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## **Regulation of common land under the Commons Act 1876: central and local perspectives**

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### **Abstract:**

In a departure from decades of enclosure legislation in England and Wales, the Commons Act 1876 made provision for statutory regulation of common land: a reflection of the legislature's growing interest in preserving and improving – rather than extinguishing – the nation's surviving common lands.

For those landowners and commoners who applied for and were granted local regulation acts and awards, this process established a new management framework, with the introduction of 'stinting' schedules (apportioning a certain number of common rights to each commoner), and boards of 'conservators' with powers to make byelaws. For some communities, regulation under the Commons Act 1876 promised to fill the legal vacuum afflicting common land management since the decay of their traditional management institution, the manor court; at the same time, the concept of a management body with byelaw-making powers suggested some form of continuity with the past, and could be expected to borrow from a tradition of manorial and village byelaws regulating the exercise of common rights.

However, as surviving documentation shows, the purpose and scope of conservators' powers became a major point of debate between the central legislature and commoners, raising important questions over the efficacy of applying an external statutory solution to local management problems.

Using cases from around the country, this paper explores the way in which interpretation of the Commons Act 1876 differed between the Home Office, which envisaged conservators' powers as primarily directed towards the common as a public space, and landowners and commoners who envisaged regulation as a means to more closely define and manage agricultural use of common land. In doing so, the paper points to a difficult meeting between two commons cultures, and between two legal traditions – one customary, and

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one statutory – as exhibited on commons regulated in the late nineteenth and early twentieth centuries.

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### **Introduction**

Between 1879 and 1919 some thirty-six commons in England and Wales were regulated under the 1876 Commons Act (39 & 40 Vict., c.56), from semi-urban commons and popular beauty spots to vast upland wastes stretching over thousands of acres. This shift towards regulation was in marked contrast to the decades of enclosure which had attempted to eliminate rural common land. But what was meant or intended by ‘regulation’ of a common was a source of no little confusion at this time, with different parties interpreting the objectives and conditions of the new legislation on their own terms, and conservators’ powers to regulate grazing becoming a major source of dispute.

### **1. The 1876 Act: central and local contexts**

The Commons Act emerged from a longstanding debate over the economic value and cultural significance of common landscapes. From the late eighteenth century, enclosure campaigners had depicted the commons of England and Wales as archaic, inefficient and morally dangerous, whilst detractors had argued for the protection of traditional use-rights and pointed to a less utilitarian value in open and seemingly unimproved landscapes. Up to the middle of the nineteenth century it was the enclosure regime which dominated public policy. But by the middle of the century a rapidly urbanising population had different priorities. Parliamentary debates of the 1860s and 1870s show the counter-culture of landscape preservation and public access becoming mainstream: the Commons Preservation Society was formed in 1865; metropolitan commons were given their own preservation and management act in 1866; and enclosure applications were stalled by a critical select committee of 1869 (Cowell 2002; Hill 1877; Hoskins and Stamp 1963; Hunter 1897; Shaw Lefevre 1894; Smout 2000; Tate 1967; Williams 1965; Young 1771,1808).

The Commons Act 1876 can therefore be read as something of a compromise. Whilst the Act made provision for the resumption of enclosure applications (under stricter conditions) it also introduced an alternative scheme, ‘regulation’, which would extend the preservation ethos of the metropolitan commons out into the wider country. Regulation of a common would be multipurpose. It would preserve a common’s open status and protect or introduce amenity, historical and visual interests, whilst also making provision for management (through boards of conservators) and for agricultural improvement (through stinting of grazing rights and new drainage and levelling). The potentially confused objectives of the Act were challenged, but the government maintained that their aim was simple: ‘our object is the regulating of spaces which may be convenient for purposes of

health and recreation' (Duke of Richmond and Gordon, *PD*, Lords, 4<sup>th</sup> ser., vol. 230 (1876), col. 1032). Similarly, introducing the Commons Bill, Home Secretary Richard Ashheton Cross argued that ministers must now consider 'that which the people of this country wanted almost as much as the food – the air which they breathed and the health which they enjoyed' (*PD*, Commons, 3<sup>rd</sup> ser., vol.227 (1876), cols. 188-191).

For landowners and commoners, the 1876 Act also seemed to appear at an opportune time. By the late nineteenth century many commoners were suffering the lack of an effective management institution, and communities were struggling to balance the ambitions of landowners and commoners with varying – often competing – domestic and commercial interests in the products of the common. Until their general demise across the eighteenth and nineteenth centuries (the exact time-scale varied between manors), manor courts had regulated the exercise of common rights through byelaws, orders, and ameracements (fines), and common rights had been exercised within closely defined rules of access (De Moor *et al* 2002; Dilley 1967; Neeson 1993; Searle 1986, 1993; Winchester 2000; Thompson 1993). Far from a free-for-all, access to grazing was traditionally regulated through a range of customary controls, such as stinting, heafing and the rule of 'levancy and couchancy'.<sup>2</sup> Traditional byelaws or orders might dictate that graziers would be fined for every head of stock depastured above their rightful number; that graziers would be fined for moving animals on or off the common outside the given dates; that graziers would be fined for putting on diseased or entire animals, and so on (see in particular, Winchester 2000, 26-51, and Winchester's IASC paper 2008). Furthermore, when fully operative, the community had performed the role of law enforcers, with customary-tenants serving as court juries and policing the commons as hedge-lookers, moss-lookers, constables and pinders (impounders of stray animals) – a high degree of self-regulation.

This does not mean that manorial custom was benign or just. Shaw-Taylor (2001, 126) detected 'an entire unwritten history of the exclusion of the poor from common pasture before enclosure by the simple expedient of altering manorial by-laws'. And Winchester (2000, 41) warns of dominance by larger landowners and 'more substantial' yeomanry, who might use the manor court as a means to exclude or damage their less substantial neighbours (see also Holdsworth 2005). Manor courts and byelaws were not a panacea for underlying inequalities of access. But it is important to acknowledge a pre-existing – if lapsed – culture or memory of rule-making on those commons where regulation was expected to be introduced. As has been well-

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<sup>2</sup> *Stinting*: a quota system for grazing rights. Each grazier has a certain number of stints, with their value differing according to the animal concerned and local conditions. A horse might be worth four stints, a ewe with lamb/s one stint, and so forth. *Heafing*: a heaf is a specific part of a common or fell where an individual grazier's 'heafed' or 'hefted' flock grazes. The system depends on the territorial nature of some hill sheep breeds. The right generally remains to the common as a whole. *Levancy and couchancy*: a rule limiting a commoner's right of pasture to the number of animals he/she can maintain on their own holding through the winter.

documented, the significance of rules in communal resources went generally unrecognised until the late twentieth-century CPR debates, with communal resources more likely to be depicted up to that date as inherently lawless (for CPR debates see Berkes 1992; Hardin 1968; McCay and Acheson 1987; Ostrom 1990).

It is evident from regulation documentation that a need to regain close definition and control of grazing rights was one of the primary motives given by landed interests enquiring into, or applying for, regulation under the Commons Act 1876. Thus, for example, complaints of overgrazing and trespass figure largely in papers collated in preparation for regulation of Crosby Garrett (Westmorland) (CRO Kendal WD/HH/103; Nicholson 1914, 127) and conservators' first byelaws on sampled regulated commons show an overriding concern with grazing (see for example Crosby Garrett, TNA MAF 25/63; Skipwith (Yorkshire), TNA HO 45/10316/126241; Stoke (Warwickshire), TNA HO 45/9823/B8401; West Tilbury (Essex), TNA HO 45/10457/B18343). The commoners of Uldale, Cumberland, who enquired into the possibility of regulating their commons in 1913, expressed this need when they asked the Board of Agriculture (unsuccessfully) for a short scheme of byelaws to protect the boundaries of heafs and force overstocking graziers to reduce their numbers (TNA MAF 25/10). They wanted to know whether such byelaws would stand up in court if challenged – the need for legal validity particularly strong where grazing disputes were a long-standing problem. This kind of correspondence shows a search for legal certainties and control, and the hope that this might be possible through the 1876 Act: there was no other statute or scheme at this time that offered legal powers to commoners in the management of grazing.

## **2. The structure of the Act**

It is within the detail of the 1876 Act that unresolved tension between agricultural improvement, public access, recreation and landscape preservation becomes more apparent. Whilst regulation had been presented in Parliament as a means to create health-giving open spaces, the procedures and terms of the act were still largely couched in the language of enclosure and improvement. The purpose of regulation, as stated in the preamble, was to 'give further facilities for enabling the Inclosure Commissioners to regulate, improve, stint, and otherwise deal with commons without wholly inclosing and allotting the same in severalty' (39 & 40 Vict., c.56, preamble). Regulation applications were handled by the Inclosure Commission and applications had to originate with landed rather than public interests (applications had to be supported by those representing at least one-third in value of the interests in the common, and consent for regulation had to come from at least two-thirds). Unlike metropolitan schemes, the lord of the manor had a right to veto the scheme.

Applications for regulation were followed by a local inquiry, held by an Assistant Commissioner, where applicants must prove that consent would be forthcoming. But, in a more public spirited side to the legislation, the Commissioner's inquiry also had to establish whether regulation of the

common would be to 'the benefit of the neighbourhood', defined as consisting in the 'health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed, or any part thereof, may be situate'. In theory this meant that access was related to a rough locale (nearby cities, towns etc.); in reality, the definition was so wide as to imply public access. Indeed the act presaged the modern concept that a landscape can provide a 'public good', by encouraging commissioners to insist on 'free access' to 'any particular points of view', preservation of 'particular trees or objects of historical interest', provision of recreation grounds and/or a privilege of playing games, and the creation of carriage roads, bridleways and footpaths (para. 7). 'Free access' was perhaps the key benefit to the neighbourhood, without which an application was unlikely to proceed. Thus an application for regulation of the Great Langdale commons (Westmorland) (TNA MAF 25/63) was refused in part because the lord of the manor threatened to demand *closer* definition of rights of access under regulation, curtailing the public roaming he had hitherto come to accept: a commentator in the Board of Agriculture feared this would 'probably give rise to much complaint on the part of the public and very likely on the part of some influential persons and I think it would be desirable to obviate any such objective' (internal memo, 30 August 1895).

Schemes which passed the Inclosure Commissioners' tests of consent and benefits to the neighbourhood were submitted to Parliament as a provisional order bill. If approved, the successful local provisional order act was then followed by a valuer's award which mapped the area to be regulated, outlined the terms and conditions of its use, supervised where necessary the sale of some common land (no more than a fortieth) in order to cover expenses, and set out a schedule of named stint-holders – much like an enclosure award. Indeed regulation can be read as (paradoxically) a subtle form of enclosure, particularly well-suited to lands which would not benefit from conventional partition into walled allotments – perhaps being of too rough or uneven quality, too expensive to wall, or with no possibility of changed use (upland pastures were unlikely to be converted to arable). Under regulation, partition was instead via the allotting of stints, thus permitting both the commodification of rights *and* preservation of the common as a legal category and open landscape.<sup>3</sup>

Regulation awards under the 1876 Act were not the final stage, but must rather set in place a permanent system of management. Borrowing from the Metropolitan Commons Act, 'general management' of a regulated common was invested in 'conservators', with power to make and enforce byelaws 'for the prevention of or protection from nuisances or for keeping order on the common'; and with power to introduce a range of land-improvements, including drainage, manuring, planting trees, and improvements for the added 'beauty' of the land (39 & 40 Vict., c.56, para. 5). Boards were generally

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<sup>3</sup> There were precedents in the form of private stinting awards and parliamentary stinted enclosures or 'regulated pastures' created under specific terms of the 1845 General Inclosure Act 1845. However, these differed from regulation under the 1876 act in that they involved the full extinguishment of common land status (ownership of the soil was divided between the stint-holders).

composed of between five and ten people with interests in the common. The award for some rural commons stated that conservators would be chosen 'by the persons interested in such lands out of their own number', allowing graziers to dominate (e.g. CRO Carlisle QRE/1/136 Mattereddale Award 1882); in some cases, the award stipulated that the lord of the manor, commoners, and the parish council could each appoint or elect a certain number of conservators (e.g. CRO Kendal WQR/I 98 Winton & Kaber Award 1915). However, in keeping with the new mood of caution over the fate of the commons, conservators were not to be left to their own devices. Their schemes of byelaws had to be approved by the Home Office, and any maintenance rates levied off commoners had to be approved by the Land Commissioners (later by the Board of Agriculture). Thus land owners and commoners would now enter into a long-term dialogue with Whitehall over the management of their common: a new experience for all concerned.

### **3. Implementing the Act**

Whilst the development of regulation legislation showed great promise at both local and national levels, its implementation on the ground was rather different: an awkward meeting between a culture of statutory law and modern public ideals, and an older agrarian culture still focussed on common rights and material use of common land. The disputes and controversies seen on regulated commons were generally time-specific, the early period 1880-1920 being particularly significant. Documentation generated in this critical period reveals some of the potential flaws in applying a standard model of management to common land, and perhaps for that reason has something to say to the present. It certainly has resonances with the recent Commons Registration Act of 1965 – legislation which was similarly intended to answer a legislative and management need, but which became compromised by its own terms, obscuring or missing the intrinsic qualities and varieties of common lands and rights.

Two key issues affecting implementation of the 1876 act are set out in further detail below.

#### *3.1 Fixed terms and binding awards*

In the local sphere, applications for regulation can be read as an attempt to bring clarity to the ownership and exercise of grazing rights and to introduce locally credible, externally validated powers of enforcement – with the social and economic benefits that such clarity would bring. However, the reality was perhaps more complex, resolving some aspects of the post-manorial legal vacuum but also introducing problematic constraints. The binding terms of awards could have unexpected consequences. For example, because the date of the annual stint-holders' meeting was specified in their award, Crosby Garrett (Westmorland) conservators felt unable to change it when it clashed with the local cattle market one year – inadvertently disenfranchising those commoners who kept cattle, and creating a sense of disharmony between sheep and cattle graziers (TNA MAF 25/63, correspondence of February 1886). This situation was further complicated by the three-stage process by which the power-structure of regulation was set out: through local provisional

order acts, local awards, and conservators' schemes of byelaws. When tested, it was deemed that byelaws could not expand on the powers contained in the awards; similarly, an award could only confirm powers to conservators which were contained in the preceding act. However, these distinctions appear to have been quite poorly understood, not only by applicants and conservators but also by some of the drafting commissioners and valuers – some of whom assumed that awards and/or byelaws could address management questions and powers not dealt with in previous stages.

When the chairman of the conservators of Crosby Garrett common (Westmorland) wrote to the Land Commission in 1885, to ask whether conservators had power to close their common in winter (some conservators were arguing that the common could not support the same number of stock in winter as in summer), the Home Office replied that because the award allowed for grazing at all times it was not now possible for conservators to pass a resolution 'at variance with the Award'. Dissenting conservators claimed that their commissioner had told them such a matter *could* indeed be dealt with through byelaws after the award was made (TNA MAF 25/63, correspondence of September 1885) – but it was now too late to resolve the issue. In another case, the valuer drafting the award for Skipwith (Yorkshire) omitted to specify the number and type of animals that could be grazed for each stint owned, and conservators were left with no alternative but to use a byelaw to state what the value of stints should be; the byelaw was confirmed by a reluctant Home Office, but conservators were warned of its doubtful validity (TNA HO 45/10316/126241). Finally, during an entrenched dispute over the proper purpose of byelaws (discussed in 3.2 below) the Home Office claimed that awards and byelaws could not confer a power to regulate the exercise of grazing rights if the preceding act had not *expressly* given conservators those powers – a particularly thorny issue since many conservators and commissioners had assumed that powers to regulate grazing were inherent in the terms of the act (e.g. TNA MAF 25/63, TNA HO 45/9823/B8401). It seems that having provided the legal framework for self-management, conservators' powers might nevertheless be compromised by inconsistent interpretations of the legal parameters.

The issue which the 1876 Act raised was one of how statutory management structures on commons could be designed to fairly and effectively accommodate modifications or even significant change, without compromising the validity of the structure itself. Ongoing management of common land required a degree of flexibility and reflexivity, with power to make alterations to rules and regulations (with appropriate checks and balances) when ecological and socio-economic conditions on the common required it. In the case of the 1876 Act, it would have been difficult and expensive to remedy any faults, omissions or changed circumstances: the Act made no facility for amending provisional order acts and awards once approval had been granted by Parliament (as stated in *Halsbury's Laws* (para. 660), the 'whole cumbrous machinery' would have to begin again).

### 3.2 *Conflicting concepts of law and order on common land*

Conservators' powers were determined by the phrase which gave them their remit: 'the prevention of or protection from nuisances or for keeping order on the common' (39 & 40 Vict., c.56, para. 5). It is apparent that to local conservators of grazed commons, the prevention of nuisances and keeping of order had seemed, naturally and logically, to encompass regulation of the exercise of grazing rights. This can be attributed to a number of factors: *disorder* on their commons might be associated with overgrazing and common rights disputes; grazing problems might have been the principal or a significant reason for applying for regulation; and management of grazing rights and making of 'byelaws' had been key tasks of their previous management institution, the manor court.

Much can be learned from conservators' first draft of byelaws, sent to the Home Office for approval. When conservators of Crosby Garrett common in Westmorland sent their first draft of byelaws in 1884 there were none relating to recreation or public order (TNA MAF 25/63, resolutions of 14 May 1884). This is not perhaps surprising: covering approximately 1800 acres (after regulation) of upland pasture, Crosby Garrett was far from the tourist destinations of the day, lying on the Lakes-Pennine margin. Here, conservators' main interest was in strict management of the exercise of grazing rights. In their first draft of byelaws they determined that all stock must bear the fell mark and must be marked on the given day; that commoners must not herd their own stock whilst the herdsman was engaged for the task; that commoners would be fined a pound per head of stock depastured above their awarded stint; and that stint-owners must inform the herdsman if they had let their stints to another individual. The tenor and some of the terms of these byelaws would have been entirely recognisable to manor court juries.

At this time, although the Crosby Garrett draft was refined and amended by the Board of Agriculture (with penalties reduced to the permitted level), conservators' power to regulate the exercise of grazing rights through byelaws was not questioned. However, by the 1890s, the Home Office and government Law Officers saw the matter of 'prevention of or protection from nuisance, or the preservation of order' as distinct from regulation of the exercise of common rights. It would appear that only a certain kind of misbehaviour now qualified for byelaws, matters such as theft, vandalism, and public disorder, whilst byelaws regulating the exercise of grazing rights were deemed *ultra vires* unless specific clauses to that effect had been inserted in acts and awards. Such clauses might still not allow all matters which agrarian conservators sought to manage, and commons regulated in the 1880s had no such clauses.

In 1890, Stoke (Warwickshire) conservators designed their first scheme of byelaws, which were stringent and give us an indication of some of the problems that conservators were facing (TNA HO 45/9823/B8401). Of some eleven byelaws, all but two dealt with grazing. One suggested that any householder entitled to a common right must have resided in the parish for twelve months before exercising their right. Another stated that any commoner found to be depasturing someone else's stock could expect to

forfeit their right for a twelve-month period. In addition, one byelaw set out the fee for marking of stock and another set out the marking days (draft byelaws sent 10 May 1890). But in a decision which surprised both conservators and the Board of Agriculture, the Home Office declared that the majority were improper subjects for byelaws under the 1876 Act. Two of them in particular they felt were designed to 'limit and define' grazing rights, matters which 'ought to have been dealt [with] either in the provisional order, or in the award' – inconsistencies in the three-stage process were proving to be problematic once again (minutes, 28 July 1890). Only two byelaws relating, effectively, to theft and damage – such as unauthorised removal of soil, manure or turf, or the cutting of trees and fences – were considered valid subjects for Home Office approval.

In response, the Board of Agriculture argued that strict grazing regulations were necessary on Stoke Common:

The case of Stoke Common is one of a special character, and presents exceptional difficulties, owing to the rights over the Common (which is a small one) being so numerous as to render it necessary, for the purpose of keeping order on the Common, to make regulations for the exercise of such rights [J.R. Moore, Board of Agriculture, 6 June 1890].

Further, Moore pointed out that the Stoke award *had* indeed expressly granted conservators powers to regulate the exercise of grazing rights (correspondence, 16 June 1890). The notion that byelaws could not be used to regulate the exercise of grazing rights was unfathomable to conservators. The clerk of conservators wrote that they did 'not understand the objection made to the clauses as to the conditions and fees for marking which to them appear indispensable in carrying out the award' (correspondence, 25 September 1890). But the Home Office minute to the Board of Agriculture reiterated that only two byelaws were valid: 'The other byelaws relate to the rights of pasturage: and the S of S [Secretary of State] is advised by the L.O. [Law Officers] that, notwithstanding the terms of the Award, he has no power to confirm them' (minutes, 28 July 1890). In October 1890, a reduced scheme of two byelaws was approved and signed.

In 1906 conservators of Crosby Garrett common (Westmorland) faced a similar problem when they re-drafted one of their byelaws to increase control over the letting of stints (TNA MAF 25/63). In 1884, Crosby Garrett conservators' right to regulate grazing through byelaws had not been challenged, but in 1906 the Home Office claimed that their scheme of byelaws was not such as they had power to confirm. The Home Office suggested that conservators had been mistakenly working to provisions in the 1876 Commons Act which were expressly intended for existing regulated *pastures* created under the 1845 General Inclosure Act; and that when the then Home Secretary had approved their byelaws, he, too, had been working under this misapprehension. Conservators were informed that their 'only course appears to be to leave the existing byelaws untouched and to use them for what they are worth' (correspondence, 18 April 1906). That this might seriously compromise the legal validity of conservators' powers of

enforcement – a key motivation for applying for regulation in the first place – seems to have gone unacknowledged.

Interestingly, Home Office law officers were willing to make exceptions if grazing problems could be associated with a more familiar concept of public or social disorder. This could be seen unfolding on West Tilbury commons (Essex) in 1893 (TNA HO 45/10457/B18343; TNA MAF 23/13). Applying for regulation, local parties claimed that byelaws were needed to help exclude Gypsy families' horses, cattle and sheep, alleging that these animals were eating all the commoners' grass. The Board of Agriculture supported their claim, suggesting that without a clause permitting such byelaws, 'it might be difficult, if not impracticable, to keep order on the Common' (correspondence, 14 July 1892). A clause enabling the Home Secretary to sanction grazing byelaws was therefore agreed between the Board of Agriculture and Home Office, and inserted into the provisional order act passed in 1893. Confirming their first byelaws in 1895, the Home Office noted that 'The local circumstances of West Tilbury may perhaps justify somewhat more stringent bye-laws of its commons...on account of the nuisance caused by gipsies' (minutes, 2 May 1895).

These cases and emergency clauses contradicted a widely held assumption among conservators, and indeed the Board of Agriculture, that regulating the exercise of grazing rights was fully and inherently within the scope of conservators' byelaw-making powers. It had become apparent that matters which agrarian conservators thought essential to good management and deserving of the highest level of legal support (i.e. byelaws approved by the state) seemed improper subjects of common land byelaws to the Home Office. The Home Office was in some respects attempting to protect commoners from potentially unfair regulations, stating that grazing byelaws must not 'override' a commoner's legal right (TNA HO 45/10316/126241, minutes, 15 July 1905). But their reluctance to sanction grazing byelaws also showed a lack of confidence in a regulatory system which had, after all, been approved by Parliament, and showed a limited understanding of the local importance given to grazing rules and regulations. It appeared that customary common rights, once at the centre of manorial orders and byelaws, had become peripheral to a new breed of common byelaws directed towards public order, and the common as a public space. This underlying lack of confidence in conservators and agrarian interests was no more apparent than in the refusal of the Great Langdale application for regulation: an internal memo suggested that, 'It would appear to be undesirable in the interests of tourists and the public that the management and control of such a common as this should be placed in the hands of a body of conservators representing only parochial interests' (TNA MAF 25/63, Board of Agriculture minutes, March 1896).

The Home Office's interpretation of conservators' byelaw-making powers came under scrutiny from outside Whitehall. For example, the case of Crosby Garrett prompted a letter to the Board of Agriculture from one J. Ingram Dawson, a solicitor of Barnard Castle. Ingram Dawson had sheep of his own on a regulated common and was acting for four bodies of conservators in

Westmorland and Yorkshire. He claimed that each of the Crosby Garrett byelaws was legally valid and 'absolutely necessary for keeping order and preventing disorder on the Common', interpreting the word nuisance in its 'old', and 'wide' meaning of 'anything which worketh annoyance hurt or destruction' (TNA MAF 25/63, correspondence, 1 May 1906). Again, the local interpretation of what constituted common land law, order and *disorder* differed markedly from the central Home Office interpretation. Even in the legal sphere there was grave concern: one commentator wrote from Lincoln's Inn of the Crosby Garrett controversy, stating that,

The matter is of importance, as if the view taken by the Home Office is correct, the validity of the Byelaws for East Stainmore, Matterdale and other large Commons in Cumberland and Westmorland where the rights are of real value and which were regulated soon after the passing of the Commons Act of 1876 would seem to be equally open to question. [TNA MAF 25/63, G. Pemberton Leach, correspondence, 30 September 1910]

By the 1920s the Home Office's strict policy on byelaws seems to have been quietly reversed. In 1927, conservators of East Stainmore (Westmorland) were allowed to alter their byelaws regarding overstocking of stints (CRO Kendal WD/HH/38a). By then, regulation under the 1876 Act had been superseded – no new regulations occurred under the 1876 Act after 1919. And in a further twist, the conservators of some regulated commons requested to remove those byelaws originally introduced to exclude Gypsy families (byelaws preventing hirers of horses, tents, poles and lines, and so on), as these were now blocking enterprising members of the community from selling donkey rides and entertainments to the public – as happened on Clent Hill, Worcestershire, in 1922 (TNA HO 45/11466). The complex legacy of early byelaws was continuing to exert an influence on the use and management of common land.

## **Conclusion**

The Commons Act 1876 emerged as something of a hybrid, driven both by metropolitan ideals of public access and preservation, and by a culture of enclosure and agricultural improvement. It revealed an ideal-type of common for the end of the nineteenth century: a recreational, stinted, improvable, public space. But underlying this ideal were profound and unresolved questions over what regulation was designed to achieve, and what law and order meant in the context of common land – what, in the modern era, common land was really for.

The 1876 act did not involve a simple dichotomy between central and local interests. Regulation was not imposed from the centre: commoning communities had rather to apply for, and consent to, schemes of regulation. It is evident that some commoning communities welcomed the powers that seemed to be on offer, and some were disappointed when their applications failed. But it seems that there was a fundamental disconnection between

what the different parties saw as the main objective of the act and the powers conferred under it. As has been intimated above, regulation was presented in Parliament as a means of providing health-giving open spaces – drawing on the ethos of metropolitan commons – yet to proceed, regulation depended on attracting the interest and consent of commoners and landowners, whose goals were primarily to enforce closer regulation of grazing and provision for agricultural improvement. It seems that a local need to regulate common grazing was missed or underestimated by the legislature. Nor did the legislature appear to understand the significance of the local legal and cultural context. Regulation was not written on a blank slate: with a history of manorial custom behind them, conservators had their own perception of how a management body should exercise its rule-making powers and what were proper subjects for their regulations.

The problem was one of balancing the need for a valid, enforceable and just legal management framework with the local reality of a dynamic and potentially unpredictable environment, and a society's evolving socio-economic relationship with its commons. Though not necessarily seen as significant in Whitehall, numerous questions arose at local level over the extent of conservators' powers to regulate the common: Could conservators regulate stocking numbers? Could they close a regulated common during the winter? Could they redraft byelaws to better control letting of stints? The sustainable use of a common might rest on conservators' ability to respond to such issues: common land regulation conceived as a continuous and adaptive community *process* rather than the fixed and narrow product of a statutory award.

Unfortunately, the 1876 Act seems to have suffered from a narrow and inflexible approach to common land regulation and management, based on a simplistic notion of how common pasture rights should be governed (and in this respect has resonances with the later 1965 Commons Act). Many of the problems seen in the byelaw controversies of the 1876 Act were caused by a legal process which was poorly and inconsistently applied – as can be seen in the confused legal parameters of acts, awards and byelaws – but there was also a deeper question as to where regulation of grazing fitted within the new regime. At local level, the notion that byelaws could not be used to regulate the exercise of grazing rights was unfathomable and risked undermining enforcement. In the Home Office, byelaws seem to have been primarily associated with theft, damage and public or social disorder – much like a metropolitan common or park. Each party was reading the terms and conditions of regulation from the perspective of a different commons culture. Their objectives were not, in principle, mutually exclusive, but the inflexibility of the legal mechanism sometimes served to make them so.

**Abbreviations:**

CRO Cumbria Record Office  
CPR Common Pool Resource  
PD Parliamentary Debates  
TNA The National Archives

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