CONTROLLING COMPULSORY ACQUISITION AND THE ROLE OF PARLIAMENT

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The reallocation of property rights in land is a peculiarly invasive and sensitive decision, fraught with political and societal significance. Compulsorily acquiring land from one party to give it to another is a loaded choice that signals much about the ranking of the parties, uses of land and aspirations involved in the decision. It is not a choice that should be made without serious prospective consideration of the relative pitfalls and benefits; the process should be subject to meaningful administrative law controls.

It is argued in this paper that the justifications for compulsory acquisition schemes in England have traditionally been overlooked due to constitutional and procedural constraints. Controls on the use of compulsory acquisition powers have tended in modern times to be not only reactive but also weak and ill-equipped to balance the competing interests of different parties. It is argued here that it would be preferable, particularly for large-scale infrastructural and regenerative projects, for Parliament to take a more proactive role once again in controlling compulsory acquisition.

1. Methods of Administrative Control

Compulsory acquisition falls between two stools in England; it involves land so should be of interest to property lawyers, and it involves the exercise of governmental power so should be of interest to administrative lawyers. In fact, neither of these groups is particularly interested in compulsory acquisition; instead it has been left primarily to planning lawyers and viewed as a matter of procedure. This is a pity. Compulsory acquisition is a valuable bellwether telling us much about prevailing views on how best to achieve good government and the rights and responsibilities of land ownership. The protection of property rights raises significant issues of good administration and challenges us to consider how individuals and communities interact with the state. It also raises significant questions about how best to control the use of compulsory acquisition powers.

One way in which compulsory acquisition may be controlled is to rely upon constitutional property protection clauses. These aim to secure property rights from unjustified or inappropriate state interference. This is one level of control and it is not always an effective one. Constitutional texts are by their very nature

ill suited to precise definitions. Additionally, property clauses are often contentious since their protection of existing property rights has an 'anti-redistributive effect' and simultaneously places them on a constitutional pedestal which 'shrinks the scope of democratic deliberation'.[1]

Valid compulsory acquisition powers are the other side of the property protection coin; they effectively carve-out situations and procedures by which the state may interfere legally with property rights. In an ideal world, administrative bodies exercising compulsory acquisition powers would act efficiently, fairly, effectively and transparently; they would respect individual rights whilst also serving the public good and in accordance with the rule of law.[2] Reality may sometimes fall short of this idea. The question which then arises is how best to exercise control over the use of compulsory acquisition powers. Parliament itself may be beyond legal control (other than EU law) due to the constitutional theory of Parliamentary sovereignty, but all other governmental actors are subject to legal limitations. English administrative lawyers might argue that there are two different approaches to controlling inadequate governmental behaviour.

One has been described as the 'red light' view, the other the 'green light' view. Of course, in reality most administrative systems combine both views relying on a mixture of external court-based control and internal regulation – a sort of 'amber light' view. However, the extremes of the red light and green light views are useful in forcing us to consider the merits and demerits of methods of controlling compulsory acquisition.

1.1. Red light view

This approach to administrative law holds that its primary function is to keep the powers of government 'within their legal bounds and to protect the citizen against their abuse' such that the 'powerful engines of authority must be prevented from running amok.'[3] Dicey conceived of a 'balanced' constitution where the executive might be capable of arbitrarily encroaching on individuals' rights, but the executive would be subject both to political control by Parliament and legal control through the common law by the courts.[4] Allied with administrative law's power to check administrative abuse, there is a duty to compel government authorities to perform neglected duties. In the red light view of administrative law, both Parliament and the courts are responsible for

[1] GS Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, Chicago, 2006), 30-34
[2] T Bingham, 'The rule of law' (2007) 66 CLJ 67.
[3] Wade and Forsyth, Administrative Law (Oxford, 2009), 4-5.
[4] M Vile, *Constitutionalism and Separation of Powers* (Clarendon Press, 1967), 230-233.

securing good administration; administrative law is viewed as an *external* control on government.[5]

1.2. Green light view

The green light view does not advocate arbitrary state action but instead relies more on political processes to control administrative action, rather than a judicial brake. Here, administrative law is viewed not as an external policing role, but rather as a means of 'facilitating legitimate government action.' [6] Governmental powers are controlled internally and prospectively, rather than relying upon reactive judicial review procedures. In the green light view, courts have been viewed as obstacles to progress exercising control in an unrepresentative and undemocratic manner. Griffith emphasised that if the green light view of administrative law required access to information, open government, a free and powerful press and decentralised local government as well as a strengthened Parliament.[7] The green light view does not view law as a controlling brake on government but rather asks how law can enhance the effective performance of administrative powers.

2. Traditional Approaches to Controlling Compulsory Acquisition

Questions about the best manner in which to control the use of compulsory acquisition powers in England are nothing new. Historically, England has not had an overt constitutional property protection clause. It was only with the incorporation of Article 1 of the First Protocol to the European Convention on Human Rights ('A1-P1') via the Human Rights Act 1998 that we came to possess such protection. Reliance on the control afforded by such a clause has therefore been non-existent until relatively recently. This helps to explain why there has been a traditional focus in England on *how* land may be compulsorily acquired, rather than whether it *should* be acquired in the first place.

Parliament has been acknowledged as sovereign for centuries and its pronouncements viewed (until recently) as legally unchallengeable. As Dicey observed, 'Parliament… habitually interferes, for the public advantage, with private rights' to such an extent that interferences with property rights were 'so much a matter of course as hardly to excite remark, and few persons reflect what a sign this interference is of the supremacy of Parliament.'[8] Historically, it could be said that the 'question is never asked in England whether or not the property

[5] M Elliott, *Beatson, Matthews, and Elliott's Administrative Law* (Oxford, 2011), 3.
[6] Harlow and Rawlings (London, 1997), 67-74.
[7] J Griffith, 'The Political Constitution' (1979) 42 MLR 1.
[8] AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1961), 1.

taken is for a public use, or if compensation is provided.'[9] This view is clearly exaggerated given that courts have proved resistant to arguments that Parliament did not intend to provide compensation without being provided with explicit proof, but it does contain more than a grain of truth.[10]

There is little doubt that the effect of Parliamentary sovereignty has been to focus legislative and judicial attention on the practicalities of acquisition rather than on justifying the interference in the first place. There are surprisingly few pre-Human Rights Act 1998 ('HRA 1998') era references to the idea that wider societal needs should be a factor in deciding whether or not compulsory acquisition should take place.[11] Lord Denning famously opined in the *Prest* case that Parliament should only grant a power of compulsory acquisition when this was 'necessary in the public interest' and that where the 'scales are evenly balanced' the 'decision… should come down against compulsory acquisition.' He added that in his opinion it was 'a principle of our constitutional law' that a citizen should not be deprived of his land 'against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands.'[12] The incorporation of the European Convention on Human Rights into English law via the HRA 1998 has changed the landscape somewhat. There is now a greater emphasis upon explicitly balancing the individual's rights against the interests of the wider community. However, it will be argued here that historic constitutional constraints continue to limit the availability and depth of scrutiny available.

2.1. Prerogative Powers

As Dicey noted, the English approach to the compulsory acquisition of property has long been focused on practice rather than theory. Despite the absence of an express constitutional property clause, there are many examples of the *exercise* of compulsory acquisition powers being controlled by both the courts and Parliament. This pragmatic emphasis can best be explained by delineating the historic methods of compulsory acquisition.

The starting point is the traditional prerogative power of the monarch to seize property – perhaps based on the idea that the Crown retained residual feudal property rights. However, even in its earliest incarnation this prerogative power

[9] McNulty, 'The Power of "Compulsory Purchase" under the Law of England', 643.
[10] *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 (PC), 359, (Lord Warrington): 'a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.'
[11] E.g. *Tomkins v Commissioner for the New Towns* (1989) P & CR 57 (CA) (Bingham LJ): '[w]hen land is compulsorily purchased the coercive power of the state is used to deprive a citizen of his property against his will… [this] is justified by the public intention to develop the land in the wider interests of the community of which the citizen is part.'
[12] [1983] 17 EGLR (CA), 18.

was exercised sparingly and with caution. Taking land from subjects has a habit of alienating those involved and in sowing discord and doubt among bystanders. Indications that proprietary rights should be safeguarded from the whims of royal fiat may be inferred from clauses in Magna Carta in 1215 stating that no freeman should be disseised of his freeholds, liberties or free customs … except by the law of the land (chapter 29), and that items requisitioned by the King's household should be paid for (chapters 19 and 21). Similarly, later monarchs would have been aware that one of the reasons given in 1399 for the deposition of Richard II was that no man's property was safe whilst he was king.[13] In this fraught climate the Crown slowly relinquished its prerogative power to seize property and relied instead on statutory powers. Today it can be accurately said that "compulsory expropriation of land is a creature of statute. There is no common law right or extant crown prerogative that allows such a thing."[14]

There was a vestigial prerogative right to enter private property in order to erect defences against a public enemy or the sea.[15] However, even this power has been limited by the common law. In the *De Keyser's* case the House of Lords held that where statutory and prerogative powers overlapped, the statute should take precedence.[16] Likewise in the *Burmah Oil* case,[17] which involved the destruction of Burmah Oil's installations during the Second World War in the face of the advancing Japanese army, the House of Lords held that there was a general rule that seizure or destruction of property within the realm under prerogative powers, even in a grave national emergency, could only take place on the basis that compensation was payable. Today the prerogative power to take property in time of war has been reduced to an almost meaningless sliver. As Parliament has grown in strength over the centuries, the battleground between the Crown and its subjects focused on limiting *when* and *how* the Crown might seize property rights in land, rather than justifying *whether* such powers should be exercised.

2.2. Early Use of Compulsory Acquisition Powers

With the fading use of the prerogative powers, property rights in land came to be acquired more generally under the auspices of statutory powers. Even Henry VIII, a monarch not noted for his respect of the property rights belonging to others, resorted to statutory mechanisms rather than prerogative powers when taking land for public work purposes. One such statute enacted by Parliament authorised the City of Gloucester to renew conduits conveying water to the city and to dig for springs nearby so that water could be brought into the city for the

[13] C Donahue, 'The Future of the Concept of Property Predicted from its Past', fn 94.
[14] *Waters v Welsh Development Agency* (Lord Scott) [84].
[15] *Case of the Isle of Ely* 10 Co Rep 141 (1572) and *AG v Tomline* 12 Ch D 214 (1879).
[16] [1920] AC 508 (HL).
[17] [1965] AC 75 (HL Sc).

'commonwelth utilitie and relief.'[18] The Statute is one of the earliest Acts of its kind and is 'noteworthy for its carefully drawn clauses providing for compensation in case of injury to private owners.'[19]

Robert Callis' *Reading upon the Statute of Sewers* in 1622 referred to a statute aimed at preventing the flooding of lands by the sea or by running streams, and provided specifically for the repair of sea-walls and the removal of obstructions to water courses.[20] In his reading, Callis cites two instances where a new drain was built by commissioners over private land without an inquest or jury. The first took place in 1601, and the second in 1615. In discussing the fact that 'by the making and erecting of these new defenses the inheritances of private persons are thereby prejudiced whereon they be built' he states that 'things that concern the commonwealth are of greater account in the law than the interest of private persons.' Even so, he observed that such powers should be exercised carefully such that 'where any man's particular interest and inheritance is prejudiced for the commonwealth's cause, that that part of the country be ordered to recompense the same which have good thereby.'[21] As the monarch gradually became a figurehead rather than an active political player, so Parliament assumed more and more of the Crown's roles.

2.3. Lands Clauses Consolidation Acts

Most historic instances of compulsory acquisition took place under statutory authority. These statutes were necessarily aimed at discrete projects centred on specific locales, such as building a toll-road, canal, port, reservoir or railway. The statutes used were so called 'private' Bills rather than general or public Bills which affect the whole population of the country. These Bills normally contained powers of compulsory acquisition and outlined the procedure and compensation elements. However, with growing industrialisation and the rapid rise of toll-roads, canals and later railways Parliament became overwhelmed by the volume of proposed private Bill legislation.[22]

Therefore, it was only as a result of the explosion in private Bills that Parliament enacted a series of overarching statutes governing compulsory acquisition of

[18] 33 Hen VIII c 35. WD McNulty, 'The Power of 'Compulsory Purchase' under the Law of England' 21 Yale L J 639 (1912), 643.
[19] FA Mann, 'Outlines of a History of Expropriation' (1959) 75 LQR 189, 194.
[20] 23 Hen VIII c 5.
[21] JL Sackman and others, *Nichols' the Law of Eminent Domain* (Rev. 3rd ed, M Bender, New York 1964-present) §1-76, §1.21[4].
[22] See EJL Waring, 'The Prevalence of Private Takings' in *Modern Studies in Property Law, volume 6.* N Hopkins (ed), Hart Publishing, 2013.

land in England.[23] The Land Clauses Consolidation Act 1845 did not authorise compulsory acquisition, but was instead a collection of standard 'boilerplate' clauses on procedure and compensation. The power to acquire land compulsorily was derived from the private Act authorising the specific project ('the special Act'). The Consolidation Acts of the 1840s were generally aimed at: improving the language usually used in private Bills; shortening legislation to allow for speedier consideration by Parliament and making it easier to identify a Bill's main purpose;[24] ensuring a greater degree of uniformity between clauses from analogous Bills thus allowing for greater ease of comprehension, and that judicial decisions against an undertaking could be applied against similar undertakings; ensuring that all the clauses which were meant to be in a Bill were in it; and enabling landowners who might be affected by a proposed Bill to know what their rights would be without having to wait to see the exact terms of the Bill.[25] After 1845 any Act authorising compulsory acquisition was deemed (unless otherwise stated) to include the provisions of the Land Clauses Consolidation Act 1845.

In the 19th century land typically would be acquired for building a railway or reservoir. The acquisition power would be contained in a private Act, usually promoted by a limited company with compensation usually assessed by a jury. Dispossessed owners were treated sympathetically, perhaps because the schemes were promoted for profit rather than for an ostensible public good.[26] With the growing importance of local government in the 19th and early 20th centuries in providing roads, housing and hospitals, it was no longer practicable to rely on *ad hoc* special Acts. Parliament therefore enacted general Acts which conferred compulsory acquisition powers on local authorities. Initially the authorisation of specific schemes was subject to Parliamentary approval under a 'provisional order' procedure but this was gradually replaced by the modern method of the Minister confirming a compulsory purchase order. The 1845 Act

[23] See the Land Clauses Consolidation Act 1845, Railways Clauses Consolidation Act 1845, Waterworks Clauses Act 1847, and Cemetaries Clauses Act 1847.

[24] See the comments by Lord Selborne LC in *Directors Metropolitan District Railway Company v Sharpe* [1880] 5 AC 425 (HL), 430: 'it is of the greatest importance … to remember the principles of the scheme of legislation contained in [the Consolidation Acts]. They were passed … so that, when any particular undertaking afterwards came to be authorized, the special Act might be introduced in a short form … containing only such clauses as were suggested by the circumstances of the particular case.'

[25] FA Sharman, 'The History of the Lands Clauses Consolidation Act 1845 - I' [1986] Statute L Rev 13, 17-18. See also FA Sharman, 'The History of the Lands Clauses Consolidation Act 1845 - II' [1986] Statute L Rev 78, 83.

[26] Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (Lord Scott QC, Chairman), Cd 9229 (1918) (the *Scott Report*), [8].

continued to govern the implementation of the order and assessment of compensation until the early 20th century.[27]

3. Modern Methods of Compulsory Acquisition

Today, compulsory acquisition normally occurs under two different procedures. They are a default backstop power and may only be used where there is no prospect of obtaining the land by agreement. First, there may be a public general Act – authorising the use of compulsory purchase powers to take land for a particular purpose.[28] After this a Compulsory Purchase Order ('CPO') will be made which specifies the land required and which can be confirmed only by the relevant government minister. The making and confirmation of the CPO will normally be governed by the terms of the Acquisition of Land Act 1981. The CPO must be in the prescribed form and include a description of the land by reference to a map and a statement of reasons setting out the policy and reasoning supporting the use of compulsory purchase powers.[29]

A Notice detailing the making of the CPO has to be published in local newspapers for two weeks and served on owners and occupiers affected by the proposed plan. Those people ('statutory objectors') who have been served with a notice, or are entitled to be served with a notice, have the right to object to the CPO or make representations within the time specified by the notice.[30] Objections may be disregarded if they relate solely to the amount of compensation due. If objections are made and are not resolved, the relevant Secretary of State will order a public inquiry with an independent inspector appointed by the Planning Inspectorate. The acquiring authority has to prepare a statement of case setting out the reasons for confirming the CPO and addressing the concerns of objectors. The authority is also expected to negotiate with objectors before the inquiry date to resolve their concerns if possible.

After the public inquiry, the inspector reports to the Secretary of State setting out the arguments and makes a recommendation to: (a) confirm the CPO; or (b) to confirm the CPO in part; or (c) to reject it. If the CPO is confirmed then the acquiring authority must serve notice again on all parties affected by the CPO. There is then a six-week period during which the confirmation of the CPO may

[27] See for example the compensation terms in the Acquisition of Land Act 1919, later replaced by the Land Compensation Act 1961.
[28] Examples include the Town and Country Planning Act 1990, s. 226 (as amended by section 99 of the Planning and Compulsory Purchase Act 2004); Regional Development Agencies Act 1998, s. 20; and the Leasehold Reform, Housing and Urban Development Act 1993, s. 162(1).
[29] The standard prescribed form is set out in Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004, SI 2004/2595 and the guidance contained in CLG Circular 06/2004, appendix U.
[30] Acquisition of Land Act 1981 ss. 11, 12.

be legally challenged in court on limited grounds. The acquiring authority can then use either a general vesting declaration or the notice to treat procedure to take possession of the land. The exact method used will depend on the type of interests to be acquired, the timetable and any requirements for immediate ownership of the land. Compensation will also be paid and may include payment for the market value of the property interest, compensation for a reduction in value of any retained land, reimbursement of moving costs, various statutory loss payments and other losses including reasonable professional fees relating to the negotiation and settlement of compensation.[31]

The second main method of compulsory purchase involves the use of powers included in the Transport and Works Act 1992. Under this process, the Secretary of State for Transport can make a works order, and any entity that has the power to promote a Bill in Parliament such as an individual, company or statutory body may also request that such an order should be made. A hearing or public inquiry will then be held in order to determine the merits of the request.

4. Current Problems with Controlling Compulsory Acquisition

The problem with today's most commonly used compulsory acquisition statutes is that traditional methods of control are ineffective, particularly if a red light view of administrative law is taken. Under this approach, inappropriate or ineffective compulsory acquisition by government should be amenable to challenge either in Parliament or the courts. However, as noted below, modern statutes appear to allow for the effective insulation of administrative action from meaningful control both at the Parliamentary and judicial level.

4.1. Parliamentary Control and Discretionary Powers

Ostensibly, under the red light view of administrative law, Parliament can exercise control over government action in a number of ways, some of which are prospective and some of which are reactive. Prospectively, Parliament engages in the full and reasoned consideration of proposed legislation. When enacted, such legislation is validated as being the result of a democratic system and is therefore entitled to judicial deference. Generally the system works well and proposed legislation is sensibly argued and debated. However, there are significant caveats to bear in mind. First, the business of Parliament may rely to a greater or lesser extent on political horse-trading, particularly in coalition governments. The Whip system which influences party political voting may also have an impact on which legislation is passed or modified and which falls by the

[31] Compensation provisions are beyond the scope of this paper. See the Land Compensation Act 1961, Land Compensation Act 1973 and the Compulsory Purchase Act 1965 with allied case law which form the 'Compensation Code'.

way. Finally, the time left in any given session may also affect the scrutiny with which legislation is subjected. None of these practical issues is insurmountable; there are sufficient checks and balances within the system given the need for second and third readings of legislation by both Houses of Parliament.

However, modern compulsory acquisition statutes, particularly those authorising redevelopment, do have a significant flaw. They are extremely broadly worded and discretionary in their terms leaving wide areas of competence to the relevant authority. It could be argued that this is the 'will' of Parliament and that therefore such discretion is constitutionally acceptable. The use of discretionary power allows for flexibility and sensitivity to varied circumstances. It is impossible, and probably undesirable, to attempt to craft legal rules to deal with all eventualities. However, discretion should not be exercised in an unfettered way since this may lead to unpredictable and unfair results. Ministers are responsible to Parliament and can be asked questions if their actions are inappropriate and a local authority will be democratically accountable to those living in the area affected. However, broadly-framed statutes leave little or no room for argument that a Minister or authority has exceeded their jurisdiction or acted inappropriately. In enacting such statutes, Parliament has actually adopted a *laissez-faire* attitude divesting itself of its constitutional responsibility and oversight in this area. Oversight of discretion, as noted below, is rendered nugatory when the "four corners" of jurisdiction are spread so widely that almost nothing would be outwith them, or *ultra vires*.[32]

One such example may be seen in the terms of the Town and Country Planning Act 1990 ('TCPA 1990').[33] This statute authorises local authorities to acquire land compulsorily for development or planning purposes, subject to authorisation by a Minister. The grounds on which land may be acquired are surprisingly subjective and broad as set out below:

> ***S. 226 Compulsory acquisition of land for development and other planning purposes***
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> (1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area –
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> (a) *if the authority think* that the acquisition *will facilitate* the carrying out of development, re-development or improvement on or in relation to the land, or
>
> (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is

[32] *Associated Provincial Picture Houses v Wednesbury Corporation*
[33] As amended by s. 99 of the Planning and Compulsory Purchase Act 2004.

situated.

(1A) But a local *authority must not exercise the power* under paragraph (a) of subsection (1) *unless they think* that the development, re-development or improvement *is likely to contribute to* the achievement of any one or more of the following objects –

(a) the *promotion or improvement of the economic well-being of their area*;

(b) the *promotion or improvement of the social well-being of their area*;

(c) the *promotion or improvement of the environmental well-being of their area*.

…

(4) It is *immaterial by whom the local authority propose that any activity or purpose mentioned in subsection (1) or (3)(a) should be undertaken or achieved* (and in particular the *local authority need not propose to undertake an activity or to achieve that purpose themselves*). [Emphasis added]

As may be appreciated from the terms of s. 226 TCPA 1990, the local authority has a very wide subjectively-framed discretion. It is wholly for the authority to decide whether acquiring land compulsorily may help with one of their planning or development objectives. The level of certainty required before such acquisition is allowed is also set very low. The authority need only demonstrate that *they think* the development or improvement sought *is likely* to *contribute* to either the *promotion* or *improvement* of their area economically, socially or environmentally.

It is hard to think of a scheme or plan which might fall outside the terms of this incredibly broad subjective power.[34] Some refinement has occurred as a result of the Supreme Court decision in *R (Sainsbury's Supermarkets) v Wolverhampton City*[35] where it was held that there must be a real connection between the CPO land and any benefit considered by the acquiring authority. Local authorities were reminded that they should ignore any benefits that might accrue, such as a cross-subsidy development, unless these flowed directly from the CPO land itself. The jurisdictional boundaries in s. 226 are further expanded by the inclusion of s. 226(4), which explicitly authorises the involvement of private parties and developers. The involvement of private entities may well be the most effective and efficient means by which development can be carried out, but it also poses significant problems for effective Parliamentary control and judicial oversight.

[34] T Allen 'Controls over the Use and Abuse of Eminent Domain in England' in *Private Property, Community Development and Eminent Domain,* ed. RP Malloy (Ashgate, 2008), 86.
[35] [2010] UKSC 20, [2011] 1 AC 437.

4.2. Judicial Control and Discretionary Powers

In the seminal case of *Associated Provincial Picture Houses v Wednesbury Corporation* Lord Greene MR set out certain principles of administrative law (the *Wednesbury* principles).[36] These continue to act as the foundational principles of judicial review in England and Wales. They state that a Minister or local authority exercising a discretionary power must not refuse to take into account matters that she ought to take into account, and conversely must not take into account matters that ought not to be taken into account. Even where the Minister has confined herself to the relevant matters correctly, the decision must not be so unreasonable that no reasonable Minister or authority would have made it. Additionally, no Minister or authority should act outwith the "four corners" of their jurisdiction because this would be *ultra vires* and contrary to the will and supremacy of Parliament.

The level of subjective discretion accorded to decision-makers in compulsory acquisition statutes such as the TCPA 1990 leads to significant judicial deference. There may not only be legislative discretion in 'identifying and interpreting purposes' but also as to the 'policies standards, and procedures to be followed in achieving these purposes.'[37] The degree of deference, which higher courts will show towards reviewing an exercise of discretion for being *ultra vires*, appears to depend upon the legal character of the decision-maker and an implied assessment of the relative institutional competence of the reviewing court to query the decision made.[38] Discretionary decisions made by lower courts, or by those dealing with highly specialised areas of the law,[39] or policy and political issues are likely to be deferred to by reviewing courts.[40]

In addition to the problems raised by deferential standards of review, the courts are also faced with the difficulty of controlling private entities involved in compulsory acquisition schemes. Some parties may operate in a quasi-public capacity and therefore be amenable to control via judicial review as an administrative body. Any consideration of the legal accountability of privatised entities or contracted-out service providers in England under judicial review requires some appreciation of the difficulties raised by the perennial debate

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[36] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).
[37] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1986), 29-30, 281-282.
[38] See R Clayton 'Principles for Judicial Deference' [2006] JR 109; J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] PL 592; J Steyn, 'Deference: a tangled story' [2005] PL 346; and Dyson, 'Some Thoughts on Judicial Deference' [2006] JR 103.
[39] Such as the internal rules of a university, see for example *R v Hull University Visitor, ex parte Page* [1993] AC 682 (HL).
[40] E.g. *Notts CC v Secretary of State for the Environment* [1986] AC 240 (HL) and *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129 (CA).

about the public-private divide in this sphere.[41] Defining the scope of judicial review is difficult. Traditionally, the outer boundary of judicial review has been shaped by a somewhat amorphous concept of 'publicness'.[42] An alternative approach, not seemingly favoured by the courts, has been put forward by Woolf who argued that the courts should look rather to controlling monopoly power as the criterion for deciding whether de facto powers should be subject to judicial review.[43]

One of the most significant difficulties is that private bodies often have contractual agreements with public authorities where responsibility or discretion has in effect been delegated. The basis of such delegation is normally the desire for a private body to deliver the end-product or service rather than the public authority; an example might be the provision of redeveloped housing by a private entity, with the public authority acting merely as a conduit for obtaining the relevant CPO. Services are organised around a 'central separation between "purchasers" and "providers".[44] The approach taken by the courts does not appear to have kept pace with the challenges posed by contracted-out services with findings that public law obligations are unenforceable against service providers. This is on the basis that contracting-out provisions disentangle the service provider from the 'statutory embrace' of the public authority leaving their relationship to be governed solely by the terms of the contract between them.[45] This approach has been trenchantly criticised by commentators such as Craig who argues that contracting-out provisions should have the opposite effect since they 'explicitly and directly' confirm that private parties can carry out public functions, and thereby provide a greater degree of statutory underpinning.[46]

4.3. Control and A1-P1

The property protection offered by the incorporation of A1-P1 into domestic law has not proved to be a particularly strong form of alternative control. There has been substantial English resistance to the notion that the ECHR might affect domestic property law by providing extra entitlements, as can be seen in the protracted judicial stand-off in relation to Article 8 protection. Whilst the HRA

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[41] See D Oliver 'Common Values in Public and Private Law and the Public/Private Divide' [1997] PL 630.

[42] *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA) where the Panel of Take-overs and Mergers was susceptible to judicial review despite having been established under prerogative, rather than statutory, powers.

[43] Woolf, 'Public Law – Private Law: Why the Divide?' [1986] Public Law 220.

[44] M Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997).

[45] *R v Servite Houses, ex parte Goldsmith* (2001) 33 HLR 369.

[46] P Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 LQR 551.

1998 does not give English courts the right to strike down non-Convention compliant legislation, they are required to consider the terms of the Convention when considering statutes and should interpret legislation where possible in a convention-compliant fashion[47] or make a declaration of incompatibility.[48]

In addition, the courts have regard to government policy in this area as set out in the most recent government circular entitled *Compulsory Purchase and the Crichel Down Rules*.[49] The guidance provided 'indicates the factors to which a confirming Minister 'may have regard in deciding whether or not to confirm an order.'[50] Most importantly, the guidance states that regard should be had to the provisions of Article 1, such that a CPO 'should only be made where there is a compelling case in the public interest' such that the purposes for which the CPO is to be made 'sufficiently justify interfering with the human rights of those with an interest in the land affected.'[51] The domestic courts are however generally deferential to reasonable governmental decisions in this area, particularly given the complex social and economic matrix frequently involved in planning decisions.

Whilst government advice on compulsory acquisition procedures stresses that a 'balancing act' must be undertaken, this can appear to be a case of 'shutting the stable door after the horse has bolted'. By the time that A1-P1 issues relating to legislation are considered it is almost too late for them to have much impact. Compulsory acquisition only takes place when a negotiated settlement is impossible. The acquisition is likely to be authorised by a statute with broad, subjective discretionary terms. In these circumstances, the balance is already heavily weighted against applicants seeking to argue that the scheme is misconceived, unnecessary, or unviable. In the event that a decision to grant a CPO is subject to a judicial review claim, the applicant will struggle to persuade the court that it has the institutional competence to interfere with a *prima facie* reasonable planning decision. Questions of resource allocation are often viewed as unsuitable for judicial intervention and broad discretionary powers are difficult to review.

Modern compulsory acquisition statutes in England appear to cause problems for proponents of both the red and green light views of administrative law.

[47] Human Rights Act 1998, s. 3.
[48] ibid, s. 4.
[49] ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules* (2004) ('Crichel Down Circular').
[50] The policy set out in the Crichel Down Circular, and previous incarnations, have been referred to in several court cases. *Tesco Stores Ltd v Secretary of State for the Environment* (2000) 80 P & CR 427 (QBD), 429 (Sullivan J): 'I am satisfied that the … policy as set out in Circular 14 of 94 that a Compulsory Purchase Order should not be made unless there is a "compelling case in the public interest", fairly reflects … [the] necessary element of balance.'
[51] Crichel Down Circular, [16]-[17].

The breadth and subjective nature of statutes such as the TCPA 1990 leaves both red light controls (Parliament and the courts) with little leverage, and green light controls (internal administrative mechanisms) unable to act effectively. At the same time as criticising these powers for being insulated from meaningful control, they have also proved to be ineffective and incapable of delivering large-scale regeneration and infrastructure schemes.

5. Large-Scale Infrastructure Projects

The construction of the fifth airport terminal at Heathrow near London is a good example of the 'unacceptable' problems developers and government faced when relying on normal compulsory acquisition powers and methods.[52] BAA applied through normal planning procedures to build a new airport terminal at Heathrow Airport ('Terminal 5') in 1993. The process required BAA to lodge 37 different applications under seven different legislative schemes. The planning inquiry for the Terminal 5 project sat for 46 months after which the Chairman of the inquiry took 18 months to write his report.

The government took 11 months to consider the report before issuing a decision. In total, this meant that it took more than seven years from the date the application was made to the issuing of the final decision. During this time it was noted that Schiphol airport in the Netherlands and Charles de Gaulle airport in Paris both increased their capacity with runway expansion and terminal capacity improvements. The cost and length of the inquiry was an impediment to the full and proper engagement of interested parties. The costs of legal representation throughout the inquiry led to the London borough of Hillingdon having 'to pull out of the process, as its funds had been exhausted.'[53] The result of the Terminal 5 project having taken years, rather than months, to grind its way through the planning process led to the enactment of the Planning Act 2008. This was a legislative attempt to speed up the process required when considering proposals for large-scale infrastructure projects.[54]

5.1. The Planning Act 2008

To remedy the problems evident with Terminal 5, the Planning Act 2008 ('PA 2008') was enacted. The PA 2008 aimed to make the planning application process for nationally significant transport, energy, water and waste infrastructure projects in England and Wales faster and fairer. Following the

[52] M Barnes, *The Law of Compulsory Purchase and Compensation* (Hart, 2014), 23, fn 28.
[53] 'Planning for a Sustainable Future' White Paper (2007), CM 7120, [2.7].
[54] B Denyer-Green, *Compulsory Purchase and Compensation* (Routledge, 2014) 32-33.

Localism Act 2011, applications for Nationally Significant Infrastructure Projects ('NSIPs') are now submitted to the Planning Inspectorate. Decisions on NSIP applications for development consent orders ('DCOs') are made by the relevant Secretary of State, who may advise on the merits of an application or proposed application. A consent by the Secretary of State combines a combination of planning permission with other consents, such as listed building consents. The Secretary of State has the scope to apply, modify or exclude legislation in the DCO and the order may also confer statutory authority for development that provides an automatic defence against claims for statutory nuisance (although compensation may still be claimed by those whose land is affected).

Applications for development consent are decided in accordance with 12 National Policy Statements ('NPSs') relating to energy, transport, water, waste-water and waste. They cover developments in these areas ranging from renewable energy, nuclear power, ports, aviation, water supply, hazardous waste and so on. NPSs are formed following public consultation and parliamentary scrutiny before being designated. Local planning authorities also remain involved in the procedure since they have many roles including being expected to advise the promoter on the approach to community consultation, prepare the Local Impact Report, and advise on the merits of the proposal and how impacts may be managed or avoided.

The Planning Act 2008 as amended by the Localism Act 2011 has so far been viewed as a successful option. Its procedure allows for a meaningful consideration of the justifications behind schemes, and the existence of NPSs as a tool in bounding the exercise of discretion is to be welcomed. The process leading to the issuance of a NPS involves consultation and Parliamentary debate leading to greater democratic 'buy-in' and accountability. The procedure has led to a more efficient approach in approving nationally significant infrastructure projects since when a DCO is required by a project it obviates the need for other consents including planning permission, listed building consent, conservation area consent, scheduled monument consents and so on. These issues can all be considered together at the same time as the scheme as a whole.

5.2. The Hybrid Bill Procedure

Private Acts of Parliament were the main method of compulsory acquisition of land for centuries until the boom in such legislation during the Victorian railway mania period. Such Acts are sometimes used today, either as private Acts of Parliament or so-called 'hybrid Acts', and provide a valuable option both in

achieving large-scale infrastructure projects and in ensuring good administration. Private Acts are promoted by outsiders to Parliament, rather than by the government or Members of Parliament, and were used extensively until the mid 1990s to authorise ports and railways. More recently though, hybrid Acts have been used to authorise large-scale infrastructure projects. The process for enacting such legislation is time-consuming and complex as can be seen below.

A hybrid Bill resembles a cross between both a public Bill and a private Bill in that the hybrid Bill is of general application but significantly affects particular people or organisations.[55] Hybrid Bills can be introduced by the government or a backbench Member of Parliament;[56] they are used only rarely, notably with the Crossrail Bill in 2005 and the more recent High Speed Rail (London-West Midlands) Bill in late 2013.[57] It can be hard to determine whether or not a particular Bill should be introduced in Parliament through the public, private or hybrid Bill procedure but Clerks at the Public Bill Office determine which route is best based on previous practice and Parliamentary precedent. Normally the government department behind the Bill or Parliamentary Counsel (officials responsible for drafting legislation) will advise the government that the Bill is likely to be hybrid as well.

In the event that private interests are thought likely to be affected by the proposed Bill it will be considered in detail by the so-called Examiners of Petitions for Private Bills.[58] This group of Parliamentary staff, including the Clerk of Bills (House of Commons) and the Clerk of Private Bills (House of Lords) examines the proposed legislation. There are numerous requirements to follow including advertising the proposals, informing those affected, gaining consents and depositing documents; adherence to these requirements will be checked carefully before the Bill is allowed to proceed and be debated at Second Reading stage. The public have the opportunity to comment on any Environmental Statement ('ES'), which will have been deposited with the hybrid Bill at its first reading when it is formally presented to Parliament. The public are given a minimum of 56 days from the first reading to submit comments on the ES to the government and these have to then be published, assessed and summarised by an independent assessor. The assessor's report then has to be submitted to the

[55] Erskine May, *Parliamentary Practice* (24th ed, 2011), 652-658.
[56] Backbench MP attempts to introduce hybrid bills are unlikely to be successful.
[57] R Kelly, 'Hybrid Bills: House of Commons Background Paper', 11 December 2013, Standard Note, SN/PC/6736. There have been 11 hybrid Acts enacted since 1983-4 Parliamentary session: Museum of London, Channel Tunnel, Norfolk and Suffolk Broads, Chevening Estate, Dartford-Thurrock Crossing, Caldey Island, Agriculture and Forestry (Financial Provisions), Severn Bridges, Cardiff Bay Barrage, Channel Tunnel Rail Link, and Crossrail. The High Speed Rail (London-West Midlands) Bill is currently being heard.
[58] House of Commons, *Standing Orders of the House of Commons – Public Business 2012*, September 2012, HC 614 2012-13, Standing Order No 61.

House after consultation with the relevant Minister and a further 14 days has to elapse before the Second Reading of the Bill may take place.

Promoters of hybrid Bills are favoured over those of private Bills because there is no need for the promoter to prove the need for their Bill. However, they are still subject to debate at the Second Reading stage, as with a public Bill. Members of Parliament can debate the principle of the Bill and it will be committed to a select committee, which also considers petitions against the Bill. These petitions may be brought by any individuals, organisations or groups directly and specially affected by the Bill. Petitions have to set out various particulars including the Bill title, who the petitioner is, the provisions of the Bill objected to, the damage caused to the petitioner, and the form of relief sought including amendments to clauses.[59] The promoter of the Bill may challenge the standing of petitioners on the ground that the petitioner's personal property or interests are unaffected by the enactment of the Bill. In the event that no objections or petitions are deposited, the Bill will be recommitted to the whole House to be considered in the same way as a public Bill.

If there are objections then a select committee will meet to consider the Bill. The members of the select committee will reflect the party balance in the House and they cannot have a personal or constituency interest in the Bill. It is possible for hybrid Bills to be committed to joint committees whose members are drawn from both the House of Commons and the House of Lords. The members of the select committee are not therefore industry experts, professional assessors or legal experts but politicians. They sit in a quasi-judicial capacity, and whilst it does not look at the principle or policy behind the proposed legislation (because this has already been approved) it will focus on mitigation, compensation and adjustment. The select committee has the power to call witnesses, who will be examined under oath and has the power to amend the Bill to address particular effects raised by both petitioners and the promoters. Once the select committee reports on the Bill and made any amendments it will normally be re-committed to a committee of the whole House. At this point the Committee stage, Report stage and Third Reading take place as with all other public Bills. The Bill will then be sent to the House of Lords where it petitioners may again object and appear before a select committee. Once both Houses have approved a hybrid Bill, it receives Royal Assent and becomes law in just the same way as a public Bill.

[59] See http://www.parliament.uk/business/bills-and-legislation/current-bills/previous-bills/hybrid-bills/ for template forms.

5.3. Advantages of the Hybrid Bill Procedure

Having considered the complex process outlined above it might be asked why on earth this procedure would be used. It might be argued that normal planning and compulsory acquisition rules must be dysfunctional for the hybrid Bill procedure to seem worthwhile. Despite the potential for procedural pitfalls, hybrid legislation offers significant governmental advantages. It provides an opportunity for the government to exercise significant control over the project, whilst also providing for (relatively) greater speed and a greater certainty of authorisation.

The procedure is also valuable in enabling changes to be made to primary legislation so that the impact of the proposed scheme can be considered in the round. There are also fewer risks of legal challenge because once a hybrid Bill gets past its second reading it is not possible for objectors to object to the principle of the project. There are problems with the system in that it relies on politicians assessing evidence, not professionals, limited standing rules which make it difficult for pressure groups to appear, and the difficulty of timetabling hearings around other Parliamentary business. However, in relation to the Crossrail Act 2008, it seems that the hybrid Bill system worked well in subjecting the project to sufficient scrutiny, giving parties a fair hearing and producing a workable piece of legislation. Crossrail is an infrastructure project aimed at integrating the mainline railways to the east and west of London by constructing two tunnels beneath central London from Liverpool Street to Paddington, which will then connect Heathrow in the West and Shenfield in the East. The full route is intended to open in 2018 at a cost of some £14.5billion and involves building some 26 miles or 42km of new tunnels under central London.

The process for enacting the Crossrail Act 2008 was not speedy since the Bill was deposited in Parliament in February 2005 and did not receive Royal Assent until July 2008, but it was a lot quicker than the Terminal 5 project at Heathrow Airport. The process appears to have been received well by those involved; it is noteworthy that the government is currently using the hybrid Bill procedure to introduce a far more contentious proposed project, the high-speed rail line HS2.

6. Conclusion

English compulsory acquisition procedures are complex and often arcane. Historical accident and constitutional developments have constrained the scope of the law in this area to a focus on procedure rather than theory. Additionally, as noted above, modern legislation in this area is often discretionary and subjectively-framed. This approach has exacerbated the difficulties of subjecting compulsory acquisition powers to administrative law controls, whether under

the red light or green light theories. Against this backdrop, recent developments relating to large-scale infrastructure projects have offered a welcome alternative to traditional compulsory acquisition procedures. Both the Planning Act 2008 and the hybrid Bill procedure offer greater opportunities for administrative control to be exercised prospectively over compulsory acquisition decisions. Whilst both procedures are time-consuming and expensive, they provide a useful opportunity for Parliament to exercise control over the reallocation of property rights in land.

Whether a red light or green light view is taken of the purpose behind administrative law controls, the involvement of Parliament supports both views. Under a red light approach to administrative law, Parliament can act as an external check on government proposals. The opportunities offered for debate and inquiry into the scheme and its detailed provisions are even greater than those accorded to the courts because Parliamentary sovereignty is not an issue. Parliament is able to make whatever inquiries it sees fit within the confines of the hybrid Bill procedure. In relation to the Planning Act 2008 procedures, Parliament is similarly able to debate and shape the policy decisions behind the NPSs. If a green light approach towards administrative law is favoured, this is still served by modern approaches to infrastructure projects. The involvement of Parliament encourages good internal administration on the basis that internal government processes govern the checks and balances involved. It is to be hoped that large-scale regeneration projects and development schemes continue to be considered under these procedures.

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