**Relational Regulation – The Role of Contract and the Evolution of Habitat Protection**

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**I INTRODUCTION**

The phrase ‘government by contract’ is often used as shorthand for the various ways in which contracts are used for the direct procurement of public goods or services; or, more indirectly, for regulatory contracts between regulators and private individuals, groups or wider networks of actors.[[2]](#footnote-2) In this chapter I focus on a specific example of government by contract in an area of law that is traditionally thought of as paradigmatically ‘public’ law – environmental regulation.[[3]](#footnote-3) Typical accounts of the role of government by contract in environmental regulation present contract as a private instrument with a regulatory purpose, in other words as another variety of tool in the regulatory tool box.[[4]](#footnote-4) There is less consideration of the reflexive role that contract plays in establishing and reinforcing a cooperative relationship between the parties, or in the actual or potential significance of the relational norms that underpin contractual performance as a means of securing regulatory compliance or in meeting challenging environmental policy goals.[[5]](#footnote-5) Key aspects of relational contracts such as flexibility, co-operation, trust and implied good faith (amongst other things) have largely been ignored.[[6]](#footnote-6) This seems unusual when considering the potential role for contract in governance systems addressing complex environmental challenges such as climate change and the protection and management of biodiversity. These challenges require responses that promote flexibility, experimentation and adaptability, all of which echo the inherent reflexivity of contract rather than more traditional regulatory approaches.[[7]](#footnote-7) In this chapter, I consider the relational aspects of environmental contracts in the context of the development of legislation to regulate the protection and management of nationally important habitats.

Since 1949, regulators have been able to agree contracts, known as management agreements, with owners and occupiers of designated land for the purpose of managing land in the interests of nature conservation in return for payment for those management services. These contracts have played a significant role in establishing and reinforcing relational contract norms such as flexibility and the preservation of parties’ relationship through co-operation and partnership at the same time as regulating harmful activities and latterly prescribing the positive management of such sites. In this Chapter, I argue that management agreements play a significant role in a model of governance that I term relational regulation. This model is fleshed out throughout the chapter. In relational regulation, contract plays a distinctive role, highlighting the importance of consent and voluntarism, whilst providing an instrumental purpose in capturing the type of reflexive cooperation required to manage habitats actively over long periods. It is contract rather than more traditional regulatory tools that nurtures the type of ‘habitual trust’ required in managing land in the interests of nature conservation.[[8]](#footnote-8) Nevertheless, I suggest that in the context of managing habitats at least, relational regulation requires a default statutory regime as a necessary baseline to underpin rather than enforce the relationship of habitual trust. The statutory default regime is not intended to be used as the primary mechanism that governs the relationship between regulator and regulated, rather it acts as a context within which negotiation takes place and relational norms can be fostered within that relationship via contract.

I propose that relational regulation is a distinctive model of governance which differs both from the recognised models of ‘government by contract’ and from voluntarism as a regulatory technique.[[9]](#footnote-9) Unlike models of government by contract, the need for a specific statutory default regime that operates as a regulatory baseline is significant. Unlike models of voluntarism as a regulatory technique, relational regulation does not rely purely on trust but instead is underpinned by a specific contractual instrument that creates an agreed framework of norms to give concrete form to that trust. The distinctiveness of relational regulation is, I argue, not only in the reflexivity of contract as an instrument to underpin relational norms but also in the reflexivity of the relationship between contract and the regulatory baseline. The reflexivity of this relationship can best be characterised by the way in which the policy aims of the legislation can be achieved equally through either private contract or the regulatory scheme. In theory, therefore, there is direct interchangeability. In practice, however, the preference for the relational norms fostered in contract is highlighted not only because regulation is considered as a last resort only when contractual negotiations cannot be concluded, but also because regulatory intervention is an alternative against which the terms of any contract are negotiated.

The relationship between the regulatory regime for protecting nationally important habitats and the use of contracts to manage such land has not previously been considered from the perspective of contract theory.[[10]](#footnote-10) Accordingly, developing a theory of relational regulation matters in two key ways. First, as I hope to demonstrate, the history of the legislation on habitat protection indicates that the development of the statutory framework has often been portrayed as a struggle to find the right *balance* between contract and regulation in order to achieve effective outcomes. I argue that the focus should not be on *balance* but on the dynamic reflexive relationship between contract and regulation – namely seeking to optimise reflexivity as a way of promoting the need for partnership, co-operation and flexibility rather than focusing on the level of regulatory intervention needed to secure compliance. Second, the potential of this model of relational regulation relies heavily upon the significance of the relational aspects of contract norms which at first glance may appear to be undermined by the existence of a regulatory baseline which operates as an alternative route to compliance through co-operation. Relational regulation, however, suggests that co-operation is not necessarily secured through the threat of escalating regulatory intervention as theories of responsive regulation would suggest, but is secured by nurturing relational norms through contract.[[11]](#footnote-11)

The idea that regulation of habitat protection law has been closely linked to a reliance upon contract linked to a statutory regime ties in with typical accounts of the evolution of the statutory framework.[[12]](#footnote-12) These accounts highlight the importance of voluntarism in the post-war years, moving in time to a hybrid approach emphasising a mixture of ‘encouraged participation’ and what is seen as escalating regulatory intervention under the Wildlife and Countryside Act 1981 and successor legislation.[[13]](#footnote-13) Suprisingly, perhaps, there has been little detailed analysis of the role of management agreements in this statutory context from the perspective of contract theory. Whilst the role of contract in the legislative scheme is recognised, it is rare to find any sustained or detailed analysis of the form and function of these agreements as contracts or of the relationship between contracts and the emerging statutory regime.[[14]](#footnote-14) In this chapter I hope to provide a fresh insight into the role and potential of contract in a model of relational regulation for habitat protection which contributes to both contract theory and ideas of reflexive governance and the privatisation of biodiversity.

This chapter is structured into three main sections. In the first section I consider the role of contract in habitat protection. I outline the form and function of the contracts used in managing nationally important habitats, primarily under the statutory designation of Sites of Special Scientific Interest (SSSI) with some consideration of National Nature Reserves (NNRs). I also address the question of why reflexivity is important when managing and protecting sites. In the second section, I trace the evolution of relational regulation, from the early days of true voluntarism where contracts were used by private organisations as a way of securing control over important nature sites, through different stages of legislative intervention reflecting experimentation with the optimum form for the regulatory baseline. I argue that the story of the evolution of the legislative framework is a story underpinned by the search for the most effective way of securing co-operation through relational contract norms reinforced by a regulatory baseline. In the third section I analyse and evaluate the potential for relational regulation in the context of habitat protection, acknowledging that whilst relational regulation has been of limited ineffectiveness in terms of protecting and restoring important habitats, there is still potential in exploring the reflexivity of contract and the relationship with the regulatory baseline as the key to improving the effectiveness of legislation that seeks to protect important habitats.

**2. THE USE OF CONTRACT IN HABITAT PROTECTION**

The term ‘management agreement’ is generic and associated with a range of contracts made in relation to the management of different statutory designations of national nature conservation sites.[[15]](#footnote-15) The common defining characteristic of management agreements is a contract made between regulatory bodies and owners or occupiers of land where the exchange either places restrictions on the activities that can be carried out or requires the contracting party to undertake positive management activities or capital works on specific parcels of land to contribute to the delivery of environmental objectives and outcomes. In return for meeting these obligations, the party receives appropriate payments.[[16]](#footnote-16) Management agreements have all the characteristics of formal long-term contracts for land management services that bind both the regulator and owners/occupiers.[[17]](#footnote-17) They possess the key contractual characteristics of consent and voluntariness in that there is no general requirement on either party to offer or agree to be bound by such an agreement.[[18]](#footnote-18) The exceptions to this principle of contractual autonomy can be found in circumstances where the regulator is obliged to offer an agreement ‘on reasonable terms’ prior to serving a statutory notice or acquiring a direct interest in the land through compulsory purchase.[[19]](#footnote-19) Evidence suggests that the reliance on these statutory provisions has been rare.[[20]](#footnote-20)

Contractual performance obligations are site specific and include activities and capital projects that are relevant to the special habitat features that make the land worthy of protection. These might include the use of specified grazing techniques, or the provision of management works such as fencing or drainage. Payment can be made annually, in arrears, or mid-year.[[21]](#footnote-21) Payment reflects the net income forgone by owners and occupiers when altering normal and current land management practices on a designated sites to activities which are specified under the agreement to benefit the features of interest.[[22]](#footnote-22) Where additional costs are incurred to comply with the contractual obligations, a contribution to these costs will be paid under the contract.[[23]](#footnote-23) Any dispute over payments made by the regulator under a management agreement is subject to mediation underpinned by a right to expert arbitration.[[24]](#footnote-24) Breach of the terms of a management agreement on the part of the owner or occupier of the land is subject to contractual powers for the regulator to withhold, reduce or reclaim any payments to reflect the breach, subject once again to mediation and efforts made to resolve disputes informally.[[25]](#footnote-25)

The use of contract in habitat protection can be linked to a preference for voluntarism, custodianship and the need to foster co-operation between the owners and occupiers of private land and the regulator.[[26]](#footnote-26) The idea of custodianship dominated much of the policy thinking in the post-war period in which early habitat protection legislation was first considered.[[27]](#footnote-27) Custodianship, voluntarism and contract were conceptually linked in the sense that there was an implicit assumption that the best people to manage land were the owners and occupiers of that land and that contract informed by consent and choice was the most appropriate way of formalising an essentially voluntary relationship.[[28]](#footnote-28) Whilst the legislature has shifted the emphasis away from pure voluntarism, contract still forms a key operational element of a system for managing sites, with the relationship between contract and the regulatory baseline reflecting the need for co-operation and partnership of the sort nurtured in relational contract norms rather than a traditional relationship focusing on regulatory compliance.

As outlined in my introduction, I argue that management agreements on protected sites represent a key element in a distinctive approach to governance, which I have termed ‘relational regulation’. This form of regulation differs from other types of public contracting including the economic, administrative or social control contracts studied by Peter Vincent-Jones, in that the use of contract combines specific and discrete contractual obligations with relational norms underpinned by a legally-specified regulatory baseline.[[29]](#footnote-29) Whilst management agreements contain detailed obligations by way of specific terms and conditions, they rely heavily upon co-operation to be effective with the context for contractual performance being the dynamic and complex nature of natural habitats that requires considerable flexibility to respond to changing circumstances. The regulatory regime provides a regulatory baseline in the form of Management Schemes and Notices which provide owners and occupiers of designated sites with a regulatory context for the negotiation and conclusion of a management agreement or provide for a mandatory form of control should such an agreement not be finalised.[[30]](#footnote-30)

So why is relational regulation helpful in managing activities on designated habitats? The use of relational regulation as a means of promoting cooperation, adaptability and flexibility is a necessary consequence of the inherent challenges in managing the uncertainty and complexity of dynamic habitats and the wide variability of potential responses to the consequences of direct human intervention and other impacts from the wider environment. These responses arise in cases of both direct activities on the land itself (either from owners/occupiers or third parties) and the indirect consequences of pollution, climate change and other drivers of environmental change. For the purposes of this chapter, I have selected three key examples with relevance to the effectiveness of relational regulation.[[31]](#footnote-31) These challenges in managing designated sites are related to temporal and spatial factors as well as the underlying tension between performance obligations based upon management inputs as opposed to the desired environmental outcomes or outputs. Meeting these challenges is not simply a question of regulatory compliance or of adequately meeting contractual obligations but is dependent upon the relationship between both to reflect flexibility and partnership to achieve uncertain or unpredictable outcomes.

First, the challenge of agreeing contractual performance obligations based upon terms that relate to input measures (i.e. the nature of the management activities themselves) and/or output measures (i.e. the environmental consequences of those activities). Whilst it is commonplace to specify the nature of activities to be undertaken in any service agreement, in the case of a management agreement, what is really desired is not the performance of a service or act, but the eventual (re-)creation, enhancement, restoration or maintenance of a habitat.[[32]](#footnote-32) The key challenge here is that there will always be some uncertainty over the extent to which there are clear causal links between compliance with any performance obligation included as a contractual term and the long-term impacts of those interventions.

In contractual terms, there is nothing unusual about the form and function of management agreements. If you asked a farmer to show you her contract for managing a SSSI, she would be able to point to at least one document that demonstrated all the features of a contract governing a discrete transaction.[[33]](#footnote-33) These include all the typical clauses that such agreements include such as limitation of liability, force majeure, severability, third party rights and governing law. She would also then be able to show you the specific activities and operations she was required to undertake. The contract itself would look like a typical discrete transaction which is ‘characterized by short duration, limited personal interactions, and precise party measurements of easily measured objects of exchange’.[[34]](#footnote-34)

Although many of the activities under management agreements are highly defined and detailed, in practice managing habitats is fraught with uncertainty and complexity that has many dimensions that cannot always be adequately addressed through clear contract terms. The farmer, having shown you the terms of her contract, would also be able to demonstrate (by photo where required) what actions she had taken to meet the performance obligations under the contract. What she would not be able to do is demonstrate the consequences in terms of specific environmental gains or biodiversity improvements. In this sense, regular monitoring might identify compliance with these discrete performance obligations but positive longer-term outcomes would be harder to detect.

This distinction between action-based inputs and qualitative outcomes creates levels of uncertainty. In these circumstances when should payment be made? Before or after the service is carried out or when the outputs which are desired start to emerge? When should a breach of the contract or non-compliance with any complementary management scheme be identified? What if the service is undertaken negligently (whether deliberately or accidently) but the habitat thrives? The answer is almost always that pragmatism favours discrete terms that reward for what is done in the short-term rather than results over the longer term.[[35]](#footnote-35) These uncertainties means that, as is the case with many longer-term service agreements, there is an implicit reliance on the development of relational norms to provide a degree of flexibility and adaptability when the performance of discrete obligations may be more or less ineffective in achieving these outcome focused objectives.

The non-automatic connection between inputs and outputs also has a temporal element. The length of time before we can ascertain how the natural environment is responding to management efforts will often be far longer than the period of even the longest of long-term management agreement. One obvious example would be that it is estimated that planting trees could take up to a century to produce a stable, mature forest habitat. Whilst benefits will accrue before this stage, the ultimate aim may not be fulfilled within the life of the agreement. This length of time before it becomes clear whether the intended aims materialise also limits the scope for varying contracts or management schemes. When it becomes clear whether the agreement has been successful in achieving the intended outcomes there may be little scope for identifying further gains from, or reducing the negative consequences of, meeting contractual performance obligations. These are long-term relationships requiring long-term commitments which will produce long-term results.

This provides practical challenges for contract with the prospect of changes in ownership (and thereby responsibility) potentially impacting upon the performance of specific obligations and the fostering of relational norms. Moreover, the chances of intervening events or changing circumstances such as extreme weather conditions caused by climate change or other threats to habitats from disease or simply the changing behaviour of native species increase over time, requiring both flexibility in adapting in the shorter term whilst maintaining a focus on the overall aims in maintaining the habitat. For example, digging ditches in one period to promote better drainage may become unnecessary over a much longer period where rainfall decreases.

Finally, there are challenges for contracting parties linked to space, location and the interconnectedness of habitats. It is common for larger sites to be within multiple ownership and occupation. Such sites do not respect ownership boundaries and therefore there may be a co-ordination challenge inherent in managing a network of connected contracts. Moreover, the degree of interconnectedness of sites matters within the ecological context and the coherence of a network of such sites can be an important factor in terms of maintaining a viable system.[[36]](#footnote-36) Individual performance obligations may be met for contracts on much of the land but if one party does not perform the necessary obligations in relation to a key part of the whole, that can undermine the overall aim of the network of contracts.

These three challenges of time, space and the contrast between input and output performance obligations underline the uncertainties involved in contractual performance (or for that matter regulatory compliance) and the significance of the reflexivity of contract – namely the ability to adapt to different circumstances and secure co-operation either bi- or multi-laterally through negotiation and agreement – and relational norms in the context of a dynamic relationship which involves long-term obligations to manage complexity and uncertainty.

2. THE EVOLUTION OF RELATIONAL REGULATION IN HABITAT PROTECTION LAW

In this section, I plot the evolution of relational regulation by tracing the use of contract in protecting nationally important and designated habitats. At first this co-operation was largely the product of the efforts of private individuals or organisations with an interest in nature, but the general model of voluntarism through contract was adopted following the introduction of regulatory regimes after the Second World War. The ongoing development of the statutory framework demonstrates how the legislature has tweaked the relationship between contract and regulation, underlining the inherent reflexivity of that relationship and the reliance on relational norms.

The development of relational regulation can be seen in the extent to which regulation has been modified to act as the baseline position for contractual negotiations. What started out as a purely contractual relationship between private parties has gradually developed through stages of legislative intervention to underpin the process of contractual agreement. As negotiation theory demonstrates, the availability or otherwise of alternatives to a negotiated agreement such as a regulatory or non-contractual alternative constitutes the best alternative to a negotiated agreement that a regulator would pursue if an agreement cannot be secured.[[37]](#footnote-37) This makes substantive developments in the default regulatory scheme position relevant to the effectiveness and viability of management agreements and thereby the means of securing voluntary cooperation. The availability of a regulatory alternative to a negotiated agreement on the part of the regulator influences the extent to which relational contract norms are undermined or reinforced. This idea of a default or baseline which provides a context for negotiation contrasts with traditional theories of voluntarism or responsive regulation which suggest that voluntary co-operation is secured through using the right level of sanction or enforcement activity to secure compliance.[[38]](#footnote-38) The existence of a default or baseline reinforces co-operation rather than enforcing it because it provides an alternative to negotiation as a means through which obligations can be identified and varied.

This reflexive relationship between the statutory scheme and the use of contract has evolved over time and in the following sections, I consider this evolution across distinct phases or models of regulation. After considering the early roots of voluntarism in the latter stages of the 19th and early 20th century, I develop the idea of relational regulation across the iterations of statutory schemes for habitat protection from 1949 onwards. For the purposes of analytical convenience, I characterise these phases as being linked to themes of custodianship in the initial legislative phase (1949-1981); negotiated partnership (1981-2000); and regulated partnership (post 2000) respectively. Each model or phase reflects a material development in the default statutory regime against which management agreements were negotiated or otherwise agreed. Each model also reflects the extent to which the default regulatory regime was amended to reinforce cooperation through contract.

**Pre-1949 - Early voluntarism**

The use of contract and the reliance on co-operation and voluntarism as an approach to habitat protection can be traced to the earliest efforts of individuals and groups with an interest in nature conservation. The idea of conserving nature for its own sake started to emerge in the 18th Century as changing attitudes to the countryside created, for the first time, a clear distinction between the industrial grime of the ‘town’ and more bucolic notions of the countryside.[[39]](#footnote-39) In the case of habitat protection, the use of voluntarism through private law mechanisms reflects an approach adopted by late Victorian era voluntary organisations in identifying, designating, controlling and in many cases purchasing key areas of land as recreational areas or nature reserves.[[40]](#footnote-40) The acquisition of nature reserves by these voluntary bodies recognised that private property rights provided the most certain means of protecting specific species and the habitats they relied on.[[41]](#footnote-41)

As an alternative to outright acquisition, voluntary organisations started to work in collaboration with public authorities and statutory bodies to manage land as nature reserves and other areas where co-operation could be agreed.[[42]](#footnote-42) Some private organisations also co-operated where a case was made.[[43]](#footnote-43) Various forms of exchange started to emerge. Statutes made provision for voluntary agreements with owners whereby early forms of conservation covenants could be used to restrict uses of land.[[44]](#footnote-44) More direct co-operation arose where public bodies started to manage their own land as nature reserves or contributed to funds to acquire sites. This early use of varying degrees of formal and informal co-operation in managing sites reflected a pragmatic approach to seeking to influence land-owners without resorting to either purchasing their interest or otherwise unduly interfering with ownership rights. The corollary of this was that control over activities was limited and dependent upon the extent to which the owners and occupiers were sympathetic to managing land for nature conservation purposes. Experience with this type of co-operation was mixed.[[45]](#footnote-45)

Over time the pressure for regulatory intervention grew along with a perception that threats to the countryside generally and habitats in particular came from uses other than traditional ‘rural’ uses such as agriculture and forestry. Regulation, it was argued was needed to protect the countryside from increasing urbanisation.[[46]](#footnote-46) In response, over a period of nearly 20 years, a series of Government Committees and Reports made recommendations which led to the introduction of the National Parks and Countryside Act 1949. This Act was one piece of a three-piece jigsaw which underpinned the special protection which was afforded to farming in post-World War 2 Britain and which ultimately proved disastrous for habitats. The Agriculture Act 1947 promoted the policy aim of improving agricultural productivity through a stable market including guaranteed prices and a sustainable return on capital investment. At the same time, the Town and Country Planning Act 1947 excluded agricultural land use from the definition of development. The 1949 Act reinforced the ‘post-war farm settlement’ with a system that specifically did not seek to regulate the activities of farmers in terms of activities that could damage or harm important habitats.[[47]](#footnote-47)

**The National Parks and Countryside Act 1949 (1949-1981) – Custodianship**

This overview of the early evolution of modern history of nature conservation law provides some context for the on-going preference for voluntarism and why and how contract was to become the preferred legal instrument for facilitating co-operative relationships between regulators and owners and occupiers, as opposed to more traditional regulatory instruments. Whilst the importance of the inalienability of private property rights was also a major factor, the history of co-operation provided a pattern of established processes of negotiation and concluding agreements. Purchasing sites was a strategy but largely when there were existential threats from development and outright purchase was the only feasible option to protect a site. Voluntary groups and landowners had become accustomed to the idea that persuasion, negotiation and co-operation were more effective (and cheaper) long-term approaches to managing land.

The National Parks and Countryside Act 1949 had little traditional direct regulation but was a trigger for a nationwide process of identifying a representative selection of the country’s habitat-types and then classifying and designating them to highlight the semi-natural or natural features which made the land special. This comprehensive process of effectively nationalising and systematising what voluntary groups had started in creating a database of nationally important habitats was based around the designation of land into two categories; National Nature Reserves (NNR) and Sites of Special Scientific Interest (SSSI). The designation of SSSIs was not subject to any significant statutory control either directly through regulation or through co-operation under contract. This was not an oversight by the legislature. There was thought to be no need for even contractual obligations on SSSIs because there was an assumption that owners and occupiers would continue in the pre-existing role as ‘custodians of the countryside’. This socially constructed idea of implied stewardship was an important element of the preference for voluntarism in its purest form. The evidence that sites were under threat was, in the minds of those lobbying for change, clearly linked to external development proposals rather than the activities of owners and occupiers.[[48]](#footnote-48) The past reliance on various forms of co-operation under formal or informal agreements and strong social and cultural norms associated with custodianship did not suggest that there was a need for contractual relationship between the regulator and owners and occupiers of designated sites.

Accordingly, under the 1949 Act controls over SSSIs were aimed at preventing damage from activities which required planning permission.[[49]](#footnote-49) Notification of the site was sent to the local planning authority with the aim being that if a SSSI was threatened by development which required planning permission, the regulator would be consulted and make representations which would be considered when determining whether to grant permission.[[50]](#footnote-50) The problem was that for any activities which fell outside of planning control, the designation was merely an implicit sign for landowners to be aware of the features that mattered, but without any effective means to enforce the protection of those features. The word ‘implicit’ here is used specifically to highlight the point that, remarkably, the duty to notify the designation of a SSSI was only in respect of local planning authorities. There was no formal requirement to tell owners and occupiers. In a system based around voluntarism and custodianship, it was thought unnecessary for owners/occupiers to be made aware of special features or be made to take them into account when undertaking normal agricultural operations. In practice, regulators used informal methods of social exchange and persuasion based around self-restraint and the wider public interest.[[51]](#footnote-51) In other words, the methods adopted by voluntary organisations to some effect in the years before the introduction of the legislation were still prevalent after legislative intervention. As with pre-legislative voluntarism, there was little alternative to a reliance on custodianship, but in the absence of any formal relationship with owners and occupiers of SSSIs, it was not uncommon for damaging operations to be carried out without any direct knowledge (on the part of the owners or occupiers of the land) of the fact that the site had been notified to the local planning authority.[[52]](#footnote-52)

The use of contract was introduced in the 1949 Act but only to facilitate voluntarism on the most important national habitats. In addition to the SSSI designation process, the Act provided for the more selective designation of National Nature Reserves (NNR) which were considered to be the bare minimum of the very finest examples of national habitats – the crème de la crème as it were. In practice, there was a clear overlap between the designations with NNRs generally also being notified as SSSIs.[[53]](#footnote-53) NNRs were intended to be limited in number and to meet twin aims of conservation and scientific research.[[54]](#footnote-54) The key distinguishing operational feature of NNRs was (and continues to be) that the regulator, or the owner/occupiers managed them actively for nature conservation purposes.[[55]](#footnote-55) The regulator had the power to purchase or lease land with long-term control.[[56]](#footnote-56) Alternatively the regulator could enter into contractual agreements, known as nature reserve agreements that obliged owners/occupier to manage land as a Nature Reserve where it appeared to be ‘expedient in the national interest’.[[57]](#footnote-57) The baseline regulatory incentive to reach agreement was that the regulator had compulsory purchase powers in the case where recalcitrant owner/occupiers would not enter into an agreement or if there was breach of any conditions of an agreement. The evidence suggests, however, that these powers were seldom used, for the same reasons as the relatively small scale of acquisition of sites in forms of early voluntarism.[[58]](#footnote-58) Whilst the overarching aim was to acquire National Nature Reserves through negotiation rather than compulsory purchase, the regulator, like the private organisations before them, simply did not have sufficient cash reserves to purchase the large tracts of land identified, even on a voluntary basis.[[59]](#footnote-59) Moreover, compulsory powers were of little practical value without any alternative regulatory controls to prevent harm on NNRs during negotiations. As a consequence, this early form of the regulatory baseline had little reflexive relationship with contract formation. It was designed as a direct alternative to be used as a last resort and as an alternative only when negotiations had failed. Even then, in many circumstances, it was an unrealistic alternative – and owners knew this.[[60]](#footnote-60)

Throughout the 1960s, agricultural intensification, which was not subject to planning control and therefore fell outside the sort of threats to nature that were anticipated in 1949, started to take its toll on SSSIs and the wider countryside.[[61]](#footnote-61) The custodianship model of identification and designation of sites with negotiated management for the most important national sites and a reliance on the goodwill and informal agreements with owners and occupiers on SSSIs, was unequipped to address a rapidly developing sector where new techniques, technology and demand provided an incentive for owner/occupiers to pursue alternatives and eschew negotiated agreements with regulators.[[62]](#footnote-62) The ‘invisible hand’ of the market started to have a greater influence than the traditional social and cultural norms of custodianship. In particular on SSSIs, without any effective regulatory baseline, owners and occupiers of protected sites opted to maximise their utility in using sites for more profitable uses.

During this period, there were various attempts to identify and analyse the changing threats to the countryside from sources other than urbanisation.[[63]](#footnote-63) As a result, the implicit consensus that agricultural production and nature conservation values were not in tension and that custodianship and voluntarism could be an effective foundation for protection of sites was challenged. As early as 1964, a Private Members Bill was proposed to address the shortcomings of the Custodianship Model.[[64]](#footnote-64) Shortly thereafter a group reviewing nature conservation legislation recommended that the regulator have powers to enter into management agreements and to make payments to owners of SSSIs. The Countryside Act 1968, introduced a power for regulators to enter into management agreements with owners and occupiers of SSSIs.[[65]](#footnote-65) This had little discernible effect, primarily because the lack of properly reflexive regulatory baseline meant there was little incentive to conclude agreements.[[66]](#footnote-66)

This initial phase of statutory intervention in habitat protection is characterised as a model based upon custodianship because in truth it was very similar to what had gone before, with the only major difference being that it was regulators, rather than private individuals or groups, who represented the public interest when trying to secure the co-operation of land owners and occupiers when negotiating informal or formal management agreements. The creation of a rudimentary regulatory baseline in the case of statutory powers to purchase National Nature Reserves provided the first alternative in the case of a failure to co-operate, but in practice there was nothing to prevent harm to sites during negotiations. Whilst the theme of custodianship continued to dominate the discussions over policy, the ongoing harm and damage caused to notified sites saw calls for a more interventionist approach.[[67]](#footnote-67)

**1981 – 2000 The Wildlife and Countryside Act – negotiated partnership and the origins of relational regulation**

By the mid-1970s the issue of habitat protection was becoming increasingly politicised as the notion of a regulatory model based around purely voluntary custodianship with a rudimentary regulatory baseline continued to be questioned by conservation lobbying groups.[[68]](#footnote-68) A series of reports and reviews highlighted the issues arising from the intensification of agricultural production.[[69]](#footnote-69) The agricultural lobby, responded to these criticisms by continuing to stress the importance of relying on voluntarism and co-operation in terms of identifying feasible solutions to the issue of managing important habitats within the wider countryside.[[70]](#footnote-70) Critically, they saw that policy aim as being reflected in the continued use of private contracts and agreements, with the emphasis on the importance of consent and autonomy as being the best way of securing the benefits of positive land management.[[71]](#footnote-71)

When it was enacted, the Wildlife and Countryside Act 1981 introduced a modest version of protection for SSSIs. The underlying principles of voluntarism and consultation with local planning authorities to influence development decisions with the aim of protection against direct harm remained. There was a reluctance on the part of the legislature to move too far away from the fundamental approach of custodianship and voluntarism reflected in contract. Whilst the scheme under the Act did seek to address, for the first time, typical agricultural activities that might harm a site but did not require planning permission, there was still an absence of traditional direct regulatory controls.

Instead the Act focused on a ‘blank page’ approach with a refreshed duty placed upon the regulator to re-designate and re-notify all sites that met the criteria for selection before the sites could gain the increased protection available under those provisions and critically, for the first time to notify owners and occupiers of the site’s designation.[[72]](#footnote-72) The notification duty was designed to be a trigger for the regulator’s general power to negotiate management agreements under the Countryside Act 1968. The major difference in the 1981 Act was that there was now a power to at least postpone harmful activities during those negotiations. In this sense the Act was envisaged as providing a regulatory framework within which mutual duties of notification and consultation would foster a negotiated partnership between regulators and owners/occupiers.

The official notification sent to owners and occupiers included a list of ‘potentially damaging operations’ which in the regulator’s view could damage the special features of the site. These included many operations which would have been thought of as typical agricultural practices such as ploughing, the application of fertilisers or pesticides or alternations to grazing patterns on the land. These types of operations were, of course, the sort of ‘potentially’ damaging operations which had previously fallen outside of the regulatory scope of the 1949 Act because they were not the subject of planning control. It was also these very types of operations that had wreaked so much havoc and destruction.[[73]](#footnote-73) There was no specific prohibition on carrying out ‘potentially damaging operations’ (PDO), nor was there any requirement to undertake positive management activities. Instead the Act emphasised a reciprocal duty on owners and occupiers to notify the regulator of any intention to undertake any PDO with at least four months’ written notification.[[74]](#footnote-74) During this four month ‘cooling off’ period, the regulator could give consent for the PDO or to seek to persuade the owner/occupier to enter into a management agreement under which such operations could be varied or restricted.

It was hoped that where voluntary custodianship had failed, negotiated agreements within a clearer regulatory structure would provide more effective protection. Critically, however, there were limits on the regulatory baseline which limited the reflexivity in the relationship with contract. Once the four-month cooling off period had expired, if consent had not been given or a management agreement concluded there were no further prohibitions on undertaking the PDO. In the absence of consent or an agreement, all that the regulator could do was seek to continue the negotiations, hoping that co-operation could be maintained. On the other hand, all that was required from owner/occupiers was a little patience and stubbornness. In one of the most memorable judicial soundbites in environmental law, Lord Mustill referred to this process of statutorily structured negotiation as ‘toothless’.[[75]](#footnote-75) In its own way, however, the ‘toothlessness’ of the scheme represents a very basic form of relational regulation – buying time to secure co-operation – rather than responsive regulation which would involve direct intervention as an alternative to co-operation.

The Act provided a specific regulatory context within which negotiation and co-operation could be pursued but in a way which highlighted the primacy of consensual contract (and the significance of relational norms) as the principal instrument to achieve the policy aim of protecting sites. This ‘cooling off’ period was the first real legislative recognition of the need for an effective regulatory baseline against which co-operation through contract could be negotiated. The ‘tweaking’ of the existing powers to seek management agreements under the 1949 and 1968 Acts, reflected what the legislature thought was an imbalance between the need for co-operation fostered through custodianship and regulatory intervention when co-operation could not be secured.

Throughout the 1990s the ineffectiveness of the 1981 Act and the use of management agreements in safeguarding SSSIs was underlined in academic literature and official reports.[[76]](#footnote-76) In 1994, the National Audit Office published a report that concluded that “insufficient or inappropriate management [was] the main cause of deterioration on [SSSIs]” with as many as 800 sites being damaged.[[77]](#footnote-77) The main challenges came from the practical implications of implementing such a large scale exercise in securing negotiated agreements with approximately 23,000 owner/occupiers of what had then become over 3,700 notified SSSIs.[[78]](#footnote-78) Negotiations were often painfully slow and with the backdating of payments and interest, there was little incentive for owners/occupiers to agree terms on agreements lasting for 20 years. Costs had ballooned over a 10-year period.[[79]](#footnote-79) The whole process was overly complex and bureaucratic with high transaction costs. Moreover, for a system that relied heavily on relational norms over long periods, the relationships between the regulator and large numbers of owners and occupiers was poor. Remarkably, there was no database that contained the details of owners/occupiers. There was little evidence of regular monitoring to check compliance with agreements. Perhaps unsurprisingly evidence suggested that a significant proportion of the contracting owners/occupiers felt that their relationship with the regulator was “poor or non-existent”.[[80]](#footnote-80)

The experience of the first 10 years after the introduction of the 1981 Act highlights an important point about the significance of the relational aspects of relational regulation. The practical challenges and transaction costs of implementing a commitment to developing relational norms through an extensive network of individually negotiated contracts had been underestimated. What might have been anticipated to be a methodical process of formalising pre-existing arrangements was, in effect, an administrative process of agreeing individual licences for management activities with all the restrictions such an approach might suggest. Perhaps more importantly, without any effective regulatory baseline in case of no agreement, the negotiating power of the regulator was weak.

The process of negotiating individual contracts also underlined the relative importance of the relational dimensions of contract (eg co-operation and flexibility) in contrast to the consent involved in agreeing the technical requirements of performance obligations found in individually negotiated management agreements. Negotiating specific terms and conditions had an impact upon the way informal cooperation was secured. Protracted negotiations were more time consuming and challenging than relying on informal cooperation. The irony was it might have been expected that as contracts became more prevalent with greater application of specific obligations rather than vague notions of co-operation, the effectiveness of those obligations would improve. In practice, the process of specifying obligations in lengthy negotiations undermined even further the key features of trust and flexibility required to actively manage such sites.

The failure to nurture relational contract norms and the ‘toothlessness’ of the regulatory regime under the 1981 Act illustrates the importance of the reflexivity of the relationship between the two. Criticism of the Act tended to focus on either the ineffectiveness of the regulatory provisions *or* the impracticalities of negotiating a large network of individual contracts which relied heavily upon single negotiated agreements. Relational regulation would suggest that what was important was the lack of a truly dynamic relationship between the two. Although regulators had powers to delay activities whilst negotiations with owner/occupiers continued, there was no easily available ultimate power to override stubborn or uncooperative parties.[[81]](#footnote-81) The regulators were also unable to intervene where the deterioration of a site resulted from an omission to use positive management, or where owners or occupiers snubbed appeals for voluntary positive management. Co-operation in this context was not reinforced by the regulatory scheme, but narrowly constructed within a four-month cooling off period. In negotiation theory terms, in the absence of co-operation, the regulator had no practical alternative to a negotiated agreement. Whilst contract remained the main technique for securing co-operation, there was no clear link to a regulatory baseline which reinforced the need for co-operation.

**Post 2000 – Countryside and Rights of Way Act 2000 – regulated partnership and relational regulation realised**

The weaknesses in the 1981 Act and the realisation of a fully functioning system of relational regulation were finally addressed in the Countryside and Rights of Way Act 2000. This Act introduced a clear and structured regulatory baseline as an alternative to voluntary agreement alongside clearer powers to refuse consent for harmful activities. The regulatory structure did, however, reinforce the importance of co-operation and agreement through effectively mirroring what could be done in contract under a management agreement with a regulatory equivalent, a management scheme.[[82]](#footnote-82) The Act sought to retain essential elements of relational norms through the continued reliance on management agreements in the traditional sense, albeit with a clear alternative which represented a reasonable but unilateral version of what could not be agreed between the parties. The 2000 Act amended the 1981 Act so that for the first time regulators could use regulation to prevent harmful or damaging operations from being undertaken *and* to secure the use of positive management obligations. The amendments were subtle but significant with the default position being a refusal of consent rather than a non-determination.[[83]](#footnote-83) This shift ended the ‘cooling off period’ under the 1981 Act. Under the amendments, potentially damaging operations can only be carried out, therefore, if the regulator consents, or if the work is carried out under a management agreement or management scheme, and it is an offence, subject to a fine, to cause or permit an operation requiring consent to be carried out without it.[[84]](#footnote-84)

In addition to preventative mechanisms, the 2000 Act also changed the way in which positive management of sites can be secured – moving away from relying entirely on negotiated co-operation towards an approach of where positive management can be mandated. In this form of ‘regulated partnership’ the regulator has the power to formulate a ‘management scheme’ for conserving or restoring the special features of the site. There is a formal consultation period of three months after which the scheme is served on every owner/occupier and a further nine months in which the regulator can decide whether the scheme will take effect.[[85]](#footnote-85) This period is designed to allow for modifications purely to reduce the severity of any performance obligations.[[86]](#footnote-86) The regulator has a power to directly enforce the terms of a management scheme through the service of a ‘management notice’ to require reasonable measures to ensure compliance.[[87]](#footnote-87) Failure to comply with a management notice is a criminal offence or, where appropriate, the regulator can undertake the management works and recover the costs of doing so from the owner/occupier.[[88]](#footnote-88)

The introduction of regulatory management schemes did not replace the use of consensual management agreements, but provided a different context for negotiation and co-operation. Contracts have not been replaced by regulation but the dynamic of power relationships within which agreements are negotiated and concluded has been altered. There are now parallel routes to secure co-operation, foster relational norms and promote positive management. The first, as before through contract, under private management agreements and the other using direct management schemes that are designed to achieve the same purposes as those under a negotiated agreement – no more, no less. Although the use of management *notices* signals a clearer intent to use coercive tools, the legislature’s commitment to the voluntary principle and the use of management agreements is reflected in the fact that a management notice cannot be served unless the regulator is satisfied that they are unable to reach a reasonable agreement with the owner/occupier. [[89]](#footnote-89)

The move towards greater regulation in the 2000 Act has been termed the ‘demise of voluntary controls.’[[90]](#footnote-90) An alternative view is that the legislature sought to reinforce the use of contract as a means of securing co-operation rather than replace it with a regulatory alternative. The amendments to the 1981 Act represented a significant shift towards a clearer defined regulatory baseline which recalibrated the negotiating power of the regulator whilst reinforcing the reflexive relationship between contract and regulation. Instead of simply providing a way of forcing compliance, however, the legislative scheme provided a parallel regulatory process for defining what general obligations would be required under a negotiated management agreement. Far from the death of voluntarism, the 2000 Act illustrates that contract is alive and kicking – realised through a clearer relationship between contract and the regulatory baseline as seen in relational regulation.

**Threats to relational regulation – the growth of standard form contracting under agri-environment schemes**

At this stage of the story of the legislative evolution of relational regulation we should take a slight detour to consider the overlapping role of contracts that incentivize environmentally sustainable farming practices in the wider countryside (including SSSIs and other designated sites). Although these strictly fall outside the confines of the legislation dealing with protection and management of designated habitats, there is a clear link between the growth in the use of these contracts and the development (or otherwise) of relational norms nurtured through individual management agreements under relational regulation. First piloted in 1991, the introduction of the Countryside Stewardship Scheme involved the use of standard form contracts under agri-environment schemes in the wider countryside.[[91]](#footnote-91) Since that time, a series of successor schemes have meant that whilst in theory, individual management agreements are still the cornerstone of the regulatory controls, in practice they sit within a mosaic of other contracts.[[92]](#footnote-92)

Following reforms of the Common Agricultural Policy (CAP), these schemes provide grants and subsidies to owners and occupiers of agricultural land, including SSSIs to undertake environmentally sustainable farming practices which might complement or supplement activities under a management agreement. These involve payments made to owners/occupiers following an annual application process. Payment of the grant is conditional upon meeting performance obligations by following environmental practices, known as cross-compliance.[[93]](#footnote-93) The general integration of such schemes that can cover non-designated *and* designated land, has resulted in a switch in emphasis away from individually negotiated management agreements.

How do these agri-environment grants operate in terms of contract? In contrast to management agreements, which rely heavily on individual negotiation, these schemes are general, with the contracting more akin to licensing or franchising rather than a process designed to promote co-operation and flexibility between the parties. There is an annual application process triggered within a defined window. Whilst there is some provision for technical assistance in completing the application, there is no active negotiation over terms between the parties and there is little scope for variation or flexibility (although certain schemes can be subject to bespoke conditions where appropriate). In practice the process is aimed at achieving administrative efficiency rather than developing relational norms through contract.[[94]](#footnote-94)

The use of these standard form contracts to specify performance obligations when managing both protected habitats and the wider countryside, challenges the model of relational regulation. The reflexivity of contracts ‘works best when the parties negotiate the terms of the contract’.[[95]](#footnote-95) These contracts by contrast typically only refer to the regulator’s expectations and there is little scope for further negotiation. Accordingly, in terms of the contractual relationship between regulator and owner/occupiers, the use of such a general process does not support the development of long-term relational norms or a sense of co-operation or shared responsibility. This is reflected in widespread criticism of the application process and associated outcomes as being overly bureaucratic, inefficient, inflexible, having ambiguous performance obligations whilst being too onerous in terms of record-keeping and slow in making payments.[[96]](#footnote-96) The evidence suggests that these schemes are unpopular with owners and occupiers, not only because they are overly complex, but also because there was no flexibility to ensure different environmental benefits across different landscapes and areas.[[97]](#footnote-97)

The use of standard form contracts under agri-environment schemes has arguably had a chilling effect on relational norms which would otherwise be fostered within individual management agreements. In turn, this has had the effect of undermining the potential of relational regulation in terms of securing longer term relational norms through individual management agreements. Following the introduction of a more effective regulatory baseline in the 2000 Act, the parallel use of agri-environment schemes emphasized administrative efficiency and low transaction costs in contrast to individual management agreements. Whilst management agreements have not been phased out, the overall context for negotiation has shifted from individual, bespoke obligations to a more general and standardized process. This approach has meant that the potential of relational regulation and the effectiveness of relational contract norms in securing co-operation has yet to be fully recognized.

**III. CONTRACTS AND EFFECTIVE RELATIONAL REGULATION**

The use of management agreements has been the cornerstone of the guiding voluntary principle throughout the history of nature conservation law. The idea that contract provides the most effective means of promoting cooperation is hardly controversial. The voluntary principle has had such a strong influence over domestic law and policy precisely because seeking to impose mandatory positive management obligations on large numbers of owners and occupiers of important sites across the country would be impracticable and likely to fail. The early history of nature conservation legislation also tells us that a reliance on trust and custodianship without clear means of securing that trust was equally unfeasible.

I have sought to illustrate how the legislature has provided a statutory context within which a consensual and cooperative agreement can be reached. It is this contextual element that highlights the significance of the relationship between the regulatory baseline and the process of negotiating the voluntary agreement. The provision of a formal period within which negotiation can take place, an agreement reached, and co-operation secured, exists generally in parallel to the powers to impose a mandatory management scheme, that meets the same purposes as those secured under a negotiated agreement.

But what of the effectiveness of relational regulation? The historical data gathered before and after the introduction of the 1981 Act provides a stark aggregated picture of habitats and species loss.[[98]](#footnote-98) Over the period since the introduction of habitat protection legislation the combination of agricultural intensification, forestry and urbanisation has devastated large parts of the English (and British) countryside. Dip into any dataset on nature and you will find remarkable figures of destruction and loss.[[99]](#footnote-99) Unfortunately, it would be flying in the face of all the evidence to suggest that either the initial approach of voluntarism through contract *or* the development of a more reflexive relationship between contract and a clear regulatory baseline has provided an effective response to the need for active management of protected habitats. I have provided some reasons for continued ineffectiveness. The model of negotiated partnership in the 1981 Act failed largely because there was no effective regulatory baseline. The introduction of regulated partnership in the 2000 Act provided a firmer context within which to conclude individual negotiations but this was undermined by the growth of standard form contracts which did not provide the necessary level of reflexivity or reinforce essential relational norms. It is an over simplification to say that these are the only factors at play but in these circumstances, it is at least arguable that the true potential for relational regulation has never been fully realized.

Nevertheless, the reflexive relationship between contract and regulation remains at the heart of a pragmatic approach to managing large areas of land in private ownership. This does, however, beg questions of the effectiveness of relational regulation and how the potential for contract can be better realized. What might optimal relational regulation look like? Certainly, the potential for relational contract norms in other areas of government by contract is not particularly encouraging. At the most pessimistic end of the spectrum, David Campbell has argued that the attempt to build relational contract norms into public contracting is misconceived because voluntarism in the regulatory context is a charade and true relational norms only exist in exchange between private parties in properly established markets.[[100]](#footnote-100) Peter Vincent-Jones’ work on the ‘New Public Contracting’ is slightly more positive in highlighting the role that relational norms have played in ‘social control’ contracts.[[101]](#footnote-101) He concluded that social control contracts were ineffective in meeting policy aims because relational norms could not be fostered in these particular contexts for three reasons.[[102]](#footnote-102) First, in practice, there was a lack of flexibility and ability to adjust to changing circumstances. Second, the essential norm of reciprocity in the contractual arrangements was absent because a lack of state/regulator resources meant that individuals’ needs could not be met. In turn this undermined trust between the parties. Finally, there was no true consent on the part of the individuals because the policy aims had not been the subject of deliberation or consultation on the part of those affected. This analysis did not preclude Vincent-Jones from suggesting an optimistic prescription for more effective relational social control contracts involving greater deliberation and public involvement in the policy aims of ‘government by contract’ and the growth of reflexive governance in hybrid public/private social learning organisations.[[103]](#footnote-103)

This last point suggests that the core of any future approach to relational regulation would focus on broadening out the network of relationships beyond the contracting parties when trying to blend the regulatory and contractual aspects in an increasingly reflexive governance system based on shared responsibility and trust. The historical development of relational regulation and the involvement of state regulators, private owners and occupiers and a range of voluntary organisations highlights the extent to which the overall management of important habitats and the wider countryside makes sense when this network of actors is considered as a single entity working together as a hybrid organisation where the state ‘shares responsibilities for the…performance of public functions with a range of private and non-profit entities.’[[104]](#footnote-104) Certainly, there is general recognition that much more could be done at the local level to establish more effective collaborations between owners and occupiers of land, NGOs and regulatory and other government agencies.[[105]](#footnote-105)

The idea that this responsibility is shared rather than traded or exchanged against a backdrop of regulation opens up the possibility of a broader, integrated system of reflexive environmental governance where social learning, adaptive regulation and deliberative problem-solving characterise relational regulation and the relationship between contract norms and an effective regulatory baseline.[[106]](#footnote-106) Contracts still provide the reflexivity required to promote the flexibility, experimentation and adaptability required to address complexity but there must be a greater reliance on the role that social learning plays in guiding expectations on performance.[[107]](#footnote-107) Social learning in this context refers to the idea that difficult governance issues such as occur in managing habitats, require institutional frameworks which encourage reflexive techniques involving communication, deliberation, experimentation, and the consequent modification of regulation and contract in the light of experience. True relational regulation recognises that the process of reinforcing relational norms must take place within both the contractual and regulatory contexts as part of shared responsibility.

Social learning occurs across the full range of interested parties, as opposed to the essentially bilateral, discrete arrangements that exist in both regulation and contractual exchange. Social learning in hybrid organisations would, for example, see greater involvement from third party consumers who benefit from the ecosystem services provided by the habitats themselves, including the public. This would facilitate a greater understanding of the role that the public interest should play in what might become a more marketized system. In the context of a social learning hybrid organisation, a system of exchange based upon full ecosystem service provision could involve a wider range of parties who benefit from those services, incentivise experimentation and provide resources and investment in more ambitious management schemes regulated through a combination of adaptive management processes and strongly reinforced relational norms in management agreements. In this way contract would still play a central role within this process of social learning and adaptation because contract remains the optimum way to reflect changing expectations whilst fostering relational norms including trust, co-operation and good faith between networks of parties with a common but differentiated interest. Relational regulation differs from pure contract in that the enforcement of a negotiated consensus will always be underpinned not by reference to the courts but by reference to a regulatory baseline – but only to the extent that would be reflected in a reasonable agreement.

**IV CONCLUSION**

In this chapter I have identified the distinctive role played by contract to date in managing protected habitats. In doing so I have argued that it is the relationship between contract and the regulatory baseline which matters most, because relational regulation can nurture relational norms which are essential to secure cooperation and meet complex policy goals. This works best however when there is a clear regulatory default which can provide a context for negotiation and co-operation. The nature of cooperation secured under contract when agreed against a default regulatory baseline is essential to balance out the power of the parties involved and reflect that equality to secure positive long-term obligations to manage land in circumstances which require adaptability and flexibility. The legislature has recognised this through a consistent commitment to the use of contract as the operative means of securing cooperation over the development of legislation that has regulated habitat management and protection.

It is timely to reappraise the role of contracts in habitat protection. There is a growing interest in promoting the ‘privatisation’ of biodiversity[[108]](#footnote-108) alongside the gradual introduction of more complex methodologies that seek to identify and commoditise nature in terms of capital[[109]](#footnote-109) and ecosystem services.[[110]](#footnote-110) In this way, we can see the potentially alluring prospect of economic exchange through contracts for nature as a normal component of broader commercial and economic systems, involving a wider range of actors than traditional regulators and regulated.[[111]](#footnote-111) The introduction of new concepts for managing biodiversity such as conservation covenants,[[112]](#footnote-112) compensatory habitat creation[[113]](#footnote-113) and banking and contracts for ecosystem services[[114]](#footnote-114) all make use of contracts in some form or other. Relational regulation suggests that we should be wary of introducing fully private systems without giving some thought to the extent that a reflexive relationship with a regulatory baseline might reinforce the development of important relational norms.

In addition, the current legislative and policy framework dealing with the management of land in the countryside, is about to undergo a significant change following the UK leaving the European Union. There is an opportunity to reconsider the design of agricultural and environmental policy in the countryside. The publication of a new Agriculture Bill makes no provision for direct changes to the default regulatory scheme for SSSIs, but the departure from the CAP will provide new powers to give financial assistance to agriculture based upon a version of contractual exchange for ecosystem services – termed ‘paying public money for public goods’.[[115]](#footnote-115) As currently drafted, the powers are broad and lacking in detail but this appears to stop some way short of a broader form of payment for ecosystem services where direct beneficiaries and third parties may participate in the contractual arrangements, but still places economic value on the provision of services as opposed to the management activities undertaken on land or profits forgone in not undertaking activities. The ’public payment’ subject to exchange may cover payments for management activities that benefit public goods such as environmental protection (presumably including managing SSSIs), public access to the countryside and measures to reduce climate change. Taking a broad approach to relational regulation offers a new opportunity to move towards a truly collaborative model that continues to rely on the existing model of regulatory baseline in the absence of contractual agreement but provides greater potential for relational norms and mutual responsibility through a hybrid organisation based upon problem solving, experimentation and social learning.

The development of the legislation on habitat protection, past, present and future tells us that the reflexivity of contract has always offered something distinctive in environmental regulation, even if the full potential of this reflexive relationship has not necessarily been fully recognized. Contracts also offer a chance to develop relational norms that cannot be replicated in regulation. These norms are becoming increasingly important when we look to further develop concepts of shared responsibility, adaptation and experimentation to address highly complex environmental challenges such as those found in enhancing biodiversity.

1. \* Professor of Law, York Law School, University of York [↑](#footnote-ref-1)
2. M Freedland, ‘Government by Contract and Public Law’ [1994] PL 86; Hugh Collins, *Regulating Contracts* (Oxford, OUP, 1999) Ch.13 [↑](#footnote-ref-2)
3. E. Fisher, B. Lange and E. Scotford, Environmental Law, Text, Cases and Materials (Oxford, OUP, 2009) Ch. 1 [↑](#footnote-ref-3)
4. eg S. Bell and others, Environmental Law (9th Ed., Oxford, OUP, 2017) p.327 [↑](#footnote-ref-4)
5. ‘Relational norms’ refers to the development of norms outside or as an alternative to the express terms of a contract. These norms reflect behavioural patterns seen typically in exchanges where the need for cooperation and sharing of burdens and benefits is a response to the ‘incompleteness’ of contractual terms – particularly in long-term agreements. The original identification and analysis of these norms is most associated with the work of Ian Macneil. He identified ten such ‘common contract norms’: role integrity, reciprocity, implementation of planning; effectuation of consent; flexibility; contractual solidarity, restitution, reliance and expectation interests; creation and restraint of power; proprietary of means; and harmonisation with the social matrix, see I. Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001) p.367 [↑](#footnote-ref-5)
6. See for a general discussion of the use of contracts as a regulatory instrument in environmental regulation, E. Orts and K. Deketelaere (Eds) *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe,* (London, Kluwer, 2001) [↑](#footnote-ref-6)
7. See in relation to the complexity of managing nature conservation sites generally, C. Reid and W. Nsoh *The Privatisation of Biodiversity? New Approaches to Conservation Law* (Cheltenham, Edward Elgar, 2016) Ch. 2 [↑](#footnote-ref-7)
8. see H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 2002) p.3min which the centrality of trust in social relations and the role that contract plays in maintaining that trust is explored. [↑](#footnote-ref-8)
9. The role of voluntarism as a regulatory technique in the agricultural sector is considered in N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford, Clarendon Press 1998) pp.300-307 [↑](#footnote-ref-9)
10. More typically the regulatory regime is considered in the context of theories of resource allocation and property rights i.e. the tension between the private and human ownership of land and the public interest in protecting the positive attributes of the habitat concerned see e.g., C. Rodgers, ‘Nature’s Place? Property Rights, Property Rules and Environmental Stewardship’ (2009) 68 CLJ 550 [↑](#footnote-ref-10)
11. For the role of responsive regulation in securing optimum regulatory compliance, see I. Ayres and J. Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, OUP, 1992) [↑](#footnote-ref-11)
12. P. Marren *Nature Conservation: A Review of the Conservation of Wildlife in Britain 1950-2001* (London, Harper Collins, 2001) [↑](#footnote-ref-12)
13. K. Last, ‘Mechanism for Environmental Regulation- A Study of Habitat Conservation’ in A. Ross (ed.) *Environment and Regulation* (Hulme Papers on Public Policy Vol. 8) (Edinburgh, Edinburgh University Press, 2000) [↑](#footnote-ref-13)
14. For detailed coverage of the operation of management agreements in their statutory context see, e.g. C. Rodgers, The Law of Nature Conservation, (Oxford, Oxford University Press, 2013), Ch.4 and C. Rodgers, “Land Management Agreements and Agricultural Practice: towards an integrated legal framework for conservation law” in W. Howarth and C. Rodgers (Eds) *Agriculture, Conservation and Land Use: Law and Policy Issues for Rural Areas* (Aberystwyth: University of Wales Press, 1992). [↑](#footnote-ref-14)
15. The power to enter into agreements range from specific designations of land such as Sites of Special Scientific Interest and National Nature Reserves to broader purposive powers eg under the Natural Environment and Rural Communities Act 2006, s.7, see further, C. Rodgers, n.14 pp.112-116. In this chapter the reference to ‘designated site’ covers Sites of Special Scientific Interest in England unless specified differently [↑](#footnote-ref-15)
16. See Department of the Environment, Transport and the Regions *Guidelines on Management Agreement Payments and other related matters* (DETR, 2001) at http://adlib.everysite.co.uk/resources/000/076/894/DEFRA\_SSSI\_code\_financial\_guidelines.pdf [↑](#footnote-ref-16)
17. Generally, the statute provides a power rather than a duty to offer an agreement, see Countryside Act 1968, s.15 and National Parks and Countryside Act 1949, s.16 for the powers to offer agreements in SSSIs and NNRs respectively [↑](#footnote-ref-17)
18. There is a requirement to offer an agreement on reasonable terms before the regulator can serve a management notice or exercise powers of compulsory purchase. The regulator is obliged to make a payment when an owner or occupier suffers loss because either an existing regulatory consent is withdrawn or modified, Wildlife and Countryside Act 1981 s. 28M; or as a result of a stop notice being served under Countryside and Rights of Way Act 2000 Sch. 11 [↑](#footnote-ref-18)
19. see s. 28K and 28N of the 1981 Act, s.17 of the 1949 Act or s.15A of the Countryside Act 1949 [↑](#footnote-ref-19)
20. S. Ball, “Reforming the Law of Habitat Protection” in C. Rodgers, *Nature Conservation and Countryside Law* (Cardiff: University of Wales Press, 1996), p.93 [↑](#footnote-ref-20)
21. *Guidelines on Management Agreement* (n.17)Ch. 3 [↑](#footnote-ref-21)
22. Historically this was on the basis of an annual payment reflecting ‘net profits foregone’ or, less commonly a single payment to represent the difference in capital value with or without the terms of the agreement see: *Wildlife and Countryside Act 1981 – Financial Guidelines for Management Agreements*: Department of the Environment Circular 04/83. [↑](#footnote-ref-22)
23. For example, where additional grazing animals are needed to achieve an appropriate level of grass management, a calculation of the net costs after considering any incidental benefits will be reflected in the annual payments under the contract see *Guidelines* *on Management Agreements*, (n.17), para. 3.7 [↑](#footnote-ref-23)
24. Wildlife and Countryside Act 1981, ss.28M(4) and 50(3) [↑](#footnote-ref-24)
25. See *Guidelines on Management Agreement Payments* (n.17), Ch. 6 [↑](#footnote-ref-25)
26. J. Francis, “Nature Conservation and the Voluntary Principle’ (1994) 3(3) *Environmental Values* p.267 [↑](#footnote-ref-26)
27. M. Winter, “Agriculture and Environment: The Integration of Policy” (1991) (18(1*) Journal of Law and Society* p.48 [↑](#footnote-ref-27)
28. M. Winter (n.30), p.58 [↑](#footnote-ref-28)
29. See generally on the role of public contracting P. Vincent-Jones, *The New Public Contracting, Regulation, Responsiveness*, *Relationality* (Oxford: Oxford University Press, 2006) [↑](#footnote-ref-29)
30. See the Wildlife and Countryside Act 1981, ss.28J and 28M [↑](#footnote-ref-30)
31. For a broader coverage of the pervasive issues which arise when considering public or private mechanisms for managing nature conservation see C. Reid and W. Nsoh *The Privatisation of Biodiversity: New Approaches to Conservation Law* (Edward Elgar, 2016) Ch.2 [↑](#footnote-ref-31)
32. A. Clewell and J. Aronson, “Motivations for the Restoration of Ecosystems” (2006) 20(2) *Conservation Biology* 420 [↑](#footnote-ref-32)
33. For an example of a standard form contract template see DEFRA, Countryside Stewardship Higher Tier Manual, Annex 1 [↑](#footnote-ref-33)
34. I. Macneil ‘Relational Contract Theory as Sociology: A Reply to Professors Lindenburg and Vos’ (1987) 143(2) JITE 275) [↑](#footnote-ref-34)
35. Recent pilot projects have experimented with results-based payments see, Natural England Joint Publication JP031, *Piloting Results-based Payment for agri-environmet schemes in England*’ [↑](#footnote-ref-35)
36. e.g. the Habitats Directive 92/43/EEC highlights the importance of connectivity with the aim of providing a ‘coherent ecological network of protected sites’ (see preamble para. 10). National legislation also provides Regulators with a power to offer management agreements to the owners and occupiers of ‘other land’ outside a SSSI, if this would be necessary to protect the features of the SSSI itself, see Countryside and Rights of Way Act 2000, s.75(3) amending s.15(2) of the Countryside Act 1968. [↑](#footnote-ref-36)
37. J.S. Johnston, “The Law and Economics of Environmental Contracts” in E. Orts and K. Deketelaere (Eds) *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe,* (London, Kluwer, 2001) p. 286 [↑](#footnote-ref-37)
38. I. Ayres and J. Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, OUP, 1992) [↑](#footnote-ref-38)
39. See further J. Sheail, *Nature in Trust* (Glasgow: Blackie and Son, 1976) Ch. 2-4 and W. Adams *Future Nature* (Rev. Ed. London: Earthscan, 2003) Ch. 2-3 [↑](#footnote-ref-39)
40. See M. Cocker, *Our Place: Can we Save Britain’s Wildlife Before It Is Too Late* (London: Jonathan Cape, 2018) Ch. 3-4 [↑](#footnote-ref-40)
41. J. Sheail, n.44, p.48 [↑](#footnote-ref-41)
42. Examples include railway companies using management techniques of railway embankments and cuttings and Eton and Winchester Schools creating water-meadows. J. Sheail (n.44) pp.179-180, [↑](#footnote-ref-42)
43. Eg in 1932, the RSPB persuaded various Railway Companies to delay the cutting or burning of grass on embankments and cuttings until breeding seasons had finished, see J. Sheail (n44), p.181 [↑](#footnote-ref-43)
44. Town and Country Planning Act 1932, s.34 for local authorities. The National Trust were given similar powers under the National Trust Act 1937, s.8 [↑](#footnote-ref-44)
45. For example, a vendor who cooperated with the sale of a protected reserve in Kent, used the proceeds to purchase adjoining land and proceeded to breach a covenant by converting an existing right of way into a road, thereby destroying the purpose of the original reserve, see J Sheail (n.44), p.176. [↑](#footnote-ref-45)
46. J. Sheail, (n.44), Ch.4 [↑](#footnote-ref-46)
47. M. Winter *Rural Politics – Policies for agriculture, forestry, and the environment* (London, Routledge, 1996), p.104 [↑](#footnote-ref-47)
48. P. Lowe and others, *Countryside Conflicts: The politics of farming, forestry and conservation,* (Aldershot: Gower Publishing, 1986) 47-92 [↑](#footnote-ref-48)
49. National Parks and Access to the Countryside Act 1949, s.12 [↑](#footnote-ref-49)
50. Ibid. s.14(1) [↑](#footnote-ref-50)
51. W. Adams, *Nature’s Place: Conservation sites and countryside change* (London; Allen & Unwin, 1986) pp.147-149 [↑](#footnote-ref-51)
52. D. Withington and W. Jones, :The Enforcement of Conservation Legislation: protecting Sites of Special Scientific Interest in W. Howarth and C. Rodgers (Eds) (n. 14) p.91 [↑](#footnote-ref-52)
53. Complete overlap was not formalised until the 1981 Act Ibid, p.92 [↑](#footnote-ref-53)
54. W. Adams (n.57), p.151 [↑](#footnote-ref-54)
55. Ibid. p.78-9 [↑](#footnote-ref-55)
56. National Parks and Access to the Countryside Act 1949, s.14 [↑](#footnote-ref-56)
57. Ibid. s.15 [↑](#footnote-ref-57)
58. S. Ball (n.21), p.93 [↑](#footnote-ref-58)
59. W. Adams (n.57), p.78 [↑](#footnote-ref-59)
60. Ibid. p.81 [↑](#footnote-ref-60)
61. For example, in the early 1960s 15 out of 27 of Wiltshire’s SSSIs were destroyed through the basic ploughing of chalk downland, leaving ‘a vast barley prairie, whose monotony is relieved only by barbed wire fences and oil stores’, see M. Shoard, *The Theft of the Countryside* (London: Temple Smith, 1981), p.70 [↑](#footnote-ref-61)
62. P. Lowe and others (n.54), Ch.3 [↑](#footnote-ref-62)
63. From 1963 onwards, a series of conferences, ‘Countryside in 1970’ met with the aim of attempting to resolve the emerging conflict between intensified agricultural techniques and habitat protection, see W. Adams (n. 57) p.76-7 and M. Shoard, *This Land is Our Land: The struggle for Britain’s countryside* (London: Gaia Books, 1997) p.369-370 [↑](#footnote-ref-63)
64. W. Adams (n.57), p.173 [↑](#footnote-ref-64)
65. Countryside Act 1968, s.15 [↑](#footnote-ref-65)
66. Only 70 Agreements were concluded between 1968 and 1981, covering 2000 hectares of land and costing only £25,000, see W. Adams, *Future Nature: a vision for conservation* (London: Earthscan, 2003), p.39 [↑](#footnote-ref-66)
67. Nature Conservancy Council, *Nature conservation and agriculture* (HMSO, 1977) [↑](#footnote-ref-67)
68. eg see the lobbying activity during the consultation phase for the Wildlife and Countryside Bill in 1979, see P. Lowe and others (n.54) Ch.6 [↑](#footnote-ref-68)
69. eg see a series of papers published by the Countryside Review Committee between 1976-9 starting with *The countryside: problems and policies* and Nature Conservancy Council (n.73). [↑](#footnote-ref-69)
70. P. Lowe and others (n.54), p.101 [↑](#footnote-ref-70)
71. Ibid. 102 [↑](#footnote-ref-71)
72. Renotification was a highly complex and bureaucratic process that took many years to complete including numerous statutory amendments to close loopholes, by March 1990, 97% of SSSIs had been notified or renotified see W. Adams (n.44), p.38 [↑](#footnote-ref-72)
73. M. Shoard (n.69), pp.371-377 [↑](#footnote-ref-73)
74. Wildlife Countryside Act 1981, s.28(x) [↑](#footnote-ref-74)
75. *Southern Water Authority v Nature Conservancy Council* [1992] 3 All ER 48 at p 484. [↑](#footnote-ref-75)
76. These criticisms were often cast in the context of potential non-compliance with European legislation on habitats protection under the Wild Birds and Habitats Directives (79/409/EEC and 92/43/EC respectively) see eg S. Ball (n.21), I. Brotherton, “SSSIs: betting on a busted flush?” (1994) 15(2) *ECOS* 33, RSPB, *SSSIs in the 1990s: a check on the health of internationally important bird areas* (Sandy: RSPB, 1992) [↑](#footnote-ref-76)
77. National Audit Office *Protecting and Managing Sites of Special Scientific Interest* (London: HMSO, 1994) [↑](#footnote-ref-77)
78. Ibid. para. 1.8 [↑](#footnote-ref-78)
79. Ibid. para. 3.10, costs of management agreements rose from £0.3 million in 1983-4 to over £7 million in 1992-93 [↑](#footnote-ref-79)
80. Ibid. para. 3.2 and 50% of owners having no contact with the regulator over any 12-month period [↑](#footnote-ref-80)
81. Whilst they could issue an order under s.29 of the 1981 Act to delay activities, this only had temporary effect. In addition, negotiating management agreements was often aimed at preventing harmful activities rather than cases where positive management was required either to address neglect of land or to initiative management [↑](#footnote-ref-81)
82. the 2000 Act amends the Wildlife and Countryside Act 1981, see s.28J [↑](#footnote-ref-82)
83. Note that there is a right of appeal against refusal, Wildlife and Countryside Act 1981, s.28F [↑](#footnote-ref-83)
84. Wildlife and Countryside Act, s.28P(1) [↑](#footnote-ref-84)
85. Wildlife and Countryside Act 1981, s.28J(6) and (9) respectively [↑](#footnote-ref-85)
86. Ibid. s.28J(10) [↑](#footnote-ref-86)
87. Ibid s.28(K) - again note the right of appeal under s.28L [↑](#footnote-ref-87)
88. Ibid. s. 28P(8) and s.28K(7) respectively [↑](#footnote-ref-88)
89. Ibid. s.28(k)(2) [↑](#footnote-ref-89)
90. J. Holder and M. Lee, *Environmental Protection, Law and Policy: Text and Materials* (Cambridge:CUP 2007) p.625 [↑](#footnote-ref-90)
91. see eg the Countryside Stewardship Regulations 2000, SI 2000/3048. In general, payments made in relation to a SSSI management scheme cannot be duplicated under other schemes, but in practice different activities may be eligible for payment under different schemes on the same land. [↑](#footnote-ref-91)
92. For a good example of how the contracts overlap and work together see the case of SSSI management on Scafell Pikes SSSI in C. Rodgers (n.14) p.135 [↑](#footnote-ref-92)
93. M. Cardwell, *The European Model of Agriculture* (Oxford: OUP, 2004) pp.227-34 [↑](#footnote-ref-93)
94. The administrative and procedural nature of the process of applying for and being given an agreement can be seen in the complex and lengthy manual which acts a a guide for ‘applicants’, eg see Natural England, *Higher Level Stewardship, Environmental Stewardship Handbook* (4th ed.) (Natural England, 2013) available at www.publications.naturalengland.org.uk/publication/2827091 [↑](#footnote-ref-94)
95. H. Collins (n.1), p.67 [↑](#footnote-ref-95)
96. DEFRA, *Health and Harmony: the future for food, farming and the environment in a Green Brexit – Summary of responses* (DEFRA, 2018), Ch.2 [↑](#footnote-ref-96)
97. Ibid. [↑](#footnote-ref-97)
98. E.g. State of Nature Partnership, *State of Nature 2019* available at nbn.org.uk/wp-content/uploads/2019/09/State-of-Nature-2019-UK-full-report.pdf [↑](#footnote-ref-98)
99. Statistics in the *State of Nature 2019* suggest that the quantity and distribution of UK flora and fauna has declined since 1970 and this has continued into the last decade. [↑](#footnote-ref-99)
100. For a sustained normative critique of the type of public/private hybrids such as I have argued is seen in Relational Regulation see, D. Campbell, “Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones” (2007) 14(2) Ind. J. Global Leg. Stud. 279. The historical failure of the reflexive relationship between the legislative baseline and contract arguably supports Campbell’s views. The central argument in this chapter is that the prospect of relational regulation properly realised is the ‘least worst’ option for attaining complex policy goals such as the effective management of biodiversity. [↑](#footnote-ref-100)
101. P. Vincent-Jones (n.32), Ch.9 [↑](#footnote-ref-101)
102. Ibid. Ch.11 [↑](#footnote-ref-102)
103. P. Vincent-Jones, “Relational Contract and Social Learning in Hybrid Organization”, in D. Campbell, L. Mulcahy and S. Wheeler (Eds) *Changing Concepts of Contract: Essays in Honour of Ian MacNeil* (London: Palgrave Macmillan, 2013) [↑](#footnote-ref-103)
104. Ibid. p.216 [↑](#footnote-ref-104)
105. For a historical perspective on the role of networks in maintaining the voluntary principle see. G. Cox, P. Lowe and M. Winter, *The Voluntary Principle in Conservation: The Farming and Wildlife Advisory Group* (Chichester: Packard Publishing, 1990). For a forward-looking role of enhanced network collaboration see DEFRA (n.110), p.60. [↑](#footnote-ref-105)
106. For the potential of a problem-solving to environmental challenges see J. Steele, “Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach (2001) 21(3) OJLS 415. [↑](#footnote-ref-106)
107. On the interaction between regulation, adaptability and complexity in environmental law see, J. Ruhl, “Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment By Making a Mess of Environmental Law’ (1997) 34(4) *Houston Law Rev*. 101 [↑](#footnote-ref-107)
108. Law Commission, *Conservation Covenants* (Law Com No 349, 2014) [↑](#footnote-ref-108)
109. See https://www.gov.uk/government/groups/natural-capital-committee [↑](#footnote-ref-109)
110. C. Reid and W. Nsoh *The Privitisation of Biodiversity* (Edward Elgar, 2016) Ch.3 [↑](#footnote-ref-110)
111. E. Ansink and J. Bouma ‘Payments for Ecosytem Services’ In J. Bouma and P. Van Beukerinf (eds) *Ecosystem Services: From Concept to Practice* (Cambridge, CUP 2015) [↑](#footnote-ref-111)
112. Law Commission (n.126) [↑](#footnote-ref-112)
113. DEFRA, *Biodiversity Offsetting in England: A Green Paper* (DEFRA, 2013) and D. McGillivray, ‘Compensating biodiversity loss: the EU Commission’s approach to compensation under Art. 6 of the Habitats Directive’ (2012) 24 JEL 417 [↑](#footnote-ref-113)
114. J. Ruhl and R. Juge Gregg “Integrating Ecosystem Services into Environmental Law: A Case Study of Wetlands Mitigation Banking” (2001) 20 (2) Stan. Envtl L.J. 365 [↑](#footnote-ref-114)
115. DEFRA, Consultation Paper, “Health and Harmony: the future for food, farming and the environment in a Green Brexit (DEFRA, 2018), Ch. 5 [↑](#footnote-ref-115)