

**CHANGING LANDSCAPES:  
A LEGAL GEOGRAPHY OF THE RIVER SEVERN**

**by**

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## **Abstract**

Debates in legal geography have highlighted that there is a need to develop a more creative approach in order to understand the intersections between law and geography. This paper proposes that this imbrication can be investigated by using a Sequent Legal Occupance (SLO) method of analysis in legal geography research.

By modifying Whittlesey's notion of sequent occupance, the study historically and chronologically investigates River Severn in relation to two activities, navigation and fishing, to understand the correlation between law and geography as a process of mutual constitution. It identifies the ways in which law has been present within the landscape in terms of 'occupance' and 'impress' to indicate the complex, multi layered and multi-dimensional ways in which law and geography are woven together in a particular setting.

This sequence of events is presented as the 'Severnscape', a fusion of landscape and lawscape which illustrates the ways in which the relationships between space, place and law are constantly being negotiated, changing, reforming, and performing. I argue that such an approach can be used to better understand the correlation and co-constitution of law and geography.

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## LIST OF CASES AND LEGISLATION USED

### Cases mentioned (in date order)

*Holford v George* [1868] , *Queen's Bench Division, 6 June 1868 (1867-68) L.R. 3 Q.B. 639*

*'The Madras'* [1898] P.90. Probate Divorce and Admiralty Division, 18-19 February 1898

*Carter v Murcot* [1768], Court of King's Bench ,01 January 1768 98 E.R. 127; (1768) 4 Burr. 2162

*Lord Fitzhardinge v Purcell* [1908] 2 Ch. 139, Chancery Division, 13 April 1908

### Laws and Acts of Parliament mentioned (in date order)

**1215 *Magna Carta c.33*** : 'All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast'

**1217 *Charter of Liberties c.17*** 'No embankments shall from henceforth be defended, but such as were in defence in the time of King Henry our grandfather; by the same places, and the same bounds as they were accustomed to be in his time'

**1275 *Statute of Westminster*** (3 Edward 1 , c.4)

**1285 *Salmon Preservation Act*** (13 Edw. I. cap. 47 )(Second Statute of Westminster)

**1346 'An Act Remediying Annoyances in the Four Great Rivers of England, Thames, Severn, Ouse, and Trent'** ( 21 Edw. III. cap. 34)

**1389 'A Confirmation of the Statute of 13 Edw.I. c.47 touching the taking of Salmon'**  
(13 Rich II. Stat 1. c.19)

**1393 'Justices of the Peace shall be Conservators of the Statutes made touching Salmon'**  
(17 Richard II c.9 )

**1423 'No Man shall fasten Nets to any Thing over Rivers'** (2 Henry VI c.15

**1431 'All Men shall have free Passage in Severn with Goods, Chattels &c'** (9 Hen. VI. cap. 5.)

**1531 'An Act for taking Exactions upon the Paths of Severn'** (23 Henry VIII 1531-2 cap.12)

**1533 'Act against Killing of young Spawn or Fry of Eels or Salmon'**(25 Hen. VIII. cap. 7)

**1534 'An Act that Keepers of Ferries on the Water of Severn shall no convey in their Ferry-boats any Manner of Person Goods or Chattels after the Sun going down till the Sun be up'** (26 Hen. VIII. cap. 5)

**1539 'An Act that Fishing in any several Pond or Mote, with Intent to steal Fish out of the same, is Felony.'** ( 31 Henry VIII.c.2.)

**1588 'An Act for the Preservation of Spawn and Fry of Fish'** (1 Eliz. C.17 A.D 1558)

**1605 'An Act for the Better Preservation of Sea Fish'** ( 3 James I .c.12. )

**1678 'An Act for Preservation of Fishing in the River Severn'** (30 Car II Cap.9)

**1692 'An Act for the more easy Discovery and Conviction of such as shall destroy the Game of this Kingdom'** (4 and 5 William and Mary , c.23)

**1714 'An Act for the better preventing fresh Fish taken by Foreigners being imported into this Kingdom; and for the Preservation of the Fry of Fish; and for the giving Leave to import Lobsters and Turbets in Foreign Bottoms; and for the better Preservation of**

*Salmon within several Rivers in that part of this Kingdom called England'* ( 1 George I .St.2 c.18)

**1760** *'And for the Better preservation of the spawn , brood and fry of fish and for preventing the sale of small and unsizeable fish and fish out of season'* (33 Geo.II c 27 XIII)

**1765** *'An Act for the more effectual preservation of Fish in fishponds and other Waters; and Conies in Warrens; and for preventing the Damage done to Sea Banks, within the County of Lincoln, by the breeding Conies therein'* (5 Geo III c.14 )

**1772** *'An Act for making and keeping in repair a road or Passage for horses, on the Banks of the River Severn, between Bewdley Bridge and a place called the Meadow Wharf, at Coalbrookdale, for hauling and drawing vessels along the said river; and for other purposes therein mentioned'* ( 12 George III Cap 109 )

**1777** *'An Act for the better preservation of fish, and regulating the fisheries, in the Rivers Severn and Verniew'* (18 George III c.33)

**1793** *'Act for making a Canal from the River Severn near Gloucester into a place called Berkeley Pill and a cut to the town of Berkeley'*( 33 Geo. III, c. 97)

**1799** (No title- revives Act of 1772) (39 Geo III)

**1803** *'An Act for extending and making the Horse Towing Path or Road, on the Banks of the River Severn, from Bewdley Bridge, in the county of Worcester, to the Deep water at Diglis, below the city of Worcester'* ( George III cap 129 )

**1803** *'Dart, Teign and Plym Fisheries'* (43 Geo. 3 c.lxi )

**1811** *'An Act for extending the Horse Towing Path on the Banks of the Severn from Worcester to a place below the City of Gloucester, called the Lower Parting, situate at the Corner of Portham Mead, in the county of Gloucester'* (51 George III Cap 148 )

**1818** *'An Act for preventing the Destruction of the Breed of Salmon, and Fish of Salmon Kind, in the Rivers of England'* (58 George III c.43)

**1842** *Severn Navigation Act* : *'An Act for improving the Navigation of the Severn from the Entrance Lock of the Gloucester and Berkeley Canal, and from the Entrance Lock of the Herefordshire and Gloucestershire Canal, in the County of Gloucester, to Gladder or Whitehouse Brook in the County of Worcester'*[13th May 1842] (5 & 6 Vict. c. xxiv)

**1853** *Severn Navigation Act* (16 & 17 Vict.c.xlvii)

**1861** *Salmon Fisheries Act 1861* (24 & 25 Vict. Cap.109)

**1863** *Salmon Act of 1863* (26 Vict. c. 10)

**1865** *Salmon Fishery Act* (28 & 29 Vic. c.121)

**1870** *The Salmon Acts Amendment Act* (33 &34 Vict. c.33)

**1873** *The Salmon Fishery Act* (36 & 37 Vict. c. 71)

**1876** *Rivers Pollution Prevention Act* (39 & 40 Vict. c. 75)

**1876** *Elver Fishing Act (1876)* (39 & 40 Vict. c.71)

**1877** *Fisheries (Dynamite) Act* (40 & 41 Vict. c.65)

**1878** *'An Act for the protection of Freshwater Fish'* Freshwater Fisheries Act (41 & 42 Vict. c.39)

**1879** *'An Act to amend the Salmon Fishery Act with relation to fixed Engines in Tidal Waters'* (42 & 43 Vict. c.26)

**1884** *Freshwater Fisheries Act* (47 & 48 Vict c.11)

**1886 *Freshwater Fisheries Act*** (49 & 50 Vict c.2)

**1886 *Salmon and Freshwater Fisheries Acts*** (49 & 50 Vict c.39)

**1892 *Salmon and Freshwater Fisheries Acts*** (55 & 56 Vict. c.50)

**1903 *Board of Fisheries Act*** ‘An Act to transfer to the Board of Agriculture powers and duties relating to the Industry of Fishing and to amend the Board of Agriculture Act, 1859’ (3 Edw. 7 c.31)

**1907 *Salmon and Freshwater Fisheries Act*** (7 Edw 7 c.15)

**1910 *Severn Fisheries Provisional Order*** (10 Edw 7)

**1923 *Salmon and Freshwater Fisheries Act*** (13 and 14, George V, Ch. 16)

**1948 *The River Boards Act*** (11 & 12 Geo. 6., C. 32)

**1964 *Salmon and Freshwater Fisheries Act 1923 (Amendment) Act 1964 c. 27***

**1975 *Salmon and Freshwater Fisheries Act 1975 c. 51*** ‘An Act to consolidate the Salmon and Freshwater Fisheries Act 1923 and certain other enactments relating to salmon and freshwater fisheries, and to repeal certain obsolete enactments relating to such fisheries’

### **List of Abbreviations**

**AC**- Appeals Court  
**CLS**- Critical Legal Studies  
**CPRE**- Council for the protection of Rural England  
**DECC** -Department of Energy & Climate Change  
**DEFRA**- Department for Environment, Food and Rural Affairs (DEFRA)  
**EA** - Environment Agency  
**HL**- House of Lords  
**ICES** -International Council for the Exploration of the Sea  
**IFCA**- Inshore Fisheries and Conservation Authority (IFCA)  
**ITLOS**- The International Tribunal for the Law of the Sea  
**MMO** - Marine Management Organisation  
**NGO**- Non-governmental organization  
**OFWAT** – The Water Services Regulation Authority  
**PROME**- Parliament Rolls of Medieval England  
**HCCP**-House of Commons Parliamentary Papers  
**RSPB**- The Royal Society for the Protection of Birds  
**SAC**- Special Area of Conservation  
**SEG**- Sustainable Eel Group  
**SEGG**- Severn Estuary Coastal Group  
**SEP** - Severn Estuary Partnership  
**SI** – Statutory Instrument  
**SLO**- Sequent Legal Occupance  
**SPA**-Special Protection Area  
**SRT**- Severn Rivers Trust  
**UNCLOS** –United Nations Convention on the Law of the Sea  
**WWF**- World Wildlife Fund UK  
**WWT**- Wildfowl & Wetlands Trust

## Chapter 1

### The Boundaries of Legal Geography

‘Law *has* geography within, as well as beyond, the boundaries of nation states, even if one of its characteristic qualities has been to deny it. A spatial history of law would require an analysis of these geographies and their construction’

(Hogg, 2002, 31)

#### 1.1 Introduction

If law has geography, then the primary aim of legal geography research must be to pinpoint how, why and where that geography is. It must also, within this process, ask how, why and where *law* is. But where do law and geography meet? A simple answer would be in the everyday, lived experiences of people in their environment. Although often unnoticed, law affects the spaces and places that we inhabit. From the property in which we live to where and when we are allowed to partake in leisure activities, where we can walk, drive or are allowed to fish, are all regulated by law on a daily basis within a geographical setting. In academic terms, where and how does a project combining the two disciplines of law and geography begin? I am particularly interested in this intersection, and on those hidden or ‘non-visible’ effects on the natural environment. For example, ‘Private fishing’ sign (Fig 1.1) raises a number of questions.



Fig 1.1: Berkeley Estate Notice

From a legal perspective, one may ask why that particular place is ‘private?’ What are the consequences for ignoring the notice? Is it legally binding? How is such a notice enforced? How long has that area been private ‘property’, and what are the boundaries? What happens when the fish cross the boundaries? These questions are prime examples of an opportunity to examine the intersection between law and geography. To what extent does the interrelationship between law and places or spaces explain the notion of or the need for privacy?

The legal-geographic relationship is clearly complex. This thesis seeks to examine this relationship using an empirically guided examination of a particular area. Such research aims to understand the historical interactions between geographical notions of space, place and law, to reveal the complex dynamics and layering of legal events within and upon the landscape. This introduction begins by outlining the scholarship of legal geography, and then examines the disciplines of law and geography in their separate schools of thought before identifying intersections between the two. This chapter considers the use of legal geography before outlining the aims and objectives of this research.

## **1.2 Legal Geography**

Legal geography is an emerging body of scholarship which proposes that ‘in the world of lived social relations and experience, aspects of the social that are analytically identified as either legal or spatial are conjoined and co-constituted’ (Braverman *et al*, 2014, 1) Thus, as all law is located ‘somewhere’, it needs to have a spatial frame of reference, and one such vocabulary of techniques that can be provided by the discipline of geography. One early collaboration between geographers Blomley and Clark (1990) explored the spatiality of legal

systems and encouraged scholars to embrace the potentials of a new field of enquiry. Based on primarily academic law, legal geography could be considered as the examination of theoretical perspectives which tend towards philosophical debates on how and why situations arise.

The 'legal geography' rubric has been applied by writers from urban geography to post colonialism, legal anthropology to ethnography, with researchers working on a diverse range of projects, from human trafficking to planning law, all bound within the discourse of place and space. However, 'put simply, to say that law *has* geography and that geography is *shaped* by law is not to say that law *is* geography' (Blomley & Clark, 1990, 436). The two are separate fields of enquiry that need to be examined alongside each other to understand the mutually constituted results.

Although this thesis advocates a return to the elemental investigation of law and geography, it is not just an exercise in 'mapping' the law within a geographical location, nor is it intended to be an 'impact analysis' model that 'privileges law as a seamless discourse that somehow is beyond geography' (Blomley & Clark 1990, 435). Rather, it is a project which aims to identify the historic ways in which law and geography have both played reciprocal roles in the shaping of understandings of contemporary environments and landscapes. The intention of this particular legal geography research is to uncover the ways in which law and the legal system 'operate within particular geographical and historical contexts that constrain and direct the practices of jurists and other legal actors' (Forest, 2000, 5). To achieve this, it aims to reposition the focus of legal specifics within a more local physical and social geography, moving away from the more transcendent notions of space and elaborating on notions of

place, space and time. My intention is to provide a better understanding of law and its impact on the micro scale, which in turn will provide scope for sharpened analysis, reinvigorating research into 'place' and the local. Encompassing strands of thought from a number of different perspectives within both the legal and the geographical schools, the research also seeks to develop the current legal geography project by suggesting an alternative framework for the investigation of law and geography as a co-discipline. This framework seeks to address issues within contemporary legal geography, particularly the prevailing dialogue which seems to privilege the notion of space over time (Braverman *et al* 2014, 14). In doing so, it explores the basis of theoretical resources used in the development of legal geography studies and encourages engagement with a wider range of theoretical materials.

### **1.3 The geography of the study area**

I was keen to explore legal geography and its assertions regarding space, place and time within a region of the UK, and was particularly interested in environmental law, and examining law within a geography that accounted for the human relationship with natural resources. I was inspired by the estuary along which I walked on a daily basis and after some initial research and reading (examined in more detail in the following Chapters) this landscape presented itself as an ideal area for examining the law and geography of watercourses. Watercourses, as rivers, streams and canals, as well as being a physical feature on the land, have given rise to a number of legal issues, from water abstraction, use and navigation, to drainage, pollution, flooding, ownership, rights and responsibilities. Estuaries can be seen as historic, persistent and powerful feature of the local landscape, constantly changing, changeable and unpredictable. Being tidal, such processes can be seen as a 'key form of watery agency which drives intersecting rhythmpatterns within the (material) ecosocial in



many ways. These relationships are shapers of local topographies, ecologies, cultures, and economies' (Jones, 2011, 2286). As such, these features are embedded in the local social consciousness. When seen in this way, estuaries can become a metaphor for the phenomena of law; a presence which is always in the background, continually flowing, influencing and shaping lives. As a central feature of the research, the estuary symbolises the ebb and flow of both legal application and geographical change. Locating the research around the estuary allows for an investigation of the ancient relationships between humans and the environment, and thus for examining the ways in which landscapes and lives interact with law and geography.

The estuary along which I walked was the lower part of the River Severn in Gloucestershire. The Severn is Britain's longest river at some 220 miles, flowing from its source in Plynlimon, Wales to the Bristol Channel before reaching the Atlantic (Fig 1.2). For centuries, the river has been a focus for human activities, in the form of settlements and military defences, as a source of water and food, and as a gateway for transport and trading (SEP, 2011). The shape of the Severn estuary is such that the tidal range is the second highest in the world, and as the tide rises, the water is funnelled into an increasingly narrow channel forming the large wave called the Severn Bore during high tides. To narrow the study, I focused the research on the upper estuary between Gloucester and the Second Severn Crossing. The geographical boundaries of this chosen area fall predominantly within the county of Gloucestershire.

This tidal area has a long and rich history that can be examined not only through law and geography, but also through archaeology and biology, art, literature, and social history.

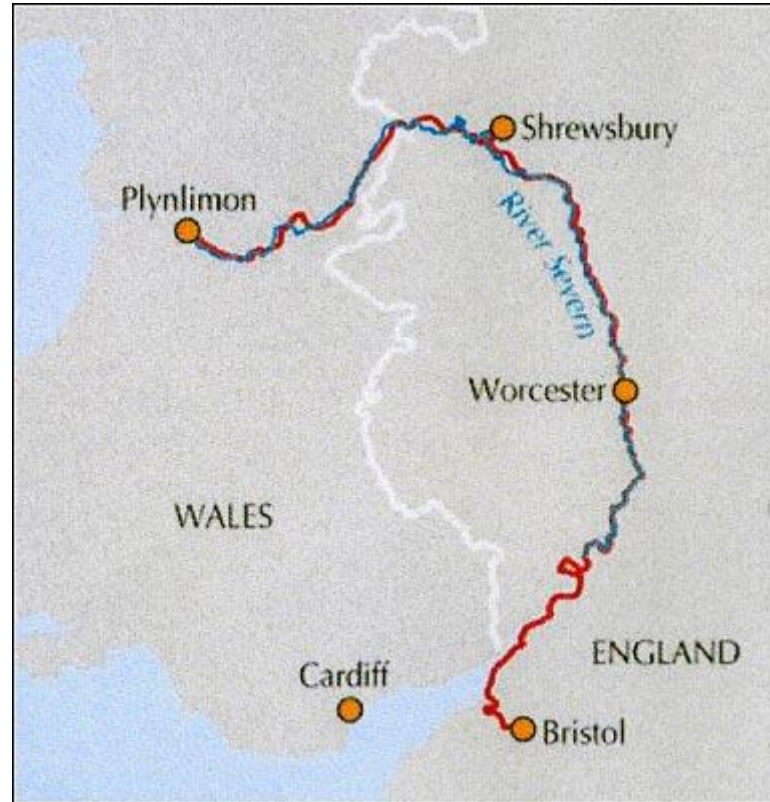


Figure 1.2: Location and route of the River Sever, UK.

(Source: Marsh, 2014)

A topographic analysis examines the locality using historic law predominantly in relation to the estuary with reference to the themes of fisheries and navigation. These topics were identified in the early stages of the research as having not only a long traceable legal history, but also as issues through which legal- geographical conflicts have played out. Each theme is examined chronologically, locating legal acts and cases from medieval times through some seven hundred years. The effects of these legal matters are explored by cross referencing with local historical studies, recorded media, legal reports, archive documents and other data. By adopting a historical perspective, transformations, whether natural, economic, political or social, become single moments in part of an evolving landscape moulded by law. Where

landscapes have been used in some legal geographical studies (Blomley, 2001; Braverman, 2011) they tend to be defined in terms of spatial relationships. By including the changes in social organisation, ideology and discourse that surrounds the River Severn, and exploring the relationships between law and geography, there is scope for the repositioning of landscape in its own right as opposed to submerged in the concept of space (Morin, 2003). When examined alongside each other, specific moments in time emerge to inform a legal geography that can be utilised in contemporary analysis. In addition, by taking into account the effects of law on the ‘non-corporeal’ (water and fish habitats) it moves away from the predominantly anthropocentric focus found in contemporary legal geography work. As both law and geography are dependent on location, situation and context, this thesis begins by reassessing the relationship between the two disciplines. The starting point for such an ambitious investigation begins by asking the following questions:

- What is law?
- What is geography?

#### **1.4 What is law?**

The definition of law in the dictionary is that it is a ‘rule of conduct imposed by authority’ (Oxford English Dictionary, 2013). In legal terms, law is simply defined as ‘that which is laid down, ordained, or established’ (The Law Dictionary, 2014, 13), or as ‘the enforceable body of rules that govern any society’ (Law & Martin, 2013, 231) with a note to ‘see also’ common law, natural law etc. This caveat is a reminder that law itself is a vast repository of cases, statutes, decisions and doctrines that not only encompasses various sub headings ( criminal law, corporate law, marine law, land law) using specific terms and definitions, but also has different meanings depending on location, situation and context. Hart (1961) remarked that

no great literature is dedicated to asking or answering the question of ‘what is chemistry?’ or ‘what is medicine?’ Thus, to understand it ‘requires not an analysis of the word “law”....but a grasp of the context in which such a question can be asked in the first place’ (Howarth, 2001, 259). Consequently, both language *and* context are integral to an investigation into the places and spaces of law, which involves the use of two types of legal academic disciplinary research. First, one must use ‘substantive law’, or that which is either codified in legislation, or determined through common law (based on judicial decision and precedent). This is administered and enforced via the mechanism of ‘procedural law’.

Yet to account for language and to apply a theoretical perspective, one must turn to the second form of academic law, that of jurisprudence, or the legal philosophy which seeks to analyse, explain and criticise the substantive and procedural law using comparative study. It raises questions about the application and morality of the law, or can investigate the very existence and definition of law itself. These classifications cannot be entirely separated, but for clarity their applications will be examined briefly.

#### ***1.4.1 Substantive and procedural law***

Those who work with substantial (or ‘black letter’) law form part of the mechanism by which law is administered and enforced. The practicing lawyer undertakes an investigation into the facts to identify the issues, and then considers the available legal rules before making the conclusions upon which he will make a case. Thus ‘legal research is as much art as science; it calls for strategy as well as serendipity’ (Goodrich, 1986, 108). The policy and legislation available to the lawyer depends upon the context and jurisdiction within which he or she is working, and whether it is an International, EU or Domestic legal concern.

International Law addresses global concerns, through the negotiation of treaties, conventions, protocols and sub-agreements by the signatory countries. The resulting agreements bind states once ratified. There is no single body for law enforcement, and they do not create obligations that individuals can rely on. Such laws offer broad frameworks for multinational issues.

As the UK is a member of the European Union, such laws apply. Under EU law, the doctrine of supremacy provides that where there is a conflict between national and EU law, the latter prevails. EU laws have 'direct effect' if they give rights and obligations to individuals and companies, and as such need no further implementation by the member state and can be applied in the domestic courts. Regulations normally have direct effect; Directives are binding, although member states have discretion as to how they implement the contents. Rather than just being a 'framework' for action, Directives provide the impetus for much domestic law.

Domestic law in the UK comprises of Primary Legislation (Acts of Parliament, Statutes, and Enactments) and Secondary Legislation (Regulations and Statutory Instruments). The UK also has a system of common law, based on case law or precedent. Such laws are developed by judgements and decisions in the Courts of Law as opposed to written statutes. In addition, law in the UK is categorised as either a Criminal or a civil offence, the former referring to crimes that cause intentional harm, and the latter to seek redress for a non criminal offence.

The précis of legislative governance given here is of course brief and serves only to provide a very basic outline of the substantive framework of law in the UK. But it indicates the many layers that exist in the structure of the legal system, and the ways, in which these layers are

negotiated interpreted, applied, and argued. An examination of these layers must be included in a legal geography project in order to build a chorographical account of a specific geographical area. In addition, the science or philosophy of law, that which underlies law as social phenomenon, must also be taken into account using the methods of jurisprudence.

#### ***1.4.2 Jurisprudence***

Jurisprudence has been described as ‘a scavenger, as well as a ragbag; having no perimeter to its field of inquiry, save that what is studied must have a bearing on some general speculation about law’ (Harris, 1997). It can be divided broadly into the two disciplinary areas (although these often complement each other) of philosophy (questioning the *value* of law) and legal theory (questioning the *nature* of law). Jurisprudence, rather than just an academic stream, has a ‘crucial role to play in defining, shaping and safeguarding the values that underpin our society’ (Wacks, 2009, 11).

Jurisprudence has a long academic history and covers a number of perspectives. The early Greek philosophers questioned the legal order of things under classical natural law. Positive law was theorised by St Thomas Aquinas (1225) and his thoughts were expanded by scholars such as Locke (1689) and Rousseau (1761) who theorised on Natural Law. Later schools of thought include classical legal positivism (Bentham, 1823). Although Marx (1818-1883) offered no explicit theory of justice, and gave law no separate analysis, it is included by theorists as an element of the superstructure. However, Marxist theory has been criticised as it fails to ‘examine the connections within the superstructure and to explain the functions of law as part of the superstructure’ (Collins, 1982, 26).

The ‘postmodern turn’ reacted against modernism following the Second World War, and saw a definite link between the language termed as science and that of ethics and politics. The ‘critical legal studies’ (CLS) movement which began in the 1970s aimed to destroy the ‘one single truth’ notion by revealing that legitimating theories pursuing rational, necessary and often efficient explanations were a form of denial (Kennedy, 1981). Later postmodernists (Balkin, 1987; Wicke, 1991) challenged the liberal orthodoxy that society has a natural structure, and proposed that as all statements are opinions, and even factual statements are open to debate and deconstruction. With a belief that a critical deconstruction of the language of law could reveal the contingent and arbitrary nature of the legal system, postmodernism urged individuals to confront and change the rigid contexts and structures (including law) in which they were confined, arguing that law is a self-reinforcing, self-perpetuating hierarchy. As such, ‘deconstruction is not a denial of the legal rules and principles; it is an affirmation of human possibilities that have been overlooked or forgotten in privileging particular legal ideas’ (Balkin, 1987). By deconstructing and examining the dominant law, postmodernism offers to reveal the true nature of society.

With such a catalogue of theories, jurisprudence has been well disposed to take comparative steps, exploring liberal theories, traditional social theories, and sociology. As jurisprudence already encroaches on the boundaries of social theory, politics, sociological research, it can also be relevant within geography. To conclude, the ‘what is law’ question within the boundaries of legal academia has no definitive answer. In fact, it may be easier to define ‘what is *not* law’. What the above does indicate is that there is a substantial amount of legal material, only briefly touched upon here, in the form of statute and written law and in theoretical and philosophical literature. Having considered the question of ‘what is law?’ it is

also helpful in the early stages of research to ask the question of geographers, ‘what is geography’?

### **1.5 What is geography?**

Geography has many sub divisions within its remit. Academically, it can be divided into two main branches (although as with law, the two may overlap in practice). Physical geography refers to the scientific study of the earth and its features, and can be traced back to the ancient Greeks. Today, geography has many subdivisions, including geomorphology, hydrology and oceanography. The discipline of human geography has branches in a number of diverse subjects, but its focus is on human activities within the environment. The roots of human geography have a long and contested history (Gregory, 1994) but it is generally agreed that interest in the subject began to gain significance during the 19<sup>th</sup> Century with the rise of geographical societies that were founded by those interested in widening their geographical knowledge. Darwin’s ‘Origin of Species’, published in 1859, began to look at the ways in which humans were influenced by their environment. This form of ‘environmental determinism’ led to geographers beginning to engage with the development of alternative theories as ‘cumulative evidenced suggested that environmental determinism was too simplistic to explain variations in human activity and culture, leading to spurious (and often racist) theories of environmental causation’ (Hubbard *et al*, 2002). In England, the first Geography department was established with financial support from the Royal Geographical Society in Oxford in 1900, leading to a new professionalism. More scientific models became popular during the mid twentieth century. Comte (1798-1857) had proposed that the study of social relationships should be developed on the same principles as the natural sciences. This



approach was adopted by human geographers in the 1950s, partly due to its basis in the humanities.

Positivist methods are said to produce true, verifiable knowledge, based on scientific judgements that are objectively made by the observer, ignoring metaphysics, which is said to express neither a tautology nor an empirical hypothesis. Positivism is founded on the assumption that individuals conform to a set of laws (behaviourism) and so the objective world can be observed and recorded (realism). Yet critical theorists argued that the positivist concern with empirical questions and factual content disregarded moral and value judgements, and more humanistic approaches emerged in the 1970s. Under the broad philosophies of idealism, phenomenology and existentialism, humanism aimed to understanding people in their environments. The core belief for idealism is that all reality is a 'mental' construction and therefore no physical objects exist outside of the 'knowing mind'. Only the individual can truly experience his or her own emotional aspects of behaviour. Phenomenology emphasises the study of the conscious experience. Through studying the meaning given to phenomena in an individual's life, human action can be understood. The characteristic that individuals give to these phenomena belong to a human 'essence' which exists in the human consciousness. Tuan prefers to use the overall term of 'humanistic geography', which seeks to gain a more comprehensive view of the complexities of human activity to 'clarify the meaning of concepts, symbols, and aspirations as they pertain to space and place' (Tuan, 1976, 275).

Positivist and humanist approaches were concerned with description rather than offering explanations for the regularities that they discovered. Structuralist theories were developed in

France in the 1950s, and built upon traditional Marxist ideas by concentrating on analytical categories (such as the mode of production) and proposed that science should look beneath the categories of things that exist to explore the hidden structures that cause the effects observable in the superstructure. These deep structures underpin all cultural phenomena (language, myth, social networks) which are generated by the human mind. Feminist theorists also began to argue that structures were mechanisms that perpetuated gender inequality in a structure of patriarchy, reproducing assumptions, practices and mechanisms to keep women subordinate to men within the broader cultural, economic, and political environment.

During the mid twentieth century, both the post structural and post modern movements in geography offered both an ontology and epistemology that was sceptical of structural explanations and attempts to attain the absolute truth. Hence 'in a world composed of flows, movements and chaos, post-structuralists suggest that solidity is an illusion' (Hubbard *et al*, 2002). As an alternative resolution between structural and humanistic theories, Giddens (1976) developed structuration theory. One of the central concepts of this theory was the 'duality of structure'; as humans interpret the world, over time, rules are reinterpreted, so structures (language, religion, ideologies) are both created and recreated as agency and structure are knitted together by social practice. Structuration theory is a complex attempt to bridge the gap between structure and agency, but has been criticised for being too loose and unfocused, with an absence of direct guidance for application (Soja, 1989).

The long, and by no means exhaustive, history of geography as an academic subject has been (very) briefly summarised here. There are of course other sub disciplines; landscape, rural, urban and historical geographies employ a range of techniques which have their roots within

the theoretical foundations of human geography, and will also have their place within this research. But in the preliminary stages, it is the basis of a relationship between law and geography which is examined here.

### **1.6 Theoretical links between law and geography**

When examined side by side, law and geography seem to share a number of theoretical foundations. It must be noted that there is a variation between the positivism of geography, which seeks to apply scientific principles and methods to social explain social phenomena, and legal positivism, which attempts to define law, and advocates that the legitimate sources of law are the those written rules that have been expressly enacted. That aside, there are other theories which are common to both law and geography, including Marxism, structuralism, post-structuralism and post modernism. There is a wealth of theoretical and philosophical material to draw upon in a thesis which seeks to analyse the development of the conjoined area of law and geography.

In early initiatives to establish a link between law and geography, it was suggested that studies should be guided by theory and shared assumptions about the nature of society (Blomley & Clark, 1990). Currently, legal geography seeks to expand its remit across the board as an interdisciplinary intellectual project, as opposed to a sub- discipline or specialism in its own right. As such, its present incarnation is seen by some as a ‘stream of scholarship that takes the interconnections between law and spatiality, and especially their reciprocal construction, as core objects of inquiry’ (Braverman *et al*, 2014, 5). This preoccupation with space and spatiality has been criticised for ‘under theorization’ (Philippopoulos-Mihalopoulos, 2011) in legal spheres, but I will also argue within this thesis that its use within

legal geography has also led to the sidelining of equally valid lines of enquiry in terms of place and time. In re engaging with ‘other spaces’ in terms of context and lived realities, legal geography has the potential to contextualise law. Thus the context of a legal decision, as an epistemological device, can provide both the texture and the bridge between the (abstract) theory and the substantive result.

Legal geographies have also focused predominantly on using critical techniques and methods. Is a critical study the best method to use in such an interdisciplinary research project? I will argue in this thesis that there are a number of alternative approaches that can be explored. Therefore this thesis examines the ways in which the fusion between law and geography has evolved using tried and tested theoretical models, but also reassesses these foundations, and argues that further interdisciplinary engagement can be achieved by using an alternative method of analysis. Drawing on archival resources, it identifies the ways in which law and geography have both historically played reciprocal roles in the formation of contemporary landscapes. By examining the physical and social geography of a particular area, and analysing the layers of law which are weaved through the lives that inhabit it, an image of the landscape as a result of the imbrications of the two can be revealed. However, the question still remains within this introduction to ask *why* should legal geography be used as a basis for a research project?

### **1.7 Why use legal geography?**

What can a project that uses the conflation of law and geography offer that cannot be found within the already established disciplinary fields? Can a legal geography project provide a better analysis than one under law or geography, jurisprudence or history? A legal historical

project based purely on the chronology of the law within the study area may not account for the wider sociological and geographical consequences in space and place. Similarly, a purely geographical analysis may not recognise the important effects that law can have upon and within the landscape. Legal geography ‘is about the social-historical fusion of meanings and the material world’ (Delaney, Ford & Blomley, 2001,xx), and as such it allows for the examination of the complex layers of law and geography and the mutual constitution of social life in time, space and place. Such a project, however, must also recognise that there are conceptual issues that need to be addressed in contemporary legal geography and this thesis therefore includes the following lines of enquiry within its framework:

- Although many legal-geography publications have attempted to provide a critical assessment of the effects of law on geography, the emphasis has been on concepts of space and the use of a predominantly spatial analysis. This thesis questions the ‘unwitting reification’ of space (Valverde, 2014, 53) by investigating notions of space and place, time and temporality.
- It has also been noted that, with a few exceptions, ‘deep engagements with history or historiography are relatively infrequent in contemporary legal geography’ (Braverman *et al*, 2014, 19). Historic analysis is therefore a fundamental part of the framework for this research in order to contextualise the law and to understand its relationship with geography.
- Legal geography projects traditionally focus on human subjects. A deeper engagement with the effects of law on the geography of animals, habitats and landscapes would provide a more holistic picture of the wider environmental issues that are affected by legal intervention. This is addressed in this thesis by the examination of the fisheries on the Severn.

- Although legal geographies have had an impact globally, there have been few UK based studies. This research is based on the landscapes of the River Severn, rooting the research in England.
- By not conforming to a particular theoretical or methodological type, the thesis will contribute to the legal geography project by offering an alternative conceptual approach which can encourage future multi-disciplinary ventures.
- By presenting an alternative conceptual approach to the study of space, place and law, it is hoped that the legal geography project will be seen as more accessible to other disciplines in the wider humanities, expanding its relevance for policy, management, and regulation.

In spite of the theoretical and conceptual issues that I intend to address, legal geography *is* moving forward. It is becoming increasingly conspicuous in academic circles, publications and conferences. For a relatively new collaboration, it is becoming a recognisable platform for exploring the ways in which territories, states, boundaries, freedoms, rights, responsibilities, and the mutual constitution of social lives can be explored in innovative ways.

### **1.8 The aims and objectives of the research**

This project aims to examine the landscape by drawing upon legal and geographical techniques and concepts to investigate changes in time, space and place. It will study the effect of law on both the human and non-human inhabitants of the estuary (in the form of migratory fish species) to analyse the relationships between law and the material; between law, humans and the environment. It aims to document, and then present, a particular view of the landscape as layers of law and geography, both unique yet interdependent. This will be

examined by initially analysing the literature that exists in legal geography, critically evaluating the contemporary literature, and extracting those approaches which are particularly relevant to a socio-legal historical analysis. I will then explore alternative conceptual approaches for the study of landscapes within legal geography, and apply this approach to the historic examination of law surrounding the development of fisheries and navigation within the study area. I will address the two concepts of 'space' and 'place' and the complex dynamics between the two. Using this research, I will evaluate the ways in which law and geography are mutually constituted, proposing ways in which an alternative approach could be utilised in other projects to enable legal geography to move forward with inter disciplinary engagement. Thus the final objective is to present an innovative approach to legal geography that will reveal the multi layered legal geography lawscape as a landscape in both space and place. This conceptual approach is presented as an example of how legal geographic research has the potential to develop using a wider range of disciplinary theories, methods and techniques.

## **Chapter 2**

### **Literature Review**

#### **2.1 Introduction**

This thesis uses the discipline of ‘legal geography’ to investigate a particular geographical area, that of the River Severn. This chapter reviews and discusses the literature used in order to form the basis of the study, exploring themes, theoretical backgrounds, and contemporary analysis within legal geography and wider human geographies.

The Chapter first discusses the origins and developments of legal geography as a recognised academic endeavour, before examining jurisprudential theoretical schools of thought. It was necessary to review legal theory to establish the philosophical foundations which lay beneath the legal geographical approach considered here. The Chapter then discusses the concepts and debates within both the emerging and the more contemporary legal geography, and examines landscape geographies before outlining the theoretical direction that this study will adopt.

#### **2.2 The origins of ‘Legal Geography’**

Legal Geography is a relatively recent phenomenon, with only a few publications attempting to bridge the gap between the two disciplines prior to the 1980s. Wigmore (1929) sought to map the legal systems of the world, and later Alexander (1968) wrote on the law of the sea, seeking out the international laws that applied to the oceans. From a geographical perspective, the establishment and distribution of authority and the ‘impact the controls have on the utilization of the sea's resources’ was of particular concern (Alexander, 1968, 177). Another legal geographical study explored the criminal law in the US in relation to the geographical and spatial components of judicial problems by examining the regional social philosophy of



the time (Harries and Brunn, 1978). By ‘mapping’ the transfer of people, the authors highlighted how ideas and philosophies created place specific or ‘spatial’ rights. These early studies mapping the distribution and pattern of legal systems were a type of regional justice, a rudimentary form of legal geographical enquiry. During the 1980s the foundations for re-examining the potentials of an amalgamated law and geography were advanced by Clark (1981) in his examination of the spatial implications of legal regulation. Clark later collaborated with another geographer to produce a paper on the ways in which law and geography could combine (Blomley & Clark, 1990). The number of papers which sought to examine this proposed concept gradually increased over the next thirty years (Fig 2.1)

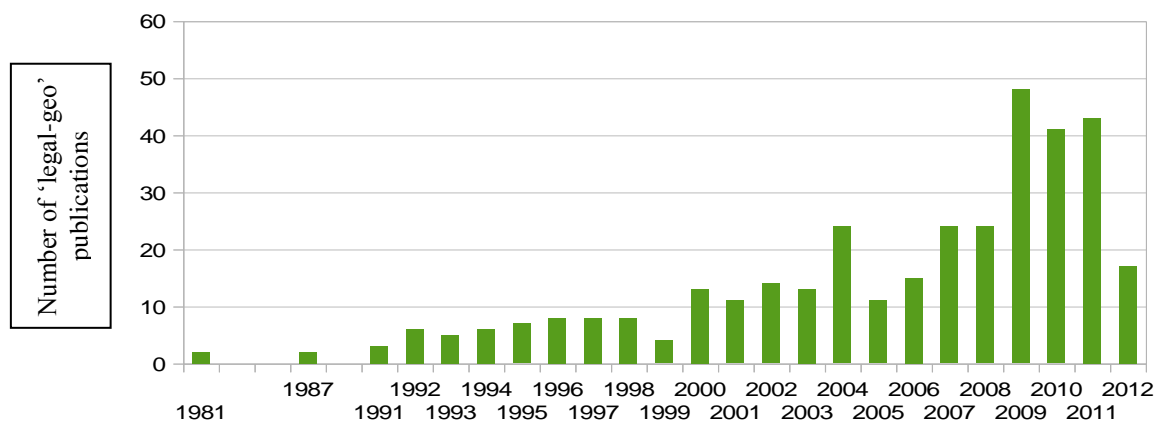


Fig 2.1 Number of legal geography type publications per year

(Data source ‘Web of Knowledge’)

The term ‘legal geography’ gained an increasing foothold in academic dialogue during the same period, with the term increasingly making appearances in publication titles and abstracts (Fig 2.2). Scholars and researchers listing it as a particular discipline remained relatively few, although it must also be borne in mind that the use of the internet for the dissemination of research was just starting to become popular during this period. Therefore the publications

recognised using a database does not necessarily cover all material and may only use selected citations. For this reason, I used two databases when researching this issue, although the results do correspond in terms of the increased visibility of legal geography academically.

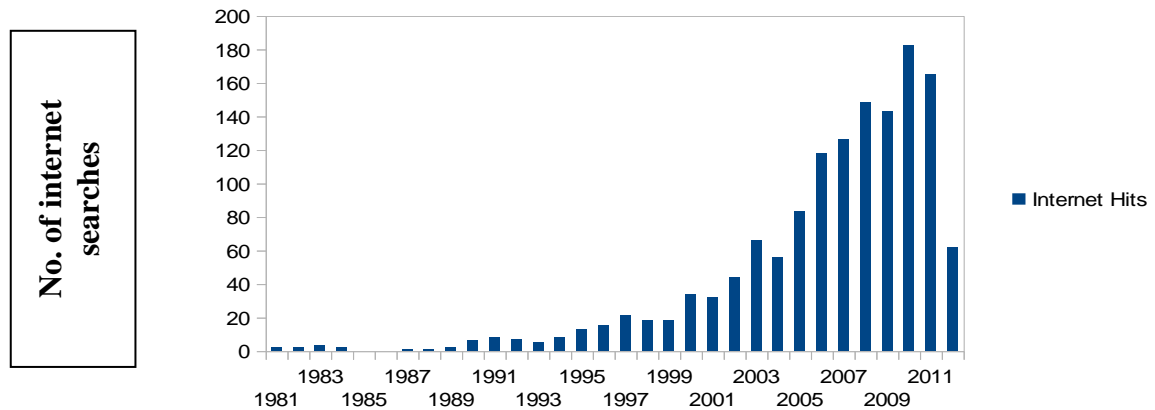


Fig 2.2 Number of internet searches using ‘legal geography’ per year  
(Data Source: ‘Google Scholar’)

Although it remains a very small academic area, legal geography now encompasses a wide range of themes and issues, from the use of the subject as part of a research project on the ethnography of settler states within the Israeli legal system (Kedar, 2003) to the use of the term in a comparative legal study examining the disintegration of Yugoslavia and the region's subsequent integration into the European Union (Trbovich, 2008). Although there are now ‘scores of articles, books, collections, special issues, workshops, conference papers, and courses’ connected with legal geographies (Braverman *et al*, 2014,1) this field remains on the periphery of the disciplines of both law *and* geography. To understand why legal geography has yet to break through into the mainstream of academic consciousness it is necessary to examine the disciplinary roots and evolution of this hybrid academic field.

### **2.3 Jurisprudence and the theoretical roots of Legal Geography**

In the area of substantial ‘black letter’ law, the practicing lawyer uses legal research skills to identify the facts and the issues at stake in order to draft an argument. Thus the job of the lawyer is problem solver, and ‘the uniqueness of the lawyer’s task lies in the use of law as a primary context and tool with which to solve the problem’ (Martin & Scherr, 2005, 384). As a lawyer, I will be making use of these skills in the practical application of sourcing, negotiating and deciphering the law regarding the River Severn, and the methods used will be discussed in the following chapter. But within legal academia there is also the study of legal systems and the analysis of law as a set of moral and cultural rules, studied as socio-legal and jurisprudence studies. The science or philosophy of law has been co-joined with other humanities subjects to create interdisciplinary schools, and it is from this platform that legal geography first emerged. As the theoretical and methodological direction of legal geography has borrowed heavily from jurisprudential perspectives, an understanding of these schools of thought was needed, therefore they form part of this literature review.

From the ancient Greeks to the seventeenth century ‘natural law’ was the only philosophy used to explain law, by taking account of the nature of humans (hence ‘natural’) and the morality of the legal system itself. Natural law declined mainly due to the rise of positivism, although the post-war period led to a revival of classical naturalist ideas. Fuller (1969) investigated the ‘internal morality of law’ and set out the minimal requirements for recognisable legal system, based on the perceived weaknesses of the Third Reich. He argued that the law establishes a baseline to inhibit ‘badness’, rather than aiming to make people ‘good’. Placing the issues of morality and ethics into a modern rights discourse, Finnis (1980) proposed that people understand their individual aspirations from an internal

perspective, from which an understanding of ‘good’ for humanity is extrapolated. From this perspective, an analysis of the obligation to obey law is understood. Others have proposed that there is broadly common ground between the natural and positivist approaches, and that there is a link between the concepts of obligation and validity (Beyleveld & Brownsword, 1986). Thus the entire enterprise of legal regulation is to deal with problem of social order through a structure of rules.

Positivism stood firmly against the natural law doctrines, denying that the criteria deriving from a moral standpoint should identify law. Classical legal positivism (Bentham, 1748-1832) was based on the idea that law is the will of the Sovereign, whether an individual or body of rule, and is the classic ‘command model’ of law. By the mid-twentieth century, Kelsen’s ‘pure theory of law’ (1960) sought to discover a logical structure underlying the objective reality of the concept of law, excluding all that was not strictly legal, including moral, ethical, sociological or political factors. Hart (1961; 1982) later used a descriptive sociology to investigate the social dimension of rules. He critiqued the classical command model, revising the positivist analysis to focus on the combination and operation of rules in a legal system, observing that ‘the most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory’ (Hart, 1961, 6).

Better known for his work in political philosophy, Raz (1986) saw that the strict positivist conception of law as rules could be combined with the recognition that morals share the same concepts. By explaining norms as rules and rights, he developed Harts’ theories to make a distinction between rules and principles, in that rules are exclusionary, specific standards,

whereas principles are abstract, broad standards which invite the use of a decision makers own judgement. Dworkin (1986) developed an alternative to legal positivism, and suggested that law should concern itself with individual rights rather than serving the community as a whole.

During the early part of the twentieth century, American Realism emerged as a revolt against formalism, and especially against British empirical positivists. For the ‘rule sceptics’ (Holmes, 1897; Llewellyn, 1931) legal rules had become reified, bearing little resemblance to the legal process. Therefore the realist should study the extra legal factors in judicial decision making, such as morality, politics and prejudice. By discovering what actually influenced Judges by analysing the non-legal factors which influenced their decisions, realists hoped to make law more predictable and thus beneficial to society as a whole. Those who doubted both the value of relying on paper rules and the adequacy of the courts as fact finding institutions were known as ‘fact sceptics. They denied the importance of doctrines of precedent or *stare decisis*<sup>1</sup> and viewing them as a weakness. Thus ‘no rule can be hermetically sealed against the intrusion of false or inaccurate testimony which the trial judge or jury may believe’ (Frank, 1930, xvii). The behavioural patterns advocated by Llewellyn (1941) were used by analysts such as Oliphant (1928) to formulate individual and institutional patterns of behaviour with some success. But as a philosophy, this type of Realism declined following WWII, when regimes such as Nazism led to a change in the intellectual climate and a reassessment of realist and progressive techniques.

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<sup>1</sup> Or ‘to stand by that which is decided’. A legal principle by which the court must uphold prior decisions if the facts of the case are similar, thus adhering to the previous ruling.

The Critical Legal Studies movement (CLS) emerged in the 1970s as a successor to American Realism. Forming part of the post-structuralist, post –modernist phenomenon, critical legal scholars contend that any other legal theory aside from their own is flawed, particularly liberal legal theory, which conceals the political structures and power conflicts within law. It rejects positivism (Kelsen, 1960; Hart, 1961) rights based theories (Finnis, 1990; Dworkin, 1986) and views the instrumentalism of Marxism as essentially structuralist. As with realism, CLS critiques formalism and formal rules, and rejects all theory and practice that depends either on autonomy, or is seen in Marxist structuralist terms as a reflection of the economy. For CLS theorists, external factors are the sole factor in a judge's decision, and the precedents chosen in common law have a political nature, as all Judges have a shared ideology which leads them to make decisions that reinforce the liberal order (Kairys, 1982). Thus CLS seeks to deconstruct law and legal language to reveal the power structures beneath. They debunk traditional methods of teaching law, which is seen as a way of disguising its political and social motives, seek to delegitimize the socio-economic system to reveal the ideological foundations of law, and to de-reify law. The legal system is flawed, benefitting only the rich and powerful. Its surface image of neutrality and fairness serves to reinforce the status quo (Unger, 1983). Thus the postmodern dialectic uses deconstructive techniques to confront rigid structures and challenge the dominant conceptions of our society (Balkin, 1987). Postmodern legal theorists proclaim the death of western 'meta-narratives' such as capitalism, liberalism, and Marxism, yet 'along with their rejection of rationality comes the rejection of the possibility of truth' (Donaldson, 1995, 336). For postmodernism to move away from deconstructionism, it must reinvent and open up new possibilities towards a reconstruction by defining the emergent paradigm (Santos, 1991; Ladeur, 1997).

There are therefore a number of different schools of thought within jurisprudence and perspectives are not confined to those mentioned, but include feminist, economic, Marxist and postcolonial approaches. Despite the wide number of perspectives in jurisprudence, many legal geographers seem to have ‘settled’ on using classical Marxist theories and Critical Legal Studies. When the development of legal geographies is traced, the dominant legal theoretical approaches that underpin them become apparent.

#### **2.4 The emergence of a ‘legal geography’**

Within geography the tendency had been ‘to impose separations on law, space and society’ (Johnston *et al*, 2009, 414) until the 1980s, when an apparent ‘spatial turn’ was made in the social sciences, prompted by critical social geography, and affecting the areas where law and geography were to engage (Von Benda-Beckmann *et al*, 2009). During the 1980s new social theories emerged. The structuration theory of Giddens (1984) used the concept of ‘locale’ to envisage space for interaction and a new realist epistemology was proposed (Sayer, 1984). Post-structural and post-modern geographical philosophies began to undertake spatial analysis (Soja, 1989). With this development emerged radical theories based on structural Marxism (Duncan & Ley, 1982) and when Clark (1981) made tentative steps towards a legal geography he adopted a broadly Marxist perspective. Examining the US government policy impact on spatial systems, he argued that the centralisation of the US administration had negated spatial diversity by focusing on laws as sets of rules and standards. To do this, he proposes that constitution amendments on individual freedom have been used by the judiciary as a ‘tool of national economic development and spatial integration’ (Clark, 1981, 1217), sanctioned by local governments who have no inherent legal authority. Essentially, he proposes that spatial outcomes can be ‘administratively and politically manipulated and can be made more or less

homogeneous according to the political structure' (Clark, 1981, 1225), and thus space as a 'social and political concept' had been made virtually irrelevant and needed to be addressed. This Marxian emphasis on economy and class instrumentalism imposes a limited perspective, and in turn an unsatisfactory investigation of law and its role within geographical space, other than remarking that space is used a political tool.

In a later paper, Clark (2001) discussed the issues of moral argument and the ethics of law using the example of a particular case in the USA which raised questions of whether national, state or local government policy should play a role in the urban race relations. Using a critical legal perspective, he asserts that judicial opinions are just narrative texts that aim to justify opposing argument. By examining the law as an institution, he proposes that the system of judicial decision making normalises itself in by idealising the law in three ways; by idealising the law as an institution, the nature of legal reasoning as a form of discourse, and the narrative image that the law conveys (Clark, 2001, 108). He submits that this idealisation of law is political, and parallel to legislation. US citizens are apparently obsessed by law, and so via natural rights theory, or social idealism, law has real meaning for both economic and social relationships in the states. He proposes that the history of the US has been the history of Court decisions, but it seems that the only difference between this and other legal systems (in the UK at least) is that the reference point is the Constitution. Clark also asserts that theories that justify the courts actions are always matched by the practice of doing so, which serves to mask the 'inconsistencies' in decision making of mistakes, analytical abstraction, incoherence and lack of logic( Clark, 2001, 110). However, it is unclear as to whether he is seeking a new theory, or just asserting his rejection of alternative theories. Clark's understanding of the law has remained firmly rooted in the critical Marxist agenda, but has taken on a CLS



deconstructionist angle. It is this agenda, adhered to by a number of geographers (Harvey, 1996) which has a number of disadvantages when considering legal geography.

Legal geography as an emerging field of academic theory was advanced by a collaboration between Blomley and Clark (1990) who presented a variety of topics hoping to encourage others to tackle related issues. Their goal was to understand the ‘imbrication’ (or the overlapping of) law and geography in social and political life. At this time, they were unsure as to how the intersection between law and geography should be studied as a theoretical problem, but were adamant that any research in law and geography had to move away from the ‘rather narrow ‘impact analysis’ nature of the debate’ that they saw as predominant among geographical analyses of law (Blomley & Clark, 1990, 435). To Blomley and Clark, the application of such social-science methods had limitations when used in potential legal geography enquiries. Foundationalism’s claim for underlying structure, functionalism’s emphasis on the role of law in sustaining power, and the limits of reductionism all belittled the status of law by ‘explaining’ it with other processes. They instead made clear that ‘to say that law *has* geography and that geography is *shaped* by law, is not to say that law *is* geography’ (Blomley & Clark, 1990, 436). Although this statement may well be true, to ignore the other perspectives as possibilities for examining the ‘imbrication’ of law and society may have been rather rash when embarking on such a new venture.

Blomley and Clark presented guiding principles in their quest for a legal geography. One was the ‘location’ of law in an evolving and contested world which is open to possibility, itself the product of contested and constructed interpretations. By using critical theory, judicial decisions can be seen as open to deconstruction. This guiding principle again returns to my

previous question about context, and in fact, the issue that is rarely raised in critical legal geography of the process of law. Most legal geography enquiries focus on the legal rule itself and its application as opposed to its formation. The question then becomes *why* such a rule is made, another question frequently disregarded in legal geography. This element of legal application may actually provide the answers to the questions sought and deserve exploration. In order to examine the application of law, the context in which it is applied and its consequences also need evaluating. Both authors stated that their own approach to the creation of a legal geography was to take the hermeneutic or interpretive approach, although initial studies were aligned with contemporary social theory and the critical legal studies movement. Their view of legal discourse was that it was ‘predicated upon principles of abstraction. Law in that sense constitutes a denial of geography (and history, anthropology, and so on)’ (Blomley & Clark, 1990, 439). Are the authors suggesting that law itself is made with no thought to the geographical nature of its application, or to the social or historical context in to which it is placed? This is an assumption that I wish to challenge; space is fundamental to many areas of law, most notably within property and land issues. As the authors also suggest that legal geography should be guided by theory and shared assumptions about the nature of society, then the root of the analysis should be first to identify the theory and assumptions. Yet by sticking rigidly to a Marxist analysis, the assumptions will always be biased.

## **2.5 The ‘spatial turn’ and legal geography**

Legal geography continued to use a critical analysis when spatial concepts began to explore the interrelations between social relations and the structuring of space. Blomley’s next collaboration addressed space and law, arguing that the relationship between the two had been

‘largely underplayed and confused’ (Blomley & Bakan, 1992, 662). Viewing legal mentality as acontextual, with little or no understanding of the local or geographic space in which it is understood, the authors identified an overuse of meta-history in critical legal analysis, which had led to a more ‘historical epistemology’ (Blomley & Bakan, 1992, 665). Using examples of the application of federal and state law within worker safety cases in the US and Canada, they demonstrated how legal spaces are constructed and reified, and proposed that both law and geography could add to one another by critically analysing the social and political nature of space itself. Yet whilst promoting interdisciplinary work between the two critical schools, the authors state that the ‘two disciplines do not simply collapse into one’ (Blomley & Bakan, 1992, 687). Rather, they promote critical analysis from each perspective in order that each can inform the other. I would argue instead that contemporary ‘legal geography’ has become a singular theoretical perspective, where geography takes the lead and supports its position by using selected legal theories (essentially critical legal studies) with the focus on public law and jurisdiction. It highlights the difficulties with a state and federal system of administration, but different legal systems may offer an alternative prognosis. By examining the UK legal system, alternative proposals can be made regarding the legal and social spaces in a particular area. It is also interesting to note that although Blomley and others have rejected regional geography, they have continually offered theories on the application of law based on particular systems, spaces and places. A study of the application of law within ‘imaginary’ and imagined boundaries poses a rather difficult problem, not least the aspects of regulation, implementation, and alternate discourse. Although law may be guilty of socially constructing (and deconstructing) space and place, law is itself placed within a number of power relations. Law may be guilty of taking a historical view, but I would disagree that it is acontextual. The example used of health and safety law, however poorly regulated, is in itself the product of

historical struggle and social change in a particular geographical place. The analysis of law, of its origins and application, resistance and acceptance, would give a more comprehensive analysis of a particular law at a particular time.

Blomley (1998) later amends his historical argument when examining the construction of spaces through the concept of property, and proposes that socio-legal scholars need to think about both the histories of property *and* of their geographies. Whilst accepting that there are contesting narratives concerning property, he views these narratives as ‘partial’, with the effect of the centrality of the historical imagination in much socio-legal theory making a geographically informed analysis difficult. In his study of a traditionally working class area of downtown Vancouver, he aims to illustrate how the landscape was not just buildings, but representations. He discusses the attempts by developers to move in and gentrify the area and the opposition from the community against the changes, based on past histories of that particular place. Although an informative narrative on the understanding of property as a site of struggle, there is little to link the issues with the application of the law. Blomley later expanded on his ideas of space and property as performance and isolated the geographical concepts of frontier (figurative, temporal and spatial), survey (early maps and colonial land surveys) and grid (as a form of disciplinary power) to investigate the ‘violence’ that property making processes can invoke, and where ‘space gets produced, invoked, pulverized, marked, and differentiated through practical and discursive forms of legal violence’ (Blomley, 2003, 135). When addressing the issue of natural and evolving boundaries caused by the Missouri River, he reiterates his ideas on property, but also notes that ‘property cannot be reduced to a set of detached ideas or representations, but must be recognized as also entailing a set of enactments, objects, networks, and actions’ (Blomley, 2008, 1839). Thus, land in dispute ‘can

be thought of as having a legal biography, traceable through alienations and transfers and dispossessions...have to be produced through forms of legal practice by which they are inscribed, stabilized, and appraised' (Blomley, 2008, 1839).

Delaney (2001) suggests that there are two notions of justice when considering the role of law in the shaping of local geographies. First, that where there is a legal remedy there is a right; second, that the nature of the violation determines the scope of the remedy (i.e. the violator must remedy the wrong, or restore the right.) He examines how this concept of justice was deployed in political disputes in the 1970s in the US and how in turn it shaped local boundaries in school desegregation cases. The US cases concerned claims against the state for the violation of the Fourteenth Amendment (the constitutional rights of citizens) by the continued use of segregated school systems. This led to intentional spatial restructuring, by redrawing zones and implementing 'nearest school-to-residence' policies. A remedy was needed, but arguments arose over the remedial plan boundaries and whether or not they were also a violation of the rights of residents. Were the boundaries the definition of legal boundary, or just lines on a map? Delaney discusses jurisdictional boundaries using the legal phrase 'intentionality', based on the issue of whether generalised segregation in Detroit was historically unintentional; if the historical patterns *were* intentional, judicial intervention was justified in the reconfiguration of boundaries. Although Delaney maintains that questions of power and spatiality are inseparable, he argues that, as opposed to Blomley's notion rather than legal practice producing spaces, the organisation of space itself is *translated* into disputes surrounding legal meaning. Delaney does not offer a new concept of the operation of the law, but does make the obvious link between geography and law in terms of space as a historically created social concept.

Goldberg (2001) also examined the discursive production and ordering of racialised spaces, arguing that 'when the law in its application and interpretation invoked history the reading is likely to be very partial' yet also as an anonymous agency, it is able to hide in the agents that it commands (Goldberg, 2001, 85). The political legal nature of race in the USA has also been examined by Oh (2004) and Ford (2001a) and these examples draw attention to the fact that many early attempts to establish a legal geography were based on studies in the US and North America as an attempt to bridge a gap between urban planning and geography by challenging the law in a social, regional and political context. Their structuralist Marxist influences laid the foundation for further legal geographies.

The spatial analysis approach itself soon began to gather momentum within legal geographical research. An early examination of the use of geographical spatial analysis in legal studies proposed that legal sociology could offer some assistance with the analysis of use of 'social' space (Economides *et al*, 1986). The study investigated how the 'application of ideas about law and justice have begun to wean geographers away from their traditional, positivist, models of human behaviour' (Economides *et al*, 1986, 162). Pointing out that legal concepts have spatial rules in terms of boundaries seems obvious to the lawyer; space is fundamental to law in this respect, so much so that perhaps the reason for the lack of spatial analysis in jurisprudence (as opposed to socio-legal studies) is that it is so glaringly obvious as to be unworthy of attention. Explicit examples exist in property disputes (Blomley, 1998) but space is an issue even in criminal law, and offences against the person- the violation of the personal space. Although Economides *et al* (1986) recognised the work of geographers in the recognition of spatial justice, here they argue for a human geography of law which takes into account the physical distribution of law and legal services. The fact that this paper recognises the spatiality of law as late as 1986 confirms that the differences between the two academic

disciplines were marked until fairly recently, and although spatial justice concepts have been explored further on the socio-legal and human geography boundaries, these concepts differ from the path that a separate legal geography has taken.

Verchick (1999) suggested that when legal scholars began to explore the geographic notion of space in the mid 1990s, new questions arose for environmental lawyers 'struggling to fit ecological rules into geographic boundaries : Is there any *here* here?' (Verchick, 1999, 741). He recognised that three core categories arose from using a critical methodology; indeterminacy, or legal rules as ambiguous; ideology in terms of influencing outcomes; and alienation of the citizen. He instead proposed a 'critical space theory' to evaluate the strengths and weaknesses that existed in both US and EU policy surrounding transboundary waste disposal. Rather than elaborating on the spaces created by law and geography, this paper is more of a comparative legal study rather than a legal geography. Such work does demonstrate the usefulness of historical investigation into a chain of events at a particular time, both in terms of the legal and the social, and these processes could be utilised to offer a better understanding of the boundaries between law and geography.

Anti-vagrancy legislation in the US has been analysed as a legal geographical issue in terms of public and private space. Mitchell (2001) took an economic analysis, identifying the underlying intention of law as the control of behaviour both in and on space, which ultimately criminalises homelessness. These laws 'reflect a changing conception of citizenship...which now seeks to re-establish exclusionary citizenship as just and good' (Mitchell, 2001, 15). Proposing that such laws are more about crime invention than crime prevention, his reasoning revolves around the economies of a global market, and the need to create a seemingly stable

and ordered urban landscape as a positive inducement to continued investment in cities in a competitive capitalist society. For Mitchell, this is 'fundamental geography', where a local prohibition against certain actions becomes total prohibition for those affected (i.e. the homeless) who do not have the luxury of public and private spaces. Although I cannot disagree with Mitchell's uneasiness about this issue, I find it rather vague in terms of legal analysis. Further research would no doubt turn up historical law and policy based around the same issues of 'public' and 'private' spaces, and in fact Ellickson (2001) does briefly refer to this in a paper in the same volume. His essay concentrates more on the issue of nuisance, but does address the application of the law by Judges, advising a pluralistic legal approach towards reconciliation, individual rights and community values to address the issue of social space.

Legal geography, perhaps logically, has also concerned itself with territories and boundaries. Ford (2001) examines the history of jurisdiction, and notes that legal authority was traditionally based on status relationships, an identity that was inherent, if not chosen. In contrast, with the development of cartography came territorial jurisdictions, relatively new areas which produced political and social identities for the people that occupied them. Territorial jurisdiction therefore separates types (some chosen, some not) but the jurisdictional market always 'bundles' these types into forms of jurisdictional identity. To understand jurisdiction, it must not be seen as structure but as discourse; it combines the material with the discursive, and the two cannot be separated. Hence, territorial jurisdictions are a set of social practices, a code of etiquette, and representations of approved behaviour as well as the behaviour itself, made real by enforcement. Thus 'lines on a map may anticipate a jurisdiction, but a jurisdiction itself consists of the practices that make the abstract space depicted on a map significant' (Ford, 2001, 202). He elaborates by examining how



jurisdiction constructs legal status and identity, whilst at the same time remembering that jurisdiction itself is the product of social practices which become enforced by custom and law. In this way, Ford has deconstructed the mainstream theories that jurisdictions are enforced in an artificial way, and instead recognises that they themselves are born of social discourse. Ford discusses the ways in which jurisdictional presence is more than physical, by using examples of residence, such as home ownership and state jurisdiction. Territorial identification provides no guarantee of autonomy; in fact, it can facilitate stereotyping by forcing marginal sub groups in to a limited number of areas, creating a fragmented social landscape. Jurisdictional boundaries therefore shape the social and political world, and ‘a failure to study the politics and legalities of space is a failure to map laws territory.’ (Ford, 2001, 216). Fords study does not concentrate on one particular state or area, and so makes a more coherent argument for a whole and inclusive analysis. It also uses a historic overview- the evolution of a particular territory based on its conception as either organic or synthetic has a bearing on the resulting landscape.

More recently, alternative concepts of the spatial element within law, geography and the social sciences in general have begun to emerge. Spatial Justice as a concept analyses social inequality through the medium of interactions in space, a geographically informed field which has accounted for space as playing a major role in the equitable distribution of resources, services and access. When Harvey (1996) examined justice and nature, he was explicit in his enquiry into the foundational principles ‘for an adequate historical geographical materialism in the Marxist tradition’ (Harvey, 1996, 6). In doing so, he hoped to show how the historical materialist enquiry could integrate themes of space, place and nature. Harvey is committed to examining the dialectics of discourse, and to space, place and time as socially constructed

concepts within the whole social process. His chapters on the dialectics of environmental change are useful (although not unique) in the examination of the 'green' movement, and can be used to investigate changes to particular landscapes as a result of these dialogues. A different approach to landscape could offer an alternative conclusion to the Marxist reasoning offered here.

Philippopoulos-Mihalopoulos (2010) states that 'spatial justice is the most promising platform on which to redefine, not only the connection between law and geography, but more importantly, the conceptual foundations of both law and space' although he notes that at present the topic remains just a 'geographically informed version of social justice' (Philippopoulos-Mihalopoulos, 2010, 1). He also poses an interesting question; 'What happens *if* spatial justice is "attained"?'. His answer is that 'space becomes geography, justice becomes the law, and nothing transcends the boundaries anymore' (Philippopoulos-Mihalopoulos, 2011, 202). Discussions regarding spatial justice however move beyond the parameters of the type of investigation that I wish to conduct. Critical spatial geographical perspectives of justice and injustice can be seen as an advancement of social justice, seeking fairness, equality and mutual obligation within society regardless of geographic location. Although having many aspects of legal geography within it, spatial justice can be seen as a field of research which concentrates on the distribution and delivery of justice, most recently in highly meritable work in environmental law (Philippopoulos-Mihalopoulos, 2007) and urban geography (Soja, 2010), as opposed to exploring the relationship between law and geography at a more fundamental level.

Philippopoulos-Mihalopoulos's (2010) call for engagement with the more abstract perspective of space and law has to some extent been addressed by Delaney's (2010) theories of the 'nomoscape' which brings law and geography together in both a holistic and comprehensive manner. This recent contribution to the spatial discussion is presented as a new theoretical model which recognises the current impasse within the critical legal geography sphere. Delaney (2010) believes that this is due to the conventional ways in which spatiality, legality and their interrelationship has been so far investigated. To counter this, he proposes, in fact, *promises* to offer an approach that dissolves the formulation of the very term 'legal geography' by developing unconventional interpretive resources (Delaney, 2010, 8). In his use of the 'nomospheric' ('nomos' being the concept of law or convention in Greek philosophy) he is referring to imaginaries, practices and projects which occur within the 'nomosphere', the sense of 'being' in the world. By using the nomosphere as a concept, he shifts the focus from 'space' to 'place' where nomospheric processes occur in places, segments of the world. Although quite a complicated approach to consider, Delaney makes an interesting proposition. In using the model of 'situation' to initiate a nomospheric investigation, Delaney's approach recognises the importance of the lived experience, allowing for a 'finer appreciation of how legalities and spatialities *happen*' (Delaney, 2010, 36). Situations are seen not just as a set of circumstances, but as social entities with spatial and temporal horizons; we, as individuals, are never *not* in a situation which is socially constituted. Situations are always conditioned by a nomospheric fracture which imposes our orientation of the world upon us (i.e. whether we are in public or private) although we may not always be aware of it; the nomospheric constitution is taken for granted and seen as 'everyday life', thus law is everywhere. Previously, he contends, where socio-legal and social theory scholars have examined legal consciousness and 'everyday life', they have tended to

homogenise it, marginalising its variety, and at the same time neglecting ‘the role of *power* in the production and maintenance in everydayness’ (Delaney, 2010, 47). Nomic ‘settings’ include home, work, and the issue of public space. Delaney has concerns over the complexity of the ‘public’, and the use of the dichotomy of the public / private and related unions often obscure the diverse array of meanings that lay beneath the surface. The assemblage of nomic settings creates a ‘nomoscape’ which can be used to identify further possible lines of investigation. Delaney examines the technique of lawyers in particular cases, proposing that the pragmatics of world making can be analysed in terms of the spatial strategies of lawyers (or ‘nomospheric technicians’) and their role in legal procedure, which is placed in the everyday world (Delaney, 2010, 161). This approach, using particular case, arguments and legislation, is certainly a comprehensive and well thought out concept. I am interested in Delaney’s conceptual approach to legal geography, particularly his ideas surrounding place based settings and situations, legal consciousness and the imagination. However, rather than undertake a truly ‘nomospheric investigation’ this thesis seeks to explore further alternatives to the conceptual approaches in legal geography.

Recent collaborative work on legal geographies has seen the publication of ‘The Expanding Spaces of Law’ (Braverman *et al*, 2014) which ‘urges interested scholars to move legal geography beyond the disciplinary boundaries into the horizons of a post-legal geography’ (Braverman *et al*, 2014, 2). By this, the authors mean that scholars should expand their investigations into power, space, law and time by drawing on nascent theoretical resources and paying attention to the core categories and definitions of both law and space. I would agree that this need to be attended to, and within this both this thesis and literature review I

have examined the theoretical roots and predominant perspectives that have emerged with the legal geography field.

Discussions surrounding space have become the accepted maxim in contemporary legal geographies, and the examples given here have offered a number of perspectives regarding the use of law to control space. Legal geography as a discipline has developed predominantly using spatial analysis methods derived from human geography perspectives in social theory. The literature on legal geographies has predominantly developed outside the UK, particularly in North America, with issues remaining situated within the 'usual ambit of the largely urban' (Braverman *et al*, 2014, 9). Studies within the UK are still rare (Darian-Smith, 2001; Griffith & Kandel, 2009). This further complicates the 'legal' in legal geography, as different legal systems have different histories, hierarchies, rules and interpretations. The English Legal System has a longer history, and is organised through different institutions to, for example, US State law. I wanted to address this deficit by investigating a legal geography within the UK focusing on English Law.

Legal geography has also been driven by those academics who contend that the issue of space has been largely ignored by legal theorists (Blomley & Bakan, 1992), informed by research in Urban Geography on property development (Blomley, 1998; Mitchell, 2001). Although it has been acknowledged that law itself has a 'fear' of space, which results in law moving away from, rather than within, spatiality, it also results in the majority of the legal geography literature concerns itself with the connection between space and law, circumventing questions about notions of 'place'. As space and place are the material frames

of daily life, they should be viewed not as separate elements but in relation to each other in terms of process (Harvey, 1996).

The neglect of place and an obeisance to space may be due to the way in which legal geography has developed. Legal geographers have tended towards the critical perspective, a method of territorial imagination which has overlooked a more relational reading of place to conform to jurisdictional political spaces (Amin, 2004). The prominent antithetical and Marxist theories have also devalued place based study (Agnew, 1989, 10). Although places are acknowledged within legal geographies (Benda-Beckman & Benda-Beckman, 2014) as relative in time, they are still subsumed within the wider spatial ambit. It has also been proposed that maybe the fact that struggles over property ‘occur in particular places seems obvious and, perhaps, rather uninteresting’ and therefore ‘like landscape, place seems to connote inertia, closure, and passivity rather than politics and relationality’ (Blomley, 1998, 581). As both landscape and place are ‘two perspectives on the becoming of social spaces’(Trudeau, 2006,437) they are perhaps worthy of further attention, as landscapes have also been sidelined for a spatial analysis in legal geography. This ‘melting of landscape into cybertextual space’ (Olwig,1996, 630) by present day geographers may have been in part due in part to Hartshorne’s (1958) dismissal of landscape as the central organizing concept of geography in the 1950s. In fact, Olwig argues that landscape is not merely a way of seeing, but ‘a far broader cultural gesture’ with a core theme in his work being ‘the recurrence of tensions between what perhaps might be called spatial and ‘patial’ concepts and practices of landscape’ (Mels,2005,322). As place and landscape can be seen as inextricably linked, it was to a review of landscape geographies to relocate place that my literature search turned.

## **2.6 Place, Space, cultural landscapes and ‘new’ lawscapes**

### *2.6.1 Landscape geography*

I wanted to research legal geographies that were concerned with ‘landscapes’ as these seemed to have a more place based setting than those using spatial notions. Blomley suggested that the concept of landscape would be a useful for investigating the ‘simultaneous importance of the material and the discursive in the geographies of property’ (Blomley, 1998, 574) in terms of the ways in which landscapes are visualised, presented, represented and are ‘mutually constituted *through* social struggle’ (Blomley, 1998, 580). A reading of landscape geographies therefore allowed also led me to examine regional, historical and cultural geographies. Landscape ‘is never simply a natural space, a feature of the natural environment’ but a ‘place where we establish our own human organization of space and time’ (Jackson, 1984, 156). I wanted to use this perspective to examine law within and upon the landscape, and began to research the ways in which geography had approached the issue prior to legal geographies inception. Traditionally, the subject of geography was concerned with regional studies, based on expeditions and the mapping of areas. Ellen Semple’s (1911) work at the beginning of the twentieth century was both historic and anthropocentric, based on the idea that manmade institutions can effect the landscape yet the environment also influenced human behaviour, she also noted ‘how geography influenced human history’ (Braden, 1992, 240). In Braden’s revisiting of Semple’s work, using structuration theory as a basis for a ‘new’ regional geography, she notes that Semple’s regions ‘are animated: they are becoming places, not merely still photographs’ (Braden, 1992, 242). Yet not all geographers at the time were convinced by Semple’s work. Sauer (1925) argued that by examining the ways in which humans have both manipulated, and been manipulated by, the physical landscape it can acquire many layers of meaning. ‘Morphology of Landscape’ (Sauer, 1925), although written

in part as a result of Sauer's dissatisfaction with the environmental determinism of Semple (Schein, 2004), began a renewed engagement with the interpretation of landscape. With ideas taken from literary theory, anthropology, critical theories and radical human geographies, the field known as cultural geographies emerged.

Sauer's introduction of landscape studies into American cultural geography may have led directly to Whittlesey's (1929) coining of the term 'sequent occupance' to examine instances where human occupation has utilised the natural environment. The term was used to describe the process by which a landscape is transformed and modified by a succession of populations. Whittlesey believed that within geography, spatial concepts remained purely descriptive, and that to progress they must be treated dynamically. To illustrate, he refers to a fifteen square mile area in New England, describing the landscape, soil type and weather. Yet descriptions like this were inadequate; a description placed in terms of historical sequences, however, brings depth to the analysis, as each generation of human occupation can be seen as linked, thus creating a 'true' perspective. Whittlesey argues for a deeper chorology, away from the purely descriptive, towards a concept which takes into account natural and environmental changes, shifts in political boundaries, enactment of laws, movements of population, technological changes, all of which are 'capable of breaking or knotting the thread of sequent occupance' (Whittlesey, 1929, 165).

Whittlesey went on to stress the importance of politics in sequent occupance, writing that 'political activities leave their impress upon the landscape, just as economic pursuits do' (Whittlesey, 1935, 85). In addition, law is a key component in politics for Whittlesey, affecting the use of land and natural resources in a number of ways, as 'every considerable



social revolution produces its crop of laws affecting land holdings' (Whittlesey, 1935, 96). He suggested that effective central security is both a central function and a *product* of the sovereign or nation state, as when a population feels safe from invasion, settlements may spread out as trade is stimulated, and demanding more land for manufacturing, transport networks and residence. Where boundary lines are drawn up and maintained by authority, 'boundary displacements may be followed by political acts which directly or indirectly modify the landscape' (Whittlesey, 1935, 89). These boundary changes not only affect physical routes and communications, but also the collection of taxes, wealth distribution and institutional practices across the territory. It is these examples of the 'cultural impress' of central authority upon the landscape which Whittlesey believed had been overlooked within geography, particularly in a regional setting.

Olwig (1996) prefers to pursue a more substantive understanding of landscape, one which recognises the 'historical and contemporary importance of community, culture, law and custom in shaping human geographical existence-in both idea and practice' (Olwig, 1996, 645). Within such an approach, elements of Whittlesey's notion of sequent occupance are echoed, whereby examining the cultural impress made by law over time, a complete picture of the resulting terrain can be better understood. In a later paper, Olwig notes that the increasing interest in landscape and law has seen the emphasis shifting 'from a definition of landscape as scenery to a notion of landscape as polity and place' (Olwig, 2005, 293). This theme is taken up by Trudeau (2006) to discuss the ways in which landscapes can be constructed by the discourses and practices that 'establish and maintain discursive and material boundaries that correspond to the imagined geographies of a polity and to the spaces that normatively embody the polity' (Trudeau, 2006, 421). Using a case study of a slaughterhouse in Minnesota, he

explores what he terms the ‘territorialized politics of belonging’ and the boundaries that they create which in turn structure the social relationships that occur within specific landscapes. This is similar to Howe’s (2008) analysis of the law relating to the state-church wars in the USA using the presence of religious symbols and Decalogue’s on public land. The religious symbol or icon in a public place is a performative medium, producing new legal meaning, and turning ‘place’ itself into a moral actor. For Howe, geographers have underestimated the challenge of interpreting the nature of ‘national memory’ (collective memory, cultural identification and adhesion) in landscapes. As an example, he notes that how and where the American flag is displayed can reflect social boundaries defining the ‘insiders’ and ‘outsiders’ of a place or area. Using a number of legal cases to explore the cultural significance of objects, he asserts that in legal theory, laws consist of myths that provide normative action. Therefore religious freedom itself is an assortment of narratives and images; it is a tool that allows the actors to control space. This is an interesting perspective and is one which again examines the regional in terms of historical occupation, and in particular here, a type of ‘religious sequent occupance’. Expanding on the use of memory and landscapes, Hill (2013) suggests that utilising memory narratives could provide the antidote to histories that suggest linear development. By using a non-representational, or a ‘more-than- representational’ style, the author aims to invoke *multiple* meanings and representations ‘ so that it is possible for the reader to detect alternative potentialities and narrative trajectories, times and places, presences and absences’ (Hill, 2013,393). Such an interpretation of landscapes within narratives is an angle which I want to explore by using both legal and non-legal documentation throughout this thesis, and has the potential to offer an alternative reading of historical text.

The idea of law as hidden in natural landscapes is explored by Braverman (2011), examining tree landscapes in Israel/ Palestine and legal geography from a visual perspective. The adaptation of landscape for human consumption is an issue which particularly interests me, and in legal geographical terms, the ways in which these modifications can be endorsed by law. It is also interesting to see how manmade changes to the landscape can also become embedded in the social consciousness, and become worth preserving at a later time. This issue is addressed by Delaney (2001a) who takes a tentative step towards an analysis of nature in legal geography by proposing that law is a site of production when viewed as a cultural domain. Using case law on a range of 'natural' resources or issues, he argues that by paying more attention to the role that law, as involving 'elements of discourse, institutionalised disputation, power and consciousness' (Delaney, 2001a, 500) would reveal the enforcement, or reinforcement, of dominant visions of the natural world, particularly relevant to analysis of laws which pertain to non-human 'subjects'. By presenting law as a set of prevailing discourses, Martin and Scherr (2005) recognised that lawyers themselves are 'the medium through which that discourse becomes prevalent in landscape' (Martin & Scherr, 2005, 383). By implementing the rules of law through practical decision making, 'lawyer's actions constitute and simultaneously are constituted by particular landscapes' (Martin & Scherr, 2005, 379). Again, it is this idea regarding the mutual constitution of law and landscape which is one that should be of core concern to legal geography. Landscape geographies can inform legal geography by highlighting the natural features within an area that have relevance in terms of custom, discourse and culture. Geographies which emphasise the importance of local practice or of the ways in which natural features, such as rivers 'create hybrid timescapes with nonhuman rhythms folding into social rhythms of economy and culture' (Jones, 2011, 2292) can inform the ways in which landscapes are perceived. Thus 'thinking of landscapes as

opportunities for action requires viewing such scenes as forms of activity, not as passive receptacles for human behaviour (Martin & Scherr, 2005, 382) where law as a form of activity is embedded in space and place.

An alternative perspective of the historic notion of picturesque landscapes was explored by Ryan (2001) who identified the alteration of various topographies by the landed aristocracy in England both during the enclosures and by the appropriation of land by European settlers in the new colonies. He examines the relationship between society and nature, remarking that the tendency was to alter it if it was to be found 'lacking', a relationship similar to 'the relationship of a consumer to consumable' (Ryan, 2001, 143). Using the metaphor of the 'commanding eye' of the beholder, Ryan concludes that the picturesque has been a controlling discourse, used by a certain section of society as justification for its transposition both in England and abroad. However, Schein (1997) rejects the commanding or 'beholding eye' of the observer theory regarding landscape, suggesting that the cultural landscape can capture 'different, even competing, sets of meaning, or independent, thematic networks of knowledge—networks presenting the landscape as nature, habitat, or history—and that these really *are* inherent in each cultural landscape' (Schein, 1997, 663). Thus particular landscapes can host any number of relatively independent discourses, and it is these discourses within which all practises are negotiated and played out. By viewing the cultural landscape as 'discourse materialized' Schein uses the example of urban property in the US where he identifies those discourses intersecting the landscape. In this case, it was the discourses of architecture, insurance mapping, zoning and historic preservation, which can be rather neatly directed towards legal texts and the use of property within legal geography as a cultural

discursive landscape. Thus the 'the cultural landscape can be envisioned as an articulated moment in networks that stretch across space' (Schein, 1997, 662).

The ways in which cultures 'perform' a sense of identity can be compared with Ingold's perspectives, which urge scholars to focus on the ways that 'landscape is constituted as an enduring record of - and testimony to - the lives and works of past generations who have dwelt within it, and in so doing, have left there something of themselves' (Ingold, 1993, 152). Such a perspective accounts for the temporality of the landscape by adopting the 'dwelling perspective' similar to the 'impress' in Whittlesey's sequent occupance approach. He also notes that landscape is not land, nor nature, nor is it space, as 'with space, meanings are attached to the world, with the landscape they are gathered from it' (Ingold, 1993, 155). He enhances the explanation of a chronological or historical sequence of events as provided by Whittlesey by referring instead to temporality. Instead of a series of events which can be systematically dated in relation to their occurrence, 'temporality and historicity are not opposed but rather merge in the experience of those who, in their activities, carry forward the process of social life' (Ingold, 1993, 157) and the activities which occur make up what Ingold terms the 'taskscape'. Thus the taskscape is the socially constructed space of human activity, an ongoing process of interaction between people, animals and objects and their surroundings, all of which is a perpetual process, a living story.

One such example of a 'taskscape' can be seen with customs regarding property and law. In researching foxhunting 'landscapes', Acton (2013) calls for 'a greater insight into the diversity of local, indigenous, custom-based spatialities, particularly those existing in taken-for-granted, yet relatively unexplored cultures on our own doorstep' (Acton, 2013, 2). By investigating claims to land which are generated through customary practice rather than by

statutory means, the study is able to examine the ‘embodied relationship with the land that exists in customary practice’ (Acton, 2013, 6). This analysis of custom is one which must be considered when interpreting changing landscapes through a historical lens, as much statutory law derives from local and customary rules and practices. Law can be seen as shaping landscapes, yet landscape as a concept within geographical analyses has both a contested nature and mutual constitution with culture.

When analysing material notions of property as tangible assets and the legal practices which structure spaces, Blomley (1998) admits that the histories and geographies of property ‘seem commingled’ (Blomley, 1998, 571), and attempts to employ a strategy that both attends to the historic narratives and geographical claims simultaneously by using the ‘landscape’ concept. He takes a similar framework to that used by Schein (above) although rather than referring to the cultural landscape prefers to see landscape as both materially produced space *and* as representation of a space (or ‘oppositional landscapes’) thus retaining the spatial element. Conceding that struggles over the meanings and use of property are caught up in a particular *place*, where ‘struggles over landscape are both material and representational’ (Blomley, 1998, 580) this reference to landscapes proposes that landscape is property and property is landscape, rather than a new analytical approach.

As an expansion of the idea of property and place, Sax (2001) recognises that legal geographies focus on property, ownership and legal spaces. Using a US case regarding development, habitat conservation and compensation rights as an example, Sax states that the Court, being committed to conservatism, wanted to affirm the importance of property, but could not find a way to control regulatory excess without threatening the state apparatus. As if

to appeal to both land owner and state, they agreed that when a landowner was deprived of 100% of the value of his property, then compensation was required unless the proposed development would have violated existing property and nuisance law. In this way, the decision used nuisance law (a slippery concept in itself) to emphasise the difference between regulation to maintain land, and regulation which embraces the powers of the police. The case, although recognising the emerging views of the land as part of a wider ecosystem, limited the legal foundation for such a concept. Proposing an alternative view of the legal perception of property and associated rights under an 'Economy of Nature' perspective, Sax asks if environmental regulations that require the maintenance of land are significantly different from traditional regulations. He outlines the two concepts of property; the traditional or transformative view (land as an inert space until it is put to (human) use); and habitats, seen as expendable, but valuable once commoditised. Using an ecological view (the 'economy of nature') land is not a passive entity, but has a value of its own, without being defined by boundaries. He looks at the early environmental movement, when the principle aim was to designate areas; industrial pollution laws, for example, still view tracts of land next to waterways as separate entities, rather than parts of a whole ecological system. However, Sax believes that there is an emerging view that the landowner is the custodian and protector, and the line between public and private has become blurred. An 'economy of nature' affects the concepts of land ownership and entitlement. By not compensating in the case highlighted, a new definition of property may have emerged, where there was less focus on individual dominion and more on public decisions and affirmative obligation.

Unfortunately, Sax does not explore the model which could emerge from a compensatory regime. Assuming a non compensatory regime, he does use a usufructory model (a hybrid

where both economies could be served) where there is no exclusive dominion, but a right to a compatible use. Here, the owner's rights would be subordinate to those for the community, or the 'greater good'. This model already operates in navigable waterways, with the mining of minerals and on historic regulation of timber use. He also notes that privatisation is not as wide spread as traditionally thought, returning to his opinion that landowners should not be compensated for that which should never have been privatised in the first place. Although this is a valid opinion, it is rather a moot point, considering his insight into the direction in which the law should be going to amend the current situation. Sax's analysis of the US laws treatment of land and property is compelling, taking an interesting approach to theoretical debate surrounding the nature of ownership and the ownership of nature itself.

#### 2.6.2 *'Lawscapes'*

The discussions surrounding property and landscape have taken a recent turn in legal geography discussion with the emergence of 'lawscapes' which seem to have monopolised the term to indicate an exploration of 'the meaning of property in legal cultural discourse and practice' (Graham, 2011, 2). Graham uses an historic analysis of law (specifically the enclosure movement in England and the legal colonial histories of Australia and North America) to elaborate on what she terms 'lawscape'. Noting that place (or the physical or the natural world) is conceived, experienced and articulated anthropocentrically, she argues that 'the paradigm of modern property law describes, prescribes and explains unsustainable people-place relations because it does not situate itself in place' (Graham 2011,5). Thus modern property law sees place as meaningless, as it dephysicalises the world by removing the physical 'thing' from the property relation and replacing it with an abstract 'right' in property. This is illustrated by a number of cases in which 'legal and cultural discourses both



describe property as a relation between persons, or between their relative rights of persons' (Graham, 2011, 161) Property has historically been reduced to a commodity. This perspective is useful when understanding property rights in nature, yet although 'the paradigm of modern law, a paradigm of placelessness, is not meaningful or viable as a prescriptive theory and practice of relationships between people and place' (Graham, 2011, 206) the author offers no specific solution to such a conundrum, although environmental law has perhaps started to conduct more people-place discourse.

In other literature, the 'lawscape' has been promoted as a way in which to 'investigate the spatialised history of the urban manifestations of the law' (Carr, 2013, 109). Thus the lawscape here has been defined as the 'spatial rendering of the simultaneous divergence and confluence between the law and the city in their abstract as well as applied forms' (Philippopoulos-Mihalopoulos & FitzGerald, 2008, 440). Such an analysis returns to the spatiality of law, and the law's relationship with space, despite the authors specifying that such a move, although founded on the existing discourses of the 'Law and Geography' movement, 'also differs in that it is not employed as another contextualised study of law or indeed merely as part of a project for space reinstatement' (Philippopoulos-Mihalopoulos & FitzGerald, 2008, 440). Thus the literature is brought full circle to the question of law, space and place.

This 'unwitting reification of space' (Valverde, 2014, 53) within legal geography has been addressed by examining spatiotemporal dynamics, where although temporal dimensions are discussed within legal geography, time is also reduced to history (Valverde, 2014). Examining linear forms of temporality (which the author notes can include historicism) could 'deepen legal geographers understanding of the temporal role in the development of Western

law' (Valverde, 2014, 61). Thus such an insight would account for differences in temporalities as highlighted by landscape geographers in terms of rhythmic non-human phenomena, whilst also attending to the issue of different temporalities within the same *place* as plural temporalities (Valverde, 2014, 62).

Von Benda-Beckman & Von Benda-Beckman (2014) take an anthropological approach to legal geography and therefore attend to the issues of both place and temporality. As places are relative in time and also vary in permanence, they can also overlap, creating not only voids in legal spaces but also complex 'nested' spaces in which differing legal systems can be contradictory. Thus there can be legal pluralism within the same bounded spaces, where laws (EU, International, local) overlap and materialise within the same physical space, creating a clash of divergent notions about what that political or legal space *is*. Legal places can also 'literally move in space' (Von Benda-Beckman & Von Benda-Beckman, 2014, 37) particularly where there are natural boundaries such as rivers or coastlines are eroded. Within this paper, place and space are different as space seems to be hierarchically above place in terms of scale; space the *effect* yet *place* is affected.

When attending to specific places and place making, Ingold proposes that the overall picture of landscapes must also be 'expanded to embrace the totality of rhythmic phenomena, whether animate or inanimate' (Ingold, 1993, 164) a perspective shared by Jones (2011) who explores the notion of relational, temporal- material performances by using tides to analyse the 'rhythmpatterns of timespace' (Jones, 2011, 2285). This authors many years of engagement with the Severn as a research area also lends an excellent and authoritative perspective to this thesis. This view of the tidal landscape of the Severn Estuary as a process

of intersecting rhythms, between the natural and the human, encompasses not only the human made impressions upon the landscape, but ongoing processes that occur between humans, non-humans and landscape. In addition, in areas where a multiplicity of timescapes can occur within the same landscape, the social 'taskscape' is affected; within the Severn, the taskscapes of navigators and fishermen cannot be investigated without reference to the timescapes of tides and fish. Until recently, legal geographies have focused predominantly on human social interactions (Braverman, 2011a). Even where a natural resource such as water is the issue, the focus has tended to be on property (Blomley, 2008) or politics and economics (D'Souza, 2002). Nature has been considered (Sax, 2001) but again predominantly as a resource for human utilisation. Although human geographers have explored issues concerning the interconnectivities between nature and society (Panelli, 2010; Lulka, 2004) these fall into the 'more than human' or 'posthuman' social geography research field. It has been noted that such geographies tend to focus on warm-blooded animals, whereas a radical restructuring of spatial discourse would allow scholars to think of space outside of the constraints of measurable geography and fenced legal context (Bear & Eden, 2011, 336). Within the environmental justice field, there are demands for spatial representation to address the boundaries between the human and the non-human, with suggestions that a 'plural emplaced' account would address all entities occupying the same geographic space (Philippopoulos-Mihalopoulos, 2011, 200). Thus using landscape geographies within the research would bridge the gap between the animate and inanimate, human and non-human phenomena and investigate those rhythm patterns that occur between them. The incorporation of such an approach would benefit the development of legal geography, encouraging a wider and more holistic perspective that would move away from the anthropocentric direction of current research and allow for the promotion of localised studies.

## 2.7 Conclusion

This chapter initially outlined the beginnings of legal geography as a field of scholarship and examined its rise in visibility through the 1990s. Theoretical perspectives in jurisprudence were outlined in order to identify those that have been predominantly used by legal geography scholars, before reviewing the development of the project through selected published works. Doing so has revealed that the application of a generally Marxist slant and a tendency towards a critical legal studies perspective seems to have provided the underlying theoretical framework for early legal geographies. However, we should be sceptical of the dominance of structural Marxian orthodoxy in geography, as its ‘mismanagement’ has ‘led to an unsatisfactory understanding of man in the world (man's lived experience) because it has treated such experience as a determinate outcome of structural processes, or more crudely, structure is seen as determining behaviour’(Eyles, 1981, 1372). In addition, although a general theory of historical materialism could be applied to the analysis of the law and legal systems, as Collins has asserted, ‘to demand a general theory of law from a Marxist is to ask him to run the risk of falling prey to what can be termed the fetishism of law’ (Collins, 1982,10). The CLS propensity for deconstruction, postmodern deconstructive techniques which confront and challenge the law, and the dominant use of the dialectic which views reality as a structured totality may provide a ‘unified, holistic philosophy by which to study social life’ but it also ‘imposes constraints on its practitioners’ (Eyles, 1981, p.1375). Legal geography needs to transcend these constraints on its theoretical understanding, not necessarily by abandoning Marxism altogether, but by allowing it to expand its rhetoric and allow re examination in terms of social reality.

I also reviewed those publications following the ‘spatial turn’ in both geography and legal geography which provided a critical analysis to the ways in which legal spaces are constructed, both socially and politically (Blomley & Bakan, 1992). A number of topics were considered, from the public / private divide (Mitchell, 2001) to racialised spaces (Goldberg, 2001) and issues of spatial justice (Harvey, 1996; Philippopoulos- Mihalopoulos 2010). However, despite Soja’s conviction that the reassertion of space could not ‘be accomplished simply by appending spatial highlights to inherited critical perspectives and sitting back to watch them glow with logical conviction’ (Soja,1989,12), this form of spatial perspective has dominated legal geography, characterized by the phenomenon of ‘add space and stir’ which ‘reduces space to yet “another” social factor, “another” perspective which does not offer anything more than at best a context and at worst a background’ (Philippopoulos- Mihalopoulos, 2011,6).

A reading of spatial legal geographies led me to question the use of ‘place’ in law and geography. Although a few investigations have used techniques to analyse the historical and cultural issues which become visible when place *making* is taken into account (Delaney, 2010; Howe, 2008) the concept and analysis of places and place-making still remains largely invisible in the legal geography field. A review of cultural and landscape geographies was then undertaken to identify the ways in which a different perspective could be utilised in a legal geography of place. The review was a chronological account of the development of landscape geographies, which led to a re examination of the work of Whittlesey (1929) whose concept of sequent occupance encompassed the historical cultural and legal influences that leave an impression upon the landscape. In his view, geography was a succession of stages of human occupance, thus the researcher ‘must take account of changes in any of the complex

elements of natural environment, and in the equally complex cultural form' (Whittlesey, 1929, 164). Whittlesey's approach to geography was not embraced by other geographers of the time. Dodge (1938) argued that there had been no agreement within the geographic community on the ways in which aspects of former occupance of land and reflections in the cultural features of a landscape should be classified. It was thought that although the reading of landscape changes over time is part of the geographic imperative, the 'process of studying both bold and subtle manifestations of landscape transformation is too universal to be captured only in an esoteric professional term called sequent occupance' (Salter, 1995, 473). However, in contemporary landscape geographies, Olwig reiterates Whittlesey by stating that 'once energy has become embodied in the landscape of a place through the activities of people and polities, for example, as a terraced field or a shelterbelt, it becomes a source of productive and consumptive energy for perhaps centuries' (Olwig, 2011, 411). Trudeau (2006) discussed the ways in which discourse and practice can be represented by landscapes as visual ideas that create perspectives about how land should be used in particular places. The discussions surrounding the discourse of law and the ways in which it can be hidden in landscapes was demonstrated by Howe (2008) and Hill (2013) which led to a review of cultural and performative landscapes, and the issue of time and temporality. Ingold (1993) introduced the idea of the 'taskscape' in which places are characterised by experiences which depend on the activities in which its inhabitants engage. Thus 'it is from this relational context of people's engagement with the world, in the business of dwelling, that a place draws its unique significance' (Ingold, 1993, 155).

The discussion then turned to the tentative use of concepts of landscape by legal geographers in terms of property and place (Blomley, 1998; Sax, 2001). Geographies of property have

coined the term 'lawscape' in contemporary analysis, in urban settings (Philippopoulos-Mihalopoulos & FitzGerald, 2008) and to denote 'a connection of reciprocal invisibility between law and the urban space' (Philippopoulos-Mihalopoulos, 2012). The term has also been used to explore 'the meaning of property in legal cultural discourse and practice' (Graham, 2011,2) and thus Graham (2011) uses the term 'lawscape' to ask what landscapes reveal about law by examining the conceptual origins and development of modern English property law and its transplantation to the colonies. Graham argues that the landscapes upon which the laws were placed reflect a dephysicalised concept of property which led to its commodification, where 'despite its lack of attention to the land, modern English property law transformed the landscape not only of England but of other countries across the globe' (Graham, 2011, 133). Grahams use of historic law to gain an insight into the development of the relationship between property and place, in particular the way that 'anthropocentrism characterises modern property law according to which place, in itself, is meaningless' (Graham, 2011, 5). This perspective is useful for understanding the nature / culture paradigm which is seen as two separate spheres in law, and when viewed with, for example, the plural temporalities proposed by Valverde (2014) may offer a way of integrating a the study of non-human phenomena with legal geography. This would correspond with those perspectives offered by both Ingold (1993) and Jones (2011) regarding the use of timescapes and rhythmescapes.

This examination of these alternative landscape, lawscape and timescape geographies all seem to be an extension of Whittlesey's original proposals for 'sequent occupance' in 1929, where the sequential historical effects of politics, law, religion and population in certain land areas can create a whole and dynamic 'map' of the influences that create 'place'. The study of

place as a result of historical human cultural relations, integrating law as part of the performance within that landscape can be used to bring sequent occupance up to date and into a contemporary study. Within such an approach, elements of Whittlesey's notion of sequent occupance can be expanded upon by examining the cultural impress made by law over time, similar to the way in which 'once energy has become embodied in the landscape of a place through the activities of people and polities, for example, as a terraced field or a shelterbelt, it becomes a source of productive and consumptive energy for perhaps centuries' (Olwig, 2011, 411). I would argue that the concept of 'sequent occupance' has the potential to provide much deeper insights into the presentation of a landscape than the purely physical, and to include all aspects of authority, including law, in the development of space and place. One approach would be to examine the evolution of a specific area, with a particular emphasis on the role of law in shaping transformation, which would fit well within a sequent occupance framework, whilst at the same time paying attention to the timescapes and non-human rhythms to account for the landscape as a whole. Attention to the temporal nature of the landscape would reveal the ways in which 'the reaction of culture to and upon nature varies from place to place and alters with the lapse of time' and although 'the areal variation is explicit in all geography...the temporal modification is frequently disregarded' (Whittlesey, 1945, 34).

This theme will be explored further as the thesis progresses in laying a framework for such a 'sequent legal occupance' approach. The following chapter sets out the methods and notions used by Whittlesey before discussing the ways in which his approach can be adapted for use in a legal geography framework, as well as outlining the methods used to source, collect and collate the substantial evidence used in the study.



## **Chapter 3**

### **Methodology**

#### **3.1 Introduction**

The previous Chapter examined the literature used to provide the basis of a legal geography research project. It examined the history and development of legal geography as an academic line of enquiry. It also investigated the theories, epistemologies and ontologies from both geography and jurisprudence that have been adapted and used in legal-geographical interpretations. This Chapter focuses on the research process used in the thesis, identifies the ways in which the project was designed and explains the ways in which the information was sourced and interpreted. Beginning with a review of the dominant theoretical approaches within legal geography, this Chapter will identify the concepts and methods used within the research process. It begins to formulate an approach which expands on the notion of sequent occupance by using law as the investigating axis. It then outlines the reasons for the location, timeframe and focus of the study, before explaining the methods used to source the legal and historical data that was used to support the investigation.

#### **3.2 Theoretical approaches**

The initial goal of legal geography was to understand the ‘imbrication’, or the overlapping of the law and geography of social and political life, and how one affects the other (Blomley & Clark, 1990). The previous chapter examined the development of legal geography and the ways in which this ‘imbrication’ had been investigated. Part of the early reading stage necessitated delving into the foundational theories of both law and geography in order to unravel the ways in which certain methods had been chosen by legal geographers in their

research, allowing me to critique the dominant methods of analysis that have become prevalent in contemporary legal geographies. As discussed in the literature review, it seems that the legal perspective within legal geography has taken its lead from critical legal studies. Both schools of thought 'share a concern with social, economic, and political inequality and seek to demonstrate how legal institutions, conventions, and practices reinforce hierarchical social relationships' (Forest, 2000, 8). Although such perspectives encourage the examination of the social contexts of law, any critically based theory will always be skewed towards the basic premise that law is a political tool. That said, this research does not necessarily disagree with critical enquiry *per se*, but rather seeks to take an historical overview of the law and its development to establish the ways in which legislation is affected by geography and the landscape affected by law. In doing so, it is hoped that different relationships between law and geography will emerge, allowing for the development of a complementary approach to the dominant critical assumptions and concepts that have emerged in legal geography thus far.

In order to develop such an approach, within the previous chapter landscape geographies were examined, particularly the notions of temporality, 'timescapes' (Ingold, 1993) and rhythmpatterns (Jones, 2011). As these elements can be seen in the sequent occupance approach proposed by Whittlesey (1929) I began to collate the literature to embellish Whittlesey's original formula in order to propose that the concept of 'sequent occupance' has the potential to provide much deeper insights into the composition of a landscape rather than focusing on the purely physical. Thus such a formula can be developed and used to investigate the legal geography of an area.

In his original studies, Whittlesey illustrated the ways in which human occupance was a succession of stages which left an 'impress' upon the landscape (Whittlesey, 1929). For Whittlesey, these imprints were predominantly concerned with the occupation and utilization of the land itself, leaving traces of culture and sometimes visible objects. The 'impress' of physical objects left upon the land could be a bridge, canal or tunnel. Even where these objects have been dismantled or have fallen out of use, there may be a physical imprint left upon the land, the ghost of a previous occupation. Such objects could also include legal or historical documents, land registrations or Acts of Parliament. Such cultural artefacts can be used in a historical legal geography to investigate either a physical or a social 'impress', as Whittlesey noted that interruptions in the cultural order, such as population shifts, new technology, shifts in political boundaries and the 'mere enactment of laws' could all be 'capable of breaking or knotting the thread of sequent occupance' (Whittlesey, 1929, 165).

Whittlesey's work on sequent occupance is limited to his paper on the subject (1929) and the practical studies that he undertook in the first half of the twentieth century, and was not without its opponents. Dodge (1938) noted that scholars who had used the notion of sequent occupance at its inception had not come to an agreement as to the ways in which aspects of former occupance, reflected in the cultural landscape, should be classified. Yet it could be argued that Whittlesey's approach was a work in progress. In a later paper, he expounded on the notion of impress stating that 'examples of the cultural impress of effective central authority upon the landscape can be multiplied indefinitely' (Whittlesey, 1935, 97) allowing for a number of interpretations. The study of the political impress on the landscape 'involves us in a wide variety of variables, many of which (and, more especially their interrelationships) are still little understood' (Knight, 1971, 386). Although there is still no solid conceptual model for assessing political impress, Kasperson and Minghi (1969)

proposed that there could be four components to such an investigation: political goals, agents of impress, processes and effects. Therefore, legal systems, as agents of political impress, ‘may regulate extensively the use and development of the physical environment’ (Kasperson and Minghi, 1969, 429). On this basis, this thesis will extend the sequent occupance approach by substituting the political impress for a legal impress, creating a ‘sequent legal occupance’ (SLO) framework. Similarly to political impress, although legal impress ‘may be conceived in man-land terms, we are dealing with a variety of spatial distributions, some of which are visible in the landscape, and some of which may be illuminated only very indirectly’ (Kasperson and Minghi, 1969, 429). Thus, this study will examine the goals, agents, processes and effects of law, adhering to Whittlesey’s notion of impress but from a legally centred perspective, extracting both the direct and indirect effects of law upon the landscape.

### **3.3 Locating a study area**

To begin to research the effects and impress of law upon the landscape, I needed to select a particular study area. Whittlesey noted that regional settings were crucial to understanding the impress of political forces, and that the phenomena engendered by such forces ‘should have a recognized place as elements in the geographic structure of every region’ (Whittlesey, 1935, 97). As I was substituting ‘political forces’ for ‘law’, I needed to examine the legally influenced elements of a particular region and its relationship with the wider legal structure. In Whittlesey’s ‘sequent occupance’ the sequential historical effects of politics, law, religion and population in certain land areas can create a whole and dynamic ‘map’ of the influences that create ‘place’. Within such a structure, place is ‘not closed but an ‘articulated moment’ embedded in localized and extra local networks’ (Blomley, 1998, 582). In order to uncover these localised aspects and the interrelationship between space, place and law, I decided to

make space and place separate lines of inquiry. In terms of landscapes, local ‘suggests location in isotropic space, and a certain binary between the larger spatial context and the local situation within that space’ (Olwig, 2011, 406). Thus, my reasoning was that the constitutive parts of a legal system should be examined separately, in the local place based context and in the larger spatial context before being analysed *in relation* to each other, in order to effectively construct a sequent legal occupance.

A specific ‘place’ with a rich cultural history was needed to implement such an examination. Having a background in environmental law, my initial agenda was to focus on environmental law and issues. Whilst living alongside the Severn Estuary at Berkeley, Gloucestershire, I was fascinated by the raw brutality that the estuary displayed; weather conditions alter the pastoral riverscape within minutes, from a seemingly calm, flat surface to a raging inland sea. The estuary is a central feature of this part of Gloucestershire; it has been a site of human activity for centuries, as a location for settlement, a source of food, water and raw materials, as a gateway for trade, and more recently as a site for industrial development, power stations and offshore aggregate extraction. I was also aware that the Severn itself was locally renowned for its fishing industry, particularly eels and elvers. As part of my research was concerned with moving away from the anthropocentric perspectives in legal geography, the tidal nature of the estuary would allow for the examination of the role of ‘time and rhythm’ (Bear & Eden, 2011) within the landscape and the effects of this on both the human and the non-human population. Again, a sequent ‘legal’ occupance (SLO) approach would allow me to assess the impact over time of law on the landscape and its natural inhabitants. Thus, the estuary had the essential elements prominent natural and manmade features, a rich cultural history and both human and non-human inhabitants.

During my initial research, I explored the geographical location as a visible landscape to identify the potential legal and cultural elements that could be used to construct a sequent legal occupance. I familiarised myself with the physical geography of the River Severn, examining facts and figures regarding flow, tidal data and use. I then had to map the area and decide on the physical boundaries for my study. From source to sea, the Severn is Britain's longest river, at some 220 miles (Fig 3.1) flowing through four counties (Powys, Shropshire, Worcestershire and Gloucestershire) growing in size and gathering momentum before it reaches the Bristol Channel.

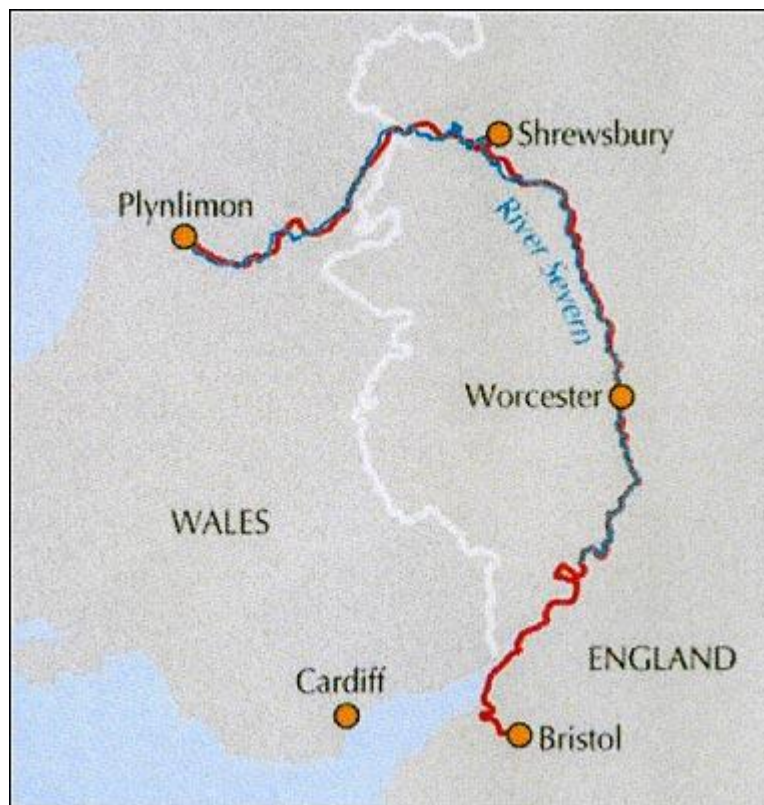


Figure 3.1 Location and route of the River Severn, UK.

(Source: Marsh, 2014)

A river becomes an estuary where freshwater meets the sea water within a partly enclosed area. During spring tides, the Severn Estuary may be tidal up as far as Upper Lode Lock at Tewkesbury (Henderson and Bird, 2010). As Britain's second largest estuary, it has the

second highest tide in the world, which can exceed 14.5 m. At the lower reaches of the estuary, the Severn becomes the Bristol Channel below Cardiff (line denoted (a) at Fig 3.2).

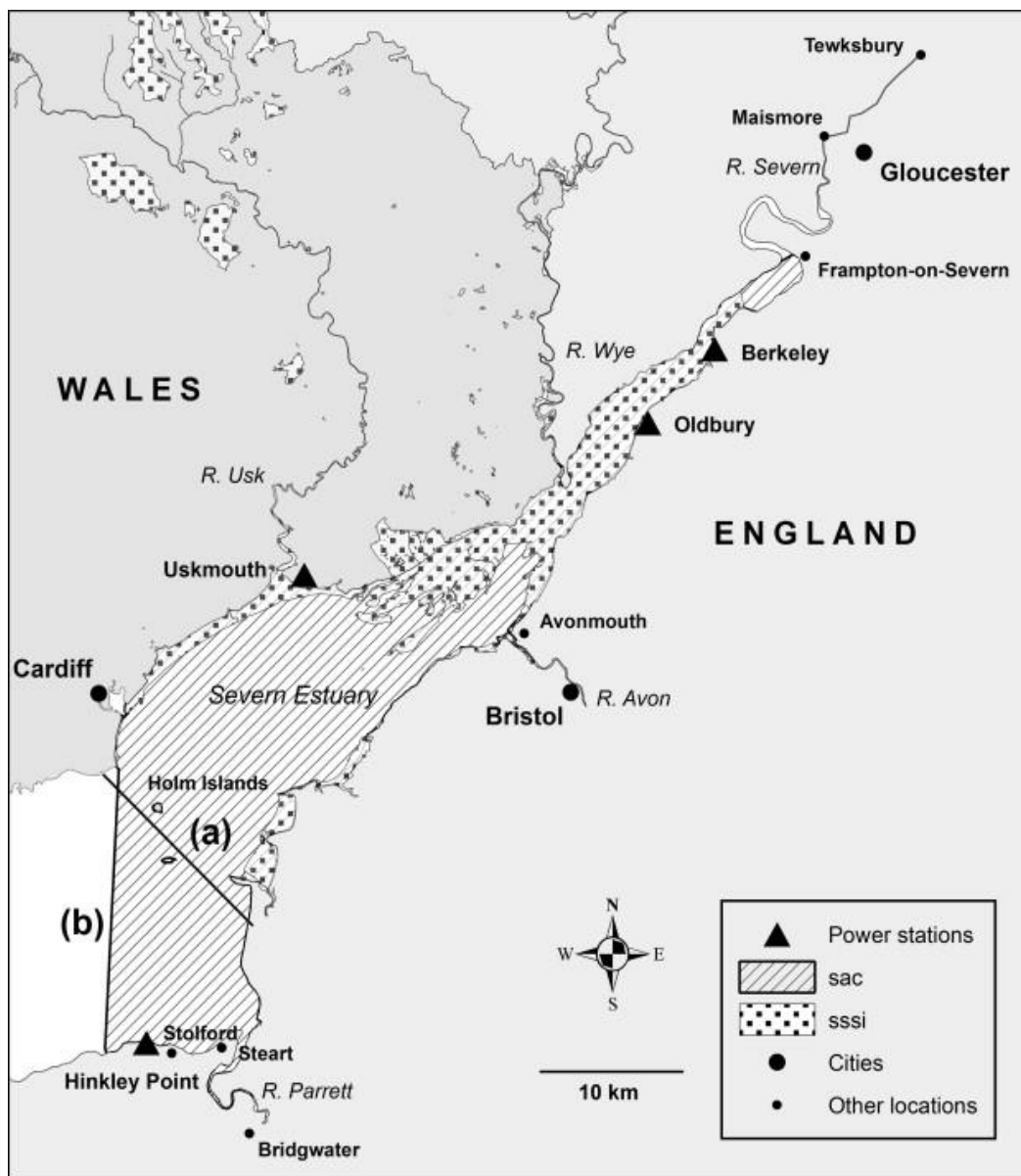


Fig: 3.2 The Severn Estuary

(Source: Henderson and Bird, 2010)

The estuary between Gloucester and Bristol is a beautiful, complex and fascinating natural feature. The area has been designated as a Site of Special Scientific Interest (SSSI) and a candidate for designation as a Special Areas of Conservation (SAC) (Fig 3.2). As a

landscape, it is a ‘constantly fluxing rhythmpattern with daily, monthly, seasonal, and longer beats. The topography never settles as channels and sandbanks shift’ (Jones, 2011, 2293). This constantly changing and intricate system of sub tidal, intertidal and terrestrial habitats, mudflats, sandbanks and salt marshes can be seen at Sharpness on the east shores (Fig 3.3).



Fig 3.3: South Pier at Sharpness on the Severn Estuary at low tide  
(Image: Gloucester Pilots, 2013)

At Avonmouth, where the estuary is over five miles wide, the ‘light and visible space (between sky, water, mud banks, and near and far shores) at differing states of weather/daylight/tide is extraordinarily liminal and thus of fascination to poets, artists, and others who choose to engage with this landscape’ (Jones, 2011, 2293). One example of this is Gurney’s poem ‘By Severn’ which refers to the natural phenomenon of the Severn Bore (the large wave formed by the monthly spring tides) and the poem captures the temporal, transitory nature of the way in which it ebbs and flows.



If England, her spirit lives anywhere  
It is by Severn, by hawthorns and grand willows.  
Earth heaves up twice a hundred feet in air  
And ruddy clay falls scooped out to the weedy shallows.  
There in the brakes of May Spring has her chambers,  
Robing-rooms of hawthorn, cowslip, cuckoo flower —  
Wonder complete changes for each square joy's hour,  
Past thought miracles are there and beyond numbers.

Ivor Gurney, 'By Severn'

(Source: Rawling, 2011)

This image of one aspect of the Severn, a persistent and powerful feature of the landscape, which has inspired artists and writers over the years, is not only historically embedded in the social consciousness but is a feature which was also constantly changing, changeable and unpredictable. I wanted to try to link this notion of the river with the characteristics of the phenomena of law as a progressive, shifting, ever present (if not always visible) force operating within the same space. A project which included the rich social and cultural history of the River would enable me to identify the places where there had been intersections of law and geography and allow me to construct a sequent legal occupancy of this locality.

The cultural history of the river is sometimes visible on the landscape as ruins and wreckage. The Severn has a long history as a navigational route, serving the major ports of Bristol, Cardiff and Gloucester. The boat 'graveyard' at Purton below Frampton-on-Severn (Fig 3.4), was in fact a deliberate beaching of over 80 vessels between 1909 and 1963 following a

landslip between the river and the canal. Boat owners were encouraged to dump old ships along the shore to stop the breach in the banks. Such examples of ‘impress’, physical artefacts left upon the land, could be used as indicators for further investigation of a sequent occupance as described by Whittlesey.



Fig. 3.4

Remains of ships on the Severn shore at Purton, Gloucestershire

(Image: Authors own)

As Whittlesey noted, that the spaces occupied by man included surface waters, and as such the ‘combined space occupied and otherwise used at any stage of human evolution constitutes the realm which encompasses man's geographic outlook at the time. Its confines fix the horizon of geography then current’ (Whittlesey, 1945, 1). The physical geography at the time of the beaching of these boats was in need of repair, to aid the navigation of ships along both the river and the canal. Yet these horizons, conceptions of space by those who live or have lived in the locality, can be altered by technology, communication and knowledge. A landslip today would have different implications and alternative remedies. Thus as the geographic horizon is multidimensional, in order to take account of the aspects of space, the three

elements of velocity, pace and timing (as well as the synchrony of occurrences at a particular place) have to be taken in to account (Whittlesey, 1945). I needed therefore to decide on a timeframe for my study, one that would account for these factors in the investigation of space and law. To do this, I had to first identify the issues, resources and the geographical boundaries of the area.

### **3.4 Identifying the boundaries**

My initial research was based upon the political and legal influences that were associated with the River Severn. I primarily searched for any information related to the river that would indicate a legal authority in order to gain an overview of the legal issues that were both visible and non visible on the landscape. For example, the power stations along the Severn at Berkeley and Thornbury were visible features, yet the pollution from these and other activities, such as mineral abstraction, may be unseen, and leave non-visible traces of occupance.

During initial searches, I used information supplied by the Severn Estuary Partnership (SEP) an independent non -statutory initiative led by local authorities and statutory agencies set up in 1995. The SEP is the secretariat for a number of different groups and takes an integrated approach, bringing together those with an interest in the management of the estuary. They therefore hold information regarding the many issues that surround the management of the Severn (Fig. 3.5).

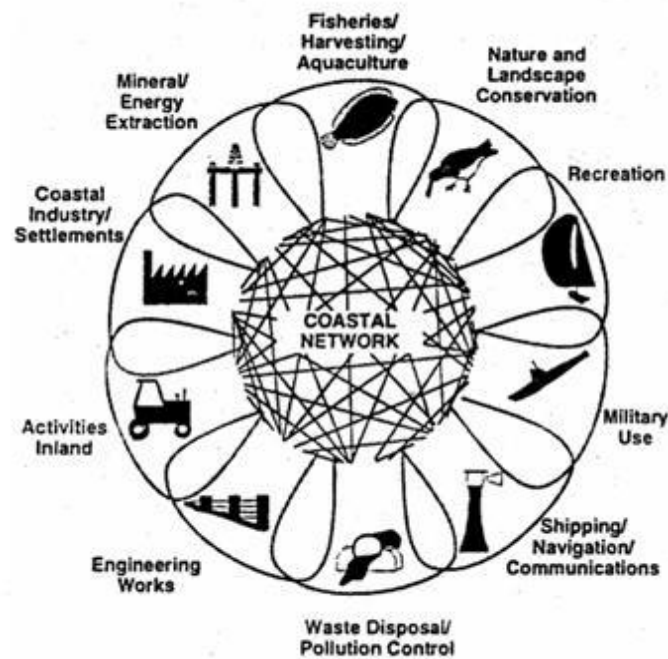


Fig 3.5 SEP 'integrated approach' diagram

(Source: SEP, 2012)

I was able to gain an overview of these issues using the information provided by the SEP. Issues such as water abstraction, port authority or planning regulation depend on through which geographical area the river flows. Therefore, in addition to the county and district boundaries (Fig 3.6) there are four port and harbour authorities, three water authorities, and two EA regions. There are also additional boundaries supplied by NGO's (such as Natural England) (Fig 3.6).

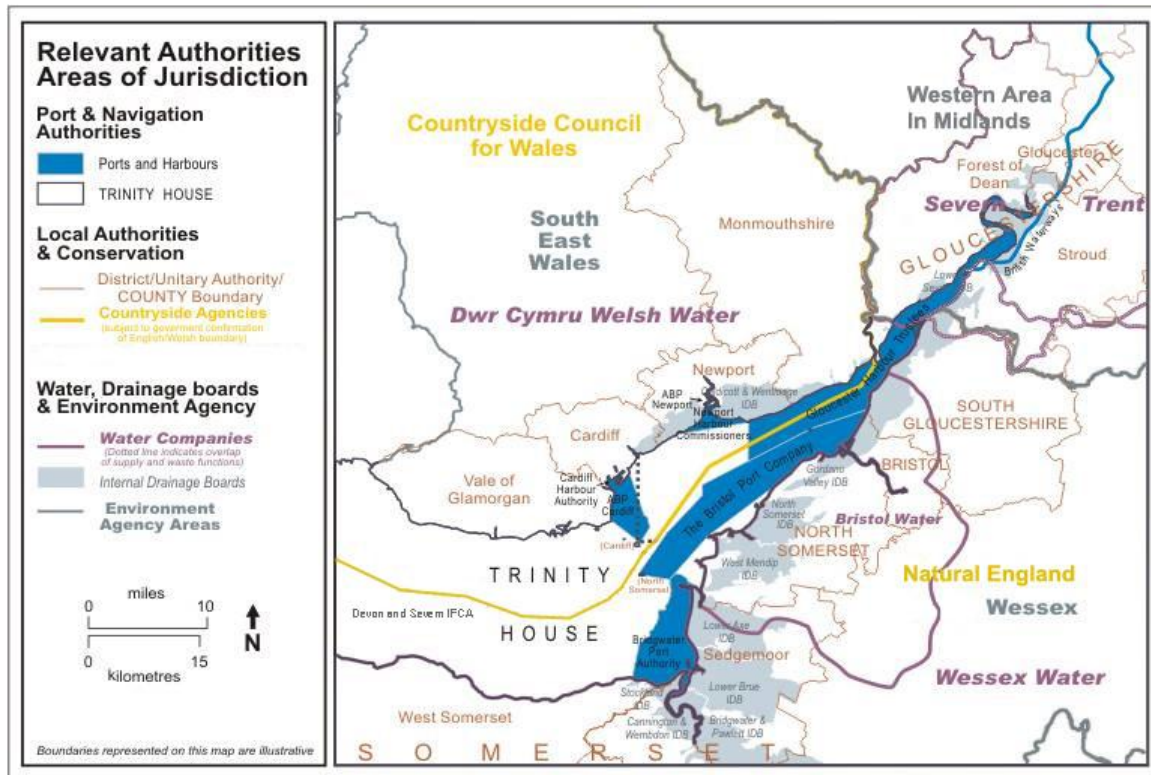


Figure 3.6: Map of the jurisdictions on the Severn Estuary

(Source: ASERA)

Legal frameworks are implemented by these authorities within their jurisdictions. Above these national legal frameworks, a number of EU Directives are also applicable. The EU Water Framework Directive<sup>2</sup> addresses water protection in terms of pollution, and aims for ‘good’ status in all ground and surface waters. This was implemented in the UK with the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003. This document specifies nine ‘basin’ areas within England and Wales (with a further two cross-border districts with Scotland)<sup>3</sup>. Under the designated competent authority that is the Environment Agency, the Severn basin covers 21,590 km<sup>2</sup> (8,333 square miles) and is cross

<sup>2</sup> Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, [online] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0060>

<sup>3</sup> Foundation for Water Research [online] at [http://www.euwfd.com/html/how\\_is\\_it\\_being\\_implemented-.html](http://www.euwfd.com/html/how_is_it_being_implemented-.html)

border with Wales (Fig 3.6). Being tidal, it is also under the remit of the Marine Management Organisation (MMO), and within the jurisdiction of various port and pilot authorities (Fig 3.6). Within this complex configuration of overlapping districts, boundaries and management areas, each agency will have its own areas of interest, regulatory structure, and legal control. Thus the potential legal interactions, if each administration is analysed, is voluminous.

To research a legal geography that encompassed all the legal administration covering the whole of the River Severn from source to sea could lead to difficulties sourcing the law in the relevant areas and issues with these different boundaries and jurisdictions. Concentrating on a smaller area, such as the estuary, would allow me to make a more comprehensive and localised analysis. The shore boundaries on this part of the Severn lay predominantly within the county of Gloucestershire, a place with which I already had a personal interest and a good geographic knowledge. This would be of use when reading the law and literature relating to specific ‘places’ during my investigations of space and place.

To limit my investigation within predominantly the tidal area, I found the Severn Estuary Partnership map (Fig 3.7) to be the most useful guide for creating the boundaries for my research. In addition, I decided to concentrate my research within the boundaries of English law, and used the M4 motorway, or the ‘second’ Severn crossing as my southerly boundary; below this line, the administrative areas fall between Wales and Bristol.

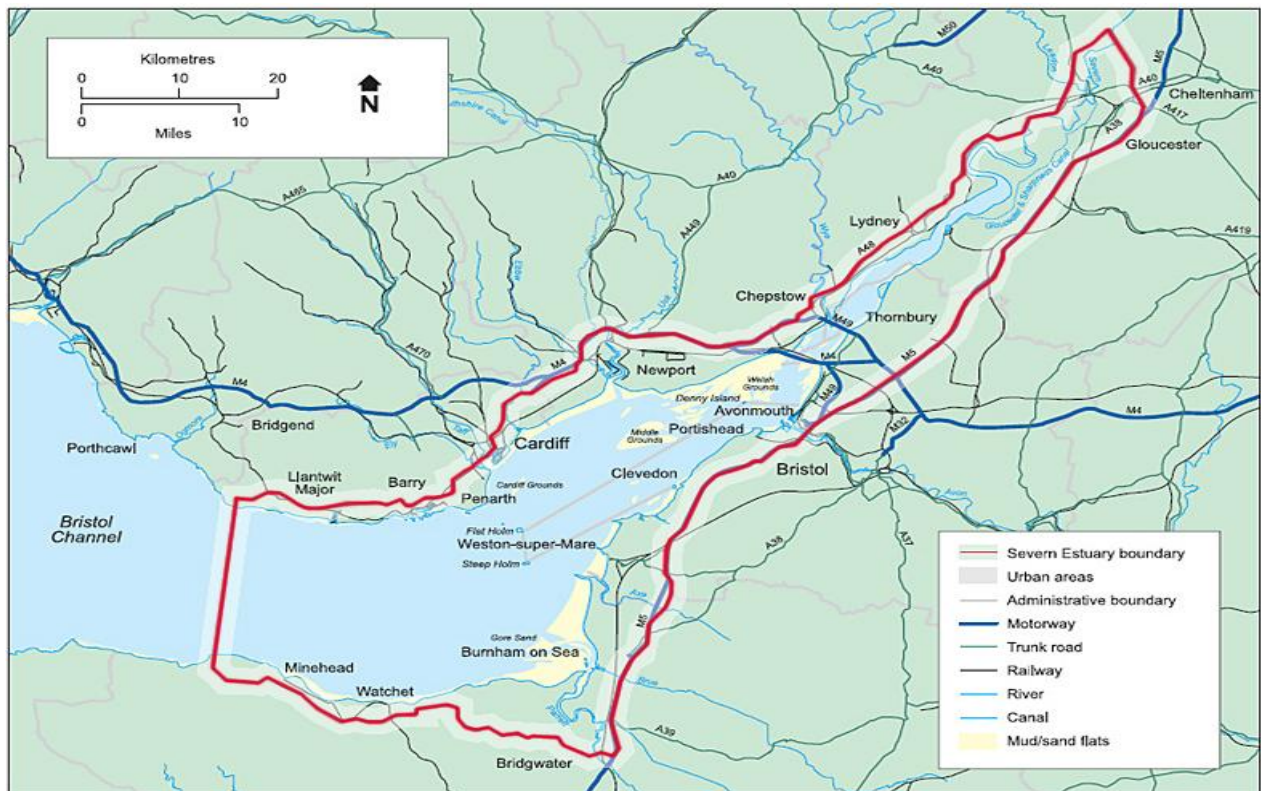


Figure 3.7: Boundary Map of the Severn Estuary with administrative areas  
(Source: SEP, 2011)

Once I had mapped my research area geographically, I then had to decide on a timeframe for the construction of a sequent legal occupancy.

### 3.5 Identifying a timeframe

During the initial stages of research into legal and authoritative boundaries surrounding the Severn, a number of questions began to arise regarding the amount of overlapping and competing jurisdiction across the study area. The ‘theme’ for the research was based around the central feature of the Seven Estuary. Water law can be examined under a number of different divisions; as a utility, examining the regulation, allocation and management of water provision; in terms of rights and access to water as a critical resource; in a global, international and national context, in terms of freshwater or marine development; as an environmental issue, dealing with pollution, climate change, flooding, waste water, and

public health, but also in terms of wildlife and fisheries. Much of the initial legislation that I viewed concerning these issues was relatively new (for example as European law and International Directives) and fell within the latter part of the twentieth century. The Department for Environment, Food and Rural Affairs (DEFRA) cover the most relevant areas of water and habitats and exercises its powers through legislation. Functional bodies, such as the Environment Agency (EA), and the Marine Management Organisation (MMO) are responsible for a number of licences and levies, as well as enforcement and prosecution. The Inshore Fisheries and Conservation Authority (IFCA) controls districts (of which the Severn falls within the Devon and Severn area) which are overseen by committees that consist of local authorities, the MMO, EA and Natural England. The Water Services Regulation Authority (OFWAT) is the economic regulator of water and sewerage. There is then a plethora of law, policy and protocol regarding the Severn depending on which specific topic is of interest, much of which is multi-agency supervised.

In the early stages, the information I collected concerning the regulation of the river was arranged and documented within categories (Table 3.1). This is not an exhaustive list, but the major parties are listed. Drawing upon these sources, they became a source of reference for my research, which evolved as I undertook a general enquiry into all aspects of the estuary. I was able to see the legal landscape as a complex and multi-faceted area, governed, overseen and protected by a numerous laws, organisations and interests.



Table 3.1: Table of relevant authorities considered during initial research

| <b>Administration<br/>and management</b>  | <b>Working and Research<br/>Groups</b>   | <b>Charities, NGO's<br/>and Clubs</b>   |
|---|--|---|
| <i>Environment Agency</i><br><i>Natural England</i><br><i>Severn Trent Water</i><br><i>Department of Energy<br/>&amp; Climate Change (DECC)</i><br><i>Department for the<br/>Environment, Food and<br/>Rural Affairs (Defra)</i><br><i>Associated British Ports,<br/>ABP</i><br><i>Gloucester Harbour<br/>Trustees &amp; Gloucester<br/>Pilots</i><br><i>Sharpness Marina</i><br><i>The Bristol Port Company</i><br><i>Marine Management<br/>Organisation</i><br><i>(MMO)</i><br><i>Inshore Fisheries &amp;<br/>Conservation Authority</i><br><i>(IFCA)</i> | <i>Association of Severn Estuary<br/>Relevant Authorities (ASERA)</i><br><i>Severn Estuary Coastal<br/>Group (SECG)</i><br><i>Severn Estuary Conservation<br/>Group</i><br><i>Severn Estuary Partnership<br/>( SEP)</i><br><i>Severn Estuary Levels<br/>Research Committee</i><br><i>Severn Estuary Research<br/>Group</i><br><i>Sustainable Eel Group (SEG)</i><br><i>International Council for the<br/>Exploration of the Sea (ICES)</i> | <i>Council for the Protection of<br/>Rural England (CPRE)</i><br><i>Farming and Wildlife<br/>Advisory Group</i><br><i>Marine Conservation<br/>Society</i><br><i>RSPB England</i><br><i>Severn Rivers Trust</i><br><i>Trust for the Promotion of<br/>Environmental Awareness</i><br><i>Wildfowl &amp; Wetlands Trust</i><br><i>(WWT)(Slimbridge)</i><br><i>Gloucestershire Wildfowlers<br/>Association</i><br><i>The Angling Trust</i><br><i>Wildlife Trusts</i><br><i>World Wildlife Fund UK</i><br><i>(WWF)</i><br><i>Wildlife &amp; Countryside Link</i><br><i>Canal &amp; Rivers Trust</i> |

Based on these preliminary investigations, in September 2011, contacts taken from the groups identified were asked if they would take part in a short questionnaire to allow me to refine the topics for my research. The questions were open-ended to allow for interpretation by the respondents, and the feedback allowed me to identify the issues that I would focus on. Responses confirmed that the Severn Estuary was seen as an important part of the social and economic life of the locality. Fish and wildlife were perceived as a significant environmental feature. The stopping of commercial traffic on the Upper Severn has resulted in a deterioration of the infrastructure, leading to an erosion of the banks, and changes to the water channel. In addition, reduced use has allowed the river to silt up and foliage along the

banks to become overgrown. There were concerns over the rate of water abstraction, diffuse pollution from agriculture, and the increase in flood risk. All of these issues were seen as caused by management problems, and in some cases, it was unclear as to who was responsible for keeping the banks free of the foliage, maintaining the management of obstruction to flood flows and addressing the silting of the riverbed. Most of the respondents were aware of the many legal changes that directly affect the river. There were concerns over the implementation of the Water Framework Directive and other EU legislation, to proposed changes in planning laws and the potential for increased water abstraction. For the fisheries respondents, concerns were raised over the increased predation and the decline in numbers of certain fish species particularly Roach, Dace, Salmon and Eels. It was felt that a more effective division was needed for policy purposes on sites for nature conservation.

To gain further insight into the issues surrounding the Severn, as part of this initial exploration process I also attended a number of debates, seminars and meetings, including the Severn Estuary Forum in Cardiff in September 2011 and September 2012, a yearly conference organised by the SEP to bring together the working groups and other interested parties for the dissemination of research and policy developments. In addition, the Severn Rivers Trust, an independent environmental charity, has a comprehensive calendar of events including workshops particular to the catchment areas and presentations on topics ranging from water pollution to invasive non-native species. I attended a number of these local events, including the SRT Annual conference in Telford in November 2011. At these events, I interviewed a number of the delegates and attendees, taking notes on the issues raised and their responses. In total, I gathered information from eighteen interested parties.

The general consensus was the need for change in how the existing laws are managed and enforced, and an evident suspicion of any government legislation which may deprive local

people and institutions of their historic rights. The issues raised at these events allowed me to focus my aims and to begin to revise my earlier research, to focus on the main aims and objectives, and to concentrate on collecting the evidence needed to construct a central focus for the study. From the responses to the interviews and questionnaires, and from extensively reading and researching material relating to the estuary, I identified the following thematic areas as potential topics:

- Navigation and trade
- Fisheries
- Pollution
- Habitats, wildlife and biodiversity
- Energy and industry

As the focus for my research was to be a sequent occupance analysis, I wanted to take a long-term view using a historical geography focus. In terms of human and non-human activity and occupance, the effects of law on the landscape and the natural environment may take months, years or even decades to produce change. To enable me to evaluate these changes I began to make preliminary searches of law and legislation within each of these topics, identifying those with a documented history, and evaluating the issues that had remained relatively prominent over a longer period than perhaps the more contemporary issues. I needed to source material which would enable me to fully investigate the ‘embeddedness’ of law within the landscape, its inceptions, implications, consummations and terminations. I was seeking to examine the effects of law over time and on the local setting, and the interrelations between law and the socio-economic and cultural landscape, by analysing laws from different historical periods and comparing their effects. This would involve uncovering the reasoning behind legislation through careful contextualisation of the prevailing social and cultural conditions. How were laws affected by social relations, what

actions and reactions surrounded such laws, what were the cultural implications and, perhaps more importantly, have historic laws had a lasting effect on the social and geographical landscape?

With this objective in mind, three of the topics were discounted. The first of these was water pollution, as the regulation of water began only began to take a statutory course in the UK in the 1800s with the Industrial revolution, with the Rivers (Pollution Prevention) Act of 1876 being the first Act in the UK to prohibit both sewage and industrial pollution of waterways. The biggest modern shake up of water law came with the River Boards Act 1948, denoting the beginning of a regulated industry approach. If I were to use this theme, it may have limited my scope in terms of examining cultural and landscape changes. I wanted to examine a longer time period, and in addition, although there are many resources regarding scientific and hydrological issues, not being a scientist, I would be limited in my ability to assess and disseminate such technical information.

The issues of Habitats and Biodiversity were examined together as they overlap in their remit, both falling within the Environmental Law spectrum, defined ‘by reference to the physical non-human environmental media, including land, water, air, flora and fauna, and so on’ (Wolf & Stanley, 2011,4). As a relatively recent area of law, the European Union (formerly the European Economic Community) began to involve itself in 1973 with legislation on the natural environment through the EU Environmental Action Programme. I decided that a study on the law of these issues would steer the research towards concentrating on marine and bird species, and again the scientific nature of such a study was not within my academic skill set and would move away from the human geographical element of my project. Being a contemporary issue, it would also have been difficult to

source data for a historical geography without making only tentative links to possible effects. I also discounted energy and industry on the estuary (the site of two nuclear power stations and the potential source of tidal power) as it became clear early on into my project that research into this area would necessitate separate research and training in regulatory and transactional matters both nationally and internationally. I would also have needed a good grounding in the law and policy surrounding extraction, licensing and acquisition. Such issues were beyond both my time frame and my legal specialism.

The remaining themes of navigation and the fisheries were seemingly embedded in the histories of the communities surrounding the river. Both of these activities were prominent themes in the initial perusal of literature pertaining to the estuary. As the focus for my research was to be a sequent occupance analysis, I needed to take a long-term view using a historical geography focus. In terms of human and non-human activity and occupance, the effects of law on the landscape and the natural environment may take months, years or even decades to produce change. Both activities have had social, economic and environmental significance within the local area, and there seemed to be a substantial amount of legal material to enable a legal geography project to be based on these themes. I was able to source legal data on both of these topics as far back as the thirteenth century, and the legal issues also seemed to show contradictory approaches as both navigational and fisheries communities had different agendas that came into conflict.

Having evaluated the material that I had collected, I had the sources available to create a sequent legal occupance framework that spanned over eight hundred years, from 1215 to the present day. However, as noted above, the jurisdictional complications that become apparent when examining EU and international law led me to close the 'sequence' at the mid twentieth

century. Although this would still encompass a vast time period, the legal data that I would use for the project would remain firmly within the realms of the historical as opposed to the contemporary, conforming to a historical legal geography approach. A final timeframe would not be decided until I had collected all of the legal data that I was going to use, as I was unable to identify which legislation was linked with a sequence. Thus, my next stage was to source, collate and examine the materials that I would use in my thesis.

### **3.6 Sourcing the data for the study area**

Within the UK, a law student who commences their higher education in law at University with the purpose of becoming a Solicitor or Barrister will have within their first timetable a core course in legal skills and methods. Rather than a ‘methodology’, this approach is a toolbox of techniques by which to apply law and legislation in the outside world. During my own legal training, I was taught to systematically learn the empirical research methods for understanding the classification systems, then tracing and finding the relevant case or piece of legislation. Thus on the long road to legal practice, I was taught a method by which to source the evidence on factual situations, ensuring the validity of the judgement or statute, verifying the effects on existing law and ensuring a valid citation, all which are needed in order to confidently to present a case. It was this legal method that I was to use in sourcing the relevant legislation for my thesis. The following thread is gives an example of both the time and effort taken to undertake such a detailed search into the legal status of waterways. The initial searches were made using the term ‘water’ to enable me to gain an overview of the ways in which the topic could be categorised in the legislation, but searches were repeated using a number of related terms such as fisheries, navigation, foreshore and agriculture to ensure that the correct legislation and case law was uncovered.

### *3.6.1 The legal method for sourcing the statutory law*

The starting point for finding a law is to consult a text or legal encyclopaedia, usually the authoritative ‘Halsbury’s Laws of England’<sup>4</sup>, which has over one hundred volumes arranged by subject, and can be viewed in printed encyclopaedic form in a library or via the online database Lexis<sup>5</sup>. A search for Information on water law using the index will make two references;

‘Water and waterways’ in Vol. 100 (2009) 5<sup>th</sup> Ed, Paras 1–452

-in Vol.101 (2009) 5<sup>th</sup> Ed Paras 453–851

Within this initial listing, subheadings are listed (inland waters, water supply etc) and the subheading ‘navigation’ contains another six levels. Under ‘Rights of Navigation in tidal waters’ there is an entry under 689, ‘General public right of navigation’ which gives a concise description of the relevant law, and footnoted references to Acts and cases. If using the printed version<sup>6</sup>, consultation with the Cumulative Supplement (published annually to update and abridge the information) and the Noter-Up binder (which further updates the aforementioned supplement) and the information can be taken down<sup>7</sup>.

Statutory Law (Acts of Parliament) is relatively straightforward. Acts are given a title, citation, and date of assent (i.e. and there are a number of databases to assist. However, although freely available resources (such as [www.legislation.gov.uk](http://www.legislation.gov.uk)) hold all legislation from 1988 to the present, and most of the pre-1988 legislation, it only holds the original

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4 Halsbury's Laws of England covers the whole spectrum of English law and is designed to enable practitioners to answer the full range of questions likely to arise in the course of their work, especially those which fall outside their own fields of expertise. <http://www.lexisnexis.co.uk/en-uk/products/halsburys-laws-of-england>

5 [www.lexisnexis.com](http://www.lexisnexis.com)

<sup>6</sup> Updates on the online version are visible at the bottom of the text

<sup>7</sup> Halsbury's also publishes ‘Is it in Force?’, useful for finding out whether a section of an act is in force, when it came into force or when it will come into force.

published (as enacted) version and no revised version (particularly if the legislation was wholly repealed before 1991). Legal databases such as LexisNexis and Westlaw are online subscription databases resources used by practitioners and students. They publish cases, legislation and law reports as well as a number of law journals and bulletins specific to practice areas (i.e. the All England Law Reports, Butterworth's' Company Law Cases, Family Law Reports ). They are a trusted and reliable source for legal information, as they provide the full text of all Acts and SIs in force, including any amendments. I personally prefer Westlaw, as it has a good legislation search and includes historical law. Using the free text option for 'water' using Westlaw<sup>8</sup> brings up nearly 5000 results. However, there is a topic index on the left of the page to allow the user to direct the search. A search within the initial results for law relating to navigation and estuaries refines the results to 62, with two in force relating to the Severn. The index allows the results to be separated into UK Acts and Statutory Instruments. Statutory Instruments are secondary or delegated legislation.

### *3.6.2 Sourcing historical legislation*

The approach to sourcing historical law differs in that, as noted above, law that has been repealed, due to the sheer volume, is often not listed on legal databases. Here the method is almost the reverse of that used by the student practitioner, the aim being to find law that has gone out of use as opposed to being in force. I approached this problem by first collecting a library of sources in the form of texts, books and articles which related to the history of fisheries and navigation, finding those that referenced laws, and particularly to the Severn. To collect this information, I made use of the University catalogue, as well as visiting my local libraries, Gloucester archives, and museums for lesser-known publications. Gloucester Folk Museum allowed me access to some of their fisheries documents that were not on

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<sup>8</sup> Westlaw.co.uk



display. I also used digital texts of books such as Priestley's 'Historical Account of the Navigable Rivers, Canals and Railways of Great Britain' of 1831, and Cornish's 1824 publication 'Of Channel- fisheries and of the Statute Laws by which they are regulated'. Some of these older legal works often have an index of enactments by year or by subject. With these initial investigations, I compiled a chronology of legislation. The next stage was to verify the laws that I had listed from the secondary sources as accurate.

### *3.6.3 Archive research*

Archive retrieval of law is particularly difficult. I am not a legal historian (and nor do I claim to be) therefore sourcing the material was a case of trial and error. The history of recording legal documents needs to be understood before the process of retrieval can take place, as where a piece of legislation is listed will depend on its date. Although there is no exact date for the 'beginning' of English law, it developed as 'codes' that imitated the Roman jurisprudence following the arrival of Roman missionaries in the year 597 ( Harding, 1966) The earliest of these laws were tools for assisting the arbitration of customary rules, for compensation and peace keeping. The best source of information for the earliest codes and laws that I have found is through Fordham University (Halsall, 1996) who have a detailed and dedicated webpage for both Ancient and Medieval law with translated legal texts, including selected pleas to the crown in Manorial and Eyre Courts. I also found the Journal of Legal History to have some most illuminating articles, which assisted me in sourcing some of the material.

I used the Magna Carta (1215) as a starting point, as at this point in history laws, charters and declarations began to be written down, and can therefore be used as substantial evidence. All laws were sourced using the extended process of searching initially by date (if available). However, depending on both the date and type of record sought, each piece of legislation,

accord or writ has to be searched in a separate document. The records that I used fell predominantly into the following categories:

#### 1129-1130 Pipe Rolls:

These rolls or parchments were Crown records of the monarch's yearly accounts. The earliest surviving pipe roll covers the financial year from 1129-1130, and include fines and penalties. They run in an almost unbroken series from 1155 until 1832. The originals are held at the National Archives, Kew, although they are in Latin, and so needed to be sourced as translations.

The Pipe Roll Society<sup>9</sup> (as part of the National Archives) has translated, and continues to translate, the documents from the year 1158-9 (Vol I) to 1130 (Vol 95). Note that the volumes do not run in chronological order, but by are catalogued according to when each roll was translated into English. These are available to buy in paper form, but a digital archive of the Rolls up to Vol 36<sup>10</sup> (1186) is available online at their internet archive<sup>11</sup>. The Henry III Fine Rolls Project (1216–1272) has translated and made these records for this period available online.<sup>12</sup> It is necessary to have the year, and at least the month, and preferably the actual date of the record to find the relevant material, as each roll is listed by year.

#### 1272-1504 Parliament Rolls:

The Parliament Rolls were the official records of the meetings of the English Parliament from 1272 to 1504. Written in Latin, Anglo-Norman and Middle English, they were superseded by the journals of the lords.

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<sup>9</sup> <http://www.piperollsociety.co.uk>

<sup>10</sup> With the exception of volumes 10,12,32,33,34 and 36

<sup>11</sup> <http://archive.org/search.php?query=subject:%22Great%20Britain%20--%20History%20Angevin%20period,%201154-1216%20Sources%22>

<sup>12</sup> <http://www.finerollshenry3.org.uk/content/calendar/calendar.html>

The Parliament Rolls of Medieval England (PROME) have digitally published both the original Latin and the translated versions.<sup>13</sup> The rolls are categorised by reign, from Edward I (1272) to Henry VII (1504). This needs to be accessed via an account (such as through the National Archives) and I did sometimes have issues accessing and viewing some of the documents, with access restricted on some days but not on others.

#### 1216 – 1452 Calendar of Patent Rolls

These were compiled by the Chancery and include the Letters Patent, which expressed the will of the sovereign on a range of matters of public interest. These are online at a number of websites, but I used those translated and published by the University of Iowa<sup>14</sup>. They are catalogued by reign (from Henry II to Henry VI), volume and page number, and so these are needed to search for a particular record. However, it does also have a text search box which will link to all pages with a search term. Later rolls (to Henry VI, 1504) have been translated and are available with subscription at British History Online.

#### 1204-1547 Close Rolls

These were ‘closed’ or sealed letters, conveying orders and instructions, and recorded on the rolls. The Calendar of Close rolls from Henry III (1216) to Henry VIII (1547) have been translated and are available with subscription at British History Online, along with other state papers and correspondence.

From the mid sixteenth century, it becomes much easier to source the written law. There are House of Lords Journals (from 1509), the House of Commons Journals (from 1547) and the Statutes of the Realm (from 1628) which are all available with subscription at British History

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<sup>13</sup> [www.sd-editions.com](http://www.sd-editions.com)

<sup>14</sup> <http://sdrc.lib.uiowa.edu/patentrolls/>

Online. The House of Commons Parliamentary Papers (HCCP) has a digital subscription resource with papers from 1688<sup>15</sup>

### *3.6.4 Locating legislation and case law*

As I have had legal training, I am familiar with reading the law and knowing which abbreviations refer to which documents. Technically, this takes a great deal of tuition, so I will briefly give an overview of the way in which law is published and categorised here. A citation in legal terms is the format by which a report of the judgment on a case can be found. For example:

*Pepper v Hart* [1993] AC 593 (HL)

This names the parties involved, with the abbreviation denoting that the case was decided by the House of Lords (HL) and can be found in the 1993 series of the Law Reports called the 'Appeals Cases' at page 593 (AC 593). Such a citation is therefore a catalogue number. For domestic legislation, an Act is cited by its short title and date. For example:

Anti-terrorism, Crime and Security Act 2001

For older statutes, there is usually a regnal year and chapter number:

Crown Debts Act 1801 (14 Geo 3 c 90)

This indicates that the Act was passed in the 14th year of the reign of George III (14 Geo 3) and as it was the 90th Act given the Royal Assent in that parliament session, it is Chapter 90 (c 90). There are many different citations depending on the way in which and when a legal text was recorded, but most of my research used the older legislation. I found that a number of the acts that were noted in my initial readings were either untraceable, or had been cited with the wrong heading or date. This was frequently encountered when using non-academic texts that had been compiled referencing other authors, and when using British History

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<sup>15</sup> <http://parlipapers.chadwyck.co.uk>

Online (a database of documents relating to particular towns or regions, written by various authors and then put into a compilation) and where citations had been reused without being checked and verified first. Thus a considerable amount of hours were spent trying to track laws that had been cited but could not be found; tracking and finding laws that had been wrongly quoted; those that were correct but had been wrongly cited (dated) and were found by meticulously searching the record books page by page.

The method for verifying a source is shown in the diagram (Fig 3.7). The search begins with the basic citation (in this case, 9 Henry VI cap.5), found in a non-legal text that referenced this particular Act. The flow chart links each stage of research. A basic internet search engine query for the citation yielded no results; sometimes (although rarely) a citation will reveal the actual document, but will often only return near matches based on the numerals, which may be totally unrelated. The next stage was to search for the named act was taken.

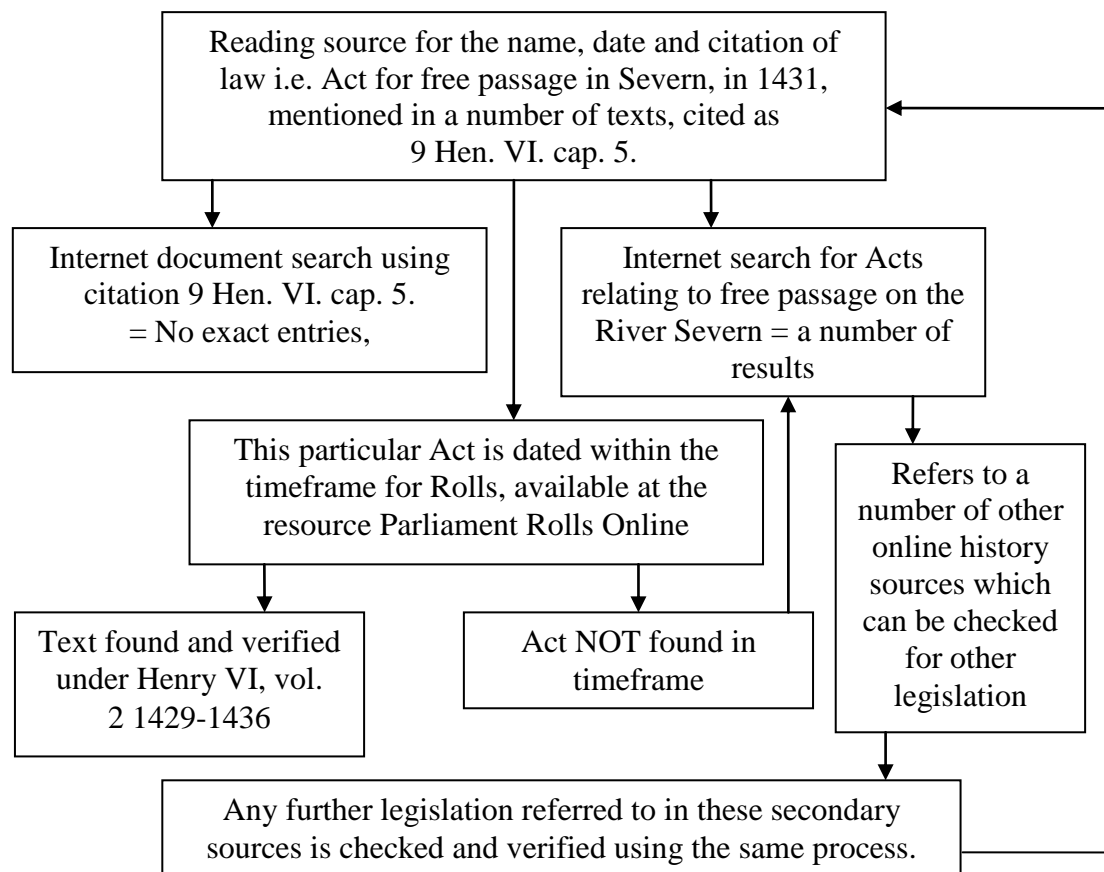


Fig 3.8: An example of sourcing and substantiating legal records

Knowing the date range for documents, the Act can be traced to the Parliament Rolls. However, if the Act is not located where it should logically have been documented, further searches are made using the name of the legislation (if available) or key search words. A general internet search can be useful for revealing related legislation, which is again verified using the same methods.

Once the relevant Acts and legislation was collected, verified and recorded, the resulting data was placed in chronological order in a timeline from 1215 to the twentieth Century (Table 3.2).

Table 3.2: Timeline of selected legislation relating to the River Severn 1215- 1995

| <b>A LEGAL TIMELINE OF THE RIVER SEVERN</b>  |           |  |
|--|-----------|--|
| <b>NAVIGATION</b>  |           | <b>FISHERIES</b>   |
| 1277 Supervision of weirs impeding navigation<br>1286 Commission to check weirs  | 1215      | 1215 Magna Carta-removal of fish weirs<br>1285 Close season on Salmon<br><br>1289 Royal Commission check nets and weirs                        |
| 1346 Removal of obstructions in Rivers<br>1351 Removal of Fish weirs<br>1365 Wreckage case<br>1377 Removal of Obstructions<br>1397 Removal of Obstructions<br>1399 Removal of Obstructions   | 1300s     | 1345 Salmon Act<br><br><br>1393 Salmon Conservators<br>1397 Salmon Act   |
| 1400 Gloucester bailiffs ordered to allow ships to pass<br>1401 Forest looters<br>1402 Removal of Obstructions<br>1411 Bailiffs summonsed for taking taxes<br>1423 Removal of ‘trinks’ Act<br>1429 Looting<br>1431 Act for Free Passage on the Severn<br>1472 Removal of weirs Act<br>Commissioners sent to inspect rivers | 1400s     | Commissioners to investigate destruction of fish fry   |
| 1503 Toll Extraction Prevention Act<br>Mobs and piracy<br>1531 Toll Extraction Prevention Act<br>1534 Ferry Boat restriction Act<br><br><br>1586 Framilode Mobs and piracy<br>1580 Gloucester Port Status  | 1500s     | 1533 Banning of taking of fry of Eel and Salmon for 10 years<br>1539 Private game poaching law<br>1558 Fry Protection Act<br>1562 Poaching Act |
|  | 1600s     | 1605 Act for the Better Preservation of Sea Fish<br>1678 Severn Fish Preservation Act bans elvers<br>1692 Game & Poaching Act                  |
|  | 1700-1750 | 1714 Act to prevent imported fish<br>Ban of sale of undersize fish   |

|  |           |   |
|--|-----------|---|
|  |           |   |
| 1772 Towpath Act<br>1779 Stroudwater Canal<br>1786 Jessop's Lock Survey<br>1793 Gloucester- Berkeley Canal Act<br>1794 Sharpness Canal starts      | 1750-1800 | 1765 Severe penalties for fish poachers<br>1777 Ban on elvers repealed on Severn                                  |
| 1803 Towpath extended<br><br>1827 Gloucester Ship Canal opens<br>1828 Towpath Obstructions<br>1842 Severn Commission                               | 1800-1850 | 1818 Salmon Act<br>1824 Cornish publishes on defects of the fishery laws<br>1825 Fisheries Select Committee       |
| 1858 Upper Lode Lock completed<br>1861 Pilotage Act<br>1869 Sharpness New Dock started<br><br>1879 Severn Railway Bridge<br><br>1885 Severn Tunnel | 1850-1900 | Salmon Acts 1861, 1863, 1865, 1873, 1876, 1879<br><br>1876 Elver Fishing Act<br><br>1884 Freshwater Fisheries Act |
| 1939 First Severn Bridge disaster<br>1947 Transport Act<br>1948 River Boards   | 1900-1950 | 1903 Board Of Agriculture<br>1910 Severn Fisheries District<br>1923 Salmon & Freshwater Fisheries Act             |
| 1952 'Darleydale H'<br>1960 Second Severn Disaster- Bridge abandoned   | 1950-2000 | 1951 Pollution Act<br>1975 Salmon & Freshwater Fisheries Act<br>1995 Environment Act                              |

The columns allowed me to clearly see the events and legislation in time periods and any correlation between those relating to fisheries and navigation. This allowed me to mark up periods when there was more legislative activity and to examine any potential interrelationship between them. It also allowed me to view the law in a linear representation, so that I could investigate where enactments may have been 'grouped' so that I could examine the influences between them, where they ceased to become relevant, and where they were superseded by other enactments and events. The most obvious example of this type of



cluster is the raft of legislation between 1861 and 1869 and the Salmon Acts. A ‘contextualist analysis of the law requires both an understanding of the meaning of particular legal texts and an understanding of the context in which these texts are produced’ (Forest, 2000, 6). I needed to have an overview of the political and social, as well as the geographical landscape in which they were decreed, the context in which they were debated, enacted and incorporated, as well as the reasons for their use or misuse, continuation or demise. This led to the sourcing of related literature.

### *3.6.5 Sourcing related social history and historic geography literature.*

I needed to contextualise the law and legal structures in their relevant time frames, as the ‘contested nature of such legal regimes and constructs is largely ignored. Little, if any attention, is given to the socio-spatial and cultural variations in definitions and meanings of law (and crime) at an everyday level’ (Hogg, 2002, 32). To analyse these variations, the archives were used to build a secondary list of documents that could supplement the reading of the statutes by understanding them within a social history context. I wanted to source both personal and popular media accounts which would allow me to incorporate alternative perspectives at the time, rather than to just analyse the black letter law.

This is where living in the area in which the research topic is geographically situated really is advantageous. I visited local libraries across the county, as those situated along the River Severn hold excellent local history sources, including limited run printed books, privately published booklets and independently produced material. There is an extensive Waterways Museum in Gloucester Docks (although unfortunately at the beginning of my research, their large archive section was in the process of being moved to the National Waterways Museum in Ellesmere Port, Cheshire and was inaccessible!). I made use of the proximity of the dedicated Gloucester Archives over a number of months to collect literature. As the archive

is only open four days a week, I would use their online catalogue<sup>16</sup> to compile a list of potentially useful documents before arriving. Using a broad text search would reveal a large number of documents, which I would try to narrow down to the most relevant. However, once at the archives, visitors may only order three documents at a time, and each 'run' leaves on the hour until the hour before closing. Inevitably, as the online catalogue does not give you an image of the potential document, from the maximum of 21 documents that I could view per day, many would be unusable, some were unreadable, and others were documents that I already had knowledge of. Once a useable document is found, photocopying is out of the question for many of the more delicate items, and so the process of copying (in pencil) the record begins. Fortunately, the archive has a well stocked reference library of local history books that I made use of whilst waiting for document retrieval. Particularly useful were the Volumes of 'Gloucestershire Notes and Queries' (Blacker, 1881).

The British Library has a dedicated British newspaper archive from 1710, and The Times has its own searchable archive from 1785. Newspaper articles often had law reports, and letters to the editor could be a good indication of the views of readers on particular events. Some angling and sporting magazines also have archive resources. In addition, historic maps and plans of the area, including the proposed canal works, were viewed to assess changes to the physical landscape and waterway as a result of legislation that authorized such schemes. In some cases, structures have been built, and then removed or allowed to disintegrate (i.e. the Severn Railway Bridge and towpaths). These were included in the research, as they indicate change, and are a reminder that time changes knowledge, and in turn, social structure and the lived environment.

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<sup>16</sup> <http://ww3.gloucestershire.gov.uk/DServe/DServe.exe?dsqApp=Archive&dsqCmd=Index.tcl>

With the final list of verifiable legislation, a number of time periods clearly showed ‘peaks’ where activity occurred, often due to some external influence (i.e. the awarding of port status to Gloucester; the building of the canal). The laws which had documented opposition or approval, and sufficient records identifying the regulating and applying those laws, would be the basis for my historical legal geography. The timeframe was to be between 1215 and up to and including the final amendments to the Salmon Acts in 1923. Although this was a period of six hundred years, I decided the study would concentrate on the ‘clusters’ of activity at certain times, and view them in relation to each other in terms of knowledge, culture, law and landscape, thus providing a sequent ‘legal’ occupance perspective to historical legal change on the Severn Estuary.

### **3.7 Conclusion**

This Chapter began by summarising the theoretical underpinnings for the research. I have started to develop a sequent occupance approach, as proposed by Whittlesey (1929), and proposed that the concept has the potential to investigate the legal geography of an area when more contemporary notions of landscape and temporality are used within an expanded framework. By investigating the ‘impress’ of law using a historical legal geography, developing Whittlesey’s notion of the cultural impress of central authority upon the landscape (Whittlesey, 1935) this thesis will extend the sequent occupance approach by substituting the political impress for a legal impress, creating a ‘sequent legal occupance’ (SLO) framework.

The chapter then identified the regional setting for the investigation and the reasons for selecting the River Severn as a project area. Once the geographical area had been decided, it then set out the ways in which I refined the boundaries of the study by examining the

available literature and limiting the scale of the study. The process of selecting the themes was then elaborated upon. This began with an open theme with the River Severn as a central feature during which preliminary information was collected both formally using research methods and informally by attending seminars and meetings and distributing questionnaires. The theme was narrowed to concentrate on navigation and the fisheries, influential culturally and in terms of the landscape, and rich in terms of legal and social data. The research structure builds upon the empirical research by exploring the legal geography of the Severn Estuary as a series of events and activities influenced by law to create a 'sequent legal occupance' analysis which examines both space and place in terms of law and the landscape. The Chapter then explains the methods used to source the law and legislation, as well as related social history literature used in the research. I present some of the legal data used in a timeline (Table 3.2) to illustrate the legal intervention within both navigation and the fisheries on the Severn from 1215 to the end of the twentieth century. During the research process, those laws which indicate clusters of activity will be used as the foundation for the development of a sequent legal occupance analysis of the Severn.

Due to the long timeframe used in the research, the following Chapter (Chapter 4) is intended as an overview of the history, law and geography surrounding navigation and the fisheries on the River Severn, using preliminary findings to illustrate the rich cultural setting of the project. It also serves to contextualise the deeper analysis in the later Chapters. As such, it is a 'potted history' of the legal issues, a narrative which identifies the enactments as a series of layers, each building upon previous legislation, events and turning points, each contributing to the 'impress' that will be examined as sequent legal occupance.

## **Chapter 4**

### **An introduction to the legal history of the River Severn**

#### **4.1 Introduction**

This chapter will give a brief outline of the legal history of the River Severn, including the lower part of the river, or the estuary. The whole of the Severn is included in this overview, as although the inland part of the river Severn is navigable between Stourport and Gloucester and the estuary to the Bristol Channel, it was once navigable by boat as far as Welshpool (Hawkes, 1999). This chapter serves to contextualise the research by illustrating that law does not just ‘happen’; it has a space, place and time and is relative to the landscape in which it is played out. Yet as it is ‘not enough to study landscape as a scenic text’ (Olwig, 1996, 645) this thesis seeks to make a ‘historical study of our changing conceptions and uses of land/landscape, country/countryside, and nature’ (Olwig, 1996, 645) to gain a more substantive understanding of landscape and its relationship with law. Thus the elements in this study, the law, the geography and the river as a central focus are examined as a whole landscape ‘in a constant process of becoming’ (Blomley, 1998, 581) By examining legislation historically, the local and wider social circumstances surrounding each legal action is included to begin to examine the presence and implications of a sequent legal occupancy.

In the first section, this chapter aims to illustrate some of the legal issues that have affected the use of the river as a navigational ‘highway’. As one of the most trade important routes in England between 1215 and the mid 1950s, the Severn was subject to a number of national and local laws. Legislation was frequently passed to aid the passage of boats and goods on all the major rivers of the realm to keep trade flowing, and the Severn was no exception. The chronology also introduces physical geographical changes, implemented by law, in the building of bridges and canals, which in turn influenced the use of the river.

The second section introduces the natural biota of the estuary, especially that of fish and their lifecycles. This is important, as the natural environment influences the habits and thus the health of the local the fish population and knowledge of the habits of migratory fish were frequently misunderstood by legislators. Fish were once an abundant source of food and historically, ‘salmon were once so plentiful that masters were restrained by their indentures from compelling their apprentices to eat this fish more than twice a week’ (Cornish, 1824). By the nineteenth century, it was recognised that fish stocks nationally had declined. The Salmon Acts which began in 1861 were designed to implement a national administration to improve the situation, yet these too had unintended consequences for both the fish and the human population.

## **4.2 A legal history of navigation on the Severn**

### *4.2.1 Barges and Bowhaulers*

As a geographic area, the estuary between Bristol and Gloucester is surrounded on the east side by hills and valleys and by the Forest of Dean on the west banks and forms a natural route between England and Wales. By the time the new Westgate Bridge over the River Severn at Gloucester was completed in 1189, use of the river for trade purposes was well established, with military cargo and other supplies regularly shipped to and from the city. During the 13th century, the river was the usual means of bringing oak to Gloucester from the Forest of Dean which was used to build both Gloucester Castle and a number of religious houses (Herbert, 1988). Boats of up to 60ft long, known as ‘trows’ relied on the tides to carry them up river, but once they reached the shallows gangs of six or more men called ‘bowhaulers’ (boat haulers) were employed to physically pull the barges with ropes to their destination (Fig 4.1)

Other vessels mentioned in legal records are ‘drags’ or ‘floats’, which seemed to be ‘wood or timber so joyned together, as swimming or floting vpon the water, they may beare a burden or load’ (Cowell, 49, 1607)

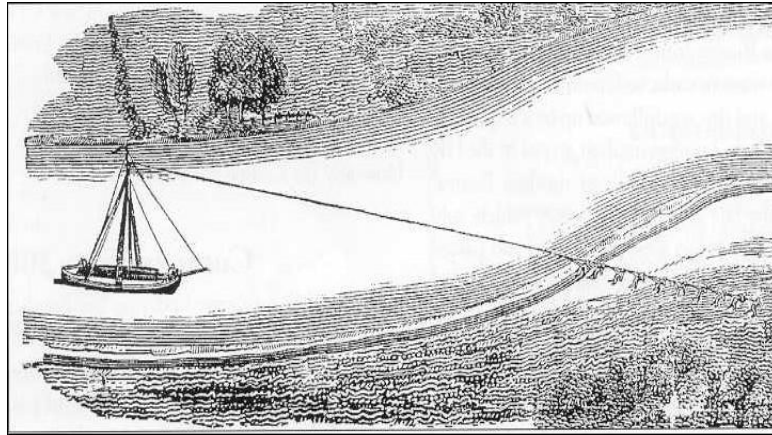


Fig 4.1: ‘Bowhaulers’

(Source: Wilkinson, 2011)

The Magna Carta of 1215 (British Library) had declared that all fish-weirs were to be removed from all rivers in England, but the Calendar Rolls record that complaints were made in 1247 that a monk from Gloucester Abbey had placed a fishing weir in the river, stopping boats from reaching the town (Boynton, 2003). Later Rolls record that the King had been informed that, ‘ships and boats cannot pass through the said river without impediment and danger’(Boynton, 2003) , so in the years 1277 and 1286 two Gloucester men were appointed to supervise the removal of such weirs, and to maintain a width of twenty-six feet on the River.

Nearly a hundred years later obstructions were still hindering boats in English waters. In 1346, ‘An Act Remedying Annoyances in the Four Great Rivers of England, Thames,

Severn, Ouse and Trent' yet again ordered the removal of fish weirs and other obstructions, again in contravention of the Magna Carta.

In 1365, the close rolls (Maxwell-Lyte, 1910) recorded that a boat sank in poor weather between Bristol and Gloucester. The crew drowned, and the cargo of wine was found floating upon the Severn by the Sheriff of Gloucester, who took the cargo into his 'care', stating that that he did so 'in case the wine should be adjudged for wreck' When called to Chancery to explain himself, the question arose as to what constituted wreck as opposed to flotsam, jetsam, or ligam and the consequent ownership. The definitions were that 'flotsam' are the goods of a ship that has sunk that are floating on the sea; 'jetsam' are goods that have been cast overboard when the ship is in danger of being sunk; 'ligam' is similar to jetsam, although these are goods that are so heavy that they will sink, so the mariners have tied a buoy or a cork to them so that they can find them again. None of these goods are wreck, as long as they remain on the water, but they do become wreck once they have washed on to the shore. In addition, under the Statute of Westminster:

'where a man, a dog, or a cat, escape alive out of a ship, that such ship, nor barge, nor anything within them shall be adjudged wreck, but the goods shall be saved and kept by view of the sheriff, coroner, or King's bailiff, so that if any sue for those goods, and after can prove that they were his, or perished in his keeping within a year and a day, they shall be restored to him without delay'

(Statute of Westminster, 1275).

This also applied to flotsam, jetsam and ligam. Therefore, the goods found floating on the Severn were *not* wreck and were to be returned to the rightful owners.



In 1377, Edward III was addressed by petition yet again complaining that the Severn was still being restricted by weirs preventing navigation (Boynton, 2003). This was obviously an ongoing issue throughout the Rivers of the realm. Taxes on boat trade were also a grievance, and levies were being charged on boats using the city of Bristol port, causing jealousy amongst the Gloucester burgesses. At the same time it ‘aggravated the resentment’ felt towards Bristol as a trading centre (Herbert, 1988) In 1400 complaints were made by Mayor of Bristol that people had seen looted goods from Bristol bound boats being sold in Gloucester markets (Stamp, 1927). The burgesses were taking matters into their own hands, and the following year the bailiffs of both Worcester and Gloucester along with men from the Forest of Dean were taking illegal tolls from boats and ‘compelling the divers to sell their cargo against their will’.<sup>17</sup> The King was informed that the men were demanding ‘5 d. for a tun of wine, and 5 d. for each tun of oil...and they have extortionately levied the same money, in accordance with their tax, on your said lieges, to the great oppression, damage, and ruin of your same lieges, and an evil precedent if due remedy is not ordained in this matter.’(Given-Wilson, 2012).

A similar complaint was made in 1411, only this time, the burgesses of Bristol and Gloucester petitioned Parliament about trow owners who were stopping and charging boats. On the eve of Michaelmas 1411, the trow owners lay in wait for boats from Gloucester to pass by on the river and forcibly robbed them of their goods. The fines were heavy; £100 each on conviction and any future incidents were to carry a fine of £40 and a payment of three times that amount in damages to the victims. Yet such penalties did not stop problems with riverside piracy or the conflict between bailiffs, burgesses, trow owners and foresters, all

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<sup>17</sup> ‘divers’ is the old English version of diverse, and so may relate to the various tradesmen, but was also used as an alternative to the use of the words such as various, sundry, several; more than one, some number of etc

of whom were taking their own 'taxes'. It seemed that the whole riverside community wanted to have their fair share of the wealth that was passing along 'their' river. Measures were taken with an Act of 1431 (Fig 4.2) which declared that:

**C A P. V.**

[See further St.  
19 H. 7. c. 18.  
28 H. 8. c. 12.]      **All Men shall have free Passage in *Severn* with Goods,  
Chattels, &c.**

**A**LSO, because the River of *Severn* is common to all the King's liege People, to carry and re-carry within the Stream of the said River, to *Bristol*, *Gloucester*, and *Worcester*, and other Places adjoining to the said River, all Manner of Merchandises and other Goods and Chattels, as well in Trowes and Boats, as in Flotes otherwise called Drags, in every Part adjoining to the said River; within which River many *Welshmen* and other Persons dwelling in divers Places adjoining to the said River, have now late assembled in great Number, arrayed in Manner of War, and taken such Flotes, otherwise called Drags, and them have hewed in Pieces, and with Force and Arms beaten the People which were in such Flotes, to the Intent that they should hire of the said *Welshmen* and other Persons, for great Sums of Money, Boats, and other Vessels for Carriage of such Merchandises, and other Goods and Chattels, to the evil Example and great Impoverishment of the said liege People, if Remedy be not speedily provided; It is ordained by Authority of this Parliament, That the said liege People of the King may have and enjoy their free Passage in the said River with Flotes and Drags, and all Manner of Merchandises, and other Goods and Chattels, at their Will, without Disturbance of any; and if any be disturbed of his free Passage in the said River, the Party grieved shall have his Action according to the Course of the Common Law.

Fig 4.2: 'All Men shall have free Passage in Severn with Goods, Chattels &c' (1431)  
(Source: Tomlins, 1811, 440)

However, it became apparent during the next decade that river users would have to make some forms of payment for maintenance. In 1505 the City of Gloucester registered a claim to collect tolls for the upkeep of the Westgate Bridge as the Mayor and burgesses claimed that, as owners of the bridge, they had spent 300 marks on its upkeep over three years (Herbert,

1998). Floods and ice caused damage in the winter months, and the trowmen had added to the damage by hooking and grappling on the bridge to haul their boats through the arches. Although the toll of 6d was allowed it did not go down well and the burgesses sometimes had to resort to shooting arrows and throwing stones at the trowmen as they passed to force them to come in to the bank and pay the levy (Herbert, 1988).

In 1531 'An Act for taking Exactions upon the Paths of Severn' was passed. The Act states that 'for time out of mind' the Kings subjects had used a path of 'a foot and a half broad' on either side of the river for drawing up their vessels with ropes ( bowhauling) without having been imposed any tax or toll for doing so. Yet of late, 'certain covetous persons have perturbed and interrupted many of the Kings subjects' by forcing them to hand over money and bottles of wine in order to pass. The fine for such behaviour was to be forty shillings. Three years later in 1534 another Act was passed, 'An Act that Keepers of Ferries on the Water of Severn shall not convey in their Ferry-boats any Manner of Person Goods or Chattels after the Sun going down till the Sun be up'. The statute states that due to the daily felonies, murders and robberies that had been occurring in Gloucestershire and Somerset (where the counties were across the water from Wales) , the 'said robbers, felons and murderers' had been taking the stolen goods by night across into South Wales and the Forest of Dean by ferry.<sup>18</sup> The 'secret and sudden conveyance by night' of stolen goods was encouraging more persons to leave South Wales and cross the river to perform robberies. Thus not only were night ferries banned, but the ferrymen were only to take paying customers across the water during the daytime after they had asked them to disclose who they were and where they lived. The local Justices of the Peace had full authority to ask for a payment of

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<sup>18</sup> Those specifically mentioned are the ferryboats at Auste (Aust), Fremeland (Framilode?), Pyrton (Purton), Arlingham, Newenham (Newnham), Portsedes (Portishead) and Poynte (unknown).

Surety from all the ferry keepers that they would not carry any goods or cattle at night, and that they would disclose any information asked of them regarding any of their passengers. Unfortunately, such measures did not prevent a mob who ‘assaulted and rifled a barge laden with malt appointed to have been conveyed into Wales’ at Framilode in 1586, and the Privy Council sent a letter to the Sheriffs and Justices of the Peace of Gloucester requiring them to find the ringleaders of the gang, and for this ringleader to be jailed. (Dasent, 1897, 91).

In 1580, Gloucester was finally granted Port Status under Charter. Vessels could now trade directly between Gloucester and foreign ports without having to call in at the Bristol custom house. Increased trade made the Severn a major artery route and traffic increased steadily during the next century, which heralded the industrial revolution.

#### *4.2.2 Horses and canals*

When the Coalbrookdale works at Ironbridge (Fig 4.3) began to flourish during the mid 1700s, coal became one of the main cargos on the Severn. It was said that ‘when the river begin to fill with fresh water after a period of rain as many as eighty trows would leave the Ironbridge Gorge at once’ (Witts,2008). In a letter to The Gentleman’s Magazine of 1758, a Mr Perry noted that more than 100,000 tons of coal were annually shipped from the collieries to Bristol and beyond along the Severn alongside great quantities of grain, pig and bar iron, iron and earthenware, wool, hops, cider and provisions. The writer had recorded the 376 barges and trows using the River in 1756, the bulk of which were recorded above Gloucester (Urban, 1758, 278). Salt from Droitwich was an industry that also benefitted Gloucester Docks; in 1691, some ‘154 hogsheads, 170 bushels, 201 bags, 36 tons and 4 barrels of salt’

was shipped from Gloucester (approximately 9,500 gallons); by 1735, this amount had increased to some 277,000 bushels (over 2 million gallons) (Willan, 1937, 78).<sup>19</sup>



Fig 4.3: ‘View of the Iron Bridge over the River Sever, near Coalbrookdale’ showing Bowhaulers circa 1782’ (Walker & Burney)

(Courtesy Ironbridge Gorge Museum, 2013)

Yet improvements were desperately needed to keep the river navigable. In 1786, Parliament heard that during the previous summer the river level fell, in some places to only 12 inches, stranding the boats for three months.<sup>20</sup> Other obstructions along the route were frequently causing delay and consequent loss to traders. However, attempts to improve the navigation were often vigorously fought off by landowners, as experienced in 1786 by the engineer Jessop when he surveyed the River and proposed sixteen locks between Coalbrookdale and Diglis. The landowners thought that the scheme would cause their meadows on the banks to

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<sup>19</sup> 1 Hogshead = 52 gallons ; 1 bushel = 8 gallons

<sup>20</sup> Sixteenth Parliament of Great Britain: third session (24 January 1786 - 11 July 1786) 21 March 1786, p.374 at <http://parlipapers.chadwyck.co.uk>

flood. Jessop had to go to some lengths to convince the opponents of his scheme that locks would maintain the river level by addressing them personally and using measurements and examples to show that flooding would not occur (Jessop, 1796)

During the 18th and 19th centuries, two types of trow used the Severn. The larger ones worked out of Bristol up to Gloucester, had a weight of up to 80 tons, and masts that could be lowered to enable them to pass under the bridges. The smaller trows of up to 60 feet (20-40 tons) worked the route above Gloucester and through into Wales. Bowhaulers were still needed to tow the boats upstream when the shallows impeded their progress. Yet these labourers were not a popular community to those outside of trading. In the 1770s Richard Reynolds described bow hauling as ‘degrading and unseemly, the means of harbouring and collecting persons of bad character and facilitating a system of plunder injurious to trade and destructive of the morals of the people engaged in it’ (Ironbridge Gorge Museum). Horses had started to replace manpower on some rivers, but they needed a path along the bank. Acts for their provision began in 1772 with ‘An Act for making and keeping in repair a road or Passage for horses’ (or a towpath) for the riverbank at Coalbrookdale. The trustees appointed failed to repair the path and the act had to be revived in 1799. By 1803, an ‘Act for extending and making the Horse Towing Path’ extended it to Diglis, just below Worcester. By 1811, the ‘Act for extending the path...from Worcester Bridge to Lower Parting’ just below Gloucester incorporated the Company of Proprietors of the Gloucester and Worcester Horse Towing Path and enabled them to raise the necessary sum of £10,000 in shares of £25 each, to be recouped with the collection of tolls (Fig 4.4).

| TOLLS.  |            |
|---|------------|
| For every Horse or other Beast passing on the Towing-path, and drawing any Boat, Barge or other Vessel on the River ..... | 1 per Mile |
| For every Distance less than a Mile .....   | 1          |
| Vessels haled by Men exempted from Toll.  |            |

Fig 4.4: Toll charges Worcester Bridge to Lower Parting

(Source: Priestley, 1831, 564)

Surveys were carried out in 1792 for a ship canal to bypass the shallows between Sharpness point and Gloucester, and construction of the Gloucester & Berkeley Ship Canal began two years later. Few of the original financiers lived to see the canal completed; work ceased in 1799 with only the Gloucester basin and a few miles of canal finished (Herbert, 1988). The new canal basin for the terminal at Gloucester opened in 1812. This promoted industry in the city, particularly shipbuilding, and in 1814, a shipyard launched a 113-ton brig, the first vessel bigger than a Severn trow built at Gloucester within living memory (Herbert, 1988). The canal was finally completed in 1827. At 16 ½ miles long, 70 feet wide, and at a depth of 18 feet, it was capable of ‘receiving Indiamen of four hundred tons burthen’ and ships of up to 600 tons (Priestley, 1831). The effect on Gloucester’s foreign trade was immediate, and rapid growth continued until the mid 1830s. The number of ships using the canal rose from 4,272 in 1828 to 7,576 in 1832 and the effect on trade in Gloucester Docks immediately after the canal opened was marked (Table 4.1).

Table 4.1: Customs receipts for the port of Gloucester 1825-1835

(Source: Power, 1848)

|                             |          |
|-----------------------------|----------|
| 1825                        | £12,711  |
| 1826                        | £19,006  |
| 1827( <i>CANAL OPENED</i> ) | £28,550  |
| 1828                        | £45,428  |
| 1829                        | £57,400  |
| 1830                        | £90,282  |
| 1835                        | £160,484 |

Sharpness dock was enlarged between 1869 and 1874, with the addition of a new dock to allow bigger ships to dock at Sharpness, instead of having to discharge at Gloucester. Cadbury opened a factory beside the canal at Frampton in 1916, converting milk into chocolate crumb to be transported to Birmingham by barge. Although the original capacity was 40,000 gallons a month by 1967, the average monthly capacity (in addition to milk handled for the Milk Marketing Board) was 1¼ million gallons in 1967, employing 160 people (Elrington et al, 1972).

Despite the ship canal, demands for the improvement of the River intensified during the 1830s. The Severn Commission was authorised by the Severn Navigation Act in 1842 to make improvements to the waterway, and despite making the river deeper and easier to navigate, sand and rocks still made travel difficult for boats between Bristol and Sharpness Docks (Fig 4.5).





*Map of the Severn Estuary from Avonmouth to Sharpness with the navigation channel indicated.*

Fig 4.5: 'A Map of the Severn Estuary from Avonmouth to Sharpness with the navigation channel indicated'

(Source: Witts, 2002)

Up until 1861 the safe navigation of the Bristol Channel and River Severn was in the hands of the Pilots attached to the Port of Bristol. Owing to the increase in the trade, the Bristol Channel Pilotage Act 1861 gave commissioners the power to license pilots for ships bound for Cardiff, Newport and Gloucester. Gloucester District was given jurisdiction of the Bristol Channel eastward of Lundy Island and up to the City of Gloucester, including the River Wye to Chepstow Bridge (Stone, 1966,3). Pilots are essential on the Severn due to the unpredictable tides, weather and the unique nature of the geography of the estuary, leading to a number of shipping disasters. In 1887, the 'Prince Victor', a ship laden with 10,000 casks of paraffin, left Bristol for Sharpness Docks on the spring tide. Despite being accompanied by pilot tugs, strong winds grounded the ship and it became waterlogged, drowning the Norwegian Captain, his wife and young son in the cabin (Stone, 1966).

Legal cases were heard in the Admiralty courts, and were usually related to salvage matters. In 1898, 'The Madras', a wooden ship of 1739 tons carrying timber, became stranded on a rock in the river when its pilot tug hit a bank of fog. Attempts to get the vessel off failed; three tugs stayed with the Madras for four days until the greater part of the cargo was taken off. The tug owners claimed that, legally, they were due remuneration out of the salvage money for the part that they played in saving the cargo. However, the ship owners claimed that as this was a contract, once the vessel grounded, the subsequent towage was made ineffectual, stating that even though the tugs had stayed with and held the ship, preventing her from floating adrift, the utmost they could claim was service, for which the customary charge was £6 per tide. In Court, the Judge decided that the tugs were entitled to moderate remuneration of £370 (the total value of the ship, freight and cargo was £2724) with no salvage rights('The Madras' 1898).

The 'St Agnes' became stuck on the Severn in December 1906, and the owner gave notice that he had abandoned the wreck. It therefore fell to the Trustees to remove the wreck, which was achieved by dynamiting in 1907. Although a claim was made against the owner for the costs incurred these were never recovered, it being decided that the owner of the ketch was not liable in law for the expense of the removal of his own abandoned ship. If the owner considered that the value of the vessel when salvaged would be less than the cost of salvage, he can therefore formally abandon the vessel, in which case it ceases to have an 'owner'. In such circumstances, the Harbour Authority 'are left to deal with the wreck as they think fit, at their own cost' (Stone, 1966, 61). On the Severn, the onus frequently fell on the Gloucester Harbour Trustees as they are deemed primarily responsible for navigation.

#### 4.2.3 Bridges, tunnels and railways

For the Victorian rail traveller, a break in the journey had to be made on reaching the Severn to take a ferry at Aust or Beachley to rejoin a train on the other side. By the 1860s Welsh coal mining had expanded rapidly; in the Rhondda alone twenty new pits opened between 1865 and 1875 (Daniel, 2013). An economic method of moving the coal from the pits to the docks was urgently needed. A number of schemes had been proposed to cross the estuary and in 1873, the building of the GWR Severn Railway tunnel between had begun between Gloucestershire and Monmouthshire (Fig 4.6).

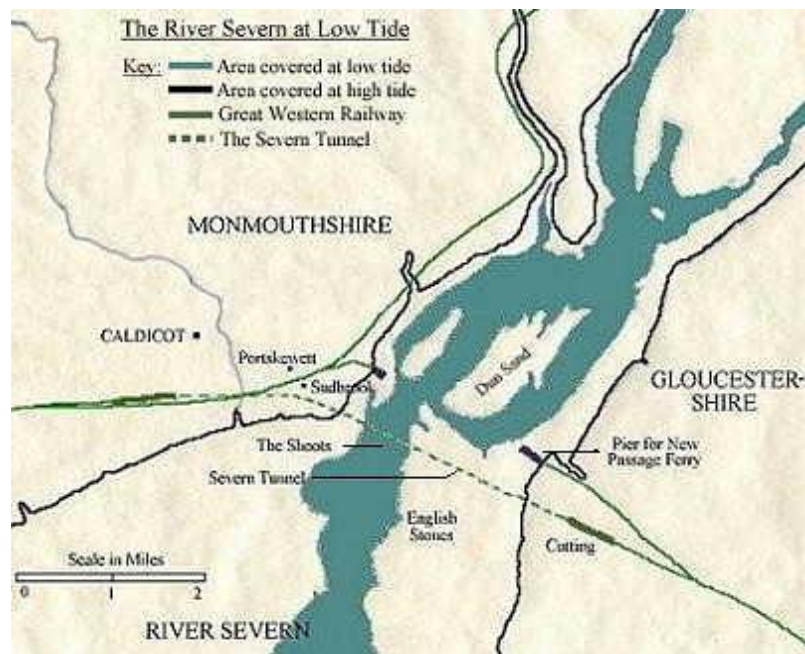


Fig 4.6: The route of the Severn Railway Tunnel

(Source: Daniel, 2013)

After encountering problems with flooding, tidal waves and underground pools, the route finally opened in 1886. In the meantime, the Severn Railway Bridge had been completed in 1879 (Fig 4.7) and was transporting coal from the Forest of Dean to the east shores on the Severn and Wye Railway. The cast iron bridge spanned the canal, using a swing bridge to

allow ships through (Fig. 4.8) and the river, and took forty miles off a journey which previously had to cross the river at Gloucester.



Fig 4.7: Map of the location of the Severn Railway Bridge

(Source: Ordnance Survey, 1946)

Both the tunnel and the bridge continued to take traffic, although the bridge was beset with disasters. In 1939 two dumb barges ‘Severn Pioneer’ and ‘Severn Carrier’, loaded with oil and petroleum and being towed by the ‘Severn Traveller’ were swept up river past Sharpness Docks and struck the railway bridge. Of the eight crew, only two survived. By 1954, the Severn Railway Bridge had become effectively bankrupt.



Fig. 4.8: ‘Building the Severn Railway Bridge (Swing bridge pier) 1847’

(Source: Gloucester .Archives: Ref. B417/23554)

The cost of building it had outweighed the benefits, with most rail traffic now using the tunnel. In 1960, its fate was sealed when the ‘Arkendale H’, laden with fuel oil, and the ‘Wastdale H’, loaded with petroleum spirit, hit thick fog on their way up river to Sharpness Docks. Both vessels found themselves above the dock entrance, came together and, unbeknownst to the skippers, had been tied together by a crewmember. Whilst battling against the tide the current caught the ‘Arkendale H’ which struck a pier on the Severn Railway Bridge. The ‘Wastdale H’, still tied alongside, turned over and caught fire, which spread to both ships, whilst burning petrol filled the river from the ruptured tanks. Two spans of the Bridge collapsed; luckily, the 10.16 train had safely crossed just minutes before the signalman saw the flames and called the rescue services (Fig 4.9). Although on hearing the huge explosion people had turned out to assist with the rescue, five crewmembers lost their lives.



Fig. 4.9: ‘A police officer surveys the damage the morning after on the Severn Railway Bridge, 1960’

(Source: Press Association, 2013)

As the disaster did not occur under the jurisdiction of the Gloucester Harbour Trustees, they were not directly implicated. The Court of Enquiry stated noted that the general increase of traffic using Sharpness Docks (including craft carrying highly inflammable cargo) had created greater shipping hazards ‘particularly in the event of an unexpected reduction in visibility’ (Stone, 1966,67). As a result, proposals were made to improve all navigation signals, with a Navy Hydrographer enlisted to take a survey of the Estuary so that up-to-date information of any changes could be recorded. The new charts became available in 1966. The bridge itself was never repaired, and was finally dismantled in 1967, although the remains of the barges can still be seen at low tide.

In 1966, nine pilots were operating on the river and 996 vessels were piloted, with a net tonnage of 263,182. The annual DWT (deadweight tonnage) today is between 900,000t and

1,200,000t, piloting around 300 vessels a year (Gloucester Pilots, 2012). A deadweight ton is a measure of a ship's carrying capacity, including bunker oil, fresh water, ballast water, crew and provisions. Sharpness Docks handle ships of up to 6,000 tonnes (with cargo), with dry bulks, minerals, timber and cement being its main imports. However, most of this is then transported by road and rail, the canal being mainly a pleasure cruise waterway, with only two or three cargoes a week. Although Gloucester Docks remained busy with barge traffic well into the 1960s, petroleum traffic soon rapidly declined, and in the face of competition from road transport, ceased to be a commercial port by the 1980s.

#### *4.2.4 Summary*

This brief history of the River Severn as a trade route indicates that, despite its unpredictable nature, the estuary being a 'strange area of mud flats and rocks and sand banks, ebbing pools and water channels' (Collins, 1996) and has therefore been a source of unpredictability and unruliness for human navigation throughout history. The first section explained the rise of the Severn from the twelfth century. Trows, pulled by bowhauling men through the shallows up in to Wales, encountered hindrances in the form of fish weirs, sandbanks and water levels. They also encountered levies and taxes for the upkeep of the bridges as well as river piracy. By the mid eighteenth century, the river was a major goods route to and from the industrial centre at Ironbridge, despite issues with water levels in the navigation. Trows had increased in size; the Bowhauler's work was viewed not only viewed 'unseemly', but the loads also too heavy for them to contend with. Towpaths for horses were built, but they fell out of use when the new ship canal was cut between Sharpness and Gloucester in 1827, as did the Bowhaulers. As the size of the vessels grew, accidents, wrecks and their legal responsibilities were discussed, with the Gloucester Pilots and Gloucester Harbour Trustees having been given jurisdiction in 1861. By the late nineteenth century, knowledge and engineering skills enabled the building of the Severn Railway Bridge and the Severn Railway Tunnel. Although

the tunnel is in use today, the bridge was the scene of a major shipping disaster in 1960 and fell into disrepair.

The River Severn has been utilised by humans and in the past has benefited from it. In the villages along the estuary, shipbuilders, mariners, carpenters, barge owners, rope makers, tanners and all manner of related professions settled; in Frampton alone in 1831 over fifty families were employed on the River Severn (Elrington *et al*, 1972). Almost every activity connected to the River for navigation, from building locks to removing wreckage, has been enabled, or disabled, by law. The next section considers another important activity on the Severn, that of fishing.

#### **4.3 A Chronology of the Fisheries on the Severn**

Man has fished for food for millennia. On the River Severn, the earliest fish trap known on the estuary is from the Late Bronze Age. Archeological surveys have also uncovered over thirty medieval wooden fish traps, baskets and post-and-wattle fences. These fisheries were highly distinctive, and seemingly unique to the Severn estuary. In the early Middle Ages, documentary references in local Saxon charters refer to *cytweras* ('basket weirs') and *haecweras* ('hackle weirs', possibly hedge weirs, or fences of brushwood) (O'Sullivan, 2004). The Domesday Book, completed in 1086, recorded fifteen fisheries situated in Gloucestershire.

In law, there are a number of types of fishery. A Barrister, writing in the mid Nineteenth Century, notes that there are five types; a common fishery, several or separate fishery, a free fishery, a common of fishery and a fishery in gross. However, 'we shall find, in the progress of our inquiry, that these several kinds may be resolved into four, namely, a public, a several, a free, and a common of piscary' (Woolrych, 1853). As a general rule, there is a presumptive



right for all citizens to fish in the sea and all navigable waters, as there is an established principle that the sea and navigable streams are common to the Crown and subjects. These rights may be challenged, or claimed, by way of claims (either by custom, grant or privilege) by individuals through law.

#### *4.3.1 Fish on the Severn*

The Severn estuary is a habitat for a number of species of fish, the most important in this project, in terms of law and cultural significance, being the eel, the lamprey and the salmon. The common or freshwater eel is generally thought to spawn in the Sargasso Sea. The *leptocephali*, flat transparent larva, unable to swim, and measuring between 5-7mm, float more than 3,000 miles, for up to two years, from the North Atlantic to the continent. The *leptocephali* metamorphose into glass eels on the continental shelf before migrating to coastal areas such as the Bristol Channel. From there they begin to metamorphose into elvers and begin the journey upstream, using the tidal currents to move mainly by night. Once upstream, elvers stay and grow into adult eels in fresh water, staying for up to 25 years. When they approach maturity (males at between 6-12 years old, females at 10-30 years), they stop feeding, their eyes grow larger, their flanks become silver, and they start on the journey back to the Sargasso Sea, moving down river in late summer and autumn, mainly by night. The whole journey to the spawning grounds is thought to take up to a year or more. The female can produce as many as ten million eggs during spawning; it is probable that shortly after spawning, the eels die (White & Knights, 1997).

Spearing, one of the oldest methods of fishing for eels, occurred during the winter months or at night when eels would lay motionless near the riverbanks (Fig 4.10). The fisherman would thrust the spear into the mud, and the eel would be impaled on the serrated edges. The spear

would have between three and nine tines or prongs with serrated edges and a tapered socket attached a wooden pole, often made of ash and up to twenty feet long, depending on the depth of the mud.



Fig 4.10: 19th Century eel spear from Minsterworth, Glos

(Source: Taylor, 1974, 9)

Lamprey although sometimes called the ‘lamprey eel’ are in fact are a primitive jawless species not related to the Eel at all. The species normally spawns in freshwater but completes part of its life cycle in the sea. Two species can be found in the Severn, the river and the sea lamprey. King Henry I is said to have died from a ‘surfeit of lamprey’ in 1135 in France.

Adult salmon arrive in the Severn estuary from the North Atlantic during the summer, breeding in the shallows between September and February. Salmon were traditionally fished on the Severn with lave nets, weirs, stop and long nets and ‘fixed engines’. Long nets were used on the ebb tide and cast from boats. The net was made from hemp and a net of up to 200 yards would need a crew of four men. In the eighteenth century, smaller ‘putchers’ were used to catch salmon. The ‘putcher’ is a funnel shaped trap made from willow and hazel. Rows of

these cone-shaped willow baskets were grouped together and laid on a rectangular framework across the main tidal flow of the river. Over 11,000 putchers were licensed on the Severn and surrounding area, with weirs consisting of frames of fifty baskets.



Fig. 4.11: Poachers spearing salmon and ‘Burning the waters’

(Source: Salmon Boats, 2013)

Spearing was also common until the sixteenth century, commonly with the practice known as ‘burning the water’ (Fig 4.11) when a ‘torch or flare was used at night to attract salmon to the shore or to a boat carrying the poachers, when they could easily be speared’ (Taylor, 1974). This method was made illegal in 1818.

Other traditional methods of catching fish on the estuary included the use of putcher ranks, stopping boats, putts, drift nets and lave netting, this last method being the only traditional method to have survived into the 21st century. ‘Putts’ involved the use of large, wide-mouthed, closely woven baskets that were arranged in rows above the mudflats to harvest virtually all fish from the ebbing tide ( Fig 4.12). Putts were between twelve and fourteen feet long.



Fig 4.12: 'Putts on the Severn in the 1970s'

(Source: O'Sullivan, 2004)

#### *4.3.2 A chronology of the law relating to fisheries on the Severn*

Although fish weirs were highly effective, they were also regarded as a hindrance to navigation. The Magna Carta of 1215 (British Library) stated that 'All fish-weirs shall be removed from the Thames, the Medway and throughout the whole of England, except on the sea coast.' The regular supply of lamprey for the royal table by the Gloucester burgesses had begun by the time of King John (1199- 1216) and under his successor, Henry III, the arrangement was formalised with the presentation of lamprey pies to the Crown. In addition, bailiffs in Gloucester recorded in the close rolls as regularly called upon to provide lamprey to the Kings table, along with salmon and shad (Maxwell-Lyte, 1902). By 1285, the Salmon Preservation Act created a closed season on salmon between September and November and on young Salmon between mid April and mid June. Penalties for those caught by the wardens were severe (Fig 4.13)

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[ No. II. ] Stat. Westm. 2. c. 47. Anno 13 Edward I.  
stat. 1. c. 47.

**I**T is provided that the waters of Humber Owse Trent Done Aire Derwent Wherfe Nidd Yore Swale Tese Tine Eden and all other waters (wherein salmons be taken) within the kingdom, shall be in defence for taking salmons from the Nativity of *Our Lady* unto *St. Martin's Day*. And that likewise young salmons shall not be taken nor destroyed by nets nor by other engines at millpools, from the midst of *April* unto the Nativity of *St. John Baptist*. And in places where such rivers be there shall be assigned overseers of this statute, which being sworn shall oftentimes see and inquire of the offenders: and for the first trespass they shall be punished by burning of their nets and engines: and for the second time they shall have imprisonment for a quarter of a year: and for the third trespass they shall be imprisoned a whole year: and as their trespass increaseth so shall the punishment. (Confirmed by 13 R. 2. st. 1. c. 19. 17 R. 2. c. 9. St. 25 H. 8. c. 7. and see 2. Inst. 477.)

Fig 4.13: Salmon Preservation Act 1285

(Source: Evans, Hammond & Granger, 1836, 166)

From this period up until 1818, the statutes 'show a continual anxiety of the legislature to preserve fish, and especially salmon and migratory fish', (Moore & Moore, 1903, ix). In 1289, a commission was sent to the River Severn to investigate weirs that were too high and narrow, as well as fishing nets that were 'also too narrow' (Boynton, 2003, 17Edw.1). In 1291, local landowners between Bristol and Shrewsbury were to 'enquire by jury of the counties of Gloucester, Worcester and Salop' those landowners who had 'narrowed and raised weirs (*gurgites et waras*) there, contrary to the Statute of Westminster, so that ships cannot pass as heretofore along that water, and touching others who have taken small salmon in that water with nets and other engines contrary to the same statute' (Boynton, 2003, 19 Edw 1). In 1389, a Confirmation Statute (touching the taking of Salmons) reiterated the Statute of Westminster 1285 and 'asserted that the statute be firmly holden and kept' with those caught to be punished 'without any favour thereof to be shewed'. Yet another Act of 1393 'Justices of the Peace shall be Conservators of the Statutes touching Salmons' yet again made the position clear, but also stated that laws concerning this problem had not been duly

executed due to a lack of ‘good conservators’ or persons willing to police the legislation. It was hoped that by making JP’s conservators of the laws (and also by allowing both the conservators and any under –conservators that they employed to keep half the fine upon a conviction).

By the 1500s, many of the gentry had begun to stock fish such as pike, bream and carp for pleasure angling. The Act of 1539 ‘An Act that Fishing in any several Pond or Mote, with Intent to steal Fish out of the same, is Felony’ was designed to tackle those poachers targeting private fisheries, by providing that any person breaking the head of a ‘pond, stew or mote’ would be deemed a poacher, and that ‘those so offending shall have and suffer all such pains of death and punishments’ as any other criminal. But, at the same time, the same issues that were supposed to have been tackled by the conservation statutes of 1285, 1389 and 1393 were still causing problems, as seen with the lengthy statute of 1558, ‘An Act for the Preservation of Spawn and Fry of Fish’ which actively banned the killing of spawn or fry of Eels or Salmon throughout the country for a ten year period, with a fine of £5 for anyone caught doing so. It stated that the taking of young eels, salmon, pike and various other stock had become so prevalent that in some places, ‘they feed swine and dogs with the fry and spawn of fish and otherwise (lamentable and horrible to be reported)’. Such practices show that there was obviously no shortage of fry, but the Act was far sighted enough to realise that this behaviour would lead to a shortage of adult fish. This lengthy yet succinct enactment specified a number of illegal activities. It prevented the taking of any fry or spawn of any fish, by any means, after the following June, and of no salmon or trout out of season. It stipulated that no Salmon under 16”, Barbel under 12”, Pike under 10”, Trout under 8” inches were to be caught and, if fishing by net, the legal mesh was two and a half inches broad. The Act also banned the use of any type of fishery ‘engine’. An ‘engine’ or ‘fixed engine’ in

fisheries law is any device that is fixed to the soil, such as a weir, putcher or a stopping boat; the public do not have the right at common law to make use of the banks or shores for such purposes, unless provided by law or customary grant. Those taking smaller fish (which includes elvers) were allowed to use the engines that they had been using, so long as it didn't contravene the other conditions set out in the Act.

By the 1600s scientific knowledge had expanded. The 1605 'Act for the preservation of Sea Fish' has an illuminating introduction (Fig 4.14).

**FORASMUCH** as it is certainly known by daily experience that the brood of sea fish is spawned and lieth in still waters, where it may have rest to receive nourishment and grow to perfection, and that it is there destroyed by wears draw-nets and nets with canvas or like engines in the middle or bosom of them in harbours havens and creeks within this realm, to the great damage and hurt of fishermen and hindrance of the commonwealth, for that every wear near the main sea taketh in twelve hours sometimes the quantity of five bushels sometimes ten sometimes twenty or thirty bushels of the brood of sea fish; and also those which use draw-nets, nets with canvas or engines in the midst of them, do every day they fish destroy the brood of all the sorts of fish aforesaid in great multitudes:'

Fig 4.14: 'An Act for the Better Preservation of Sea Fish, 1605'

(Source: Evans, Hammond & Granger, 1836, 174)

This type of 'sea fish' refers to those that move into estuarine waters to breed or grow (such as eel and salmon). In this Act, any person placing weirs within 5 miles of a harbour mouth, or in an area deemed a haven for 'spoil', fry, brood or spawn of any sea fish was to be fined £10, the mesh of nets was increased to 3 inches, with the fine for using an illegal sized net set at 10 shillings ( half to the local parish in which the offence was committed 'to the use of the poor people', and half to 'the person that shall sue for the same'. )

An 'Act for Preservation of Fishing in the River Severn' passed in 1678 aimed to preserve the fry. Fishing with any net, device, engine, weir or spear for Salmon, Trout, Pike or Barbel under the length specified in the 1588 Act was now illegal. In addition, the nets for Salmon, Pike, Carp, Trout, Barbell, Chub or Grayling was to be 2½ inches mesh. The season was closed at spawning time (March 1st to May 1st). Justices of Peace were to be the named Conservators, with the power to employ Under Conservators, with the authority to sign warrants for searching suspect's houses for illegal nets, which if found, would be burnt, and engines destroyed. Suspects were to be tried by the Assize courts with a penalty of £5. The game laws were also strengthened in 1692 with 'An Act for the more easy Discovery and Conviction of such as shall destroy the Game of this Kingdom' as the game had been 'very much destroyed by many idle persons, who afterwards betake themselves to robberies, burglaries, or other like offences, and neglect their lawful employments'. The Act again included fish and any 'instruments' for their capture, with Clause V specifically referring to unlawful fishing. What is interesting in this statute is the reference to a certain 'class' of peoples, who, as poachers, are automatically presumed to carry on all manner of other illegal activities when they should be working.

Another preservation Act of 1714 included a clause for the 'better Preservation of Salmon within several Rivers' created a blanket ban on the catching of salmon under 18 inches and on the hindering of spawning Salmon between the last day of July and the 12th of November, as 'whereas of late years the breed and fry of sea fish has been greatly prejudiced and destroyed by the using of nets too small' specifies net size, making the mesh size on trawl or drag nets now 3½ inches from knot to knot. Use of any technique to bypass the mesh size was subject to a £20 fine or 12 months imprisonment. Any persons bringing to shore to sell any undersized fish (with specific sizes listed) were to give the illegal fish to the poor of the



parish where they were found and to forfeit 20 shillings, with the proviso of a moiety to the informer. In default of payment, the offender was to be taken to the local gaol, where he would be severely whipped and put to hard labour for between 6 and 14 days.

In the latter part of the Century, George III was prolific in passing legislation relating to fish and fisheries, passing a total of seventeen related Acts (3 relating to fish markets; 3 to Oyster preservation; 10 to fisheries in general and 1 specific to Salmon). The Act of 1765 'An Act for the more effectual preservation of Fish in fishponds and other Waters' stated that once again laws in place for preserving fish were ineffectual. To deter those 'disorderly persons', the severe penalty of transportation for seven years was introduced for poachers of fish from any domestic waters. In 1777 'An Act for the better preservation of fish, and regulating the fisheries, in the Rivers Severn and Verniew' took into consideration that the elvers 'which come up the River Severn at a certain season in immense quantities' were of such 'great support' for the inhabitants of the adjacent parishes that the Act of 1678 was repealed. Hence for the first time in 100 years, the taking of elvers for personal consumption was once again permitted on the Severn, although it was noted by the Severn Commissioners in 1876 that the former Act had never been obeyed anyway (Severn Elver Report, 1876).

Even during the eighteenth century, the salmon had actually been 'the poor man's staple food' (Macleod, 1968, 116). The depletion of fish stocks was not improving, and the law, it seems, had not been able to relieve the situation. Yet even the 'Act for preventing the Destruction of the Breed of Salmon, and Fish of Salmon Kind' of 1818 had done little to strengthen the laws that were already in force. The Act had banned spearing, although poachers continued to use the method illegally (Cornish, 1824) and the Act, along with all other legislation, had been unenforced and was therefore ineffectual. For Cornish, the answer was simple. Salmon were

not scarce because their spawn were being destroyed or obstructed. In fact, ‘the scarcity proceeds from other causes. It is not because the *fry* are destroyed, but because they have *never existed*; because the parent stock is *obstructed* in going to the beds of the rivers with the freedom and facility they require.’ (Cornish, 1824, 205). In addition, rivers were put in defence (closed up) too late, trapping the older fish, where they died in fresh water. The younger salmon attempting to return from the sea, apart from being caught, were also being trapped in fenders and gratings on mill races. By 1825, a Select Committee had been appointed to investigate the Salmon Fisheries, reporting that the fisheries had indeed rapidly declined, and that effectual measures were urgently needed to preserve them. They recommended that the close season should be extended and in addition, there should also be a close time, between sunsets on Saturdays until sunrise on Mondays. They also addressed Cornish’s issue with gratings and fenders, recommending that a regulation would allow free passage of fish. Yet by 1828, there was still ‘mounting evidence that the national salmon catch was dwindling’ (MacLeod, 1968, 116), although it would not be addressed by law for another thirty years.

#### *4.3.3 The Salmon Acts*

Regarding the resulting Salmon Acts of 1861 -1886, ‘no area of Victorian administrative history is more richly documented or less adequately explored than that concerning the development of public policy by professional or scientific ‘specialists’ within the civil departments of Government ’(MacLeod, 1968,114). These Acts embodied the first permanent attempt by Parliament to protect and regulate private property in the public interest, using specialist scientific and professional knowledge; but this was not without opposition. The Times had reported of salmon that ‘not another instance could be found in which an article of food has been lost to the public, or converted by the course of events from a common treat into an expensive luxury’(The Times, 1861). The reasons given were the

diminished supply, with almost all salmon being sourced from Ireland and Scotland, where legislation had been put in place to preserve the fish. The article demanded the same remedial government action in other waters.

The first Salmon Fisheries Act was passed in 1861, a major piece of legislation with thirty-nine clauses which repealed almost all previous legislation on the matter. It placed the superintendence of the salmon fisheries in the Home Office, prevented pollution, fishing by use of lights, spears 'gaff, strokehall, snatch, or other like instrument' and the use of roe as bait. Nets were regulated to two inches knot-to-knot; fixed engines were banned, with penalties for the taking of unclean fish and young salmon. It also compelled those with artificial channels (i.e. canal companies and fisheries) any licensed fishery to attach a 'fish pass' and to put up and maintain gratings across the races to stop the salmon descending into locked waters. The closed season was between September 1st and February 1st with an additional close time between noon Saturday and six on Monday morning. During this period, the proprietor or occupier of every fishery was to maintain a clear opening of 'not less than four feet in width from the bottom to the top' through all cribs, boxes, or cruives so that a free space was secured for the passage of fish up and down through each. Fisheries Inspectors were appointed, although 'the absence of any useful fishery statistics and the dearth of meteorological records about weather or water conditions influencing fish harvests made the enforcement of regulations seem arbitrary and unjust' ( MacLeod, 1968,121). It was, it seems, an ambitious project, yet the first reports were optimistic, with the Severn fisheries reporting their best season for years.

A Salmon Act amendment was passed in 1863, and the 1865 Salmon Fishery Act created local conservators to police new fishery districts, authorising them to impose licenses on

every person wishing to fish for trout or salmon. Water bailiffs were appointed to inspect all weirs, dams, and fixed engines. The 1873 Salmon Fishery Act, introduced by private bill, was designed to give inspectors greater powers of enforcement. It included the banning of basket traps at weir aprons, prohibition on sales of Salmon, trout and Char out of season, and the fixing of salmon baskets, or ‘devices for catching Eels or the fry of eels’ between January 1st and June 24th. It alarmed readers of *The Field*, who saw it as unnecessary and dishonest (MacLeod, 1968, 134). On the River Severn, the Act had banned the use of eel traps between January 1st and June 23<sup>rd</sup>, despite there being no downward movement of eels during these months. However, by their inclusion, there was a reported ‘agitation in the district amongst the elver takers’ at attempts to enforce the law. The Commission, seeing that the legislation affected the poor the hardest, with no effect on the Salmon, recommended that (Fig 4.15):

The sum and substance of the whole, then, is :—

1. No legislation for elvers is required for any river except the Severn.
2. All legislation respecting elvers affecting other rivers than the Severn should be repealed.
3. Legislation respecting elvers has been passed for the Severn for the last 200 years.
4. Such legislation does not seem to have been ever enforced.
5. The elver fishermen on the Severn are willing to close the fishing after the 30th April.
6. The Conservators desire a close season commencing on the 20th April.
7. We propose to take the mean between these dates, and that the close season should commence on the 26th April for the Severn alone.
8. Such legislation should be provided by a separate Act, and all legislation respecting elvers should be expunged from the Salmon Acts.

Fig 4.15: Recommendations for the Severn

(Source: Severn Elver Report, 1876)

As a result, the Elver Fishing Act (applicable only to the River Severn) addressed all of these points, and was passed in 1876.

The 1879 amendment ‘An Act to amend the Salmon Fishery Act with relation to fixed Engines in Tidal Waters’ created a close season for putts and putchers (Fig 4.16) between

September 1st and May 1<sup>st</sup>, adding that whilst no fixed engine of any description should be placed or used for catching salmon in any inland or tidal water, the section would not affect any ancient right or mode of fishing that had been lawfully exercised at the time of the passing of the act. In *Holford v George* (1868), the owner of a fishery in the Severn had claimed right to use 480 putchers and 3 stop-nets for salmon between the high and low water marks at Arlingham. He claimed that he had used these devices for forty-five years. A witness who was sixty years old said that he remembered the fishery since he was ten years old, that is to say, for forty-five years prior to 1861. Further, in a document dated 1610, when the owner of the Great Manor of Berkeley conveyed the manor of Arlingham, he expressly mentioned ‘all the free fishing and several fishing in the river Severn’ which proved the legality and antiquity of the appellant's claim.



Fig 4.16: Putchers (approx. 700) on the Severn

(Source: Salmon Boats)

It was evident that fisheries in the Severn connected with the manor of Berkeley existed from very ancient times. However, the commissioners were of opinion that inasmuch as Magna Carta had prohibited a several fishery being created since that date, and that as subsequent statutes repeatedly prohibited weirs or kiddles in navigable rivers, the only ground on which

the fixed engines could be legal was on the presumption that the Crown had granted the right before the Magna Carta. The judgement stated that it was a matter of discretion for the commissioners whether they ought to be satisfied that it has been legally enjoyed, but as they were not satisfied that it was indeed an ancient fishery; it was deemed to be illegal and was ordered to be removed.

When the use of dynamite in fishing practices became popular in the latter part of the 1800s, an inquiry into its use had been requested and presented to Parliament in 1877. The report found that the method, destructive by its very nature, was frequently used in both sea and river fishing. The method involved placing a charge in the water which when fired ‘violently raised’ the water. The fish in the immediate vicinity were stunned and floated to the top of the water where they were collected. However, the explosion also had the effect of actually bursting the swim bladder of the fish in those nearest the shot and so they were killed outright, sank, and were not collected. Therefore the use of dynamite was deemed particularly injurious as it destroyed more fish than were actually taken from the water, regardless of size, age or condition, and because ‘the fish so destroyed are inferior as articles of food’ (Buckland and Walpole, 1877, 3). The Fisheries (Dynamite) Act of 1877 made the penalty on conviction £20 or 2 months imprisonment. This was followed by the 1878 Act for the protection of Freshwater Fish, or the Freshwater Fisheries Act which extended the close season on salmon, trout, char, and all other freshwater fish. Further amendments to the Freshwater Fisheries Act in 1884 and 1886 led to the consolidated Salmon and Freshwater Fisheries Acts 1886. Advocates of closed seasons on fishing believed that overfishing during breeding seasons was the cause of the decline in fish, and so these Acts were greeted with enthusiasm. Yet even approaching the twentieth century there was still no firm scientific evidence either on the extent of the decline of fish stocks, or the reason for such a perceived

demise, despite some anglers blaming other factors, such as canalisation, loss of habitat, steam launches and the use of ‘unsporting methods’ ( Bartrip, 1985, 293). The three fundamental principles of the Salmon Acts of 1861 – 86 (preservation, the free ascent of salmon, and the prevention of pollution) were still widely disregarded; to implement the three cardinal principles of the 1861 act ‘required more knowledge of natural history and fishery technology than the Victorian scientific community possessed’ (MacLeod, 1968, 150). One further amendment in 1892 created the Salmon and Freshwater Fisheries Acts 1861 to 1892 (Table 4.2) .

Table 4.2: Salmon and Freshwater Fisheries Acts 1861-92

(Source: Board of Fisheries Act 1903)

**ENACTMENTS RELATING TO POWERS AND DUTIES OF THE BOARD  
OF TRADE TRANSFERRED TO THE BOARD OF AGRICULTURE.**

**1. SALMON AND FRESHWATER FISHERIES ACTS.**

|                       |   |  |
|-----------------------|---|--|
| 24 & 25 Vict. c. 109. | - | The Salmon Fishery Act, 1861.                  |
| 26 & 27 Vict. c. 10.  | - | The Salmon Acts Amendment Act, 1863.           |
| 28 & 29 Vict. c. 121. | - | The Salmon Fishery Act, 1865.                  |
| 33 & 34 Vict. c. 33.  | - | The Salmon Acts Amendment Act, 1870.           |
| 36 & 37 Vict. c. 71.  | - | The Salmon Fishery Act, 1873.                  |
| 39 & 40 Vict. c. 19.  | - | The Salmon Fishery Act, 1876.                  |
| 39 & 40 Vict. c. 34.  | - | The Elver Fishing Act, 1876.                   |
| 40 & 41 Vict. c. 65.  | - | The Fisheries (Dynamite) Act, 1877.            |
| 41 & 42 Vict. c. 39.  | - | The Freshwater Fisheries Act, 1878.            |
| 42 & 43 Vict. c. 26.  | - | The Salmon Fishery Law Amendment Act, 1879.    |
| 47 & 48 Vict. c. 11.  | - | The Freshwater Fisheries Act, 1884.            |
| 49 & 50 Vict. c. 2.   | - | The Freshwater Fisheries Act, 1886.            |
| 49 & 50 Vict. c. 39.  | - | The Salmon and Freshwater Fisheries Act, 1886. |
| 54 & 55 Vict. c. 37.  | - | The Fisheries Act, 1891, Parts III. and IV.    |
| 55 & 56 Vict. c. 50.  | - | The Salmon and Freshwater Fisheries Act, 1892. |

The Severn fishery district had been defined by the 1865 Salmon Fishery Act as being not only the river itself, but also the River Vyrnwy and of all other tributaries within the county of Montgomery. In 1867, a second certificate further included the tributaries of the Vyrnwy district and all tributaries of the river Severn in that county. The Salmon and Freshwater Fisheries Act of 1907 authorised the Severn Fisheries Provisional Order of 1910, which

geographically defined the fishery district (Fig. 4.17) succinctly. One should imagine that these boundaries despite being descriptively succinct may be rather more difficult to prove whether or not a fisherman was found to the correct side of the imaginary line drawn from 'near the Dumplings' to the 'site of the Avon Battery'.

The area included within a line commencing at the seaward extremity of the boundary between the parishes of Woolaston and Aylburton and drawn straight to the western edge of Lydney Sands ) thence continued along the general line of ordinary low-water on the western edge of Lydney Sheperdine and Beacon Sands successively to the south-westernmost extremity of Beacon Sands thence true south-east until it reaches the line of ordinary low-water on the western edge of Oldbury Sands thence in a south-westerly direction along the ) general line of ordinary low-water on the western edge of Oldbury and Slimeroad Sands successively until it reaches the south-western extremity of Slimeroad Sands thence straight towards the north-eastern extremity of the Lower Bench until it meets the deep water line of the channel dividing the said Lower Bench from the Upper Bench ) thence along the deep water line of such channel and of the channel dividing Northwick Oazo and the English Stones from the Dun Sands until it meets the deep water line of the main channel of the estuary of the River Severn or Bristol Channel near the Dumplings thence along such deep water line through the Shoots until it meets a straight line drawn from the site of the Avon Battery to the seaward extremity of the western bank of Collister Pill thence along the natural watershed of all rivers flowing into the eastern side of the said estuary northward of the said site until it reaches Broadway Hill thence along



the natural watershed between the tributaries of the River Avon flowing into the said river eastward of Marcliff Hill and the tributaries flowing into it westward thereof until it reaches the point near Marcliff Hill where the boundary between the counties of Warwick and Worcester abuts on the left bank of the River Avon thence true north until it reaches the natural watershed of the River Arrow thence along such watershed and along the natural watershed of the River Severn and of all rivers flowing into the estuary of the said river or Bristol Channel northward of the seaward extremity of the boundary between the parishes of Woolaston and Aylburton aforesaid until it reaches such seaward extremity where it began.

Fig 4.17: The Severn Fisheries District

(Source: The Severn Fisheries Provisional Order 1910, 17-18)

In 1923 the Salmon and Freshwater Fisheries Act consolidated earlier legislation yet again, giving Fishery Boards the power to carry out improvement work, although ‘the resources of these boards in terms of finance, manpower and scientific expertise was minimal, so they were able to achieve very little in terms of positive protection or improvement of the fisheries in their areas’ (James, 2012). Thomas Williams MP noted that he fishery boards under the Salmon and Freshwater Fisheries Act 1923 had done, and were still doing very valuable work, but said that it was clear ‘that for the prevention of pollution, as in the case of both drainage and fisheries, each river system ought to come under the control of one authority’ (Hansard, 1948) . A new bill proposed to merge fisheries, pollution and land drainage functions and to give local authorities a majority on the boards. The River Boards Act of 1948 removed the fishery boards’ responsibility for fisheries and pollution control, creating new river boards the local authority. The Salmon and Freshwater Fisheries Act 1923 was repealed and replaced with the Salmon and Freshwater Fisheries Act 1975. Most of the sections of this Act are still in force today.

The Salmon and Freshwater Fisheries Acts were the first concerted attempt by Parliament to actively manage, control, protect and regulate private property in the form of water in the 'public interest' (Macleod, 1968). By sanctioning the expenditure of public money to achieve this goal, they appointed permanent staff and inspectors. Such policy reveals early attempts by the government to extend its reach over space and place, human and non-human which have had a lasting impact on the fisheries.

#### *4.3.4 Summary*

This overview has rather briefly summarised the ways in which fishing as an activity has been carried out on the River for thousands of years. A number of devices have been used over the centuries on the Severn to catch an array of fish, many of these unique to the area, most of which are no longer in use or have been legislated against. It is worth noting the methods used and the subsequent laws, as they give an insight into the communities that existed and the ways in which these laws have affected the geography and use of the river over periods of time. The law has been used to regulate such activity as early as the thirteenth century, when it became apparent that migratory fish needed to be protected at certain times of the year in order to sustain the population. However all legislation following closed seasons on Salmon and other fish has encountered problems with implementing and policing the laws, which led to a number of confirmation statutes reiterating the importance and reasoning behind the protection measures. During the seventeenth century, the scientific age brought better understanding of the biology of fish, evident in the legislation to protect stock by restricting fishing practices. At the same time, as private estates began to stock game, poaching from these parks became a problem. One suspects that this is not a coincidence; as access to the poor mans staple food became restricted, poaching incidents rose. The fishing legislation that remains in place today is a legacy of the enactments that began over eight hundred years ago.

#### **4.4 Conclusion**

This brief chronology of the laws that have been passed in relation to navigation and the fisheries highlights the changes to trade, industry and society that have affected the use of the waterway. When the economic value of fishing was much less than that of trade, the focus was on keeping the navigation clear. As the river as a trade route has declined, the laws applicable to fisheries have become much more restrictive. Yet what is apparent is that at no point prior to the implementation of the 1948 River Boards Act did there seem to be any communication between the two types of user, either in terms of debate, legislation or implementation. For example, although river pollution had been both identified and legislated against with the 1876 Rivers Pollution Prevention Act, within the fishing community ‘fears about diminishing fish stocks were rarely related to the influence of water pollution’ (Bartrip, 1985,293). The river, it seems, was viewed either as a fishery, or as navigation, but not as one environmental concern in need of a holistic approach to conserve it as a resource. Some laws were positive and proactive (those to prevent shipping accidents), some were restrictive (close seasons and other fishing regulations) but all had different social consequences. Changes to the law and the rural economy shaped the geography of the river.

To provide a more forensic examination of the legal-geographical interrelations played out in the River Severn, further research in the following chapters will continue to analyse legislation within a sequenced framework. By broadening the examination to include research into historic social relations, changing boundaries, alterations in landscape and local economies, the law can be studied in terms of place attachments and spatial practices, exposing the deeper meanings that can furnish the law with a geographical context.

## Chapter 5

### The spaces and places of law

*‘Central authority usually undertakes to act for the whole of its territory in specified matters.*

*This tends to produce uniformity in cultural impress even where the natural landscape is  
diverse’*

(Whittlesey, 1935, 90)

#### 5.1 Introduction

The previous chapter presented a legal historical overview of the issues relating to the navigation and the fisheries on the River Severn in order to contextualise the research. This chapter turns to the examination of the roles of space and place, by discussing the two concepts and their usage within legal geography. It will discuss the difficulties associated with separating the two notions, before outlining a definition and interpretation for use within this thesis using landscape theories. As the research will draw out the empirical consequences of the association between space and place within a sequent legal occupancy analysis, the following chapters will clarify the use of this spatial analysis within such a framework.

To be able to make sense of modern law ‘it is necessary to have some understanding of how it has come to be’ (Jessel, 1988, xiii). In the second part of this chapter, I begin to trace the development of law relating to the fisheries and the consequences for the River Severn. A particular species of migratory fish, the Salmon, has had a long history of legislative measures for its protection. Using a territorial spatial perspective, legal methods can be analysed to scrutinize successive spatial horizons, or the ways in which people ‘view’ the world over time (Whittlesey, 1945, 3). The analysis of the sequent occupancy of law in relation to the fisheries demonstrates how provisions made in ‘space’ (through national

legislation) interact with 'place' (specific local areas) which can have repercussions that may take decades to manifest. Using a sequent legal occupancy analyses, the examination of the provision of legislation over a long period of time can reveal the multi layered and multi faceted actions, reactions and interplay between national law and local milieux. Using this approach, the legal management of fisheries in England prior to the twentieth century can be seen as hierarchical struggles between nation and scale, scale and space, space and place.

## **5.2 The concepts of 'space' and 'place'**

Space and place are two words that are often used within geographical literature. The initial aim was to separate the two concepts so that I could understand the difference between the two and prevent the misuse of the terms within the geographically influenced parts of my thesis. Within law, place as a word or a descriptive expression does not have specific meaning. It is a generic term that could be used to describe a specific (mapped) area, a locality, neighbourhood or town. Definitions of space can refer to the body of rules and regulations applicable to and governing space-related activity (as in 'outer space', the physical universe beyond the earth's atmosphere) or it can refer to aerospace issues. Law's specificity only arises in questions where the boundary line of a particular place is in dispute, such as in property law or the act of trespass or in jurisdictional matters (i.e. the right and extent of the powers granted to the Courts to hear a matter). In such matters, lawyers are interested primarily in the letter of the law and its application, rather than the moral and philosophical questioning of geographical definition. Yet in the English counties 'a consciously used instrument of both change and conservation has always been the law' (Harte, 1985, 2). This is particularly apparent in land, property and planning issues. Professional lawyers in this respect recognise the power of law in the creation of place and space in certain areas, although theoretical investigation of the terms used are generally left to

legal academics. However, it is not easy to disentangle space from place with definitive certainty, as ‘space and place derive their meanings in large part through their opposition to each other’ (Wainwright & Barnes, 2009, 967). To understand this opposition, I sought first to divide the two, before realigning them within the landscape as the basis for my research project. This would correspond with Whittlesey’s study into regions, whilst modernising his methodology and developing a sequent legal occupancy framework.

Discourse surrounding space in a philosophical context was historically divided at first instance between absolute or substantive space, relative space and relational space (Werlen, 1993) which can be briefly outlined here. A concept of absolute space derives from the Newtonian approach that space exists independently of any object, and as such is a ‘container’. Thus ‘absolute space, in its own nature, without relation to anything external, remains similar and immovable’ (Werlen, 1993, 1). Alternatively, relative space rests on two assumptions, that ‘space can be defined only in relation to the object(s) and/or processes being considered in space and time. Second, there is no defined or fixed relationship for locating things under consideration’ (Jones, 2010, 244). Under this premise, the spatial scientific methods of geography in the 1950s developed statistical methods to map, model and measure the distance and relationships between phenomena over space and time. Contemporary discussions surrounding the nature and relationship of space, place and the self have also emerged within the framework of philosophical spatial inquiry, extending debates in human geography to relational approaches (Sack, 1997; Casey, 2001), a ‘paradigmatic departure from the concerns of absolute and relative space, because it dissolves the boundaries between objects and space, and rejects forms of spatial totality’ (Jones, 2010, 245). Thus, space is always in process; it is a product of interrelations.

The turn towards the theorising of space as relational has been attributed by Gregory (1994, 349) to Harvey in his theoretic of historico-geographical materialism during the 1970s. The rise of 1960s post-structural philosophies in general were already confronting the structuralist methods of inquiry, (that human culture is to be understood by its interrelationship to the larger system) and influenced geographical thought. Relational thinking within geography is now 'extremely widespread, if not dominant, across the discipline' (Malpas, 2012, 229). The basis is that space itself is a social construct, continuously being made, unmade and remade (Jones, 2010), expressed as a dynamic process which is in essence 'performed'. As such, 'space is not an anterior actant to be filled or spanned or constructed.....space is practised, a matrix of play, dynamic and iterative, its forms and shapes produced through the citational performance of self-other relations' (Rose, 1999,248).

It seems here as if the words space and place could both be used as a descriptive, so how does the term space and 'spatial' differ from the term 'place'? When using the word 'place', its definition may be taken to denote a particular or specific piece of space, a spot on a map or location. Space, in comparison, might be seen as a broader, global or less particular area (Agnew, 2011). The diction and use of the label 'space' is often fully disputed within the arguments concerning geographical interpretation. (Elden, 2010; Malpas, 2012). Similarly, place (and all its related associations) is not straightforward, but also a contested subject. As such, it is often difficult to disentangle the notion of 'place' from 'space', which has led to arguments in geography over definitional issues between the two (Agnew, 2011). Many geographers explore the concept of space in relation to place and the oppositional nature of language arises in such comparisons. Within this space/place bifurcation, geographical discourse has 'furnished a set of oppositions around space and place that continues to produce

real effects’ (Wainright & Barnes, 2009, 971) which can be illustrated with a Derridian derived table of common terms (Table 5.1).

Table 5.1: The space-place distinction  
(Source: Wainright & Barnes, 2009, 971)

| Space       | Place         |
|-------------|---------------|
| Motion      | Pause         |
| Extension   | Community     |
| Position    | History       |
| Totality    | Particularity |
| Infinity    | Identity      |
| Exteriority | Interiority   |
| physis      | tekhnē        |

Such oppositions remind us that when attempting to separate place from space, each vocable is already imbued with its own connotations within the English language, creating an invisible barrier between the two. Place, then, is often imagined as synonymous with community, history and identity of a more particular geographical area. The space–place division often crosses other familiar binaries such as local-global; state-society; nature-culture. As such, it has been suggested that space is parasitic, in that it exists only due to the relations between the objects and events that occur within places (Agnew, 2011). For some geographers, place is a condition of the human experience and, as such, needs to be studied in context (Entrikin, 1991). For others, place is synonymous with region, therefore the two have ‘become fused in inevitably contested institutional practices, discourse and memory’ (Paasi,



2002, 808). Some geographers engage with the concept in terms of state making and territory (Vandergeest & Peluso, 2001) whilst others use these interpretations within a more political analysis, where place can be 'local, particular and unique, whilst remaining importantly contextualised within broader physical and social landscapes' (Pierce *et al* 2011, 55). For Amin (2004) these territorial imaginations have overlooked a more relational reading of place to conform to jurisdictional political spaces. This Marxian predominance in geography has sidelined place in favour of the study of commodity and the globalisation of capitalism. The discussions of place have formed definitions in both the scientific orthodox circles, and the antithetical (predominantly Marxist) analyses seem to have devalued place based study (Agnew, 1989, 10). The orthodox social sciences have overlooked place in favour of 'community', which in turn focused on the loss of community and thus a decline of the significance of place.

### **5.3 Legal Geography, space and place**

If the concepts of space and place are contested within geography, how have they been interpreted by legal geographers? Where legal geographers have taken those spatial issues that have arisen within geography and merged them with a legal analysis, they have readily interpreted the issue of space as a philosophical and abstract concept. Blomley and Bakan (1992) remarked upon the 'invisibility' of space within legal studies, despite the construction of numerous 'spaces' by legal actors (Blomley & Bakan, 1992, 669). A focus on the spaces and spatiality of law became the central focus for the emerging legal geography project. Verchick (1999) proposed a 'critical space theory' to explore the meaning and significance of space in law, using critical legal studies as the intersection between the two disciplines specifically in cases of environmental pollution. Examining the ways in which law affects geographical space in both physical and political ways, this argument is founded on a critique

of the indeterminacy of law, which is seen to create translation issues on the 'ground'. This theory defines three strands of spatial analysis in legal studies; urban law (segregation and property law), environmental justice, and global spaces (Verchick, 1999, 744). Yet these 'strands' are grounded in space as a territorial rather than a theoretical issue, concentrating on the reaches and application of law as opposed to the interrelationships between space and law. Sax (2001) also recognised that legal geographies focused on property and the ownership of legal spaces, by analysing the utility of land and its transformation in terms of human value. Contemporary studies still seem to define space in accordance with these limited spatial theories. Legal spatial models within legal geography still tend to focus on property and property rights (or a version of such translated into the private/ public model) thus focusing on particular spatial issues in context.

Delaney submits that these forays into the 'law-space nexus' only at particular intersections of particular spatial issues lose sight of any potential wider dimensions of socio-spatial legality (Delaney, 2010,12). Alternatively, legal spatial investigations have branched off into the spatial justice (or spatial injustice) category, and removing itself from the legal geography rubric (Harvey, 1973; Soja, 2010). Critical legal and socio-legal studies have started to question the application of space within their respective disciplines, questioning the politics (Butler, 2009) and the wider application of the law in terms of jurisdiction and scale (Valverde,2009), yet these questions too fall into the staple categories under which space is analysed within legal geography. The evidence seems to indicate that 'space' does not have a solid theoretical basis within geography, law or legal geography, despite recent attempts to identify ontology (Malpas, 2012). Although Blomley has noted that 'rather than a passive stage on which the histories of social life unfold, place, like space, is actively constructed through a constellation of material and discursive practices' (Blomley, 1998, 581) space and

place, both in the ways that they are perceived and in the ways that the terms are used, seem to be interchangeable within legal geography. Thus the boundaries between the language of space and place, territory and territoriality, are often blurred, and one must be cautious of using words that may cause the over-generalisation of a particular geographic region. Blomley stated that using a critical geographic perspective when examining the law of property has the social production of space at its core, yet this type of investigation alone cannot provide enough insight. He believes that careful attention to space, place, and landscape is a necessary and important part of such a project (Blomley, 1998). Therefore the use of landscape may be the key to creating an analytical framework which can encompass both spaces *and* places within a project which recognises the importance of both, yet does not reify one over the other, within legal geography.

#### **5.4 Changing landscapes**

The use of the term landscape within this thesis is used to describe a notion of place which draws upon combined geographical, historical and sociological imaginations to make a chorological analysis. Landscape geographer Olwig feared a 'melting of landscape into cybertextual space' might result in its disciplinary dematerialization (Olwig, 1996 630) but more recently has also noted a shift change in the definition of landscape from one of scenery to a notion of landscape as polity and place. Thus within this thesis, the use of the term is defined as the sites where 'political or cultural entities manifest themselves, creating the amalgam of places that can be perceived as landscape' (Olwig, 2005, 293). Landscape however also invites us to imagine a scene, a geography, a particular and peculiar topography with objects, flora and fauna. Thus the very use of the word is presenting an image which is inclusive of things on, above and below an imagined terrain. It is three dimensional, an area in which location (or site), locale and sense of place can be imagined (Agnew, 2011).

Whittlesey stated that with the configuration of three-dimensional earth came 'hints that the geographic horizon is multi-dimensional, in being conditioned by time no less than by space' (Whittlesey, 1945, 23). For landscape geographers, landscapes 'cannot be objects simply understood, but instead exist as living, social processes with the ability to generate values through a community's knowledge of the past' (Waterton, 2005, 314). Therefore using the term acknowledges time and temporality as an essential part of understanding the ways in which law can affect geography and vice versa. As fundamentally 'law has its origins in time and place' (Graham, 2011, 203) using landscape to uncover these origins will also lead to those laws made in a wider 'space' which have a particular meaning in 'other' places. These 'historically contingent' social processes can be seen as influenced and transformed by the wider institutional framework (Paasi, 2011).

Those geographers who study landscapes often use literature as a way of investigating the changing conceptions of culture and its relationship with the physical scenery (Winchester et al, 2003). In addition, 'sometimes the images of jurisdiction pulsate through the culture giving greater significance to one aspect of the landscape than others' (Brigham, 2009, 395). Therefore this research will use a number of sources in addition to the legal documents, including literature, narratives, chronicles, travel writings and newspapers to understand the ways in which law is present in the landscape. The resulting analysis is a sequent 'legal' occupance, a lawscape which is layered through time, revealing the changing landscape of the River Severn as a historical legal geography.

Such a sequent legal occupance, however, 'is never complete and is perpetually under construction, and thus can never be satisfactorily relegated to just one past or another, or one present' (Waterton, 2005, 314). The following historical analysis therefore examines the

development of the law regarding the fisheries in the UK, particularly the law in relation to Salmon. It then uses a case study to identify the ways in which these developments had an effect on the River Severn. The development of the law in this area is a good example of the way in which law does not occur as a singular event, but as a series of linked events which may be seen as a form of sequent occupance.

### **5.5 Early law and the fisheries**

The Anglo-Saxons brought their own 'codes' or laws to England in the fifth century (Jenks, 1913, 4) and by the latter part of this period, the arrangement of piecemeal local laws were becoming generally applicable to all. These were recorded as the 'dooms' or 'laws' of King Alfred. By 1066, the sheriff was a key official, a royal representative, and the judicial and financial deputy to the ealdorman or Earl, who controlled several shires (Lyon, 1960, 63). This manorial system was catalogued by the Domesday Book of 1085, which counted the 'hundreds' and recorded the laws of the land in order to map the administrative landscape. A hundred was 100 hides, with each hide being approximately 120 acres (Lyon, 1960, 66). Between 10 and 40 hundreds created a county. As an early form of democracy, the 'hundreds' were arranged so that each had a main hall for meetings every four weeks. Disputes were heard at the Hundred Courts in central towns or village, with five men from each village acting as jury. Representatives from each Hundred heard matters of national importance at a central court. By combining the early English legal system played out within the villages with the Norman feudal concept of a man holding a defined area of land in return for services, the 'idea of the 'manor' as a legal institution evolved' (Jessel, 1998, 26). Writs and Charters were used from the mid eleventh century to disseminate law to the shires of England. These early laws can be seen as representing 'the all-important effort to arrange matters in advance in order, above all, to avoid future dispute' (Hyams, 1991, 173).

In Northern Europe, large quantities of fish were part of the diet in Northern Europe from around 1,000 AD, possibly linked to the widespread adoption of Christian dietary habits, but also due to the expanding population and better fishing technology (Woolgar, 2010, 7). It is not surprising then that fish as a species and related activity appears in early written legal records. The Magna Carta of 1215 at Chapter 33 stated that ‘all fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast’ (British Library) The great rivers of the realm were at the time were the avenues of transport and commerce, therefore the clause was intended to remove obstacles to navigation (McKechnie, 1914, 343) allowing merchants to freely trade on the water without obstruction. A revision to the Charter in 1217 added that ‘No embankments shall from henceforth be defended, but such as were in defence in the time of King Henry our grandfather; by the same places, and the same bounds as they were accustomed to be in his time’ (Charter of Liberties, 1217,c.17) . The time limit refers to Henry II, or post 1189. It is noted that of putting in defence was done by subjects as well as the King, and as such was probably not so much the exercise of any prerogative right ‘but rather an act of dominion exercised by the owner of the soil over which the water flowed’ (Moore & Moore 1903,6). Prior to the Charter, it was common for the King to put rivers ‘*in defenso*’ in the form of a writ to bar others from fishing or fowling whilst he went hunting. However, as there is ‘grave doubt as to whether the King reserved or exercised any right of fishing’, others submit that the primary object of the section was to release the country from the burden of building and repairing the bridges that had to be ‘attended to’ whenever the King exercised his sporting rights (Moore & Moore 1903, 10).

When Charters were produced or reissued (the Magna Carta was reissued with amendments in 1216, 1217 and 1225) they were sealed and distributed throughout the realm by the Royal

Chancery with a letter from the King requiring the terms of the charter to be broadcast by the county sheriffs in the county courts. The County of Gloucestershire received a copy of the 1217 Charter in Latin text on parchment, which was most likely housed in Gloucester Cathedral. Knowledge of the Charter would be realised as it was ‘simultaneously assimilated through its steady application in the courts and through the lawyer’s working knowledge of its terms’ (Maddicott, 1984, 31). Yet such laws could be misinterpreted. During this research it has been noted that Chapter 17 was often misconstrued in law as intended to preserve the public right to fish, but this was an error; in the Middle ages, fish was for food and not for sport (McKechnie, 1914, 303). The rule that Magna Carta prohibited Crown grants of several fisheries in tidal waters unless the particular fishery had been the subject of a grant or appropriation prior to its order was ‘a master stroke of judicial legislation. Nothing is said in Magna Carta about rights in fisheries’ (Schauer, 1940, 524). One of the provisions relied upon to sustain such an interpretation over the following centuries was Ch.33 which read that ‘all kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore’ again presumably to prevent the obstruction of vessels, as ‘kydells’ were staked nets set into the river bed, often surrounded by dams to funnel the fish into the nets. Whether the charter was aimed at removing the public nuisance of weirs in navigable waters, or to assist the migratory fish is open to debate, but the statute had an effect on both.

The Charter can be analysed in a number of ways. Seen as an example of state assertion of rights over waters, it could be perceived as an expression of power. If ‘the focus of territory is not exclusion from a given area, but creation of ordered social relations, which are, in many cases, relations of dominance’ (Brighenti, 2006, 76) then the Charter is an early example of this. Yet the issue of fishing and rights to fishing in waters was a Europe wide problem, not just confined to England. Throughout medieval Europe, the transfer of fishing rights from

common right to private property became ‘an axiom of the legal literature’ (Hoffman, 1996, 653). By the late eleventh Century, royal grants and usurpations had placed landowners in possession of a majority of the fisheries. At the same time, the fish population was evidently under stress in other regions. In France in 1289, King Philip IV had issued ordinance highlighting the problem as one of overfishing, which affected the quality and increased the price of fish to the detriment of the nation as a whole (Hoffman, 1996, 648). Such examples question the role of ‘knowledge’ in the political context of legal decision making (Valverde, 2009, 143). Although the Charters were produced for domestic soils, it cannot be coincidental that issues relating to fish and food security are similar to those seen in European governance. On the Severn therefore, ‘just as the landscape as discourse materialized belies its social and historical construction, the visible form of the local conceals the reach of influences whose origins often are far removed from the immediately local’ (Schein, 1997, 663). Further analysis of the legal issues in a wider area, for example considering the concurrent European legislation, would be useful for a geo- ecological investigation in terms of ecology and historical fish stocks, thus broadening the spatial ‘horizon’ beyond singular nation states. A sequent legal occupance analysis of this ‘horizon’ when viewed as an early medieval ‘fish horizon’ within historical law and archaeological geography, indicates that changes in population, technology, communication and law can be seen as some of the ‘interruptions of the cultural order engendered by man’ (Whittlesey, 1929, 165) with an impact on the natural and ecological landscape.

The examination of early laws regarding fisheries have started to lay the foundations for analysing law in this area as a sequent legal occupance. It is also necessary to have some knowledge of the lifecycles of the fish that were subject to these laws. It seems that the legislators were aware of the impact that of some of their fishing methods were having on the



migratory catches, particularly regarding Salmon, even if they did not fully understand the environmental consequences of some of their actions. Yet trying to regulate fishing activity using statute proved difficult. By examining both the habits of migratory fish and the effects of some of these laws will assist in building a sequent legal occupance that encompasses both the human and non-human elements within the landscape. .

## **5.6 Law and the management of Salmon and migratory fish**

In the Severn, adult salmon arrive during the summer, breeding in shallows between September and February. The young ‘fry’ are termed ‘smolt’ when they reach two years of age, and start to return to the sea. After a year at sea the fish may return to the river to breed, and by then are known as grilse, or locally (in the Severn) as ‘botchers’ (Taylor, 1974, 11), becoming ‘salmon’ at the age of four. Salmon were traditionally fished on the Severn with lave nets, weirs, stop and long nets and ‘fixed engines’. Salmon were the concern of Scottish legislation from 1030 AD, when a closed season was created, and in 1214, all dams were to be fitted with fish passes and barrier nets to be lifted every Saturday (Hoffman, 1996, 642). Within England, the Second Statute of Westminster of 1285 created a closed season on salmon in all waters from September to November, and for young salmon from mid April until the Nativity of St. John the Baptist (mid June). The penalties for a first offence were the taking and burning of nets and engines; for a second offence three months in prison, and for the third offence, ‘and as their trespass increasith, so shall the punishment’. On the Thames, the Mayor of London had authority over the tidal river and the estuary, and legislation particular to the river was frequently enacted to remove fishing weirs from the foreshore and to regulate the mesh of nets. In 1237, the removal of 30 kiddles was ordered and the owners arrested (Galloway, 2009, 177).

The Second Statute of Westminster confirmation in 1389 decreed that fishermen were not to use 'any nets called stalkers, nor other nets nor engines whatsoever they be' to take the fry of any fish, at any time of the year. By 1393, the Act that 'Justices of the Peace shall be Conservators of the Statutes made touching Salmons' was needed as previous statutes had not been enforced, leading to the Mayor and aldermen of London petitioning the King for the better regulation of fishing on the Thames and Medway, claiming that over-fishing of fry, and the construction of weirs and other engines was destroying the fish stocks and causing great damage to the city.<sup>21</sup>

In 1423, legislation declared that 'No Man shall fasten Nets to any Thing over Rivers'. The practice of using standing nets and engines called 'trinks' that were hung from boats and anchors across the rivers had become a problem, and the Act fined those who carried out such methods to be charged 100 shillings. Fishing by hand net was still lawful so long as the nets were not staked and left unattended. The 'misfortune of this act of parliament' was that it was only enforceable by the King's attorney general, and was therefore largely ignored (Cornish, 1824, 170). The rising human population and growth of towns and cities not only made the demand for fish soar, but also contaminated water courses, (Hoffman, 1996, 638) It is evident that during this period fish yields were being affected, and this promoted the increased use of regulatory measures to control human behaviour throughout Europe. As a result, 'Medieval Europeans both adjusted the social face with which they confronted nature and manipulated nature to fit their own wishes' (Hoffman, 1996, 652). Thus, the legislation over fisheries arising from human necessity can be seen as a territorial assertion over a common resource, and as such, 'territory, as the result of the manipulation of eco-bio-anthropo-logics, is the most material expression there is of the needs of humans' (Raffestin, 2012, 136).

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<sup>21</sup> Petition Ref.no SC 8/121/6028 National Archives ,1383-1393

As noted, laws and Charters were proclaimed and disseminated locally; their implementation was confirmed by their use within the legal administration. Nevertheless, if not managed and enforced locally, they were of little or no benefit. When fisheries laws are analysed as an early attempt at resource management using the ‘tragedy of the commons’ approach it is clear that although prohibition is easy to legislate, ‘how do we legislate temperance?’ (Hardin, 1968, 1245). Management of a resource is a question about how to regulate people’s behaviour, and this can only be achieved through knowledge, particularly in the political context of legal decision making (Valverde, 2009, 143). Within fishing communities in particular, such knowledge is ‘not given, clearly bounded or clearly defined. Rather, it is embedded in, and continuously produced through, networks of relations and interactions among people and between people, institutions and specific environments’ (Johnson et al, 2004, 3). In early English fishing communities, there was no scientific or economic rationality that could be recognised in the laws that prohibited types of fishing at certain times; they would have instead been regulated only by their own inherited and local knowledge. If the fisheries are seen, as they were in law, as a common resource, a problem occurs ‘when a *resource* domain is coincident with or intersects the *rights* domains of two or more resource users’ (Giordano, 2003, 369). This is particularly noticeable in river resources and the management of migratory sources, where there is both a temporal and spatial dimension when both resources and rights domains can change over time. However, in the middle Ages, such knowledge was underdeveloped, both by the users and by the legislators. The application of blanket legislation on the fishing community can be seen to have failed, as the spatial and geographic concerns were not yet recognised. Yet as time and knowledge proceeded, along with increased knowledge surrounding the diverse ‘hydrosphere’ the content of later law changed.

### **5.7 Post medieval fisheries and the law**

In 1533, an ‘Act against Killing of young Spawn or Fry of Eels or Salmon’ banned such activity throughout the country for ten years. Although again this seemed to have little effect, as in 1558, ‘An Act for the Preservation of Spawn and Fry of Fish’ was passed to preserve spawn and young eel, salmon and pike, which, as noted in the preamble, had been decimated by people who had been known to ‘feed swine and dogs with the fry and spawn of fish and otherwise (lamentable and horrible to be reported) destroy the same to the great hindrance and decay of the commonwealth’. The taking of fry and spawn of any fish, by any means, and of salmon or trout out of season, was banned nationwide (with the exception of the Tweed, Usk and Wye). A lengthy enactment with thirteen provisions, it specifically gave measurements for those fish banned from capture (i.e. no Pike under 10 inches or Salmon under 16 inches), and specified net sizes to allow the younger and smaller fish to escape, for which Cornish (1824) gave full approval. Yet the same statute also deemed salmon taken in the Dart, Teign, and Plym between February and November as seasonable, when ‘they ought to have known that the greater part of the salmon in the early part of the year, and all the old back, or spent fish, are not only unseasonable, and uneatable, but are absolutely poisonous’ (Cornish, 1824, 177). The subtle differences within the territory of England created different seasons depending on the life cycle of the fish in particular waterways, which although known to Cornish in 1824, was either not known, or not considered by the legislators of the sixteenth century. Even some two hundred years later, by the Act of 1760 ‘for the Better preservation of the spawn, brood and fry of fish’, anyone selling or in possession of ‘unsizebale fish’ or fish out of season would be prosecuted and either fined or committed to three months hard labour. Yet any attempt to prosecute those with unseasonable salmon taken from the Dart, Teign or Plym would come up against the fact that ‘parliament have made all fish taken on these rivers between February and November wholesome and seasonable, in law, though they would poison a horse in fact! (Cornish, 1824, 181). Therefore ‘despite

homogeneity claiming plans, each territory is as heterogeneous as the ensemble of subjects and agents who form it by inhabiting (territorializing upon) it' (Brighenti, 2006, 85). The Devon Rivers mentioned above were in fact legislated upon specifically in the 'Dart, Teign and Plym Fisheries' Act of 1803, which created a closed season for Salmon on the Teign between December and March, and on the Dart and Plym between November and February. Cornish again notes that very few Salmon are seasonable or fit to be caught as early as March, stating that the legislators, who could ascertain the difference in the nature of the fish between two rivers that lie only a few miles from each other, should also have known that many of the fish were also 'not fit to be killed' during these times (Cornish, 1824, 186). The problems with the laws surrounding seasons can to be attributed to the law imagining the fisheries as one territory, or one single issue. Yet they are a number of separate territories, hydrospheres, or watery landscapes, each defined by place, time and tide. More scientific and specific local knowledge was needed in such situations and the law in this instance revealed shortcomings in its attempts to address the fisheries problems via the single agency approach. Yet it was not until the nineteenth century that legislation began to recognise that it needed to account for these subtle variations in its treatment of the fisheries of England. Yet as will be seen, the enactments up to the Salmon acts had already had a marked affect on the sequent occupance of both the human and fish territories that would not be easily remedied.

### **5.8 Salmon Campaigns in the Nineteenth Century**

In 1820, The Times (1820) reported two gentlemen from the North of England had travelled to London to seek protection from the chief magistrate regarding the taking of fish out of season. Despite statute to prevent this, people were smuggling unseasonable fish from the northern rivers to sell at London Markets. The two men took a trip to Billingsgate Market to prove this. Such behaviour was clearly having an impact on the fish stocks. Unfortunately,

the two gentlemen reappeared a few weeks later to say that following the article, the public had become confused about whether or not Salmon was in season, and even the poor were turning up their noses at salmon and ‘refused to give the miserably reduced price it was become necessary to ask the very best fish in the market’. A clarification was duly printed (The Times, 1820b). The national newspapers were fast becoming a source of widespread knowledge, and the spread of this readily available media was instrumental to both the dissemination and the negotiation of the Salmon Acts. Such dissemination is one of the ways in which sequent legal occupance can occur- by imparting knowledge through the media, the remit of the law could be widened, reaching a larger part of the population and thus indemnifying itself against those who could claim that they were ‘unaware’ of legislation. Thus, law can have a presence in the sense that it occupies the spaces of knowledge. Yet knowledge can also criticise law. Following some eight hundred years of legislation attending to British fish stocks, in a book reviewing the Salmon fisheries, Cornish wrote that ‘the Salmon is one of the most valuable fish we have; yet the law....is lamentably defective for its preservation: and, wonderful to say, mankind seem more bent on destroying the whole race of them than that of any other animal’ (Cornish, 1824, 5).

By 1824 a Select Committee reported that the fisheries had rapidly declined, and agreed that still more effectual legislative measures were urgently needed to preserve them. By now, legal intervention was part of the ‘management’ of the fisheries as a national resource. The select committee made a number of recommendations on close seasons and the removal or adaptation of gratings, fenders and blockages to allow free passage of fish. The reports included minutes of evidence from local fisherman. The following extract records an interview with a Mr Provert from Worcester regarding the rivers Severn and Wye:

A great number of salmon are destroyed by spearing during the spawning time?  
 —Immense quantities.  
 That is the case in all the rivers of which you have been speaking?—Yes.  
 Is there a great quantity of fry destroyed in descending the river?—Yes.  
 How is it destroyed?—With small mesh nets.  
 Are those nets fixed or moveable?—Moveable, they drag them along; some are fixed I am told.  
 Are there any fixed nets or machinery of any sort used for destroying the fry in their descent?—Yes, there are fixed machinery in weirs, puts or wheels, across the river Severn.  
 Is that fixed machinery very destructive to the fry?—Uncommonly; that has been a great source of destruction, they take millions in a night.  
 Are those nets set for the express purpose of taking the fry?—Exactly.  
 Are there weirs in those rivers?—Yes, a great many.  
 Is there a considerable number of salmon caught in the weirs?—It cannot be otherwise; they cannot pass the weirs.  
 Do you know that the weirs are there?—They were there lately.  
 When did you see them there?—I saw them two years ago last August.  
 Was there a considerable number of salmon caught in them?—Prodigious quantities.

Fig 5.1: 'Report from the Select Committee on the Salmon Fisheries of the United Kingdom'  
 (Source: Kennedy, 1825, 6)

The extract reveals that salmon were still being destroyed in great numbers despite national legislation to protect the stocks. An Association formed in Gloucester in 1801 as a result of the short supply of Salmon included an attorney from Gloucester, who noted that fish of an unsound quality were 'perpetually taken' and that it was difficult to persuade the fishermen to return the older fish to the water. In particular, the use of 'puts' (putchers) inadvertently caught salmon fry which were fed to pigs after the more desirable shrimp had been sorted (Kennedy, 1825, 9). This behaviour had been reported in the statute (above) of 1558 but was still the practice of fishermen.

Industrial growth had compounded the problem. As factories replaced mills, pollution was regularly discharged into the nearest streams and rivers and 'bacteria feasting on raw sewage from squalid industrializing cities turned rivers into oxygen free dead zones deserted by salmon' (Montgomery, 2003, 72). Although industrial pollution was not specifically

mentioned in the fisheries bills, it had been tackled by city councils. The waste from Gas Works was a highly toxic mix of lime, acid, oil, tar, and ammonia, which killed large numbers of fish. In 1820, a group of Thames fishermen petitioned the Lord Mayor to take action against the gas companies. However, a commission investigating London's water supply in 1827 reported that the fishermen and fishmongers 'had testified that the Thames fishery had been shrinking every year over the previous fifteen years, the time when the gas industry had first emerged. The number of fishing boats had halved (all were now unprofitable) and salmon catches that used to be ten thousand a year had disappeared completely' (Tomory, 2012, 44).

Charles Dickens, a great campaigner for the Salmon, regularly used his weekly magazines to campaign for action. In 1861, he wrote that

'The cry of 'Salmon in danger!' is now resounding throughout the length and breadth of the land. A few years, a little more over-population, a few more tons of factories poison, a few fresh poaching devices and newly-invented contrivances to circumvent victims, and the salmon will be gone-he will become extinct. In all human probability, our grandchildren will be as proud of knowing 'a man who has tasted a salmon' as even we, in the present day, are of the acquaintance of a friend who has eaten a salmon caught in the river Thames'

(Dickens, 1861, 405)

That same year, The Times reported that salmon which had sold fifty years earlier at three-halfpence-a pound was now thought cheap at 2 shillings (or 48 halfpence), noting that 'not another instance could be found in which an article of food has been lost to the public, or converted by the course of events from a common treat into an expensive luxury' (The Times, 1861, 6) The diminished supply was blamed on the failure of the law; almost all salmon being sourced at the time was brought from Ireland and Scotland, where legislation



had been put in place to preserve the fish. The article demanded the same remedial government action in English waters.

## 5.9 The Salmon Acts

That same year, the first Salmon Fisheries Act (1861), lauded as an Act for the ‘public at large’ was confidently promoted by then Royal Commission.

In conclusion, we desire humbly to represent to Your Majesty the conviction impressed upon our minds by all that we have seen and heard, that a national property, of great value and importance, which was, in early times, watched over and encouraged by the Legislature, has, through improvidence and neglect, been suffered to decline ; and unless timely measures be adopted for its recovery, is threatened at no distant period with total ruin.

Fig 5.2 Report of the Royal Commission (1861, xxxv)

Under ‘judicious management’, the commission believed that this large-scale endeavour, with the use of science, technology, and professional knowledge, could be used ‘administratively by the state to conserve and protect the wealth of the nation’ (MacLeod, 1968, 114). With a rising population, it would also help to feed the people. The Act contained thirty-nine clauses. It placed the superintendence of the fisheries with the Home Office, included the prevention of pollution, banned fishing by use of lights, spears and other instruments, or the use of roe as bait. Nets were regulated to 2” knot-to-knot, fixed engines were banned, and there was a new penalty for the taking of unclean fish and young salmon. It also compelled those with artificial channels (i.e. canal companies and fisheries) to put up and maintain gratings across them to stop the salmon descending into locked waters. In addition, any licensed fishery was to attach to every dam a ‘fish pass’ so that no injury be done to the salmon. The closed season was between September 1<sup>st</sup> and February 1<sup>st</sup> (except with rod and line) and between noon Saturday and 6’0 Clock on Monday morning. This universal closed season was ‘adopted to combat the fraud and poaching that flourished under the umbrella of a complex web of overlapping seasons set by local authorities’ ( Montgomery, 2003, 76).

Yet there were some objectors to the legislation. In the Commons, Mr Henley objected strenuously to the payment out of the public funds of an unlimited number of inspectors, who would be ‘always putting their noses into everybody's face and their hands in everybody's pocket’( Hansard, 1861,v.163). A certain M.P, who relied on the Rivers for his manufacturing waste, argued that the law was ‘damaging the great commercial interests of the country for the sake of preserving a few fish’, along with others who submitted that the issue was ‘whether the people of the country were to live by their industry, or whether industry was to be suppressed that salmon might flourish’ (Hansard, 1861,v.164) Arguments from the opposition concentrated on the idea that declining fish stock was a matter of opinion as opposed to verifiable fact, and refereed to the fallibility of supposed evidence from fishermen (Bartrip, 1985,293). It soon became clear that some amendments were needed. Although the Act of 1861 had prohibited the sale of salmon in close seasons ‘there was nothing to prevent fishermen from catching salmon and exporting them for sale to France’ (MacLeod, 1968, 122). The amended Salmon Act of 1863 prohibited export during closed seasons. In addition, the Act ordered the sluices on mill dams to be closed when the mill was not in operation, with the water diverted to the fish passes, yet although this had been successful worked well in some Irish rivers, where they had more rain, in some parts of England and Wales there was less rain and therefore less water available for the fish (Macleod, 1968, 122).

The sporting magazine ‘The Field’ had initially supported Parliamentary involvement, yet when the Government proposed to strengthen the powers of conservators with an amendment to the Salmon Act in 1865, they too finally withdrew their support, stating that ‘there never was a government in modern days which did so much to advance centralisation and the placing of power over property and persons in its own hands as the present one. On all sides

the spread of this deadly influence is felt and the more it spreads the more influence it has and the capability of spreading its influence grows' (The Field, 1865 in MacLeod, 1968, 119). The 1865 Salmon Fishery Act appointed local conservators over new fishery districts, empowering these conservators to impose and administer licenses for every person wishing to fish for trout or salmon. This localised form of policing would attend to the problem of different fishing seasons in rivers countrywide. Further amendments to the Act were made in 1870 and 1873

The Field and other sporting magazines were concerned predominantly with their angling for recreational purposes rather than with resource conservation. In 1877 the Fisheries (Dynamite) Act finally prohibited the use of dynamite in public fisheries, and that same year the first issue of the Fishing Gazette had called upon its readers to campaign for a closed season on coarse fishing in accordance with legislation on Salmon and other fish (Bartrip, 1985). This separate social circle of fishing activity (i.e. non-commercial) reported that 'many waters have become depleted of fish which once abounded in them: and perhaps of the 5,000 miles of rivers and canals in England, two thirds are rendered almost barren by netting and the destruction of fish' (Bartrip, 1985, 290). Such pressure group campaigns led to 'An Act for the protection of Freshwater Fish' in 1878 (the Freshwater Fisheries Act) which extended the legislation pertaining to salmon to include 'all kinds of fish (other than pollan, trout and char) which live in fresh water, except those kinds which migrate to or from the open sea'. The following year, An Act to amend the Salmon Fishery Act with relation to fixed Engines in Tidal Waters' (1879) created a closed season for putts and putchers between September 1<sup>st</sup> and May 1<sup>st</sup>. The Freshwater Fisheries Act of 1884 allowed conservators to create bylaws in their district in relation to mesh and net sizes, and a further amendment in 1886 made it clear that freshwater fish *did not* include eels for the purposes of the 1878 Act.

In the second Act of that year all of the Acts were consolidated, and were to be known collectively as the Salmon and Freshwater Fisheries Acts 1861 to 1886.

In National terms, this period of specific legislative activity surrounding the fisheries had started to make a brief improvement, but then had 'lapsed into a pathetic history of indifferent half measures' (MacLeod, 147). The following section examines the effects of this legislation on a local area to identify the effect that law made in 'space' can have on a particular landscape.

### **5.10 The effects of the Salmon Acts on the Severn; a case study**

The Salmon Acts were national legislation yet implemented through local fisheries boards. The Severn Fisheries Board was formed in 1867, and was divided into county districts. The board has been described as a 'roll call of upper crust English society of the day, comprising of peers of the realm, landed gentry and civic dignitaries' (Hunt, 2007, 6) with only a few representative fishermen and fishmongers, indicating both the sequent occupance of society at the time in the County, but is also a representation in terms of sequent legal occupance regarding those deemed worthy of being a board member. Accounts of the rise of the popularity angling as a leisure activity place the figure of 50,000 nationwide club members by the 1870s as a low estimate (Bartrip, 1985, 296) and so a low representation of commercial fisherman during this period may reflect such a shift from economic activity towards leisure pursuits. This may have been the overall shift throughout the country, although in Gloucester, eel and elver fishing was still of both commercial value and a regular food source.

Within the amended 1873 Salmon Act, a small section stated that between 1<sup>st</sup> January and 24<sup>th</sup> June, no person shall 'hang, fix or use, in any salmon river, any baskets, nets, traps, or devices for catching eels or the fry of eels, or place in any inland water any device

whatsoever, to catch or obstruct any fish descending the stream' (1873, s.15). As the elvers migrated upstream in the spring, this effectively prohibited elver fishing in the Severn, something that the local fisherman were not prepared to accept.

In the spring of 1874, the Gloucestershire magistrates heard a few cases and the offenders were handed fines. The following year, there was only one conviction under the Act, and it was possible that 'the reality of the ban had sunk in, and compliance now accorded with this changed state of affairs' (Hunt, 2007, 21). Yet in March of 1876, ten men were prosecuted in Gloucester for elver fishing and were fined. Three of those men it seems were corn porters, seasonal employees at the docks, who were laid off every spring. In 'time honoured tradition', once out of work, they had turned to the elver harvest for income and food (Hunt, 2007, 36). In April, unable to pay the fines, these three men were placed in Gloucester prison to serve fourteen days hard labour on the treadmill). There was a backlash within the elvering community against the harshness of the punishment, with Inspectors reporting 'an agitation in the district amongst the elver takers' at attempts to enforce the law. At public inquiries in Gloucester and Worcester, the Inspectors reported that the fishermen had said that there were such a number of elvers running up the river that it was impossible to take more than a tenth of them in any case. The Act had led to a decrease in supply of elvers, and so an increase in the price of eels. The Inspectors concluded that:

**We cannot conclude this report without observing that, trivial as the subject may seem, the elver fishing is a matter of the greatest importance to the poor of Gloucester. Hundreds of men—one witness told us a thousand men—are annually engaged in it. The elvers come at a time, just after the conclusion of winter, when there is little work for the poor, and the elver fishing is regarded as the poor man's privilege. It seems undesirable, except on grounds of the most proved necessity, to interfere with an immemorial custom of considerable advantage to the poorer classes of the community.**

Fig 5.3: Excerpt from the report by the inspectors relating to elver fishing on the Severn,

(Source: Severn Elver Fishing, 1876, 4)

Following the report (Fig 5.3) they recommended that the close season on the Severn should begin on April 26<sup>th</sup>, which was accepted into the new Elver Fishing Act of 1876.

The Gloucester elver trials are an example of the way in which law operates in particular landscapes. As ‘law signifies a realm of meaning ( making) , legal meanings are “inscribed” onto segmented materialities, social spaces ‘contain’ meanings and so on’ ( Delaney, 2010, 13). The section on closed seasons in the 1873 Salmon Act had particular *meaning* on the Severn due to its reliance on the elver catch. When it was enforced nationally, it had a particular effect on the landscape occupied by both the eel population and the urban poor in Gloucester. When analysed in this way, this example of the application of a particular section of the Salmon Act of 1873 shows that ‘seldom, if ever, can control from a single agency upon patterns of social relationships be absolute. Consequently, the existence and proliferation of conflicting strategies need to be accounted for’ (Brighenti, 2006, 69)

The administration of the Salmon Acts was transferred to the board of Agriculture in 1903, and the list of the enactments (Table 5.2) highlights just how much legislation had been passed.

Table 5.2: The Salmon and Freshwater Fisheries Acts as of 1903

(Source: 3 Edw. VII, c.31 1903)

**ENACTMENTS RELATING TO POWERS AND DUTIES OF THE BOARD  
OF TRADE TRANSFERRED TO THE BOARD OF AGRICULTURE.**

**1. SALMON AND FRESHWATER FISHERIES ACTS.**

|                       |   |  |
|-----------------------|---|--|
| 24 & 25 Vict. c. 109. | - | The Salmon Fishery Act, 1861.                  |
| 26 & 27 Vict. c. 10.  | - | The Salmon Acts Amendment Act, 1863.           |
| 28 & 29 Vict. c. 121. | - | The Salmon Fishery Act, 1865.                  |
| 33 & 34 Vict. c. 33.  | - | The Salmon Acts Amendment Act, 1870.           |
| 36 & 37 Vict. c. 71.  | - | The Salmon Fishery Act, 1873.                  |
| 39 & 40 Vict. c. 19.  | - | The Salmon Fishery Act, 1876.                  |
| 39 & 40 Vict. c. 34.  | - | The Elver Fishing Act, 1876.                   |
| 40 & 41 Vict. c. 65.  | - | The Fisheries (Dynamite) Act, 1877.            |
| 41 & 42 Vict. c. 39.  | - | The Freshwater Fisheries Act, 1878.            |
| 42 & 43 Vict. c. 26.  | - | The Salmon Fishery Law Amendment Act, 1879.    |
| 47 & 48 Vict. c. 11.  | - | The Freshwater Fisheries Act, 1884.            |
| 49 & 50 Vict. c. 2.   | - | The Freshwater Fisheries Act, 1886.            |
| 49 & 50 Vict. c. 39.  | - | The Salmon and Freshwater Fisheries Act, 1886. |
| 54 & 55 Vict. c. 37.  | - | The Fisheries Act, 1891, Parts III. and IV.    |
| 55 & 56 Vict. c. 50.  | - | The Salmon and Freshwater Fisheries Act, 1892. |

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In 1923, the Salmon and Freshwater Fisheries Act consolidated all legislation contained within the Acts and gave fishery boards right to take proceedings under River Pollution Prevention Acts. The Act remained in force until it replaced with the Salmon and Freshwater Fisheries Act 1975, which is still in force today, with some amendments.

The Salmon Acts themselves can be seen as a turning point in legal consciousness. Where pre industrial legislation was concerned primarily with the preservation of navigation, property and national fish stocks, by the nineteenth century, angling had become a popular pastime. It was during the Victorian era that leisure time, and the way in which such time was spent, became a major social concern (Bartrip, 1985, 303). ‘The Field’, a periodical first published in 1853, focused on rural pursuits, reflecting the change in attitude towards the landscape. The concept of landscape itself became a mediating factor between people’s sense of themselves and the broader social and cultural environment (Taylor, 2006, 7). In the Fishing

Gazette of 1878, a writer noted that ‘when we consider how many tens of thousands of people there are in the kingdom whose favourite recreation is angling, the question of legislating for their interests assumes a different aspect’ (Bartrip, 1985,303). Law begins to be seen as a discourse, within which meanings in place and time have caused a shift in the application of law from a top down imposition, legitimated by enforcement, to the negotiation and maintenance of law through social interaction (Blandy & Sibley, 2010, 278). These discourses, moments within space, can be seen as flows which crystallise into things (laws) which become ‘permanence’s’ in the material landscape (Harvey, 1996, 81). The landscape was not just a mediator, but also a physical representation of the desires and needs of those living in it, and therefore a reflection of the political landscape (Olwig, 2002, 21).

## **5.11 Conclusion**

This chapter began by summarising the concepts of space and place and noted the difficulties in using each word within legal geography due to the connotations each provokes within language. With this in mind, it went on to examine the history of law relating to fish and fisheries as enacted in the national legislature. In doing so it has started to map out a sequent legal occupance in relation to the fisheries based on the scale of law at a national level. By using a sequential approach, the importance of time in relation to the environment of the fisheries has been revealed, not only in terms of knowledge, but also in natural lifecycles of the fish that are central to understanding the problems associated with legislating for non-human sources. Thus where law both affects and is materialised in space, it is itself ‘the product of contests over the design and shape of that geography rather than the natural or inevitable result of the logic of law as a mode of reasoning’ (Blomley and Clark, 1990, 440).



The sequential analysis began with the Magna Carta of 1215. In terms of the wider social context of medieval fisheries in Europe, it was revealed that there was a broader context to the known issues, which may have driven legal decision making in England. This early example of national law can be seen as the beginnings of changes to the landscape by law in a physical sense (the removal of weirs) which was to have an unintended consequence on the fish population. When viewed within the 'space' of law, the regions which depended on the fisheries can be seen as socially constructed, historically contingent social processes, which became institutionalised as part of wider transformations occurring in corresponding regions in Europe (Paasi, 2011, 10). As such they are time and space specific, and in a perpetual state of transformation. Law as an institution, I would argue, is a fundamental part of this process; by viewing the spatial horizon of Europe occurring at the time there are implications for the study of the impact of legal interference on naturally occurring habitats.

During the medieval period, salmon as a food source became a resource management issue. It was suggested that underlying these legal strategies was a form of territorial assertion over natural resources, as 'territory plays the fundamental function of naturalizing the ownership of a given object, as it publicly declares it to be a property of the territory's pre-announced owner' (Brighenti, 2006, 75). However, despite attempts to protect and conserve fish stocks for the benefit of the nation, the knowledge needed to implement and rationalise the resulting laws was lacking. The evidence suggests that despite shared institutions and social patterns, laws are often interpreted 'in contradictory, controversial and even conflicting ways' (Brighenti, 2006, 69). Human behaviour proved difficult to regulate. Scientific knowledge would have to be developed before more substantial legal methods could be attempted.

Changes in reasoning, drafting and applying the law become apparent from the mid sixteenth century. Yet in attempting to preserve fisheries for the benefit of the commonwealth, laws to

create and maintain the fisheries infrastructure and enable the flow of goods with a national territorial approach revealed anomalies (Brenner & Elden, 2009, 365). Industry had already caused the destruction of fish in many of the rivers, and even now ‘many English rivers poisoned by pollution during the industrial revolution still have no salmon’ (Montgomery, 2003, 72). The legal approach did not account for the subtle variations in the ecologies of particular waterways. This, coupled with insufficient understanding of the migratory patterns of fish resulted in laws which made unseasonable fish legally seasonable (Cornish, 1824, 186) and were therefore of little or no benefit in the long term.

By the inception of the Salmon Acts in the mid nineteenth century, knowledge was far superior regarding fish and their management. Despite the increase in industrial pollution, previously poor legal intervention was blamed for the low salmon stocks across the nation, and it was believed that judicious action to prevent over fishing would remedy the situation. The growing angling movement orchestrated campaigns that would influence the parliamentary decision to pass the Salmon and Freshwater Fisheries Acts. The laws had a detrimental effect on the poor of Gloucestershire, however, as they were to include sections relating to eels and elvers, revealing that law enacted in space can have particular outcomes in place and time. The Acts themselves did little to prevent the damage that had already been done over previous centuries, or to renew faith in the English fisheries. A century after the Salmon acts of the 1860s, ‘the annual catch of English and Welsh Rivers fell to just a quarter of the 1870 catch’ (Montgomery, 2003)

Using a sequent legal occupance analysis of the fisheries Acts interruptions of the cultural order that can occur with ‘mere enactment of laws’ (Whittlesey, 1929, 165) can be put into perspective. Despite the difficulties of separating space and place on a rhetorical level, to

ignore the importance of specific geographical places and landscapes in analysis is to overlook the fact that both territory and territoriality ‘derive from the activity that humans carry out in the space that is given or provided to them in common, within the limits of the conception that they have of it’ (Raffestin, 2012, 124). Although this has been alluded to with the Gloucester elvering cases here, the following chapter will concentrate on the particular geographical area of the Severn as a ‘place’ in terms of human activity and examine the conflicts that arise in when law is enabled and performed at the regional level. It also considers the way that conflicts that can arise *between* laws, specifically where a waterway is used for different activities. Legal interventions can have long term effects on the social landscape as well as on the non-human environment, and it is these repercussions which will be examined in sequence.

## Chapter 6

### Legal Landscapes

There is a gentle nymph not far from hence,  
That with moist curb sways the smooth Severn stream  
Sabrina is her name.

(Milton, 'Comus', 1634')

#### 6.1 Introduction

The previous Chapter discussed the ways of understanding the interconnections between law and geography by using examples of law created on the national level. Yet such a large-scale spatial analysis only offers us a partial account of law as a process, as it does not examine the ways in which the legal imbricates with the local or the regional. Although it has been noted that there are difficulties associated with the separation of space and place both in a geographical and legal analysis, localised interests do need to be considered when viewing law within the landscape. This is because every local perspective is imbued with place-based connections, interpretations and attachments. The majority of this thesis focuses on the Severn as it runs through Gloucestershire, as these were the boundaries that I drew up in my initial research plan. As such, the focus can assist with the discovery of localised meaning and interpretation in an area where the Severn predominantly becomes an estuary. The difference in the tidal flow of the water has created different activities to those carried out further up stream in terms of fishing, navigation and trade. Thus, 'a place in the landscape is not 'cut out' from the whole, either on the plane of ideas or on that of material substance. Rather, each place embodies the whole at a particular nexus within it, and in this respect is different from

every other' (Ingold, 1993, 155). This chapter therefore uses the term 'place' as a frame of reference to examine those particular legal issues and interventions to stress the importance of localised research. Scholarship in geography also suggests that 'rather than a passive stage on which the histories of social life unfold, place, like space, is actively constructed through a constellation of material and discursive practices' (Blomley, 1998, 581). This Chapter uses landscape theories to investigate the relationship between place, literature, economy and culture, and also illustrates the historical legal making of 'place' using maps and documents.

The second part of the chapter further examines conflicts on and over the river by looking at the different ways in which the waterway has been used for human activity throughout history. Whittlesey proposes that geography can be viewed as a succession of stages of human occupance (Whittlesey, 1929, 162) and therefore I argue that this analysis of the Severn can evaluate the social and economic consequences of legal intervention in terms of its predecessors. If landscapes are sites of cultural production, then law as a discourse may have a tendency to 'read nature in light of peculiar or local anxieties or concerns' (Delaney, 2001, 488). It follows that an analysis of the speech and discourse used in both law and literature may offer further insight into the effect of law on the creation, or alternatively, termination of places and landscapes. By 'unthreading' the strands of human occupance, using sequent 'legal' occupance as a conceptual approach, a picture of the legal geography, of the natural-cultural construction of the area over time can be built.

## **6.2 The legal making of place**

Property is perhaps the most obvious example of the influence of law on 'place' as it actively creates and confirms boundaries that can be legally recognisable (Blomley, 2010). Although

emotional ties to place are not tangible, nor stable, legal constructions can be identified through the analysis of particular incidents at particular locations with the use of statutes. To understand the making of 'place' in terms of a sequent legal occupancy, it is necessary to review the making of Gloucestershire's legal boundaries in history.

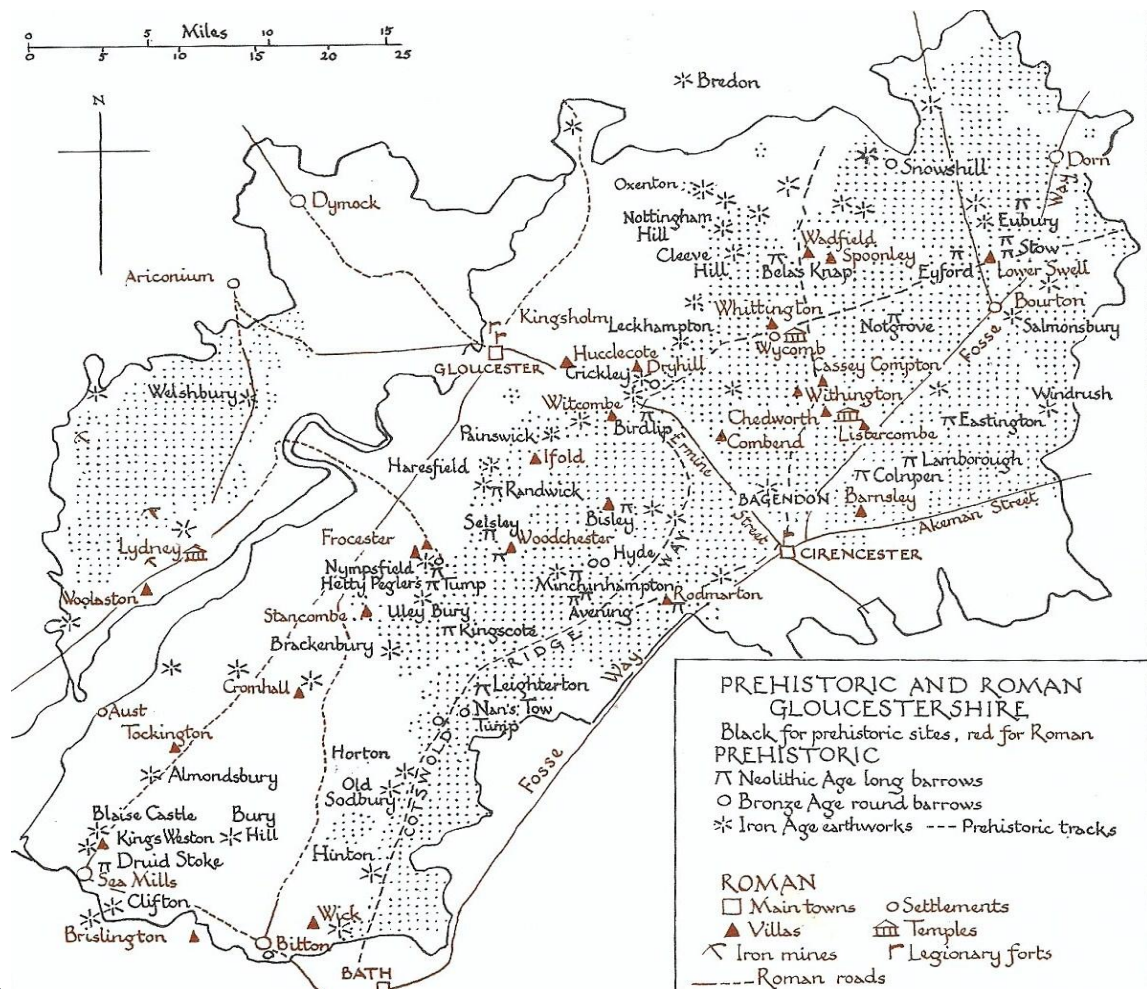


Fig 6.1

Map of prehistoric and Roman Gloucestershire.

(Source: Smith & Ralph, 1972, 19)

The creation of Gloucester as a known and named particular place was one that emerged from its strategic position on the Severn. When the Romans arrived in around 49A.D, they made Glevum (Gloucester) one of the four Legionary Stations and a valuable commercial centre (Fig 6.1). They built a fort to guard the Severn crossing from where they advanced into Wales. Roman occupation left its own imprint of legal and institutional organisation before the Anglo Saxons captured Gloucester from the Britons in 577 A.D. By Edward the Confessor's reign in 1042, Gloucester was of national importance, a regular meeting place of the royal council with a Royal palace at Kingsholm (Herbert, 1988). From the latter part of the 8th century, nearly all of the villages of Gloucestershire had been founded as estates that surrounded halls (Smith & Ralph, 1972). This method of organisation (which preceded the Norman Conquest) developed in the 10th century out of both 'circumstances and mutual interests' (Jessel, 1988, xv). By 1066 Gloucester was a well-established urban community and a royal borough in which around half of the burgesses, numbering around three hundred, held their land directly from the Crown. (Herbert, 1988) Followers of William I were rewarded with Saxon landholdings, with the King taking the land of Harold, amounting to about a quarter of the land in Gloucestershire (Smith & Ralph, 1972, 26). The Domesday Book, conceived in Gloucester by King William in the winter of 1085, (Darby & Terret, 1971, 43) catalogued not only the lands, but also existing laws and codes of the realm. The Domesday count recorded over forty 'hundreds' in Gloucestershire (Darby & Terrett, 1971, 4) with the largest estate being that of the Hundred of Berkeley, which bordered the Severn to the south of Gloucester. In the Century following Domesday, the Manors developed as estates held by those granted honours, such as Earls and Barons. Legally, the sovereign title held by the King also held him as the paramount Lord, with Lords or Barons as intermediaries with tenures (Gray & Gray, 2005, 78).



Fig 6.2

### Map of Saxon Gloucestershire

(Saxon Gloucestershire, Smith & Ralph, 1972, 24)

The Statute of Quia Emptores in 1290 prevented subinfeudation, or the subleasing of land by the tenant barons to whom it had been granted in return for services to the Crown. Only the Crown could grant new tenures and no new feudal relationships were formed after this date. The transfer of land became a commercial transaction, so that once the conveyance had passed, the new tenant had no ongoing obligation towards the seller. This statute still regulates fee simple transfers of land today, as each transfer of property substitutes the buyer



for the seller ‘so that all tenants in fee simple are today presumed (in the absence of any contrary evidence) to hold directly of the crown as ‘tenants in chief’ (Gray & Gray, 2005, 81).

The boundaries on the Saxon map (Fig 6.2) show the similarity between both of a modern day Gloucestershire and that of the 11th century County, with the bounded framework changing little in over a thousand years. Paasi (2011) uses four analytical stages to investigate place making; territorial shaping, with the making of ‘soft’/‘hard’ boundaries; symbolic shaping or naming of ‘place’; institutional shaping in terms of a court system, and the ‘establishment of the region as part of the regional system and social consciousness’ (Paasi,2011,12). As an inherited sequent legal occupance, Gloucestershire, as a recognised shire and county, was created by these early settlements, with legal boundaries laid down over time through the administrative periods of occupation by ruling inhabitants in the stages as noted above. With the districts divided into hundreds and counties, it becomes possible to see the beginning of the ‘increased definition of the territorial extent of spheres of political and economic power, as boundaries were used to demarcate the spatial limits of rights and obligations’ (Jones, 1999, 73). As property must be produced in order for it to become ‘legal and actionable’ (Blomley, 2010, 206) with these regional divisions in place relatively early in history, the concept of ‘property’ and the rights and obligations attached to such land parcels began to emerge. After 1066, the Norman kings ‘grafted’ their laws and procedure onto existing administration (Lyon, 1960, 103) and the beginnings of an organised legal and administrative system took shape.

### **6.3 The River Severn as a legal ‘place’**

The river as a particular place can be described in a number of ways. As a natural environmental feature, it forms a physical boundary between England and Wales. As a landscape or 'waterscape', it hosts a diverse population of flora and fauna. As a legal entity, it challenges notions of property by its very existence as an uncontrollable natural phenomenon, embedded and constant within the landscape. Thus, that which was morphology becomes 'scenery' to be viewed from a particular, often aestheticised detachment. Landscape, then, can be both 'site' and 'sight.' (Blomley, 1998, 574). Using literature that has recorded the site and sight of the Severn can access 'areas of experience' and as such can be thought of as a 'kind of cartography, surveying and charting nameless places' (Brown & Irwin, 2008, 19). Literature therefore as an artistic, as opposed to a scientific creation can enrich the understanding of 'place' (Pocock, 1981). Culturally, the word 'Severn' derives from the Latin word 'Sabrina' which can be found in classical and mythical stories (Witts, 2008). One such tale tells of the myth of Locrin (son of Brutus, the first king of the Britons in 1104BC, according to Geoffrey of Monmouth). Although married, Locrin was still in love with his mistress who had bore him a daughter, Sabre. When Locrin dies, his wife commands that the mistress and her daughter be thrown into the river, and the river shall bear her name (Thompson, 1999). Thus, Sabre became Sabren, later Sabrina, and finally Severn. Such names and legends can be found throughout literary history. When Milton wrote *Comus* (1634) it was to mark the installation of the Earl of Bridgwater. The Earl had been given the responsibility for Wales and the adjoining English counties, including Gloucestershire and the Forest of Dean. The piece introduced the concept of a landscape to the audience, promoting the message of a golden age under the guidance of the Monarch (Olwig, 1996) with the River Severn representing the 'meeting points of two nations, two languages and two cultures' (Sanders, 2001, 7). In *Comus*, Milton seems to refer directly to Crown policies regarding the

forest ‘and to the vexed question in the Dean localities of 1634 (the year in which the forest eyre had been held) of common rights’ (Sanders, 2001, 15). An eyre was the circuit travelled by an itinerant justice, which included the right to inspect the Kings holdings, therefore a court had been held in relation to the rights of the foresters. Although use of historical text is often seen by spatial analysts as nostalgic, or regressive (Agnew, 2011) such a phenomenological, holistic approach can use it to examine the context in which law is performed. Thus, in an ‘ecocritical’ reading of literature, where local politics are analysed alongside the geographical and topical situation, such texts can be used to explore the dynamics of a ‘place’, and move away from the notion of a purely descriptive artistic production. The Severn estuary is a ‘constantly fluxing rhythm pattern with daily, monthly, seasonal, and longer beats. The topography never settles as channels and sandbanks shift. The light and visible space (between sky, water, mud banks, and near and far shores) at differing states of weather/daylight/tide is extraordinarily liminal (and thus of fascination to poets, artists, and others who choose to engage with this landscape) (Jones, 2011, 2293). One example is the following poem by Gurney:

If England, her spirit lives anywhere  
It is by Severn, by hawthorns and grand willows.  
Earth heaves up twice a hundred feet in air  
And ruddy clay falls scooped out to the weedy shallows.

From ‘By Severn’, Ivor Gurney (1890-1937)

(Source: Kavanagh, 2004)

This poem refers to the bore, the unchanging natural phenomena that have been a constant and predictable feature of the estuary for thousands of years. Indeed,

‘If we are to take the agencies and the liveliness of nonhumans and nonhuman processes seriously in the construction of the ‘social’, then surely we must pay heed to such processes as the habits/rhythms of water and the oceans. They are shapers of life on earth at macro, meso, and micro scales and bring form to complex tidal rhythm patterns of time spaces to be found at the ocean’s margins’

(Jones, 2011, 2300)

Poetry relates to location through personal human experience, and the perspective of and therefore reflects the difference between place from space in terms of familiarity and time (Sack, 1997, 16). In a similar way, the very naming of natural features can be seen as part of the process of the identification of the material world, which can be ‘bounded’ and thus become legal objects or subjects (Blomley, 2010). This modernist theoretical conception of the ‘social production’ of nature (Delaney, 2001) is thus apparent in the written word. The river is portrayed as wild, unpredictable, untameable, or as a resource to be harnessed, tamed and utilised. When seen as the latter, the estuary becomes a legal subject. The landscape is ‘a discursive terrain, across which the struggle between the different, often hostile, codes of meaning construction has been engaged’ (Daniels & Cosgrove, 1993, 59). These struggles can be seen in the constitution, and the settlement, of legal property. It is these issues that will be discussed in the following section.

#### **6.4 The Severn as ‘legal’ property**

During the Middle Ages, the Severn was an important resource for those living on its shores, providing food and income. Local knowledge of fishing, tidal conditions, currents and

topography would have been essential on such an unpredictable tidal estuary. In the absence of written evidence, it is possible to imagine that ‘local’ fishing communities working every day out on an estuary's creeks and channels would have experienced a sense of separateness or isolation from the broader social community’ (O’Sullivan, 2004, 465).

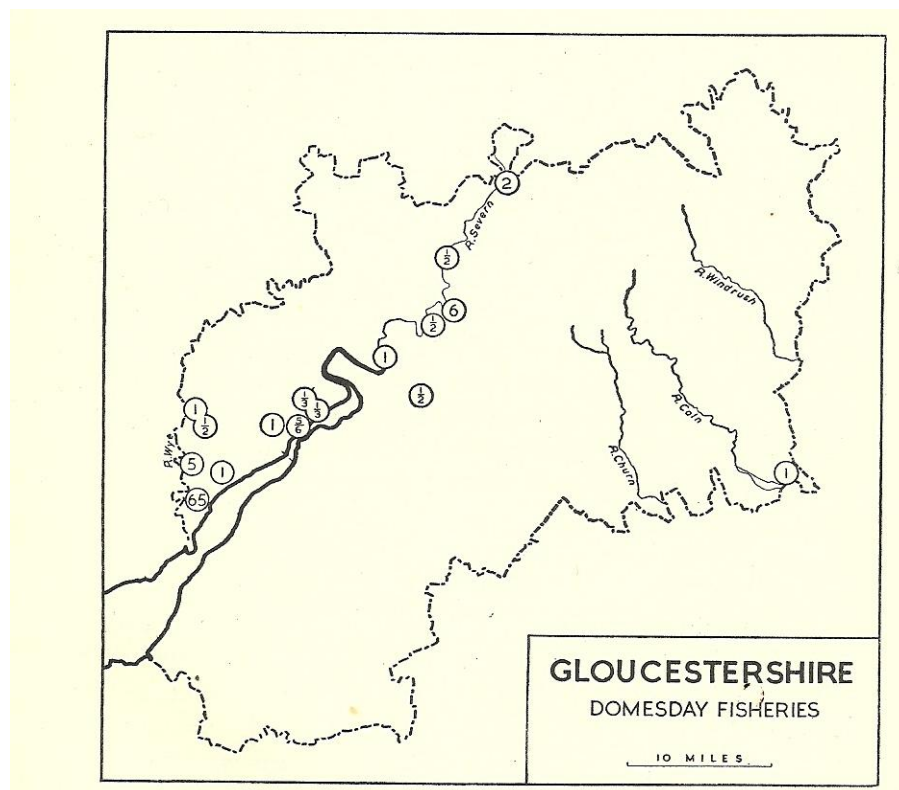


Fig 6.3

Domesday fisheries in Gloucestershire

(Source: Darby & Terret, 1971, 37)

These same fishermen would have used their experience and knowledge of the estuary and its fishing pools to sustain their own unique ‘places’, passing on knowledge through the generations. Thus landscapes such as this can be seen as ‘living, social processes with the ability to generate values through a community’s knowledge of the past’ (Waterton, 2005, 314). The importance of the fishing economy can be seen with the records of manorial or private fisheries mapped in 1086 for the Domesday count (Fig 6.3).

In law, fisheries benefit from the soil over which the water flows, therefore title to a fishery arises from the right to the soil on the river bed. When not part of the bed, the fishery becomes an ‘incorporeal fishery’, usually given as a leasehold or freehold connected to a Manor, and the right is to take fish in a defined stretch of water only. A ‘corporeal fishery’ (or a ‘several fishery’ in tidal waters) includes the use of the soil under the water. If Manors were granted the rights to the foreshore by the Crown, the Lord could also be granted fishing or sporting rights. In these circumstances, he owned the half of the riverbed and had jurisdiction over mills and weirs (Jessel, 1998, 111). Several Manors held rights to the fisheries on the Severn, including the Berkeley estate, which had a boundary bordering the estuary for eighteen miles.

## **6.5 Law, custom and landscape**

Customs were the precursor to English Common Law and as such create a narrative, ‘weaving together the common stories recounted in countless cases of who was doing what when’, setting a precedent for later behaviour (Olwig, 2005, 307). This is of course the modern and accepted version of the judiciary and the common law system, the development of which Blomley has interrogated for its claims to have a historical continuity and communality, submitting that ‘legal histories, it seems, are social and political histories, imbued with contingency and struggle’ (Blomley, 1994, 68). For him, this is evident during the early sixteenth century when ‘interjurisdictional’ jostling between rival legal structures (such as manorial, customary and civil) occurred, which was instrumental in the ‘renegotiation of the geography of legal relations’ and the systemisation of the common law during that period (Blomley, 1994, 80). If adjudicated by law, a custom must satisfy four conditions; that it is

ancient, certain, reasonable and continuous. A customary right is not exercisable by the public at large, but by the residents of a particular place (Gray & Gray, 2005, 335). In early legal claims, many cases pivoted on the rights of the public to fish in what they saw a public waters. An example can be seen in the case of between *Carter v Murcot* (1768). The defendant claimed that as the Severn was a navigable river and an arm of the sea, in which case, the presumptive right that every person had a right to fish in the waters could be upheld. He maintained that when the tide was in, the water could not belong to a Manor, as the Crown owned the water to the high tide mark. In judgement, Lord Mansfield stated that ‘the rule of law is uniform...in navigable rivers, the proprietors of the land on each side have it not; the fishery is common: it is prima facie, in the King, and is public’. Yet plain as this was, it was overruled. Although no earlier reported case has been found in which it was claimed that there could be a tidal creek over which there was no public right ...Lord Mansfield was willing to accept that the absence of a claim that the water was public was enough to establish that it was private’ (Caffyn, 2010) . The argument for the plaintiff that it was in fact part of a manor, ‘and a place may be parcel of a manor, if between the high and low water marks; though the sea flows and reflows upon it’ was upheld. Therefore, although Magna Carta prevented the Crown from making fresh grants affecting public privileges, where the Crown had previously excluded the public it can lawfully grant out this right if appurtenant to a Manor.

In the case of *Lord Fitzhardinge v Purcell* (1908), the Lord of the Manor of Berkeley took action against Purcell for trespass upon his estate. Under grants alleged to have been made to Lord Fitzhardinge’s ancestors by Henry I (and therefore prior to Magna Carta) the boundary of the Manor was said to be the middle of the deepest channel of Severn and included the soil of the foreshore. Lord Fitzhardinge claimed entitlement and filed for an injunction to prevent

Purcell from trespassing both on foot and by boat, which he had done for shooting wild fowl. Purcell's defence was similar to that in the case of *Carter v Murcot* in that he claimed the right to go upon the foreshore and shoot wild duck on there as a member of the public exercising the right of all the King's subjects in and over the foreshore of a tidal navigable river. The River Severn, bed and foreshore were the property of the Crown, with the boundary of the Manor being the high-water mark, so that the fishing in the deepest channel remained public. He also claimed the right, as an inhabitant of the Manor, and being a wildfowler by occupation, by virtue of custom, particularly the custom of the gale, was a right enjoyed by him and his ancestors.

Justice Parker assessed the matter, stating that in order to succeed, the plaintiff must show possession of the land, and the title must be derived by grant from the Crown. The Judge notes that the evidence in the form of Charters dating from 1153, reeve accounts, *halmotes* (Saxon Court records) and rent-rolls were not easy to decipher. Without maps or definitive boundaries, it seems unclear throughout as to the extent of the Manor holdings in this period, yet finds it proven that the King had vested the foreshore and bed of the river in the Lord of the Manor. The decision, then, is made based not on the vague and indefinite evidence of inherited rights to the land but to a form of customary usage, yet the defendants various claims to customary use were dismissed. Purcell claimed that as the shooting had been going on for 'many years', and had ever been interfered with and that the fishing had always been public. His defence stated that the Manor owned at most a free fishery, with no right to the soil. He used the custom of Gale as evidence for this, yet compared to Lord Fitzhardinge's evidence, based on very similar criteria, the custom of the Gale was dismissed, as in light of the evidence produced the Judge stated that he would not have to consider 'whether such



custom or practice, if proved to have been enjoyed as a right, would be a valid or legal custom'. It is also noted that King Henry II distrusted the Berkeley's and 'took away their manor and gave it to a Bristol Merchant' (Peel, 1980, 36). This merchant was a Fitzhardinge, whose son then married a Berkeley daughter, giving her the land 'in dower' on condition that Roger de Berkeley released whatever his rights he had left in the estate. The land was then recovered by way of convenient marriage, rather than by grant.

Smyth of Nibley's records of the Berkeley Family between 1066 and 1618 recorded the custom called the 'Gale'. Smyth records that Berkeley estate held the land from 'to the deepest part of the channel' (Maclean, 1885, 321) and lists 53 species of sea fish prevalent to the area, including swordfish, shrimp and conger eel. In this part of the river, anyone could fish with *becknet* or *ladenet* (but not with any other device) for any fish except for Royal fish. These were listed as the sturgeon, seal, porpoise and thornpole (despite attempts to identify this fish with the help of the Angling Trust, searches have proved unfruitful, and one can only assume that this was a type of dolphin). Fish listed as 'galeable' were the salmon, gillinge, shad and lamprey. Smyth writes that:

' the fisherman sets the price of such his fish; the Lord chooseth whether he will take the fish and pay halfe that price to the fisherman; or refuse the fish and require halfe the price of the fisherman soe set by him; The price or miety taken is called the Gale'

(Maclean, 1885, 321)

The lord's dues from the fisheries were collected by a 'galeor' in each manor, a term used only in Gloucestershire to denote the collector of the manorial duty on fish. A term has been

recorded as being in use denoting a particular practice in a particular place as part of a particular custom, must be accounted for in an SLO analysis. Such ‘forgotten’ practices (although this term endured until at least 1832, when it was last recorded)<sup>22</sup> form part of the sequence of customary practice rejected by law. This particular custom held that should the fisherman land the fish past the sea mark and put grass in its mouth, then he would not have to pay the fee; if a sturgeon was caught, it was to be taken to the castle, where the Lord was to pay half a mark, and a long bow and two arrows for it. All fish taken from the Severn were to be taken to the Market cross in Berkeley and be offered for sale there for an hour there before the fisherman could carry it out of the hundred to sell.

The written accounts of such customs, now long forgotten, can inform a sequent legal occupance of a landscape to indicate the physical presence of the estuary and its influence on the surrounding shores. Where customs such as that of the Gale have long fallen out of use (and as such would fail in a Court of Law to satisfy the requirements to be upheld) they are an example of legal geography in action, of boundaries and conflicts between the public and the private, played out in a particular place. Where there were no definite geographical maps to clearly define the boundaries, or ambiguous claims to title, customary usage was decided in favour of the Lord as opposed to ‘poacher’ when deciding that Fitzhardinge had a claim to the Severn shores. The dismissal of the public right to fish signalled a shift from the King as the sovereign Lord and chief tenant, to the Lord of the Manor as Lord of his domain (as granted by the Crown) and his personal property rights over those of the public. The uses of the concept of ‘landscape’ within these discourses can emphasis the ‘embeddedness of lawyers, lawyering, and all actions within a ‘scene’ of socio-spatial relations’ (Martin & Scherr, 2005,

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<sup>22</sup> In 5th Rep. Dean Forest Comm. (1835) 70, I never sold a gale, but I have bought quarries. I went to the galer, and had it transferred in the gale-book., Oxford English Dictionary [online]

380). Such cases represent the legal shift from public to the private; yet the realisation of such divisions only occurs where one type of person (the public) is excluded from carrying out activities which affect another (private owner). For Blomley, these 'spatial inscriptions', confirmed by the common law, are productive in that they shape a type of legal consciousness (Blomley, 2005, 282) Law becomes a process of enactment, not merely by the adjudication of the conflict, but by its unseen presence. The landscape is not just the setting for legal and social interaction, but is 'an objective, external, material assembly of facts and things which is realised through direct encounter and observation' (Wylie, 2007, 33). The estuary is a locale, a place where legal structuring and interpretation has forged values and changed behaviours (Agnew, 2011) by legally endorsing where certain activities may or may not take place. This demarcation between public and private space and place is a site where a process of alienation is played out (Olwig, 2005a).

The cases also reveal the attempts by legal means to enforce and reinforce boundaries that are physically in perpetual motion; in addition to the actual river, the fish and birds are also transboundary, yet this has not prevented law interpreting 'watery' boundaries. Neither water nor wild animals (whilst alive) can be 'owned' in English law, and thus the treatment of both relies on the entitlement to the land over which they pass (Gray & Gray, 2005, 60). Thus to have property in nature is not structure, but effect (Blomley, 2008, 1839). As sequent 'legal' occupance, legal interruptions have changed the cultural order, and over time created the natural landscape as a representation of a particular political and legal entity (Olwig, 2005a, 294). As each successive generation occupies the land, changes in the legal order have had a direct effect on its use, played out here in terms of property law.

Whereas in the case studies, the Crown presumption was rebutted by evidence of title, today the Crown manages virtually the entire seabed to the 12-mile nautical limit, and half of the foreshore (Crown Estate, 2011). It remains *prima facie* entitled to all foreshores between high and low water mark, which can only be rebutted by evidence of title. This raises the question of time, as the doctrine of estates in land law identifies that each landowner did not own land, but a ‘slice of time’ in the land (Gray & Gray, 2005, 69). Thus, the notion of time cannot be severed from the concept of property in law, nor from the concept of place, as it plays a crucial role in both. Indeed, ‘the property-rights concept is not singular in nature; rather, it refers to a bundle of rights that may vary by resource, time, and place’ (Giordano, 2003, 366). Place can be investigated through sequent ‘legal’ occupancy, by examining legal cases as a form of discourse and the issues that arose in terms of ownership, rights, customs and power. These discourses themselves shape the landscape and the imagination, in a similar way to art and literature. Thus place can be seen as having a ‘duality’; a geographical site, or place, which is at the same time a site from where geographical, cultural, political and theoretical viewpoints emanate (Duncan, 1993, 39). In law, places can become a site of conflict between the private and the public, where law decides who owns a slice of ‘time’. Yet within these legal places, conflicts also arose between users, between navigators and fisherman, and these will be examined in the following section.

## **6.6 Conflict on the Severn: Fishing and Navigation**

Legal discourse played a part in the construction of the river as a place where conflicts arose over rights and ownership. Yet rights in property and rights in navigation, although they may be exercised in the same place and over the same water ‘are wholly distinct and have no relation to one another’ (Moore & Moore, 1903, 88). The basis remains in common law that

there is a public right of passage over all navigable tidal waters, but only for the purpose of navigation or trade (Gray&Gray, 2005, 333). As such, the right does not extend to activities such as wildfowling, mooring, or landing without permission.

The Severn has a long fishing history, with eels and elvers being the main local catch. Fisheries were of national importance on the Severn, with the King commandeering a number of its produce. Fish was supplied by either by the Royal weirs in the Castle, those owned by the church, or by local fishermen. Lamprey, which flourished in the Severn, were regarded as a gastronomic delicacy favoured by Royalty. In 1200, King John fined the men of Gloucester 40 marks for disrespecting him in the matter of his lampreys (Taylor, 1974, 16). King Henry III was regularly supplied fish by Gloucester, and the calendar rolls of 1226 record that he ordered the Sherriff to bring 40 Salmon and as many Lamprey as he could find in time for Christmas ( Maxwell-Lyte, 1916,8). In February of 1240, he banned the sale of lamprey, ordering that all catches were to be sent straight to the Palace(Maxwell-Lyte, 916, 455), and a year later, in 1241, the sheriff was directed not to let anyone buy lamprey during lent and to send all catches direct to wherever he was holding court; in 1243, this amounted to 188 lampreys (Blacker, 1887, 316).However, the Crown was also placed in a rather anomalous position with regards to the use of the estuary by river traffic. Complaints that a monk had built a fishing weir obstructing boats trying to reach Gloucester were made in 1247 (Herbert,1988), with a commission sent in 1289 to Gloucester to investigate landholders in all counties by the Severn who had narrowed and raised weirs, contrary to statute, preventing ships from passing through (Boynton, 2003, Edward I, Vol.2, 459). Edward III heard a petition in 1377 regarding the Severn between Worcester and Bristol which reported that ‘the gorges (weirs) in the said water are so firmly fastened that the watercourse cannot pass

properly’ which caused surrounding meadows to flood and prevented navigation so that ‘every year various people and boats perish’ (Given –Wilson, 2005). The chevron type weirs allowed fish to pass up river, and be caught in the receding tide, but some had ‘passes’ that were too narrow to allow larger boats through (Green, 1999, 17).

By the seventeenth century, a plethora of fishing Acts began to be heard in Parliament, as discussed in the previous Chapter. The impact of such statutes on a river where the mainstay was eels and elvers was potentially devastating for the both the local fishing industry and for the community, yet the use of the river as a trade route was to have a greater impact on the fish habitat than the perceived over fishing problem. In 1887, the chairman of the Severn Board of conservators stated that of all the rivers in England, not one exceeded the Severn in importance; yet the erection of navigation weirs above Gloucester had ‘turned the river into a modified canal’ and almost extinguished shad, twaite and flounder from upper waters; in the lower Severn, the salmon and lamprey were ‘almost extinct’ (Day, 1887, 51). Migratory patterns were blocked by the creation of the artificial waterways (Hunt, 2007, 48) built to the advantage of the trading vessels. The legal ‘occupance’ had turned in favour of navigation, adversely affecting the natural fish population, with the headlong march towards progress placing human economics over the natural resources that had been of such local importance a decade earlier.

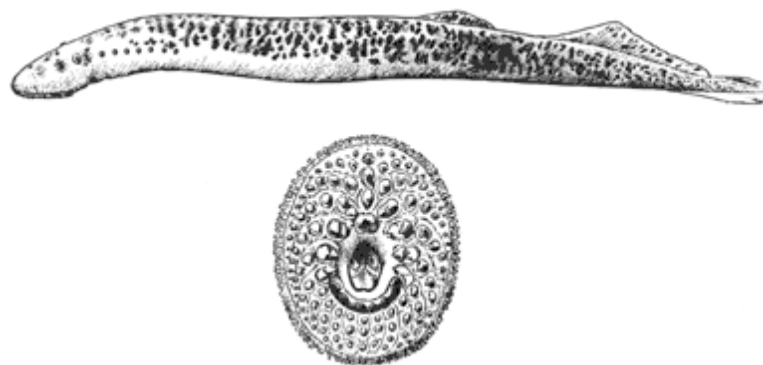


Fig 6.4: Sea Lamprey

(Source: Bigelow and Schroeder, 1948, 46)

This example could be proffered as an indication of devaluation of place to a mere location, where its values are assessed in terms of its capital exchange (Agnew, 2011, 323). As place becomes location, local lore and knowledge can become lost and forgotten. By the nineteenth century, a Cheltenham fishmonger recalled that “the art of cleaning lamprey (Fig 6.5) was being lost in the vicinity, whereas in previous decades, ‘certain persons used to devote their time to this occupation’ (Day, 1887, 52).

## COUNTLESS FISH

Gradually the floods went down, and then there would come into the city shabbily dressed men with ponycarts, piled high with what looked like masses of colourless jelly. When you got closer you could see that the masses were made up of countless tiny fish, not more than 2½ in. long, with black eyes and a fine black line from head to tail.

Down all the back streets went the fishermen with their loads, and after a time you made out that what they were shouting at the tops of their voices was “Live elvers !” Front doors would open all along the street and housewives would come running out with basins and dishes and triumphantly take away a pound or so of these tiny fish as a treat for supper.

Elvers were the favourite delicacy of Gloucester folk, who fried them and ate them whole, just as they were, or occasionally in a covering of batter or egg. Strangers and sojourners, however, always regarded them with anything between suspicion and revulsion, and I myself, not being a native of the city, never quite found the courage to taste them.

Fig 6.5: ‘West Country Scene: Housewives Running With Basins When ‘Live Elvers’ Were Hawked’

(Source: *The Times*, 1962, 14)

During high spring tides, there was a ‘spectacular rise and fall of water levels, with its accompanying waterborne debris of logs and branches’ which effectively ruled out any other type of fishing during elver season (Hunt, 2007, 5). In short, elvers were the only source available from the river during the spring and, as they were free, were eaten in abundance locally. An article in *The Times* (Fig 6.5) recalls such a memory from the turn of the twentieth century. The author refers to the ‘Gloucester folk’ regarding elvers as a delicacy at the beginning of the 1900s, whereas in *Days* account of 1887 they were still seen as a ‘poor mans food’ (Day, 1887, 53). Such articles can reveal the difference in both opinion and conception within a local community, from without and within. (Winchester et al, 2003). The reports regarding other issues also reveal a difference of opinion within these layers of ‘occupance’.

## **6.7 Conflict on the Severn- Trows, tolls and trade**

As navigation conflicted with the fisheries, so too was there grievance between the traders. In 1241, bailiffs of Gloucester gave the king one tun of wine so that the bailiffs of Worcester could be brought before the justices ‘to show why they hinder property and merchandise which are taken by ships by the River Severn from coming to the vill of Gloucester’ ( F.R , 25 Henry III, Mem.8, 467).

It had also been reported that persons from the Forest of Dean had also been making boats unload and sell their cargo against their will. These ‘extortions, oppressions, misprisions,



forestallings and regratings' (Boynton, 2003) continued, with riverside gangs reported to have violently attacked boats and made threats to kill. In 1411, twenty trow owners conspired to prevent the passage of boats along the river unless the owners unloaded and placed the goods onto their trows to be carried for a fee. On Michaelmas Eve the trow owners sought revenge against those who had refused their 'services' and lay in wait until the drags approached. They attacked the steersmen and the drags 'and made them cut the said float into pieces in the said river, failing which their heads would be cut off there'. All the goods and firewood were washed away in the river. The burgesses sought a 'speedy remedy, help and protection in this matter against such rioting, conspiracy, and wrongdoing' (Given-Wilson, 2005).

Some twenty years later, there were still problems concerning the route from Tewkesbury to Bristol alongside the Forest of Dean, when gangs of men had been threatening to kill those who would not hand over their goods. Ordinances sent by the King to foresters stating that this river robbery was treason had further fuelled their anger, and a plea was sent to the King from the inhabitants of Tewkesbury stating that the offenders came 'with greater armed mobs and violence than they ever did before' in a 'war-like manner just like enemies of a foreign land,' attacking several trows carrying wheat, malt and flour. They threw the crew from their vessels (several of whom drowned) and cut the boats in two, warning that if vessels should carry any goods up or down river 'they would cut to pieces all of the said trowes if they came along the edge of the said forest in future' On account of the violence, 'no common person from the aforesaid Tewksbury or from the neighbouring regions dares carry corn or other goods on the said river ...the said forest and hundreds are vast regions, with unruly people, and close to Wales, and all the commons of the same forest and hundreds are unified in their ill-will and violence, placing no value on the law, nor on the officers nor ministers thereof' (Given-Wilson, 2005, Sept. 1429)

The above incidents recorded in the fifteenth century inform a sequent legal occupance understanding of the social changes occurring during this period. The general administration of the law was changing at the time, with the 'eyre' system of itinerant circuit justices breaking down at the end of the 11th Century due to its increased workload (Harding, 1966, 67). The system was replaced by Justices of the Peace, who resided in their own counties. Edward II issued frequent commissions to the Justices, but his reign marked almost two centuries of intermittent anarchy (Harding, 1966, 71). In such an atmosphere of general discontent, the commissions contributed to the countryside disorder and the suspicion of legal mechanisms (Kaeuper, 1979, 784). Coincident writing at the time portrayed a society 'wracked by violence', with an 'attitude toward the outlaws that is uneasily compounded of fear and respect, while the attitude toward law enforcement is suspicious or even hostile' (Kaeuper, 1979, 737). This analysis of the national mood seems to be consistent with the analysis of the Severn as a particular place. When central authority is weak, 'border districts, even if legally subordinate, are in practice at liberty to carry on their life pretty much as they please' (Whittlesey, 1935, 88). The above incidents certainly affirm such attitudes within Gloucestershire, by both local inhabitants and by the burgesses. Foresters openly flouted the Kings writ, but in context, this may be seen as a reflection of the longer struggle by the Forest inhabitants to maintain their territory and identity. A central part of the history of the Forest, often a cause of dispute and violent confrontation, was the exercise of commoning rights in the demesne woodland, where a strain of 'lawlessness' was evident among inhabitants of those parishes for centuries before it was noted as a characteristic of those who settled on the demesne itself (Currie & Herbert, 1996, 13). Forests in particular were perceived as problematic locales in the early modern period, 'enshrined as they were in the popular

imagination as the realm of beggars and outlaws' (Sanders, 2011, 8). These thoughts are apparent not only in literary sources (Milton's portrayal of the Forest of Dean in 'Comus') but also within legal documents. Thus a social construction of cultural identity was informed and maintained where resistance to authority was legally recorded, and law and legal interceptions in a particular place can be seen as examples part of a territorial struggle, one which 'shapes binding relations of access, pre-assignment, inclusion, superordination and subordination among actors' (Brighenti, 2006, 85).

When Gloucester attained Port Status in 1580, Bristol inhabitants presented a bill of complaint to the Crown regarding the extent of Gloucester's jurisdiction over the waters, reporting a 'dearth' of corn, grain, butter and cheese in their city, and that piracy had in fact risen as a result of the new Gloucester Custom house. As Ireland could now trade directly with Gloucester for corn, this may have added to Bristol's impoverishment. Despite this, they also stated that the upper Severn was 'utterly insufficient for any convenient or serviceable ships to ride or fleet in' (Counsel, 1829, 221) as argument against the new Port authority. In fact, this seems to have been correct, with few large or foreign-going vessels seen at Gloucester because of the navigational difficulties.

By the seventeenth century, accounts of the state of the navigation can be found in a travel journal of 1641 ( Fig 6.6) in which a journey by boat down the Severn from Gloucester to Bristol was fraught with danger, including 'rockes and perrilous deepes , whirling Gulfes and violent streames'( Taylor, 1641). In addition, the author remarked that the Severn was as much 'abus'd as us'd', with the Forest coal mines choking the passage with tons of rubbish. A huge amount of trade was now it seems passing to Bristol through Gloucester, as according

to Taylor, trowmen still ‘abused’ the commodities so much that people living above Gloucester would rather go by road to cities such as London to buy their goods than rely on the river.

**F**Or who can (but with pittie) here behold  
These multitudes of mischiefes manifold,  
Shall Rivers thus be barr'd with stops and locks,  
With Mills, and Hills, with gravels beds, and rocks :  
With weares, and weedes; and forced Islands made,  
To spoyle a pulique for a private Trade ?

Fig 6.6 From ‘Taylor’s Last Journey’ (1641)

Yet Taylor’s accounts do not seem to have prevented the Severn being one of the major transport arteries of seventeenth-century Europe. The number of boats passing through Gloucester increased from 443 per year in the 1670’s, to 736 by the early 1720s. The tonnage operating out of Gloucester ‘was the largest of any port on the west or the south coast of England throughout the period 1709 to 1751’ (Wanklyn, 1996,24). As river trade grew with the metal and mining industries, boats were not only increasing in size in, but also in volume.

## **6.8 The Industrial revolution and the Severn**

During the nineteenth century, boats could be sailed downstream, although Bowhaulers were still the main method of transporting goods upstream, with teams of up to twenty men pulling on a rope from masthead. Petitions for towpaths for horses to pull barges were submitted by vessel owners to Parliament (Journal HC 01/02/1771) with the first towpath Act passed in 1772, followed by a number of Acts to extend them. The bowhaulers, keen to keep their livelihoods, became violent as the advantages of horse-towing became clear to the boat owners. In 1828, a large group of men gathered to obstruct the towing path at Upton-upon-

Severn, and summonses were issued for the ringleaders, with an additional 10/- offered to pay for drink to the other men on their promising to disperse and return peaceably to their houses (Wilkinson, 2012). In 1832, The Tewkesbury Yearly Magazine reported that the bowhaulers, who wrongly believed that the Acts for the towpaths had expired, took violent action (Hewett, 2010). A disturbance broke out in Gloucester, where horses were forcibly taken from the vessels and the gates on the towing-path were nailed up. The rumours quickly spread to Tewkesbury, Upton and Worcester, where there were serious riots. Rewards were offered to arrest the ringleaders of the vandals (Fig 6.7).

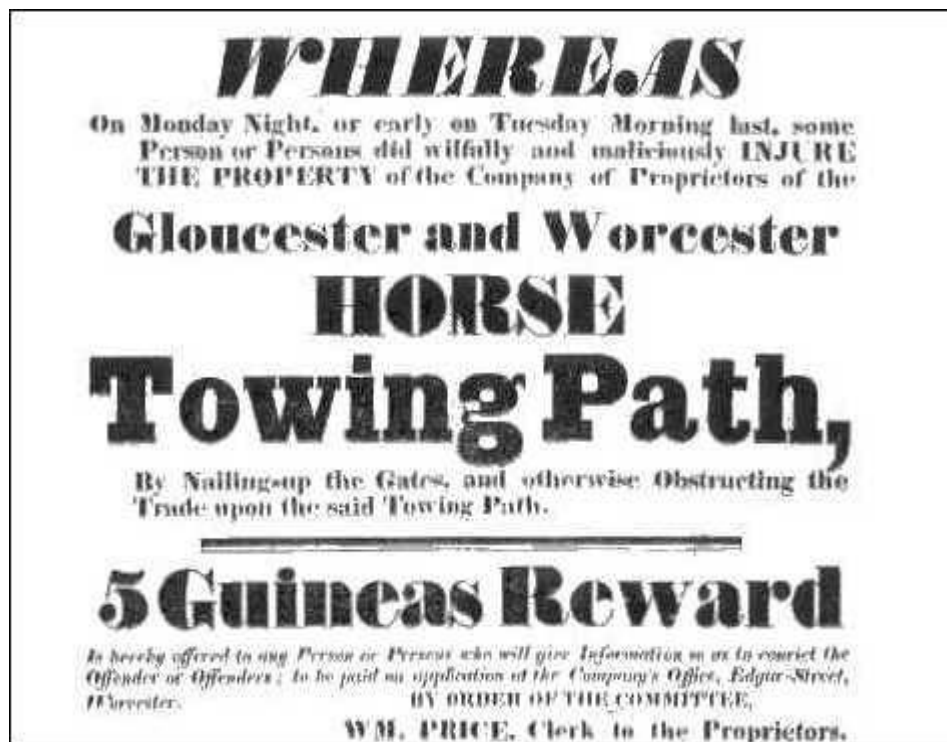


Fig 6.7: Reward poster for tow path obstructions, 1832

(Source: Wilkinson, 2012)

The writer of the article noted that ‘it is obvious, that were a body of men permitted to take the law into their own hands, and to dictate how the trade of the country should be carried on, neither private interests nor the public peace could be preserved’( Hewett,2010). These sentiments are echoed by the Reverend Fletcher in 1835, who wrote of the bowhauling gangs: ‘Since the dawn of day, they have wrestled with the impetuous current; and now, that it almost overpowers them, how do they exert all their remaining strength, and strain their every nerve! How they are bathed in sweat and rain!.....through the intenseness of their toil they bend forward, their head is foremost, and their hands upon the ground.... O sin, what hast thou done? Is it not enough that these drudges should toil like brutes? Must they also curse one another like devils?’ (Fletcher, 1835, 251).

Despite years of neglect, as soon as the Severn became essential to the industry in the Midlands, private enterprise stepped in to make the journey more financially viable. The discourse that surrounded the bowhaulers was infused with the language of morality (or immorality) as justification for the building of towing paths. Their reactions against the loss of their livelihoods with direct and often violent action compounded the views of the ‘civilised’ ranks that this was a class of persons in need of removal. Such events can reveal the cost to ‘place’ of the capitalist preoccupation with ‘location’ (Agnew, 2011). The convenient ‘location’ for the installation of tolls and towpaths displaced a body of people who had worked on the Severn for centuries, (although the industrial revolution and the impending steam engine would have inevitably taken their employment in the end). For Whittlesey, a ‘deep and widely ramified impress upon the landscape is stamped by the functioning of effective central authority’ (Whittlesey, 1935, 85). The legal impress, in the form of a change in policy favouring private capital and enterprise, changed nature of the relationship between

the land, law and the people, and these changes are reflected in the contemporary landscape. Its 'impress' was the comprehensive lock and toll system, affecting not only the physical geography of the area, but also permanently altering the social and ecological landscape. The portrayals of bowhaulers by the literate classes, keen to place the labouring classes in more meaningful employment, did lead to petitions for their salvation. Yet it was the coming of steam tugs that finally ended the practice of bowhauling.

By 1842, the Severn Navigation Act sanctioned improvements to the navigation from the entrance Lock of the Gloucester and Berkeley Canal to Whitehouse Brook in Worcestershire. Once steam tugs began to use the river, attention moved again to the need for more improvement on the waterway, with lock building sanctioned by Parliament under the 1853 Severn Navigation Act. In 1858, the final lock at Upper Lode was opened, apparently to the great rejoicing of the local population (Fig 6.8).



Fig 6.8: The new channel at Upper Lode

(Illustrated London News Ltd, 1858)

The media reported that as the old channel was closed, a firing of batteries and loud cheering came from the ‘assembled multitudes’. The capitals newspaper wished continued success to Tewkesbury and its neighbourhood (Illustrated London News, 1858).

By 1890, when the river had been dredged, together with the removal of the rock bars, there was a depth of 10ft from Gloucester to Worcester. Boats still had to navigate the estuary between Bristol Port and Sharpness Docks (Fig 6.9) and were subject to the tides.



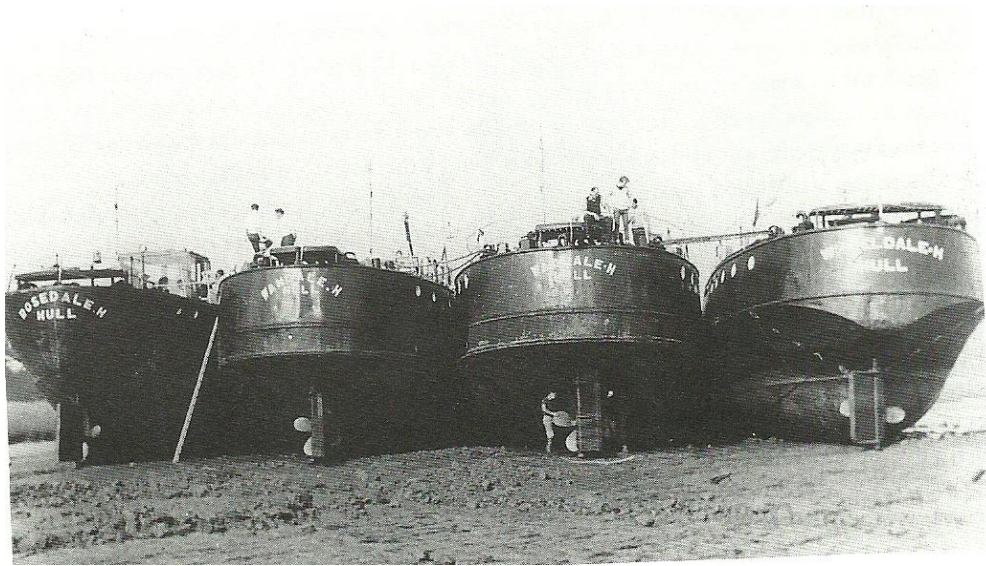


Fig 6.9: Tanker Barges lying in the mud at Shepperdine awaiting the next high tide

(Source: Witts, 2002, 70)

By the start of the nineteenth century most of England's canal system had been completed, although the great canal boom was short lived. By the end of the nineteenth century, although many canals were still working, they were doing so at a loss due to the railway age; the Gloucester and Berkeley Canal due to its position was an exception (White, 2002, 36). The widespread replacement of steam power by electricity reduced dependence on water transport, and the 1950s and 1960s saw barge traffic disappear from most English canals

## 6.9 Conclusion

Tuan stated that one of geography's central tasks is to understand the making and maintenance of place by making use of the speech and discourse that lies behind 'place making' (Tuan, 1991, 684). The River Severn and the surrounding terrain has been analysed in this chapter as a particular 'place' in order to frame the discourse within a specific location. Within this local setting, the social dynamics that exist between law, geography and landscape have been examined and in order to emphasise the impress of sequent 'legal' occupance that has created layers within, and on, the landscape over time. Where these have not always been

physical impressions, dialogue and literature have been used to assist in tracing the legal occupance that has remained as a paper relic. Thus examining a landscape shaped by law has revealed the otherwise hidden social constructions of place, nature and society through the implementation of law and legal means.

This Chapter has focused not on asking *what* property is, but on asking *how* it is (Blomley, 2008, 1839). As ‘place’ has no specific meaning within the law, the creation of Gloucestershire was initially seen as the creation of a territory increasingly marked by political boundaries. The division of land into hundreds, manors and shires was for the benefit of the local administration and the law. The later notion of property and the corresponding legal rights that came with it were then examined in relation to place. Within this conception of property, nature too became subject to legal ownership. By being legally ‘attached’ to the soil over which it travelled, the legal term ‘profit of the soil’ aptly categorises fisheries as a commodity that can be exploited for human use. In the cases examined, it is suggested that in the absence of tangible and definitive boundaries, judges will interpret precedent and evidence in order to create them, even where not perceptible (as in the shifting waters of the estuary). In this sense, ‘we can see law in relationships, artefacts, images, scenes, or landscapes’ (Schein, 1997, 387) when we uncover the historic legal making and breaking of these places.

Legal intervention was examined with conflicts that arose on the river between fisheries, trade and trows. The analysis of fishing habits and consumption informs a sequent occupance in terms of social behaviour in place, both in response to, and despite, legal interference. It is suggested that the instances of piracy along the Severn are responses to both the legally endorsed taxation of goods and to the social and economic climate in that particular place, at

that particular time. The bowhaulers were used as an example of a particular community who found employment due to the presence of, and the geographical and physical nature of, the Severn. They are also an example of the maintenance of social order by law. Although indispensable to early traders, they were inadvertently displaced due to the emergence of legislation that promoted the march of private industry and industrial progress. Writing of the time indicates the process of ‘othering’ that assisted in the campaigns by those who would benefit from the removal of this particular ‘class’ of persons. Thus, ‘sometimes the images of jurisdiction pulsate through the culture giving greater significance to one aspect of the landscape than others’ (Schein, 1997, 395). These events can be seen as the reflection of the broader perception change from the local, place based imagination, towards a nation state and the promotion of a nationalist ideology (Rollison, 1992).

The following Chapter will suggest that the imbrication of space and place within law can be understood by using the sequent legal occupance approach, which can accommodate all scales of the inhabitation and modification of areas by humans. Therefore, on a national and a local level, it can be used to assess ‘the power of the state both to challenge and to reinforce dominant socio-spatial relations’ (Martin & Scherr, 2005, 379). The bringing together of the issues that have been examined thus far within the thesis will be compared and contrasted to allow for the consideration of analytical shortcomings that exist within the abstractions of law, and of how law imagines and connects with the rich layers of place as illustrated in this chapter. The findings will be presented as the ‘Severnscape’.

## Chapter 7

### The Severnscape as a sequent ‘legal’ occupance

*‘proper conservation of natural resources may be defeated by failure to attach due importance to the time element in the destruction and conservation of the earth's endowment’*

(Whittlesey, 1945)

#### 7.1 Introduction

The previous two Chapters analysed the ways in which law can have differing effects depending on the landscape in which they are enforced. Initially examining the use of space as part of theoretical terminology, it was noted that the use ‘space’ and the ‘spatial’ as a method of investigation has multiple theoretical bases within geography, law and legal geography, and are frequently used as ‘catch-all’ terms that enfold a wide variety of labels, such as place, territory, region, jurisdiction, setting and scale. Therefore the Severn was analysed as a complex, multi layered and multi-dimensional legal area, to account for the disparity within the spatial reference. Due to the geographical position of the Severn, it was seen as affected in a multiplicity of ways by legal intervention, with legislation, policy and management strategies originating from local, regional and national sources. The historical investigation of these interventions uncovered the multi layered processes by which the laws were passed, and some of the repercussions of overlooking place and time in fisheries management on the River Severn.

In Chapter 6, these repercussions were addressed by paying particular attention to ‘places’. By examining the stages of both legal and human occupance of the Severn, with a focus on the importance of the discourse of ‘place’, a picture of the river, landscape and locale was drawn

as a recognisable dynamic social and cultural district. The social dynamics between law, geography and landscape created a site of cultural production. Law needed to be brought to the forefront of the analysis into how the dynamics of space and place were connected. Expanding on geographies 'sequent occupance', I began to introduce law as the focal point for analysing historical social change, under the new term of sequent 'legal' occupance (SLO).

Building on the examination of the elements used in Chapters 5 and 6, this Chapter integrates the findings thus far within space, place, space, law and geography to further develop the conceptual approach of 'sequent legal occupance' (SLO) and create a framework to provide an alternative method for the better understanding of the relational nature between law and geography. This presentation of the effects of law on landscape, and an exploration of the imbrications between the two, explores the layers and overlaps between law and geography. The SLO method focuses on those junctions within this thesis, and presents them as a 'Severnscape', an example of a method for examining the long term affects of legal intervention upon a particular landscape, with the potential for wider application in future legal geography projects.

## **7.2 The Severn as a legal space**

Within academic legal geography literature, the concept of 'space' as both a relational and dynamic process which is performed (Rose, 1999,248) is linked to law as both legal thought and practice, containing many representations of 'the multiple spaces of political, social and economic life' (Blomley & Bakan, 1992,669). I have investigated some of these representations using the laws of waterways and fisheries as a frame of reference. Yet as

space is continually made and remade, it cannot be studied as a constant, static and stable category. The problem of theorising 'space' within this study then became the question of whether space itself was causally productive ( in a legal sense) or if it was relative in the way that it characterised the relations between constituents in the physical world (Urry, 1985). To understand this, space was investigated in terms of how law became both a part of and a driver of a 'spatial consciousness'. The inclusion of time was central to this study, as it took a chronological historical overview of the development and use of law, particularly on the Severn. Although neither temporal nor spatial relations of themselves produce particular effects; there is a distinction between the temporal (where time can only move forwards, and does not necessarily involve spatial change) and spatial-temporal change, which can only occur once temporal changes have been implemented (Urry, 1985, 31).

To examine this complex interplay between space, place and time, both natural temporal changes within landscapes were viewed alongside spatial and social changes brought about by law, revealing the spatial *and* temporal relationship between the natural and the legal. In this way, as Blomley quotes, landscapes can be 'both "site" and "sight"' (Blomley, 1998, 574). They are the geographical spaces and places where law happens, but also where they are seen, lived and take effect. The Magna Carta of 1215 collated the piecemeal laws of England, but also insisted on the recognition of the Sovereign as the central power source over legal matters (Jenks, 1913). The manor was a central administrative pillar of feudal society, controlling use and tenancy of the estate as well as acting as a court in local matters. As the Crown owned all of the land, manors were awarded to Lords in reward for military service or political support, typically to Knights (Jessel, 1998). Land was divided by the Lord of the Manor under tenure to those working on the estate. Traditionally, surveys of the manor were

taken by an official overseer, who ‘ was charged with receiving tenants for the performance of ritualised ceremonies of homage and fealty and reviewing the customary rights that made up a manor’ (Blomley, 2003,126). The recording of documents, particularly in legal matters, was not widespread until the thirteenth century, and therefore manorial systems continued to operate with both written and unwritten precedent that was ‘often little more than a codification of oral memory’ (Thrift, 1996, 186). Laws were rules by which people in a particular locality abided by, rather than a nationwide system of legal and illegal behaviour. Thrift also submits that the creation of legal memory (set with the ascension of Richard I in 1290) was ‘a fiction designed to suit royal bureaucrats and only royal courts functioned that way’ (Thrift, 1996, 186).

Yet literacy and communications were changing. By the sixteenth century, manorial surveys had been replaced by scale maps, and during the next century came the first wave of common land, enclosures displacing tenants and a change in attitude towards property as a commodity. (Blomley 2003, 126). Thus the distribution of land by legal means was both a creator of space (as estates in land) and the means by which spatial relations were formed (between landholders and non- land holders). The creation of space, then, was initially based on the power relationships and dependencies that had been formed within historic social systems. Law assisted in the creation of these relationships, and was therefore instrumental in the division of the landscape, the boundaries of which left an impression that can be traced, if not seen, as a form of sequent legal occupance.

The estuary was a natural boundary between estates on the Severn, as well as being an important part of the holding. Yet ‘the social is never simply the social in terms of networks and spaces, but also in terms of ecologies of time, of the hybrid mixtures of rhythms and

tempos and durations where nonhuman elements play active parts' (Jones,2011,2301). The Severn, as the other major rivers of the realm, was significant as a route for trade, navigation and transport, and the Magna Carta (1215) recognised such importance by ordering the removal of obstructions and the prevention of the building of weirs. Law relating to waterways had to deal with the dual issues of navigation and fisheries ( both of national importance) but taking separate legislative paths which often clashed. The resulting disputes were often due to the geographies of the places in which the legislation was applied, whether it affected fish stocks or navigational channels. By the late eleventh Century, the private landowners were in possession, and therefore control, of a majority of the English fisheries, which became a 'twig in the bundle of remunerative rights being assembled into lordship over land and men' (Hoffman, 1996, 65, 4). By examining the spaces and places of both land and water, law has been seen to create space by inclusion or exclusion; legally dividing the physical geography of the land created social relations, dependencies and obligations between the sources of legal power (initially the Crown, and later by parliament) and the inhabitants of such spaces in which it operated.

In this thesis, it has been shown that by tracing the activity within navigation and fisheries separately, disparity has been revealed. Identifying such a variation over the control of these important assets and their financial value within a legislative sphere at particular times in history has uncovered some of the anomalies that occurred by the application of law in one area without heeding the impact on the other. This is particularly visible within the fisheries, with some legislation resulting in differing outcomes due to the added complication of localised behaviour of different fish species, their migrations and breeding patterns. The



subtle differences within the territory of England created different seasons depending on the life cycle of the fish in particular waterways.

The ‘Act for the Preservation of Spawn and Fry of Fish’ of 1558 deemed all fish on the Rivers Dart, Teign and Plym as seasonable by statute between February and November, although they were apparently poisonous if caught and eaten in February (Cornish, 1824) . This statute was attended to by a later Act of 1803 (‘Dart, Teign and Plym Fisheries’) which moved the dates of the seasons forward. It was observed that if a magistrate had been given the power to decide if a fish was seasonable or not within the district, then a stop, or at least ‘some check might have been given to this horrible, and it may be justly termed, unnatural practice’ (Cornish, 1824, 184). Thus it was observed at then time that

‘a general sweeping clause, to say, that the fishing shall commence at a given time, and that all fish taken between two certain periods shall be deemed “*seasonable* and fit to kill,” when they are not only uneatable and nauseous, but absolutely poisonous, is so repugnant to every notion we have on the subject, that one can neither think of it with patience, or write upon it with temper’ (Cornish, 1824, 181).

The author believed that as a consequence of this Act, yearly fisheries tenants would sell the unseasonable fish, in particular the older Salmon that were returning to the sea. Although I do not claim to be an ichthyologist, the inclusion of historic literature surrounding legal measures concerning fish within the study broaches the issue of the long-term effects of human intervention upon the natural world. Legislation on closed seasons, weirs and canals introduced another dynamic to the issue of ‘space’ for migratory fish. By using fish as an

example of non-bounded, transitory elements in a landscape, a different perspective can be revealed. This alternative perspective is particularly important when examining riverscapes, as traditionally ‘people had to fall in with the rhythms of their environment: with the winds, the tides, the needs of domestic animals, the alternations of day and night, of the seasons, and so on, in accordance with what the environment afforded for the conduct of their daily tasks’ (Ingold, 2000,325).

The territory over which the species exist, travel and reproduce can also be seen as relational, or ‘a form of intraspecific communication’ (Brighenti, 2006, 69) between humans and nature, as it is only humans who are able to obey the written law. Law has had long-term consequences for fisheries, and as a form of control over such management, it can be seen as an exertion of territorial power. Space, as a human concept, is created, used by, and adapted for, human behaviour. However, as it becomes categorised within geography, the law frames spaces within its own structure where it can order, label, preside and legislate over certain forms of activity. If using a concept of territory to describe ‘space’, such territories can be seen as dynamic, always being produced and reproduced; but at the same time ‘states make their own territories, not under circumstances they have chosen, but under the given and inherited circumstances with which they are confronted’ (Brenner & Elden, 2009,367). Law operates over time in space, but at the same time, it must always have regard to the natural lie of the land. In addition, shifts in forms of land ownership, governance, of economics, power and of knowledge are all relevant and relative to the operation of law. To view law as separate from space, place and time is to underestimate the powerful inter-relationship that it has with such factors.

Some of the conceptual issues that occur between law and geography using a spatial analysis reveal both similarities and differences in those disciplinary conceptions (Table 7.1). Law views space solely as the product of human agency. Its primary concern is with the rights of groups or individuals based on legitimate, traceable and proven ‘legal’ ownership. Space, therefore, is a question of scale, and of what can be defined. When surveys and maps became common usage in the sixteenth century ‘space in general, and property in particular, were disembodied from lived relations and social relations’ (Blomley, 2003, 127). As the enclosure movement swept England in the sixteenth century, space became a part of legal entitlement and rights. As geography addresses the ways in which space is socially constructed, it cannot ignore law as one of the drivers for these constructions.

Table 7.1 Concepts of ‘space’ within the disciplines of geography and law

| SPACE AS A CONCEPT | Geography                                  | Law  |
|--------------------|--|--|
|                    | Relative, absolute or relational           | Defined in terms of human utilisation            |
|                    | Socially constructed                       | Public or private<br>Ownership of property       |
|                    | Region, territory, territorial and bounded | Enacted, reinforced, and negotiated              |
|                    | Political                                  | Physical and political<br>Jurisdiction and scale |

Where law ignores its own part in the construction of space, geography also underestimates the role of law, which plays ‘a significant role in transforming the way local people use local resources, in allowing new users to proliferate, and in repressing or in destroying alternative knowledge about the impact of all of the above’ (Wiber, 2009, 83). Thus the spaces of region

and territory, where constructed, are both underpinned and shaped by law and politics, and territory needs to be understood ‘in an expanded sense of political – legal and political – technical issues’ (Elden, 2010, 801), as well as within a historical and geographical context.

But does a ‘spatial analysis’ account for these contexts? Within cultural geography there has been concern that emphasis on social construction may encourage further the collapse of place into space (see Oakes, 1997; Malpas, 2012) by elevating the status of spatial study and devaluing the use of place for contemporary researchers (Agnew, 1989). The collapse of ‘place’ into ‘space’ within geography has been widely discussed (Malpas 2012; Merrifield 1993) and for some, the side effect of emphasising the cultural construction of place ‘has been to make all places seem less authentic; as multiple conflicting constructions attach to any one place, none has any apparent superiority over another’ (Wiber, 2009, 80). Where the emergence of the postmodern dialectical interpretation of political economy and social relations has tended to analyse place *within* an extended concept of space, the use of such structuralist methods can also ‘underplay the complex, multivalent connectivities at work in place making’ (Pierce *et al.* 2011, 56).

These complexities become more prominent when place is viewed as a social construct along with space *and* time, where place can have double meaning, either as a location or position within a socially processed map of space-time, or ‘as an entity or a ‘permanence’ occurring within and transformative of the construction of space time’ (Harvey, 1996, 294). Some of these elements have been examined within this thesis, to understand and to highlight the connections between space and place.

### **7.3 The Severn as a ‘place’**

Places can be seen as collections of senses with some form of connection to a geographically defined area. As both ‘place’ and the individual human ‘self’ are tied together (Casey, 2001) within the wider location of space, then space and place within the SLO framework must be examined in parallel. Such analysis into the historical construction of place, with an emphasis on legal procedure, can make use of documentation into the ways in which the natural world is perceived and conceived, whilst being actively lived and experienced. One way to analyse this is to investigate the creation of property, and ways in which places are formed in terms of law. As an example, following the Norman invasion of 1066, the King acquired the ultimate ‘title’ to all land in England, seen by some as a ‘brute emanation of territorial power acquired and sustained through physical force’ (Gray & Gray, 2005,67). The resulting feudal system of tenurial landholding was complex, but early legal division of land can be seen as the early foundations of the common law of property law based on possession, ownership and title rather than localised, piecemeal laws, custom and tradition. The link between territory and land is both political and economic, with territory itself as a form of property. Therefore landscape ‘always emerges from biographical and place-specific historical and social contexts at the same time that it contributes to the uninterrupted becoming of biography and place’ (Pred, 1984, 287). The creation of early English counties as territories can be seen as such a boundary-drawing activity and ‘as a process which creates pre-assigned relational positions’ (Brighenti, 2006, 65) which existed between landowner and tenant. Within these territories, places emerged to which attachments were formed. Law is part of the narrative which creates, identifies, changes and confirms place, using geographical devices and knowledge to establish property boundaries. Law only questions these boundaries on the instigation of

individuals for whom that particular *place* has meaning and the meaning itself can also be seen as manipulated by law.

Using literary sources as well as including legal discourse can assist with recognising a particular place at a particular moment to illustrate this discursive terrain. In terms of power relations, 'the becoming of place is situated at the underside of directly or indirectly controlling what people do. It lies in directly or indirectly affecting what people know (and are able to say) and how they perceive and think' (Pred, 1984, 290). Time is important in the communication of power; the increase in literacy and written texts can 'enable memory to be organised in a way different from that found in oral cultures, and in doing so, they promote a different kind of time consciousness' (Thrift, 1996, 182). I would argue that this manipulation is particularly noticeable in legal proceedings, which could either consider or dismiss evidence based on customary practice depending on whether or not the 'proof' was adequately recorded. Written documents recorded customs and practices that were already being used in England, but as literacy developed 'so the consciousness of time past could be extended (and manipulated)' (Thrift, 1996, 182). The use of personal writings (as opposed to legal transcripts) cannot be overlooked in examining notions of place. Taylor's (1641) account of his voyage along the Severn in the mid seventeenth century presented a vision of the estuary as violent, both in nature and by those who utilised it. His documents record the social, natural and cultural landscapes, and are one of the ways in which to locate 'place realities'. Such realities have a reciprocal affect on law; where law is a narrative which can confirm or dismiss place, the reality of place is the lived experience, which creates the object of law. Local custom and place based activity can be used to examine the way law has negotiated tradition and either replaced or submerged such practices within a state based

system of laws. What emerges is a set of opposing perspectives regarding place from either a legal or a geographical viewpoint (Table 7.2).

Table 7.2: Concepts of ‘place’ within geography and law

| PLACE AS A CONCEPT | Geography  | Law   |
|--------------------|--|---|
|                    | A particular and unique compartment of space                               | Bounded space with legal rights                                   |
|                    | Oppositional to ‘space’  | Interchangeable with ‘space’                                      |
|                    | Based on history, community and identity                                   | Based on legal boundaries, rights and use                         |
|                    | Socially constructed   | Boundaries can be discovered ( and changed) using legal documents |
|                    | Part of a regional process   | Recognises regional administrative boundaries and laws            |
|                    | Recognised by physical and social features                                 | Recognised by ownership and presumption of ownership              |
|                    | Usage may change the physical landscape                                    | Ownership may change the rights of users                          |
|                    | Uses <i>either</i> spatial <i>or</i> place based theory to inform research | Concerned with individual legal status                            |
|                    |  |   |

For geography, using the term ‘place’ invites discussion on community, shared histories and senses of belonging (Pierce *et al* 2011, 55). Conflicts which arose over the legitimate use of resources by various actors revealed the social dynamics that occurred in particular places, and their relationship to law and geography. In law, place (as with space) is recognisable only by its legal boundaries which are defined, preserved or removed through individual legal process. Yet ‘in order to be, law needs to be somewhere. But the ‘where’ of law need not be a country (a nation-state), nor a region. It can be a person, as well as an interpersonal relation’ (Brighenti, 2006, 83). Law needs to define itself by attaching itself to a person, place, space or entity. To address this aspect, in this study I have advocated using an SLO approach to view law in terms of relationships, between places and spaces, humans and non- humans, nature and human-made interventions. Thus ‘the mix of everyday practices that take place locally is

constrained-but also enabled-in usually unseen ways by the ongoing dialectic between those practices and local and more encompassing structural properties' (Pred, 1984, 284). Legal consent that permits change in space and place can change the dialogue between actors as social shifts change power relations.

Rather than espousing the predominance of space or place within legal geography, the two must be seen through the lens of the law. The difficulty within law then arises that this textual distinction does not seem to be apparent beyond philosophical discussion. Law has either not addressed the space/ place nexus, or is unwilling to comment, plying its trade instead in boundaries. Law remains a powerful discourse, which can imbue meanings and practices upon space, place, or both simultaneously, regardless of the label which is used. What is important, it seems, is not whether space or place have more *meaning* within the lived environment, but that the legitimate declarations 'are not merely externally imposed and legitimated through enforcement by law, but are continuously re-created and maintained by social interaction' (Blandy & Silby 2010, 278). It is these social interactions in 'locales', whether local, regional or national, which need to be the focus for legal geography.

#### **7.4 Legal 'occupance'**

How can an alternative approach to legal geography, using a sequent occupance approach, transcend the oppositional and theoretical differences between space and place to reveal a multi-dimensional legal geography, which can address the effect of legislative behaviour upon the particular? Whittlesey proposed that human occupation of the land should be viewed as a succession of stages, using a historic investigation of a place in terms of its human occupation. Thus, 'not only does the recognition of sequent occupance place the current stage



in its proper relation to antecedents and to successors; it throws it into true perspective' (Whittlesey, 1929, 164). By revising this method of geographical investigation, and using law as the lens through which changes to the landscape can be viewed, Whittlesey's original formulation for using sequent occupance as a method of viewing the landscape as a series of culturally distinct modes of human occupance that could be discovered in layers or patterns through time, although seen as novel when first pronounced, was criticized by his contemporaries for its limitations. Although in 1937, Whittlesey restricted both the scope and the meaning of the term, by stating that only those things from the past which are now visible in the present are of concern to the geographer (Darby, 2002) Dodge continued to criticise Whittlesey, stating that although the hunting and collecting occupance was historically true, 'its effects are not a part of the present geographic setting' (Dodge, 1938, 233). He was also concerned that there was a lack of uniformity in the classification of the application. Yet Darby noted that 'it is not always easy to separate the surviving elements of a past phase from associated phenomena that has disappeared' (Darby, 2002, 162). Where a town has been built or a forest destroyed, such an act may obliterate the features that were fundamental to its origin. Yet sequent occupance according to Whittlesey's model interprets landscapes by geographical measurements such as size, population, economic development, resources, climate and soil type. Although 'impress' can be formed by central authority, these can include but are not limited to legal institutions.

A sequent occupance investigation 'must take account of changes in any of the complex elements of natural environment, and in the equally complex cultural forms' (Whittlesey, 1929, 164). Law, being one such form which can both affect and be affected by the natural environment, is one of the cultural indicators which can be examined in a historical and

geographical framework. By detailing historical changes in society in relation to economic development, and tracing transitions in living and land use patterns, these sequential settlements leave an ‘impress’ (Whittlesey, 1935, 85) or imprint on the land for future generations. Whittlesey refers to the ‘impress’ of central authority on the natural landscape, therefore the impressions do not necessarily have to be physical or visible on the landscape. Cultural impressions can be made with the enactment of law, and social attitude and behaviours towards natural landscapes can be evaluated in terms of cognitive impression. Assisted by the use of archival documents, arts and the related scientific studies of specific landscapes, the impression can be documented in the ways in which legal decisions are made.

This thesis has used law as the focal point within a sequent occupance approach, and there are two dimensions to a ‘legal’ occupance. First, in terms of the spatial, legal occupance can refer to the legislation of a particular sovereign, ruling body or particular governance. The occupance may become apparent through boundaries, borders, or territories, but may also emerge as institutions and forms of practice, control or coercion. Although political units may change in size or structure, or may even be erased by the moving of boundaries, ‘the geographic regions of which they are composed are not thereby destroyed. Instead, each of these regions continues to carry on its own economic, social, and political life and its individual history’ (Whittlesey, 1943, 1). As each legal occupance leaves an ‘impress’, the analysis must include both space *and* place; governance in space cannot be assumed to have affected governance in place, or vice versa. I have argued here that, for example, with legislation created to manage the fisheries, the permutations of such actions may only be realised years later due to the fragility of the aquatic lifecycles that they aimed to control. By using SLO to create chronological account of the landscape, the legacies of previous

governance systems can be seen as effect upon the landscape. Law created in space can have unintended or unforeseen circumstances in 'place', and in such instances, legal occupance can be analysed in the particular. This may not change the occupance status of the law unless it is then amended within space. Legal effect in place may produce distinct outcomes dependent on the landscape, which influences the ways in which law may become embedded in place. This may alter the subsequent legal occupance. Then, as Whittlesey stated, 'the *sociological* structure of life is affected: directly, as in laws governing religion and school systems; indirectly, as in affiliation with a political unit where a different language is spoken, or in submersion of a social minority' (Whittlesey, 1943, 3). This method of investigating space and place accommodates the laws inability to distinguish between the two concepts by analysing the effect of law at the both macro- and micro-scales.

The second form of 'legal' occupance is concerned with property or ownership. Where an individual or a body of people are legally assigned a land holding, then their occupance upon the land is the concern of geography. Legal holdings carve up the land and create boundaries. Property is by its legal nature sequent, as it passes from one owner to another. The use of the land is governed and restricted by law, as it oversees all discussions regarding legal ownership, use, rights, or public activity. As the legal definition of real property became defined, so the spaces of possession were increasingly visible on maps, and 'property was no longer a relation between superiors and mesne lords, but a thing to be commodified, and possessed, both legally and conceptually' (Blomley, 1994, 98). As concepts of property changed, so the changes to language and the ways in which property was articulated (for example as home, habitat, dwelling, and abode) became influential within legal discourse. Yet within this process, 'the land is bound by custom, but the land also binds the memory, which

in turn is the bearer of custom. Land and custom thus bind each other through memory' (Olwig, 2002, 56). This form of legal occupance produces places where 'self, body, and landscape address different dimensions of place in contrast with space' (Casey, 2001, 683). Law has helped to create, construct and confirm some of these realities, by invigilating the notion of property throughout history, and cannot 'be detached from the particular places in which it acquires meaning and saliency' (Blomley, 1994, 46).

This thesis used Whittlesey's sequent occupance concept as an initial framework, but modified it in a number of ways. Firstly, as noted above, it has placed law as one of the central enabling features of landscape change and focussed on the 'cultural impress' that law creates. Using the specific concept of landscape has allowed for an emphasis on the 'embeddedness of lawyers, lawyering, and all actions within a 'scene' of socio-spatial relations' (Martin & Scherr, 2005, 380). Thus it is a sequent legal occupance, with a focus on law within the landscape.

Secondly, rather than adhering to set periods or eras of cultural human occupation, this sequent legal occupance has traced law as a process. It has sought to address contemporary legal geographies, particularly by challenging the 'frozen manner in which law, space and locality are frequently conceived' (Blomley & Bakan, 1992, 687). In this sense it has drawn attention to the ways in which the lived experience, explored by using media, personal data and archival records, can bring a 'finer appreciation of how legalities and spatialities *happen*' (Delaney, 2010, 36). Using the tidal estuary as a focal point has encouraged the examination of the discord that lies within the tidal rhythm patterns 'firstly, between natural and social rhythms; and, secondly, between conflicting uses of tidal ecosystem services which share the

same landscape' (Jones,2011,2296). Therefore it has viewed the progression of law within two specific areas sharing the same watery landscape, fisheries and navigation, and highlighted the conflicts that have arisen between the two activities. The inclusion of the effect of law on non-human inhabitants of the estuary in the form of particular migratory fish species highlights the fact that human legal intervention upon natural resources is not always predictable. Here, the 'consonance between social (economic) and tidal rhythms occurs in the first instance because the social systems have to follow the timing of the tides to benefit from the ecosystem service they provide' (Jones 2011, 2295). This chronological exploration identifies the progression of law, adhering to Whittlesey's later view that modes of thought do not break off at the entrance of a successor, but new values take time to progress, and 'may be discerned only vaguely until long after it has begun to alter the structure and the pattern of society' ( Whittlesey, 1945,22).

Thirdly, it differs from sequent occupance most fundamentally by stating that law, which cannot always be physically seen upon a landscape, can change the landscape over time. Law is therefore 'discourse materialised' and 'discourses themselves, in all their manifestations - textual, material, ideological - are humanly created, and our myriad individual acts of inhabiting the landscape are part of the ongoing reformulation of those discourses' ( Schein, 1997, 664). . By examining the legislation as it occurred in time, space and place, the social, political and environmental background in which they were negotiated was uncovered by using dialogue, literature, and written accounts of legal reasoning of the time. Thus, it has highlighted how the landscape is 'a social embodiment of the relations and struggles that went into building it' (Blomley, 1998, 580).

Finally, it has addressed the notions of space and place and the tensions between ‘what perhaps might be called spatial and ‘patial’ concepts and practices of landscape’ (Mels, 2005, 322). An analysis of spatial theories identified instances where the factor of time is sometimes sidelined to represent space as a seamless entity. Such a hypothesis ignored historical factors and the reasoning of law as a discourse, and its social and environmental consequences. Space and place both must be made apparent within the research of a process that accounts for the movement of time as notions and knowledge of space and place also *change* over time. Where the effect of law becomes one part of a sequent discursive element within the social occupation of space, those effects can be different when analysed in place, creating localised consequences dependent on the particular and the unique, which may have different impacts and outcomes to those seen in the wider analysis of space. Thus ‘much of the confusion generated by these diverging approaches can be clarified by re-examining, in historical and geographical con-text, the substantive meaning of landscape as a place of human habitation and environmental interaction’(Olwig,1996 630). It is this re-examination that I have undertaken within this thesis using a modified framework of sequent occupance that refers to space and place as variations of scale within a legal framework. Within these scales, situations are seen not just as a set of circumstances, but as social entities with spatial and temporal horizons (Delaney, 2010).

## **7.5 Presenting the ‘Severnscape’**

Using sequent legal occupance as a conceptual framework, I have identified some of the layers of human action that have been influenced, regulated and altered by law within the particular geographical area of the Severn estuary in Gloucestershire. Thus the SLO of a

region can be presented as a geographical study of law, space, place, where time overlaps, creating histories that are embedded within the landscape. Where they cannot be clearly seen as physical manifestations on the land, or are immediately recognisable influences in the modern world, they nonetheless remain below the surface, and can inform and influence future action. The Severnscape can be seen as a work in progress, and at any moment in time is essentially a historical geographical narrative. The material ‘selects itself with reference to the evolving sense of space and the mutual modification of nature and culture that eventuates’ (Whittlesey, 1945, 34). It views stages of occupance in relation to both natural and cultural elements, with the added dimension of the law as a lens through which such transformations and structural changes can be viewed. The river can be seen as a metaphor representing the ebb and flow of the interactions between human societies and law. Semple succinctly noted in the early part of the twentieth century that the surface of the Earth presents obstacles, yet it also ‘offers channels for the easy movement of humanity, grooves whose direction determines the destination of unknowing, unplanned migrations, and whose termini become, therefore, regions of historical importance’(Semple, 1909,426). The Severn has been used in this thesis to examine the region that surrounds it, not only as a visible landscape, but also as a historical layering consisting of a multiplicity of social and natural factors. The analysis can be presented diagrammatically in the same way as a geological timeline, where layers of law provide the foundations for later human and legislative action.

The sequent legal occupance can be presented diagrammatically as a chronological timeline to indicate the ways in which traces of law can remain and strike through later legislation in the form of statute or precedent (Table 7.3). The table is not fully inclusive, but is provided as a

visual representation of the longevity of laws which lie behind the structural. In the first column is the 'sequence' of events in chronological form. These are written documents, physical structures or enabled legislative actions (the collection of tolls) that have applied on the Severn. Law has been instrumental in the building of permanent physical structures that can remain visible on the landscape. The Severn tunnel, sanctioned by law for the transportation of rail freight, is an example of changes to the transport infrastructure that contributed to the decline of river traffic. Structures for transport require a number of legal measures before they are authorised, and a search of the relevant documentation can reveal social attitudes towards technology and change. Some structures may be removed, such as the Severn Railway Bridge, but remain on the landscape (for now) as an impression, a reminder of changing times and the continual interplay between the social and the material. As part of a process, once the final remains of the bridge have returned to the water, the memory of the structure will remain as documented in legal and social literature.

The second column indicates the 'legal' effect, the remedy or the enabling factor, the reason for the law and the resulting action. The final column indicates the 'occupance' or the time that the legislation has remained, either on the statute books, or has been of relevance in later case law. All laws, enacted, enforced, ignored or repealed, have relevance as building blocks for future legal intervention. Although in its diagrammatic form, the sequence of legal occupance appears linear, this research has shown that law does not operate as a simplistic and unbroken series of statutes and events.



| SEQUENCE                                     | LEGAL  | OCCUPANCE |
|--|--|-----------|
| 1996   | Second Severn Crossing opened  |           |
| 1966 Severn Bridge                           | First motor bridge replaces Aust ferry   |           |
| 1885 Severn Tunnel                           | Replaced need for Severn Rail Bridge   |           |
| 1879 Severn Railway Bridge                   |  |           |
| 1827 Gloucester to Sharpness canal completed | Removed need for towpath along the Severnside  |           |
| 1811 Towpath to extended to Gloucester       |  |           |
| 1802 Towpath to Diglis                       | Created for horses to tow boats  |           |
| 1790 Act for Locks (Coalbrookdale to Diglis) | Final stages of locks built on Upper Severn  |           |
| 1542 River Severn Preservation Act           | Repealed 1958  |           |
| 1531 Act for extraction of tolls             | ( as 1503)   |           |
| 1503 Act Concerning the Severn               | Penalties for those taking tolls ( unless authorised)  |           |
| 1472 Free Passage Severn                     | Prima facie, all navigable tidal waters are subject to a public right of navigation ( see 1432 and 1170) |           |
| 1432 Free Passage Severn                     |  |           |
| 1215 Magna Carta                             | Became law in 1297 –all now repealed except s.1, s.9,s.29  |           |
| 1170 Free Passage Severn                     | To prevent hindrance of vessels  |           |
| 1085 Domesday Book                           | Division of estates and landholdings, ‘mapping’  |           |

**Table 7.3**  
Diagrammatic representation of SLO in relation to navigation

The inception of a particular piece of legislation is dependent on a myriad of factors. Some law does not reach the statute books, but appears in the form of discussion. Legal documents such as the Domesday Book and the Magna Carta retain their longevity by usage, and both of these documents have been cited in legal argument in the twentieth century when issues of property have been taken to court.

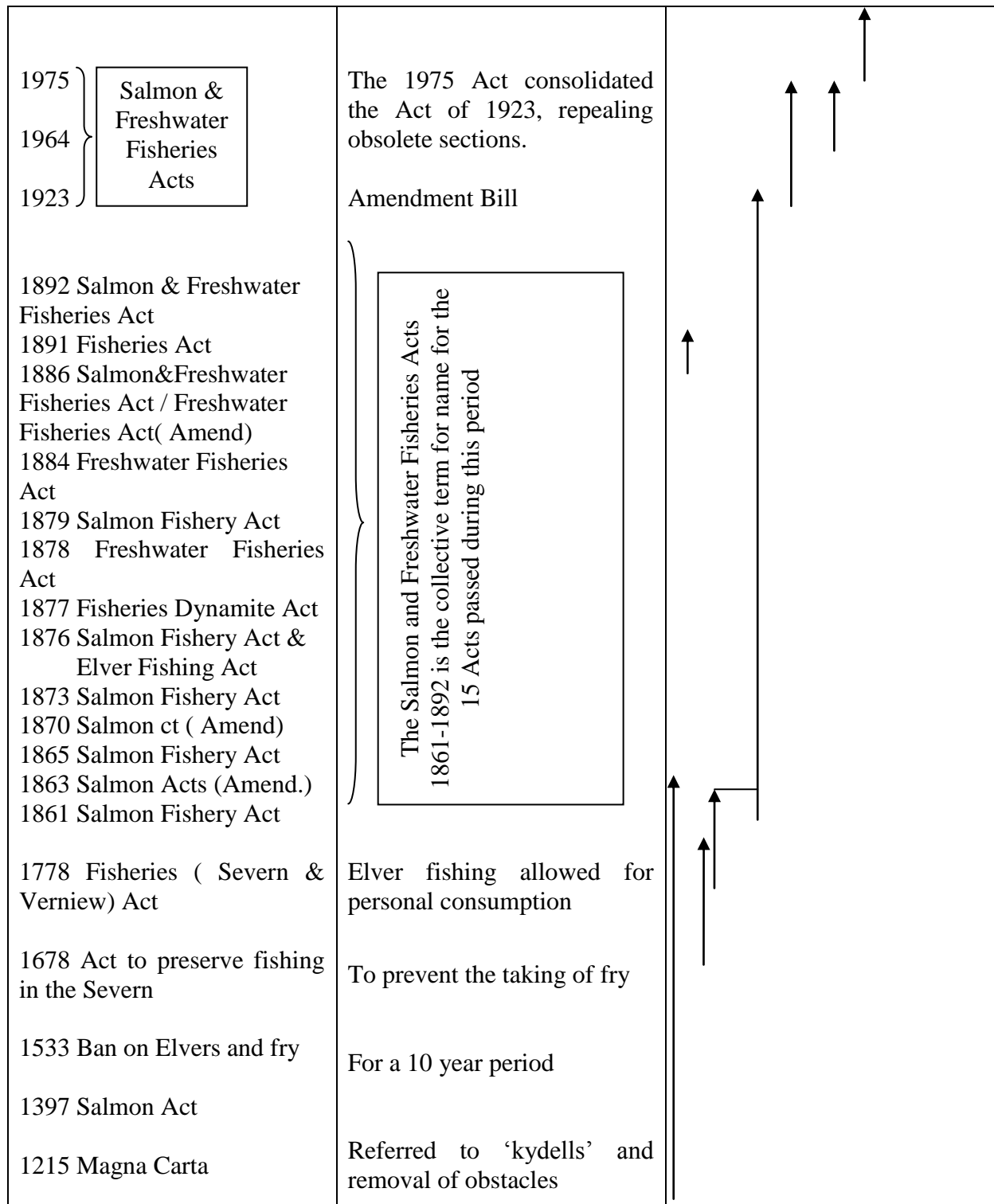
Other legal interventions have been renewed, altered or superseded by other laws, dependent on geographical, social and natural circumstance, but again remain as markers in the historical development of the region as a whole.

Presenting the law of the fisheries as a diagrammatic timeline (Table 7.4) presents a slightly different problem. Whereas navigation law has left some evidence of its actions in the form of physical markers, fisheries legislation leaves traces only in statute. Yet by presenting it as a timeline, these laws act as markers for examining the consequences of legal action. Again, the first column indicates the sequence of law from 1215-1975. The second column notes the effect of the legislation, and the third column indicates the 'occupance' of the statute and its longevity. Again, the process is not a linear and unbroken chain of legal events. Some laws overlap; some were reinstated, repealed, or built upon in later legislative action. Between 1861 and 1892, the complexity faced by the legislators over the fisheries and their management is indicated by the number of changes and amendments that were made over the period. The changing nature of legal practice reminds us that knowledge can displace beliefs over time, often with severe ecological consequences (Wiber, 2009, 89). Time is the major factor in the evolution, development and destruction of the fisheries on the Severn.

# SEQUENCE

# LEGAL

# OCCUPANCE



**Fig 7.4**  
Diagrammatic representation of SLO in relation to the fisheries

This thesis has revealed the substantial amount of legislation that has been passed on this one relatively small geographical area within regarding just two administrative issues, and even then, the list is not exhaustive.

The SLO approach adopted here revealed that within the fisheries, 'place' is socially constructed by law, discursively manipulated towards individual or collective ends, and across time the collective ends were dependent initially on the economics of trade on the Severn. As river trade declined, the revival of fish stocks were driven by an alternative collective interest. The Salmon Acts became an issue for central authority, yet within the Severn catchment, the consequence of such uniform legislation inhibited the customary taking of eels and elvers, an oversight which resulted in local prosecutions and social unrest. Using SLO, such legislative action was designed to 'produce uniformity in cultural impress' even where the natural landscape was diverse (Whittlesey, 1935, 90). By examining the Acts in both space and place, it was conceded that the Severn estuary had an abundance of eels, and the local population was its greatest consumer. To deprive the local population of such a food source would have been unenforceable, and this was a decisive factor in the passing of a specific, local act to allow elver fishing. The Salmon Acts are an example of the interconnected realities experienced by the population which is always dependent on location, and is an example of an area in which the state attempted to 'pulverize' space into a manageable, calculable and abstract grid, whilst at the same time 'diverse social forces simultaneously attempt to create, defend or extend spaces of social reproduction, everyday life and grassroots control' (Brenner & Eden, 2009, 367).

When both of these diagrams (Table 7.3 and Table 7.4) are viewed together, it is apparent that the majority of the fisheries legislation was enacted during the nineteenth century. This followed the extensive lock and canal building era, which included the Gloucester and Berkeley Ship Canal opening in 1827. With such a comparison, it is easy to speculate on the causes of a nationwide decline in fish stock following an intense overhaul of the inland waterways. This is particularly relevant to studies on migratory barriers to fish, particularly eels, on the Severn (White & Knights, 1997) and issues such as loss of habitat, such as wetlands, due to human changes to landscape that have had a considerable impact on fish stocks. What is important here is that the relationships between spaces, places and law are dynamic, constantly being negotiated, changing, reforming, and performing. Where space and place are challenged, law may be called upon to adjudicate. Where law creates an action or reaction in space or place, it may be accepted and practiced or interpreted, or rejected, negotiated or modified. The effects are not always immediate, and all elements are influenced by past, present and potential future actions, represented in and on the landscape.

## **7.6 Conclusion**

This chapter has reflected on the issues of law, space, place and time to furnish a processual account of change in the River Severn using an updated method of sequent occupance analysis. The resulting sequent legal occupance account has been presented here as the ‘Severnscape’, a type of lawscape which analyses law and landscape through two particular river based activities. In doing so, it has promoted an alternative method conceptual framework by which law, space and place can be researched using a wide spectrum of disciplinary theories and historical investigation. Such active blurring of the disciplinary boundaries can only encourage further the promotion of legal geography.

In this Chapter, I have underlined the key differences between SLO and Whittlesey's original sequent occupance framework. These changes allow legal geography to consider using multiple interpretations of space, place and landscape to become a necessary part of interdisciplinary discourse in a number of areas. An emphasis on the importance of time would allow also the subject to engage with contemporary issues in both law and geography simultaneously. Looking back at the accumulation, ebb, flow and retreat of law in space and place allows for the reflection of previous legal enactment on contemporary policy and experience. I have also presented two diagrammatic interpretations of sequent legal occupance in each of the study areas. These provide a visual representation of a 'timescape' to illustrate the ways in which law is formed in layers, and can remain as an influence upon the landscape over long periods. Thus, law can have an 'occupance' even where there may be no visible object. It is this occupance that I have sought to reveal throughout this thesis, to indicate the ways in which law is present within the landscape.

As seen in this thesis, debates have taken a variety of interesting (and sometimes abstract) routes leading to a diverse formulation of legal geographies. SLO provides a conceptual approach which starts from the basic premise that both law and space are processes during which some 'things', legal, cultural or physical, can remain fixed for a period of time; other 'things' fade away, yet leave an impression, or a presence, that can be equally influential on subsequent activities. These 'things' can be studied over a period of time as a sequence of linked events which allows for the connections between them to be investigated. The use of landscape geographies has offered an alternative interpretation of the space/ place divide within legal geography. Landscape geographies can inform legal geography by highlighting

the natural features within an area that have relevance in terms of custom, discourse and culture. Geographies which emphasise the importance of local practice or of the ways in which natural features, such as rivers ‘create hybrid timescapes with nonhuman rhythms folding into social rhythms of economy and culture’ (Jones, 2011, 2292) can inform the ways in which landscapes are perceived. The use of such theories and methods of investigation are not intended as a solution, but to encourage legal geographers to widen their theoretical bases and be open to further conceptual ideas. Indeed, even ‘a full understanding of the modern English concept of landscape requires attention to both the preservation of continuities and the process of redefinition’ (Olwig, 1996, 635). Landscape is neither a passive receptor nor just a location for law and deserves more deliberation within the sphere of legal geography. Yet ‘the landscape is perhaps the most complex image to decipher, as it incorporates the ‘before’ and ‘after’ that prepare a future which is itself difficult to describe. In other words, it is an ‘evolution whose construction does not cease’ (Raffestin, 2012, 129). It is this evolution of space, place and law that has been presented in this thesis as the ‘Severnscape’.

The final chapter will examine possible potentials for the SLO conceptual approach, and offer ideas for the expansion of the framework to allow legal geography to attain the interdisciplinary interest and engagement that it seeks.

## Chapter 8

### Concluding Remarks

*‘What we call the beginning is often the end. And to make an end is to make a beginning.*

*The end is where we start from’*

(T.S Eliot, 1942)

#### 8.1 Introduction

This thesis began by asking the fundamental question ‘where do law and geography meet?’ I have presented my research findings as the ‘Severnscape’ to demonstrate the ways in which law and geography have encountered each other in a process of co-constitution along the River Severn. I have suggested that by using a modified version of sequent occupance, a framework for the discovery of this process can provide indicators for the exploration of the often hidden relationship between law and geography.

Despite becoming more visible as a topic (as highlighted by the increase in the number of publications) legal geography remains on the periphery of both legal and geographical academia, remaining a little known sideline undertaken by ‘casual and itinerant participants whose primary intellectual concerns are elsewhere’ (Braverman *et al*, 2014, 1). By utilising Whittlesey’s notion of sequent occupance, this thesis has identified the legal sequences that occur in the social, natural and economic environment and uncovered the ways in which they can leave an ‘impress’ (Whittlesey, 1935, 85). I argue that using this framework would encourage those on the periphery, perhaps within historical geography and legal studies, to engage with legal geographical research. This chapter reviews the research findings and



identifies the component parts of sequent 'legal' occupance (SLO) to highlight the ways in they could be used in an integrated and multi disciplinary approach.

Finally, the chapter identifies a number of potential topics to which the sequent legal occupance approach could be applied in future research. This aims to promote the development and use of SLO as a frame of reference for legal geography, and to make the subject a 'truly interdisciplinary intellectual project' (Braverman *et al*, 2014).

## **8.2 Using SLO as a framework for legal geography**

The legal geography pennant is used to explore the co-constitution of law and geography; this research therefore can be defined as a legal geography of the River Severn. I have also called it a 'Severnscape', referring to the way in which it as also a lawscape in the sense that it explores the law within a particular landscape. It is neither a geography of the law, nor a critical geography. To be classed within the former, it would either be a study which mapped the movement of capitalism and colonialism (Mahmud, 2011) or a type of legal anthropology (Drummond, 2000) examining the law in a cross-cultural and comparative setting. I have deliberately moved away from a 'critical' legal geography, for a number of reasons. Firstly, the research is an observation that both law and geography operate in sequences, suggesting that by uncovering and understanding these sequences, the co-constitution of law and geography can be better understood. Secondly, it has been said that 'radical and critical geographies seek not only to interpret the world, but also to change it through the melding of theory and political action' (Blomley, 2008a, 287). There is no underlying political motive for this research, nor any active criticism in the ways and workings of the law; as I do not plan to take political action, I do not believe that it can be called a truly 'critical' geography.

Nor is this thesis just a new take on historical geography. It has the workings of the institution of law at its core, reversing the tendency of legal geographies to lean towards the predominantly geographical approach. By taking an integrated approach, this thesis has neither promoted any one theory or school of thought over another, nor placed a limit on the sources or literature. Using an array of academic perspectives, from philosophy to history, theory to politics, I have sought to produce a legal geography in context using a revised method of sequent occupance to identify the issues. The following subheadings summarise the key elements within this SLO approach.

#### *8.2.1 Chronological sequences*

Whittlesey noted that ‘in the unification of a large and diverse area under a single system of government, despite advantages derived from solidarity, the inhabitants of marginal districts feel the application of many of the laws as hardships’ (Whittlesey, 1929, 162). In choosing a ‘marginal’ district, this thesis has examined the historical development and decline of both navigation and the fisheries along the Severn. As the law developed and became centrally rather than locally administered, the effects on those dependent on the River for their income and employment was documented. By tracing a chronological social and legal history that spanned over five hundred years in relation to these activities, the study aimed to highlight the importance of the sequence of events that occurred legally. Critical legal geography has been said to reveal the way that law works in ‘practical, embodied and mundane ways, enrolling and inscribing itself upon bodies, things and spaces’ (Blomley, 2006, 91) and SLO has used sequences to identify the ways in which law has permeated the landscape of the Severn, leaving not only physical but cultural and social imprints.

SLO has sought to understand the imbrication, or overlapping patterns that can be seen in within legal geography. When examining the law, these overlaps can only be thoroughly understood when the events and circumstances that led to the legislation are also analysed. Law itself is a sequence of events, based on previous decisions and precedents, of which geography plays a role. SLO has the advantage of hindsight; using historical law and geography, it can identify sequences which can both examine and explain the effects of law in and upon the landscape over a long period of time, rather than analysing one particular moment in history. To understand law and its presence within the landscape, we need to be aware of how that law actually happened. The ways in which laws are envisaged, implemented, resisted and acted out are a fundamental part of the relationship formed between humans and landscapes. Thus ‘human occupance of area, like other biotic phenomena, carries within itself the seed of its own transformation’ (Whittlesey, 1929, 162). It is the significance of these transformations in *place* which formed the core of this research.

#### 8.2.2 *Spaces, places and law*

Within sequent occupance, law is only one of the influences that affect the landscape (Whittlesey, 1935). However, it has been the focal point of the application of SLO, in evaluating the impact of law over a historical period. Although some legal geographies of property have engaged with both literary and historical perspectives, many focus on one particular timeframe. If we recognise that ‘enactments of property are said to occur through the telling of narratives’ (Blomley, 2000, 87) then these narratives are both accessible and chronological when researched through law. As both ‘property concepts and property law exhibit apparent continuity over many generations, but the history of property concepts also reveals changes, discontinuities and radical ruptures’ (Delaney, 2001, 495) then a sequent legal occupance method and can be used to actively research such apparent continuity, and to

view property, landscape and spatial relations in such a way to identify those changes and ‘radical ruptures’ identified by Delaney (2001).

Legal geography has developed predominantly using the more abstract spatial analysis methods derived from human geography perspectives in social theory based on spatial production (Lefebvre, 1991). Legal geographers have therefore predictably tended towards critical legal and Marxist perspectives, and as a consequence the subject has developed within the concepts used by critical legal geographers (Blomley, 2003; Delaney, 2010). Yet by applying these accepted geographies to legal geography, the focus has been on outcomes, rather than ‘questions about the process of legalization itself, such as: how do individuals or groups make claims in legal ways? How do they invoke the law?’ (Martin *et al*, 2010, 179). Legal geographers have ignored the potentials for investigating the history of law and the working method of legislation, a fundamental part of the legal process. An engagement and an understanding of the role of law, lawyers, processes and functions would benefit both the law, and the geography, in legal geography. I would argue that the use of SLO and its multi-dimensional approach to law would also allow legal geography to re-examine the ways in which it imagines the ‘legal’ strand in legal geography. Legal geographers ‘need to recognise the ways in which multiple layers of law differently define and constrain uses of legal space, with unanticipated consequences for understanding place’ (Wiber, 2009, 89). SLO brings this relationship to the forefront of legal geography. When ‘space’ and ‘place’ are recognised as both co-dependent and relational, then a particular ‘landscape’ can be viewed as a process, central to an understanding of legal geography.

The social dynamics between law, geography and landscape were examined to emphasise the ways in which SLO had created layers, not only in the form of property regulation, but also within the physical landscape (as transport and waterways networks) and the cultural landscape (in terms of dialogue, literary sources, and sentiment towards the fisheries). This could then be compared and contrasted with the 'national' legislature. Whittlesey recognised that central authority usually acts for the whole of its territory in certain matters 'even where the natural landscape is diverse' (Whittlesey, 1935, 90). Thus the implementation of national legislation was examined in a particular landscape to discover whether such uniformity prevailed. One example of this was the parliamentary decision to pass the Salmon and Freshwater Fisheries Acts, which had a detrimental effect on the poor of Gloucestershire as they included sections relating to eels and elvers. In this sense, place is 'not passive but is a site for political struggle that can, moreover, have extra local implications' (Blomley, 1998, 582). This was later recognised, and the law was subsequently changed. Although the legislation was centrally administered, within the examination of landscape, it was affected by place based action due to the diverse nature of the location.

Place can be seen as something that 'takes place ceaselessly' and is 'what contributes to history in a specific context through the creation and utilization of a physical setting' (Pred, 1984, 279). It can be argued that 'law is one of the most important and under theorized components of the construction of place and in the relation of place to larger spaces' (Wiber, 2009, 81). SLO identifies sequences of legal process, where the problematic of 'place' can be addressed by developing a micro-historical geographical approach which regards legal attributes and actions within a landscape by adopting a multi-dimensional, multi-layered perspective. Using this approach does not deny that there are dialectical oppositions between

space and place. However, when the margins between the two are brought closer together, space and place are recognised as co-dependent even where the outcomes may be different (Table 8.1).

Table 8.1: The concepts of place and space using the SLO approach

| Space within SLO  | Place within SLO   |
|---|--|
| Space as multi-layered, can be viewed by studying successive stages of human habitation                           | Specific location and locale operating within the larger spatial domain                                      |
| Legally manipulated , enforced and maintained   | A particular ‘landscape’, influenced by law, but also includes the personal and emotional discursive terrain |
| Historical social, economic and environmental events influence the political status, law, and boundaries of space | The ‘landscape’ can be examined as a social, economic and legal creation                                     |
| Historically created and socially influenced  | Historically created over time and socially influenced by both local and national law                        |
| Shaped by the physical landscape as well as the social, legal and economic climate.                               | Shaped by the physical landscape as well as the social, legal and economic climate.                          |
| Social change can affect changes to governance and law  | Social change can inform the decisions made in law which may affect local landscapes                         |

From the SLO perspective, space and place are contrasting, yet complementary, concepts; both are equally valid, and each needs to be considered when examining the other. Both are interchangeable and fluid and can draw on a range of indicators that investigate legal action within a landscape by adopting a multi dimensional, multi layered perspective. The use of SLO within legal geography can focus on the *relationship* between space and place as opposed to theoretical ruminations over which may be the more relevant conceptual approach to use. Using the SLO approach does not deny that there are distinct differences and dialectical oppositions between space and place, but disentangling the two notions and reimagining them as *situations* where law and geography meet to create the overall landscape

also allows for a range of diverse sources of literature so that spaces and places are viewed as a 'reality to be clarified and understood from the perspectives of the people who have given it meaning' (Tuan, 1974, 213). Thus the focus became the 'impressions' of law on the landscape. An engagement with the 'platiality of the landscape tradition, i.e. the engagement with the particular character of certain locations' (Mels, 2005, 321) may help to raise place from its subordinate position and allow it to step firmly back into the realms of geographical discourse. Given that we are 'when all is said and done, wordsmiths, we need to pay more careful attention to the ways in what we say or write communicates, incites and engages' (Blomley, 2008, 289). I would go so far as to suggest that the term 'platial' be captured by the legal geographical project and turned to its advantage, using the term to demonstrate how the social dynamics that exist between law and geography can emphasise the impress of sequent 'legal' occupance that creates layers within, and on, the landscape in a 'platial' setting over time.

### *8.2.3 Engaging with regions and landscapes*

The spatial turn within geography has encouraged a move away from the regional, yet the examination of legal geography as SLO within this paper has used a particular area to investigate the impact of law on the local. Early critics claimed that any research in law and geography had to move away from the 'rather narrow 'impact analysis' nature of the debate' that had been predominant among those seeking a geographical analysis of law (Blomley & Clark, 1990, 435). Yet despite legal geographies spatial claims, in Blomley's research into an area of downtown Vancouver (Blomley, 1998) he suggests that an exploration of 'landscape' is critical to an understanding of socialised property relations, and that the struggles over the meanings and use of property are caught up in a particular *place*. SLO is particularly useful for the examination of the space, place, people and law in one geographical area due to its

ability to view the complexity of the relationships between them by using landscape as a central focus.

The River Severn a landscape which has been the subject of different legal questions historically in terms of whether water is tidal or non tidal; whether the owner of property on the shore has rights to the centre of the channel; and what the rights or exclusions are for users of the estuary, or for what purpose, whether this be as a resource or as a passage. It is both a boundary and a territory, over which legal 'ownership' as property (as a navigable route or over fishing rights) has been historically disputed. Although the physical attributes of the estuary itself have indeed changed naturally over time (for example, it has changed course, widened or deepened, silted or slowed) some of the drivers of change over its natural state and course have been human made. These changes can be seen in statute in the form of removing weirs and obstructions, the installation of towpaths and bridges, and the building of locks and canals. Thus the terrain of the Severn has been legally negotiated, claimed, controlled and managed and throughout the ages, law has been present as adjudicator and enabler.

The power that law has over landscape has been illustrated by the production of property. Even where definitive boundaries are hidden, such as on the shifting river bed, the 'legal subject' is both recognised, protected and enforced (Blomley, 2010, 206). Legal decisions made regarding the legal status of land, water or property can have different consequences, impacting on the geographical area in a number of ways. In the Severn, the issue of whether the water between Bristol and Gloucester was 'open sea' had to be settled in Court in 1780. In a case between a Gloucester pin-maker and Gloucester customs house (Counsel, 1829) it was heard that a consignment of British made brass wire was delivered to Gloucester by boat from



Bristol, but without the warrant the custom house claimed was needed to prevent levy evasion on goods traded on the open sea. The pin-maker argued that the goods had travelled only on the estuary, which was not open sea. The court agreed with the pin-maker that the River Severn estuary upwards of Bristol was not open sea, and therefore not subject to either warrant or levy between the two ports. Once published, this decision resulted in an increase in trade between the two cities (Counsel, 1829, 231). This was perhaps beneficial to traders, but not such a good result for the customs houses. This legal decision on the status of a particular geographical feature had a recognisable impact on the social and economic development of the area in which it was legally recognised, enacted and subsequently performed. Yet it was a decision based on the status of that particular landscape, and that particular region, and therefore only had a legal outcome in that particular place.

#### *8.2.4 Non-human subjects*

It has been argued that ‘much of the confusion generated by the diverging approaches to space and place can be clarified by re-examining ‘in historical and geographical context, the substantive meaning of landscape as a place of human habitation and environmental interaction’ (Olwig, 1996, 630). In Whittlesey’s original paper, he drew an analogy between sequent occupance in chorology and plant botany, but made the distinction that the chorologist, when focusing attention on human occupance, ‘must take account of changes in any of the complex elements of natural environment, and in the equally complex cultural forms’ (Whittlesey, 1929, 164). If geography recognises ‘whatever humans do affects their non-human surroundings, and the non-human environment, living or not’ (Hoffman, 1996, 631) which in turn also affects all human activity, then legal geography can also encompass this notion. I would argue that the SLO approach, making use of landscape geographies,

would enable legal geography to account for the environmental and the ecological as opposed to the predominantly anthropocentric basis for investigation.

As seen above, the law can decide on the status of a body of water, or the rights attributed to the owner of the land over which water flows. The transboundary phenomena that cross property in the form of wildlife ‘cannot be the subject of absolute ownership in English law’ (Gray & Gray 2005, 58) although the person in possession of the land may have rights to hunt and shoot them. Yet in law, fish do not qualify as ‘wildlife’, as although they are not bound by conventional borders, they are capable of being utilised by humans. Fish occupy an odd position somewhere between game and food, but are still seen as in need of protection. Aquatic biologists have now identified the unstable flow regimes which create difficult habitats for fish, as instability disrupts their reproductive behaviour (Hoffman, 1996, 639). Ironically, the historic laws affecting the Severn designed to control the fisheries population were hindered by parallel laws to encourage trade, with the implementation of changes to the waterways to assist navigation, such as locks and canal systems. This may have had a long term detrimental affect on the fish population. SLO identified the ways in which navigation became more important legally than the fisheries, and ‘this changes too the generation of knowledge over time- displacing some knowledge in favour of other knowledge – with some severe ecological consequences’ (Wiber, 2009, 89) Until the Salmon Acts of the mid nineteenth century, legal intervention was focused on ‘creating use rights, regardless of resource location’ (Giordano, 2003, 367) for traders and property owners. By historically examining the development of such laws, SLO uncovered the long term problems caused by coexisting legislation, the ecological consequences of which did not become apparent for many decades.

Human geographers have started to explore issues concerning the interconnectivities between nature and society (Panelli, 2010; Lulka, 2004) yet these fall into the ‘more than human’ or ‘posthuman’ social geography research field and tend to focus on warm-blooded animals and on ‘domestic and livelihood relationships’ (Bear & Eden, 2011, 336). There has also been some limited legal geography research into ‘animal geographies’ (Braverman, 2011) and the role of nature (Harvey 1996; Delaney, 2001b) although such explorations remain tentative. Although some environmental issues are being addressed (Philippopoulos-Mihalopoulos, 2011) legal geography needs to do more to investigate the lived experiences of those both human and non-human. Such an approach has the potential to engage interdisciplinary interest with, for example, environmental law, ecology and life sciences on issues of policy, management, and regulation in terms of understanding the correlation between law, geography, place, space and effect. Some potential issues with which legal geography using SLO could engage with these themes are outlined in the following section.

### **8.3 The potentials for legal geography**

Legal geography in its current developmental stage has the potential to address all of the issues that I have reflected upon in this addendum. Its agenda has not been set, therefore it has the scope to explore and modify its direction. I suggest that the conceptual approach presented in this thesis as SLO could be applied to a number of themes or topics which also have the capacity to investigate and explore the ways in which landscape and the non-human are interconnected. My particular research, with the River Severn as its central theme, used a long time period to demonstrate that ‘all materiality is fluid in the end; even if some materials flow at slow speeds and run through rhythms that beat over millennia rather than years, days,

or seconds. And all flows are complex in that they intersect with other flows and create multiple speeds, durations, and rhythms within relational processes' (Jones, 2011, 2300). The river feature within the Severnscape provided a particularly vivid metaphor when exploring the flow of law, therefore this SLO framework could be transposed on to any other waterway (a 'Thamescape' for example). Yet it doesn't have to be confined to a waterway; any natural feature could present itself as a potential feature through which the lawscape and landscape can be analysed simultaneously using the SLO approach. It could also be used to great effect in contemporary and topical debates. Therefore, in each of the following suggestions, the focus is on the sequences and outcomes, whether these outcomes are realised or predicted. Although the suggestions are UK based (as I believe that legal geography needs to be promoted in this area) they are merely proposals to provoke wider debates on the application of legal geography to a range of themes.

To move away from the anthropocentrically centred debates, studies which account for other creatures could be made regarding the badger cull in the UK. This issue raises a number of questions that fall within the scope of legal geography, having the two major components needed for such an inquiry. In terms of law, it contains both domestic, (including intra domestic with the Welsh Assembly replacing proposals for a cull with a five year vaccination programme) and EU law. Geographically, badger culls and pilot culls are carried out in particular areas. In addition, the high public profile and reaction to the cull, again locally, nationally and internationally, questions the legal and geographical in terms of particular landscapes. The topic accounts for the human and non-human in terms of action and reaction, and has the potential for the inclusion of a number of strands of research, giving it the scope for an interdisciplinary project based on an SLO framework to map the sequence of events,

outcomes, or predicted outcomes. Another project could examine the fishing industry in the UK. Again, in terms of law, the industry is subject to not only domestic law, but EU and international treaties, with EU quotas being a particularly contentious issue. Geographically, a comparative study could be made of particular fishing communities along the coastline, and the social impact of such laws over time. This topic has been alluded to within this thesis, but there is a great deal of law and policy surrounding this issue which could be dissected and examined using the SLO approach.

To encourage legal geography to engage with environmental impact issues there are a number of topics within the UK that could be researched using the SLO approach. Traveller and nomadic provision, a topical and contentious issue, is imbued by law and geography. Planning and policy decisions, cultural issues, court cases and moral sentiment are all contained within this subject which actively addresses the imagination in terms of geography, rights, space and place. Such an investigation into the law surrounding travellers and Gypsies could illustrate how ‘specific laws embody public policies by integrating and balancing competing discourses and values, equitably or inequitably’ (Martin & Scherr, 2005, 382). Perhaps even more topical are the current energy proposals concerning ‘fracking’ in the UK. Energy security, planning, policy and again moral sentiment all feature within such discussions, and is another topic for which SLO would be an appropriate, multi-disciplinary research project, as its effects on the natural landscape are yet to be fully identified.

These issues and many more contemporary and historic legal issues are ripe for legal geography to take up. Recent debates in legal geography have highlighted that there is a need to develop creative approaches to understanding the intersection between law and geography

to catalyse wider inter-disciplinary interest (Braverman *et al*, 2014). The above suggestions can draw from other branches across a wide spectrum of academia, and the dissemination and collaboration of such knowledge can deepen investigations into the relationship between law and geography, and contribute to the development of novel conceptual approaches to address the intersections between space, place and time.

#### **8.4 Conclusion**

I have demonstrated within this final chapter that legal geography has the potential to reach a wider audience by utilising some or all of the elements that I have used in the SLO approach. In moving away from a predominantly spatial analysis and re-engaging with ‘place’ to investigate the relationship between the two, it can move towards rather than away from regional geographies to engage a wider audience. It can also examine the interconnection between the ‘non-corporeal’ or non-human, ecological and environmental aspects of geography that have a bearing on and are affected fundamentally by spatial and platial relationships. This would address the anthropocentric bias within current legal geographic approaches. By utilising approaches within landscape geographies, historical geography and other forms of enquiry, legal geography has the ability to widen its remit and make use of the many facets of contemporary geography that are available. It has been said that a ‘full understanding of the modern English concept of landscape requires attention to both the preservation of continuities and the process of redefinition’ (Olwig, 1996, 635) and I argue that this can be addressed by attending to the legal geography framework. The landscape is a hybrid, multidimensional lawscape, affected in a multiplicity of ways by its geographical aspect, and the diverse relationships between institutions, nature, and society.

I have proposed that the relationships between law and geography that account for space, place and landscape can be investigated by using a Sequent Legal Occupance (SLO) method of analysis. Drawing on archival resources and using an SLO ‘lens’ identifies the ways in law and geography have both historically played reciprocal roles in the formation of the contemporary environment in terms of ‘occupance’ and ‘impress’ within and upon the landscape. I argue that the SLO approach has the potential to attract a much wider and more diverse audience to legal geography, increasing its visibility across a range of academic and scientific disciplines. Such engagement would promote further investigation into the correlation between law and geography, the effects of such a fusion on place and space, and a better understanding of the ways in which all entities are co-constituted.

*‘ the continuous but varicoloured woof of human life is woven with the firm but not uniform warp of areas into a strong yet supple texture, pleasingly varied but always orderly in pattern’ .*

(Whittlesey, 1929, 165)

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