer however, the need to justify that academic work has some practical utility is often apparent. Since I began this research, national parks have

become a 'hot topic',[14] with litigation,[15] statutory reform,[16] and proposed new designations,[17] all attracting attention to national parks. Alongside this, cultural awareness of national parks has also increased, with national park landscapes being a consistent feature in English and Welsh cultural imagery.

This can be illustrated through some examples. In 1982 Michael Morpurgo, an English author, wrote the book 'War Horse' setting portions of his story in the moorlands of Dartmoor. In 2011 this story was adapted to become Steven Spielberg's internationally acclaimed 'War Horse' film. Using the language of the original story, Spielberg chose to film much his content in Dartmoor, broadcasting Dartmoor National Park around the world as an expression of English ruralism. Indeed, Spielberg himself commented 'I have never before, in my long and eclectic career, been gifted with such an abundance of natural beauty as I experienced filming War Horse on Dartmoor'.[18] Alternatively, in the late 19th century, many of the great Romantic poets, notably William Wordsworth and Samuel Coleridge convened in the Lake District, writing poetry about that landscape. These poems have influenced countless pieces of work, embedding their imagery within cultural understandings of the Lakes. For example,

[14] Note the discussion of 'hot situations' in Elizabeth Fisher 'Environmental Law as 'Hot' Law' (2013) 25(3) JEL 347, 350-351.

[15] *Dartmoor National Park Authority v Darwall and another* [2023] EWCA Civ 927. Other recent national parks litigation includes *Worthing BC v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 2044; *Dee & Dee v Secretary of State for Levelling Up Housing and Communities & New Forest National Park Authority* [2022] EWHC 2166 (Admin); *Stubbs v Lake District National Park Authority* [2020] EWHC 2293 (Admin).

[16] Levelling-Up and Regeneration Act 2023, s 245.

[17] Clair Marsh and Malcom Prior, 'England to get new national park as part of nature plan' (*BBC*, 29th November 2023) <www.bbc.co.uk/news/science-environment-67538625> accessed 16th October 2024.

[18] Michael Morpurgo, 'why Steven Spielberg was right to choose Dartmoor for War Horse' (*The Telegraph*, 12th January 2012) <www.telegraph.co.uk/Michael-Morpurgo-why-Steven-Spielberg-was-right-to-choose-Dartmoor-for-War-Horse> accessed 16th October 2024.

TIME person of the year 2023, Taylor Swift,[19] wrote 'take me to the lakes, where all the poets went to die', in her song *the Lakes* on her internationally awarded album Folklore.[20] Both examples show how the imagery of national parks in England and Wales has global cultural significance.

The global status of English and Welsh national parks has also attracted questions about the quality and suitability of national parks as a mechanism for preserving the countryside, with allegations that 'National Parks [have] Failed Nature' repeatedly being rehearsed.[21] As noted at the start of this thesis, my intention here was never to confront the modern validity of these criticisms. Yet, as the Minister of Housing and Local Government Henry Brooke stated on the 28th May 1959, 'before any fresh government legislation is brought forward to amend the National Parks and Access to the Countryside Act 1949, the nation has got to think out more clearly than ever what it wants to make of National Parks'.[22] To think clearly, and look to the future of national parks law then, it is important to have gone backwards, to understand exactly what circumstances resulted in the legal present. This thesis provides, for the first time, a legal historical account of national parks. In doing so, it places the NPACA 1949 both in its historical context and in the context of the specific legal landscape

[19] Sam Lansky, '2023 Person of the Year: Taylor Swift' (*TIME Magazine*, 6th December 2023) <Time.com/6342806/person-of-the-year-2023-taylor-swift> accessed 16th October 2024.

[20] Taylor Swift with Jack Antonoff, Aaron Desser and Joe Alwyn, *Folklore* (Public Records 2020).

[16] Damian Carrington, 'How national parks failed nature – and how to fix them' (*The Guardian*, 13th September 2024) <www.theguardian.com> accessed 22nd September 2024; Malcom Prior, 'National Parkland in public hands 'would help nature' (*BBC News*, 12th September 2024) <www.bbc.co.uk/news> accessed 22nd September 2024; Damian Carrington, 'England's national parks overseen by 'bloated', mostly white male boards' (*The Guardian*, 13th September 2024) <www.theguardian.com> accessed 22nd September 2024; Sarah Ryan, 'Park strife: does the UK really need more National Parks? (*Live for the Outdoors*, 5th April 2024) <www.liveforetheoutdoors.com> accessed 22nd September 2024; Adam Vaughan, 'Cuts threaten national park paths and rights of way access' (*The Times*, 1st April 2024) <www.thetimes.com> accessed 22nd September 2024.

[22] TNA/COU 1/817 (28th May 1959) 'Future of National Parks: Nation must decide what it wants them to be, says Minister'.

against which the legislation was enacted. Understanding the *how* and *why* of national parks does not determine whether they are fit for purpose now. What it does provide is a fuller understanding of these spaces as legal creations. It is only now we have gone backwards that it is possible to turn to consider the future.

-End Materials-

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