The Concept of Public Interest in the Scots Law of Landownership

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A. INTRODUCTION

> The chief attribute of property is the right of deriving from land, and its accessories, all the uses or services of which they are capable. This right may be considered in relation to others as EXCLUSIVE; or in relation merely to the subject, as ABSOLUTE. The exclusive right may suffer limitation wherever the public interest requires it; the absolute use may also be restrained on similar principles, where it tends to the injury or discomfort of the public.[1]

So said George Joseph Bell, this scholarship's namesake, in his *Principles of the Law of Scotland*. The dichotomy between traditional notions of property in land, centred on liberal ideas of freedom and security, and the frequent need, in face of social or environmental challenges, to restrain those notions in favour of the 'public interest' is one which underpins the study undertaken in this work. Questions of *how* the public interest shapes our ideas of individual property in land – its function – and *what* values it embraces – its content – are given primary focus. Comparison is undertaken across two time periods, between which much has changed, yet much has also remained the same.

In section B, the ideas of Bell and his predecessors during the institutional period, a rich and fertile period of development in Scots law, are considered. The presence of public interest ideas in rules relating to both the scope and nature of individual property in land is illustrated through consideration of the division of things, as well as the right of ownership itself. It is concluded that, despite much reference being made to the function of the public interest as a check on the excesses of exclusive and absolute land use, the narrow content of that concept, as well as the comparatively more nuanced protection of ultimately private interests, limit the practical significance of such statements.

Section C moves focus to the modern day, where the notion of the public interest may be seen to underpin the recent Scottish land reform agenda. Use of and reference to the public interest in the development of land reform legislation is considered, with a view to ascertaining the content of the modern conception of the public interest. A case study of the most prominent use of the concept – the community rights to buy – is then undertaken, with a critical view, albeit one

[1] Bell, *Principles* § 939.

cognisant of the challenges and difficulties at play, taken on the canon of ministerial decisions in this context. Discussion is concluded with an exploration of the pivotal role played by administrative law principles in both liberating and anchoring the content of the public interest in such decisions.

In view of the introduction of a new land reform Bill in the Scottish Parliament earlier in 2024, brief consideration is given to the future of public interest ideas, particularly as regards their manifestation in legislation, in this context in section D.

Concluding this work, Section E then undertakes a comparative discussion of the two time periods, engaging with possible explanations for similarities and differences between the function and content of the public interest as it stood in Bell's time and as it operates today.

It is hoped that the discussion of such topics may aid understanding of the important place of public interest ideas within Scots land law, and provoke thought and consideration of both their current shortcomings and future potential.

B. THE INSTITUTIONAL PERIOD

(1) The division of things

The division of things is a topic considered by most institutional writers in the Scottish canon. As an exercise, the division of things seeks to categorise objects in various manners according to their particular characteristics and significance. It is perhaps a somewhat neglected subject in the modern day, with primary focus in the contemporary classification of Scots property law as regards the division of things devoted only to the categories of heritable/moveable and corporeal/incorporeal.[2]

This work will not give a full account of the development of the division of things during the institutional period.[3] Rather, in keeping with the focus of this research, attention will be paid to

[2] J Robbie, *Private Water Rights* (2015) paras 2.01-2.02.
[3] For a detailed and comprehensive account, see Robbie (n 2) ch 2.

an aspect of the division of things which is particularly pertinent as regards the public interest. This aspect represents another axis on the scale presented by the division of things, namely the capability of certain objects of private ownership.

Modern scholars will be familiar with the list of things unowned but capable of appropriation by *occupatio* – e.g. shells on the beach, wild animals and running water[4] – and of those incapable of ownership – e.g. air and light.[5] Accounts are given in most of the institutional texts as to the nature of these things: Stair, for example, classes such things as being held under the real right of 'commonty', "which all men have of things, which cannot be appropriated",[6] and Bankton refers similarly to "the original community of all things" remaining present in certain objects such as those listed previously.[7]

However, justifications for such rules are frequently lacking in the earlier texts. With some jurists, this is perhaps unsurprising; the work of Mackenzie, for example, has been described as typically eschewing "philosophical disquisitions" in favour of simply attempting to "set down the leading principles concisely".[8] Where justification is presented, it is usually religious. Mackenzie describes a class of things known as *juris divini* which fall outside of the commerce of private persons on account of their "relative holiness and sanctity",[9] and Stair cites mythological and biblical parables in relation to ways and passages over land held by the public.[10]

However, a key development comes with later works, including Bell's *Principles* and Erskine's *Institute*, in which a distinction, previously elided by other jurists, between things remaining unowned because they are *incapable* of appropriation and those which are "*exempted* from commerce"[11] for reasons of the public good is for the first time made explicit. This class of things, the *res publicae*, share between them a sense of public necessity; as Bell states, each of the

[4] K G C Reid, *The Law of Property in Scotland* (Butterworths 1996) paras 279 (running water) and 542 (shells and wild animals); G L Gretton and A Steven, *Property, Trusts & Succession* (4th edn, EUP 2021) para 9.2.
[5] Reid, *Property* (n 4) para 282.
[6] Stair, *Institutions* II.1.5.
[7] Bankton, *Institute* II.1.2 and II.1.5.
[8] D M Walker, *The Scottish Jurists* (W Green 1985) 165.
[9] Mackenzie, *Institutions* II.1.
[10] Stair, *Institutions* II.1.5.
[11] Erskine, *Institute* II.1.5 (emphasis added).

examples he discusses (including the seas and shores, rivers and harbours, roads, bridges, fairs and markets) are "necessary for public use and intercourse, and as such are vested in the Crown in trust for the subject".[12] Furthermore, the role of public safety and defence is invoked with regard to the classification of the seas as *res publicae*.[13]

Many varying and conflicting accounts of the division of things are given in the institutional texts, changing over time on account of doctrinal shift and differences in interpretation alike. While this change has continued into the present day,[14] it is hoped that this short discussion of the function of ideas of public utility in the development of the division of things may serve to highlight the role of the public interest in shaping not only the nature but the *scope* of individual property over time.

(2) The right of property

(a) Exclusive and absolute rights

Another fruitful area of inquiry concerns the role played by the public interest in the nature of the right of ownership – or 'property', as it is generally termed by the institutional writers – in land.

In defining the right of property, it is common for maximalist and far-ranging accounts to be given; it remains accepted in the modern day that ownership is the most comprehensive right one can have in a thing.[15] Craig, referring to the Italian jurist Bartolus de Saxoferrato, states that "when a thing is in someone's power, so that no part of it can be said to belong to another, we rightly say that this is ownership".[16] Nevertheless, the concept of ownership is undoubtedly one which presents difficulty in definition,[17] primarily, it is argued, for linguistic reasons rather than

[12] Bell, *Principles* § 638.
[13] ibid § 639.
[14] Fairs and markets, e.g., as Bell discusses, are of course no longer exempted from commerce.
[15] Gretton and Steven (n 4) para 3.1.
[16] Craig, *Jus Feudale* 1.9.9.
[17] See, e.g., Gretton and Steven (n 4) para 3.1; "Whether the right of ownership can be defined is doubtful. It can at least be described."

particularly widespread uncertainty about its content.[18] A standard formulation developed in time, not in least because of a growing habit of homework-copying, as it were, among certain of the juristic writers.[19] The definitions adopted by Mackenzie, Forbes and Erskine each follow a familiar pattern, with a general power of liberty in use and disposal asserted, qualified by restraint via "law or paction".[20]

However, the works produced by later jurists such as Hume[21] and Bell saw greater clarity of analysis given to the concept of ownership. Indeed, Bell's discussion of rights of property in land is by far the most methodical in its approach, with a taxonomical classification of the relevant powers and limitations arising from landownership.[22] Noting a new division in the powers attendant to the right of ownership, Hume considered the "most material" of the three primary powers to be "the right to use the subject".[23] That right, as Hume viewed it, consisted of two substantive powers,[24] traditionally termed the *exclusive* and *absolute* rights of use; this division was similarly adopted by Bell.[25]

The *exclusive* right, as Hume describes, permits the owner of land to "hinder others from taking use of his subject". This proposition he founds, by way of example, on the case of *Earl of Breadalbane v Livingstone*,[26] in which declarator was granted against the defender, who had hunted game on muirs owned by the pursuer, to the effect that the right of exclusive use of land required outsiders such as the defender to obtain permission before using the land for such

[18] For example, Bankton's definition of the right of property holds it to be "that whereby any thing is one's own"; Bankton, *Institute* II.1.6. Circular and somewhat feeble as this definition may be, it points to a key challenge in the definition of ownership, namely the difficulty in defining the concept without recourse to more primitive ideas of an object simply being *mine*.

[19] K G C Reid, 'Property Law: Sources and Doctrine', in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (OUP 2000), 198.

[20] Mackenzie, *Institutions* II.1; Erskine, *Institute* II.1.1; Forbes, *Institutes* 100. The version of Forbes' *Institutes* used in this work is the 2014 reprint published by Edinburgh Legal Education Trust, and the new pagination used in that edition is referred to here.

[21] Hume, *Lectures 1786-1822* Vol III (G C H Paton (ed), Stair Society Vol 15, 1952) is referred to in this work, although its text of course was not directly produced by him, being a revised compilation of notes from his lectures as Chair of Scots Law at the University of Edinburgh; see Walker, *Scottish Jurists* (n 8) 319-329.

[22] See Bell, *Principles* § 962-63.

[23] Hume, *Lectures* III 201; the other two powers noted being "the power to recover [the subject] when lost or taken away" and "the power to alienate and dispose of the thing".

[24] ibid.

[25] Bell, *Principles* § 939.

[26] (1790) M 4099.

purposes, it being of no relevance that the pursuer's muirs were not enclosed by a fence.[27] Indeed, Erskine considered the exclusive right to be fundamental to ownership, stating that the right of property "necessarily excludes every other person but the proprietor; for if another had a right ... so much as to use [the subject], it would not be his property, but common to him with that other".[28]

The consequences of this power are somewhat startling, with Hume appearing to contend that a proprietor's right of exclusion over his land extends so far as to permit intentional neglect. It is stated that an owner:

> ...may prohibit, if he please, the cutting or pulling up and carrying away of the very weeds, broom, furze or reeds, or other rank or foul produce, that encumbers and injures the land. In doing so, the man may perhaps be thought hard and churlish and to lose much more in one view than he gains in another; that is his concern but he is doing no more than the Law does, and plainly must allow him, if he choose.[29]

Given this statement, it is perhaps not surprising that one of the primary criticisms of this model of landownership "rests on the perception that landownership is focused on rights rather than responsibilities".[30] At least at the level of the right of property in land, it appears that neither the ecological sustainability of the land nor its viability for future heritors represents a significant limitation, with such motives instead being imposed through economic incentives or, in the modern day, *post hoc* regulation.[31]

As for the absolute right, Hume summarises its content by stating that the owner of land "is entitled to take every use of it himself".[32] Quite similarly, Bell holds that, as a default,[33] the landowner enjoys something close to sovereignty over his land; he has "a right to do whatever

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[27] ibid.
[28] Erskine, *Institute* II.1.1.
[29] Hume, *Lectures* III 201.
[30] D W Mackenzie Skene et al., 'Stewardship: From Rhetoric to Reality' (1999) Edin LR 151, 153; for a similar statement, see also A Tindley, ''The Usual Agencies of Civilisation': Conceptions of Land Ownership and Reform in the Comparative Context in the Long Nineteenth Century', in M M Combe, J Glass and A Tindley (eds), *Land Reform in Scotland* (EUP 2020) 74, 85.
[31] See, e.g., Environmental Liability (Scotland) Regulations 2009, SSI 2009/266.
[32] Hume, *Lectures* III 201.
[33] Bell qualifies his statement "under the exceptions to be immediately stated"; Bell, *Principles* § 962.

he pleases with his property within its limits, and to derive from it all the uses and services of which it is capable".[34] While in the modern day one may well argue that, with the reference to this power of full volition existing *within its limits*, there is recognition of a need to restrain the possibility of unbridled and detrimental land use, it is suggested that, given the tenor of the remainder of Bell's discussion and the degree of environmental knowledge which obtained at the time, it is more likely that this reference concerned the topological limits of the land. In particular, Bell's contention that, subject to restraints imposed by the law of neighbours, "a proprietor may exhaust ... or destroy the substance of his ground"[35] is striking, and indicative of the stark implications of this model of the rights of property in land.

(b) The role of the public interest

Evidently, the rights attendant to landownership as described by the Scottish jurists, and in particular Hume and Bell, are extensive. However, it must be observed nonetheless that the simplistic statements of these exclusive and absolute rights should be read in light of some notable qualifications, many of which are grounded in ideas of the public interest. These reservations, it is submitted, temper the extent to which the rights attendant to landownership can fairly be considered absolute.

As regards basic statements of principle, many of the institutional texts give notice to the role of the public interest in shaping the right of property in land. Bankton, for example, notes that "the use of property is ... frequently restrained for the public good",[36] and refers to the maxim *interest reipublicae ne quis re fua male utatur*;[37] Kames states as a rule that "property, which is a private right, must yield to what is essential for the good of the nation";[38] Hume asserts that "every notion of separate property is founded, at least in some measure, on considerations of the

[34] ibid.
[35] ibid § 964.
[36] Bankton, *Institute* II.1.6.
[37] ibid. The maxim translates as "It is for the advantage of the public that no person be allowed to use his property improperly, or to the prejudice of his neighbour"; P Halkerston, *Translation and Explanation of the Principal Technical Terms and Phrases Used in Mr Erskine's Institute of the Law of Scotland* (2nd edn, 1829) 66.
[38] Kames, *Principles of Equity*, 53.

common interest of society";[39] and Bell considered that both the exclusive and absolute rights of property "may suffer limitation, wherever the public interest requires it".[40]

From this, the role of the public interest in the regime of landownership extant during the institutional period may be observed: it serves to restrain the excesses of the generally extensive right of ownership. Nevertheless, it need not be accepted that this function necessarily hinders or damages the right of property. Erskine was clear in his view that restraint in pursuit of the public interest (albeit in the context of *post hoc* regulation of property use, rather than any inherent limitations in rights of ownership themself) had the effect of enhancing, rather than smothering, rights of ownership, noting that:

> The right of property is not weakened by the restraints which have been laid by law upon proprietors in the use of it: for restraints of law are not designed to hurt property, but rather to secure and strengthen it, by inhibiting our licentiousness in the exercise of it.[41]

(c) The content of the public interest

While this may illustrate the *role* of the public interest in this context, discussion so far has left unanswered the question of its *content*. Which interests are embraced by this admittedly vague conception? How is this role of restraint manifested?

It is submitted that, just as the function of restraint exercised by the public interest serves to mitigate the potential for misuse created by the exclusive and absolute rights of property, the content of the public interest as noted by the institutional writers in turn attenuates the practical significance of that function. The interests embraced by the 'public interest' are, for the most part, essentially private and, where genuinely public, narrow and of uncontroversial expedience.

[39] Hume, *Lectures* III 205.
[40] Bell, *Principles* § 939. See also ibid § 956: "...the exclusive right of a land-owner yields wherever public interest or necessity requires that it should yield."
[41] Erskine, *Institute* II.1.2.

Various writers ground in the public interest a doctrine against the intentional vexation of a neighbour, known as *æmulatio vicini*.[42] Mackenzie, for example, explains that "the law designing the general good, allowes us not to use our own, so as thereby chiefly to prejudge our neighbour".[43] Although an act carried out by a proprietor may be of itself lawful, the doctrine referred to strikes at wanton damage caused to a neighbour, with scrutiny of the proprietor's purposes required. Erskine refers to an example using the drainage of water:

> …he may lawfully drain his swampy or marshy grounds, though the water thrown off from them by that improvement should happen to hurt the inferior tenement. But he must not make a greater collection of water than is necessary for that purpose; seeing such use would be merely *in æmulationem vicini*, without any profit arising to himself.[44]

A more sophisticated doctrine is expounded by Kames, who proposes a rule "no less beautiful than salutary"[45] composed of two branches. The first dictates that "the exercising my right will not justify me in doing any action that directly harms another" and "so far my interest yields to his", while the second relieves a proprietor of liability for indirect or consequential harm so caused.[46] The doctrine of *æmulatio vicini*, in Kames' view, serves rather as a limited exception to this rule, such that consequential harm inflicted intentionally would still bring about liability.[47]

Evidently, a great deal of ink is spilled, and justifiably so, on the regulation of rival and conterminous interests in land. However, the interests protected, even under the guise of the 'public interest', are at their heart private; there appears to be little evidence in the institutional texts of any nuanced doctrine of protection of public interests akin to those protecting private interests as discussed immediately above.

The interests of non-neighbours, in the proprietor's surrounding community and further afield, in, for example, the prevention of environmental harm or prejudice to local communities are

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[42] For a modern account of the scope and relevance of this doctrine, see E Reid, 'Strange Gods in the Twenty-First Century: The Doctrine of *Aemulatio Vicini*' in E Reid and D Carey Miller (eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (EUP 2005).
[43] Mackenzie, *Institutions* II.1.
[44] Erskine, *Institute* II.1.2.
[45] Kames, *Equity* 46.
[46] ibid 42-43.
[47] ibid 55

undoubtedly absent in the content of the public interest as is operative in the accounts of the institutional writers. On one hand, this might be considered surprising given the justifications employed with regard to doctrines in neighbour law as described above. Hume writes that:

> Every individual comes to see, that if he were to insist on the absolute disposal of his own, he might indeed incommode his neighbours, but that he would be liable to be equally molested by them in return. He contracts too in time some degree of regard for them.[48]

It is not difficult to accept that a landowner in many cases is liable to incommode a much greater field of persons than merely his immediate neighbours, the former of whom nevertheless does not enjoy the protection of doctrines such as common interest or *æmulatio vicini*. Although the bargain set out by Hume in the quote above requires each party to own land, with non-landowners lacking the power of retaliation underpinning the justification, it does not follow that such persons are necessarily less deserving of protection; indeed, the justice of denying such protection for that reason is surely questionable in light of the historic and continuing concentration of landownership in Scotland.[49]

Nevertheless, it is apparent that the connections inherent to neighbouring plots of land are consequential in the applicability of these other-regarding doctrines. Kames asserts that such duties of "benevolence" must arise from "very intimate" connections, on account of the obligation to "bestow upon another any portion of my substance, than merely to do a good office which takes nothing from me".[50] While it is not asserted that such a state of affairs is necessarily unjust, it is suggested that the writings discussed illustrate that the range of interests protected by the ideas of public interest employed in earlier texts is comparatively narrow and individualistic.

As stated above, there are occasions in the institutional accounts where the public interest takes on a more obviously 'public' character,[51] but these are again notably circumscribed. Building

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[48] Hume, *Lectures* III 207

[49] See, e.g., Scottish Land Commission, *Legislative Proposals to Address the Impact of Scotland's Concentration of Land Ownership* (4 February 2021) <www.landcommission.gov.scot/our-work/governance-ownership/scale-and-concentration-of-land-ownership> accessed 6 August 2024.

[50] Kames, *Equity* 136.

[51] In the sense that that epithet might today be understood.

regulations, immediately visible to those writers residing in Edinburgh, having been introduced there in the seventeenth century following a series of fires,[52] are referred to by a number of writers, with Bankton noting that principles of "policy and good neighbourhood" and "safety against fire" play a role in "limit[ing] the use of one's property for the public good".[53]

Kames' only substantive example given behind his assertion that the right of property "must yield to what is essential for the good of the nation" is that, "in order to defend a town besieged, a house standing in the way ought to be demolished".[54] Similarly, Hume describes instances of "a fire within [the] Burgh" and a need for "repelling the invasion of an enemy" or searching a proprietor's grounds for a "malefactor who is supposed to be lurking there".[55] The extinction of a fire finds mention again by Bell, who refers similarly to the pursuit of a criminal and the destruction of "dangerous or noxious animals".[56] The juridical basis for such interferences is held to be the "supereminent power over the property of individuals" held by the public,[57] termed *dominium eminens* in the work of Grotius to whom Erskine refers.[58]

The thread linking these multifarious cases is public exigency. Erskine highlights the need for "a necessity, or at least an evident utility, on the part of the public";[59] Hume considers that it is in "pressing and urgent cases" where rights of property must yield to the public interest;[60] and Bell notes a "strict limit of necessity" as regards the exercise of eminent domain by the legislature.[61] While it is hoped that excessive anachronism is avoided, it remains stimulating to consider the application of such rules to modern challenges such as the climate crisis.

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[52] M De Brayas, 'Edinburgh Old Town: City Shaped by Fire Part 2' (*Cobble Tales*, 18 May 2019) <www.cobbletales.com/edinburgh-old-town-city-shaped-by-fire-part-2> accessed 6 August 2024.
[53] Bankton, *Institute* IV.45.119.
[54] Kames, *Equity*, 53.
[55] Hume, *Lectures* III 205-06
[56] Bell, *Principles* § 957.
[57] Hume, *Lectures* III 205.
[58] Erskine, *Institute* II.1.2.
[59] ibid.
[60] Hume, *Lectures* III 206.
[61] Bell, *Principles* § 960.

Walker notes the role of what he terms "latency" as one of the primary drivers of inaction on the current environmental and ecological challenges.[62] He states:

> Because of "climate lag" it is estimated that the impact of emissions will only be fully felt between 25 and 50 years after their occurrence – these effects being borne disproportionately by future generations. This is a circumstance that serves as an incentive to postpone decisions that are, in fact, urgent.[63]

As the eventual impact and outcome of society's conduct past and present cannot be seen with the same immediacy as certain other exigencies (such as the fires or enemy invasions to which Hume refers)[64], it is open to question whether the rules discussed above, with a vision of the public interest that centres around immediate exigency, might face difficulty in addressing a latent challenge such as the climate crisis.[65]

C. MODERN DEVELOPMENTS

(1) The land reform agenda

Since the establishment of the Scottish Parliament in 1999, statutory reforms in the field of land ownership have been manifold. Some, being primarily the work of the Scottish Law Commission,[66] aimed towards the modernisation of the system of land tenure and its attendant burdens. The Abolition of Feudal Tenure etc (Scotland) Act 2000 swept away the last remnants of the feudal system of land tenure,[67] which, although having dwindled in practical significance

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[62] N Walker, 'Sovereignty, Property and Climate Change' (2023) 27(2) Edin LR 129, 132.
[63] ibid.
[64] Hume, *Lectures* III 205-06.
[65] Indeed, the phrase 'climate crisis' (alternatively, 'climate emergency') has arisen in part due to a concerted linguistic effort to reflect the severity and urgency of an ultimately latent threat; see, e.g., Damian Carrington, 'Why the Guardian Is Changing the Language It Uses About the Environment' The Guardian (London, 17 May 2019) <www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment> accessed 5 August 2024.
[66] See respectively Scottish Law Commission, *Report on Abolition of the Feudal System* (Scot Law Com No 168, 1999); *Report on Real Burdens* (Scot Law Com No 181, 2000); *Report on the Law of the Tenement* (Scot Law Com No 162, 1998).
[67] For an overview of the feudal system, see G L Gretton in Reid, *Property* (n 4) paras 41-113.

since the time of even Craig,[68] nevertheless represented an unwanted relic of the past as the new millennium dawned. Two other statutes, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004, completed important technical work in simplifying and modernising the law, particularly (but not exclusively) as it related to residential property.

Others, however, had more overtly political goals in mind. It is these statutes which give the greatest cause for interest in relation to the modern face of the public interest in Scots land law, and which are typically placed under the 'land reform' banner. The first and most important is the Land Reform (Scotland) Act 2003 (hereafter "the 2003 Act"). Following the establishment of the Land Reform Policy Group ("LRPG") by the UK government in 1997, a series of papers were published,[69] setting out discussion of and proposals for land reform in rural Scotland.[70] A land reform Bill followed these papers, being introduced into and passed by the Scottish Parliament between 2001 and 2003, and gaining Royal Assent in February 2003.[71] A 'second wave'[72] of land reform followed around a decade later, with a new report by a new group, the Land Reform Review Group ("LRRG"),[73] leading to statutory intervention in the Community Empowerment (Scotland) Act 2015 and, primarily, the Land Reform (Scotland) Act 2016.

It is apparent that the concept of the public interest lies at the centre of the measures provided for by the land reform statutes. The LRPG grounded the case for reform in a need to "secure the public good",[74] with its chair, Lord Sewel, also noting a desire to "put in place new and innovative means of properly securing the public interest in land use and land ownership".[75] Indeed, in a later report, the title of which – *The Land of Scotland and the Common Good* – highlights this

[68] Craig, *Jus Feudale* I.9.19; for an overview of the demise of feudal tenure, see Gretton (n 67) paras 45 and 113; Reid in Reid and Zimmermann (eds), *A History of Private Law in Scotland* (n 19) 187-91.
[69] Land Reform Policy Group, *Identifying the Problems* (Scottish Office 1998); *Identifying the Solutions* (Scottish Office 1998); *Recommendations for Action* (Scottish Office 1999)
[70] LRPG, *Identifying the Problems* (n 69) para 1.2.
[71] The parliamentary history of the 2003 Act can be found in Explanatory Notes to the Land Reform (Scotland) Act 2003 <www.legislation.gov.uk/asp/2003/2/notes/division/3> accessed 6 August 2024.
[72] Combe identifies two broad waves of parliamentary activity in land reform in M M Combe, 'Legislating for Community Land Rights', in Combe, Glass and Tindley (eds), *Land Reform in Scotland* (n 30) 161-63.
[73] Land Reform Review Group, *The Land of Scotland and the Common Good* (Scottish Government 2014).
[74] LRPG, *Identifying the Problems* (n 69) para 2.2.
[75] LRPG, *Recommendations for Action* (n 69) foreword.

eminent nexus, the LRRG asserted that land reform, as a pursuit, is necessarily geared towards securing the public interest.[76]

With this in mind, the question naturally must follow: what is the public interest? The near indispensability of the concept in the land reform context is apparent, but its propensity for competing interpretations, both in substance and in form, carries risk. As Combe notes:

> Terms such as 'community', 'private benefit' and *'public good'* are used extensively in political debate and the wider literature, but conflicting or confused meanings attached to these can generate misunderstandings or even rancour, whatever disciplinary or political standpoint an observer takes.[77]

This question as to the content of the public interest will first be considered through examination of the values which have underpinned the development of modern land reform measures at the political stage.

Although the public interest for understandable reasons tends to remain undefined in most discussions thereof, the clear nexus between land reform measures and the public interest allows for the values embraced by the former, it is submitted, to illuminate the nature of the latter. The principal goal, as is apparent from the policy reports, has generally centred around the sustainable development of rural communities. The LRPG considered that this ought to be the "overriding objective" of land use,[78] and identified it as forming a key element of the public interest;[79] in addition, two of the three key values embraced by the LRRG are, respectively, environmental sustainability and economic success,[80] highlighting that, even if not referenced in terms, the goal of sustainable development features significantly in the content of the public interest in this context.

Statements given in the parliamentary debates preceding the enactment of the 2003 Act add credence to this notion. Focus was given to creating "much-needed social, economic and

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[76] LRRG, *Common Good* (n 73) 20.
[77] M M Combe in Combe, Glass and Tindley (eds), *Land Reform in Scotland* (n 30) 3 (emphasis added).
[78] LRPG, *Identifying the Problems* (n 69) para 2.5.
[79] ibid para 2.6.
[80] LRRG, *Common Good* (n 73) 9.

environmental opportunities",[81] "empowering communities" and bringing about "sustainable rural development",[82] as well as taking "the Highland economy … into the 21st century".[83] Emphasis was also placed on social inclusion,[84] particularly with regard to the introduction of the right of responsible access,[85] as well as on the good management of land.[86]

While certain values thus appear to take an uncontroversial place in the substance of the public interest, it is fruiful to consider those which are more contested. The issue of history – putting right perceived wrongs suffered during, for example, the Highland Clearances – was raised primarily by opposition parties,[87] with the government focusing on the justifications discussed immediately above, grounded in ideas of sustainable development. In the wider context, Combe has noted similarly, stating that the "unspoken factor" of history:

> …has not actually featured prominently in the publicly stated justifications for twenty-first century Scottish land reform, nor has it found itself embodied expressly in legislation… Rather than looking backwards, the stated arguments in favour of land reform tend to look forwards, perhaps by being about enterprise and community revitalisation (or at least retention).[88]

In like manner, the concentration of landownership in Scotland has served as merely a subsidiary justification for land reform. Although undoubtedly a factor which loomed large in the minds of campaigners and legislators alike,[89] the LRPG suggested that, despite much of the rancour animating calls for land reform centring around this factor, the public interest does not necessarily require a change in the pattern of landownership. Rather, "so long as the land is used

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[81] Scottish Parliament, Official Report col 14460 (23 Jan 2003).
[82] Official Report col 14471 (23 Jan 2003).
[83] Official Report col 873 (24 Nov 1999).
[84] Official Report cols 7383 and 7399 (20 Mar 2002); col 14461 (23 Jan 2003).
[85] See 2003 Act, pt 1.
[86] Official Report cols 859-61 (24 Nov 1999).
[87] See, e.g., Official Report col 14462 (23 Jan 2003), where SNP MSP Rosanna Cunningham remarked that "it has taken us three centuries to get to this point"; or col 14463 (23 Jan 2003), where Conservative MSP Bill Aitken bemoaned "other parties in the Parliament being obsessed with replaying the class wars of 200 years ago", labelling the Bill "a disgrace" and its passage "a day of shame for the Parliament". Aitken's remarks, it is suggested, serve as a reminder that the habit of facile hyperbole in contemporary politics is far from a new phenomenon.
[88] M M Combe in Combe, Glass and Tindley (eds), *Land Reform in Scotland* (n 30) 6-7.
[89] See, e.g., Official Report cols 14463-64 and 14469 (23 Jan 2003), where two members of the governing coalition refer to the issue, one holding that "the narrow, concentrated and often absentee pattern of land ownership is failing rural Scotland".

so as to foster thriving communities, then it may be that the public interest is satisfied, whether or not land ownership changes";[90] in essence, the focus with landownership is on the *how* rather than the *who*. Similarly, the Ministerial foreword to the LRRG's report considers that "we need to build a society with a modernised system of landownership and, where it is in the public interest, a greater diversity of land owners", [91] suggesting that the deconcentration of landownership may instead represent a tool to meet the logically prior public interest, rather than being an end in itself.

Evidently, the public interest is composed of a number of factors and values. However, one difficulty which may be presented with such a model is the possibility of competing and conflicting elements. An example presented by the LRRG highlights this challenge:

> If there are, for example, 500 hectares suitable for growing arable crops that are owned by five farmers, and the incentives provided by the government to encourage those crops to be grown result over time in all the farms becoming owned by one farmer, then that has a social impact on the local community involved. The crops will look the same, but for that to be judged sustainable land use, consideration needs to be given to how such a change impacts on communities…[92]

Serving as a potent illustration of the disadvantage of a conception of the public interest consisting of component factors – e.g., economic success, social justice and environmental sustainability –[93] the example points towards the necessity of discretion. As these factors are not merely alternative names for the same thing, but different (without meaning to suggest *incompatible*) goals which necessitate different policies and approaches, some mechanism is needed to resolve cases such as the instant one, where the values embraced conflict with each other.

The relevance of political discretion is made clear by further discussion in the LRRG's report. Drawing a distinction between the 'common good' and the 'public interest', the LRRG consider that the latter idea is "something which is politically identified at any one time" and that Ministers

[90] LRPG, *Identifying the Problems* (n 69) para 3.2.
[91] LRRG, *Common Good* (n 73) 7.
[92] ibid 158-59.
[93] ibid 9.

will typically "base decisions on what they believe to be in the public interest".[94] Unlike the public interest, which in the view of the LRRG appears to be a predominantly subjective concept, the 'common good' has at its heart some objective content, "embrac[ing] questions of" *inter alia* "social justice, human rights [and] democracy".[95] In this case, so the LRRG assert, the public interest lies in furthering "the common good of the people of Scotland".[96] The interposition of the 'common good' leads to somewhat awkward outcomes, such as the possibility of a vision of the public interest which rejected the common good, and it is argued that it is likely unnecessary to juxtapose the two concepts. Indeed, an entirely subjective conception of the public interest leads to issues such as those identified by Sorauf, who states that "for a vast number of people, the public interest has come to mean the indefinable, a political *je ne sais quoi*, a 'yardstick of indefinite length with no inches or feet marked on it'".[97]

Nevertheless, it is clear that the presence of discretion within the concept of the public interest must be substantial in order for it to be workable. In the next section, this point is expanded, taking the most prominent use of the 'public interest' in the land reform statutes as a case study. The role and content of the public interest in that context is explored, as well as the influence of administrative law principles in maintaining a theoretically consistent substance in that concept.

(2) Community rights to buy: a case study

(a) The framework

The first and, to date, most important land reform statute of the modern era is the Land Reform (Scotland) Act 2003. As has been noted, the 2003 Act introduced a range of measures, the most well-known of which being the so-called 'right to roam', a right of responsible access on most land in Scotland.[98] This section focuses on another of the measures first introduced by the 2003

[94] ibid 236.
[95] ibid 235.
[96] ibid 22.
[97] F J Sorauf, 'The Public Interest Reconsidered' (1957) 19(4) The Journal of Politics 616, 623, citing C J Friedrich, *Constitutional Government and Democracy* (rev ed, 1950) 462.
[98] Land Reform (Scotland) Act 2003, pt 1.

Act, falling broadly under the umbrella term of 'community rights to buy', targeted at the aims discussed previously, including the fostering of sustainable rural development and the deconcentration of landownership. As will be seen, the legal framework applicable to these measures features the most prominent use of the public interest concept in any modern land reform statute to date, and is thus considered ripe for examination.

Three of the community rights to buy to be introduced by and since the 2003 Act will be considered: the right of pre-emption provided for by Part 2 of the 2003 Act ("pre-emption right"), the right to buy abandoned and neglected or detrimental land ("ANDL right") under Part 3A of that Act,[99] and the right to buy land to further sustainable development ("SD right") under Part 4 of the Land Reform (Scotland) Act 2016 ("the 2016 Act"). For reasons relating to the distinct regime of law applicable to crofts, the crofting right to buy[100] is outwith the scope of this research and will not be considered, save for discussion below of one crofting case raising issues pertaining equally to the other rights to buy.[101]

A key difference between the rights to buy should be noted at the outset. The right of pre-emption introduced by Part 2 of the 2003 Act allows community groups to register an interest in certain landholdings, granting the community the right of first refusal should the landowner market the land for sale. It thereby operates, in essence, on a 'willing seller' basis. On the contrary, the rights introduced by Part 3A of the 2003 and Part 4 of the 2016 Acts enable the compulsory transfer of the land in question from its current owner to the community group. By reason of the latter two rights to buy's more recent introduction and less frequent exercise,[102] the pre-emption right introduced by Part 2 of the 2003 Act has generated the greatest amount of material, leading discussion in this work naturally to gravitate towards it, but reference is made to the more recent rights to buy where appropriate.

[99] As amended by Community Empowerment (Scotland) Act 2015, s 74.
[100] See 2003 Act, pt 3.
[101] See text to n 135 ff.
[102] See Register of Applications by Community Bodies to Buy Land <www.roacbl.ros.gov.uk> accessed 7 August 2024.

Although focus in this section is given to the role of the public interest in the community rights to buy, a summary of the procedural framework in place for the exercise of these rights is provided for context.[103] Each of the rights is exercisable only by a 'community body': an incorporated body established for the purpose, meeting certain constitutional requirements relating to its connection to and representation of the relevant community.[104] Once established, the community body must apply to the Scottish Ministers, with that application being required *inter alia* to identify the relevant land and its owner.[105]

Once an application in the prescribed form has been received, the Scottish Ministers must decide whether or not it will be registered in line with several key criteria. It is in these criteria where the primary function of the public interest concept in this context lies. With the pre-emption right, the community's acquisition of the land must be "compatible with furthering the achievement of sustainable development" and enjoy sufficient support within the community, a sufficient connection to the land must be made out, and the registration of the community interest must be *in the public interest*.[106] For so-called 'late' applications – those submitted after land has been exposed for sale – more stringent tests are in place, requiring *inter alia* good reasons for late application and a more strongly compelling public interest case.[107] In addition, as the pre-emption right must be 'activated' once the land in question is exposed for sale for transfer to the community body to take place, the public interest test is also reiterated at that stage.[108] Similar tests are in place for the other two direct rights to buy, both requiring exercise of the right to buy to be compatible with furthering the achievement of sustainable development and in the public interest.[109]

[103] For a more comprehensive examination of the community rights to buy generally, see W M Gordon and S Wortley, *Scottish Land Law* Vol 2 (3rd edn, W Green 2020) ch 31; M M Combe, 'Legislating for Community Land Rights', in Combe, Glass and Tindley, *Land Reform in Scotland* (n 30) 154.
[104] 2003 Act, ss 34 (pre-emption right) and 97D (ANDL right); 2016 Act, s 49 (SD right).
[105] 2003 Act, ss 37 (pre-emption right) and 97G (ANDL right); 2016 Act, s 54 (SD right).
[106] 2003 Act, s 38(1).
[107] ibid s 39.
[108] 2003 Act, s 51(3)(d).
[109] 2003 Act, s 97H(1) (ANDL right); 2016 Act, s 56(2) (SD right).

(b) A tool of discretion?

As with any other use of public interest ideas discussed in this work, the question of the content of the public interest quickly becomes pressing. Furthermore, with considerable expenditure of time, money and energy required by community actors to fulfil the rigorous and demanding expectations of an application under the community right to buy legislation, the significance of this issue is only intensified.

To aid and encourage community groups with the preparation of an application, guidance has been released in respect of each of the community rights to buy.[110] The main substantive discussion of the nature of the public interest as envisaged by the legislation is given in the 2016 Guidance, which applies to applications for the pre-emption right following amendment made to the 2003 Act by the Community Empowerment (Scotland) Act 2015.[111]

In examining the guidance provided to community bodies, as well as the decisions made by the Scottish Ministers in respect of applications to exercise the community right to buy, the public interest criterion is shown in a range of lights, not all of which positive. While clear substantive values are often illustrated by these materials, it is argued that the use of the public interest in asserting them is often confused and disjointed.

In certain cases, the public interest requirement appears *redundant*, being used to bolster existing failures rather than acting as an independently operative factor. Some examples are simple and stark: the application of Ballater (RD) Ltd was rejected in part because it failed to meet the public interest *in fulfilling the other registration criteria*.[112] Others are more complex: for example, one theme apparent throughout the guidance is a presumption against use of the pre-emption right (and, one must assume, the other community rights to buy) to block development;

[110] *Community Right to Buy Guidance for Applications Made On or After 15 April 2016* (Scottish Government 2016) ("*2016 Guidance*"); *Community Right to Buy Abandoned, Neglected or Detrimental Land Guidance for Applications* (Scottish Government 2018); *Right to Buy Land to Further Sustainable Development Guidance for Applications* (Scottish Government 2020).
[111] *2016 Guidance* (n 110) paras 1-3.
[112] Ministerial decision notice in application by Ballater (RD) Ltd (CB00005); see also decision in application by Elie and Earlsferry Community Collaborative Ltd (CB00244) <www.rcilcb.ros.gov.uk> accessed 8 August 2024.

a disapproval of so-called NIMBY-ism.[113] Attempts to subvert the planning process, which the guidance asserts to be an "entirely separate matter" which is "in no way related",[114] will not be considered fondly, and "may be refused on public interest grounds".[115] However, with another of the main *sine qua non* factors in the legislation being compatibility with furthering sustainable development,[116] it is certainly open to question whether this forms a matter of the public interest *per se*. Although the guidance places discussion of planning subversion primarily in a section titled 'Public interest',[117] it is understandably stated that attempts to "prevent any development" and "maintain the status quo" will also be "construed as not being compatible with furthering the achievement of sustainable development".[118] Anti-development ambitions have been fatal to a range of community applications since the introduction of the pre-emption right in 2003.[119] In its discussion of the public interest in *Park of Keir Friends Ltd*, the Scottish Ministers stated:

> The right to buy legislation aims, in the public interest, to remove land-based barriers to the sustainable development of rural communities. A community body which has as a purpose the prevention of any development on land or maintenance of the status quo is not compatible with the policy of the Act.[120]

Unambiguous as this statement might be, it nevertheless raises the question of the role of the public interest in fulfilling this policy goal. Similarly, in cases where proposals would constitute even an unwitting hindrance to sustainable development – such as where the duplication of an existing facility would lead to the possible failure of both,[121] or where registration of a pre-emption right would result in planning blight – there has been held to be an *additional* failure in relation to the public interest. Similarly, the guidance encourages community bodies to indicate

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[113] That acronym representing the objection 'not in my back yard'; 'Nimby, n, Etymology' (*OED Online*, March 2024) <www.doi.org/10.1093/OED/5318888695> accessed 7 August 2024.
[114] *2016 Guidance* (n 110) para 70.
[115] ibid para 91.
[116] 2003 Act, ss 38(1)(b) [pre-emption right] and 97H(1)(b) [ANDL right]; 2016 Act, s 56(2)(a) [SD right].
[117] ibid section 8.
[118] ibid para 85.
[119] See, e.g., decisions in applications by Carradale Community Trust (CB00246); Park of Keir Friends Ltd (CB00019); Darnick Village Trust (CB00148); Holmehill Ltd (CB00016).
[120] Decision in Park of Keir Friends Ltd (n 119).
[121] See, e.g., decisions in applications by Bargrennan Community Trust Ltd (CB00129); Edenshead Friends 2007 (CB00104).

how the benefits of their proposals would not be "outweighed by any disadvantages to the wider community, the environment or the economy",[122] recalling a previous section where sustainable development is held to be grounded in "environmental, social and economic benefits".[123]

The close nexus between the vision of the public interest embraced by modern land reform statutes and the concept of sustainable development has been shown earlier in this work. As such, it is difficult to see the relevance of the public interest criterion in the case of proposals which were hampered by disadvantages in the same fields as are stated to form the substance of sustainable development, given that it cannot be solely on its failure to meet the public interest that the application founders.

While this argument might seem somewhat obtuse, it is not the only instance where the public interest criterion appears to interact in a somewhat awkward manner with other criteria, as will be seen below. Furthermore, it must surely be the case, and especially so in light of the principle of statutory construction that Parliament does not legislate in vain,[124] that a distinct 'public interest' criterion was included for purposes other than to reinforce existing provisions.

Another problem, rather at the opposite end of the spectrum, can be identified: the public interest can be used to *subvert* existing criteria. This is particularly the case as regards the public interest in relation to community support. The guidance states:

> …if support for your CB's right to buy were marginal and a potential consequence of proceeding with the right to buy were to divide your community, Ministers might decide that the adverse effect of your CB's right to buy would outweigh the public interest in retaining an otherwise unified community.[125]

The difficulty here lies in the fact that existing statutory rules govern this issue. The legislation provides that Ministers must "regard an indication of the approval of one tenth or more members of the community" as "signifying a sufficient level of support".[126] One must wonder, it is argued,

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[122] *2016 Guidance* (n 110) para 90.
[123] ibid para 85-86.
[124] See, e.g., *Kelly v Nuttall* 1965 SC 427, 438.
[125] *2016 Guidance* (n 110) para 93.
[126] 2003 Act, s 38(2).

whether it strikes excessively at the consistency and comprehensibility of the statutory rules, something which is crucial when the targeted users of the legislation are in most cases laypersons with limited resources, to use broad discretionary criteria to undermine and alter the application of existing provisions.

Two conclusions – albeit opposite ones – can be drawn from these issues. One is that the public interest criterion is obsolete; it is doing too much when it need not do anything at all. It is merely another stone with which to kill an already-deceased bird. There is difficulty with this view, however; it is not difficult to imagine a case where a proposal which met each of the substantive criteria might appear disadvantageous or undesirable for some other reason.

The other, then, is that the criteria suffer from a deficiency in definition and delineation; this results in the public interest test doing work which might fairly be expected to be done by better-defined criteria. While this argument certainly carries some weight, it must also be remembered that there is a perhaps insurmountable difficulty in drafting a set of criteria by which to assess proposals to alter the status quo, both of which in substance are effectively free-form and almost unrestrained in their potential manifestation.

If it is the case that the public interest cannot be exhaustively defined, then it must represent a tool of discretion, a protection against unforeseen challenges. This is perhaps more appropriate in cases such as the community right to buy where, although much expenditure of community resources is required to complete an application, it cannot be said that there is any *entitlement* to the registration of a right of refusal in, or the compulsory transfer of, the land in question.

Such use of the criterion can be seen in the decision in the application by Damhead Neighbourhood Company (CB00189). Although the Scottish Ministers recognised the value in the community body's proposals, which included local food production and the provision of a social place within the community, it rejected the application on public interest grounds in part due to the effect on the current landowner of registering the pre-emption right. The land in question was held subject to a testamentary condition which required that first refusal be given to another party. Having identified that attempts to transfer the land in question to the community group could result in forfeiture of the legacy and potential reversion of the land to the executor of the

initial testator, the Scottish Ministers decided that, having "considered the … wider effects of registering the interest, including the effects on the landowner",[127] registration would not be in the public interest.

It is perhaps arguable that the decision reaches the correct outcome, but through defective reasoning: a more plausible reason to reject the application would be that registration might nevertheless be ineffective in conferring preference, thus rendering any proposals impossible in a manner fatal to any case based on sustainable development. If this is accepted, it serves as further evidence of the public interest criterion's tendency to be otiose.

Nevertheless, the public interest criterion in the community right to buy legislation remains a key stage of the application and decision-making processes, at least on appearances. Its symbolic value, not least due to the constraints imposed by Article 1 Protocol 1 of the European Convention on Human Rights, which requires the deprivation of property by the state to be *inter alia* "in the public interest",[128] must also be remembered.

There is, however, a natural disinclination towards excessively discretionary powers, especially in the field of Scots property law, which is traditionally based on clear rules. The use of the concept of the public interest is, in this sense, unusual; in a similar vein, Mates and Bartoň have written that:

> …the public interest may act not only as a criterion demarcating the boundary between private and public law, but also the opposite, as a phenomenon that blurs the differences between them.[129]

In light of this observation, the next section explores the crucial role played by principles of administrative law in shaping the role and content of the public interest in this context, concluding that although there are evident risks attached to the level of discretion enjoyed by

[127] Decision in application by Damhead Neighbourhood Company (CB00189), 3-4.
[128] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 1 pr 1. The Scottish Parliament may not legislate, nor may the Scottish Ministers act, in a manner incompatible with the Convention; Scotland Act 1998, ss 29(2)(d) and 57(2).
[129] P Mates and M Bartoň, 'Public Versus Private Interest – Can the Boundaries Be Legally Defined?' [2011] Czech Yearbook of International Law 171, 182.

the Scottish Ministers in their decision-making function, the public interest, in theoretical terms at least, does not exist entirely without substance.

(c) The influence of administrative law

The decisions of the Scottish Ministers in applications under the community right of pre-emption are subject to a statutory appeal route.[130] Although there must be noted a formal distinction between judicial review (an inherent supervisory power) and rights of appeal (creatures of statute), it appears to be settled law that the role of the courts in community right to buy appeals is "akin to judicial review", following the same common law principles.[131]

As such, the principles of administrative law play a key role in the scope and content of the public interest criterion. Two have been particularly formative in the (regrettably limited) canon of case law which has developed in relation to the community right to buy: the principle of deference and the doctrine of proper purposes.

As for deference, it is generally clear that the approach of the courts has been notably hands-off as regards community right to buy decisions. This approach of strong deference can be seen particularly in the *Holmehill* case,[132] the first major judicial consideration of decision-making under the community right of pre-emption. The pursuers in the case, Holmehill Ltd, had submitted an application which was deemed 'late' in terms of section 39 of the 2003 Act and subsequently rejected for want of 'good reasons' sufficient to overcome the presumption of rejection in place for late applications, and a similarly uncompelling public interest case. After the pursuers appealed to the sheriff court under the statutory appeal route, Sheriff McSherry gave instructive dicta highlighting the role of the court in such appeals.

Emphasising the importance of "ensuring consistency of decision-making throughout Scotland" and having respect for the Scottish Ministers' position, being "duly constituted and elected", the

[130] Land Reform (Scotland) Act 2003, s 61.
[131] *Moorbrook Textiles Ltd v Scottish Ministers* 2024 SLT (Sh Ct) 1 [9].
[132] *Holmehill Ltd v Scottish Ministers* 2006 SLT (Sh Ct) 79.

sheriff concluded that the discretion as to the public interest was "best left to elected representatives … who are in possession of relevant information and who are charged with exercising such discretion".[133] It was not enough that a reviewing authority was "not satisfied that [the decision] was right"; rather, the positive satisfaction "that the decision was wrong" was required.[134]

A similar approach was taken in another case brought by Pairc Crofters Ltd, to date the most authoritative judicial consideration of the public interest criterion in the 2003 Act, having been appealed to the Inner House.[135] Although the case was brought under the crofting right to buy,[136] its discussion of the public interest, it is argued, is equally applicable to the other community rights to buy. Again, the court refused to interfere with the decision of the Scottish Ministers, with the Lord President (Gill) holding it to be a task for the primary decision-maker (i.e., the Scottish Ministers and, in the case of the crofting right to buy,[137] the Scottish Land Court) to "assess the public interest on the facts and circumstances of the case".[138] However, the court warned against excessive extension of that idea, with the proposition that the public interest is *non-justiciable*, or incapable of determination by a court, being rejected.[139]

Evidently, an approach of strong, albeit not absolute, deference appears to have been adopted by the courts. That said, the most recent case on the issue, *Moorbrook Textiles Ltd v Scottish Ministers*,[140] is something of an outlier, with a much more interventionist approach taken. Sheriff Paterson held that the Scottish Ministers had committed an error of law in its interpretation of the 'public interest' test in the provisions relating to the community pre-emption right. The decision is surprising in view of the orthodoxy expressed in the materials surrounding modern land reform legislation, and reinforced in the case law as discussed immediately above, that:

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[133] ibid 96.
[134] ibid.
[135] *Pairc Crofters Ltd v Scottish Ministers* [2012] CSIH 96, 2013 SCLR 544.
[136] See 2003 Act, pt 3.
[137] 2003 Act, s 91.
[138] *Pairc Crofters* (n 135) [57].
[139] *Pairc Crofters* (n 135) [62]-[63].
[140] *Moorbrook* (n 131).

> The public interest … is something which is politically identified at any point in time. Once made, these decisions are subject to public accountability through normal democratic processes.

While greater scrutiny of the scope of the public interest criterion is welcomed in light of the observations made in this work thus far, the decision is nevertheless a startling one, with the conclusion that the Scottish Ministers have misunderstood the public interest being drawn far more readily than might have been conceived on a traditional approach. An explanation for the decision may be that the ground of review in issue – error of law in statutory construction – is typically one in which courts are reluctant to defer to the approaches of decision-makers,[141] as opposed to a ground of review centring on the exercise of discretion. The sheriff's primary objection to the Scottish Ministers' view of the public interest in their decision lay in its failure to consider the viability of other private plans for the land; however, this arguably rests on a rather uncharitable interpretation of a single line in the decision[142] and, more generally, stands at odds with the tenor of decision-making in other applications. Much more can be said on the decision, but for reasons of space this will be omitted in the present work.

If it is accepted that the decision in *Moorbrook* is surprising, it must also be admitted that a strongly deferential approach is by no means axiomatic. Even at its weakest (i.e., with the pre-emption right), the community right to buy interferes with the proprietor's right of disposal, something Bankton considered "inherent" to the right of property.[143] Given the historical reluctance to interfere with property rights both at common law and in the Convention, it is by no means an unreasonable suggestion that the approach taken might mirror that of other 'suspect' issues, with something closer to 'anxious scrutiny' warranted in review.[144] Nevertheless,

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[141] See M Elliott and R Thomas, *Public Law* (4th edn, 2020) 512-519; see also *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; cf the recently overturned concept of *Chevron* deference in the United States, under which courts defer to reasonable interpretations of ambiguous statutory provisions by administrative agencies; see *Chevron USA Inc v Natural Resources Defence Council Inc* 467 US 837 (1984); *Loper Bright Enterprises v Raimondo* (US Supreme Court, 28 June 2024).

[142] See *Moorbrook* (n 131) [21]; it is argued that references by the Scottish Ministers to "taking into account the whole context" and "not *just* considering" (emphasis added) the merits of competing proposals do not necessitate the conclusion that only the public interest in the community body's proposals was considered.

[143] Bankton, *Institute* II.1.6.

[144] On 'anxious scrutiny', see, e.g., *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554 ff (Bingham MR).

it must also be accepted that the issue of the 'public interest' is at its core one of the most purely political determinations with which a decision-maker can be charged.

The question naturally raised is one of whether the public interest, being so inherently political, is capable of meaning *anything*? If so, what are the potential consequences of this? Writing in a comparative and theoretical context, Lovett notes that even scholars "who tentatively support [expropriations carried out explicitly in the name of economic development] worry that the plasticity of the typical 'public interest' or 'public use' requirement for the exercise of eminent domain can lead to abuse," with some government officials being bolstered by "excessive judicial deference" to claims of public benefit.[145]

It is argued that another doctrine of administrative law, that of proper purposes, means that such a fear, in theoretical terms at least, is unfounded. Alternatively known as the *Padfield* principle,[146] the doctrine stands to guide the exercise of statutory discretion couched in prima facie unrestrained terms, such that no discretion is ever truly unfettered. As Lord Reid stated in the eponymous case:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.[147]

Such reasoning can be observed in the community right to buy cases. For example, in *Holmehill*, the sheriff considered that, although the Scottish Ministers had been left "a significant area of discretion and judgment" by the public interest criterion, this nevertheless required to be exercised "with reference to the policy principles underlying the Act", those being the aims of

[145] J Lovett, 'Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's New Compulsory Community Right to Buy' in Combe, Glass and Tindley, *Land Reform in Scotland* (n 30) 177, 181-82.
[146] See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[147] ibid 1030.

"increas[ing] community ownership in land" and the "sustainable development of rural communities", and the notion that "ownership is an onerous responsibility" which requires forward planning.[148]

A particularly illustrative example of the sense in which the public interest is grounded in these policy aims, and especially the ambition to increase community land ownership, can be seen in a recent decision under the right to buy to further sustainable development. The application of Poets' Neuk to buy a plot of land in St Andrews, the first to be made under the most recent right to buy, introduced under the Land Reform (Scotland) Act 2016, was approved by the Scottish Ministers in January 2024, with various public interest justifications given. One, quoted here below, merits attention:

> [Poets' Neuk's] is the first application of its kind in Scotland and, if granted, is likely to generate interest not only in St Andrews but also further afield and therefore influence land use in Scotland more widely. For instance, the granting of this application, in such a well known place of historical interest as St Andrews, could encourage other communities, in Scotland, to consider whether there is land in their area which, if transferred to the community, could bring significant benefits to the community. Ministers have ... concluded that such a transfer is likely to have an impact on land use in Scotland through leading by example.[149]

While one might reasonably criticise such a justification for its obvious circularity, it is argued that it is nevertheless defensible as a subsidiary justification among a range of other, more substantive ones, and on account of the nature of the public interest as shown above.

Of course, that the public interest criterion is rooted in identifiable policy aims does not necessarily import ease in practice. The guidance published in support of the community pre-emption right is undoubtedly correct in asserting that "it is not a simple matter to decide what might be in the public interest".[150] The decision in the appeal brought by Coastal Regeneration Alliance,[151] against the rejection of their application to register a pre-emption right in land,

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[148] *Holmehill* (n 132) 98-99.
[149] Decision in application by Poets' Neuk (SD00002) 7 <www.roacbl.ros.gov.uk/SD00002.html> accessed 14 August 2024.
[150] *2016 Guidance* (n 110) para 90.
[151] *Coastal Regeneration Alliance v Scottish Ministers* [2016] SC EDIN 60.

illustrates this point sharply. While it was contended by the pursuers that the Scottish Ministers had "introduced criteria not required by the 2003 Act or by the Guidance" when they rejected its application for failing to show a clear need for the proposals and a "negative impact if registration were not granted",[152] this argument was rejected by the sheriff. Rather than arbitrarily augmenting the existing statutory criteria, the Scottish Ministers had merely explained the exercise of their "broad discretion fettered only by the requirements of the common law applicable to administrative decisions".[153]

The decision highlights, if nothing else, the importance to community bodies of familiarity with the canon of decisions made by the Scottish Ministers, which although lacking formal precedential value nevertheless allow for greater tailoring of applications to meet expectations. While the Scottish Ministers' discretion may not be entirely unfettered, the broadness of the aims of the 2003 Act, although "not difficult to identify and understand",[154] in turn weakens the restraint placed on that discretion in practical terms. Fears identified by Rowan-Robinson and McKenzie Skene,[155] as well as by Combe,[156] of the "Humpty Dumpty-ish quality" of terms such as 'sustainable development' and 'public interest', on account of their susceptibility to mean "just what I choose it to mean", are quite understandable. While one solution to this problem could be the publication of a revised and expanded guidance, it must be borne in mind that, given the target audience of such resources, the inclusion of further detail may well have unwanted effects on accessibility.

Nevertheless, the impact of the proper purposes doctrine on the consistency of decision-making is observable. In an empirical study taking into account the first five years of decision-making in respect of the community pre-emption right, Pillai found no noticeable change in approach between the Labour/Liberal Democrat coalition which considered the initial tranche of

[152] ibid [60].
[153] ibid [61].
[154] *Pairc Crofters* (n 135) [113].
[155] J Rowan-Robinson and D W McKenzie Skene, *Countryside Law in Scotland* (Tottel 2000) 2.
[156] M M Combe, 'Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?' [2006] Jur Rev 195, 219.

applications and the subsequent SNP administration tasked with each application decision henceforth.[157]

It is thus concluded that, despite the evident and lamentable practical difficulties in using previous decisions to aid the completion of applications, the consistency of that decision-making is in a reasonably satisfactory state. Although scrutiny of the Scottish Ministers' reasoning is desirable to combat the risks which can be posed by broad discretionary powers, it is nevertheless apparent that sufficient legal constraints are in place to ward against arbitrariness. A balance must be found between flexibility of decision-making as is merited by an intervention in property rights as undoubtedly serious as the array of community rights to buy, and the consistency and predictability required to attain the relevant policy objectives, particularly in relation to communities with limited resources and access to expertise.

D. WHITHER THE PUBLIC INTEREST?

A word on the future of public interest ideas in modern land reform ought to be included. It is hoped that the observations in the sections previous might stimulate thought as to the strengths and flaws of more explicit uses of the concept in law.

Proposals for even greater integration of the public interest in land law date perhaps even as far as the measures enacted discussed previously. In 1996, the prominent land reform campaigner Andy Wightman argued that one of the principles underlying a new land reform agenda must include the idea that private landholding should be conducted in the public interest, going so far as to argue that the ownership of land, as a juridical concept, must "encompass only those rights which it is in the public interest to have held privately".[158] Such ideas are often closely entwined with ideas of stewardship obligations, again advocated by Wightman,[159] under which landowners

[157] A Pillai, 'Sustainable Rural Communities? A Legal Perspective on the Community Right to Buy' (2010) 27 Land Use Policy 898, 903-04.
[158] A Wightman, *Who Owns Scotland* (Canongate 1996) 205-07.
[159] ibid 211.

would be required to "take account of the public interest when decisions are made or actions taken with regard to the use or management of land".[160]

Nevertheless, short of the explicit use of the public interest concept in the community rights to buy legislation as considered above, further involvement of such ideas has yet been absent in recent reforms. Perhaps the most likely candidate[161] for inclusion in legislation was the so-called 'public interest test', which would impose a check on major land sales, requiring external approval, likely by the Scottish Ministers, in line with the public interest before such sales could proceed. The idea of such a measure can be seen as far back as the initial LRPG reports which spawned the 2003 Act, in which views are sought on the viability of a public interest test in the transfer of large-scale landholdings,[162] ultimately concluding that legislation "to allow time to assess the public interest when major properties change hands" ought to form part of a "possible agenda for early legislation".[163]

The likelihood of the inclusion of a public interest test on major transfers appeared to grow when such action was recommended for legislation in 2019 by the new Scottish Land Commission, established under the Land Reform (Scotland) Act 2016.[164] In a later report, setting out proposals targeted at reducing the concentration of landownership in Scotland, the Commission stated that it "envisaged that [the] power would have strong parallels with those of the Competition and Markets Authority when assessing the risk to the public interest of mergers and acquisitions" and that it would be used as a "targeted mechanism" used to check transfers which could "create or perpetuate excessive market power that could harm the social, economic, or environmental wellbeing of an area's communities".[165]

[160] As described in Mackenzie Skene et al (n 30) 156.
[161] It is noted in Gordon and Wortley (n 103) para 29-14 that the alteration of the nature of landownership to include a degree of inherent responsibility remains something of a fringe prospect, although perhaps liable to grow in potential in the face of contemporary pressures.
[162] LRPG, *Identifying the Problems* (n 69) para 3.15.
[163] LRPG, *Recommendations for Action* (n 69) para 3.2.
[164] See Land Reform (Scotland) Act 2016, pt 2.
[165] Scottish Land Commission, *Legislative Proposals* (n 49) para 7.1.

Following that recommendation, the inclusion of the policy as a commitment in the (now-abrogated)[166] Bute House Agreement,[167] and the announcement of the development of a new land reform Bill by the Scottish Government,[168] it was expected that this public interest test would be included. After the introduction of the Land Reform (Scotland) Bill to the Scottish Parliament in March 2024,[169] views remain mixed as to whether this is in fact the case.

The Bill's Policy Memorandum takes the view that the Bute House Agreement commitment to a public interest transfer test is fulfilled by the measures included in the Bill. In essence, a bifurcation of the substance of a public interest test has taken place: provisions in the Bill requiring that advance notification be given to community groups before large-scale landholdings can be exposed for sale fulfil one element of the policy,[170] while provisions enabling the Scottish Ministers to divide or 'lot' large-scale landholdings upon transfer fulfil another.[171]

However, as is surely evident, the measures as introduced in the Bill are, as Combe notes, "something of a shift away from the public interest test that the consultation adverted to".[172] No view is expressed on the suitability of the Bill's measures to meeting the stated policy aims, but the disapproval of certain parties, including Wightman, who contended that "the absence of a public interest test", among other issues, meant that "the Bill is unlikely to have any meaningful impact on the pattern of landownership in Scotland", is noted.[173]

With the Bill remaining at stage 1 in the Scottish Parliament at time of writing, only time will tell the impact of the measures proposed as an equivalent to a public interest test in the Bill. Nevertheless, it is notable in light of the limitations of the public interest concept highlighted in

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[166] 'Bute House Agreement Ends' (Scottish Government, 25 April 2024) <www.gov.scot/news/bute-house-agreement-ends> accessed 7 August 2024.
[167] Scottish Government and Scottish Green Party, *Shared Policy Programme* (Scottish Government 2021) 44.
[168] See, e.g., *Land Reform in a Net Zero Nation* (Scottish Government 2022), a consultation paper seeking views on proposals for a new land reform Bill.
[169] SP Bill 44 Land Reform (Scotland) Bill [as introduced] Session 6 (2024).
[170] ibid cl 2(4).
[171] ibid cl 4.
[172] M M Combe, 'Land Reform (Scotland) Bill [Number 3] Introduced to Holyrood' (*Basedrones*, 26 March 2024) <www.basedrones.wordpress.com/2024/03/26/land-reform-scotland-bill-number-3-introduced-to-holyrood> accessed 7 August 2024.
[173] A Wightman, 'Land Reform (Scotland) Bill (1)' (*Land Matters*, 28 March 2024) <www.andywightman.scot/2024/03/land-reform-scotland-bill-1-2> accessed 7 August 2024.

this work that the new Bill has perhaps marked a shift away from more explicit uses of the concept in statute.

In like manner, the provisions of the Bill which would introduce compulsory land management plans for certain larger landholdings, from which parallels with the stewardship obligation outlined above might well be drawn, do not mention the idea of the public interest.[174] While much of the detail as regards this measure will not be seen until after the Bill's eventual passage through the Scottish Parliament – and regrettably so, it is argued –[175] with the Bill merely imposing obligations on the Scottish Ministers to make regulations, it remains notable that the required details in any land management plan (including the owner's long-term vision for managing the land and achieving Scotland's net zero targets)[176] are expressed in more substantive terms than might have been the case with stewardship proposals.

In any event, it will take much longer for any trend towards or away from public interest criteria to become apparent, but it is suggested that the legislative methods adopted in the new Bill provide food for thought about how best specific policy aims in relation to land and the public interest can be achieved.

E. CONCLUSIONS

As was alluded to in the introduction of this work, the adage that *plus ça change, plus c'est la même chose* is perhaps an apt one as regards the influence of the public interest in this context. This is certainly the case as regards its role: just as was identified by Bell in his *Principles*, the exclusive and absolute rights of property in land must nevertheless yield where the public interest, however that term is understood, demands.[177] In this sense, the function of the public

[174] 2024 Bill (n 169), cl 1(4).
[175] For a discussion of the increasing trend of so-called 'framework Bills', see L Kerr, 'Scottish Government Avoids Legislative Scrutiny With Framework Bills' (*Scottish Legal News*, 7 May 2024) <www.scottishlegal.com/articles/liam-kerr-framework-bills> accessed 7 August 2024.
[176] 2024 Bill (n 169), cl 1(4), inserting a new s 44B into the Land Reform (Scotland) Act 2016.
[177] Bell, *Principles* § 939.

interest, in limiting the excesses and dangers of too libertarian a conception of property, remains the same. In the modern day, this is especially the case in the context of planning and other regulation,[178] which although outwith the scope of present discussion, nevertheless are of considerable importance and merit mention.

One sense in which the role of the public interest may differ from that in Bell's time relates to the importance of discretion in its modern manifestation, as discussed above. Although the range of interests embraced by the notion of the public interest is undoubtedly different in the modern day, the uncertainty in the public interest's modern content and its susceptibility to change on account of political ambition must, it is argued, represent a qualitative difference in the function of the public interest in regulating property rights. Although it would undoubtedly be hyperbolic to assert the practical impact of this shift to be anything particularly drastic, awareness of the potential effects of increasingly unpredictable or ambulatory rights of property is necessary in order to ensure modern land reform remains workable and sustainable.[179]

If it is accepted, as it surely must, that a much wider range of interests form part of the modern conception of the public interest, the explanation for this must also be questioned. The growth in the role of the state, it is argued, coupled with a land reform agenda driven by political ambition and sustainable development has led to the modern conception of the public interest becoming at once greatly expanded and harder to adequately pin down. The benefits of this are not difficult to identify: consider the assertion of Bell that the right of property, although limited by the public interest, must nevertheless allow a proprietor to "exhaust … or destroy the substance of his ground". In embracing interests not limited to immediate and extreme exigency, the public interest may be seen to better reflect the long-term and societal importance of land. However, difficulties in the modern approach, as has been discussed, are in no short supply either. As Kivell and McKay assert:

[178] See, e.g., Planning (Scotland) Act 2019, s 1; defining the purpose of planning as "to manage the development and use of land in the long term public interest".
[179] See M M Combe, 'Introduction', in Combe, Glass and Tindley (eds), *Land Reform in Scotland* (n 30) 1, 7.

> Since the late 1960s it has become increasingly clear that the concept of 'the public good' is severely weakened by the multiplicity of interest groups which exist in modern urban society.[180]

Perhaps it is unsurprising, then, that a concept which has become so grounded in political ambition necessitates political discretion, as has been noted, in order to function with genuine substance and significance.

While this work offers no ready solutions as to how a happier balance between the necessary flexibility of the public interest as a concept and the consistency understandably desired in modern society, it recommends nonetheless the study and consideration of the function of public interest ideas in relation to land. Indeed, as future challenges – social, economic and environmental – continue to come to a head, and the crucial role played by land management and use in meeting those challenges becomes increasingly apparent, it will become just as necessary as it will be fascinating to observe the role played by the public interest in shaping land law for a new age.

Ross McCormick

August 2024

[180] P T Kivell and I McKay, 'Public Ownership of Urban Land' (1988) 13(2) Trans Inst Br Geogr 165, 166.