LAND REFORM AND THE COMMON GOOD

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Abstract

This thesis examines the extent to which Scotland's community rights to buy align with progressive property theory. These community rights to buy enable the transfer of land from a private landowner to a community body, either without the landowner's consent or through a pre-emptive right voluntarily granted by the landowner. The measures were introduced as part of a wide-ranging land reform programme for the "common good" which has been defined as including wellbeing for all, environmental sustainability, social justice, fairness and equality. The pursuit of these value-based objectives resonates with progressive property theory, which examines the role property can and should play in advancement of values like equality, dignity, promotion of justice and community.

To answer the research question, the thesis employs a mixed methodology. It provides a historical analysis of land reform in Scotland, followed by an examination of modern-day land reform measures introduced since the re-establishment of the Scottish Parliament in 1999, with a particular emphasis on the suite of community rights to buy. The thesis then proceeds with a doctrinal analysis of the community rights to buy legislation contained in the Land Reform (Scotland) Act 2003, the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2016. Lastly, the thesis contains an analysis of the literature of progressive property theorists Gregory Alexander, Joseph Singer and André van der Walt, concluding with identification of common and divergent areas of their work.

This thesis then argues that the suite of community rights to buy introduced as part of Scotland's recent land reform programme has a close alignment with the common characteristics of progressive property theory. It contends that both the legislative intent for these community rights to buy and the statutory process as enacted differ significantly from previous approaches to land reform. The measures allow for the consequentialist approach promoted by progressive property theorists to be taken by decision makers, who must consider contextual and human relationship factors. Moreover, there is an emphasis on attainment of pluralistic progressive values pre-determined by the legislator. However, while the community rights to buy meet this benchmark, factors such as the continued entrenchment of the view that ownership is the guardian of other rights and the inaccessibility of the measures to those who should benefit from them mean this legislation will not significantly alter the lives of those on the margins of society and advance wellbeing for all.

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This thesis is dedicated to my father, Dr Derek Arthur (1945 – 2010).

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Michael Arthur

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Abbreviations

A1P1	Article 1 of the First Protocol to the European Convention on Human Rights
BoAS	Board of Agriculture for Scotland
CDB	Congested Districts Board
DAFS	Department of Agriculture & Fisheries Scotland
ECHR	European Convention on Human Rights
EHRiC	Scottish Equality and Human Rights Committee
HIE	Highlands and Islands Enterprise
ICESCR	International Covenant on Economic, Social and Cultural Rights
LRPG	Land Reform Policy Group
LRRG	Land Reform Review Group
LRRS	Land Rights and Responsibilities Statement
NHS	National Health Service
RACCE	Rural Affairs, Climate Change and Environment

RESAS	Rural and Environment Science and Analytical Services
SLC	Scottish Law Commission
SLF	Scottish Land Fund
SNP	Scottish National Party
SPICe	Scottish Parliament Information Centre
UN	United Nations

Chapter 1 Introduction

1.1 Aims

Scotland is in the process of implementing an extensive land reform programme for the benefit of the "common good." In 2014, the Land Reform Review Group (LRRG), commissioned by the Scottish Government, reported the findings of their inquiry into Scotland's system of land ownership, and the role it plays in shaping the relationship between Scotland's people and land.[1] The Report included a number of recommendations for "land reform", which the group defined as "measures that modify or change the arrangements governing the possession and use of land in Scotland in the public interest."[2] They identified the "common good" as the goal to which the public interest aspires in the land reform context, and described a number of factors which they considered part of this common good objective, including wellbeing for all, environmental sustainability, social justice, fairness, equality and human rights.[3]

Although the land reform programme in Scotland has been the focus of significant public debate,[4] academic analysis of the measures has been limited.[5] In particular, there has been no systematic analysis of the theoretical underpinnings of the law. The aim of this thesis is to remedy that omission. The Scottish Parliament has introduced a vast amount of legislation since the start of its modern-day land reform programme. The LRRG found that between 2000 and 2013, of the 205 Acts which had received Royal Assent, 38 of these

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[1] Land Reform Review Group, "The Land of Scotland and the Common Good" (2014). Available at https://www.gov.scot/Resource/0045/00451087.pdf

[2] *Ibid* Sec 1, para 9.

[3] *Ibid* Sec 2, paras 9-13.

[4] See, for example, The Spectator, "Should we fear a Mugabe-style land grab in rural Scotland?" (2015). Available at http://www.spectator.co.uk/2015/05/should-we-fear-a-mugabe-style-land-grab-in-rural-scotland/ and The National, "#BeBrave: Campaigners in mass lobby of Holyrood over Land Reform Bill" (2015). Available at http://www.thenational.scot/news/14899307._BeBrave__Campaigners_in_mass_lobby_of_Holyrood_over_Land_Reform_Bill/

[5] See for example M Combe, "Part 2 and 3 of the Land Reform (Scotland) Act 2003: A definitive answer to the Scottish Land Question?" (2006) Jur Rev 195; W Sellar, "The great land debate and the Land Reform (Scotland) Act 2003" (2006) Norsk Geografisk Tidsskrift 100; M Combe, "No place like Holme: community expectations and the right to buy" (2007) 11(1) Edin LR 109; M Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish land question" (2016) Juridical Review 291; J Lovett & M Combe, "The Parable of Portobello: Lessons and Questions from the First Urban Acquisition Under the Scottish Community Right-to-Buy Regime" (2019) 80 Mont. L. Rev. 211; M Combe, J Glass and A Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (2020); and J Robbie & E van der Sijde, "Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability" (2020) Loyola Law Review 553

contained land reform provisions, spread across all parliamentary sessions.[6] For this thesis, it was therefore necessary to focus on a specific area of recent land reform. To this end, Scotland's suite of community rights to buy has been selected; the pre-emptive community right to buy, the crofting community right to buy, the community right to buy abandoned, neglected or detrimental land and the community right to buy to further sustainable development.

Arguably these community rights to buy, which can result in the transfer of land from a landowner to a private entity known as a community body without the consent of the landowner,[7] are the most dramatic of the land reform measures which have been enacted in this period. This approach to the forced redistribution of land directly to private bodies was introduced with little, if any, comparative analysis, and no other jurisdiction has implemented such measures. Moreover, the community rights to buy approach to land reform has evolved gradually over the modern land reform period. The initial two rights to buy were introduced in the Land Reform (Scotland) Act 2003 and then amended by the Community Empowerment (Scotland) Act 2015. The 2015 Act also established the third community right to buy, and the fourth and final one to date was part of the Land Reform (Scotland) Act 2016. Each new right to buy has increased the scope of eligible land which can be transferred without consent. The above reasons make them an ideal area of land reform to examine from a property theory perspective.

In order to evaluate the community rights to buy, progressive property theory will be considered. As will be shown in this thesis, progressive property theorists examine the role that land and land law can and should play in advancing progressive values such as equality, dignity, promotion of justice and community. These values which underpin progressive property theory coincide with both the common good factors identified by the LRRG as being the goal of land reform and the Scottish Government's expressed intentions when introducing recent land reform, in particular, the community rights to buy.[8] It is therefore an appropriate strand of property theory to be used to theoretically evaluate Scotland's land reform legislation.

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[6] Land Reform Review Group, "The Land of Scotland and the Common Good" Sec 3, para 8.

[7] This is the case for three out of the four community rights to buy. The other one creates a pre-emptive right in the land in favour of the community body and without the consent of the landowner. See section 3.2.

[8] For example, see Scottish Government, "Land Reform (Scotland) Bill Policy Memorandum" (2015) paras 2-8.

In light of the above, the research question is as follows: To what extent are Scotland's community rights to buy aligned with progressive property theory? This thesis will explore (i) whether the aims of the community rights to buy legislative measures and their statutory processes are aligned with progressive property theory, and (ii) the extent to which they are so aligned.

1.2 Methodology

To answer the above research question, this thesis takes a mixed methodological approach. First, a historical approach is undertaken to examine Scotland's land reform endeavours, covering the period from the 11th Century to the modern day. Donald Dewar, who would later become Scotland's First Minister, had made clear in 1998 that "we must let the past go, and look to the future."[9] However, Combe states that for land tenure, "[p]rudence dictates that there should be analysis of how [a land tenure] system came to exist and of past efforts at reform."[10] This, in Combe's view, allows for a "comparator to the previous day."[11] An historical analysis will therefore allow for an examination of the factors which have driven previous land reform and an analysis of the success of the approaches adopted. This evaluation can then be used as a comparator to the legislative intent of modern-day land reform, particularly the community rights to buy, and will allow for a determination as to if and when a progressive focus to land reform was adopted. An historical analysis will also help to explain how and why the modern-day pattern of landownership in Scotland came to exist, building on work by the likes of Callander[12] and Wightman.[13]

Second, as the community rights to buy were selected as the legislation to be examined through a property theoretical lens, it is necessary to determine what these measures are and the wider framework to which they belong. This is achieved through a doctrinal critical analysis approach, defined by Dixon as "a dissection of the law *as is*, examining it for consistency and coherence, as well as a critical appreciation of the law in terms of

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[9] D Dewar "Land Reform for the 21st Century" (1998). Available at http://www.caledonia.org.uk/land/dewar.htm

[10] M Combe, "Part 2 and 3 of the Land Reform (Scotland) Act 2003: A definitive answer to the Scottish Land Question?" (2006) Jur Rev 195 at 197.

[11] *Ibid*.

[12] For example, R Callander, *How Scotland is Owned* (1998), R Callander, *A Pattern of Landownership in Scotland* (1987).

[13] For example, A Wightman, *Who Owns Scotland* (1996), A Wightman, *The Poor Had No Lawyers* (2013).

policy compatibility and future development."[14] The research for this thesis therefore includes (a) an examination and critique of the political and policy factors driving the introduction of the community rights to buy measures and (b) in-depth doctrinal analysis of the legislation. This will include consideration of the Land Reform (Scotland) Act 2003, the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2016, and the relationship of these to the wider land reform programme.

Lastly, to determine progressive property theorists' positions on "why property is what it is, and whether it should remain that way"[15] a review of progressive property theory literature was undertaken. The findings from this piece of research will then be used to evaluate if the community rights to buy can be justified using progressive property theory and to what extent they are aligned with it. In order to obtain a range of opinions and to identify comparable and divergent views, the work of three progressive property theorists was considered.[16] Gregory Alexander and Joseph Singer were first chosen. These two American scholars, who were signatories of "A Statement of Progressive Property,"[17] are leading experts in progressive property theory and have written extensively on this area of research. Further, while they have similar outlooks on what property law should achieve, these are based on different foundations. To gain insight from a different jurisdiction and obtain expert knowledge from a civil law perspective, a South African scholar, André van der Walt, was chosen as the third theorist. South Africa has been going through a land reform programme post-apartheid, and Van der Walt played a key role in shaping the development of law under the new South African Constitution. His work on this has been

[14] M Dixon, "A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?" in S Bright and S Blandy (eds), *Researching Property Law* (2016) 1 at 2-3. Italics by the author.

[15] L Underkuffler, "A Theoretical Approach: The Lens of Progressive Property" in S Bright and S Blandy (eds), *Researching Property Law* (2016) 11 at 12.

[16] There are other progressive property theorists not covered in-depth in this thesis. See, for example, M Radin 'Property and personhood' (1982) 34 Stanford LR 957, L Underkuffler, *The Idea of Property: Its Meaning and Power* (2003), J Nedelsky, "Should Property Be Constitutionalized? A Relational and Comparative Approach" in G van Maanen & A van der Walt (eds), *Property on the Threshold of the 21st Century* (1996) 417, D Lewinsohn-Zamir, "The Objectivity of Well-Being and the Objectives of Property Law" (2003) 78 NYU L Rev 1669, E Peñalver, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (2010) and H Dagan, "Reimagining Takings Law", in G Alexander and E Peñalver (eds), *Property and Community* (2009) 39.

[17] G Alexander, E Peñalver, J Singer and L Underkuffler, "A Statement of Progressive Property" (2009) 94(4) Cornell Law Review 743.

published widely and is recognised by other progressive property law theorists, including Singer.[18]

1.3 Structure

This thesis is structured into the three distinct components: (a) land reform in Scotland; (b) property theory; and (c) an analysis of the relationship between these two elements.

Chapter Two presents a historical discussion on land reform in Scotland from the 11th to the 20th Century. This provides a baseline to be used as a comparator to show how the rationale for land reform has changed in Scotland's modern day land reform programme. It also gives a contextual background to the key drivers which resulted in Scotland's current pattern of concentrated ownership, one of the often-stated impetuses for land reform, including the introduction of the land tenure system of feudalism and the succession law principle of primogeniture. Further, the chapter will consider various pieces of legislation introduced in the 17th Century and will argue that these were implemented as a result of the influence of owners of large-scale estates with the purpose of strengthening or protecting ownership rights for individual gain. It will also describe the subsequent Age of Improvement in which land was first treated as an economic commodity, namely using land for profit rather than sustenance and which resulted in mass clearances of various groups by landowners in the 18th and 19th Centuries. The chapter will conclude with a discussion on the methods adopted in an attempt to counter the dominance of the large landowners following civil unrest at the end of the 19th Century. It will be shown that while these measures were introduced in tandem with the political ideologies of the UK Government in power at the time, which recurrently changed between 1880 and 1920, these were driven by attempts to quell agitation, and were mainly unsuccessful in achieving significant change, including attempts made to convert tenants to owners. In particular, it is maintained that land reform during this period was not introduced for the advancement of progressive values.

Chapter Three then covers modern day land reform in Scotland to bring the review of Scotland's land reform journey up to date and will describe the factors which resulted in the introduction of the community rights to buy. As will be shown, the re-establishment of

[18] For example, T Mulvaney and J Singer, "Move Along to Where? Property in Service of Democracy (A Tribute to André van der Walt)" (2017) Texas A&M University School of Law Legal Studies Research Paper No. 17-39, Harvard Public Law Working Paper No. 17-40.

the Scottish Parliament in 1999 and the creation of a commission, the Land Reform Policy Group, to identify and assess proposals for land reform, were key events which resulted in a step change in the objectives of Scotland's land reform. This group placed a community based sustainable development objective on land reform which, in their view, should be introduced, to improve social, environmental and economic factors. The work of the Land Reform Policy Group culminated in the enactment of, among other things, the Land Reform (Scotland) Act 2003 which included two community rights to buy, the pre-emptive community right to buy and the crofting community right to buy. These rights allowed for suitably incorporated entities called "community bodies" to apply to obtain either a pre-emptive right to land or the transfer of crofting land without the consent of an owner, provided that various criteria were met.

The chapter will also describe what has driven Scotland's continued programme of land reform by examining the work of the Land Reform Review Group, commissioned in 2012. This body came to the view that land reform should have a focus on the common good. To this end, the group produced an extensive report in 2014 containing a number of wide-ranging land reform recommendations. Following publication of this report and in tandem with a Government focused on improving community empowerment, two new community rights to buy were enacted in the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2016; the community right to buy abandoned, neglected or detrimental land and the community right to buy to further sustainable development. These rights to buy have specific objectives, scope and criteria and, again, do not require the consent of the landowner for the transfer of land. The chapter will argue that while the introduction of the community rights to buy were made with minimal research, they were the enabler for future land reform and the Government has since embraced the link between land reform and sustainable development, human rights and the diversification of the types of landowners. It will later be contended in the thesis that such objectives are progressive and aligned with progressive property theory.

Chapter Four contains the doctrinal analysis of Scotland's four community rights to buy. Consideration is given to several provisions in the legislation that will be further analysed through a progressive property lens later in the thesis. It also provides a critique of the approach used when the provisions could result in the achievement of progressive objectives not being met. The chapter argues that the restrictive approach to defining eligible land is unnecessary and detrimental to the achievement of the objectives of the legislation and initial concerns on the geography-based definition used for a community

body are raised. Further, it is highlighted that there is a high bar in the criteria required to be met for an application to receive consent which could minimise the number of successful applications. Moreover, it is contended that there is a disparity in how landowners' views are obtained when compared to the support and statutory prescribed forms that community bodies can use, raising concerns of procedural equality. It is also argued that the approach to valuation does not allow for contextual factors to be considered and contends that the Scottish Ministers are not the appropriate decision-making body due to a potential conflict of interests and a lack of expertise. Lastly, it is maintained that there is a lack of a statutory requirement to monitor whether the stated plans of the community bodies have been achieved and whether the legislation is meeting its progressive objectives.

Chapter Five provides a literature review of the progressive property theories of Gregory Alexander, Joseph Singer and André van der Walt. Each writer is first considered separately. The chapter covers (a) Alexander's human flourishing theory and his social-obligation norm, (b) Singer's entitlement model, and his views on the externalities of ownership and property as the law of democracy, and (c) Van der Walt's recommended constitutional notion of property, his views on the centrality of property rights and where they should sit within a hierarchy of rights, and his promotion of consideration for those on the margins when developing a property regime.

The chapter then compares the work of the three authors to identify common strands which are used later in the thesis to ascertain if the community rights to buy are aligned to progressive property theory and to what extent. It is argued that the scholars use progressive values to justify the introduction of new property law measures or restrictions placed on current rights and have similar views on the requirement for property law to allow for the context of the parties and the relationship between them to be considered in dispute resolution. Likewise, it is found that there was a common position that consideration for the consequences that would arise as a result of a decision was necessary when settling conflict and that each of the approaches advanced by the theorists are pluralistic in nature. Finally, it is maintained that Van der Walt's theories take a more radical stance than Alexander and Singer, and his views on the centrality of property rights, the role of property as the guardian of other rights, and the relationship between ownership and social obligations differ from the other two theorists.

Chapter Six provides the results of the analysis of the relationship between the community rights to buy and progressive property theory. It argues that the introduction of the community rights to buy and the goals of the legislative measures can be justified with reference to progressive property values. The intention of the measures has been driven by the advancement of societal and environmental gains and the promotion of progressive goals such as equality and social justice. In particular, the community rights to buy approach has a focus on the objectives of land law, rather than being solely concerned with subject-object-right relationships. This is in contrast with the approaches to land reform discussed in Chapter Two, which were driven by enhancing or protecting the ownership right, or to suppress civil unrest.

Further, it is established that the intention behind the introduction of the community rights to buy and the statutory processes enacted are aligned to progressive property theory, answering the first half of the research question. Examining the community rights to buy using the identified common strands of Alexander, Singer and Van der Walt's theories, it is found that the measures require decision makers to take a consequentialist approach with an emphasis on the attainment of the legislator's pluralistic progressive values. Contextual and human relationship factors can also be introduced by other parties in the conflict for consideration by Scottish Ministers when determining the outcome of an application. While the community rights to buy do therefore pass the benchmark test for alignment with progressive property theory, it is contended that there is a mismatch between Van der Walt's views on what a property system should achieve and the community rights to buy legislation. An approved community right to buy application results in the transfer of an ownership right from one entity to another. It therefore remains in the property sphere, continues to promote ownership as a norm, and does not re-imagine an approach to property through consideration of those on the margins of society.

Chapter Seven then provides an examination of a number of the approaches used in the community rights to buy, and identifies and recommends areas which can be enhanced in order to better attain the progressive objectives of the measures. It is contended that the community rights to buy are exclusionary because they only allow for the transfer of the ownership right to a community body and do not allow for other approaches such as land-leasing agreements or the provision of use rights. Ownership is previously identified as something groups of individuals wished to avoid in preference for other land rights. The community rights to buy therefore maintain centrality thinking and do not meet Van der Walt's push for a move away from the view that the ownership right is the norm.

Further, it is shown that the community rights to buy excludes communities of interest through the use of a territorial definition for a community and such groups therefore cannot realise the intended benefits of the measures. Also, through an analysis of the complex statutory processes and the various capacity requirements it places on community bodies, it is contended that the community rights to buy in their current form are a barrier to those on the margins of society. This therefore hampers the full achievement of the progressive objectives and conflicts with Van der Walt's conceptualisation of marginality in property. This is further exacerbated through the identification in this chapter of various methods that landowners, generally the more powerful of the parties in a conflict, can use to frustrate the aims of the legislation. It is therefore contended that these identified factors will mean that, until addressed, this legislation will not significantly alter the lives of those on the margins of society and achieve wellbeing for all.

The final chapter of the thesis is the conclusion chapter. Chapter Eight provides a summary of the various findings of this thesis and identifies areas for future work. The referencing conventions adopted throughout this thesis follow the approach taken by Edinburgh University Press and the Edinburgh Law Review.[19]

[19] A summary can be found at https://www.euppublishing.com/page/elr/submissions

Chapter 2 History of Land Reform in Scotland

2.1 Introduction

This initial chapter provides a historical background to land reform in Scotland. It will provide a baseline to be used when examining if and how the rationale for land reform has changed in Scotland's modern-day land reform programme and for determining the relationship between latter day land law and progressive property theory. In particular, it will highlight how historically there has been a focus on individual property rights, particularly ownership, which have changed over time, for example, becoming better protected against legal challenges or diluted in preference of other rights. It will also provide the context to help understand why Scotland has a pattern of land ownership far more concentrated than in other European countries.[1] A 2014 study by Wightman showed that out of a population of 5.3 million, just over 430 landowners owned half of Scotland's privately held rural land.[2] It will be shown that this pattern of ownership was first developed when feudalism was adopted as Scotland's system of land tenure and continued through significant social and economic changes.

The chapter will describe the key changes which have occurred in land law in Scotland, from the introduction of feudal tenure in the 11th Century to the enactment of the Land Settlement (Scotland) Act 1919 and its consequences. It provides an overview of the initial effects resulting from the establishment of feudal tenure and an analysis of how this system has changed over time. This includes descriptions of the key legal measures which were introduced and the effects these had on landownership. Following this is background on the Agricultural Revolution and the Age of Improvement which culminated in the Highland Clearances. The chapter ends with an examination of how Westminster dealt with the land question in relation to the Highlands between the end of the 19th Century and the start of the 20th Century, followed by a brief section on land reform during the 20th Century.

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[1] See, for example, J Hunter *et al*, "Towards a comprehensive land reform agenda for Scotland" (2013) para 3.1. Available at https://www.parliament.uk/documents/commons-committees/scottish-affairs/432-Land-Reform-Paper.pdf. The Land Reform Review Group also note that it has been claimed that Scotland has a "more concentrated pattern of large scale private land ownership than is found in any other country in the world." Land Reform Review Group, "The Land of Scotland and the Common Good" (2014) para 24.3. Available at https://www.gov.scot/Resource/0045/00451087.pdf

[2] A Wightman, "Land Reform – the wait is over" (2014). Available at http://www.andywightman.com/archives/3975

2.2 Developments in Landownership in Scotland during the 11th to 18th Centuries

2.2.1 Introduction

This section will detail the history of feudalism as a system of land tenure in Scotland. This has relevance for this thesis due to effect feudalism had on shaping land ownership in modern day Scotland. As Wightman highlights, over the centuries, feudalism "evolved from a system that was essentially concerned with governance through the exercise of feudal authority to a system of land tenure and ownership … and it is that transformation that resulted in the pattern of ownership we have today."[3]

2.2.2 The Terminology of Feudalism

Before continuing with the discussion on the introduction of feudal tenure, some background on the concept of feudal tenure and its terminology would be beneficial. As Gretton notes: "Feudalism is notoriously hard to define."[4] With feudal tenure, the Crown assumes ownership of all land in a jurisdiction and grants authority over portions of this land to individuals, who can in turn delegate the management and use of parts of this land to others. Feudalism, therefore, established a system of control across the whole population based on land and introduced a "pyramid over the land of Scotland that runs down from [the Crown] at its apex, through superiors, to the vassals at the base in actual possession of the land."[5] In the feudal system, land is not actually owned, but is held in tenure, with tenure being a personal relationship between two parties.[6] Land was conceptualised as having multiple ownership, with superiors having one form of ownership, known as *dominium directum* and vassals a different form known as *dominium utile*.[7] When discussing landownership, landholdings and landowners in this and subsequent chapters, references to the owner of land (unless otherwise stated) will be to the vassal, in other words the person at the bottom of the feudal chain who holds *dominium utile*.[8]

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[3] Wightman, *The Poor Had No Lawyers* 19.

[4] G Gretton, "The Feudal System" in Reid, *Property* (1996) para 42.

[5] Callander, *How Scotland is Owned* 10.

[6] Gretton, "The Feudal System" para 42.

[7] *Ibid* para 49.

[8] There can, of course, be others below the owner, such as tenants who have rights to possess land, but this is not part of the feudal chain. For a historical discussion on the differing views on whether both superiors and vassals had ownership, see Gretton, "The Feudal System" para 51.

The Scottish system of feudalism imposed a feudal bond in which the "vassal owed his lord fealty and, in some cases, also homage."[9] In exchange, the superior granted the vassal the feu. In other words, it was a form of transaction. Homage, which included fealty, was only a requirement for what Gretton calls "true feus,"[10] those linked to the provision of military support. Fealty or homage had to be renewed when there was a change in vassal.

There were different types of tenure based on the obligations placed on the vassal, which was termed the *reddendo*, along with other irregular requirements called casualties. The true feudal tenure was wardholding with the *reddendo* of "hunting and hosting" which required the vassal and his men's attendance to the King during times of war.[11] Other tenures included those based on religion and the protection of the soul of the superior (mortification), and those with a rent, either illusory (blench) or actual (feufarm). Only blench and feufarm existed as valid feudal relationships by the time feudal tenure was abolished in 2004.

Although the vassal was entitled to possess the land on the basis of the feu, superiors could reserve rights to make certain uses of the land (for example, in relation to mineral extraction or use for sport), impose conditions on any dealings the vassal had with their ownership rights (for example, the superior might hold a right of pre-emption), and impose restrictions on the vassal's use of the land (for example, forbidding the erection of further buildings).[12] Thus a vassal could use their land as they wished, subject to both the laws of the land and the conditions in the charter which had feud the land to them. They held conditional title in that if they breached any of the latter conditions, the land would be forfeited back to the superior.[13]

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[9] Gretton, "The Feudal System" para 53.

[10] *Ibid*.

[11] Gretton, "The Feudal System" para 64.

[12] Callander highlights that "the rights retained by superiors created "hidden maps" of landownership that are even more concentrated than the more conspicuous pattern of landholdings." Callander, *A Pattern of Landownership in Scotland* 14.

[13] See G Gretton & A Steven, *Property, Trusts and Succession*, 4th edn (2021) para A.15 and Callander, *A Pattern of Landownership in Scotland* 20.

2.2.3 Introduction of Feudalism and Primogeniture

Feudalism was seen as a "well-tried system of law and order for strengthening [the King's] central authority"[14] which "involved the promotion of power, based on the possession of land."[15] Feudalism began to permeate in Scotland following the Norman conquest of England in the early 11th Century. Malcom III, who was the King of Scots from 1034-1093, started the process of change following his defeat of Macbeth in 1054 and introduced earls, lords and barons, replacing the older offices of thanes. The introduction of feudalism did not result in significant changes to the patterns of ownership.[16]

Though many countries which had adopted similar systems of feudalism began to abolish them from the 14th Century onwards,[17] the "system demonstrated a remarkable capacity for survival"[18] and the decline was gradual. Nevertheless, in England, it was mostly abolished in the mid-17th Century and the revolutionary period at the end of the 18th Century saw it come to an end across most of the west of continental Europe.[19] Feudalism did, however, survive in Scotland, though in a slowly diminishing form until it was abolished in 2004.[20] In Wightman's view, it lasted so long in Scotland as compared to elsewhere due its "successful adaptation to changing circumstances and the powerful role afforded to landowners in government."[21]

Another related key change which occurred at the start of the 12th Century was to succession. The concept of primogeniture was adopted, resulting in land holdings passing to the eldest son following death of the landowner. This played a significant role in the sustained concentrated pattern of landownership in Scotland, with Wightman's view that:

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[14] Callander, *A Pattern of Landownership in Scotland* 16.

[15] *Ibid*.

[16] This was different to the case in England where feudalism was "imposed as the reorganisation by a class of incoming conquerors of lands forfeited by the defeated." D Walker, *A Legal History of Scotland, Vol 1* (1988) 76.

[17] Gretton, "The Feudal System" para 45.

[18] *Ibid*.

[19] *Ibid*.

[20] Abolition of Feudal Tenure etc. (Scotland) Act 2000.

[21] Wightman, *The Poor Had No Lawyers* 19.

> "Of all the legal framework surrounding landownership, the law of succession in Scotland is the single greatest reason the pattern of private landownership remains so concentrated compared with the rest of Europe."[22]

Scotland introduced the principle of primogeniture for the succession of military feudal holdings. This principle gave preference to males over females[23] and predated feudalism. Wightman claims this principle "was a means of ensuring the perpetuation of the feudal system"[24] as it maintained undivided landed wealth. Irvine Smith credits David I for establishing it in Scotland when he "put his son, and on his son's death his grandson, in the position of next man to himself"[25] and in 1144 he "appears to have had his son's right of inheritance recognised by the national council."[26] When David's eldest son died, he proclaimed his son's eldest son as heir to the throne. Irvine Smith states that this principle became accepted as applying to feudal property in general by the end of the 13th Century,[27] with Wightman noting that a court set-up in 1292 to determine the succession to the throne confirmed the common law of inheritance to feudal estates.[28]

Originally, the principle, as opposed to breaking up estates between sons, was seen as necessary for reasons of defence and the protection of estates. Irvine Smith notes that this justification changed in the time of Stair who, in 1681, argued that primogeniture preserved the "memory and dignity of families" which division would erode.[29]

Primogeniture continued to minimise the breaking up of large estates and helped to maintain the original pattern of ownership during the subsequent centuries. It was abolished by the Succession (Scotland) Act 1964. However, Wightman highlights that even though this now allowed for estates to be inherited by those other than the eldest son, this did not mean that the primogeniture principle could not still be adopted.[30]

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[22] Wightman, *The Poor Had No Lawyers* 41.

[23] If there were no male heirs, then the land was split equally amongst the daughters as heirs portioner. Gretton, "The Feudal System" para 55

[24] Wightman, *The Poor Had No Lawyers* 40.

[25] J Irvine Smith, "Succession" in *An Introduction to Scottish Legal History* (1958) 208 at 209.

[26] *Ibid*

[27] *Ibid*

[28] A Wightman, *The Poor Had No Lawyers* 39.

[29] Irvine Smith, "Succession" 209, citing Stair, *Inst* 3.4.22.

[30] A Wightman, *The Poor Had No Lawyers* 41.

2.2.4 Developments in Landownership between the 12th and 16th Centuries

It was David I, Malcolm III's son, who speedily pushed forward the implementation of feudalism in Scotland.[31] David had previously lived in England, had two earldoms and owned other land in a number of counties in England. During his reign as King of Scotland from 1124-1153, he adopted feudalism "consciously,"[32] granting large parts of Scotland to Anglo-Norman families who held land by him in England and converting Scottish native lords to earls with feudal titles. It was this group of, in Wightman's terminology, "native pre-feudal landowners"[33] who, at the time of David's death, "dominated the pattern of landownership"[34] but who co-existed alongside what Walker describes as a "new aristocracy,"[35] formed through the "process of delegation of royal wealth and power to Norman incomers."[36]

Significant changes in both the shape of landownership and the make-up of landowners occurred during the 11th and 12th Centuries. Anglo-Norman families showing loyalty to both kings and feudal superiors saw a growth in their landholdings, mainly through forfeiture, that is, land being removed from those losing the King's favour,[37] but also through the use of strategic marriages.[38] The Church had also been granted extensive areas of land during this period, in particular, with the establishment of parishes.[39] By the end of the 13th Century, land ownership was "completely dominated by the Crown, the Church and a small number of great landlords and magnates."[40]

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[31] D Walker, *A Legal History of Scotland, Vol 1* (1988) 75.

[32] *Ibid*.

[33] Wightman, *The Poor Had No Lawyers* 11.

[34] *Ibid*.

[35] Walker, *A Legal History of Scotland, Vol 1* 75.

[36] *Ibid*.

[37] As discussed in section 2.2.2, this occurs when someone in the feudal chain did not meet one of their obligations. During this period, not showing loyalty or providing military resources to a superior (which could be the King) resulted in the land being forfeited back to the superior / Crown.

[38] Callander, *A Pattern of Landownership in Scotland* 20.

[39] *Ibid*.

[40] *Ibid*.

The 14th to 16th Centuries have been described by Paton as the "Dark Age of Scottish legal history"[41] with "continuous political strife and economic troubles, recurrent national war, internal rebellions and internecine feuds."[42] Further major changes in landownership through forfeiture and changing loyalties ensued as a result of The Wars of Independence in the 13th and 14th Centuries, and by the end of the 14th Century, the Crown had granted most of its land to the major landowning families. Paton highlights this, stating that, by the 15th Century, feudalism had moved to a "position where the central authority was weak"[43] with the seizure of control in Scotland's provincial regions by barons resulting in conditions which were "not compatible with the development of private law."[44]

The 15th Century was to see the start of the disappearance of the well-established pattern of earldoms and provincial lordships and there were significant drops in both the number of earldoms and the families of earls. Callander states that there were repeated instances of the families of the higher nobles not successfully producing male heirs for father-to-son succession, with a quarter of these families failing each 25-year generation.[45] Landowners below the higher nobles prospered from this and between the 13th and mid-15th Century the "old nobility disappeared."[46] These families became the major landowners who then "maintained their dominance for centuries to come"[47] with fewer changes to the ownership pattern occurring in the 150 years following 1450 than before it.[48]

The 15th Century also saw an increased use of allegiances formed between landowners in social and political spheres due to a reduction in military activity; "[l]andowners widened their alliances to secure and strengthen their hold on the land and the power it conferred."[49] Formal bonds of friendship known as 'manrent', kinship ties, strategic marriages and the continuation of other feudal obligations resulted in stability and played a key role in maintaining the concentration of landownership in Scotland during this century.

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[41] G Paton, "The Dark Age, 1329-1532" in *An Introduction to Scottish Legal History* (1958) 18 at 19.

[42] *Ibid* 18.

[43] *Ibid*.

[44] *Ibid*. It is of note that the *An Introduction to Scottish Legal History* volume does not have a separate "Landholding" section until the chapter discussing the period 1532–1660.

[45] Callander, *A Pattern of Landownership in Scotland* 25.

[46] *Ibid*.

[47] *Ibid*.

[48] *Ibid*.

[49] *Ibid 26*.

The 15th Century did, however, start to see a growth in the number of landowners[50] in Scotland, in particular, through the use of the previously uncommon feuing of land using blench or feufarm;[51] Gretton notes that while feufarm, a "commercial tenure engrafted on to the stock of feudal law,"[52] appears to have been a valid type of feudal tenure since feudalism was introduced in Scotland, its growth at this time was in part due to the introduction of legislation promoting its use. For example, the Feuing Act 1457 and the Feuing Act 1503 removed the requirement that the superior must consent to a vassal's subinfeudation[53] of the land they held. The land had to be feued to a sitting tenant, that is, one in possession, and this was used, in the main, to convert leases into feus. Feuing started to replace the real feudalism of wardholding and saw increased usage by the Crown and Church. Feuing proved to be profitable to superiors and helped to promote their position in society. Though the grantee of the feu had security of possession, the superior, at this time, continued to control the land, had to grant authority on the heritable nature of the grant, could feu to someone else (or retain) the land at the end of the feu and had the opportunity to charge for a renewal. The growth of feuing "expanded the base of the feudal pyramid with many small landowners."[54]

Irvine Smith states that the "traditional view of landholding underwent a radical change"[55] during the 16th Century, with feudal relationships becoming "less sacrosanct and land increasingly the subject of commercial investment."[56] Callander states that "the original feudal pattern of landownership dominated by Crown, Church and nobles had disappeared"[57] by the end of this century and was now "completely dominated by private landowners."[58] The Church had held half the land's wealth at the start of the 16th Century,[59] but feued out the majority of its land during the century's first quarter, partly due to

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[50] In case of confusion, landowner here denotes a vassal.

[51] There were also increases due to the formation of cadet branches and the growth in the number of baronies.

[52] Gretton, "The Feudal System" para 68.

[53] Defined by Reid as the "creation of a new feudal estate by a *grant in feu*." K Reid, *The Abolition of Feudal Tenure in Scotland* (2003) xxix.

[54] Callander, *A Pattern of Landownership in Scotland* 30.

[55] J Irvine Smith, "The Rise of Modern Scots Law, 1532-1660" in *An Introduction to Scottish Legal History* (1958) 25 at 32.

[56] *Ibid*.

[57] *Ibid* 30.

[58] *Ibid* 30. That is, no longer dominated by the Crown or the Church.

[59] Gretton, "The Feudal System" para 66.

increased taxation, in particular, the Great Tax introduced in 1532 to maintain the College of Justice,[60] but also "in an attempt by the prelates to save to themselves or their kind, something of the Church property from what they saw to be the impending disaster of the Reformation."[61] There were also instances where protection offered by the large landowners to the Church in exchange for heritable bailieships allowed the landowner to appoint Bishops from their own families who then feued out Church land to family members. Further, land held by the tenure of mortification, in general, fell "into lay hands, by fair means or foul"[62] during the Reformation, and the Annexation of Temporalities Act 1587 resulted in land held by the Church becoming vested in the Crown and subsequently feued.[63] This Act also changed the liferent that the nobility had held as commendators[64] into a hereditary feu which therefore could be held by them in perpetuity.

Callander states that there were around 10,000 landowners at the end of the 16th Century but emphasises that this was mainly made up of those holding small pieces of land with fewer than 1,500 landowners dominating the shape of ownership.[65] The families of these landowners had continuously expanded their holdings during the previous five centuries and they would now start to use the power that landownership provided them with to preserve and improve their control of their property. The trend of an increasing number of landowners would stop during the 17th Century and Scotland would start to see a contraction in those who held land and an expansion in the size of their estates which would continue for nearly 200 years.

2.2.5 Developments in Landownership in the 17th and 18th Centuries

Callander describes the 17th Century as a "land hungry century."[66] A number of events, some initiated by the major landowners, took place in the 17th Century which resulted in changes in the treatment of land in Scotland. The main cause for this transitional period was financial; land was seen to have economic benefits and the military protection

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[60] Irvine Smith, "The Rise of Modern Scots Law, 1532-1660" 32.

[61] *Ibid*.

[62] Gretton, "The Feudal System" para 66.

[63] *Ibid*.

[64] Laypeople who were responsible for the custody of the abbey and its revenues and who lived in a Commendator's House.

[65] Callander, *A Pattern of Landownership in Scotland* 30.

[66] *Ibid* 44.

obligations had all but disappeared. Political stability and the use of land as a commodity allowed for an increased level of land market transactions.[67] Landowners also started to see profitability in land use with a move to "direct economic management",[68] a re-organisation of tenancy arrangements and an increased use of previously uncultivated land.

Increased tensions between the Crown and the nobility also occurred during this century. This power struggle resulted, according to Wightman, in the introduction of legislation instigated by the large landowners to provide protection to their titles using legal measures. Following the increase in the size of their estates due to the breakup of the land previously owned by the Church, the "nobility began a ruthless process of lawmaking to institutionalise and make lawful their rights;"[69] that is, to ensure that the real rights they then held in land were free from challenge. Irvine Smith echoes this, stating that this period "produced a considerable body of law relating to landholding and its incidents,"[70] including those that were "designed at protecting title to land."[71]

Both authors were of the opinion that the Registration Act 1617 and the Prescription Act of 1617 were the two key pieces of such legislation. The former introduced the Register of Sasines, a public register of land deeds which were legally defendable, a requirement justified due to the "gryit hurt sustened by his Maiesties Liegis by the fraudulent dealing of pairties … whiche can not be avoyded vnles the saidis privat rightis be maid publict and patent."[72] The latter conferred title to someone who had possessed a piece of land for 40 years, this time warranted as way to counteract the "gryit prejudice whiche his majesties liegis sustenis in thair landis and heretages ... by the counterfutteing and forgeing of fals evidentis and wreatis and concealling of the same to suche a tyme that all meanis of improving thairof is takin away, whereby his majesties liegis ar constitute in a gryit uncertantie of thair heretable rightis and divers pleyis and actiounes ar moved aganes

[67] *Ibid* 34-36.

[68] *Ibid* 43.

[69] Wightman, *The Poor Had No Lawyers* 32.

[70] Irvine Smith, "The Rise of Modern Scots Law, 1532-1660" 32.

[71] *Ibid*.

[72] Registration Act 1617, s1. This has been translated as the "great hurt sustained by his majesty's lieges by the fraudulent dealing of parties … which cannot be avoided unless the said private rights be made public and patent to his highness's lieges." Records of the Parliaments. Available at https://www.rps.ac.uk/trans/1617/5/26.

thame efter expyring of threttie or fourtie yearis, whiche nevirtheles by the civill law and be the lawes of all natiounes ar declaired voyde and uneffectuall."[73]

In spite of these validations for the enactment of the legislation contained on the face of the Acts, Wightman takes a revisionist view on the reasons for these being introduced, arguing that, following the questionable appropriation of Church land and the subsequent extensive redistribution of land to the nobles, it was "felt necessary to institute both a register and a law to legitimise the ownership of stolen property"[74] and he claims that the Prescription Act soon became "a means to legitimise the appropriation of land which had never been granted to the owner in the first place."[75] Irvine Smith has a less accusatory view, stating that the Register was introduced due to the "absence of professional standards among the notaries public, and the prevalence of forged deeds"[76] though he does use a quote from Lord Kames who described the introduction of the forty year period for the prescription of heritable rights as "the palladium of our landed proprietors."[77] Regardless of the intention behind the creation of these new pieces of legislation, the outcome of the two Acts was to protect the status quo position, with the legal background linked to the land losing some of its significance.

As mentioned earlier, the 17th Century saw the trend of growth in the number of landowners cease. There were a number of reasons for the resulting re-concentration of landowners with debt playing a key role in re-shaping the pattern of ownership. Taxes had been increasing and a number of landowners, in particular, the majority of the nobles, found themselves in financial troubles and either had to sell pieces of land or lost them through appraisal, where an individual obtained a claim to property through buying a landowner's debt from the landowner's creditor.[78] Callander notes that a survey of land transactions in the 17th Century showed that one third of them were through the use of

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[73] Prescription Act 1617, s1. This has been translated as the "great prejudice which his majesty's lieges sustain in their lands and heritages ... by the counterfeiting and forging of false evidents and writs and concealing of the same to such a time that all means of improving thereof is taken away, whereby his majesty's lieges are constituted in a great uncertainty of their heritable rights and diverse pleas and actions are moved against them after expiring of 30 or 40 years, which nevertheless by the civil law and by the laws of all nations are declared void and ineffectual." Records of the Parliaments of Scotland. Available at https://www.rps.ac.uk/trans/1617/5/26.

[74] Wightman, *The Poor Had No Lawyers* 32

[75] *Ibid* 35.

[76] Irvine Smith, "The Rise of Modern Scots Law, 1532-1660" 33.

[77] *Ibid*, citing H Home, Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1777) Art 3, 262.

[78] Callander, *A Pattern of Landownership in Scotland* 36.

appraisals.[79] The major landowners, using their political influence, were responsible for the introduction of a number of Acts of the Scottish Parliament in order to minimise the practice of appraisals.

Another piece of legislation introduced to mitigate the rise in landowner debt was the enactment of the law of entail in 1685. An entail involved a conveyance of land containing restrictions on who could inherit the land. Such could result in a perpetual chain of heirs, each of which could not alienate the right through conveying the land to another party.[80] Irvine Smith describes the purpose of entail as the "protection of family estates against alienation and execution for debt"[81] and allowed for the "preservation of their succession in a particular line of heirs"[82] which had to be different than the legal order of succession.[83] Rankine notes the three "cardinal prohibitions" essential for an entail; prohibitions against alienating, contracting debt and altering the order of succession.[84] Entailment allowed the large landowners to maintain their holdings for significant periods of time regardless of individual circumstances which, in Wightman's view, was one of the two main drivers "responsible for the remarkable concentrated pattern of private ownership"[85] because it "removed the entire land interest from any interference by the market and mothballed it in perpetuity."[86] By 1784 there were 772 entails recorded, which made up a fifth of Scotland's land; this proportion increased to 50% by 1825.[87] The importance of entail started to diminish by the middle of the 19th Century, in particular, because the "restrictions imposed on heirs of entail were found to be a disadvantage in developing and

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[79] *Ibid*.

[80] Gretton & Steven provide the example of land being entailed to "X and the heirs-male of this body." Gretton & Steven, *Property, Trusts and Succession* para 30.30.

[81] J Irvine Smith, "The Rise of Modern Scots Law, 1660-1707" 44 at 48. Wightman is of the view that entail was also introduced to stop the Crown from being able to forfeit land. The forfeiture of estates for treason following the Jacobite uprising in 1745 showed that this was not the case. Wightman, *The Poor Had No Lawyers* 43-44.

[82] Irvine Smith, "The Rise of Modern Scots Law, 1660-1707" 48.

[83] W Gordon, *Scottish Land Law*, 2nd edn (1999) para 18-04 based on the cases *Moubray's Trs v Moubray* (1895) 22 R 801 and *Farquhar v Farquhar* (1838) 1 D 121. The third edition of *Scottish Land Law* (vol 1 (2009) and vol 2 (2020)) does not cover the law of entail in depth, and only briefly discusses the final abolishment of entails. W Gordon, *Scottish Land Law*, 3rd edn (2009) para 2-12.

[84] J Rankine, *The Law of Land-ownership in Scotland*, 4th edn (1909) 689.

[85] Wightman, *The Poor Had No Lawyers* 48. The other legal driver being primogeniture, see section 2.2.3.

[86] *Ibid* 43.

[87] *Ibid* 44.

improving land."[88] The Entail Amendment Act 1848 provided a statutory right to disentail and the introduction of the Entail (Scotland) Act 1914 prohibited the creation of any new entails.[89]

It was the large landowners who took advantage of the debts and financial situation of the small landowners in order to "reassemble territories that had become fragmented"[90] and to expand their holdings. For example, some of those in financial difficulties found themselves having to change their feu to a tenancy in exchange for corn during the famine of 1690s and there was an increased use of taking back feus when a vassal needed a new title. Tenancies came to be seen as the preferred tenure arrangement as they provided the ability to increase rents which was more profitable when compared to a fixed rent feu. Re-concentration was also seen through the reduction in the practice of landowners granting individual plots of land to their sons with the preference to hold the land under sole ownership.[91]

Callander quotes there being approximately 9,500 landowners in Scotland at the end of the 17th Century, with half of these having the rights to inherit or sell the land they held.[92] These holdings were dominated by those who held their land directly from the Crown such as the nobles and titled aristocracy.[93] The 18th Century saw this number continue to fall, dropping to 8,500 by 1850 and 8,000 at the end of the Century.[94] During this time, the population of Scotland had increased by half a million. Debts, again, played a major role in changes of ownership during the century. However, as Callander notes, there were families "whose fortunes were rising and who were always ready to absorb the lands of another"[95] and the changes in ownership would often be an "interchange between the top and middling landowners."[96] In his analysis of the county of Aberdeen between 1667 and 1771 he found that the growth of land held by the great landlords came from the smaller landowners. There were 27 great landlords (those with valued rent over £2,000 Scots) who

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[88] Gordon, *Scottish Land Law*, 2nd edn (1999) para 2-22.

[89] For further information, see W Gordon, *Scottish Land Law*, 2nd edn (1999) chapter 18.

[90] Callander, *A Pattern of Landownership in Scotland* 42.

[91] *Ibid*.

[92] *Ibid* 44.

[93] *Ibid*.

[94] *Ibid* 59.

[95] *Ibid* 54.

[96] *Ibid*.

owned half the county in 1771[97] compared to 27.5% in 1667.[98] The small landowners (valued rent £500 Scots or less) fell from 503 to 140 and 35% to 12% of the land.[99] Such a concentration was similar for the whole of Scotland with the great landlords controlling 44% of Scotland's land at this time.[100]

Wightman notes that towards the end of the 18th Century, feudalism had "lost much of its rationale."[101] The Government in London introduced a number of reforms to Scotland's land tenure system following the Jacobite Rebellion in 1745. Significantly, wardholding was abolished. Further, vassals could sell their land to whom they wished without requiring the approval of their superior, new heritable jurisdictions were abolished and existing ones could be bought out by feudal landlords in possession. Feudal obligations had now, in general, been diminished to a requirement to pay the annual feu duty. Callander, however, observed that while these changes did not alter the landownership pattern, they did promote the unification of landowners into one class. Though superiors still retained the ability to place burdens and retain rights on the land, "the wider influence of superiors had become limited to parliamentary representation."[102]

2.3 The Age of Improvement and the Clearances

This section provides a brief summary of the changes seen in Scotland during the Age of Improvement and the subsequent Lowland and Highland Clearances. Its aim is to provide background as to the changes in how land was used, the new benefits and powers that landownership brought and the resulting developments to the structure of land tenure. While the key events during this period were not responsible, in the main, for any significant change to the landownership pattern, they provide examples of the viewpoint of landowners, why they continued to hold on to their large estates and how they perceived the obligations and responsibilities which landownership placed on them. It also gives a

[97] *Ibid* 48.

[98] *Ibid* 39.

[99] *Ibid* 39 and 48.

[100] *Ibid* 50.

[101] Wightman, *The Poor Had No Lawyers* 19.

[102] Callander, *A Pattern of Landownership in Scotland* 46.

context to the pushes for land reform which took place at the end of both the 19th Century and 20th Centuries, which are discussed later in this thesis.[103]

Scotland was a rural country at the start of the 17th Century; the vast majority of the population of one million lived, worked and depended on the land. There were only a small number of actual landless people. Surplus produce was rare and there was little commerce activity. Tenants made up about one third of the rural population.[104] The lease provided them with legal protection[105] and they could not be removed from the property without notice and due process. However, the majority of the rural populace did not have such protection. The cottars were provided with small areas of land[106] from the tenants in exchange for labour. These cottars had neither legal rights to the land nor any security if they were asked to leave.

The 18th Century saw significant changes in the Lowlands.[107] Relationships between landowners and tenants became more commercial. The Union of the Crowns in 1707 saw the selling of cattle across the Scotland-England border become an exploitable market by landowners in the Lowlands. However, this pastoral husbandry required land, and this land had to be enclosed by walls for grazing and protection. The resulting consolidation of land required the eviction of tenants and cottars and 1723 saw a large number of served notices.[108] The continuing use of evictions resulted in an uprising in 1724 when groups of men and woman in Galloway, who came to be known as the Levellers, systematically pulled down dykes the landowners had had built for enclosing the cattle.[109] As well as through violence and destruction, the Levellers also produced documents to promote their cause. These included anonymous letters, two of which are summarised by Aitchison and Cassell.[110] These letters adopted a natural law argument against the eviction from land; both recognised the legal rights of landlords to improve their property but were of the view that these improvements "ought to be for the glory of God and for the greater good of

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[103] See sections 2.5 and 3.2.

[104] P Aitchison & A Cassell, *The Lowland Clearances* (2003) 20.

[105] For example, through the Leases Act 1449.

[106] Devine states that they usually held less than 5 acres. T Devine, *The Scottish Nation* (2012) 130.

[107] The Lowlands are commonly defined as the land south of the Highland Line. See Aitchison & Cassell, *The Lowland Clearances* 1 and T Devine, *Clanship to Crofters' War* (1994) xiii.

[108] Aitchison & Cassell, *The Lowland Clearances* 34.

[109] *Ibid* 37-39.

[110] *Ibid* 46.

human society"[111] and a landlord should not carry out activities to the "prejudice or ruin of his fellow creatures."[112] One letter asked the question: "whether all the proprietors had the power to turn all their grounds into pasturage to the exclusion or oppression of the body of moveable tenants who had a claim by the law of God and nature to be supported by the products of the Earth."[113]

The middle of the 18th Century saw significant population growth in Scotland due to a lack of war and famine, with this increase mainly in urban areas. To cope with the increased populace's food needs, agricultural innovations were required to maximise the output from the land. These included improvements to drainage, liming of the soil, the move away from using runrigs[114] and the infield-outfield system,[115] and the adoption of crop rotation systems which produced two to three-fold yield increases. Landowners in the Lowlands started to include land improvement conditions in leases[116] and a tenant failing to make these improvements faced an increased threat of eviction at the end of the lease. Aitchison and Cassell state that this resulted in a "embryonic capitalist tenant-farmer class"[117] with those successful at improving receiving longer leases and more land at the expense of those less successful. The outcome of these changes from 1760 to 1790 was when "a recognizable modern landscape of enclosed fields, trim farms and separated holdings started to take shape in the Scottish countryside"[118] and from the last quarter of the 18th century "market forces established a complete dominance as the agrarian system in virtually every area of the Lowlands became geared to satisfying the needs of Scotland's burgeoning cities and towns."[119] The continued consolidation of farms which contracted

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111 *Ibid*.

112 *Ibid*.

113 *Ibid* 47.

114 Land being ploughed into a sequence of ridges and furrows. Crops were grown on the former, while the latter acted as ditches which drained off the surface water.

115 A system where land was split between areas of infield and outfield. Infield land, usually closest to the settlement itself, was the land with the best quality soil. This was used extensively for the growing of crops and did not have fallow cycles. Outfield land, with inferior land, had a multipurpose, including being used for the growing of oats manured by stock grazing on the land and the provision of stone and turf. Portions of outfield land were not used for crops each year, allowing for fallow periods and a return to pasture. Improvers claimed that both this system and the use of runrigs where "inefficient, wasteful of land and incapable of reform." Devine, *The Scottish Nation* 132

116 Such as bringing in new land, draining marshes and bogs, and uprooting trees. Aitchison & Cassell, *The Lowland Clearances* 65.

117 *Ibid* 56.

118 Devine, *The Scottish Nation* 110.

119 *Ibid* 135.

the number of tenants and the removal of the cottars resulted in a new predominance of landlessness.

The 1760s also saw the start of drastic changes in the Highlands and to the traditions of the clans which resulted in the "subordination of the human factor to the new needs of productive efficiency".[120] Devine notes that in the subsequent decades, "traditional society was destroyed … and a new order based on quite different values, principles and relationships appeared in its place."[121] The *duthchas* obligation on the heads of the clans, "to provide protection and security of possession for their people within their lands"[122] came to be ignored. Though the heads of the clans were now feudal lords, they had previously operated within a kin-based society and the "territory of the clan was governed by a quite different set of assumptions which were in conflict with the legal realities of private ownership."[123] The traditional townships, known as *baile*s were eradicated. These areas, which had been in place since before records began, were made up of multiple tenant farmers, cottars and servants. By the 1840s, "only a few remnants of a once universal pattern of settlement and cultivation remained."[124] Instead, a crofting society was formed through the consolidation of land into single tenant farms generally of uniform size.[125]

Mass evictions started to take place to meet market pressures, which included the growth in pastoral farming and the creation of large sheep farms and cattle ranches.[126] Sheep, which generated high and steady profit margins, required significant areas of land for grazing and therefore the "unexploited lands of the north had become too valuable to be let to the inexperienced tenancy."[127] There was also the forced movement of people to newly created crofts, usually from inland to coastal areas. This approach was assumed would create a dual economy of pastoral inland farms and kelp and fishing industries on the coast.[128] Devine highlights that the displacement of communities was not generally carried

[120] Devine, *Clanship to Crofters' War* 35.

[121] *Ibid* 32.

[122] *Ibid 34*.

[123] *Ibid* 10.

[124] *Ibid* 33.

[125] *Ibid* 35.

[126] *Ibid* 34-37.

[127] *Ibid* 36.

[128] *Ibid* 37.

out *en masse* with the clearances happening gradually and continually which resulted in a "systematic process of enforced movement on an unprecedented scale."[129] He provides the example where 6,000 to 10,000 people from the inner parishes on the Sutherland estate were removed and placed on the coast between 1807 and 1821 and which he describes as the "most extraordinary example of social engineering in the early nineteenth century."[130]

The final phase of the clearances began in the 1820s; post-war recession and a collapse in the kelp and fishing economies "compelled a radical change of policy"[131] and land that had been allocated for use by the crofters and cottars was consolidated for profitable sheep-farming. This necessitated removal of the perceived redundant population, who were either placed on desolate land or, in a change of approach to reduce over-population, removed through the use of assisted emigration schemes.

The legal system did not provide any protection to the displaced people with a minimal level of control being adopted by the state. Devine notes that from the 17th Century onwards the "balance of law had swung even more decisively towards the interests of private property."[132] There were a number of Acts of the Scottish Parliament for division and consolidation of land and a simplified eviction process. Tenants had finite rights based on their lease and cottars and servants had no security of tenure. Devine compared this to other European countries and found that:

> "It was the legal and customary defencelessness of the people which made the clearances possible in the Highlands, and which simply would not have been feasible in many regions of the continent where peasant ownership and legal rights and privileges built up over the centuries were formidable obstacles to radical and rapid agrarian modernisation."[133]

The start of the nineteenth century saw the number of landowners continue to drop, reaching 7,637 in 1814[134] and the make-up of the major landowners saw only minor changes by the end of the Century. As described above, this period saw extensive changes

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[129] *Ibid*.

[130] *Ibid* 37.

[131] *Ibid* 55.

[132] *Ibid* 39.

[133] *Ibid* 39.

[134] Callander, *A Pattern of Landownership in Scotland* 60.

to the use of land in Scotland and a significant displacement of the rural population. However, in terms of the concentration of land ownership, there was a "stark contrast between the upheaval and deprivations amongst [the] rural population and the constancy in the pattern of landownership and the composition of landowners."[135]

A key event which shaped future land reform took place in 1832 with the passing of the Scottish Reform Act 1832, subsequently entitled Representation of the People (Scotland) Act 1832. Before then, both the electorate and the legislative bodies were dominated by the landed class, with the latter giving the landowners, as Wightman describes, "one huge advantage"[136] when it comes to land-related legislation. The Parliament of Scotland can be dated back to 1326 when the King first received an annual revenue and other tax raising became illegal.[137] Innes states that the Parliament was "now complete with the King and its Three Estates."[138] These Estates were the clergy, the nobles and the commons with the latter made of vassals such as lesser barons and burgh representatives, with Innes highlighting "there was as yet no idea of representation"[139] of the lay people. This system became impractical by the 18th Century due to increased numbers of participants and James I instead introduced a system of representation in the 1740s whereby each county was to be represented by one or two "wise men."[140] The electoral franchise at this stage became those superiors who held land directly from the Crown, based on the wealth of their superiority,[141] with vassals having no vote. Wightman claims that this resulted in an electorate body in 1830 of less than 4,500 out of a population of 2.3m.[142] The Representation of the People (Scotland) Act 1832 increased the number of potential voters by enfranchising those holding property valued at £10 or more and resulted in the electorate rising from 0.2% to 13% of the population.[143] Further improvements were made in 1889 when reforms were introduced such that county government representatives had to be elected and in 1928 when woman became entitled to vote.[144] In Wightman's view, the

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[135] *Ibid* 62.

[136] Wightman, *The Poor Had No Lawyers* 102.

[137] C Innes, *Lectures on Scotch Legal Antiquities* (1872) 105.

[138] *Ibid*.

[139] *Ibid* 106.

[140] *Ibid* 122.

[141] Wightman, *The Poor Had No Lawyers* 102-03. The franchise was increased in 1743 to include superiors who held land of at least £400 Scots.

[142] *Ibid* 102.

[143] R Houston, *Scotland: A Very Short Introduction* (2008) 26.

[144] *Ibid* 27 and Wightman, *The Poor Had No Lawyers* 105.

1832 Act and the later reforms "eroded"[145] the landowners' political power as before then, "a tiny number of feudal superiors made the very laws they stood to benefit from and ran the day-to-day administration of counties"[146] which resulted in land laws with "no legitimate democratic sanction."[147]

2.4 The Disappearance of the Commonties

This section will discuss the disappearance of areas of common land known as commonties, which subsequently became part of the landowners' patrimony. Commonties were areas of land with ancient traditions of communal use which had originated before the introduction of feudalism.[148] These pieces of uninhabited land were held in common by neighbouring proprietors who had "extensive rights of common use"[149] and were a traditional source of subsistence for the local population at no cost apart from their own labour. Such areas were an essential element of the rural annual cycle and were crucial for the provision of fuel, such as peat and turf, building materials and for the grazing of livestock.[150] They were also a useful resource during population or food supply fluctuations.[151] Commonties were governed by established rules which ensured that the use of the land, such as grazing, was shared equitably between the landowners and subsequently their tenants, and required that no financial gains could be made from the commonty.[152] Callander notes that a landowner "seeing another infringing the commonty had the right and responsibility to sue them in law."[153]

The consolidation of commonties into private ownership resulted in an increased concentration of landownership in Scotland and Callander describes the disappearance of this land as a "major episode in the development of the pattern of landownership in

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[145] Wightman, *The Poor Had No Lawyers* 105.

[146] *Ibid*.

[147] *Ibid*. It is his view that this is the case for such land legislation that has not been repealed or reformed.

[148] Reid states that they originate from "at least to medieval times and very probably much earlier." K Reid *et al*, *The Law of Property in Scotland* (1996) para 37.

[149] Wightman, *The Poor Had No Lawyers* 49.

[150] Callander, *A Pattern of Landownership in Scotland* 109.

[151] *Ibid*.

[152] *Ibid* 110.

[153] *Ibid*.

Scotland."[154] The Scottish Parliament introduced a number of Acts in the 17th Century which made the division of commonties simpler, quicker and cheaper, and resulted in a near eradication of commonties by the end of the 19th Century. These Acts, it has been argued, did not, however, have agricultural improvements as their focus; rather they were for strengthening the model of private property and "rationalising and clarifying the hold of landowners on their land."[155] Irvine Smith also notes that the changes were "not popular with the peasantry."[156]

Commonties were explicitly included in charters when large pieces of land were being conveyed. This was to ensure that "a landowner's tenant still had access to the resources they depended on."[157] The charters did not, however, include detailed descriptions of the areas nor who had the rights to use and how to use. As Wightman put it: "Whilst commonties [were] well delineated on the ground … they were not delineated in the feu charters that landowners held but described only in general terms."[158] The legal uncertainty as to who owned these areas resulted in the introduction of three pieces of legislation in the 17th Century.[159] Before then, commonties were indivisible at common law.[160] The wording of these pieces of legislation made clear that commonties were private property. The first Act, passed in 1608, regulated what had been happening in practice, and allowed for division of common possession if it was agreed by all the concerned parties. It also had the purpose of stopping encroachment taking place. This was followed by an Act in 1647 which allowed for division of commonties in certain parts of Scotland if there was agreement of the majority of the landowners and consent from the superior.

The third and most important Act came into force in 1695 and was used for the vast eradication of the remaining commonties. The Division of Commonties Act 1695, which

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[154] *Ibid* 13.

[155] *Ibid* 110. The quote was taken from I Adams, *The Division of Commonties in Scotland* (1967) PhD Thesis, University of Edinburgh. Irvine Smith takes a less emotive stance simply noting that, along with legislation related to runrigs, "prepared the way for Scotland's participation in the agrarian revolution of the 18th Century." Irvine Smith, "The Rise of Modern Scots Law, 1660-1707" 48.

[156] Irvine Smith, "The Rise of Modern Scots Law, 1660-1707" 48.

[157] Callander, *A Pattern of Landownership in Scotland* 104.

[158] Wightman, *The Poor Had No Lawyers* 51.

[159] Indeed, the Division of Commonties Act 1695 explicitly stated that it was "for preventing the disscords that arise about Commonties."

[160] Reid, *The Law of Property in Scotland* para 37.

Gordon states was introduced to "encourage enclosure and cultivation of land,"[161] remains in force today and resulted in commonties being divided "at the instance of any having interest."[162] Such a person could initiate a division by applying to the Court of Session with evidence of their claim to a proportion of the commonty. Following a review of the evidence of both the initial pursuer and those who also provided documentation to justify their right to part of the land, the judge would appoint a local commissioner who divided the land up, taking into consideration the quality and quantity of the land and the valued rents of the properties which had given the landowners the rights to parts of the commonty. This could be a relatively quick process if there were no disputes. Disputes arose over how indivisible property such as quarries were dealt with, and with regards to the decided proportions; for example, though commonties had the concept of equitable use, they were divided up based on land held outwith the commonty and thus to the detriment of those with smaller landholdings. However, the majority of the complex disputes were over the determination of who, in fact, had a legal right to a share of the commonty and some cases took over one hundred years to be concluded. One common case for disagreement arose due to lack of clarity in the wording of titles making it difficult to ascertain if a landowner had a right of ownership or a servitude right of access over the commonty,[163] with the latter resulting in the landowner having no right to be included in the division.[164]

It is evident that these Acts were then used for different purposes than their original intention. Their legislative purpose was to assist in the determination of ownership of the commonties and "removing the sometimes legally ambiguous commons as part of consolidating the estate."[165] However, with the increasing focus on the economic value of land during the 18th Century, landowners started to view commonties as "wasteful relics of the past that impeded modern progress"[166] and utilised the legislation to bar the users of the land from continuing to use it for their personal benefit. Commonties, as discussed above, could not be used for personal profit and there was a disincentive to make improvements to the land pre-division as these could then be used by the tenants of the other landowners. In

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[161] Gordon, *Scottish Land Law* 4th edn (2009) para 15-184.

[162] Division of Commonties Act 1695, s1. Mosses could be left out of a division and there could still be a large number of common mosses in Scotland today.

[163] For example, see Rankine, *The Law of Land-ownership in Scotland* 601 and *Gall v Greenhill*, May 31 1810, F.C.

[164] Their servitude did, however, survive the division but was often exchanged for ownership of a different area of the commonty. See Rankine, *The Law of Land-ownership in Scotland* 607.

[165] Callander, *A Pattern of Landownership in Scotland* 111.

[166] *Ibid*.

order for a landowner to use these areas of land as they wished, in particular, for forestry and sporting pursuits, they had to be classed as private property and therefore needed to be divided. It was this drive for profit that provided the catalyst for divisions, especially when available land started to diminish. The 1695 Act did not, however, allow for the voice of the users of the lands, such as the tenants or cottars, to be heard. They were not required to be included in the evidence gathering, even though their livelihood depended on continued access to the commonty. Indeed, the first indication they would have of likely division was seeing individuals walking along the boundaries or the arrival of a surveyor. With landowners in the 17th Century having "virtually complete control of both the Scots Parliament and the legal profession"[167] it is clear why any measures to protect such sections of the population where not prevalent. Wightman states that the 1695 Act was responsible for the division and subsequent disappearance of commonties making up over half a million acres[168] while Callander notes that nearly all such land had been added to private estates by the end of the 19th Century.[169]

2.5 The Highland land question and Westminster

This section will describe the key events which took place during the end of 19th Century and the start of the 20th Century. These happenings, in part, relate to the changing rights of tenants and their legal relationship with the landowners, and provide examples of how the general public can drive such reforms, the role of the landowners in attempts to alter the distribution of land and the complications in converting tenants to landowners. This section will also continue to highlight the political aspect of land reform and how the ideology of political parties, when determining public policy for the common good of citizens of the state, can shape the patterns of landownership such as through the introduction of powers allowing for the compulsory purchase of land. Lastly, it will raise the question as to whether the redistribution of land for societal gains should necessarily be at the level of ownership or if it can be addressed through tenancy arrangements and responsibilities placed on landowners.

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[167] *Ibid*.

[168] Wightman, *The Poor Had No Lawyers* 70.

[169] Callander, *A Pattern of Landownership in Scotland* 103. Wightman highlights that it is not evident if all commonties have now been divided and states that there are approximated 90 commonties with no record of a division. See A Wightman, Wightman, *The Poor Had No Lawyers* 272.

The late 19th Century saw significant changes in the relationship between landowners and tenants being implemented by the state. Legislation was introduced at various stages during this period which affected the power of ownership rights. Callander describes the economic and political events of the 1870s and 1880s as an "important watershed in the development of landownership in Scotland"[170] while Devine describes them as "quite remarkable."[171]

An event involving crofters, which came to be known as the Battle of the Braes, was the start of this significant period of land reform. Crofters resided in crofts which had been created by the breakup of the *bailtean* through the division of joint tenancies into small tenancies of a few acres. This process started in the 1760s and by 1840, 95% of the majority of the Highland parishes were made up by crofts with the crofters generally having year-long tenancies.[172] The size of these crofts was designed to only provide partial subsistence and the crofting families had to find work elsewhere to survive.[173] In 1882, a number of crofters on the Isle of Skye petitioned to the proprietor for the return of grazing rights on Ben Lee which they felt was their historic right.[174] This request was rejected and the crofters threatened to stop paying rent. When summons for the removal of those in rent arrears was attempted to be served, violent altercations took place.

Devine notes the significance of this event which, in his view, "signalled a decisive change of direction from past episodes of protest."[175] Significantly, the protest was "proactive rather than reactive"[176] in nature, with the crofters taking the initiative to try and reclaim rights they had lost seventeen years before. Further, landowners were facing a new type of opposition; it was becoming politically unacceptable to use mass evictions to deal with rent strikes. It has also been noted that those taking part in the protests where from a new

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[170] Callander, *A Pattern of Landownership in Scotland* 76-77.

[171] Devine, *The Scottish Nation* 431.

[172] See Devine, *Clanship to Crofters' War* 47 and T Devine, *Clearance and Improvement* (2006) 108.

[173] Devine, *Clanship to Crofters' War* 48. Devine states the "fundamental guiding principle" was "too much land would act as a distraction from other more profitable tasks." He describes the policy of the Highland crofters being primarily labourers, with agriculture becoming a secondary activity as "disastrous policy" in retrospect.

[174] E Cameron, *Land For The People?* (1996) 17.

[175] Devine, *Clanship to Crofters' War* 218.

[176] *Ibid*.

generation, brought up during prosperous conditions and therefore who had not suffered the demoralising periods of famine.[177] However, Devine also makes this observation:

> "In fact, the distinguishing feature of the events of the 1880s, or the 'Crofters' War' as they have come to be described, was not so much the spread of violence, intimidation and lawlessness through the Highlands as the fusion of an effective political campaign for crofters' rights with a high profile series of acts of resistance, of which the refusal to pay rents and the 'raiding' of old lands were the most significant."[178]

The crofters' agitation soon became a political problem, in particular through the formation of groups such as the London and Edinburgh Highland Land Law Reform Associations and the Sutherland Association along with representations being made in Parliament by sympathisers of the crofters' cause. In 1882, requests started to be made for a Royal Commission to investigate crofters' conditions and in 1883, it was announced that a Commission would be appointed.[179] This Commission, chaired by Lord Napier, toured the Highlands and took evidence from both crofters and landowners. There was lack of agreement between the members during the writing of the report, and a number of dissents were included in the publication, in particular in the section which dealt with land.[180] Napier, who wrote much of this section, had sympathy for the crofters' situation and wanted to improve it through improved leases, the set-up of townships and the promotion of emigration.[181]

The publication of the report had little impact on policy. The Government felt that legislation was required to meet the recommendations and they were of the preference that landowners should act voluntarily to meet the concerns of the crofters.[182] The crofters were upset about the lack of improvements to the security of their tenure in the proposals, there was criticism that the legislation did not deal with the issue of the cottars, while proprietors felt too much weight had been given to the evidence of the crofters, with the Duke of Argyll being "critical of Napier for allowing himself to be seduced by the picture

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[177] *Ibid* 222-223.

[178] *Ibid* 220.

[179] Cameron, *Land For The People?* 19.

[180] *Ibid* 22.

[181] *Ibid*.

[182] *Ibid* 24.

of a pre-Clearance paradise in the Highlands."[183] In spite of this, the Report was seen as a "symbolic victory for the crofting agitation as, for the first time, a public body had admitted the validity of the land rights of the people, even though these were not recognised in law."[184]

At the start of 1885 it became clear that the Government had come to the view that some form of legislation could not be avoided. This was of concern to one of the major landowners in Scotland. Donald Cameron of Lochiel took the view that a conference of proprietors would be expedient in order for them to come to a collective agreement on what measures they would accept through Government legislation and what aspects they should act on voluntarily. This was essential, in the view of Lochiel, to stop the enactment of a bill "into which the proprietors had had no input, and which might act against their best interest."[185] The conference was seen as the "first real concerted attempt by landowners to state their case"[186] on this issue and its output played a significant role in the shaping of future legislation.

May 1885 saw the presentation of a bill to Parliament which contained measures to redefine the landlord–tenant relationship.[187] This was not for the whole of Scotland but only for the Highland region.[188] It provided for a level of security of tenure for crofters in that a crofter could not be removed from their holding unless they breached one or more statutory conditions, with these conditions including the non-payment of rent, causing injury to the holding and subletting without consent.[189] The bill also included the appointment of valuators to determine rents and compensation for improvements made to crofts.[190] Based on the outcome of the January conference and the apparent willingness of

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[183] *Ibid* 26.

[184] Devine, *Clanship to Crofters' War* 220. It should be noted that the crofters did at that time have certain rights based on their tenancy agreements.

[185] Cameron, *Land For The People?* 28. Cameron cites the speech made by Donald Cameron of Lochiel.

[186] *Ibid* 31.

[187] *Ibid* 34.

[188] The Act only applied to the counties of Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney, and Shetland. Crofters Holdings (Scotland) Act 1886, s19.

[189] Cameron, *Land For The People?* 35.

[190] *Ibid*

the proprietors to voluntarily provide new land to crofters, it did not include provisions for compulsory purchasing of land.

There were divergent views on the bill. On one side, it was noted that the measures were closely linked to the recommendations from the proprietors' conference which had no link to the Napier Commission's report while, on the other hand, the Conservatives opposed it because it "violated property rights."[191] However, other political pressures saw the Liberal Government fall at the end of 1885 and the bill was put on hold. Following a period of Conservative minority rule, the Liberals returned to power in February 1886. A new Crofters' Bill was introduced in February 1886, with small changes to the previous one, and the Crofters' Holdings (Scotland) Act 1886 received royal assent in June 1886.

The historic significance of this Act is emphasised by Devine who notes that it:

> "made clearances in the old style impossible, breached the sacred rights of private property, controlled landlord-crofter relations through a government body and afforded the crofting population secure possession of their holdings."[192]

He states that the Act did not return the land taken during the clearances as "that would have amounted to expropriation of property and remained politically unthinkable."[193] Further, Devine highlights the role the press played in disseminating the crofters' case and changing opinion, observing that they provided a "publicity machine which even the wealthiest landowner could never hope to equal."[194]

The unrest in the Highlands did not, however, end following the enactment of the 1886 Act. Cottars were now causing disturbances with demands for the return of land lost during the clearances, in particular on the island of Lewis.[195] This agitation occurred in tandem with a change of Government and the start of a period of Conservative dominance. Faced with the agitation on Lewis, the Government attempted to identify a solution which was

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[191] *Ibid*.

[192] T Devine, *Clanship to Crofters' War* 221.

[193] *Ibid*.

[194] *Ibid* 224.

[195] Cameron, *Land For The People?* 69. It should be noted, however, that it was the crofters' situation which continued to dominate the land reform agenda and there was little, if any, changes made to appease the cottars.

"both politically and financially acceptable."[196] They took the view that the Crofters Act was not sufficient to deal with a perceived overcrowded population in the Highlands and introduced state-aided emigration along with a technocratic approach in an attempt to solve the continuing problems in the Highlands, such as through improvements to infrastructure. This was, in the main, due to demands made by the Highland landowners who felt that advancements in communications and railways, alongside the development of a fishing industry were needed. These policies were not a success; the trial emigration of families to Canada failed and fishing did not become a predominant area of economic activity.[197] Further, it had no link to the main demand of the crofters which was for reforms to the land tenure system which the Conservatives were against as they had "a belief that the Liberals had gone far enough in 1886, and a veneration for private property."[198]

There was a change of Government in 1892 and the Liberals took office again in Westminster. This change of Government resulted in a new approach in the Highlands with the Liberals promising to legislate for the cottars and tenants and adopting a "more ideological concentration on the relationship of the crofters to the land."[199] However, the Government were focused on Irish Home Rule, did not give Highland policy high priority and, in Cameron's view "failed to produce anything distinctive."[200] A Royal Commission had been set-up in December 1892 to identify any suitable land which could be provided to crofters.[201] Though the Commission[202] identified nearly 2 million acres of land suitable for new holdings, the extension of existing grazing, and forests which could be converted into suitable land for occupation, it did not make any policy recommendations regarding the most favourable size for a holding or detail where the money would come from for the creation of new holdings.[203] A bill was introduced in 1895 which received disapproval from various parties;[204] it did not include any of the Commission's recommendations but

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[196] *Ibid*.

[197] *Ibid* 71.

[198] *Ibid* 81.

[199] *Ibid* 62.

[200] *Ibid* 82.

[201] *Ibid* 77.

[202] Report of the Royal Commission (Highlands and Islands, 1892). See http://discovery.nationalarchives.gov.uk/details/r/C6931826.

[203] Cameron, *Land For The People?* 80.

[204] *Ibid* 81.

focused on extending the crofter tenure model to other areas, such as replication of the introduced tenure protection and providing compensation for improvements.

Significant change in land reform policies did, however, occur in the period from 1895 to 1906 following the return of a Conservative government. The landlord-tenant relationship was no longer the dominant concern and the Conservatives' view was that the purchasing of land by the state to be subsequently sold to the crofters was the solution to the continuing land question. This would have two benefits; it would reduce the perceived onerous crofting responsibilities faced by landowners and it would create new proprietors. The Congested Districts (Scotland) Act 1897 created a new Board, later called the Congested Districts Board (CDB), which had the purpose of "administering the sums available for the improvement of congested districts in the highlands and islands of Scotland"[205] with the objectives to "promote agriculture, provide land for settlement among crofters and cottars, extend road communications and develop the fishing industry."[206] As a specific example of the purpose of the Board, Cameron notes that the "island of Lewis was the epitome of all the evils the CDB was supposed to combat: congestion, subdivision, poor agricultural practice and bad housing conditions."[207]

The Commissioners of the Board had the power to determine where the congested districts were[208] but they had to be within crofting parishes.[209] Using a formula based on population size and rent valuation they denoted fifty-six crofting parishes as being congested who could then receive government funding.[210] The Act did not contain any compulsory purchase powers and the acquiring of land had to be done in agreement with the landowner.[211]

The purchasing of land by the state started off slowly with minor projects creating new landholdings but 1903 saw a turn in the fortunes of the Board as larger pieces of land were being offered by those with extensive estates.[212] Migration, however, remained

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[205] Congested Districts (Scotland) Act 1897, s1.

[206] Devine, *Clanship to Crofters' War* 238.

[207] Cameron, *Land For The People?* 98.

[208] Congested Districts (Scotland) Act 1897, s10. It had to be based on population and valuation.

[209] *Ibid*. The definition of a crofting parish had the same meaning as that in the 1886 Act.

[210] Cameron, *Land For The People?* 83.

[211] Congested Districts (Scotland) Act 1897, s5(2).

[212] Cameron, *Land For The People?* 88.

problematic. Crofters and cottars were refusing to move to the new land for a number of reasons, including the quality of the new land and loss of current employment, but Cameron, using a quote from the solicitor representing crofters, highlights what he felt was likely the key factor: the "unspeakable tenacity with which people like them cling to their native locality."[213]

Troubles arose even when good land was purchased and new holdings created which were subsequently purchased. In 1900, 29 holdings were bought by crofters on the Syre farm in Strathnaver.[214] In 1907, the new owners were requesting that the Government allowed them to go back to being tenants, complaining about the size of their property, the high purchase annuity and the onerous burdens which were attached to ownership.[215] Devine states that the CDB had "raised expectations among the land-hungry cottars which it could not fulfil"[216] and the 640 new holdings it created and the 133,000 acres of enlargements "was very far away from the land transformation which the population of the Western Highlands had expected."[217] The cottars had anticipated the "wholesale restoration of the lands they believed their forefathers had lost during the clearances"[218] while the crofters had a "greater desire to obtain tenancies under the protection of the Crofters' Act of 1886 than assume the burdens of ownership."[219]

The Liberals came back into power in 1906. Rejecting the policy of land purchasing, they introduced the Small Landholders (Scotland) Bill in the middle of 1906 which improved and extended to the whole of Scotland the use of 'dual ownership', that is a rent-paying tenant but with tenure protection, rights to payment for compensation and the ability to appeal to a Commission for rent review, which had been introduced in the Crofters' Holdings (Scotland) Act 1886.[220] It also included the contentious introduction of compulsory purchasing powers for the creation of new crofts. They had an "open agenda of trying to create a new model of life in the countryside"[221] to assist with migration from

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[213] *Ibid* 89.

[214] *Ibid* 90.

[215] *Ibid*. This request was refused, as was the second attempt in 1909 but finally agreed to in 1911.

[216] T Devine, *Clanship to Crofters' War* 238.

[217] *Ibid*.

[218] *Ibid*.

[219] *Ibid* 239.

[220] Cameron, *Land For The People?* 125-126.

[221] *Ibid* 194-195.

over-populated urban areas for "the general good of the nation."[222] This bill was criticised, in particular due to lack of demand for such changes outwith the crofting counties[223] and because it was not the result of an in-depth study of Scotland's land problem.[224] Landowners were of the view that the expansion of the protected tenancies introduced in the Crofters' Act 1886 was an "infringement of their rights of ownership"[225] while in the Lowlands, the improvements to property were made by the landowner, not the tenant, and therefore the compensation protective measures were not required. The bill was removed in 1906 and re-introduced with the same provisions in 1907 only to be rejected by the Conservative-dominated House of Lords. During this period, the House of Lords were tending to "pick on soft targets – bills which lacked support from important sections of the Liberal constituency."[226] The bill was rejected by the House of Lords a further two times when it came back to them unchanged; the House's main objection was "to the extension of crofter tenure to the Lowlands."[227]

The bill finally passed in 1911.[228] This resulted, in the main, from a change of approach where a new category of tenants was defined as statutory small tenants who were generally those tenants outwith the crofting areas and who would only receive partial protection.[229] This has been the main complaint about the previous bill by all parties, including those in Government, in particular because there was no identified need to extend the measures in the Crofters' Act 1886 for the crofting regions to the rest of Scotland. A secondary significant factor was the restrictions placed on the House of Lords by the Parliament Act 1911 which removed their power to veto bills.[230]

The Small Landholders (Scotland) Act 1911 gave power to the newly formed Board of Agriculture for Scotland (BoAS) to negotiate the creation of new smallholding schemes on landowners' property and to provide both compensation to the landowner for any subsequent loss and loans to the successful applicants. The Act allowed for compulsory

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[222] *Ibid*.

[223] *Ibid* 126.

[224] *Ibid* 128.

[225] *Ibid* 133.

[226] *Ibid* 131. The introduction of the bill had resulted in discourse in the cabinet and resignation of the person in charge of Scottish business in the House of Lords.

[227] *Ibid* 132.

[228] *Ibid* 139.

[229] See Small Landholders (Scotland) Act 1911, s32.

[230] Cameron, *Land For The People?* 140.

purchase of land to establish new (including extended) landholdings on private land.[231] The decision to issue a compulsory purchase order would be made by the newly formed Scottish Land Court if there was a lack of consent from the landowner.

The initial task of the BoAS was to determine the requirement for new land and what land was available.[232] The BoAS were limited as to what land could be appropriated without consent; it excluded farms of less than 150 acres, home farms[233] and land with a lease in place as at Whit Sunday 1911 for non-crofting counties and 1906 for the crofting areas.[234] Initially, over 5,300 applications were made, for example, by crofters and cottars; 3,370 of these were for new holdings, 80% coming from the crofting counties and 40% from the Outer Hebrides alone.[235] A large number of the applications made specific requests as to type of land and locality.[236] Once suitable land was identified, the Board would then negotiate with the landowner on the development of the new or extended smallholding. Unfortunately, it was the compensation provisions which proved to be problematic. Poor drafting and cumbersome procedures resulted in a number of loopholes. Cameron's view is that it was use of these loopholes "by adroit landowners seeking to exploit areas of ambiguity [which] would be the main feature of [the Act's] short and troubled history."[237]

Based on the various issues which arose during the initial implementation of the Small Landholders (Scotland) Act 1911, a newly formed Coalition government in 1918 set out to "provide a comprehensive solution to the Scottish land problem."[238] The Land Settlement (Scotland) Act 1919 was an amalgamation of the two approaches adopted in the 1886 and 1911 Acts and the 1897 Act; it allowed for both the establishment of new holdings on private land and delivered means for crofters who wanted to become owners of their holdings. Part I of the Act was concerned with acquisition of land, either through compulsory purchase or by agreement, which could then be either sold or leased to applicants as small holdings. There was a change of approach whereby the BoAS could

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[231] Small Landholders (Scotland) Act 1911, s7.

[232] Cameron, *Land For The People?* 144.

[233] Such property which is not rented out to tenant farmers.

[234] Small Landholders (Scotland) Act 1911, s7(16).

[235] Cameron, *Land For The People?* 145.

[236] Cameron notes that this caused issues because it "forced the Board to create holdings of smaller size than it, and the more helpful proprietors, were comfortable with." *Ibid* 164.

[237] *Ibid* 147.

[238] *Ibid* 166.

issue orders for the creation of new holdings without needing to go through the Scottish Land Court (though they did need the approval of the Secretary for Scotland). Part II made a number of amendments to the 1911 Act including improvements to the compensation procedure.

This Act "represented a considerable improvement"[239] and was an "honest attempt by the Coalition government to construct a non-ideological approach to land settlement following reflection on the failure of the ideological motivated statue of 1911."[240] In numerical terms, the 1919 Act saw significant improvements in the creation of new holdings and enlargements compared with that under the 1911 Act, with the number of settlements as a percentage of real demand (that is, following the removal of withdrawn or invalid applications) rising from 10% to 29% in the crofting counties.[241] While it resulted in new landholdings being created, Cameron notes that the (a) "procedure was still complicated,"[242] (b) the initial preferential treatment on the provision of land to ex-service personnel added a level of complexity and (c) the Board's main difficulty was that the "demand for land was vociferous."[243]

2.6 The 20th Century

The 20th Century saw some significant changes in the shape of landownership in Scotland in three main areas:[244] the drop in the acreage of the larger estates; a growth of small owners, in particular with tenants purchasing the land they had leased; and an increased use of state held land. Between 1872 and 1970 there was a 30% drop in the number of estates of 1,000 acres or more[245] and the number of estates of 20,000 acres or more fell from 171 to 121.[246] Tax pressures such as death duties and a drop in income generated from estates saw the major landowners selling parts of their estate and this resulted in an increased trend of tenants purchasing their holdings; farmland which was owner-occupied

[239] *Ibid* 171.

[240] *Ibid* 194.

[241] *Ibid* 165 and 188

[242] *Ibid* 171.

[243] *Ibid* 189

[244] This brief section covers land reform up until in the 1970s. Later land reform will be covered in-depth in Chapter Three.

[245] Callander, *A Pattern of Landownership in Scotland* 81.

[246] *Ibid* 80.

rose from 11% to 29% between 1914 and 1930.[247] A key factor in the drop of the proportion of estates of 1,000 acres or more was due to the significant increase of state ownership which grew from 0.2% in 1872 to 13% of Scotland's land in 1970.[248] This was dominated by the Forestry Commission and the Department of Agriculture & Fisheries Scotland (DAFS). The latter had obtained and retained the land through the buying of private land for the provision of small holdings and crofts between 1897 and 1955. Callander notes that the increase of state ownership between the 1870s and 1970s made up nearly half of the land lost from those estates with 1,000 acres or more.[249] However, this resulted in the larger estates holding a greater proportion of Scotland's privately owned land, with 75% of such land belonging to estates 1,000 acres or more in 1970. Callander further analysed the owners of the 25 largest estates in Aberdeen in 1979 and found that a quarter of these estates had been held by the same families for over 400 years with two receiving their land from Robert the Bruce in the 14th Century.[250]

2.7 Conclusion

This chapter has provided a background to the land tenure model which was adopted in Scotland and provided a summary of a number of key events which occurred in land ownership up until the 20th Century. A concentrated pattern of ownership has existed in Scotland since the introduction of feudalism. The state did little to address this during periods where large areas of land were appropriated by various groups of landowners, and there were in fact a number of legal measures introduced to help maintain this concentration of ownership. As time passed, the relationship between land and people was increasingly driven by economic priorities and the goal of maximising wealth with little thought to human suffering. What is not apparent is whether this was allowed to continue due to nefarious intent of the landowners and their power to influence the government, or because it was needed for Scotland's economic development through agricultural improvements. Attempts to address the dominance of the large landowners began only when the matter became political following unrest in the Highlands at the end of the 19th Century. The UK Government adopted policies with the key objective of minimising agitation while still attempting (with varying success) to remain within the ideological

[247] *Ibid* 83

[248] *Ibid* 91.

[249] *Ibid* 92

[250] *Ibid* 94.

beliefs of the ruling party. However, little attempt was made to fully understand the Scottish land situation and its people. The closest attempt at such an analysis to do this was the work of the Napier Commission in 1883 whose recommendations were ignored by the Government of the day as they were not politically aligned with their policies and who continued to be influenced by the major landowners. The recurrent changes in the ruling party at Westminster from the 1880s to the end of 1920 saw protracted and polarised approaches to the land question. The 1919 Act became the last significant piece of Scottish land legislation, and the land tenure model was allowed to stagnate throughout the majority of the 20th Century.

What is evident from this chapter is that land reform during this historical period bears little relationship, if any, with the common good objective set for land reform in Scotland as described in section 1.1. Up until the late 19th Century, land law was introduced as a method to either maintain the status quo or to increase the land held in individual patrimonies. Equality and fairness were not the drivers for land legislation, common ownership and community has been minimised and as highlighted above, no robust analysis on how Scotland's land could be used for the wellbeing of the nation was undertaken. While improvements were made to the land rights of various groups at the end of the 19th Century and the beginning of the 20th Century, these were specific in nature.

However, as Callander highlights, approaches to land reform can be vastly overhauled to meet modern societal needs. He stated in 1987 that:

> "For nine centuries, feudal landownership has controlled the relationship between people and place in Scotland. The ideas and values of this ancient system, developed as legal theory and expressed as law, represent one way of governing this fundamental relationship. Modern ideas and values may require a different approach and this will involve re-writing the Law of the Land, so that it represents contemporary theories of an appropriate relationship between people and place."[251]

Based on what has been described in this chapter, such a major re-balancing of the land tenure system is necessary if the legislator wants to introduce measures which are aligned to progressive property theory and the promotion of values such as dignity and social justice. Moreover, any such approaches should take cognisance of how and why Scotland

[251] Callander, *A Pattern of Landownership in Scotland* 137.

found itself in the position it was in at the end of the 20th Century, particularly the concentrated pattern of ownership. As will be discussed in the next chapter, such a step change in land reform has started to occur and the early 21st Century saw the abolition of feudal tenure and the introduction of wide-ranging land reform measures by the Scottish Parliament in an attempt to create a new relationship between people and land. Whether these were founded on a robust theoretical legal basis aligned with progressive property theory and what lessons have been learned from historical land reform will be fully analysed in Chapters Six and Seven.

Chapter 3 Modern Day Land Reform in Scotland

3.1 Introduction

The previous chapter provided background on land reform in Scotland up until the Land Settlement (Scotland) Act 1919 was enacted. The aim of this chapter is to follow from this time period and cover contemporary land reform in Scotland with a focus on the community rights to buy legislation. As discussed in section 1.1, there has been a significant number of land law legislation enacted since 2000 and the community rights to buy have been selected as the focus for the research question. This was based on the arguably controversial approach used in the measures which can result in a forced transfer of land from one private entity to another and the continued evolution of the community rights to buy, both in the number of enacted rights to buy and the scope of the measures.

In order to fully analyse the community rights to buy from a progressive property perspective, it is necessary to not only understand the legislation itself, but also the objectives used to justify modern day land reform and the political and social landscape which resulted in the introduction of the community rights to buy. To achieve this, the chapter commences with a contextual background to modern day land reform, including a discussion of the reform recommendations produced by two important groups: the Land Reform Policy Group, commissioned by the Scottish Executive in 1997; and the Land Reform Review Group, commissioned by the Scottish Government in 2012. The chapter will evaluate how these groups' outputs shaped modern day Government policy and land legislation, and will provide a high-level description of, in particular, the community rights to buy legislation enacted over this period. This will be followed by an analysis of the fundamental concepts which the legislation uses, such as community ownership and sustainable development. These components will later be considered through a progressive property lens in order to determine if they are justifiable from a progressive property perspective and what extent they are aligned. The chapter then finishes with a conclusions section.

3.2 The Land Reform Policy Group, Devolution and Land Reform

The previous chapter discussed land reform in Scotland up until the introduction of the Land Settlement (Scotland) Act 1919. Pre-devolution and the re-establishment of the

Scottish Parliament in 1999, there were few further land reform measures introduced by Westminster. Apart from the enactment of the Agricultural Holdings (Scotland) Act 1949, which provided similar but less comprehensive rights to tenant farmers as those held by crofters,[1] the purchase of large areas of land by the Forestry Commission for the thirty-year period following the end of the Second World War[2] and the passing of the Land Tenure Reform (Scotland) Act 1974, which played a key role in the eventual abolition of the feudal system, land reform in Scotland was mainly limited to the crofting sphere. In particular, the Crofting Reform (Scotland) Act 1976 was introduced which gave crofters an absolute right to buy their croft from their landlord for a set price based on annual rents.[3] This lack of land reform measures did not, however, mean that there was no longer an appetite for land reform in Scotland. In the 1990s, land reformers continued to press for change, in particular due to the continued concentrated pattern of ownership along with what Seller described as the perceived "democratic deficit,"[4] that is, an unregulated land market whereby land can be acquired based purely on the price requested by the seller with no control measures on things like size, residency of buyer etc.[5]

The key enabler of substantive changes to land law was the introduction of the Scottish Parliament in 1999 which would have both the time and desire to incorporate land reform into its legislative schedule. In preparation for the opening of the Scottish Parliament, the newly elected Labour Government in Westminster set up the Land Reform Policy Group (LRPG) in 1997.[6] This group, chaired by Lord Sewell, was given the remit:

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[1] See section 2.5.

[2] J Hunter "Scottish land reform to date: By European standards, a pretty dismal record." (2013) 5. Available at: http://www.communitylandscotland.org.uk/wp-content/uploads/2014/06/Land-Reform-History.-Jim-Hunter.pdf

[3] Hunter notes that this Act did not go as far as the recommendation of the Crofters Commission, established in 1955, which had advocated that all croft tenants should become owner-occupiers through the state purchase of privately held land in crofting tenure followed by the transfer of the ownership right to the individual crofters. *Ibid*.

[4] W Sellar, "The Great Land Debate and the Land (Scotland) Act 2003" (2006) 60 Norsk Geografisk Tidsskrift 100 at 104.

[5] For example, see A Wightman, *Who Owns Scotland* (1996) and R Callander, *How Scotland is Owned* (1996). These texts followed on from the seminal text J McEwen *Who Owns Scotland?* (1977) and Callander, *A Pattern of Landownership in Scotland*.

[6] Three publications were produced by the Land Reform Policy Group: Identifying the Problems (1998); Identifying the Solutions (1998) and Recommendations for Action (1999).

> "to identify and assess proposals for land reform in rural Scotland, taking account of their cost, legislative and administrative implications and their likely impact on the social and economic development of rural communities and on the natural heritage."[7]

The LRPG produced a number of recommendations in January 1999,[8] in particular for the abolition of the feudal system and the introduction of a community right to buy, stating that it "would be fitting if a Land Reform Bill were amongst the earliest legislation to be considered by the new Scottish Parliament."[9] In the LRPG's view, the objective for this land reform was "to remove the land-based barriers to the sustainable development of rural communities."[10] They stated that sustainable development needs an "integrated approach which takes account of social and economic as well as environmental aspects"[11] and to achieve this requires "increased diversity in the way land is owned and used,"[12] that is,

> "more variety in ownership and management arrangements (private, public, partnership, community, not-for-profit) which will lead to less concentration of ownership and management in a limited number of hands."[13]

The LRPG also stated that sustainable development required community participation in decisions related to the ownership and use of land which can affect both individuals' and their community's lives.[14] They did not provide a definition for a community, because, in their view, the classification for what is a community should be determined by context.[15] The LRPG provided an agenda for legislation to meet their stated objective and the Scottish Executive (as it was then) subsequently accepted the LRPG's recommendations in full.[16] The first term of the newly devolved administration therefore saw various pieces of

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[7] Land Reform Policy Group, "Recommendations for Action" (1999) 3. Available at https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/0045/00454964.pdf

[8] *Ibid*.

[9] *Ibid* 8.

[10] *Ibid* 4.

[11] *Ibid*.

[12] *Ibid*.

[13] *Ibid*.

[14] *Ibid*.

[15] *Ibid*.

[16] Scottish Executive, "Land Reform, the Draft Bill" (2001) 1.2.

land legislation enacted, including the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Land Reform (Scotland) Act 2003, both of which are described below.[17]

The abolition of feudal tenure has been described as "the first key step in the contemporary land reform process."[18] The LRPG had abolition of feudal tenure at the top of their list of recommendations, describing the main purpose for such land law reform as "modernising the archaic base of property law which has constrained Scottish life for so long"[19] and calling feudalism "outdated and unfair land law."[20] As discussed in Chapter Two, the use of feudalism had continued to decline from the end of the 18th Century[21] and Gretton and Steven describe it as a "mere shadow"[22] by the 1960s. The creation of new feuduties, that is, a *reddendo* rent payment under feufarm,[23] was prohibited by the Land Tenure (Scotland) Act 1974, but this did not prevent land being feued nor block superiors from enforcing (a) the obligations contained in a feudal title, (b) payment of feuduties created prior to the 1974 Act and (c) restrictions on how a vassal could use the land they held. Further, the consent of the superior was required if the vassal wished to modify the burdens placed on them, which usually was only given on the basis of a payment to the superior. Indeed, at the same time as the release of the LRPG recommendations, the Scottish Law Commission (SLC), who had also been examining the use of feudal tenure, stated the main reason for their view that feudal tenure should be abolished was, from a social policy perspective,

> "it has degenerated from a living system of land tenure with both good and bad features into something which, in the case of many but not all superiors, is little more than an instrument for extracting money. Superiors who have no actual

[17] Another significant piece of land legislation which was passed, but which is not relevant to this thesis was the Title Conditions (Scotland) Act 2003 which primarily relates to the regulation of real burdens.

[18] M Combe, J Glass and A Tindley, "Introduction" in M Combe, J Glass and A Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (2020) 1 at 4.

[19] LRPG, "Recommendations for Action" 7.

[20] *Ibid*.

[21] See section 2.2.5.

[22] Gretton & Steven, *Property, Trusts and Succession* A.19.

[23] See section 2.2.2.

> interest in the enforcement of real burdens can extract money from vassals for granting waivers of their right to insist on observance."[24]

The recommendation to abolish feudal tenue reached by the LRPG and the SLC became reality the next year through the enactment of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. This Act was passed by the Scottish Parliament on 3 May 2000 and was the fifth bill to progress through the new Parliament. Section 1 of the Act states that "[t]he feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished."[25] This date was subsequently set for 28 November 2004.[26] On this day, the *dominium utile* was converted to, what Reid describes as, "*dominium* pure and simple."[27] Vassals at the bottom of the feudal chain now obtained outright ownership and all superiorities were abolished. Rights dependent on the feudal system, such as feudal real burdens, were extinguished unless preserved via a group of complex rules.[28]

The next key piece of legislation was the Land Reform (Scotland) Act 2003. Part 1 of the Act introduced a statutory right to roam, subject to an obligation of responsible exercise and applicable to all land not specifically excluded by the legislation.[29] Part 2 established the first community "right to buy" land, perhaps more accurately described as a community right of first refusal if and when the owner decides to sell land in which the community is interested.[30] The policy aim for introducing this right, which will subsequently be termed the pre-emptive community right to buy in this thesis, was it would "add impetus to the drive for greater diversity and community involvement"[31] and therefore help to achieve the

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[24] Report on *Abolition of the Feudal System* (Scot Law Com No 168, 1999) para 1.16.

[25] Abolition of Feudal Tenure (Scotland) Act 2000, s1.

[26] The Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Commencement No. 2) (Appointed Day) Order 2003 (SSI 2003/456), art 2.

[27] K Reid, "Abolition of the Feudal System" (1999) 44(2) J.L.S.S. Italics added.

[28] For an in-depth examination of the Abolition of Feudal Tenure (Scotland) Act 2000, see Reid, *The Abolition of Feudal Tenure in Scotland*.

[29] This part of the Act is outwith the scope of this thesis. For an overview of the rights, see Gretton and Steven, *Property, Trusts and Succession* paras 19.2-19.12 and for an in-depth examination of the legislation, see J Lovett, "Progressive property in action: the Land Reform (Scotland) Act 2003" (2011) 89 Nebraska L. Rev. 739.

[30] Land Reform (Scotland) Act 2003, Part 2.

[31] Scottish Government, "Land Reform (Scotland) Bill – Policy Memorandum" (2001) para 8. Available at https://archive2021.parliament.scot/S1_Bills/Land%20Reform%20(Scotland)%20Bill/b44s1pm.pdf

removal of the land-based barriers to the sustainable development of rural communities objective set by the LRPG.

The pre-emptive community right to buy, based on the recommendation made by the LRPG, requires a suitably incorporated community body to first register their interest in the new Register of Community Interests in Land.[32] As enacted, the Act required the community body to be formed as a company limited by guarantee, and to fulfil a number of conditions, for example, that it must be representative of the local community and that its main purpose is a focus on the achievement of sustainable development.[33] The community body's interest would be registered where, in the view of Ministers, a number of criteria had been met, such as that the registration would be in the public interest and there was sufficient support for the registration in the community.[34]

Following a successful application, and if and when the current owner wishes to transfer the land, the community body then had to follow a statutory process, including gaining approval for the purchase of the land from the community, and the transfer had to be shown to both further the achievement of sustainable development and be in the public interest.[35] If the community and the Minsters approved the purchase, then the community body would pay either the agreed, independently determined or appealed value and a standard conveyancing transaction would then take place.[36] Part 2 was originally only applicable to (supposedly) rural land through the use of a population threshold of 10,000.

Part 3 of the 2003 Act introduced a crofting community right to buy. This right was similar to the pre-emptive community right to buy in Part 2, but with two significant differences; (a) it is only applicable to croft land and specific related land in the crofting counties and (b) it is an absolute right in that it is a right to force a sale without requiring the consent of the landowner (and therefore not needing the community body to first register an interest).[37] The stated policy aim for Part 3 was also akin to Part 2: "to remove barriers to

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[32] There are also provisions which allow for a body to register an interest after land has been placed on the market but before missives are concluded. However, for these applications there is a more stringent public interest test and justification has to be provided as to why the interest in the land had not previously been registered. Land Reform (Scotland) Act 2003, s39.

[33] *Ibid* s34.

[34] *Ibid* s38.

[35] *Ibid* s51.

[36] *Ibid* s56.

[37] Land Reform (Scotland) Act 2003, Part 3.

sustainable rural development by empowering crofting communities."[38] The Act received royal assent on 25 February 2003, and Parts 2 and 3 came into force on 15 June 2004.[39]

3.3 The Land Reform Review Group, Community Empowerment and Stronger Land Reform

After the significant and innovative land reform measures which were enacted in the first term of the Scottish Parliament and discussed above, land reform was not given the same focus in the subsequent two parliamentary terms. However, land reform came back onto the radar of the legislator following the Scottish National Party (SNP) winning a majority in the Scottish Elections of 2011. The Government commissioned a new group, the Land Reform Review Group (LRRG), in 2012 with the wide-ranging remit to identify how land reform will:

> "Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;
>
> Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;
>
> Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland."[40]

The first two of these paragraphs make clear that the Government remained committed to increasing both diversity and community-held land. The latter is further evidenced by Alex Salmond, the then First Minister, committing in June 2013 to bringing one million acres of land into community ownership by 2020, approximately double that in community ownership at the time[41] and one twentieth of Scotland's land mass.[42] The third paragraph

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[38] Scottish Parliament, "Land Reform (Scotland) Bill – Policy Memorandum" para 16.

[39] Land Reform (Scotland) Act (Commencement No. 2) Order 2004, art 2(a).

[40] Land Reform Review Group, "The Land of Scotland and the Common Good" (2014) 5.

[41] *Ibid* Sec 16, paras 6-10. Also, see https://www.gov.scot/publications/one-million-acres-2020-strategy-report-recommendations-1-million-acre/

[42] Of note is that of the approximately 500,000 acres of land held in community ownership in 2012, the LRRG highlight from a survey carried out that "the vast majority of this area (95%) comprises 17 large rural estates under community ownership." LRRG, "The Land of Scotland

can be seen as renewing the sustainable development objective for land reform set by the LRPG. This is backed up by the statement of Paul Wheelhouse, then Minister for Environment and Climate Change, in his Ministerial Foreword to the LRRG's report that "the relationship between the land and people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country."[43]

The LRRG published their findings in 2014 in a report entitled "The Land of Scotland and the Common Good."[44] They define land reform as "measures that modify or change the arrangements governing the possession and use of land in Scotland in the public interest,"[45] with the goal that the public interest aspires to achieve being "the common good of the people of Scotland."[46] In the LRRG's view, the common good includes active citizenship, environmental sustainability, social justice, fairness, equality and human rights (including those contained in both the European Convention on Human Rights and the UN's International Covenant on Economic, Social and Cultural Rights).[47]

Thirteen of the 62 recommendations in the LRRG report were in relation to community ownership. A number of changes were proposed to the pre-emptive community right to buy, both to widen its scope and make it more flexible.[48] These included extension of the scheme to include urban as well as rural land, extension of the types of legal entities which could be used to constitute community bodies and additional changes "to make the legislation more straightforward and less onerous for local communities to use."[49] The Government legislated for these changes in Part 4 of the Community Empowerment (Scotland) Act 2015.[50] In particular, urban land became eligible for the pre-emptive community right to buy through the removal of the maximum population threshold and

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and the Common Good" Sec 16, paras 6-10. The figure of one-twentieth was provided in M Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish land question" (2016) Juridical Review 291 at 296.

[43] LRRG, "The Land of Scotland and the Common Good" 7.

[44] Available at https://www.gov.scot/publications/land-reform-review-group-final-report-land-scotland-common-good/

[45] LRRG, "The Land of Scotland and the Common Good" Sec 1, para 9.

[46] *Ibid* Sec 2, para 6.

[47] *Ibid* Sec 2, paras 9-13.

[48] *Ibid* Sec 17, para 11.

[49] *Ibid*.

[50] Sections 36-61 of the 2015 Act amended Part 2 of the 2003 Act (the pre-emptive community right to buy), sections 62-73 amended Part 3 of the 2003 Act (the crofting community right to buy).

Scottish Charitable Incorporated Organisations and community benefit societies became eligible legal entities for both of the rights to buy.

The Community Empowerment (Scotland) Act 2015 also inserted a new Part 3A into the Land Reform (Scotland) Act 2003, introducing a new right to buy, the community right to buy abandoned, neglected or detrimental land. Under Part 3A, a community body has the right to force the sale of land for market value when (a) the land can be shown to be either abandoned or neglected, or (b) the landowner's use and management of the land is causing detrimental effects to the environmental wellbeing of the community.[51] Though the introduction of this new right was not based on a specific LRRG recommendation, the Government viewed such land as being a potential barrier to the achievement of sustainable development,[52] stating that there were cases where landowners can stop communities from improving or developing facilities, or allowing communities to bring back to use derelict or neglected areas which become a blight on the local area.[53] The Government's opinion was that, in such circumstances and when no other solutions were available,[54] communities should not need to wait for the land to be first placed on the market in order for them to acquire it.[55] The Government further justified the introduction of the community right to buy abandoned, neglected or detrimental land by stating that in many cases the catalyst for successful community-led action can be ownership or control of land or buildings. This can promote "community confidence and cohesion,"[56] allowing communities to control their own future and help them to improve the attractiveness, economic prosperity and sustainable development of their community.[57]

The process by which the community right to buy abandoned, neglected or detrimental land is exercised broadly mirrors that for the crofting community right to buy, including requiring both a public interest and (a tailored) sustainable development test to be met. However, several additional tests are also imposed due to the specific nature of the

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[51] Community Empowerment (Scotland) Act 2015, s74 created the new Part 3A in the 2003 Act.

[52] Scottish Government, "Community Empowerment (Scotland) Bill, Policy Memorandum" (2014), para 65. Available at https://archive2021.parliament.scot/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/b52s4-introd-pm.pdf

[53] *Ibid*.

[54] *Ibid*.

[55] *Ibid*

[56] *Ibid* para 53.

[57] *Ibid*.

applicable land.[58] The Act received royal assent on 24 July 2015, with the amendments to the 2003 Act coming into force on 15 April 2016[59] and the new community right to buy abandoned, neglected or detrimental land on 27 June 2018.[60]

Land legislation and the introduction of community rights to buy did not, however, end there and the Government moved into a period of what Combe describes as an "apparent pattern towards stronger land reform."[61] In the Scottish Government's Programme for Scotland 2014-15, "One Scotland,"[62] the First Minister, Nicola Sturgeon, wrote that the Government would "bring forward a Land Reform Bill to drive radical and effective land reform"[63] which would include "new powers for Scottish Ministers to intervene where the scale of land ownership and management decisions are a barrier to local sustainable development."[64] This was to achieve the Government's aim that the "land of Scotland should be an asset that benefits the many and not the few."[65] In particular, the Government made clear their intention to "move the debate on land reform from one focused on historic injustices to a modern debate about the current balance of land rights in Scotland and how this can be managed to best deliver for the people of Scotland."[66]

The subsequently enacted Land Reform (Scotland) Act 2016 contained 12 Parts, three of which have relevance to this thesis.[67] Most significantly, Part 5 introduced a fourth community right to buy, the community right to buy to further sustainable development. This new right was closely linked to the LRRG recommendation entitled "A Right to Buy

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[58] See section 4.5.3.

[59] The Community Empowerment (Scotland) Act 2015 (Commencement No. 3 and Savings) Order 2015 (SSI 2015/399), art 2(a).

[60] The Community Empowerment (Scotland) Act 2015 (Commencement No. 11) Order 2018 (SSI 2018/139), art 2(a).

[61] M Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish land question" 301.

[62] Scottish Government, "One Scotland" (2014). Available at https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/0046/00464455.pdf

[63] *Ibid* 6.

[64] *Ibid*.

[65] *Ibid*.

[66] *Ibid* 77.

[67] The Act also gave a legislative basis for a new body, the Scottish Land Commission, who would have responsibility for reviewing and recommending changes to Scottish land law and policy along with having an advisory role on land matters. For a discussion on this and the other elements contained in the Land Reform (Scotland) Act 2016, see M Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish land question" 291.

Land" which proposed an extension of the pre-emptive community right to buy to an actual right to buy land if such a transfer was judged to be in the public interest by Ministers.[68]

The community right to buy to further sustainable development provides Ministers with the power to consent to the transfer of land to either a community body or a nominated third person in situations where the transfer is likely to advance sustainable development, will result in significant benefits for a community and averts significant harm to a community.[69] This power was justified by noting that communities can often have minimal influence in how landowners use and develop their land, and they cannot access the land for their own development, both of which can have damaging outcomes such as blight and the inability to grow food, develop business opportunities and enjoy recreational activities.[70]

The statutory process for this new community right to buy follows closely that of the other two absolute community rights to buy. However, given the new objective for this community right to buy, there is a significant difference in the tests that the community body is required to meet before consent will be given, for example, the community body has to evidence the significant and long-lasting benefits to the community if the land was transferred.[71]

The second relevant part of the 2016 Act, Part 4, places a duty on Ministers to issue guidance for owners and tenants about engaging with communities on land-based decision making which could affect those communities.[72] Thirdly, Part 1 requires Ministers to

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[68] LRRG, "The Land of Scotland and the Common Good" Sec 17, para 16. Combe writes that this new right introduced by the Government was not "presaged" in the LRRG report. M Combe, "Legislating for Community Land Rights" in M. Combe, J. Glass and A. Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (2020) 154 at 163. It could be argued that given the Government's view of the link between sustainable development and the public interest at the time, and the inclusion of the public interest within the sustainable development conditions that needed to be met in the enacted legislation, the new right equates, perhaps loosely to the LRRG's proposed right to buy land in the public interest. Further, realising the wide-ranging nature of giving such a power to Ministers, the LRRG make clear that it should only be used as a backstop in instances where other methods to obtain the land had failed and a high threshold would be required to be met such that forced transfers would only take place when the land was sufficiently important to the community body (LRRG report, Sec 17, paras 19-23), both of which were included in the community right to buy to further sustainable development and therefore again connects the two rights. It should, however, be noted that Combe was an adviser to the LRRG.

[69] Scottish Government, "Land Reform (Scotland) Bill, Policy Memorandum" para 181. Provided examples of third-party purchasers were a housing association or a local business partner.

[70] *Ibid* paras 176-178.

[71] *Ibid* para 180. For further details on the consent criteria, see section 4.5.4.

[72] Scottish Government, "Land Reform (Scotland) Bill, Policy Memorandum" para 28.4.

produce a principle-driven, though not enforceable, Land Rights and Responsibilities Statement (LRRS).[73] There are various factors Minsters must consider when constructing the LRRS, including increasing the diversity of ownership, supporting community empowerment, reducing inequalities, furthering the achievement of sustainable development and the promotion of respect for the human rights that Ministers consider relevant.[74] The Land Reform (Scotland) Act 2016 received royal assent on 22 March 2016, with Part 5, which contains the community right to buy to further sustainable development, coming into force on 26 April 2020.[75]

3.4 Analysis

3.4.1 Introduction

The above sections have described relevant aspects of Scotland's contemporary land reform programme. The remainder of this chapter is made up of a discussion on a number of questions arising from the approach taken by, and the focus of, the Scottish Government during this period; (a) why community ownership? (b) why sustainable development? (c) why diversification? and (d) what about human rights?[76]

3.4.2 Why Community Ownership?

Modern day land reform has been community-orientated rather than focusing on individual rights in land, or, as was common in an earlier era, on land nationalisation.[77] Why has the Government adopted this approach? Community owned land in Scotland has had a varied past which has been experimental in nature. The first modern instance, albeit not exactly community ownership, came about as a result of the CDB[78] purchasing the Glendale Estate on Skye in 1904 and transferring the ownership of this to approximately 150 crofters on

[73] *Ibid* para 28.1.

[74] The LRSS is further discussed in section 6.2.2. For an in-depth and comparative discussion on the use of the LRRS, see J Robbie & E van der Sijde, "Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability" (2020) Loyola Law Review 553 at 606-607.

[75] The Land Reform (Scotland) Act 2016 (Commencement No. 10) Regulations 2020 (SSI 2020/20) reg 2.

[76] There is also a question as to why the community rights to buy only allow for the transfer of the ownership right. This is discussed in section 7.2.

[77] See sections 2.5 and 2.6.

[78] For background on the Congested Districts Board, see section 2.5.

the Glendale Estate under a 50-year purchase agreement.[79] These crofters gained *pro indiviso* rights to the common grazings, which had been transferred collectively[80] and they became outright owners of their individual crofts in the 1950s.[81] Hunter describes this testing of community ownership as "a little bit accidental."[82] However, this was not the case with the next development in 1923 when Lord Leverhulme offered the island of Lewis, which he had purchased in 1918, to the residents as a gift.[83] This offer was made to two groups, one who would take control of Stornoway and the surrounding area and the second who would have responsibility for the remaining estate. The offer to the former group was accepted and 70,000 acres of land on this island was therefore transferred to the newly established Stornoway Trust, which still exists,[84] resulting in Scotland's first large-scale estate to be held in community ownership.[85]

The next factor to Scotland's community focused approach to land reform was the privatisation agenda of the Conservative government which took office at Westminster in 1979. This included a pledge to shrink the amount of land that was held in state-ownership, including Forestry Commission land and agricultural land held by Department of Agriculture & Fisheries Scotland (DAFS).[86] However, similar to previous attempts,[87] the crofters who were tenants of DAFS showed little interest in becoming owners by way of the right to buy provided to them under the Crofting Reform Act 1976. In 1989, the Scottish Crofters Union therefore suggested to the Government that they should consider allowing for DAFS land to be held on a community ownership basis similar to what had occurred in Stornoway.[88] This approach was accepted by the Government, under the condition that a pilot exercise would be carried out first. Therefore, 630 crofters on Skye and Raasay were offered the opportunity for the transfer of the state-owned estate to a

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[79] J Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* (2012) 29-30.

[80] Wightman, *The Poor Had No Lawyers* 194.

[81] Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* 31.

[82] *Ibid*.

[83] *Ibid*.

[84] Hunter explains that this trust is made up of ten trustees who are voted into their role by a franchise made up of the adult population of the trust estate. *Ibid* p33.

[85] The local councillors representing the areas of the second group rejected the offer.

[86] J Hunter "Scottish land reform to date: By European standards, a pretty dismal record." (2013) 6. Available at: http://www.communitylandscotland.org.uk/wp-content/uploads/2014/06/Land-Reform-History.-Jim-Hunter.pdf

[87] See section 2.5.

[88] Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* 47-48.

crofting trust. This group, though preferring community ownership to Government sale of the DAFS land on the open market, wished to keep the status quo and rejected the offer.[89] This resulted in the Government placing the community ownership project on hold.

However, there then followed a "momentum of crofting communities intent of regaining their collective land rights."[90] This started in 1992 when a group of crofting tenants in Assynt decided to use the model developed for Skye and Raasay and made an offer on the open market to purchase the North Lochinver Estate (from the liquidator) and have it transferred into community ownership. This endeavour, which in Hunter's view, was "little short of revolutionary,"[91] saw the newly formed Assynt Crofters Trust successfully purchase the estate in 1993. This resulted in the then Secretary of State for Scotland, Michael Forsyth, proposing in 1995 that 250,000 acres of state-owned crofting land should be transferred into community ownership[92] and saw the enactment of the Transfer of Crofting Estates (Scotland) Act 1997 which gave the Scottish Ministers the power to dispose of such land to an approved body.[93] Though only one crofting community body has made use of this right to date, Combe is of the view that it had the unintended effect of placing community into the mind-set of legislator.[94]

In tandem with this, there were the heavily publicised successful community body acquisitions of privately owned land that had taken place outwith any statutory framework, such as in Eigg and Gigha. Further, the lectures given by the historian Dr Hunter in 1995[95] and the economist Professor Bryden in 1996[96] as part of the John McEwen Memorial Lectures on Land Tenure in Scotland[97] had both strongly promoted a major expansion of community ownership across rural land. Such events therefore presented community

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[89] *Ibid* 52

[90] J Bryden & C Geisler, "Community-based land reform: Lessons from Scotland*"* (2007) 24 Land Use Policy 29.

[91] Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* 54.

[92] Bryden & Geisler, "Community-based land reform: Lessons from Scotland*"* 30.

[93] The intention of this Act had been for the land to be transferred free of charge but due to the Conservatives losing office, such a policy was replaced by the requirement that market value was paid. Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* 74.

[94] M Combe, "Community Rights in Scotland" in T. Xu and A. Clarke (eds), *Legal Strategies for the Development and Protection of Communal Property* (2018) 79 at 92.

[95] J Hunter, "Towards a Land Reform Agenda for a Scots Parliament" (1995) The John McEwen Memorial Lectures on Land Tenure in Scotland.

[96] J Bryden, "Land Tenure and Rural Development" (1996). The John McEwen Memorial Lectures on Land Tenure in Scotland.

[97] Available at http://www.caledonia.org.uk/land/lectures.htm

ownership models as an attractive solution to land reform and were likely the driver for the LRPG community-centric recommendations. These recommendations were made without any justification or following detailed research to determine the likely benefits and disadvantages of such an approach. As Combe stated in 2006, in his discussion on the introduction of the two community rights to buy in Land Reform (Scotland) Act 2003: "At no point did the Government or the LRPG provide reasons why a 500-acre estate owned by a community body and run by 20 members is a situation to be preferred to 20 small-holders of 25 acres each."[98] Of note, however, is Cameron's observation that the use of community ownership as a potential solution to Scotland's land question, which came from the grass roots rather than through legislation proposals, did "[break] the logjam"[99] of land reform in Scotland. This, perhaps, will be the lasting key benefit and legacy of the community-based approach.

3.4.3 Why Sustainable Development?

There has been a focus on sustainable development in relation to the community rights to buy legislation from the outset. Indeed, Ross has described sustainable development as a primary objective of the community rights to buy[100] and stated that sustainable development "equates to or has priority over the other duties and objectives"[101] contained within the schemes. This, in her view, makes Scotland's community rights to buy exceptional both in UK and global terms.[102] Pillai has also described this commitment to sustainable development as the most exciting aspect of community rights to buy because it imposes "a duty on a particular landowning group to manage their land in a sustainable manner"[103] which offers "an alternative to the traditional rights-based system of landownership and tenure in Scotland."[104] This introduction of sustainable development into the area of land reform in Scotland and its subsequent development is therefore of

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[98] Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 217.

[99] E Cameron, "Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880-1999" in M. Combe, J. Glass and A. Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (2020) 94 at 108.

[100] A Ross, "The Evolution of Sustainable Development in Scotland: A Case Study of Community Right to Buy Law and Policy, 2003-18" in M. Combe, J. Glass and A. Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (2020) 236 at 237.

[101] *Ibid* 238.

[102] *Ibid* 239.

[103] A Pillai, "Sustainable rural communities? A legal perspective on the community right to buy" (2010) 27 Land Use Policy 898 at 904.

[104] *Ibid*.

interest. This subsection will be in two parts, first discussing the introduction and evolution of the sustainable development concept in land reform, followed by an examination as to whether community ownership is an appropriate model for the achievement of sustainable development.

3.4.3.1 Introduction and evaluation of sustainable development in land reform

In 2010, Pillai was of the view that following devolution in Scotland in 1999, land reform progress has been "workmanlike"[105] but advancements to achieve sustainable development "lacked momentum."[106] The term itself was introduced in 1980 by the International Union for Conservation of Nature in their World Conservation Strategy document.[107] In this publication, it is stated that sustainable development requires changes to improve the quality of human life which consider both social and ecological features along with pecuniary factors, and decisions on the use of resources to achieve this must look to the long term.[108] Shortly after this, the Brandt Commission's North-South: A Programme for Survival publication[109] highlighted that development planning should not have financial growth as the dominating factor, placing the objective instead on the achievement of self-fulfilment, and the Commission placed the responsibility for the attainment of this goal on politicians. Three years later, the World Commission on Environment and Development commenced work on a major piece of research which, in Blewitt's view, would "firmly establish sustainable development as the most significant concept and practice of our time."[110] The results of this study, *Our Common Future*, more commonly known as the Brundtland Report, were published in 1987.[111] The report provided a definition of sustainable development, which continues to be used: "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[112] Ross highlights that this definition promotes discussion through allowing for

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[105] *Ibid* 899.

[106] *Ibid*.

[107] IUCN, "World Conservation Strategy" (1980). Available at https://portals.iucn.org/library/efiles/documents/WCS-004.pdf

[108] *Ibid* 18.

[109] Independent Commission on International Development Issues, *North/South: A Programme for Survival* (1980).

[110] J Blewitt, *Understanding Sustainable Development*, 2nd edn (2015) 9.

[111] Brundtland Commission, "Our Common Future" (1987). Available at https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf

[112] *Ibid* 41.

diverse and conflicting interests to be considered but also allows for different interpretations and therefore outcomes to be considered valid.[113]

In 1992, the UN Conference on Environment and Development, known as the Earth Summit, took place in Rio de Janeiro. This meeting resulted in a number of legally binding agreements on matters such as climate change, biological diversity and human actions on the environment, being adopted by the Governments of over 175 member states of the United Nations.[114] In the UK, such sustainable development requirements started to be included in Government policy and legislation during the 1990s. However, it was not until December 2005 that the Scottish Government, a Labour and Liberal Democrat coalition, published its first sustainable development strategy entitled "Choosing Our Future."[115] This document stated that it was the Scottish Government's intention to achieve the same goal as the UK Government, namely "to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations"[116] and both Governments adopted a principle-based approach to their shared framework for sustainable development.

Given this slow engagement with sustainable development concerns, it is of note that such a focus was given to sustainable development by the LRPG in its recommendations and subsequently incorporated into the community rights to buy legislation in the Land Reform (Scotland) Act 2003. Pillai's view is that the Scottish Government used sustainable development as the core principle for their land reform program as it "enabled different standpoints to be united behind a common goal"[117] and allowed the Government to amalgamate the viewpoints of various contributors to the land reform debate under one umbrella term. An analysis of the key lectures provided by leading experts on land reform as part of the John McEwen Memorial Lectures on Land Tenure in Scotland[118] shows that this could be a valid conclusion. For example, Wightman states his view that land reform, as a policy agenda, is sophisticated due to its ability to encompass various strands such as

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[113] Ross, "The Evolution of Sustainable Development in Scotland" 236.

[114] United Nations, "Agenda 21." Webpage available at https://sustainabledevelopment.un.org/outcomedocuments/agenda21

[115] Scottish Executive, "Choosing Our Future" (2005). Available at https://www.webarchive.org.uk/wayback/archive/20170701074158/http://www.gov.scot/Publications/2005/12/1493902/39035

[116] *Ibid* 6.

[117] *Ibid*.

[118] Available at http://www.caledonia.org.uk/land/lectures.htm

social issues, the environment and the economy, and it should not be depicted as simply a tool to deal with matters such as large estates, nefarious landlords and crofters,[119] while Bryden highlights that it has been recognised that a focus on economic growth can cause social divisions, both within and between different societies and therefore there is no automatic positive correlation between economic prosperity and the achievement of social goals.[120] Further, Bryden notes that there has been a realisation that people and communities do not all share the same goals, and this diversity needs to be recognised and respected if a global developed society is to be achieved.[121]

How has the Scottish Government since embraced the strategic goal of sustainable development during the evolution of the community rights to buy? As noted above, sustainable development took some time to come to the forefront of Scottish Government strategy and when the LRPG came to view it as the objective of land reform in 1999, it is not clear how well sustainable development was understood. Indeed, Wightman, in 1999, shortly before the first Land Reform (Scotland) Bill was first read in the new Parliament, stated his view forcefully:

> "There is still no coherent set of political principles driving the Government's land reform agenda forward. Current debate, as I have hinted, has either deployed rhetoric that suggests some underlying political philosophy but displays no signs of carrying it through into action, or, has deployed rather opaque language such as 'removing the land-related barriers to the sustainable development of rural communities.' There is nothing inherently wrong with such an objective. Indeed it has proved useful. But where is the big picture? Surely a new Parliament which has the potential to provide original and principled political philosophy is precisely the place we should be developing strategic and far-sighted thinking."[122]

It could be argued that this viewpoint was correct at that time through examination of the text of the first Land Reform (Scotland) Bill policy memorandum. Within this document, after re-iterating the LRPG's land reform objective of removing land-based barriers, the policy objectives section merely notes that "[p]roviding communities with a right to buy

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[119] A Wightman, "Land Reform: Politics, Power and the Public Interest" (1999). The John McEwen Memorial Lectures on Land Tenure in Scotland.

[120] Bryden, "Land Tenure and Rural Development" (1996).

[121] *Ibid*.

[122] Wightman, "Land Reform: Politics, Power and the Public Interest".

land will add impetus to the drive for greater diversity and community involvement"[123] and in the section on effects on sustainable development, all that is written about the community right to buy schemes is that they will underpin sustainable development "by creating new opportunities for rural and crofting communities."[124]

This is in stark contrast to the explicit sustainable development goals which the Government are now focused on achieving through land reform. In the 2014 consultation document for the latest Land Reform Bill, Dr Aileen McLeod, the then Minister for Environment, Climate Change and Land Reform wrote that the Government's vision was:

> "for a strong relationship between the people of Scotland and the land of Scotland, where ownership and use of the land delivers greater public benefits through a democratically accountable and transparent system of land rights that promotes fairness and social justice, environmental sustainability and economic prosperity."[125]

And within the subsequent policy memorandum for the Bill, the Government equate the sustainable development of collective bodies to the public interest of the nation, stating that "[i]t is in the public interest that communities across Scotland, wherever they may be, have a sustainable future."[126]

Further, it is evident that the Government now explicitly articulates the link between land law and the achievement of sustainable development. For example, the Government's view is that a lack of influence a community can have in how a landowner uses or manages their land can result in detrimental long term effects to social, economic and environmental wellbeing.[127] They also link the achievement of sustainable development to the ability to use property such as buildings and land in order to manage economic, social and environmental issues.[128] In addition, for the community right to buy to further sustainable

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[123] Scottish Government, "Land Reform (Scotland) Bill Policy Memorandum" (2001) para 8.

[124] *Ibid* para 43. The new access rights are also claimed to promote sustainable development by "raising awareness among ordinary people of the value of the natural environment by encouraging them to enjoy the countryside." *Ibid*.

[125] Scottish Government, "A Consultation on the Future of Land Reform in Scotland" (2014). Available at https://consult.gov.scot/land-reform-and-tenancy-unit/land-reform-scotland/supporting_documents/00464887.pdf

[126] Scottish Government, "Land Reform (Scotland) Bill Policy Memorandum" (2015) para 143.

[127] *Ibid* para 177.

[128] *Ibid* paras 140-141.

development, communities must show that these benefits will be long lasting,[129] which emphasises the Government's policy that solutions must not only be for the short term, but deliver solutions for the benefit of future generations.

Nevertheless, such statements do not address Wightman's concern that this could merely be rhetoric. Ross, however, through analysing both the evolution of the community rights to buy guidance published by the Government and the changing approach to the sustainable development tests in the legislation, believes that Scotland now has the potential to move past the rhetoric of sustainable development resulting in the community rights to buy producing transformational results.[130] In particular, Ross highlights the approach taken by the Government to contextualise within the legislation how sustainable development should be interpreted.[131] This allows for different factors to be used in the sustainable development equation based on what the individual piece of legalisation is attempting to achieve. For example, given the policy aim of the community right to buy abandoned, neglected or detrimental land, there is a narrow test for sustainable development with the community body's proposal having to show how it is compatible with furthering the achievement of sustainable development of just the land rather than sustainable development as a whole.[132] Further, if the application is concerned with detrimental land, the sustainable development factors to be used by the Ministers are again adapted to include a number of harm-based categories.

Such a tailored approach to the sustainable development test was again used for the community right to buy to further sustainable development. For a community body to be successful, the plans in their application must meet what are termed "sustainable development conditions" in the legislation, an approach not used in other Scottish statutes.[133] Making clear the Government's commitment to its view on the link between public interest and sustainable development, the public interest is one of these sustainable development conditions, and a community body's proposal is not seen as furthering sustainable development if the transfer of land is not in the public interest. The legislation, unique to this community right to buy, then expands both the concept of public interest and the other sustainable development conditions to include factors which Ministers must

[129] *Ibid* para 182.

[130] Ross, "The Evolution of Sustainable Development in Scotland".

[131] *Ibid* 252.

[132] *Ibid* 253.

[133] *Ibid* 254.

consider, including community engagement and the effects of the proposed transfer on the landowner. Ross concludes that this customised approach to interpreting what is sustainable development and what are the sustainable development priorities based on context and intended outcomes shows a "significant evolution in the implementation and delivery of sustainable development in Scotland."[134]

It therefore appears that regardless of the reasons behind the introduction of the sustainable development focus and its potential inherent vagueness, it has resulted in a change of focus in strategic land reform and subsequent legislation in Scotland. A focus on sustainable development has seen substantive and significant land legislation introduced which has moved away from historical concerns in regard to individual property rights such as the security of tenure of crofters and farmers, to a forward-looking approach which takes into account vital societal and environmental themes with the intention of ensuring that Scotland is more likely to achieve an enhanced and long-lasting level of sustainable development.

3.4.3.2 Sustainable development and community ownership

What is not apparent is why community ownership was seen as the solution to achieving sustainable development, as opposed to a model of individual ownership. Indeed, in Wightman's 1999 John McEwan lecture, albeit in relation to the Government's overall plans for radical land reform, he discussed the lack of robust analysis which had been carried out at the time of the initial consideration of the first Land Reform Bill, noting a divergence between political ambition, and information and insight.[135] There has since been academic debate as to whether community ownership is the solution to the furtherance of sustainable development. In regards to land reform, Warren and McKee note that there is now a sustainability criterion which must be met when determining a mix of legal rights and responsibilities: "what structures will best deliver development which is socially economically and environmentally sustainable?"[136] They note the power that ownership gives an owner and highlight that such privilege can be exercised to cause benefit or damage – "unfettered power is a two-edged gift"[137] – and can be used in an

[134] *Ibid* 262.

[135] Wightman, "Land Reform: Politics, Power and the Public Interest".

[136] C Warren & A McKee, "The Scottish Revolution? Evaluating the Impacts of Post-Devolution Land Reform" (2011) 127 Scottish Geographical Journal 17 at 21.

[137] *Ibid*.

autocratic or an inclusive manner. They are therefore of the view that no straightforward correlations exist between the type of owner, be it private, social or the state, and how the land is used and correctly state that "[*w*]*ho* owns land and *how* land is managed are thus distinct but closely linked dimensions of the challenge of delivering rural sustainability."[138] They highlight that it will take a significant number of years to determine which landownership models will produce the best sustainable benefits but note Pillai's view that without the significant support required for the community ownership schemes, such as technical assistance and financial backing, community ownership may not continue to be sustainable.[139] In their view, the important aspect in the achievement of sustainability is the interaction and the development of partnerships between conservation owners and community bodies. Wightman is of a similar view when considering the longevity of community ownership, stating his concern that "community ownership is seen as *the* answer when actually it is just one of a number of answers"[140] which echoes the succinct definition of land reform by Warren & McKee when they wrote "[l]and reform is about finding the right mix of rights and responsibilities which will facilitate the development of a healthy society and a healthy environment."[141] To conclude, based on the above discussion and given the time-lag before it can be ascertained whether the Government's community centric approach will result in robust sustainable development, it is clear that other solutions to the sustainable development global objective need to continue to be considered as part of Scotland's land reform programme.

3.4.4 Why Diversification? And Diversification of what?

The next topic for examination relates to Scotland's drive for diversification. It will first cover the use of the word diversification in land reform and then examine the effects which can result from diversifying the scale of ownership.

3.4.4.1 Diversification and land reform

The use of certain terminology can result in confusion as to what the intention of the legislation is. This can cause specific issues in both the general perceptions of the effectiveness of the community rights to buy legislation, and when measuring success

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[138] *Ibid*. Italics by the authors.

[139] *Ibid* 34.

[140] Wightman, *The Poor Had No Lawyers* 202.

[141] C Warren & A McKee, "The Scottish Revolution? Evaluating the Impacts of Post-Devolution Land Reform" 21.

during post-enactment scrutiny or the monitoring of the actions of the community bodies. Diversification is one of these terms. Take for example the policy memorandum for the first Land Reform (Scotland) Bill, which stated that land reform "has the potential to change patterns of ownership in Scotland to ensure a greater diversity of ownership, greater diversity of investment and greater sustainable development"[142] Is this the same diversification as the LRPG's diversification goal of "more variety in ownership and management arrangements (private, public, partnership, community, not-for-profit) which will lead to less concentration of ownership?"[143]

The term diversification is continually used in land reform debates. However, it can sometimes be unclear whether it is diversification of ownership, that is, increasing the number of owners of land, or diversification of ownership type, that is, changing the current percentages of land which is owned privately, publicly, by partnerships or by not-for-profit organisations, that is under discussion. For example, the community rights to buy are primarily concerned with the latter type of diversification and are an attempt to increase the proportion of land held in community-ownership by removing it from the other ownership-types, such as private or public bodies. While each successful community right to buy can increase the number of individuals owning land, this would only ever be a "+1" if the community body does not already own other land, and if the current landowner is breaking up part of their estate and retaining other land. There is no change to the total number of individuals owning land in Scotland if neither of these events occurs.[144] This drive for more land to be held in community ownership, rather than a direct attempt to significantly change Scotland's high level of concentrated ownership, is also apparent by the use of Government targets which are set by acres rather than the number of community bodies owning land.[145]

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[142] Scottish Government, Land Reform (Scotland) Bill, Policy Memorandum para 5.

[143] *Ibid*.

[144] It is also worth highlighting that as at 21 November 2021, there had been only 252 pre-emptive community right to buy applications since it came into force. The applications are available as part of the Register of Community Interests in Land at: https://www.eservices.ros.gov.uk/rcil/ros/rcilcb/presentation//ui/pageflows/viewCountySummary.do

[145] What appears to be absent from the literature is a view on what the ideal diversification of owners should be. As mentioned above, the LRPG viewed that the achievement of sustainable development was through diversification of ownership between private, public, partnership, community and not-for-profit. But what would be the correct mix? The legislation discussed above has been an attempt to move more ownership from other ownership-types to community ownership but there potentially could be a limit before there are detrimental effects to sustainable development, or indeed other factors such as social justice, equality and fairness.

This raises the question as to why, if the number of landowners is not going to significantly change, either in the short or long term, this approach continued to be used and lauded by some land reformers. Perhaps it is that, even though Scotland's concentrated level of ownership is still recognised as a key concern,[146] the Government and land reformers have seen that community rights to buy (i) can deal with the lack of desire by some groupings such as crofters and tenant farmers to move from tenancy arrangement to absolute ownership as discussed in Chapter Two, and (ii) can remove portions of land from large landowners (provided the legislative tests are met). That is, concern about the concentration of landownership was not simply to do with the pattern of ownership, but also driven by who the owners were. Indeed, the community rights to buy have the indirect effect of ensuring that more land is owned by UK entities made up of a proportion of local representatives, and therefore not held by foreign owners.[147] It could therefore be that there has been a change in the focus of both land reformers and the legislator, from a concern about the distribution of ownership to a drive for the re-distribution of power, from unaccountable individuals to locally representative democratic bodies. Such a scenario was perhaps in Wightman's thinking when in 1999 he stated:

> "But there is a fear in certain quarters I suspect that land reform becomes associated with what are now regarded as old-fashioned ideas of redistribution. The response to such fears is to view land reform as a process of modernisation of Scotland's land laws in order to redistribute power as part of promoting economic and social progress."[148]

Returning to the issue of terminology, the Government has previously made clear which diversification goal they are trying to achieve when introducing new legislation or policy. For example, the Government's vision in 2004 included their goal "for a fairer, or wider and more equitable, distribution of land in Scotland … with greater diversity of land ownership."[149] This emphasises the distinction between the two types of diversification.

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[146] The LRRS, published in September 2017, included the principle, unfortunately using the word "diverse", that: "There should be a more diverse pattern of land ownership and tenure, with more opportunities for citizens to own, lease and have access to land." See https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement/pages/3/

[147] The LRRG had recommended that the Government "should make it incompetent for any legal entity not registered in a member state of the European Union to register title to land in the Land Register of Scotland" Land Reform Review Group, "The Land of Scotland and the Common Good" Sec 5, para 11.

[148] Wightman, "Land Reform: Politics, Power and the Public Interest".

[149] LRRG, "The Land of Scotland and the Common Good" Sec 24, para 30.

Similarly, it is of note that the section in which the LRRG discuss this vision is entitled "Increasing the Number and Diversity of Land Owners,"[150] further re-enforcing that there are two different aspirations that require different approaches to land reform.

3.4.4.2 Effects of diversification of scale

How will the Government achieve its 2014 vision of a "fairer, or wider and more equitable, distribution of land"[151] and a significant growth in the number of landowners? The LRRG made a number of recommendations to help achieve this, such as a reform of succession rights[152] and setting an upper limit on the amount of land a private person could own.[153] However, they made clear their view that the "current fiscal regime for land ownership and use plays an important part in maintaining the concentrated pattern of large scale, private land ownership in rural Scotland"[154] and recommended that to achieve any significant growth in the number of rural landowners required the fiscal regime to be reviewed and then progressively structured in order to promote this growth.

Before such radical fiscal changes are made, it is necessary to determine what the effects would be of reducing the concentration of ownership. To analyse such a question, the Rural and Environment Science and Analytical Services (RESAS) Division of the Scottish Government commissioned an evidence-based study to answer the question of whether the "diverse (scale of) land ownership leads to better social, economic and environmental outcomes."[155] To test this hypothesis, the research team examined the social, economic and environmental outcomes which arose following the break-up of three large estates and matched them against three instances where the scale of ownership had remained the same.[156] The study used a sustainable development framework to carry out a comparative analysis to determine whether changes (or lack of changes) in local sustainable

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[150] *Ibid*.

[151] LRRG, "The Land of Scotland and the Common Good" Sec 24, para 30.

[152] *Ibid* Sec 6, para 20.

[153] *Ibid* Sec 24, para 29.

[154] *Ibid* Sec 25, para 48.

[155] RESAS, "Impact of diversity of ownership scale on social, economic and environmental outcomes" (2006) 9. The reason for the brackets in the research question is because the Scottish Government had to subsequently confirm that diversity in this case was in relation to the scale of ownership and not ownership-type. This re-emphasises the issue with the various meaning of the term.

[156] Crofts and land owned by communities were excluded from the study at the request of the Government. *Ibid* 11-12.

development outcomes was driven by the scale of landownership or due to other factors. Ten different outcomes were used, three economic, four social and three environmental.[157]

The report states that while changes to landownership and the scale of landownership can have an impact on the sustainable development of rural areas, the conclusion of the study was:

> "Land ownership scale is one of a myriad of factors that influence the economic, social and environmental development of rural communities. The complexity of ownership motivations, societal, policy and economic interactions in driving community development means that it is too complex to conclude that scale of land ownership is a significant factor in the sustainable development of communities."[158]

They further noted that in one case study it could not be concluded that the fragmentation of the land had resulted in positive results for the wider communities in that rural area.[159] It was also found that the drivers for social, economic and environmental changes were not correlated with landownership but as a result of what they call "general social-economic factors"[160] for which examples are provided such as regional economic growth, mobility of people, tourism growth and infrastructure.[161]

Subsequent to the publication of the RESAS report, the Scottish Land Commission issued a report entitled "Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland."[162] Through examination of the over 400 responses received to a set of questions on the benefits and issues associated with Scotland having land owned by a small number of landowners, the writers of the Scottish Land Commission report came to a similar conclusion as RESAS as regards the *scale* of landholdings, that is, the size of an estate was not a determining factor for positive or negative rural development. However, they did find that significant and long-term damage

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[157] *Ibid* 24.

[158] *Ibid* 63.

[159] *Ibid*.

[160] *Ibid* p64.

[161] *Ibid*.

[162] Scottish Land Commission, "Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland" (2019). Available at https://landcommission.gov.scot/downloads/5dd7d6fd9128e_Investigation-Issues-Large-Scale-and-Concentrated-Landownership-20190320.pdf

was occurring in affected communities due to the *concentration*[163] of landownership, that is, land being held by a small number of people in Scotland.[164] They attribute this harm to the system of private property which gives a landowner the power to "to decide who can access land, when, for what purpose and at what price."[165]

It is worth noting the different approach taken by the two studies, particularly as the RESAS compared and contrasted two different models of ownership while the Scottish Land Commission report was concerned with current viewpoints on the concentration of ownership and did not examine what would be the effects, both positive and negative, of significantly changing the number of landowners. It is clear that further work in this area is needed first before any robust conclusions can be achieved and policies made.

3.4.5 And what about Human Rights?

Finally in this section examining the approach taken by the Government in the community rights to buy is a consideration of the human rights aspect of the legislation. As Combe notes, there are two types of land reform; one which uses a blanket approach, providing the same rights or placing identical obligations onto all landowners, and the other which actively seeks to change the owner.[166] While for the former, the introduction of obligations on landowners can engage human rights, it is the latter which, in the main, engages with constitutional or international control.[167] Community rights to buy fall within the latter category, and must comply with the provisions of the European Convention on Human Rights (ECHR).

The Scotland Act 1998 states that the Scottish Government cannot act in a manner which is incompatible with the rights contained in the ECHR.[168] Any Act of the Scottish Parliament

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[163] Italics were added for emphasise by the author of this thesis and highlight again the different use of terminology in land reform debates with the potential for misinterpretation and confusion.

[164] The report notes that these people are made up of private individuals and organisations, and highlights that a community body can also abuse its market power. Scottish Land Commission, "Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland" para 9.3.

[165] *Ibid* 5.

[166] M Combe, "The Environmental Implications of Redistributive Land Reform" (2016) 18(2) Env. L. Rev. 104 at 106-107.

[167] *Ibid*.

[168] Scotland Act 1998, s57.

contrary to Convention rights is not law.[169] Article 1 of Protocol 1 (A1P1) to the ECHR states that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."[170]

Since a successful community right to buy application forces the landowner to transfer their land to the applicant, either when they consent to sell or without their consent, the legislation would seem to breach A1P1 unless it can be shown to be in the public interest and subject to the conditions provided for by law and by the general principles of international law. There appears, however, to be an inverse relationship between the continued increase to the scope of rights provided to community bodies and the Government's view on whether the introduction of these would result in human rights violations. For example, in the policy memorandum for the first Land Reform (Scotland) Bill, the Executive noted that there could be an argument that the right to buy provisions should not require the landowner to first decide to sell before a transfer to the community body could take place but argued against such an approach stating:

> "an unlimited right to buy of this kind would have a major and universal impact on property rights, inevitably with implications of ECHR difficulties unless suitably compensated for. The cost of the necessary compensation would be very significant, either for funding agencies such as the Land Fund or for the Executive itself. The Executive believes that this scale of disruption to the property market, plus the costs of compensation, cannot be justified."[171]

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[169] *Ibid*, s29(2)(d).

[170] European Court of Human Rights, "European Convention on Human Rights" 33.

[171] Scottish Government, "Land Reform (Scotland) Bill – Policy Memorandum" (2001) para 23. Such difficulties were not envisaged for the crofting community ownership measures. The Executive was of the view that the low value of crofting land and the extent of eligible crofting

This opinion changed during the planned introduction of the community right to buy to further sustainable development, which does not require the consent of the landowner. It was highlighted in the policy memorandum for the later Land Reform (Scotland) Bill that a landowner or tenant's rights under A1P1 of the ECHR would be engaged through the use of this right to buy. However, it was the view of the Government that the measures would be compatible with the ECHR because (a) they are being introduced the achieve the legitimate aims of bringing about a significant benefit, removing a potential harm and promoting sustainable development through the transfer of land, and (b) the Act "pursues this aim in a way that is proportionate and strikes a fair balance between the general community interest and the protection of rights of owners of land and tenants."[172] No further information was, however, provided as to why the new power was seen as proportionate or striking a fair balance. Indeed, evidence was given by various parties during the Stage 1 process on possible ECHR issues, in particular in relation to the proportionality requirement, with groups arguing that the Government would need to provide evidence that no other methods existed by which they could achieve their same goal through the use of a more reasonable and restrictive approach.[173]

The above discussion raises the question of why the Government's approach to A1P1 and community rights to buy has altered. The fear raised by landowners post-implementation of the Land Reform (Scotland) Act 2003 that the most significant impact on private ownership would be that "the goalposts will change in the future"[174] has arguably become reality. How, for example, did the Government come to feel that increasing the scope of the community rights to buy, far from breaching human rights, was a way of *promoting* human rights? There are a number of reasons for this change, three of which are covered below.

First, and likely why the Government has shown an increased confidence in regard to the threat of ECHR-based litigation, was the decision of the Inner House of the Court of

land would result in significant less disruption and compensation costs. They were also of the view that an unlimited right to buy in this case is "justified by the greater need to support such crofting communities, which are located in the most fragile areas where the potential for a bad landlord to do real harm to the community is at its greatest." *Ibid* para 25.

[172] Scottish Government, "Land Reform (Scotland) Bill, Policy Memorandum" (2015) para 34.

[173] RACCE, "Stage 1 Report on the Land Reform (Scotland) Bill" (2015) para 99-102.

[174] Warren & McKee, "The Scottish Revolution? Evaluating the Impacts of Post-Devolution Land Reform" 25.

Session in *Pairc Crofters Ltd v The Scottish Ministers*,[175] in which a landowner claimed his A1P1 rights had been infringed due to the crofting community right to buy process not allowing for the landowner's views to be given sufficient consideration. This argument was unsuccessful. Perhaps more importantly, no attempt had been made in the case to contend that the introduction of the crofting community right to buy, which can have the end result of a forced sale, was, in itself, causing an infringement of ECHR rights and therefore not law.[176]

A second reason for this changing approach by the Government may have been the work of the Scottish Human Rights Commission, in particular the publication of their first Action Plan in 2013, which helped promote an understanding that human rights were not just a tool to block land reform but could also be used to promote change. The efforts of this group resulted in a recent amendment to the community rights to buy legislation to include an explicit requirement placed on Ministers such that when determining whether to consent to a right to buy application they must take account of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[177] McCarthy, using the work of Murdoch, describes the rights in this covenant as "forming the basis of socialist conceptions of human rights,"[178] and the ICESCR includes rights such as to education, health, and, within the overall right to an adequate standard of living, rights to food and housing.[179] While the ICESCR is not directly justiciable in that an individual cannot raise an action in a court, domestic or international, with a claim that the state has breached one of the rights, McCarthy raises the possibility that the ICESCR rights could be required to be used as an interpretative tool for determining if the public interest test in A1P1 has been met.

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[175] *Pairc Crofters Ltd v The Scottish Ministers* [2012] CSIH 96 para 56

[176] See F McCarthy, "Property Rights and Human Rights" in M Combe, J Glass and A Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (2020) 213 at 222-223.

[177] See Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish land question" 297 and McCarthy, "Property Rights and Human Rights" 214. The Community Empowerment (Scotland) Act 2015 inserted this requirement into the three community rights to buy enacted at that time as s98(5A) of the Land Reform (Scotland) Act 2003.

[178] McCarthy, "Property Rights and Human Rights" 218.

[179] Office of the United Nations High Commissioner for Human Rights, "International Covenant on Economic, Social and Cultural Rights" (1966). Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx. For a discussion on the ICESCR and how it relates to Scottish land reform, see Robbie and Van der Sijde, "Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability".

Lastly, Combe highlights that the ECHR also conveys positive obligations and cites the 2006 European Court of Human Rights case *Codona v United Kingdom*,[180] where it was ruled that gypsy travellers were entitled to the provision of accommodation from a local authority, provided there was suitable accommodation available and the authority was having to decide whether to provide the housing to the travellers or not.[181] Based on these three events, it is clear that there has been an increased awareness within the Scottish Government of the pivotal role that land reform can play in the attainment of a range of human rights and this has resulted in the provision of an augmented suite of rights to buy in order for communities to obtain land for the promotion of their human rights.

It should be noted, however, that there has yet to be a successful exercise of the community right to buy abandoned, neglected or detrimental land or the community right to buy to further sustainable development. It could be that following such an occurrence, community rights to buy will face their next Convention rights challenge, in particular given the views, provided above, which were expressed during the legislative scrutiny of what became the Land Reform (Scotland) Act 2016.

3.5 Conclusion

This chapter has provided an overview of the land reform which has occurred in Scotland over the last 25 years. This period has seen some pioneering land legislation enacted by the Scottish Parliament following its opening in 1999, such as the 2003 and 2016 Land Reform (Scotland) Acts. The chapter commenced with a section which provided an outline of the work of two land reform groups, the LRPG in 1997 and the LRRG in 2012, and details were provided on a number of key pieces of legislation that the work of these bodies helped to shape, including the Land Reform (Scotland) Act 2003, the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2016. These Acts introduced four new community rights to buy in Scotland, one a pre-emptive right and three absolute rights which can force the sale to a community body of either crofting land, abandoned, neglected or detrimental land, or land which will be used to further sustainable development. The last of these came into force in April 2020.

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[180] *Codona v United Kingdom* (485/05) Unreported European Court of Human Rights 7 February 2006, admissibility decision.

[181] Combe, “The Land Reform (Scotland) Act 2016: another answer to the Scottish land question” 299

The latter half of the chapter has examined some of the framework concepts underpinning the flagship community rights to buy and raised questions such as why there has been a focus on community ownership, diversification and sustainable development, and potential human rights issues. As discussed, when the community rights to buy were first introduced, they had a significant focus on the community ownership of land and sustainable development, both of which, it appears, were introduced with little scientific or comparative research, and the new community rights to buy have continued to have an emphasis on these two concepts. The chapter also analysed a number of the approaches taken when shaping community rights to buy. Consideration was given as to whether community ownership is the correct, or only, model for achieving sustainable development and the increasing engagement between the Government and the concept of sustainable development was examined. The claimed achievement of diversification was also analysed and it was highlighted that though the use of community rights to buy would result in an increase in the number of acres of land held in community ownership, based on the small number of applications made to date (albeit recognising that not all transfers of land to communities occur as a result of the legislation) and the prevalence of large estates being owned by communities, it will be a number of years, if ever, before Scotland sees significant changes to the number of landowners resulting solely from the suite of community rights to buy.

In spite of these concerns, it is apparent from the discussion in this chapter that there has been a significant change in the focus of land reform in Scotland. The over-arching objective of the common good with its underlying value-based goals such as equality and fairness, the drive for sustainable development and a legislator taking cognisance of the role land reform can play in the promotion of human rights all have a very different focus than the land reform measures which were discussed in Chapter 2. Land reform, including the community-centric community rights to buy, is being used in an attempt to improve the wellbeing of the country as a whole and not as a way to strengthen or protect ownership rights of individuals or to provide additional legislative protection to specific groups due to political pressures. How aligned the approach adopted is to progressive property theory, for example, the drive for the advancement in sustainable development, will be fully examined in Chapter Six following the introduction of progressive property theory in Chapter Five. The next chapter will first build on this introduction to the community rights to buy and will provide an in-depth analysis of some of the provisions contained in the community rights to buy legislation which are relevant to the evaluation of the research question.

Chapter 4 Community Right to Buy Legislation

4.1 Introduction

The previous chapter introduced the community rights to buy, the area of modern-day land reform which has been selected to be used to investigate their alignment with progressive property theory. The chapter provided a description and critique of the four rights to buy – the pre-emptive community right to buy,[1] the crofting community right to buy,[2] the community right to buy abandoned, neglected or detrimental land[3] and the community right to buy to further sustainable development[4] – which have been enacted as part of Scotland's modern day land reform programme. In order to have a detailed understanding of the legislation to allow for it to be robustly examined through a progressive property theoretical lens, this chapter will undertake to describe in more detail a number of the key components of the community rights to buy and provide an analysis of the approach taken by the Government. In instances where these rights to buy have a level of commonality in a certain area, the provisions will be described together. If there are significant differences, then each right to buy will be discussed individually (or groupings will be used). It is not the intention of this section to cover all aspects of the legislation, and only those relevant to the thesis, either for critique in this chapter when it is identified that the provisions could result in the attainment of progressive objectives not being realised or when the legislation is examined through a theoretical lens in Chapters Six and Seven, will be included.[5] This chapter will therefore focus on what land is covered by the legislation, the definition of a community body, the definition of a community, the criteria for consent, valuation and post-application information.

[1] Land Reform (Scotland) Act 2003, Part 2.

[2] Land Reform (Scotland) Act 2003, Part 3.

[3] Land Reform (Scotland) Act 2003, Part 3A, inserted by the Community Empowerment (Scotland) Act 2015, s74.

[4] Land Reform (Scotland) Act 2016, Part 5.

[5] For detailed information on the community rights to buy, see https://www.gov.scot/policies/land-reform/

4.2 What land is covered by the legislation?

4.2.1 Pre-emptive Community Right to Buy

As highlighted in the last chapter, the pre-emptive community right to buy was originally only eligible for land in rural areas.[6] Following the enactment of the Community Empowerment (Scotland) Act 2015, the threshold was removed, making urban land eligible for the pre-emptive community right to buy.[7] Section 33(1) of the Land Reform (Scotland) 2003 Act therefore now states that a community interest can be registered in any land in Scotland unless it is excluded land.[8] Excluded land is defined as those separate tenements which are owned by a different owner than the owner of the land itself.[9] This exclusion does not apply to salmon fishing or mineral rights.[10]

4.2.2 Crofting Community Right to Buy

For the crofting community right to buy and in common with other crofting legislation, the definition of eligible croft land is detailed, complex and, as to be expected, crofting specific. For the purposes of this section, it suffices to say that the right applies to land which meets the definition of a croft contained within the Crofters (Scotland) Act 1993,[11] common grazings,[12] and salmon fishing and mineral rights which are within or near to the eligible croft land.[13] Crofting community bodies can also now apply for the right to buy a tenant's interest,[14] though tenancies of dwelling-houses are excluded. Contiguous non-crofting land, including sporting interests, is also eligible land if it has the same owner as

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[6] See section 3.2. When enacted, there was a threshold of land with a population of 10,000 or under. Land Reform (Scotland) Act, s33(2) (as enacted). This was removed by The Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2004 (SSI 2004/296), art 2.

[7] For a discussion on the first urban land purchased through the pre-emptive community right to buy (albeit as a late application), see J Lovett & M Combe, "The Parable of Portobello: Lessons and Questions from the First Urban Acquisition Under the Scottish Community Right-to-Buy Regime" (2019) 80 Mont. L. Rev. 211.

[8] Land Reform (Scotland) Act 2003, s33(1).

[9] *Ibid* s33(2).

[10] *Ibid* s33(2A). The mineral rights to oil, coal, gas, gold or silver are, however, excluded.

[11] *Ibid* s68(2)(a).

[12] *Ibid* s68(2)(b).

[13] *Ibid* 68(2)(d). The mineral rights to oil, coal, gas, gold or silver are, however, excluded. Combe describes the inclusion of the separate tenements as "somewhat [controversial]." Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 209.

[14] Land Reform (Scotland) Act 2003, s69A, inserted by Crofting Reform etc. Act 2007, s31

the eligible croft land.[15] As Combe highlights, this allows the crofting community body to manage land outwith the restrictive crofting boundaries but without it being what he describes as "overly confiscatory."[16]

4.2.3 Community Right to Buy Abandoned, Neglected or Detrimental Land

Due to the policy intention behind the community right to buy abandoned, neglected or detrimental land, there is a precise definition provided in the Act for eligible land, which is split into separate "abandoned and neglected" and "detrimental" categories. Land will be eligible if, in the view of Ministers, "(a) it is wholly or mainly abandoned or neglected, or (b) the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community."[17] Secondary legislation has been introduced to provide Minsters with factors they must consider when determining whether land is eligible.[18] For the abandoned and neglected element, this includes (a) the physical condition of the land, including how long it has been in that condition and what harm it can cause to the public, adjacent land and the environment, and (b) how the land is being used, for example, the extent to which it is being used for lawful recreational activities or to preserve the environment. For the detrimental category, when examining the effect on the community, along with again having regard for the use and management of the land, the Ministers must determine if such activities have resulted in a statutory nuisance[19] and check to see if a warning notice has been issued under section 44 of the Antisocial Behaviour etc. (Scotland) Act 2004.[20]

There are also a number of exclusions contained within the definition of eligible land. For example, due to the lack of consent required by the owner of the land before the land is transferred, protection is provided through the exclusion of homes.[21] Eligible croft land is

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[15] Land Reform (Scotland) Act 2003, s70.

[16] Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 209.

[17] Land Reform (Scotland) Act 2003, s97C(2).

[18] The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 (SSI 2018/201).

[19] Under the definition provided in section 79(1) of the Environmental Protection Act 1990.

[20] The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 (SSI 2018/201) reg 6.

[21] Land Reform (Scotland) Act 2003, s97C(5)(a).

also excluded as this has already been legislated for in the crofting community right to buy.[22]

4.2.4 Community Right to Buy to Further Sustainable Development

The community right to buy to further sustainable development has a similarly wide-ranging definition of land which is within scope to the pre-emptive community right to buy, with eligible land being defined as land other than that which is excluded.[23] Similar to the crofting community right to buy, an application can be made for the purchase of a tenant's interest under this right to buy. The tenancy has to be, in part or wholly, over eligible land and does not include croft tenancies or tenancies of dwelling-houses.[24] However, uniquely to this right to buy, sub-tenancies are also included.[25] Lastly, as with the community right to buy abandoned, neglected or detrimental land, homes and crofting land are excluded.[26]

4.2.5 Discussion

As highlighted above, when the pre-emptive community right to buy came into force, only rural land was eligible. However, during the consultation process for the Land Reform (Scotland) Act 2003, a number of landowners and community interests were of the opinion that urban land should also have been eligible. This view was not endorsed by Ministers who stated that "the lives of people who live and work in towns and cities are not constrained by landownership in the way that those in the country are"[27] and therefore there was not the "same rationale for a community right to buy in the urban context."[28] It is not clear what research Ministers carried out to reach this view, though it is likely the policy was driven by the rural focus contained in the LRPG's recommendations. Little further comment was made on this exclusion at the time. Nearly a decade later, however, when the LRRG published their findings in 2012, they were of the view that it would be an improvement to extend the pre-emptive right in the Land Reform (Scotland) 2003 Act to

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[22] *Ibid* s97C(5)(c).

[23] Land Reform (Scotland) Act 2016, ss45-48.

[24] *Ibid* s48(1).

[25] *Ibid* s48(7).

[26] *Ibid* s46.

[27] Scottish Executive, "Land Reform, the Draft Bill" (2001) 22.

[28] *Ibid*.

urban communities through the removal of the population threshold.[29] No justification or evidence was provided for why they had reached this opinion. This was left to the Ministers who, as detailed in the policy memorandum for the Community Empowerment (Scotland) Bill, were now of the opinion that the "same issues of community confidence and cohesion, sustainability and improvements to the built and natural environment apply wherever communities are empowered to take control of assets."[30] The policy memorandum does, however, note that consultation on the Community Empowerment Bill had shown a 93% approval rating for the change with the key reason cited that it would give people residing in urban areas the same rights as those living in rural areas.[31]

While Wightman's view is that the removal of the population threshold restriction could be "the most lasting legacy of the new legislation,"[32] it will clearly result in additional resource requirements, both funding and human resources. The Financial Memorandum of the Community Empowerment (Scotland) Bill, while acknowledging that the change to include urban areas may lead to an increased number of communities making applications, states that the Government could not accurately estimate what the demand would be or how it would affect application numbers.[33] Highlands and Islands Enterprise (HIE), however, were of the view that there would be a significant growth in interest in the pre-emptive community right to buy for which the resultant costs would need to be funded by the Government.[34] Both HIE and the Scottish Property Federation also questioned the Government's prediction of a potential five to ten additional applications[35] with HIE highlighting that approximately 15 submissions were being made annually by rural communities and urban communities make up 80% of the population.[36] With Government financing of the community rights to buy often cited as a key driver for the success of the legislation, the inclusion of urban areas (along with the introduction of the two new

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[29] LRRG, "The Land of Scotland and the Common Good" Sec 17 para 9.

[30] Scottish Government, "Community Empowerment (Scotland) Bill, Policy Memorandum" para 59.

[31] *Ibid*.

[32] Wightman, *The Poor Had No Lawyers* 360.

[33] Scottish Parliament, "Report on the Financial Memorandum of the Community Empowerment (Scotland) Bill" (2014) para 69. Available at http://archive2021.parliament.scot/S4_FinanceCommittee/Reports/fiR14-CommunityEmpowermentReport.pdf

[34] *Ibid* para 70.

[35] *Ibid*.

[36] Highlands and Islands Enterprise, "Financial Memorandum Submission" (2014) section 8. Available at https://archive2021.parliament.scot/S4_FinanceCommittee/General%20Documents/Highlands_and_Islands_Enterprise_Community_Empowerment_(Scotland)_Bill.pdf

community rights to buy) is likely to have an impact on the number of transfers of land which take place, resulting in increased requests for Government financial support. Unfortunately, with Government reports on community ownership not including application figures, nor distinguishing between community ownership which resulted through the legislation and that occurring from voluntary transfers,[37] it would require an analysis of the Register of Community Interests in Land to determine changes in the volume and type of applications following the removal of the population threshold.

Another point of discussion in regard to the definition of eligible land is that, apart from the pre-emptive community right to buy, homes which are owned (as opposed to those which are leased) are classed as excluded land. The reason for this was made clear during the consultation exercise to assist with the development of secondary legislation for the community right to buy to further sustainable development which the Government initiated in June 2019.[38] The justification for the exclusion was given as "[h]ome owners and their families should feel secure in the possession and occupation of their homes and gardens."[39] "Home" is now defined to include the curtilage (not defined) of a home, along with types of land such as those used to store vehicles used by the occupant, to grow food primarily for the subsistence of the occupant, for access and for recreation and leisure activities.[40] The justification given for these exclusions was that along with putting land which is needed for shelter, eating and sleeping outwith the scheme, land which allows for activities normally associated with the "full life of the home"[41] should also be excluded. What is not clear, however, is why the determination of whether a home is eligible could not have been made as part of the public interest test. Indeed, Lovett highlights that the blanket exclusion approach in the legislation might be questionable as it could "take too much property off

[37] For example, see Scottish Government "Estimate of community owned land in Scotland 2017" (2017), available at https://www.gov.scot/publications/estimate-community-owned-land-scotland-2017/ and Scottish Government "Community ownership in Scotland: 2018" (2019), available at https://www.gov.scot/publications/community-ownership-scotland-2018/

[38] Scottish Government, "Consultation on secondary legislation proposals relating to Part 5 of the Land Reform (Scotland) Act 2016 – the Right to Buy Land to Further Sustainable Development" (2019).

[39] *Ibid* 17.

[40] The Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 (SSI 2020/114), reg 4.

[41] Scottish Government, "Consultation on secondary legislation proposals relating to Part 5 of the Land Reform (Scotland) Act 2016 – the Right to Buy Land to Further Sustainable Development" 19.

the table"[42] and therefore hinder justifiable community initiatives such as redevelopment and relocation projects.[43] Perhaps the actual reason why the exclusion of all homes was included explicitly in the Acts was to minimise the chances of a successful claim that the legislation breaches A1P1 or Article 8 (right to respect for your private life, your family life, your home and your correspondence) of the ECHR.[44]

Finally, Minsters could have also provided a definition for what exactly would constitute a home (as opposed to what additional land would be included as part of a home discussed above). However, they did not wish to use this power and it was not included in the regulations. They noted that while it gives an open definition for a home, this is appropriate "in order to include the different and diverse ways that people make their homes,"[45] which in turn assists with the achievement of goals such as social diversity, equality, and gives individuals the right to choose their own mode of living.[46]

Lovett's point above is valid and it appears unnecessary to be overly restrictive as to the type of land which is eligible for a community right to buy. As will discussed later in this chapter, within the legislation, there are already a number of consent criteria that have to be met, including a public interest test and Minsters also have to take into account the view of the landowner before providing their consent. The type of land in the application could be considered at the decision-making stage, allowing for the context of the land and the parties involved to be used and treating each application on a case-by-case basis.

4.3 Definition of a Community body

A body making an application under any of the community rights to buy has to be a company limited by guarantee, a Scottish Charitable Incorporated Organisation or a community benefit society.[47] There are various requirements placed on each of these

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[42] J Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's Compulsory Community Right To Buy" in M.M. Combe, J. Glass and A. Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (2020) 177.

[43] *Ibid*.

[44] For more discussion on this, see section 3.4.5.

[45] Scottish Government, "Consultation on secondary legislation proposals relating to Part 5 of the Land Reform (Scotland) Act 2016 – the Right to Buy Land to Further Sustainable Development" 20.

[46] *Ibid*.

[47] Land Reform (Scotland) Act 2003, s34(A1)(a), s71(A1)(a), s97D(1)(a), Land Reform (Scotland) Act 2016, s49(1)(a). When the 2003 Act was enacted, community bodies could only be

bodies based on the documentation which governs the body, for example, its constitution or the articles of association. Such documentation must include, amongst other things, a requirement that the body has 10 members or more,[48] a requirement that three quarters of the group are members of the community, a condition that the body has to be properly financially managed and an obligation that any surplus monies or assets are used for the benefit of the community.[49]

A new feature contained as part of the community right to buy to further sustainable development allows a community body to nominate a third party to make the purchase of the land. In this case, the community body has to be a body corporate with similar but less restrictive requirements to the above; a written constitution is required, which includes a need for local representation, a statement that the body's aims and purposes are for the benefit of the community and that surplus funds are used for the needs of the community.[50] Combe describes this new ability to have land transferred but not directly to a community body as a "major innovation" when compared to the other community rights to buy, stating that it allows a community to "bring a nominee that shares its ethos into its land reform plans, bringing fresh ideas and, one imagines, fresh investment to the party."[51] The policy memorandum for the later Land Reform (Scotland) Bill provides a housing association or a local business partner as examples of third party purchasers the Government think will use this new power in order to deliver benefits to a community.[52]

Regardless of the type of constituted entity, the body will become a community body, and therefore eligible to use the community right to buy provisions, only after they have received written notice from Ministers confirming that they are "satisfied that the main

companies limited by guarantee. The scope was extended by the Community Empowerment (Scotland) Act 2015, s37 and s62.

[48] The requirement for the body to need 10 or more members (which was originally 20 when the 2003 Act came into force) can be disapplied if Ministers think it is in the public interest. Land Reform (Scotland) Act 2003, s34(2), s71(2), s97D(5), Land Reform (Scotland) Act 2016, s49(6).

[49] For the full listing of these requirements, see Land Reform (Scotland) Act 2003 s34(1),(1A),(1B), s71(1),(1A),(1B), s97D(2)-(4), Land Reform (Scotland) Act 2016, s49(2)-(4).

[50] Land Reform (Scotland) Act 2016, s49(1)(b).

[51] M Combe, "Rights To Buy: the New Addition" (2020) 65(7) J.L.S.S.

[52] Scottish Government, "Land Reform (Scotland) Bill, Policy Memorandum" para 181.

purpose of the body is consistent with furthering the achievement of sustainable development."[53]

The need to meet the tightly defined requirements contained in the legislation has been described by Wightman as imposing "something of a straitjacket"[54] onto community bodies. He highlights that the early community bodies who successfully acquired land in Assynt, Eigg and Knoydart could not have made use of the community rights to buy legislation (had it been in place at the time) due to the way these bodies were constituted. Combe also draws attention to the fact that the trust format used by the Stornoway Trust[55] was rejected by the Executive during the scrutiny of the first Land Reform (Scotland) Bill.[56] The Executive at the time, however, were more concerned about the apparent transparency benefits resulting from requiring bodies to incorporate as companies limited by guarantee than the resulting set-up costs, with Ross Finnie, the then Minister for Environment and Rural Development stating that:

> "Bodies will be transparent for a relatively modest cost. I do not believe that registering a company for between £100 and £200 would be more expensive than taking advice on establishing a trust or a partnership under the Partnership Act 1890."[57]

Such a decision to exclude trusts and partnerships could be revisited due to the planned intention of improving the visibility of these entities through the inclusion of information on who has influence or control over the person listed as the owner or tenant of the land for partnerships and trusts as part of Scotland's Register of Persons Holding a Controlled Interest in Land.[58] Further, setting-up a SCIO or company limited by guarantee is not a simple exercise, meaning that the community rights to buy are more accessible to

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[53] Land Reform (Scotland) Act 2003, s34(4), s71(4), s97D(6), Land Reform (Scotland) Act 2016, s49(7).

[54] Wightman, *The Poor Had No Lawyers* 204.

[55] See section 3.4.2.

[56] M Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 218.

[57] Scottish Parliament, Justice 2 Committee, Wednesday 30 January 2002 Col 986. Available at https://archive.parliament.scot/business/committees/historic/justice2/or-02/j202-0402.htm

[58] See Scottish Government, "The Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 Explanatory Document" (2020). Available at https://www.parliament.scot/S5_Environment/General%20Documents/A26039866ExplanatoryDoc.pdf

communities which already have more financial or social capital than communities in more deprived areas, which seems counter to the policy intent.

4.4 Definition of a Community

Apart from for the crofting community right to buy, a community is to be defined by postcode unit(s) or areas defined by Ministers in regulations,[59] which, to date, has included areas such as islands and electoral wards,[60] and is made up of those individuals who are resident in such locations from "time to time"[61] and who are eligible to vote in local government elections in the relevant polling district.[62] The crofting community right to buy scheme defines crofting communities based on three different scenarios.[63] It can be made up of residents in a crofting township which is located in or has a relationship with the croft land being applied for and who are eligible to vote in the local government elections for the district(s) where that township is. Communities can also be made up of tenants of crofts in a township or owner-occupier crofters of owner-occupied crofts in a township.[64]

This territorial approach to defining a community has been heavily discussed since the inception of the community rights to buy. This issue will be examined in depth in Chapter Seven.[65]

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[59] Land Reform (Scotland) Act 2003, s34(5)(a), s97D(9)(a), Land Reform (Scotland) Act 2016, s49(9)(a).

[60] The Community Right to Buy (Scotland) Regulations 2015 (SSI 2015/400), reg 2, The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Applications, Ballots and Miscellaneous Provisions) (Scotland) Regulations 2018 (SSI 2018/140), reg 17 and The Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 (SSI 2020/14), reg 6.

[61] Land Reform (Scotland) Act 2003, s34(5)(b), s97D(9)(b), Land Reform (Scotland) Act 2016, s49(9)(b).

[62] Land Reform (Scotland) Act 2003, s34(5)(b)(ii), s97D(9)(b)(ii), Land Reform (Scotland) Act 2016, s49(9)(b)(ii).

[63] This was expanded by the Community Empowerment (Scotland) Act 2015, s62(7)(b)(iii).

[64] Land Reform (Scotland) Act 2003, s71(5)(a). It also includes persons who, "if, in Ministers' opinion, it is inappropriate so to define the crofting community, in such other way as Ministers approve." Land Reform (Scotland) Act 2003, s71(5)(b)

[65] See section 7.3.

4.5 Criteria for consent

Once an application has been submitted, there are numerous factors which Ministers have to consider when determining whether to consent to the request and Ministers have a duty to take account of all provided views and responses when making their decision on the application.[66] No further details are provided on how they should balance or rank these responses. The approaches to be taken by Ministers when determining an application for each of the four community rights to buy are described below, followed by a discussion on two issues resulting from the method adopted; who should be making decisions on applications and how landowners' views are collected and used.

4.5.1 Pre-emptive Community Right to Buy

As highlighted in the high-level description of the legislation, the pre-emptive community right to buy scheme has a two-stage consent process.[67] First, a community interest will only be entered into the Register of Community Interests in Land if it is (a) compatible with the attainment of sustainable development, (b) there is a close connection between the community and the land, (c) there is a justifiable level of support within the community for the registration and (d) the registration would be in the public interest.[68] For judging the level of local support, Ministers have to accept it is achieved if one tenth or more of the community approve the registration, though they do have discretion to allow for a lower figure.[69] Registration lasts for five years[70] and the body can apply for re-registration for another five years[71] in the window six months prior to the expiry date.[72] There is also the potential to have an interest registered after land has been placed on the market but before missives have been concluded, denoted in the legislation as a late application.[73] However,

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[66] Land Reform (Scotland) Act 2003, s73(13), s96G(14) and Land Reform (Scotland) Act 2016, s55(6). The wording is slightly different for registering the interest in land as part of the pre-emptive community right to buy process, see Land Reform (Scotland) Act 2003, s37(10).

[67] Technically, there are three stages given that the Minsters have to first confirm that they are content that the purpose of the body is the furtherance of sustainable development. See section 4.3.

[68] Land Reform (Scotland) Act 2003, s38(1).

[69] *Ibid* s38(2).

[70] *Ibid* s44(1).

[71] *Ibid* s44(4).

[72] *Ibid* s44(2).

[73] *Ibid* s39.

both the community support and public interest requirements are significantly stricter[74] and the body must satisfy Ministers that there were justifiable reasons for the application being late.[75]

Following successful approval and registration of their interest, the community body must now wait for the landowner to notify the community body that they propose to transfer their land. Once this notification has been received, the community cannot buy the land until they have received the consent of both the community and Ministers to the purchase.[76] The former requires that a justifiable proportion of the community population have voted in a ballot with the majority voting in favour of the purchase of the land.[77] For the latter, and similar to the registration stage, Ministers will only give their approval for the purchase if the body still meets to the community body requirements,[78] their plans for the land are compatible with furthering the achievement of sustainable development and the transfer is in the public interest.[79] The Ministers must provide reasons for this decision in writing to both the community body and the land owner.[80] Both of the Ministerial decisions can be appealed to a sheriff.[81] Following the introduction of the Community Empowerment (Scotland) Act 2015, Ministers, when making their decision on registration,

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[74] The level of support has to be "significantly greater" than that required had it been a timeous application while the factors used to determine if the registration would be in the public interest have to be "strongly indicative" that it would be such. *Ibid* s39(3)(b)-(c).

[75] For a discussion on late applications and the strict approach taken by the Court in an appeal following the rejection of a late application see M Combe, 'No Place like Holme: Community expectations and the right to buy', Edinburgh Law Review, 12 (2006) 109-116.

[76] Land Reform (Scotland) Act 2003, s51(1).

[77] *Ibid* s51(2). This section was changed following the Community Empowerment (Scotland) Act 2015 coming into force. See s48 of this Act. The requirement in the original 2003 Act is for either more than half of the community to have voted, or, if less than half, then, based on the circumstances, a sufficient proportion to justify the transfer.

[78] See section 4.3.

[79] Land Reform (Scotland) Act 2003, s51(3). While the original enactment of the 2003 Act was silent on how the Ministers would obtain the information to make their second decision on matters such as the public interest or sustainable development or whether they had to use previously submitted documentation, the Community Empowerment (Scotland) Act 2015 inserted a new provision into the 2003 Act allowing them to use a prescribed form to obtain the information required to satisfy their decision to consent or not to the purchase. *Ibid* s51B, added by the Community Empowerment (Scotland) Act 2015, s50. Further, the landowner or other relevant parties are not given an opportunity to respond to the information provided by the community body at this stage.

[80] Land Reform (Scotland) Act 2003, s51(5).

[81] *Ibid* s61. The owner, a member of the community or a creditor with a right to sell the land can appeal against a positive decision by the Ministers, while the community body can appeal against a negative one. The sheriff's decision is final. The right of appeal provided to creditors was added by the Community Empowerment (Scotland) Act 2015, s58(a).

renewing registration and the exercise of the right to buy, have to have regard to the International Covenant on Economic, Social and Cultural Rights.[82]

4.5.2 Crofting Community Right to Buy

Section 74 of the 2003 Act provides a number of criteria which must be satisfied in order for Ministers to consent to an application under the crofting community right to buy scheme. Along with a number of eligibility checks, there is a requirement that (a) the exercise of the right to buy is linked to the achievement of sustainable development,[83] (b) the crofting community has approved the proposal to purchase the land,[84] (c) the exercise of the right to buy is in the public interest[85] and (d) the land has not previously been purchased and sold by the crofting community body using this right to buy.[86] The approval by the community body is achieved by carrying out a ballot of the community within a six month period before applying in which a majority votes in favour of the body exercising the right to buy.[87] For the public interest test, there is an explicit statement that "the public interest includes the interest of any sector (however small) of the public which, in the opinion of Ministers, would be affected by the exercise of the right to buy."[88] As with the pre-emptive community right to buy, when deciding whether to consent to the application, Ministers have to have regard to the International Covenant on Economic, Social and Cultural Rights.[89] Ministers must provide their decision along with reasons for this decision in writing to the crofting community body, the land owner and those who were invited to send their views on the application.[90] The decision by the Ministers can be

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[82] Land Reform (Scotland) Act 2003, s98(5A) added by Community Empowerment (Scotland) Act 2015, Sch 4 para8(6)(b). This requirement is "subject to […] any amendments in force in relation to the United Kingdom for the time being [and] any reservations, objections or interpretative declarations by the United Kingdom for the time being in force."

[83] Land Reform (Scotland) Act 2003, s74(1)(j).

[84] *Ibid* s74(1)(m).

[85] *Ibid* s74(1)(n).

[86] *Ibid* s74(1)(g). There will also be a number of requirements that parties have been correctly identified. This is a pending amendment from s65 in the Community Empowerment (Scotland) Act 2015.

[87] Land Reform (Scotland) Act 2003, s75(1). This majority has to be in both the subset of those who voted and those voting who are tenants of the crofts contained with the land which is being applied for.

[88] *Ibid* s74(2).

[89] *Ibid* s98(5A). This is again "subject to […] any amendments in force in relation to the United Kingdom for the time being [and] any reservations, objections or interpretative declarations by the United Kingdom for the time being in force."

[90] *Ibid* s82(1).

appealed to a sheriff.[91] Uniquely to this community right to buy, the legislation makes explicit that appeals can only be made on a question of law.[92]

4.5.3 Community Right to Buy Abandoned, Neglected or Detrimental Land

Though both the community right to buy abandoned, neglected or detrimental land and the crofting community right to buy result in a forced sale, the criteria which must be met before consent is granted is considerably more challenging for the former right. This is mainly due to the requirement placed on the community body to evidence that the land is eligible land and that it falls into one of the categories covered by the legislation.[93] There is also a new requirement placed on Minsters to examine the behaviour of the landowner in regard to their use and management of the land being applied for.

Again, Minsters can only consent to an application if it is both in the public interest[94] and is linked with furthering sustainable development.[95] Different from the previous rights and due to the eligible land scope of this right, if the application is concerned with abandoned or neglected land, Ministers also have to be of the opinion that sustainable development will not be achieved if the land continues to be owned by the current owner.[96] There is again a requirement for the community to have approved the proposal through holding a ballot in the period six months before the application,[97] and that there is a close connection between the community and the land.[98] Given the nature of this right to compel a transfer against the wishes of the landowner, a new test was included in this right to buy; the community body must have previously attempted to purchase the land using other means but not succeeded.[99] Finally, if the application is based on a claimed causation of harm to

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[91] *Ibid* s91. The owner, a member of the community or someone whose views were sought on the application can appeal against a decision by the Ministers to consent to transfer of the land, while the community body can appeal against a refusal. The sheriff's decision is final.

[92] *Ibid* s91(5).

[93] For the factors which the Ministers must consider when determining if the land is eligible, see section 4.2.3.

[94] Land Reform (Scotland) Act 2003, s97H(1)(b)(i).

[95] *Ibid* s97H(1)(b)(ii).

[96] *Ibid* s97H(1)(c)

[97] *Ibid* 97J. The majority of those voting have to be favour of the transfer, with either at least half of the community or a justifiable proportion taking part in the ballot.

[98] *Ibid* s97H(1)(h).

[99] *Ibid* s97H(1)(j).

the environmental wellbeing of the community then Ministers need to be satisfied that the community's proposals will remove or substantially reduce the harm,[100] the harm would continue if the current owner continued to own the land[101] and the community body had worked with any relevant regulators in order to counter the harm.[102] When making their decision, Minsters have to have regard to the International Covenant on Economic, Social and Cultural Rights.[103] Ministers must provide their decision along with reasons for their decision in writing to the community body, the land owner and those who were invited to send their views on the application.[104] This decision can be appealed.[105]

4.5.4 Community Right to Buy to Further Sustainable Development

Due to wide ranging land that is eligible for a community right to buy to further sustainable development, there are understandably a lot more hurdles for a community body to clear before an application is approved. Indeed, Combe describes it as an "onerous process that communities might find difficult to get through."[106] There are again the requirements for the community to approve the proposal,[107] a close connection between the community and the land[108] and for the community body to have previously contacted the landowner requesting that the land is transferred to the body which was either refused or ignored.[109] Also, as with the other community rights to buy, there is the sustainable development test. However, differing from the other rights to buy, explicit details of what is required to be proven by the body, termed the "sustainable development conditions"[110] are included in the legislation and they set a high bar. Along with a requirement to evidence that the transfer

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[100] *Ibid* s97H5(a).

[101] *Ibid* s97H5(c).

[102] *Ibid* s97H5(b).

[103] *Ibid* s98(5A). This is again "subject to […] any amendments in force in relation to the United Kingdom for the time being [and] any reservations, objections or interpretative declarations by the United Kingdom for the time being in force."

[104] *Ibid* s97M(1).

[105] *Ibid* s97V. The owner, a member of the community or a creditor with a right to sell the land can appeal against a decision by the Ministers to compel transfer, while the community body can appeal against a refusal. The sheriff's decision is final.

[106] M Combe, "Community Rights in Scotland" 98.

[107] Land Reform (Scotland) Act 2016, s56(3)(h).

[108] *Ibid* s56(3)(g).

[109] *Ibid* s56(3)(a). This must have been made in the period 6 months before the application was submitted.

[110] *Ibid* s56(1)(a).

of the land will promote the attainment of sustainable development[111] and is in the public interest,[112] the body has to show that the transfer of land will likely significantly benefit the relevant community[113] and that it is "the only practicable, or the most practicable" approach to achieving this benefit.[114] This final condition also requires details to be provided to show that rejecting the application would likely lead to harm being caused to the community.[115] When determining potential benefit and harm, Ministers must take into account the community's economic development, regeneration, public health, and social and environmental wellbeing.[116]

Further, when considering if the sustainable development conditions have been met, Ministers can take into account what regard, if any, the landowner has had for the guidance issued by Ministers on the engagement of the community in decisions regarding land under Part 4 of the 2016 Act[117] and Ministers must consider the information provided by the landowner on the effect a transfer would have on the landowner.[118] Finally, in this community right to buy, the intention of the Act for the promotion of equality and a wide range of human rights is made clear. While the other community rights to buy expressly require Ministers to have regard for the International Covenant on Economic, Social and Cultural Rights, this right to buy significantly extends the scope for what Ministers have to consider as part of their decision making. Ministers must have regard to "the desirability of encouraging equal opportunities"[119] and "relevant non-Convention human rights"[120] when considering their decision. The latter are defined as those Ministers deem to be relevant[121] and those which "are contained in any international convention, treaty or other international instrument ratified by the United Kingdom, including the International

[111] *Ibid* s56(2)(a).

[112] *Ibid* s56(2)(b).

[113] *Ibid* s56(2)(c)(i).

[114] *Ibid* s56(2)(c)(ii).

[115] *Ibid* s56(2)(d).

[116] *Ibid* s56(12).

[117] Land Reform (Scotland) Act 2016 s56(4).

[118] *Ibid* s56(10).

[119] *Ibid* 56(13)(b).

[120] *Ibid* 56(13)(a).

[121] *Ibid* 56(14)(a).

Covenant on Economic, Social and Cultural Rights."[122] Ministers must provide their decision, along with reasons for this decision, in writing to the community body, the land owner (or tenant if applicable) and those who were invited to send their views on the application.[123] The Minsters' decision can be appealed.[124]

4.5.5 Who should determine the applications?

As discussed above, the decision-making power for consenting to community right to buy applications has been bestowed on Ministers. Wightman noted when the initial Draft Land Reform Bill was published in 2001 that while the basis for ministerial decision making on applications was contained within the Bill, "at the end of the day many of these decisions [will be] political decisions which will be made by Ministers who will be guided by guidelines drawn up by civil servants."[125] This continues to be case for all four community rights to buy.

Indeed, such an approach to decision making was discussed in the policy memorandum for the later Land Reform (Scotland) Bill. Bestowing the new power again to the Scottish Ministers and not to another body was justified by the Government whose view was Ministers would be the appropriate body to review and consent to applications. The reasons given where (a) the process would, in the main, mirror the steps in the other community rights to buy, (b) the Minsters had experience of considering other community right to buy applications and (c) there was an advantage to having all community rights to buy applications reviewed by the same team.[126]

It can be argued, however, that there are two potential issues here. Firstly, in 2015, the Scottish Government's commissioned impact evaluation of the pre-emptive community right to buy found that community bodies used the Scottish Government as their primary resource for support during their registration activities. Three quarters of the community

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[122] *Ibid* 56(14)(b). This is again "subject to […] any amendments in force in relation to the United Kingdom for the time being [and] any reservations, objections or interpretative declarations by the United Kingdom for the time being in force."

[123] *Ibid* s60(1).

[124] *Ibid* s97V. The owner (or tenant if applicable), a member of the community or a creditor with a right to sell the land can appeal against a decision by the Ministers to compel transfer, while the community body can appeal against a refusal. The sheriff's decision is final.

[125] A Wightman, "Land Reform Draft Bill – How to Improve the Bill" (2001) para 9.1. Available at http://www.andywightman.com/briefings/docs/briefing_5.pdf

[126] Scottish Government, "Land Reform (Scotland) Bill, Policy Memorandum" (2015) p33.

bodies surveyed had used this source at least a fair amount of the time for both advice and guidance on completing the application form as well as for motivation and moral support.[127] As an example, one respondent stated that the Scottish Government had reviewed their draft application form before submission.[128] Such closeness to individual applications could result in a conflict of interest or a bias towards the arguments in a community body's application at the expense of the landowner's submission.

While a Ministerial decision can be appealed, based on the unsuccessful Sheriff Court appeal in *Holmehill Ltd v Scottish Ministers*,[129] Combe stated in 2006 that for an appeal to win would "require a large amount of fertiliser to blossom."[130] Indeed, Lovett highlights the different approach taken in the Scottish legislation to the judicial scrutiny of authority's land transfer decision-making compared with other jurisdictions, describing the process in Scotland's community right to buy legislation as "sparse and strangely bifurcated." [131] Lovett highlights the different costs and risks for both parties when determining whether to either appeal the consent decision of the Ministers or the valuation assessment, noting that the approach adopted in the legalisation appears to favour the community body, and he raises a concern that the initial judicial or Lands Tribunal decision cannot be appealed to the Court of Session.[132] He also highlights that it is not transparent what level of judicial scrutiny the court should adopt when reviewing the use of Ministerial discretion, for example, should it be a reasonable or irrational test, or should a greater level of scrutiny be adopted. He states that "[i]n terms of long-term democratic legitimacy, the legislation might have been stronger had it addressed this important matter."[133]

Secondly, based on the argument that advantages of community ownership include that land use is best determined by community bodies with their local knowledge and that it promotes localised decision making and democracy, it is not clear why the decision-making body, with its wide range of discretionary powers, needs to be centralised. This is

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[127] Ipsos MORI, "Impact Evaluation of the Community Right to Buy" (2015) para 5.24. For this question, Ipsos MORI used the following possible responses: (a) A great deal, (b) A fair amount, (c) Not very much, (d) None at all and (e) Don't know.

[128] *Ibid* para 5.26.

[129] 2006 S.L.T. (Sh Ct) 79.

[130] M Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 206.

[131] Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's Compulsory Community Right To Buy" 205.

[132] *Ibid* 206.

[133] *Ibid* 207.

especially relevant given later discussion above on the sphere of influence which can used by those who currently hold the ownership right.[134] In Wightman's view, the discretionary powers in the Act "confer by far the greatest empowerment not on communities but on the Scottish Ministers who sit in judgement on the necessity, worth and value of a community's aspirations."[135] Wightman has suggested alternative bodies for the approval of applications, such as local authorities or local organisations, noting that it is the former who have the responsibility for planning and environmental local matters.[136] He also discussed extending the remit of the new local access forums[137] which were to be set up to consider access issues and who would have the benefit of transparent and open decision making procedures with ideally, in his view, public evidence gathering.[138] Such an approach would allow experts, in particular those with local and/or sustainable development expertise to provide invaluable advice on the viability of the claims made by the parties.

4.5.6 Accounting for the landowner's view

The above section on the criteria for consent highlighted that the views of the landowner have to be considered by Ministers. When the draft Bill for the first Land Reform (Scotland) Bill was first published, there were no provisions in the pre-emptive community right to buy which would allow landowners to provide Ministers with their views on the potential transfer of land. The Bill was, however, changed following the landowners' request that such a step should be introduced into the process,[139] and this was replicated in the other three community rights to buy. Therefore, before making their decision to (a) consent to register an interest in the case of the pre-emptive right or (b) consent to the transfer of the land, Ministers must invite the landowner (or tenant if applicable) to provide their views on the application.[140] For the pre-emptive and the crofting rights to buy, no specific information from the landowner is required, while for the other two rights, specific information from the landowner is also to be requested. For the community right to buy

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[134] See section 7.5.

[135] Wightman, *The Poor Had No Lawyers* (2015) 349.

[136] Wightman, "Land Reform Draft Bill – How to Improve the Bill" para 9.3.

[137] See https://www.scotways.com/faq/law-on-statutory-access-rights/232-what-are-local-access-forums

[138] Wightman, "Land Reform Draft Bill – How to Improve the Bill" para 9.3.

[139] Scottish Executive, "Land Reform, the Draft Bill" (2001) 26.

[140] Land Reform (Scotland) Act 2003, s37(5)(b), s73(8)(i), s97G(9)(a) and Land Reform (Scotland) Act 2016, s51(1)(a)(i)-(ii).

abandoned, neglected or detrimental land, this information includes (a) whether the landowner is of the view that it is in the public interest for the application to be approved or, if not, the reasons why;[141] (b) whether the owner's continued ownership of the land would be compatible with the attainment of sustainable development;[142] (c) whether the landowner agrees that the land is abandoned, neglected or causing harm and if not, the reasons why[143] and (d) any proposals the owner has for the land.[144] For the community right to buy to further sustainable development the information includes the owner's view on the likely impact that the community body's proposals will have on the owner, including on their current or planned use of the land;[145] and whether the owner is of the view that the proposals in the application will meet the requirement to achieve the sustainable development conditions[146] and, if not, the reasons why not.[147]

There are a number of issues with the approach taken to obtaining the landowner's views. While detailed guidance is provided for community bodies to assist with making an application,[148] which provides further information on, for example, what would be classed as being in the public interest, there is not the same level of assistance provided for landowners when making their response, including what sort of views Ministers would deem relevant.[149] Indeed, the landowner does not have the benefit, which the community body has, of having a prescribed format for providing their views.[150] Given the specific pieces of information requested of the landowner in the two newest community rights to buy, this lack of prescribed form seems even more surprising. Also, a key difference between the four rights to buy is the requirement placed on the landowner to justify how

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[141] Land Reform (Scotland) Act 2003, s96G(10)(a).

[142] *Ibid* s96G(10)(b).

[143] *Ibid* s96G(10)(c).

[144] *Ibid* s96G(10)(d).

[145] Land Reform (Scotland) Act 2016, s55(2)(a).

[146] See section 4.5.4.

[147] Land Reform (Scotland) Act 2016 s55(2)(b).

[148] See https://www.gov.scot/policies/land-reform/

[149] For example, for the pre-emptive right to buy, the guidance text merely states "[The Ministers] will enclose a copy of the application and supporting documents (in terms of section 37(5)(a) of the Act) and will give you 21 days in which to provide any views you wish to put forward on the application (section 37(5)(b)). Failure to provide comments within this time will be understood as you having no views on the application. Ministers have no obligation to consider views submitted outwith this period."

[150] For example, for the community right to buy for sustainable development, this prescribed form can be found in Schedule 1 of The Right to Buy Land to Further Sustainable Development (Applications, Written Requests, Ballots and Compensation) (Scotland) Regulations 2020 (SSI 2020/21).

they manage their land in the community right to buy abandoned, neglected or detrimental land, with the landowner being asked to explain how they are using their land and detail how they will achieve sustainable development. In order for Ministers to determine which party's land use is more likely to result in sustainable development and to what degree, it is not clear why such information is not required in the other two schemes which result in a forced sale.

Finally on this topic, it could be argued that the type of information required of a landowner can be reactive in nature and could result in the landowner appearing defensive. For example, the Research Shop, when analysing the responses received to the "Consultation on the Future of Land Reform in Scotland" document,[151] found that a significant number of concerns were raised about the "pre-supposition in the consultation that landowners do not currently manage land well and are acting as barriers to sustainable development."[152] With no prescribed form for the landowner to use, the landowner is in a position where they could feel that they have to pick holes in a community body's justifications contained in the application form rather than detailing their opinion on why the transfer of their property is not in the public interest.[153] If the latter approach is used, Ministers could face a situation where incomparable public interest justifications have been provided with no basis on how to decide between them.

As discussed in Chapter Three,[154] and relevant to highlight again at this stage, there has been litigation in this area. In *Pairc Crofters Ltd v Scottish Ministers*,[155] a landowner had claimed that the crofting community right to buy process did not provide for adequate opportunities for representation from the landowner, which resulted in a breach of his rights under A1P1 and Article 6 (right to a fair trial). The landowner's case was unsuccessful with the Inner House of the Court of Session finding that there were numerous instances in the process where the landowner was protected, including having

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[151] Scottish Government, "A Consultation on the Future of Land Reform in Scotland" (2014).

[152] Research Shop, "A Consultation on the Future of Land Reform In Scotland: Analysis of consultation responses" (2015) 53. Available at https://consult.gov.scot/land-reform-and-tenancy-unit/land-reform-scotland/user_uploads/land-reform-analysis.pdf

[153] For the pre-emptive right, the Minsters send the copy of the application and other submitted documents to the landowner. Land Reform (Scotland) Act 2003, s37(5)(a). For the other three rights to buy, the community body sends the application form and accompanying information directly to the landowner at the same time as submitting it to the Minsters. Land Reform (Scotland) Act 2003, s73(6)(a), s97G(7)(a) and Land Reform (Scotland) Act 2016, s54(7)(a).

[154] See section 3.4.5.

[155] [2012] CSIH 96; 2013 S.L.T. 308.

the ability to respond to a community body's stated plans on how the transfer would further sustainable development and during the public interest test when Ministers, under s74(2), had to include any sector, regardless of size, which, in the Ministers' opinion would be affected by the exercise of the right to buy and this included the landowner.[156] It therefore looks like further legal challenges on how a landowner's voice is considered during a community right to buy application decision would be unlikely to succeed and it could only come about through a change in Government policy.[157]

4.6 Valuation

4.6.1 Process

In the event that an application is successful, Ministers must then select a valuer who has to be a person who is suitably qualified, independent, with knowledge and experience of valuing that which is being transferred.[158] The valuer has to act as "an expert and not as an arbiter,"[159] that is, the valuer does not act on behalf of any of the parties involved.[160] The Ministers are responsible for the valuation costs.[161] The valuer must obtain the views on the value from various listed stakeholders such as the community body and the owner,[162] and then, surprisingly apart from in the crofting community right to buy, share the information received from each with the other parties.[163] Apart, though again this is not

[156] For discussion on this case, see M Combe, "Ruaig an Fhèidh" (2011) 56(5) J.L.S.S. 54 and "Ruaig an Fhèidh: 3" (2013) 58(2) J.L.S.S. 31, and McCarthy, "Property Rights and Human Rights" 222-223.

[157] There could, however, be a potential A1P1 and Article 14 (protection from discrimination) challenge based on the fact that the community body is provided with an apparent unequal level of support and guidance during a community right to buy application process.

[158] Land Reform (Scotland) Act 2003, s59(1), s88(1), s97S(1) and Land Reform (Scotland) Act 2016, s65(1).

[159] Land Reform (Scotland) Act 2003, s59(3)(b), s88(4)(b), s97S(3)(b) and Land Reform (Scotland) Act 2016, s65(3)(b).

[160] Land Reform (Scotland) Act 2003, s59(3)(a), s88(4)(a), s97S(3)(a) and Land Reform (Scotland) Act, 2016 s65(3)(a).

[161] Land Reform (Scotland) Act, 2003 s59(10), s88(8), s97S(7) and Land Reform (Scotland) Act 2016, s65(7).

[162] Land Reform (Scotland) Act 2003, s60(1), s88(9), s97S(8) and Land Reform (Scotland) Act 2016, s65(8).

[163] Land Reform (Scotland) Act 2003, s60(1A), added by Community Empowerment (Scotland) Act 2015 s56(a), Land Reform (Scotland) Act 2003, s97S(9) and Land Reform (Scotland) Act 2016, s65(9).

clear why, for the pre-emptive community right to buy scheme, if a value has been agreed between the parties, they must inform the valuer of this agreed value.[164]

The valuer must provide the various parties with notice of their valuation.[165] The valuation figure can be appealed to the Lands Tribunal (or Land Court for the crofting scheme) by the owner, tenant, community body or third party purchaser[166] and this body can reassess the value of the land to be used for the transfer.[167]

4.6.2 What value?

The valuer must determine the market value of the land or tenant's interest.[168] This has to be made up of what the value would have been if the transfer had taken place on the open market between two willing parties,[169] less any loss of value in the owner's other land or interests due to the sale.[170] Apart from the pre-emptive community right to buy scheme which does not involve a forced sale, the value has to be further reduced by "the amount attributable to any disturbance to the seller which may arise in connection with the transfer."[171] While no further guidance is provided as to what could constitute such a disturbance, Lovett makes the presumption that it would include economic losses such as relocation expenses and lost goodwill.[172] Lastly, the valuer can allow for factors or characteristics which would have resulted in a higher than market price being paid by another person.[173]

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[164] Land Reform (Scotland) Act 2003, s88(10), s97S(11) and Land Reform (Scotland) Act 2016, s65(11)-(12).

[165] *Ibid*

[166] Land Reform (Scotland) Act 2003, s62(1), s92(1), s97W(1) and Land Reform (Scotland) Act 2016, s70(1).

[167] Land Reform (Scotland) Act 2003, s62(3), s92(3), s97W(3) and Land Reform (Scotland) Act 2016, s70(2).

[168] Land Reform (Scotland) Act 2003, s59(4), s88(5), s97S(4) and Land Reform (Scotland) Act 2016, s65(4).

[169] Land Reform (Scotland) Act 2003, s59(6)(a), s88(6)(a), s97S(5)(a) and Land Reform (Scotland) Act 2016, s65(5)(a).

[170] Land Reform (Scotland) Act 2003, s59(6)(b), s88(6)(b), s97S(5)(b) and Land Reform (Scotland) Act 2016, s65(5)(b).

[171] Land Reform (Scotland) Act 2003, s88(6)(c), s97S(5)(c) and Land Reform (Scotland) Act 2016, s65(5)(c).

[172] Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's Compulsory Community Right To Buy" 204.

[173] Land Reform (Scotland) Act 2003, s59(7)(a), s88(7)(a), s97S(7)(a) and Land Reform (Scotland) Act 2016, s65(6)(a). There are some specific differences between the schemes in the value

4.6.3 Discussion

As highlighted above, all four schemes use, in the main, the market value for the property which must be paid by the community body for the transfer to take place. Wightman has highlighted that community bodies have argued against such a figure being used due to the fact that it is consistently higher than the economic value, that is, the capacity for the land to generate an economic return. Wightman's view was that "[s]ince communities wish to conduct rational economic activity they should not be expected to pay inflated prices for land."[174] He does, however, recognise that this could result in potential ECHR issues with a landowner seeking compensation for the gap between the two figures, which, if not covered by the community body would have to be funded by the Government. A further valuation issue was raised by Hunter in terms of how land held by public authorities or agencies should be valued. This was of particular importance due to the reluctance by some funding bodies to provide grants to community bodies to assist with the purchase of Government-held land. As noted above,[175] the Conservative Government in 1997 had the intention of offering state-owned croft lands to crofting community bodies for either a low or no cost. However, due to s1(4) of the Transfer of Crofting Estates (Scotland) Act 1997, which requires the consent of the Treasury when terms are being established for the transfer of such property, this approach to price setting requires intervention by the UK Government which has not been forthcoming to date.[176]

4.7 Post-application information

A successful purchase of land does not mean that the relationship between the community body and the community rights to buy comes to an end and the body is subsequently free from any further obligations. If a community body which has purchased land through any of the four community rights to buy subsequently changes its memorandum, articles of

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determination. For the pre-emptive community right to buy, any separate tenements or moveables to be included with the transfer must be valued separated. Land Reform (Scotland) Act 2003, s(5),(8) and (9), For the crofting community right to buy, where sporting interests are to be leased back to the owner, the agreed terms and conditions of the lease have to be considered. Land Reform (Scotland) Act 2003, s88(11). For the community right to buy for sustainable development, there is a provision which requires for consideration of rents payable or other rights and obligations in a case where the "application to buy a tenant's interest does not relate to the entire tenanted land." Land Reform (Scotland) Act 2016, s66.

[174] Wightman, "Land Reform Draft Bill – How to Improve the Bill" para 6.2.

[175] See section 3.4.2.

[176] For a discussion on this matter and methodologies used by the Scottish Government to circumvent this requirement, see Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* 178-183.

association, constitution or registered rules they have a duty to inform Ministers.[177] If Ministers are of the view that such a change would mean that the body would not have been entitled to have bought the land had they not already done so, then Ministers can acquire the land compulsorily from the community body.[178] This means a community body who obtained land through a community right to buy will continue to have requirements such as local representation and the use of surplus funds and assets for the good of their community. The body's main purpose would also have to remain consistent with furthering the achievement of sustainable development. It is not evident that this power has been used by Ministers to date.[179]

Only one of the four community rights to buy provides a power to Ministers to obtain information to enable them to monitor the outcomes of the legislation and their decisions. The Community Empowerment (Scotland) Act 2015 inserted provisions into the Land Reform (Scotland) Act 2003 for the pre-emptive community right to buy[180] which gives the Ministers the ability, but not the duty, to request information for "the purpose of monitoring or evaluating an impact that the right to buy land […] has had or may have."[181] Such information can be obtained from only the community body[182] and the owner or former owner of the land for which the application was made[183] and these parties have a duty to provide such information to the best of their ability.[184] There is therefore a clear lack of sufficient statutory monitoring procedures in the legislation to allow Ministers to determine either the success of the community rights to buy or whether the community bodies have been meeting their stated aspirations and achieving sustainable development. With this recent inclusion of the monitoring power in the pre-emptive community right to buy welcomed by the RACCE Committee, who stated that it would "support effective

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[177] Land Reform (Scotland) Act 2003, s35(1), s72(1), s97E(1), Land Reform (Scotland) Act 2016, s50(1).

[178] Land Reform (Scotland) Act 2003, s35(3), s72(2), s97E(2), Land Reform (Scotland) Act 2016, s50(2). Similarly, a body with a registered interest has to notify the Ministers of any changes and if the Ministers are of the view that such a change would mean the body would no longer meet the community body definition then the Ministers can ask the Keeper to remove interest from the Register. Land Reform (Scotland) Act 2003, s35.

[179] The Scottish Government's Community Land Team confirmed in 2020 that they did not hold statistics on when these sections had been used.

[180] Community Empowerment (Scotland) Act 2015, s61 which added s67B to Land Reform (Scotland) Act 2003.

[181] Land Reform (Scotland) Act 2003, s67B(1) and s67B(3).

[182] *Ibid* 67B(2)(a).

[183] *Ibid* 67B(2)(b).

[184] *Ibid* 67B(4).

monitoring and evaluation of the impact of the community right-to-buy provisions,"[185] it is not apparent why similar measures have not been included in the other three community rights to buy schemes nor why the Ministers have been given the discretion as to whether or not to use the monitoring power in the pre-emptive community right to buy.

If the Scottish Government does decide to start collecting data, it would benefit from considering the Ipsos MORI recommendations for the information that could be gathered to monitor the pre-emptive community right to buy scheme (and extend it to the others).[186] Ipsos MORI's recommended approach grouped data elements into three areas, (a) participation statistics, (b) factors which result in community bodies not continuing with the process and (c) the attainment of long term goals following a purchase, particularly in the achievement of the sustainable development objectives.[187] While the first of these can be achieved through analysing currently gathered data, Ipsos MORI were of the opinion that community bodies should be contacted to obtain the reasons for leaving the process before a successful purchase in order to determine barriers to completion.[188] Similarly, they see benefits in obtaining feedback from the bodies who purchased land in order to determine, among other things, if and how the land is being used, what have been the environmental and economic impacts to the community, the current status of the community body and the body's view on what the legacy of the community right to buy process has been.[189] The Ipsos MORI report did, however, highlight that during the community right to buy process, community bodies are already subjected to significant information provision requirements. It was therefore recommended that caution should be exercised in order not to place additional data burdens on them.[190]

Finally on the topic of post-application scrutiny is a concern which has been raised, but not apparently addressed, in regards to the lack of powers provided to Minsters in relation to potential non-implementation of the stated plans by community bodies.[191] The RACCE Committee during its review of the Community Empowerment (Scotland) Bill requested

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[185] Rural Affairs, Climate Change and Environment Committee, "Report on Part 4 of the Community Empowerment (Scotland) Bill (2015) 47.

[186] Ipsos MORI, "Impact Evaluation of the Community Right to Buy" section 6.

[187] *Ibid* 6.2

[188] *Ibid* 6.5.

[189] *Ibid* 6.6.

[190] *Ibid* 6.3.

[191] Rural Affairs, Climate Change and Environment Committee, "Report on Part 4 of the Community Empowerment (Scotland) Bill" 64.

further information from the Government on "what [was] envisaged in terms of burdens and claw-back provisions should the plans of a community body not be implemented"[192] and asked whether the Government "[had] considered applying a time requirement for implementation of community bodies' plans."[193] It could be argued that the need for this is critical given that during the post-legislative scrutiny of the Land Reform (Scotland) Act 2003, an interviewee commented on the easiness of evidencing meeting the sustainable development test through using consultant produced "best case scenarios."[194]

4.8 Conclusion

This chapter has provided detailed information on some of the key concepts used in the community rights to buy legislation, including the definitions of eligible land, community, and community body. The factors which have to be used by Ministers in their decision-making and by a valuer when determining the price which should be paid for a transfer were also described. It is evident that this is a complex piece of legislation. There are a significant number of statutory provisions which a community body needs to engage with and satisfy in order to successfully receive consent from Minsters for the pre-emptive right or the forced transfer of land. This includes the necessary constitution for a community body to be considered eligible and the, to use Combe's term, onerous consent criteria contained in the community right to buy to further sustainable development legislation. Also, there are provisions with a lack of commonality between the statutory processes which are unrelated to the nature of the right to buy, for example, the ability to monitor the outcomes of the legislation in the pre-emptive community right to buy and the additional human rights and equality considerations provided for in the community right to buy to further sustainable development. As will be shown in Chapter Seven, both of these concerns negatively impact the extent of alignment between the legislation and progressive property theory.

Further analysis was also provided on a number of the provisions. It was concluded that there was an unnecessary restrictive approach taken to both the type of eligible legal entities and the definition of eligible land. Moreover, the appropriateness of the Scottish Ministers' role as the community rights to buy decision-makers was questioned, both in

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[192] *Ibid* 64.

[193] *Ibid*.

[194] Centre for Mountain Studies, "Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003" (2010) 81.

terms of their expertise in reviewing applications and a potential conflict of interest. The equity of the approach taken for obtaining landowners' views was also highlighted and it was argued that community bodies receive a number of benefits, such as Government support and the use of a prescribed form, which are not available to a landowner. Further, the lack of statutory monitoring of the effects and outcomes of the measures and the blanket use of market value when determining the value of the land were raised as concerns. It will later be argued that these issues will affect the alignment of the measures to progressive property theory.

The next chapter will now introduce the progressive property theory element of this piece of research. The output of that chapter will allow for the approach taken in the community rights to buy described in this and the previous chapter to then be examined through a progressive property theoretical lens to determine if it is aligned to progressive property theory, and if so, to what extent.

Chapter 5 Progressive Property Theory: Alexander, Singer and Van der Walt

5.1 Introduction

The previous chapter provided a doctrinal analysis of Scotland's community right to buy legislation. The introduction of these new measures was as a result of a significant level of public debate, which was not without political controversy. For example, the Land Reform (Scotland) Act 2016 resulted in headlines of a "Mugabe-style land grab"[1] on the one hand and demands that politicians "Be Brave"[2] and go further with their reforms, on the other. These political discussions have not, however, been matched with a legal theoretical analysis of the reforms. This chapter therefore introduces the next foundational element of this thesis, a literature review of the work of three leading property law scholars; Gregory Alexander, André van der Walt and Joseph Singer. This will allow for an exploration of how a coherent theoretical underpinning to the current Scottish programme might have shaped the legislation differently and bridged the gap which now exists between stated objectives and the actual effects of the legislation.

As will be discussed later in the chapter,[3] the work of these three academics can be classed as progressive property theory, and such is the reason why their work has been chosen for this thesis. Progressive property is a relatively new category of theoretical inquiry. It was first substantively introduced in 2009 in a positioning article written by four academics, Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler.[4] This paper, "A Statement of Progressive Property,"[5] contains five key beliefs of these academics on what is necessary for an approach to fit within the progressive property framework. These can be summarised as:

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[1] The Spectator, "Should we fear a Mugabe-style land grab in rural Scotland?" (2015). Available at http://www.spectator.co.uk/2015/05/should-we-fear-a-mugabe-style-land-grab-in-rural-scotland/

[2] The National, "#BeBrave: Campaigners in mass lobby of Holyrood over Land Reform Bill" (2015). Available at http://www.thenational.scot/news/14899307._BeBrave__Campaigners_in_mass_lobby_of_Holyrood_over_Land_Reform_Bill/

[3] See section 5.5.1.2.

[4] Van der Walt notes that Alexander had previously used the expression "progressive property" in his 1998 article "Critical Land Law" in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (1998) 52. Van der Walt, "The Modest Systemic Status of Property Rights" 1 footnote 1.

[5] G Alexander, E Peñalver, J Singer and L Underkuffler, "A Statement of Progressive Property."

- The common view that property is concerned with the "protection of individual control over valued resources,"[6] for example, the right to exclude and the right of free use of property, is inadequate and cannot be used solely for the resolution of conflicts and developing property regimes. Instead, it is necessary to examine the "underlying human values that property serves and the social relationships it shapes and reflects."[7]

- There are a multitude of values which property rights serve. These are incommensurable as they relate to "qualitatively distinct aspects of human experience"[8] which cannot be reduced to one metric.

- Decisions on property entitlements remain necessary even though there are plural values at play. These choices cannot be mechanical, and require rational, principled and contextual reasoning.

- Due to the allocative nature of property systems, they bestow power. For fairness, property measures must promote the availability of the material resources necessary to participate in society.

- Property allows for and defines communities, and can shape the relationships between the constitutive members, either positively or oppressively. It is therefore necessary for property law to "establish the framework for a kind of social life appropriate to a free and democratic society."[9]

This statement has been described as "the minimum requirements for scholarship to fit within the new school of thought"[10] and more akin to an "orientation than a fully defined set of values or intellectual commitments."[11] Various academics, either explicitly or implicitly, have developed their theories aligned to these five requirements but with their own particular narrative of progressive property theory. For example, both Baron and

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[6] *Ibid* 743.

[7] *Ibid*.

[8] *Ibid*.

[9] *Ibid* 744.

[10] E Rosser, "The Ambition and Transformative Potential of Progressive Property" (2013) 101(1) California Law Review 107 at 115.

[11] *Ibid*.

Rosser note the differing foci of Singer (democracy), Peñalver (virtues), Alexander (human flourishing / social-obligation norm) and Purdy (freedom).[12] While it has been highlighted that the statement leaves space for alterative, albeit overlapping, accounts of progressive property,[13] both Baron and Lovett note that these theories have at their core human relationships and how people should treat each other, grounded on a set of values.[14]

Such an approach to property theory has its critics. Externally, the most vocal critics of progressive property are from the advocates of a stream of property scholarship known as information theory. Information theorists incorporate economic cost-benefit analysis-based arguments and view the purpose of a property system to be the minimising of information costs through the simplification of human interactions.[15] Baron examines a number of key differences between information and progressive property theorists. She highlights a divergence in view in relation to exclusion, and whether "the right to exclude is fundamental to what it means to have a property right?"[16] Information theorists view the answer to this in the affirmative with progressive property theorists seeing relations and values as the key driving factors and discussion on exclusion diverting the focus from societal concerns. Baron also finds that information theorists concentrate on how property systems work, rather than examining the end results,[17] that is, their interest is in the "functional mechanics of the property systems, the way that property operates as a means to an end."[18] They also criticise progressive property theorists' drive for change, preferring stability,[19] with Baron suggesting that information theorists take the view that "our social world is already in reasonably good shape, and that changes that might destabilise existing ownership rights are perilous."[20]

Further, information theorists question the inherent complexity in the progressive property approach and its lack of formalisation. In particular, they question the need to examine the

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[12] J Baron, "The Contested Commitments of Property" (2010) 61 Hastings L.J. 917, Rosser, "The Ambition and Transformative Potential of Progressive Property".

[13] Rosser, "The Ambition and Transformative Potential of Progressive Property" 110.

[14] Baron, "The Contested Commitments of Property" 920 & 922, Lovett, "Progressive property in action: the Land Reform (Scotland) Act 2003" 744 & 746.

[15] For example, see H E Smith, Property as the Law of Things, (2012) 125 Harv. L. Rev. 1691.

[16] Baron, "The Contested Commitments of Property" 919.

[17] *Ibid* 940

[18] *Ibid* 964

[19] *Ibid* 944

[20] *Ibid* 966.

specific situations of each conflict in order to determine the values at stake rather than applying pre-defined property rules. Information theorists therefore question the lack of anonymity in the progressive theories. For them, there is no importance in whether a conflict is between two owners or between an owner and a non-owner, and constantly accounting for various interests removes the benefit of resolving issues mechanically through pre-defined measures which allow the society to operate at a low cost.[21]

Baron highlights that this does mean that information theory is not concerned with values. She notes that information theorists see coordination as a value and adhere to the normative stance that "to coordinate social behaviour effectively, property *should be* (on the whole) simple."[22] Further, in the view of informative theorists "property rules instantiate and encode values."[23] Baron states that information theorists assess the right to exclude as a method to protect values such as autonomy and flourishing, with property systems operating effectively because these values do not need to be discussed and examined in each case. Adopting the type of approach promoted by the progressive property theorists would be to the detriment of a working system: "questioning complicates property law in a way that is incompatible with the functional commitments of the informational model."[24]

A final key difference between the two approaches to property theory is in relation to duties.[25] Information theorists criticise the progressive approach which advocates a consideration for the duties an owner might owe to others and has a focus on community. With information theorists' concern being the coordination of society and at a low cost, they view property rights as automatically instilling duties in the non-owners of that right. To them, this has advantages for both owners and non-owners, in particular, due to the publicity aspect of real rights meaning that duty holding non-owners do not need to obtain extensive information about the owner in order not to breach the right.[26] Therefore, as property rules simply tell the duty holder what they are not allowed to do and where they

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[21] *Ibid* 958.

[22] *Ibid* 950. Emphasis by the author.

[23] *Ibid* 951.

[24] *Ibid* 952-953.

[25] *Ibid* 955-957.

[26] For a discussion on publicity and land ownership, see M Arthur, "Publicity and Privacy in Land Registration in Scotland" (2018). University of Glasgow LL.M(R) thesis. Available at https://theses.gla.ac.uk/8699/

are not allowed to be, there is no need to examine the quality of the relationships which has the benefit of minimising transactional costs.

There has also been internal criticism of the approaches adopted by progressive property theorists to date. In particular, Rosser, though recognising the worthiness of the objectives of the theory, has reservations in regard to the effectiveness of the adopted approach. Rosser's stance is that attempts to transform property law internally, that is, by altering property concepts, are not likely to be successful. He also opines that progressive property is "at once too radical and not radical enough."[27] He is of the view that the Statement of Progressive Property and the subsequent articles built upon it make creative use of outlier cases[28] and are "too aggressive in [their] positive description of the law's content."[29] Conversely, he notes that the Statement contests the commodification aspect of property law but does not challenge either the acquisition or, directly, distribution features.[30] Due to this, Rosser's view is that it provides a limited framework in which changes to property law systems could be supported by progressive property theorists and is "too timid in its response to the historical injustices and inequalities that are *the* defining feature of American property law."[31] In his opinion, progressive property scholars should therefore not focus primarily on use rights and should "embrace and emphasise"[32] issues associated with acquisition and distribution.

While recognising the criticisms discussed above, it is apparent that progressive property theorists have a focus on the achievement of social justice and other value-based goals through reform of property law, and discuss how such objectives can interact and compete with each other. The outlook of the progressive property theorists clearly matches the intention of the Government when introducing the suite of community rights to buy and its drive for furthering the common good, including the goals of equality, fairness and social justice as described in Chapter Four. As discussed in section 1.2, in order to examine the alignment of the community rights to buy with progressive property theory, the use of three such theorists was to obtain a range of different viewpoints on progressive property theory which could be used to identify common and divergent features of this strand of

[27] Rosser, "The Ambition and Transformative Potential of Progressive Property" 111.

[28] *Ibid* 113

[29] *Ibid* 126

[30] *Ibid* 113.

[31] *Ibid* 126.

[32] *Ibid* 111.

property theory, and Alexander, Singer and Van der Walt were selected. The former two, as well as being signatories of the Statement of Progressive Property, are leaders in this field of property theory and are prolific writers on the topic.[33] Van der Walt, a similarly well-respected scholar who writes with a progressive property focus, was selected as the third theorist to obtain insight from a different jurisdiction and the viewpoints from an expert in civil law.[34]

For each of the three theorists, a summary is provided of their recent work examining how property law systems can be or should be used to promote the achievement of social goals.[35] Following this descriptive element there is an analysis examining how their theories compare and contrast with each other. Finally, there is a conclusion section which summarises the key findings of the chapter.

5.2 Gregory Alexander and Human Flourishing

5.2.1 Basis for Human Flourishing

Alexander developed a theory of private ownership based on the promotion of human flourishing which has as its roots the political and moral writings of Aristotle. Alexander claims that setting human flourishing as property's moral foundation provides "the best account of the value constitution that underpins the structure of modern property law"[36] and is the "most morally attractive justification of property."[37] His human flourishing approach is therefore both descriptive and normative.

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[33] Rosser cites the example of Alexander who, in 2013, was the "author or co-author of twelve books, forty-six articles or book chapters, and nine essays or book reviews." *Ibid* 115, footnote 31.

[34] There are other progressive property theorists not covered in-depth in this thesis. See, for example, M Radin 'Property and personhood' (1982) 34 Stanford LR 957, L Underkuffler, *The Idea of Property: Its Meaning and Power* (2003), J Nedelsky, "Should Property Be Constitutionalized? A Relational and Comparative Approach" in G van Maanen & A van der Walt (eds), *Property on the Threshold of the 21st Century* (1996) 417, D Lewinsohn-Zamir, "The Objectivity of Well-Being and the Objectives of Property Law" (2003) 78 NYU L Rev 1669 and H Dagan, "Reimagining Takings Law", in G Alexander and E Peñalver (eds), *Property and Community* (2009) 39.

[35] As the three theories do not build on the work of each other, an alphabetical order has been adopted.

[36] G Alexander, *Property and Human Flourishing* (2018) 3.

[37] *Ibid*.

Alexander defines the concept of human flourishing as something that is achieved when a person's life "goes as well as possible"[38] which, in his view, is when a person "lives a life of dignity, self-respect, and satisfaction of basic material needs."[39] He contends that achieving such a life is the goal to which property law should attempt to contribute. His theory is consequentialist in nature, meaning that decisions on which action to follow should be determined on the basis of which one will result in the best outcome. In his view, the attainment of human flourishing is the value that should underpin such life choices.

He emphasises two key elements of his theory. First, it is pluralistic; it is not possible to reduce human flourishing down to a single moral value. Inherent in the concept of human flourishing are a number of values, which are incommensurable. Alexander provides some examples of these values such as individual autonomy, self-determination, equality and personhood.[40] It is clear that these cannot be balanced against each other. Alexander, however, posits that it is still possible to make rational choices between such values when they come into conflict with one another.[41] Second, in his view, flourishing is objective. He contrasts flourishing with happiness and emphasises the difference between them by stating that there can be some things that an individual can hate even if they know they are intrinsically good for them.[42] Therefore, though human flourishing recognises that there are numerous ways of living a well-lived life, it does not allow that every possible way of living is good. As Alexander states, "the common good must have an objective dimension in the sense of filtering certain values, certain choices, or certain ways of living that are intrinsically bad."[43]

5.2.2 Capabilities and Human Flourishing

In order to measure human flourishing, Alexander makes use of the work of Sen,[44] whose capability approach was to examine what a person can do, rather than what they possess. Sen writes that well-being is sometimes measured by the "commodity-command of a

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[38] *Ibid* 5.

[39] *Ibid*.

[40] For example, see G Alexander, "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell Law Review 774 at 765.

[41] For discussion on this, see section 5.2.5.

[42] Alexander, "The Social-Obligation Norm in American Property Law" 765.

[43] *Ibid* 6, footnote 9.

[44] A Sen, *Commodities and Capabilities* (1999)

person"[45] which is, in his view, "a confusion of 'well-being' with 'being well off', and a confounding of the *state* of a person with the extent of his or her *possessions*."[46] To describe the latter view, he uses terminology from Marx,[47] "commodity fetishism", which he defines as "to regard goods as valuable in themselves and not for (and to the extent that) they help the person."[48] Sen notes that while commodity-command can help to achieve well-being, it is not the end in itself.[49] Therefore, in Sen's view, it is a person's capabilities which should be used to determine whether they have a well-lived life regardless of what they chose to do with them or the possessions that they hold.[50] Alexander states four such personal capabilities which, in his view, are uncontroversial for achieving a well-lived life; life (including health), freedom (including the ability to make your own life choices), practical reasoning and sociability.[51]

Alexander is of the view that these capabilities cannot be developed in isolation and humans are dependent on others to nurture the required capabilities.[52] Further, because these capabilities are required in order to flourish, the development of the capabilities must be an objective human good and promoted as such. With human dignity requiring that each individual has an equal entitlement to flourish, every person must therefore have an equal entitlement to those things which are required to flourish, namely the identified capabilities along with the material resources required to develop them. His argument, therefore, is "[i]f an individual, as a rational moral agent, values her own flourishing, then to avoid self-contradiction she must appreciate the value of others as well"[53] and if we value the development of the capabilities in others then, in Alexander's view, this places an obligation on individuals to ensure, in certain circumstances, that this occurs. He highlights the normative aspect to this argument by asserting that "[a] society that fosters

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[45] *Ibid* 16.

[46] *Ibid*. Emphasis by the author.

[47] K Marx, *Capital, Vol. 1: A Critical Analysis of Capitalist Production* (1887).

[48] Sen, *Commodities and Capabilities* 19.

[49] *Ibid 16.*

[50] Alexander, *Property and Human Flourishing* 6-7.

[51] *Ibid* 7.

[52] *Ibid*.

[53] G Alexander & E Peñalver, "Properties of Community", (2009) 10 Theoretical Inquiries in Law 128 at 142.

those capabilities which are necessary for human flourishing is morally better than one that is either indifferent or (even worse) hostile to their manifestation."[54]

5.2.3 The Social-Obligation Norm

In order to achieve such a nurturing society, Alexander develops this obligation, which he terms the 'social-obligation norm,'[55] the basis of which is the relationship between community, human flourishing and property. With regards to the interaction between community and flourishing, he states that in order to develop the required capacities to live a well-lived life it is essential for humans to be both in a society and dependent on other human beings in a society. He argues that communities, including the state, are the facilitating bodies which help us to obtain the resources we need to flourish,[56] claiming that "living within a particular sort of society, a particular web of social relationships, is a necessary condition for humans to develop the distinctively human capacities which allow us to flourish."[57] For property, he notes that while other theories, such as utilitarianism and liberal contractarianism, view communities as simply a collection of individuals, in his view there is a mutual dependence between an individual and the community with property situated at the juncture between the two.[58]

Based on this dependence between members of a community, and differing from private property law's traditional focus on what property rights an owner holds and the extent of the rights, Alexander examines the inherent obligations that owners have or should have to others. In order to develop a foundation for the identification of these obligations, he links the social thesis work of Taylor[59] and the capabilities theory described above to produce the social thesis:

> "In order for me to be a certain kind of person – a free person with the basic capabilities necessary for human flourishing – I must be in, belong to, and support a

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[54] Alexander, *Property and Human Flourishing* 9.

[55] Alexander, "The Social-Obligation Norm in American Property Law" 774.

[56] Alexander, *Property and Human Flourishing* 8.

[57] Alexander & Peñalver, "Properties of Community" 135.

[58] *Ibid* 128.

[59] C Taylor, *Philosophical papers. 2, Philosophy and the Human Sciences* (1985). In particular Chapter Seven, "Atomism".

> certain kind of society – a society that supports a certain kind of political, social, and moral culture and that maintains a decent background material structure."[60]

To relate this thesis to property Alexander narrows it to:

> "In order for me to be this kind of person – a free person with the basic essential capabilities – I must have, I must *own*, certain resources."[61]

He then places a moral social-obligation norm on an owner to "provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing."[62] A property owner can therefore have the content of their ownership restricted. If an owner has access to a resource which is necessary in order for an individual in the owner's community to develop a capability to flourish, then that owner has the social obligation to allow the individual to make use of that asset if it would be reasonable to require them to do so.

The justification for this obligation comes from dependency: as an individual needs to be part of social networks so that they can acquire particular necessary human capacities then this dependence results in an obligation on that individual to sustain these social networks.[63] Community is a good thing in itself, rather than simply an instrument to benefit individuals, and based on this assumption, individuals have an obligation to support the overall community.

Of note is that these obligations are not strictly reciprocal.[64] An individual cannot know in advance who they will need to support and the people requiring support might not have provided this individual with any benefits previously nor be likely to in the future. As we are dependent on community to allow us to become independent rational beings,[65] this

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[60] Alexander, *Property and Human Flourishing* 55.

[61] *Ibid* 59. Later on he makes clear that full ownership is not always required and other types of property relationships such as possession or use can be appropriate.

[62] Alexander, "The Social-Obligation Norm in American Property Law" 774.

[63] *Ibid* 771.

[64] *Ibid* 770.

[65] Taylor similarly writes of an obligation to belong. He argues that a free individual is "only what he is by virtue of the whole society and civilisation which brought him to be and which nourishes him" and this "creates a significant obligation to belong for whoever would affirm the value of this freedom; this includes all those who want to assert rights either to this freedom or for its sake." Taylor, *Philosophical papers. 2, Philosophy and the human sciences* 206. He further states that a free individual can only affirm themselves as such due to their relationship with a

therefore requires us to give unconditionally, it is the needs of others which determines what is expected of us rather than what support we have already been given or expect to obtain at a later time.[66]

5.2.4 Human Flourishing, Property and the Law

With property systems playing a role in the allocation of rights and duties to individuals in the community with regards to available resources needed for both survival and flourishing, Alexander's view is that "whenever we discuss property, we are unavoidably discussing the architecture of community and of the individual's place within it."[67] As discussed above, due to human flourishing requiring social matrices to be in place, it could therefore be legitimate for a community to make demands on a property owner who is a member of that community, necessitating them to provide resources or share what they own in order to maintain those social structures.[68]

This raises the question as to what demands a political body can make on an individual. As Alexander notes, the state itself is a community, albeit it differs from others as it has significant coercive powers.[69] He states that in modern capitalist societies an argument could be made for placing the obligation onto the state for ensuring individuals have access to the various materials and social prerequisites required for developing the necessary capabilities as it is now (if it ever was) not possible for private or voluntary communities to ensure that this occurs.[70] With sociability being one of the four essential capabilities for the achievement of human flourishing, not a subjective choice, societies need to ensure that there are suitable opportunities for individuals to acquire the resources they require to function as social beings in order to flourish and, in Alexander's view, such a requirement can best be met by the state. Clearly this approach could therefore result in the state making demands on an individual's property and Alexander states that:

> "In short, if we accept the existence of an obligation to foster the capabilities necessary for human flourishing, and if we understand that obligation as extending

developed civilisation which, in turn places on them an obligation to "complete, restore, or sustain the society within which this identity is possible." *Ibid* 209.

[66] Alexander and Peñalver, "Properties of Community", 143

[67] *Ibid* 128.

[68] Alexander & Peñalver, *An Introduction to Property Theory* 95.

[69] G Alexander &E Peñalver, "Properties of Community" 145

[70] *Ibid* 146.

> to an obligation to share property, at least in surplus resources, in order to enhance the abilities of others to flourish, then it follows that, in the predictable absence of adequate voluntary transfers, the state should be empowered and may even be obligated to step in to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities."[71]

He addresses the concern that this could provide the state with unfettered powers which, if misused, could have detrimental flourishing effects. The ability of the state, in his view, would be curtailed by the very principles of human flourishing and the state could only act in a manner which protected the capabilities such as freedom, practical reasoning and sociability. For example, this would include the state not acting in an arbitrary manner in order to ensure the protection of individual dignity and the state adopting the principle of subsidiarity to promote local or private solutions over state action.[72]

5.2.5 Human Flourishing and Indeterminacy

As mentioned above, Alexander is of the view that even though there is a plural dimension to human flourishing, it is still possible to make rational choices between incommensurable values. To highlight incommensurable values he provides the example of a comparison between Bach's musical genius and Mother Theresa's kindness which are both valuable but in fundamentally different regards.[73] He goes further, providing a three-part test developed by Elizabeth Anderson to show that values can be incommensurate even if they share a common value,[74] for example, the inability to rank the genius of Bach and Shakespeare.[75] Such issues can arise with human flourishing. With Alexander stating that there are numerous ways for individuals to flourish, each based on various different values,[76] there is a possibility that these assorted values could come into conflict in

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[71] *Ibid* 148.

[72] *Ibid*.

[73] G Alexander, "Pluralism and Property", (2011) 80 Fordham Law Review 1017 at 1043.

[74] See E Anderson, *Value in Ethics and Economics* (1993).

[75] Alexander, "Pluralism and Property" 1044. He further raises the possibility of an imaginary Shakespeare who also wrote novels. This Shakespeare would be better than the real one, but one could still not make a claim that the imaginary Shakespeare would then have greater genius than Bach.

[76] Alexander & Peñalver, *An Introduction to Property Theory* 100.

decision making, with an inability to reduce a choice down to a single comparable moral value.

Alexander takes an Aristotelian approach to justify the ability to make such choices which is based on the concept of practical reasoning. There can be a number of right options available, and it is through rationality that individuals can make justifiable decisions. Humans, when faced with conflicting and irreducible choices, are able to reflect, analyse and use their practical reasoning skills to break down the problem into lower level considerations in order to determine what outcomes are important to them and why.[77] Such considerations, often carried out semi-consciously, are made in order to determine "what really matters", defined by Alexander as "those actions, modes of behaviour, personal characteristics, virtues, ways of life that deeply and honestly express and embody the kind of life that the individual regards as satisfying, worthwhile and fulfilling – in short, good."[78] Alexander, using the work of both Taylor[79] and Raz,[80] describes such an approach as complementarity reasoning where instead of balancing or placing weightings on the various options, an individual will "ask whether one or another of the options at her disposal fits better with her life goals and commitments, with her project of becoming the kind of person she has chosen to be."[81] With a human being on the continual path to becoming a certain type of individual, they must therefore assess an individual choice as it arises as a part of that ongoing progression and not as a one-off decision.[82]

With the complementarity reasoning approach above having the potential of being agent-relative, in that it is dependent on the values of an individual, Alexander extends it to group decision making. That is, when faced with a decision between choices for which there is not an evident dominating best option, it is legitimate, in his view, to select one of the options "simply because it fits better with the constellation of values we have already chosen to pursue through our prior collective decisions."[83] Consideration of which good is more valuable is not of importance for the basis of such a choice, rather it is the perception

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[77] Alexander, "Pluralism and Property" 1046-1047.

[78] *Ibid*.

[79] C Taylor, "Leading a Life", in R Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (1997) 170.

[80] J Raz, *Engaging Reason: On the Theory of Value and Action* (2002).

[81] Alexander & Peñalver, *An Introduction to Property Theory* 101.

[82] Alexander, "Pluralism and Property", (2011) 1048-1049.

[83] Alexander & Peñalver, *An Introduction to Property Theory* 101.

of how the goods fit together and a determination of which option sits closest with this mix and the overall vision of the decision makers.

Alexander does, however, make this admission. He concedes that:

> "spelling out in a more satisfying way the contours of the process of applying practical reason to social choices implicating plural and incommensurable values remains an important challenge for the human flourishing theory of property, and, indeed, for pluralist theories of all kinds."[84]

5.3 Property Theory of Joseph Singer

5.3.1 Social Relations and Rights

To turn to the second theorist to be examined, this section will consider the relevant work of Singer, who develops a social relations model for property which takes into account the various characteristics and diversity of human interactions.[85] He does this by first reconceiving the ownership concept. His approach requires a change of thinking about property rights to move away from what he calls the ownership model, the view that the ownership right is necessarily something which allows an owner to limit others from infringing the owner's entitlement unless consent is provided by the owner.

His view is the absolute power of ownership cannot exist in a society that values individuals, and limitations must therefore be placed on the use of property in order to protect the personal and property rights held by others. Singer states that property is more complex than the ownership model allows, arguing that property creates conflict, has inherent ambiguity and is difficult to define. He describes the ownership model as both "misleading"[86] and "morally deficient"[87] and argues that it promotes self-interest. His view is the perception that ownership provides absolute control is also self-defeating because, for example, it would allow someone to use their property in a way which damages another person's property. Singer therefore describes property as a paradox with inherent tensions and provides examples of tensions within core property rights such as rights of access

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[84] *Ibid*. This issue will be discussed further in section 6.3.5.

[85] J Singer, *Entitlement: The Paradoxes of Property* (2000)

[86] *Ibid* 5.

[87] *Ibid*.

versus rights to exclude and title versus possession. Lastly, a focus on the absolutist concept of property can, in Singer's view, "blind us to morally relevant facts."[88] He opines that the ownership model conceals the type of relationships between individuals which would be considered as fair and those that would be viewed to be unjust.[89] Singer is therefore of the opinion that the ownership model promotes a definition of property rights which does not take into account the resulting social effects[90] and leads him to conclude that "we will make better judgements about how to understand and construct property if we start in the messy real world rather than in the fantasy world of theory."[91]

Instead of the ownership model approach, Singer is of the view that as different rights can result in conflict between parties, there needs to be a focus on the relationships such rights create and an acceptance of the interdependence of individuals. Using the work of Nedelsky, Singer highlights that autonomy is achieved through a mixture of both independence and dependence and not through a delineation of individuals from each other.[92] Rights are not about separations between individuals or the creation of personal boundaries because respect for others is achieved through recognising that we operate best and can successfully achieve our goals in the "context of social relations that support our own abilities to flourish."[93] As rights structure relationships, the justness of the rights can only be determined if we explicitly focus on the resultant relationships.[94]

Such an approach allows for the consideration of various property regimes to be based on the type of social relationships we want to promote or avoid. Importantly, it allows for a recognition that a system of property is not just concerned with the relationship between subjects and objects but also has human relationships at its core. As Singer states, property law "provides the legal rules that shape the contours of human relationships regarding control of valuable resources"[95] and it "creates a setting in which individuals live their lives and interact with others."[96] As there is no set formula or theory for determining the rules of

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[88] *Ibid* 32.

[89] *Ibid* 13.

[90] *Ibid* 68.

[91] *Ibid* 32.

[92] *Ibid* 131.

[93] *Ibid* 130-131.

[94] *Ibid* 139.

[95] *Ibid* 134.

[96] *Ibid*.

a property regime, fundamental choices need to be made about the society in which we wish to live and what norms we hope to achieve. This is of particular importance, states Singer, because the introduction of legal measures to achieve this goal can have profound and enduring effects on our society.[97]

5.3.2 Entitlements and Obligations

After determining that social relations should be the basis for property, Singer moves on to examine entitlements and the intertwined nature of ownership and obligations. He argues that:

> "property is best understood as comprising limited and conflicting entitlements rather than absolute powers in title holders."[98]

Singer terms this the entitlement model which he posits better defines the meaning of property when contrasted with the ownership model. His entitlement model requires a change of focus from the absolute view of ownership to a consideration of the various conflicting legitimate claims that persons can have to rights in a property. Entitlements, Singer states, can still protect individualist values such as autonomy and security, but, importantly, can also be used to advance social goals through the allocation of power between parties. The entitlement model therefore has at its core a requirement to focus on the interrelations between both the state and its citizens and between owners and non-owners. Though Singer shies away from constructing a normative framework for answering the questions of what entitlements there should be and how they should be determined, he does emphasise that state action has a key role in the entitlement model, stating that "[p]roperty is a form of power, and the distribution of power is a political problem of the highest order."[99]

Singer develops his entitlement model further by then placing obligations onto property owners, stating that it is the "tension between ownership and obligation that is the essence of property."[100] His view is that defining entitlements necessarily requires consideration of the resulting obligations which would arise. He is of the opinion that ownership cannot be

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[97] *Ibid* 137-138.

[98] *Ibid* 209.

[99] *Ibid* 9.

[100] *Ibid* 204.

thought of as providing an owner with the power to act with no consideration for others, with Singer going so far as stating that "[o]wnership without obligation is a form of dictatorship."[101] Ownership, therefore, does not provide for a boundary that allows an individual to use their property as they wish without a duty for them to consider how their actions will affect others, and he concludes:

> "Because each individual is of infinite worth and deserving of respect and common decency, entitlements can only be justified to the extent they are compatible with the legitimate interests of others."[102]

The entitlement model's central concern is therefore the determination of the effects on the exercise of rights on others rather than a focus purely on questions of title. Property rights result in both entitlements and obligations, and both need to be considered when defining property rules.

Singer recognises the decisions on the construction of property rules can be difficult and he therefore places importance on the social context. His view is that we should focus on rules that "shape the contours of social relations in a manner that accords with our considered judgements about the appropriate and defensible forms of social life."[103] He highlights that such a consequentialist approach needs to consider not only the outcomes at an individual level, but also that property rules can affect communities and society as a whole, noting that "the extent of an owner's property rights is partly contingent on the context in which those rights are exercised."[104] Singer further argues that it is such a contingency which results in the stability of property rights; in order for property rights to be stable, there is a need to limit certain property rights to ensure the security of the property rights which have been determined, normatively, as being necessary to meet a society's core interests.[105]

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[101] *Ibid* 209.

[102] *Ibid* 94.

[103] *Ibid* 210.

[104] *Ibid* 85.

[105] *Ibid* 86.

5.3.3 Expectations

After establishing that property brings with it both entitlements and obligations, Singer then looks at what entitlements should be protected and he states his view that the protection of justified expectations is the fundamental normative goal of property law.[106] In order to determine if an expectation is justifiable he emphasises that "expectations are not only claims of entitlements to control resources"[107] but are also "claims that others should be obligated to respect those claims."[108] It is therefore not sufficient to only examine the strength of an entitlement, the relational aspect of the entitlement requires that the justness of the resulting obligations must also be considered. Considering what expectations are justified requires value-based reflections on goals such as fairness and utility in order to determine when it is right to accept an individual's claim to an entitlement and the placing of obligations on others. Singer's view is that the consequential systemic effects of different property rules on an assortment of norms, such as justice and welfare, should therefore be considered when determining what the law should be,[109] which places a normative element into property law theory.

Singer does, however, realise that such an approach introduces new tensions, in particular when there can be potential contradictory values. While noting the different approaches simplifiers and complexifiers would take[110] and the strengths and weaknesses of each method, he explicitly states that he has not made an attempt to produce a framework for dealing with the tensions he has identified and a level of judgement would always be required.[111] Singer does, however, promote what he calls humanity, a principle which stops people acting simply in self-interest with a lack of compassion for the suffering of others. He highlights that property is not something that is simply protected and recognised, it is something that is developed by society which collectively determines its social and legal meaning.[112] He therefore places an obligation on society to develop a property regime that works fairly and writes that:

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[106] *Ibid* 211

[107] *Ibid*.

[108] *Ibid*.

[109] *Ibid*.

[110] The former uses a theory, framework or value to solve the paradox while the latter overtly recognise the contradiction and solve it without using a single value.

[111] J Singer, *Entitlement: The Paradoxes of Property* 215

[112] 215.

> "Indeed, the very legitimacy of granting a person control over scarce resources depends on whether others have alternative means of meeting the needs that those resources could have met. An expectation cannot be justified, no matter how strong it is, if protecting it would leave others unduly vulnerable. One expectation we are entitled to have is that we may obtain the means necessary for a dignified human life."[113]

5.3.4 The Externalities of Ownership

The last three sub-sections have described Singer's entitlement model. The next two sub-sections will look at two ways of bringing his model into practice, first looking at how the theory can be used to resolve conflicts and then how his theory can be used to aid legislators when determining property norms.

As noted above, at the time of writing *Entitlement: The Paradoxes of Property*, Singer did not provide a methodology for determining the outcomes for instances where there are tensions between justifiable competing claims. He does, however, introduce a potential decision-making tool in his later work through the consideration of externalities which allow for the protection of both legitimate and legal expectations and a focus on the promotion of societal values. Singer writes that "[p]roperty rights and externalities are born together; you cannot have one without the other."[114] The economist's traditional understanding of externalities is the positive or negative effect on an individual of an action by another individual. Singer restricts his definition of externalities to be only those effects which have a moral significance and in which the law should be interested.[115] He justifies this narrower definition of an externality by noting that there can be actions which cause effects that do not need to be considered or protected on a normative basis. For example, a party in a conflict may feel harmed through another's action but their interest might not be legitimate in a general or specific social context.[116] Therefore the effect of this action is not legally relevant and hence should not be allowed for in any balancing consideration.

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[113] *Ibid* 211-212.

[114] J Singer, "Property as the Law of Democracy" (2017) 63 Duke L.J. 1287 at 1296.

[115] J Singer, "How Property Norms Construct the Externalities of Ownership", in G Alexander and E Peñalver (eds), *Property and Community* (2009) 57 at 58.

[116] Singer uses example of an individual wishing to fly a flag from their home in a condominium which had a rule prohibiting external adornments.

Using this definition in the area of property law, it is therefore the case that an externality will only arise when the exercise of a property right results in harm to a legitimate interest.[117] Singer notes that this then results in two questions, (a) how do you determine when a property right is resulting in a negative externality? and (b) what are the harms that the law should recognise?[118] To answer these requires a determination as to "when is an act of ownership within the scope of the owner's domain, and when does it cross the boundary to invade the domain of others?"[119] and in instances when the latter occurs, it is then only those effects which are normatively relevant that should be considered.

Singer provides a useful example of the difficulties in addressing these questions. It is assumed that if I sleep in my bed that I not causing any negative externalities but if I slept in my neighbour's bed without their consent I would. I own the bed so presumably my use of it does not cause harm. A non-owner might yearn to possess or use my property, but they do not have a right to do so and my not allowing them to do such does not result in any harm.[120] However, would a negative externality arise if I refuse to allow a homeless person to sleep in my empty spare room? Should our interests be balanced? It is clear that a harm is being caused here but should it be classed as a legally relevant harm?[121]

To deal with the question of determining externalities, Singer is of the view that we need to consider property norms. He defines these as "standards that help allocate and define the legitimate interests of persons with respect to the control of valued resources"[122] and which "shape our understanding of the *meaning* of property rights and the *legitimate contours of social relationships*."[123] He highlights that such norms are components of private and public law and the objective of protecting both persons and property can result in tensions when the protection of the latter harms the legitimate interests of the former. In his view, it is through the moral aspect of property norms that we can determine whether the exercise of a property right does or does not result in a (legally relevant) negative externality:

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[117] Singer, "How Property Norms Construct the Externalities of Ownership" 60

[118] *Ibid* 61.

[119] *Ibid*.

[120] *Ibid* 64

[121] *Ibid* 62.

[122] *Ibid* 65

[123] *Ibid*. Italics in original text.

> "Norms orient us, first, by telling us who is an "owner" and who is a "nonowner" with regard to any particular entitlement in a particular resource, and second, by telling owners when they are obligated to take into account the effects of their actions on others and when they are entitled to think of their own interests alone. In so doing, property norms define which externalities we as a society must pay attention to, worry about, and seek (if possible) to prevent."[124]

Singer then develops his norms approach further stating that property necessarily involves judgements about interests.[125] At this stage in his paper, Singer appears to be looking at a normative hierarchy between parties who both have property-related interests, writing that the norms can help to determine which right should trump the other when different property rights are in conflict rather than including those with interests but no form of property right.[126] However, later in his paper he recognises that the character of the interest is of importance, such as freedom of speech, when determining if a property right can result in an externality, recognising that non-owners can have other interests which should be protected if the valid use by an owner of their property affects them in a way which results in a legally relevant harm.[127]

Singer discusses possible approaches to deal with a conflict between a legitimate exercise of a property right and the infringement on a non-property related right.[128] For example, he uses the New Jersey Supreme Court case *State* v *Shack*[129] to highlight an instance where a landowner's exclusionary right was not allowed to be exercised. The landowner had argued that persons entering his land to provide migrant labourers working and living on his land with medical provision and legal advice were trespassing and he had the right to determine who could and could not enter his property. The court, however, ruled against the landowner. Singer, summarising the case, states that the court's view was that:

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[124] *Ibid* 66.

[125] *Ibid* 70.

[126] *Ibid* 71.

[127] *Ibid* 75. Indeed, as Singer notes, ownership rights are not absolute and can be limited by public policy. For example, subordinate real rights such as servitudes and real burdens are not valid if they are contrary to public policy. A question, not answered here but addressed later on, is whether the ownership right itself can be subject to such restrictions.

[128] *Ibid*.

[129] 277 A.2d 369 (N.J. 1971)

> "Preventing individuals from receiving visitors in their homes or having their basic needs met denies them "dignity" and treats them as if they did not deserve to be treated as human beings."[130]

This leads Singer to the view that a decision on whether to recognise a claim to a property entitlement depends on "the *values underlying the claim* and the *context* in which the claim is asserted"[131] and in the *Shack* case, the court concluded that the farmer's interests were not legitimate when they were resulting in such types of harm.[132] The self-regarding right to exclude, seen as one of the entitlements included within the ownership right, when exercised, was causing harm to the dignity of others which the court felt it was legitimate to protect. In the case of *Shack*, the farmer exercising his right of ownership to determine who could access his land:

> "imposes a particular kind of externality that one should not be entitled to impose on others and therefore exceeds the rights of the owner."[133]

Such an approach provides a test for resolving conflict. In particular, it is not restricted to parties which both have some form of property claim. Its consequential and contextual focus requires that potential harms are identified and protected, and allows for chosen values which a legislator or court wish to protect to be explicitly recognised and considered.

5.3.5 Property as the Law of Democracy

In his paper "Property as the Law of Democracy,"[134] Singer develops a framework to assist a state with developing the property norms discussed above. Singer emphasises the importance of first deciding the normative values that a political body wishes a property system to achieve before then introducing measures to deal with economic aspects such as information costs. Singer writes that:

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[130] Singer, "How Property Norms Construct the Externalities of Ownership" 77. Summarising paragraph 374 from the case.

[131] *Ibid* 77. Italics in original text.

[132] *Ibid*. Italics in original text.

[133] *Ibid* 78.

[134] Singer, "Property as the Law of Democracy" 1296.

> "The values of a free and democratic society are both more fundamental and contested than the value of minimising information costs or the value of managing complex human interactions. The question is not how to *simplify* human interactions; the question is how to *define the minimum standards* for human interactions compatible with the values of a free and democratic society that treats each person with equal concern and respect. Information costs are important to the structure of property law, but political, moral, and rule of law norms must be satisfied *first*. Costs of human interaction become relevant only *within* a normative framework that defines what kinds of property arrangements are compatible with the ideals of freedom, equality and democracy."[135]

Singer is of the view that property theorists need to have a similar focus on what he describes as the "contested concepts"[136] of liberty, equality and democracy as on the economic factors of a property system. Further, he is of the view that information or other costs cannot be validly analysed until a determination has taken place in regard to what the normative social and legal framework should be and within which such costs would then arise.[137] Based on this, Singer defines property law as a "constitutional problem"[138] and provides five key issues which need to be addressed when examining the principles of a property system. In particular, he provides arguments for why the answer to such questions should not be driven by economic factors but instead, allow for the legislator to recognise the fundamental norms that the regime should adhere to.[139]

5.3.5.1 What Kinds of Property Rights Can a Democracy Recognize?

The legislator can limit what property rights are valid. It has to select and define the different types of property rights that a democratic state can recognise without "violating its deepest values."[140] The law defines certain property rights that are allowed and not allowed, and legislators have abolished property rights that are no longer seen to be appropriate to the values of current society. Singer provides examples of the latter which have occurred in the USA, a number of which have also been restricted in Scotland, such

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[135] Singer "Property as the Law of Democracy" 1302. Italics in original.

[136] *Ibid* 1303.

[137] *Ibid*. Italics in the original.

[138] *Ibid*.

[139] *Ibid* 1325

[140] *Ibid* 1304.

as feudalism, entail, primogeniture and the introduction of environmental laws. He argues that the decisions to curtail such rights had not been based solely on economic reasoning but through a determination of what components are required in a property system to meet basic norms such as equality and freedom.[141] In his view, when deciding the type and scope of property rights requires "placing some types of property arrangements off the table."[142]

5.3.5.2 How Many Owners are Consistent with Democracy?

While discussing this question, Singer adds a number of similar issues such as how many owners is enough, what is the correct balance of property rights and does it promote or violate property rights to take land from one landowner and pass it to a group of individuals?[143] In his view, if "the system of property law does not make it realistically possible for each person to become an owner of the property needed for a full human life, then we have deprived individuals of the freedom that was the reason for creating property rights in the first place."[144] Singer's opinion is that the question of establishing what is an appropriate level of inequality cannot be evaluated using only a quantitative approach, but requires a qualitative determination of what the shape of a free and democratic culture should be.[145] Therefore, the question as to whether the system provides appropriate opportunities for individuals to obtain property, or the benefits which having property provides, is a normative one which can only be answered through an examination of the fundamental values which the society wants to promote.[146]

5.3.5.3 Who Can Own Property in a Democracy?

This question is not solely to do with discrimination. It requires consideration in areas such as the eviction of defaulters from their homes following debt arrears and whether just cause is required when evicting tenants. Singer states that to answer such questions requires us to decide what type of society we want to live in which cannot be done through looking at cost minimisation. Instead, a normative approach is needed including an

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[141] *Ibid*.

[142] *Ibid* 1308.

[143] *Ibid* 1310.

[144] *Ibid* 1312.

[145] *Ibid*.

[146] *Ibid* 1313.

analysis of the pertinent values, rights and interests which will be affected by the property regime.[147]

5.3.5.4 How Long Do Property Rights Last in a Democracy?

A landowner generally does not have to justify why they choose not to sell their property to another and property is usually not taken from us simply because another person claims that they need it more, or could make better or more efficient use of it.[148] There are, however, instances where this doctrine can be overridden, such as in the case of expropriation, positive prescription and the acquiescence defence in encroachment cases. Singer states again that these are value choices that require normative reasoning to determine the contours of our social and political life.

5.3.5.5 What Obligations Do Owners Have in a Democracy?

The question here is whether a landowner has the right to put their own interests before that of the community. If it is the former, Singer states that this "arguably violates democratic norms by giving despotic power over the community to a single individual"[149] and therefore "problems can arise if property rights allow the few to impose their will on the many."[150] Singer is of the view that identifying the obligations that owners have requires consideration of a society's fundamental norms and values[151] and includes a choice in regards to the appropriate relationship between rights and power.[152]

Finally, it is of note for later analysis that in the conclusion section of his article, Singer states that:

> "Democracies elect leaders who pass laws that establish minimum standards for social and economic relationships compatible with our justified expectations and

[147] *Ibid* 1313-1316.

[148] *Ibid* 1317.

[149] *Ibid* 1322.

[150] *Ibid*.

[151] *Ibid* 1324

[152] *Ibid* 1323.

> our considered judgements about what it means to treat others with dignity and respect."[153]

With modern political theory claiming that the definition and allocation of property rights needs to be carried out in a way which "accords with a basic framework of society that is consistent with democratic political and social values in a society characterised by pluralism in comprehensive normative views"[154] then addressing Singer's five questions should allow for a maximisation of the values a society has chosen to promote and protect and, in particular, help to achieve social goals.

5.4 Property Theory of André van der Walt

5.4.1 A Constitutional Notion of Property

This section will now analyse the work of the third progressive property theorist selected for this thesis, the South African Van der Walt. As part of his property law theory, Van der Walt examines the role that property and property law can and should have in the process of social transformation and analyses the role that policy and legislation have in developing changes to achieve social objectives, in particular within a transformation-resistant legal culture.[155]

He notes that the South African Constitution contains a number of property-related clauses along with a selection of objectives which are required to be met. For example, section 25(5) states that:

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."[156]

He argues that to achieve such societal or constitutional goals it is necessary to develop a systemic, constitutional notion of property. In his view, in South Africa, there is just one single system of property law that obtains its authority and gets its life from the

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[153] *Ibid* 1334

[154] *Ibid* 1330-1331.

[155] A van der Walt, *Property and Constitution* (2012).

[156] The Constitution of the Republic of South Africa, 1996. Available at http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf

Constitution[157] and the sources of property law should be developed and construed in a way that advances the essence, objectives and purposes of the South African Bill of Rights.[158] That is, property law and other legal measures must be used to ensure that the desired characteristics of the Constitution are met and, similarly, the unwanted aspects are eradicated. Therefore, the transformation of law to meet societal goals, not always linked explicitly to property, can result in changes to private property rules, for example, ensuring equality and non-discrimination could affect ownership rights. He describes the situation in Germany which has a private law property system that has a "double constitutional obligation."[159] Property rights in that jurisdiction have to align themselves with the normative objective behind the constitutional notion of property,[160] in particular to ensure that an individual can "realise and develop her own life and her own personality" [161] through interaction with property. However, this must be in a social context: individuals should only be able to use a range of property rights that give appropriate account to the public interest with the determination of the public interest including the achievement of general, non-property constitutional-based goals.[162] To achieve such a system requires, in Van der Walt's view, a change of focus from individual property rights to an overall property system. Such a system should not be driven by a private law view of property but needs to be adaptable to changes of circumstance such as social developments and be based on the Constitution's normative view on the contours of property law and what it should achieve.[163]

Van der Walt addresses the issues of how private law property rights and a constitutional notion of property can interact with each other and whether one should be classed as more supreme than the other. He uses decisions from the South African Constitutional Court to show that private law cannot be developed independently from the Constitution. He is therefore of the opinion that notions of property, both in private and constitutional law, must be "axiomatically … influenced by the Constitution and by the constitutional

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[157] Van der Walt, *Property and Constitution* 122.

[158] *Ibid*.

[159] *Ibid* 127.

[160] *Ibid*.

[161] *Ibid*.

[162] *Ibid*. Van der Walt provides examples of such objectives as the protection of human dignity and the prohibition of discrimination.

[163] *Ibid* 131.

context"[164] and such will include the transformative objectives of the laws introduced to achieve specific provisions of the Constitution.[165]

To assist in developing a constitutional vision of property, Van der Walt highlights the different use of terminology between private property law and constitutional or public law. Private law uses specific and narrowly defined rules for determining objects, rights and obligations which are hierarchical and require deductive reasoning. The language in constitutional documents is different and looser, even if similar terminology is used. For example, s25(5) of the South African Constitution, quoted above, included "gain access to land on an equitable basis." There is no guidance as to what the definition of land or equitable access is. Certain wording in the Constitution is therefore non-specific and is not always defined in the private property sphere. The text does, however, clearly emphasise the constitutional objective of the clause. The Constitution therefore provides a normative vision for what a property system should achieve, the effects it should not allow and it promotes a focus on societal and relational-based goals such as non-discrimination.[166] It also allows for purposive interpretation to be used to ensure constitutional objectives are met, objectives which are different to traditional private property aims such as the protection of individual rights and maintaining stability.[167] Van der Walt states that this is fundamental: "the constitutional notion of property is systemic, dynamic, goal-orientated and purposive instead of rights-based, static, conceptual and doctrinal."[168] Private property law, in Van der Walt's view, can continue to focus on individual rights and remedies as long as it does not hinder the constitutional objectives, and the normative values in the constitutional objectives must be used to interpret and develop private property law.

In order to achieve this constitutional notion of property, Van der Walt states that there needs to be change of focus from looking at objects to considering objectives. He provides this example:

> "The private law notion of property sees the owner or user of land who may or may not have an enforceable right; the constitutional notion sees the citizen who may or may not have been the victim or the beneficiary of apartheid land law. The latter

[164] *Ibid* 122.

[165] *Ibid*.

[166] *Ibid* 134.

[167] *Ibid* 138.

[168] *Ibid* 134.

> involves greater attention for the overall picture of the property system and for the relationships between the elements, and especially for the qualities or features of the whole system, as opposed to exclusivity and abstractly focusing on the nature or integrity of discrete private rights."[169]

He states that achieving the realisation of a constitutional notion of property can therefore result in the extension of the "narrow traditional private law notion of property rights to interests that were excluded or marginalised in the past."[170] Such a change could achieve a fairer distribution of access to land and a more equitable allocation of the benefits of private ownership which was previously the monopoly of land owners.[171]

5.4.2 The Rights Paradigm

As noted above, Van der Walt was of the view that a property institution should have a normative basis to promote constitutional objectives. Van der Walt also examines the difficulties in changing the property regime and transforming society in order to achieve values such as dignity, equality and justice. He asks "whether it is possible to theorise property in the context of social and political transformation that highlights the fundamental tension between protection of established property interests and promotion of social-economic justice through some form of redistributive politics."[172] To answer this he takes a different approach to other academics in this area and analyses how social justice can be obtained through making fundamental changes to the existing property regime. Such a property system can be responsible for establishing and maintaining inequality and while there are certain social justice goals which can be achieved within an existing model, he argues that there can be necessary justice-based changes or modifications to a property institution that are so essential that they cannot be either contained within or explained by existing legal doctrine.[173] He described this doctrine as "a coherent explanation of property rules and practices that legitimately entrench and protect individual property holdings and the market economy within which they function"[174] and notes the common dichotomy between a legislator's obligation to introduce reforms to achieve social and political

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[169] *Ibid* 145.

[170] *Ibid*.

[171] *Ibid*.

[172] A van der Walt, *Property in the Margins* (2009) 13-14.

[173] *Ibid* 15.

[174] *Ibid* 218.

objectives which can affect property interests and the court's tendency to protect property holdings through the use of legal doctrine, unless the court is specifically told otherwise in precise and clear language. He states that:

> "legal doctrine that frustrates or inhibits the implementation of social and economic reforms is unlikely to change, simply because of political or policy considerations that have not been translated into the supposedly objective, neutral or scientific language that fits the doctrinal logic that most judges, practitioners and academics feel comfortable with."[175]

In jurisdictions implementing property reform, this can therefore result in the general outcome being the protection of current property rights to the detriment of the social and economic reforms. The effect of this is a tension between the desire, both morally and politically, to introduce new legal measures and the societal and legal doctrinal resistance or lack of aspiration to reform.[176] He is of the view that this unavoidable tension is actually beneficial; it gives space for critical reflection, promotes challenges to the current system and allows for analysis through a different lens. Such an approach can result in the entrenched doctrinal approach losing its traditional central position and obtaining a marginal status in reform debates which helps to ensure that the objectives of improving social and political injustice are met.[177] Van der Walt is of the view that using the experience of those on the margins of society or the distributive pattern, rather than those who benefit from the status quo and expect the property regime to secure their rights, can be instrumental when examining stability versus change conflicts.[178]

Van der Walt then uses a theoretical and descriptive framework which he denotes the 'rights paradigm'[179] to further emphasise the difficulties in reforming a property regime. This framework has a rights-centred focus with a doctrinal hierarchy where property interests are ranked as either strong rights, weak rights or non-rights with the first set of rights, generally ownership, trumping the other two in disputes while weak rights generally triumph over non-rights. Such a paradigm, he notes, protects those with current entrenched rights and is resistant to change. Further, it is backward looking and does not allow for the

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[175] *Ibid* 18.

[176] *Ibid* 20.

[177] *Ibid* 214.

[178] *Ibid* 216.

[179] *Ibid* 27.

use of context in a dispute. As Van der Walt states, using such a hierarchy results in property disputes being determined "in terms of an abstract, syllogistic logic, in which contextual issues such as the general historical, social, economic or political context of the dispute and the personal circumstances of the parties have no relevance or effect."[180]

He goes on to opine that if strong rights become adapted based on policy grounds, then this can enhance the possibility of social justice reform initiatives achieving their objectives. As an example, he describes eviction cases where this has occurred, highlighting that the important factor was not simply that an owner had their strong rights limited but that this occurred in a way and for a reason which contradicted the edict of the rights paradigm because the decisions were based on parameters not generally used in such resolutions, for example, the characteristics of the parties and the availability of replacement housing. This leads Van der Walt to conclude that the foundation of the rights paradigm becomes less tenable when rights, such as to possession, are qualified by extraneous factors, that is those "completely unrelated to the relative merits of the parties' claims to possession, totally out of the property holder's control and purely based on justice or fairness considerations."[181]

Based on this descriptive analysis he makes the normative argument that:

> "real and significant reform of the property regime requires a doctrinal, methodological and rhetorical paradigm shift that would dilute and undermine the influence of the rights paradigm in 'normal' thinking. An important aspect of this reform would have to involve reconsideration of the relative significance of ownership in the rights paradigm, particularly with reference to land rights, since it is clear … that ownership-focused thinking plays an important part in upholding the paradigm and the socio-economic structures entrenched by it."[182]

5.4.3 Centrality and Property in the Margins

Van der Walt further examines why property doctrine and the rights paradigm described above are unsusceptible to change through considering the centrality of ownership. He discusses the logic of centrality where owners of property perceive a central locus for

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[180] *Ibid*.

[181] *Ibid* 226-227.

[182] *Ibid* 52.

property in society due to its role in the free market which is taken as a necessary building block of a liberal society. Similarly, lawyers generally take the view that property is a "central organising concept in law and legal theory."[183] This centrality outlook then, in his view, associates the power that having property brings to attaining human and social values which are seen to be essential such as human flourishing or utility. He states that the "central role that is assigned to property in upholding and safeguarding these values explains and justifies the otherwise startling inequalities that follow from the unequal distribution of property in society."[184] This central focus results in a perception that owning property is the normal state of affairs and therefore not having property is viewed as unnatural.

It is this central way of thinking that Van der Walt believes we need to move away from. He highlights three groups of individuals who can be included in the unnatural category; those people involved in a natural disaster, those suffering from some form of social, economic or political discrimination and individuals with no property based on a personal political decision. He then states that a democratic society based on plurality which is determining if their property regime is just or requiring change, should analyse the impact that the current institution has on these groupings.[185] Importantly, however, Van der Walt continues that this should not simply be through the lens of aiding those in need. Attempts to de-centralise the focus of property law, for example, through the social origin argument that the state can limit property rights for a social need, "does no more than remind the rich and powerful that they have a duty of conscience not to forget the needs of the less privileged,"[186] and he questions if "we have made a really significant shift by simply adding concern for the poor to mainstream ownership thinking as an afterthought."[187]

In order to therefore achieve a correct conceptualisation of marginality in property, Van der Walt first highlights that marginality "involves legal positions not characterised or dominated by the presence of rights, possessions, privilege and power"[188] and therefore to achieve social justice for those in the margins requires a departure from centrality thinking towards the imaginings of a legal order which is not dictated by the hierarchies of the

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[183] *Ibid* 231.

[184] *Ibid*.

[185] *Ibid* 233.

[186] *Ibid* 241.

[187] *Ibid*.

[188] *Ibid*.

rights paradigm and distinctions between the presence and absence of entitlements and privileges.[189] A de-centred perspective, in his view, enables the assessment of those people and groups in the margin in a different manner by "allowing their interests and their lack of property (and hence power) to influence the formulation, interpretation and application of law, on the basis of proper consideration of their particular situation, their needs, their status, their beliefs or their customs."[190] When considering those in the margins, a lack of holding a property right should be just as much of a determining factor in a dispute as having one, especially when the context of the situation is allowed for and legislation interpreted purposively. Allowing for individual circumstances in decision making enables those in margins to be viewed as "persons rather than just positions"[191] and results in the development of the property regime that takes into account "not only the power of privileged established property positions, but also the effect of this power on others who do not share in it."[192] As Van der Walt states:

> "This requires recognition of the somewhat unusual and disturbing notion that property law is not exclusively or even primarily about owners and holders of rights, but about those who do not own property and whose lives are shaped and affected by the property holdings of others; those who are required to respect property and who are owned as or through property."[193]

To assuage the fear of the effects of such a de-centralised approach and changes to the rights paradigm, Van der Walt highlights that there will have been historical shifts in dominant property rights from, at the time, marginal positions due to social, economic and political changes or through developments in the legal or political fields. He therefore recommends that property lawyers need to be reminded of these "often denied or forgotten events"[194] in order for them to be more susceptible to and accepting of similar developments again, even though "they might appear impossible or even unthinkable in the everyday slog of property practice."[195] By changing legal culture, including its language, logic and assumptions, in tandem with legislative changes, then, in his view, it should be

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[189] *Ibid* 242.

[190] *Ibid* 238.

[191] *Ibid*.

[192] *Ibid* 247.

[193] *Ibid* 238.

[194] *Ibid* 244.

[195] *Ibid*.

possible to move from the centre to the margins and overcome the notion of the rights paradigm in order to allow for an approach to discussing property that would result in a need to ensure that the property regime promoted and protected both rights and justice in tandem.[196]

5.4.4 The Modest Systemic Status of Property Rights

To support his theory being put into practice, Van der Walt has also examined the role that property law plays and should play in the determination of the protection of various different types of rights in individual conflicts.[197] He notes that progressive property lawyers, when discussing the social purpose of property, will often highlight that property rights are not absolute as they are commonly subject to restrictions. This is seen as acceptable on a normative basis as such limitations are necessary to achieve a number of social goals such as for human flourishing. This viewpoint can be contrasted with what Van der Walt calls an "over-inflated perception of property"[198] where property is seen as a "simple system that relies on bright-line rules regarding a small number of standardised property forms and that pivots on the right to exclude."[199] Van der Walt argues against both perspectives. He opines that the legal protection of property rights both has and should have a modest systemic role in the law.[200]

On a descriptive basis, through examining a number of cases from different jurisdictions[201] in the area of exclusion rights in relation to non-commercial usage of commercial private land which is quasi-public or has restricted public access, he finds that the outcomes of the cases were decided with a focus on the protection of non-property rights, such as life, dignity or free-movement, with the protection of property given a lower priority. He describes instances where the court has had to address conflicts between life-dignity-equality rights and property rights and notes the tendency for the former to be "safeguarded as a systemically primary objective"[202] with the latter "protected in whatever space

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[196] *Ibid* 247.

[197] A van der Walt, "The Modest Systemic Status of Property Rights" 15.

[198] *Ibid* 25.

[199] *Ibid*.

[200] *Ibid* 27.

[201] These jurisdictions include Germany, the USA and South Africa.

[202] Van der Walt, "The Modest Systemic Status of Property Rights" 48.

remains."[203] A key factor in the decisions was that the courts were not performing a weighting of interests or a balancing exercise to determine which right outranks the other. They were carrying out what Van der Walt calls a demarcation exercise where there is a determination as to where to draw the line in terms of the protection of property rights in order to secure life-dignity-equality rights.[204] Further, for rights such as free movement or free speech, he notes that these are different to the life-dignity-equality rights as they are generally not absolute rights and weighing such rights against property rights requires a normative constitutional decision. He highlights that in such instances that while the expectation would be that "the enforcement of either right could be construed as a limitation of the other that requires justification"[205] there was in fact a "kind of presumptive privilege [attached] to the non-property right"[206] and justification was required for the protection of the property right.

Van der Walt's review of these cases allows him to address the normative status of property rights when compared to non-property rights. He makes use of the work by Nedelsky[207] who is of the view that property should not belong in a constitution as if its value is comparable with that of other rights. She argues that "property rights should be held accountable to equality, not the other way round"[208] and leads Van der Walt to make the key observation:

> "'property implicates the core issues of politics: distributive justice and the allocation of power,' which should be the subject of democratic debate – if property is entrenched in a constitutional right these issues will effectively be removed from political deliberation, which would be unacceptable."[209]

Based on these findings, Van der Walt then develops a normative argument in which he states that the protection of property rights should only play a modest role in a legal system

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[203] *Ibid*.

[204] *Ibid* 51.

[205] *Ibid* 63.

[206] *Ibid*.

[207] J Nedelsky, "Should Property Be Constitutionalized? A Relational and Comparative Approach" in G van Maanen & A van der Walt (eds), *Property on the Threshold of the 21st Century* (1996) 417.

[208] Van der Walt, "The Modest Systemic Status of Property Rights" 93.

[209] *Ibid*. The start of this quote is taken from Nedelsky, "Should Property Be Constitutionalized? A Relational and Comparative Approach" 427.

and it should not be its central purpose.[210] In his view, there are important and concrete reasons for ensuring that non-property rights should often, or even always, be protected before property rights are even considered.[211] He notes that even though property rights might have relevance in a dispute, this does not require that the decision needs to be based on protecting the property rights and that it is:

> "often possible, and necessary, to protect non-property rights and values in their own right and not on the back of property rights, even in instances where we are accustomed to think about those conflicts as property issues."[212]

While Van der Walt notes the work of various authors who view property rights as being different to other rights due to their allocative nature which can result in or maintain social injustice and inequality,[213] his normative justification for the difference between the non-property rights and property rights is "the status of protecting property rights as a systemic objective, relative to the systemic function of upholding the non-property rights."[214] These non-property rights are upheld due to the society we wish to live in; in order to live in a democratic and free society which recognises and protects these non-property rights will and should necessarily result in constraints being placed on property rights.[215] To maintain such a society, fundamental rights such as life-dignity-equality and the civic rights like freedom of movement, speech and assembly, should not generally be allowed to be trumped by economic-based rights.[216] He concludes that instead of viewing property as "the saviour, the knight on the white steed, the guardian of every other right,"[217] his preference is:

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[210] Van der Walt, "The Modest Systemic Status of Property Rights" 30.

[211] *Ibid*.

[212] *Ibid* 31.

[213] See, for example, L Underkuffler "When Should Rights "Trump"? An Examination of Speech and Property" (2000) 52 Maine LR 311 at 313 & 316.

[214] A van der Walt, "The Modest Systemic Status of Property Rights" (2014) 98.

[215] *Ibid* 99.

[216] *Ibid* 101.

[217] *Ibid* 105.

> "to see property as a gaggle of cleaners who move in after everyone else has left, brandishing buckets and mops, cleaning up the property debris once the real work of maintaining the democratic legal system has been completed."[218]

5.5 A Comparison and Contrasting of the Property Theory of Singer, Alexander and Van der Walt

5.5.1 Similarities

5.5.1.1 Introduction

In order to determine if there is a progressive property theoretical normative justification for the community rights to buy, this section will now examine the similarities between the work of Alexander, Singer and Van der Walt. These common features will then be used in Chapter Six as a benchmark to test the approach used in the community right to buy measures.

5.5.1.2 Progressive property theory, social justice and values

The three theorists, Alexander, Singer and Van der Walt, with their emphasis on the examination of the social purpose of property in their writing, can be classed as progressive property lawyers. Van der Walt describes the two key aspects to progressive property law writing.[219] First, there is a descriptive approach in which evidence is provided to disprove the idea that the ownership right is absolute, with ownership instead being subject to a number of restrictions and regulations. The three authors use such an approach in their theoretical writing. Singer notes that the absolute concept of ownership views property as self-regarding because it assumes that it is just the owner who has a legitimate interest in the property they own with everyone else having no legitimate claim to determine how the owner uses their property.[220] To contradict this view he provides a number of examples which highlight that owners' rights are not always treated as absolute, including instances of rights of access, the law of prescription and restrictions being placed on the right of alienability. Alexander similarly uses case law to provide examples of when use restrictions have been placed on an owner such as for environmental or historical

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[218] *Ibid* 105-106.

[219] *Ibid* 16-17.

[220] Singer, *Entitlement: The Paradoxes of* Property 3.

preservation reasons or through forced sales[221] while Van der Walt describes the increasing provision of new or enhanced rights for tenants in various jurisdictions[222] and cases where non-property rights have been protected at the expense of a property right.[223]

Second, there is the normative element which Van der Walt describes as providing justifications with reference to progressive values for the introduction, use and scope of restrictions and exceptions which can limit what an owner can do with their property. Van der Walt provides examples of such values as being "social obligations, structural pluralism, virtue ethics, freedom, human flourishing and democratic governance."[224] Van der Walt also states that progressive property theorists highlight the normative complexity of property systems because it allows them to exhibit their concern with the promotion of a mixture of values such as dignity, virtue and freedom.[225]

Such a normative approach is taken by the three theorists. Singer highlights that, as opposed to efficiency and rights theorists who reject the complexity of moral decision making through condensing normative inquiries down so that they are only concerned with a fundamental principle, a correct systemic approach to property will recognise and accept that individuals hold a plurality of values and there are numerous different ways in which they value things.[226] He highlights the unavoidable complexity inherent in property law, stating that there cannot be one definition for property which can be used that does not require "controversial value judgments about how to choose between conflicting interests."[227] Singer makes clear his view on the necessary normative relationship between property systems and values. He states there needs to be acknowledgment that property norms shape social relations, necessitating a normative determination of what type of social relations will meet various goals such as equality and the promotion of justice.[228] Similarly, Alexander states that "human flourishing is a value-plural concept, encompassing multiple and incommensurable moral values or ends; hence property has

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[221] For example, see Alexander, "The Social-Obligation Norm in American Property Law" 755 and 791.

[222] Van der Walt, *Property in the Margins* Chapter 4.

[223] Van der Walt, "The Modest Systemic Status of Property Rights" 45-91.

[224] *Ibid* 16-17.

[225] *Ibid* 21.

[226] Singer, *Entitlement: The Paradoxes of Property* 145-146.

[227] *Ibid* 3.

[228] *Ibid* 12

multiple ends"[229] and claims that a society which fosters the promotion of the, objectively good, concept of human flourishing is morally superior to those societies which do not.[230] Likewise, Van der Walt, in his argument for a constitutional approach to property, makes clear that the "constitutional framework within which the property system is accommodated and regulated should be understood to include a range of systemic or institutional characteristics that property law must embody and effects that it must avoid."[231] The development and interpretation of legislation and common law should be used to achieve this and Van der Walt is of the opinion that, for property law, this should include the promotion of progressive values such as equality and dignity along with transformative goals such as redistribution of land, security of tenure and equal access to land.[232]

5.5.1.3 Context, consequences and the relational nature of property law

As well as highlighting the complexity of property, Van der Walt states that to develop normative theories, progressive property writers "describe property in terms of open-ended conversations about the effect that contextual, social and other normative considerations have on the outcome of property disputes"[233] as opposed to a "mechanical responses to bright-line rules"[234] approach. Context, consequences and relationships play a key role in the writing of the three theorists. Strong emphasis is placed on the need in conflict resolution to consider the status and attributes of individuals and how a decision would affect both parties rather than simply following a mechanical formalistic approach. Similarly, the writers promote the development of legislation which allows for such contextual factors to be considered, for example, in the field of eviction protection.

As highlighted above, Van der Walt recommends an approach which recognises "persons rather than just positions."[235] His view is legally valid property rights can be trumped based on "extraneous or subjective factors"[236] such as the parties' positions in society,

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[229] Alexander, *Property and Human Flourishing* 4.

[230] Alexander & Peñalver, "Properties of Community", 9.

[231] Van der Walt, *Property and Constitution* 177.

[232] *Ibid*.

[233] *Ibid* 21.

[234] *Ibid*.

[235] Van der Walt, *Property in the Margins* 239.

[236] Van der Walt, "Property and Marginality", in G Alexander and E Peñalver (eds), *Property and Community* (2009) 81 at 102

financial status and personal circumstances, and the effects a decision would have on groups such as the parties' families and communities.[237] Similarly, Singer's view that the norm of property law is the protection of justified expectations has a contextual and consequentialist basis. His theory promotes discussion of contextual situations in which it would be justifiable to place obligations on individuals to respect property rights held by others.[238] This requires evaluating what types of relations a society wants to promote or discourage when developing the types of legal rules that the system should contain.[239] Singer notes that property is a social system, with a focus on the relationships between people themselves rather than only those between individuals and things. He therefore promotes an approach that considers the consequences of adopting different property rules.[240]

The human flourishing approach, with its push for actions that promote individual human flourishing in a given situation, is clearly consequentialist in nature. Alexander's social-obligation norm also introduces a relational aspect to property rights. For example, when critiquing various metaphors which attempt to figuratively capture an identifiable expression for the concept of ownership, he promotes the use of the owner-as-neighbour metaphor because it makes clear there is relational characteristic inherent to ownership and it highlights the necessary balance between what an owner can control and the responsibilities to others that result from their ownership.[241] In his view, the owner-as-neighbour term highlights the relationship an owner has with their community and emphasises the moral obligation ownership places on an individual to ensure that the community they reside in can develop in a way that achieves human flourishing.[242]

5.5.1.4 Pluralism

Singer's view on developing rules to shape society and promote moral values and his theory that entitlements should protect autonomy and promote social goals has a pluralistic nature. Singer promotes a systemic approach which recognises the interdependence of legal institutions and social relationships, and takes account of the "plurality of values we

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[237] Van der Walt, *Property in the Margins* 226.

[238] Singer, *Entitlement: The Paradoxes of* Property 13.

[239] *Ibid* 12.

[240] *Ibid* 11.

[241] Alexander, *Property and Human Flourishing* 69.

[242] *Ibid* 73.

hold as well as the plurality of ways in which we value things."[243] There could therefore be a difference in the viewpoint of pluralism between Singer and Alexander. Singer critiques rights theorists who "seek to identify a single basic norm that underlies all justice claims"[244] and he provides such an instance as the promotion of human flourishing.[245] Similarly, Singer includes human flourishing as an example of a moral value along with others such as fairness, distributive equality, justice and autonomy which, in his view, rights theorists believe need to be considered when governing how individuals should interact with each other in a democratic society.[246]

However, Alexander, when developing his human flourishing theory emphasises that it pluralistic because within the concept of human flourishing there are various incommensurable values. He describes human flourishing as a concept, which he conceives to include moral values, rather than being a moral value itself. For example, he states that human flourishing includes values such as personhood, equality, community and individual autonomy, and emphasises that these inherent values cannot be reduced to one single value.[247] This leads him to conclude that there is not a sole fundamental value which can be used to resolve property conflicts.[248] Singer and Alexander's theories could therefore produce comparable outcomes. A justified expectation which should be protected could be one that promotes the values contained within Alexander's human flourishing concept and one that does not place obligations on others which would hinder their ability to flourish.

Similarly, Van der Walt notes that progressive property theorists portray property as a "complex, pluralistic set of doctrines and institutions"[249] and his aspirations for (a) a constitutional notation of property with a focus on overall objectives rather than objects and (b) the move away from a regime that protects property at the expense of life-dignity-equality rights is clearly also pluralistic.

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[243] Singer, *Entitlement: The Paradoxes of* Property 146.

[244] *Ibid* 145.

[245] *Ibid*.

[246] *Ibid* 105-106.

[247] Alexander, *Property and Human Flourishing* 5.

[248] *Ibid* 35.

[249] Van der Walt, "The Modest Systemic Status of Property Rights" 26.

5.5.2 Differences

5.5.2.1 Introduction

Despite the similarities discussed above, which will be used in Chapter Six to analyse the community rights to buy, there are notable differences in the work of Van der Walt when compared to that of Alexander and Singer. This could be as a result of the backgrounds of the theorists. Alexander and Singer's theories sit within a political and legal culture where the primacy of property is absolutely entrenched, and the questioning of this viewpoint of ownership could be classed as radical. With the history of South Africa, there is a political and legal culture which is much less accepting of the idea of fixed or neutral property rights, leaving property law academics with more scope to argue against property's primacy as a moderate stance. This section will examine three areas of divergence, namely the centrality of property rights, the role of property as the guardian of other rights, and the relationship between ownership and social obligations.

5.5.2.2 Centrality of property rights

While it is clear that the three theorists have social justice improvements as a focus for their property law theories, Van der Walt appears to attempt to answer a different question. While Alexander and Singer focus on what values a property law system should adhere to or achieve, Van der Walt suggests that the legislators and courts should focus on societal goals enshrined in constitutional rights and determine how best to meet these through legal methods which could, but do not necessarily need to be, property law based. The examples he provides in his article "The Modest Systemic Status of Property Rights"[250] show a tendency of the courts to protect other constitutional rights before a property right, providing evidence of a move away from a strict adherence to the rights paradigm.[251] Singer would analyse such cases, for example, the rights of beggars on commercial property or restrictions placed on hoteliers to not discriminate based on race, as a conflict between two types of property right, namely ownership and rights of access. Such property law cases should then be decided through an examination of the justifiable legitimate expectations of the parties which takes into account the justness of any resulting obligations. That is, Singer views such instances purely within the property law sphere. Van der Walt places more emphasis on the life-dignity-equality aspect of certain rights and

[250] (2014) 1 Journal of Law Property, and Society 15

[251] See section 5.4.4.

is of the view that viewing matters purely through a property law lens results in a perception that having property is "normal and central to the social and legal system"[252] and to not have property rights is "extraordinary."[253] This leads Van der Walt to what he describes as a "somewhat unusual and disturbing notion"[254] that

> "property law is not exclusively or even primarily about owners and holders of rights, but about those who do not own property and whose lives are shaped and affected by the property holdings of others."[255]

Further, Singer is of the view that a property system should have a desire to create a minimum level of equality that would provide each individual with the capacity to "enter the property system on terms that are fair and the means necessary to sustain a dignified human life."[256] While Van der Walt recognises the benefits of such social justice issues being considered within property theory, he describes it as an inadequate method which will not result in any more than minimal equality improvements if it "assumes the form of a more or less condescending nod toward the needs of the not-rich, not-propertied, not powerful"[257] and results in "having property, being rich, and being powerful still [determining] the norm against which the shortcomings of the have-nots are measured."[258] Van der Walt is of the view that human flourishing also adheres to such logic. With Alexander's development of Taylor's social thesis, which places a requirement on owning resources in order to flourish, it is clear, states Van der Walt, that the human flourishing viewpoint uses centrality reasoning.[259]

5.5.2.3 Property as the guardian of other rights

Following on from the issue of centrality is that of the perceived hierarchical nature of rights. Van der Walt critiques the viewpoint held by some that property is the "guardian of other rights,"[260] meaning a legal system which protects private property so as to ensure that

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[252] Van der Walt, "Property and Marginality" 84.

[253] *Ibid*.

[254] *Ibid* 90.

[255] *Ibid*.

[256] Singer, *Entitlement: The Paradoxes of* Property 162.

[257] Van der Walt, "Property and Marginality" 96.

[258] *Ibid*.

[259] *Ibid*.

[260] Van der Walt, "The Modest Systemic Status of Property Rights" 32.

other non-economic rights are met or in order to meet a societal value or values. In particular, he examines whether property must be protected for ensuring personhood or the promotion of human flourishing. These theories, in his view, see property as an equal to (or perhaps greater than) the other fundamental rights because it "secures personhood or human flourishing by safeguarding fundamental, personhood- or flourishing-entrenching rights like life, liberty, human dignity and equality."[261] Van der Walt states that this viewpoint of property can result in the personhood and human flourishing theories being mistakenly linked with the guardian-of-other rights argument because they can been seen as incorrectly supporting the view that the maintenance of social and legal institutions has the protection of property as a central function.[262]

Using the work of various authors,[263] Van der Walt shows how this emphasis on property protection does not sit comfortably in the redistributive requirements of the personhood and human flourishing theories.[264] As this thesis is concerned with Alexander's theory, the achievement of human flourishing will be used as an example in Van der Walt's argument below.

The theory of human flourishing requires, in Van der Walt's view, that individuals hold a minimum level of property and this will subsequently require the state to pursue

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[261] *Ibid* 37.

[262] *Ibid*.

[263] J Nedelsky, "Should Property Be Constitutionalized? A Relational and Comparative Approach" 425, C Rose "Book review: The guardian of every other right: a constitutional history of property rights by James W Ely (1992)" (1993) 10 Constitutional Commentary 238-246 240-242, D Barros "Property and freedom" (2009) 4 New York Univ J Law & Liberty 36-69.

[264] Though Van der Walt does not mention Singer's theory in this part of his argument, based on Singer's comments above on distributive justice, it is arguable that Van der Walt would have come to a similar opinion on Singer's approach. Singer argues that one of the functions of a property system is to ensure that ownership is distributed and if a society has an objective of ensuring equality to values such as respect, life, dignity and happiness then "the system of rules, practices, and institutions should ensure that everyone can become an owner." Singer, *Entitlement: The Paradoxes of Property* 144. This therefore equates to Van der Walt's view that the human flourishing theory necessitates a threshold for the level of property held by an individual and therefore the subsequent reallocation of property by the state. In spite of this, Van der Walt concludes his "The Modest Systemic Status of Property Rights" article with the statement that it is Singer's subsequently published "Property as the Law of Democracy" paper which provides the strongest progressive theoretical and normative justification for his argument. He describes Singer's view of property as the law of democracy as a "democratically restrained progressive property theory" because, in Van der Walt's view, Singer takes the view that the definition of property rights is driven by what is required to live in a democratic society and not the foundation which underpins a democracy. Van der Walt, "The Modest Systemic Status of Property Rights" 101-102 and 105. However, it could be argued that it is when determining the primary choices necessary for a democracy underpinned by values such as equality and social justice that the two would reach different conclusions based on Singer's views on the purposes for a property system stated above.

redistributive methods. Such an approach, in his view, would make existing property holdings insecure because there would need to be significant movement of property from those who have it to those who do not in order to achieve the intended goal of human flourishing for all.[265] The courts would likely not rely on human flourishing logic and would continue to entrench current property interests, and this legal protection would seek to avoid attempts to redistribute property to achieve this baseline of universal human flourishing.[266] Further, as human flourishing promotes the redistribution of property, then protecting existing property rights weakens the hypothesis that property is required to flourish.[267] Van der Walt therefore concludes that the strong protection of property rights can in fact prevent rather than advance human flourishing[268] and there is not a persuasive justification for why the non-economic rights required for the achievement of human flourishing therefore have to engage the protection of property rights.[269] Based on this argument, his view is:

> "it is important for progressive property theory to recognise the relatively modest systemic status of property rights in the broader scheme of fundamental rights; to acknowledge that the default position is to secure the protection and promotion of non-property rights on the basis of their relatively superior normative and systemic status and not via the protection of property; and to devise conceptual and analytical tools to facilitate a distinction between the two categories of rights."[270]

5.5.2.4 Ownership and social obligations

The final topic of divergence is in regard to social obligations. As noted above, both Alexander and Singer attach social obligations to property rights, in particular, the ownership concept. While Van der Walt notes the importance of such social responsibilities, his view is there is a requirement to "avoid simply adding concern for the poor to mainstream ownership thinking as an afterthought."[271] This requires a conceptualising of marginality as a principle which does not simply operate on a needs

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[265] Van der Walt, "The Modest Systemic Status of Property Rights" 39.

[266] *Ibid* 40.

[267] *Ibid* 42.

[268] *Ibid* 41.

[269] *Ibid*.

[270] *Ibid*.

[271] Van der Walt, "Property and Marginality" 97.

basis but explicitly allows for no-property, that is, an approach which includes "legal positions not characterized or dominated by the presence of rights, possessions, privilege and power."[272] Such an approach therefore differs from Singer's humanity principle.[273]

Van der Walt states that to achieve this rethinking of marginality requires moving away from the centrality of rights logic and the power it brings, to a legal institution which is not subject to hierarchies founded on the distinction between the presence or absence of rights.[274] He makes clear that he is not attempting to diminish the strength of property rights or ownership, stating that property law could not operate without some level of focus on property rights and the associated power these bring. However, he recommends imagining a perception of property which takes into account the interests of individuals or groups who have generally seen to be not part of the established property elite rather than the abstract thinking of either protecting ownership or those who are in need.[275] This would allow, in Van der Walt's view, for property law to account for marginality without just defining marginality as simply the absence or counterpoint of property.[276] He highlights a need to "[patrol] the margins of supposedly established and accepted distinctions such as the private/public divide and the ownership/use rights hierarchy"[277] and asks:

> "What is the role or the doctrinal function of these concepts, distinctions, institutions, rules, and practices in upholding and entrenching the property regime? That is, how can they be used to undermine that regime and imagine an alternative that is less dominated and predisposed by its legacy of inequality, hierarchy, privilege, and power?"[278]

5.6 Conclusion

This chapter has provided a detailed description of the theoretical work on the role of property systems in society by three leading property law scholars. It was found that

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[272] *Ibid* 98.

[273] See section 5.3.3.

[274] Van der Walt, "Property and Marginality" 98.

[275] *Ibid* 99.

[276] *Ibid*.

[277] *Ibid* 105.

[278] *Ibid*.

Alexander contends that human flourishing is the goal which property law should attempt to achieve, and this happens when a person can live a life of dignity, self-respect, and satisfaction of basic material needs. In his view, the achievement of human flourishing is dependent on an individual living in a society, and he develops a social-obligation norm in which he places obligations on owners to ensure that those in their community have the resources needed to flourish.

The review of Singer's work showed that he is of the view that the central normative goal of property law is to protect justified expectations. In order to determine if an expectation is justifiable, he highlights that expectations are not only claims of entitlements to control resources but are also claims that others should be obligated to respect those claims. It is therefore not sufficient to only examine the strength of the entitlement, the relational aspect of the entitlement requires that the justness of the resulting obligations must also be considered. This should, for example, require consideration of the negative externalities which can arise as a result of protecting one party's entitlement. As one expectation we are entitled to have is that we may obtain the means necessary for a dignified human life, he is of the view that non-owners must have the ability to obtain access to property.

Finally, it was noted that Van der Walt examines the role that property law can play in the transformation of society in order to achieve values such as dignity, equality and justice. He analyses how social justice can be obtained through making fundamental changes to the existing property regime. In particular, he is of the view that there is a need to move away from (a) a framework which has a rights-centred focus and (b) a doctrinal hierarchy where ownership is ranked higher than other property and non-property rights. Further his theory is that to achieve constitutional goals we need a constitutional notion of property which requires a change of focus from looking at objects to considering objectives. That is, a move away from the private law notion of property which focuses on an owner or user of land who may or may not have an enforceable right, to a constitutional notion which sees a citizen who may or may not have been the victim or the beneficiary of a land measure. In his view, it is the qualities or features of the whole system which are important rather than discrete private rights.

The section examining how the theories of these writers compare with each other concluded that there were a number of similarities in Alexander, Singer and Van der Walt's writings, in particular (a) the consequentialist approach taken by the writers with an emphasis on the attainment of pre-determined and pluralistic values through the

development of property systems, legislative measures and the outcomes of property disputes and (b) a focus on contextual factors that should be allowed for when developing legal rules and in conflict resolution. However, while it was maintained that there was a significant element of commonality across the theories, it was also argued that there were a number of critical differences. In particular, Van der Walt has a divergent viewpoint on the role of property and the central focus that the ownership right plays in public policy and property disputes. Van der Walt also recommends a move away from a focus on objects and the doctrinal private law approach of examining who does and does not hold a property right and what that right entails. This differs significantly from Alexander's theory that having property is required for human flourishing and Singer's view that equality can only be achieved if everyone has the same opportunities to enter the property market. The next chapter will now apply the findings from this analysis of progressive property theory, particularly the common and divergent views of the three theorists, to the community rights to buy objectives and statutory process in order to determine to what extent the community right to buy legislation is aligned with progressive property theory.

Chapter 6 Principles to Policy

6.1 Introduction

Chapters Three and Four discussed modern-day land reform in Scotland, with a focus on the community rights to buy. Chapter Five provided an overview of the work of three key progressive property theorists, Alexander, Singer and Van der Walt. This chapter will evaluate the extent that the objectives and approach of Scotland's suite of community rights to buy align with progressive property theory as encapsulated by these scholars. In order to first establish if the community rights to buy are aligned to progressive property theory, the initial sections will determine if the introduction of the community rights to buy was justified with reference to progressive values and provide an evaluation of the community rights of buy using the common strands of the discourse of Alexander, Singer and Van der Walt identified in the preceding chapter, namely context, consequences, relationships and pluralism. To identify the extent of the progressiveness of the measures, this will be followed by a section focusing on Van der Walt's divergent views on the centrality of property rights, the role of property as the guardian of other rights, and the relationship between ownership and social obligations.

6.2 Progressive property theory and community rights to buy

As discussed in section 5.5.1.2, Van der Walt states that there are two key elements to progressive property theory. The first of these is a descriptive approach adopted by progressive property theorists to support their view that ownership is not absolute. The second of these, the normative component, justifies, with reference to progressive values, the introduction of new property rights or the placing of limitations on what an owner can do with their property. This section considers the second of these and examines whether such an approach was taken by the Scottish Government when introducing the community rights to buy. Singer's theory of property as the law of democracy and Van der Walt's constitutional notion of property will be used for this analysis as they have relevance to the question. Alexander's human flourishing theory, in particular the nurturing of capabilities, will be discussed in depth in the section discussing consequences.[1]

[1] See section 6.3.3.1.

6.2.1 A democratic notion of property?

As discussed in section 5.3.5, one example of a normative approach to progressive property theory was adopted by Singer in his "Property as the Law of Democracy" paper.[2] In this article, Singer argues that property theory should not have cost versus benefit considerations as its only focus, and, instead, concepts such as equality, democracy and liberty, though hard to define, should also be given as much attention.[3] Singer therefore views property law as a constitutional framework which requires norms and values to be identified and these can result in the introduction of new property rights, or limitations to the types of recognised property rights and their scope.

In order to determine if the community rights to buy have these progressive characteristics of Singer's understanding of property law as the law of democracy, it is necessary to consider the five questions raised by Singer in his article and analyse how the community rights to buy legislation relate to them. Each of these questions are discussed below:

6.2.1.1 What kinds of property rights can a democracy recognise?

In his discussion on this question, Singer focuses on the removal of types of property rights by a legislator if it is deemed that the rights should no longer be recognised in a free and democratic society. The Scottish Government has a recent history of taking such measures. For example, (a) the initial eradication, albeit slow, of some of the components of the feudal system was covered in Chapter Two, (b) the concept of primogeniture in succession law,[4] with its inherent inequality, was abolished in 1964[5] and (c) ultra-long leases were no longer recognised from 2015 following the enactment of the Long Leases (Scotland) Act 2012, introduced, in part, due to the use of conditions in these leases which "allow an inappropriate degree of control by a person who has little or no interest in the land."[6] The final abolition of the undemocratic system of feudal tenure in 2004, discussed in Chapter Three, was also of huge symbolic importance.[7] These actions were not taken primarily for economic, market-based reasons. Rather, analysis of Scotland's property law

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[2] Singer, "Property as the Law of Democracy"

[3] *Ibid* 1303.

[4] See section 2.2.3.

[5] Succession (Scotland) Act 1964.

[6] Discussion Paper on *Conversion of Long Leases* (Scot Law Com DP No 112, 2001) para 2.3. See also Report on *Conversion of Long Leases* (Scot Law Com No 204, 2006) para 2.3.

[7] Abolition of Feudal Tenure etc. (Scotland) Act 2000.

system by bodies such as the LRPG and the SLC determined that, for example, feudal tenure was outmoded and archaic. With the Government accepting the recommendation to abolish feudal tenure, it can be argued that the legislator recognised that feudal tenure was not a property law system which a 21st century democracy, with a focus on equality and social justice, should legitimately recognise.

As well as the removal of recognised rights, the legislator has also introduced new ones, in particular, the suite of community rights to buy. These do not have a wholly pecuniary focus and are an attempt to subvert the free market and individual freedom of choice, often seen as the backbone to a capitalist democracy, based on the view that this system was not achieving the modern goals that the democratically elected legislator had as its focus, such as equality, social justice and environmental sustainability. Due to the relative infancy of these new property rights, it is yet to be determined if they will result in the achievement of their social and environmental objectives, or what long term economic effects they will have, but it is important to recognise that the legislator has shown itself to be receptive to considering which property rights it will legitimately recognise or abolish, and will introduce new ones to promote modern day needs.

6.2.1.2 How many owners are consistent with democracy?

When introducing this question, Singer gives the example of the Hawaiian island of Linai, which at the time of his article was populated by 3,135 people but 98% of the land was owned by one individual.[8] This situation continues despite the fact, as he notes, that feudalism was abolished in this jurisdiction many years ago. He argues that if individuals are meant to have equal protection of the law and if this requires promotion of equal opportunities, then it is necessary to develop a property law regime which will achieve both these values. This results in Singer asking: "[h]ow many owners is enough?"[9] which he then follows up with, in relation to the island of Linai, "[w]ould it promote or violate property rights to take the land from [the Linai owner] and redistribute it to the thousands of islanders?"[10] As discussed in section 2.1, Scotland has continued to have one of the most concentrated patterns of ownership globally, resulting in the LRRG coming to the view that it is in the public interest to increase the number of land owners in Scotland.[11]

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[8] Singer, "Property as the Law of Democracy" 1308.

[9] *Ibid* 1310.

[10] *Ibid*.

[11] LRRG, "The Land of Scotland and the Common Good" Sec 24, para 30.

The Scottish Government have also highlighted the issue of the appropriate number of owners. For example, in their consultation on the future of land reform in Scotland, the then Minster for Environment, Climate Control and Land Reform, Dr Aileen McLeod, wrote:

> "If Scotland were starting afresh we would not be designing the pattern of land ownership we see today. Our aspiration is for a fairer and more equitable distribution of land in Scotland where communities and individuals can own and use land to realise their potential. Scotland's land must be an asset that benefits the many, not the few."[12]

Further, as discussed in Chapter Three, there have been the recent Government commissioned study and Scottish Land Commission report examining the consequences of diversification of scale and their effects on social and economic factors.[13] However, as highlighted in section 5.3.5.2, Singer notes that determining the appropriate level of inequality cannot be carried using quantitative methods or calculated using economic techniques. It requires value-based considerations.[14] It is a normative question to first determine what is an adequate level of opportunity and then to what extent should the property law system be used to generate such opportunity. He goes as far as stating that if it is not realistically possible for all individuals to acquire property to live a complete human existence, then these people will be deprived of the freedom which was the driver for the construction of a property system in the first place. The introduction of the community rights to buy will go some way to help achieve this goal, but it should be recognised that other measures will likely also be required.

6.2.1.3 Who can own property in a democracy?

For this question, Singer covers the examples of discrimination and the eviction of tenants due to rent arrears.[15] In the case of Scotland, the question of who can own property can be answered to include community bodies with the introduction of community rights to buy being viewed as a solution to help achieve democratic goals. As discussed in section 3.4.2, this was not a result of any in-depth analysis or comparative research but as there has been

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[12] Scottish Government, "A Consultation on the Future of Land Reform in Scotland" (2004) ii.

[13] See section 3.4.4.2.

[14] Singer, "Property as the Law of Democracy" 1312-13.

[15] *Ibid* 1313-1316.

a continued increase in the scope of these rights, it is clearly an approach that subsequent legislators have seen as appropriate and justifiable for achieving its objectives. Indeed, the longevity of the community rights to buy approach is in contrast with the yo-yoing of land reform policy and legislation introduced at the end of the 19th Century and start of the 20th Century following changes of government in Westminster, as described in Chapter Two.[16]

One issue, however, which has continued to be raised is what type of legal entities will be recognised and whether interest groups should be allowed to have land transferred to them through the community rights to buy.[17] The question of who can own community-held property in a democracy, as part of the community rights to buy legislation, still needs to be addressed.

6.2.1.4 How long do property rights last in a democracy?

As Singer highlights, usually property is not taken from an owner just because someone else thinks they need it more or could use it better, and, generally, a key purpose for a property system is stability.[18] However, a legislator, when considering, for example, how many owners is appropriate in a democracy, can then also be faced with deciding how much stability to protect. Singer is of the opinion that time plays a crucial role in a private property regime. He emphasises the importance of time when defining property, arguing that the legitimacy of a property right has to be determined by the consequences that exercising that right would bring at that period of time.[19] Singer argues that property rights must have the ability to be redefined as contexts change, in particular to ensure that the market system is available to all on an equitable basis in order to remove the possibility of unfair power distributions. He therefore critiques the view that a property right becomes fixed at the point of creation or acquisition and subsequent events or changes in society can have no effect on any aspects of this right. Changing circumstances mean that the definition and allocation of property cannot be fixed.

It is clear that the community rights to buy have adopted Singer's recommended approach. Necessary social and environmental changes, along with a publicised drive to reduce Scotland's concentration of ownership, mean both that the ownership right is not fixed at

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[16] See section 2.5.

[17] This is further discussed in section 7.3.

[18] Singer, "Property as the Law of Democracy" 1317.

[19] Singer, *Entitlement: The Paradoxes of Property* 174.

point of creation or transfer, and an owner, regardless of when or how they obtained the ownership right, should now have a legitimate expectation that the retention of their right is dependent on them using their land in a manner that does not unjustifiably harm others and promotes sustainable development. It is therefore defensible for the legislator to introduce a level of instability into the property system in order to ensure the advancement of progressive goals based on changing social and environmental factors, and to then provide for the security of community ownership identified as necessary to protect such interests

6.2.1.5 What obligations do owners have in a democracy?

To help answer this question, Singer considers the case of an owner who knocked down a department store in Boston's city centre and then left the empty land neglected to the detriment of the community.[20] Singer asks: "Does [the owner] have the right to put his own interests above those of the community, or does he have an obligation either to develop his property or submit to a taking by eminent domain for transfer to someone who will develop it?"[21] It appears that the Government has answered Singer's normative question with the latter. They have considered progressive norms and come to the view that forced transfers promote equality rather than violate it, and they see the protection of the community from harm as being of greater moral worth than allowing a landowner to use their land as they wish. While owners already had a number of legal obligations, the community rights to buy have shown that the Government is placing a use and management of land for furtherance of the achievement of sustainable development obligation onto landowners. It is requiring them to ensure that the social, economic and environmental needs of their community, both now and in the future, are met or the owner faces the land being removed from them.

6.2.2 A constitutional notion of property?

Van der Walt, it could be argued, takes a more radical stance to the normative component than the Singer approach discussed above, in particular as his theories are linked to the achievement of transformative changes in a sphere which yearns for stability and is resistant to change. However, as discussed in Chapter Three, Scotland's land reform programme, and in particular, the community rights to buy have been both pioneering in

[20] Singer, "Property as the Law of Democracy" 1319.

[21] *Ibid* 1323.

nature and predicted to potentially produce transformational outcomes. Does this mean that Scotland has been on a pathway to achieving Van der Walt's normative constitutional notion of property, including a greater level of a consideration of the overall qualities and features of the framework of the property system and the relationships between the elements as opposed to a doctrinal focus on individual property rights?

At the high level, it is apparent that it has, albeit that Scotland does not have the benefit of a written constitution at present. The Scottish Government has attempted to transform the property law system away from one which has a focus on individual rights and has instead set goals for what it wants it to achieve; a move away from a system that protects objects to one which focuses on promoting the advancement of progressive values. This is evidenced through examples such as (i) the LRRG setting the goal for land reform as the achievement of the common good in Scotland, the promotion of which benefits society as a whole, advances "the wellbeing of all the people in an area,"[22] and includes attaining objectives such as social justice, equality, realisation of ICESC rights and environmental sustainability,[23] and (ii) the policy memorandum for the latter of the Land Reform (Scotland) Bill stating that:

> "Land, both rural and urban, is one of Scotland's most fundamental and finite assets and is intimately linked to ideas of well-being, social justice, opportunity and identity and is key to both the success and development of its people and communities alike."[24]

However, perhaps the most significant move towards the achievement of Van der Walt's constitutional notion of property has been the introduction of the LRRS. As discussed in section 3.3, Part 1 of the Land Reform (Scotland) Act 2016 places a duty on Scottish Ministers to "prepare and publish a land rights and responsibilities statement"[25] which is defined as a "statement of principles for land rights and responsibilities in Scotland."[26] When considering the content of this statement, Ministers had to have regard for the achievement of various objectives, including promoting respect for human rights, supporting community empowerment, reducing inequalities arising from socio-economic

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[22] LRRG, "The Land of Scotland and the Common Good" Sec 2, para 8.

[23] *Ibid* paras 9-12.

[24] Scottish Government, "Land Reform (Scotland) Bill Policy Memorandum" 2015 para 3.

[25] Land Reform (Scotland) Act 2016, s1(1).

[26] *Ibid* s1(2).

disadvantage and increasing the diversity of land ownership.[27] The initial LRRS needed to be consulted on,[28] and finalised and published by Ministers one year after the provisions came into force,[29] therefore by 1 October 2017.[30] Subsequently, the LRRS must be reviewed every five years, and by section 3, Ministers must "in exercising their functions and so far as reasonably practicable, promote the principles set out in the land rights and responsibilities statement."[31]

The LRRS was first published in 2017,[32] and contains a vision[33] and six principles, which the Government describe as "high-level and ambitious and, together, provide a goal to work towards."[34] The stated aims of the published LRRS are threefold; (a) to inform Government policy and action, (b) to promote landowners or those responsible for land to consider the effects of their decisions on the achievement of the LRRS vision and to therefore encourage responses to modern day issues such as shortage of housing, societal imbalances and environmental concerns, and (c) to foster an understanding that as well as holding rights in land, individuals also have responsibilities in relation to how they use land.[35]

The opening principle of the LRRS is:

> "The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The

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[27] *Ibid* s1(3).

[28] *Ibid* s2(2). This was initiated on 16 December 2016. See Scottish Government, "Land Right and Responsibilities Statement: a consultation" (2016). Available at https://www.gov.scot/publications/land-rights-responsibilities-statement-consultation/

[29] *Ibid* s2(1).

[30] The Land Reform (Scotland) Act 2016 (Commencement No.1 and Transitional Provision) Regulations 2016 (SSI 2016/193) reg 2.

[31] Land Reform (Scotland) Act 2016, s3.

[32] Scottish Government, "Scottish Land Rights and Responsibilities Statement" (2017). Available at http://www.gov.scot/Resource/0052/00525166.pdf

[33] "A Scotland with a strong and dynamic relationship between its land and people, where all land contributes to a modern and successful country, and where rights and responsibilities in relation to land are fully recognised and fulfilled." *Ibid* 9.

[34] *Ibid* 7.

[35] *Ibid* 6-7.

> framework should support sustainable economic development, protect and enhance the environment, help achieve social justice and build a fairer society."[36]

Examining this principle, it clearly follows Van der Walt's highlighted dichotomy of a different use of terminology in private property law compared with public law. The above principle describes aspirations for what the property law system should strive to achieve and uses non-specific, non-defined and non-legal terminology. It is goal-oriented, non-technical, emphasises the features that the property system should have and, using Van der Walt's words, "involves greater attention for the overall picture of the property system."[37] And it is within this framework that the community rights to buy sit. The intention behind the measures is in tandem with the objectives contained in the principle. Democratically elected Ministers in a conflict situation have to make a decision, which can be appealed, to determine who should be the owner of a piece of land based not solely nor primarily on who is the registered owner on the Land Register or in the Register of Sasines. Instead, the Ministers must use value-based judgements, with consideration to explicit goals in the legislation, such as sustainable development, equality and the promotion of ICESC rights,[38] to determine which owner would more likely achieve public-law based goals and this decision could result in the forced removal of an ownership right from a private individual, which will promote the likelihood of the objectives of the principle being achieved.[39]

6.2.3 Conclusion

Based on the above discussion, while it might not be the case that the Scottish Government have explicitly considered Singer's five questions or Van der Walt's constitutional notion of property law (and, if not, would arguably benefit from doing so), it is apparent that the intentions behind the community rights to buy can be justified by reference to progressive values and they go some way towards addressing the democratic and constitutional issues raised by Singer and Van der Walt. The community rights to buy have the characteristics of an approach to property law which focuses on objectives and not objects, and they have been introduced to promote the advancement of progressive values. Significantly, the establishment of these measures and the focus on value-based considerations can be

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[36] *Ibid* 9.

[37] Van der Walt, *Property and Constitution* 145.

[38] See for example, Land Reform (Scotland) 2016, s56(1)-(2), (13)-(14).

[39] There could also be an argument that, based on section 3 of the Land Reform (Scotland) Act 2016, Ministers, when making a decision, should consider which of the parties' intentions for the land was more aligned to the principles in the LRRS.

contrasted with the approaches to land reform discussed in Chapter Two. The driving force for the majority of land reform taken during the period examined in that chapter was to either strengthen the ownership right or curtail civil unrest. The community rights to buy therefore represent a step-change in the focus of land reform and the consequential transformative benefits.

6.3 Context, consequences, relationships and the pluralistic nature of the community rights to buy.

6.3.1 Introduction

The initial section of this chapter concluded that the intentions and goals of the community rights to buy could be justified by reference to the features which progressive property theorists posit a property system should adhere to, in particular, the use of property to advance progressive values. To determine if the community rights to buy could be classed as being progressive property measures, the next step is to examine if the approach taken in the legislation has comparable characteristics to the four common features of Alexander, Singer and Van der Walt's theories, as identified in section 5.5.1; context, consequences, relationships and pluralism. Each of these will be considered separately below. It should be highlighted that though these four areas are common in each of the three theorist's work, one of the writer's theories might receive more focus in a section due to it having a closer alignment with that topic.

6.3.2 Context

The ability to allow for contextual factors in conflict resolution is of key importance in Alexander, Singer and Van der Walt's property theories and all three scholars promote approaches which move away from mechanical formulistic methods of decision making. Instead, in order to promote societal values such as fairness, dignity and social justice, they argue that additional contextual-based factors should be considered in any decision matrix.

Examination of the process adopted for the community rights to buy shows that such a contextual approach to decision making has been realised. Indeed, the community rights to buy appear to enshrine Van der Walt's aspiration for a shaking of the foundations of the rights paradigm[40] because cases are not determined based purely on the relative strengths

[40] See section 5.4.2.

of the legal rights held by both parties. The legislator has realigned the strong right of ownership, based on policy grounds, in order promote justice-based land reform achieving its goals. The property system has been adapted in a manner that has changed the rights paradigm in such a way that having the ownership right does not provide the owner with the automatic power to trump all other claims.

Instead, the measures allow for the consideration of extraneous aspects of the parties in the decision-making process. While there are a number of requirements that need to be met in order for a community body to be able to submit an application, such as their legal constitution and a requirement for them to have a connection with the land, there are no explicit property rights that have to be held for the application to be considered by the Ministers. Decisions are then made using the material provided in the applications by both parties and others with an interest, and, while there is a prescribed form which needs to be submitted, the legislation does not place any restrictions on what type or quantity of information that can also be included in support of the application. This approach fits closely with Van der Walt's theory because it recognises that the context is important in dispute resolution, it removes the traditional hierarchy of rights approach to property claims and aligns with Van der Walt's view, quoted in section 5.4.2, that a vital part of reforming the rights paradigm requires the:

> "reconsideration of the relative significance of ownership in the rights paradigm, particularly with reference to land rights, since it is clear … that ownership-focused thinking plays an important part in upholding the paradigm and the socio-economic structures entrenched by it."[41]

As an example of the wealth of contextual information that can be provided to assist with decision making, the Helensburgh Community Woodlands Group, in its (albeit unsuccessful) application to justify the transfer of land,[42] introduce a significant number of extraneous factors into their conflict with the landowner, none of which are title related. For example, they show how their proposals for the land are in tandem with the Scottish Government's intended National Outcomes for Communities, Economy, Environment, Health and Human Rights, namely:

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[41] Van der Walt, *Property in the Margins* 52.

[42] Decision Notice for Application Case Number AB00001.

- We live in Communities that are inclusive, empowered, resilient and safe
- We have a globally competitive, entrepreneurial, inclusive and sustainable economy
- We value, enjoy, protect and enhance our environment
- We are healthy and active
- We respect, protect and fulfil human rights and live free from discrimination[43]

and the application details how the community body's intention for the land will help to achieve five of the 17 UN's Global Goals for Sustainable Development:

- Goal 3: Ensure healthy lives and promote well-being for all at all ages
- Goal 4: Quality education
- Goal 11: Make cities inclusive, safe, resilient and sustainable
- Goal 13: Take urgent action to combat climate change and its impacts
- Goal 15: Life on land[44]

Lastly, the community body list a number of (a) environmental and amenity benefits, (b) social, educational and health benefits and (c) economic benefits to justify why the transfer of the land from the private owner to the community body would be in the public interest.[45] This therefore provides Ministers with a portfolio of factors, including social and environmental aspects, to be considered when determining who, in their view, should be the owner of the land, which would normally not be applicable in a traditional ownership claim.

It should also be re-emphasised that decisions of Ministers can be appealed to the Sheriff Court. As discussed in section 4.5.5, to date, the court has avoided examining the merits of the applications following an appeal.[46] However, if, during an appeal by a community body following a rejected application, it was decided that the content of the applications could be considered by the court, it would be interesting to see how the court would deal

[43] *Ibid* 13-14.

[44] *Ibid* 17-20.

[45] *Ibid* 12-13.

[46] Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 206.

with the non-legal, non-property law-based factors of the case and their ability to trump an ownership right. Would the rights paradigm start to be adopted?

For example, Ministers have a statutory requirement to consider the ICESCR in their decision making.[47] At present, ICESC rights are not enshrined in legislation and therefore are not currently justiciable. It is therefore not possible for a community body to appeal a decision claiming that the rejection was in breach of their ICESC rights. It is, however, within the competence of the Scottish Parliament to introduce such legislation. While the common law does not allow Scottish courts to consider ratified treaties as being binding if the treaty has not been incorporated into domestic legislation,[48] Boyle notes that in *Whaley & Anor v Lord Advocate*[49] it was ruled that the list of reserved matters in the Schedule 5 of the Scotland Act 1998 does not include observing and implementing international obligations.[50]

Boyle highlights that the Scottish Equality and Human Rights Committee (EHRiC) in 2018 considered how to develop the role the Scottish Parliament has in being a guarantor of human rights, but with no specific focus for this Committee on compliance of economic and social rights.[51] However, Boyle also comments that there have been proposals to incorporate the UN Convention of the Rights of the Child into legislation and the First Minister's Advisory Group was recently tasked with examining the potential incorporation of human rights, including economic, social, cultural and environmental rights into domestic law.[52]

Since the publication of Boyle's book, the Scottish Government have introduced a bill to incorporate the UN Convention of the Rights of the Child into Scottish law.[53] While this

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[47] See, for example, Land Reform (Scotland) Act 2016, s56(14)(b). Disappointingly, in terms of the ICESCR in the Helensburgh Community Woodlands Group decision, all that was provided in the decision response was: "In reaching their decision under section 97G(2) of the Act, Scottish Ministers have had regard to the International Covenant on Economic, Social and Cultural Rights." Decision Notice for Application Case Number AB00001 29.

[48] *Moohan & Anor v The Lord Advocate* [2014] UKSC 67 para 30.

[49] [2003] ScotCS 178 para 44.

[50] K Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (2019) 244-245.

[51] *Ibid* 117.

[52] *Ibid* 243. Information on the First Minister's Advisory Group on Human Rights Leadership is available at https://humanrightsleadership.scot/

[53] See https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill

bill passed stage three on 16 March 2021 with unanimous approval,[54] the UK Government is challenging aspects of the bill as it is of the view that it could place obligations onto them and therefore would be outwith the competence of the Scottish Parliament. The case has been referred to the Supreme Court for a ruling.[55] It remains uncertain at this time if the Scottish Government will subsequently introduce similar legislation for the ICESC rights.

Based on the above discussion, it is clear that context can play a key role in the determination of community rights to buy applications by the decision makers and, potentially, the court. This allows for a move away from a focus on individual property rights and results in the community rights to buy sharing the common contextual feature prevalent in Alexander, Singer and Van der Walt's progressive property theories.

6.3.3 Consequences

As well has having a common context focus, section 5.5.1.3 highlighted that the property theories of the Alexander, Singer and Van der Walt are also consequentialist in nature. The scholars encourage an approach which allows for decision makers to be able to have consideration for the potential effects that a property rule or a conflict resolution will have on the relevant parties. The community rights to buy have a similar consequential focus with the requirement for a successful community body application to show that the transfer of land will achieve, among other things, the goal of sustainable development and the removal of harm. The next two subsections will explore this consequential aspect in detail, looking first at positive consequences and then negative consequences.

6.3.3.1 Positive consequences

The criteria which need to be met for a successful community right to buy application shows that the measures have a consequential focus; furthering the advancement of sustainable development. This approach potentially has a close relationship with Alexander's theory, discussed in Chapter Four, that the human flourishing concept is the moral foundation for property law and the objective goal of a property law system is to ensure that individuals are given the necessary capabilities to live a good life.[56] In

[54] *Ibid*.

[55] See https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56725145

[56] See section 5.2.1.

Alexander's view, the capabilities that humans need to flourish are life (including health), freedom, practical reasoning and sociability. Further, in Alexander's view, humans are dependent on others, for example, those in their community or the state, to make certain that these capabilities can be nurtured, including the provision of the material resources needed to achieve this. He therefore places a moral obligation on owners to ensure that those in their community can flourish.

This theory appears, on the face of it, to be closely aligned with what the Government is trying to achieve with the community rights to buy and its sustainable development focus. This raises the question on what is the relationship between human flourishing and sustainable development; are the two analogous? To answer this question requires both a comparison of their definitions and a determination as to whether or not sustainable development is an objective concept. As discussed in section 5.2.1, Alexander places considerable weight on his human flourishing approach being of moral worth due to its objective nature. In his view, people should be able to recognise the inherent goodness of the human flourishing concept, even if it is something that they do not agree with or aspire to achieve, and the objectiveness of human flourishing provides a device for recognising that there are ways of living which are fundamentally harmful. It could be argued that this ties very closely with the concept of sustainable development.

For example, the definition of sustainable development in the Brundtland report: "Development that meets the needs of the present without comprising the ability of future generations to meet their own needs"[57] has an evident goal for the current populace to live a well-lived life, and is ensuring that future generations are left with a planet which will allow them to also live a good life. Similarly, the then Scottish Executive's 2005 sustainable development strategy with its drive to enable humans, both now and in the future, to "satisfy their basic needs and enjoy a better quality of life"[58] is interchangeable with the latter part of Alexander's high-level description of human flourishing: "a life of dignity, self-respect and satisfaction of basic material needs."[59]

Further, these sustainable development definitions are objective. While someone might wish to live in a way that does not help to ensure that future generations have the ability to

[57] Brundtland Commission, "Our Common Future" 41.

[58] Scottish Executive, "Choosing Our Future" 1.3.

[59] Alexander, *Property and Human Flourishing* 5.

live a well-lived life, and though there can be many interpretations on what the definition of sustainable development is,[60] the inherent moral goodness in sustainable development would be hard to argue against.

Based on the above discussion, it can be argued that the Scottish Government's community rights to buy suite shares elements of Alexander's human flourishing theory, albeit at the conceptual level. Applications for the transfer of land are approved only if such will achieve the key consequential goal of furthering the achievement of sustainable development, and which will therefore subsequently result in future generations having the chance to have a well-lived life. At a detailed level, the question still to be addressed is whether successfully meeting the sustainable development goals of the Scottish Government, which need to be evidenced in a community right to buy application in order for Ministers to provide their consent, will promote the achievement of each of Alexander's four capabilities required in order to flourish? These are considered below.

6.3.3.1.1 Capability one: life (including health)

The link between the life capability and sustainable development is self-evident. A continued good quality of life, and the improved health of both the populace and the planet are driving factors behind sustainable development and therefore the community rights to buy. For example, the approach adopted to sustainable development taken by the Scottish Government in the "Meeting the Needs - Priorities, Actions and Targets for Sustainable Development in Scotland" 2002 document, which communities are asked to consider when making their application,[61] states that social justice is central to their view of sustainable development and this includes a "healthy nation in which everyone can live in good health or has access to help if that is not the case."[62]

Further, when considering an application, Ministers must have regard to relevant non-Convention rights such as ICESC rights,[63] and article 12 – the right to health, provides a "right of everyone to the enjoyment of the highest attainable standard of physical and

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[60] This is discussed in section 7.4.1.2.

[61] Scottish Government, "Community Right to Buy. Guidance for Applications made on or after 15 April 2016" (2016) para 87. Available at https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/03/community-right-buy-guidance-applications-made-15-april-2016/documents/00497051-pdf/00497051-pdf/govscot%3Adocument/00497051.pdf

[62] Scottish Executive Environment Group, "Meeting the Needs…" (2002) para 5.

[63] For example, Land Reform (Scotland) Act 2016, s56(13)-(14).

mental health."[64] Another example of a focus on the life capability is contained in the Land Reform (Scotland) Act 2016, where there is obligation placed on the Ministers, when determining if the sustainable development conditions have been met, to consider effects to public health, social wellbeing and environmental wellbeing as part of their investigation into the benefits or harms that could arise from granting (or not granting) their consent to the application.[65]

Alexander provides an example on how decision makers can use consequential thinking in relation to this capability in their decision making. In the US Supreme Court case *Graham v Estuary Properties, Inc*,[66] the court stopped a landowner exercising their right to destroy a mangrove forest by enforcing a wetlands environmental regulation. While the court appeared to take a harm versus benefit viewpoint in their decision, Alexander provides a consequential justification for the outcome, stating that as the physical health of the community is intricately tied to the ecological health of the forest and the forest is part of the infrastructure which is necessary for the supporting and nurturing of the human capabilities which are a basis for a well-lived life, then, using his human flourishing approach, that owner has an obligation to ensure that the community's health is maintained.[67]

6.3.3.1.2 Capability two: freedom

Alexander highlights that the freedom capability includes the freedom "to make deliberate choices among alternative life horizons."[68] This links closely with what a successful community rights to buy application should achieve. For example, the crofting right to buy is allowing crofters to own their crofts and therefore shape their own futures and the pre-emptive community right to buy increases the likelihood of a community taking ownership of property in order to improve its sustainability and self-reliance. Further, the Community Empowerment (Scotland) Bill policy document highlighted the Government's view that Scotland's people "are best placed to make decisions about our future, and to know what is needed to deliver sustainable and resilient communities,"[69] and, in the discussion on

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[64] International Covenant on Economic, Social and Cultural Rights (1966). Available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[65] Land Reform (Scotland) Act 2016, s56(12).

[66] 399 So.2d 1374 (Fla. 1981).

[67] Alexander, "The Social-Obligation Norm in American Property Law" 800.

[68] Alexander, *Property and Human Flourishing* 7.

[69] Scottish Government, Community Empowerment (Scotland) Bill Policy Memorandum para 3.

community rights to buy, the Government highlights that "control of assets can be a key factor in making a community more attractive to live in, supporting economic regeneration and sustainable development."[70] Similarly, the policy memorandum for the later Land Reform (Scotland) Bill, when introducing the community right to buy to further sustainable development, highlighted that how land is used will impact local communities, and when communities have "been unable to influence development decisions and cannot access land for their own development, this can have detrimental impacts,"[71] with the introduced measures providing communities with ability to make an application for a transfer of land to counteract this consequence.

The freedom capability is also relevant for the landowner. While the community rights to buy can restrict the freedom of landowners, Minsters have to consider the views of the landowner and the consequences that the transfer of the land from their patrimony would have on them. It is then for Ministers to make a value-based decision on what freedom they were going to curtail. However, there is a further constraint on freedom in the community rights to buy. The focus on sustainable development requires for the use and management of land to be shown to be living within the Earth's limits. This could lead to a divergence between community empowerment and sustainability.

6.3.3.1.3 Capability three: practical reasoning

The practical reasoning capability, including the ability to understanding "planning and evaluation, causes and consequences, self-restraint and discipline"[72] is more difficult to link to a successful community right to buy application than the others but the approach adopted does have the potential for achieving this. For example, similar to the discussion on health above, article 13 of the ICESCR provides a right to education for everyone and the guidance notes for the pre-emptive community right to buy provide, as an example of a sustainable development initiative, the "improvement or provision of new amenity for locals and visitors in terms of access, interpretation and education."[73] Further, the reduction of social disadvantage and the improvement of education provision within the

[70] *Ibid* para 53.

[71] Scottish Government, Land Reform (Scotland) Bill Policy Memorandum (2015) para 176.

[72] Alexander, *Property and Human Flourishing* (2018).

[73] Scottish Government, "Community Right to Buy. Guidance for Applications made on or after 15 April 2016" para 89.

community as a consequence of the transfer of land to the community body could result in improvements to the practical reasoning in the community as a whole.

6.3.3.1.4 Capability four: sociability

The communal aspect of community rights to buy have a clear potential to develop sociability within a community through improvements to community cohesion and advances in community empowerment. As the policy memorandum for the latter Land Reform (Scotland) Bill highlights, unsustainable communities suffer from inhibited social activity.[74] Also, when discussing sustainable development, the pre-emptive community right to buy guidance notes highlight potential sociability enhancements such as access to participate in the community body's project and improvements to recreation facilities and local amenities.[75]

From the above discussion, it is apparent that the transfer of land to a community body following a successful community right to buy application which has evidenced how such a transfer will result in the furtherance of sustainable development, can enhance the nurturing of the four capabilities needed for human flourishing in varying degrees. When considering whether the criteria for consent have been met, in particular the sustainable development requirements, Minsters will have to determine if the claimed consequences for the transfer (or for the status quo) are likely to occur, thus meeting the second of the common progressive property theory requirements.

6.3.3.2 Negative consequences

As well as allowing for the consideration of the likely achievement of positive consequences as a result of the transfer of land to a community body, the community rights to buy also attempt to address the potential negative effects of land use and management. This raises the theoretical question as to what are the sorts of harms and situations where a legislator should intervene to remove or minimise negative consequences and is the approach taken in the community rights to buy defensible theoretically.

As discussed in section 5.3.4, Singer defines a negative externality as the occurrence of an adverse effect on an individual which has a moral importance and one in which the law

[74] Scottish Government, Land Reform (Scotland) Bill Policy Memorandum (2015) para 143.

[75] Scottish Government, "Community Right to Buy. Guidance for Applications made on or after 15 April 2016" (2016) para 89.

should intercede. He takes the view, therefore, that there is a role for the legislator to determine when property rights are resulting in negative externalities and what harms legislation should acknowledge and prevent as opposed to those they can legitimately ignore. In particular, he is of the opinion that there can be a clear link between property norms and negative externalities through examination of what are the instances when "an owner has exceeded the scope of her property rights by imposing legally relevant harm on others."[76] Singer highlights that this occurs in all private property systems because owners are allowed to impose some harm on others, but there are also limitations in place, for example, the right to exclude can be restricted by public policy.[77] Determining property rules and conflict resolution therefore requires judgements about interests.[78] These should be protected if the use of a property right results in a legally relevant negative externality because it "imposes a particular kind of externality that one should not be entitled to impose on others and therefore exceeds the rights of the owner."[79] Clearly such a rule is fluid; externalities cannot be frozen in time; as societies change, so do the harms that should be legally recognised.

This raises the question as to whether the Government has adopted such a negative externality approach in the community rights to buy legislation. Examining the legislation, it is evident that, apart perhaps from the pre-emptive right,[80] such an approach to property norms has been built into the consent criteria to a varying extent. It is clear that this method has been used in the specific example of the community right to buy detrimental land; a negative externality has to be occurring because the legislation requires that for the land to be eligible, the landowner's current use or management of the land is harming, or could cause harm, either directly or indirectly to the environmental wellbeing of the community.[81] The legislation also then ensures, it could be argued, that this is a legally (and morally) relevant externality through the requirement that this harm should not be negligible in the opinion of Ministers[82] and the harm is likely to continue if the owner

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[76] Singer, "How Property Norms Construct the Externalities of Ownership" 61.

[77] *Ibid* 64 & 76.

[78] *Ibid* 70.

[79] *Ibid* 78.

[80] It could be argued the other way for the pre-emptive right to buy and those excluded from purchasing the land are being imposed with a negative externality.

[81] Land Reform (Scotland) Act 2003, s97c(2)(b).

[82] *Ibid* s97C(3)(a)(ii).

retains ownership of the land.[83] To ensure that the new owner, the community body, does not then continue to cause this form of negative externality, the legislation also requires that the intentions of the community body, in terms of the use or management of the land, will remove or substantially reduce the harm to the community as a consequence of the transfer of land.[84]

Harm to the community is also included in the community right to buy to further sustainable development, and is not restricted to environmental harm. For this right, the legislator has come to the view that an owner should not be allowed to retain their land if, among other things, it is likely to result in harm to the community,[85] and Ministers have to look at potential negative consequences to the community on areas such as public health, economic stability, social welfare and environmental degradation as part of their decision matrix.[86] Further, the type of negative externality in this case is also not necessarily one which is currently occurring at the moment of the community body's application. It can be the expected effects resulting from the intentions of, or the inaction by, the landowner. As a result of the Government determining this to be a legally relevant harm, Ministers can therefore approve the transfer of land to a community body if they are of the opinion that the long-term plans for the landowner's management of the land would exceed the rights of that owner due to the consequential long-term social, environmental or economic harm to future generations.[87]

To conclude this subsection, it should be highlighted that Singer raises a potential circular issue with his negative externality argument. Granting a community right to buy against the wishes of a landowner will necessarily be at the expense of the owner and therefore would result in a type of negative externality. The important question, in Singer's view, is what should be determined first in a dispute; property rights or externalities? If it is property rights, then it could be argued that the community body and/or the Government have no basis for limiting the freedom of the owner to act as they wish. However, if it is externalities which are to be considered first, then it becomes necessary to examine the

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[83] *Ibid* s97H(5)(c).

[84] *Ibid* s97H(5)(a).

[85] Land Reform (Scotland) Act 2016, s56(2)(d).

[86] *Ibid* s56(12).

[87] For example, for the community right to buy abandoned or neglected land, there is a requirement that "the achievement of sustainable development in relation to the land would be unlikely to be furthered by the owner of the land continuing to be its owner," and therefore evidenced harm in the long-term is necessary. Land Reform (Scotland) Act 2003, s97H(1)(c).

consequences of individuals' actions on others to allow for the competing interests to be balanced and only then define who has a property right.

It appears that the Government has moved to the latter approach. It is the causation of the owner's use and management of the land that is of paramount importance. If a landowner cannot evidence that their actions will result in sustainable development and therefore protect the future needs of their community, Ministers can decide that the ownership right of that land should be held by the community body who can then achieve this as a consequence of the transfer of land. However, there can be legitimate interests on both sides, for example, the landowner might also have valid plans for the use of the land. Singer states that "the only way to escape this circularity loop is to make a normative judgement about whose interests are legitimate and, if there are legitimate interests on both sides, to consider carefully which interests should be given priority when they clash."[88] How the Ministers will or should deal with such instances will be discussed below in relation to the pluralism inherent in the community rights to buy.[89]

6.3.3.3 Conclusion

The above analysis showed that, as argued for in the progressive property theories of Alexander, Singer and Van der Walt, the community rights to buy have a consequential outlook. The advancement of sustainable development, which is required to be evidenced and then used by Minsters when deciding whether to consent to the transfer of land to a community body, will, as a consequence, result in improvements to social, economic and environmental concerns. A successful community right to buy application should also progress the nurturing of the capabilities identified by Alexander as being required to flourish. There is a further consequential aspect to the community rights to buy with their drive to eliminate the negative effects which poor land use or management can cause, and land can be forcibly transferred from a landowner's patrimony to a community body if it can be shown that, as a consequence of this, the harm will cease.

6.3.4 Relationships

The third common feature of the progressive property theories of Alexander, Singer and Van der Walt is relationships, not only between individuals and objects but between

[88] Singer, "How Property Norms Construct the Externalities of Ownership" 63.

[89] See section 6.3.5.

individuals themselves. For example, as part of the entitlement model, Singer's view is that owners cannot act without considering others and he claims, for the sakes of decency, entitlements can only be justified to the extent that they are compatible with the legitimate interests of others. This relational aspect appears to be in tandem with the Government's intention with the community rights to buy. Community rights to buy provide a legal basis for the transfer of ownership to a private entity based on the legitimate interests of others, including, but not restricted to, the community that the landowner is a part of. While perhaps not going as far as placing an obligation on a landowner to consider the effect of their actions on their community, the legislator has provided a power to those individuals adversely affected through their relationship with the landowner and the landowner's use or management of their land to counteract this. Further, the legislation also provides another relational legitimate interest test in that the approval of the transfer of land must be in the public interest. Importantly, this public interest test is not restricted to solely the parties in conflict. It includes the nation as a whole,[90] including any individuals or groups which would be affected by the exercise of the right to buy. While the latter is an explicit requirement for the crofting right to buy scheme,[91] (and the other community rights to be buy would be enhanced by adding this provision), it could be argued that this requirement is also implicit in the public interest test criteria included in each of the other community rights to buy legislation.

6.3.5 Pluralism

As discussed in section 5.5.1.4, progressive property theory is pluralistic with inherent indeterminacies. This is also true of the community rights to buy. When considering a community right to buy application, and, in particular, the context, consequences and relationships elements, Ministers can be faced with incommensurable choices. For example, Ministers could encounter both an application from a community body with land use plans which would further the achievement of sustainable development and a set of intentions from the landowner which would promote the achievement of different strands

[90] In Land Reform (Scotland) Act 2016, the public interest test also requires consideration on the effects of granting (or not granting) the application on land use in Scotland. Land Reform (Scotland) Act 2016, s56(10)(b).

[91] Land Reform (Scotland) Act 2003, s74(2).

of sustainable development. This could lead to the similar situation of trying to compare the achievements of Bach and Shakespeare.[92]

This concern arose during the scrutiny of the later Land Reform (Scotland) Bill where the issue was raised as to what would occur if an application had evenly balanced sustainable development improvement claims made by both the community body and the landowner as a result of their plans for the land. When questioned, the Government confirmed that the presumption in such cases would be for the community body, stating that "whilst applications would be assessed on a case by case basis, in certain circumstances, well managed land could be subject to the new right to buy provision, providing that all the tests set out in the Bill had been met."[93] This raises questions of legal certainty, with landowners who are using their property in a manner which is furthering sustainable development still facing the potential forced transfer of their land to another private entity body, and, more importantly, whether such an approach is justifiable from a progressive property theory standpoint.

Alexander discussed a consideration of the constellation of values which the decision makers have or have been working towards as a potential solution to this concern,[94] while Singer recommended careful consideration for which of the competing interests should be prioritised.[95] Could such approaches be adopted by the Scottish Ministers if faced with a decision on two incomparable but beneficial plans for land management or use, and if so, what value-based instruments should they make use of? For example, Ministers could take cognisance of the Government's land use strategies and policies to see which of the two applications fits closest with the current aspirations of the legislator. Or would it be appropriate to use the LRRS, which the Ministers have a duty to promote, to help with decision making in such cases?

The answer could be a simple one. One of the key goals for Scotland's land reform program since the advent of the LRPG has been to produce a different shape for ownership in Scotland, and, in particular, grow the proportion of land held by communities. It could therefore be argued that if two intended uses for land were made which would evidently

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[92] Alexander, "Pluralism and Property" 1043.

[93] Scottish Parliament, "10th Report, 2015 (Session 4): Stage 1 Report on the Land Reform (Scotland) Bill" (2015) para 250.

[94] See section 5.2.5.

[95] See section 5.3.4.

both result in sustainable development, then the Ministers should consent to the community body's application as this would help to achieve the legislator's other drive for a greater diversity of land ownership by increasing the amount of community owned land. Such an approach would have the benefit of transparency and foreseeability.

Theoretically, it could be argued that this approach brings in a subjective slant into the sustainable development test. Community ownership is a drive of current policy, with little scientific backing, and will not necessarily make gains to well-living in itself. Perhaps when faced with two equally good but incommensurable plans for the use of the land, the decision on which one to select should be carried out explicitly as part of the public interest test, at which point it would be acceptable for a subjective view of the public interest, as viewed by the democratically elected decision makers, to be introduced and which would not be at the expense of the objective sustainable development criteria. Therefore, if it was not possible to make a decision based purely on the two different intended uses of the land due to them being incommensurable, Ministers could make their decision based on which one was more in the public interest, for example, and based on current Government policy, the re-shaping of Scotland's land ownership pattern. This would be theoretically justifiable as it is linked to the decision makers' constellation of values and the selection is being made based on which option sits closest with Ministers' priorities and overall vision.

To date, the Scottish Ministers have yet to deal with the issue of two beneficial but incomparable planned uses for land. In the two community right to buy abandoned, neglected or detrimental land rejected applications (though not as a result of the sustainable development test), when considering the land use and management intentions in the submissions of the community body and the current landowner, the Ministers have come to the other two possible conclusions. In the Helensburgh Community Woodlands Group application,[96] the Ministers, when considering whether plans for the use of land were compatible with furthering the achievement of sustainable development, concluded that the community body's intentions were not compatible with this being attained,[97] but were of the contrary view that the land being continued to be held by the current owners would not hinder the advancement of sustainable development.[98] While in the case of the

[96] Decision Notice for Application Case Number AB00001, available at https://roacbl.ros.gov.uk/AB00001.html

[97] *Ibid*, section 6.3, page 21.

[98] *Ibid*, section 6.4, page 25.

Woollcombe Square Residents Association's application,[99] the Ministers were not satisfied that the community body's plans were compatible with the furthering the achievement of sustainable development[100] but were also of the view that it was unlikely that sustainable achievement would be attained if the owner of the land continued to be the owner.[101]

While the Scottish Government has recognised the necessary pluralistic, holistic and integrated approach to sustainable development thinking, stating that it cannot be achieved "simply by weighing competing demands in the balance"[102] and making clear that it is "not a matter of economic development versus environment,"[103] it remains to be seen how Ministers will address this if and when they have to decide between two incomparable but both beneficial plans for the use and management of land in a community right to buy application.

6.3.6 Conclusion

This section of the chapter considered the relationship between the community rights to buy and the similar characteristics identified from the progressive property theories of Alexander, Singer and Van der Walt; context, consequences, relationships and pluralism. Through a detailed examination of the intention behind and the approach taken by the Scottish Government with the community rights to buy, it was evident that these four common factors are prevalent and therefore it can be concluded that the community rights to buy are aligned to the aspirations of a progressive property law system. Context is allowed for in the decision making through an unrestricted allowance for supplementary supporting documentation in an application, while consequences, it could be argued, underpin the legislation, with the drive to achieve sustainable development and the power given to Ministers to transfer land to a community body without the consent of the landowner when the outcome of this has been shown will remove harm and result in positive outcomes to the community. Thirdly, relationships, in particular, those between a landowner and the community they belong to, was a driving concern behind the introduction of the measures, with the behaviour and actions of a landowner and the effects

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[99] Decision Notice for Application Case Number AB00003, available at https://roacbl.ros.gov.uk/AB00003.html

[100] *Ibid*, section 6.3, page 11.

[101] *Ibid*, section 6.4, page 12.

[102] Scottish Executive Environment Group, "Meeting the Needs…" para 14.

[103] *Ibid.* Emphasis in original document.

this has on others, being factors which will be considered by Ministers when deciding whether to agree to a forced transfer of property to a community body in order to improve the community collectively, including its future generations. Lastly, it is clear that the approach to the community rights to buy was pluralistic, in particular with the requirement to show how the planned use and management of land will further the achievement of sustainable development. The decisions matrices used by Minsters cannot be reduced to a single value and the advancement of a number of progressive objectives can be relevant when deciding whether to consent to an application.

Given the context, consequence, relationship and pluralism aspects of the community rights to buy, it can therefore be concluded that the community rights to buy are justifiable from a progressive property theoretical stance. However, while the legislation does meet this benchmark, it is not clear to what extent the alignment is between the community rights to buy and Van der Walt views on the scope for how far property law measures should be used to achieve transformational change. The relationship between Van der Walt's divergent views, as compared with those of Alexander and Singer's, and the community rights to buy is examined in the remainder of this chapter.

6.4 Theoretical differences and the community rights to buy

6.4.1 Introduction

In the preceding part of this chapter, it was shown that the introduction of the community rights to buy were justified based on progressive values and the measures share the key common features of progressive property theories, with a focus on context, consequences, relationships and pluralism. In order to determine the extent to which the community rights are aligned to progressive property theory, the remainder of the chapter will consider how the adopted approach fits with Van der Walt's conflicting views in the areas of centrality, property as the guardian of other rights and social obligations.

6.4.2 Centrality

As discussed in section 6.4.2, one of the key differences between the work of Alexander and Singer, when compared with Van der Walt's theory, is their views on the centrality of property rights, in particular, the ownership right, with Van der Walt contesting the viewpoint that having property should be seen as being the norm. The community rights to

buy legislation has strong links with Alexander and Singer's centrality approach which focuses on the ownership right as the overriding solution to the achievement of social goals. Based on their theories, Alexander and Singer would likely argue that the Government correctly examined how Scotland could achieve societal goals such as sustainable development, social justice, equality and fairness from within the property law sphere and found the answer to be community rights to buy with its measures allowing for the ownership right to be transferred from one legal person to another to meet these objectives. This is in contrast to Van der Walt's view that we need to move away from the "having property is the norm" position; clearly the community rights to buy adhere to this perceived notion. The community rights to buy approach of allowing for ownership to be transferred from one person to another is therefore not actually decentralising property in any meaningful way, ownership is no more permeable than it was before and the rights to buy are promoting ownership as a norm.

Further, while the community rights to buy do allow for those in the margins, with no property rights, to bring their circumstances into the matters being considered by the Ministers, at the point of transfer of ownership, the community body then becomes the decision maker as to how to improve the position of those on the margin. Those in the margins within a community can therefore remain there unless the community body itself mitigates their situation. This can have the effect of the Government moving its commitment to achieving the various stated goals, for which they are democratically accountable, on to community bodies. Without closely monitoring the attainment of the stated intentions for the community body's use and management of the land, on which the transfer of the land was determined,[104] it will not be transparent if the progressive-based objectives, now the responsibility of the community body, are being achieved nor if the negative effects resulting from an entrenchment of ownership, as identified by Van der Walt, have been removed.

6.4.3 Property as the guardian of other rights

As discussed in section 6.4.3, Van der Walt argues against the viewpoint that a legal system should protect private property in order to safeguard other non-economic rights or to promote societal values, which he denotes as property as the guardian of other rights. On the face of it, it appears that the Scottish Government has adopted measures that go

[104] For example, using Land Reform (Scotland) Act 2003, s67B. See section 4.7.

against the commonly held opinion that property is the guardian of other rights because it has developed its property system in a manner that does not always protect private property rights in order to achieve certain societal goals such as sustainable development. The legislator has therefore recognised the modest status that property rights should have and moved towards a system which recognises and protects normatively superior non-property rights at the expense of certain private property rights, such as the ownership right.

However, the Government clearly then sees private, community ownership as the conduit to achieve their goals and therefore the legislator appears to be viewing community ownership as the guardian of other rights, a paradox raised by Robbie and Van der Sijde, based on Van der Walt's work.[105] When a jurisdiction with an unequal distribution of the ownership right introduces measures to mitigate this it will necessarily result in conflicts between those who have the rights and those that do not and result in a potential further entrenchment of those rights due to a continued prioritisation for the primacy of ownership. In Van der Walt's view, the way out of this paradoxical situation is to place property within a broader system of values, where those suffering from the negatives effects of the current ownership pattern can be given a greater level of attention, in this case, it could be argued, a community body.

This raises the question as to whether the Government's aims could be attained through different approaches. As will be discussed in section 7.2, there were numerous instances during the scrutiny of the bills containing the various community rights to buy legislation, where something less than ownership was suggested, such as land leasing arrangements. If the advancement of sustainable development can be met through other methods, then, it could be argued, these should be introduced instead of or, at least, alongside the community rights to buy. For example, the approval of a community right to buy could be found to be infringing A1P1 of the ECHR[106] if it did not pass a fair balance test.[107] One of the elements of this test is whether "other, less intrusive measures existed that could reasonably have been resorted to by the public authorities in the pursuance of the public interest."[108] If such approaches existed, then justification is necessary to show why they

[105] Robbie and Van der Sijde, "Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability" at 606-607.

[106] For discussion on A1P1, see section 3.4.5.

[107] European Court of Human Rights, "Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights" (2021) para 90. Available at https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf

[108] *Ibid* 155.

were not used. This would have particular relevance if less invasive solutions to the concerns raised by a community body were included in the landowners' response to the application. Interestingly, there is a requirement in both the community right to buy abandoned, neglected or detrimental land and the community right to buy to further sustainable development that the community body has previously tried to buy the land,[109] but not a condition that they also make a request to the landowner to implement their planned use for the land or to adopt methods to achieve their formulated objectives.[110]

It does, however, appear that the Government have foreseen such eventualities. For example, in the community right to buy to further sustainable development, such proportionality requirements are built in to the consent criteria, such as the transfer of land "is the only practicable, or the most practicable, way of achieving that significant benefit,"[111] while the community right to buy abandoned, neglected or detrimental land requires that requests have been made to the relevant regulator to address the harm.[112] It remains to be seen whether these provisions and/or Van der Walt's argument will provide sufficient grounds to justify a human rights infringement.

6.4.4 Social obligations

The final of the divergent viewpoints to be discussed in this chapter are social obligations and consideration as to whether the Government is adopting a needs-based approach or allowing for no-property. Alexander and Singer attach social obligations to property rights, in particular, the ownership right. For example, Alexander's theory states that if as a population we agree with the objectivity of the achievement of human flourishing, then the social-obligation norm becomes relevant and results in a member of a society having an obligation to ensure that others in that society also have the ability to flourish.[113] Singer similarly views property as not something that simply needs to be protected. Giving legitimacy to someone to use their property should not, in his view, be justified if it left others without the means to live a dignified life.[114] Both Alexander and Singer's theories can therefore result in an individual in a community having their property rights restricted

[109] Land Reform (Scotland) Act 2003, s97H(1)(j), Land Reform (Scotland) Act 2016, s56(3)(a).

[110] Arguably another example of the Government's view of the centrality of community ownership.

[111] Land Reform (Scotland) Act 2016 s56(2)(c)(ii).

[112] Land Reform (Scotland) Act 2003 s97H(5).

[113] Alexander, "The Social-Obligation Norm in American Property Law" 774.

[114] Singer, *Entitlement: The Paradoxes of Property* 212-215.

if it is necessary in order to benefit others. Such a view is closely comparable with the approach adopted in the community rights to buy. While land can forcibly be removed from a landowner as a result of a successful community right to buy application, this can only occur if the body making the application has a connection with the land, and is therefore part of the same community as the owner, and it has some form of need.

Does this mean that the community rights to buy conflict with Van der Walt's views on social obligations? As discussed in section 5.5.2.4, while Van der Walt did share the importance for social responsibility, his concern was in regards to a legislator (a) only allowing for the poor as an afterthought to conventional ownership considerations, (b) operating on a needs basis rather than allowing for those with no property and (c) not removing the distinction between a presence or an absence of rights. Through the lens of Van der Walt's theory, it could be argued that the community rights to buy, with their resulting transfer of the ownership right from an individual to a legal person, the community body, are the continuance of a property regime which is "predisposed by its legacy of inequality, hierarchy, privilege, and power."[115] This raises the question: are the community rights to buy either protecting ownership or assisting those 'in need,' or are they reimagining the concept of property to take into account the interests of those who are not part of the established property elite? The answer to this is linked to the capabilities required both pre- and post the submission of a community right to buy application and this will be discussed in-depth in the next chapter. However, if the Scottish Government do have convergent ambitions to Van der Walt for the eradication of inequality, it is evident that they need to take cognisance of Van der Walt's theoretical work on the relationship between property and the margins, and use this to inform future land reform.

6.4.5 Conclusion

Section 5.5.2 identified the divergent views contained in Van der Walt's theories when compared to those of Alexander and Singer, centrality, guardian of other rights and social obligations. These three divergent areas were topics for which Van der Walt took a more radical stance to Alexander and Singer. Analysing the areas of centrality, guardian of other rights and social obligations shows a potential gap between the approach adopted in the community rights to buy and Van der Walt's goals. While values such as equality, dignity and social justice were the driving factors that the community rights to buy were meant to

[115] Van der Walt, "Property and Marginality" 105.

advance, this remains purely within the property sphere. A successful community right to buy is moving the ownership right from a "have" to a "have not" and is therefore continuing to entrench the views that having property is the norm and that ownership is the primary right.

6.5 Conclusions

This chapter considered the relationship between the property theories of Alexander, Singer and Van der Walt and Scotland's community rights to buy regime. It was initially concluded that the community rights to buy were aligned to progressive property theory. The introduction of the community rights to buy was justified through the Government's aim of achieving social goals and protecting and enhancing progressive values. With the intended focus on the advancement of a blend of social, environmental and economic objectives, there was a clear step change from the previous attempts at land reform discussed in Chapter Two. Moreover, through analysing the relationship between the community rights to buy and the four identified common characteristics in the property theories of Alexander, Singer and Van der Walt, it was found that the community rights to buy did share the features of context, consequences, relationships and pluralism, and were therefore aligned to the progressive property theories advocated by the work of these scholars. Extraneous factors, usually absent from a traditional property law conflict, could be submitted to support a community right to buy application and the effects of a decision on parties with different relationships with the landowner, such as the community and the nation, are explicitly considered as part of a Ministers' decision matrix. Further, the community rights to buy are consequential in nature, with a successful application only being approved if it can be shown that the transfer of land will, for example, promote the advancement of sustainable development. Lastly, the community rights to buy are pluralistic because they allow for Ministers to consider a number of values when considering right to buy applications.

Given the recent transformative land reform agenda and the drive to reduce inequalities, including those as a result of Scotland's long-standing concentration of significant areas of land being held by a small proportion of the population, Van der Walt's theories, concerns and the studies he carried out of the approaches taken in other jurisdictions should be relevant to the Government. When evaluating the extent that the community rights to buy were aligned to progressive property, this chapter covered a number of the gaps between his ambitions and current Government policy. For example, it needs to be realised that the

moving of the ownership right between different persons is not the only conduit to removing inequality in the property law sphere, and the views and experience of those on the margins of society need to be allowed for when introducing future land reform. It does, however, need to be recognised that there are potential difficulties in fully introducing Van der Walt's constitutional notion for property and the use of system of values in a country with no written or justiciable constitution. The next chapter builds on these conclusions, examining several of the approaches used in the community rights to buy to identify and recommend areas which could be enhanced in order to improve the likelihood of the progressive aims of the legislation being fulfilled.

Chapter 7 Rhetoric to Reality

7.1 Introduction

The previous chapter discussed the relationship between the progressive property theories of Alexander, Singer and Van der Walt, and Scotland's community rights to buy. It was concluded that the Government's intentions behind introducing these measures were aligned to the viewpoints of these theorists, albeit the policies and statutory processes were not as far reaching as the transformative outlook of Van der Walt. This chapter will now analyse a number of the specific areas of the community rights to buy from a progressive property perspective, identifying how they could be improved to close the gap between Van der Walt's aspirations and the attainment of the progressive aims of the legislation.

The structure of the chapter will follow the order in which these potential issues could arise. It will first consider two exclusionary elements of the community rights to buy; the approach adopted that only allows for the ownership right to be transferred, and the strict and territorial definition for what can be classed a community body. The next substantive section will identify and analyse issues which could arise when a community body is navigating their way through the community right to buy process, both in terms of complexity and capacity requirements. Lastly, the landowner can also play a role in circumventing the legislation or using the power which comes with ownership, and such factors are discussed next before the chapter ends with a set of conclusions.

7.2 Community ownership, centrality and property as the guardian of other rights

As discussed in the previous chapters, Van der Walt was of the view that the ownership right should not be treated as the guardian of other rights and that transformative change requires a move away from viewing individuals as either having or not having ownership. The experience of those on the margins need to be considered and they should not simply be treated as welfare cases for which property is provided as a sign of sympathy. As highlighted in the previous chapter, the legislator does not appear to be aligning the land reform intentions of the community rights to buy with this viewpoint. While measures have been introduced allowing for the ownership right to be removed from private individuals to promote and achieve progressive values, this results in simply transferring the same

perceived guardian of other rights on to another body, which then has the status and power that comes with having the ownership right.

It is not, however, evident why the aspirations for the introduction of the community rights to buy, such as the achievement of goals like social justice, equality and sustainable development, would be best met, or could only be accomplished, through the passing of this right of ownership to community bodies. For example, in Chapter Two, it was highlighted that one of the reasons for the failed attempts at previous ownership and community ownership land reform measures had been a lack of interest from tenants in converting their tenancy rights to ownership for a number of reasons.[1]

In line with this, during the consultation processes preceding the introduction of the community rights to buy, comments had been made about the focus being placed on ownership and not on other rights such as rights of use or leasing, or on community management of land. For example, the policy memorandum for the first Land Reform (Scotland) Bill stated that even if the pre-emptive community right to buy scheme was enacted, "it seems likely that many communities will prefer to pursue some form of community involvement short of outright ownership."[2] For the crofting community right to buy, the Executive were of the view that there would little impetus for "communities to take on the not inconsiderable burdens of ownership"[3] if there was currently a good relationship between the community and the landlord. Further, during the consultation for the later Land Reform (Scotland) Bill, complaints had been made about the Government's approach as it was felt that the proposed new community right to buy "over-emphasised the role of ownership in barriers to sustainable development over land use."[4] The Government also decided not to introduce non-ownership solutions such as enforced leasing, preferring for this to be achieved voluntarily between the parties.[5]

This ownership focus is particularly notable given Part 5 of the Community Empowerment (Scotland) Act 2015. This part, entitled Asset Transfer Requests, introduced a right allowing community bodies to request the transfer of not only the ownership right, but also

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[1] See section 2.5.

[2] Scottish Government, "Land Reform (Scotland) Bill – Policy Memorandum" (2001) para 21.

[3] *Ibid* para 25.

[4] Scottish Government, "A Consultation on the Future of Land Reform in Scotland: Analysis of consultation responses" (2015) para 6.34.

[5] Scottish Government, "Land Reform (Scotland) Bill, Policy Memorandum" (2015) para 190.

the lease or other property rights, of land or buildings owned by local authorities, certain public bodies and the Scottish Ministers if the community body was of the view they could use the property in a more beneficial way.[6]

Peacock, however, states that "[t]hrough the taking of the control that comes only with ownership, people have become empowered to deliver a more sustainable future."[7] Skerratt, through interviews with members of community bodies, identified a number of reasons for why communities have a desire to own the land they reside on.[8] The main driving factor she found was the recognition that "land is the foundation on which all other developments sit."[9] Therefore, the ownership of land allows bodies to make decisions on initiatives such as housing schemes, renewable energy developments and investments. Further, it places them in a position to generate economic development opportunities, resulting in benefits such as population growth and inward investment.[10] Ownership is therefore seen as a way to allow communities to control the future for later generations, in particular allowing them to carry out long-term projects rather than focusing on short-term planning. Communities had also found that ownership and subsequent successful management of the land had resulted in creditability gains, giving the body increased levels of influence and warranty in areas such as grant applications. Such had been the "catalyst for collective action, stewardship, and creative forward-planning development."[11] Skerratt also found there was an emotive element to ownership of land. Communities felt a deep attachment to the land based on the permanence and historical background to where they lived. Obtaining ownership to the land on which they lived therefore resulted in gains to confidence and increased proactive decision-making with a focus on the future.

Achieving these benefits, however, relies significantly on both the capabilities of the community and funding streams.[12] Skerratt writes that bodies have sought to buy land

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[6] Community Empowerment (Scotland) Act 2015, ss77-97.

[7] P Peacock "Land: For the many, not the few?" (2018) 9. Available at https://landcommission.gov.scot/downloads/5dd6c6f024659_Land-Lines-Land-Ownership-Peter-Peacock-March-2018.pdf

[8] S Skerratt, "Community land ownership and community resilience" (2011) 5. Rural Policy Centre Research Report.

[9] *Ibid*.

[10] *Ibid*.

[11] *Ibid*.

[12] This is discussed further in section 7.4.2.

because "[t]here is a knowledge that land is permanence"[13] and "land is never a liability, but always an asset."[14] Nevertheless, ownership can have downsides as well, for example, in situations where investment decisions go wrong, financial hardship occurs or tenants are discontent.[15] It could also be argued that a number of the above benefits highlighted by Skerratt do not require ownership but merely a greater role for communities in land management decision making or through the leasing of the land. Unfortunately, this was not covered in the approach adopted by Skerratt and there was a focus on why the communities decided to purchase the land they lived on. There was no consideration for other, less timely, costly and resource-heavy approaches that the community bodies would have preferred to have used to achieve the same goals nor what are the benefits which can only be achieved through ownership. This would have been a particularly useful area to have received feedback on from those who have had the experience of community ownership.

Further, obtaining views of those who have decided not to engage with the process due to the binary approach taken to the question of ownership and those generally excluded from such consultations, such as those on the margins, would allow the legislator to expand the scope of the community rights to buy appropriately. The legislation could then allow for the transfer of other types of rights (and tailor the process and criteria appropriately) if this could be evidenced to achieve the outcomes for which the measures were first introduced. Importantly, however, it should be recognised that due to the legislative provisions, community ownership, as opposed to private ownership, requires that surplus funds be re-invested for the benefit of the community rather than to the individual.[16] This issue of where surplus funds resulting from land management decisions should reside would need to be addressed if measures were introduced to provide communities with ability to obtain rights in land less than full ownership.

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[13] Skerratt, "Community land ownership and community resilience" 5.

[14] *Ibid*.

[15] For example, the Isle of Gigha Heritage Trust had problems such as the re-paying of a debt which was secured on the land owned by the community body. See The Sunday Herald, "A tale of two islands as Gigha dream turns sour" (2014). Available at http://www.heraldscotland.com/news/13190772.A_tale_of_two_islands_as_Gigha_dream_turns_sour/

[16] Fischer and McKee provide an example of this where the community had negative views of a landowner having a wind farm built on his land because "the revenue created would only accrue to the landowner, not to the community." A Fischer & A McKee, ""A question of capacities? Community resilience and empowerment between assets, abilities and relationships" (2017) 54 Journal of Rural Studies 187 at 191.

7.3 Definition of a community and communities of interest

As well as excluding those who are not interested in full ownership of land, the community rights to buy, in their current state, also exclude those who cannot meet the territorial definition of a community contained in the legislation. Lovett states that from a property theory perspective, "the relatively narrow conception of 'community' for the [community rights to buy] is defensible for now."[17] This might be the case in terms of the work of Alexander and Singer, in particular, the former's social-obligation norm and the latter's approach to justified expectations. However, the territorial approach, with its exclusionary nature, means that the community rights to buy are divergent to Van der Walt's vision. Groups such as Gypsy Travellers, who have historically faced inequalities and been excluded from land reform thinking,[18] and others in marginal positions cannot meet the required definition of a community and therefore have land transferred to them to advance the sustainable development of their communities.

It is therefore of note that Lovett also takes the view that the scope of the legislation may need to be extended to include communities of interest.[19] Indeed, the solely geographical basis for a community in the rights to buy legislation has been contentious. While Warren and McKee comment on the difficulty of defining community, stating that community is an "intuitive, relational concept which is difficult to pin down satisfactorily in law,"[20] Brydon & Geisler highlight that "Scotland's land reform law adheres to the place-based tradition."[21] As well as excluding interest groups whose membership may have legitimate interests in the sustainable development of areas of land, Combe also highlights it can have implications for areas of the country which have no residential communities.[22] As Warren

[17] Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's Compulsory Community Right To Buy" 196.

[18] See, for example, L Poole, "National Action Plans for Social Inclusion and A8 migrants: The case of the Roma in Scotland" (2010) 30(2) 245, Scottish Government, "Improving the Lives of Scotland's Gypsy/Travellers (2019-2021)" (2019) and House of Commons, Women and Equalities Committee "Tackling inequalities faced by Gypsy, Roma and Traveller communities" (2019).

[19] Lovett also notes that if the community rights to buy "increasingly gains a foothold in urban or peri-urban areas, geographic lines and postal codes could prove arbitrary and irrelevant in some cases." *Ibid*.

[20] Warren & McKee, "The Scottish Revolution? Evaluating the Impacts of Post-Devolution Land Reform" 26-27.

[21] Bryden & Geisler, "Community-based land reform: Lessons from Scotland*"* (2007) 31.

[22] Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 217.

and McKee state, "[m]aking a distinction between the geographic and the functional community is not only difficult but can also be divisive and counter-productive, excluding social capital which is much often much-needed."[23]

This issue has continued to be raised on numerous occasions since the introduction of the community rights to buy legislation. Requests have been made for communities of interest to be able to use the pre-emptive community right to buy scheme during the consultation on the initial Land Reform Bill. This was due to there being "sites where there is no resident community interested in acquisition, but environmental management [was] required to regenerate the land."[24] The proposal was rejected by the Government, stating they believed there were other measures available for this, but without providing any further elaboration on what these could be.[25] This was followed at Stage 1 of the first Land Reform (Scotland) Bill when the Justice 2 Committee recommended that that the "community of interest represented by Gypsy Travellers be addressed on the face of the Bill."[26] The LRRG later also stated the importance of communities of interest, defined as "social groups or networks with a particular shared focus,"[27] having an involvement in the management and ownership of land.[28] They provided examples of such groups as the Royal Society for the Protection of Birds and the National Trust for Scotland.[29] Similarly, SPICe's briefing paper for the Community Empowerment Bill noted that during the consultation process:

> "The most common view expressed […] was that communities should be able to define themselves according to interest in addition to place. A multitude of examples was provided, a selection being; arts organisations; people with disabilities; fishing interest groups; railway preservation groups; ex-soldiers;

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[23] Warren & McKee, "The Scottish Revolution? Evaluating the Impacts of Post-Devolution Land Reform" 27.

[24] Scottish Executive, "Land Reform, the Draft Bill" (2001) 24.

[25] *Ibid*.

[26] Justice 2 Committee, "Stage 1 Report on the Land Reform (Scotland) Bill Volume 1: Report (2001) para 15. The Committee also highlight the concern that requiring a community body to be representative of and supported by the local community "runs the risk of further marginalisation of communities such as Gypsy Travellers." *Ibid*.

[27] LRRG, "The Land of Scotland and the Common Good" Sec 15, para 11.

[28] *Ibid*.

[29] *Ibid*.

> wildlife preservation association; language group; ethnic group; people with mental health problems; church; and users of allotments."[30]

This concern is still prevalent. During Stage 1 legislative scrutiny of the later Land Reform Bill, the Rural Affairs, Climate Change and Environment (RACCE) Committee again raised the issue of the exclusion of communities of interest, recommending that the Government consider making them eligible to use the measures.[31] This was rejected by the Government, highlighting that a local community could form a partnership with a community of interest as the third-party purchaser.[32] However, they did pledge to examine this issue at a later date after noting issues raised by groups such as travellers, hutters and the Mountain Bothies Association.[33] It is not clear, however, why the Government did not feel it could support the amendment which would have allowed the Ministers to use their discretion to accept applications from such groups on an exceptional basis or circumstance.[34]

The refusal to include such groups is particularly notable when again comparing it with the approach adopted in Part 5 of the Community Empowerment (Scotland) Act 2015.[35] While eligible community transfer bodies are restricted to groups of over 20 members,[36] there is no requirement for the group to be defined territorially. Indeed, the Asset Transfer Requests guidance notes for communities includes the following:

> "A community can be any group of people who feel they have something in common. In many cases, it is that they live in the same area. However, it can also be that they share an interest or characteristic. Communities of interest could include faith groups, ethnic or cultural groups, people affected by a particular illness or disability, sports clubs, conservation groups, clan and heritage

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[30] SPICe, "Community Empowerment (Scotland) Bill" (2014) 15.

[31] RACCE, "Stage 1 Report on the Land Reform (Scotland) Bill" (2015) para 273. The committee "supports views that [the definition of a community body] should be flexible enough to go beyond a geographic or postcode based definition and include communities of interest. The Committee recommends that the Scottish Government reconsiders whether the provisions in the Bill are flexible enough to allow for this, and if not, amends the Bill at Stage 2 to rectify this."

[32] SPICe, "Land Reform (Scotland) Bill: Stage 3" (2016) 16.

[33] RACCE Committee, "Official Report 27 January 2016" (2016) 57.

[34] This was amendment 84. *Ibid* 55.

[35] This differing approach to the communities of interest was raised by Lovett. See Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's Compulsory Community Right To Buy" 195-196.

[36] Community Empowerment (Scotland) Act 2015, s80.

> associations, etc. They may be very specialised or local, ranging up to national or international groups with thousands of members."[37]

An argument not put forward by the Government, but which has been identified through research, is the relationship between conservation bodies and community groups.[38] There has been conflict between such groups based on differing objectives. For example, community groups have viewed conservation bodies (or third-sector organisations) as being too focused on achieving their specific objectives without taking into account the views of the community. However, the likelihood of this occurring could be considered by Ministers when reviewing an application made by a community of interest, in particular if the potentially affected community is allowed to express their views on the potential transfer. Finally, Lovett also raised the potential issue of the unintended exclusion of individuals from the wider social community from taking part in the community project which could result from allowing communities of interest to use the community rights to buy.[39] If communities of interest do become eligible to use the community rights to buy, then the issue raised by Lovett would require careful consideration by the legislator when defining the statutory requirements that a community of interest would have to meet.

In order to better realise the progressive aims of the legislation, and with a Government focused on the achievement of equality, diversification of ownership-type and the achievement of sustainable development, the exclusion of communities of interest requires either a robust justification or work should commence to allow such bodies to use the community rights to buy. It should be noted that the latter can be achieved by Ministers through their power to use regulations to include new types of community bodies.[40]

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[37] Scottish Government, "Community Empowerment (Scotland) Act 2015: community transfer bodies' guidance" (2017) para 5.12. Available at https://www.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-community-9781786527509/pages/5/

[38] For example, see Warren & McKee, "The Scottish Revolution? Evaluating the Impacts of Post-Devolution Land Reform" 33,

[39] Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's Compulsory Community Right To Buy" 196.

[40] Land Reform (Scotland) Act 2003, s34(A1)(b), s71(A1)(b), s97D(1)(b) and Land Reform (Scotland) Act 2016, s49(1)(c).

7.4 Complexity, capacities and the margins

Moving on from the discussion on the appropriateness of the exclusionary measures which only allow for the transfer of the ownership right and a territorial definition of a community, this section will now consider the accessibility of the measures for those who can and do want to use them. As Van der Walt has noted, property law is not just about the rights of owners, but also those affected by the property holdings of others.[41] Decision making should also allow for those in the margin to be viewed as persons and not positions.[42] While the community rights to buy go some way to addressing these views as they take into account the fact that a community body is the one with no property right in an application decision, there remains the question of whether there is a gap between the statutory measures and the transformative intentions of the legislator. Does the approach adopted suitably allow those on the margins of society to engage with the community rights to buy and subsequently result in improvements to inequality and social justice, objectives that Van der Walt considers property regimes should promote?

This section will therefore consider whether those in marginal positions can make use of the legislation in its current state. This will be achieved through examining the complexity of the community right to buy legislation and the capacity requirements placed on communities such as leadership skills, time and significant financial outlay. It will commence with an examination of issues linked to the complexity of the legislation, consisting of three areas (a) the complexity which is inherent in the statutory process itself, (b) the lack of a statutory definition for sustainable development and finally (c) the use of four different community rights to buy. The section will then move on to look at issues relating to how the community body can successfully, or otherwise, interact with the legislation and this will include (a) capacity and skill-set requirements, (b) financing a community right to buy and (c) who are the actual beneficiaries of the community rights to buy.

[41] See section 5.4.3.

[42] *Ibid*.

7.4.1 The Complexity of Community Rights to Buy

7.4.1.1 The complexity of the statutory process

As highlighted previously, one of the driving forces for the introduction of the community rights to buy was for the promotion of sustainable development through the reduction of land-based barriers faced by local communities.[43] If this is to be achieved, then it is clear that the legislation needs to be understandable and accessible by those who should be benefiting from the powers and would be making use of the community rights to buy, especially those on the margins; otherwise one barrier will have been removed and a new one introduced. It has been found, however, that the legislation as enacted requires parties to navigate their way through highly complex processes in relation to which various issues have been identified. As Wightman stated for the pre-emptive community right to buy, the "legislation is a complex and bureaucratic minefield with numerous obstacles all of which have to be negotiated expertly and exactly … [and] … given the policy aims of land reform, it is desirable any community with the desire to make an application should be able to do so with the minimum of effort."[44] Similarly, during the post-enactment scrutiny of the Land Reform (Scotland) Act 2003, it was found that a common complaint made by stakeholders about the pre-emptive community right to buy was the "time-consuming and complex nature"[45] of the provisions. The process was also viewed as having "excessive length and bureaucracy"[46] associated with it. Similarly, the "complexity and resource-heavy nature of implementation" [47] was seen as a deterrent to crofting bodies using the crofting community right to buy legislation.

That is not to say that attempted improvements have not been made. The introduction of the Community Empowerment (Scotland) Act 2015 had a stated intention to streamline and improve the right to buy process and the updated procedure was largely replicated for the community right to buy to further sustainable development. It appears, however, that the changes made by the 2015 Act did not go far enough. During the Stage 1 scrutiny of the community right to buy to further sustainable development, the RACCE Committee

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[43] LRPG, "Recommendations for Action" 4.

[44] Wightman, *The Poor Had No Lawyers* 349. This also has the potential to allow landowners to attempt to avoid their land being subject to the other community rights to buy through identifying errors in submissions. See section 7.5.

[45] Centre for Mountain Studies, "Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003" (2010) 76.

[46] *Ibid*.

[47] *Ibid* 104.

found that a common view was that it was "not sufficiently accessible and easy to understand,"[48] a problem exacerbated due to fact that the community rights to buy were designed to be used by parties such as community bodies, landowners and farmers. The Committee noted the evidence from Dr Robbie at the University of Glasgow who opined that lawyers would find the legislation difficult to interpret. Dr Robbie highlighted that such community bodies with limited available financial resources would find the expense of necessary legal expertise a barrier to them being able to use the community right to buy.[49] Such concerns do not appear to have been taken on board and the process for each of the four community rights to buy remains complicated, time-consuming and prone to submission errors.[50]

Interestingly, Wightman notes that the similar pre-emptive right to buy for tenant famers which was introduced in the Agricultural Holdings (Scotland) Act 2003 has a much simpler application process and prescribed form.[51] In his view it is this easier to navigate procedure which resulted in a significantly higher number of applications being submitted for this pre-emptive right when compared to the pre-emptive community right to buy.[52]

7.4.1.2 A legislative definition of sustainable development

A further aspect of the complexity of the community rights to buy legislation is in relation to the absence of a definition of sustainable development in the legislation. This could potentially make it difficult for community bodies to demonstrate how they meet the various sustainable development tests in the legislation.

Pillai, in 2010, noted that while the broad meaning of the term sustainable development was "readily comprehensible,"[53] there were, at the time, few available legal rules that could be used to interpret, enforce or challenge the principle of sustainable development in

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[48] RACCE, "Stage 1 Report on the Land Reform (Scotland) Bill" (2015) para 60.

[49] *Ibid* para 61.

[50] Indeed, as of 29 September 2021, one of the three requests made for the right to buy abandoned, neglected or detrimental land was rejected four months after the application was made due to the technical error that the map submitted included land not owned by the identified landowners. For the rejection letter, see "AB00002 - HCWG - Decline to consider letter - 220420.pdf" at https://roacbl.ros.gov.uk/AB00002.html

[51] Wightman, *The Poor Had No Lawyers* 355.

[52] *Ibid*. He notes that at 31 January 2013, there had been 1,148 registered interests from tenant farmers which was significantly higher than the 95 made by community bodies.

[53] Pillai, "Sustainable rural communities? A legal perspective on the community right to buy" 898

Scotland. She describes the changing approach in attempting to define sustainable development, with first the LRPG's approach using a loose definition which provided a "peg on which to hang the many facets of the land reform debate"[54] and that prioritised economic and social benefits. This was followed by an attempt to provide a definition in the first Land Reform (Scotland) Bill. The definition, "development calculated to provide increasing social and economic advantage to that community and protect the environment"[55] was subsequently removed due to concerns about how to ascertain a suitable balance between the pillars of social, economic and environmental interests. The Land Reform (Scotland) Act 2003 therefore did not include any definition, which resulted in Combe writing that this "offhand treatment of sustainable development is most unfortunate."[56]

The lack of definition did result in a number of issues following the implementation of the 2003 Act. The Centre for Mountain Studies' research found that community bodies were not encountering issues meeting the sustainable development test.[57] The strongest criticism was the Act was actually inadequate when it came to sustainable development with interviewees commenting on the easiness of evidencing the promotion of sustainable development using consultant-produced "best case scenarios."[58] Unease was also raised that there was a "dangerous overreliance on economic sustainability and an undervaluing of social sustainability."[59] For the latter issue, Pillai found similar results when examining the applications made between 2004 and 2008, with only just over a half of the applications including environmental objectives.[60]

This issue remains a concern. Indeed, in 2015, the Scottish Government's commissioned analysis of the responses received to the "Consultation on the Future of Land Reform in Scotland" publication found that a common complaint was the lack of definitions for terms such as sustainable development. For example, one respondent highlighted that "what one party may perceive to be sustainable development […] may not appear so from another

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[54] *Ibid* 899.

[55] Scottish Executive, Land Reform (Scotland) Bill (2001), s31(3)

[56] Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 220.

[57] Centre for Mountain Studies, "Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003" 81.

[58] *Ibid*

[59] *Ibid*.

[60] Pillai, "Sustainable rural communities? A legal perspective on the community right to buy" 902.

perspective."[61] The RACCE Committee also raised concerns about the definition of sustainable development. During Stage 1 of the later Land Reform (Scotland) Bill, the committee stated that "it is essential that the principle of sustainable development is both understood and supported by people across Scotland, and has an accepted and well-understood basis in law."[62] It therefore pressed the Government to clearly define terms such as sustainable development.[63]

This has not been done, but is of importance. Indeed, Pillai highlights that the pre-emptive community right to buy (and subsequently the later community rights to buy) does not have an "overt mechanism for requiring integration of the three pillars"[64] of social, economic and environmental benefits, which could lead to the adoption of a market-centric approach. This is at odds with the progressive property justification for the community rights to buy. In particular, it hinders Van der Walt's promoted move away from "practices that legitimately entrench and protect individual property holdings and the market economy within which they function."[65] This is made clear by Ross when she recently wrote that:

> "If applicants and decision-makers are unsure of what sustainable development means in the context of land reform they will be reluctant to move away from the status quo."[66]

It should be noted, however, that, legally, the Inner House of the Court of Session did not find the lack of definition of sustainable development to be problematic. It was ruled that, in relation to the management and use of land, "the expression sustainable development is in common parlance"[67] and "[i]t is an expression that would be readily understood by the legislators, the Ministers and the Land Court."[68] Therefore, to better attain the progressive goals of the legislation by avoiding Van der Walt and Ross's concerns of entrenchment and a continued status quo, attempts to reduce complexity through the inclusion of an explicit

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[61] Research Shop, "A Consultation on the Future of Land Reform In Scotland: Analysis of consultation responses" (2015) 50.

[62] RACCE, "Stage 1 Report on the Land Reform (Scotland) Bill" (2015) para 82.

[63] *Ibid* paras 271-272.

[64] Pillai, "Sustainable rural communities? A legal perspective on the community right to buy" 904.

[65] Van der Walt, *Property in the Margins* (218)

[66] Ross, "The Evolution of Sustainable Development in Scotland" 250

[67] *Pairc Crofters Ltd v The Scottish Ministers* para 56.

[68] *Ibid*.

definition for sustainable development in the legislation would have to be made in the political arena rather than through the courts.

7.4.1.3 Why 4 separate processes

A final aspect of the complexity of the legislation for discussion is that there are now four different community rights to buy in Scotland, all with similar processes, purposes and goals. This issue was discussed during Stage 1 scrutiny of the later Land Reform (Scotland) Bill. Views were raised on how the community right to buy to further sustainable development related to the other community rights to buy legislation, with bodies not sure which they should be using in a given instance.[69] It is not clear if the Government addressed this concern or whether work was carried out to determine if all the regimes could be merged into one piece of legislation. Further, it is not evident (a) if community bodies will continue to use the pre-emptive community right to buy given they can now achieve a forced sale through use of the two newer community rights to buy, (b) whether bodies will start to make multiple applications for one piece of land using the various rights to buy in case one fails, and (c) community bodies will attempt to convert their pre-emptive right into a forced sale.

It could be argued that separate schemes are required due to the differing tests, but these could be amalgamated into one single piece of legislation. This is likely what the LRRG were expecting when they recommended that community bodies "should have the opportunity to use a range of statutory land rights which are defined to suit different needs and circumstance."[70] This so called "Menu of Land Rights" should, in their opinion, be made up of (a) a Right to Register an Interest over Land, (b) a Right of Pre-emption to Buy Land, (c) a Right to Request to Buy Public Land, (d) a Right to Buy Land and (e) a Right to Request a Compulsory Purchase Order over Land. This Menu would then contain the "thresholds of requirements to be met for each right [progressively increasing] … with the increasingly significant nature of the rights involved."[71] Such an approach would clearly have merits and would make the suite of community rights to buy more accessible and understandable to interested parties. It could also have the added benefit of merging the

[69] RACCE, "Stage 1 Report on the Land Reform (Scotland) Bill" (2015) para 247.

[70] LRRG, "The Land of Scotland and the Common Good" Sec 17, paras 12-26.

[71] *Ibid* Sec 17, para 25.

public registers which hold applications and supporting documentation submitted during the process into one single register.[72]

In a similar vein, it is also not evident why improvements which were made to subsequent Acts were not replicated into the previous schemes. For example, the community right to buy to further sustainable development has an explicit requirement that the effects on the landowner are taken account of[73] and there are expanded human rights considerations.[74] It also introduced a proportionality-based threshold where the transfer of land has to be the practicable, or the most practicable method of achieving the claimed benefits.[75] Further, there is an explicit direction in the crofting community right to buy for the Ministers to take into account all affected sectors when determining if the public interest requirement has been met[76] and an exclusion placed on land which has previously been purchased by the crofting community body using this right to buy and then subsequently sold.[77] Lastly, there are the post-application monitoring measures in the pre-emptive community right to buy but which are absent from the others.[78] Amalgamating the community rights to buy into one piece of legislation would therefore also allow for a more consistent approach to be adopted across the four rights to buy. This would make the measures more accessible to those for which the legislator intended to use them and therefore enhance the fulfilment of the measure's progressive objectives.

7.4.1.4 Conclusion

The three subsections above have highlighted complexity issues which are inherent in the current community rights to buy. They make the measures difficult to navigate and can result in insurmountable obstacles for either those considering making a community right to buy application, or, for those who do engage with the process, achieving a successful outcome. To help achieve Van der Walt's argument of a legal regime that focuses on the objectives of legislation and to ensure that community rights to buy fully realise the value-

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[72] See for example, the Register of Community Interests in Land at http://rcil.ros.gov.uk/RCIL/default.asp?category=rcil&service=home and the Register of Applications by Community Bodies to Buy Land at https://roacbl.ros.gov.uk/

[73] Land Reform (Scotland) Act 2016, s56(10)

[74] *Ibid* s56(13).

[75] *Ibid* s56(2)(c)(ii).

[76] Land Reform (Scotland) Act 2003, s74(2).

[77] *Ibid* s74(1)(g).

[78] *Ibid* s67B.

based objectives, these statutory concerns should be addressed to reduce the byzantine approach currently in the legislation.

This should start with a merger of the four community rights to buy into a single piece of legislation with a common approach adopted where appropriate. As highlighted by Wightman,[79] the simpler process followed in Agricultural Holdings (Scotland) Act 2003 should be examined and used to adapt the complex process in the community rights to buy. Further, there have been concerns raised in various parts of this thesis on various provisions in the legislation which could be simplified, in particular to make them more accessible to those on the margins. This includes setting up community bodies in a particular legal form, which requires initial financial outlay and legal advice. As detailed earlier, such a requirement is not necessary for a community body to submit an Asset Transfer Request.

There have also been continual requests for a definition of sustainable development to be included in the legislation. This would increase the level of certainty about what Ministers require from community bodies for their decision-making and result in more successful applications. Further, there was the concern raised by Combe that the criteria for consent in the community right to buy to further sustainable development was setting potentially too high a bar. To date, there have been no applications in the nineteen months since this right to buy came into force. The Government therefore needs to focus on the objectives of the legislation and re-consider what is the appropriate level of statutory consent criteria needed for these to be achieved. Lastly, the concern of Van der Walt that private law can be used to frustrate public law objectives, sometimes at the instigation of landowner,[80] has been occurring and applications are being rejected out-right for not meeting one of the many requirements of the legislation. To enhance the legislation achieving its progressive aims, the measures would be improved if community bodies could remedy such situations, when appropriate, without the need to start the process again.

Until the process is simplified, in particular to consider the skillsets and resources that the intended beneficiaries of the community rights to buy have, it remains likely that Dr Robbie's identified barrier will remain reality and the Government's progressive intentions of empowering those communities who need it and increasing diversification of

[79] Wightman, *The Poor Had No Lawyers* 355.

[80] See section 5.4.1.

ownership-type will not be met. This capabilities issue will be examined in the next section.

7.4.2 The Capacity requirements of the Community Rights to Buy

7.4.2.1 Introduction

As discussed above, the community right to buy legislation is complex in nature and places a number of resource intensive requirements on community bodies. This raises the question of which capacities and skill sets a community body must possess in order for them to make use of the powers available to them. In particular, in terms of Van der Walt's theory of property in the margins, do groups on the margins of society have the necessary capacities and skills to make use of these measures? Or have the community rights to buy further marginalised such groups in favour of those who have readily available access to such resources, and who may therefore receive even further benefits through the transfer of land. To consider such questions, this subsection will examine (a) the capacities and skill-sets needed to use the measures, (b) the financial requirements throughout the process and (c) the main beneficiaries of the community rights to buy.

7.4.2.2 Capacities and skill-set requirements

Having the necessary capacity and skillset were found to be key in the results of the Scottish Government's commissioned impact analysis of the pre-emptive community right to buy. Comments such as "determination, energy and motivation of key people"[81] were repeatedly cited as being essential for navigating the process. During the post-enactment scrutiny of the Land Reform (Scotland) Act 2003, it was similarly found that, along with the complexity issues discussed above, the workload required, both during the process itself and then following the purchase of the asset, was dependent on the skill sets of the members of the community body.[82] Those community bodies containing specialists such as directors and accountants had found the process more straightforward compared to those with limited means and capabilities.[83]

[81] Ipsos MORI, "Impact Evaluation of the Community Right to Buy" para 3.16.

[82] Centre for Mountain Studies, "Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003" 78.

[83] *Ibid*.

Such a view was echoed by the National Health Service (NHS), who made the following statement on inequalities during Stage 1 scrutiny of the later Land Reform Bill:

> "There seems to be a presumption in the proposed right for community bodies to buy land that all communities are equally placed to benefit. However, the resources needed to facilitate community purchase and management of land may be distributed unevenly between communities. Affluent communities are likely to have better access to the range of technical, specialist and managerial skills as well as valuable external connections."[84]

Skerratt, through discussions with 16 community land trusts, identified the skills and capacities which are required for a community land purchase and post-purchase activities.[85] Skerratt groups the required attributes by stage of the process:

Pre land purchase or transfer (2-7 years)	Confidence to start the process Strength of purpose Desire to do something different Doers rather than simply visionaries Persistence and doggedness Administrative & financial skills
1-5 years post land purchase or transfer	Project management Financial & legal skills Securing revenue streams Ongoing estate management Personal negotiation & diplomacy Communication and engagement with community Time and energy Board governance External communication & relationship-

[84] RACCE, "Stage 1 Report on the Land Reform (Scotland) Bill" (2015) paras 88 and 92.

[85] Skerratt, "Community land ownership and community resilience" (2011) 6. She notes that such trusts are generally made up of volunteers, though occasionally external partners or paid development officers are also included.

	building Lobbying on behalf of the community
5+ years post land purchase or transfer	Ability to keep being innovative Identifications & realisation of ongoing revenue streams Rotation of board members Succession planning and implementation Maintaining community buy-in External engagement & relationship maintenance Lobbying and policy influence[86]

This wide-ranging list of significant personal skill requirements reinforces the NHS concern regarding potential inequalities, which will likely be further exacerbated for smaller communities. It also led Skerratt to conclude that "although every community has the capacity to carry through land purchase and subsequence development of assets, not every community has the resources or capacity within their community."[87]

Of these skills and capacities, research in this area has shown that strong leadership is key, in particular, the ability to deal with conflict and ensure robust communication is provided to all stakeholders. Without such, traits such as mistrust and apathy can occur.[88] For example, strong leadership would be essential in the relatively small community area studied by Fischer and McKee, in order to achieve a state where "a general level of trust is established that assumes that everybody's contribution is valued in principle."[89] This is particularly relevant given their hypothesis that to achieve community change required "multiple factors and their interactions [to be taken] into account"[90] Bryden *et al* similarly state that "places lacking in solidarity, trust, and association are likely to have lower levels

[86] *Ibid* 6.

[87] *Ibid* 7.

[88] *Ibid* 8.

[89] Fischer & McKee, "A question of capacities? Community resilience and empowerment between assets, abilities and relationships" 54.

[90] *Ibid*.

of well-being and general welfare than those endowed with these qualities."[91] Lastly, leadership would also be required to deal with potential inequalities which may be created and/or maintained within a community, if the proposed development of the land benefits and/or excludes a particular population group.

If Van der Walt's goal of inclusion is to be realised, dealing with this capacity and skillset issue is essential to the success of the community rights to buy, in particular as the scope of the rights have now been extended, both in terms of eligible land and purpose. The NHS's concern is valid, and with the progressive goals of the Government's land reform including the achievement of social justice and fairness, the ability to use the legislation has to be fair and accessible to all, and in particular, those in the margins. Further, with the central sustainable development focus of community rights to buy meaning that the acquisition of land has to result in long-term benefits, there is a requirement for meeting the capacity needs over an extended time period following the point of initial transfer. It is therefore clear that continuing localised support and training needs to be available for those communities who wish to use one of the community rights to buy but who do not have the ready access to the required capabilities.

7.4.2.3 Financing community right to buy

Similarly to the personal skill-set requirements discussed above is the question of the financial resources which are necessary for a community body to make use of the community rights to buy. Lovett and Combe highlight the importance of funding for a successful community right to buy application, noting that it is required at various stages of the process, from initial seed money to scope out the project, create a business plan and form the community body, to the funds needed to make the actual purchase.[92]

As Skerratt wrote in 2011, the "Land Reform (Scotland) Act 2003 creates the *right* to buy; however, it is the [Scottish Land Fund] that creates the *financial means* to buy."[93] The Scottish Land Fund (SLF) was introduced in February 2001 and during its five years of existence it funded 250 grants to 188 community groups to purchase, maintain and develop

[91] Bryden & Geisler, "Community-based land reform: Lessons from Scotland" 25.

[92] See Lovett & Combe, "The Parable of Portobello: Lessons and Questions from the First Urban Acquisition Under the Scottish Community Right-to-Buy Regime" 211. Though not covered in the section on funding, the community body also used a consultancy firm to help with the community ballot and engaged their own valuer.

[93] Skerratt, "Community land ownership and community resilience" 10. Italics are Skerratt's.

land at a cost of £13.9m.[94] Of note, the SLF's budget came from lottery funding and was not public money. The SLF was subsequently replaced by the Growing Community Assets fund, also lottery funded but not ring-fenced for Scottish land matters and the promotion of land reform.[95] In 2011, a research report stated that there was "consensus from all community land trusts that the [SLF] must be reinstated."[96] This was followed in 2012 by the SNP introducing a new SLF, initially with a three year budget of £6m and which was extended to four years with an additional £3m budget.[97] This fund was to assist with reaching the Government's previous target of an additional 500,000 acres of land being owned by community bodies by 2020.[98]

This new SLF, along with the Government's target, results in a number of issues. Hunter *et al* provide the logistical example of achieving the target by comparing the size of the Auch and Invermearan Estate with the market value for the estate. This piece of land was 28,000 acres and therefore just over 5% of the Government's target of new community owned land, and which the cost for the estate was £11.4m, 25% more than the SLF's four year budget in total.[99] Wightman also raises a political concern that this money is now publicly funded. He states that the use of the funds will be "subject to rather greater scrutiny and may well become rather more politicised than the previous lottery-run programme."[100] Lastly, with a number of authors highlighting the importance of funding for the longevity of community right to buy, it is not clear how the schemes will be able to continue to operate if such funding was again removed. This is especially the case for the community right to buy to further sustainable development with its wide-ranging definition of eligible land and a successful application requiring the funds to be paid in the six-month window after the consent decision.[101]

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[94] Wightman, *The Poor Had No Lawyers* 199

[95] Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* 187.

[96] *Ibid*.

[97] Hunter *et al*, "Towards a comprehensive land reform agenda for Scotland. A briefing paper for the House of Commons Scottish Affairs Committee" (2015) para 6.3. Available at https://www.parliament.uk/globalassets/documents/commons-committees/scottish-affairs/432-Land-Reform-Paper.pdf

[98] *Ibid*. Also, see section 3.3.

[99] Hunter *et al*, "Towards a comprehensive land reform agenda for Scotland" para 6.4.

[100] Wightman, *The Poor Had Now Lawyers* 200.

[101] Land Reform (Scotland) Act 2016, s64(2).

The issue of funding streams is of particular concern for those on the margins who may have no financial outlay and could face significant difficulties in generating the necessary funds. For the Government to realign the property regime to achieve a fairer society, as in principle one of the LRRS,[102] it needs to adopt Van der Walt's conceptualisation of marginality to take account of those who are not currently part of the elite, for example, those with no property or ready access to funding, and robustly address the financial aspect of the rights to buy. As Skerratt writes, "[c]ommunity land ownership is not a quick fix. It is a long-term plan, and is an investment in livelihoods that will shape Scotland's communities and their sustainability for many decades to come."[103] If the legislator adheres to this transformative vision, then it needs to continue to assist in the financial requirements behind such an investment. At present, the removal of funding streams could result in those who most need the advancement of progressive goals, such as reducing inequality and improving social justice, not being able to use the rights to buy. The approach to funding could be more closely aligned with Van der Walt's progressive outlook if decision makers for individual funding awards took into consideration the context and position in society of the party making the application and considered the likely consequences of providing funding to meet the advancement of progressive values. Ring-fencing funding for unrepresented groups such as those on the margins would also enhance the progressive outcomes of the legislation and allow for consideration of groups generally excluded from land reform, an approach promoted by Van der Walt.

A further funding issue is the method used to determine what compensation is due to the landowner for the transfer of land to the community body. How does the community right to buy legislation's approach to pecuniary matters compare with progressive property theory on this topic? Lovett describes the process and criteria used to determine what compensation a landowner (or tenant) will receive for the loss of their property (or tenancy) following a successful community body application as "[p]erhaps the weakest, or at least the least imaginative"[104] provisions in the latter two community rights to buy. He states that while the criteria that Ministers have to consider before providing consent to an application is both contextual and has a human-flourishing basis, the compensation method adopted uses a singular market-based metric. This approach therefore does not allow for

[102] See section 6.2.2.

[103] Skerratt, "Community land ownership and community resilience" 10.

[104] Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's Compulsory Community Right To Buy" 204.

any subjective factors to be considered apart from a consideration as to what someone else might pay due to something specific with the land.[105]

Unfortunately, compensation is not an area that receives particular focus in the writings of Alexander, Singer and Van der Walt.[106] However, arguably the valuation provisions are at odds with the contextual, consequential and relationship elements necessary for the measures to be even classed as progressive, let alone going as far as the aspirations of Van der Walt's for the transformation of the property regime to achieve a constitutional notion of property, resulting in the promotion of social-economic justice and a more equitable allocation of the benefits of private ownership. Community bodies cannot argue that the determined compensation amount should be reduced based on the contextual social situation. For example, it is not possible for a community body to request that Ministers or the independent valuer consider the mutual advantage to the landowner that will arise as the consequence of the intended use and management of the land. Indeed, the only way subjective matters can be accounted for are those from the landowner which could increase the valuation of the land. In order for the progressive aims of the legislation to be better attained, including the promotion of equality, Lovett's comments should be taken into account. The valuation provisions should therefore be expanded to allow for interested parties to introduce relevant factors for consideration during the assessment of the value of the land.

7.4.2.4 Positive impacts – to Community or Community Body?

The final of the three capacity elements which could result as a barrier to fully achieving the progressive aspirations of the community rights to buy is the inconsistency which has been found between who the Government believes should benefit from the community rights to buy and who, in fact, does. This is of particular relevance if the intentions of the community body included measures to improve the situation of those who have been excluded from society or who are living on the margins, and whether community bodies readily have the capacities and foresight to deal with this issue. It raises the question in

[105] See, for example, Land Reform (Scotland) Act 2016, s65(6). Lovett provides the example of what a member of the family might have paid to ensure that the property was retained. Lovett, "Towards Sustainable Community Ownership" 205.

[106] For Singer's discussion on the relationship between US regulatory takings and just compensation, see J Singer, "Justifying Regulatory Takings" (2015) 41 Ohio Northern University Law Review 601.

relation to community bodies, can they and are they passing on their capacity gains to others?

Ipsos MORI uncovered an interesting distinction between community bodies and the community itself when exploring the achievement of the identified outcomes for the pre-emptive community right to buy legislation. While finding that the measures had resulted in a number of successful outcomes for the community bodies, the results for the community as a whole were more mixed. For example, an increase in knowledge and skills was more prevalent in the community body than within the community.[107] Also, the participation in other community initiatives or activities were, in the main, "confined to members of the community bodies, rather than members of the wider community."[108] They conclude that there can be a disconnection between who benefits from the outcomes of a community right to buy, with a significant number being associated with the community body, and those benefits for the wider community harder to ascertain.[109]

Such a worrying conclusion could mean that the progressive community empowerment goals of the community rights to buy are being frustrated, with those on the margins being excluded and not benefiting from the measures. Further, it could lead to a concern of Wightman's who stated that "[i]f the most appropriate solution is a diversity of forms of tenure, is that fact that Knoydart or Gigha or South Uist are now owned by one large-scale landowner (albeit under community control) any better than what it replaced?"[110]

7.4.2.5 Conclusion

These three sub-sections have considered the capacities and resources needed for a successful community right to buy. It was highlighted that a significant range of skills were needed pre, during and post a community right to buy application. Also, the importance of external and ring-fenced funds was emphasised, such as those which have been provided by the SLF. Further, there was consideration of who, in fact, was profiting from the community rights to buy. A concern was raised that the benefits resulting from

[107] Ipsos MORI, "Impact Evaluation of the Community Right to Buy" para 5.46.

[108] *Ibid* para 5.45.

[109] *Ibid* para 7.8

[110] Wightman, *The Poor Had No Lawyers* 203.

the transfer of land were being realised by the community body itself and not those that the legislator thought the measures should be helping.

The legislator needs to take cognisance of the experience of those who have engaged with the community rights to buy, such as those in Skerratt's research, and identify means for ensuring that the intended beneficiaries of the measures receive the nurturing of the necessary skills and capabilities. The use of post-transfer monitoring of community rights to buy should also be used to assist with this. Lastly, the Government should recognise that without public funds, the longevity of this land reform is under threat and make a long-standing commitment to provide the necessary support and resources. The next section will now consider the other main party in a community right to buy application, the landowner.

7.5 Role of Landowners

Following on from the capacity issues raised above, another potential barrier to the attainment of the progressive goals of the community rights of buy is the role which can be played by the landowners themselves. How can individuals, in particular, those on the margins of society, successfully fare against the strong powerbase of the current large estate landowners and the claimed "game playing" by those trying to avoid to effects of the legislation? Chapter Two highlighted how landowners have historically used their influence and power to protect their ownership right. Can the community rights to buy counteract this or will they continue Van der Walt's fear that legal doctrine will be used to protect the status quo to the detriment of political objectives and social reform.[111]

To minimise the ability of landowners to frustrate the process, anti-avoidance provisions have been built into the community rights to buy, such as not allowing a landowner to advertise their land for sale following a community body application.[112] Wightman, however, reports that for applications meeting the pre-emptive community right to buy statutory requirements, landowners have "done secret deals in the background"[113] such as

[111] Van der Walt, *Property in the Margins* 20.

[112] See, for example, Land Reform (Scotland) Act 2003, s43, and Land Reform (Scotland) Act 2016, s61 and the subsequently introduced Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations (SSI 2020/114), regs 7-11.

[113] Wightman, *The Poor Had No Lawyers* 351.

withdrawing land from sale once a right to buy has been approved.[114] Further, he is of the view that there are a number of methods available to landowners to frustrate community body applications because the "legislation offers several technical obstacles."[115] He cites from a law firm's briefing which claimed that "[i]f a landowner wishes to prevent an application being registered, it is far more fruitful to scrutinise an application to see if it complies with the statutory requirements … the landowner can use any gaps between prohibition letters to conclude missives of sale of the land."[116] Examples of such errors in applications include an incorrect incorporation of a map and a missing declaration of a standard security. He concludes that "communities are faced with the prospect of well-paid lawyers scrutinising every detail"[117] in order for applications to be rejected due the potential of a legal challenge, highlighting that such approaches go against the community empowerment intention of the legislation.

This was echoed during the government commissioned post legislative scrutiny of the Land Reform (Scotland) Act 2003 when it was highlighted what may be a "potentially fatal weakness"[118] in the crofting community right to buy scheme (and it can be assumed the others): where a crofting community body has the "inability to prevent a resistant landlord with sufficient capital to find legal means to delay and ultimately avoid any kind of purchase using Part Three of the [Act]."[119] Such approaches by landowners are therefore closely aligned with Van der Walt's concern that a fixation on doctrinal matters instead of focusing on the objectives of the measures can hinder change and entrench current inequality and power imbalances.[120]

As well as through legal methods, landowners have other ways of frustrating the community rights to buy. For example, during the post-enactment scrutiny of the 2003 Act, it was also found that a barrier to the greater use of the pre-emptive community right to buy was the lack of motivation to register an interest as community groups did not want

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[114] Wightman does, however, not provide any evidence for this assertion.

[115] Wightman, *The Poor Had No Lawyers* 351.

[116] *Ibid* p352.

[117] *Ibid*. This has clear links with the complexity concerns discussed in section 7.4.1.1.

[118] Centre for Mountain Studies, "Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003" 132.

[119] *Ibid*.

[120] Van der Walt, *Property and Constitution* 145 and Van der Walt, *Property in the Margins* 20.

"to provoke antagonism from local landowners, or conflict within the community."[121] As an example, the report states that community relations with landowners had suffered following the "mere suggestion of altering a community group's constitution to make it eligible to register an interest in land in the future."[122]

It is not clear if such an issue has been addressed, in particular with the increased scope of the new community rights to buy. For example, the Scottish Land Commission's recent report "Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland,"[123] though considering a different aspect of land reform, contains evidence on (a) the vital relationship between communities and landowners, (b) the power that a landowner retains regardless of the right to buy schemes and (c) the concerns community bodies have in regards the behaviour of the landowner. Poor social and community cohesion were found to be the second most frequent issue linked to concentrated land ownership.[124] In particular, there was a power imbalance between landowners and communities, with landowners having significantly better access to professional support such as solicitors, accountants, professional advisers and land managers.[125] This was exacerbated in certain situations where community bodies had been required to pay for the landlord's agent's professional fees when commencing negotiations with the landlord to purchase land or crofts.[126]

A similar theme was the "them and us" culture where landlords had personal and business networks with connections to those who could influence decisions such as councillors, parliamentarians and the legal profession.[127] The study also found that a number of respondents raised the "very strong fear of the repercussions that could arise if they were seen to oppose the wishes of their local landowner."[128] Such actions included blocking employment or access to housing. The report highlights this anxiety does not necessarily

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[121] Centre for Mountain Studies, "Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003" 86.

[122] *Ibid*.

[123] Scottish Land Commission, "Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland" (2019).

[124] The ability to realise economic potential was the most frequent issue.

[125] Scottish Land Commission, "Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland" para 5.12.

[126] *Ibid*.

[127] *Ibid* para 5.1.3.

[128] *Ibid* para 5.1.5.

result from the previous behaviour of a landowner but can be concerns as to what they could potentially do. It therefore made it "not difficult to see how detrimental living with such a culture of fear would be to the long-term development prospects of a community."[129] The Scottish Land Commission concluded that

> "Issues most clearly arise when [a] combination of resources and power is exploited by the landowner. The negative effects of such behaviour can be particularly damaging to community and social cohesion ranging from causing anger or frustration, to feelings of intimidation and fear to speak out, to disempowerment and helplessness, and in extreme cases impacting on resident's [*sic*] health and well-being, and perpetuating community decline."[130]

It is clear from the above, and as with the historic period covered in Chapter Two, that the power and influence a landowner has can make it difficult for a community body to even want to consider attempting a community right to buy, let alone successfully deal with any nefarious attempts by the landowner to sabotage the process. It does, however, need to be emphasised that the Scottish Land Commission study was written based on supplied evidence provided by people who made contact with the researchers to express their opinions on land ownership. Some of the report's findings differ from the RESAS study, discussed in Chapter Three,[131] which adopted an analytical and data driven approach to examine the issues of land ownership in Scotland. There is therefore a need for further scientific work to be carried out to validate the Scottish Land Commission's findings before attempts are made to legislate in attempt to minimise any disruption that landowners can cause to the community rights to buy.

7.6 Conclusions

This chapter discussed various potential barriers to realising the progressive goals of the community rights to buy and how Van der Walt's theories could be used to better align the measures to better promote the progressive aims of the legislation. While it is clearly appropriate to enact legislation based on compelling principles with legitimate goals, it has to also be usable by the intended beneficiaries and not be able to be manipulated by those who wish to block it. This chapter highlighted that consideration is necessary to (a)

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[129] *Ibid* 5.1.5

[130] *Ibid* 5.4.

[131] See section 3.4.4.2.

determine if the binary choice of either ownership or exclusion from the measures is appropriate, (b) allow groups in the margins who cannot meet the territorial definition of a community body to become eligible to use the measures and (c) minimise the methods available to landowners to frustrate the intentions of the legislation. Further, it was found that Government support is required to ensure that, where needed, those who desire to form a community body (and this should include communities of interest unless it can be justified otherwise by the legislator), submit a community right to buy application and subsequently achieve sustainable development with the land, have the capacities to achieve such. This could be through training, provision of expertise and/or financial backing.

While it is recognised that some of the identified issues are easier to solve, such as attempts to reduce the legislative complexity, including condensing it into one Act, simplifying the statutory requirements and defining sustainable development, it is acknowledged that others are much harder to counter, such as the significant financial outlay that would be required to provide the acquisition costs of the community rights to buy and to increase community capacities where required.[132] The Government does, however, need to address such areas to enhance the extent of the progressiveness of the community rights to buy regime. By doing so, they can maximise gains to progressive objectives such as fairness, social justice and environmental concerns, and help promote the social transformation ambitions of the legislator.

[132] This is in particular when the Government has other priorities which require funding. However, to emphasise the relativeness of funding community ownership compared to other initiatives, Hunter highlighted in 2012 that the £30m that was provided to the community land sector in the Highlands and Islands over twenty years equates to one fifteenth of the cost of a recent five-mile stretch of a motorway in Glasgow or a 600-yard stretch of Edinburgh's tramway system. Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops* 176.

Chapter 8 Conclusions

8.1 Introduction

Conclusions have been provided in the thesis at the end of each substantive chapter. This final chapter provides a summary of these findings and details two potential areas for future work.

8.2 Conclusions

As stated in Chapter Two, the research question of this thesis was: To what extent are Scotland's community rights to buy aligned to progressive property theory? To answer this it was necessary to determine whether the aims of the community rights to buy legislation and the statutory processes were aligned with progressive property theory and, if so, to what extent. The thesis adopted a mixed methodological approach in order to answer these questions.

Through a historical review of land reform in Scotland, it was clear that progressive objectives had not previously been considered when enacting land law. It was found that while there had been a number of political, legislative and societal changes between the 11th and 20th Centuries, there had been no significant shifts in the concentrated pattern of ownership which evolved in Scotland during the initial allocations of land to nobles at the advent of feudalism. The landowners who held large areas of land continued to use their power and influence to maintain this pattern or increase their individual holdings, for example, through the introduction of the Register of Sasines and the division of the commonties.

It was shown that the State only became involved following civil unrest by those aggrieved by the mass evictions carried out by landlords which took place in the 18th and 19th Centuries to increase the capacity for livestock. Improvements to agricultural methods resulted in land becoming more widely used for economic gains rather than sustenance, and the maximisation of wealth was prioritised to the detriment of human wellbeing. It was found that while the different UK Governments in power between 1880 and 1920 attempted various solutions to Scotland's land question, these were driven by political ideology rather than as a result of in-depth studies or implementation of progressive value-based policies.

If land reform in Scotland was to become progressive after centuries of minimal change, it was clear that something dramatic was required. It was found that the enabler for this re-balancing was the establishment of the Scottish Parliament in 1999. From the outset, the new Scottish Parliament has dedicated itself to land reform. In particular, the legislator commissioned two groups to investigate Scotland's system of land tenure and to make recommendations for land reform. Both these groups introduced progressive thinking into what can be achieved through land reform. The first, the Land Reform Policy Group, stated in 1999 that they viewed the objective for land reform to be the elimination of the land-based barriers which were blocking the sustainable development of rural communities. Moreover, in their opinion, the achievement of sustainable development required greater diversification in the ownership and management of land, and this would lead to a reduction in the level of concentration of ownership.

A decade later, this was followed by the work of the Land Reform Review Group, which, in 2014, took the view that land reform should be changes that are made in the public interest, with the common good the goal to which the public interest should aspire. The common good, in their view, included wellbeing for all, social justice, equality, fairness, environmental sustainability and human rights. It was the recommendations of these two bodies, and a legislator who in recent times has had a policy aim to improve community empowerment, which were responsible for the introduction of the four community rights to buy in Scotland. It was argued that the continued evolution of the community rights to buy was in tandem with and driven by a legislator forming a deeper understanding of the relationship between land reform and progressive goals. These progressive objectives included the advancement of sustainable development, the promotion of human rights, including those in the International Covenant on Economic, Social and Cultural Rights and the diversification of the types of landowners. However, it was contended that it will take a number of years before it becomes evident if the Government's community-centric approach will result in robust sustainable development. Moreover, it was concluded that drastic changes to the number of landowners in Scotland will only occur following a significant number of successful community rights to buy applications, albeit the suite of measures will see an increased acreage of community owned land.

In order to analyse whether the community rights to buy were aligned with progressive property theory, and, if so, to what extent, the thesis considered the progressive property theories of Gregory Alexander, Joseph Singer and André van der Walt. Through analysing the common and divergent threads of these theorists, it was concluded that the progressive

property theorists adopt a similar approach. In particular, they use progressive values to justify the introduction of new property law measures or restrictions placed on current rights. The theorists also have similar views on the requirement for property law to allow for the context of the parties and the relationship between them to be considered in dispute resolution. Likewise, there is a common position that consideration for the consequences that would arise as a result of a decision is necessary when settling conflict. Moreover, it was evident that each of the approaches advanced by the theorists is pluralistic in nature. Van der Walt's work, however, has a number of divergent areas of opinion, namely, his view on the centrality of property rights, the role of property as the guardian of other rights, and the relationship between ownership and social obligations.

These theoretical findings allowed for the determination that the community rights to buy are aligned with progressive property theory, answering the first of the two research sub-questions. The Government's intention behind the measures was to promote progressive values, such as social justice and equality and there has been a clear drive to focus on the objectives land reform can achieve rather than on the protection of objects. Moreover, it was shown that there is a correlation between Government policy and Singer's normative questions raised in relation to property as the law of democracy. It was also concluded that the progressive community rights to buy were in stark contrast to that which had occurred historically which had aims such as the protection of the ownership right from legal claims from others and the ending of social agitation.

Further, using the common strands of the three theorists, it was argued that the community rights to buy measures meet each of four requirements for a progressive approach to property law. Firstly, they allow for decision makers to account for context. Unrestricted information can be included by both parties for consideration by Minsters as part of a community right to buy application. Secondly, it was contended that the measures meet the progressive theorists' requirement that the consequences of approving or rejecting an application are taken into account during decision making. Evidencing the achievement of advancing sustainable development is a common theme in the consent criteria, and harm to the community if an application is not given consent is also considered in a number of the provisions. In terms of the third component, relationships, it was argued that the community rights to buy do not have a sole focus on the relationship between an individual and an object. The measures allow for land to be transferred to those negatively affected as a basis of their relationship with a landowner and the landowner's use or management of the land. Lastly, it was maintained that the community rights to buy legislation, and in

particular, their focus on sustainable development, mean that it is a pluralistic approach to property law. Decision makers, when reviewing an application, cannot reduce their decision down to consideration of a single comparable value. Instead, they need to use practical reasoning skills and consider the overall vision of the policy makers when resolving a dispute.

For the second sub-question, addressing the extent to which the community rights to buy are aligned to progressive property theory, the divergent areas of Van der Walt's theories were considered. It was concluded that while the community rights to buy do have a close alignment with the common characteristics of progressive property theory, there is a disparity between Van der Walt's views on what a property system should achieve and the community rights to buy legislation. It was argued that while it is evident that advancing progressive values such as social justice and equality is one of the objectives of the community rights to buy, the approach adopted has a focus on the strong ownership right. Decentralising property has therefore not occurred and ownership is not any more permeable than it was prior to the introduction of the community rights to buy. This approach promotes the centrality viewpoint and continues to entrench ownership and its resulting power into Scotland's system of property rights. The community rights to buy therefore inhibit change for those on the margins of society, for example, communities with little financial or social capital. This goes against legislative intent. These groups, such as those from less deprived areas, face land-based barriers and cannot benefit from the community rights to buy to the detriment of the progressive objectives they are meant to achieve.

At various stages of the thesis concerns have been raised and areas have been identified which could be enhanced to allow the measures to have a closer relationship with Van der Walt's property theories and therefore improve the fulfilment of the progressive aims of the legislation. For example, it was argued that there is an exclusionary element to the community rights to buy. Both communities who do not want to take on the full ownership of land and communities of interest, including a number of groups who have faced historical inequality, cannot currently use the measures. Further, the statutory measures are too complex and need a significant range of capacities to engage successfully with the legislation. This is in discord with Van der Walt's theory of marginality in property. To better promote the achievement of the progressiveness aims of the measures, the rights to buy have to be usable by the intended beneficiaries and compatible with their needs. This is achievable through enhancements to the legislation, such as merging the

four rights into one, explicitly defining sustainable development and not penalising a community body outright for an easily fixable technical error. Government support is also necessary to assist with the required funding streams and training.

The role landowners can play in the success of the community rights to buy, and the avenues available to them to frustrate the legislation was highlighted. It was concluded that the measures would be improved by enhancing the anti-avoidance provisions to ensure that the influence and power a landowner has cannot be used to detrimentally affect community empowerment, in particular, for those on the margins of society. Specific concerns were also raised in regard to the restrictive approach taken to the types of entities that a community body could use for incorporation and the arguably overly narrow definition of eligible land. Further, it was argued that the Scottish Ministers are not the appropriate decision-making body due to a lack of local expertise and a potential conflict of interests. Moreover, it was contended that there is a lack of statutory oversight on the achievement of the community bodies stated goals for the land which is transferred to them. This is necessary in order to monitor whether the legislative progressive aims are being realised.

To conclude, Scotland's suite of community rights to buy differ significantly from previous approaches to land reform and have a close alignment with the common characteristics of progressive property theory. There is, however, the potential to enhance the extent of the progressiveness of the measures. Making changes to the areas described above would further advance the achievement of progressive objectives such as wellbeing, equality, social justice and improving the environment. This would allow for the community rights to buy legislation to move closer to Van der Walt's visions for how property and property law can and should be used to achieve change and help to further advance the Land Reform Review Group's common good objective for land reform in Scotland.

8.3 Further work

There has been a dynamic process of land reform ongoing in South Africa for the past two decades. It would be of benefit to carry out a collaborative piece of research with researchers from that jurisdiction to compare the approaches taken, how these link with progressive property theory and the success or otherwise of the measures. This could be used to examine how the Scottish experience could learn from and inform the development

of the law in other jurisdictions in which land reform is on the agenda and result in invaluable insight for future land reform in both countries and further afield.

As a statutory requirement, the public registers for each of the community rights to buy store a wealth of information for each application. An in-depth analysis of this would result in key findings and statistics which would solidify and augment the conclusions of this thesis. For example, this would include consideration of (a) what are the methods used by Ministers to determine the sustainable development and public interest tests, (b) how they compare and balance the evidence of the party's submissions, (c) what reasons are provided for rejecting or declining an application, (d) how the Minsters engage with human rights and (e) the reasons why appeals have been made and the subsequent judgements of the court. The outcome of such research questions could then be analysed from a progressive property theory perspective.

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