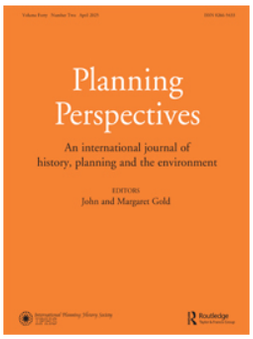

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Shaping and transposing: an analysis of the impacts of case law on the evolution of planning practice in twentieth century England & Wales

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ABSTRACT

The impacts of case law on the conceptual evolution of planning practice are important to the fields of administrative law and town planning in the context of the common law jurisdiction of England & Wales, yet they remain under-examined in the literature of both fields. This paper utilizes historical institutionalist theory to analyse the emergence of distinct planning practices, drawing on relevant legislation and citing case law from 1909–1986. In examining planning's emergence from the milieu of the law on housing, public health, and administration, broader contexts across the chosen timeline are considered, in terms of the amount of activity seen through annual planning applications and appeals, and in terms of the legal, political, and economic contexts of the period. These layers of context reveal the ways in which planning actors have historically turned to case law to shape the boundaries of administrative power and how the courts, in deciding planning cases, transposed their approach from better established areas of case law, thereby fixing planning practice on new path dependent processes. It is concluded that case law between 1909 and 1986 formed part of the context for, and directly shaped, the evolution of planning practice in the twentieth century.

KEYWORDS

Planning history; planning practice; planning law; case law; historical institutionalism

Introduction

'Planning law' as it is defined here is the strand of public administrative law which regulates planning activities in the jurisdiction of England & Wales, through a body of case law and Acts of Parliament (primary legislation). Case law is understood to mean law which is made by the courts, either through their interpretation of legislation and policy, or through the development of the common law principles which guide them. Usage of the term 'case law' in this paper must also be understood in the context of the common law system of the England & Wales. Common law, as the term is understood today, means that judges have competency to declare the law, based on binding precedent found in previously decided legal cases from the same or higher courts.[1] This can be in the absence of legislation on a matter, or in interpreting the meaning of legislation.

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[1]ICLR, *The English Legal System*.

Planning case law is generally considered to play a supervisory, arbitrational role within the planning system.[2] Whilst not discounting the explanatory power of different or wider contexts, this paper seeks to show that early planning case law influenced the evolution of the planning system in the early to mid-twentieth century, contributing to the way planning is thought about and undertaken today.

The 'planning system' is taken to mean the development of policy against which discretionary decisions are principally made, as well as such decisions, particularly through development control (what would today be referred to as development management). Two analyses are undertaken in this paper. First, the number of cases associated with each Act are tracked and analysis is undertaken as to why certain Acts have more associated case law than others. Second, the amount of planning law 'activity' (legislation, case law, and appeals) across the period is analysed to periodise the study and situate it historically. This paper uses historical institutionalism ('HI') as its theoretical framework. HI theory illuminates the effects of institutional structure and agency on the determination of social and political outcomes and holds that the timing and sequencing of events is crucial to understanding power dynamics, rules and norms, and the range of options available to actors that together constitute an institution.[3]

Planning case law does not involve itself in 'planning judgement', that is to say, discretionary matters relating to the practice of planning rather than the legal principles which govern it. The principle that the court will not involve itself in administrative discretion unless the decision is patently unreasonable finds an early expression in the famous case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*[4] and persists throughout planning jurisprudence, finding a recent expression in *Tesco Stores Ltd v Dundee City Council.*[5]

Notwithstanding the principles expressed in the *Wednesbury* and *Tesco* cases, planning case law has shaped the planning system in the jurisdiction of England & Wales into what it is today. The expression of the case law's reticence towards involving itself in planning judgement is itself a recognition of this fact and twentieth century case law and legislation has much to tell both legal scholars and social scientists about the way in which the planning system and planning case law interact. In particular, the emergence of certain 'planning sensibilities' is perceptible from the milieu of public health, housing, and administrative law in the late nineteenth and early twentieth centuries. The 'planning sensibility' is defined as the collection of histories, attitudes, behaviours and traditions that together constitute a certain group of practitioners' shared (but by no means agreed upon) understanding of the rationale behind town and country planning,[6] for example planning in the public interest, the protection of property rights, or public participation in planning.[7]

Historical institutionalism

Historical institutionalism is used as the theoretical framework for the research in this paper, due to HI theory's propensity to elucidate how timing, path dependence and sequences affect institutions and shape social, political and economic behaviour and change. Three concepts which are key to the theoretical framework: institutions, path dependence and critical junctures. The first of these, institutions, has a different meaning under a historical institutionalist framework than in

[2]Grant, *Urban Planning Law*, 608.
[3]Skocpol, "Why I Am an Historical Institutionalist".
[4][1948] 1 KB 223.
[5][2012] UKSC 13.
[6]Millichap, "Law, Myth and Community," 284.
[7]McAuslan, *Ideologies*.

everyday language. An institution under its ordinary meaning would be more akin to a 'setting' in in HI literature.[8] In HI literature, settings are populated by 'actors' who apply the 'rules of the game' that constitute the institution in question.[9]

Hall and Taylor[10] provides the chief working definition of institutions as 'the formal or informal procedures, routines, norms and conventions embedded in the organisational structure of the polity or political economy'. The second key concept in HI theory is that of path dependency, which can be understood to mean that what has happened at an earlier point in time will effect the possible outcomes of a sequence of events occurring at a later point in time. Mahoney[11] goes further, arguing that studies of path dependence are based on an assessment of 'how process, sequence and temporality can be best incorporated into social explanation' and so defines path dependence as 'those historical sequences in which contingent events set into motion institutional patterns or event chains that have deterministic properties'.[12]

The third concept requiring definition is 'critical junctures'. Critical junctures can be broadly defined as 'episodes of change'[13] or, in reference to path dependent sequences, as 'brief phases of institutional flux that occasionally punctuate path dependent institutional stability and reproduction'.[14] Such phases can be considered 'critical' because they place institutional arrangements on paths or trajectories, which are then very difficult to alter.[15] Mahoney defines critical junctures as 'choice points when a particular option is adopted among two or more alternatives'.[16] Mahoney's definition also emphasizes the importance of agency and meaningful actor choice during such periods of flux. Capoccia and Kelemen[17] argue that in institutional analysis, critical junctures are characterized by a situation in which the structural influences on action are significantly relaxed for a short period. Therefore, a definition of a critical juncture is:

1. A relatively short period of time (compared to the path dependent process initiated),
2. During which there is a high probability that agents' meaningful choice will affect the outcome of interest (relative to the probability before and after the juncture).

Applying these definitions to this paper, the institutional analysis in question is the impact of the institution of case law on the institution of planning practice. In this analysis the first setting that needs to be examined is the courts of England & Wales. This setting is populated by actors such as the judiciary, producing judgments interpreting the meaning of planning legislation and arbitrating on matters of fact at first instance, as well as both public sector lawyers and lawyers representing and advising private clients. The deployment of HI theory in this paper contends that such actors, within their setting, develop the 'rules of the game' not only for what can be considered their own institution, that of case law, but also have a role in developing the 'rules of the game' which govern the institution of planning practice.[18]

[8]Sørensen, "New Institutionalism".
[9]Taylor, "Rethinking Planning Culture," 691.
[10]Hall and Taylor, "Political Science," 938.
[11]Mahoney, "Path Dependence," 510.
[12]Ibid., 507.
[13]Taylor, "Rethinking Planning Culture," 691.
[14]Capoccia and Kelemen, "The Study of Critical Junctures," 341.
[15]Pierson, *Politics in Time*.
[16]Mahoney, "Path Dependence," 347.
[17]Capoccia and Kelemen, "The Study of Critical Junctures".
[18]Taylor, "Rethinking Planning Culture".

The institution of planning practice is broader and more varied than that of case law. Planning practice's setting includes anywhere where planning decisions are made, including in central government departments, local and regional councils, as well as by private developers. As a corollary to these settings, the actors are similarly varied and include anyone within these settings taking planning decisions, which may be influenced by emergent case law. For example, a private developer who is more likely to litigate to achieve planning goals, given a perception that the court is on the side of private property rights.[19] Similarly, a local authority needing to reflect and clearly delineate the roles and powers of planning officers versus planning committee members following an unfavourable judgement.[20]

Existing scholarship

Planning law is peculiarly absent from many debates about the purpose and nature of planning from within the academic field of planning and is under-researched when compared to other aspects of planning practice. Millichap points out that key planning law cases remain 'largely unknown to the planning professions'.[21] A lack of reflection of the impacts of case law on planning practice is also evident in the academic field of planning law. The current and previous editions of planning law textbooks such as Moore and Purdue[22] and Bowes[23] do not reference any case law in their respective sections on the history of planning in the United Kingdom. The perceived difficulties in identifying the impacts of case law in planning have led to their rarely being examined in legal scholarship.[24] The impacts of case law on planning practice may offer an excellent 'way in' to identifying the role and purpose of case law more generally. This is because of the close, albeit problematic, relationship between policy and law in planning, 'and the role of legal frameworks in the practical significance of policy'.[25] Furthermore, aside from immigration case law, planning has historically been the most litigated area in public law for citizens of the United Kingdom,[26] thereby providing a rich seam of researchable material in the form of case law and associated documentary evidence. The lack of recognition of the influence of case law in both planning and legal scholarship represents a lacuna in the literature from which to examine the influence case law may have had on the evolution of planning practice in the twentieth century.

This paper sits within a line of scholarship starting with Foley,[27] who argued that town planning in Britain is informed and influenced by ideology. Milsom, Baker, and Booth[28] demonstrate that the early planning Acts, most notably the Town and Country Planning Act 1947,[29] arose out the jurisdiction of England & Wales' unique conception of private property rights, based on feudalism and the jurisprudence of early common law planning administrators. McAuslan,[30] applied Foley's thinking to planning law, arguing that in exercising its function of the interpretation of legislation and the development of common law when deciding planning cases, the court is informed by the ideologies that shape its decision-making processes. These ideologies were 'first the traditional

[19]R. v Hillingdon LBC Ex p. Royco Homes Ltd [1974].
[20]Lever (Finance) Ltd v Westminster Corporation [1970].
[21]Millichap, "Law, Myth and Community," 281.
[22]Moore and Purdue, *A Practical Approach to Planning Law*, 13th Ed.
[23]Bowes, *A Practical Approach to Planning Law*, 14th Ed.
[24]Lee, *English Planning Law*.
[25]Ibid., 2.
[26]Elliot and Thomas, "The Effectiveness and Impact of Judicial Review".
[27]Foley, "British Town Planning".
[28]Milsom, *The Historical Foundations of the Common Law*; Baker, *The Common Law Tradition*; Booth, *Planning by Consent*; Booth, "The Control of Discretion".
[29]c. 51, United Kingdom.
[30]McAuslan, *Land, Law and Planning*; Ideologies.

common law view that the role of the law is to protect private property; second that the law exists to serve the public interest; and third that the law serves the cause of public participation'.[31]

The literature also reveals a historic tension between case law's role as regulator to the planning system and the extent of administrative discretion given to planners and to judges.[32] Jowell[33] offers a historical view on legal control of administrative discretion, arguing that despite ebbs and flows of the extent of control, the law has always had a role in shaping the nature of administrative discretion. Booth[34] makes the case that the historical judicial approach to the control of administrative discretion, and indeed the way in which administrators exercise discretion, emerges and is informed by the common law tradition. Booth[35] further argues that planners' emergence in the early twentieth century as administrators led to their adopting quasi-judicial approaches, both to lend themselves legitimacy and because that is the mode of administration that common law English and Welsh society was used to.

Similarly, the literature reveals that planning has been constructed around a series of concepts that are derived, at least in part, from case law.[36] Public law cases use principles such as reasonableness (the standard being that a reasonable decision maker *could* reach the same decision), ultra vires (beyond the powers granted to a decision maker by Parliament) and natural justice (the decision maker is not biased and offers a fair hearing). Planning practice concepts have developed out of such principles, including the meaning of 'development', material considerations, and amenity.[37] The conclusion can therefore be drawn from the literature that the signs of case law's influence on planning are visible in a system that emphasizes appropriate development for the place and time and through responsiveness and flexibility. This paper engages with these ideas further by arguing that in early planning cases, evidence of ideological decision making in court decisions led to the transposition of legalistic thinking in early planning decision making. McAuslan's ideas were developed by Grant[38] and, to an extent, by Griffith[39] in an examination of the political ideologies of the judiciary. Adshead[40] argues that judicial ideology continues to inform the determination of planning case law to this day. Finally, Lees and Shepherd[41] offer a contemporary example of the tension at the heart of discretionary control, exposing inconsistencies between legal and policy-based imperatives. This paper contributes to the literature on judicial control of planning discretion by presenting a historical argument that early planning case law deeply influenced planning in the early twentieth century, and seeks to examine how this influence operates, and to what end.

Methodology

This study encompasses 77 years inclusive of 1986. The legislative timeline starts with the Housing, Town Planning &c. Act 1909.[42] The earliest planning case identified is 1909, which is *Re Harvey*

[31]Adshead, "Revisiting the Ideologies of Planning Law," 174.
[32]Davis, *Discretionary Justice*; Forsyth, "Administrative Discretion"; Jowell, "The Legal Control of Administrative Discretion"; Jowell, "Administrative Law".
[33]Jowell, "The Legal Control of Administrative Discretion".
[34]Booth, *Planning by consent*; Booth, "The Control of Discretion".
[35]Booth, "The Control of Discretion".
[36]Dworkin, *Taking Rights Seriously*.
[37]McAuslan, *Land, Law and Planning*.
[38]Grant, *Urban Planning Law*.
[39]Griffith, *The Politics of the Judiciary*.
[40]Adshead, "Revisiting the Ideologies of Planning Law".
[41]Lees and Shepherd, "Incoherence and Incompatibility in Planning Law".
[42]c.44, United Kingdom.

and London County Council's Arbitration,[43] which concerned both rights to light and the 1909 Act. The 1909 Act represents the first dedicated piece of planning legislation and, in a sense, the addition of town and country planning to central and local governmental functions.[44] This is not to deny the contributions that earlier, nineteenth century legislation made to the development of town and country planning in England & Wales. Rather, the 1909 Act serves as the starting point as it is the first Act examined that definitively relates to planning. The study of case law ends in 1986, after which a significant drop in case law was perceived. One explanation for this drop is the fact that the Greater London Council ('GLC') was disbanded in 1986.[45] There was then a fourteen-year gap in planning at a regional level in London before the Greater London Authority was founded in 2000.[46] This, coupled with the fact that the recent glut of planning legislation and consequent litigation would create an unwieldy data set renders 1986 an appropriate juncture to conclude the study.

Thirty-three pieces of legislation were identified as being relevant to planning practice between 1909 and 1986. Two hundred and forty nine individual cases associated with this legislation are identified as relevant to planning practice. 'Associated' in this context means that the tribunal deciding the case cited or were asked to interpret the provisions of the legislation in question. The first piece of legislation that can properly be considered a 'planning' Act is the Housing, Town Planning &c Act 1909.[47] However, both Heap and Bowes[48] identify the fact that the connections between planning, public health, and housing legislation are highly relevant. The fields of housing and planning remain closely linked across the period of the study, whereas the field of public health is cleaved from the former two fields in the early twentieth century. One reason for this disassociation is that the Ministry of Health Act 1919[49] established the Ministry of Health. This Ministry was briefly responsible for town and country planning, therefore, whenever a bill was put forwards by the Ministry, it often contained provisions relating to all three fields. For example, both of the earliest Acts which explicitly relate to planning, the Housing, Town Planning &c. Acts 1909 and 1919[50] contain provisions relating to all three fields. In 1943 a new Ministry of Town and Country Planning was formed, and public health became seen as distinct from planning.[51] In contrast, the functions of housing and planning remain part of the same Ministry across the period studied.

In terms of the subject matter of the legislation, 32 pieces of legislation (see Figure 1) are 'purposive' Acts, in other words, they have the word 'planning' in the title and reference planning activities in the long title of the Act. The first of these is the Housing, Town Planning &c. Act 1909 and the last is the Housing and Planning Act 1986.[52] The fact that the first word in the title of both the first and the last piece of planning legislation studied is 'Housing' indicates the centrality of housing to both early and more recent legislative planning endeavours,[53] and in its demonstration of planning's emergence from public health codes.[54] It is also demonstrative of the

[43][1909] 1 Ch. 528.
[44]Cherry, *Town Planning in Britain*, 18.
[45]Local Government Act 1985, c.51, United Kingdom.
[46]Greater London Authority Act 1999, c.29, United Kingdom.
[47]Heap, *An Outline of Planning Law*; Bowes, *A Practical Approach to Planning Law*.
[48]Ibid.
[49]c.21, United Kingdom.
[50]c.44, United Kingdom; c.35, United Kingdom.
[51]Sharp, *The Ministry of Housing and Local Government*, 16.
[52]c.44, United Kingdom; c.63, United Kingdom.
[53]Sharp, *The Ministry of Housing and Local Government*, 139.
[54]Heap, *An Outline of Planning Law*, 1.

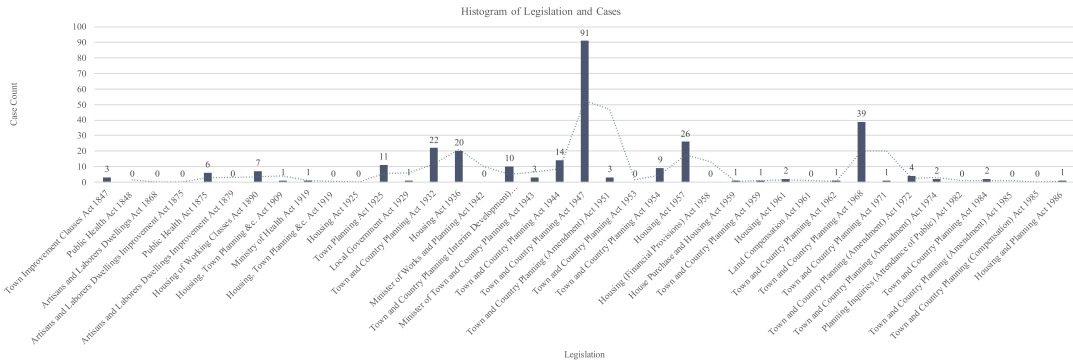

Figure 1. Case law and legislation histogram. Source: Author's own work.

ascension and decline of a planning ideology distinct from housing over the course of the early to late twentieth century. This is further demonstrated by the unusual inclusion of '&c.' (meaning 'etcetera') in the first planning Acts' titles, representative of how little understood the endeavour of planning was when the Act was passed, and how underdeveloped a sensibility around planning was. This paper argues that one of the contributions of case law was to develop and strengthen a shared understanding of planning such that later Acts are firmly titled as a 'Town and Country Planning Act', before a return to the primacy of housing over planning at the end of the study.

Of the 249 pieces of case law identified, 116 are considered to be impactful to the evolution of planning practice. The impact of the cases was identified based on their subject matter. Cases relating to development control were found to be most likely to be impactful. Exceptions to this finding were cases that relate to compulsory purchase and enforcement. The reasons for these exceptions are discussed in the conclusion of this paper. This is because the activities that go into development control, compulsory purchase and enforcement likely formed the greater part of day-to-day planning practice in London between 1909 and 1986. The data collected is supportive of this contention. There are very few cases in the timeline challenging a local authority's plan making activities or functions. Instead, the majority of cases in the timeline in some way relate to the control of development, enforcement, and compulsory purchase.

Tracking the impacts of case law

The first way in which the impacts of case law on emergent planning practice were tracked was through the creation of a histogram showing the number of cases associated with each piece of legislation and illustrating periods of path dependency, punctuated by the critical junctures to planning practice engendered by the passing of a new Act. The histogram is shown in Figure 1. Several conclusions can be drawn from it. First, a bell curve can be broadly drawn in terms of the number cases across the study's period. This peaks sharply at the 1947 Act, which has 91 cases associated with it, and drops off on either side. If one of the functions of planning case law is understood to be the interpretation of legislative intent on a given subject matter, then this bell curve can be seen to represent the rise of town and country planning as a governmental endeavour (and its concurrent need to be interpreted and explained in the courts) starting from the Housing, Town Planning &c. Act 1909, peaking at the 1947 Act, before becoming better understood by both the law and

society at large after the 1968 Act.[55] It is also possible to view the high number of cases associated with the 1947 Act as a result of the fact that that the Act brought all land under planning control for the first time. Therefore, many more landowners were affected by planning, each representing a potential litigant.

Viewed from these perspectives, the timeline can be examined to determine why certain Acts such as the 1947 Act have such a high number of planning cases associated with them and whether a link can be drawn between the legislation, through the case law, terminating in impacts on planning practice. The three pieces of legislation with the highest number of associated cases, aside from the 1909 Act which is also examined, in chronological order are:

1. Housing, Town Planning &c. Act 1909: 3 cases
2. Town and Country Planning Act 1932: 22 cases[56]
3. Town and Country Planning Act 1947: 91 cases
4. Town and Country Planning Act 1968: 39 cases

An examination of the Acts reveals that each contains provisions that made fundamental or at least significant changes to the planning system as it was prior to that Act and thus representing an impetus for litigants to bring claims requiring the courts to exercise their interpretive function to clarify the meaning of these changes. The period of institutional flux created by the changes to the planning system brought about by the Acts allows them to be classified as critical junctures. Path dependent planning practices are then disrupted and set upon new paths with case law used as the vehicle for institutional change. The more fundamental the changes wrought by a new Act, the more cases tend to be associated with it suggesting, in line with HI theory, that during the critical juncture engendered by a new planning Act, actor (or litigant) agency is more meaningful and more likely to bring about institutional change than outside of such periods.[57] Specific cases associated with these and other Acts are analysed, as well as the content and purpose of each of the four pieces of legislation, to determine why they have so many associated cases and how the legislation interacts with case law to influence planning practice.

Starting with the 1909 Act, one significant associated case is *Re Ellis and the Ruislip-Northwood Urban Council*,[58] although as Millichap points out, it is 'a case that is largely unknown to the planning professions'.[59] The case concerned a landowner, Mr. Ellis, who wished to claim compensation as a result of being injuriously affected by a town planning scheme made by the Council. The case is significant in its demonstration of early judicial involvement in the rationale behind town planning. The Court of Appeal allowed Mr. Ellis' appeal. In doing so the judges provided an early definition of the term 'amenity', which Scrutton L.J. defined as 'pleasant circumstances or features, advantages'.[60] This definition seeks to separate the law on town and country planning from an earlier public health focus on sanitation, thereby giving effect to Parliament's intentions that town planning should render 'the house healthy, the home beautiful, the town pleasant, city distinguished and the suburb salubrious'.[61] In this sense, the court in *Re Ellis* was using its interpretive powers

[55]c.72, United Kingdom.
[56]c.48, United Kingdom.
[57]Mahoney, "Path Dependence," 347.
[58][1920] 1 KB 343.
[59]Millichap, "Law, Myth and Community," 281.
[60]§49.
[61]Burns MP, Town Planning Act, 1908.

to shape early planning practice to focus on an environmental, rather than sanitary, understanding of planning.

The case of *Conron v. London County Council*[62] concerned a challenge by a public house to a scheme under s.1 of the 1909 Act for the development of circa 3,000 acres of land for the erection of dwelling houses for 120,000 working class people. What is notable about the case is the way in which the court interpreted the provisions of prior housing Acts, such as the Housing of the Working Classes Act 1890,[63] to achieve the distinctly planning focused aims of the 1909 and 1919 Acts. For example, Peterson J stated

> Sect. 45 of the Housing, Town Planning, &c., Act, 1909, however, prohibits the compulsory acquisition for the purposes of Part III. of the Act of 1890 of any land which forms part of any front garden or pleasure ground or is otherwise required for the amenity or convenience of any dwelling house.[64]

The Judge then went on to interpret the provisions of Housing Acts so as to circumvent this issue and allow the scheme to continue. The *Conron* case can be seen as one in which the court used its experience and competency with existing housing legislation to inform early planning practice. This connects to the theoretical framework of HI in that the critical juncture formed by the 1909 and 1919 Acts contributed, via the *Re Ellis* and *Conron* cases, to setting planning practice on a path dependent process, divergent from the paths housing and public health were set upon.

Several years later, following the enactment of the Town and Country Planning Act 1932, the town planning ideology in the England & Wales was more developed, although by any assessment still in its infancy. The most numerous topics of litigation related to the 1932 Act are planning permissions (9 cases) and planning schemes by a local authority (4 cases). Prior to the 1932 Act the two most significantly litigated Acts are the 1909 Act (3 cases) and the Town Planning Act 1925[65] (11 cases). Taken together, these Acts represent a rise in litigation due to the planning professions and the law grappling to understand concepts of town and country planning as it emerged from the milieu of public health and housing, and into a distinct field.

A case that encapsulates case law's impact on this emergence is that of *Attorney-General v Barnes Corporation and Ranelagh Club Limited*.[66] The case is another example of the court attempting to interpret planning law through the lens of existing powers of local government and, in doing so, setting early planning practice on its own path. The case concerned the delegation of planning responsibilities by the local planning authority to a private members club, whose land was the subject of a planning scheme under the Housing, Town Planning &c. Act 1919. The action was instituted by the Attorney General on behalf of a ratepayer of the borough, claiming a declaration that the appointment of representatives of the club to a planning committee was *ultra vires* (beyond the powers given to them by Parliament), that the powers of the Council had been improperly delegated, and that the agreement between the planning authority and the club was *ultra vires* and therefore unenforceable and void.[67] The court was nevertheless able to find in the defendant's favour on the basis that there was nothing in the provisions of the Town and Country Planning Act 1932 to prevent the local authority from entering into such an agreement. The case is an interesting one in that it is brought by the Attorney General as a representative of central government, to curtail the activities of local government. The Court could not find justification for a restriction of

[62][1922] 2 Ch. 283.
[63]53 & 54 Vict. c. 70, United Kingdom.
[64]§291.
[65]c.16, United Kingdom.
[66][1939] Ch.112.
[67]§111.

the local authorities' activities within the still limited body of public law, no doubt prompting central government to clarify local government powers in this area through future legislation, such as the 1947 Act, rather than actions by the Attorney General.

In the 1947 Act, the chief changes to the planning system contained in the legislation were to establish the need for planning permission to develop land, and that land ownership no longer conferred an automatic right to develop. Although the 1947 Act was repealed by the 1971 Act,[68] those two principles persisted, and indeed persist to this day in the 1990 Act.[69] As discussed above, the principles represented a fundamental shift in how land ownership and development operate and affected every landowner and planning authority in the jurisdiction. Given the intense period of institutional flux engendered by the 1947 Act, it is unsurprising that it was so thoroughly litigated. The form and procedure these contemporaneously novel methods of control follow, although laid down in statute, had to be tested in their infancy by the courts in order to establish new path dependent modes of planning practice.

A good example of planning practitioners seeking to establish the limits of the new governmental powers via case law is that of *Cambridge City Council v Minister of Housing*.[70] In this case, the planning committee had submitted a draft development plan to the County Council recommending that it be 'approved and submitted' to the Minister. In the County Council's resolution, the words 'approved and' were omitted so as not to bind individual members from expressing their opinions at the public inquiry. The plan was sent to the Minister, and, after an inquiry, was approved with modifications. The Council applied to quash the plan on the ground that it was not approved by the planning authority. The High Court, in dismissing the application, held that it was not necessary for each member of the committee to agree with every part of the plan as approved by the Minister, all that s.5(1) of the 1947 Act required was that the authority submit a plan for approval by the Minister, which they had done. Although this finding appears at surface level to be a simple piece of legislative interpretation, it should be recognized that it was possible for the court to make the opposite finding, to interpret s.5(1) as meaning that plans should be approved by the Council before they are submitted to the Minister. This case therefore represents another example of actor agency being heightened during periods of institutional flux, as well as the importance of contingency to a historical institutionalist understanding of critical junctures.[71]

Turning last to the 1968 Act, there were five Town and Country Planning Acts ('TCPAs') between the 1947 Act and the 1968 Act. In total there are 14 cases associated with these five pieces of legislation. From this it can be surmised that the provisions of these Acts were not nearly as legally or practically contentious as the TCPAs which immediately precede and follow. That is not to say that the intervening two decades was devoid of planning litigation. The 1968 Act introduced substantial protections for listed buildings, as well as structure plans, action areas and greater public participation in planning.[72] However, of the 39 cases associated with the Act, twelve relate in some way to enforcement, twelve to planning permission, thirteen to compulsory purchase, and the remaining two to miscellaneous topics. The 1968 Act did introduce tweaks to the way the three main areas were handled in the 1947 Act and subsequent planning Acts. Nevertheless, it is notable that the areas of enforcement, planning permission and compulsory purchase remained the most

[68]c.78, United Kingdom.
[69]c.8, United Kingdom.
[70][1955] 1 WLUK 61.
[71]Mahoney, "Path Dependence".
[72]Grant, *Urban Planning Law*.

popular topic for litigation, irrespective of the other changes to the planning system introduced by an Act.

There is also a historical explanation for the proliferation of case law around the 1968 Act. The law in the 1960s and 1970s was characterized by a widening of access to the courts through more readily available legal aid, as well as an expansion of public law principles by judges in whom legal aid litigants found a sympathetic ear.[73] This new environment of greater legal recourse, when applied to the far-reaching system of land use regulation established by the 1947 Act, may explain the rise in litigation during this period rather than the content of the 1968 Act itself.

The case of *Lever (Finance) Ltd v Westminster Corporation*[74] serves to illustrate case law's ongoing influence on the working practices of professional planners. The case involved a planning officer, whose usual practice was to indicate to recipients of planning permission whether, in their view, a minor variation to an approved building project was material or not. The question before the Court of Appeal was whether the local planning authority was bound by such an indication from one of its planning officers, and who ultimately could determine whether a variation was material or not. In giving his judgement, Lord Denning MR wrote:[75]

> So here it has been the practice of the planning authority and of many others, to allow their planning officers to tell applicants whether a variation is material or not. Are they now to be allowed to say that that practice was all wrong? I do not think so. It was a matter within the ostensible authority of the planning officer; and, being acted on, it is binding on the planning authority.

This case is distinguished from other, earlier authorities such as *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd*[76] that hold that a planning authority cannot be estopped (meaning that it cannot be prevented from contradicting its past actions or statements) when carrying out its public duties by one of its planning officers. It is also notable that current planning practice in a comparable situation, that of pre-application planning advice from planning officers is non-reliance advice. The *Lever (Finance)* case therefore clarifies the extent and meaning of delegation of planning powers to officers by the planning authority, despite it being the latter to whom Parliament has entrusted the decision to.[77] The judgement had a bearing upon planning practice in the sense that it is a recognition by the courts of both the developer's need for certainty when it comes to planning permissions, as well as the technocratic nature of planning decisions.

The overarching conclusion that can be reached at this stage is that the most litigated Acts and the periods of most litigation demonstrate that the court's interpretive and advisory function represents an impact upon planning practice in and of itself. The courts here are not exercising planning judgement, however they are undertaking a subjective interpretive exercise and thereby guiding and shaping planning practise within the bounds set out in legislation. Each piece of planning legislation passed has the potential to constitute a critical juncture. During such periods, those planning actors affected by the Act (and with the resources to do so) turn to an external institution, that of case law, in an effort to curtail, or at least more clearly define the boundaries of administrative power and thereby fix planning practice on a new path dependent process. In doing so, such actors demonstrate the central thesis of this paper, that case law plays a defining role in shaping planning practice across the twentieth century. Conversely, when called upon to deal with such

[73]Griffith, *The Politics of the Judiciary*, 104.
[74][1970] 3 All ER 496.
[75]Ibid., 230.
[76][1962] 1 Q.B. 416
[77]*Lever (Finance)*, 229.

actions, particularly in the years before a corpus of planning law built up, the Court appears to transpose its approach from more well-established areas of law, such as housing or local government law, to aid in its interpretive function.

Historical context and periodization

As well as an analysis of the number of cases associated with each Act, and how those cases may have impacted planning practice, it is important to situate the number of planning cases year on year across the study historically, and to analyse what that means about case law's influence on the evolution of planning practice. This is important both to provide context and to dismiss alternative explanations of phenomena, as well as to HI's core contention that 'history matters'[78] in the sense that the timing and sequencing of events is crucial to understanding power dynamics, rules and norms.

A comparison can be made between the number of planning cases across the period studied and the number of relevant Acts passed over the same period. The former is representative of the court's function of explaining and interpreting legislative intent, whereas the latter is an indication of the importance placed on planning as a societal endeavour by successive Parliaments. To make this comparison, we can return to the case law quantum line in Figure 1. It is interesting to note the extent to which the years in which the judgments of the cases were published match up with the years significant legislation was enacted. There is a perceptible delay between the passing of an Act and the year in which questions related to that Act first come before the court. For example, none of the 7 cases that were heard in 1947 relate to the 1947 Act. Two of each are related to the 1944 Act,[79] the 1943 Act,[80] and the 1932 Act. One is related to the Housing Act 1936.[81] This demonstrates that there tends to be a gap of at least three years before a case related to a given Act is heard by the court. This delay is related to two factors. First, the length of time it takes for the changes to the planning system brought about by new legislation to be felt by those operating within it or put another way, the persistence of path dependent processes. Second, the delay is an indication of the complexity of planning cases and the length of time it takes from the start of legal action to judgement being handed down in the case. Taking these two factors together, it is unsurprising that there is a delay between the passing of an Act and the publication of judgements associated with that Act.

The analysis of the comparison between the number of cases associated with each Act, the number of judgments published and Acts passed could stop at the conclusion that the former is representative of the significance of the changes to the planning system brought about by various Acts whereas the latter represents the same point, only with a delay due to procedural complexity and the perceptibility of the changes. However, there are other factors to consider. First, a comparison of the quantum of planning applications and planning appeals from 1962 to 1979 (the dates between which such data is available) with the number of planning cases in the timeline reveals insights into the influence of case law on planning practice. Second, the data must be historically situated and subject to periodization to show changes in subject matter over time, as well as to account for the fact that certain pieces of case law were more impactful than others. Both

[78]Hall and Taylor, "Political Science," 937.
[79]c.47, United Kingdom.
[80]c. 29, United Kingdom.
[81]c.51, United Kingdom.

comparisons reveal different contributions made by case law to the emergence of a planning sensibility that is evident by the end of the study.

Table 1 shows the total number of planning applications submitted and decided, as well as planning appeals data and planning case law judgments issued between 1962 and 1979 across the jurisdiction of England & Wales. The combination of this data sheds light on the number of planning applications that were litigated, as a planning application is normally the subject of a planning appeal before it is subject to a legal challenge. It also gives a more general indication of the amount of planning activity taking place over a portion of the period of the study. Comparatively, the peaks of planning litigation appear to be between 1963 and 1971. Although the planning decisions data presented here only starts at 1962, the years 1972 and 1973 appear to be periods of particularly intense planning activity. For example, in 1972 there were 614,862 planning decisions and nine planning cases. More generally, there appears to be a spike in planning activity, both in terms of applications and litigation in the early 1970s. As shall be discussed this may be the result of exogenous critical junctures in the form of planning legislation creating a period of institutional flux during which litigation is used to set the institution of planning on new path dependent processes, in other words arising from within the planning system and the laws influence upon it, or it may the result of a different type of exogenous change, in the form of external, socio-economic factors.

Data on planning appeals is of relevance to case law's impact on planning practice in establishing whether there is a direct link between the number of planning appeal decisions and the number of legal challenges in the courts. Data on planning appeals from the Department of the Environment was available between 1963 and 1979, shown in Table 1. Again, there is an apex of planning appeals decided in the 1970s, albeit somewhat later in 1973–1976, which would account for the time it took for the appeals to be heard and decided following a decision by the local authority. However, this period appears to have been something of a lull in planning litigation, with only 4 legal cases

Table 1. Planning applications, appeals, and litigation: 1962–1978/79 England and Wales.

	Applications submitted	Permissions granted		Appeals received	Appeals withdrawn	Net appeals received	Appeals decided	Appeals outstanding	Planning judgements issued
		Number	%						
1962	397,301	333,495	84	–	–	–	–	–	6
1963	411,563	345,651	84	12,207	3,732	8,475	8,581	6,797	18
1964	461,715	378,695	82	14,345	4,429	9,916	8,726	7,987	12
1965	443,387	364,935	82	14,071	4,357	9,714	8,697	9,004	3
1966	415,052	345,799	83	11,725	4,485	7,240	9,035	7,209	6
1967	422,553	358,338	85	10,735	2,904	7,831	8,495	6,545	4
1968	426,286	359,449	84	10,250	2,976	7,274	7,081	6,738	5
1969	402,714	342,889	85	8,739	2,987	5,752	6,557	5,933	4
1970	414,301	351,624	85	8,865	2,692	6,173	5,786	6,320	9
1971	463,301	385,989	83	10,351	2,962	7,389	5,828	7,881	12
1972	614,862	493,097	80	15,099	3,277	11,822	6,216	13,487	9
1973	622,652	491,174	79	19,213	3,714	15,499	11,409	17,476	4
1974/75	414,900	330,800	80	12,470	4,882	7,588	13,159	12,790	5
1975/76	454,206	379,821	84	12,420	4,076	8,344	11,739	9,395	4
1976/77	446,142	378,447	85	12,495	3,203	9,292	9,238	9,449	3
1977/78	441,612	378,998	86	11,490	3,168	8,322	8,970	8,801	5
1978/79	500,901	432,570	86	12,845	2,720	10,125	9,570	9,305	6

Source: Department of the Environment; Welsh Office; Westlaw.

decided in 1975, the high point for planning appeals. The number of cases does pick up again in subsequent years, thereby taking into account the time it takes for a planning appeal to come to court and be decided, however not to an extent that would be reflective of the high number of planning appeals heard in the mid-1970s. This phenomenon can be accounted for by reference to HI theory. If new planning legislation represents the critical juncture and the rationale behind planning is shaped by subsequent planning litigation, then the drop-off in planning litigation in years where there are more planning appeals is explicable. Litigation is used as a tool for change, and not necessarily as a corollary to a failed planning appeal.

The data on planning applications, appeals, and planning judgements can be historically situated in three ways. The first and simplest is by reference to planning Acts passed in a given year. This holds explanatory power for the data in Table 1. Spikes in planning litigation following the passing of legislation can be perceived. For example, there are 30 planning cases between 1963 and 1964, the years following the enactment of the Town and Country Planning Act 1962. Similarly, the other significant spike in litigation, when another 30 judgements were issued between 1970 and 1972, coincides with the enactment of the 1971 Act. It is notable that a link can be established between the years planning legislation is passed and the amount of planning applications, appeals and legal judgements arising in the years immediately following the legislation's enactment.

As can be expected, many of the cases relate to the interpretation of the new Act in question. However, they also relate to older legislation or previously well-established points of planning law, representing the fact that institutional flux brought about by a new piece of planning legislation allows for a revisitation of the ideological underpinnings of planning practice by the courts on behalf of litigants. An example of this phenomenon can be seen in the fact that although the 1947 Act has by far the most associated cases in this study (see Figure 1), only three of these cases pre-date the passing of the next key piece of planning legislation, the Town and Country Planning (Amendment) Act 1951.[82] The other associated cases tend to cluster around the date of the passing of the most recent key piece of legislation. For example, there are twenty-nine cases citing the 1947 Act in the two years immediately following the passing of the 1962 Act,[83] which itself only has one case that cites it in this study.

The data in Table 1 can also be periodised by reference to legal history. Both Griffith and Sedley[84] see the 1960s and 1970s as a growth period for judicial intervention into governmental activities including planning. Judicial reticence in the 1940s and 1950s to intervene in governmental decisions unless a high bar is crossed is illustrated in cases such as *Franklin v Minister of Town and Country Planning*,[85] in which the court declined to quash an order made by the Minister who had announced prior to consultation that his mind was already made up on the issue that was being consulted upon. This can be contrasted with planning cases from 1960s and 1970s that appear in this study such as *R. v Hillingdon LBC Ex p. Royco Homes Ltd*.[86] The *Royco* case involved a local authority that, in granting planning permission, had imposed conditions upon a developer that the houses to be built would be occupied by people on the authority's housing list who would have security for a period of ten years. The court held that the conditions denied the developer's rights of ownership and quashed the decision, thereby demonstrating, as Griffith points out, that

[82]c.246, United Kingdom.
[83]c.38, United Kingdom.
[84]Griffith, *The Politics of the Judiciary*; Sedley, *Lions Under the Throne*.
[85][1948] AC 87.
[86][1974] Q.B. 720.

> the courts inclined to the view that in a conflict between the common law property right of an individual and the statutory powers of a local authority to interfere with those rights, the benefit of any doubt in the statute was to given to the individual.[87]

As well as an explanation of the data in Table 1 based on legal history and on concurrent planning legislation, reference should also be made to the socio-economic context from which the data arises. In terms of planning practice, changes in housing development during the 1960s and 70s moving away from a small number of local authorities delivering large schemes to a large number of private house builders delivering smaller schemes[88] has some interpretative power. This is especially the case when linked to McAuslan's ideas on the traditional judicial protection of private property rights together with an emergent jurisprudence towards planning in the public interest and public participation in planning.[89]

The reason the data in Table 1 presents both a proliferation of case law and planning activity is that the planning practice in terms of applications and appeals results from private developers who, when aggrieved by a local, regional or central government decision, turn to the courts for recourse. The courts were more willing to quash governmental decisions than they had been in previous decades[90] whilst still retaining their long-held ideology of protecting private property rights from governmental interference.[91] This connection between case law and planning practice, via an increase in private development, influenced planning practice in that planners during this period became more cognisant of the 'Judge Over Your Shoulder' as the Cabinet Office's 1987 guide to good decision making was entitled.[92]

These three historical interpretations of the data presented in Table 1 provide insights into case law's impact upon the evolution of planning practice. First, there does appear to be a link between the amount of general planning activity (in terms of planning applications and planning appeals) and case law. In other words, the more development control planning that is taking place, the more planning litigation is likely to occur. This finding is indicative of the conclusion that case law forms another constituent part of the multitude of considerations that go into planning practitioners' understanding of their institution. However, there does not appear to be a direct link between the number of planning appeals decided and the quantum of case law, which indicates that litigation, both in the form of legal challenges and latterly judicial review, addresses more fundamental features of planning practice beyond an individual refusal of planning permission. This finding points to the fact that the 1960s and 1970s were a growth period for legal challenges requested by an actor who was neither the decision-making body (local authority, planning inspectorate, or Minister) nor the applicant to the original planning application. Finally, the link between the socio-economic change taking place during this period, namely a move away from large scale local authority housing development and towards developer led, smaller scale, housing projects can be linked to historic judicial attitudes towards the interaction between government and private landowners.

Conclusions and reflections

A number of points and reflections on the impacts of case law upon planning practice's evolution in the twentieth century emerged through this research. First, it was interesting from an HI

[87]Griffith, *The Politics of the Judiciary*, 104.
[88]Hall, "The Containment of Urban England," 400.
[89]Ideologies.
[90]Sedley, *Lions Under the Throne*.
[91]Ideologies.
[92]Great Britain, Cabinet Office, Management and Personnel Office.

perspective to note 'paths' of case law topics, sometimes arising from the provisions of a certain piece of legislation, such as compensation and war damage cases arising from the 1947 Act. There are six cases related to war damage (between 1947 and 1957). These are clustered in the decade following the Second World War which saw both extensive damage to property as well as much expropriation of private property from individuals and companies by central government. The explanation for this path of case law is therefore clear. Another interesting example of the temporal clustering of case law is the 21 cases that relate to caravan sites. These cross multiple pieces of legislation but are clustered in a relatively short period of institutional flux between 1959 and 1965. This path culminates with the case of *Hartnell v Minister of Housing and Local Government*,[93] suggesting that certain subjects continue to be litigated, and the critical juncture engendered by a new Act can potentially persist, until a final, authoritative, determination is given by the House of Lords (now the Supreme Court). Whilst some clusters of case law topics are explained by historical circumstance, others represent planning practice's attempts to grapple with a new or challenging aspect of planning, arising from an Act's failure to address the root causes of that issue, and keeping practitioners fixed on a path whose undesirability is demonstrated in the amount of litigation generated. This path persists until the court, often transposing expertise or insights from other fields of law, gives an authoritative determination as to how the issue is to be approached by planning practitioners.

Such determinations represent a doorway between case law, planning practice and other fields, through which the institution of case law transposes its own methods and thinking into the practice of planning. There are 44 cases relating to compulsory purchase and 57 cases relating to enforcement, both clustered around the 1947 Act and forming the most litigated topic. Both enforcement and compulsory purchase are direct forms of governmental intervention over development rights and therefore appear to be areas where parties subject to these actions are more likely to litigate. Consequently, it is unsurprising that, when provisions were substantially introduced by the 1947 Act, these forms of development control were heavily tested in the courts as the government, judges, and litigants sought to establish the extent and nature of these new powers. This assertion is supported by Baroness Evelyn Sharp, the permanent under-secretary to the Ministry of Housing and Local Government (as it then was), who pointed out that 'these provisions gave rise to more High Court litigation than the whole of the rest of the 1947 Act'.[94]

The persistence of certain topics litigation represents the institution of case law's increasing confidence in certain areas of planning practice as opposed to others. The level of familiarity with an area of planning leads to impacts upon the institution of planning practice. Examples include cases such as *Brookes v Flintshire CC*,[95] which demonstrate that enforcement is an area of planning practice in which judges have historically felt able to involve themselves. The case concerned provisions of the 1947 Act, which states that if the justices are 'satisfied that the requirements of the [enforcement] notice exceed what is necessary for restoring land'[96] they vary the notice accordingly. The court held that an enforcement notice limiting the use of a field for the siting of caravans was indeed excessive to the notice's aim of restoring the field to agricultural and camping use and sent it back to the justices to be amended accordingly.

[93][1965] A.C. 1134.
[94]Sharp, *The Ministry of Housing and Local Government*, 150.
[95][1956] 4 WLUK 56.
[96]s.23(4)(b).

The reason for this willingness to intervene as compared to other areas of planning practice such as local plan preparation may be that enforcement represents an infringement by the state of the private property rights of individuals which relates the ideologies of judges that McAuslan and Griffith[97] argue are implicitly on show in many historic planning cases. In a similar vein, enforcement cases can involve punitive resolution, such as a fine or imprisonment. As the local authority must apply to the court to impose such sanctions in enforcement cases, judges may have felt more able to involve themselves in the facts and, effectively, in the planning judgement of the case than in other areas. In this manner, enforcement represents an example of the institution of case law transposed to the formation of a certain perspective of planning sensibility. The courts inevitably decided early planning cases according to the legal principles they felt comfortable and competent in applying. The content of these principles then influenced how early planning practitioners acted and made decisions in areas such as enforcement.

It is clear from the data that although planning may have been influenced by early twentieth century case law, the higher courts only start to see significant numbers of planning cases come before them from around 1947/48, following the passing of the 1947 Act. There are of course cases and legislation prior to this date, but nevertheless a clear uplift in case law following the passing of the 1947 Act is perceptible. In this sense, the 1947 Act constitutes a critical juncture as regards the increased influence of case law upon planning practice. As well as the fact that more landowners than ever before were affected by the 1947 Act, this uplift can be seen as a reaction of private persons (both legal and natural) to the societal changes the Act wrought, via the organs of the state, in this case the judiciary.

In summary, it is important to remember that at the beginnings of the formation of the statutory planning system in 1909, the legal administrative system was already long established. Collating and analysing the data has enabled the identification of some of the impacts of case law upon the emergence of planning practice. These impacts are those that relate to the courts' role in adjudicating the relationship between the parties involved in development control planning practice, namely the Minister, local authorities, companies, individuals, and community groups. This adjudication often takes the form of the court interpreting the meaning of legislation (laid before Parliament by the Ministry to pass) in ways that impact the approaches and interests of these parties in different ways. The judiciary's awareness and intentionality towards these impacts is a moot point for the purposes of this paper. The fact remains that when the study begins in the early twentieth century, a venerable institution, replete with principles, conventions, and with an identifiable sensibility, was undertaking supervision of a nascent institution, poorly understood by both the actors regulating it and, in some cases, the institutional actors themselves.[98] It is therefore inevitable that during periods of institutional flux both early practitioners and the courts would shape the institution of planning practice by transposing well-established principles of case law across to the less well understood principles of planning practice. The former in their approach to early planning practice, and the latter in the way they decide early planning cases.

Disclosure statement

No potential conflict of interest was reported by the author(s).

[97]Ideologies; Griffith, *The Politics of the Judiciary*.
[98]Booth, *Planning by Consent*; Booth, "The Control of Discretion".

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