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**The Capacity of Scotland's Community Right to Buy Legislation to contribute to Ecological Sustainability**

Calum Glen Stewart

Submitted in fulfilment of the requirements of the degree of LLM (Research)

School of Law, College of Social Sciences  
University of Glasgow

*30410 words*

## **Abstract**

The principal aim of this thesis is to contribute to sustainability debates. Specifically, this thesis aims to assess the capacity of the statutory community rights to buy – part of Scotland’s wider land reform framework – to contribute to ecological sustainability. ‘Ecological sustainability’, in context of this thesis, is the ultimate goal of humanity successfully living within the ecological limits of the Earth. This thesis outlines that these community rights to buy are defined and affected by both sustainable development and property law. Therefore, it seeks to interrogate the extent to which both of these aspects are influenced by anthropocentrism, rather than ecocentrism, and the impact this has on the capacity of the community rights to buy to contribute to the achievement of ecological sustainability.

Three central arguments are important in this regard: the spectrum between anthropocentric and ecocentric understandings of sustainable development; how imbuing responsibilities in ownership can help to bridge the gap between these two understandings; and how the structuring effect of property law resists placing responsibilities on ownership, thus impeding the ability to find a more appropriate point between anthropocentrism and ecocentrism. The cumulative effect of these themes on the capacity of the community rights to buy in Scotland to contribute to ecological sustainability will be the focus of the conclusion of this thesis.

Chapter 1 introduces and explores these three central themes. It will be argued that global interpretations of sustainable development have tended to adopt an anthropocentric approach within the spectrum of anthropocentrism/ecocentrism, and that this is mirrored in Scotland’s approach to sustainable development. The nature and culture dualism will then be explored as a potential explanation for the anthropocentric focus of both sustainable development and property law. This chapter will conclude that, whilst responsibilities can bridge the gap between anthropocentrism and ecocentrism, the structural effect of Western property law norms resists this, which is problematic for ecological sustainability.

Against this background, Chapter 2 is concerned with situating Scotland within these debates. It will assess the concentrated ownership patterns seen today, arguing that an emphasis on individual ownership rights has facilitated this; an example of property law’s structural effects eschewing responsibilities in ownership. These factors have anthropocentric outcomes. This chapter will argue that an increasing focus on responsibilities within land policy in Scotland shows an implicit recognition of the need to move beyond the existing rights paradigm. However, this is stymied by property law’s structural emphasis on rights. Against this background, the chapter will conclude with a brief outline of what the community rights to buy are, their significance, and their adoption of sustainable development, before engaging in a deeper evaluative exercise in Chapter 3.

Chapter 3 will assess what kind of sustainable development is being envisaged in the community right to buy legislation, and whether this is suitable for the achievement of ecological sustainability. It will be argued that, whilst showing signs of ecocentrism, given the structural effects of property law in Scotland and the concomitant focus on individual rights the community rights to buy find themselves at the anthropocentric end of the sustainable development spectrum identified in Chapter 1. However, the backdrop of Scottish land policy signifies a will to incorporate responsibilities, as well as rights, into ownership. In this regard, it is argued that the community rights to buy, in their incorporation of sustainable development, signify a form of incremental change when viewed in tandem with other policy in Scotland, which can better integrate ecocentric approaches and which could incite progress towards ecological sustainability.

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# Introduction

Human activity has had, and is continuing to have, a profound impact on the Earth's environment.<sup>1</sup> In this regard, the relationship between humans and land is pivotal. Land is inextricably linked to the wider environment; it sustains and supports ecologies and livelihoods, fosters animal relationships and flourishing, and provides natural beauty in abundance. However, humankind continues to engage in patterns of consumption that the planet cannot sustain,<sup>2</sup> which are legitimised through the continued separation of human and non-human communities. New formulations and frameworks are required in order to provide pathways towards ecological sustainability; in other words, the ability of humankind to live within the Earth's ecological limits. A key concept in this regard is that of sustainable development. The implementation of the concept of sustainable development has multiple implications for the relationship between humans and land. At the present time, particularly in the West,<sup>3</sup> this relationship tends to be dominated and defined by private property rights. This tends to lead to anthropocentric outcomes, and new formulations are necessary to imbue more ecocentrism.<sup>4</sup> As Nicole Graham states, '[t]he paradigm of modern European property relations is anthropocentric. It is a dichotomous model of the world that separates people from everything else...' The Earth is in a state of ecological emergency and necessary action is often curtailed due to this anthropocentric paradigm.<sup>5</sup> Graham states that '[t]his paradigm is, however, in crisis...'<sup>6</sup> This crisis requires new approaches, which can better lead to ecological sustainability. Sustainable development may represent such an approach, but its impact so far has been limited by a largely anthropocentric approach.

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<sup>1</sup> See N Graham, *Lawscape: property, environment, law* (Taylor & Francis Group, 2010) at p.24, referencing D Harvey, *Justice, nature and the geography of difference* (Wiley-Blackwell, 2000) at p.119. Graham states that '[d]espite the contentiousness of remarking that humans bear an enduring, or at least serious, impact on the natural environment, 'there is increasing public acceptance of the idea that much of what we call 'natural', at least as far as the surface ecology of the globe and its atmosphere is concerned, has been significantly modified by human action.'" Perhaps the clearest demonstration of this point is climate change: see Intergovernmental Panel on Climate Change, 'Climate Change 2021: The Physical Science Basis' (2021).

<sup>2</sup> See, in relation to climate change, Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis* (2021); World Meteorological Organization, *State of the Global Climate 2020* (2021) which outlines that 2020 was one of the warmest years on record with global average temperatures around 1.2 degrees Celsius above pre-industrial levels; on habitat and ecosystem destruction see Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Global assessment report on biodiversity and ecosystem services* (2019).

<sup>3</sup> In this regard, 'the West' is used to refer more specifically to Anglophone or European-influenced frameworks.

<sup>4</sup> See, for example, M Davies, 'Can property be justified in an entangled world?' (2019) *Globalizations*, 17(7), pp.1104-1117; P Burdon (ed.) *Exploring Wild Law: The philosophy of earth jurisprudence* (Wakefield Press, 2011); F Mackenzie, *Places of possibility: Property, Nature and Community Land Ownership* (Wiley-Blackwell, 2013).

<sup>5</sup> N Graham (no. 1) at p.2.

<sup>6</sup> *Ibid.*

In Scotland, sustainable development has become a key guiding principle for policy and legislation.<sup>7</sup> In particular, land reform in Scotland, which has a community right to buy framework at its core, incorporates sustainable development as a central aim. In the wider context of the relationship between humans and land, including non-human communities, how do these community rights to buy contribute to ecological sustainability? The goal of this thesis is to investigate this question.

The structure of the thesis is as follows. Chapter 1 looks to introduce three main themes which are important to the transition to ecological sustainability. Firstly, it will present the idea of a ‘spectrum’ of sustainable development, with wholly anthropocentric interpretations at one end and wholly ecocentric interpretations at the other, explaining what both extremes of interpretation might look like. Global interpretations of sustainable development will be interrogated, suggesting that they tend to adopt an anthropocentric approach in this regard. Scotland’s wider sustainable development policy will be shown to follow this pattern. Secondly, the theme of the ‘nature and culture dualism’ will be introduced. This section will explain that this dualism is a potential explanation for the anthropocentrism present in sustainable development approaches, as it separates human communities from non-human communities, which in turn contributes to the commodification of nature. This chapter will then focus on property law. It will outline that new formulations of property law are necessary in order to break out of the nature/culture paradigm, particularly given the twin crises of climate change and biodiversity collapse. One such formulation is the introduction of responsibilities in ownership. However, Chapter 1 will conclude by arguing that the structural effects of property law, particularly Western notions of property law, oppose the introduction of such new formulations. This will be highlighted as a key barrier to ecological sustainability.

Chapter 2 is concerned with introducing Scotland to this discussion. Scotland’s peculiar distribution of landownership will be examined, looking at some of the historical factors that have led to the patterns of ownership that persist today. This Chapter argues that the system of property law in Scotland has been a major factor in the distribution of landownership and that this has had, and continues to have, serious societal and ecological impacts. This section will highlight the anthropocentrism of this outcome. Chapter 2 continues to outline that much of Scotland’s land reform agenda, which has been developed to address concerns related to the concentration of ownership, has adopted sustainable development as a key concept. It

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<sup>7</sup> A Ross, ‘The Evolution of Sustainable Development in Scotland: A Case Study of Community Right to Buy Law and Policy, 2003-18’ in M M Combe, J Glass, A Tindley (eds.) *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press, 2020) at p.238.

introduces two key land policy documents, the Land Use Strategy and the Land Rights and Responsibilities Statement. It will argue that such documents show a recognition from policymakers in Scotland of the requirement to move beyond the dominant rights paradigm and to introduce more ecocentric approaches, including imbuing responsibilities into ownership. Like in Chapter 1, this section will argue that the structural effects of property law in Scotland resist such approaches so that, where they do appear, they are limited in their scope and justiciability. This chapter will conclude by outlining the primary *legal* vehicle for land reform in Scotland: the community right to buy legislation, in particular its adoption of sustainable development.

Chapters 1 and 2 provide the overall context for Chapter 3, which performs a dual role. Firstly, it questions what *kind* of sustainable development is being promoted within Scottish community right to buy legislation, essentially ‘placing’ the community rights to buy within the anthropocentric/ecocentric spectrum of sustainable development outlined in Chapter 1. It will take forward the argument that the community right to buy legislation does have certain ecocentric traits, insofar as it is principally forward-looking and explicitly ties sustainable development and property law together in the same arena. However, it will argue that the legislation remains largely anthropocentric. Secondly, Chapter 3 interrogates the possible reasons for this anthropocentric outlook. Building on the discussion in Chapters 1 and 2, Chapter 3 argues that typical goals of private property norms – economic stability and certainty – can no longer justify the strong protections that ownership rights attract; responsibilities must play as key a role if we are to transition to ecological sustainability. However, as will be argued, the community right to buy legislation can be seen as a fundamental challenge to typical notions of private ownership, representing a kind of incremental change that can lead to wider governance and societal shifts toward the goal of ecological sustainability.

Though there is an increasing amount of literature on wider sustainability debates, there is scarce research on the transition to ecological sustainability and Scottish property law. Therefore, novel approaches must be taken. To this end, this thesis adopts an approach that is both descriptive and normative.<sup>8</sup> Ecological sustainability is the normative goal which frames the overall discussion; it is the question of *why*, informing all debates in this thesis. In this regard, the thesis outlines key theoretical concepts that contribute toward this normative goal. This thesis limits its scope to property law. It assesses its theoretical

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<sup>8</sup> See L S Underkuffler, ‘A Theoretical Approach: The Lens of Progressive Property’ in S Bright, S Blandy (eds.) *Researching Property Law* (Palgrave, 2015) at pp.12-13.



underpinnings, but through the lens of sustainability. In other words, exploring how property theory has been informed by the key concepts outlined in this thesis, for example the human/nature dualism, and how this contributes to the sustainability debate. In order to inform this normative element, a descriptive approach will be taken in places in order to outline the current functioning of property law at a general level, and more specifically to outline the scope of the right to buy legislation in Scotland. For example, the thesis will outline the particular legislative provisions in the community right to buy legislation which relate to sustainable development. As a result, this thesis does not adopt a traditional doctrinal approach, as it does not provide an in-depth review of legislation and case law relating to the community right to buy in Scotland and to interpret the meaning of specific provisions in a doctrinal manner.<sup>9</sup> Taken as a whole, the approach of this thesis will be used to generate critical insight into the community right to buy regime in Scotland, and trace its potentialities in contributing to ecological sustainability.

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<sup>9</sup> D Watkins, M Burdon, *Research methods in law* (Routledge, 2018) at p.88.

# Chapter 1

## Achieving ecological sustainability: the spectrum of anthropocentric/ecocentric sustainable development and the structuring effects of property law

### 1. Introduction

There is a pressing need to find ways of achieving ecological sustainability – to live within the Earth’s ecological boundaries. Sustainable development and property law are vital to the success of this transition, as they inform and define the processes through which ecological sustainability can be achieved. Therefore, this chapter will introduce and examine central themes relating to sustainable development and property law which will be used to examine the community rights to buy later in this thesis.

This chapter will begin by outlining the concept of ecological sustainability – living within the Earth’s natural limits – and its importance within this thesis. This is the essential motivation of the overall debate. Sustainable development will then be outlined as a method of achieving ecological sustainability, and the form that sustainable development has so far taken on the global stage is evaluated. The discussion will highlight that there exists a ‘spectrum’ of sustainable development. On one pole is a wholly anthropocentric approach, which insists upon the central importance of humankind within any sustainability debate. On the other, overtly ecocentric approaches reject the idea that humankind have a ‘superior’ place within planetary habitats, arguing that non-human ecologies must be afforded greater attention than currently given. This chapter will suggest that an approach based entirely at either pole is not desirable. It will argue that effective approaches to sustainable development should exist within this spectrum, taking into account both the reality that humankind has a profound influence on Earth systems, whilst ensuring more attention and care is paid to those systems for their own sake. In doing so, it will highlight that current approaches are too anthropocentric and must imbue more ecocentrism in order to effectively lead to ecological sustainability. This chapter will then outline Scotland’s wider sustainable development

policy, arguing that, in adopting international standards, anthropocentric tropes pervade its approach.

The next section explores the underlying reasons for the dominance of anthropocentric interpretations of sustainable development. The role of the nature/culture dualism is introduced and examined in this regard, arguing that the tendency to separate humankind from nature has facilitated and encouraged anthropocentrism, not only in sustainable development but also in Western notions of property law, which are preoccupied with individual ownership rights. Robust, new formulations are needed to tackle this paradigm. One such suggested formulation is to imbue responsibilities within land ownership; empowering such responsibilities with the same legal weight as individual rights in ownership can contribute to bridging the gap between anthropocentric and ecocentric approaches. However, the structural effects of traditional property law norms, whilst promoting stability and certainty, strongly resist new methods of introducing ecocentrism into wider debates, particularly the imposition of responsibilities on landownership. This is one of the central challenges of achieving ecological sustainability.

## 2. Anthropocentric v ecocentric approaches to sustainable development: their impact on achieving ecological sustainability

### 2.1 Ecological sustainability

In our pursuit of growth, humans consistently demand more than the Earth's ecosystems can supply.<sup>10</sup> It is increasingly recognised that societies must operate in more sustainable ways in order to stem the effects of climate change, restore ecosystems, and protect human and non-human communities. Examples of the effects of ignoring the Earth's natural limits are plentiful, and are increasing. Ocean heat content reached new record highs in 2019 and then again in 2020, in conjunction with steady global sea level rises since satellite altimeter measurements began in 1993.<sup>11</sup> Atmospheric concentrations of the major greenhouse gases

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<sup>10</sup> See Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, 'The global assessment report on biodiversity and ecosystem services' (2019); W Steffen *et al*, 'The Anthropocene: From Global Change to Planetary Stewardship' (2011) *AMBIO* 47, 7 at p.740: 'Humanity now acquires more than the ongoing productivity of Earth's ecosystems can provide sustainably, and is thus living off the Earth's natural capital in addition to productivity.'

<sup>11</sup> World Meteorological Organization, 'State of Global Climate 2021: WMO Provisional Report,' 2021 at p.3.

continued to increase in 2020 and 2021.<sup>12</sup> To compound this, no agreement was reached at the recent Conference of the Parties in Glasgow to ensure that temperature rises are limited to a rise of 1.5 degrees. This has catastrophic effects for human and non-human communities.<sup>13</sup>

Therefore, it is imperative that ways of living within the ecological limits of the Earth are adopted; the boundaries of Earth systems need to be recognised and operated within. It is true that humankind has ‘wrested control of Earth systems.’<sup>14</sup> Concomitantly, there is a requirement and responsibility to consider how to manage these Earth systems sustainably. The way that societies conceptualise the wider term ‘sustainability’ thus has important consequences. The term can have many different meanings to different people, so there is merit in narrowing its scope to an extent. In this regard, ‘ecological sustainability’ provides a compelling fulcrum. Andrea Ross states that, ‘[e]verything we do is constrained by the Earth’s ecosystem and there is a need to revisit the basic principles that govern our decision making, to ensure that environmental concerns have greater influence...Decision making based on ecological sustainability places the discussion of trade-offs within the ecological limits of the Earth.’<sup>15</sup> It ‘advocates the need to operate within the ecological carrying capacity of the earth.’<sup>16</sup> In this regard, Ross suggests that the term ‘ecological sustainability’ should be the ‘normative core’ of sustainable development.<sup>17</sup>

What role, then, does law play in ecological sustainability? Ross states that ecological sustainability should be treated as a ‘fundamental legal principle that ought to be given the same priority as other fundamental legal principles, such as justice, equality and freedom.’<sup>18</sup> Therefore, there are normative questions to be asked of the wider legal frameworks in place, particularly those of sustainable development and property law. To what extent are they capable of facilitating ecological sustainability?

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<sup>12</sup> Ibid.

<sup>13</sup> To give just one example, there has been a significant decline in the abundance of terrestrial and freshwater species in the UK; 6% over the past 10 years. See State of Nature Partnership, ‘State of Nature 2019 Report’ 2019.

<sup>14</sup> F Clingerman, ‘Imagining place and politics in the Anthropocene’, in A Valtonen, O Rantala, P Farah (eds.), *Ethics and Politics of Space for the Anthropocene* (Edward Elgar Publishing, 2020) at p.17.

<sup>15</sup> A Ross, *Sustainable Development Law in the UK: From rhetoric to reality?* (Earthscan, 2012) at p.292.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid. at p.288: ‘with ecological sustainability as its normative core, sustainable development has the capacity to set meaningful objectives, duties, and rules and provide boundaries for decision making.’

<sup>18</sup> Ibid. at p.287.

## 2.2 Sustainable development: anthropocentric v ecocentric approaches

The concept of sustainable development has developed as a response to the challenges of human-led changes to Earth systems.<sup>19</sup> It is a flexible concept, lacking a universally agreed definition. The most widely agreed definition – that sustainable development equates to ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’<sup>20</sup> – is a starting point, but is imprecise<sup>21</sup> and has an anthropocentric focus. John Blewitt offers a pragmatic view of sustainable development as a ‘dialogue of values.’<sup>22</sup> In this regard, interpretations are not black and white. It is possible to imagine a spectrum of sustainable development; with wholly anthropocentric and ecocentric approaches at diametrical poles. Anthropocentric sustainable development can be seen as development which benefits only humans. The environment will feature to an extent, but only to the extent that it will benefit, or can be utilised by, humankind. Such interpretations can be consistent with ecological sustainability, but not necessarily. On the opposite pole, wholly ecocentric sustainable development would prioritise environmental concerns, seeing humans as part of nature, rather than superior to it.<sup>23</sup> Both ends of the spectrum of interpretation have been criticised. A fully ecocentric approach can be problematic in terms of disregarding equity and justice concerns.<sup>24</sup> However, against the backdrop of environmental degradation, a wholly anthropocentric approach to sustainable development is less likely to lead to ecological sustainability. Even where it may do so, it will take a much longer time than an approach which also imbues ecocentric concerns.<sup>25</sup>

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<sup>19</sup> H F Greene, ‘Conceptual Frameworks of Earth Law’ in A R Zelle, G Wilson, R Adam (eds.) *Earth Law: Emerging Ecocentric Law* (Wolters Kluwer, 2020) at p. 71.

<sup>20</sup> World Commission on Environment and Development, *Our Common Future* (1987) (the ‘Brundtland Definition’).

<sup>21</sup> A Ross, *Sustainable Development Law in the UK: From rhetoric to reality?* (Earthscan, 2012) at p.14.

<sup>22</sup> J Blewitt, *Understanding Sustainable Development* (3rd ed., Taylor & Francis Group, 2017) at p.41, where he explains that ‘Different individuals, communities, pressure groups, institutions and governments are likely to view sustainability and sustainable development from different perspectives.’

<sup>23</sup> *Ibid.* at pp.44-47. Blewitt outlines that ecocentric values can be understood by the term ‘deep ecology’. This highlights the need to challenge the need for human dominance over nature. As Blewitt states at p.46, ecocentrism recognises that ‘[w]hen we harm nature, we harm ourselves.’

<sup>24</sup> *Ibid.* at p.47, where he outlines the criticism from Ramachandra Guha that ecocentric approaches, in their commitment to biocentrism and wilderness preservation, diminishes the needs of humans; instead, the ‘real problems are cultural and economic – over-consumption by the West and by Third World elites, growing militarization and so on.’ See R Guha, ‘Radical American environmentalism and wilderness preservation: A Third World critique’ (1989) *Environmental Ethics*, 11(1) at pp.71-83.

<sup>25</sup> See L J Kotzé, D French, ‘The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene’ (2018) *Global Journal of Comparative Law*, 7, pp.5-36. Kotzé and French argue for the necessity of ecocentric concerns to be incorporated into approaches which are currently too anthropocentric.

Therefore, this thesis investigates where the community rights to buy in Scotland lie in the spectrum of sustainable development.

Prevailing approaches to sustainable development have been anthropocentric. The Brundtland definition falls into this category: it is defined by the ‘needs of future generations’ rather than the need to live within the Earth’s ecological limits. To illustrate at a global level, the UN Sustainable Development Goals (SDG)<sup>26</sup> can be seen as a barometer for ontologically accepted international understandings of sustainable development. Adopted in 2015, the SDG comprise 17 goals, with over 300 indicators of progress. This is an extensive remit providing universal, high-level policy aims. However, the SDG have been criticised for relying too heavily on anthropocentric tropes.<sup>27</sup> Kotzé and French argue that ‘the focus in the SDG is on human development, progress and the improvement of the human condition.’<sup>28</sup> While an ecocentric approach to sustainable development would have at its core the need to live within the ecological limits of the Earth,<sup>29</sup> Kotzé and French argue that the SDG promote an approach which promotes growth, reducing Earth systems to resources for consumption. This approach is no longer tenable, according to Kotzé and French,<sup>30</sup> yet it is insisted upon because the ‘anthropocentric ontology of the [SDG] is evident from the primacy of the human in, and the human-focused objectives of, virtually all of the SDG.’<sup>31</sup> For them, this is exemplified in the content of the SDG: ‘Goals 1 and 2, for example, aim to end poverty in all its forms everywhere, to end hunger...and promote sustainable agriculture; but do not recognise that this can occur sustainably only if Earth system limits are respected.’<sup>32</sup> In other words, the SDG fail to properly consider the co-dependence of human life and Earth systems, instead perpetuating the trope of the environment as primarily a resource for the benefit of humankind.<sup>33</sup>

Anthropocentric approaches to sustainable development are also often evident in discourses concerned with technical solutions to the global challenges presented by environmental

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<sup>26</sup> See United Nations, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ 2015; United Nations, ‘The 17 Goals’, see <<https://SDG.un.org/goals>> (last accessed 02/02/2022).

<sup>27</sup> See D French, ‘The global goals: Formalism foregone, contested legality and ‘re-imaginings’ of international law’ (2016) *Ethiopian Yearbook of International Law*, at p.151; L J Kotzé, D French, ‘The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene’ (2018) *Global Journal of Comparative Law*, 7, pp.5-36.

<sup>28</sup> L J Kotzé, D French (no. 25) at p.26.

<sup>29</sup> For more on ecocentrism generally, see P Burdon, ‘Eco-Centric Paradigm’ in P Burdon (ed) *Exploring Wild Law: The philosophy of earth jurisprudence* (Wakefield Press 2011) at pp.85-96.

<sup>30</sup> *Ibid.* at pp.26-27.

<sup>31</sup> *Ibid.* at p.27.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at p.28. Although, Kotzé and French acknowledge that Goals 7, 11, 14 and 15 accommodate to a greater extent the idea that humankind’s survival depends on the continued existence of environmental resources. They temper this somewhat by arguing that this ‘does not render them ecocentric in any overt sense’ as they still reinforce the anthropocentric paradigm. See L J Kotzé and D French (no. 25) at p.28.

breakdown. As Ross states, '[t]hese approaches are based on the premise that technology and international trade will ensure there are always enough resources...'<sup>34</sup> This kind of 'ecological modernisation'<sup>35</sup> is attractive for market economies: it allows for continued economic growth while encouraging technical innovation and competition.<sup>36</sup> However, this approach is not free from criticism. As Ross states, '[t]he result is that while fewer resources are required...more are being consumed...Technology is used to justify our erosion of the earth's capital instead of simply living off the interest.'<sup>37</sup> This 'techno-rational narrative'<sup>38</sup> can in turn promulgate the view that pressing environmental problems can be solved by the same means that contributed to them in the first place.<sup>39</sup> Consequently, a pervading belief is that the environment can be effectively managed in a market context.<sup>40</sup>

However, can anthropocentric and ecocentric approaches to sustainable development be reconciled? As discussed, sustainable development has so far presented itself as largely anthropocentric in nature. Indeed, anthropocentric visions of sustainable development may lead to ecological sustainability: if they are propelled by human need then the need to protect Earth systems for humankind could still lead to the same end goal as ecocentric approaches. However, although ecological sustainability may be achieved, it will not be achieved with the same effectiveness and speed as incorporating ecocentric approaches to sustainable development. The speed at which Earth systems are deteriorating requires quicker shifts to ecological sustainability. Andrea Ross argues that sustainable development

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<sup>34</sup> A Ross (no. 21) at p.289.

<sup>35</sup> For background on ecological modernisation, see J Barry, M Paterson 'Globalisation, Ecological Modernisation and New Labour' (2004) *Political Studies*, 52, 4, p.767; A Hayden, *When Green Growth is Not Enough: Climate Change, Ecological Modernization and Sufficiency* (McGill-Queen's University Press 2014); J Blewitt (no. 22) at p.64.

<sup>36</sup> As Gunnarson-Ostling and Svenfelt state, the driving force behind ecological modernisation is that 'environmental degradation is not an impediment to economic growth, but a catalyst for growth through the quest for clean technologies, energy efficient products and management systems such as road pricing and smart production systems.' see U Gunnarson-Ostling, A Svenfelt, 'Sustainability Discourses and Justice: Towards social-ecological justice' in R Holifield, J Chakraborty, G Walker, *The Routledge Handbook of Environmental Justice* (Routledge Handbooks, 2017) at p.165.

<sup>37</sup> A Ross (no. 21) at p.289.

<sup>38</sup> A Valtonen, O Rantala, 'Introduction: reimagining ways of talking about the Anthropocene' in A Valtonen, O Rantala, P Farah (eds.), *Ethics and Politics of Space for the Anthropocene* (Edward Elgar Publishing, 2020) at p.5.

<sup>39</sup> Ibid.

<sup>40</sup> N Castree, 'Neoliberalizing nature: the logics of deregulation and reregulation' (2008) *Environment and Planning A*, 40, at p.131. See also J Blewitt (no. 22) at p.66, where he presents the example of nuclear power: 'The resurrection of interest in nuclear power as a green energy source...is part of this discourse where faith in, or political adherence to, technology and (sound) science closes off questions and alternative possibilities. Moral and technological development and economic progress...become aligned with instrumental policy frameworks... that deny the significance of other ways of seeing and doing things.' See also U Gunnarson-Ostling, A Svenfelt (no. 36) at p. 165, stating that this kind of ecological modernisation 'has been viewed by its critics as an attempt to green capitalism, sustain business-as-usual and de-radicalize sustainable development.' See also E Freyfogle (no. 65) at p.643.

should be viewed as a process.<sup>41</sup> As a process, interpretations can be iterative and move within this spectrum of anthropocentric and ecocentric approaches. Powerful and effective interpretations of sustainable development will not attach themselves to either pole, but will exist within the spectrum. There is a balance to be struck in this regard: humankind has a role to play and must recognise its unique place in Earth systems, whilst recognising the need to adopt practices which are within the ecological limits of the Earth.<sup>42</sup>

### 2.3 Approaches to sustainable development in Scotland and their place on the anthropocentric/ecocentric spectrum

It has been argued that global approaches to sustainable development tend towards the anthropocentric pole of the spectrum. Therefore, at this point it is worthwhile analysing the general outlook of sustainable development at a national level, in Scotland, to assess the extent to which this trend is mirrored.

As Andrea Ross argues, much of the interpretation of sustainable development in Scotland has been left to policy.<sup>43</sup> Ross contends that in Scotland, since 2003, there have been ‘three significant eras of sustainable development policy.’<sup>44</sup> The first era, while ‘quite progressive in its vision’ was too focused on economic growth and did not offer tangible outcomes. Instead, it was merely aspirational.<sup>45</sup> The second era was predicated on a joint framework document, produced by the UK, Scottish, Welsh and Northern Irish administrations in 2005.<sup>46</sup> This shifted the focus from high economic growth to the ‘goal of a sustainable economy’<sup>47</sup> and was shortly followed by a Scotland-specific policy document entitled

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<sup>41</sup> A Ross (no. 21) at p.299. Quoting M Stallworthy, *Understanding Environmental Law* (Sweet & Maxwell, 2008) at p.174, she states that, ‘This process would provide the ‘foundation for integration of environmental and other considerations within the process of decision making and a means whereby environmental impacts...previously uncosted, can be internalised.’

<sup>42</sup> Indeed, Kotzé and French themselves admit that ‘a full-scale transition from anthropocentrism to ecocentrism...would be fraught with several, seemingly insurmountable challenges.’ See L J Kotzé and D French (no. 27) at p.30.

<sup>43</sup> A Ross (no. 7) at p.247.

<sup>44</sup> *Ibid.* at p.240.

<sup>45</sup> *Ibid.* at p.241, referencing the Scottish Executive Policy Statement, *Meeting the Needs...Priorities, Actions and Targets for Sustainable Development in Scotland* (2002), available at <<https://www.webarchive.org.uk/wayback/archive/20180514194918/http://www.gov.scot/Publications/2002/04/14640/4040>> (last accessed 25/07/2021). This policy Statement provided the foundation for the first era of sustainable development, according to Ross.

<sup>46</sup> HM Government, Scottish Executive, Welsh Assembly Government and Northern Ireland Office, *One future – different paths: the UK’s shared framework for sustainable development* (2005) (available at <<https://core.ac.uk/download/pdf/1586982.pdf>> (last accessed 29/07/2021).

<sup>47</sup> A Ross (no. 7) at p.241. Ross contends that this shift, coupled with an explicit acknowledgement of the Earth’s ecological limits, ‘demonstrated a deeper commitment to ecological sustainability.’



‘Choosing Our Future – Scotland’s Sustainable Development Strategy.’<sup>48</sup> The third era of sustainable development in Scotland represented a shift in focus from a sustainable economy to ‘sustainable economic growth’<sup>49</sup> with the introduction in 2007 of ‘Scotland’s Economic Strategy’<sup>50</sup>, updated in 2015, which Ross contends was intended to influence all government action.<sup>51</sup> The Economic Strategy largely aimed ‘[t]o create a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth,’<sup>52</sup> achieved by ‘increasing economic competitiveness and tackling inequality.’<sup>53</sup> The current approach to sustainable development in Scotland coalesces around the SDG. Indeed, Scotland was one of the first countries to sign up to the SDG in 2015. Scotland’s method of integrating the SDG in a national setting is defined by its National Performance Framework (NPF).<sup>54</sup> The NPF outlines several ‘National Outcomes’ which are aligned with the SDG.<sup>55</sup> There is a monitoring process in place, through the ‘National Indicators’, which give a measure of the extent to which the National Outcomes are being met.<sup>56</sup>

If we view sustainable development as a process in which certain approaches will exist on a spectrum, with extreme anthropocentric and extreme ecocentric sustainable development as the two polar outcomes, then where does this wider approach to sustainable development in Scotland sit? Looking at the three initial ‘eras’ since 2003, as defined by Ross, these can be seen to promote sustainable development, but almost exclusively the economic strand of sustainable development. The ‘second era’ of sustainable development, around 2005, arguably gave the most deference to environmental issues in the sustainable development spectrum. Scotland’s sustainable development strategy at that time placed ‘environmental objectives and actions...ahead of social and economic goals, thus reinforcing a vision based on limits rather than tradeoffs.’<sup>57</sup> By advocating an approach based on limits, this suggested a more nuanced approach which imbued essential elements of ecocentrism. However, the subsequent introduction of the Economic Strategy, with its prioritisation of growth,

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<sup>48</sup> Scottish Executive, *Choosing our Future – Scotland’s Sustainable development strategy* (2005).

<sup>49</sup> Ibid, at pp.241 and 242.

<sup>50</sup> Scottish Government, *Scotland’s Economic Strategy* (2015).

<sup>51</sup> A Ross (no. 7) at p.251.

<sup>52</sup> Scottish Government, *Scotland’s Economic Strategy* (2015) at p.35.

<sup>53</sup> Ibid.

<sup>54</sup> The National Performance Framework has its own dedicated website which outlines its aims and measures its progress. See <<https://www.nationalperformance.gov.scot>> (last accessed 01/02/2022).

<sup>55</sup> These are: Children and Young People; Communities; Culture; Economy; Education; Environment; Fair Work and Business; Health; Human Rights; International; and Poverty.

<sup>56</sup> See <<https://nationalperformance.gov.scot/measuring-progress>> (last accessed 01/02/2022). In addition, a thorough review was undertaken between the SDG Network Scotland, Scottish Government and the Convention of Scottish Local Authorities, culminating in a lengthy report published in 2019, on the progress Scotland has so far made in meeting the SDG. See SDG Network Scotland, ‘Scotland and the Sustainable Development Goals: A national review to drive action’ (2019).

<sup>57</sup> A Ross (no. 7) at p.241.

highlighted that sustainable development in Scotland was, for the time being, defined by anthropocentrism.

There is no doubt that the most recent approach, built around the SDG, is far more wide ranging than any previous sustainable development policy in Scotland. The NPF provides a platform for Scottish Government to work in partnership with local authorities and community planning partnerships. Progress in achieving the SDG is continuously monitored through the performance of 81 National Indicators.<sup>58</sup> Of all of the ‘eras’ of sustainable development, this most recent approach shows the strongest commitment to achieving sustainable development by a considerable distance. The approach is more holistic than any that came before, and imbues the environment as a specific concern, complete with its own dedicated National Outcome and National Indicators.<sup>59</sup> This is a thorough approach to sustainable development. However, what can be said of its place within the anthropocentric/ecocentric spectrum? Firstly, it is an approach that shows genuine commitment to connecting the various strands of sustainable development together to achieve tangible, sustainable outcomes. The National Outcomes are widespread and relate explicitly to social, economic and environmental goals. In this sense, the inclusion of a National Outcome specifically for the environment means that the NPF is far from the extreme anthropocentric end of the spectrum. However, the wording of the environmental National Outcome, in particular, betrays an ontological reliance on anthropocentrism. Certain tropes are utilised; particularly that of ‘natural land’ performing primarily as an ‘asset’ or ‘resource’.<sup>60</sup> The preservation of ecologies and habitats are done so for ‘future generations’, rather than for the sake of planetary survival itself. This echoes the criticisms of Kotzé and French, above, where they argue that the SDG, on the whole, reflect protection of the environment but only insofar as it leads to human benefits.<sup>61</sup> In this regard, wider sustainable development policy in Scotland, based as it is upon the SDG, arguably remains largely anthropocentric.

Therefore, Scotland’s approach to sustainable development, through its National Performance Framework, contains elements of ecocentrism. However, the approach remains largely anthropocentric. It rarely recognises, explicitly, the need to live within the ecological limits of the Earth, and where it does this is in order to ensure the survival of

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<sup>58</sup> See <<https://nationalperformance.gov.scot/measuring-progress/performance-overview>> (last accessed 15/02/2022).

<sup>59</sup> These include including ‘visits to the outdoors,’ ‘biodiversity,’ ‘condition of protected nature sites,’ and ‘waste generated.’

<sup>60</sup> See <<https://nationalperformance.gov.scot/national-outcomes/environment>> (last accessed 16/02/2022).

<sup>61</sup> L J Kotzé; D French (no. 27) at p.27: ‘[the] anthropocentric ontology of the [SDG] is evident from the primacy of the human in, and the human-focused objectives of, virtually all of the SDG.’

future generations of humans. However, although Kotzé and French argue that an anthropocentric approach does not allow for living within the Earth's limits if, as Ross argues, sustainable development should be viewed as a process<sup>62</sup> then, as a human-made process, it will usually tend towards more anthropocentric tropes. Anthropocentrism does not necessarily preclude ecological sustainability; it just convolutes and slows the process by not imbuing ecocentric approaches.

### 3. Nature, culture and property law: the need for change in achieving ecological sustainability

#### 3.1 The nature and culture dualism and its presence in sustainable development and property law

If anthropocentric interpretations of sustainable development have taken root, it must be questioned why. It has been suggested that humankind is engaged in a 'crisis of thinking.'<sup>63</sup> This crisis coalesces around questions and assumptions of our place and effect on Earth. This is often couched in terms of 'nature', on the one hand, and 'culture' on the other. Culture encapsulates everything seen as 'human'. Nature captures everything else. As Nicole Graham states, 'The paradigm of nature/culture operates via the dichotomous logic of anthropocentrism. Anthropocentrism divides the world into two categories: human beings and 'the rest', then places humans at an imaginary centre of that world.'<sup>64</sup> Anything outwith the category of 'human', then, is reduced to a resource for human use and consumption.<sup>65</sup> This ability to logically separate nature from culture – a 'predominantly exclusive Western paradigm'<sup>66</sup> – stems from 'instrumentalist rationality and the property-owning man [and] has become a tool that legally creates human entitlements to the environment, that justifies

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<sup>62</sup> A Ross (no. 21) at p.299.

<sup>63</sup> A Valtonen *et al* (no. 38) at p.2, referencing J Zylinksa, *Minimal ethics for the Anthropocene* (Open Humanities Press, 2014).

<sup>64</sup> N Graham (no.1) at p.27.

<sup>65</sup> See A Valtonen *et al* (no. 38) at p.3. See also E Freyfogle, 'Ethics, Community and Private Land' (1996) *Ecology Law Quarterly*, 23(4), at 644: 'The land had instead become a warehouse of discrete resources, each priced by how it could be exploited.' See also G Monbiot, 'The gift we should give to the living world? Time, and lots of it' (2021) *The Guardian Newspaper*, available at <<https://www.theguardian.com/commentisfree/2021/aug/08/living-world-time-saplings-oak-slow-ecology-habitats>> (last accessed 09/08/2021) when discussing the need for 'slow ecology', Monbiot criticises such terms as 'natural capital accounting' and 'biodiversity net gain', which treats 'one habitat or feature as exchangeable for another.'

<sup>66</sup> L J Kotzé and D French (no. 27) at p.12.

and legitimises these entitlements, and that strengthens them through laying claims to the environment and its benefits to human development.’<sup>67</sup>

Anthropocentrism, therefore, insists upon the mutual exclusivity of nature and culture.<sup>68</sup> The tendency to separate nature from culture has allowed for the rationalisation of practices which deepen the environmental crisis. However, this separation is neither realistic nor sustainable. Valtonen and Rantala state that, ‘natural and cultural entangle in so many ways that their separation must...be questioned, and novel formulations introduced.’<sup>69</sup> Fiona Mackenzie shares this view, arguing that we must look to disturb ‘the norm of nature as external to the social,’ and look to ‘allow new ways of thinking critically and creatively about how to move forward...’<sup>70</sup>

Many critical and creative approaches have been advocated which recognise humankind existing among and as an integral part of ‘natural’ ecosystems.<sup>71</sup> However, whilst there is a need to bring paradigmatic understandings of nature and culture closer together, there is also a need to recognise the contemporary place of humankind in this paradigm. The nature and culture dualism is a human creation, and consequently the results – environmental degradation, climate change, habitat and biodiversity destruction – are caused by humans. There is now a clear responsibility incumbent upon humankind to produce solutions to the problems we have caused. Peter Burdon argues that ‘human beings are unique and have become a force of nature that is able to influence the geological development of the Earth system.’<sup>72</sup> Viewing humans as a unique force, able to manipulate Earth systems in this way, is, arguably, an anthropocentric view. However, it insists upon the baseline acceptance that we need to live within the Earth’s limits and that we are the only force capable of achieving this. Therefore, anthropocentric approaches may persist, but to be ecologically sustainable they must proceed with acceptance of this responsibility. Stewardship of land then exists

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<sup>67</sup> Ibid.

<sup>68</sup> N Graham (no. 1) at p.28: ‘[n]ature and culture are thought to be as different as it is possible to be...They are not, therefore, two distinct concepts, but two poles of the same meta-concept, nature/culture.’ Klaus Bosselmann criticises this ‘reductionist approach’; the nature and culture relationship is ‘misconceived through the domination of certain philosophical and cultural traditions in European history. As a consequence, modern legislation to protect the natural environment has developed in a compartmentalised, fragmented, economist and anthropocentric manner.’ See K Bosselmann, ‘From Reductionist Environmental Law to Sustainability Law’ in P Burdon (no. 4) at p.204.

<sup>69</sup> A Valtonen *et al* (no. 38) at p.2.

<sup>70</sup> F Mackenzie (no. 4) at p.28 – 29, quoting N Castree and B Braun, ‘The Construction of nature and the nature of construction’ in B Braun, N Castree (eds) *Remaking Reality: Nature at the Millennium* (Routledge 1998) at p.34.

<sup>71</sup> As Peter Burdon states, ‘[The science of ecology] provided environmentally conscious lawyers with a firm foundation to advocate for laws that placed human beings as interconnected parts within a broader community of life.’ See P D Burdon ‘Ecological Law in the Anthropocene’ (2020) *Transnational Legal Theory* 11(1-2), at p. 34.

<sup>72</sup> Ibid.

for the sake of living within the Earth's limits, rather than the preservation of resources for human consumption.

The fact that prevailing interpretations of sustainable development are anthropocentric is not surprising. However, as discussed above, whilst it is possible to view anthropocentric and ecocentric approaches to sustainable development as diametrically opposed, one should rather view both approaches as existing on a spectrum. Viewing sustainable development as *either* anthropocentric or ecocentric is an approach informed by the nature/culture dualism. Instead, appropriate interpretations of sustainable development would concern themselves incorporate elements of both. Humankind is the cause of the environmental crisis, and is also the solution.

The nature and culture dualism is also present in predominant conceptualisations of property law frameworks in the West. Fundamentally, the nature/culture dualism has facilitated legal norms which operate in ignorance of environmental destruction and which, consequently, contribute to it. As Nicole Graham states, 'the ongoing practice of property law depends entirely on a very particular, instrumentalist value of the biosphere.'<sup>73</sup> The instrumentalism here is facilitated by a focus on individual ownership rights: if one can secure rights over land then economic benefits can be extracted without any serious interferences. Economic growth is the result of this instrumentalist approach and has been the consistent paradigm of the last century. Growth has brought many benefits: technological advances; increased quality of life for many in society; increased global communication and interconnectivity. However, it is inherently unsustainable; antithetical to the ecocentric goal of living within the Earth's natural limits. The growth-orientated, instrumentalist view of nature as a resource – a direct consequence of the nature/culture dualism – permeates sustainable development, which has predominantly been engaged with on the anthropocentric end of an ontological spectrum of understanding and approach.

### 3.2 The role of responsibilities in bridging the gap between anthropocentrism and ecocentrism

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<sup>73</sup> N Graham (no. 1) at p. 23. See also Freyfogle (no. 65) at p.643: 'For too many people, the challenge of ownership became not how to live harmoniously and permanently with a chosen place, but how to exploit the land for its maximum yield, how to maximize the present value of a resource flow, even if doing so exhausted the land in a generation or two.' He continues at p.648 to state that, 'Nature does not observe our lines...If the prime lesson of ecology is that of interconnection, property law has not yet learned it.'

‘We have grown confused about the link between private ownership and community ethics, and thus have trouble seeing how private property could be brought in line with a new, ecologically informed land ethic.’<sup>74</sup>

The arguments so far presented highlight that humankind must take responsibility for nature. However, the nature/culture dualism is deep rooted. It extends throughout the rules that govern day-to-day life, and has a powerful interaction with property law. The nature/culture dualism is exercised through law’s ability to ‘other’ through juridical legitimisation.<sup>75</sup> The legitimacy of such exclusionary power in the context of property law comes from the ability to exercise strongly protected individual ownership rights. However, whilst the protection of these rights can bring stability and security in growth, an approach which steadfastly prioritises these rights, and by extension the importance of the individual, arguably leaves no option *except* anthropocentric interpretations of sustainable development.

New interpretations must be considered in order to challenge the nature/culture paradigm and better contribute to ecological sustainability. Such interpretations would ideally allow for more ecocentric interpretations of sustainable development. It is possible that imposing responsibilities on property ownership can lead to approaches which are informed as much by ecocentrism as they are by anthropocentrism. Joseph Singer provides a compelling alternative to a rights-based approach to property law. He suggests that there are two prevailing worldviews of ownership in Western property law discourse. These constitute the ‘castle’ model, on the one hand, and the ‘investment’ model on the other.<sup>76</sup> In the former, Singer conjures the image of a feudal lord with complete dominion over his castle, with which interferences must be robustly justified. In the latter, property is viewed as an ‘investment in a market economy,’ wherein an owner who has invested in their property should be afforded the expectation to reap the rewards of that investment.<sup>77</sup> Both of these models subscribe to the idea that ownership is antithetical to wider obligations; it is instead rooted in individual rights.<sup>78</sup> Singer suggests an alternative model – the ‘citizenship model’ – which asserts that obligations are, in fact, inherent in ownership.<sup>79</sup> Here, Singer highlights

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<sup>74</sup> E Freyfogle (no. 65) at p.642.

<sup>75</sup> L J Kotzé and D French (no. 27) at pp.13-14.

<sup>76</sup> J W Singer, ‘The Ownership Society and Takings of Property: Castles, Investments and Just Obligations’ (2006) *Harvard Environmental Law Review*, 30, at p.314.

<sup>77</sup> *Ibid.* at p.322. As Singer acknowledges, this approach chimes with Lockean theories of property law, which focus on individualistic notions of property.

<sup>78</sup> *Ibid.* at p.323, Singer notes that, ‘[t]he models overlap because an owner who is exercising a traditional property right may be said to have justified expectations in the continued exploitation of that right despite the harmful effects on others.’

<sup>79</sup> *Ibid.* at p.328.

that the consequences of certain actions of an owner within their parcel of land<sup>80</sup> are often not restricted solely to that land; they can have wider societal effects. Seen this way, property laws are systemic and structural. They govern a finite resource and the allocation of that resource.<sup>81</sup>

Critically, an approach such as the ‘citizenship model’ could represent a ‘novel formulation’<sup>82</sup> to question the current nature and culture paradigm and bridge the gap between anthropocentric and ecocentric approaches to sustainable development. Currently, property law operates, as Singer outlines, to protect the right of ownership above all else. The rights of the landowner to exclude and to use the land as they see fit can be challenged, but such interferences must be justified robustly. Land-use decisions can have deep impacts both on human and non-human communities, and approach informed by responsibilities as well as rights would recognise this. Land ownership could, therefore, be restricted from a new angle; instead of rights pitted against other rights, a more holistic approach would factor responsibilities into the equation. An ontological acceptance of a system of property law which recognises obligations inherent in ownership can open up theoretical and practical spaces for sustainable development to be interpreted with increasing ecocentrism.

### 3.3 How the structuring effects of property law resist the imposition of responsibilities on ownership

If approaches to sustainable development, both in Scotland and further afield, remain tied to anthropocentric norms, then it is important to assess whether new formulations, such as incorporating responsibilities into ownership, are indeed possible. As discussed in this chapter, there exists an inherent link between, on the one hand, the nature and culture dualism and, on the other, the legal norms, including sustainable development, that determine humankind’s relationship with the land. The fulcrum of this relationship is anthropocentrism. It is more pertinent than ever, then, to find ways of integrating more ecocentric approaches to sustainable development. Discussion earlier in this chapter suggested that imposing responsibilities upon ownership is one way to challenge the predominant nature/culture paradigm. However, the functioning of property law has deep,

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<sup>80</sup> Or indeed a possessor of land, such as a tenant.

<sup>81</sup> Discussing Singer’s citizenship model, Frankie McCarthy states that, ‘[s]ince land is a resource every human being needs to survive, the allocations we choose to make through our property law system affect everyone.’ See F McCarthy, ‘Property Law and Human Rights in Land Reform’ in M M Combe, J Glass, A Tindley, *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press 2020) at p.23.

<sup>82</sup> A Valtonen *et al* (no. 38) at p.2.

embedded roots; is it possible to successfully introduce responsibilities in this regard? Property law has a profound, structuring effect on society. These structures are difficult to break down; they fundamentally resist change as the status quo has been so successful in facilitating growth. Therefore, it will inevitably resist new ‘novel formulations’, such as those advocating for responsibilities and obligations as inherent in ownership.

Andre van der Walt introduces a challenge to what he terms the ‘rights paradigm’.<sup>83</sup> This is the ontological approach to property rights which insists upon a hierarchical structure in which ownership sits atop, protected by deeply entrenched notions of individual rights.<sup>84</sup> The effect of this paradigm is to paint property law, and particularly ownership, as a naturally occurring, neutral and unchanging force. However, for Van der Walt, there is a paradox here. The place of ownership in this hierarchical structure is insisted upon because it brings stability and certainty, but reality dictates that it is, in fact, regularly impinged, albeit without proper recognition that this is actually the case. Property law is inherently fluid. For Van der Walt, the insistence on a legal fiction such as the rights paradigm renders property law unable to adapt and react to a changing world. Instead, it serves largely to entrench and strengthen the status quo. This leads to a schism in society between those who have strong ownership rights and those who do not; the latter often being those in the ‘margins’ of society.<sup>85</sup> Extending this logic, the rights paradigm marginalises not only human communities but also non-human communities. The exclusionary ability of ownership has structural consequences which extend beyond merely the protection of individual ownership rights for reasons of economic stability and certainty.

At this point, it is important to temper the discussion insofar as it does not seek to suggest that the concept of private property law is inherently *bad* or fundamentally unsuited to ecocentrism. However, it is essential to highlight the shortcomings of prevailing Western worldviews of property law in their ability to facilitate this effectively. Freyfogle highlights this in discussing the link between property law and the economy:

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<sup>83</sup> AJ Van der Walt, *Property in the Margins* (Bloomsbury, 2009) at p.27.

<sup>84</sup> Ibid, at p.31, Van der Walt explains ‘...property relations are ordered and property conflicts are adjudicated within a paradigm that favours the protection of existing rights and the stability of the status quo through its abstract, acontextual, backward-looking, rights-privileging rhetoric and logic.’ This view of property law shares aspects of Singer’s ‘castle’ and ‘investment’ models of property law insofar as obligations are not imposed on ownership; any interference on ownership must be justified.

<sup>85</sup> Ibid, at p.24. It is in this space that the link between property law norms and environmental justice arguments becomes apparent: those who suffer the worst injustices of environmental deterioration are often those groups existing in the margins, who are left powerless due to their lack of strong ownership rights. Within property law, the rights paradigm, Van der Walt argues, is a root cause of this marginalisation.



‘[the ability of property law] to encourage economic activity provides its most-cited social benefit. With reasonably secure rights owners have incentives to develop and use lands in ways that create spill-over economic gains for the community...Private property is legitimate because it promotes economic growth.’<sup>86</sup>

In this regard, property law’s functioning can and does lead to stability.<sup>87</sup> Where property rights are certain, there is transactional security. With this certainty comes economic growth. Therefore, a common argument is that change should be tempered by, and exist within, a protection of the status quo. This suggests that existing property rights are to be protected, rather than challenged.<sup>88</sup> Freyfogle explains, however, that this observation is ‘significantly incomplete’.<sup>89</sup> Property is more than simply a facilitator for economic development; land use can profoundly affect both human and non-human communities, both positively and negatively.<sup>90</sup> Freyfogle gives two competing examples: on the one hand, intensive land activity can significantly degrade the land itself;<sup>91</sup> on the other he recognises that secure property rights ‘can give an owner greater ability to act as steward of the land...’<sup>92</sup> In the context of sustainability, property law is a double-edged sword. The issue lies not in its existence but rather in the way it is viewed and applied. Looking at Freyfogle’s second example; secure legal rights can indeed empower an owner to act as steward of the land. However, private property law would not impose any such obligations on the owner. Considering Singer’s castle model, for example, the imposition of any obligation on ownership would constitute a strong interference, justifiable only in the strongest terms. Such stewardship could arise only from individual altruism, rather than being necessitated

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<sup>86</sup> E Freyfogle, ‘Private Ownership and Human Flourishing: An Exploratory Overview’ (2013) Stellenbosch Law Review 24, at p.437.

<sup>87</sup> See, for example, A J van der Walt (no. 68) at pp.1 – 26; J Robbie and E van der Sijde, ‘Assembling a Sustainable System: Exploring the systemic constitutional approach to property in the context of sustainability’ (2021) Loyola Law Review, 66, at p.603; E Freyfogle (no. 22) at p.443 where he states ‘Key benefits of private property arise only when a system is reasonably stable, allowing people to make and carry out long-term plans.’ The stabilising effect stems from power of property rights to ‘internalise the costs and benefits of an owner’s use of a resource and facilitate the market allocation of resources to their highest-value users.’ See J Purdy, ‘A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates’ (2005) The University of Chicago Law Review, 72(4), at p.1240. Purdy references Richard Posner’s argument that ‘[l]egal protection of property rights creates incentives to exploit resources efficiently.’ See R A Posner, *Economic Analysis of Law* (6th Edition, Aspen Publishing, 2003). Hernando de Soto also argues that insecure or no-rights to property are the principal contributor to poverty, and what is needed to lift communities out of poverty is to ensure secure private property rights. See generally H de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Publishing, 2000).

<sup>88</sup> A J Van Der Walt (no. 83) at p.4.

<sup>89</sup> E Freyfogle (no. 86) at p.437.

<sup>90</sup> One obvious negative example from earlier in this chapter is the notion of environmental justice.

<sup>91</sup> E Freyfogle (no. 86) at p.428: ‘[l]and degradation is more likely to occur when a legal framework authorizes it.’

<sup>92</sup> Ibid.

by the system itself.<sup>93</sup> The structural effects of property law, in this regard, resist the imposition of responsibilities in favour of certainty, stability, and growth.

However, this is problematic in our current age. As Van der Walt argues, '[l]aw, as a protector of the security of vested and acquired rights and guarantor of the stability of the system, is primarily backward-looking.'<sup>94</sup> Sustainable development is inherently forward looking, no matter whether it is wholly anthropocentric or ecocentric. An anthropocentric approach advocates sustainability for human development and survival, and ecocentric approaches insist upon living within the Earth's resources. Both are forward looking and require a system which encourages this. The nature/culture dualism, backed as it is by property law, has created an environment inherently unsuited to ecological sustainability. However, sustainability dictates that a more holistic approach, which includes ecocentric sustainable development, must be considered.

The problem is that the prevailing paradigm of property law has rendered both itself and other forces, such as sustainable development, largely static. As Earth systems struggle to cope with the demands placed upon them by humankind, this is no longer sustainable. As argued, property law has profound, structural effects. Yet, as Freyfogle argues, while humankind's understanding of the environment has grown more sophisticated over time, private property norms have remained comparatively unchanged.<sup>95</sup> If property law cannot change then the structures in place to address environmental crises, including sustainable development, will remain ineffective. As Freyfogle contends, one of property law's most cited benefits is economic stability and certainty. Property law will *inherently* resist change because of its intended outcomes. Therefore, a structural change of approach to property law, such as the imposition of responsibilities on ownership, is unsurprisingly resisted. As argued, responsibilities imbued into property law relations can represent a fundamental challenge to the nature/culture dualism. In turn, this can lead to the normalisation of ecocentric approaches to sustainable development. However, the structural effects of property law resist such change in order to cement growth. This is the central challenge of an ecocentric approach to sustainable development.

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<sup>93</sup> To take a real-life example, Danish billionaire Anders Holch Povlsen has acquired around 220,000 acres across 12 estates in Scotland. His plans for the estates are largely ecocentric: they include pledges of re-wilding and restoration. This is clearly beneficial for the natural environment of Scotland. However, the issue remains that Scotland's private property laws have largely left that decision up to Mr. Povlsen alone. Equally, he could have decided to implement intensive grazing, shooting and forestry operations. See BBC News, 'Anders Povlsen: Why a Danish billionaire bought the Highlands' available at <<https://www.bbc.co.uk/news/uk-scotland-47803110>> last accessed 20 January 2021. Povlsen will be discussed again in Chapter 2.

<sup>94</sup> A J Van Der Walt (no. 83) at p.5.

<sup>95</sup> E Freyfogle (no. 65) at p.672.

## 4. Conclusion

This chapter has sought to outline debates relevant to this thesis which are related to the achievement of ecological sustainability. Sustainable development has emerged as a key framework in creating a more sustainable future. However, a global approach which remains anthropocentric means that visions of sustainable development better equipped to tackle phenomena such as climate change, which would incorporate ecocentrism to a greater extent, remain in the fringes of global action. Instead, sustainable development has developed within an anthropocentric framework, due to a continuing ontological separation of nature and culture. Property law is inextricably bound in this debate. Deep-rooted protections for individual ownership rights mean that any changes to that system are strongly resisted. Approaches which could lead to the incorporation of ecocentrism, such as responsibilities in ownership, are eschewed in order to protect outcomes of certainty and stability. These outcomes have had many positive effects, but without counterbalances they are fundamentally unsustainable as they work to entrench the nature/culture dualism.

The result is that sustainable development will continue to struggle to find its own, effective voice. The frameworks in place resist approaches which facilitate more ecocentric interpretations of sustainable development as these do not fit the paradigm of growth. Anthropocentric sustainable development, which does not adequately challenge the instrumentalisation of nature, may lead to the goal of living within the Earth's natural limits. However, doing so within a wider framework that fundamentally resists change means that these approaches to sustainable development are handicapped, like running a race with a weight strapped to one's back. In the face of increasingly irreversible environmental destruction, frameworks must exist that challenge the nature/culture dualism and advocate the inclusion of ecocentric approaches.

In the next chapter, the contextual background to the community right to buy regime in Scotland will be outlined and analysed more fully in the context of the theoretical debates raised in this chapter.

## Chapter 2

# Sustainable development policy and property law in Scotland

### 1. Introduction

Chapter 1 framed the discussion to suggest that sustainable development on a global scale, as well as at a general policy level in Scotland, tends towards the anthropocentric end of the anthropocentric/ecocentric spectrum. In other words, concerns about the Earth's ecological survival are framed in human terms. It highlighted that anthropocentric interpretations do not necessarily lead to inertia, but suggested that imbuing ecocentric interpretations will more effectively lead to ecological sustainability. The underlying reasons for anthropocentric interpretations have their roots in the nature/culture dualism. Chapter 1 outlined that novel formulations are required to challenge this paradigm, to find a more appropriate approach within the anthropocentric/ecocentric spectrum identified, principally the incorporation of responsibilities into ownership. Chapter 1 concluded that the structuring effects of property law render this type of formulation difficult because of its strong protection of individual ownership rights.

Chapter 1 highlighted that Scotland's wider sustainable development policy, based on the SDG, tends toward the anthropocentric pole of the anthropocentric/ecocentric spectrum. Therefore, this chapter seeks to analyse whether this anthropocentrism is evident in policy relating specifically to land use in Scotland. To do this, it will firstly provide context in outlining that the nature/culture dualism is manifested in the concentration of ownership patterns seen today in Scotland. This process has fostered a focus on individual ownership rights, rather than responsibilities; an overtly anthropocentric outcome. This chapter will then outline some of the recent policy responses to the Scottish 'land question', in particular the introduction of the Land Use Strategy and the Land Rights and Responsibilities Statement. This will highlight that responsibilities are beginning to play a larger role in land use in Scotland, shifting the focus away from a purely anthropocentric approach to one with elements of ecocentrism, but that traditional notions of ownership rights in Scotland remain deep rooted and difficult to overcome. Finally, the statutory community rights to buy will be introduced, in particular their incorporation of sustainable development, in order for a deeper

evaluative exercise to be undertaken in Chapter 3 to identify their relationship with the arguments outlined in Chapter 1, and whether they are capable of contributing to ecological sustainability.

## 2. Scotland's land in the context of ecological sustainability

‘As the saying goes, ‘the thing about land is that they don’t make it any more.’’<sup>96</sup>

This section looks at Scotland's concentrated ownership patterns and extremely unequal population distribution. The section argues that historical factors, defined by the nature/culture dualism and facilitated by the structuring effects of Scots property law, have created a difficult environment for ecological sustainability.

### 2.1 The concentration of ownership in Scotland

Whilst much of Scotland's land is often viewed with a vivid romanticism,<sup>97</sup> the ‘wild’, uninhabited beauty of much of Scotland's land can be attributed to a rather turbulent history resulting in patterns of landownership being severely concentrated in very few hands.<sup>98</sup> This has created what has been termed the ‘Scottish land question’<sup>99</sup> This question stretches back centuries,<sup>100</sup> and a full historical examination is not possible within the confines of this thesis. Nevertheless, even a brief insight uncovers evidence for the concentrated patterns of ownership seen today. Following the Jacobite rebellion of 1745-6, individual claims of ownership over former clan territory was an early indicator of the importance that property rights were to play in the coming centuries.<sup>101</sup> The Industrial Revolution then entrenched the perceived importance of ownership rights, as greater potential for high earnings were to be found in land and land values concomitantly increased. The Highland Clearances were

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<sup>96</sup> C Warren, *Managing Scotland's Environment* (Edinburgh University Press, 2009) at p.45.

<sup>97</sup> For example, see L Gairn, *Ecology and Modern Scottish Literature* (Edinburgh University Press, 2011) pp.3-4 for an insight into the relationship between Scotland's natural environment and prose and poetry.

<sup>98</sup> See Land Reform Review Group, *The land of Scotland and the common good: report* (Scottish Government Environment and Forestry Directorate, 2014) at p.159.

<sup>99</sup> See E A Cameron, ‘Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880-1999’ in M Combe, J Glass, A Tindley, *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press, 2020) at p.63.

<sup>100</sup> For a greater insight into the history of the land question in Scotland see E A Cameron (no. 99); A Wightman, *The Poor Had No Lawyers: Who Owns Scotland And How They Got It* (4<sup>th</sup> ed., Birlinn, 2015); and J Glass, M F Price, C Warren, A Scott (eds.), *Lairds, Land and Sustainability: Scottish Perspectives on Upland Management* (Edinburgh University Press, 2013) at pp.64-68.

<sup>101</sup> J Glass *et al* (no.100) at p.63.

inextricably bound in this, as land was cleared of people to make way for profitable sheep farming.<sup>102</sup> Throughout all of this has been the endurance of the Scottish ‘laird’; in other words, large rural estates found throughout Scotland. Throughout the centuries these estates have been remarkably robust in their ability to remain unbroken through family generations. This has been, in large part, due to the prevalence of rules of primogeniture and entail.<sup>103</sup> Since the Industrial Revolution, the popularity of the Scottish sporting estate has endured.<sup>104</sup> Such estates, by their nature, require vast tracks of privately-owned, uninhabited and often bare land. These factors result in the estimation that 50 per cent of Scotland’s privately-owned land is held by just 432 owners.<sup>105</sup> For some, this is a problem;<sup>106</sup> with a common argument that land in Scotland is not being used to benefit the communities that live there, nor for the ecologies and habitats that could exist there.<sup>107</sup>

## 2.2 Scotland’s ‘land question’ as a representation of anthropocentrism

The patterns of ownership and population distribution in Scotland reveal that a focus on ownership rights has contributed to a structural, anthropocentric view of land. Scottish landowners generally do not find their right of ownership to be strongly impinged, rather the opposite: the core terms of ownership in terms of Scots law are rights of *usus*, *fructus* and *abusus*.<sup>108</sup> In this regard, landowners are entitled to use the land, to reap the benefits therein and to exercise their right of disposal with very little constraint. Over time, this has structural

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<sup>102</sup> Ibid. at p.64; E A Cameron (no. 99); A Wightman (no. 100).

<sup>103</sup> Primogeniture ensured that the eldest son inherited an estate, and acted as a ‘means of ensuring the perpetuation of the feudal system as it avoided any possibility of the division of landed wealth.’ Entail essentially ringfenced landed estates from claims by creditors which contributed to their resistance to fragmentation. See A Wightman (no. 100) at pp. 39 to 48. Primogeniture was only fairly recently abolished, by the Succession (Scotland) Act 1964, and entails still existed until the Abolition of Feudal Tenure (Scotland) Act 2000. This contrasts with their abolition in much of Europe in the late eighteenth century. See Wightman (no. 100) at pp.41-46.

<sup>104</sup> Sporting estates account for 43 per cent of all privately owned rural land in Scotland: P Higgins, A Wightman, D MacMillan, *Sporting estates and recreational land use in the Highlands and Islands of Scotland: Report for Economic and Social Research Council* (2002) available at <[http://www.docs.hss.ed.ac.uk/education/outdoored/sporting\\_estates\\_research\\_report.pdf](http://www.docs.hss.ed.ac.uk/education/outdoored/sporting_estates_research_report.pdf)> at p.10 (last accessed 19/07/2021).

<sup>105</sup> J Hunter, P Peacock, A Wightman, M Foxley, *432:50 – Towards a comprehensive land reform agenda for Scotland: a briefing paper for the House of Commons Scottish Affairs Committee* (2013) available at <<https://www.parliament.uk/globalassets/documents/commons-committees/scottish-affairs/432-Land-Reform-Paper.pdf>> at p.5 (last accessed 10/06/2021).

<sup>106</sup> See J Glass *et al* (no. 100) at p.63.

<sup>107</sup> Scottish Government, *Attitudes to Land Reform* (2021) at pp.17 and 31.

<sup>108</sup> Scotland falls into the category of a ‘mixed’ legal system. It has elements of both Common Law, in its Roman roots, as well as Civilian Law, from English influence. Scots property law is Civilian in nature, but was for a long time feudal. Its Civilian nature imbues a strong right of ownership as this forms the most complete right a person may have in a thing; all other rights in property stem from ownership in this regard. See M Combe, ‘Legislating for Community Land Rights’ in M Combe, J Glass, A Tindley (eds.) *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press, 2020) at p.155.

consequences. In Scotland, individuals have been able to take ownership of large swathes of land and retain this land for generations.<sup>109</sup> Their ownership rights, of *usus*, *fructus* and *abusus*, have permitted land uses to largely remain unchecked and the wider system of property law has acted to protect these rights. This is rooted in the separation of nature and culture; a focus on ownerships rights over land has abstracted it from its physical reality, becoming ‘no more than the ‘thing’ of the property relation.’<sup>110</sup>

Although private ownership can often be a ‘valuable, if not indispensable, component of the social order and of economic flourishing,’<sup>111</sup> where such ownership is concentrated in so few hands, as it is in Scotland, there can be concomitant, structural impacts on human and non-human communities. For example, the social and ecological effects of the Highland Clearances remain evident. Societally, the uneven distribution of Scotland’s population can be traced directly to the Clearances, so too can the gradual decline of Gaelic culture.<sup>112</sup> Ecologically, sheep grazing has a detrimental impact on vegetation, and consequently also for animal communities and ecosystems.<sup>113</sup> Other wide-scale land practices by landowners in Scotland, such as sporting estates, also have profound ecological consequences that can span generations.<sup>114</sup>

This is not to say that ownership of large estates is necessarily antithetical to positive ecological outcomes. For example, in 2006, Danish billionaire Anders Holch Povlsen

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<sup>109</sup> A useful critique of land ownership in Scotland, both historical and contemporaneous, can be found in A Wightman (no. 100).

<sup>110</sup> N Graham, ‘Dephysicalisation and entitlement: legal and cultural discourses of place and property’ in B Jessup and K Rubenstein (eds.) *Environmental Discourses in Public and International Law* (Cambridge University Press 2012) at p.97.

<sup>111</sup> E Freyfogle, ‘Taking Property Seriously’ in E Freyfogle (ed.), *Property Rights and Sustainability* (Brill, 2011) at p.43.

<sup>112</sup> E Richards, *Debating the Highland Clearances* (Edinburgh University Press, 2007) at p.3. At p.99, Richards states that such cultural erosion coalesced to form a ‘sense of anomie or alienation, a loss of social accord.’ See also C W J Withers, *Gaelic Scotland: The Transformation of a Culture Region* (Routledge, 1988).

<sup>113</sup> L C Ross *et al*, ‘Sheep Grazing in the North Atlantic Region: A long-term perspective on environmental sustainability’ (2016) *Ambio*, 45, at p.557; C Warren (no. 96) at p. 11. The scale of increase in sheep pastures during the Clearances, and the lasting ubiquity of sheep grazing in Scotland, has led to major changes in flora and fauna; ecologies which were once species-rich were often reduced to species-poor pastures: see R A Dodgshon, ‘The Scottish Highlands before and after the Clearances: an ecological perspective’ in I D Whyte and A J L Winchester (eds.), *Society, Landscape and Environment in Upland Britain* (Society for Landscape Studies, 2004) at p.76.

<sup>114</sup> Grouse moors and related management practices have been criticised for their ecological effects, such as soil nutrient loss, acidification of streams and rivers, low species diversity, as well as the illegal killing of birds of prey: see Revive, *A Better Way: How an alternative to grouse moors could help tackle climate change, increase biodiversity and benefit Scotland’s people* (2019) available at < <https://revive.scot/publication/a-better-way-how-an-alternative-to-grouse-moors-could-help-tackle-climate-change-increase-biodiversity-and-benefit-scotlands-people/>> (last accessed 14/06/2021); A Wightman and R Tingay, *The Intensification of Grouse Moor Management in Scotland* (2015) available at <[http://www.andywrightman.com/docs/LACS\\_Grouse\\_Report\\_2015.pdf](http://www.andywrightman.com/docs/LACS_Grouse_Report_2015.pdf)> (last accessed 10/06/2021); RSPB Report, *The Illegal Killing of Birds of Prey in Scotland 2015-2017* (2018) available at <[https://ww2.rspb.org.uk/Images/illegal-killing-report\\_tcm9-462198.pdf](https://ww2.rspb.org.uk/Images/illegal-killing-report_tcm9-462198.pdf)> (last accessed 11/06/2021).

purchased the 42,000-acre Glenfeshie estate. Since then, he and his wife have acquired around 220,000 acres over 12 Scottish estates, with the primary purpose of conservation and re-wilding.<sup>115</sup> There are clear positive outcomes for ecologies in this regard. In this regard, the *scale* of ownership can have positive ecological outcomes. Where, as evidenced by Povlsen, a single landowner controls a large amount of land, decisions can be taken over that land without much compromise; where those decisions are ecologically positive then this has clear environmental benefits. This extends beyond individual landowners, to community landowners, NGO and charity landowners, and public landowners. This contrasts to more fragmented ownership, in which such landscape-scale decisions are not possible; fragmentation of landholdings and breaking-up of unified land management under a single owner can have negative consequences for local ecologies as a result.<sup>116</sup>

Indeed, research by the Scottish Land Commission shows that there is a clear distinction between scale and concentration, insofar as scale is not necessarily the primary ‘risk factor’, but instead it is *concentration* of landholdings that presents risks.<sup>117</sup> This is because concentration of land means a concentration of power. Where land use decisions are made in Scotland, often these decisions can have fundamental effects on human and non-human communities because ownership is so concentrated in few hands. The historical changes to land and the consequent patterns of ownership and population distribution have left an anthropocentric legacy of *rights* in land rather than responsibilities. Furthermore, as Scotland’s property law system demands only that ownership rights are respected, rather than responsibilities, there is no *incentive* for land use which recognises the importance of non-human ecologies. Such action must originate from the landowner themselves. The emphasis on rights, rather than responsibilities, means that landowners and policymakers struggle to find the appropriate balance on the anthropocentric/ecocentric spectrum.<sup>118</sup> An approach which does not recognise responsibilities in landownership, and which focuses

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<sup>115</sup> See BBC News, ‘Anders Povlsen: Why a Danish billionaire bought the Highlands’ available at <<https://www.bbc.co.uk/news/uk-scotland-47803110>> (last accessed 26/03/2021).

<sup>116</sup> See Scottish Land & Estates response to the Scottish Government, ‘A Consultation on the Future of Land Reform in Scotland’ (2015) available at <<https://www.scottishlandandestates.co.uk/our-work/land-reform>> (last accessed 01/08/2021) at question 14: ‘case study after case study highlighted that one of the biggest threats to species conservation was the fragmentation of landholdings and the consequential break-up of coherent and unified management.’

<sup>117</sup> Scottish Land Commission, ‘Legislative proposals to address the impact of Scotland’s concentration of land ownership: A discussion paper from the Scottish Land Commission’ (2021).

<sup>118</sup> For example, a common criticism of Povlsen’s land use decisions is that they are *too* ecocentric; they ignore the human communities that are as much a part of the landscape as non-human communities. This is a general criticism of wholly ecocentric approaches. See J Blewitt (no. 22) at p.47, where he states that ‘Western conservationists, influenced by deep ecology and including organisations like the World Wide Fund for Nature...have sometimes...failed to appreciate how the effects of environmental problems seriously impact on the poor...’



only on rights, fails to find the balance between anthropocentrism and ecocentrism. Due to the underlying rationale of the protection of ownership rights – market security and certainty – approaches will inherently tend towards anthropocentrism.

### 3. Land reform as a response to Scotland's land question: land policy and the community rights to buy

#### 3.1 Land reform in Scotland

Land reform has arisen in Scotland as a response to the challenges presented by concentrated land ownership. Scotland's 'land question' has 'remained in the bloodstream of Scottish politics and in the cultural memory of Scotland.'<sup>119</sup> It is pertinent at this point to outline what land reform can look like, and the shape it takes in Scotland. Most land reform frameworks seek to regulate the use and ownership of land, usually through legislative changes, in order to address some kind of existing imbalance. On an international level, numerous definitions of land reform have been presented. For example, the United Nations stated in 1962 that '...the ideal land reform programme is an integrated programme of measures designed to eliminate obstacles to economic and social development arising out of defects in the agrarian structure.'<sup>120</sup> The World Bank has offered the definition that '...land reform is concerned with changing the institutional structure governing man's relationship with the land.'<sup>121</sup>

In Scotland, the Land Reform Review Group, established by the Scottish Government to review land ownership patterns in Scotland, had within the explanation of its remit the following statement:

The relationship between the land and the people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country. The structure of land ownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it. In recent years, various approaches to land reform, not least the expansion of community ownership, have contributed positively to a more successful

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<sup>119</sup> See E A Cameron (no. 99) at p.109.

<sup>120</sup> See Scottish Parliamentary Information Centre, *International Perspectives on Land Reform* (2015) at p.5

<sup>121</sup> *ibid.*

Scotland by assisting in the reduction of barriers to sustainable development, by strengthening communities and by giving them a greater stake in their future.<sup>122</sup>

This statement shows the interpretation of land reform in the specific context of Scotland. Further, the statement recognises that ownership has a significant impact on both human and non-human communities. In Scotland, sustainable development has been identified as explicit purpose of its land reform programme, and permeates land reform policy. Community ownership is the principal legislative vehicle of land reform, taking the form of statutory community rights to buy land.<sup>123</sup> Sustainable development is a ‘primary objective’<sup>124</sup> of each form of statutory community rights to buy.

### 3.2 Scotland’s policy relating to sustainable development of land

The concept of sustainable development is central to Scotland’s land reform programme but, as noted in Chapter 1, the interpretation of this concept is crucial in determining its effectiveness and wider sustainable development policy in Scotland points to an anthropocentric outlook. Therefore, this section will analyse certain policy documents relating to the sustainable development of land in Scotland, in particular the Land Use Strategy and the Land Rights and Responsibilities statement. It will evaluate these policy documents, concluding that they include elements which tend towards an anthropocentric outlook, still focused on growth, but also elements which incorporate ecocentric approaches. However, it will highlight that such approaches remain voluntary, largely because the structural effects of property law resist their legal imposition on ownership. The result is a slow approach to ecological sustainability, which could be hastened by the inclusion of more ecocentric approaches.

The discussion has so far outlines that concentrated landownership can fundamentally impact human and non-human communities. In Scotland, ownership rights are paramount, and responsibilities have little voice. This means that one of the outcomes of the ‘land question’ – concentrated ownership patterns – are largely unregulated. Rights of *usus*, *fructus* and *abusus* remain dominant. This is problematically anthropocentric and slows progress in achieving ecological sustainability because it fails to appreciate the importance of finding the balance between anthropocentric and ecocentric approaches. However, to what

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<sup>122</sup> Land Reform Review Group, *The land of Scotland and the common good: report* (2014).

<sup>123</sup> These rights will be explored in detail in Chapters 2 and 3.

<sup>124</sup> A Ross, (no. 7) at p.237.

extent does policy relating to land use in Scotland attempt to address this? Where does it sit on the anthropocentric/ecocentric spectrum, and does it attempt to imbue responsibilities into ownership?

Firstly, the Land Use Strategy<sup>125</sup> delineates the Scottish Government's long-term vision for sustainable land use, and outlines objectives and policies for delivery.<sup>126</sup> The three key objectives are as follows:

'Land based businesses working with nature to contribute more to Scotland's prosperity.

Responsible stewardship of Scotland's natural resources delivering more benefits to Scotland's people.

Urban and rural communities better connected to the land, with more people enjoying the land and positively influencing land use.'<sup>127</sup>

Ross states that these objectives contextualise the Scottish Government's approach to sustainable development for land.<sup>128</sup> This points to a more ecologically-focused outlook for the sustainable development of land. For example, the Land Use Strategy explicitly recognises the need for 'a shift in the way we think about land'<sup>129</sup> and that 'all aspects of the environment, including humans, are interrelated and should not be viewed in isolation.'<sup>130</sup> This speaks to an attempt to overcome the nature/culture dualism, representing a marked shift from the 'sustainable growth' approach advocated in the Economic Strategy,<sup>131</sup> by recognising the inherent connection between human and non-human communities. The Land Use Strategy also adopts a landscapes-based angle of approach, encompassing different landscapes in Scotland: settlements, farmland, semi-natural land, rivers and water bodies,

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<sup>125</sup> Scottish Government, *Scotland's Third Land Use Strategy 2021-2026: Getting the best from our land* (2021). Producing the Land Use Strategy was a key obligation under the Climate Change (Scotland) Act 2009.

<sup>126</sup> *Ibid.* at p.6.

<sup>127</sup> *Ibid.* at p.11.

<sup>128</sup> A Ross (no. 7) at p.252. Ross here refers to the Land Use Strategy 2016. This has since been updated, but the objectives have remained the same.

<sup>129</sup> Scottish Government (no. 125) at p.7.

<sup>130</sup> *Ibid.* at p.9.

<sup>131</sup> Indeed, the Land Strategy suggests an 'ecosystems approach' to land use in Scotland. The Convention on Biological Diversity describes an ecosystems approach as a 'strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way....it recognizes that humans, with their cultural diversity, are an integral component of ecosystems.' See Convention on Biological Diversity, 'Ecosystem Approach', available at <<https://www.cbd.int/ecosystem/>> (last accessed 25/07/2021). This shares similarities with what Bryan Norton terms 'adaptive ecosystem management' which advocates for humans managing land as *part of that land*, rather than imposing management on it: B G Norton, *Sustainability: A Philosophy of Adaptive Ecosystem Management* (Chicago University Press, 2005).

coastal land, islands and marine areas.<sup>132</sup> This suggests a holistic, contextualised approach to the sustainable development of land which takes steps to recognise both the need to address the nature/culture dualism as well as the need to live within the ecological limits of the Earth.

However, the Land Use Strategy arguably delivers mixed messages. Whilst advocating an ecosystems approach and acknowledging the nature and culture dualism, it also promotes a fairly anthropocentric vision of land use. The objective of contributing to ‘Scotland’s prosperity’ points to an outlook more aligned with that of sustainable economic growth within the Economic Strategy.<sup>133</sup> Furthermore, although advocating a ‘shift in the way we think about land,’ the language in the Land Use Strategy regularly commits to the trope that land is primarily a resource. The Land Use Strategy states that the Scottish Government is committed ‘to putting the environment at the heart of what we do,’<sup>134</sup> but is clear that this is intended primarily for the benefit of human communities only:

‘Scotland’s natural capital is our stock of natural assets...These natural assets underpin many of the ecosystem services that our economy relies on...’<sup>135</sup>

There is an argument here that the Scottish Government are attempting to connect the three pillars of sustainable development – social, economic and environmental – in defining ecologies as natural capital which underpin Scotland’s economy, suggesting that there is a synergetic relationship in this regard. However, it is reasonable to conclude that land continues to be reduced to a resource.<sup>136</sup> Therefore, the nature/culture dualism is present in land use policy; there is a tension apparent between, on the one hand, advocating an ecosystems approach which recognises the importance of environmental protection and which views humans as part of their natural environment and, on the other, an anthropocentric, economically-driven view of land. Therefore, whilst the Land Use Strategy adopts certain ecocentric measures, it remains rooted in anthropocentric tropes of land-as-a-resource.

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<sup>132</sup> See Scottish Government (no. 125). This is a new approach, forming a key difference between the 2021 Land Use Strategy and the previous version from 2016.

<sup>133</sup> A Ross (no. 7) at p.252. Again, Ross is referring to the 2016 Land Use Strategy here. However, as mentioned above, the objectives remain unchanged in the 2021 version.

<sup>134</sup> Scottish Government (no. 125) at p.10.

<sup>135</sup> Ibid. While the Land Use Strategy advocates an ecosystems approach which recognises the nature and culture dualism, the conceptualisation of land as ‘natural capital’ is potentially at odds with this. As Blewitt states, the notion of ‘capital’ has extended beyond business and economics to ‘capitalize’ sustainable development and the conceptualisation of ‘critical natural capital’ has been developed in turn. This is problematic as difficulties can arise over, for example, non-substitutability (what can fill the holes in the ozone layer?) and irreversibility (human-made capital cannot replace an extinct species): J Blewitt (no. 22) at p.33.

<sup>136</sup> Indeed, the Land Use Strategy continues to quantify the value of land by reference to its asset value and job-supporting capabilities.

Another significant document regarding land and sustainable development is the Land Rights and Responsibilities Statement (LRRS),<sup>137</sup> published in 2017. It sets out principles to guide land use and inform Government policy in Scotland. Section 1 of the Land Reform (Scotland) Act 2016 Act required Scottish Ministers to produce the LRRS and, in so doing, have regard for, *inter alia*, ‘promoting respect for, and observance of, relevant human rights’;<sup>138</sup> ‘promoting respect for internationally accepted principles and standards for responsible practices in relation to land’; ‘increasing the diversity of land ownership’; and ‘furthering the achievement of sustainable development in relation to land.’<sup>139</sup> Therefore, the LRRS is useful insofar as it provides insight into the Scottish Government’s vision of the sustainable development of land.<sup>140</sup>

The true significance of the LRRS is in its promotion of the importance of *responsibilities* in ownership of land. This suggests that, from the viewpoint of the Scottish Government, obligations are inherent in ownership.<sup>141</sup> It recognises that land reform is an evolving concept,<sup>142</sup> allowing space for iterative changes that can better achieve ecological sustainability. It adopts an approach which mixes both ecocentric and anthropocentric tropes, striking a balance with regard to sustainable development. The balance is particularly evident in Principle 4 of the LRRS, which states:

‘The holders of land rights should exercise these rights in ways that take account of their responsibilities to meet high standards of land ownership, management and use. Acting as the stewards of Scotland’s land resource for future generations they contribute to sustainable growth and a modern, successful country.’

This Principle can be broken into two sections: one ecocentric and one anthropocentric. The first section states boldly that, notwithstanding centuries of the dominance of the rights paradigm in Scotland, in fact, responsibilities should be incorporated into land ownership, management and use and humans should act as stewards of the land. The second section, arguably, tempers this: whilst landowners should act as stewards and incorporate

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<sup>137</sup> Scottish Government, *Scottish Land Rights and Responsibilities Statement* (2017).

<sup>138</sup> The Land Reform (Scotland) Act 2016 s.1(6) states that ‘human rights’ for these purposes can include rights within the European Convention on Human Rights, as well as ‘other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom, including the International Covenant on Economic, Social and cultural rights...’ More discussion on the human rights-based approach of the 2016 Act will be carried out later in this chapter.

<sup>139</sup> The Land Reform (Scotland) Act 2016 ss.1(3)(a), (b), (g).

<sup>140</sup> Scottish Government, *Land Rights and Responsibilities Statement* (2017).

<sup>141</sup> For more on obligations and ownership, see J W Singer (no. 76).

<sup>142</sup> Scottish Government, *Land Rights and Responsibilities Statement* (2017) at p.6.

responsibilities, this is for *future generations*. It is to contribute to *sustainable growth*. This echoes the tropes of wider sustainable development policy in Scotland outlined in Chapter 1, of growth and sustainability for human benefit, rather than planetary survival. Such anthropocentric tropes are utilised throughout the LRRS. For example, the land-as-a-resource is a common trope in the LRRS; it states that ‘Scotland’s land is a resource for all of Scotland’s people,’<sup>143</sup> and the Economic Strategy, discussed in Chapter 1, is a common reference point throughout the LRRS,<sup>144</sup> suggesting that the vision is inherently tied to notions of economic growth. Therefore, the tension apparent in the Land Use Strategy, between an anthropocentric vision predicated on sustainable economic growth and a more contextualised, environmentally informed view of sustainable development, also permeates the LRRS.

The discussion above shows that both the Land Use Strategy and LRRS incorporate ecocentric visions, which indicates a shift to imbuing more ecocentrism in the anthropocentric/ecocentric spectrum of sustainable development of land in Scotland. However, these land policies remain largely tied to anthropocentrism, for example in notions of growth as an ultimate goal, rather than living within ecological boundaries. As argued in Chapter 1, whilst an anthropocentric approach to sustainable development can lead to ecological sustainability, an approach which incorporates ecocentrism is more likely to effectively lead to ecological sustainability at a time when it is urgently needed. These policies show an openness to incorporating ecocentric approaches which can do this, but remain tied to anthropocentric notions of economic growth.

The Land Use Strategy and LRRS both show conflict. Both documents show a willingness from the Scottish Government to implement novel approaches, which can better find the balance between anthropocentric and ecocentric approaches. However, the messaging is confused, remaining tied too much to anthropocentrism. This is in part because of the structuring effects of property law: the emphasis of individual ownership rights, compounded over hundreds of years in Scotland, means that policy that attempts to highlight the importance of responsibilities is tempered to a great extent. This is further highlighted by the legal nature of these documents: they are voluntary. There is no legal requirement or incentive to follow them. This highlights the difficulties in introducing novel formulations that can better achieve ecological sustainability.

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<sup>143</sup> Scottish Government (no. 137) at p.13.

<sup>144</sup> Ibid. at pp.6, 14, and 15.

### 3.3 The 'sustainable development aspects' of the CRB legislation

Although policy in relation to land is undoubtedly an important reference point for how sustainable development is being interpreted at a governmental level in Scotland, many of the changes to land ownership and use and, consequently, the sustainable development of land, is carried out through legislative means. Regardless of notions of 'atonement' within Scotland's land question,<sup>145</sup> the legislative and policy framework for land reform in Scotland is predominantly forward-looking.<sup>146</sup> It is not explicitly restitutionary in nature; instead it is focused on the goal of sustainable development and uses community ownership as its primary vehicle. In this regard, the CRB legislation contains multiple provisions relating to aspects of sustainable development. Therefore, this section looks to outline what the community rights to buy in Scotland (the CRB legislation) are, and the extent to which they incorporate sustainable development, before Chapter 3 engages in a deeper evaluative exercise assessing whether this overlapping of sustainable development and property law in the CRB legislation is capable of facilitating ecological sustainability.

The Land Reform (Scotland) Act 2003 (the 2003 Act) conferred a right of first refusal to purchase land for community bodies which have registered an interest in certain rural land (the pre-emptive CRB), as well as right for crofting community bodies to actively force a sale of croft land in certain prescribed circumstances (the crofting CRB).<sup>147</sup> The Community Empowerment (Scotland) Act 2015 (the 2015 Act) and the Land Reform (Scotland) Act 2016 (the 2016 Act) were then subsequently implemented. The 2015 Act created a new community right to compulsorily purchase land that is 'wholly or mainly abandoned or neglected',<sup>148</sup> or managed in such a way that is detrimental to a community's 'environmental wellbeing',<sup>149</sup> (the CRB abandoned, neglected or detrimental land). The 2016 Act formed the final part of this legislative triptych, and created a new community right to compulsorily purchase land for the purposes of furthering sustainable development (the CRB for sustainable development).

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<sup>145</sup> E A Cameron (no. 99) at p.109

<sup>146</sup> A Ross (no. 7) at p.243 where she states that the 'main emphasis of the LRSA 2003 was not about righting any past wrongs...'

<sup>147</sup> Due to the complexities and specificities of crofting law in Scotland, this thesis will not consider the crofting CRB further in this thesis.

<sup>148</sup> The Land Reform (Scotland) Act 2003 s.97C(2)(a).

<sup>149</sup> The Land Reform (Scotland) Act 2003 s.97(2)(b).

The CRB legislation is underpinned by sustainable development in a number of different ways. The 2003 and 2016 Acts state that community bodies will only qualify as such if Scottish Ministers are satisfied that the main purpose of that community body is consistent with furthering the achievement of sustainable development.<sup>150</sup> With regard to the preemptive CRB, if a right has been registered in the Register of Community Interests in Land, the community body cannot proceed to buy the land without further satisfying Scottish Ministers that what it proposes to do with the land is compatible with furthering the achievement of sustainable development.<sup>151</sup>

The CRB abandoned, neglected or detrimental land has certain ecocentric links. To qualify as eligible land for this CRB, there are alternate tests: the land in question must either be wholly or mainly abandoned or neglected (the ‘abandoned or neglected test’),<sup>152</sup> or the use or management of the land results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community (the ‘detrimental land test’).<sup>153</sup> The specifics of these tests are expanded upon in the Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 (the ‘2018 Regulations’). These provide matters for Scottish Ministers to have regard to when considering either of the two tests under this CRB, including specific environmental considerations. With regard to the abandoned or neglected test, the 2018 Regulations outline that Scottish Ministers must be have regard to: whether the physical condition of the land causes, or is likely to cause, environmental harm;<sup>154</sup> the designation or classification of the land, including whether it forms a nature reserve or conservation site;<sup>155</sup> and the extent to which the land is being held for conservation purposes.<sup>156</sup> For the detrimental land test, the 2018 Regulations expand on what Scottish Ministers should have regard to in assessing environmental harm to a relevant community,

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<sup>150</sup> The Land Reform (Scotland) Act 2003 ss.34(4), 71(4), 97D(6); the Land Reform (Scotland) Act 2016 s.49(7).

<sup>151</sup> The Land Reform (Scotland) Act 2003 s.51(3)(c).

<sup>152</sup> *Ibid.* at s.97C(2)(a).

<sup>153</sup> *Ibid.* s.97C(2)(b).

<sup>154</sup> The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 reg.3(c)(iii). Reg.3(2) states that ‘environmental harm’ has the meaning given in s.17(2) of the Regulatory Reform (Scotland) Act 2014, which includes harm to the health of human beings or other living organisms, harm to the quality of the environment (including quality of air, water or land), offence to the senses of human beings, and damage to property.

<sup>155</sup> *Ibid.* reg.4(1).

<sup>156</sup> *Ibid.* reg.5(a)(ii). This Regulation also applies to considerations relating to the detrimental land test for CRB abandoned, neglected or detrimental land, relating to whether the use of land causes harm to the environmental wellbeing of a relevant community.



including whether the use of the land constitutes a ‘statutory nuisance.’<sup>157</sup> The inclusion of specific environmental considerations in this regard can be seen to correlate closely with ecocentric notions of sustainable development, particularly when considering the further delineation of the abandoned and neglected test and detrimental land tests under the 2018 Regulations, which help to widen and contextualise these tests. If land is classified as being abandoned and neglected or detrimental, then in making the decision to consent to the transfer, Scottish Ministers must be satisfied that the exercise of the right to buy is compatible with furthering the achievement of sustainable development in relation to the land.<sup>158</sup>

The 2016 Act is perhaps the most obvious avenue for discussion in relation to notions sustainable development. The CRB for sustainable development requires that the proposals for the land must satisfy the ‘sustainable development conditions’ before the CRB can be exercised.<sup>159</sup> These include whether the transfer is likely to further the achievement of sustainable development, whether it is in the public interest, whether the transfer might result in significant benefit to the relevant community and, and that not granting consent is likely to result in significant harm to the community.<sup>160</sup> As will be expanded upon in Chapter 3, the sustainable development conditions explicitly include public interest as a consideration. This is in contrast to the 2003 Act which maintains a separation between public interest and sustainable development. The cumulative effect of the substantive considerations for the CRB for sustainable development is a more contextualised interpretive guide for matters of sustainable development, entrenched in statute rather than left to policy.<sup>161</sup>

Fundamentally, the above discussion highlights that the CRB legislation is based upon sustainable development. Any application by a community body to purchase land is

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<sup>157</sup> Ibid. reg.6(1)(a). Reg.6(2) gives statutory nuisance the same definition as that in s.79(1) of the Environmental Protection Act 1990, which includes matters such as contaminated water, dust and other effluvia, fumes or gases, animals being kept on premises that are prejudicial to health or a nuisance, and noises.

<sup>158</sup> The Land Reform (Scotland) Act 2003 s.97H(1)(b)(ii). However, the CRB abandoned, neglected or detrimental land does not exclusively equate the achievement of sustainable development with community ownership; s.97H(c) directs Scottish Ministers to also consider whether sustainable development would be better furthered by the current owner staying in place.

<sup>159</sup> The sustainable development conditions are found in the Land Reform (Scotland) Act 2016 s.56(2) or, where the application is to buy a tenant’s interest, s.56(6)(a). Chapter 3 will analyse the sustainable development conditions in more detail, for present purposes it suffices to outline where to find them in the 2016 Act.

<sup>160</sup> What constitutes ‘significant benefit’ or ‘harm’ to the community in this regard is expanded upon in the Land Reform (Scotland) Act s.56(12). Scottish Ministers must consider the effect of granting consent with reference to economic development, regeneration, public health, social wellbeing, and environmental wellbeing.

<sup>161</sup> This will be discussed in more detail in Chapter 3.

inherently defined by sustainable development as it is based upon Scottish Ministerial satisfaction that both the community body and the acquisition itself are capable of contributing to the achievement of sustainable development. The sustainable development aspects of the 2003 Act and 2016 Act are, in principle, wide enough to represent both anthropocentric and ecocentric approaches. This last section has provided a descriptive overview of the sustainable development aspects of the CRB legislation. However, crucially, the CRB legislation does not provide explicit definitions for sustainable development. Given that it is the key principle underpinning the CRB legislation, and considering the anthropocentric tropes utilised in wider sustainable development policy and land use policy in Scotland, it is important to assess what *kind* of sustainable development the CRB legislation promotes to interrogate their ability to contribute to sustainability. Therefore, this is the basis of the evaluation which will take place in Chapter 3.

#### 4. Conclusion

Scotland's system of property law has had a tumultuous history. A strong right of ownership has been retained as the backbone of its structure. This chapter argued that, structurally and historically, the protection of ownership rights has contributed to the concentrated ownership patterns that persist in Scotland today. In this regard, there are consequential effects for Scottish communities, both human and non-human. Following Scottish devolution, policy and legislation have attempted to address Scotland's 'land question'. This chapter outlined recent land use policy in Scotland and argued that, whilst there are elements within the policy documents that resonate with the achievement of ecological sustainability, in particular the assertion that responsibilities must be exercised in landownership, the structuring effects of property law in Scotland stymie their effectiveness, particularly insofar as they remain voluntary documents. The result is a set of mixed messages, at times paradoxical, which arguably do not contribute to the overall goal of ecological sustainability. The sustainable development aspects of the CRB legislation were then delineated, highlighting the extent to which sustainable development acts as the legislative driving force of the CRB legislation. However, the question remains; in light of the mixed messages within wider sustainable development and land use policy, and the lack of statutory definition of sustainable development within the CRB legislation, what kind of sustainable development is being promulgated by the CRB legislation? Crucially, what does this contribute to the achievement

of sustainability in Scotland? Does it lead us any closer to living within the Earth's ecological limits?

## Chapter 3

# The Community Rights to Buy in the spectrum of anthropocentric and ecocentric approaches: their ability to facilitate ecological sustainability

### 1. Introduction

In order to tackle the numerous challenges of human-made environmental deterioration,<sup>162</sup> it is clear that new approaches, which can lead to transformative change, are needed.<sup>163</sup> However, there is an ongoing tension between stability and change, indeed ‘both are needed, and in just the right amounts.’<sup>164</sup> With regard to land, more insight is needed into the relationship between sustainable development and property law. Among the many solutions posited to combat environmental degradation and habitat loss, changes to property law regimes do not tend to figure highly. Indeed, changes to property law are largely avoided due to the prevailing notion that such changes will have a destabilising effect on markets and, consequently, societies.<sup>165</sup> In this regard, the CRB legislation is, in some respects, radical in its approach, particularly in allowing for the compulsory taking of property in the name of sustainable development. Chapter 2 highlighted the ‘sustainable development aspects’ of the CRB legislation. Therefore, the purpose of this chapter is to evaluate what kind of sustainable development is incorporated in the CRB legislation. It seeks to interrogate where the CRB legislation exists within the anthropocentric/ecocentric spectrum outlined in Chapter 1. Does it follow wider sustainable development in Scotland in a largely anthropocentric approach, or does it mirror land policy, such as the LRRS and Land Use Policy, in imbuing more ecocentrism? Like land policy, is this incorporation of ecocentrism tempered by the structuring effects of property law? In engaging in this evaluation, this chapter will assess whether the CRB legislation is capable of contributing to the achievement of ecological sustainability.

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<sup>162</sup> See, for example, Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Summary for Policymakers of the IPBES Global Assessment Report on Biodiversity and Ecosystem Services* (2019). This outlines that 75% of the terrestrial environment and 66% of the marine environment are ‘severely altered’ to date by human actions.

<sup>163</sup> *Ibid.* at p.14.

<sup>164</sup> E Freyfogle (no. 65) at p.443.

<sup>165</sup> See footnote 87 for further discussion on this point.

Section 1 of this Chapter will analyse the ‘sustainable development aspects’ of the CRB legislation in further detail, exploring where on the spectrum of anthropocentrism and ecocentrism they sit. Section 2 will then assess this discussion in light of the structural effects of property law in Scotland, looking at whether the emphasis on ownership rights stymies the capacity of the CRB legislation to contribute to ecological sustainability. It will be argued that, whilst the CRB legislation has the potential to function in a manner that supports ecological sustainability, it is still too rooted in anthropocentrism. Scots property law remains steeped in the nature/culture paradigm, entrenching notions of individual ownership rights rather than responsibilities. As such, legislative measures such as the CRB legislation only scratch the surface of the kind of transformative change needed to address this paradigm. However, this chapter will conclude that the CRB legislation represents a kind of ‘prefigurative politics’.<sup>166</sup> it is a forward-looking suite of legislation with sustainable development at its core and may represent a form of incremental, cumulative change on the path to ecological sustainability, particularly when viewed in tandem with other forward-looking land policy such as the LRRS.

## 2. Interpretation of the sustainable development aspects of the Community Rights to Buy: their place on the anthropocentric/ecocentric spectrum

As Chapter 1 identified, sustainable development has increasingly featured as a response to human-led changes to Earth systems. However, its elasticity can make it a difficult notion to pin down. Interpretations, so far, in Scotland have tended towards anthropocentrism. Certain documents, such as the LRRS, imbue ecocentrism, for example in the incorporation of responsibilities in ownership. However, the structuring effects of property law preclude a wholesale adoption of this approach in law. Therefore, this section seeks to highlight how sustainable development has been incorporated into Scotland’s CRB legislation. It will evaluate the ‘sustainable development aspects’ of the CRB legislation, introduced at the end of Chapter 2, and analyse how Scottish Ministers, as the arbiters of CRB applications, are interpreting these aspects. This will highlight that, similar to land use policy and sustainable

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<sup>166</sup> M Davies, L Godden, N Graham, ‘Situating Property within Habitat: Reintegrating Place, People and the Law’ (2021) *Journal of Law, Property and Society*, 6, at p.33.

development policy more widely in Scotland, the ‘sustainable development aspects’ of the CRB legislation, whilst imbuing elements of ecocentrism, are largely anthropocentric.

## 2.1 The anthropocentrism (and ecocentrism) of the CRB legislation

### 2.1.1 *Scotland’s fourth era of sustainable development*

Sustainable development is a core principle of the CRB legislation, and the provisions are some of the strongest sustainable development obligations in any UK statute.<sup>167</sup> Chapter 2 provided an overview the ‘sustainable development aspects’ of the CRB legislation. It was noted that the CRB legislation includes public interest tests,<sup>168</sup> and the 2016 Act goes further in explicitly including public interest as part of its sustainable development tests.<sup>169</sup> The CRB legislation has also made human rights, which ‘create conditions essential for sustainable development’,<sup>170</sup> a relevant consideration for Scottish Ministers in assessing CRB applications.<sup>171</sup> However, the fact remains that, whilst the legislation includes references to sustainable development, public interest and adopts a human rights-based approach – all factors which point to a positive, progressive, sustainable suite of legislation – analysis is nonetheless worthwhile to assess the extent to where these sustainable development aspects exist within the anthropocentric/ecocentric spectrum identified in Chapter 1 and, consequently, to test the capacity of the CRB legislation to deliver ecological sustainability.

Both Ross and Pillai argue that the first three ‘eras’ of sustainable development in Scotland suffered from a schism between wider sustainable development policy and the guidance for

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<sup>167</sup> A Pillai, ‘Sustainable rural communities? A legal perspective on the community right to buy’ (2009) Land Use Policy, 27, at p.898.

<sup>168</sup> For example, as part of the considerations of Scottish Ministers in deciding whether to allow a community buyout to proceed: see Land Reform (Scotland) Act 2003 ss.51(d), 97H(1)(b)(i); Land Reform (Scotland) Act 2016 s.56(2)(b).

<sup>169</sup> This will be discussed in more detail later in this chapter.

<sup>170</sup> UN Office of the High Commissioner for Human Rights, ‘Advancing sustainable development through human rights’ available at <<https://www.ohchr.org/EN/AboutUs/ManagementPlan/Pages/sustainable-development.aspx#:~:text=HTMLCountry1,Advancing%20sustainable%20development%20through%20human%20rights,people%2C%20leaving%20no%20one%20behind.>> (last accessed 28/07/2021).

<sup>171</sup> For example, in considering an application for a CRB for sustainable development, Scottish Ministers must have regard to ‘relevant non-Convention human rights’, at s.56(13). Subsection 14 clarified this to mean human rights other than human rights under the European Convention of Human Rights, and expressly include the International Covenant on Economic, Social and Cultural Rights as part of these alternatives. This chapter will discuss this in more detail.

the pre-emptive CRB and crofting CRB ('the original CRB').<sup>172</sup> As the 2003 Act<sup>173</sup> did not elaborate what sustainable development could mean in the context of community ownership, Scottish Government guidance issued in this respect was extremely important in putting meat on the bones of sustainable development in relation to land. However, instead of developing in line with wider sustainable development policy, guidance for the original CRB developed in a silo.<sup>174</sup> According to Ross, the introduction of the CRB abandoned, neglected or detrimental land and the CRB for sustainable development (the 'new CRBs') has heralded a 'fourth era' of sustainable development in relation to the CRB regime.<sup>175</sup> This is because the new CRBs take a more contextualised, bespoke approach to interpreting sustainable development which 'acknowledges and perhaps prioritises certain factors and recognises how the tensions inherent in sustainable development are likely to play out in any given context.'<sup>176</sup>

If this is indeed the case, to what extent does the CRB legislation follow an anthropocentric approach? Can it be said that this bespoke approach enables the new CRBs to incorporate ecocentric approaches to land use in Scotland? The remainder of this section will explore some of the 'sustainable development aspects' aspects of the CRB legislation in light of these questions. The statutory sustainable development conditions for the CRB for sustainable development conditions will be evaluated in this light; then, this section will consider the public interest tests in the CRB legislation; it will continue on to consider the human rights-based approach of the CRB legislation; then it will consider the CRB abandoned, neglected or detrimental land. This section will highlight the largely anthropocentric nature of the CRB legislation, whilst recognising that there are aspects of ecocentrism present. This section will conclude by analysing a recent decision by Scottish Ministers on an application based on the CRB abandoned, neglected or detrimental land. It will assess how the sustainable development aspects of the CRB legislation are being interpreted by Scottish Ministers,

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<sup>172</sup> A Ross (no. 7) at pp.247-248; A Pillai (no. 167) at p.904. Although Pillai does not use the same language of 'eras' as Ross, her argument also follows the line that the rhetoric of the pre-emptive CRB and crofting CRB 'bears little or no relation to national strategies.'

<sup>173</sup> Prior to the introduction of the CRB abandoned, neglected or detrimental land in Part 3A.

<sup>174</sup> Ross argues that the guidance for the pre-emptive CRB refers to the 2002 document 'Meeting the Needs – Priorities, Actions and Targets for Sustainable Development in Scotland' which was replaced by the Economic Strategy. The guidance makes no reference to the Economic Strategy and there 'has been no perceptible change in the sustainable development guidance in these versions to reflect each of the Scottish three different eras of sustainable development...since 2003.' See Ross (no. 7) at p.247.

<sup>175</sup> Ibid. at p.262.

<sup>176</sup> Ibid. at p.252. Indeed, the guidance for the new CRBs does not flesh out the sustainable development provisions within the legislation, as it does for the original CRB. This suggests that the Scottish Government are confident that the legislative provisions are strong enough, and clear enough, on their own.

concluding that, whilst there are elements of ecocentrism present in the CRB legislation, the outcome is largely anthropocentric.

### 2.1.2 *The sustainable development conditions in the 2016 Act*

The 2016 Act introduced the most radical CRB to date. The CRB for sustainable development can trigger the compulsory transfer of property to a properly constituted community body specifically for the purposes of sustainable development. The requirements to be met for this are stringent. What is significant is the inclusion of more detailed interpretive statutory provisions relating to sustainable development.<sup>177</sup> In this regard, Section 56(1)(a) of the 2016 Act requires that Scottish Ministers are not to consent to an application unless they are satisfied that the statutory ‘sustainable development conditions’ are met. These are worth quoting in full:

- ‘(a) the transfer of land is likely to further the achievement of sustainable development in relation to the land,
- (b) the transfer of land is in the public interest,
- (c) the transfer of land –
  - i. is likely to result in significant benefit to the relevant community...and
  - ii. is the only practicable, or most practicable, way of achieving that significant benefit, and
  - iii. not granting consent to the transfer of land is likely to result in harm to that community.’<sup>178</sup>

This is the first instance in the CRB legislation that an explicit expansion of a vision of sustainable development has been committed to statute. The legislation has not been in force for much time,<sup>179</sup> so it remains to be seen how this may be further interpreted in Scottish Ministers’ decisions. There are further interpretive guides within the 2016 Act: the third condition, regarding ‘significant benefit to the relevant community’, is expanded upon in

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<sup>177</sup> Ross compares this with the Land Reform (Scotland) Act 2003, ‘where the definition and interpretation of sustainable development has...been left to policy and guidance...’: A Ross (no. 7) at p.254.

<sup>178</sup> The Land Reform (Scotland) Act 2016 s.56(2).

<sup>179</sup> The provisions came into force on 26 April 2020: see The Land Reform (Scotland) Act 2016 (Commencement No. 10) Regulations 2020 regulation 2.



section 56(12) which states that, in deciding what constitutes significant benefit, Scottish Ministers must consider:

- (a) economic development,
- (b) regeneration,
- (c) public health,
- (d) social wellbeing, and
- (e) environmental wellbeing.

The fact that Ministers *must* consider these elements shows that these factors figure highly in sustainable development considerations.

However, whilst the overall functioning of this CRB is radical, particularly when compared to the first CRB in the 2003 Act, the language remains similar to much of that in sustainable development policy in Scotland in that it adopts primarily anthropocentric tropes. Although these conditions ‘differ significantly from the Scottish Government’s goal of increasing sustainable economic growth’<sup>180</sup> and provide a more contextualised approach to sustainable development in relation to land<sup>181</sup> which explicitly includes environmental considerations, they are predicated on benefit to human communities only. Where the environment does figure, it does so to a minimal extent. As Combe states, although ‘environmental wellbeing’ is included as a consideration for Scottish Ministers, ‘it is not of central importance: in fact, it only features at the end of a very onerous process that communities might find it difficult to get through.’<sup>182</sup> The context for its inclusion is as a consideration of what constitutes benefit to a *human* community. Therefore, it is apparent that there are hints of ecocentrism in this CRB: the link to environmental wellbeing means that ecological considerations are explicitly tied into a statutory test. However, the kind of sustainable development envisaged by the sustainable development conditions remains tied to anthropocentrism.

### 2.1.3 *Public interest and sustainable development*

Public interest has featured as a consideration for Scottish Ministers in CRB applications since their inception. It is a wide, multifaceted term, and it is not the purpose of this chapter

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<sup>180</sup> A Ross (no. 7) at p.255.

<sup>181</sup> Ibid.

<sup>182</sup> M Combe, ‘The environmental implications of redistributive land reform’ (2016) *Environmental Law Review*, 18(2) at p.123. The possible meaning of the term ‘environmental wellbeing’ will be considered in more detail later in this section as part of the discussion on Part 3A of the Land Reform (Scotland) Act 2003.

to review it in detail. However, its relationship with sustainable development within the ambit of the CRB legislation gives interesting insight into the place of the CRB legislation on the anthropocentric/ecocentric spectrum.

Public interest in the 2003 Act is included as a separate test from sustainable development in the CRB matrix. However, the 2016 Act goes further, and explicitly includes public interest as a factor to be considered within the wider sustainable development considerations.<sup>183</sup> However, if public interest is a factor that Scottish Ministers must consider under the 2003 Act in any event, what difference does it make to include it under the banner of sustainable development in the 2016 Act? For Ross, this is a symbolic change, as ‘sustainable development by definition must be in the public interest.’<sup>184</sup>

Although there is symbolic significance in expressly including public interest into the sustainable development test in the 2016 Act, the interpretive difficulties remain for all CRBs: what is the public interest in this regard? The guidance for the pre-emptive CRB fleshes out possible considerations of public interest and makes specific mention of environmental concerns. For example, it states that that a community body should consider and show that possible benefits to the community as a whole do not outweigh certain disadvantages to the wider community, the environment, the economy or to private interests.<sup>185</sup> Again, the guidance states that community bodies ‘should consider the environmental, social, economic and other benefits that will be brought about.’<sup>186</sup> There is no doubt public interest in addressing environmental degradation and including non-human communities in considering land use and management, but such explicit reasoning is not to be found in the CRB legislation. The 2016 Act incorporates the public interest as an explicit test for sustainable development, but goes no further in fleshing out what the ‘public interest’ could be.

Public interest tends to be a term which is left undefined, precisely because ‘public interest’ is not static. It shifts with social, economic and environmental changes. Therefore, it is possible that the ‘public interest’ could incorporate ecocentrism. Scottish Ministers might

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<sup>183</sup> Land Reform (Scotland) Act 2016 s.56(2)(b).

<sup>184</sup> A Ross (no. 7) at p.256. She states that ‘[w]hether the public interest is considered inside or outside the approach to sustainable development likely makes little impact on actual decision-making.’ Although this may be the case, does it imply that sustainable development is to be viewed differently by Scottish Ministers depending on the type of CRB in question? If so, then there is a possibility of deepening the confused outlook of sustainable development in the CRB regime where, arguably, Scottish Ministers should be promoting a joined-up approach within the overall CRB regime regarding sustainable development.

<sup>185</sup> Scottish Government, *Community Right to Buy: Guidance for applicants made on or after 15 April 2016* (2016) at p.42.

<sup>186</sup> *Ibid.* at p.43.

regard an application to be in the public interest if it has ecological benefits, or contributes to climate change mitigation, for example. However, given that the sustainable development policy backdrop in Scotland is one which takes a rather anthropocentric stance, insofar as environmental protection is incorporated largely to ensure the development of *human* communities only, an approach to ‘public interest’ which takes a more ecocentric approach seems some way off.

#### 2.1.4 *Rights-based approach in the CRB legislation*

An additional approach to sustainable development within the CRB legislation the consideration of human rights. Both the 2003 Act and the 2016 Act provide that, when assessing a CRB application, Scottish Ministers must have regard to human rights.<sup>187</sup> Whilst technically a separate consideration from specific sustainable development provisions within the CRB legislation, this rights-based approach permeates any decision-making under the CRB legislation, and therefore inevitably there will be intersection between human rights and sustainable development.

Coupled with considerations of public interest, this rights-based approach places the decision-making process for CRBs on anthropocentric footing.<sup>188</sup> Indeed, such rights-based approaches do ‘little to challenge anthropocentric and individuated interests in land.’<sup>189</sup> Human rights are, by their nature, anthropocentric. Indeed, even the incorporation of wider human rights concerns under the International Covenant on Economic, Social and Cultural Rights within the 2016 Act does little to change this fact.<sup>190</sup> However, as discussed in Chapter 1, anthropocentric concerns are not mutually exclusive to ecological concerns: the two are connected. Anthropocentric sustainable development does not preclude ecological sustainability. That goal can be reached, even if it is done for the good of humans rather than

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<sup>187</sup> As discussed in Chapter 2, the Land Reform (Scotland) Act 2003 s.98(5A) and the Land Reform (Scotland) Act 2016 s.56(13) and (14) are the relevant provisions in this regard. The 2016 Act is broader in its inclusion of ‘relevant non-Convention human rights’ in s.56(13)(a) which is defined in s.56(14) as ‘such human rights other than the Convention rights’ that Scottish Ministers ‘consider to be relevant’ and which include (but crucially are not limited to) the International Covenant on Economic, Social and Cultural Rights.

<sup>188</sup> While the ICESCR includes environmental considerations under Article 12(b), these are inevitably couched in terms of rights to human communities.

<sup>189</sup> M Davies *et al* (no. 166) at p.41.

<sup>190</sup> The only consideration of the environment within the International Covenant on Economic, Social and Cultural Rights is under Article 12(2)(b), which seeks to insure environmental protection but for the improvement of human physical and mental health.

for the sake of planetary protection itself; human rights-based approaches can act as a ‘potential pathway towards locating property within human-nonhuman communities.’<sup>191</sup>

Nevertheless, as argued in Chapter 1, whilst anthropocentric approaches can lead to ecological sustainability, the incorporation of ecocentrism will allow that goal to be reached more directly, at a time when it is needed urgently. Against the sustainable development policy in Scotland, and among the sustainable development aspects of the CRB already outlined, the incorporation of human rights does little to imbue ecocentrism into the CRB.

### 2.1.5 *The Community Right to Buy Abandoned, Neglected or Detrimental Land: ecocentric or anthropocentric?*

The CRB abandoned, neglected or detrimental land relates either to land which is wholly or mainly abandoned or neglected (the ‘abandoned or neglected test’) or land where the use or management of is such that it results in or causes harm to the environmental wellbeing of a relevant community (the ‘detrimental land test’).<sup>192</sup> This CRB, whilst arguably convoluted and difficult to navigate, offers a useful barometer of where the CRB legislation sits within the anthropocentric/ecocentric spectrum of sustainable development, due to its direct link with environmental considerations.

The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 expand on what Scottish Ministers must have regard to when considering an application under the abandoned or neglected test,<sup>193</sup> as well as what Scottish Ministers should have regard to in assessing the detrimental land test.<sup>194</sup> The wording of ‘environmental wellbeing’ within the detrimental land test is the same as that employed in section 56(12) of the 2016 Act, when Scottish Ministers are considering applications for the CRB for sustainable development. However, the CRB abandoned, neglected or detrimental land fleshes out the concept to a greater extent. For example, when considering detrimental land, section 97C(3)(a) outlines that ‘harm’ within that test includes ‘harm the environmental effects of which have an adverse effect on the lives of persons comprising the relevant community...’ Furthermore,

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<sup>191</sup> M Davies *et al* (no. 166) at p.41.

<sup>192</sup> The Land Reform (Scotland) Act 2003 s.97C(2).

<sup>193</sup> As outlined in Chapter 2, these include: whether the physical condition of the land causes, or is likely to cause, environmental harm; whether the designation or classification of the land, including whether it forms a nature reserve or conservation site; and the extent to which the land is being held for conservation purposes.

<sup>194</sup> This includes considering the environmental harm to a relevant community.

when considering the physical condition of the land in relation to considerations of abandoned or neglected land, ‘environmental harm’ is to be considered within the meaning of section 17(2) of the Regulatory Reform (Scotland) Act 2014<sup>195</sup> as ‘harm to the health of human being or other living organisms, harm to the quality of the environment, offence to the senses of human beings...or other legitimate uses of the environment.’

For a community right to buy which seeks to bring abandoned or detrimental land back into reuse, ecological regeneration features very little. Generally, considerations for this CRB remain situated within a largely anthropocentric framework. This follows the pattern of much of the ‘sustainable development aspects’ of both the 2003 Act and 2016 Act; whilst environmental considerations are taken into consideration as part of the decision-making process, such considerations are largely anthropocentric in their primary consideration of what the environmental effects are on human communities. In order for this CRB to be successful, any environmental concern would likely have to demonstrate some impact on human communities. Even where further interpretive guides are given, either in guidance or in the legislation itself, these frame relevant environmental considerations as those which have effects predominantly on human communities only,<sup>196</sup> tending towards an anthropocentric view of land.<sup>197</sup> Nevertheless, whilst the general outlook of this CRB is anthropocentric, the cumulative effect of these environmental tests is the hint of an approach which more readily considers ecocentric concerns. This is evident in the regard to be had to the health of ‘other living organisms’, and to the ‘quality of the environment’ as considerations that Scottish Ministers should have regard to when considering ‘environmental harm’ in a detrimental land test.

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<sup>195</sup> The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018, reg. 3.

<sup>196</sup> Malcolm Combe quotes the Official Report of the Scottish Parliament from proceedings at Stage 3 of the Bill, which outlines that when debating the term ‘environmental wellbeing’ the relevant Scottish Minister stated that the term is broader than simply harm to the physical condition of the community; it also can incorporate harm to the ‘amenity of the community,’ for example the aesthetic of an area: see M Combe (no. 182) at p.122. This suggests that, although attempting to maintain a broad ambit for ‘environmental wellbeing’, the term ‘wellbeing’ does not reach beyond the wellbeing of human communities.

<sup>197</sup> For example, looking to the guidance for the CRB abandoned, neglected or detrimental land, it states that the ‘main purpose’ of this CRB is to bring such land ‘back into *productive* use,’ (emphasis added) where that land ‘will remain a resource which benefits your community as a whole.’ See Scottish Government, *Community Right to Buy Abandoned, Neglected or Detrimental Land: Guidance for applications* (2018) at p.51. Again, here we are faced with the land-as-resource trope which seems at odds with ecological sustainability, but which echoes much of CRB policy and legislative provisions so far.

### 2.1.6 *The Helensburgh Community Woodlands Group application: How is sustainable development being interpreted within the CRB regime?*

If the preceding discussion outlines that both policy and the CRB legislation present a fairly anthropocentric outlook, but which is increasingly incorporating ecocentric approaches, then it is beneficial to assess how Scottish Ministers are interpreting the sustainable development aspects of the CRB in practice. In other words, does the approach of Scottish Ministers suggest a similar anthropocentric approach? The recent decision on the application by Helensburgh Community Woodlands Group ('HCWG') to exercise the CRB abandoned, neglected or detrimental land<sup>198</sup> suggests that it does.<sup>199</sup>

HCWG wished to trigger the CRB to compulsorily purchase a plot of ground, designated as an Open Space Protection Area and under a Tree Preservation Order, which it argued was 'abandoned or neglected' under the ambit of the 2003 Act.<sup>200</sup> Ultimately HCWG were unsuccessful on four separate grounds. Firstly, the land was not found to be 'abandoned or neglected' under the auspice of the 2003 Act and therefore was not 'eligible land'.<sup>201</sup> Secondly, the transfer was not found to be in the public interest as HCWG failed to show a sufficient need of the community for the land.<sup>202</sup> The third and fourth grounds for refusal are the subject of focus for this section and give insight into how sustainable development policy and legislation is being interpreted at ministerial level. In relation to sustainable development, HCWG failed to show that the exercise of the CRB was compatible with furthering the achievement of sustainable development in relation to land under section 97H(1)(b)(ii) of the 2003 Act,<sup>203</sup> and failed to satisfy Scottish Ministers that the achievement of sustainable development in relation to the land would be unlikely to be furthered by the current owner retaining ownership under section 97H(1)(c) of the 2003 Act.<sup>204</sup> In relation to

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<sup>198</sup> Decision on the Application by Helensburgh Community Woodlands Group for Consent to Exercise Right to Buy Land at South of Cumberland Avenue, Helensburgh G84 8QP (18 August 2020) AB00001 ('Helensburgh Decision').

<sup>199</sup> J Robbie, 'Babes in the Woods' (2021) *Edinburgh Law Review*, 25(3) at p.348 where she states '[t]he decision gives some early indication of the Scottish Ministers' approach to this particular right to buy, which will be important for community bodies to consider in relation to future applications.' It is also important to note that ministerial decisions under the CRB legislation are not to be treated as judgments; they do not bind further decisions or set any kind of precedent. However, they do give insight into ministerial discretion under the CRB legislation. It is also worth bearing in mind that the Helensburgh Decision is not the only application to be registered in the Register of Applications by Community Bodies to Buy Land. There are a further two applications, one being made by the same community body as in the Helensburgh Decision. However, they are not significant for the purposes of this discussion.

<sup>200</sup> S.97C(2)(a).

<sup>201</sup> Helensburgh Decision (no. 198) at p.9.

<sup>202</sup> *Ibid.* at p.16.

<sup>203</sup> *Ibid.* at p.21.

<sup>204</sup> *Ibid.* at p.25.

the latter two grounds, HCWG referred to the UK's Shared Framework for Sustainable Development<sup>205</sup> and to the Sustainable Development Goals<sup>206</sup> in its conceptualisation of sustainable development. However, Scottish Ministers rejected these arguments, stating that whilst HCWG's 'goals are admirable and could benefit all of the community,' HCWG failed to provide a fully costed plan which outlined the financial viability of the project.<sup>207</sup>

Whilst it is true that the 'lack of a business plan and risk assessment highlights that the community body may not have considered the issues that could arise through acquisition,'<sup>208</sup> the decision by the Scottish Ministers to deal exclusively with this concern, rather than balancing any environmental or social aspects of the application against economic considerations, places the reasoning on anthropocentric footing, particularly in light of the progressive ecological aspects in policy documents such as the Land Use Strategy and LRRS.<sup>209</sup> The Scottish Ministers were also not convinced that the achievement of sustainable development would be unlikely to be furthered by the owner of the land continuing in place. This is because the owners had shown a willingness to engage with the community regarding the implementation of a land management plan, and Scottish Ministers stated that they should be given time to implement this.<sup>210</sup> This is perhaps symptomatic of a cautious approach from Scottish Ministers, enabling a low threshold to be met for the second test in this regard; in this case, simply suggesting that they intend to address the issues and work with the community body was enough.

This approach by the Scottish Ministers points to an anthropocentric interpretation of sustainable development. It places a strong emphasis on the individual ownership rights of

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<sup>205</sup> Indeed, HCWG's application referenced Scottish Planning Policy, which it stated 'confirms the Government's continued support for the...guiding principles...set out in the UK's Shared Framework for Sustainable Development.' See Application by Helensburgh Community Woodlands Group for Consent to Exercise Right to Buy Land at South of Cumberland Avenue, Helensburgh, G84 81P (9 December 2019), response to question 8.2, Appendix 28 ('Helensburgh Application'). The Shared Framework is no longer in force and was replaced by the Economic Strategy. This is now reflected in the most recent Scottish Planning Policy, updated in December 2020. See Scottish Government, *Scottish Planning Policy* (2020).

<sup>206</sup> United Nations General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development* (2015). Specifically, HCWG referred to five goals: Ensure healthy lives and promote well-being for all at all ages; Quality education; Make cities inclusive, safe resilient and sustainable; Take urgent action to combat climate change and its impacts; and Life on land. See Helensburgh Application (no. 205) at appendix 28-32.

<sup>207</sup> Helensburgh Decision (no. 198) at p.21.

<sup>208</sup> Ibid.

<sup>209</sup> There is perhaps a criticism to be levied at the HCWG here, insofar as their argument relating to sustainable development was not fully developed. However, equally, as discussed, Scottish policy on sustainable development in relation to land is somewhat disparate. The guidance for the CRB abandoned, neglected or detrimental land offers nothing to expand on what sustainable development might mean for this CRB and guidance for other CRB within the 2003 Act refer to outdated documents: see Ross (no. 7) at p.247, referencing Scottish Government, *Community Right to Buy: Guidance for Applications Made on or After 15 April 2016* (2016). Therefore, the arguments presented by the HCWG could arguably be a symptom of a confused governmental outlook on sustainable development of land.

<sup>210</sup> Helensburgh Decision (no. 198) at p.25.

the existing landowner,<sup>211</sup> and did not engage fully with the potential ecological impacts that the CRB may have had. However, this is indicative of the approach of the CRB legislation and wider sustainable development policy in Scotland. It imbues certain characteristics of ecocentrism, but in most instances only to a superficial extent. It highlights that, within the spectrum of anthropocentric/ecocentric approaches to sustainable development, the interpretation of CRB applications by Scottish Ministers tends fairly strongly towards anthropocentrism, due in large part to the structuring effect of property law which prioritises individual ownership rights. For example, the Scottish Ministers did not engage to a great extent with the National Performance Framework, even where the application strongly referenced the SDG. No reference was made to the LRRS to highlight the responsibilities that are incumbent on landowners, which appears to be a missed opportunity. What this suggests is that the approach to the CRB is not as aligned as it could be with wider land use and sustainable development policy in Scotland. This leaves the ecocentric elements of documents like the Land Use Strategy and LRRS largely isolated, and an approach to the CRB legislation to develop on an anthropocentric footing. However, CRB decisions are made on a case-by-case basis, and this may not be indicative of an overall ministerial approach; only time will tell.

## 2.2 A tentative middle ground

This section argued that purely anthropocentric interpretations of sustainable development are unlikely to further ecological sustainability, whereas interpretations which also incorporate ecocentric considerations, for example the effects of land on non-human communities and ecologies in addition to human communities, would better contribute to ecological sustainability. The ‘fourth era’ of sustainable development,<sup>212</sup> marked by the introduction of the CRB abandoned, neglected or detrimental land and the CRB for sustainable development, is predicated on a more contextualised approach, where more detail is afforded to defining sustainable development in binding legislative provisions and affording more potential for ecocentric approaches to be incorporated within the CRB legislation. Nevertheless, it appears that many of the tests that relate to sustainable development in the CRB legislation display a similar anthropocentrism to the wider sustainable development policy in Scotland outlined in Chapter 1, particularly when

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<sup>211</sup> This point will be expanded upon in section 3 of this Chapter.

<sup>212</sup> A Ross (no. 7) at p.262.



considering environmental factors: where more ecocentric considerations are forthcoming, they arise only where human communities may be affected. The Helensburgh Decision, whilst not a judicial decision and hence not binding, underlines this view. The question then arises, why does the CRB legislation struggle to effectively incorporate ecocentric views?

### 3 The CRB regime and ecological sustainability

It is becoming clearer that major systemic changes are needed to meet current and future challenges to Earth systems. Ecological sustainability is a fundamental goal in this regard. Sustainable development has arisen as a key driver of change in Scotland, particularly in the CRB regime. However, as the discussion above has argued, there is a risk that it becomes an empty vessel as a result of growth-orientated, wholly anthropocentric interpretations. Therefore, the question of *why* there is an apparent resistance to more ecocentric interpretations of sustainable development is important to investigate.

#### 3.1 Property and ecology: Challenging the rights paradigm?

As discussed in Chapter 1, property law has structural effects which affects both human and non-human communities. Western property law norms have largely separated these communities, entrenching the nature/culture dualism, allowing for land to be viewed primarily as a resource.<sup>213</sup> In Scotland, property law has facilitated events with deep historical significance, such as the Highland Clearances, and has promulgated Scotland's concentrated ownership patterns which continue to this day. The 'mainstream conceptual structure' of property law also pervades policy choices, legislative provisions and decision-making at governmental level.<sup>214</sup>

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<sup>213</sup> N Graham (no. 110) at pp.96-97. Graham explains that the 'physical specificity' of what is owned is removed from consideration in property law; land is then reduced to a resource. As she states '[a]bstraction thus makes possible entitlement to property that, untied from its physicality and the sustainability of its uses over time, furnishes the basis of its ongoing alienability, and the exclusion of all others to its benefits or profits.' Therefore, as private property rights become more important to economic success, as a corollary so does the protection of ownership. This view is, for Graham, environmentally unsustainable and presents 'insurmountable obstacles to the objectives of environmental law.'

<sup>214</sup> Such property law norms extend well beyond state-led practices, too. They are evident in the 'everyday': as Davies, Godden and Graham argue, this 'mainstream conceptual structure of property is reinforced in a variety of property law doctrines and rules and is manifested in everyday practices.' See Davies *et al* (no. 166) at p.33.

Although systemic protection of ownership rights has deep structural effects, there is no doubt that ownership is still important. Its core goals of security and certainty have allowed many to achieve economic prosperity and independence.<sup>215</sup> Secure rights in property can also maintain better stewardship of land and help to achieve conservation goals.<sup>216</sup> However, new realities, such as the deepening climate crisis, the loss of biodiversity and habitat destruction necessitate a less monochromatic approach. Property law has a strong role to play in the achievement of ecological sustainability, but it must evolve to meet the ecological we are increasingly faced with, rather than perpetuate them, in order to remain morally justified.<sup>217</sup> Freyfogle argues that ‘property law always conveys messages to people about the land itself, about how they should perceive it, and about how private owners fit into it.’<sup>218</sup> The typical goals of private property norms – economic stability and certainty – are being significantly challenged in the face of these ecological challenges. Freyfogle states that ‘a more ecological image [of land ownership and use] is very much needed...[which] would portray nature’s parts as interrelated, with their values visibly dependent on the healthfulness of the links between...them.’<sup>219</sup>

Adaptation of approaches to land are needed, in this regard. Incorporating responsibilities into ownership is one such approach. Indeed, it is explicitly advocated by the LRRS. This assertion, in itself, presents a strong suggestion of an ecocentric approach.<sup>220</sup> However, the structural effects of property law in Scotland stymie the effectiveness of this approach: its protection of individual ownership rights mean that responsibilities in land are difficult to impose legally, thus the LRRS remains voluntary. Sustainable development is undoubtedly part of the adaptation of property law, but conceptualisations of sustainable development

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<sup>215</sup> E Freyfogle, *The Land We Share: Private Property and the Common Good* (Island Press, 2003) at p.223.

<sup>216</sup> See B Cook and R Lane, *Making Ecologies on Private Land* (Palgrave Macmillan 2020) at p.22: ‘Private property is deeply implicated in the spatial and temporal configuration of landscapes, which means it has substantial consequences for how conservation is understood and enacted.’

<sup>217</sup> E Freyfogle (no. 215) at p.211.

<sup>218</sup> *Ibid.* at p.210.

<sup>219</sup> *Ibid.* at pp.210-211. Freyfogle categorises three ‘images’ of ownership that have been conveyed since the nineteenth century. First, the ‘atomistic’ image, which is still relevant today, in which the ‘natural landscape comes divided into distinct parts, each part ecologically separate from the others and valued in isolation.’ Secondly, the ‘mechanistic’ image of land, where nature is still made up of distinct parts, ‘but this time the parts are not treated as identical.’ However, the ‘ecological image’ outlined above is now necessary. Although this chimes with much of Earth jurisprudence, those such as Burdon may disagree with Freyfogle’s conclusion of this ecological image, where, at p.211 he states that it ‘would diminish the role of humans in creating and managing nature, and...would draw attention to the fact that it is life itself that courses throughout the whole.’ Burdon presents a different view, arguing that anthropocentrism is now an ‘objective fact’ insofar as ‘[w]e can no longer withdraw and expect nature to return to any kind of ‘natural’ state...We may have acquired it foolishly, but we now have a responsibility for the earth as a whole and pretending otherwise is itself irresponsible.’ See P Burdon, *Ecological law in the Anthropocene* (2020) *Transnational Legal Theory*, 11(1-2), at p.39, quoting C Hamilton, ‘The Anthropocene Rupture’ (2016) *The Anthropocene Review*, 2(1) at p.47.

<sup>220</sup> Particularly considering Principle 4 of the LRRS: ‘The holders of land rights should exercise these rights in ways that take account of their responsibilities to meet high standards of land ownership, management and use...’

have remained predominantly anthropocentric, with only smatterings of ecocentrism appearing within approaches. Ecological sustainability as a legal principle<sup>221</sup> seems some distance away. However, change is inevitable in any system.<sup>222</sup> Property law is not static, nor has it ever been.<sup>223</sup> Of course, achieving change easier said than done; property law norms are deeply entrenched and the prevailing rights paradigm which operates in Western jurisdictions renders alternatives difficult – although necessary – to justify in the face of security and certainty.<sup>224</sup> Van der Walt argues that, even when morally legitimate, change can be resisted ‘by requiring clear and unambiguous authority for it and, once the authority to change has been demonstrated, by reading it so restrictively so as to limit the change to the minimum that is clearly required and authorised and that would cause the smallest possible harm or loss to existing rights.’<sup>225</sup> This kind of restricted application represents a tension between the need for stability and the need for change. This approach is evident from the discussion in this thesis regarding the mixed messages within sustainable development, land policy and the CRB legislation in Scotland, which remain on the anthropocentric side of the anthropocentric/ecocentric spectrum identified in Chapter 1.

### 3.2 Opening up possibilities through the CRB legislation

Chapter 1 argued that, to challenge the nature/culture dualism, new formulations are needed in property law and sustainable development frameworks. These formulations could integrate more ecocentric values into the approaches taken within these frameworks. The CRB legislation appears to have the potential to represent such a new formulation, particularly when viewed in tandem with approaches to land policy such as the Land Use Strategy and LRRS.

Looking again to the Helensburgh Decision, Robbie argues that it is possible to view this as an example of two competing visions of ownership rights: on the one hand, the view that land is primarily a financial investment, and on the other hand, a more holistic, value-driven

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<sup>221</sup> See A Ross (no. 21) at pp.287-310.

<sup>222</sup> A J Van der Walt (no. 83) at p.215.

<sup>223</sup> See E Freyfogle (no. 215) at p.209: ‘Most people recognize that law changes over time; visibly and constantly, legislators and regulators tinker with governing rules. It can be unsettling nonetheless the realise that property law has changed as dramatically as it has, to hear that lawmakers have significantly refashioned the rights and responsibilities of ownership over the past two centuries.’ Although Freyfogle’s discussion here takes place in an American context, its message nonetheless is relevant in a Scottish context.

<sup>224</sup> A J Van der Walt (no. 83) at p.215.

<sup>225</sup> Ibid.

view of land.<sup>226</sup> It is arguable that the dominant rights paradigm in Scotland led to a narrower approach by Ministers, particularly when considering the looming possibility of a challenge under Article 1 Protocol 1 (A1P1) of the European Convention on Human Rights (ECHR).<sup>227</sup> However, the narrow approach of Scottish Ministers is not necessarily a prescribed one. The alternative, holistic vision of land ownership in relation to the Helensburgh Decision, as highlighted by Robbie, is perhaps not unattainable under the CRB regime. As McCarthy argues, a challenge under A1P1 is not as likely as it is often made out to be.<sup>228</sup> As she states, the view of A1P1 as an ‘obstacle to reform, relies on a ‘castle model’-type conceptualisation of ownership in which obligations on owners are alien.’<sup>229</sup> McCarthy states that this conceptualisation is not supported by relevant case law, ‘in which the highly limited scope of A1P1 challenges to date has resulted in minimal restriction on the ongoing land reform programme.’<sup>230</sup> Therefore, both Robbie and McCarthy argue that the CRB legislation tends to be viewed very narrowly because of the dominant position that ownership rights hold in Scotland. Both writers critique the basic principle that obligations are not inherent in ownership. This basic principle is apparent in the above discussion regarding the Helensburgh Decision where the Scottish Ministers largely focused on the financial viability of the transfer. This is not, necessarily, the ‘wrong’ approach, but it exemplifies the manifestation of the rights paradigm in Scotland: ownership is fervently protected, even in the face of more holistic, progressive policy and legislation. This kind of approach could more easily imbue ecocentric concerns and lead law and policymakers to a more appropriate point in the anthropocentric/ecocentric spectrum of sustainable development.

However, at a fundamental level, the CRB legislation may represent a challenge to notions of ownership in Scotland. Not only can it deprive current owners of land, but it regulates the nature of ownership that a community body may enjoy in the event of a successful application. For example, the requirement for each CRB that a community body’s aims must be consistent with furthering the achievement of sustainable development fundamentally

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<sup>226</sup> J Robbie (no. 199) at pp.352-353.

<sup>227</sup> Article 1 Protocol 1 provides for the protection of private property as a human right. It 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 the general principles of international law.’ Therefore, it provides for strong protections of ownership rights subject only to legitimate interferences.

<sup>228</sup> F McCarthy (no. 81) at pp.232-234. At p.234 McCarthy refers to the jurisprudence of the European Court of Human Rights, in which ‘obligations inherent in ownership are clearly recognised.’

<sup>229</sup> Ibid. at p.234. McCarthy here is referring to Singer’s ‘castle model’ of ownership, which was discussed in Chapter 1 of this thesis. See J W Singer (no. 76) at p.314.

<sup>230</sup> Ibid. at pp. 221-227. *Salvesen v Riddell* [2013] UKSC 22 arguably fuelled this approach, but McCarthy argues that its scope is limited to its very specific facts. Again, in *Pairston Crofters Ltd v Scottish Ministers* [2012] CSIH 96, the challenge that this case represents is very limited in scope and was ultimately unsuccessful so provides no precedent for A1P1 challenges.

changes and restricts the exercise of ownership for the purposes of sustainable development. The 2016 Act goes even further in this regard with the sustainable development conditions. Therefore, the CRB legislation is, from the very beginning of the process, requiring ownership to be consistent with sustainable development in Scotland. This challenges typical notions of ownership by predicating its very existence on the furtherance of some other goal – in this instance sustainable development. As Fiona Mackenzie argues, the process of ‘normalisation’ operates to justify a certain practice, where that practice is engaged with repeatedly over time.<sup>231</sup> In other words, prevailing norms exist because of their entrenchment through the ‘doing’ of that norm. However, as Mackenzie points out, new possibilities can be opened up where these norms are ‘undone’.<sup>232</sup> This undoing can occur through new ideas or methods which disturb prevailing norms. Mackenzie argues that community ownership is one such method, which acts to trouble the binary of nature/culture, which has become ‘normalised’ through the functioning of property law. Mackenzie’s discussion of community ownership is perhaps wider than the focus of this thesis, which is on the legislative community rights to buy.<sup>233</sup> In this regard, it is possible to view the CRB legislation as challenging traditional aspects of private ownership rights by diminishing, firstly, the perceived importance of individual ownership rights, as well as in its incorporation of sustainable development. Taken in tandem with other land use policy in Scotland, for example the Land Use Strategy and the LRRS, which strongly suggest support from the Scottish Government for new approaches such as incorporating responsibilities in ownership, the overall approach to land reform in Scotland shows a move towards incorporating more ecocentrism.

Of course, as discussed, the conceptualisation of sustainable development in Scotland remains rooted in anthropocentrism, and the resistance to change in the property law regime is consistently strong, but the argument stands nonetheless that the *possibility* of progressive change is opened up by the CRB legislation restricting ownership in favour of sustainable

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<sup>231</sup> F Mackenzie (no. 4) at p.12.

<sup>232</sup> Ibid.

<sup>233</sup> Referencing Singer’s view of the predominant worldview of property law as being dominated by individual rights (what he terms the ‘ownership model’), Fiona Mackenzie states that ‘[t]he community land movement...displaces a narrative of property characterized in broad terms by “the ownership model”...and conjures in its place a counternarrative that removes the land as commodity from global property markets. As a distinctly counterhegemonic move, it strikes at the core of the process of neoliberalization, reversing norms that have defined tenurial relations for hundreds of years...’ see F Mackenzie (no. 4) at p.38. As Nicole Graham states, ‘[w]here the entire community, not just the dominant right-holding stakeholder, is engaged in the decision-making process ‘a sense of ownership...is created, leading to greater chances for political support and implementation’...’ This ownership is ‘not of the land but of the decisions about and over the land...’. See N Graham, ‘Owning the Earth’ in P Burdon (ed.), *Exploring Wild Law: The philosophy of earth jurisprudence*, (Wakefield Press 2011) at p.265.

development.<sup>234</sup> It shows a willingness to incorporate more ecocentric values into the regulation of landownership and use in Scotland, particularly when viewed in light of recent land policy such as the LRRS, which looks to incorporate responsibilities into landownership. In this regard, it is possible to view the inertia in the achievement of ecological sustainability as cyclical: protection of ownership is entrenched and thus impedes ecocentric approaches to sustainable development in favour of short-term solutions predicated on economic growth, such as ‘sustainable growth’, but a break in the chain such as the CRB legislation may be the catalyst for further incremental, progressive change which actively incorporates ecocentric approaches.

This is tempered, however, insofar as the CRB legislation *on its own* is unlikely to lead to the achievement of sustainability in relation to land. Similar changes, including the adoption of sustainable development as a core legal principle, strengthened by consistent messaging, would be required across the legislative and policy spectrum.<sup>235</sup> Indeed, certain land use policy documents in Scotland, such as the Land Use Strategy and LRRS, are showing a willingness from policymakers to imbue more holistic, ecocentric approaches to land. However, in order to address increasing environmental degradation, ecocentric approaches would need to form a more fundamental part of the wider sustainable development approach in Scotland, including the CRB legislation. Ecological sustainability would form the explicit principal aim. Nevertheless, as argued above, the CRB legislation may provide a template, or starting point, for more ecocentric approaches to be incorporated. To illustrate, looking at the CRB abandoned, neglected or detrimental land, changes to certain provisions within the 2003 Act could significantly alter the conceptualisation of sustainable development, fostering an outlook more in tune with ecological sustainability. For example, the definition of ‘eligible land’ under section 97C(2)(b) includes land where the use or management is such that it ‘results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community.’ It is interesting to speculate the possible consequences of re-defining ‘relevant community’ to include non-human communities. In this regard, the scope of ‘detrimental land’ would be expanded to include land which is detrimental to non-human communities as well as human communities, and in so doing addressing to an extent the anthropocentrism present in the Act. Just as changes to the CRB legislation may present opportunities for more ecocentrism, so too perhaps could placing the LRRS on statutory

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<sup>234</sup> On community ownership opening up possibilities for challenging dominant notions of ownership in Scotland, see F Mackenzie (no. 4). Although she discusses community ownership in the wider sense (not just the CRB legislation), she argues that community ownership has the potential to cause a ‘troubling of the norms of property...’ See p.48.

<sup>235</sup> A Ross (no. 21) at p.305 and 311-331.

footing, rather than it remaining a voluntary document. Such approaches are not beyond the realms of possibility,<sup>236</sup> but requires a fundamental shift in attitudes toward what should qualify as justified interferences with ownership rights. Currently, given the anthropocentric messaging in policy and throughout the CRB legislation, compounded by the structural protections afforded to ownership rights as a result of the rights paradigm, it is difficult to imagine such provisions being successfully implemented into legislation. However, as a general point, incorporating sustainable development as the key principle of the CRB legislation, particularly when viewed as part of a wider process which includes, for example, the approach to responsibilities in ownership in the LRRS, may represent the kind of ‘prefigurative politics’ needed for a fundamental shift in attitudes, which would more readily incorporate ecocentric approaches and more effectively achieve ecological sustainability.

### 3.3 Are communities the best facilitators of ecological sustainability?

If the CRB legislation can be said to open up possibilities for a more ecocentric approach to sustainable development and property law, the question then becomes: are communities somehow inherently better-suited to owning and managing land in ways that contribute better to ecological sustainability? This is a question without a clear-cut answer,<sup>237</sup> although it is useful to present some basic arguments presented in this regard. Common arguments against community ownership tend to coalesce around the lack of expertise in land management among communities and, notwithstanding grants from the Scottish Land Fund, the difficulties in obtaining secure funding to maintain the land, which both may actually cause damage to the environment.<sup>238</sup> Related to this is the possibility for conflict and lack of

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<sup>236</sup> For example, in determining whether land is wholly abandoned or neglected under Part 97C(2)(a) of the Land Reform (Scotland) Act 2003, Scottish Ministers must have regard to, *inter alia*, Regulation 3(c)(iii) of the Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 which states that the physical condition of the land or any building on the land causes, or is likely to cause, environmental harm. This is further defined in Section 17(2) Regulatory Reform (Scotland) Act 2014 as including ‘harm to the health of human beings or *‘other living organisms,’* (emphasis added) as well as ‘harm to the quality of the environment, including...air, water or land, and other impairment of, or interference with, ecosystems.’ This is a clear indication that the CRB abandoned, neglected or detrimental land can and does take into consideration non-human communities.

<sup>237</sup> M Combe (no. 182) at p.114: ‘Although [this question] is not the kind of question that might find a definitive answer in a legal journal, it is legitimate to raise the question in the hope that commentators and, indeed, legislators will engage with it in future.’

<sup>238</sup> This argument can take multiple forms. For example, see J Glass *et al* (eds), *Lairds, Land and Sustainability: Scottish Perspectives on Upland Management* (Edinburgh University Press 2013) at p.72: current landowners have argued that community ownership can ‘put the natural heritage at risk by undermining the incentive for long term, high-quality land management.’ See also Scottish Government, *Attitudes to Land Reform* (2021) at p.59.

capacity within communities, which can stymie sustainable development.<sup>239</sup> Similarly, from a conservation angle, there is an argument that fragmentation of landholdings and breaking-up of unified land management under a single owner can have dangerous consequences for local ecologies.<sup>240</sup> Indeed, landholders such as Anders Povlsen would not be able to implement landscape-scale conservation practices were it not for the ability to purchase vast tracts of land and be largely free to do what they please with that land in the first instance.<sup>241</sup> It could be said, on the other hand, that communities have a greater connection with, and understanding of, the land;<sup>242</sup> Freyfogle argues that '[w]idespread ownership disperses power in society and can encourage people to take responsibility for their conduct.'<sup>243</sup> This may enable a greater sense of stewardship and a diminished tendency towards commodification of land. Mackenzie argues that a 'commoning of the land' can strengthen community identity.<sup>244</sup> She offers case studies, such as the North Harris Trust, whereby through their community-led initiatives such as replanting native woodland, they are 'undoing a norm of nature as distinct from social process.'<sup>245</sup> In this sense, community ownership is inclusionary; both socially and environmentally. This can be contrasted with conservation efforts by private individuals. Whilst large landowners such as Povlsen are working to protect and conserve ecosystems, as outlined in Chapter 1, this is inevitably discretionary, and potentially exclusionary.<sup>246</sup> Indeed, the recent 'green laird' movement has been criticised for being exploitative.<sup>247</sup> This kind of land ownership shows the potential

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<sup>239</sup> See J Glass *et al* (no. 238) at p.153 where a proposed wind turbine development was proposed following the Assynt buyout. This resulted in 'contentious debate and the indefinite shelving of the project.' Other examples can be found in certain community buyouts, for example the purchase under the 2003 Act of Rhubadoch forest on Bute by the community resulted in rifts in the community body: see Herald Scotland, 'If you go down to the woods, you'll get a big and disappointing surprise' (2019) available at <<https://www.heraldscotland.com/news/17844888.go-woods-get-big-disappointing-surprise/>> (last accessed 10/08/2021).

<sup>240</sup> See Scottish Land & Estates response to the Scottish Government, 'A Consultation on the Future of Land Reform in Scotland' (2015) available at <<https://www.scottishlandandestates.co.uk/our-work/land-reform>> (last accessed 01/08/2021) at question 14: 'case study after case study highlighted that one of the biggest threats to species conservation was the fragmentation of landholdings and the consequential break-up of coherent and unified management.'

<sup>241</sup> See BBC News, 'Anders Povlsen: Why a Danish billionaire bought the Highlands' available at <<https://www.bbc.co.uk/news/uk-scotland-47803110>> (last accessed 10/08/2021).

<sup>242</sup> See B G Norton, *Sustainability. A Philosophy of Adaptive Ecosystem Management* (University of Chicago Press 2005) at p.608: '...many of the key details of a sustainable lifestyle will be idiosyncratic to a particular community located in a particular place with a distinctive ecology...'

<sup>243</sup> E Freyfogle (no. 65) at p.437.

<sup>244</sup> F Mackenzie (no. 4) at p.38.

<sup>245</sup> *Ibid.* at p.83.

<sup>246</sup> For example, owners of large estates looking to 'rewild' these areas are often criticised for failing to view human communities as inevitably part of local ecologies. This links to the discussion in chapter 2 regarding the 'wilderness fallacy', and indeed the Third Land Use Strategy discussed in Chapter 2 recognises the interrelatedness of human and non-human communities in its ecosystems approach.

<sup>247</sup> There are concerns that large tracts of land in Scotland are now being purchased by private individuals or companies motivated by offsetting future carbon tax liabilities. See, for example, Press and Journal, 'Green



dangers of treating ecosystems as ‘natural capital’ or as ‘true wildernesses’; it continues to separate nature and culture. Mackenzie’s argument, of community inclusion, suggests that communities working with the land are inherently more sustainable because of their connection with the land.<sup>248</sup> Mackenzie’s discussion relates largely to communities in the Outer Hebrides, and does not focus on the CRB legislation. However, it is not unreasonable to extend her argument to include both communities throughout Scotland, urban and rural, as well as the CRB legislation more generally. Therefore, the ‘prefigurative politics’ of the CRB legislation can represent a shift to more ecocentric approaches to land. Indeed, the requirement within the CRB legislation that there is a connection between the relevant community body and the land in question<sup>249</sup> suggests the recognition of the need for more connections between humans and land. Furthermore, the widening of the CRB legislation from rural to all land in Scotland<sup>250</sup> suggests there is more to community connection with land than simply ‘the great outdoors’, encouraging integration between people and the built environment as well as countryside. This messaging, coupled with the recent shift in land use policy to an approach based on responsibilities,<sup>251</sup> suggests that there is an iterative move towards more ecocentric visions of land use in Scotland. However, in the face of deeply entrenched notions of individual ownership rights, this iterative movement will encounter many anthropocentric hurdles.

#### 4 Conclusion: mixed messages?

This chapter has explored the sustainable development aspects of the CRB in more detail, interrogating whether the CRB regime can contribute to ecological sustainability. The first section of this chapter looked at the ‘sustainable development aspects’ of the CRB

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lairds: Scottish Land Commission boss vows to protect communities’ (2021) available at <<https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/3371656/green-lairds-scottish-land-commission-boss-vows-to-protect-communities/>> (last accessed 09/08/2021).

<sup>248</sup> See also J Blewitt (no. 22) at p.34, referencing Norton (no. 242): ‘...adaptive management means human ingenuity and practice working as an integral part of nature rather than simply on nature, for human beings help constitute these wider ecosystems.’ This is also a counter-argument to the environmental justice critique of the CRB: communities suffering from the effects of environmental degradation may benefit from a community-led approach, rather than having a project imposed on them which may further alienate their connection to the land. On the benefits of community-led approaches to regeneration, see M Sorkin (ed.), *Variations on a Theme Park: The New American City and the End of Public Space* (Hill and Wang 1992).

<sup>249</sup> See the Land Reform (Scotland) Act 2003 ss.38(1)(b), 97H(h); the Land Reform (Scotland) Act 2016 s.56(g).

<sup>250</sup> The Community Empowerment (Scotland) Act 2015 s.36 amended s.33 of the Land Reform (Scotland) Act 2003: whereas prior to this a community interest could only be registered over rural land only, it was consequently extended to all of Scotland.

<sup>251</sup> Particularly in the LRRS.

legislation, highlighting that much of the CRB legislation is progressive, suggesting the possibility for ecocentric approaches to be incorporated. For example, the new CRBs highlight a move towards enshrining sustainable development in legislation, rather than leaving definitions to policy. The provisions themselves also suggest a more contextualised approach to sustainable development of land: the ‘sustainable development conditions’ in the 2016 Act outline relevant considerations across the three pillars of sustainable development; ‘public interest’ is now expressly included as part of the sustainable development considerations in the 2016 Act; the CRB legislation also promotes a human rights-based approach; and the CRB abandoned, neglected or detrimental land includes a specific focus on ‘environmental harm’. These are all, arguably, progressive in their own right. However, a common theme throughout each of these legislative provisions is that the justification for each relates back to human communities only. This is indicative of an anthropocentric approach, which still views human and non-human communities as separate. Where the environment is considered, it is done so in an anthropocentric manner, looking at how environmental action can best benefit human communities. This is evident in the approach of Scottish Ministers in the Helensburgh Decision, where, crucially, Scottish Ministers’ concerns were centred on the financial viability and economic success of the community buyout. This is not, necessarily, antithetical to ecological sustainability, but it eschews ecocentric approaches which can quicken the sluggish pace at which environmental action is currently being taken. Overall, considering the spectrum of anthropocentric/ecocentric approaches to sustainable development outlined in Chapter 1, it can be said that the sustainable development provisions within the CRB legislation remain tied to the anthropocentric end of the spectrum, with only hints of ecocentrism.

The question of ‘why’ was then explored: why do visions of sustainable development within the CRB legislation remain anthropocentric when the need for ecocentric approaches are needed more than ever? It was suggested that dominant conceptualisations of ownership rights in Scotland are part of this explanation. The protection of ownership rights is rooted in the separation of nature and culture; land is abstracted from its physical reality and becomes ‘no more than the ‘thing’ of the property relation.’<sup>252</sup> This anthropocentric approach has consequently manifested itself in notions of sustainable development. This can be seen from the anthropocentric nature of much of the CRB legislation, whereby the environment figures as a consideration but only to the extent to which it affects human communities.

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<sup>252</sup> N Graham (no. 110) at p.97.

Consequently, the functioning of sustainable development in Scotland, particularly within the CRB legislation, arguably does not contribute as it should to ecological sustainability.

However, the CRB regime perhaps represents an ‘opening’ of sorts; an opportunity to break the cycle by challenging typical protections of ownership and allowing chances for communities to create new, and foster existing, ties with land. This may represent the kind of ‘prefigurative politics’ promoted by Davies, Godden and Graham.<sup>253</sup> This approach is based on the idea of ‘imagining or prefiguring the future.’ It promotes the notion that ‘fundamental change accumulates incrementally – through repeated behavioural change, piecemeal reforms, and the development of narratives to guide larger transformations.’<sup>254</sup> In other words, the CRB legislation is by no means revolutionary. However, particularly when viewed with other land use policy such as the Land Use Strategy and the Land Rights and Responsibilities Statement, it can figure as part of a wider sea-change in altering the nature and culture dualism and, consequently, contributing to ecological sustainability.

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<sup>253</sup> See Davies *et al* (no. 166) at p.33.

<sup>254</sup> *Ibid.* at pp.33-34.

# Conclusion

The core aim of this thesis was to assess the potential of the CRB legislation in Scotland to facilitate ecological sustainability. In other words, providing the tools to live within the ecological limits of the Earth.<sup>255</sup> Within this assessment, certain concepts have been outlined and analysed, such as the nature/culture dualism and anthropocentric/ecocentric interpretations of sustainable development. The connection of these concepts to property law has, in turn, been interrogated. This analysis has served to highlight some of the challenges that the CRB legislation faces as a forward-looking framework based on sustainable development. However, this thesis has not sought to provide specific recommendations for wholesale reform to the system in place. Indeed, the scope of a work such as that would be well beyond that of this thesis. Instead, its purpose is primarily to assess the *form* of sustainable development adopted by the CRB legislation. This discussion highlighted that this form, whilst demonstrating certain ecocentric traits, remains largely anthropocentric, dominated by human concerns. Whilst this can contribute to ecological sustainability in the long-term, the inclusion of *more* ecocentrism will help to achieve that goal quicker at a time when it is greatly needed.

Chapter 1 introduced three core themes which are important to the transition to ecological sustainability: the anthropocentric/ecocentric spectrum of sustainable development; the nature and culture dualism and the requirement for new formulations, such as imposing responsibilities within landownership, to tackle this; and the structural effects of property law, which resist these new formulations. This is outlined as a major barrier to ecological sustainability.

In order to situate the discussion in a locality, Chapter 2 introduced Scotland to the debate. As a country with abundant natural beauty, it also has well-documented troubles relating to land. There are a multitude of factors at play in relation to Scotland's 'land question', but of particular relevance in this regard is the relationship between property law – particularly the strong protection of ownership rights – and the nature/culture dualism. This is evident in its concentrated patterns of landownership. Sustainable development has been a key approach in tackling the land question in Scotland. Therefore, Chapter 2 sought to assess the parameters of certain land policy in light of the anthropocentric/ecocentric spectrum outlined in Chapter 1, arguing that they imply a move to more ecocentric approaches, particularly in

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<sup>255</sup> A Ross (no. 21) at pp. 287-310.

their adoption of responsibilities in landownership. However, the structural effects of property law in Scotland were highlighted as a key barrier to such approaches, stymying their potential for ecological sustainability. Chapter 2 concluded by outlining the primary legislative land reform measure in Scotland – the CRB – and how they incorporate sustainable development.

Chapter 3, then, critically evaluated the sustainable development aspects of the CRB legislation outlined in Chapter 2, to interrogate the capability of the CRB to facilitate ecological sustainability. It recognised that, whilst there are elements of ecocentrism within the CRB legislation, much of its content still relates environmental concerns back to human communities only, rather than for the sake of planetary systems survival themselves. Further, a unified approach to its interpretation by Scottish Ministers, for example taking into account the principles within the LRRS, is lacking, suggesting that anthropocentric concerns will be the norm in this regard. Chapter 3 then argued that this can be seen as a natural corollary of a property law system in which ownership rights are not only strongly protected but also largely antithetical to wider obligations, resulting in an approach which tends more to anthropocentrism than ecocentrism. The failure to effectively incorporate ecocentrism may not ultimately preclude ecological sustainability, but it does make its realisation far more difficult at a time when it is urgently needed.

The issues here are multifaceted and complex; there are no simple solutions. However, as Chapter 3 suggested, the CRB regime may constitute a potential incremental change to wider systems in place, including notions of property law. A ‘prefigurative politics’ of this kind may work as part of a wider behavioural and perceptive sea change in achieving ecological sustainability. As Ross states, ‘even if a weaker and less ambitious formulation [of sustainable development] is preferred, providing some legislative backing for the production, use and review of the strategies would still be valuable and consistent with calls for reflexive governance for sustainable development.’<sup>256</sup>

Therefore, it is tempting to state that the CRB legislation, particularly the new CRBs, are suitably equipped to facilitate ecological sustainability because of their commitment to entrenching sustainable development as a legal condition. However, as argued in Chapter 3, the ‘sustainable development aspects’ of the CRB legislation tend to revert back to anthropocentric tropes. To compound this, even if such provisions were more strongly imbued with ecocentrism, the implementation of such provisions would prove challenging

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<sup>256</sup> A Ross (no. 21) at p.313.

given fundamental protection of ownership rights in Scots property law, as can be seen in the implementation of the LRRS, which remains entirely voluntary. As Ross argues, it is simply not enough to have ecological sustainability as a legal principle; it needs to be backed up with a consistent message and powerful support for best practice, namely good leadership supported by binding obligations.<sup>257</sup> Sustainable development would also be required to act as a guiding force throughout other legislation and policy beyond community ownership and land use.<sup>258</sup> In other words, one piece of legislation is not capable on its own in achieving ecological sustainability; systemic change is required across government and throughout society in order to reach this goal. Hodgepodge approaches must be eliminated in favour of a concerted effort across the legislative and political sphere which advocate the normalisation of more ecocentric approaches to sustainable development, as well as concomitant societal culture shifts.<sup>259</sup>

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<sup>257</sup> Ibid. at p.305.

<sup>258</sup> Ibid.: 'Over and above its symbolic and educational value, specific legislation in relation to sustainable development generally...would impose mandatory obligations on policymakers and decision makers, often with meaningful consequences both inside and outside the courtroom.'

<sup>259</sup> Ibid. at pp.287-310.

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