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THE CLIMATE EMERGENCY AND LANDOWNERSHIP IN SCOTLAND

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SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE DEGREE OF  
PhD

SCHOOL OF LAW

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## ABSTRACT

In 2019, the Scottish Government declared a climate emergency, legally mandating a transition to net zero greenhouse gas emissions by 2045. Land use is a significant source of emissions. Therefore, land use change is necessary for emissions reduction. Property is a fundamental determinant of land use. Therefore, it is essential to critically assess its role in both contributing to, and reducing, emissions. In Scotland, the property paradigm is predicated on what is termed the 'ownership model'. This model is characterised by three core, interrelated tropes: it is abstract (severed from the material realities of land), extractive (commodifying land and separating the benefits of land use – sent to a diffuse range of corporate interests – from the material impacts), and individualistic (privileging an absolute right of use of the owner and enforcing a rigid public/private divide). These tropes facilitate land use practices which contribute to climate change while inhibiting effective regulation of those practices. In the context of the climate emergency, the property paradigm itself must change if land use is to change to mitigate that emergency.

Against this backdrop, and drawing from legal geography, the thesis critically analyses three Scottish land use policies, evaluating their capacity to mitigate climate change by examining how they reinforce or challenge the ownership model. These sit on a spectrum of state intervention, from market-led approaches (voluntary carbon markets); to regulatory measures aimed at operationalising certain obligations in ownership (compulsory land management plans); to redistributive measures (the community rights to buy land). This analysis highlights that voluntary carbon markets rely on, and entrench, the tropes of the ownership model. Despite claiming to address emissions, these markets may inadvertently worsen the crisis by reinforcing harmful property practices. Land management plans offer a moderate challenge to the ownership model by imposing some obligations on landowners, but they stop short of embedding climate-related responsibilities deeply within ownership structures. The most transformative potential lies in the community rights to buy; by enabling democratic, place-based decision-making and integrating local knowledge, these rights allow for more ecologically grounded and socially equitable land use. They challenge the abstract and exclusionary nature of property by rooting it in relationships of care and responsibility within environmental limits. This analysis has broader implications for property law in general, arguing that for the paradigm to change to fully contribute to mitigating the climate emergency, it must be grounded in the material conditions of Earth systems. This thesis argues that for land use policy to truly support climate mitigation it must facilitate new 'performances' of property; practices that reframe ownership as embedded within socio-ecological systems. Such shifts would destabilise the current ownership model, redistribute power and reimagine property not as an absolute right but as a situated obligation tied material realities. This thesis ultimately exposes the political choices embedded in property law and their far-reaching consequences for addressing the climate emergency.

## CONTENTS

<b>CHAPTER 1: INTRODUCTION</b> .....	<b>1</b>
1.1 Research context .....	1
1.2 Research questions .....	5
1.3 Methodology .....	8
1.3.1 A critical legal geographical disposition.....	8
1.3.2 Critical v doctrinal approaches .....	8
1.3.3 Property’s relationality .....	11
1.3.4 Performativity theory.....	15
1.4 Structure.....	22
<b>CHAPTER 2: THE OWNERSHIP MODEL IN THE CONTEXT OF THE CLIMATE EMERGENCY</b> .....	<b>27</b>
2.1 Introduction.....	27
2.2 Placelessness in property: the ownership model.....	28
2.2.1 Abstract ownership .....	30
2.2.1.1 The nature/culture dualism.....	30
2.2.1.2 Nature/culture dualism in property law: dephysicalised property.....	31
2.2.2 Extractive ownership: the instrumental utility of the person/thing divide .....	32
2.2.3 Individualistic ownership – the public/private divide in the ownership model .....	35
2.3 Performativity theory and regulation .....	40
2.4 Conclusion .....	42
<b>CHAPTER 3: ‘USE’ AND ‘DELIGHT’ – HISTORIC ORIGINS OF CONTEMPORARY PROPERTY DEBATES IN SCOTLAND</b> .....	<b>44</b>
3.1 Introduction.....	44
3.2 Scots property law and the ownership model .....	46
3.3 Rural land in Scotland and the ownership model.....	52
3.3.1 Concentration of ownership.....	55
3.3.2 Land as ‘use’.....	58
3.3.2.1 The Clearances.....	63
3.3.2.2 Minerals, ‘use’ and ownership – ‘conventional separate tenements’ .....	67
3.3.3 Land as ‘delight’ .....	70
3.3.3.1 ‘Delight’ as the other side of the same coin as ‘use’ .....	70
3.3.3.2 ‘Delight’ in grouse moors and nature conservation .....	72
3.3.4 Counter performances to land as ‘use’ and ‘delight’: regulating land use .....	77
3.3.4.1 Crofting reforms.....	78
3.3.4.2 The Right to Roam as a ‘placed’ response .....	80
3.3.4.3 Regulating Grouse Moors .....	84

3.4	Conclusion .....	86
<b>CHAPTER 4: VOLUNTARY CARBON MARKETS .....</b>		<b>88</b>
4.1	Introduction.....	88
4.2	Voluntary carbon markets in Scotland.....	90
4.2.1	A brief explainer.....	90
4.2.2	Scottish Government policy on voluntary carbon markets .....	92
4.3	Voluntary carbon markets and the ownership model: placelessness in policy .....	96
4.3.1	Abstract ownership .....	97
4.3.1.1	Entrenching the nature/culture dualism: dephysicalisation and VCMs.....	97
4.3.2	Extractive ownership .....	99
4.3.2.1	Entrenching the person/thing dualism.....	99
4.3.2.2	On propertising carbon.....	106
4.3.3	Individualistic ownership.....	108
4.3.3.1	Entrenching estrangement.....	108
4.4	Voluntary carbon markets and performative property .....	113
4.4.1	Perpetuating land as ‘use’ in the climate emergency .....	113
4.5	Conclusion .....	117
<b>CHAPTER 5: RECENT LAND REFORM IN SCOTLAND – LAND MANAGEMENT PLANS .....</b>		<b>119</b>
5.1	Introduction.....	119
5.2	Land Reform in Scotland .....	119
5.2.1	A brief explainer .....	119
5.2.2	The Land Rights and Responsibilities Statement: The first steps towards integrating broader obligations in ownership? .....	120
5.2.3	The Land Reform (Scotland) Bill 2024: ‘Land Reform in a Net Zero Nation’ .....	124
5.2.3.1	Legislative provisions relating to LMPs .....	127
5.3	Land Management Plans and the Ownership Model .....	129
5.3.1	Abstract.....	130
5.3.2	Extractive.....	133
5.3.3	Individualistic .....	135
5.3.4	Land Management Plans as a sufficient challenge to the ownership model in the context of the climate emergency? .....	141
5.4	Land management plans and performative property.....	144
5.5	Conclusion .....	146
<b>CHAPTER 6: THE COMMUNITY RIGHTS TO BUY LAND.....</b>		<b>148</b>
6.1	Introduction.....	148
6.2	The community rights to buy land.....	149

6.2.1	Community ownership in Scotland generally .....	149
6.2.2	Community ownership and ‘commoning’ the land.....	151
6.2.3	Community rights to buy: community ownership as part of land reform in Scotland .....	152
6.2.3.1	The Community rights to buy: the pre-emptive right to buy.....	153
6.2.3.2	The Community rights to buy: the expropriation rights to buy .....	155
6.2.3.3	Community right to buy review .....	158
6.3	The CRtB as a challenge to the ownership model .....	160
6.3.1	Abstract.....	161
6.3.2	Extractive.....	166
6.3.3	Individual.....	173
6.4	The CRtB and performative property: commoning and climate change .....	178
6.5	Conclusion .....	185
<b>CHAPTER 7: POLICY CONCLUSIONS IN THE CONTEXT OF SCOTLAND AND THE CLIMATE EMERGENCY – BUILDING A FRAMEWORK FOR LAND USE POLICY DESIGN .....</b>		<b>186</b>
7.1	Introduction.....	186
7.2	Challenging the ownership model through a land use policy analysis framework .....	188
7.3	Applying the framework .....	191
7.3.1	Voluntary carbon markets.....	191
7.3.2	Land management plans .....	192
7.3.3	Community rights to buy .....	194
7.4	Conclusion .....	198
<b>CHAPTER 8: PROPERTY CONCLUSIONS IN THE CONTEXT OF SCOTLAND AND THE CLIMATE EMERGENCY – PERFORMING THE FUTURE .....</b>		<b>200</b>
8.1	Introduction.....	200
8.2	Change vs certainty.....	201
8.3	Performing changes to property in the climate emergency.....	205
8.3.1	Performing changes to property.....	205
8.3.2	Reconciling performativity with regulation.....	207
8.3.3	Application beyond Scotland.....	211
<b>CONCLUSION.....</b>		<b>213</b>
<b>BIBLIOGRAPHY .....</b>		<b>216</b>

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## AUTHOR'S DECLARATION

I certify that the thesis presented here for examination for a PhD degree of the University of Glasgow is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it) and that the thesis has not been edited by a third party beyond what is permitted by the University's PGR Code of Practice.

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I declare that this thesis has been produced in accordance with the University of Glasgow's Code of Good Practice in Research.

I acknowledge that if any issues are raised regarding good research practice based on review of the thesis, the examination may be postponed pending the outcome of any investigation of the issues.

Name: Calum Glen Stewart

Signature:

Date: 30/09/2025

## LIST OF ABBREVIATIONS

CLS	Community Land Scotland
CRtB	Community Right(s) to Buy
ECHR	European Convention on Human Rights
HCWG	Helensburgh Community Woodland Group
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPCC	Intergovernmental Panel on Climate Change
LMP	Land Management Plan
LRPG	Land Reform Policy Group
LRRG	Land Reform Review Group
LRRS	Land Rights and Responsibilities Statement
RCIL	Register of Community Interests in Land
SLC	Scottish Land Commission
SLE	Scottish Land and Estates
SNP	Scottish National Party
UN	United Nations
VCM	Voluntary Carbon Market

# Chapter 1: Introduction

## 1.1 Research context

The Earth is undergoing a period of rapid atmospheric warming. Human activity is estimated to have caused approximately 1°C of global average warming above pre-industrial levels.<sup>1</sup> The IPCC estimated in 2018 a likely average temperature increase of 1.5°C above the baseline level between 2030 and 2052 based on current patterns.<sup>2</sup> In fact, 2024 was the warmest year on record globally, and the first year that average global temperature exceeded 1.5°C.<sup>3</sup> This has catastrophic consequences for Earth systems.<sup>4</sup> Stark climatic events – including heatwaves, floods, rainstorms, coastal erosion, sea-level rises, ocean acidification, and extreme weather systems – are occurring with increasing regularity and severity. These changes affect all aspects of human and non-human life on Earth; the loss of biodiversity across the globe, food and freshwater shortages, and increased global human migration. Anthropologically driven changes to the Earth’s natural systems have had such a severe impact that many now suggest we are in fact living in a new geological epoch – the Anthropocene.<sup>5</sup> This nomenclature captures the paradigm that

<sup>1</sup> IPCC, ‘Climate Change 2023: Synthesis Report: Summary for Policymakers’ (2023), 4 <[www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](http://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf)>, 4.

<sup>2</sup> IPCC, ‘Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels’ (2018), 4 <[www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM\\_version\\_report\\_LR.pdf](http://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf)> accessed 10/08/2025. ‘Pre-industrial’ is defined at 24 as the ‘multi-century period prior to the onset of large-scale industrial activity around 1750. The reference period 1850-1900 is used to approximate pre-industrial global mean surface temperature.’

<sup>3</sup> European Commission Copernicus Institute, ‘2024 is the First Year to Exceed 1.5°C Above Pre-Industrial Level’ (2024) <<https://climate.copernicus.eu/copernicus-2024-first-year-exceed-15degc-above-pre-industrial-level>> accessed 04/09/2025.

<sup>4</sup> This thesis adopts the term ‘Earth systems’. This is a term rooted in Earth systems science, and has specific scientific meanings ascribed to it. Earth systems are used in the growing field of study regarding planetary boundaries, which identifies nine key interconnected earth systems including climate change and biodiversity loss. See J Rockstrom *et al*, ‘A Safe Operating Place for Humanity’ (2009) 461 *Nature* 472 – 475. See also W Steffen *et al*, ‘Planetary boundaries: Guiding Human Development on a Changing Planet’ (2015) 347(6223) *Science* 1259855-1 – 1259855-10. Here the authors suggest that four planetary boundaries have been crossed: climate change; biosphere integrity; biochemical flows and land-system change. Earth system science is a vast area, so scope for discussion here is limited, but it suffices to highlight that all planetary boundaries are interconnected; land use is significant in the crossing of the climate change Earth system boundary. As discussed by Steffen *et al*, atmospheric carbon dioxide concentrations are increasing, largely owing to human-driven changes. Land use, such as hydrocarbon extraction and fossil fuel burning, contribute to the atmospheric loading of carbon dioxide. This is recognised in the planetary boundary of land-systems change, or ‘the bio-geo-physical processes in land systems that directly regulate climate’ which is also suggested to have been crossed. See also Stockholm Resilience Centre, ‘Planetary Boundaries’ <[www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html](http://www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html)> accessed 29/08/2025.

<sup>5</sup> See P J Crutzen, ‘Geology of mankind’ (2002) 415 *Nature* 23; W Steffen *et al*, ‘The Anthropocene: Are humans now overwhelming the great forces of Nature?’ (2007) 36(8) *Ambio* 614. For a useful illustration of the Anthropocene, see D Matthews, *Earthbound: The Aesthetics of Sovereignty in the Anthropocene* (2021) 6: ‘...the next ice age is due to begin in 50,000 years’ time. But because human activity has released such

humans have assumed the role of ‘masters and possessors of nature.’<sup>6</sup> Put shortly, the current geophysical epoch is one of human-induced environmental crises.

The level of planetary warming is determined by the output of carbon emissions balanced with the level of sequestration, or storage, of carbon. Therefore, to avoid this increase in warming, the IPCC recommends that net zero greenhouse gas emissions must be achieved by 2050.<sup>7</sup> Net zero is the atmospheric state wherein that the total greenhouse gas emissions equal to or less than the emissions that are removed from the environment; the levels of carbon sequestration are equal to the levels of emission.

This will inevitably require a global effort to limit the total cumulative anthropogenic carbon dioxide emissions, and this global effort must be translated into national policies if it is to have any impact. Yet progress is slow. Energy sector carbon emissions reached record highs in 2024,<sup>8</sup> and many of the principal emitters are rolling back on commitments to move to greener alternatives.<sup>9</sup> Given that regional contributions to global emissions differ greatly, and Europe is one of the top regional emitters,<sup>10</sup> it is important to understand the reasons for this lack of effective climate change mitigation and indeed a rolling back on many climate commitments from both private actors<sup>11</sup> and states,<sup>12</sup> particularly in wealthier regions with disproportionately higher emissions.

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large quantities of CO<sub>2</sub> and other greenhouse gases...the onset of this ice age has been delayed. And it is quite likely that the ice age following that, due to begin in 130,000 years’ time, will not come to pass. The actions of ‘modern man’...have diverted the course of planetary history.’

<sup>6</sup> N Graham, *Landscape: Property, Environment, Law* (2011) 29. See also D Matthews (no 5) 6: ‘social forces that have produced high-pollution economies have acquired so much power within the Earth’s systemic functioning that the prevailing climatic conditions of the last 12,000 years have been displaced, with human societies now having assumed the extraordinary capacity to shape ‘geohistory.’. At 113, Matthews summarises the position poetically: in the Anthropocene humankind is ‘simultaneously aggrandised and humbled.’

<sup>7</sup> IPCC (no 2) 11. See also Office for National Statistics, ‘Net Zero and the Different Official Measures of the UK’s Greenhouse Gas Emissions’

<[www.ons.gov.uk/economy/environmentalaccounts/articles/netzeroandthedifferentofficialmeasuresoftheuksgreenhousegasemissions/2019-07-24](https://www.ons.gov.uk/economy/environmentalaccounts/articles/netzeroandthedifferentofficialmeasuresoftheuksgreenhousegasemissions/2019-07-24)> accessed 28/01/2025.

<sup>8</sup> International Energy Agency, ‘CO<sub>2</sub> Emissions’ <<https://www.iea.org/reports/global-energy-review-2025/co2-emissions>> accessed 04/09/2025.

<sup>9</sup> S Jack and F Masud, ‘BP Shuns Renewables in Return to Oil and Gas’ BBC News (2025) <[www.bbc.co.uk/news/articles/c3374ekd11po#:~:text=BP%20has%20announced%20it%20will,been%20lower%20than%20its%20rivals.](https://www.bbc.co.uk/news/articles/c3374ekd11po#:~:text=BP%20has%20announced%20it%20will,been%20lower%20than%20its%20rivals.)> accessed 04/09/2025; K Keane, ‘New Climate Assessment for Jackdaw Gas Field’ BBC News (2025) <[www.bbc.co.uk/news/articles/c99g0vyrzml0](https://www.bbc.co.uk/news/articles/c99g0vyrzml0)> accessed 04/09/2025.

<sup>10</sup> IPCC (no 1), 10.

<sup>11</sup> See, for example, Jack and Masud (no 9).

<sup>12</sup> Chatham House, ‘Labour’s Ditched £28 Billion Climate Pledge Sends the Wrong Message on UK COP Energy Commitments’ <[www.chathamhouse.org/2024/02/labours-ditched-ps28-billion-climate-pledge-sends-wrong-message-uk-cop-energy-commitments](https://www.chathamhouse.org/2024/02/labours-ditched-ps28-billion-climate-pledge-sends-wrong-message-uk-cop-energy-commitments)> accessed 04/09/2025.

Scotland, whilst no longer politically part of the EU following the 2016 Brexit referendum, remains geographically within the region of Europe. In 2019, the Scottish Government declared a climate emergency.<sup>13</sup> Consequently, it introduced the legal requirement to achieve net zero greenhouse gas emissions in Scotland by 2045.<sup>14</sup> For the Scottish Government, this means that the amount of greenhouse gas emissions released into the atmosphere from Scottish sources are ‘offset’ by mitigating actions that balance out such emissions to ‘zero’.<sup>15</sup> The recognition of the existence of a global climate emergency, along with a legally binding emissions reduction target, are important steps in overall action to reduce emissions and mitigate climate change, as well as important political messages in recognising the social and environmental damage inflicted by increasing temperatures. Net zero has risks and benefits: it is an ostensibly simple emissions accounting exercise which seeks to find success in a complex world, risking the flattening out of the complexities of Earth systems in policy terms; on the other hand it provides a legally-binding fulcrum through which to organise action around and contribute to long-needed systems change, especially with the increased focus in Scotland on a ‘socially just’ transition to net zero.<sup>16</sup> Further, tangible action to reduce emissions is lagging: in 2024 the Scottish Government abandoned its interim emissions reduction targets, deeming them unachievable.<sup>17</sup> These targets were replaced with ‘carbon budgets’ – caps on emissions in Scotland over five year periods starting from 2026.<sup>18</sup> The Climate Change Committee has

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<sup>13</sup> Scottish Government, ‘The Global Climate Emergency – Scotland’s Response: Climate Change Secretary Roseanna Cunningham’s Statement’ <<https://www.gov.scot/publications/global-climate-emergency-scotlands-response-climate-change-secretary-roseanna-cunninghams-statement/>> accessed 25/08/2025.

<sup>14</sup> The Climate Change (Scotland) Act 2019 amended the Climate Change (Scotland) Act 2009 to insert a new Section A1 which sets out this target. Subsection (1) states that the ‘Scottish Ministers must ensure that the net Scottish emissions account for the net-zero emissions target year is at least 100% lower than the baseline.’ This ‘target’ year is subsequently defined in subsection (2) as 2045.

<sup>15</sup> See <<https://netzeronation.scot/about>> accessed 25/08/2025.

<sup>16</sup> The Scottish Government is pursuing a policy agenda which is guided by a just transition to a decarbonized economy. A term such as ‘just transition’ is inherently contested, and as such little space is dedicated to providing these contestations in this thesis. However, for further information on just transition in a Scottish policy context, see <[www.gov.scot/policies/climate-change/just-transition/](http://www.gov.scot/policies/climate-change/just-transition/)> accessed 25/08/2025. Here, a just transition in the context of decarbonization is ‘achieving Net Zero in a way that distributes the costs and benefits fairly, and which tackles inequality and injustice.’ Therefore, where the term ‘just transition’ is used in this thesis, this general definition is the one pulled on; a recognition that there cannot be effective climate action without recognising and addressing the potential social impacts. The Scottish Government set up the Just Transition Commission, which provides independent policy advice to the Scottish Government: see <[www.justtransition.scot/](http://www.justtransition.scot/)> accessed 25/08/2025. Just transition tends to be discussed in the context of labour, yet the Scottish Land Commission published a paper linking land use change with just transition: see Scottish Land Commission, ‘Natural Capital and Land Reform: Next Steps for a Just Transition’ <[www.landcommission.gov.scot/downloads/64903dace3e45\\_Natural%20Capital%20and%20Land%20Reform%20Next%20Steps%E2%80%93Summary.pdf](http://www.landcommission.gov.scot/downloads/64903dace3e45_Natural%20Capital%20and%20Land%20Reform%20Next%20Steps%E2%80%93Summary.pdf)> accessed 25/08/2025.

<sup>17</sup> See K Keane, ‘Scottish Government Scraps Climate Change Targets’ (2024) BBC News <[www.bbc.co.uk/news/uk-scotland-68847434](http://www.bbc.co.uk/news/uk-scotland-68847434)> accessed 10/06/2025.

<sup>18</sup> These were enshrined in law by the Climate Change (Emissions Reduction Targets) (Scotland) Act 2024. Section 1(2) inserts a new section A2 into the Climate Change (Scotland) Act 2009.

produced advice on what these budgets should be, with the initial 2026-2030 budget representing a 57% decrease on 1990 emissions levels.<sup>19</sup> However, importantly, the Climate Change Committee advises that these carbon budgets are deliverable.<sup>20</sup>

There are many ways to offset emissions, though emissions must ultimately be reduced at source if climate change is to be meaningfully mitigated.<sup>21</sup> Scotland has halved its greenhouse gas emissions since 1990, mainly through a transition to renewable energy.<sup>22</sup> However, *land use* is a global source of emissions.<sup>23</sup> Indeed, land system change has been identified as one of nine ‘planetary boundaries’ which define the ‘safe operating place’ for humanity on Earth.<sup>24</sup> Therefore, national strategies relating to land use are key in reversing the damage inflicted on Earth systems. The Scottish Government has explicitly recognised the role of land use in meeting climate change targets, proposing that transformative land use change must occur as a result.<sup>25</sup> The question is how to achieve such change.<sup>26</sup> Whilst legal and policy attentions often focus on energy, transport, and industry, this thesis argues that a critical and overlooked contributor to both the cause and potential solution of this crisis is the institution of property, specifically the Western conception of private land

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<sup>19</sup> See Climate Change Committee, ‘Scotland’s Carbon Budgets: Advice for the Scottish Government’, 8 <[www.theccc.org.uk/wp-content/uploads/2025/05/Scotlands-Carbon-Budgets-2.pdf](http://www.theccc.org.uk/wp-content/uploads/2025/05/Scotlands-Carbon-Budgets-2.pdf)>. The second carbon budget (2031 – 2035) is set at 69% lower than 1990 levels. The third carbon budget is set at 80% lower than 1990 levels, and the fourth carbon budget is set at 94% lower. This advice was produced as per the newly-inserted section A4(4)(b) in the Climate Change (Scotland) Act 2009.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> See IPCC, ‘Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development’, 112 <[www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15\\_Chapter\\_2\\_LR.pdf](http://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Chapter_2_LR.pdf)>.

<sup>23</sup> See section 2 for further discussion. See also IPCC (no 2), 14. More than 70% of the global, ice-free land surface is directly affected by human use. Land use for food production is a key example: the Report states that ‘data available since 1961 shows the per capita supply of vegetable oils and meat has more than doubled and the supply of food calories per capita has increased by about one third. Currently, 25-30% of total food produced is lost or wasted. These factors are associated with additional GHG emissions.’

<sup>24</sup> See no 4.

<sup>25</sup> See Scottish Government, ‘Update to the Climate Change Plan 2018 – 2032: Securing a Green Recovery on a Path to Net Zero’ (2020), 9, 14, 15, 64-66, and 167-181. See also Scottish Government, ‘Scotland’s Third Land Use Strategy 2021-2026: Getting the best from our land’ (2021), 3, where it states that Scotland’s land is one of the main reasons it is able to achieve net zero five years earlier than the UK as a whole. See also Scottish Government, ‘Land Reform in a Net Zero Nation: Consultation’ <<https://consult.gov.scot/agriculture-and-rural-economy/land-reform-net-zero-scotland/>> accessed 28/01/2025. In the overview of this consultation it states, ‘...we want to ensure that our land is owned, managed and used in ways that rise to the challenges of today [including] net zero...’

<sup>26</sup> It should be noted at this point that the primary focus of this thesis is the relationship between property, land use and climate change. In relation to climate change, it is recognised that climate is part of wider Earth systems and is inextricably linked with other biotic and atmospheric conditions. Therefore, the increasing loss of biodiversity is, of course, related to and caused by anthropogenic climate change. The choice to focus on climate change in this thesis is not to suggest that any other anthropogenically-caused crises are any less worthy of analysis, but instead to retain a cogent focus on tangible outcomes within the confines of a legal thesis.

ownership. This is precisely because ownership is the key component of land use decisions.

In Scotland, as in other liberal Western jurisdictions, the prevailing ‘ownership model’ of property governs land use decisions. This model, however, is based on a preconceived and outdated notion of Earth systems as inherently limitless and replenishable, which can be utilised for constant economic growth.<sup>27</sup> It can be distilled into three core, interrelated ‘tropes’: it is abstract, in that it severs property from its material context; it is extractive in that it incentivises and legitimises the instrumental treatment of land as a commodity wherein the economic benefits are separated from the damaging physical impacts and extricated to far-off players with little connection to the land; and it is individualistic in its privileging the idea of an absolute right of ownership of the owner, creating a rigid public/private divide that shields property from public scrutiny and regulation. In other words, the ownership model is ‘placeless’. It is this placelessness that has led to destructive land use practices contributing to climate change and now inhibits the very land use changes necessary to mitigate it. Therefore, the property paradigm itself must be critically analysed for opportunities for change in the face of the climate emergency.

As Margaret Davies *et al* state, ‘property is an eminently suitable topic for such a project because of its multi-faceted nature and because of the pressure for reform that is being applied to it from many directions.’<sup>28</sup> This pressure for reform is particularly pointed in Scotland: the Scottish Government has an ambitious, legally binding target to reach net-zero emissions by 2045, and land use is recognised as a critical sector for achieving this goal. Simultaneously, Scotland has a relatively progressive ongoing programme of land reform; policy measures which seek to address the profound social and environmental consequences of its highly concentrated pattern of private land ownership. This creates a fertile ground for analysing the role of property in the climate emergency.

## 1.2 Research questions

This thesis confronts the role of land ownership in the climate emergency. Ownership – the key right of property law – is a key determinant of land use, which is itself a principal

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<sup>27</sup> L Butler, ‘Property, Climate Change, and Accountability’ in N Graham, M Davies, and L Godden, *The Routledge Handbook of Property, Law and Society* (2023), 287.

<sup>28</sup> M Davies, L Godden, and N Graham, ‘Situating Property within Habitat: Reintegrating Place, People and the Law’ (2021) 6 *Journal of Law, Property and Society* 1.

source of emissions. The ‘ownership model’ of property has arisen as the most successful representation of property, yet this is problematic; the ‘tropes’ of the ownership model mean that it is fundamentally unsuited to the task of mitigating anthropogenic climate change. In fact, it establishes property as a key contributor to the climate emergency.

Therefore, if land use is to change to mitigate the climate emergency, it is imperative that property itself is subject to change. The thesis addresses the tropes of the ownership model and assesses to what extent these tropes can be destabilised and decentred. State policy measures which seek to regulate land use to address climate change are chosen as a locus for analysing the potential decentring of the ownership model. By ‘policy measures’, this thesis is referring to methods of governance that are used to enact certain, though often numerous, policy objectives;<sup>29</sup> the *overarching* policy objective in this context is the climate emergency and the principal method is that of land use change. This thesis analyses three such policy measures, each existing on a spectrum of state intervention from least to most: Voluntary Carbon Markets (VCMs), which are market-based, facilitative approaches that incentivise private investment in land use change like afforestation and peatland restoration for carbon offsetting; Land Management Plans (LMPs), which are regulatory measures that impose obligations on large landowners to plan land use transparently, in consultation with communities, and with regard to climate goals; and the Community Rights to Buy land (CRtB), which are redistributive measures that facilitate the state-sanctioned transfer of ownership from private actors to community bodies. Not all of these policy measures are explicitly related to the overarching policy objective of the climate emergency, but as shall be discussed they contain important elements which both explicitly and implicitly relate to that objective.

This thesis assesses how the ownership model may be challenged (or, indeed, entrenched); this is the critical lens, discussed further, below, in section 1.3. The mechanism for this critical lens comprises the three policy measures. The ultimate goal is informed by the research context: how to mitigate the climate emergency through land use change in Scotland. This can be summarised as the following question:

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<sup>29</sup> This thesis does not intend to expand upon, or contribute to, debates about what constitutes a policy measure. Instead, this concise, but useful, definition is used. As will be highlighted in chapters 3, 4 and 5, in particular, a policy measure in the context of property can range from non-interventionist, hands-off, voluntarist approaches, through to legislative and regulatory approaches, all the way to redistributive approaches as part of wider reform regimes. For further discussion on policy measures, or tools, see M Howlett, ‘What is a Policy Tool?’ in M Howlett (Ed), *The Routledge Handbook of Policy Tools* (2022), 3 – 13.

how does the prevailing ownership model of property in Scotland shape the effectiveness of land use policies aimed at mitigating the climate emergency, and to what extent can state intervention through land use change decentre this model to foster positive socio-environmental relations which mitigate the climate emergency?

This can be separated into various subtopics. Firstly, there is a fundamental theoretical thread throughout this thesis, outlining the existence of the ownership model in the property paradigm how it is implicated in causing and perpetuating the climate emergency. This thesis argues that there are three ‘tropes’ which represent the ownership model: it is abstract; extractive; and individual. These tropes, in various ways, both create land use which contributes to the climate emergency and inhibits land use change which mitigates that emergency. As outlined in section 1.3, a critical legal geographical lens aids in grounding this discussion in material settings, highlighting that the exercise of property rights lead to physical consequences for human and non-human communities and our environments. Secondly, there is a descriptive core to this thesis: outlining how the ownership model has become culturally and spatially embedded in Scotland; the climate consequences of this embeddedness; and the legal and policy frameworks in place regulating land use. Thirdly, an analytical approach is utilised to address the three policy measures relating to land use change in the climate emergency: to what extent do they challenge, or entrench, the tropes of the ownership model? What are the consequences of these outcomes for enabling or inhibiting land use change that mitigates the climate emergency? These learnings can provide a useful framework for effective policy design for land use change to mitigate the climate emergency.

Indeed, this thesis takes the learnings from these questions to inform a wider question regarding property. As we progress further into the climate emergency, what does this analysis reveal about the nature of property reform to address that emergency? How can state regulation facilitate such change towards a more relational, placed and obligational property paradigm? This thesis draws further from critical legal geographical accounts to highlight that property is not a static institution but is rather a dynamic, social institution which is vulnerable to change. In particular, this thesis argues that state policy measures are one means of enacting such change. Therefore, the Scottish context is a useful platform for discussion to begin to answer a much larger question: if our fundamental concept of property is a root cause of the climate emergency, how must it change and what might that change look like? What is the potential role of state policy in such change? An outline of

the methodology adopted in this thesis begins to offer some initial answers to these questions.

### 1.3 Methodology

#### 1.3.1 A critical legal geographical disposition

‘...because all human activities are reliant on the Earth, property is necessarily situated within ecological systems.’<sup>30</sup>

This thesis argues that state action in relation to land use change is not only justified but is absolutely necessary to achieve the successful mitigation of climate change through reducing emissions caused through land use. This thesis draws from critiques of liberal conceptions of property, primarily from within the field of legal geography, in explaining why private land ownership is an issue in the context of the climate emergency; that it has contributed to planetary warming through emitting land uses and that it impinges on alternative land use changes. Consequently, such critical offerings uncover the need for the property paradigm itself to change. Such changes are required so that property can better reflect the material realities of the climate emergency, tackling, rather than contributing to them. The question that then arises from this inquiry is *how* that change can be achieved in the face of the ossification of the ownership model in the property system. This thesis relies on aspects of legal geography to highlight that, contrary to what is posited in the modern liberal paradigm, property is spatially contingent and, thus, can be iteratively changed through social ‘performances’ of property. Further, it argues that these performances can arise through the imposition of well-designed state policy measures which recognise the relationality of property and its role in climate change.

#### 1.3.2 Critical v doctrinal approaches

The overall analysis of the policy measures in this thesis takes place in the locus of change, yet traditional legal analyses, including doctrinal approaches, tend to be anathema to change. As South African property theorist A J Van der Walt explains,

‘the stand-off between moral, political or constitutional obligation or pressure to bring about change in a particular property regime and the cultural, doctrinal

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<sup>30</sup> Davies *et al*, ‘Property Within Habitat’ (no 28), 36.

and methodological tendency to resist, postpone or minimise such change is not only a fruitful but an essential locus for critical reflection about property.<sup>31</sup>

Van der Walt writes from the perspective of transformative change in a social setting, particularly that of South Africa transitioning from Apartheid. However, the same reasoning can be levelled at systemic change in the context of the climate emergency. Law, particularly property law – positioned within the wider subject area of private law – resists systemic change. Yet this position has become increasingly untenable in the face of property’s culpability in anthropogenic climate change. Questions raised by the climate emergency are thus unlikely to be addressed through doctrinal methods.<sup>32</sup> While useful in many respects, such approaches tend to be narrowly constructed,<sup>33</sup> not accounting for the material consequences of property’s enactment.<sup>34</sup>

Therefore, this thesis is informed by critical methodologies ‘aimed at unmasking and deconstructing complacency, consensus and traditionalism.’<sup>35</sup> Such critical dispositions help to ‘unmake many of our methodological habits, including: the desire for certainty...and expectation for security.’<sup>36</sup> Whilst aspects of the field of progressive property theory<sup>37</sup> inform this analysis, the bulk of the analytical lens draws from critical

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<sup>31</sup> A J Van der Walt, *Property in the Margins* (2009), 211.

<sup>32</sup> S Aldelman, ‘Planetary Boundaries, Planetary Ethics and Climate Justice in the Anthropocene’ in D French and L J Kotzé (Eds), *Research Handbook on Law, Governance and Planetary Boundaries* (2021), 65.

<sup>33</sup> Bearing in mind that doctrinal approaches can come in many forms. In this regard, a ‘doctrinal approach’ might include a rigorous exploration of specific legal doctrine(s) primarily for the purpose of explaining what that doctrine is and how it operates. See M Bódig, *Legal Doctrinal Scholarship* (2021), 118, where the author states that ‘legal doctrinal scholarship cultivates doctrinal knowledge about law...it also reflects an open commitment to preserving the integrity of legal practices...’ Such an approach may disregard the wider social, political or ecological implications of law in favour of a full explanation of the doctrine’s formal parameters. Doctrinal theses are particularly useful for those lawyers in practice seeking answers on a specific legal question: as Bódig states at 119 ‘legal doctrinal scholarship [has tuned] its epistemic needs on the needs on the practices of...the legal profession.’ This thesis is not aimed at this audience as such, rather is asking wider questions of the law in a way that many practitioners may find unhelpful when searching for specific answers to specific legal queries. Another methodological approach which has been used when discussing ownership and climate change is law and economics, which is discussed in more detail in chapter 4. However, this thesis is concerned with new approaches to ownership in the climate crisis; using legal geography as the principal lens through which this analysis takes place is done to better understand and highlight the very real and physical relationship between people, law and place.

<sup>34</sup> Further discussion is had on this aspect in section 1.3.4.

<sup>35</sup> A J Van der Walt, ‘Tradition on Trial: A Critical Analysis of the Civil Law Tradition in South African Property Law’ (1995) 11(2) *South African Journal on Human Rights* 169, 193.

<sup>36</sup> L Fox O’Mahoney and M L Roark, *Squatting and the State: Resilient Property in an Age of Crisis* (2022), 214.

<sup>37</sup> See Van der Walt, ‘The Modest Systemic Status of Property Rights’ (2014) 1 *Journal of Law, Property and Society* 15, 21: progressive property opens space to ‘describe property in terms of open-ended conversations about the effect that contextual, social and other normative considerations have on the outcome of property disputes.’ On progressive property’s core tenets, see G S Alexander, E M Peñalver, J Singer and L Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743. This statement distils the core tenets of progressive property theory, presenting both descriptive as well as normative accounts of property. For example, property confers the holders of property rights a great deal of power and

legal geography. Whilst arguably not a methodology in its own right,<sup>38</sup> legal geography positions law firmly in its physical settings: what are the ‘spatial’ effects of the exercise of ownership?<sup>39</sup> Prominent legal geographer Nicholas Blomley explains that legal geography ‘takes the intersection of law and spatiality as its focus, revealing the analytic and ethical difference that this combination makes to the world.’<sup>40</sup> One’s lens of analysis is thus trained on the wider implications of property within an interconnected world: when a landowner exercises their legal right, they do not do so in the abstract. Their actions have physical consequences. These consequences can be social and cultural, biotic and atmospheric. Legal geography is, therefore, concerned with the *material* effects of property, rather than focusing (as law tends to do) on the implications of law and legal changes on the overall coherence and stability of the legal system itself. In times of crisis, fundamental questions must be asked of the status quo. Ownership, as the primary right of property, should not escape scrutiny.<sup>41</sup> Yet, questions relating to the ecological and ethical implications of ownership are frequently hived off to other areas, including environmental

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thus property law configures relationships of power, with fundamental ethical implications; challenging this view includes recognition of the ‘plural and incommensurable values’ inherent within property. For a useful overview of the school of thought, see R Walsh, *Property Rights and Social Justice: Progressive Property in Action* (2021), 20 – 44. Walsh details progressive property’s perspectives on the linking of property and social justice through recognition of property’s pluralism. In addition, both legal geography and (though to a lesser extent) progressive property theory share certain affinities with so-called ‘Wild Law’ within wider theories of ‘Earth Jurisprudence’. On these, see: M Maloney and P Burdon (Eds), *Wild Law – In Practice* (2014); and P Burdon (Ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011). Wild Law engages with aspects such as the introduction of rights of nature. However, to maintain a sufficiently narrow scope which is focused on the spatial consequences of property through land use change. In addition, certain core claims of Earth Jurisprudence, particularly ‘ecocentrism’ is rejected within this thesis as an entrenching of the nature/culture dualism (see section 2.2.1). Therefore, Earth Jurisprudence and Wild Law are not engaged with explicitly.

<sup>38</sup> See N Blomley, ‘What is Legal Geography? Why, and Why Now?’ In R Bartel and J Carter (Eds), *Handbook on Space, Place and Law* (2021), xvii. Legal geography is a ‘disposition’ rather than a ‘discipline’ according to Blomley.

<sup>39</sup> It is important to highlight briefly that, firstly, progressive property and legal geography are not entirely congruous and, secondly, that this is not taken to be problematic for the purposes of this thesis. Progressive property is a critique of dominant framings of property, useful particularly in Western liberal traditions. It provides space for considering the values ascribed to property, arguing for value pluralism. However, it is a distinctly social project. It is not ‘place literate,’ and has been the subject of criticism from legal geographers as a result. See A Byer, *Placing Property: A Legal Geography of Property Rights in Land* (2023) at 60 – 63. Byer argues that progressive property theory has a homogenising tendency. For example, in its promotion of ‘human flourishing’ it is in danger of making assumptions about the collective that ‘ignore geography and could ultimately undermine the integrity of place.’ In other words, it can fail to account for the interconnectedness of communities to their environment, including non-human relations. Nevertheless, this thesis contends that the two fields of study are not entirely incongruous; the contribution of progressive property theory in providing the space for critiques of property paradigms, particularly within a narrowed approach such as that within this thesis, is more important than the conceptual differences between the two fields of study. Legal geographer Nicholas Blomley also offers a critique of progressive property, whilst agreeing with many of its central terms. On this critique, see section 1.3.4.

<sup>40</sup> Blomley, ‘What is Legal Geography?’ (no 38), xvii. ‘Space’ and ‘spatiality’ as specific terms are explained further in section 1.3.3.

<sup>41</sup> N M Davidson and R Dyal-Chand, ‘Property in Crisis’ (2010) 78(4) *Fordham Law Review* 1607, 1609. Davidson and Dyal-Chand suggest that in times of crisis, fundamental questions ‘about the nature of property’ are ‘brought to the fore.’

law and planning law.<sup>42</sup> Put short, a lens of analysis focuses on the intersection between law and spatiality offers scope for potentialities that may not otherwise arise when addressing property's role in the climate emergency and the concurrent need for change in the property paradigm. Therefore, the following two sections – 1.3.3 and 1.3.4 – explain the core concepts of legal geography drawn upon in this thesis.

### 1.3.3 Property's relationality

‘You can’t sue an acre.’<sup>43</sup>

This thesis utilises the spatiality of property as a principal lens of analysis. That is to say, property law constitutes, and is constituted by, space: the material and social aspects of human and non-human life on Earth. Yet the hegemony of the ownership model is reliant on an imagined state of stasis and isolation. Property, according to the ownership model, has no spatial implications beyond what economic gains it can provide for the rights holder through extraction of value from land and natural attributes like water, minerals, air and so on. If property decisions were to be contingent on material limits, then the ownership model could no longer promise the owner that their ownership right is not materially earthbound<sup>44</sup> – in other words that it can accrue abstract capital value merely as a *right* in land and thus guarantee economic certainty and stability for the owner (and the political system as a whole). This partly explains why, as stated above at the end of section 1.3.2, the *consequences* of ownership – including climate change through emitting land uses – are hived off to other areas of law, which ‘act as proxies that reinforce the property concept by managing conflicts over custom, land use and environmental impacts in ways that insulate private property rights from challenges.’<sup>45</sup> In other words, this not only limits a reading of property as causally-linked to its material consequences – including climate change – but consequently insulates property from critical inquiry as to its need for change in the context of the climate emergency.

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<sup>42</sup> A Byer, *Placing Property: A Legal Geography of Property Rights in Land* (2023), 63.

<sup>43</sup> Blomley, *Territory* (2023), x.

<sup>44</sup> Note that this term has multiple meanings in various contexts. See, for example, D Matthews, *Earthbound: The Aesthetics of Sovereignty in the Anthropocene* (2021). Matthews takes from Latour's claim that the ‘human of the Holocene’ needs to give way to an altered political subjectivity in the Anthropocene – the ‘earthbound’. See B Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime* (2017), 281. This is a conceptualisation of the *human* being an earthbound subject, rather than institutions like property being materially contingent.

<sup>45</sup> *ibid.*

As such, legal geography situates property debates within the material sites where property is exercised. Part of this exercise involves, firstly recognising and taking seriously the assertion that law and space are mutually constitutive and, secondly, being alive to the consequences of this relationality. Property constitutes space in a multitude of ways, for example through legal instruments (deeds, agreements, titles, boundaries, maps) which convert a complex physical world into abstract alienable parcels delineated through Cartesian lines, dictating how space can be used, accessed, and controlled. Through such means, property shapes physical spaces: land; water; and built environments, for example. But these physical spaces are never neutral or passive, and it is often difficult to inscribe them with the term ‘natural’: the physical spaces that law produces exist also as *social* spaces, produced by, and productive of, the interactions among people and their environments.<sup>46</sup> These interactions inevitably include law as an organising power, for example law dictates who does and does not have access to certain physical spaces, and also under what terms.<sup>47</sup> These social spaces can often be ascribed ‘cognate concepts such as place, territory, and scale.’<sup>48</sup> For example, ‘places’ are those spaces inscribed with specific layers of human meaning interwoven with layers of networked and historic experiences among people and the physical space around them.<sup>49</sup> Crucially, this process is interconnected, iterative and cyclical; law is also constituted through and in response to spatial phenomena. As Nicholas Blomley contends,

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<sup>46</sup> P Babie, ‘The Spatial: A Forgotten Dimension of Property’ (2013) 50(2) *San Diego Law Review* 323, 325 – 326, where he states that, ‘[a]t every moment of life, we are interacting with others and the world around us through some form of property – private, common, or public...and as we interact with these physical spaces...we interact with others and make choices about those interactions. Through our choices and our interactions with physical space and with others, we structure, create and produce ‘social’ spaces and over time, alter and restructure, recreate and reproduce those physical and social spaces.’ See also K Kokal and W Menski, ‘Performing Law: Space and the Unfolding of Gender and Violence in India’ in R Bartel and J Carter (Eds) *Handbook on Space, Place and Law* (2021), 73: ‘...[s]pace also includes people, objects and processes that constitute such physical manifestation of space.’

<sup>47</sup> J A Shoemaker, ‘Papering Over Place: When Land Becomes Asset Class’ in B Akkermans (Ed) *A Research Agenda for Property Law* (2024), 130. See also A Kennedy and C Holley ‘A Case for ‘Place’ In Governing the Energy-Environment Nexus’ in R Bartel and J Carter (Eds) *Handbook on Space, Place and Law* (2021), 269: ‘[p]laces are more than just physical, they give definition to otherwise abstract space.’

<sup>48</sup> Blomley, ‘What is Legal Geography?’ (no 38), xvii. On ‘territory’ see N Blomley, *Territory* (2023). On ‘place’ see Graham, *Landscape* (no 6); as well as no 49, below.

<sup>49</sup> Y-F Tuan, *Space and Place: The Perspective of Experience* (1977), 136: ‘[s]pace is transformed into place as it acquires definition and meaning.’ See also J A Shoemaker, ‘Re-Placing Property’ (2024) 91 *The University of Chicago Law Review* 811, 827 – 828. Shoemaker explains that people can form *deep* place attachments, wherein feelings of belonging are developed and maintained at different scales, including individuals and groups. See also A Kennedy and C Holley (no 49), 269, where the authors discuss the ascription of meaning to ‘place’, arguing that it is more than simple attachment, which ‘refers to the bonds formed through interactions between places and people.’ Place ‘meaning’ instead ‘refers to the symbolic perceptions and values that are ascribed to certain places by individuals as well as groups...’ Therefore, ‘place’ refers to social spaces that are especially inscribed with particular and contextual meaning, describing and articulating what that place is and the kinds of representations it offers. As Kennedy and Holley state at 270, ‘place meanings are derived from lived experiences.’

‘[property]...is dependent upon everyday life to give meaning to its central concepts...to root its abstract rules and principles in human understanding, and to produce implementation, compliance and judgement. It is misleading to regard law as capable of existence apart from or in opposition to everyday life.’<sup>50</sup>

Property, therefore, is given meaning through spatial relationships and is consequently dependent on these relationships to give meaning to its existence and exercise.<sup>51</sup> In this way, both social and physical spaces shape property. In the context of this thesis, the climate emergency is a prime example of the spatial realities that produce property; law is constantly evolving and shifting to accommodate new climatic realities which are felt in both physical and social spaces,<sup>52</sup> though (as will be discussed in more depth in section 1.3.4, below) everyday acts, such as the demarcation of a boundary line or a ‘no trespassing’ sign, also inform the development of property.<sup>53</sup> Davies, Godden and Graham state that the right of ownership is given meaning not through individualism but through relationship, highlighting that ‘all legal designations of persons and all property arise from and hence are consequential to social relationships.’<sup>54</sup> They extend this assertion to include ecological relationships, arguing that property is also contingent upon nature for its existence and meaning.<sup>55</sup>

Therefore, law is spatial, and space is legal;<sup>56</sup> space and law are constantly in a state of co-creation. This can be visually represented as outlined in Figure 1, below. As such, property

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<sup>50</sup> N Blomley, ‘The Boundaries of Property: Complexity, Relationality and Spatiality’ (2016) 50(1) *Law and Society Review* 224, 225, quoting D M Engel ‘Law in the Domains of Everyday Life: The Construction of Community and Difference,’ in A Sarat and T R Kearns (Eds), *Law in Everyday Life* (1995), 123.

<sup>51</sup> See Davies *et al*, ‘Property Within Habitat’ (no 28), 39.

<sup>52</sup> In a Scottish context, it is possible here to reference the introduction of new laws which have the effect of becoming organising powers within law. An example is the introduction of a legally binding target of reaching net zero emissions in Scotland by 2045 as now prescribed in the Climate Change (Scotland) Act 2009.

<sup>53</sup> D Delaney, R T Ford, and N Blomley, ‘Preface: Where Is Law?’ in N Blomley, D Delaney, and R T Ford (Eds) *The Legal Geographies Reader: Law, Power and Space* (2001), xviii: ‘[b]oundaries mean. They signify, they differentiate, they unify the insides of the spaces that they mark...And the form that this meaning often takes – the meaning that social actors confer on lines and spaces – is *legal* meaning.’ See also discussion of ‘territorialisation’ in N Blomley, *Territory* (2023).

<sup>54</sup> Delaney *et al* (no 53).

<sup>55</sup> Davies *et al* (no 28), 39. The authors use the example of Locke’s justification for private property rights: that we own ourselves and thus we own the fruits of our labour. This formula ‘presupposes unidirectional production of property objects by human subjects...It erases both the mutualistic practices of indigenous societies and also the agency of the Earth in the processes of production.’

<sup>56</sup> Nicole Graham uses the portmanteau ‘lawscape’ to describe the mutually constitutive relationship between property law and environments. See Graham, *Landscape* (no 6). See also I Braverman, ‘Expanding the Places of Law’ in I Braverman, N Blomley, D Delaney and A Kedar, *The expanding places of law: a timely legal geography* (2014), 1, where she states that , ‘[l]egal geographers contend that in the world of lived social relations and experience, aspects of the social that are analytically identified as either legal or spatial are conjoined and co-constituted...every aspect of law is *located*...Likewise, landscapes are inscribed with legal significance...Such fragments of a socially segmented world – the *where* of law – are not simply the inert

is not just about ‘what’ legal rules apply, nor ‘who’ holds the right of ownership – though these considerations are often presented as the only ones that matter – but also the question of ‘where’ law is enacted.<sup>57</sup> In other words, property is not an external, abstract force acting upon space, rather it is *situated* within space.

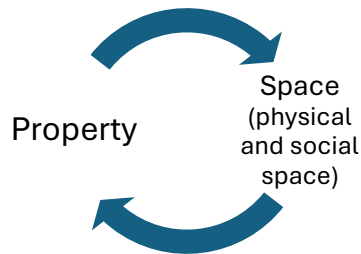


Figure 1: The ongoing co-construction of property (as a legal institution) and space

However, the ownership model obscures this relationality, detaching property from the material, spatial conditions of Earth. As Margaret Davies states,

‘European notions of ownership and property centre on the allegedly free and separated person/subject and fail to acknowledge the co-emergence of human and non-human in a meaningful landscape. As a result, our ‘ownership’ is shallow and abstract, disconnected from the object of ownership, and from any ethical bonds that arise in relation to it.’<sup>58</sup>

This disconnect is what allows for the ownership model to operate without restraint, causing fundamental rifts in Earth systems leading to extractive and hugely emitting land uses. Space becomes homogenised and generic, reduced to sites of extraction and dispossession – the embedded connections that imbue them with the status of ‘places’ are removed through the operation of the ownership model, thus engendering a sense of ‘placelessness’.<sup>59</sup> Similarly, Nicole Graham traces the placelessness that derives from colonial dispossession and maladaptation of transplanted legal regimes to sites of existing

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sites of law but are inextricably implicated in *how* law happens.’ See also R Bartel and J Carter, ‘Where to from here? From law to place and back again’ in R Bartel and J Carter (Eds) *Handbook on Place, Place and Law* (2021), 382: this ‘active reciprocal relation between inhabitant and context,’ draws together ‘human, non-human, living and non-living, through a closer understanding of the local scale in which we live and its interconnections with the planetary scale...’

<sup>57</sup> See N Blomley, *Unsettling the City: Urban Land and the Politics of Property* (2004); Shoemaker, ‘Re-Placing Property’ (no 49), 828 – 829, where she states that, ‘[p]roperty rules determine or at least greatly influence how land is used and by whom, including by balancing the relative stability of existing land relationship and defining access, if any, for nonowners. These property variable – who gets to do what where, who benefits, and who is excluded – all impact whether spaces develop as meaningful, vibrant, inclusive places or whether they exist as more abstract spaces of placelessness...’

<sup>58</sup> M Davies, ‘Can Property Be Justified in an Entangled World?’ (2020) 17(7) *Globalizations* 1104, 1110.

<sup>59</sup> Shoemaker, ‘Re-Placing Property’ (no 49), 827. Shoemaker uses the examples of ‘fields of mechanically straight commodity crop rows or truly cookie-cutter concrete, corporate self-storage facilities.’

people-place connection.<sup>60</sup> As she explains, '[ownership] of land, in modern law, is attached neither to responsibility for the land nor to knowledge about it.'<sup>61</sup> Consequently, the 'rupture of people-place relations, the associated loss of place-based knowledge and the fragmentation of integrated ecological systems have profound consequences on entire ecological systems and processes.'<sup>62</sup>

In this way, property has become a key cause of the climate emergency, yet this role remains largely unchecked, and the ownership model continues to operate without meaningful restraint. This causes Earth systems to be subjected to far greater stresses than they can handle. Therefore, this thesis takes from legal geographical critiques of liberal conceptions of property to engage with the spatial dimensions of property; advocating a rethinking of property to reflect interconnected human, non-human, and ecological relationships, especially in light of the climate crisis, highlighting the need for legal reform that reintegrates land, people, and place. Uncovering the tropes of the ownership model directs attention to what their material consequences are, including the destruction of Earth systems through anthropogenically-accelerated climate change. Understanding that property is not naturally occurring, but spatially produced and productive, subsequently directs attention to the possibility that the property paradigm is, in fact, vulnerable to change. This thesis, firstly, argues that challenging the ownership model is fundamental to addressing property's role in the climate emergency and, secondly, outlines that performativity theory is a potential locus for understanding how such challenges may lead to wider, necessary, change in the property paradigm so that it is more grounded in ecological and environmental limits, imbuing values of obligation and care – in opposition to the tropes of the ownership model.

#### 1.3.4 Performativity theory

Davies *et al* argue that such change involves reintegrating 'conceptually, socially and economically' human and non-human worlds, 'with that merging reflected in law.'<sup>63</sup> For them, this task involves 'thinking together physical ecologies, social existence, and legal discourse.'<sup>64</sup> However, as Jessica Shoemaker states, 'because our property system is so

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<sup>60</sup> Graham, *Lawscape* (no 6), 85 – 132.

<sup>61</sup> N Graham, 'Dephysicalised Property and Shadow Lands' in R Bartel and J Carter (Eds) *Handbook on Space, Place and Law* (2020), 285.

<sup>62</sup> *ibid.*

<sup>63</sup> Davies *et al*, 'Property Within Habitat' (no 28), 36.

<sup>64</sup> *ibid.*

fundamental to our daily social and economic lives, it can also come to seem inevitable and out of our collective control.<sup>65</sup> This is a danger in the context of the climate emergency because the spatial effects of property – including the destruction of Earth systems leading to our planet’s warming climate – are not only obscured but appear immune from critique.<sup>66</sup> Indeed, this presents a problem as far as the reintegration advocated by Davies *et al* is concerned: what can be done if this is the nature of the property paradigm? Section 1.3.3, above, outlined the beginnings of an answer to this question, arguing that property is not pre-political or naturally occurring, rather it is created through an ongoing relational process with space; property is not only enacted in the physical and social world, but is also created in these worlds.

In order for property to adequately respond to the climate emergency, it must move beyond the ownership model. The property paradigm must be materially contingent. This thesis contends that state intervention in the form of policy measures for land use change – especially land use change which, in some manner, seeks to mitigate climate change – can form a part of this reimagining of the property paradigm. It is contended that such changes can constitute, over time, a property paradigm that reflect the limits of Earth systems and, in so doing, mitigate the climate emergency.

However, there remains the question of *how* law is produced in these cycles. Even if property is spatially relational, this still presumes a ‘reality’ to property: that it is ‘out there’<sup>67</sup> somewhere and we simply must find the ‘right’ form to fit the current epoch of the Anthropocene. Nicholas Blomley argues that this is not how property is made.<sup>68</sup> There is no prepackaged form of property that we can, as a society, pick from at any given time. Crucially, if the ownership model is as flawed as is suggested, how and why does it endure? Blomley argues that property is ‘performed’ into being. These performances are ‘active forms of engagement, communication and interaction that help constitute the world in particular ways.’<sup>69</sup> Blomley references Judith Butler in outlining how performativity

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<sup>65</sup> J A Shoemaker, ‘Papering over Place: When Land Becomes Asset Class’ in B Akkermans (Ed) *A Research Agenda for Property Law* (2024), 131.

<sup>66</sup> *ibid.*, where Shoemaker states that ‘[if] the property system itself is natural and fixed, why would we critique current property distributions or property’s role in ongoing environmental change?’

<sup>67</sup> Blomley, *Territory* (no 43), 69.

<sup>68</sup> See N Blomley, ‘Performing Property: Making the World’ (2015) 26(1) *Canadian Journal of Law & Jurisprudence* 23 – 48.

<sup>69</sup> *ibid.*, 33 – 34. Referencing Carol Rose, Blomley argues that performances can be thought of in conscious and ‘persuasive’ terms or as much smaller, ‘routinised’ actions. He compares arguments for the sanctity of property with the registration of a title in the land register as examples of both. They can be ‘dramaturgical’ – Blomley uses the example of lawnmowing as an example – yet extend beyond communicative acts and into

rests on the idea that it is not a singular or deliberate act but rather is the ‘reiterative and citational practice by which discourse produces the effects that it names.’<sup>70</sup> In other words, the property paradigm is only made real through repeated actions, behaviours and patterns as humans interact with the social and physical world around them.

The ownership model is intrinsically bound up with the extant capitalist model of production,<sup>71</sup> yet as Gibson-Graham warn there is a correlative representational effect between characterisations of capitalism, as a functioning system with a stable structure, and the *strengthening* of that system, performed into being by these very representations.<sup>72</sup> There is thus a similar danger with the ownership model: as Blomley points out, talking about the ownership model, even in critical ways, risks legitimising it; speaking it into existence.<sup>73</sup>

However, this should not preclude critical thinking around the ownership model. It may be spoken into existence, yet it is nonetheless persistent in the world. Therefore, along with such critiques of the ownership model there must not only be an acknowledgement of the dangers of speaking it into existence, but also inquiries made as to *why* it persists. As Blomley argues, the ownership model is not so much *real* as it is *successful*. Property only emerges through ‘material practices and patterned usages of located human and nonhuman

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the ‘workings of objects’. See C Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (1994). Performativity can be linked with ‘prefigurative politics’, which also rests on the idea of iterative changes in social settings constituting the legal and social order. See Davies *et al*, ‘Property Within Habitat’ (no 28), 33 – 34.

<sup>70</sup> Blomley, ‘Performing Property’ (no 68), 36. This can be linked with Deleuze and Guattari’s ‘rhizome theory’, which describes networks of relations as rhizomatic; like plant roots that have no fixed originating point but rather connect via a mass of different, non-hierarchical and overlapping connection points which grow over time. See G Deleuze and F Guattari, *A Thousand Plateaus* (1980), 3 – 25. See 21 in particular: ‘[t]he rhizome is an acentered, nonhierarchical, nonsignifying system without a General and without an organizing memory or central automaton, defined solely by a circulation of states’ See also A Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (2015), 189: ‘Deleuze and Guattari urge us to ‘make rhizomes, not roots...Don’t sow, grow offshoots!’ Rhizomes specifically encapsulate the ideas of horizontal, trans-species, heterogeneous growth. Not a linear, vertical construction but a surface where any modulation is absorbed, closed in and eventually spread in lake-like smoothness.’

<sup>71</sup> A full exposition of the term ‘capitalism’ is beyond the scope of this thesis, which takes as a starting point the basic assertion that capitalism is an economic system which is predicated on the means of production being held by private individuals or corporations. This system is pervasive, particularly in Western jurisdiction. The thesis argues that the ownership model is fundamentally bound up with capitalism as a model of extraction. Both render other possibilities – political and property possibilities alike – invisible. See N Blomley, *Unsettling the City: Urban Land and the Politics of Property* (2004), 8 – 9. For an in-depth analysis of the pervasiveness of the term ‘capitalism’ in common discourse, and the problems associated with this, see J K Gibson-Graham, *The End of Capitalism (As We Knew It): A Feminist Critique of Political Economy* (2006).

<sup>72</sup> J K Gibson-Graham, ‘Diverse Economies: Performative Practices for ‘Other Worlds’ (2008) 32 *Progress in Human Geography* 613, 615; J K Gibson-Graham, *The End of Capitalism (As We Knew It)* (no 71).

<sup>73</sup> Blomley, ‘Performing Property’ (no 68), 47: [t]he ‘ownership model’ is a product of its critics, rather than its advocates.’

actors’;<sup>74</sup> law is spatial and space is legal. Therefore, if the ownership model is to be viewed as the dominant force within the property paradigm, it is more prudent to explore the reasons for its success.<sup>75</sup> Performativity helps in this challenge. As Blomley explains, the ownership model ‘has performative force not as a ‘model’, in abstraction, but because it is more or less plugged into a world in which it is deemed ‘true’.’<sup>76</sup> It is not a model to be picked from among a choice of many other property models, but it instead persists because it is ‘more-or-less successful’ in the context of an extractive, capitalist worldview.<sup>77</sup> The performances of property are only successful if they can comprehensibly reference past actions of a similar nature – thereby legitimising that current act.<sup>78</sup> As Margaret Davies contends, property is made real through processes of naturalisation: ‘an ingrained imaginary invests it with a status that is natural or at least pre-legal.’<sup>79</sup> These normalising performances can be big or small, violent or everyday: the dispossession of inhabitants from land,<sup>80</sup> or the building of a fence between residential neighbours.<sup>81</sup> Yet, for these performances to be *successful* they must accurately represent what has come before – what is deemed acceptable.<sup>82</sup> In utilising the example of fence-building, Blomley explains that, ‘[we] could, of course, tear down our fence, and plant vegetables in each

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<sup>74</sup> Davies, ‘Can Property be Justified?’ (no 58), 1112.

<sup>75</sup> Part of Blomley’s interest in performativity stems from what he sees as a critical blind spot of progressive property theory. Progressive property often critiques the ownership model, yet Blomley explains that this critique often presumes a reality to the ownership model. Although progressive property scholars recognize that the ownership model is not *representative* of the world but does indeed produce the world in some ways – it does not represent certain values like human flourishing and instead entrenches individualism, for example – this is a form of ‘social constructivism’ wherein property’s reality is ‘something separate from the ownership model’. Performativity aids an understanding of property being constantly produced, as Blomley states, ‘[the] reality of property is not prior to the ownership model but itself partly produced through it.’ See Blomley, ‘Performing Property’ (no 68), 35 – 39.

<sup>76</sup> *ibid.*, 36.

<sup>77</sup> *ibid.*, 34. Blomley critiques many of the arguments of the progressive property field of study. For example, progressive property theorists may critique the ownership model on the grounds that it is doctrinally inaccurate (i.e. the law actually contains a variety of overlapping rules which constrain the absoluteness of title presented in the ownership model), or that it misrepresents our ‘actual, lived ethical commitments.’

<sup>78</sup> See Davies, ‘Can Property be Justified?’ (no 58), 1112: ‘[a]ction or performance cannot take place in a vacuum... This idea... provides a framework in which all material things, including human beings as such, are understood to be produced by reiterated actions.’

<sup>79</sup> *ibid.*, 1106.

<sup>80</sup> *ibid.*, 1109. Davies gives the example here of ‘de facto’ Israeli settler possession of Palestine turning into the ‘de jure’ legal right, citing N Stolzenberg, ‘Facts on the Ground’ in E Penalver and G Alexander (Eds) *Property and Community* (2010), 116.

<sup>81</sup> Blomley, ‘Performing Property’ (no 68).

<sup>82</sup> J Butler, *Undoing Gender* (2004). Butler discusses performativity through the lens of the prevailing norms of gender, wherein what counts as ‘normal’ is ‘undone’ through different ways of ‘doing’ gender: as drag; butch; femme; transgender. Such challenges to the normalised processes and discourses of gender trouble the status quo of what counts as ‘human’, which depends on a binary of male and female. Whilst the focus of this thesis is not on gender, such ideas of performativity as a potential site of challenge opens the pathway to applying the same logic to property, as authors like Blomley (gentrification of urban areas), Davies *et al* (property within habitat) and Mackenzie (community ownership in Scotland) have done previously. See, respectively, Blomley, *Unsettling the City* (no 71), Davies *et al*, ‘Property within Habitat’ (no 28), and F Mackenzie, *Places of Possibility: Property, Nature and Community Ownership* (2012).

other's gardens. Yet such alternative enactments of property are unlikely to reconstitute prevailing judicial dispositions and cultural practices more generally.<sup>83</sup>

Performativity does not suggest that property does not exist at all, or that loses its grip as an organising force. Indeed, Blomley argues the opposite: to manifest the separation between nature and culture in property law – the 'person/thing' logic discussed in section 2.2.2 – is a result of 'sustained and citational labour.'<sup>84</sup> Thus the process of turning 'nature' into 'property' is the result of ongoing work. Citing Theodore Steinberg, he states that, '[p]roperty law...is 'the voice of reason that we use to tidy but the messy and dynamic world of nature.'<sup>85</sup> For Blomley, this attests to the organising power of the ownership model; that it can both produce legal certainty from an uncertain spatial situation whilst maintaining its appearance as benign and neutral. In other words, whilst it may be tempting to view property as 'unreal' or 'absurd', 'to stop here is to risk ignoring the ways in which such absurdities organise the world...in often brutally efficient and powerful ways.'<sup>86</sup>

In this regard, performativity opens space to explore both the power property exerts in space, as well as its fluidity, highlighting that it can change over time as a phenomenon emergent from patterned performances. These performances are never complete, but always open and ongoing. Therefore, they are capable of challenge. This is especially pertinent in the context of the climate emergency, which necessitates challenges to the status quo. The 'very necessity that property has to be performed – often through bodily

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<sup>83</sup> Blomley, 'Performing Property' (no 68), 36. Blomley highlights how performances do not work in abstraction, rather through 'enrolments' of physical actors in spatial settings. For example, the practice of mapping, whereby spaces are abstractly represented on a cadastral map and associated with legally certain rights to exclude, alienate and use, does not work on its own as a performance. the cadastral map is a powerful representation of the abstractness of the ownership model: it not only depicts the world, but it also produces it as a form of representation. At 41, Blomley explains that the act of mapping *in itself* does not constitute paradigmatic changes, using the example of English enclosure wherein the science of mapping and cartography was playing an active role in enclosures, leading to changes in physical social spaces in England. He cautions, however, that 'whatever the performative effect of maps in bringing new forms of property into being, enclosure did not work through maps alone.' Instead, enclosure required many other, interlinked and contemporaneous, forms of 'enrolments'. In other words, property is not performed into being in the abstract, rather it is done through bodily work in space, or as Blomley terms them 'forms of corporeal discipline' as landowners sought to regulate the physical movement of commoners. Thus, the introduction of the hedgerow formed an important physical enrolment to accompany mapping, as part of a wider property performance, to enforce 'new forms of spatial discipline.' This worked alongside other enrolments, including courts, estate management and surveying that meant that 'the hedge...worked iteratively, as enclosure was unrolled.' See also Blomley, *Territory* (no 43), 34 – 35; Blomley, *Unsettling the City* (no 71), 67.

<sup>84</sup> Blomley, 'Performing Property' (no 68), 37.

<sup>85</sup> *ibid.*, 37 – 38, citing T Steinberg, *Slide Mountain: Or, The Folly of Owning Nature* (1995), 8. Steinberg follows this argument with the conclusion that property law is illusionary. However, as Blomley cautions, performativity would resist an implied divide between the illusory nature of property and the 'real world' because 'despite such frequent slippages and 'failures' of property, it manages to attain settlement and resolution.'

<sup>86</sup> *ibid.*, 39.

practices – opens the possibility, perhaps even the inevitability, of rearticulations of property and subjectivity.’<sup>87</sup> However, not all possibilities are equally possible. As Blomley explains, because of the often self-fulfilling nature of reiteration and performativity, it means that property is also capable of ‘fixity and sedimentation.’<sup>88</sup> Locke stated that property is produced through the enactment of human labour upon the land; because we own our bodies, we own the products of what our bodies create.<sup>89</sup> This is not objectively true, and indeed has been challenged time and time again,<sup>90</sup> but the performative strength of this statement within a wider context of extractive land practices and economic liberalism is more *successful* than, for example, the virtues of the commons.<sup>91</sup> This is why, within this thesis, the descriptive accounts of the ownership model are termed ‘tropes’. Tropes represent recurrent themes or motifs – a ‘common theme or device’ according to the Merriam-Webster dictionary.<sup>92</sup> These represent ‘discursive formations’ – sets of statements, concepts and metaphors that organise thought. Therefore, they operate as mechanisms of power,<sup>93</sup> naturalising certain ideologies, producing a reality to property which makes it appear less contingent and more inevitable. Property ‘tropes’ are, in these ways, performative – repeating them produces legal and spatial realities.

The above discussion highlights, in addition to the discussion above in section 1.3.2, why this thesis does not employ a purely doctrinal approach. This thesis engages in inquiry situated in the locus of change, yet doctrinal methods tend not to dwell on change. Doctrinal works on property law and climate change may resist normative conclusions regarding what changes ought to be made so that property can mitigate, rather than contribute to, the climate emergency. Instead, there are elements of both descriptive and normative analyses within this thesis. As Davies *et al* argue, in contrast to ‘mainstream legal thinking, the normative and the descriptive are not separate in much contemporary

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<sup>87</sup> *ibid.*, 37.

<sup>88</sup> *ibid.*, 25.

<sup>89</sup> J Locke (Ed T P Peardon), *The Second Treatise of Government* (1997).

<sup>90</sup> For example, much of Marx’s work was positioned in opposition to this theory of labour. See T Rockmore, *Marx after Marxism* (2002), 23.

<sup>91</sup> See, generally, on the reasons for the supposed demerits of the commons, G Hardin, ‘The Tragedy of the Commons’ (1968) 162(3859) *Science* 1243-1248. Indeed, the ‘success’ of the story of why the commons cannot be successful is reliant on this wider context. The commons are not unsuccessful because that is *factually* correct; rather because, as a performance, they have been successfully outmoded by stories of the commons as ‘tragedy’.

<sup>92</sup> See <[www.merriam-webster.com/dictionary/trope](http://www.merriam-webster.com/dictionary/trope)> accessed 02/09/2025.

<sup>93</sup> This is influenced by Foucault’s mobilisation of the idea of a ‘discursive formation’ to explain how certain recurring figures or narrative devices shape how knowledge is formed and truth is legitimised. See M Foucault, *Archaeology of Knowledge* (2002), 34 – 43.

critical and social theory.<sup>94</sup> Performativity theory in a property context highlights the normative effects of description: to describe a certain facet of the law as descriptively *true* means the person making that description is performing a representation of a particular reality. Doctrinal work thus often has normative outcomes which are obfuscated by the method itself. The issues of method in this regard are explored further by Lorna Fox O'Mahoney and Marc Roark in their work *Squatting and the State*, where they argue in relation to property scholarship that reality is produced by the descriptive accounts that methodology often employs. They cite the work of John Law in this regard, who advocates for a methodology based on *uncertainty*, because where methods seek to standardise and commit to the status quo, the more the status quo is protected from change.<sup>95</sup> Therefore, such a methodological approach, based on the value of uncertainty and the concept of iterative, performative, changes, is adopted in this thesis to address property and land use within the climate emergency. As Blomley states, 'to make and remake property...takes work.'<sup>96</sup> This work is done in the ongoing relational processes between property, physical space and social space which are, as Blomley states, both citational and reiterative.<sup>97</sup> New performances of property must embed and gain traction – citing previous (similar) performances – such that they become successful. These performances must be enacted in the material world. Crucially, and as developed further in section 2.3, this thesis contends that state intervention – specifically policy measures which change the way that land is used, held and exchanged – *facilitate* property performances in the physical world.<sup>98</sup> The

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<sup>94</sup> Davies *et al*, 'Property Within Habitat' (no 28), 4, footnote 6.

<sup>95</sup> L Fox O'Mahoney and M Roark, *Squatting and the State: Resilient Property in an Age of Crisis* (2022), 215, citing J Law, *After Method: Mess in Social Science Research* (2004).

<sup>96</sup> Blomley, 'Performing Property' (no 68), 37.

<sup>97</sup> There are links between performativity theory, constructivism and Actor-Network Theory. Blomley explains that performativity theory differs from constructivism because the latter views property as arising either through some external force (for example the ownership model working upon the world as the *'primum mobile'*) or alternatively *human* agency as the force that produces property; as arising through 'voluntarist subjects' who act 'independently as constructive agents.' See Blomley, 'Performing Property' (no 68), 65. Performativity, on the other hand, sees property not as a 'false consciousness' nor 'fully manipulable' by human agency; instead, ongoing sets of performances produce the world, including the human and non-human agents within that world. This links with Actor-Network Theory in that it views humans as one of a number of possible agents that can produce the world, including non-humans as well as objects, technologies and institutions like property. Both recognise that social reality is produced, rather than fixed. Networked actors produce and exert force in the world which helps to produce it. Agency thus arises through networked relations and interactions, rather than externally or through humans only. Where performativity differs, though, is in the recognition of *successful* property performances like the ownership model, and in that, questioning why they are successful. This engages with a view of agency that recognises power imbalances between the agents engaged in a performance – for example the physical power that humans, as agents, can exert over non-humans, or owners and non-owners – rather than viewing all agency (human and non-human alike) as equally weighted in every situation. On Actor-Network Theory see J Law and V Singleton, 'ANT and Politics: Working In and On the World' 36 *Qualitative Sociology* 485 – 502; Fox O'Mahoney and Roark (no 95), 215 – 216.

<sup>98</sup> Blomley cites the introduction of the 'right to buy' in the UK during Margaret Thatcher's term as Prime Minister as an example of state policy that had, and continues to have, important consequences for how

facilitative features of these measures can either *entrench* or *challenge* the ownership model, the outcomes of which not only have important implications for overall efforts to reduce emissions through land use, but concomitantly also for assessing changes to the property paradigm itself in the context of the climate emergency.

#### 1.4 Structure

Chapter 2, therefore, opens the space for this critical reflection. It provides an initial descriptive account of the tropes of the ownership model – that it is abstract, extractive and individualistic – to highlight the causal links between those tropes and anthropogenic climate change. Each trope can be critiqued on its own terms, but they are interrelated parts of a wider placeless model of property which severs the connection between land ownership and material spatial conditions, thus contributing to the climate emergency by enabling land use decisions which degrade Earth systems. This descriptive account leads to an initial normative assertion that the ownership model must be challenged if land use in Scotland is to change to mitigate the climate emergency. The chapter then carries forward the discussion in sections 1.3.3 and 1.3.4, above, to highlight the role of regulation through state policy measures in the construction of property. It is argued that policy measures can facilitate property performances, which carry with them the potential to entrench or to destabilise the ownership model. Therefore, it is imperative that such policy measures are designed with the ownership model in mind – to not only avoid its tropes but to actively challenge them.

Chapter 3 then situates this discussion in Scotland, exploring the extent to which the ownership model is not a peculiarly American phenomenon, as may be inferred from the predominantly US-based discussions of the ownership model,<sup>99</sup> but manifests in the

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property is enacted between people. See Blomley, *Territory* (no 43), 23. He argues this point in relation to what he calls ‘bounding’, which refers to ‘the degree to which alternatives to transacting are opened or foreclosed, thus determining participant’s relative staying power or their capacity to threaten or opt not to enter into any given transaction at all.’ He argues that a government policy to sell off 70% of public-owned housing limited the property choices of people, pushing them into transactions with private landlords and thus a transference of property power. Apparent through such performances is the link between land use change policies and the entrenching of the ownership model, deepening certain power structures and inequalities: through limiting the availability of public housing, the privateness of property is normalised. The ownership model becomes no less ‘true’ but becomes far more entrenched and successful within a system reiteratively created through these representations.

<sup>99</sup> See, generally, G S Alexander, E M Peñalver, J Singer and L Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743; J B Baron, ‘The Expressive Transparency of Property’ (2002) 102(1) *Columbia Law Review* 208; Gregory S Alexander, *Property and Human Flourishing* (2018); Andre Van der Walt, *Property in the Margins* (2009); Joseph W Singer, *Entitlement: The Paradoxes of Property* (2000); L Underkuffler, *The Idea of Property: Its Meaning and Power* (2003); T M Mulvaney, ‘Progressive

Scottish property paradigm. This chapter examines the interconnection between Scots property law and the spaces that comprise rural Scotland, uncovering the ways through which property has become defined by the ownership model through both societal and spatial changes, and concomitantly looking at the ways through which these spatial changes have also arisen through property's increased commitment to the ownership model. It details how Scotland's unique history – as a site of historical dispossession and spatial injustices yet also as a country embroiled in violent colonial dispossession – has generated a pattern of private land ownership that is one of the most concentrated anywhere in the world. This concentration of ownership has led to a concentration of power, wherein two dominant, anthropocentric attitudes towards space have arisen: that of 'use' (extractive practices like industrial agriculture and mining) and 'delight' (conservation and leisure practices enacted by the landowning classes such as grouse moors and sporting estates, though also including contemporary examples of nature conservation). The chapter explains that, though often in tension, these attitudes are really two sides of the same coin, reinforcing a dualism between nature and 'culture', treating land as an abstract resource to be controlled, leading to environmental degradation and severed land-based connections which, ultimately, contribute to anthropogenic climate change. The chapter concludes by introducing performativity theory to explore certain 'counter-performances' to these dominant attitudes, interrupting and challenging the ownership model. It explains that regulation is often facilitative of these performances. This sets the scene for a discussion of regulation as a facilitator of performances which either entrench the ownership model or decentre it, in chapters 3, 4 and 5.

Chapter 4 begins the specific analyses of policy measures in Scotland and the climate emergency. Voluntary Carbon Markets are examined, with a particular focus on woodland generation. It argues that while VCMs ostensibly aim to address the climate crisis by funding carbon sequestration projects, they ultimately entrench the ownership model, further abstracting property from material spatial conditions, leading to the commodification of more and new natural attributes such as carbon, and deepening the concentration of ownership in Scotland. Viewed iteratively, VCMs perform and reinforce a property paradigm that commodifies nature whilst narrowing future political possibilities for land use change that mitigates the climate crisis. The chapter critiques the Scottish

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Property Moving Forward' (2014) 102(5) California Law Review 349 – 373. Although, the influence of progressive property theory has moved beyond the US to an extent. See R Walsh, *Property Rights and Social Justice: Progressive Property in Action* (2021), 25.

Government's policy position of supporting these markets through a lack of meaningful regulation as well as public subsidies and tax breaks.

Chapter 5 utilises the same analytical framework to address recent land reform progress in Scotland, specifically addressing mandatory land management plans (LMPs) for large landowners. LMPs represent a form of regulatory, rather than redistributive, land reform – as a policy measure it does not specifically address the concentration of ownership in Scotland through the reallocation of ownership. However, instead, it seeks to imbue certain wide-ranging obligations into the right of ownership specifically for large landowners. These obligations, a number of which can be specifically tied to climate change mitigation, have the potential to challenge the ownership model by embedding public and environmental obligations into private ownership. However, it also highlights certain limitations of this approach which exemplify the difficulties of regulating what is traditionally a strongly protected institution in private property. Once more, the performative aspects of LMPs are explored to examine the extent to which it can contribute, as part of a wider land reform programme, to iterative changes to the property paradigm.

Finally, chapter 6 analyses the most interventionist policy measure in this thesis: the community rights to buy land. The CRtB comprise a legislative framework which looks to redistribute land specifically to a designated group: communities of place. Such communities must have sufficient connection to the land to make an application. The chapter explores the credentials of the CRtB as an overall policy measure which challenges the ownership model's tropes, arguing that its focus on aspects such as people-place connection, sustainable development and the reinvestment of profits from land use back into the community lead to the conclusion that it challenges all three tropes in material ways. Therefore, a focus on relationality within the CRtB leads to an argument that, as a policy measure, it can facilitate the 'commoning' of land, taking from geographer Fiona Mackenzie. Whilst not a panacea, this commoning can form powerful performances in the spaces where community ownership is enacted, leading to potentially paradigm-changes that can better facilitate land use change that mitigates the climate emergency.

Chapters 7 and 8 then present policy and property conclusions, respectively. Chapter 7 summarises the key points from chapters 3, 4 and 5 regarding the three policy measures analysed, focusing on their capacity to challenge the ownership model and change land use

to address the climate emergency. In short, the deeper the level of state engagement with land use change, the more that the tropes of the ownership model are challenged. There is, therefore, a strong case to be made for greater levels of government action on land use change. Whilst arguing that a coherent, joined-up policy approach to land use change in the wider context of net zero in Scotland is increasingly necessary, with mixed signals being sent by the Scottish Government on the most effective and ethical means of achieving this land use change, crucially any land use policy measure must address the ownership model in ways that challenge each of the three tropes. Therefore, this chapter outlines the basis for a framework which can be used by policymakers in the initial design-stages of land use change policy for climate change mitigation. Such a framework can ensure land use change which not only avoids the tropes of the ownership model but that directly challenges them. This leads to a wider discussion of the effects of such challenges on the property paradigm itself – imperative if land use is to *continue* to mitigate the climate emergency beyond certain policy goals such as net zero.

Chapter 8, therefore, provides a summary of the property implications explored in this thesis. Looking beyond climate targets like net zero by 2045, the arguments throughout the thesis relating to performativity theory are drawn upon to examine the effects that these regulatory measures have on the relationality between law and space. Reiterating that property is not a static, naturally occurring institution but instead is constantly shaped and reshaped with and through space, this chapter argues that purposeful, well-designed state interventions can guide new, more sustainable property performances. However, they may equally have the opposite effect, and in fact this is often the more likely outcome given the strength of the ownership model and its success within a wider capitalist system, leading to the sedimentation of the status quo and the inhibiting of meaningful changes to the property paradigm to ensure sustainable futures beyond the 2045 net zero goal in Scotland. Therefore, it is imperative to work to create land use change policy which embeds ownership within environmental limits and material networks of human and nonhuman actors. The capacity of any land use policy to mitigate the climate emergency is intrinsically linked to its ability to destabilise the tropes of the ownership model and alter the property paradigm. Ultimately, the journey towards a sustainable future requires a fundamental rearticulation of property from a placeless, exclusionary and individual right to a placed relationship of obligation and care, embedded within environmental limits. By placing property law at the centre of the climate debate, this thesis aims to provide a

critical framework for policymakers, arguing that effective action requires confronting the root causes of unsustainable land use, not just its symptoms.

# Chapter 2: The Ownership Model in the Context of the Climate Emergency

## 2.1 Introduction

Although there are a number of different areas of law which influence land use, it is essential to consider property law, in particular the right of ownership over land. This is because those who own land decide what can and cannot be done on that land, yet the right of ownership does not reflect land's material limits nor its inherent relationality with the people *on* that land. In other words, it is 'placeless'.<sup>100</sup> This leads to considerable spatial consequences. Such consequences have contributed to global socio-environmental issues, including climate change. This chapter thus highlights the ways in which the property paradigm is problematic in the context of climate change, outlining the need to address the capacity for change in the property paradigm. Performativity theory is then drawn upon to outline that changes can arise through destabilising existing performances. This destabilisation can arise through the facilitation of new performances, which this chapter explains can arise through state policy measures.

Therefore, the chapter first breaks down the ownership model into three constituent tropes, analysing how they each contribute to anthropogenic climate change.<sup>101</sup> As such, the chapter explains why property is part of the existential problem of climate change; it is informed by a model that enables, and indeed encourages, destructive land use practices that not only contribute to the climate emergency, but also inhibit effective regulation of those practices. However, as this thesis will argue it may also form part of a wider range of solutions. As this chapter will discuss, property appears immutable; the ownership model creates an impression of immunity to change. At the same time, property must be subjected to scrutiny and changes if it is to address the systemic issues stemming from land use, including reducing land-based emissions. This chapter begins to engage with performativity as a means of achieving this change. The climate emergency demands that property can enact land use responses to climate change that are grounded, place-based and

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<sup>100</sup> E Van Wagner, 'Notes from the Periphery: Finding more than (non) ownership in property law?' in N Graham, M Davies, L Godden (Eds) *The Routledge Handbook of Property, Law and Society* (2023), 217: 'Property law structures the way we make decisions about how we live together and with the world around us. In doing so, it shapes, but it also shaped by, our relationships with the places we inhabit and encounter.' See also Graham, *Landscape* (no 6); Byer (no 42).

<sup>101</sup> Note that the arguments within section 2.2 of this chapter have informed a recent publication by this author. See C Stewart, 'Voluntary Carbon Markets and Net Zero in Scotland: A Property and Place Perspective' (2025) 19(1) *Carbon and Climate Law Review* 3 – 14.

collective. Therefore, as is argued in section 2.3, regulation represents one means of enacting such confrontation through engaging with the tropes of the ownership model and facilitating new property performances. The Scottish Government has, for some time, been active in implementing several measures to facilitate and encourage land use change specifically to address climate change. Many of these land use changes are intended to reduce emissions, thereby linking with wider legal and policy targets like net zero, thus contributing – on the face of it – to mitigating the climate emergency. However, the extent of the engagement of these policies with the ownership model has a fundamental bearing on this outcome. Therefore, the question to ask in this regard is whether these measures adequately challenge the property paradigm in Scotland. In considering this question, new possibilities and narratives of property are given space in this thesis, addressing the need for change in the property paradigm as opposed to the need for certainty to address the climate emergency.

## 2.2 Placelessness in property: the ownership model

‘Property allows us to project ourselves, our will, into every nook and cranny of life.’<sup>102</sup>

Property determines land use choices. These land use choices have a bearing on the extent to which that land will contribute to, or inhibit, the mitigation of the climate emergency. Therefore, it is necessary to outline what ‘property’ comprises. The term ‘property’ encompasses a broad spectrum of rights over land, with the principal right of ownership at its core. Whilst recognising that many definitions of property exist in the world – including informal communal tenure, indigenous understandings and practices, and indeed incorporeal property rights like intellectual property – this thesis is concerned with property relating to physical land, as predominantly conceived in the liberal Western legal tradition. In this tradition, property broadly manifests in an ostensibly simple, positivistic way.<sup>103</sup> This thesis analyses Scots private property law, which is part of a wider mixed legal jurisdiction with roots in both common and civilian law traditions. Chapter 3 will explore Scots property law in more depth though, like most other Western jurisdictions, the principal right of property in Scots law is that of ownership, and this thesis focuses on a

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<sup>102</sup> P Babie, ‘Private Property and Climate Change’ in C Bevan (ed), *Research Handbook on Property, Law and Theory* (2023), 500.

<sup>103</sup> As Peter Burdon states, ‘the dominant theory of law is legal positivism...[which] asserts that it is both possible and valuable to produce a purely conceptual or descriptive theory of law, free from moral evaluation or external influence.’ See P Burdon, ‘The Great Jurisprudence’ in P Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011), 61.

major facet of ownership – *heritable* ownership; the right of ownership in immovable things such as land and buildings which is enforceable against the world (rather than between, for example, individuals party to a contract).<sup>104</sup> This thesis argues that ownership in Scotland has come to be understood and practiced in a way that not only contributes to the climate emergency but actively inhibits action to prevent it. This is because property in Scotland conforms to what can be termed ‘the ownership model’.

The ownership model is distilled to its most basic points by progressive property theorist J W Singer, who states that:

‘[property] is about rights over things and the people who have those rights are called owners...Owners are free to use the property as they wish. They have the right to exclude others from it or grant them access over it. They have the power to transfer title – to pass the powers of ownership to someone else. They are also immune from having the property taken away from them without their consent, or they must be adequately compensated if the property is taken by the state...’<sup>105</sup>

However, the ownership model is, for Singer, ‘misleading and morally deficient.’<sup>106</sup> In other words, it accounts for a vision of property which privileges certain values above others. Those values are narrow in scope, favouring the individual who holds the right and closing off the land to any non-owner. This has had, and continues to have, destructive effects on Earth systems: the ownership model draws on an ‘intellectual trajectory’ traceable to John Locke’s theorising that processes of privatisation and enclosure through property are ‘not simply inevitable...[but they are] also normatively good, to the extent that [they express] divine will.’<sup>107</sup> The ownership model renders property ostensibly benign and pre-political, determining only the relationship between the owner and the thing owned. Yet, through it, property has become an institution of power, shaping relations among human, non-human, living and non-living.<sup>108</sup> Property does not simply regulate the relationship between a person and the thing owned; it regulates the relations among people, and among people and their environments. This allocation of spatial power has vital implications for the climate emergency.

<sup>104</sup> See generally K G C Reid, *The Law of Property in Scotland* (1996), 1 – 20.

<sup>105</sup> J W Singer, *Entitlement: The Paradoxes of Property* (2000), 2 – 3.

<sup>106</sup> *ibid.*, 3. Nicholas Blomley echoes this, arguing that it is ‘ethically consequential’ insofar as it shapes ‘political and ethical discourse, [offering] a morally impoverished vocabulary...’ See Blomley, *Unsettling the City* (no 71), 155.

<sup>107</sup> F Mackenzie, *Places of Possibility: Property, Nature and Community Land Ownership* (2013), 20, citing Nicholas Blomley, *Unsettling the City* (no 71), 85 – 86.

<sup>108</sup> R Bartel and J Carter, ‘Where to from here? From law to place and back again’ in R Barel and J Carter (Eds) *Handbook on Place, Place and Law* (2021), 382; Graham, *Lawscape* (no 6).

From Singer's summation, above, it is possible to extrapolate three central tropes of the ownership model. These tropes have become embedded in modern property paradigms and contribute to emitting land uses, whilst restricting regulatory intervention to prevent such land use. As such, it is intimately connected with the climate emergency. Yet this connection is obscured through the ownership model itself.

As explained in section 1.3.4, the term 'trope' is utilised to draw out the rhetorical nature of the ownership model – that it is powerfully suggestive and presents a narrative of objective truth, but that it is by no means naturally occurring. These tropes, therefore, are powerful narrative devices in social settings because they reiteratively map out the nature of property in simple terms, distilling a complex institution into simple 'bright-line' rules,<sup>109</sup> promising certainty and stability in an otherwise uncertain world. These three tropes can be described as follows: first, ownership is abstract, separated from the physical realities of place. Secondly, and as a result of the first, ownership is extractive. Thirdly, it is highly private; an individual institution. Taken together, these tropes form a vision of ownership far removed from the material spatial conditions of life on Earth, justifying land uses which continually degrade Earth systems and contribute to the climate emergency.

## 2.2.1 Abstract ownership

### 2.2.1.1 *The nature/culture dualism*

The ownership model is deeply connected to a conceptual dualism between nature, on the one hand, and 'culture' (society) on the other.<sup>110</sup> In this dualism, nature is ontologically separate from society. Nature is thus an anthropogenically generated phenomenon; within the nature/culture dualism the term 'nature' describes a nature that is imagined, rather than real. It is everything not human.<sup>111</sup> In her work *Lawscape*, Nicole Graham traces the

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<sup>109</sup> Van der Walt, 'Modest Systemic Status of Property Rights' (no 37), 20.

<sup>110</sup> Graham, *Lawscape* (no 6), 23 – 37.

<sup>111</sup> Philosopher Bruno Latour reasons that 'nature' thus conceived is imagined as a passive object, pre-determined and lacking distinct meaning or agency. See, B Latour, *The Politics of Nature: How to Bring the Sciences into Democracy* (2004). See also J K Weir, 'Terrain: De/centring Environmental Management with Indigenous Peoples' Leadership' (2021) 20(1) *Borderlands* 171, 178, where she states that within the context of environmental management and scholarship on the environment, the 'natural science focus on nature as separate to humans sets up several challenges. For example: it has little capacity to engage with inter-being-relationality; it does not require expertise in language and interpretation; and, indeed, institutional norms and disciplinary practices prioritise invisibilising power, culture and perspective.' See also at 179: referencing B Latour, *We Have Never Been Modern* (1993), Weir further explains that the nature/culture dualism is a 'hyper-separation of nature and humans, such that they are not just different but incommensurate.' See also V Plumwood, 'Decolonizing Relationships with Nature' in W Adams and M Mulligan (Eds) *Decolonizing Nature: Strategies for Conversation in a Post-colonial Era* (2002), 52 – 78. Plumwood links the ontological

historical roots of this dualism, explaining that the idea of society as ‘culture’ is rooted in Enlightenment thinking wherein humans were seen to have moved beyond description in purely biological terms akin to other species, but rather ‘human in the sense of being a *culturally determined and distinguished* species from all other uncultured species.’<sup>112</sup> This was a politicisation of nature as external, as ‘other’, which privileges certain interests whilst obscuring others.<sup>113</sup> It is a construction founded and legitimised through the grounds of scientific method development during the Enlightenment, with its ‘normalising procedures of ‘measurability’, ‘objectivity’, and ‘replicability’.’<sup>114</sup> In this process, humans are the ‘subjects’ of inquiry, instigating and carrying out the method. In contrast, the ‘object’ of inquiry became the attributes of nature. As Graham states, ‘[it] is not possible to be both the subject and the object in the ontology of science: something is either of culture or it is of nature.’<sup>115</sup> This is, therefore, an ongoing process of ‘othering’. Nature is ‘out there in the world’,<sup>116</sup> to be studied, mapped, examined, conserved and used. Within the nature/culture dualism, such othering represents a hierarchical ordering of this relationship: humans are separated from nature, but they are also above it, designated as ‘masters and possessors of nature’.<sup>117</sup>

### 2.2.1.2 *Nature/culture dualism in property law: dephysicalised property*

Law became part of this scientific method, embodying the dualism of nature/culture in the separation between *persons* and *things* within the property relationship.<sup>118</sup> Graham argues that the nature/culture dualism ‘formed the basis of the modern idea of property in law.’<sup>119</sup> Referencing Karl Marx’s theory of ecology, Graham explains that,

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separation between nature and culture with the violent processes of colonial land dispossession, linking colonisation directly to nature itself; where ‘nature’ can be reduced to something separate and inferior to human, it can be rendered as a passive resource.

<sup>112</sup> Graham, *Landscape* (no 6), 28 (emphasis added).

<sup>113</sup> Mackenzie (no 107), 27

<sup>114</sup> *ibid.* See also Graham, *Landscape* (no 6), 28 – 32.

<sup>115</sup> Graham, *Landscape* (no 6), 29.

<sup>116</sup> N Blomley, *Territory* (no 43), 5, citing E W Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (1989).

<sup>117</sup> Graham, *Landscape* (no 6), 20, 29 - 32. Graham traces this statement back to Descartes: see R Descartes, *Discourse on Method and the Mediations* (1978). This notion of ‘masters and possessors of nature’ has exerted tremendous spatial influence as the impetus for a ‘Cartesian’ attitude to land. This is a method of viewing and mastering land through scientific and hierarchical method, enabled by a nature/culture dualism. See, for example, V Plumwood, *Feminism and the Mastery of Nature* (1993), 104 – 119. For a helpful visual representation of Cartesian mapping of land, see Blomley, *Territory* (no 43), 36, Figure 3.2, which is taken from the illuminating online comic illustration ‘So Below’. See <[www.sobelow.org](http://www.sobelow.org)> accessed 26/08/2025.

<sup>118</sup> Graham, *Landscape* (no 6), 37.

<sup>119</sup> *ibid.*, 38. Graham states that these two ideas are mutually enforcing. Indeed, chapter 2 will highlight in more detail how this mutual enforcing has manifested in Scotland.

‘the idea of abstraction is an important part of Marx’s critique of modern property. Abstraction explains the historical development of [dephysicalised ownership] ... Rather than material things such as land having intrinsic value, as particular and unique places, the demands of changing forms of wealth created quantitative values of land, as places or areas. The quantitative evaluation of a thing, or object, standardised the thing according to other objects, which allowed their comparison and trade.’<sup>120</sup>

Therefore, as nature became ontologically ‘other’ to culture, law became a mechanism through which to enact this separation or ‘othering’. Therefore, property law became the law of ‘things’. These things came to be viewed instrumentally viewed as the ‘object’ of the property relation, with persons as the ‘subject’. This can be described as the dephysicalisation of property.<sup>121</sup>

Dephysicalisation, therefore, represents the manifestation of the nature/culture dualism in law. It reimagines place as a blank slate – a vacant surface awaiting some anthropogenic input. Dephysicalisation has been vital to the development of the modern property paradigm. It is part of a ‘continuing history’ wherein law ‘constructs itself as a metaphysical discourse that simultaneously constitutes and is constituted by the absence of the physical.’<sup>122</sup> Dephysicalisation thus enforces a spatial severance between people and space, replacing spatial relations with the unilateral power of thing-ownership by an individual. This process depicts the property relation as inert and neutral, concealing the deeply intertwined social relations and histories that produce and sustain it.<sup>123</sup>

### 2.2.2 Extractive ownership: the instrumental utility of the person/thing divide

Land as a driver of economy became an imperative aspect of the growth of capitalism in Western systems.<sup>124</sup> Feudalism, based on networked forms of relationality between people and place,<sup>125</sup> became substituted for a form of property which replaced those complex

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<sup>120</sup> *ibid.*, 150.

<sup>121</sup> *ibid.*, 134 – 159.

<sup>122</sup> *ibid.*, 23.

<sup>123</sup> Blomley, *Territory* (no 43), 15 where he states that, ‘[property] is imagined as ‘about rights over things’.’ Blomley argues that property is reified in that it is *imagined* as a thing – for example the statement ‘this is my property’ is an act of ratification. In reality, property does not exist in the material world, yet common discourse presents the right of ownership itself as the ‘thing’ of ownership. This has the effect of naturalising what is a deeply contested and political power.

<sup>124</sup> Graham, *Landscape* (no 6) 51 – 83.

<sup>125</sup> *ibid.*, 26, where Graham links the concept of ‘property’ with that of ‘identity’, such that ‘disputes over land were addressed by reference to location and use rather than to abstract legal categories – in other words, land was treated different, because it was recognised and valued materially.’ This is not to suggest that land relations under feudalism were just or fair, but rather that the modern concept of individual ownership sits uncomfortably with feudalism, which is predicated on *holding*, rather than owning land.

relationships with ‘simple and finite relationships in law.’<sup>126</sup> As land became increasingly enclosed for private use, it was necessary to justify such enclosure and destructive land uses. This justification arises through the nature/culture divide and manifests in law as a ‘person/thing’ divide. To explain, land is made alienable through its dephysicalisation and, as such, dephysicalisation became a protected aspect of property theory. In becoming ‘property’, land can be transferred easily between parties because what is being transferred is the abstract, legal *right* relating to land.<sup>127</sup> The property right is seen as the passive object of value, with the person being the rational and active subject. As Graham states, modern property ‘refers to an object or thing whose only relationship to the owner is that it is owned.’<sup>128</sup> In a capitalist system, this is viewed positively because it leads to the efficient exchange of property rights in the free market, being untied to geographical constraints. However, this process produces a paradox between the abstract and the physical: if the system wherein value is attributed to a property right is based on metric completely abstracted from the land itself, then the physical limits of that land will not be taken into consideration.<sup>129</sup> Karl Marx highlighted the fundamental contradiction of capitalism is to be found in the ‘metabolic rift’ between nature and man: legal geographer Amanda Byer explains that ‘[rendering] the land as abstract and alienable property...demanded the dephysicalisation of landscape, the separation of the socio-cultural...from the ecological, so that nature could be reduced to natural resource or raw material.’<sup>130</sup> In this way, by abstracting the property right from the physical realities of the land, the values of different physical things are presented as interchangeable, flattening the complex and heterogeneous realities of land. Margaret Davies states that, as a consequence, ‘the value of a parcel of land can be calculated as a finite number of plastic buckets, making it entirely abstract and detached from the place itself.’<sup>131</sup>

This commodification of land embeds an instrumental, anthropocentric view of the natural world within property narratives. For Jessica Shoemaker, this has led to land becoming an

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<sup>126</sup> *ibid.*

<sup>127</sup> Byer (no 42), 38.

<sup>128</sup> Graham, *Landscape* (no 6), 26.

<sup>129</sup> *ibid.*, 150. Referencing R Tucker (ed), *The Marx-Engels Reader* (1978), 93, Graham states that Marx viewed this change as representing a shift from ‘qualitative value to quantitative value’ explaining that, ‘[t]he quantitative evaluation of a thing, or object, standardised the thing according to other objects, which allowed their comparison and trade...the uniformity of the language of money, which standardised the evaluation of things, became its own logic so that things or objects could only be spoken of, related and exchanged in terms of that language.’

<sup>130</sup> See A Byer (no 42) at 39, referencing K Marx, *Capital, vol 1* (1976), 637 – 638.

<sup>131</sup> Davies, ‘Can Property be Justified in an Entangled World?’ (2019) 17(7) *Globalizations*, 1104, 1110.

‘asset class,’<sup>132</sup> defined by a ‘sense of disconnect and abstraction in...ownership that separates a more fungible ‘estate’ or asset from the living natural and social ecology of ‘land’.’<sup>133</sup> In this way, property allows for the anthropocentric control and subjugation of natural attributes. ‘Land’ is rendered as an object within the patrimony of the subject, which can be alienated to other subjects in far off places, completely disconnected from the material setting of that right. Crucially, dephysicalisation means that this control is not informed by the material limits of the attribute itself, but rather by a more abstract set of metrics based on economic considerations controlled and regulated in the ‘marketplace’. This lack of spatial grounding means that the *impacts* of land use are not felt by the owner beyond how it may affect their wealth or investment. Yet it is those impacts which contribute to the climate emergency. The extractivism of the ownership can manifest in clearly destructive ways, for example mining operations which destroy and pollute ecosystems or industrial processes which emit massive amounts of CO<sub>2</sub>. Yet it also persists in less obvious ways, as will be explored further in chapter 4 in relation to voluntary carbon markets.

Further, because dephysicalised property is not related to physical reality, these attributes can be even further disaggregated. As Graham and Shoemaker note, ‘...the disentanglement of property rights from their material contexts has made it possible to legally separate the solid, liquid and gaseous parts of landscapes and extract them from their integrated ecological networks, leading to the exhaustion of oil and gas deposits, the collapse of aquatic ecosystems and exponential biodiversity.’<sup>134</sup> Therefore, land use arising from a property paradigm defined by these tropes place Earth systems under extreme pressure beyond what they are capable of enduring.

The trope of extractivism can thus be defined as the manifestation of the nature/culture dualism in property law: not only is the right of ownership dephysicalised from spatial realities, but this further enables the commodification of land and natural attributes. Land, as the object of ownership, is passive and inert, whereas the owner, as the subject, is the active participant in the relationship, unilaterally ascribed agency. Such commodification is felicitous within the extant capitalist system because it transforms a finite resource – Earth systems – into an infinite source of wealth. The ability to separate the right of ownership

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<sup>132</sup> Shoemaker, ‘Papering Over Place’ (no 65), 136.

<sup>133</sup> *ibid.*

<sup>134</sup> N Graham and J Shoemaker, ‘Property Rights and Power Across Rural Landscapes’ in N Graham, M Davies, L Godden, *Routledge Handbook on Property, Law and Society* (2023), 429.

from the land itself enables the financial benefits of extractive land use practice to be exported across the world, entirely divorced from the material consequences of those practices. Instead, it is the human and non-human communities who must deal with the immediate environmental issues and, eventually, the entire public, as the environmental effects of the climate emergency deepen across the globe. In other words, the destruction of Earth systems and the emitting of greenhouse gases contributing to the climate emergency are separated from the financial benefits reaped by the owner. The right of ownership, therefore, is not tied to physical limits.

### 2.2.3 Individualistic ownership – the public/private divide in the ownership model

‘In the conceptual space framed by the life of the owner, we are invited to live as if we were the only ones that mattered.’<sup>135</sup>

‘... in our choices about the present, we colonise the future.’<sup>136</sup>

Dephysicalisation is the result of a nature/culture divide which permeates the ownership model. Property is alienable – the person is separated as an active subject and the land as a passive object.<sup>137</sup> Consequently, property has come to be defined as a *private* institution, bracketed off from public inquiry.<sup>138</sup> The property paradigm is kept intact through a rigid public/private binary. This binary leads to the ‘absenting’ of land.<sup>139</sup> Nicole Graham states that,

‘[t]he significance of the partner term to ‘thing’ in the private property relationship, ‘person’, denotes the singular of people. The idea of the ‘person’ in property corresponds with the primacy of the individual proprietorship in the theoretical model of private property.’<sup>140</sup>

The ownership model is a spatial model which affects not just the relations between people and land, but also relations among people. As Graham states, the alienability of ownership plays a ‘dual role’, firstly in abstracting the right of ownership from the physical reality of the land it is enacted on, leading to an estrangement of people from land – a loss of spatial connections – but, secondly, this alienability also leads to estrangement from other

<sup>135</sup> Singer, *Entitlement* (no 105), 6.

<sup>136</sup> Babie, ‘Property and Climate Change’ (no 102), 504.

<sup>137</sup> Byer (no 42), 38.

<sup>138</sup> N Blomley (no 106), 2: ‘[p]roperty, according to [the ownership model] is almost exclusively *private* property...the actions of the owner are imagined as self-regarding: they concern only him or her and the things owned.’

<sup>139</sup> Graham, *Landscape* (no 6), 45.

<sup>140</sup> *ibid.*, 44

people.<sup>141</sup> The ownership model promises to the owner an absolute right to use the property, accompanied by an equally strong right to exclude any unwanted intrusion from non-owners (including the state). In this way, the ownership model ‘privileges a certain form of life – the life of the owner.’<sup>142</sup> Through this privileging, the ownership model promises individual freedom. As Paul Babie states, this freedom encompasses the ‘choice that an individual might make concerning a life project’ which requires the use of material attributes with which ‘to support the pursuit of that project.’<sup>143</sup> However, in this pursuit, an individual will inevitably conflict with others with certain claims, needs or desires relating to the land. Property, according to the ownership model is, thus, defined by exclusion: to secure the freedom promised by the ownership model, property grants the owner with the power to exclude, sending a simple message to non-owners to ‘keep off.’<sup>144</sup> This right of exclusion, according to the ownership model, enables the owner to go about their ‘life project’ free from interference. Where land use is a key contributor to climate change through emitting land use practices, this individualism is problematic not only in sanctioning the ability of the owner to use the land as they see fit, but in shielding that right from public inquiry or interference.

Most property lawyers would, at this point, disagree with this absolutist notion of property. Indeed, in the modern day it makes little legal sense to state that ownership is absolute, considering the number of other legal restrictions on that right. Other rights and obligations frequently interfere with the right of property: contracts may create certain obligations on a property owner which restrict their absolute right to use the property; public law constraints, such as environmental designations and planning limitations, increasingly restrict what an owner can do on land; private property law itself imposes certain limitations on the right of use, such as the securitisation of heritable property (a mortgage) in favour of a creditor, and proprietary rights of access.<sup>145</sup>

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<sup>141</sup> *ibid.*; Byer (no 42), 38.

<sup>142</sup> Singer, *Entitlement* (no 105), 6.

<sup>143</sup> Babie, ‘Property and Climate Change’ (no 102), 495.

<sup>144</sup> Van der Walt, ‘Modest Systemic Status of Property Rights’ (no 37), 23.

<sup>145</sup> Indeed, even the simple messaging that the ownership model delivers about property being owned by a single, identifiable owner, is increasingly difficult to justify in an age of multi-layered, international corporate ownership. Furthermore, private property rights are protected in Scotland under the European Convention on Human Rights, Article 1 Protocol 1. This states that everyone is entitled to the peaceful enjoyment of their property and shall not be deprived of their property except as mandated by the state in the public interest. Such cases will usually involve some form of state expropriation of private property, and relate to the question of adequate compensation for the owner. Therefore, to state that the right of to use and exclude are absolute rights which are vested in a single owner who can be simply and easily identified is not accurate in a legal or institutional sense.

Nevertheless, the tropes of the ownership model are strong modes of signalling.<sup>146</sup> The trope of individualism, therefore, relies on the synthesised idea ‘of natural beings and their natural freedoms, consolidated into the figure of the liberal individual – a highly artificial but totally naturalised figment of the capitalist imagination.’<sup>147</sup> This tells a story of property which has taken root in society. The story that the trope of individualism signals is that property *is* absolute. The ownership model thus appears to guarantee certainty and, through this, order in a ‘disordered and ambiguous world.’<sup>148</sup> This certainty offers stability: if a property claim is settled and secure then the extant political system appears stable.<sup>149</sup> Therefore, the value of the property right should, in theory, be tied to this certainty. Nicholas Blomley explains that,

‘[t]he presumed clarity of the ownership model is deemed valuable, in part, because of its guarantee of secure and uncontested relations with others with respect the use and disposition of things. Because we know who owns what, and where their title came from, and because ownership is complete and zero-sum, conflict should be minimised.’

According to this logic, if the law can, at least, *appear* to guarantee absolute powers of exclusion to each owner, the extant system retains stability. Consequently, individualism within property relations is institutionally protected and guaranteed – bracketed off from public life and therefore from public interference. As Lorna Fox O’Mahoney and Marc Roark argue, property law within the liberal capitalist system is bracketed-off as a ‘branch of private law positioned within the ‘private realm’ and with the public/private divide putatively separating politics/policy/public law from law/doctrine/private law.’<sup>150</sup> Property, thus, remains *private* property because property law is seen as simply a system of rules for allocating property rights and deciding claims between owners who come into conflict,

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<sup>146</sup> See J W Singer, ‘No Right to Exclude: Public Accommodations and Private Property’ (1990) 90(4) Northwestern University Law Review, 1283, 1459, where he states that ‘demonstrating that [property] can be deconstructed does not deprive it of its cultural force as an organising category.’ See also L Underkuffler, ‘Property: A Special Right’ (1996) 71(5) Notre Dame Law Review 1033 – 1058.

<sup>147</sup> Davies, ‘Can Property Be Justified?’ (no 131), 1114.

<sup>148</sup> Blomley, *Unsettling the City* (no 71), 14.

<sup>149</sup> See Van der Walt, *Property in the Margins* (no 31), 12 – 26.

<sup>150</sup> Fox O’Mahoney and Roark, *Squatting and the State* (no 95) at 159-160. See also Blomley, *Unsettling the City* (no 71), 2, where he states that property, according to the ownership model, is ‘almost exclusively *private* property. A bright line is drawn between the owner and the state.’ See also Byer, *Placing Property* (no 42), 63, where she states that ‘landscape’s functions have been redistributed to other areas of law, such as cultural heritage law, planning law and environmental law, which act as proxies that reinforce the property concept by managing conflicts over custom, land use and environmental impacts in ways that insulate private property from challenges.’

rather than an institution guaranteeing power for some over others and over Earth systems.<sup>151</sup>

As such, individualism prioritises the ability of the owner to make choices about the land owned, often over the stability of Earth systems themselves. Individuals can pollute as they see fit and regulation *may* interfere with these land use decisions, but that regulation rarely, if ever, arises from property law itself: it is environmental law; planning law; cultural heritage law. In other words, the consequences of the private actions of owners on land – in this context those which contribute to the climate emergency – are not issues of private law at all. State regulation of the property paradigm itself is, therefore, not warranted. Such state interventions exist to protect *existing* rights of owners, not to change them, even where such change is morally, politically or environmentally justified.<sup>152</sup> Interferences with property rights are restricted to those viewed as absolutely unavoidable.<sup>153</sup> As property theorist André van der Walt argues, ‘[ideological] assumptions about the personal...importance of ownership translate into presumptive power for the individual property owner, whose right functions as a trump in that it is presumed free from regulatory restrictions...’<sup>154</sup> Fox O’Mahoney and Roark argue that, as a consequence, the ‘scale of investment in the infrastructure and resources that support dominant paradigms [of

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<sup>151</sup> See U Mattei and A Quarta, *The Turning Point in Private Law: Ecology, Technology and the Commons* (2018), 36, where the authors state that, ‘...a vision of property as a legal concept to be kept separate from the material and political conditions of life has been jealously protected by lawyers to the point that today practically nobody teaching property law considers its unfair distribution and staggering private concentration as an issue that has to do with its legal nature.’

<sup>152</sup> Van der Walt, *Property in the Margins* (no 31), 4. See also H Doremus, ‘Climate Change and the Evolution of Property Rights’ (2011) 1(4) UC Irvine Law Review, 1091, 1094 – 1096, explaining the conventional wisdom of the ‘evolution of property rights’ whereby, in order to solve societal issues, the first step is to create new property rights applicable to that issue. This will be drawn upon further in section 4.3. See also Blomley, *Territory* (no 43), 15, where he states that, ‘[t]he owner is metaphorically set against other interests, who are seen as threats – notably the state. While state intervention can occur, this is always suspect and must be justified in relation to the *prior* and *superior* rights of the owner. Property rights protect us, as individuals, from the collective.’ (emphasis added). See also Davidson and Dyal-Chand (no 41), 1643: ‘[f]undamental in [the conceptualisation of property] is the notion that private firms and individuals have the freedom to engage in a broad range of competitive behaviour, with property rights serving as a source of freedom. This...creates an atmosphere in which state intervention in private structures of ownership is not only unwelcome, but a signal of abnormal, troubled times.’ See also Babie, ‘Property and Climate Change’ (no 102), 495 – 496.

<sup>153</sup> Van der Walt, *Property in the Margins* (no 31), 4.

<sup>154</sup> Van der Walt, *Property in the Margins* (no 31), 39. See also Van der Walt, ‘Tradition on Trial’ (no 35), 184 – 185: ‘private law rights are seen, valued and protected as trumps which insulate the individual from all but the most limited unavoidable state actions.’ This is because of the assumption that ‘private property interests take priority over public or social interests, unless a specific law makes provision for a specific and limited interference with private property for a legitimate public purpose. Even then the law must be property promulgated, the interference must be foreseen in it, the limits of the interference must be properly demarcated, and the eventual state action must be confined within those limits...Outside of these requirements state actions which interfere with private property would be unlawful.’

property] is high, so it is unsurprising that property systems are resilient to new paradigm thinking.’<sup>155</sup>

The individualism presented in the ownership model cuts off property’s relationality, defining property in negative terms: a right untrammelled from non-owner interference, protected by a state guarantee. This is, in essence, to imagine ownership as a ‘castle’, wherein the individual maintains absolute power within a legally-protected sphere.<sup>156</sup> Yet, the lens of the climate emergency belies the logic of such an individualised view of property, which enables self-regarding land use decisions with direct causal links to anthropogenic climate change.<sup>157</sup> The decisions made by an individual on the land they own have environmental impacts far beyond the boundaries delineated in their titles deeds. The physical consequences of the exercise of property rights which are separated from the public sphere as decidedly ‘private’ are rendered invisible by this bounding exercise, enabling ongoing environmental degradation, dispossession, loss of community connections and the exacerbation of climate change.<sup>158</sup> These ostensibly private actions affect collective interests. As Lynda Butler argues, the individualism in the property paradigm is an issue of sociotemporal scale: it has led to collective interests such as preventing climate change being ignored entirely from property theory;<sup>159</sup> this means that the will to tackle collective issues, such as climate change, is shifted from generation to generation.<sup>160</sup> Therefore, where the ownership rights governing land use are predominantly

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<sup>155</sup> Fox O’Mahoney and Roark, *Squatting and the State* (no 95), 228.

<sup>156</sup> See J W Singer, ‘The Ownership Society and Takings of Property’ (2006) 30 *Harvard Environmental Law Review* 309, 315, referencing Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (2006), 31. For further discussion of the effect of the ‘castle’ metaphor in spatial thinking, see Blomley, *Territory* (no 43), 63 – 77. For example, at 68 Blomley states that, ‘[t]he castle metaphor relies upon a spatial logic of defensive boundaries, with a sharp divide between a secure inside and a threatening outside.’

<sup>157</sup> See Blomley, *Territory* (no 43), 15: ‘[t]he owner is assumed to be motivated by self-interested and self-regarding behaviour: for example, improving the land in order to attain a higher resale price.’ See also N Walker, ‘Sovereignty, Property and Climate Change’ (2023) 27(2) *Edinburgh Law Review* 129, 132: ‘[v]arious factors contributing to global warming, in particular the extraction and use of fossil fuels and deforestation, are closely tied to forms of economic production and development that...favour certain powerful interests...’ See also See Mattei and Quarta (no 151), 39: ‘[a] diffused individualistic attitude is responsible for many of our ecological predicaments, since it determines scarce political resolve to limit self-centred daily decision-making in favour of some care and public engagement.’ See also L Butler, ‘Property’s Problem with Extremes’ 55(1) *Wake Forest Law Review* 1 – 53.

<sup>158</sup> See N Graham, ‘Dephysicalised Property and Shadow Lands’ in R Bartel and J Carter (Eds), *Handbook on Space, Place and Law* (2021), 281 – 291, wherein Graham describes the material effects of property which are obscured by the property system, which focuses on dephysicalised, legalistic rights-talk in ignorance of the embeddedness of land use decisions in the land itself.

<sup>159</sup> L Butler, ‘Property’s Problems with Extremes’ (2020) 55(1) *Wake Forest Law Review* 1, 20: ‘collective interests in preventing climate change are too diffuse to impose pressure on individual decision-making and too attenuated in a temporal sense to cause concern.’

<sup>160</sup> *ibid.*, 24 – 25, where Butler states that, ‘...significant problems of scale arise from the narrow focus on the individual owner’s rights and interests and not on the true scales of a decision...The individual owner’s decision-making calculus is confined for the most part to the owner’s chain of title and to the physical or

inward-looking, land use change for the transition to net zero is, at best, fragmented and, at worst, prevented from happening at all. Although the ownership model provides forms of certainty through guaranteeing formal property rights to individuals, this privileging exercise ranks this legal certainty over the survival of Earth systems. Ownership is the trump right, and against other more diffuse claims – for example collective rights to a healthy environment, or indeed claims from those with no rights – ownership ‘must always win.’<sup>161</sup> Consequently, regulatory action to change land use for climate goals like net zero are restricted to the absolute minimum, and must be rigorously vetted. The question, therefore, is whether this is still justifiable in the climate emergency.

### 2.3 Performativity theory and regulation

The above sections uncover the tropes of the ownership model, discussing their role in the climate emergency. However, as Joseph Singer states, ‘demonstrating that the ownership model can be deconstructed does not deprive it of its cultural force as an organising category.’<sup>162</sup> The discussion so far in this chapter has contributed to the question of ‘why’ property must change – because the ownership model which helps constitute it is so intrinsically bound up with the causes of climate change. This, then leads to the question of ‘how’ that change may occur, and what it might look like.

Section 1.3.4 introduced performativity theory, arguing that representations of property help to produce the ‘reality’ of property. Indeed, it was outlined in the section that there is a danger of speaking the ownership model into existence. Nevertheless, what the above sections 2.2.1 – 2.2.3 outline is the strength of the ownership model in popular representations of property. In this regard, the ownership model is *successful* because these tropes – as narratives devices – are deeply intertwined with the liberal capitalist model. They successfully reiterate the same performances of property, legitimised through similar representations through time. Therefore, new descriptive accounts of property can cumulatively lead to new property realities.

How do such new descriptive accounts arise? This thesis argues that regulation is one such method. State policy measures facilitate spatial interactions. As such, it has the potential to

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legal boundaries of the property...The spatial scale of an individual property owner’s decision making is too narrowly defined to capture the true footprint of the decision.’

<sup>161</sup> Van der Walt, ‘Tradition on Trial’ (no 35), 179.

<sup>162</sup> Singer, ‘No Right to Exclude’ (no 146), 1459.

facilitate *alternative* spatial interactions which challenge the representations of property made by the ownership model. Instead of land being viewed in abstract, instrumental terms, solely through the lens of the individual, policy measures carry with them the potential to create land uses which view property as an opportunity to create land-based responses to the climate emergency which are grounded, obligational and collective.

Regulation is an essential part of the property paradigm, notwithstanding the oppositional view presented by the ownership model.<sup>163</sup> Because regulatory measures enable, or inhibit, certain land uses and encounters on land among human and non-human actors, they are always engaged in processes of normalisation. In other words, they can represent previous and ongoing performances which entrench the ownership model. Yet they can alternatively represent new forms of performances which create new property possibilities, particularly through challenging the tropes of the ownership model. This is an important question in the context of the climate emergency: systemic changes are required if the property paradigm is to move beyond the ownership model, and such systemic changes may arise through new performances of property; such performances can arise through regulatory measures. As Margaret Davies states, the idea of the performativity of property ‘provides some hope for change, because new facts, and new performances, can lead to new norms.’<sup>164</sup> The ownership model is a successful attempt to describe the world, yet these simplified descriptive accounts of complex social and biotic phenomena perform into being the realities that they describe. As Davies *et al* state, ‘[If] different methods can produce different results, this is not necessarily indicative of varying perspectives on a single underlying reality, but rather of the production of different realities.’<sup>165</sup> Put simply, ‘[w]e have choices about how we produce the world.’<sup>166</sup>

Therefore, the importance of spatially informed, well-designed policy measures for land use change which mitigates climate change cannot be overstated. The outcomes of these

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<sup>163</sup> See Babie, ‘Private Property and Climate Change’ (no 102), 499: ‘[u]nfettered, the exercise of [land use choices] conferred by property runs the risk of producing negative social outcomes in both the physical and the social space in which we live. To avoid these outcomes requires the regulation of the choice enshrined in property by corresponding values – moral imperatives, duties and obligations...For this reason, in every society that invoked property as a means of resource distribution, the choice inherent in property is constrained by the state’s power of regulation...’ See also J Singer, ‘After the Flood Equality and Humanity in Property Regimes’ (2006) 52 *Loyola Law Review* 243, 270: ‘[t]he traditional understanding of the relation between property and regulation is that they are in mortal tension with each other. Every regulation appears to be a limitation on property rights and every increase in property rights appears to limit the intrusive power of the state. But this understanding is fatally flawed.’

<sup>164</sup> Davies, ‘Can Property Be Justified?’ (no 131), 1112.

<sup>165</sup> Davies *et al*, ‘Property Within Habitat’ (no 28), 34.

<sup>166</sup> *ibid.*

policies are important in bringing about iterative changes to the property system so that, over time, it may become more embedded in the material spatial conditions of Earth. A property system thus constituted would better reflect the realities of the climate emergency, facilitating land use change that is grounded, rather than abstract; which recognises limits and obliges owners to operate within these limits; and which fulfils wider community values and is grounded in local knowledge and open to regulatory interventions based on the public good, rather than wholly individual and private. This thesis takes this analytical point and applies it to three policy measures for land use change which carry possibilities for climate change mitigation. What effects do these policies have not just on the ownership model, but on changing the property paradigm itself over time, in ways better suited to mitigating the climate emergency?

## 2.4 Conclusion

This chapter has provided a descriptive account of the ownership model. It has taken each of its tropes in turn, to highlight the ways in which they contribute to anthropogenic climate change. It explained that, firstly, the ownership model is based on a separation between nature, on the one hand, and culture on the other. This dualism allows for the treatment of the former as an external object. In a property setting, this means that the right of ownership is not connected to its material realities: it is dephysicalised. Secondly, this means that new, spatially unconnected, values can be attached to nature – as Davies states, ‘the value of a parcel of land can be calculated as a finite number of plastic buckets, making it entirely abstract and detached from the place itself.’<sup>167</sup> This separation of the right of ownership from physical reality enables its exploitation for economic gain. Because of this disconnection, the value of land is not contingent upon its material limits, leading to the continued exploitation of nature and ensuing environmental degradation. The benefits of this extraction are privatised, whilst the costs are borne by everyone, and everything, else. The climate emergency is a potent example. Finally, the individualism of the ownership model, centred on a presumptive absolute right to exclude, treats property as a purely private matter. This prioritises the owner’s freedom and desire for certainty over property’s relationality and a need for collective responses to the problem of climate change, shielding property from public inquiry. Consequently, this blocks necessary land use changes to address the climate emergency, as the private rights of the owner consistently trump collective environmental needs.

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<sup>167</sup> Davies, ‘Can Property be Justified?’ (no 131), 1110.

This is a description of the problems inherent in the ownership model in the context of the climate emergency. Therefore, a first *normative* step towards changing land use is to recognise that these aspects of the property paradigm must change. As explained in section 1.3.3, property is relational. It is part of an ongoing co-construction with space, wherein law constitutes spaces which simultaneously interact with law. Because of this, the embedding of the ownership model within the property paradigm leads to the kinds of spatial consequences described throughout section 2.2. In the context of the climate emergency, it is crucial that the property paradigm is subjected to change, and that such change must come through expressly *challenging* the tropes of the ownership model. How can property be *less* abstract, extractive and individual? The question, subsequently, turns from ‘what must be changed’ to ‘how to enact change.’ Section 1.3.4 explored performativity theory as a possible platform for change, recognising that the relationality of law and space leaves open the possibility for changes to the property paradigm to happen *in space* through iterative ‘performances’ by a network of human and non-human actors. This thesis, therefore, explores the potential for state-led policy measures which change land use to be facilitative of such performances and, as such, whether those performances may lead to change or sedimentation in the property paradigm. The next chapter will provide necessary context to this debate, explaining the ways through which law and space have developed in Scotland; absent such debate, the potential impacts of the policy measures analysed in chapters 4, 5 and 6 would lack the context needed to provide the spatial scrutiny of those policy measures.

# Chapter 3: 'Use' and 'Delight' – Historic Origins of Contemporary Property Debates in Scotland

## 3.1 Introduction

This thesis argues that land use is a contributor to climate change because the property paradigm is represented through the tropes of the ownership model. The previous chapter outlined these tropes and introduced the argument that regulatory measures for land use change in the climate emergency can facilitate new performances and challenge these tropes, fundamentally altering the property paradigm over time. This chapter situates this discussion in a Scottish context, before engaging in an analysis of specific policy measures in chapters 4, 5 and 6. It locates the ownership model – a critical assessment of property originating in the USA – within the legal jurisdiction of Scotland. This is done through an inquiry into the relationality of law and space in rural Scotland, which highlights that the ownership model is deeply embedded in the property paradigm and has had profound spatial impacts, including the sustaining of land uses across vast areas of land that are net contributors to climate change.

Section 3.2 describes the main components of property law in Scotland. Scotland is a mixed legal jurisdiction with elements of both civil and common law. Although, the property law system is rooted more in civil law traditions. It subsequently argues that, despite its doctrinal differences with purely common law systems from where the ownership model critique originates, Scots property law embodies the same core tropes of the ownership model.

Section 3.3 then engages with the relationality of law and space, outlining certain spatial impacts of the existence of the ownership model within this relation. As Lynda Butler contends in the context of climate change,

‘the original conditions within which a property system develops matter greatly. Those conditions affect the assumptions made and the norms, values and principles driving the system. The conditions shape how interests in resources are allocated, whether the dominant interests are those of the individual or of the society, and what the principles governing distribution and

use would be. What are the goals of the property regime?...What is the nature of the relationship between the Earth system and a property regime?’<sup>168</sup>

Jurist A J van der Walt argues similarly, within the context of systemic change, that,

‘...such a case in favour of reform or transformation of a property regime cannot be argued abstractly. The historical, socio-economic and political context of the actual effect of established property regimes on the lives of individuals and communities are important in making normative judgments about the justification of either upholding or changing them. The fact that property regimes are shaped in part by social, economic and political factors and that they therefore reflect their context means, on the one hand, that their moral and political legitimacy can only be determined with reference to their context...’<sup>169</sup>

In other words, property systems are made through knowledge frameworks that are specific to particular cultural and material contexts.<sup>170</sup> These contexts are ‘deeply historical, grounded in the developing modes of production and susceptible to conflicting processes.’<sup>171</sup> As argued in chapter 1, property is spatial; it is enacted and performed in physical and social spaces. It enables, or prohibits, the production of meaningful places through these performances. At the same time, these spaces can produce property – though often in less obvious or apparent ways. Property only emerges from, and is given meaning through, how space is used, disputed and understood – how it is materially ‘performed’ in these spaces.<sup>172</sup> Therefore, in the context of the climate emergency as a reason for change in the property paradigm, section 3.3 engages with certain land histories of rural Scotland, addressing the increased concentration of ownership over time as a means through which the spatial consequences of the ownership model have been amplified. As a result, rural land in Scotland has largely come to be defined through two spatial lenses: that of ‘use’ and ‘delight’. Though the two are different in many respects, the section highlights that they are both anthropocentric at their core, indicative of the nature/culture dualism. This discussion enables an understanding of the ways through which land is constituted and

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<sup>168</sup> L Butler, ‘Property, Climate Change, and Accountability’ in N Graham, M Davies, L Godden, *The Routledge Handbook of Property, Law and Society* (2023), 287.

<sup>169</sup> Van der Walt, *Property in the Margins* (no 31), 212.

<sup>170</sup> M Davies *et al.*, (no 28), 2.

<sup>171</sup> R Tally, *Spatiality* (2012), 117. Tally cites French Marxist philosopher Henri Lefebvre, who states that ‘[e]very society...procures a space, its own space.’ See H Lefebvre, *The Production of Space* (1991), 31.

<sup>172</sup> N Blomley, ‘The Boundaries of Property: Complexity, Relationality and Spatiality’ (2016) 50(1) *Law and Society Review*, 225 quoting D M Engel ‘Law in the Domains of Everyday Life: The Construction of Community and Difference,’ in A Sarat and T R Kearns (Eds), *Law in Everyday Life* (1995), 123: ‘property]...is dependent upon everyday life to give meaning to its central concepts...to root its abstract rules and principles in human understanding, and to produce implementation, compliance and judgement. It is misleading to regard law as capable of existence apart from or in opposition to everyday life.’

understood in Scotland, in particular how these understandings have created land use that largely contributes to the climate emergency, rather than mitigating it.

These two dominant spatialisations are drawn upon throughout the thesis as a means of reflecting upon whether the policy measures analysed in chapters 4, 5 and 6 can lead to *different* land uses that may lead to less anthropocentric spatialisations, which in turn influences the direction of property law towards one more grounded in material spatial conditions. Indeed, certain regulatory interventions are drawn upon in section 3.3.4 as potentially facilitative of 'counter-performances' of property, paving the way for further discussion of the policy measures in chapters 4, 5 and 6.

### 3.2 Scots property law and the ownership model

The property regime in any given system has concurrent spatial effects on place. As argued in Chapter 1, property is routinely presented as a static, pre-political institution. As a result, its spatial consequences are obfuscated. Chapter 1 argues that this is generally true of all Western jurisdictions, though this section highlights how this has been the case in Scots property law.

Scotland is a country politically situated within the United Kingdom, specifically within the island of Great Britain. Although not an independent nation, it has a large amount of autonomy. It is a devolved nation within the UK, following the passing of the Scotland Act 1998, which re-established the Scottish Parliament,<sup>173</sup> and defines the operational parameters of devolution – what the Scottish Parliament can and cannot legislate for.<sup>174</sup> The Scottish Parliament cannot, for example, legislate on 'reserved matters'.<sup>175</sup> Set out in Schedule 5 to the Act, these include aspects such as defence,<sup>176</sup> borrowing,<sup>177</sup> and foreign affairs.<sup>178</sup> Whilst human rights as a subject matter are not reserved, the Scottish Parliament cannot legislate in a way that is compliant with rights under the European Convention on Human Rights.<sup>179</sup> This is relevant for any discussion of property law in a legislative setting

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<sup>173</sup> Scotland Act 1998 Section 1.

<sup>174</sup> Scotland Act 1998 Section 29 outlines the basic provisions for legislative competence of the Scottish Parliament.

<sup>175</sup> Scotland Act 1998 Section 29(2)(b).

<sup>176</sup> Scotland Act 1998 Schedule 5 paragraph 9(1).

<sup>177</sup> Scotland Act 1998 Schedule 5 paragraph A1.

<sup>178</sup> Scotland Act 1998 Schedule 5 paragraph 7.

<sup>179</sup> Scotland Act 1998 Section 29(2)(d).

because the Scottish Parliament must be alive to the potential to legislate *ultra vires* when regulating property rights.<sup>180</sup>

Whilst politically Scotland is not independent, its legal system is. In particular, its private law framework is oftentimes markedly different from its nearest neighbour, England. Scotland is a mixed legal jurisdiction, containing foundational elements of both European civil law and English common law. This makes for a rich vein of analytical possibilities. Yet it also makes direct comparisons with other legal systems more challenging. Critiques relating to the ownership model have developed in Anglo-American common law jurisdictions (predominantly the USA).<sup>181</sup> Scottish legal history is bound up with elements of common law and civil law. However, the right of ownership in Scotland is predominantly civilian. This is because the roots of Scots property law are found in Roman law. Yet, unlike many of its European civil law counterparts, it has remained uncodified. This presents comparative issues in transplanting the same critique to a civilian or mixed jurisdiction. However, this thesis poses that, notwithstanding the differences between civil and common law conceptions of property, the tropes of the ownership model nevertheless manifest in Scots property law doctrine. This becomes clear through a brief exposition of the right of ownership in Scotland.

The law relating to ownership of physical things in Scotland is the law relating to so-called heritable property. The ownership of heritable property is based on the idea of real rights. All real rights in land are heritable.<sup>182</sup> Real rights are thus proprietary rights enforceable

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<sup>180</sup> The relevant property rights under the European Convention on Human Rights are primarily found in Article 1 of the First Protocol to the ECHR (A1P1), which states that individuals are entitled not to have their property taken from them or regulated in such a way which constitutes a functional taking of property, unless that state action is justified in the public interest and they receive adequate compensation. The relationship between legislating to control property rights or to expropriate them and potential A1P1 challenges is discussed throughout this thesis, but does not form a cornerstone of the discussion, due largely to the fact that such discussions warrant far greater space than can be afforded in the confines of this thesis.

<sup>181</sup> These arguments tend to coalesce around the account of property given by Blackstone: '[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.' See C M Rose, 'Canons of Property Talk, or, Blackstone's Anxiety' (1998) 103(3) *The Yale Law Journal* 601, 601. Rose takes this quote from W Blackstone, *Commentaries on the Laws of England* (facsimile ed 1979) (1765-69). In this seminal article Rose argues that this is not an accurate description of how property actually works, rather it is an ideological statement which masks property's inherent relationality. In a legally contextualised setting, this conceptualisation of ownership was made in a common law setting. Thus, critiques of this conceptualisation have arisen in common law jurisdictions, including the USA, Canada, and Australia. As will be explained, this thesis does not adopt Blackstone's definition of property precisely because it has shaped common law, not civil law, of which Scots law takes much from in its property system. Of course, Blackstone is influential in a Scottish setting (being as it is a mixed legal jurisdiction), yet this chapter will outline similar sentiments from Scottish writers.

<sup>182</sup> Erskine, *Institute*, II, 2, 5.

against the world. Civilian systems divide these real rights into a (usually) closed list: at the top of the list there is always the real right of ownership, from which the other real rights derive.<sup>183</sup> Crucially, and where it differs from common law systems, ownership in Scots law is unititular: the right is indivisible and singular, meaning only one claim to ownership can be recognised at any one time.<sup>184</sup> This is a distinctly civilian characteristic of Scots property law.<sup>185</sup> This differs markedly from common law conceptions of the ‘relative title’ of ownership, which envisage ownership as a divisible bundle of rights that are ‘relative’ to one another.

The development of the modern Scots law of property, although having roots in Roman law, is traceable to its so-called ‘institutional writers’. In particular, James Dalrymple, Viscount Stair, advanced the development of Roman-Scots law with the publication of his famed *Institutions* in the late 17<sup>th</sup> century. Indeed, the development of Scots law as a mixed legal jurisdiction is, in large part, because most of the prominent jurists of the 17<sup>th</sup> and 18<sup>th</sup> centuries were educated on the European continent, predominantly in France and the Netherlands. Therefore, following the Treaty of Union of 1707, constituting the United Kingdom, Scotland’s legal system was ‘founded on philosophical principles that contrasted with the precepts that constituted English law.’<sup>186</sup> However, that is not to say that feudalism had no part in Scotland. Indeed, the civilian, Roman law influence of the institutional writers often sat uneasily alongside a system of tenure which was historically feudal.<sup>187</sup> In addition, due to increasing English influence through the 19<sup>th</sup> century, though

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<sup>183</sup> See discussion in K G C Reid, ‘Sharp v Thomson: a Civilian Perspective’ (1995) 10 Scots Law Times 75 - 79. These are known as ‘subordinate real rights’.

<sup>184</sup> K G C Reid, *The Law of Property in Scotland* (1996), 482. Ownership can be shared between co-owners, for example a married couple who share ownership of a house, with both holding each a 50% share, but the right itself is not divided.

<sup>185</sup> The decision of the House of Lords in the case of *Sharp v Thomson* 1997 SC (HL) 66 is well-known for its controversial adoption of the common law ‘beneficial interest’ test to be applied to the holder of a floating charge upon attachment. However, the appealed judgment from the Inner House is of interest insofar as it affirms the nature of ownership in Scotland. See *Sharp v Thomson* 1995 SC 455, 469: ‘Scots law, following Roman law, is unititular... There is no opportunity for fragmentation of the concept of ownership...’ At 475, Lord President Hope states that, crucially, the creditor could not have a ‘concurrent rights of ownership in the property... the argument that there can be a separation of interests of ownership according to what was described as the reality of the situation *is contrary to principle*.’ Emphasis added. In other words, either someone has the right of ownership or they do not, there is no ‘in between’. The *Sharp v Thomson* saga shows the difficulty in applying creations of English common law (the floating charge, in this instance) to Scotland, where ownership is strictly viewed as individual and indivisible. See also K G C Reid, ‘Sharp v Thomson: a civilian perspective’ (no 183) in which Reid analysis the decision in *Sharp v Thomson* against the background of the civilian nature of Scots property law. This article is very useful in providing a brief overview of the facts and the fundamental legal issues at stake in *Sharp v Thomson*.

<sup>186</sup> A Chitnis, *The Scottish Enlightenment: A Social History* (1976), 79.

<sup>187</sup> See K G C Reid and R Zimmerman, ‘The Development of Legal Doctrine in a Mixed System’ in K Reid and R Zimmerman (Eds), *A History of Private Law in Scotland* (2000), 187: ‘...feudalism was followed by the beginnings of a reception of Roman law; and, while not easily susceptible, feudalism was Romanized to

Scots law is distinctly civilian in character there are also elements of common law to be found in its genetic makeup.<sup>188</sup>

The work of the institutional writers was thus vital in providing coherence to a system fraught with potential tensions from its various sources. This development of the modern property paradigm in Scotland in the 17<sup>th</sup> and 18<sup>th</sup> century is the bedrock for how ownership is understood in modern day practice. According to Bell in his work, *Principles*:

‘The chief attribute of property is the right of deriving from land and its accessories all the uses or services of which they are capable. This right may be considered, in relation to others, as ‘exclusive’; or in relation merely to the subject as ‘absolute’.<sup>189</sup>

Indeed, this passage, to an extent, offers a glimpse of all three tropes of the ownership model. Ownership is presented by Bell as an individual endeavour: the right of ownership allows the holder of that right to use the land to the explicit exclusion of any other person. Because of this, the main purpose of the right of property is to extract some kind of use from the land: the ownership right is considered in relation to the ‘subject’<sup>190</sup> as ‘absolute’. In other words, all uses for the land are prescribed regardless of its limits. The right of ownership is ‘absolute, exclusive and abstract in nature.’<sup>191</sup> Through its civilian roots, in principle it embraces the power ‘to use...to enjoy the fruits...to consume...to possess...to dispose...to reclaim...and to resist any unlawful invasion...’<sup>192</sup> This conception of ownership traces back to Scots law’s Roman law roots. Thus, it shares much in common with European Civilian counterpart jurisdictions. In the Civil law tradition, ownership is the ‘original example of a right conceived as a sphere of absolute and exclusive individual autonomy.’<sup>193</sup> Therefore, in Scots law, the right of ownership provides the holder with power in two important ways: an ‘absolute’ right of control over land, and the right to

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some degree.’ The authors proceed to explain that the core tension between Roman law and feudal law is the conceptualisation of ownership. Roman property law is unititular; feudalism is relational in the sense that ownership can be split into different forms of *dominium*, with the Crown at the top (*dominium eminens*) and each vassal below on the feudal chain also holding a form of *dominium*. See G L Gretton, ‘Feudal System’ *The Laws of Scotland: Stair Memorial Encyclopaedia* (vol 18, 1996), paragraphs 41 – 43.

<sup>188</sup> *ibid.*, 6 – 8, and 10 where it is stated that ‘...in one sense legal history seems always on the side of those who argue for the civil law tradition in Scots law.... for...it can hardly be disputed that the main reception of English law did not occur until the nineteenth century.’

<sup>189</sup> Bell, *Principles*, 939.

<sup>190</sup> Scots law generally refers to land, confusingly, as a ‘subject’, though it is legally defined as an object of property.

<sup>191</sup> R Zimmerman, D Visser, K G C Reid, ‘Property Law: Some Themes and Variations’ in R Zimmerman, K G C Reid, D Visser (Eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005), 659.

<sup>192</sup> *ibid.*, 660.

<sup>193</sup> Van der Walt, ‘Tradition on Trial’ (no 193), 178.

exclude others from land. Of course, over time, ownership has become restricted by other legal measures such that it may not be wholly accurate to term ownership ‘absolute’. However, as Reid states, ‘the *very idea of restriction* presupposes the idea of absoluteness, and unless ownership is to be reduced merely to a fixed list of permissible acts...it must continue to be defined, by exclusion, as a right to use property in any way not prevented by law or by agreement.’<sup>194</sup> Indeed, in the Civilian systems from which Scots property law finds much of its source, such restriction is by its nature ‘temporary and exceptional.’<sup>195</sup>

However, one may point to the fact that Bell presents a limitation of sorts in the passage quoted above: the use of the land is predicated on what that land is ‘capable’ of producing. The right itself ‘derives’ from the land. This speaks to the Civilian nature of ownership being conceived of a right directly *in a thing* rather than a right against or between people. Institutional writer Erskine posited in his work *An Institute of the Law of Scotland* that ownership can be defined as, ‘the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction.’<sup>196</sup> The abstract nature of ownership in Scotland soon belies this reading as suggesting some kind of material relationality between people and space, or at least considering property in the context of its physical enactment; Scots property law is not so much concerned about the thing itself as it is with the *right* of ownership. As Reid explains, ‘a thing is of significance to the law only insofar as it gives rise to rights which can be held by persons.’<sup>197</sup> In this sense, to assert that ownership is about ‘things’ (in this context land) in Scotland is only true in an abstract, legalistic sense. Indeed, this view of property is steeped in the thinking of the time of the Scottish Enlightenment. For example, institutional writer Bankton, in his *Institution* links the study of property law with philosophical and scientific thinking of the time:

‘[n]atural philosophy examines things according to their properties and qualities, in order to discover their powers; physick considers them with respect to their medicinal values, and other arts and sciences in the respective views proper to them; and positive law regards them as the subjects of rights; *for only rights are the object of laws.*’<sup>198</sup>

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<sup>194</sup> Zimmerman *et al* (no 191), 659, emphasis added. The authors make reference to the oft-cited definition of ownership from institutional writer Erskine: it is the ‘right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction.’ See Erskine, II, 1, 1.

<sup>195</sup> A J Van der Walt, *Property in the Margins* (2009), 33.

<sup>196</sup> Erskine, *Institute*, II, 1, 1. Again, a ‘subject’ in this instance is what many property lawyers would call an ‘object’ of property – a thing.

<sup>197</sup> K G C Reid, *The Law of Property in Scotland* (1996) at 8.

<sup>198</sup> Bankton, *Institute*, I, 3, I

A Scots law understanding of a ‘thing’ of ownership, therefore, is defined by its abstractness; its value is to be found in its designation as a *right* in that thing, devoid of regard to social or ecological context. Property is thus hierarchically arranged according to this rights paradigm: ownership is unititular and free from restriction and all other rights in property derive from that right. The only way that ownership can be interrupted is if the owner agrees (for example the implementation of a servitude), or by way of state intervention which must be strongly justified and (almost) always accompanied by compensation.

The doctrinal parameters of ownership in Scotland are now seen as settled. Much work has been done in the 20<sup>th</sup> and 21<sup>st</sup> centuries to achieve relative certainty in the doctrine. As a result, the ownership model has become even more entrenched. The abolition of feudal tenure in 2004 meant that any competing doctrinal ideas of property were well and truly eliminated.<sup>199</sup> Ownership became untrammelled by feudal ideas of property, allowing the ownership model to further entrench in ideas of property in Scotland.<sup>200</sup>

The discussion so far suggests that the ownership model can be mapped onto the development of ownership and property law more broadly in Scotland. The initial difficulty is that the ownership model is a common law critique, specific to the peculiarities of common law concepts of property. However, not only can the ownership model be seen to manifest in doctrinal Scots property law as argued above, but compounding this is the shared commitment from both common and civil law jurisdictions to an abstract idea of property, manifested in the liberal individual. Indeed, such features are immediately clear and understandable to any civilian property lawyer.<sup>201</sup> Notwithstanding what doctrine portrays – that civil and common law notions of ownership could not be more different – ownership as an ‘absolute’ right to control a thing is very much a shared value between the systems. As Van der Walt states,

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<sup>199</sup> Abolition of Feudal Tenure (Scotland) Act 2000 section 1. The ‘appointed day’ was 26 November 2004 (The Abolition of Feudal Tenure (Scotland) Act 2000 (Commencement No. 2) (Appointed Day) Order 2003.

<sup>200</sup> See K G C Reid, ‘Property Law: Sources and Doctrine’ in R Zimmerman and K G C Reid (Eds) *A History of Private Law in Scotland* (2000), 187 – 192. As Reid explains, feudalism was extremely influential in the development of property law in Scotland, though it sat uneasily with the doctrines of Roman Law which became increasingly important in Scots law. This is because feudalism is a relational concept: it necessarily involves two or more parties – ‘ownership’ as a concept of individual ownership was not readily acceptable in feudalism. In contrast, Roman law relies on the *dominium* of a single title bestowed on an individual. This latter view became the dominant one through the writings of the Institutional Writers. See 187: ‘[b]y 1820 [institutional writer] Bell was able to tell his students that ‘the feudal system is now abolished except as to the system of conveyancing [transferring ownership] formed upon it.’

<sup>201</sup> A J Van der Walt, *Property in the Margins* (no 31), 39.

‘despite the differences between the Roman-law-based civil law system and the English common law system...the notion of absolute ownership and the idea that property ownership occupies a superior position in the hierarchy of property interests are not unknown in common law property theory.’<sup>202</sup>

Why is this? The answers are wide-ranging. As explained in chapter 1, law is spatially constructed and constructive. Therefore, property law is contingent upon the physical and social spaces that exist at any given time. Different jurisdictions will, therefore, develop differently. Yet, the legal system in Scotland, much like most Western jurisdictions, has developed congruently with the development of industrialisation and commitments to economic growth through a capitalist system. As Van der Walt explains, the ownership model is presented as a pre-political institution that secures individual autonomy and protects key liberal values like self-determination, rational choice, and the free market. Consequently, ‘ownership is seen as a natural or rational phenomenon and not as a social or political construct...’<sup>203</sup> Therefore, although both systems differ on the particular doctrinal elements of property, that they are ‘quite distinct’ is rather a ‘myth’:<sup>204</sup> ownership in both jurisdictions conforms to the tropes of the ownership model because of the shared commitment to capitalist values in both systems.<sup>205</sup> As will be explored further in section 3.3, below, this highlights the importance of the relationality of property and space, in that the two are always engaged in co-constructing one another. Therefore, doctrinal differences are not regarded as fatal to the assertion that the ownership model is present in both systems. The question stemming from this is the extent to which the existence of the ownership model in Scots property law has created and sustained land use that contributes to the climate emergency.

### 3.3 Rural land in Scotland and the ownership model

The previous section outlined the doctrinal aspects of ownership in Scots law, highlighting the ways in which the ownership model is present in the property paradigm in Scotland. Yet property is spatially contingent – the dominance of the ownership model in the Scottish property system did not appear out of nowhere. It is produced by, and produces, spatial changes in both social and physical spaces. Therefore, this section discusses the

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<sup>202</sup> *ibid.*, 36.,

<sup>203</sup> Van der Walt, *Property in the Margins* (no 31), 40.

<sup>204</sup> Reid and Zimmerman (no 188), 3.

<sup>205</sup> A J Van der Walt, *Property in the Margins* (no 31), 40: ‘[w]ithin the common law doctrine, the stronger possessory claim is associated with the same notions of strong privilege that characterise absolutism talk in the civil law systems, because the ownership model...protects the same liberal economic values and interests in both systems.’

ways in which dominant spatialisations of land – particularly rural land – in Scotland have manifested. It outlines how attitudes towards land have developed congruently with developments in law as part of a ‘historical coevolution’.<sup>206</sup> In other words, land use produces particular spaces, and these land uses are informed by the ‘concepts and norms that facilitate and protect them.’<sup>207</sup> Nicole Graham uses the portmanteau ‘lawscape’ to describe this relationality, explaining that the placelessness of property can occur anywhere:

‘The universalism of modern law is materialised by land use practices. In effect, what we see in a landscape is not a detached and separated physical realm...but ourselves, our practices and our law – a lawscape.’<sup>208</sup>

Therefore, the purpose of this section is to outline how the paradigm of placelessness has manifested in rural Scotland. Section 3.2 concluded that Scots property law is deeply connected to the ownership model. This section will explain the effects of this on rural land in Scotland. How has the property paradigm materialised in a spatial setting? Understanding this relational dynamic uncovers many of the underlying reasons for land use in Scotland which has historically and contemporaneously contributed to the climate emergency, and the difficulties faced in destabilising the ownership model as a result.<sup>209</sup>

It should be noted at this point that the spatial consequences for rural Scotland of the concentrated private ownership of land are vast – too many to adequately outline within the confines of this chapter. Yet, what can be delineated are the *dominant* spatialisations of rural Scotland and how these have been shaped by, and have shaped, the Scottish property paradigm through recent history. This tracing reveals the entrenching of the dualism

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<sup>206</sup> Blomley, *Territory* (no 43), 24.

<sup>207</sup> Graham, *Lawscape* (no 6), 5.

<sup>208</sup> *ibid.* Graham writes from an Australian perspective, though as this thesis contends such a statement is equally applicable in the context of Scotland.

<sup>209</sup> For example, section 3.3.4 introduces certain ‘counter performances’ to the ownership model that have arisen. One of these is the land reform regime, introduced in 2003. In particular, this section outlines the ‘right to roam’ in Scotland as a placed response to the ownership model. However, the difficulties in achieving this legislative change must not be underestimated. As this section will discuss, notwithstanding the establishment of the Scottish Parliament (such changes could have been legislated for regardless of its existence), it took around 100 years between the first example of land reform legislation in Scotland and the passing of the Land Reform (Scotland) Act 2003, and even with its passing it faced heavy criticism from vested land interests. For example, the Act was likened to a ‘Mugabe-style land grab’ when first introduced – referring to the land reform processes in Zimbabwe led by Robert Mugabe which attempted to redistribute rural land away from minority white ownership, albeit in a far more extreme manner than in Scotland. See K Scott, ‘Holyrood Backs Land Reform Seen by Tories as Mugabe-Style Confiscation’ *The Guardian* (2003) <[www.theguardian.com/politics/2003/jan/24/scotland.devolution](http://www.theguardian.com/politics/2003/jan/24/scotland.devolution)> accessed 20/08/2025.

nature/culture in attitudes towards land in Scotland, which have led to land use practices which largely contribute to, rather than inhibit, the climate emergency.

Taking from the work of historian T C Smout, this section highlights processes of ‘culturing’ throughout the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> centuries, as spaces of ‘use’ and, secondly, as places of ‘delight’.<sup>210</sup> These spatialisations have deeply ingrained the tropes of the ownership model in land use. These spatialisations may be viewed in opposition to one another,<sup>211</sup> but as section 3.3.3.1 will explain they are two sides of the same (anthropocentric) coin. ‘Use’ generally refers to extractive practices which prioritise values like ‘productivity’ and ‘development’ – land practices wherein economic value is directly obtained from physical changes to the land. This perspective views nature primarily as a resource to be exploited for anthropogenic gain. ‘Delight’ images rural spaces as vehicles of aesthetic value, wherein recreational or emotional enjoyment is derived from the land, including practices such as game shooting, or indeed modern practices such as rewilding. Both categories are, to varying extends, crude distillations of complex assemblages of property performances, yet as analytical accounts they provide value in highlighting the broad spatialisations of Scotland’s rural land and the issues they cause for Earth systems. Through discussion of these two spatialisations, it becomes clear that Scotland is, as described by geographer Anna Paterson, a ‘nation built on paradoxes’ as far as land and the natural environment is concerned.<sup>212</sup> As will be discussed in this section, both spatialisations – ‘use’ and ‘delight’ – represent, to varying degrees, ‘exclusionary geographies’<sup>213</sup> which correlate with the tropes of the ownership model: as Nicole Graham states, ‘law determines, in part, how land is regarded aesthetically and how landscape is made materially. As the law of private property and enclosure objectified or *othered* land into landscape, the law erased the specificities of those lands as places from its discourses.’<sup>214</sup> The spatialisations of ‘use’ and ‘delight’ as materialisations of the ownership model in land use have been instrumental in dominant land uses in rural Scotland which continue to contribute to the climate emergency and inhibit mitigatory action in that regard.

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<sup>210</sup> See T C Smout, *Nature Contested: Environmental History in Scotland and Northern England since 1600* (2000), 7 – 36.

<sup>211</sup> See, for example, A Paterson, *Scotland’s Landscape: Endangered Icon* (2002); Smout (no 210), 7 – 36.

<sup>212</sup> Paterson, (no 211), 10. She further explains that ‘[Scotland’s] landscape is an essential part of national identity but still marketed as a commodity.’

<sup>213</sup> See Mackenzie, *Places of Possibility* (no 107), 12. Mackenzie here refers to the term ‘exclusionary geographies’, referencing D Gregory, ‘Edward Said’s Imaginative Geographies’ in M Crang and N Thrift (Eds), *Thinking Space* (2000), 302 – 348.

<sup>214</sup> Graham, *Lawscape* (no 6), 67.

These spatialisations are extremely pointed because Scotland has one of the most concentrated patterns of private ownership in the world.<sup>215</sup> Therefore, an understanding of the spatialisations of ‘use’ and ‘delight’ is aided by an initial discussion in section 3.3.1 regarding this concentration and its roots. The overall analysis in this section 3.3, therefore, provides necessary context to the ways in which the land use change policy measures analysed in chapters 3, 4 and 5 either entrench the ownership model or facilitate new performances which challenge it. In so doing, a picture of the relationship between these policies and the climate emergency becomes clearer.

### 3.3.1 Concentration of ownership

Rural Scotland is geographically variegated in many aspects; though relatively small in size its coastline stretches over 10,000km, containing over 900 offshore islands,<sup>216</sup> with incredible biodiversity.<sup>217</sup> Most of the land mass of Scotland can be classed as rural, yet rural places in Scotland have been very sparsely populated by human inhabitants for centuries. Indeed, Scotland is one of the most sparsely populated countries in Europe,<sup>218</sup> and the only country in the UK where the human population is projected to decline.<sup>219</sup> The sparsity of Scotland’s population can, in part, be explained by the extant pattern of land ownership. Most rural land is owned by very few people, and this state of affairs has persisted for generations.<sup>220</sup> It is estimated that only 433 private individuals and companies own 50% of Scotland’s private rural land, which equates to 0.008% of the population.<sup>221</sup> Recent data shows that that ownership of land is actually becoming more concentrated, despite the implementation of land reform measures aimed at addressing the social impact

<sup>215</sup> LRRG, ‘The Land of Scotland and the Common Good’ (2014) 153 – 160, <[www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2014/05/land-reform-review-group-final-report-land-scotland-common-good/documents/00451087-pdf/00451087-pdf/govscot%3Adocument/00451087.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2014/05/land-reform-review-group-final-report-land-scotland-common-good/documents/00451087-pdf/00451087-pdf/govscot%3Adocument/00451087.pdf)> accessed 15/08/2025.

<sup>216</sup> C Warren and J Glass, *Managing Scotland’s Environment* (2024), 4.

<sup>217</sup> *ibid.* where the authors state that, ‘for its size, Scotland has the most varied geology and natural landscapes of any nation on Earth. The enormous diversity of terrestrial and marine habitats supports some 90,000 species of animals, plants and microbes.’

<sup>218</sup> *ibid.*

<sup>219</sup> Scottish Government, ‘Tackling Scotland’s Population Challenges’ <[www.gov.scot/news/tackling-scotlands-population-challenges-1/#:~:text=Projections%20show%20that%20Scotland's%20population,decline%20over%20the%20next%20decade.](http://www.gov.scot/news/tackling-scotlands-population-challenges-1/#:~:text=Projections%20show%20that%20Scotland's%20population,decline%20over%20the%20next%20decade.)> accessed 02/02/2024.

<sup>220</sup> This will be discussed in more detail in section 3.3.1, below.

<sup>221</sup> LRRG, ‘The Land of Scotland and the Common Good’ (2014) at 159, <[www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2014/05/land-reform-review-group-final-report-land-scotland-common-good/documents/00451087-pdf/00451087-pdf/govscot%3Adocument/00451087.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2014/05/land-reform-review-group-final-report-land-scotland-common-good/documents/00451087-pdf/00451087-pdf/govscot%3Adocument/00451087.pdf)> accessed 26/02/2024. The relevant data has recently been updated: see A Wightman, ‘Who Owns Scotland 2024: a preliminary analysis’ (2024) <[www.andywightman.scot/docs/WOS\\_2024\\_PRELIM\\_v2.pdf](http://www.andywightman.scot/docs/WOS_2024_PRELIM_v2.pdf)> accessed 27/03/2024.

of this concentration since 2003.<sup>222</sup> The origins of this pattern are deep-rooted and complex. For example, Andy Wightman traces as far back as 1124 and the reign of David I in Scotland.<sup>223</sup> The Land Reform Review Group in their 2014 report highlight the period from the 17<sup>th</sup> century through to the latter half of the 19<sup>th</sup> century as evidencing rapid concentration of ownership in rural land.<sup>224</sup> This took place through a number of means, including grants of land from the Crown coupled with Scotland's deep-rooted clan system, but as discussed in section 3.3.2.1 this concentration largely came about through the violent dispossession of inhabitants at the hands of commercial interests. Rural land ownership has remained concentrated due to the strong protection of property rights in Scotland, indeed in a contemporary context it has shifted towards increased corporate ownership.<sup>225</sup>

Scotland's hyper-concentrated land ownership patterns contribute to the creation of profound spatial consequences arising from rural land use decisions, discussed further in sections 3.3.2 and 3.3.3. Indeed, these spatial consequences are not consigned to history; they remain current, with ownership becoming more diffuse, corporatised and 'foreign': absentee owners not resident on the land itself (in contrast to traditional estate owners) have come to own so much land in Scotland.<sup>226</sup> This echoes the recent work of the Scottish Land Commission, a Non-Departmental Government Body tasked with reviewing issues of land ownership and use in Scotland, which found that it is the concentration, rather than scale, of ownership that presents social and environmental problems in a rural Scottish

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<sup>222</sup> A Wightman, 'Who Owns Scotland 2024' (no 221). These land reform measures are largely found in the Land Reform (Scotland) Act 2003 and 2016, and the Community Empowerment (Scotland) Act 2015. A new Land Reform (Scotland) Bill is, at the time of writing, currently making its way through the Scottish Parliament. See chapters 3 and 4 for further discussion of land reform legislation in Scotland.

<sup>223</sup> See A Wightman, *The Poor Had No Lawyers: Who Owns Scotland (And How They Got It)* (2015), 13. Wightman's argument attempts to equate the imposition of feudalism in Scotland with the British colonialization of Australia and its concept of *terra nullius*.

<sup>224</sup> LRRG (no 221), 160, stating that a 'government survey in 1872 found that 90% of Scotland's land area of 7.9 million hectares was owned by 1,380 private land owners.' See also R F Callander, *A Pattern of Landownership in Scotland: With Particular Reference to Aberdeenshire* (1987), 32-33.

<sup>225</sup> This is discussed further in sections 3.3.2, 4.3.2.1 and 4.3.3.1

<sup>226</sup> For example, the largest private landowner in Scotland is Danish billionaire Anders Povlsen, with London-based, US-majority-owned asset management company Gresham House owning the second most private land in Scotland. See A Wightman 'Gresham House is now Scotland's 2<sup>nd</sup> Largest Landowner' (2025) <<https://andywightman.scot/2025/08/gresham-house-is-now-scotlands-2nd-largest-landowner/>> accessed 21/09/2025. Whilst 'absenteeism' is a difficult concept to precisely define (for example does a landowner who resides for two weeks out of every year count as 'absent' or 'foreign'?) it nevertheless poses risks for land use in Scotland at a time when changes are necessary to tackle the problem of emitting land uses. On the issues associated with absentee and foreign ownership in rural Scotland, see J Glass, M Price, C Warren and A Scott, *Lairds, Land and Sustainability: Scottish Perspectives on Upland Management* (2013), 66 – 68.

context.<sup>227</sup> Jessica Shoemaker argues in the context of rural land ownership in the USA, concentration of power through property ownership is problematic because the holding of so much property by one individual tends to beget more property. She states that, '[a]n owner gets all of the gain from the property, which creates incentives to maximise the resource,' even where many of these gains are often randomly generated and outwith the control or efforts of the owner, representing a 'built-in multiplier' wherein those that own property 'get more property without regard to their individual effort...' <sup>228</sup> As a result, property itself fails to offer checks and balances against this concentration of power.<sup>229</sup> This is also true in the Scottish context; the hyper concentration of decision-making power over land in very few individuals, enabled by property law, is a principal factor in the historic and contemporary shaping of land in rural Scotland. Such shaping is attributable to changing attitudes over time towards land as 'use' and 'delight'.

Sections 3.3.2 and 3.3.3, below, highlight in more detail what these attitudes comprise and the consequences they have had for climate change. The sections trace the histories of these attitudes set against the background of the concentration of land ownership detailed in this section, outlining that such attitudes have traditionally been driven by a very exclusive group of individuals from around the 17<sup>th</sup> century as rural land ownership became more concentrated. Those who held land became 'a more unified social and economic class.'<sup>230</sup> This pattern continued throughout the 18<sup>th</sup> and into the 19<sup>th</sup> century, as 'large estates grew larger, and titled families continued to dominate.'<sup>231</sup> Therefore, much of

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<sup>227</sup> The Scottish Land Commission is a creature of statute, created under Part 2 of the Land Reform (Scotland) Act 2016. The Scottish Land Commission has frequently recommended that the concentration of ownership of rural land in Scotland must be addressed in order to tackle the socio-economic consequences stemming from that concentration. See Scottish Land Commission, 'Review of Scale and Concentration of Land Ownership: Report to Scottish Ministers' (2019) <[www.landcommission.gov.scot/downloads/5dd7d77021f04\\_Report-to-Ministers-Scale-and-Concentration-Land-Ownership-FINAL-20190320.pdf](http://www.landcommission.gov.scot/downloads/5dd7d77021f04_Report-to-Ministers-Scale-and-Concentration-Land-Ownership-FINAL-20190320.pdf)> accessed 04/06/2024; 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) <[www.landcommission.gov.scot/downloads/601acfc4ea58a\\_Legislative%20proposals%20to%20address%20the%20impact%20of%20Scotland%E2%80%99s%20concentration%20of%20land%20ownership%20-%20Discussion%20Paper%20Feb%202021.pdf](http://www.landcommission.gov.scot/downloads/601acfc4ea58a_Legislative%20proposals%20to%20address%20the%20impact%20of%20Scotland%E2%80%99s%20concentration%20of%20land%20ownership%20-%20Discussion%20Paper%20Feb%202021.pdf)> accessed 04/06/2024. For a historical tracing of the concentrated pattern of ownership in Scotland, see R A Callander (no 224) and A Wightman, *The Poor Had No Lawyers* (no 223).

<sup>228</sup> Shoemaker, 'Re-Placing Property' (no 49), 876 – 877, referencing T W Merrill, 'The Property Strategy' (2012) 160 *University of Pennsylvania Law Review* 2061, 2093-4.

<sup>229</sup> *ibid.*

<sup>230</sup> G S Alexander, 'The Sporting Life: Democratic Culture and the Historical Origins of the Scottish Right to Roam' (2016) 2016(2) *University of Illinois Law Review* 321, 326 - 327. The rise of the so-called 'Great Landowners' in the second half of the 17<sup>th</sup> century is of note in this regard. This title refers to an exclusive group (one estimate places the total number at less than 5,000) of men who held ownership rights over the greatest proportion of rural land in Scotland.

<sup>231</sup> Alexander, 'The Sporting Life' (no.230), 330, referencing Callander (no 224), 51.

the history of rural spaces in Scotland from the 17<sup>th</sup> century onwards is defined by the formation and consolidation of power in very few people with very particular attitudes towards place. However, as both sections explain, contemporary attitudes towards land use are no longer consolidated solely in the ‘traditional’ landowner but instead have become both increasingly corporatised and spread out to new interest group owners such as conservation charities. However, the sections detail, in this regard, that not only does the problem of concentrated ownership still persist, but that the attitudes remain wedded to the ownership model, in particular the nature/culture dualism present within that model, sustaining land uses that contribute to, or inhibit meaningful mitigation action against, climate change.

### 3.3.2 Land as ‘use’

‘...the concept of dephysicalised property did not emerge as a lofty theory but as a desire to bring about change to land use and ownership in a particular time and place and for particular socioeconomic reasons.’<sup>232</sup>

‘...but our own incontestable naturalness confines us to personal mortality, evolutionary fragility and total dependence on the natural systems of the globe.’<sup>233</sup>

Historian T C Smout traces the ways in which rural land in Scotland has been spatialised as ‘use’ in the ways in which people have interacted with their environments over time.<sup>234</sup> This vision of land prioritises instrumentality; a view of land as either ‘developed’ or ‘undeveloped’. This section traces the ways in which this spatialisation became so dominant in Scotland, and how it has evolved alongside property at a time of increasing concentration of ownership, highlighting the ways in which land use in Scotland has contributed, and continues to contribute, to the climate emergency.

Since the 17<sup>th</sup> century, notions of ‘use’ increasingly dominated attitudes to land in Scotland. These attitudes were largely shared among landowners of the time. Because so few landowners had come to own land in Scotland, such attitudes are extremely important in understanding the land uses that arose from these attitudes. To explain, the concentration of ownership in rural Scotland throughout the 17<sup>th</sup> and 18<sup>th</sup> centuries coincided with the

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<sup>232</sup> N Graham, ‘The Mythology of Environmental Markets’ in D Grinlinton and P Taylor (Eds), *Property Rights and Sustainability* (2011) at 153.

<sup>233</sup> Smout (no 210), 2.

<sup>234</sup> *ibid.*, 7 – 36.

early stages of the Scottish Enlightenment.<sup>235</sup> Crucially, the ‘rationalism’ of Enlightenment thinking fundamentally altered people’s relationships with their surroundings, wherein advances in scientific method led to an understanding that humans could not only understand the world in scientific terms but, consequential to that understanding, *control* the environment.<sup>236</sup> This rationalism brought about a shift towards increasingly abstract, extractive and individual ways of thinking about place. As Graham argues, this rationalism places ‘people in an imaged centre, their environment literally surrounds and is peripheral to them.’<sup>237</sup> This was certainly true of the Scottish Enlightenment, which was characterised by scientific method and commitment to practical thinking about land, driven by the principal values of improvement and economic benefit of the owner.<sup>238</sup> Rural spaces began to be viewed in terms of extractive use value; not as places imbued with local meaning and spatial interconnectedness but rather instead variously for industrial agriculture, mineral extraction or for the production of raw materials. Land became subject to the belief that it could and should be altered or ‘improved’ by systematic anthropogenic intervention. Accompanying this shift towards the rationalism of Enlightenment thinking were advancements to agrotechnology and a desire by the landowning classes to invest further in land.<sup>239</sup> This meant that rural Scotland quickly became a primary source of raw materials for use in industry, as well as a key investment strategy.<sup>240</sup> ‘Improvements’ to the land were systematically undertaken to these ends. These anthropogenic changes to the land became widespread for the purposes of large-scale agriculture, pasturage and industrial processes.<sup>241</sup> Smout explains that the Scottish Enlightenment enabled in landowners,

‘[a] resolve not to accept nature as an unalterable given...but as an enormous unrealised opportunity, the material from which man could fashion his worldly improvement...In Scotland, the phrase ‘improver’ came to be associated with a

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<sup>235</sup> Scotland experienced its own eponymously named ‘Scottish Enlightenment’ from around 1730 through to 1820, with notable contributors including the economist Adam Smith and scientist Joseph Black.

<sup>236</sup> See A C Chitnis, *The Scottish Enlightenment: A Social History* (1979).

<sup>237</sup> N Graham (no 6), 4.

<sup>238</sup> See Chitnis (no 236), 7 – 36.

<sup>239</sup> B Bonnyman, ‘Agricultural Enlightenment, Land Ownership and Scotland’s Culture of Improvement, 1700-1820’ in M M Combe, J Glass and A Tindley, *Land Reform in Scotland: History, Law and Policy* (2020), 39 where he states that widescale changes to rural land in Scotland in the latter half of the 18<sup>th</sup> century ‘were underpinned by a distinctive culture of improvement, strongly influenced in outlook and practice by the attitudes, ideas and values of the Scottish Enlightenment.’

<sup>240</sup> *Ibid.*, 40.

<sup>241</sup> For more detailed analysis of the social and ecological impacts of the Improvement movement, see Smout (no 210), 19 – 25; T M Devine, *Clearance and Improvement: Land, Power and People in Scotland 1700-1900* (2006); J Hunter, *The Making of the Crofting Community* (2018); and Bonnyman (no 239).

whole new attitude to natural resources, one which was searching and critical...'<sup>242</sup>

He exemplifies the point with reference to changing attitudes to peat bogs, wherein attitudes had shifted from the 17<sup>th</sup> century – most viewing bogs as a ‘bounty of a merciful providence...seldom is there mention of any possible change in land use.’<sup>243</sup> However, as Improvement thinking took hold in the 18<sup>th</sup> and 19<sup>th</sup> centuries, land as ‘use’ became embedded: ‘to the improvers...it was a scandal that... ‘innumerable millions of acres lie as a useless waste, nay, a nuisance to these nations.’<sup>244</sup> Indeed, it has been argued that it was the very nature of the physical spaces of rural Scotland which drove the ‘ingenuity’ of the Scottish Enlightenment. Scottish historian Roger Emerson argues that the Scottish Enlightenment must be contextualised through Scotland’s geography, which ‘made Scots poor but which also endowed them with the means of improvement and posed questions which the enlightened studied and sought to answer.’<sup>245</sup> As changes to geography took place through increasing anthropogenic intervention the economic bounty that followed legitimised and entrenched these physical changes

This intervention was only made possible through property.<sup>246</sup> As the doctrine of law became the subject of greater study and practice throughout this period of time from the 17<sup>th</sup> century, the rationalism of law justified the enclosure of land and the extractive practices of ‘use’ to take place on that land. As Nicholas Blomley states, the ‘ways in which landscapes are visualised and represented are also caught up in the politics of property.’<sup>247</sup> These are ‘ways of seeing’ which were emerging from new capitalist property relations. The increasingly entrenched view of land as nothing more than the ‘thing’ of the property relation – for the exclusive use of the owner – rendered invisible not only ‘those who produced the land’<sup>248</sup> but also the ecological realities of the land itself. Land became the subject of Cartesian mapping techniques, enclosing land as distinctly private through the drawing of straight lines across areas of land previously mixed in their use and make-

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<sup>242</sup> Smout (no 210), 20

<sup>243</sup> *ibid.*

<sup>244</sup> *ibid.*

<sup>245</sup> R L Emerson and M G Spencer, ‘Several Contexts of the Scottish Enlightenment’ in A Broadie and C Smith (Eds), *The Cambridge Companion to the Scottish Enlightenment* (2019), 9. As Emerson explains, less than 10% of Scotland’s land was arable at this time, with more or less 13% suitable for grazing. Therefore, as Emerson argues, the Scottish Enlightenment was fuelled by necessity: ‘Agricultural improvement, to produce both more food and the materials for industries...was a concern which was recognised in the seventeenth century and grew in importance through the eighteenth century.’

<sup>246</sup> Devine (no 241), 8.

<sup>247</sup> Blomley, *Unsettling the City* (no 71), 54.

<sup>248</sup> *ibid.*

up.<sup>249</sup> As this form of power was so concentrated, these outcomes were widespread across rural Scotland, deepening the power relations of rural Scotland. The ‘Great Landowners’, therefore, enjoyed ‘unrivalled dominance of Scottish society.’<sup>250</sup> As Bonnyman states, a distinctive element of the Improvements was ‘the leading role played by [the] landed classes...this was a revolution that was instigated, funded and implemented from above.’<sup>251</sup> Geographer Fiona Mackenzie states that this kind of ‘imperial project’ was constructed through the ‘political economic order, together with the accompanying normalising discourses of ‘betterment’.’<sup>252</sup> This paved the way for land as ‘use’.

Discourses of land as ‘use’ thus gained traction through a cultural embedding of Enlightenment ideas of ‘improvement’ and ‘development’, enabled not only by the powers bestowed by the right of ownership, but because so few people owned so much rural land. Consequent changes were made to physical spaces, often with long-lasting ecological effects. These changes to physical spaces also shaped the social aspects of these spaces – rendering place as abstract space. Smout traces the shift in descriptions of land from various ‘improvers’ during this time, for example referencing Sir John Sinclair, a British politician and ‘improver’, in the 1790s, who observed that,

‘[of] the land which at present lies waste, a considerable extent may be brought into a state of cultivation. The meadows, in particular...might be made the most productive ground in the parish. Activity has already converted part of these into the most luxuriant corn-fields, but to the improvement of the whole *an obstacle is opposed...*’<sup>253</sup>

The obstacle in question, Smout explains, was four watermills ‘whose proprietors feared losing their power.’<sup>254</sup> In other words, the scale of these new improvement projects led not only to community displacement but the replacement of local knowledges and uses of land informed by these knowledges with industrial-scale projects. People were the engines of these projects; as Smout explains with the example of peat bogs, the processes through

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<sup>249</sup> It is of note that the register of land titles in Scotland changed from a previous ‘deeds-based’ register, whereby the title was comprised of the various deeds that related to the title, for example feu charters, servitudes, burdens, and so on. Together, this bundle of deeds comprised the title. Following the introduction of the Land Registration (Scotland) Act 1979, the system then changed (though not retrospectively) so that, going forward, all newly registered land titles were to be *map-based*. A second major overhaul of the system came with the introduction of the Land Registration (Scotland) Act 2012, which continued the map-based system. Now, almost all titles in Scotland are delineated on the basis of the cadastral map, rather than by the deeds comprising that title.

<sup>250</sup> Bonnyman (no 239), 41.

<sup>251</sup> *ibid.*

<sup>252</sup> Mackenzie, *Places of Possibility* (no 107), 20

<sup>253</sup> Smout (no 210) 20-21 (emphasis added).

<sup>254</sup> *ibid.*, 20

which these bogs were drained necessarily involved human labour, for which ‘the poor were put to work.’<sup>255</sup> Smout references a writing from the early 19<sup>th</sup> century, which states, ‘that several hundreds of ignorant and indolent Highlanders were converted into active, industrious and virtuous cultivators, and many hundreds of acres of the least possible value rendered equal to the best land in Scotland are matters of the highest national interest...’<sup>256</sup> Therefore, the drainage of peat bogs for the purposes of improvement was not just ecologically destructive – leading to massive amounts of CO<sub>2</sub> leakage which continues today, for example – but was an active part of the destruction of local people-place connections and practices.

In the above ways the relationality of property and space is exemplified in the context of widespread socio-political changes. The Scottish Enlightenment fanned the flames of a new anthropocentrism; the increased study of law, emboldened by Enlightenment thinking, viewed ownership as a tool to enact physical changes to land in Scotland, which changed the social aspects of spaces in Scotland for generations. As legal title was crystallising in fewer individuals, these individuals were granted more power than ever before over land. Consequently, the exercise of this legal power led to rapid changes to both physical and social spaces. Spaces previously characterised by a mix of uses, including many communal uses for local subsistence, were enclosed – rendered private – at scale, largely for individual profit and gain.<sup>257</sup> A common form of land tenure pre-enclosure – commonties – provides a salient example. Commonties were a form of shared community property, where extensive use rights existed, though not ‘genuine’ commons strictly speaking.<sup>258</sup> Yet, as attitudes of ‘use’ took hold, such commonties began to be viewed as economically inert spaces. The commonties were thus subjected to private enclosure such that none exist

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<sup>255</sup> *ibid.*

<sup>256</sup> *ibid.*, 21. Many of these projects were to facilitate large-scale cotton mills, which were of course enabled through the creation and perpetuation of the transatlantic slave trade.

<sup>257</sup> T M Devine (no 246), 46 – 47, stating that the aim of Improvement was ‘nothing less than to complete the basic reconstruction of economy and society...Enclosure became almost a craze, not simply because of interest in estate ornamentation...but because it was reckoned that enclosure could double or even treble the rental...’. See also G Alexander (no 230), 330: ‘[t]he sheep-farmers who replaced the ousted traditional small farmers were motivated by...profits. To that end, they introduced new so-called ‘improvements’ and introduced new practices, such as large sheep walks, that required fundamental changes in highland agrarian economy and society...The result was a demolition of an entire way of life...’ Enclosure also encompassed the division and privatisation of ‘commonties’, a form of shared community tenure once popular in Scotland. On the private enclosure of commonties see A Wightman (no 223), 66 – 77. Such enclosures were facilitated by law. See T M Devine (no 246), 104: ‘[i]n 1661, 1669, 1685 and 1695 statutes provided for the division of most commonties (rough pasture possessed jointly by different proprietors), lands held in proprietary runrig (the system by which separate areas of fragmented land were owned by different proprietors) and for the erection of fences at the boundaries of estates.’

<sup>258</sup> A Wightman, *The Poor Had No Lawyers* (no 223), 72.

today.<sup>259</sup> Law was the tool through which this spatial change was enacted: the Commonties Act of 1695 provided the means of enclosure, division and transfer to individual owners.<sup>260</sup> According to historian Tom Devine, this ‘altered the organisation, function and purposes of land from one in which several members of a community had rights of use to a new condition in which single occupants had complete control.’<sup>261</sup> Further, commonties had failed to be recognised as a form of legal tenure by the institutional writers, leaving them vulnerable to enclosure through legal routes – modern private ownership – which *had* attained a level of authority through its careful delineation by the institutional writers. As Andy Wightman states, ‘it was only when [commonties] came to be divided that their boundaries were ascertained.’<sup>262</sup> In this way, ‘place-derived interests’ were replaced with individual, economically-derived interests.<sup>263</sup>

### 3.3.2.1 *The Clearances*

One potent example of the historic (and ongoing) relationality of law and space in the context of land as ‘use’ in Scotland is the Highland Clearances. The history of the Clearances has been covered in detail in various works.<sup>264</sup> Therefore, a full account is not offered here. Yet it suffices to outline the historical context, particularly when considering the consequences stemming from private ownership of land. Broadly speaking, the Clearances refer to the forced displacement of entire communities across rural Scotland, but particularly in the Highlands of Scotland,<sup>265</sup> through the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>266</sup> This

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<sup>259</sup> *ibid.* Wightman partly attributes the sparsity of human population in the Highlands of Scotland to this Act: ‘[w]here a landowner owned the whole of a parish, commonties vanished, since, by definition, there were no landowners to hold anything in common.’

<sup>260</sup> See B Bonnyman (no 239), 54: ‘[t]hrough the powers of the Commonty Act, some half a million acres of land were transferred from multiple to single ownership...’ See also A Wightman, *The Poor Had No Lawyers* (no 223), 75: [the Commonty Act] led to the division and disappearance from the map of Scotland of over half a million acres of common land...’

<sup>261</sup> Devine (no 241), 130.

<sup>262</sup> A Wightman, *The Poor Had No Lawyers* (no 223), 74.

<sup>263</sup> Byer, *Placing Property* (no 42), 63. Byer writes from a general post-colonial perspective, with a focus on common law jurisdictions. However, see also Bonnyman (no 239), 43: ‘[m]ost accounts of the Scottish landed classes’ zeal to improve their estates have understandably tended to focus on self-interest, with the demand for higher rents and returns the overriding factor. From this perspective, traditional conceptions of the landholding were quickly replaced by more commercial attitudes, with the landed estate becoming little more than a money-making enterprise.’

<sup>264</sup> See E Richards, *A History of the Highland Clearances* (1985); Devine (no 241); T M Devine, *The Scottish Clearances: A History of the Dispossessed 1600-1900* (2018).

<sup>265</sup> The Scottish Highlands is a large area of Scotland, generally defined in both cultural and geographical terms. This thesis does not attempt to accept any one definition over another, except as to accept the term ‘Highland Clearances’ as generally relating culturally and geographically to land and its inhabitants generally in the northern half of Scotland and the inhabited islands of Scotland.

<sup>266</sup> T M Devine, *The Scottish Clearances: A History of the Dispossessed 1600-1900* (2018), 353: ‘Clearance is an omnibus term with a whole range of implications. The forcing out of people by factors, sheriff officers and police in the Highlands is the most notorious and best documented in press sources of the time and has

displacement was carried out almost entirely by private landowners to better facilitate improvements and to make way for large-scale sheep pastures as wool became more profitable. As ethnologist Mairi McFadyen states, while ‘landlords perceived this as ‘improvement’, the Gaels called it *na Fuadaichean*, the Clearances.’<sup>267</sup> Whilst recognising the simultaneous role played by Scotland, as part of Britain, in the colonial violences of the British Empire, some have argued that the Clearances were an example of ‘internal colonialism’,<sup>268</sup> not only pioneering ‘patterns of colonial conquest elsewhere in the British Empire,’<sup>269</sup> but indeed oftentimes funded by the capital generated through the colonial pursuits of the landowning class.<sup>270</sup>

This very brief insight risks oversimplifying what is a complex history and geography. Nevertheless, the fundamental socio-ecological consequences of this spatial shift in rural places remain relevant in Scotland today. Put shortly, the Clearances ‘severed a deep connection to the land and paved the way for industrialisation and colonisation of the modern world.’<sup>271</sup> Attitudes towards rural land as ‘productive’ or ‘unproductive’ land for grazing and agriculture were, in many ways, hostile or indifferent towards the existing human and non-human communities present in these places; to effectively implement the changes deemed necessary for ‘productive’ land many human communities were forcibly removed. As Gregory Alexander argues, ‘*gesellschaft* replaced *gemeinschaft* in the Highlands, as an individualistic, profit-maximising mentality took hold.’<sup>272</sup> Further compounding the violence of dispossession, Scotland’s industrial revolution occurred at a faster, more extreme pace than in England as industrialist and improver landowners in Scotland sought to ‘catch up’ with their southern counterparts in England: historian Rosalind Mitchison states that ‘Scotland packed into about thirty years of crowded development from 1750 to 1780 the economic growth that in England had spread itself

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by far the highest profile in popular understanding of clearance. However, a myriad set of influences and pressures made for loss of land in addition to these familiar and dramatic events.’

<sup>267</sup> M McFadyen, ‘A Fragile Correspondence’ (2023) <[www.mairimcfadyen.scot/fragile-correspondence/2023/essay](http://www.mairimcfadyen.scot/fragile-correspondence/2023/essay)> accessed 03/03/2024.

<sup>268</sup> M Hechter, *Internal Colonialism: The Celtic Fringe in British National Development, 1536-1966*, (1999), 47 – 73. See also I Mackinnon, ‘Colonialism and the Highland Clearances’ (2017) 8(1) *Northern Scotland* 22 – 48.

<sup>269</sup> A McIntosh, A Wightman, D Morgan ‘The Scottish Highlands in Colonial and Psychodynamic Perspective’ (1994) 27(3) *Interculture* 1, 4. The authors note, for example, the role of the Highland Regiments as part of the British Army in building the British Empire. Although, the role of the Highland soldier in the British Army it, itself, a topic which requires nuance and a sensitive approach. For example, see A Mackillop, *More Fruitful than the Soil: Army, Empire and the Scottish Highlands, 1715-1815* (2000), particularly chapter 3, where the effects of army recruitment in areas of the Highlands susceptible to the Clearances are studied.

<sup>270</sup> E Richards, *The Highland Clearances* (2008), 362.

<sup>271</sup> McFadyen (no 267).

<sup>272</sup> G Alexander (no 230), 330.

over two centuries.<sup>273</sup> The social and environmental changes were, therefore, profound and sudden. To this day, large sections of the Highlands remain devoid of people, where prior to the Clearances whole communities existed. The removal of communities from historically inhabited lands contributed to cultural losses: for example, the use of a shared language – Gaelic – reduced dramatically: approximately 58,000 people now speak Gaelic in Scotland, just over 1% of the population,<sup>274</sup> compared with around 231,000 in 1881, just over 6% of the population at the time.<sup>275</sup> Ecologically, large-scale pasturing of sheep, following the draining of peatlands for these purposes ‘altered the micro-ecology of every field [in Scotland],<sup>276</sup> changing previously species-rich landscapes to species-poor.’<sup>277</sup>

The spatial picture of rural Scotland during the Scottish Enlightenment as a place of ‘use’ was, therefore, realised more fully through the Clearances. Property law enabled high concentration of land ownership in very few individuals, who were themselves influenced by the politics of the Scottish Enlightenment. Ownership was – according to the growing doctrinal consensus – dephysicalised from land. Land was, therefore, able to be utilised at scale as a necessary tool for economic progress. Enlightenment thinking was thus ‘underpinned by commitments to strong property rights.’<sup>278</sup> In a Scottish context, one contemporary authority cites that in ‘no country in Europe [were] the rights of proprietors so well defined and so carefully protected.’<sup>279</sup> Therefore, attitudes towards land as ‘use’ and the ensuing changes to social and physical spaces were enabled and legitimised through law. The Clearances were one example of a normalising process; an eventually successful performance in a changing socio-political paradigm. The Clearances did not happen overnight, instead being enacted over many decades. Thus, the violences of

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<sup>273</sup> R Mitchison, *A History of Scotland* (1970), 345.

<sup>274</sup> Scottish Government, ‘Gaelic Language Plan 2022-2027’ <[www.gov.scot/publications/scottish-governments-gaelic-language-plan-2022-2027/](http://www.gov.scot/publications/scottish-governments-gaelic-language-plan-2022-2027/)> accessed 04/06/2024. Literary works from the time are an excellent source to explore cultural responses to land use change, the Clearances in particular. See E A Cameron, ‘Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880-1999’ in M M Combe, J Glass and A Tindley, *Land Reform in Scotland: History, law and policy* (2020), 100-102.

<sup>275</sup> C W J Withers, *Gaelic in Scotland, 1698 – 1981: The Geographical History of a Language* (2021), 10.

<sup>276</sup> Smout (no 210), 97.

<sup>277</sup> Prior to the Clearances, pasturing was generally mixed and small-scale. Throughout the Clearances land use became focused on scaling up, particularly for sheep pasture. This mono-grazing led, over time, to species-poor grassland dominating much of the landscape, causing the deterioration of hill grazings across much of rural Scotland. 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* (2004); A Mather, ‘The Environmental Impact of Sheep Farming in the Scottish Highlands’ in T C Smout (ed) *Scotland Since Prehistory: Natural Change and Human Impact*, 81 – 85.

<sup>278</sup> L Fox O’Mahoney ‘Property, Sharing and Identity: Applying André van der Walt’s Theory of Property and Social Justice in Northern Ireland’ in G Muller *et al* (Eds), *Transformative Property Law: Festschrift in Honour of AJ Van der Walt* (2018), 175.

<sup>279</sup> T M Devine (no.246), 42.

removal and the destruction of landscapes were normalised. If ownership is disconnected from land, without any obligation towards other human or non-human communities, the results of this dephysicalisation on social and physical spaces are, to an extent, unsurprising. But they are no less violent; merely routinised. Property is dependent on spatial interactions to give meaning to its central concepts,<sup>280</sup> thus when everyday life as part of a shifted alongside wider socio-political changes over this time, the ownership model was able to become deeply embedded because its core tropes were increasingly bound up with the politics of land.

The Clearances thus aid in an understanding of the relationality of law and space. Changes in society – increased industrialisation and Enlightenment thinking, and an increasing instrumental view of land – necessitated spatial changes. These spatial changes were enabled by concomitant legal changes, particularly through a property paradigm increasingly taken by the ownership model. Analysis of the Clearances in this context exemplifies that property has been an active constitutive force within this relationship. It is not a neutral regulator of space but an active, violent force in its production. An increasingly dephysicalised view of property enabled the conceptual severing of land from its social and ecological relations, transforming land previously used for multiple purposes by multiple people within a community to a tool for economic progress – land as ‘use’. This production of land as use directly facilitated the spatial violences of the Clearances – displacement and ecological degradation – normalised and protected by a legal framework which increasingly prioritised an individualistic, profit-seeking mentality. The result was the legal production of a new, impoverished spatial reality: landscapes emptied of people, culture and biodiversity and replaced by monocultural sheep pastures. This routinised violence shows how property does not just describe space but actively creates it.

Additionally, these spatial changes required *legal* changes; spatiality is what gives meaning to law. This can be seen in legal reactions such as the Division of Commonities Act 1695, which effectively denied one form of common tenure in favour of private ownership, contributing to a growing homogenisation of property law – the ownership model. The next section will outline a specific legal change in response to spatial changes – conventional separate tenements – which enabled the further commodification of natural attributes through propertisation, leading to profound climatic consequences.

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<sup>280</sup> Blomley, ‘Performing Property’ (no 68).

### 3.3.2.2 Minerals, 'use' and ownership – 'conventional separate tenements'

The relationality of property and space can be seen during the period from the 17<sup>th</sup> through to 19<sup>th</sup> centuries through changes to law in response to spatial changes. Property law rules on separate tenements in Scotland, particularly conventional separate tenements, provide an interesting example of how the tropes of the ownership model have manifested in property through changing spatial and political arrangements, especially in the manner in which they arose to protect the growing liberal economic values. In Scots law, the owner of land owns that land *a coelo usque ad centrum* – from the heavens to the centre of the earth. Ownership is, therefore, conceptualised vertically. However, a separate tenement is 'any heritable property which is owned separately from the *solum* of the ground.'<sup>281</sup> Conventional separate tenements can, therefore, be legally separated by the owner of the *solum* and transferred or leased. They can be imagined as existing on a horizontal, rather than vertical, plane. Minerals – such as coal – are one of the main conventional separate tenements.<sup>282</sup> Such legal rules were developed throughout the 17<sup>th</sup> and 18<sup>th</sup> centuries as scientific methods for the discovery and utilisation of such minerals was growing at a rapid pace. This separation of constituent physical aspects of land and their packaging into distributable titles in a manner incongruent with the core doctrinal elements of ownership in Scots law highlights the ways in which spatial changes influenced changes in law and vice versa, with severe consequences for Earth systems.

The case of *Graham v Duke of Hamilton* is informative in this regard.<sup>283</sup> The Duke of Hamilton had reserved the minerals, as a conventional separate tenement, under the *solum* of the land,<sup>284</sup> and was attempting to transfer minerals mined from adjoining lands via underground passageways underneath the *solum* of that land. The judgment of Lord Deas gives an insight into the reasoning behind minerals becoming conceived as conventional separate tenements:

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<sup>281</sup> K G C Reid, 'Landownership' *The Laws of Scotland: Stair Memorial Encyclopaedia* (vol 18, 1996), paragraph 207.

<sup>282</sup> *ibid.*, 212. Minerals are generally defined by as those minerals not falling within a certain class which is reserved to the state. These publicly owned mineral rights include gold and silver (governed by the oldest Act still in force in Scotland: The Royal Mines Act 1424), oil and gas (The Petroleum Act 1998), and coal (since 1942, when the British Government nationalised coal reserves, then privatising the coal industry through the Coal Industry Act 1994).

<sup>283</sup> *Graham v Duke of Hamilton* (1869) 7 M 976.

<sup>284</sup> A 'reservation' in this regard refers to the situation where a landowner (or feuar, in this case) transfers (or feus) land to another whilst 'reserving' the ownership of a certain aspect for themselves, in this case the minerals.

‘...the question for us is, what use can the Duke make of his right of property in his coal estate...? Now, every man can make what use he likes of his property, provided he does not do it *in æmulationem* of his neighbour. He has the same right to make what use he thinks proper of a property in coal as of a property in land.’<sup>285</sup>

In the same judgment, Lord Cowan states that the ‘natural adjunct’ of the right of ownership reserved by the Duke of Hamilton to the minerals upon the sale of the land above the *solum* was, ‘[e]very use of the subject...to enable the proprietor of the coal and limestone to win those materials, and make them of profitable avail...’<sup>286</sup> This case confirmed the then-disputed assertion that a grant or reservation of minerals under the surface is not an incorporeal right to extract minerals but represents the transfer or retention of ownership in the stratum of the Earth itself. Therefore, it is a ‘natural adjunct’ of that right to be able to use that thing. Coal, therefore, should be extracted for profit *because* it is subject to the right of ownership.

As Kenneth Reid explains, conventional separate tenements arose ‘pragmatically, in response to...socio-economic factors, namely the presence in the soil of large deposits of minerals...’<sup>287</sup> These socio-economic factors included the changes brought about by the Industrial Revolution: as it was taking hold in Scotland, coal became increasingly central to industrial processes – especially those important to Scotland’s industrial progress such as shipbuilding.<sup>288</sup> Property law responded in turn, enabling the further separation of the solid, liquid and gaseous parts of landscapes and the extraction of these parts ‘from their integrated ecological networks.’<sup>289</sup> Coal, as a naturally-occurring, Earth bound attribute, was designated as a ‘mineral’ in law, allowing for – and normalising – its increased extraction from the Earth and burning as a ‘fossil fuel’. As explained in section 3.2, Scots law does not recognise property as a bundle of rights – ownership is unititular. Therefore, this should make such doctrinal innovations as ‘conventional separate tenements’ difficult to justify.<sup>290</sup> Not so; Kenneth Reid praises the ‘pragmatism’ of the courts in this regard. Doctrine should have yielded different results, inhibiting the separation of the Earth’s strata, but notwithstanding this theoretical difficulty property law was made to fit the

<sup>285</sup> *Graham v Duke of Hamilton* (1869) 7 M 976, 982 – 983, per Lord Deas.

<sup>286</sup> *Graham v Duke of Hamilton* (1865) 7 M 976, 980, per Lord Cowan.

<sup>287</sup> K G C Reid, ‘Landownership’ *The Laws of Scotland: Stair Memorial Encyclopaedia* (vol 18, 1996), 212.

<sup>288</sup> See N Davidson, *The Origins of Scottish Nationhood* (2000), 171: ‘[h]eavy industry – pig iron production, and consequently steamship building, railway construction and the increased demand for coal – became central to the Scottish economy...in the two decades following 1830.’

<sup>289</sup> Graham and Shoemaker, ‘Power Across Rural Landscapes’ (no 134), 429.

<sup>290</sup> K G C Reid, ‘Landownership’ *The Laws of Scotland: Stair Memorial Encyclopaedia* (vol 18, 1996), 212.

changing socio-political landscape. In other words, as society was finding new value in extracting goods from land (in this instance, minerals) property law was adapted to facilitate this land use change, introducing a novel concept of conventional separate tenements. Such legal innovations were made at a time when knowledge about the climatic effects of burning coal were not known. Yet, as knowledge has developed and wider attitudes have changed towards the extraction and burning of coal, the legal separation of such natural attributes remains uncontroversial and unchallenged. Indeed, it is a continuing practice, as will be highlighted in chapter 4. This highlights the strength and, in a performative setting, the ‘success’<sup>291</sup> of the ownership model in a wider political system which has become dependent on the continued extraction of natural attributes from land.

Mineral ownership, therefore, gives an insight into the cyclical co-construction of law and space over time in Scotland, the increasing role of the ownership model in this relationship, and the consequences of this for the Earth’s climate. The changing socio-political landscape to one of extraction necessitated facilitative changes in the law – even where these were against the grain of conventional legal doctrine. In this regard, these legal changes were enabled because they represented a successful performance in the context of the growth of a capitalist system and industrial processes, allowing the ownership model to embed further in the property paradigm. In turn, these legal changes enabled and normalised further instrumental processes of extraction, as more and more coal was removed from the Earth and burned for industrial use, sending massive amounts of CO<sub>2</sub> into the Earth’s atmosphere.<sup>292</sup>

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<sup>291</sup> Blomley, ‘Performing Property’ (no 68), 45.

<sup>292</sup> It is also worthy of note that the spatial effects of conventional separate tenements were not just physical – they were also social. Cases like *Graham v Duke of Hamilton* confirmed that the working of the coal was a private matter (though this later changed following the nationalisation of the coal industry in 1946 following the Coal Industry Nationalisation Act 1946, and its re-privatisation in 1994) for the wealth maximisation of the individual owner. In this regard, what is visible is a *further* concentration of ownership in those who already owned the land – the separation of minerals as a new object of ownership enabled landowners to reserve these rights even where the surface of the land was sold or feued. In the case cited above, the defender (and owner of the minerals) was the Duke of Hamilton, William Alexander Louis Stephen Douglas-Hamilton, who owned at that time around 157,000 acres of land. Thus, the separating of the layers of strata of Earth into packageable legal titles not only enabled the destructive mining and quarrying of minerals, but in a Scottish context enabled the further concentration of ownership not just in land but in these separated ‘tenements’, also. This conferred greater economic capabilities in a class of people already bestowed with great power.

### 3.3.3 Land as ‘delight’

‘Conservation policy and practice still tend to operate as if human culture and other-than-human nature are separate and separable realms...’<sup>293</sup>

Land as ‘use’ is perhaps the clearest example of the prevalence of the ownership model in the property-space nexus in Scotland. However, as land was seen by the very few of those who owned it as a place of ‘use’, so too were ideas of ‘delight’ beginning to enter public consciousness. These notions of delight highlight the entrenching of the ownership model in ways more obfuscated but no less fundamental than those of ‘use’ and indeed continue to foster land use which can inhibit meaningful land use change to combat the climate emergency. Smout explains that, in the 17<sup>th</sup> century, ‘use and delight were very difficult to separate. By the end of the 18<sup>th</sup> century, they occupied different spheres in the mind. By the 20<sup>th</sup>, they were in frequent conflict.’<sup>294</sup> Delight, as an attitude towards rural land in Scotland, is intimately bound up with the Romantics movement of the late 18<sup>th</sup> to 19<sup>th</sup> centuries:<sup>295</sup> Smout states that if ‘Improvement is about maximising use ‘for man’ [then] romance is about defining as delightful that which in economic terms seems of least use...the wild, the barren...’<sup>296</sup> Therefore, rural land increasingly became the site of sporting estates for hunting, and of newly arising conservation practices. The increase in both the concentration of ownership and in the sparsity of human communities allowed for a new spatial characteristic of value – the Scottish ‘wilderness’.

#### 3.3.3.1 ‘Delight’ as the other side of the same coin as ‘use’

Although Smout categorises ‘delight’ as being in frequent tension with ‘use’, attitudes of delight were, and remain, steeped in the nature/culture dualism. Whilst the two attitudes may conflict, this is reflective of a tension in anthropocentric values, how to ‘reconcile the physical requirements of civilisation with the new feelings and values which that same civilisation has generated...’<sup>297</sup> Yet, as this section argues, they are both two sides of the same coin.

<sup>293</sup> C Warren and J Glass (no 317), 389-390.

<sup>294</sup> Smout (no 210), 18.

<sup>295</sup> For example, in the famous Sir Walter Scott poem *Lord of the Isles*, Loch Coruisk on Skye is the place where, ‘the proud Queen of Wilderness hath placed...her lonely throne. Smout (no 210), 24, referencing Sir Walter Scott, *Lord of the Isles*, Canto 4, lines 3-4.

<sup>296</sup> *ibid.*, 24.

<sup>297</sup> Warren and Glass, *Managing Scotland’s Environment* (2024), 228.

The idea of a ‘wild’ rural Scotland is a ‘normatively loaded spatial framework.’<sup>298</sup> It has played a strong role in maintaining anthropocentric land uses; othering rural spaces as ‘out there’ and separate from human culture. This works to entrench the tropes of the ownership model, even where the land use is perceived to be sustainable and climate friendly. Like ‘use’, ‘delight’ has a homogenising effect; spatialising rural places in Scotland as static and people-less. It sidesteps the pre-existing social and ecological conditions necessary for ‘wild’ land in the first place in Scotland; primarily those discussed above including Improvements and Clearances. Therefore, though many rural areas are currently uninhabited by humans, to describe any part of Scotland as being truly ‘wild’ does not tell the full story.<sup>299</sup> The pejorative term ‘Balmoralisation’ is a useful critique of notions of delight in this regard. This refers to growing representations of rural Scotland in the 19<sup>th</sup> century, inspired by the enjoyment Queen Victoria took from the Balmoral estate (purchased by Prince Albert in 1852) as wild. Related imagery literally paints a picture of rural place in Scotland as how it *should* look. Indeed, Balmoral ‘transcend[s] its own locality.’<sup>300</sup> In so doing, such notions speak to a powerful spatialisation of such places: empty of people, and those that do exist are either those engaged in sporting activity like grouse shooting, or those performing some narrowly-constructed entertainment activity – usually bagpiping. Romantic notions of Scotland’s ‘wild’ land took hold in the landed classes. For example, in Landseer’s famous painting ‘The Monarch of the Glen’, rural Scotland is represented predominantly by a stag in amongst an isolated, atmospheric and, importantly, de-peopled landscape.<sup>301</sup> As Nicole Graham states, ‘[a]rt, as a cultural form, constructed nature as external to it and in so doing expressed an aesthetic of alienation.’<sup>302</sup> Nicole Graham traces this historical shift in attitude in an English context,<sup>303</sup> yet it occurred to perhaps an even greater extent in Scotland. This form of ‘delight’ represented enclosure, merely for different ends.

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<sup>298</sup> S Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (2015), 3.

<sup>299</sup> Not only in the sense that many places were *intentionally* de-peopled in Scotland but also in that, ecologically, human inhabitants of Scotland have been entwined with ‘nature’ for millennia. See Warren and Glass (no 297) at 8 where they state, ‘what we see today is an ancient tapestry woven by the constant interaction between humans and the physical environment over thousands of years.’

<sup>300</sup> F MacDonald, ‘Balmorality’ (2023) 45(22) *London Review of Books* <[www.lrb.co.uk/the-paper/v45/n22/fraser-macdonald/diary](http://www.lrb.co.uk/the-paper/v45/n22/fraser-macdonald/diary)> accessed 12/08/2025.

<sup>301</sup> See <<https://www.nationalgalleries.org/art-and-artists/159116>> accessed 13/03/2025.

<sup>302</sup> Graham, *Landscape* (no 6), 62. Although Graham writes from an Australian perspective (though this quote relates to English attitudes to land), the point is equally salient in a Scottish context.

<sup>303</sup> *ibid.*, 60 – 66.

### 3.3.3.2 *'Delight' in grouse moors and nature conservation*

Land as a platform for game sport also became indicative of 'delight' for the landowning classes. Rural spaces were (and continue to be) engineered through controlled burning, or 'muirburn' to maintain 'grouse moors' wherein the shooting can take place,<sup>304</sup> and through the killing of competing predator species to maintain high grouse numbers.<sup>305</sup> This leads to fierce criticism from various angles, including those opposed to the climate damage caused by the CO<sub>2</sub> emissions released through large-scale muirburn particularly where such burning affects peat,<sup>306</sup> as well as conservation charities and interested parties.<sup>307</sup> Despite the competing scientific claims to the ecological merits and demerits of grouse moors, it is clear that without such anthropogenic change to upland landscapes, extensive areas of moorland would not exist.<sup>308</sup> Grouse moors are social creations; cultural, rather than natural, places which have been created through anthropogenic interventions over time.<sup>309</sup> Grouse moors represent an acute example of how delight as an attitude to place has manifested in rural Scotland and how our understanding of property has enabled this.

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<sup>304</sup> Warren and Glass (no 297), 201. This 'aims to create a patchwork of young nutritious growth intermixed with older growth for nesting cover.' The burning is planned so that the intensity can be managed to avoid wildfire. See the 'Supplement to the Muirburn Code: A guide to best practice' <[www.muirburncode.org.uk/wp-content/uploads/2017/09/Prescribed-Burning-on-Moorland.pdf](http://www.muirburncode.org.uk/wp-content/uploads/2017/09/Prescribed-Burning-on-Moorland.pdf)> accessed 13/06/2023. For further information on muirburn and moorland habitats see J P Holland, M Pollock, S Buckingham, J Glendinning, and D McCracken, 'Reviewing, assessing and critiquing the evidence base on the impacts of muirburn on wildfire prevention, carbon storage and biodiversity' (2022) NatureScot Research Report 1302 <[www.nature.scot/doc/naturescot-research-report-1302-reviewing-assessing-and-critiquing-evidence-base-impacts-muirburn](http://www.nature.scot/doc/naturescot-research-report-1302-reviewing-assessing-and-critiquing-evidence-base-impacts-muirburn)> accessed 03/09/2025.

<sup>305</sup> To keep up with demand, sporting estates endeavoured to maintain large numbers of birds for this purpose. As Smout states, '[t]he maintenance of moors to support huge populations of game...demanded skilled and ruthless management...The skill on the grouse moor was in the correct burning of the heather in small patches...The ruthlessness came in predator control...' See Smout (no 210), 134.

<sup>306</sup> Stop Climate Chaos Scotland, 'Ban Muirburn on Peat' <[www.stopclimatechaos.scot/manifesto/policy/ban-muirburn-on-peat/](http://www.stopclimatechaos.scot/manifesto/policy/ban-muirburn-on-peat/)> accessed 16/09/2025.

<sup>307</sup> Predator control is also highly criticised as being merely a euphemism for raptor persecution, hence conservationists often object to grouse moor management. See H Armstrong, 'Muirburning for grouse: does it increase or decrease net carbon emissions?' (2022) Report for REVIVE <<https://raptorpersecutionscotland.files.wordpress.com/2022/10/revive-coalition-report-muirburning-for-grouse.pdf>> accessed 13/06/2023; P S Thompson and J D Wilson 'A review of recent evidence on the environmental impacts of grouse moor management' <[www.rspb.org.uk/globalassets/downloads/documents/birds-and-wildlife/gamebird-shooting-review/grouse\\_moor\\_evidence\\_review\\_final.pdf](http://www.rspb.org.uk/globalassets/downloads/documents/birds-and-wildlife/gamebird-shooting-review/grouse_moor_evidence_review_final.pdf)> accessed 13/06/2023. Conversely, proponents argue that muirburn helps prevent wildfires and increases biodiversity and that predator control is a necessary practice in any land management to control species numbers. See blog post from SLE, 'Grouse Shooting in Scotland: How managed moors benefit biodiversity as well as the economy' (2022) <[www.scottishlandandestates.co.uk/blog/rural-business/grouse-shooting-scotland-how-managed-moors-benefit-biodiversity-well-economy](http://www.scottishlandandestates.co.uk/blog/rural-business/grouse-shooting-scotland-how-managed-moors-benefit-biodiversity-well-economy)> accessed 13/06/2023. See also Game and Wildlife Conservation Trust, 'The effects of predator control on breeding moorland birds' <[www.gwct.org.uk/wildlife/research/birds/waders/the-effects-of-predator-control-on-breeding-moorland-birds/](http://www.gwct.org.uk/wildlife/research/birds/waders/the-effects-of-predator-control-on-breeding-moorland-birds/)> accessed 14/06/2023.

<sup>308</sup> R A Dodgshon and G A Olsson, 'Heather moorland in the Scottish Highlands: the history of a cultural landscape, 1600-1880' (2005) 32(1) *Journal of Historical Geography* 21, 21-22.

<sup>309</sup> C Warren and J Glass (no 317), 213

Indeed, their creation and sustained survival have relied both on social conditions preferable to grouse moors – the rise of the grouse moor is strongly associated with ‘Balmoralisation’ – as well as a property paradigm which provides a great deal of protection to the value of individual welfare maximisation. Hunting for sport had existed for many hundreds of years prior to grouse shooting, but the specific spatiality comprising the ‘grouse moor’ did not arise until the mid-19<sup>th</sup> century.<sup>310</sup> As the ‘use’ value of previous land uses, including sheep farming, dwindled towards the end of the 19<sup>th</sup> century, the popularity of the sporting estate grew, in particular the grouse moor.<sup>311</sup> Land ownership had already undergone a process of extreme concentration, as such this land use change happened rapidly and at scale, and was importantly a wholly privately-led endeavour. By 1884 almost two million acres of rural land in Scotland could be classed as grouse moor. By 1912 this had increased further to 3.6 million acres.<sup>312</sup> Land became tightly and specifically demarcated as grouse moorland, fenced off to exclude a number of human and non-human communities in order to preserve the number of grouse as well as the specific landscape comprising the grouse moor.

In many ways, therefore, grouse shooting is an extractive land use; the extraction is not as tangible as, for example, open cast mining, yet the land has a specific use that is being made for a specific end – in this case the enjoyment of the landowner and/or those engaging in field sports. Nature is maintained and entrenched as other to culture. The social implications of further concentration of land in few hands to the exclusion of human communities, and the ecological implications including raptor persecution and biodiversity damage from muirburn are seen to arise naturally from this continued property performance. Self-interest is, therefore, ‘institutionalised and rewarded’ through these performances.<sup>313</sup> Spaces are rendered meaningful only insofar as their value as sporting commodities are concerned. The property performances which constitute grouse moors are numerous, including repeated actions which demarcate these places as grouse moors:

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<sup>310</sup> See Smout (no 210), 132 where he states that the emergence of a ‘vigorous land market in upland estates [allowed] anyone who so fancies...to buy or rent a moor...for their own delight.’

<sup>311</sup> G Holmes and R Crofts (Eds), *Scotland’s Environment: The Future* (2000), 21: ‘[By the 1880s] sheep farms were becoming supplemented and replaced by deer farms and grouse moors...to meet the consequences of a falling price for wool...and a rising demand for sport in wild places from the urban rich.’

<sup>312</sup> Warren and Glass (no 297), 132 - 133. It is interesting to note that, as of 2021, this figure has remained largely unchanged since 1912: grouse moors are estimated to cover between 2.5 million and 3.7 million acres, which equates to 12-19% of Scotland’s entire land mass: see Scottish Parliamentary Archives, ‘Written evidence from the Scottish Moorland Group’ <[https://archive2021.parliament.scot/S4\\_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/SMG.pdf](https://archive2021.parliament.scot/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/SMG.pdf)> accessed 12/02/2024.

<sup>313</sup> Davies, ‘Can Property Be Justified?’ (no 131), 1107.

muirburn; the act of the sport of grouse shooting itself; and certain cultural practices including the very uniforms of hunting and the fanfare around the ‘Glorious Twelfth’.<sup>314</sup> These reiterative performances naturalise the social and biophysical state of the places where grouse shooting persists.<sup>315</sup> This begins to highlight the socio-ecological effects of the ownership model in rural spaces, entrenching deep class and power dynamics through ownership whilst maintaining anthropogenic landscape-scale land management to maintain the ecological conditions necessary for the proliferation of one species of bird only. Such property performances construct, ‘a fixed hierarchy...[showing] what the Highlands should look like, whom they should belong to, who should do the work, which species are thought to matter and for whose benefit the land should be managed.’<sup>316</sup> This is a form of conservation: ‘nature’ as it is perceived as ‘wilderness’ is conserved in a state deemed acceptable for certain anthropocentric enjoyment, which so happens to be sport.

This form of conservation clashes with other forms of nature conservation in rural Scotland. As Geographers Warren and Glass state: ‘[i]n common with all predator-prey conflicts, this clash is a complex product of socio-economic and political landscapes, involving competition for shared, limited resources and divergent assessments of the issues.’<sup>317</sup> This view of conservation coalesces around the assertion that nature must be preserved in a state largely untouched by humans, or indeed reverted back to such a state. Oftentimes, such conservation is guided by separate voices with interests in separate aspects of nature: raptor conservation; water conservation; rewilding; afforestation; and so on. Nature conservation has increased in popularity and, arguably, has seen successes in Scotland.<sup>318</sup> Yet, it risks ossifying the view that all rural land must be ‘conserved’ in a state

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<sup>314</sup> The ‘Glorious Twelfth’ is the 12<sup>th</sup> day of August each year where the shooting season begins to great fanfare. In this sense, there is even a temporal performativity to grouse moors: from the Glorious Twelfth, shooting season ‘opens’ for four months only. Thus, the grouse moor as a particular spatial ‘practice’ is produced for not only a specific purpose but a specific time.

<sup>315</sup> See Davies, ‘Can Property Be Justified?’ (no 131), 1110: ‘[t]he transition of facts into norms disguises the facticity of any beginning, such as an invasion, but also renders ordinary and apparently natural a state of affairs that is entirely a social performance and exercise of power.’ In this article Davies also gives an account of the term ‘naturalisation’ – that includes ‘the very idea of property as a right that people hold, but [this term is] also to be found in the presumed elements of the social order – that it is human only, that it consists of individuals, and that the physical world provides means to ends that are entirely human.’

<sup>316</sup> MacDonald, (no 300), 45

<sup>317</sup> C Warren and J Glass, *Managing Scotland’s Environment* (2024), 202.

<sup>318</sup> For example, government agency NatureScot engages in conservation efforts which span the spectrum of ‘nature’, and such efforts are made in collaboration with interested parties including community groups. See, for example, its efforts on climate change, NatureScot ‘Climate Change Information’ <[www.nature.scot/doc/naturescot-climate-change-nature-information-sheet](http://www.nature.scot/doc/naturescot-climate-change-nature-information-sheet)>, accessed 03/09/2025. See also the successes involved in the re-introduction of the Beaver, a native species to Scotland: NatureScot, ‘Beavers in Scotland Report’ <[www.nature.scot/professional-advice/protected-areas-and-species/protected-species/protected-species-z-guide/beaver/beavers-scotland-report](http://www.nature.scot/professional-advice/protected-areas-and-species/protected-species/protected-species-z-guide/beaver/beavers-scotland-report)> accessed 03/09/2025.

of nature. Indeed, much of rural Scotland presents a great deal of conservation ‘opportunity’ because of its presentation as ‘untouched’ and ‘wild’ – in other words, its de-peopled spatiality. The largest private landowner in Scotland – with over 88,000 hectares of land owned – is Danish billionaire Anders Povlsen.<sup>319</sup> Povlsen owns this land with something of a singular vision in mind: conservation, or rather ‘rewilding’. The landowning company Povlsen heads, Wildland Ltd., focuses on ‘landscape-scale conservation’ working to ‘let nature heal, grow and thrive,’<sup>320</sup> as well as offering ‘exclusive use’ of Aldourie Castle and its 500-acre garden,<sup>321</sup> and ‘ecotourism’ opportunities.

Indeed, conservationism has been critiqued for its entrenching of the nature/culture dualism, which acts as ‘one of the myths which guides Scottish conservation policy, and which leads to the ‘hands off, keep out’ mentality commonly associated with conservationists in general...’<sup>322</sup> Therefore, like ‘Balmorality’, many of the calls for nature conservation – particularly those associated with ‘rewilding’ – are associated with highly politicised spatialisations of Scotland’s rural places as ‘wilderness’.<sup>323</sup> This is problematic for sustainable land use change. As Warren and Glass state,

‘Clarion calls to return the land to its natural state are guaranteed a sympathetic hearing in this age of existential environmental threats, but the...perpetual evolution of human and environmental history shows that it is far from easy to ascertain either what that state was or what it should be.’<sup>324</sup>

In other words, there is no such thing as an original ‘wilderness’ in Scotland. Rather, such perceptions render land static, often with reference to a chosen historical baseline which differs according to the particular interest of those arguing the point.<sup>325</sup> Such stasis can never translate to reality; the ‘turbulent dynamism [of physical spaces] rarely respects the

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<sup>319</sup> See A Wightman, ‘Who Owns Scotland 2024: a Preliminary Analysis’ <[www.andywightman.scot/2024/03/who-owns-scotland-2024-a-preliminary-analysis/](http://www.andywightman.scot/2024/03/who-owns-scotland-2024-a-preliminary-analysis/)>, accessed 25/08/2025.

<sup>320</sup> <<https://wildland.scot/>> accessed 03/09/2025.

<sup>321</sup> <<https://aldourie.scot/>> accessed 01/08/2025.

<sup>322</sup> Warren and Glass (no 297), 389-390.

<sup>323</sup> See, as an example, the recent purchase of a 7,618-hectare Highland estate by Scottish Wildlife Trust – an interest group representing the interest of conservation of nature, specifically certain species of animal – for the purposes of ‘rewilding’: BBC News ‘Wildlife Trust Buys Massive £17.5m Highland Estate’ (2025) <[www.bbc.co.uk/news/articles/cr42n0dqqzno](http://www.bbc.co.uk/news/articles/cr42n0dqqzno)> accessed 01/07/2025. This can be seen as an example of perpetuating concentrated ownership patterns but simply changing the land use from one of ‘use’ to one of ‘delight’.

<sup>324</sup> Warren and Glass (no 297), 16.

<sup>325</sup> *Ibid.*, 269.

boundaries of such socially constructed frameworks.’<sup>326</sup> In this regard, the categories of ‘nature’ and ‘culture’ have, over the centuries, ‘bled into each other so pervasively’<sup>327</sup> in Scotland that they are not so easily distinguishable. This form of ‘ecocentrism’ can thus be distinguished from anthropocentrism but is no less reflective of the nature/culture dualism.<sup>328</sup> Indeed, Povlsen and his Wildland landowning company – introduced above – have received fierce criticism from local communities for prioritising a narrow vision of conservation which entrenches the nature/culture dualism and freezes out the voices of local communities, and which is often driven by ulterior private investment motives.<sup>329</sup> As Warren and Glass state,

‘this value system can...give rise to misanthropy – a negative view of people and communities and their desire to improve their lot. People come to be seen as an inconvenient nuisance, a spanner in the finely tuned workings of sublime nature.’<sup>330</sup>

These spatial changes impact on law. Oftentimes, conservation practices entrench the concentration of ownership in Scotland,<sup>331</sup> and lead to the increased siloing of property law away from other areas of law which are created to deal with ‘conservation’, for example in

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<sup>326</sup> *ibid.* See also K R Olwig, ‘Virtual Enclosure, Ecosystem Services, Landscape’s Character and the ‘Rewilding’ of the Commons: The ‘Lake District’ Case’ (2016) 41(2) *Landscape Research* 253, 259. Rewilding, for Olwig, is a ‘misnomer, since complex natural processes cannot simply be reversed. [It] basically involves a return to the...notion of nature as ideally constituting an independent (e)state with its own government and economy, but also to the heritage of the enclosed hunting reserve.’

<sup>327</sup> Warren and Glass (no 297), 16.

<sup>328</sup> Graham, *Lawscape* (no 6), 18: ‘[e]cocentrism offers nothing more than an inversion of the hierarchical value or position of the paradigmatic categories nature/culture and thus does not so much depart from anthropocentrism as mirror it through opposition.’ See also Graham’s discussion of the ‘Romantics’ movement in art and literature as an example of ecocentrism at 75 – 76.

<sup>329</sup> For example, in 2021 Povlsen lobbied Scottish Ministers to reject proposals for a new spaceport in Sutherland, where one of Wildland’s estates is, for the launching of satellites into orbit. The spaceport, whilst concerning from an emissions perspective, was generally supported by the local population who viewed it as an opportunity to retain young people and create more economic prosperity. Wildland was especially criticised following the publication of a letter sent to Scottish Ministers under freedom of information legislation, which was argued to hold economic development in the area to ransom, stating that if the spaceport was to continue development it would pull out of development in the area. Instead, the letter details that the launch facility should be moved to Shetland (a group of islands north of Sutherland) instead, to allow further development by Wildland in Sutherland. See K Goodwin and R Edwards, ‘Revealed: How Landowner Lobbied Ministers on Spaceport’ (2021) *The Ferret* <<https://theferret.scot/landowner-lobbied-minister-on-spaceport/>> accessed 15/08/2025. Povlsen eventually petitioned for judicial review of the decision to allow the spaceport, which was decided in Scottish Ministers’ favour. See *Wildland Limited v Scottish Ministers* [2021] CSOH 87.

<sup>330</sup> Warren and Glass (no 297), 391.

<sup>331</sup> See footnotes 323 and 329.

the proliferation of law as a tool for environmental designations in the 20<sup>th</sup> century to present day.<sup>332</sup>

In this way, although notions of ‘delight’ appear on the face of it to be far removed from notions of ‘use’, they are both spatial representations of the tropes of the ownership model. The epistemic flattening of dynamic spaces to those of ‘use’ – the shift, for example, from small-scale subsistence farming to industrial-scale wherein the environment is ‘made to conform’ through drainage to a spatially enclosing property system – represented a fundamental spatial change,<sup>333</sup> enabled through property yet also constitutive of it. Land became cartographic and surveyable. This concomitantly enabled the rise of ‘delight’, the other side of the same coin from ‘use’.<sup>334</sup> Thus, an abstract, anthropocentric notion is projected onto land – in this instance the notion of ‘wilderness’; that land is then tightly bounded (often physically with fencing and ‘no trespass’ signs) to ensure the exclusion of non-owning human and non-human communities; the owner is then free to engage in whatever land use choices they see fit with little outside interference, regardless of the climatic impacts of that land use – whether it has historically been the removal and eventual burning of coal for industrial processes and the releasing of CO<sub>2</sub> emissions, or modern day land use practices such as muirburn which often degrades peatland and releases further emissions.

### 3.3.4 Counter performances to land as ‘use’ and ‘delight’: regulating land use

Rural landscapes are unlikely to change beyond the dominant framings of use and delight if the underlying property paradigm remains the same. That paradigm, however, is constituted in part by these landscapes. Both can only change together; if these spaces remain the same then the legal paradigm will not change. Looking to performativity theory, it is possible to point to certain ‘counter-performances’ that have arisen as a result of the spatial arrangements of rural Scotland. Such performances have shown possibilities for challenging the ownership model and the land use attitudes that arise concomitant to it. However, in looking at these, it is also possible to assert that these performances have, so

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<sup>332</sup> Warren and Glass (no 297), 230 – 271. At 231 they state that a ‘complex, multilayered framework of statutory measures for safeguarding the natural heritage has progressively developed, using both conservation and planning legislation.’

<sup>333</sup> Olwig, ‘Virtual Enclosures’ (no 326).

<sup>334</sup> *ibid.*, 255: ‘[t]he resultant spatial simplification of diversity, furthermore, was coupled to a pivotal epistemological shift in the understanding and perception of land facilitated by surveying and cartography and the related rise of the *perception of landscape as a scenic space.*’ Emphasis added.

far, been exceptional and limited. Where they have arisen, they have faced fierce challenges from vested interests. Therefore, new property performances in rural Scotland are difficult to bring about but are by no means rendered less necessary as a result. Nevertheless, they do exist, and it is worthwhile briefly examining a few examples before moving to discuss the possibilities of other policy measures to bring about performances which contribute to challenging the ownership model. Such a discussion highlights the ways through which regulation can facilitate new property realities and possibilities.

The above discussion in sections 3.3.2 and 3.3.3 of land as either ‘use’ or ‘delight’ explains how both are representative of the nature/culture dualism. These attitudes have not only impacted the ways in which rural land in Scotland is viewed but have also shaped the property paradigm. Sections 3.3.2.1, 3.3.2.2 and 3.3.3.2, above, highlight examples in which land as ‘use’ and ‘delight’ became entrenched in interrelated legal and spatial arrangements. Attitudes to land as ‘use’ enabled and vindicated the tropes of the ownership model both within the property paradigm and in physical and social spaces themselves: property rights were increasingly dephysicalised; the view of ‘use’ justified extractive land practices; and land ownership became concentrated in fewer and fewer individuals. However, insights into the relationality of property and space highlights that property is not static as suggested by the tropes of the ownership model; it is constantly shaped by, and shapes, the spaces in which it operates. As shown in examples in sections 3.3.2.1, 3.3.2.2 and 3.3.3.2, this relationality can legitimise and reinforce power structures: viewed as performances, these examples can be viewed as ‘successful’ in the changing socio-political landscape, wherein they gain legitimacy through referencing previous enactments of similar performances. As Nicholas Blomley argues, this can lead to the sedimentation of certain land use practices. However, property performances can also act as potential sites of resistance,<sup>335</sup> many of which can arise through, and be facilitated by, regulatory means.

#### 3.3.4.1 *Crofting reforms*

A causal line can be drawn between the negative social and environmental consequences of land as ‘use’ and ‘delight’ and a suite of regulatory responses which have coalesced to form a ‘land reform’ regime in Scotland.<sup>336</sup> The first of these can be traced to 1886, when the first of a number of reforms to the rights of crofters was introduced; the Crofters

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<sup>335</sup> Blomley, ‘Performing Property’ (no 68).

<sup>336</sup> More will be discussed on this in chapters 4 and 5, however the primary sources of modern land reform can be found in the Land Reform (Scotland) Acts 2003 and 2016.

Holdings (Scotland) Act 1886. This Act recognised and, to an extent, strengthened the security of tenure for this form of landholding.<sup>337</sup> Crofting is a form of agricultural land tenure wherein tenants – or ‘crofters’ – subsist on small-scale properties called ‘crofts’.<sup>338</sup> Although crofting had existed in various forms before the Clearances, it was not until the displacement of crofters throughout the 19<sup>th</sup> century that crofting *communities* became common, particularly in the Highlands and Islands.<sup>339</sup> Thus, the 1886 Act is an example of the introduction of new legal changes, themselves enabled by specific spatial changes. The Act was able to be passed without significant issue because it was a recognition of previous property performances – informal crofting, in other words. Yet it was an important step in the normalisation of crofting not only as a form of legal tenure but as a way of life. In many ways, crofting represents a *direct* challenge to each of the three tropes of the ownership model. At its core, crofting is based on the relationship between the crofter and the land. Crofters have statutory duties towards the land: primarily that a crofter must be ordinarily resident on, or within 32 kilometres of, the croft;<sup>340</sup> that a crofter must not misuse the croft;<sup>341</sup> and must cultivate it,<sup>342</sup> including the keeping of livestock, poultry, bees, the growing of fruit and vegetables, and the planting of trees and conservation activities. The Shucksmith Report recognised that crofting safeguards landscape and biodiversity, as well as sustaining cultural diversity.<sup>343</sup> Also inherent in crofting law is the existence of ‘common grazings’ – shared areas of land where multiple crofters local to those areas have rights in common to graze livestock.<sup>344</sup> Such a challenge to the ownership model highlights the possibility for rural land use which does not conform to either ‘use’ or ‘delight’, exemplifying a form of tenure which instead views humans as embedded in the land.

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<sup>337</sup> Section 1 of the Act states that a ‘crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions...’ The conditions are considered further in this paragraph.

<sup>338</sup> See Crofting Commission, ‘What is Crofting?’ <[www.crofting.scotland.gov.uk/what-is-crofting](http://www.crofting.scotland.gov.uk/what-is-crofting)> accessed 02/09/2025.

<sup>339</sup> As concentration of private ownership grew, the displacement of crofters from their historically inhabited areas and the resulting concentration of crofters within specific geographical areas of the Highlands grew, leading to increased tensions between crofters and landlords. This tension also stemmed from negative reactions to the increased use of cleared land as grouse moors or similar hunting grounds. A number of local revolts, including the ‘Crofters War’ of 1882, led to the eventual passing of the 1886 Act. Thus, a traditional form of landholding, but one which was unrecognised in law, was given legal recognition for the first time. See Crofting Inquiry, ‘Committee of Inquiry on Crofting: Final Report’ (2008), 14, <[https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/supporting\\_documents/Shucksmith%20Report.pdf](https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/supporting_documents/Shucksmith%20Report.pdf)> (the ‘Shucksmith Report’).

<sup>340</sup> Crofters (Scotland) Act 1993 ss5AA and 19C

<sup>341</sup> Crofters (Scotland) Act 1993 s5B(1).

<sup>342</sup> Crofters (Scotland) Act 1993 ss5C(1) and 5C(2)(a)(i).

<sup>343</sup> The Shucksmith Report (no 339), 25 – 29.

<sup>344</sup> Common grazings were initially regulated by the Crofters Common Grazings Regulation Act 1891, and more recently by the Crofting Reform (Scotland) Act 2010.

Therefore, crofting – as a form of tenure formalised through regulation – can be seen as an ongoing property performance (facilitated through that regulation) which challenges the abstractness of the ownership model through a direct relationship between the holder of the land and the land itself; countering the trope of extractivism not only through this direct relationship of small-scale subsistence but also through the imposition of regulations imposing certain positive obligations on the crofter to maintain the croft; and decentring the trope of individualism through the fostering of crofting communities and a form of shared tenure in common grazings. Whilst not on its own enough to represent a paradigm shift for property, crofting does highlight the importance of counter-performances as loci for possible change in the property paradigm over time, normalising certain processes such as statutory obligations towards the land, directly linking embedding the holder of the land with the land itself. Such counter-performances destabilise the hegemony of the ownership model by showing that other forms of ‘doing’<sup>345</sup> property exist and are possible. The land use stemming from crofting contributes to environment outcomes, including the reduction of land-based emissions through small-scale, circular and sustainable land practices.<sup>346</sup> They also provide a potential blueprint for pathways away from the ownership model; how might a different property paradigm look? A lot can be taken from crofting in this regard, which relies on an embedded notion of land use ‘entwined with nature.’<sup>347</sup> Such a notion can lead away from the large-scale instrumental and extractive land uses enacted through the ownership model, thus mitigating the climate emergency.

#### 3.3.4.2 *The Right to Roam as a ‘placed’ response*

In many ways, the Crofters Holdings (Scotland) Act 1886 contributed to what is termed the Scottish ‘land question’<sup>348</sup> – a broad term which focuses debates on land use in Scotland on the historic and contemporary issues associated with how land is owned and used in Scotland. The land question is still very much active, and modern land reform measures represent attempts to address it. A further ‘counter-performance’ of property emanating from this land question can be seen from the introduction of the Land Reform (Scotland) Act 2003, which (among other reforms) introduced a general ‘right to roam’ in Scotland.<sup>349</sup>

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<sup>345</sup> Mackenzie (no 107).

<sup>346</sup> Biggar Economics, ‘The Value of Crofting: A Report to the Crofting Commission’ (2024) <[https://crofting.scotland.gov.uk/userfiles/file/research\\_publications/The-Value-of-Crofting-a-report-by-BiGGAR-Economics-for-the-Crofting-Commission.pdf](https://crofting.scotland.gov.uk/userfiles/file/research_publications/The-Value-of-Crofting-a-report-by-BiGGAR-Economics-for-the-Crofting-Commission.pdf)> accessed 01/07/2025.

<sup>347</sup> *ibid.*, 2.

<sup>348</sup> See E A Cameron, ‘Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880 – 1999’ in M M Combe, J Glass and A Tindley, *Land Reform in Scotland: History, Law and Policy*, 94 – 109.

<sup>349</sup> Land Reform (Scotland) Act 2003 s1.

The right to roam has been described as a ‘radical reform of Scottish land law.’<sup>350</sup> Part 1 of the 2003 Act details these access rights, which afford all members of the public access rights over private land; to be on and to cross such land legally.<sup>351</sup> These rights must be accessed for recreational purposes,<sup>352</sup> for the purposes of carrying out educational activities,<sup>353</sup> or for the purposes of carrying out an activity, commercially or for profit, which the person exercising the right could carry on otherwise.<sup>354</sup> Certain land is excluded,<sup>355</sup> and the access taken must be done so responsibly.<sup>356</sup> This measure has been described as ‘radical’ because nothing like it had previously existed in Scots law; there was a general tradition of Scottish landowners being ‘tolerant of hill walkers’ with a tendency to ‘allow a precarious freedom of access to the hills and mountains,’<sup>357</sup> along with some limited legal rights of access including public rights of way which can arise through 20 years of continuous use by the public, but no legally-recognised *general* right to roam.

The potential for discussion on access rights under the 2003 Act in Scotland is huge. Therefore, discussion here is limited to a brief insight into the ways in which this right challenges dominant spatial arrangements of ‘use’ and ‘delight’ and, in so doing, decentres the tropes of the ownership model, leading to greater connections between people and their environment, which connections can – overall – lead to more sustainable people-place relations in the context of the climate emergency. Fundamentally, access rights under the 2003 Act flip the presumption of excludability within the ownership model on its head; the presumption is instead in favour of public access over private land, not the private right to exclude the public from that land.<sup>358</sup> As John Lovett argues, this embraces a ‘social obligation norm and a series of virtue-orientated standards of behaviour...’<sup>359</sup> Ownership patterns remain unchanged through such reform, but instead the public has been granted

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<sup>350</sup> D L Carey Miller, ‘Public Access to Private Land in Scotland’ (2012) 15(2) Potchefstroom Electronic Law Journal 119.

<sup>351</sup> Land Reform (Scotland) Act 2003 s1(2)(a) and (b) respectively.

<sup>352</sup> 2003 Act s1(3)(a).

<sup>353</sup> 2003 Act s1(3)(b).

<sup>354</sup> 2003 Act s1(3)(c). This rather confusing wording can be clarified with an example: the Scottish Outdoor Access Code gives the example of a mountain guide who is taking a customer out hill-walking. See Scottish Outdoor Access Code (2005) <[www.outdooraccess-scotland.scot/sites/default/files/2018-09/Scottish%20Outdoor%20Access%20Code%20-%20Part%202%20Access%20Rights.pdf](http://www.outdooraccess-scotland.scot/sites/default/files/2018-09/Scottish%20Outdoor%20Access%20Code%20-%20Part%202%20Access%20Rights.pdf)> at para 2.9 (last accessed 08/04/2025).

<sup>355</sup> 2003 Act s6(1)(a) – (j). Further guidance is given in the Scottish Outdoor Access Code. See <<https://www.outdooraccess-scotland.scot/>> (last accessed 08/04/2025).

<sup>356</sup> 2003 Act s2.

<sup>357</sup> D L Carey Miller, ‘Public Access to Private Land in Scotland’ (2012) 15(2) Potchefstroom Electronic Law Journal 119, 121.

<sup>358</sup> See J A Lovett, ‘Progressive Property in Action: The Land Reform (Scotland) Act 2003’ (2010) 89(4) Nebraska Law Review 739, 742.

<sup>359</sup> *ibid.*

the capacity to effectively interfere with the property rights of the holder rather substantially. Jessica Shoemaker states that,

‘...on the landscape, this right of access changes everything. Gates become doors and entry points for public access. Fences are intersected at regular intervals with stiles...one cannot help but imagine that this open *experience* of accessing *spaces* as shared *places* of common concern is a key part of the reform recipe. People engage in solutions to concentration and land access because they care about – and can know and directly experience – these same lands.’

The spatial consequences are numerous, yet fundamentally such a policy measure presents opportunities for people to connect with their environments absent a wider purpose, like use or delight. Certainly, activities may take place through these access rights that *bring* delight, but this is not the overriding purpose. Rather, possibilities for the development of meaningful people-place connections are fostered; people are enabled to be on private land anywhere in Scotland for almost all non-commercial purposes, within certain statutory limitations.<sup>360</sup> This, to an extent, represents a challenge to deeply-embedded notions of land as the private domain of the owner;<sup>361</sup> fencing land off to access-takers is prohibited under the 2003 Act. Indeed, the relationality of space and law is at play here: property law tends to uphold certain spatial arrangements through, for example, the production and enforcement of boundaries. This has the effect of normalising the tropes of the ownership model, embedding them in social relations and affecting the physical landscape itself.

Taken in isolation, the right to roam may appear as a meagre challenge to the ownership model. Indeed, even in a performative capacity it lacks a certain degree of force on its own, and may risk having the perverse effect of legitimising the concentration of ownership as

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<sup>360</sup> Indeed, even certain commercial activities are permitted. See Land Reform (Scotland) Act 2003 s(3)(c) which states that the right of access may be exercised ‘for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.’ This has a broad scope but, for example, commercial mountain guiding could fit this definition.

<sup>361</sup> N Blomley, ‘Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid’ (2003) 93(1) *Annals of the Association of American Geographers* 121, 123: ‘[Western] [l]iberal law...is concerned with the drawing and policing of boundaries.’ See also Singer, *Entitlement* (no 105), 43 – 44. Although not absolutely analogous, Singer discusses the tension between access rights (he uses the term ‘accommodation rights’) and the landowner’s right to exclude. He uses examples in a US context, such as restaurants and shopping centres, wherein accommodation rights prohibit the owner from exercising their exclusionary powers on the basis of certain characteristics of the access taker, such as gender, race or sexuality. He argues that these accommodation rights are not just simple limits on the exercise of ownership. Instead, these regulations ‘cannot simply be considered a minor limitation on property rights. Rather, public accommodation laws constitute a *revolution in the understanding of ownership and the relation between property and equality*.’ Emphasis added.

rural landowners continue to own the land and be seen as ‘stewards’ for allowing access.<sup>362</sup> However, firstly, its performative force for change is worthy of note. There has been a greater degree of normalisation of the right to roam in socio-political discourse in Scotland; something which in England remains highly politically fraught.<sup>363</sup> The right to roam is now part of common land discourse in Scotland, challenging on a day-to-day level the individualistic and extractive rhetoric of the ownership model. Secondly, whilst the connection of the right to roam under the 2003 Act with the climate emergency is not explicit, certainly within the 2003 Act itself there is little mention of environmental recovery, its decentring of the tropes of the ownership model, and concurrently the use/delight binary in attitudes to land, destabilises the instrumentalisation of land, legitimising the use of land for non-economic reasons. Such a narrative shift is important in the context of the climate emergency because it supports land uses other than those for maximising private financial return often through high-emission practices like intensive agriculture. The right to roam also facilitates spatial re-engagement between people and land; whereas the Clearances were an example of a severing of this connection, the right to roam can be viewed as an example of an attempt – through regulation – to recover such connection, fundamental in building the collective ethos needed for the large-scale land use changes needed to mitigate climate change. To take peatland degradation – a highly emitting, largely anthropogenically-caused phenomenon – as one example, an access-taker using their rights under the 2003 Act can begin to *see* what this degradation looks like, for example in viewing stark erosion features like peat hags and gullies.<sup>364</sup> Peatland degradation, therefore, becomes more than just an abstract notion ‘out there’ to be solved. The right to roam can, thus viewed, be a critical enabling mechanism for wider climate change mitigation by building a citizenry that values, monitors and actively participates in

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<sup>362</sup> To illustrate this point, it is not so much of a challenge to the ownership model in a Scottish context for walkers to take access over rural land: firstly, there has, for a long time, been a general tolerance of hillwalkers from landowners so *culturally* it is not so much of a change for the owner of land to bear this legal change; secondly, the pattern of landownership itself justifies such access claims insofar as concentrated ownership has led to large areas of land being kept unpeopled, thus the physical landscape – though often managed for certain ends – is comparatively free from urban or peri-urban development. Therefore, access-takers can walk in Scotland without necessarily coming into contact with other humans, not least the owner themselves, nor with any form of development that may somehow be affected by the occasional walker. This is the case for most rural land in Scotland.

<sup>363</sup> There has recently been political, media and legal attention directed at Dartmoor National Park in England. Landowners in the national park attempted to prevent so-called ‘wild camping’ – a form of access taken under the Dartmoor Commons Act 1985 s10(1) which gives the public a right to engage in ‘open-air recreation’. The landowners claimed this did not include wild camping. The case was appealed to the Supreme Court, which rejected the claim of the landowner to prevent wild camping (see *Darwall v Dartmoor National Park Authority* [2025] UKSC 20. The case gathered media attention as it made its way through the appellate divisions: see <[www.bbc.co.uk/news/articles/c24995gjdy0o](http://www.bbc.co.uk/news/articles/c24995gjdy0o)> accessed 02/07/2025.

<sup>364</sup> Hutton Institute, ‘Soil Erosion’

<[https://soilerosion.hutton.ac.uk/SoilErosion\\_Help\\_TypeAndCause\\_v1.html](https://soilerosion.hutton.ac.uk/SoilErosion_Help_TypeAndCause_v1.html)> accessed 10/09/2025.

the stewardship of the landscape, rather than such stewardship being the sole charge of the landowner.

### 3.3.4.3 *Regulating Grouse Moors*

As Warren and Glass highlight ‘[i]n contrast to deer management, there is no state oversight of moorland management for grouse...the private estates are largely autonomous.’<sup>365</sup> To an extent, this has now changed following the introduction of the Wildlife Management and Muirburn (Scotland) Act 2024, which introduces, *inter alia*, a new licencing and registration framework for grouse moors as well as for the use of muirburn. By introducing potential regulation, the Scottish Government are regulating this land use for the first time,<sup>366</sup> primarily to address concerns of raptor persecution and to ensure that ‘the management of grouse moors...are undertaken in an environmentally sustainable and welfare conscious manner.’<sup>367</sup> However, through this regulation the difficulties in displacing the centrality of the ownership model in perceptions both of property and rural spaces become clear, particularly in the reaction from land owners.

This legislative response represents a challenge to the long-lasting autonomy of grouse moors, though it is not an intervention with fundamentally paradigm-shifting implications. Ultimately, the greatest change is the introduction of licencing systems for the first time. The regulatory steps do not ban the land use, nor do they significantly alter it. Rather, they are procedural changes. Yet, throughout the Bill stage of proceedings, Scottish Land and Estates, the representative body of large landowners in Scotland, repeatedly called for less intrusive measures, arguing that the requirement for licencing was an ‘excessive’ intrusion of their ownership rights.<sup>368</sup>

‘Serious questions now have to be raised about the legality, proportionality and workability of the proposed licencing scheme...We have huge concerns about the lack of safeguards for licence holders, which are essential to good law.’<sup>369</sup>

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<sup>365</sup> Warren and Glass (no 297), 201.

<sup>366</sup> *ibid.*

<sup>367</sup> Scottish Government, ‘Wildlife Management and Muirburn (Scotland) Bill: Policy Memorandum’ (2023), 1, <[www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/accessible-policy-memorandum.pdf](http://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/accessible-policy-memorandum.pdf)> accessed 01/09/2025.

<sup>368</sup> See BBC News, ‘Licencing Row as Grouse Shooting Season Begins (2023) <[www.bbc.co.uk/news/uk-scotland-66476893](http://www.bbc.co.uk/news/uk-scotland-66476893)> accessed 05/06/2024.

<sup>369</sup> Scottish Land and Estates, ‘Statement by Scottish Land & Estates on Wildlife Management and Muirburn Bill’ (2023) <[www.scottishlandandestates.co.uk/news/statement-scottish-land-estates-wildlife-management-and-muirburn-bill](http://www.scottishlandandestates.co.uk/news/statement-scottish-land-estates-wildlife-management-and-muirburn-bill)> accessed 17/07/2025.

Appeals to common sense and the certainty of the legal system itself, like the above quote, were common. Changes to the property system must be justified in the strongest terms, as another landowner group noted in the consultation for the Act:

‘The right to shoot grouse should only be interfered with if there is robust evidence that proves beyond reasonable doubt that the raptor crime had been committed on the estate by a relevant person.’<sup>370</sup>

Thus, the ‘right to shoot grouse’ is a natural corollary of the right of ownership: use of one’s property should not be interfered with by third parties. The only reasonable explanation for interference – a licencing system in this instance – would be limited to *ad hoc* circumstances where criminal proceedings are proved to be taking place on the land.

Years of property performances are hard to unpick. Yet such regulation represents an example of such unpicking. Though this regulatory measure does not change much in practical terms – grouse shooting and muirburn will still continue as land use practices – it has the potential to disrupt common preconceptions of that land use as inherently free from intervention, opening the possibility for further reform to land ownership. A licencing regime makes the very act of grouse shooting more public through the publicity of registration, rather than a purely individual, private endeavour. The performances associated with grouse moors, including muirburn and species control – are interrupted for the first time; made contingent on wider public interests including biodiversity and environmental sustainability. The considerations relevant for the licencing scheme necessarily bring into view (some of) the physical elements of these spaces: licences for both muirburn and killing grouse will only be granted if applicants comply with a code of conduct which relates materially to the land. Of course, this brief analysis risks overstating the overall effects of this legislation on the ownership model. Yet it provides an example of iterative and proactive policy-led changes which can, as part of a wider suite of land reform measures, challenge the ownership model in the shift to decarbonising land use in Scotland.

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<sup>370</sup> Response of Black Mountain Farms to the Wildlife Management and Muirburn Bill as first introduced <[www.parliament.scot/-/media/files/committees/rural-affairs-and-islands-committee/correspondence/2023/wildlife-management-and-muirburn-scotland-bill-summary-of-organisations-responses.pdf](http://www.parliament.scot/-/media/files/committees/rural-affairs-and-islands-committee/correspondence/2023/wildlife-management-and-muirburn-scotland-bill-summary-of-organisations-responses.pdf)>, 86, accessed 20/08/2025.

### 3.4 Conclusion

This chapter has highlighted understandings of both property and land in Scotland. It has been argued that both are in a constant state of co-production, which has concomitant material implications. As Graham and Shoemaker note, the division of ‘people-place relationships into uniform, grid-like squares of private property, layered over the land itself, has had tremendous social and economic impact across rural landscapes.’<sup>371</sup> However, these implications are routinely hidden from view because the dominant property paradigm is defined by the tropes of the ownership model. Consequently, both property and place are seen as existing in a state of stasis, unlikely to change from their current state. This is problematic in the context of the climate emergency when ethical land use change specifically for emissions reduction purposes is most needed.

The dephysicalisation of the right of ownership is successful in the context of the extant economic paradigm which is intended to promote the idea of the liberal individual. In this regard, property in Scotland is understood as *private* property: property is performed by ‘bounded individuals, encouraging monological and insulated encounters.’<sup>372</sup> This short-circuits the heterogeneity of both property and place in Scotland, obscuring new possibilities in the climate emergency. Any interventions with the right of ownership must be justified in the strongest terms. As can be seen in the context of grouse moors, this means that land use practices which have questionable social and ecological consequences can continue for generations autonomously. The discussion on both the doctrinal parameters of ownership in Scotland as well as attitudes of ‘use’ and ‘delight’ in rural places highlighted that attitudes to place in Scotland are two sides of the same coin; land uses which entrench the nature/culture dualism. In this sense, the interaction between law and place has profound spatial consequences, amplified in Scotland because of its uniquely concentrated pattern of private land ownership.

Ultimately, this creates a problem for sustainability objectives. Land use has been identified as a core pathway to reaching the legally binding target of reaching net zero by 2045 in Scotland. This suggests that land use change *should* occur; that many current land use types are unsustainable. However, questions are rarely asked about the right of ownership itself. The climate emergency, and the transition to net zero as a policy response

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<sup>371</sup> Graham and Shoemaker, ‘Power Across Rural Landscapes’ (no 134), 429.

<sup>372</sup> Blomley, *Unsettling the City* (no 71), 135.

in Scotland, demands that critical analysis is directed at property law and specifically the right of ownership. Property performances suggest a reality to property that is fixed. Yet these performances can be interrupted. State regulation is one (though not the *only*) form of interruption to such performances, which can contribute to challenging the dominant ownership model by challenging the tropes of that model. Changing performances can lead to conceptions of property that are less dominated by the ownership model. For example: property that is rooted in the physical reality of its enactment, rather than entirely abstract; that entails obligations, as well as individual rights; and that values place for other attributes rather than its extractive capabilities.

## Chapter 4: Voluntary Carbon Markets

### 4.1 Introduction

‘The...crisis...confronting society is the paradox of a culture that simultaneously swings in opposite directions: first, toward an increasing understanding of, and respect for, the reality of the Earth’s interlinked systems and then toward its desire to maintain the status quo, which demands an instrumentalist relation to nonhuman biota.’<sup>373</sup>

Chapter 2 outlined the mutually constitutive roles of property and space in Scotland. It highlighted that attitudes to rural land as ‘use’ and ‘delight’ have persisted as a result of the entrenching of the ownership model in this relationality. It explored the ways through which these attitudes have material spatial effects which have contributed to the climate emergency. However, it also highlighted the ways through which such dominant attitudes to land in Scotland can be decentred, challenged and iteratively changed. Regulatory interventions can play an important role in this regard, facilitating new performances which destabilise the tropes of the ownership model over time. This can represent a ‘powerful move, opening property up to diverse possibilities.’<sup>374</sup> This thesis argues that such possibilities can be shaped by regulatory interventions. In this regard, state policy measures are extremely important in shaping new possibilities for property which actively contribute to mitigating, rather than causing, climate change. It is in this context that this chapter, and chapters 5 and 6, operate. This chapter seeks to question the extent to which policy measures relating to voluntary carbon markets (VCMs) – which allow companies to offset emissions by purchasing carbon credits created by projects aimed at sequestering or storing carbon – cause sedimentation or, conversely, destabilisation, of the ownership model.<sup>375</sup> Within this discussion, the spatial effects of such a policy measure enacted through land use change are examined, particularly with regard to their effects for climate change.

As a policy measure, VCMs represent one end of a spectrum of intervention, wherein the policies that are enacted either lead to arms-length, facilitative outcomes or leave land use change entirely up to the market. Chapters 5 and 6 continue this trend, assessing policy measures that are regulatory in nature, and those that aim to fundamentally redistribute

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<sup>373</sup> N Graham, ‘The Mythology of Environmental Markets’ (no 232), 151.

<sup>374</sup> Blomley, ‘Performing Property’ (no 68), 45.

<sup>375</sup> Aspects of this chapter, along with arguments from chapter 2 describing the ownership model, have informed a recent publication by this author. See C Stewart, ‘Voluntary Carbon Markets and Net Zero in Scotland: A Property and Place Perspective’ (2025) 19(1) Carbon and Climate Law Review 3 – 14.

ownership. Focusing attention on VCMs, though; in recent years there has been a growing interest at the legal and policy levels in measures to protect and enhance so-called ‘natural capital’. Natural capital is the term chosen by the Scottish Government to denote the ‘environmental resources (e.g. plants, animals, air, water, soils) that combine to yield a flow of benefits to people.’<sup>376</sup> These fall under the wider ambit of ‘ecosystem services’ which can contribute to human well-being.<sup>377</sup> A common trend has been to ascribe a monetary value to the ‘natural’ elements of ecosystems – including trees and peatlands – utilising elaborate accounting methods to achieve this.<sup>378</sup> In Scotland, these measures have increasingly included carbon sequestration through afforestation and carbon storage through the restoration of degraded peatland. The Scottish Government views these projects as opportunities to address climate change, meeting its legally binding target of reaching net zero emissions by 2045,<sup>379</sup> and has stated that the resources required to realise these land use changes must come primarily from private sector investment.<sup>380</sup> Thus, policy measures in Scotland regarding the protection of woodland and peatland have been dominated by those incentivising VCMs.

Section 4.2 provides a policy overview of VCMs in Scotland, outlining the impetus for the projects and the relatively ‘hands-off’ facilitative approach of the Scottish Government. Along with sections 4.3 and 4.4 it retains a particular focus on the woodland generation aspect of VCMs, as this activity forms the majority of most VCM projects.<sup>381</sup> Against this policy background, section 4.3 unpicks the property implications of VCMs in relation to the tropes of the ownership model. In one sense, they display the beginnings of a wider recognition of the importance of Earth system processes and the need to protect them by

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<sup>376</sup> NatureScot, ‘Scotland’s Natural Capital Asset Index – 2023 (data to 2021)’ <[www.nature.scot/doc/scotlands-natural-capital-asset-index-2023-data-2021-update-summary](http://www.nature.scot/doc/scotlands-natural-capital-asset-index-2023-data-2021-update-summary)> accessed 01/07/2024. The following habitats are included within this index: coastal; inland surface waters; mires, bogs and fens; grassland; heathland; woodland and forest; unvegetated or sparsely vegetates; cultivated agricultural; montane and artificial habitats.

<sup>377</sup> *ibid.*

<sup>378</sup> Davies *et al* (no 28), 43.

<sup>379</sup> Scottish Government, ‘Natural Capital Framework’ (2024) <[www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2024/11/natural-capital-market-framework/documents/natural-capital-market-framework/natural-capital-market-framework/govscot%3Adocument/natural-capital-market-framework.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2024/11/natural-capital-market-framework/documents/natural-capital-market-framework/natural-capital-market-framework/govscot%3Adocument/natural-capital-market-framework.pdf)>, 3 accessed 21/07/2025.

<sup>380</sup> See, NatureScot, ‘£2 Billion Private Finance Pilot Potential ‘Vital Step in Restoring Scotland’s Woodlands’ (2023) <[www.nature.scot/ps2-billion-private-finance-pilot-potential-vital-step-restoring-scotlands-woodlands](http://www.nature.scot/ps2-billion-private-finance-pilot-potential-vital-step-restoring-scotlands-woodlands)>. See also C T Reid, ‘Investing In Land for Natural Capital: The Scottish Experience’ (2024) 33(1) Environmental Law and Management 3 – 8.

<sup>381</sup> Climate Change Committee, ‘Supply and Demand in the UK Voluntary Carbon Market’ (2022) <[www.theccc.org.uk/wp-content/uploads/2022/10/Supply-and-Demand-in-the-UK-Voluntary-Carbon-Market-Allied-Offsets.pdf](http://www.theccc.org.uk/wp-content/uploads/2022/10/Supply-and-Demand-in-the-UK-Voluntary-Carbon-Market-Allied-Offsets.pdf)> accessed 01/06/2025.

integrating the environmental costs of land use into land use change decision-making.<sup>382</sup> However, as this section will argue, VCMs largely entrench the tropes of the ownership model, maintaining an approach to land use which views nature as separate to culture. As section 4.4 argues, this sets in motion the conditions for property performances which maintain land as ‘use’. In this regard, whilst VCMs ostensibly aim to ‘green’ land use, they represent the prevailing liberal capitalist worldview which is antithetical to ethical land use change which reduces emissions.

## 4.2 Voluntary carbon markets in Scotland

### 4.2.1 A brief explainer

Limiting climate change to 1.5 degrees Celsius requires net zero carbon dioxide emissions.<sup>383</sup> VCMs are thus seen to incentivise climate action by enabling the creation and trade of carbon credits through activities which sequester carbon dioxide and other GHG emissions, including afforestation, and activities which lock in GHG emissions which would otherwise ‘leak’, primarily peatland restoration. The possibility of looming regulation on companies based on emissions reduction targets stemming from the Paris Agreement has led to a significant increase in the number of companies pledging to achieve net zero.<sup>384</sup> However, such pledges are made with the expectation of financial gain. Therefore, VCMs represent a possible mechanism whereby companies can continue to emit if they can show that they offset unavoidable emissions.

The tradeable commodities at the heart of offsetting markets are ‘carbon credits’. These represent the avoidance or removal of greenhouse gas emissions, measured in tCO<sub>2</sub>e.<sup>385</sup> Since the UN Kyoto Protocol in 1997 it has been possible to create and trade carbon credits under the Clean Development Mechanism and Joint Implementation mechanism which allow countries to trade carbon credits which are then used to count towards national emissions reduction targets. From this scheme, independent non-state organisations developed voluntary standards for carbon credits, including the Verified Carbon Standard

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<sup>382</sup> Davies *et al* (no 28), 43.

<sup>383</sup> See IPCC, ‘Climate Change 2023 Synthesis Report: Summary for Policymakers’ (2023), 19, <[www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](http://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf)> accessed 04/04/2025.

<sup>384</sup> N Kreibich and L Hermwille, ‘Caught in between: credibility and feasibility of the voluntary carbon market post-2020’ (2021) 21(7) *Climate Policy* 939 – 957.

<sup>385</sup> Climate Change Committee, ‘Voluntary Carbon Markets and Offsetting’ (2022), 20 <[www.theccc.org.uk/wp-content/uploads/2022/10/Voluntary-carbon-markets-and-offsetting-Final.pdf](http://www.theccc.org.uk/wp-content/uploads/2022/10/Voluntary-carbon-markets-and-offsetting-Final.pdf)> accessed 03/09/2025.

(Verra), Gold Standard, Climate Action Reserve and American Carbon Registry. Carbon credits fall into one of two categories: either ‘reduction/avoidance’ activities, including generation of renewable energy sources; or ‘removal’ activities including afforestation and peatland restoration.<sup>386</sup> This chapter is concerned with the latter.

VCMs are active in Scotland. Use of these markets is growing rapidly; increases in corporate demand are concomitantly raising the price of offsets. This is driving up investor interest.<sup>387</sup> Section 4.2.2 outlines Scottish Government policy relative to VCMs but such policy can be summarised as being facilitative and voluntary in nature. There is, currently, no state regulation of the market in Scotland. In this regard, it is self-regulated through two codes: the Woodland Carbon Code (WCC) for woodland creation, in place since 2011, and the Peatland Code (PC) for peatland restoration, operational since 2018.<sup>388</sup> Carbon credits are created through the registration, validation and verification processes within the two codes, and the sale of almost all credits generated takes place through the UK Land Carbon Registry, which is managed by index fund S&P Global.<sup>389</sup> Projects generating carbon credits from the WCC aim to sequester atmospheric carbon through natural carbon cycles associated with afforestation, whereas PC projects aim to stop emissions leaking from damaged or degraded peatland through restoration projects. Most registered projects in the UK Land Carbon Registry are for woodland creation,<sup>390</sup> and indeed these projects form the bulk of analysis in this chapter as a result. However, both types of projects follow the same

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<sup>386</sup> The most common carbon credit purchases are for forestry or renewable energy projects; forestry credits accounted for 42% of the global total credits from 2015-2019. See Climate Change Committee, ‘Voluntary Carbon Markets and Offsetting’ (no 385).

<sup>387</sup> Scottish Land Commission data shows that ‘natural capital’ sales increased in 2020-2021, although recent data shows the natural capital market is cooling down as investors wait for the ‘speculation’ from recent years to subside. However, this may be explained by the observation that ‘those who are currently entering into carbon schemes already own their land and are looking to bank carbon credits in case they are required in the future.’ Additionally, companies looking to purchase carbon credits are ‘increasingly looking to form partnerships with landowners rather than purchasing the land themselves.’ See Scottish Land Commission, ‘Scotland’s Rural Land Market: Review of 2023 Insights’ (2024) <[www.landcommission.gov.scot/downloads/667945b28d03a\\_Scotland%E2%80%99s%20Rural%20Land%20Market%20Review%20of%202023%20\(1\).pdf](http://www.landcommission.gov.scot/downloads/667945b28d03a_Scotland%E2%80%99s%20Rural%20Land%20Market%20Review%20of%202023%20(1).pdf)> accessed 03/07/2024, and Scottish Land Commission, ‘Rural Market Insights 2025’ (2025) <[www.landcommission.gov.scot/downloads/684fe41cf2734\\_SLC-2025-Insights.pdf](http://www.landcommission.gov.scot/downloads/684fe41cf2734_SLC-2025-Insights.pdf)> accessed 03/09/2025.

<sup>388</sup> See Woodland Carbon Code v3.0 (2025) <[www.woodlandcarboncode.org.uk/sites/default/files/2025-09/Woodland%20Carbon%20Code\\_V3.0\\_August2025\\_0.pdf](http://www.woodlandcarboncode.org.uk/sites/default/files/2025-09/Woodland%20Carbon%20Code_V3.0_August2025_0.pdf)>, accessed 01/09/2025, and Peatland Code v2.1 (2024) <<https://live-twt-d8-iucn.pantheonsite.io/sites/default/files/2025-04/Peatland%20Code%20V2.1%20Web%20Final%20Jan%202025.pdf>>, accessed 01/09/2025.

<sup>389</sup> The Registry is accessible as two separate pages for both the WCC and PC: see <[www.woodlandcarboncode.org.uk/uk-land-carbon-registry](http://www.woodlandcarboncode.org.uk/uk-land-carbon-registry)> and <<https://registry.spglobal.com/uklandcarbonregistry/public/pc>> accessed 03/09/2025.

<sup>390</sup> J Robbie and G Jokubauskaite, ‘Carbon Markets, Public Interest and Landownership in Scotland: A discussion paper’ (2022) Scottish Land Commission, 4, <[www.landcommission.gov.scot/downloads/628dea082d087\\_Land%20Lines%20Nat%20Cap-Carbon%20Markets,%20Public%20Interest%20and%20Landownership%20in%20Scotland.pdf](http://www.landcommission.gov.scot/downloads/628dea082d087_Land%20Lines%20Nat%20Cap-Carbon%20Markets,%20Public%20Interest%20and%20Landownership%20in%20Scotland.pdf)> accessed 15/07/2024.

process for the creation of carbon credits: (1) registration of a new WCC or PC project on the UK Carbon Registry; (2) validation of the project and generation of Pending Issuance Units (PIUs); and (3) verification of the project, generating the carbon credits.<sup>391</sup>

Companies can engage with VCMs as an investor in a new or existing project. However, they can also purchase land directly and sell the credits themselves outwith the scope of the WCC or PC or indeed use credits to ‘inset’ their own emissions.<sup>392</sup> Both codes stress the requirement for any VCM project to be ‘additional’. For example, under the WCC, this is a two-part test: firstly, there should be no legal requirement specifying that woodlands should be created; and secondly, but for carbon finance the project would be economically unattractive or unviable.<sup>393</sup> Similarly, the PC requires a two-part legal/financial test for additionality, although it contains specific proportions of generated income for additionality.<sup>394</sup>

#### 4.2.2 Scottish Government policy on voluntary carbon markets

Considering the necessity of emissions reductions for net zero, the measurability of offsetting for actual reductions has been doubted. For example, the Climate Change Committee – an independent state advisory body set up by the Climate Change Act 2008 - has noted that calculating emissions reduction which are, in fact, ‘additional’ is challenging,<sup>395</sup> stating that ‘many land-based credit projects have over-claimed the emissions reduction or removal they are achieving, leading to overinflated claims of impact.’<sup>396</sup> Additionally, there are issues of permanence: it is argued that GHG emissions cannot neatly be offset on a like-for-like basis by ‘less secure biological projects which cannot be guaranteed to store carbon for millennia.’<sup>397</sup> The CCC has also warned of the impacts of VCMs on land use change, particularly their impacts on wider environmental and social outcomes due to the duration of these projects locking in particular land use for generations (the average WCC project duration is 81 years).<sup>398</sup> Furthermore, these markets

<sup>391</sup> See WCC and PC (no 388); Robbie and Jokubauskaite (no 390), 4.

<sup>392</sup> Insetting is the term used for a company engaging in carbon management to balance their own emissions.

<sup>393</sup> Woodland Carbon Code (no 388) 18 – 19, accessed 01/09/2025.

<sup>394</sup> Peatland Code (no 388) 8 – 10, accessed 01/07/2024: for a project to be additional it must have a ‘maximum level of non-carbon income of 85% of the project’s restoration and management costs over the project duration... The remaining 15% shall come from carbon finance.’

<sup>395</sup> Climate Change Committee, ‘Voluntary Carbon Markets and Offsetting’ (no 385), 38.

<sup>396</sup> *ibid.*

<sup>397</sup> *ibid.*, 48.

<sup>398</sup> *ibid.*, 76.

are exerting pressure on land values in Scotland.<sup>399</sup> Notwithstanding these critiques the Scottish Government has been supportive of VCMs in its policy framework on land use change.<sup>400</sup> The stance of the Scottish Government towards VCMs must first be understood within the wider context of natural capital investment within Scotland.

Policy on developing so-called ‘natural capital markets’ is led by the Scottish Government’s National Strategy for Economic Transformation,<sup>401</sup> which both call for ‘a values-led and high-integrity market for responsible private investment in natural capital.’<sup>402</sup> This has culminated in the publication of a ‘Natural Capital Market Framework’ for Scotland,<sup>403</sup> a non-binding set of principles for responsible investment in natural capital in Scotland. Currently the only voluntary markets in operation in Scotland are those registered with the WCC and PC. However, there are calls to widen these markets to other forms of natural capital.<sup>404</sup> In addition to this, several other policy strands on ‘mobilising private investment’ in various forms of natural capital have been published. These include, for example, investment in peatland restoration,<sup>405</sup> and ‘strategic partnerships’ between public bodies and corporate actors to ‘mobilise £2 billion in landscape scale restoration of native woodland.’<sup>406</sup> The Scottish Land Commission – the

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<sup>399</sup> See Scottish Land Commission, ‘Rural Land Market Insights 2025’ (no 387), though carbon pricing has now steadied and the market has plateaued.

<sup>400</sup> See Climate Change Committee, ‘Voluntary Carbon Markets and Offsetting’ (no 385), 31. ‘Greenwashing’ is described as a tool to ‘enable unsound climate claims’.

<sup>401</sup> Scottish Government, ‘National Strategy for Economic Transformation’ (2022) <[www.gov.scot/publications/scotlands-national-strategy-economic-transformation/](http://www.gov.scot/publications/scotlands-national-strategy-economic-transformation/)> accessed 02/07/2024.

<sup>402</sup> Scottish Government, ‘Market Framework for Natural Capital – Engagement Paper’ (2024) <[www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2024/04/market-framework-natural-capital-engagement-paper/documents/market-framework-natural-capital-engagement-paper/market-framework-natural-capital-engagement-paper/govscot%3Adocument/market-framework-natural-capital-engagement-paper.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2024/04/market-framework-natural-capital-engagement-paper/documents/market-framework-natural-capital-engagement-paper/market-framework-natural-capital-engagement-paper/govscot%3Adocument/market-framework-natural-capital-engagement-paper.pdf)> accessed 02/07/2024.

<sup>403</sup> Scottish Government, ‘Natural Capital Framework’, <<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2024/11/natural-capital-market-framework/documents/natural-capital-market-framework/natural-capital-market-framework/govscot%3Adocument/natural-capital-market-framework.pdf>> accessed 21/07/2025.

<sup>404</sup> This includes, for example, restoring biodiversity, reducing flood risk through natural flood management, planting high quality street trees, and implementing regenerative agriculture. See Scottish Land Commission, ‘Rural Land Market Insights 2025’ (no 387), 26.

<sup>405</sup> G Hurley, Y Grandemange, A Hume, and F O’Halloran, ‘Mobilising Private Investment in Natural Capital’ (2023) Scottish Government <[www.gov.scot/publications/mobilising-private-investment-natural-capital/](http://www.gov.scot/publications/mobilising-private-investment-natural-capital/)> accessed 02/07/2024. This report was prepared by London-based Finance Earth, a venture finance company providing investment advice and private fund management services, in partnership with NatureScot. It gives an overview of the challenges and barriers to peatland restoration investment and provides policy initiatives including a ‘Scotland Carbon Fund’ to attract private investment in peatland restoration, as well as a ‘Price Floor Guarantee mechanism’ which is ‘designed to transfer risk and provide confidence in early-stage markets.’

<sup>406</sup> See NatureScot, ‘£2 Billion Private Finance Pilot’ <[www.nature.scot/ps2-billion-private-finance-pilot-potential-vital-step-restoring-scotlands-woodlands](http://www.nature.scot/ps2-billion-private-finance-pilot-potential-vital-step-restoring-scotlands-woodlands)> accessed 02/07/2024. The partnership is between NatureScot (a public body) and various private actors: Hampden & Co (a UK-based private bank), Lombard

non-departmental government body tasked with taking forward land reform policy in Scotland – has also produced a ‘Good Practice Protocol on Responsible Natural Capital and Carbon Management’.<sup>407</sup>

Scottish Government policy on VCMs thus views offset markets as a key means through which its legally binding target of net zero can be achieved. Indeed, many *public* funds are being directed to inject initial financial capital into these projects. For example, the Scottish Government often subsidises the initial costs of tree planting and peatland restoration through grants provided through the Forestry Grant Scheme and the Peatland Action Fund.<sup>408</sup> Landowners can then generate income by producing carbon credits or mixing such land use with ‘productive’ land use like timber extraction.

The rationale for this strategy has largely been driven by the identification of a £20 billion ‘finance gap’ for ‘nature-related outcomes. This figure was reached in a report by the Green Finance Institute, a non-profit organisation established by the City of London Corporation and UK Government.<sup>409</sup> This suggests that private investment must be established and encouraged to achieve decarbonisation.

As mentioned in section 4.2.1, VCMs in Scotland remain unregulated at a state level. The WCC and PC are voluntary, rather than state mandated, codes of conduct.<sup>410</sup> Scotland’s

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Odier Investment Managers (an investment firm) and Palladium (a multinational company specialising in capital advisory services). This partnership seeks to mobilise £2 billion of investment in woodland, to create around 185,000 hectares of native woodland and sequester 28 million tCO<sub>2</sub>e. This is to be achieved through a ‘Memorandum of Understanding’ which has not been publicly published.

<sup>407</sup> Scottish Land Commission, ‘Responsible Natural Capital and Carbon Management’ (2022) <[www.landcommission.gov.scot/downloads/62eb846b28bdb\\_Responsible%20Natural%20Capital%20and%20Carbon%20Management%20Protocol.pdf](http://www.landcommission.gov.scot/downloads/62eb846b28bdb_Responsible%20Natural%20Capital%20and%20Carbon%20Management%20Protocol.pdf)> accessed 08/07/2024.

<sup>408</sup> See Scottish Forestry, ‘Forestry Grant Scheme’ <[www.forestry.gov.scot/support-regulations/forestry-grants](http://www.forestry.gov.scot/support-regulations/forestry-grants)> accessed 07/09/2025, and NatureScot, ‘Peatland Action Fund’ <[www.nature.scot/climate-change/nature-based-solutions/nature-based-solutions-practice/peatland-action](http://www.nature.scot/climate-change/nature-based-solutions/nature-based-solutions-practice/peatland-action)> accessed 07/09/2025.

<sup>409</sup> Green Finance Institute, ‘The Finance Gap for UK Nature’ (2021) <[www.greenfinanceinstitute.com/wp-content/uploads/2021/10/The-Finance-Gap-for-UK-Nature-13102021.pdf](http://www.greenfinanceinstitute.com/wp-content/uploads/2021/10/The-Finance-Gap-for-UK-Nature-13102021.pdf)> accessed 02/07/2024. ‘Nature-related outcomes’ are clean water; protection/restoration of biodiversity; natural flood management; improved bio-resource efficiency; climate mitigation through-bio carbon; enhanced biosecurity; improved access and engagement with natural environment and spending with multiple outcomes (overlaps). Each outcome has a specific value attached to it, denoting the necessary investment amount needed to achieve that outcome. For example, protection/restoration of biodiversity will apparently cost between £13-32 billion, with a median of £19 billion chosen as the leading figure. For Scotland, this is fractioned as £8 billion.

<sup>410</sup> Although, the WCC was created by the Forestry Commission – a UK state body responsible for the management of forestry – and is managed by Scottish Forestry (a statutory body for the management of Land in Scotland) for projects in Scotland. Further, though the WCC and PC are voluntary, the participants must agree to the codes before being able to trade within that market. As explained, however, investors or landowners do not necessarily need to sign up to these codes to produce carbon credits, though such credits would remain unverified.

Natural Capital Framework is a voluntary statement of principles which recommends ‘responsible’ investment. It is not a binding legal code of conduct.

Existing policy helps to shed light on some of the social and environmental issues associated with VCMs. For example, in the Market Framework for Natural Capital, various principles are set out, to which investors should have regard. These include investment which ‘delivers integrated land use’, which ‘demonstrates engagement and land collaboration’, which is ‘ethical’ and which is of ‘high environmental integrity.’<sup>411</sup> This suggests that there *should* be integrated land use, engagement, collaboration, environmental integrity and so on. The Scottish Government here makes explicit its recognition that VCMs are not just abstract markets but must necessarily be operational *somewhere*: trees must be grown or peatland restored at scale for carbon credits to be generated, and market players are incentivised to finance that change.<sup>412</sup> Thus, certain place-based consequences are acknowledged in Scottish Government policy, yet the underlying structural effects are obscured.

Ensuring the long-term enforceability of obligations arising under VCM projects – for example that a defined number of carbon credits will be produced – can be legally challenging.<sup>413</sup> Usually, they materialise as circuitous workarounds. Leases – a form of real right in Scotland – are not often used because ‘vacant possession’ is usually not guaranteed, nor wanted, in most cases.<sup>414</sup> Instead, standard securities are used as the legal vehicle to ensure obligations. In Scotland, standard securities are a form of secured debt wherein the creditor can enforce a certain obligation on the part of the debtor, with the debt being secured over some heritable asset.<sup>415</sup> These allow for long-term enforceable obligations, capable of running with the land, to be included in any VCM project. However, in a practical setting this remains a workaround to what would be a simpler process if the carbon credits were subject to the right of ownership. In a UK context, there

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<sup>411</sup> Scottish Government, ‘Natural Capital Framework’ (no 403).

<sup>412</sup> Robbie and Jokubauskaite (no 390).

<sup>413</sup> See C T Reid, ‘Investing In Land for Natural Capital: The Scottish Experience’ (2024) 33(1) Environmental Law and Management 1, 6, where he provides further examples: ‘[a]n individual landowner may die or sell the land within the duration of a project, whilst the investor may seek to sell on their side of the deal or in the case of a corporate body be bought over or wound up; and insolvency could affect either party.’

<sup>414</sup> *ibid.* Reid also points to potential tax implications that arise from long leases. ‘Vacant possession’ is the term used to denote the necessity of the leaseholder to gain factual possession of the property leased.

<sup>415</sup> Standard securities were introduced in Scotland under the Conveyancing and Feudal Reform (Scotland) Act 1970.

is increasing recognition of proprietary rights in new assets,<sup>416</sup> and carbon credits appear to be included as a potential asset form.<sup>417</sup> Therefore, questions are raised regarding whether carbon credits can be the subject of proprietary rights. In other words, is the carbon unit itself capable of ownership? Currently, whether carbon credits are, or are not, property under Scots law is a matter of debate.<sup>418</sup> This thesis does not intend to add significantly to these doctrinal debates, though there is some discussion in section 4.3.1., which picks up this debate to the extent to which it impacts on the question of the entrenching of the ownership model in property in Scotland.

Therefore, Scottish Government policy relating to VCMs is largely facilitative (through funds, grants, and partnerships) and voluntary (such as the Natural Capital Framework). They are reactive policies which attempt to assuage some of the environmental and social concerns relating to the operation of VCMs in Scotland whilst simultaneously encouraging private investment to address the finance gap identified by the Green Finance Institute. This is the policy background against which the next section, 4.3, operates, focusing the lens of analysis developed so far in this thesis on the VCMs being facilitated by Scottish Government policy to assess the extent to which they entrench or challenge the ownership model.

### 4.3 Voluntary carbon markets and the ownership model: placelessness in policy

Because VCMs rely on and necessitate land use change, the right of ownership is key to the existence of the market itself. To illustrate, in 2021 the multinational insurance company Aviva purchased 6,356 hectares of land in Glen Dye for the purposes of offsetting emissions through afforestation and peatland restoration.<sup>419</sup> The conditions necessary for this project to materialise are dictated by the right of ownership: it is within the power of the owner to sanction or prohibit such land use change. Chapter 2 argued that

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<sup>416</sup> See Property (Digital Assets) HL Bill (2025) 237. This Bill is currently being reviewed in the UK Parliament. Its long title is 'A Bill to make provision about the types of things that are not prevented from being objects of personal property rights.' This Bill does not apply to Scotland. However, the Scottish Government has recently concluded a consultation on a similar Bill in Scotland, wherein a legislative statement to the effect that digital assets such as cryptocurrency are proprietary in nature would be introduced, thus adding a new object of property within Scots law. See section 4.3.1 for further discussion on this point.

<sup>417</sup> United Kingdom Government, Ministry of Justice, 'Property (Digital Assets Etc.) Bill: Factsheet' <[www.gov.uk/government/publications/property-digital-assets-etc-bill/property-digital-assets-etc-bill-factsheet#:~:text=Following%20this%20consultation%2C%20the%20Law,consistent%20with%20the%20operative%20clause.](http://www.gov.uk/government/publications/property-digital-assets-etc-bill/property-digital-assets-etc-bill-factsheet#:~:text=Following%20this%20consultation%2C%20the%20Law,consistent%20with%20the%20operative%20clause.)> accessed 03/09/2025.

<sup>418</sup> Scottish Government, 'Digital Assets and Scots Private Law: Consultation' (2024) <[www.gov.scot/publications/digital-assets-scots-private-law-consultation/pages/5/](http://www.gov.scot/publications/digital-assets-scots-private-law-consultation/pages/5/)> accessed 03/09/2025.

<sup>419</sup> See Glen Dye Moor, 'The Project' <<https://glendyemoor.com/the-project/>> accessed 03/08/2025.

the presence of the ownership model within understandings of property in Scotland is problematic in the context of the climate emergency. Therefore, the question to then ask is whether, and to what extent, the VCM apparatus in Scotland challenges or entrenches the ownership model. The following sections 4.3.1, 4.3.2 and 4.3.3 take each trope of the ownership model in turn, considering the extent to which VCMs further embed these tropes. In so doing, a clearer picture becomes apparent of the potential role of VCMs in furthering land use which is a contributing factor to the climate emergency.

#### 4.3.1 Abstract ownership

##### 4.3.1.1 *Entrenching the nature/culture dualism: dephysicalisation and VCMs*

The nature/culture dualism is an ongoing ontological separation between humans and everything else. Rooted in Enlightenment thinking, humans are seen to be culturally, rather than biologically, determined and distinguished. ‘Nature’ – defined by exclusion as everything else in the physical world – is passive and without agency.<sup>420</sup> It is this separation that justifies the continued onwards trajectory into the climate emergency. Dephysicalisation is the manifestation of the nature/culture dualism in property law. In dephysicalised property, the *right* of ownership is the thing of value, and relates to the physical attributes of the thing owned only insofar as those aspects are relevant in a valuation process. The value of the thing can, therefore, be contingent on any given metric, rather than the material limits of the land itself. Thus, abstraction dominates the property paradigm, enabling extractive land practices which continue to exhaust Earth systems; the property paradigm is detached from land instead relies on an imagined state of plenty.

VCMs are highly paradigmatic of dephysicalisation. They are part of a wider movement towards recognising ‘natural capital’ as a distinct asset class. This represents, according to economist Dieter Helm, ‘all the capital assets that nature provides us for free.’<sup>421</sup> In the context of VCMs, various forms of ‘natural capital’ are at stake: soil; trees; peat; water; and carbon itself. As stated above in section 4, the natural capital movement may represent a ‘cross fertilisation of property and ecosystems’ as part of an integration between

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<sup>420</sup> Graham, *Lawscape* (no 6), 28.

<sup>421</sup> D Helm, ‘Natural Capital, Carbon Offsetting and Land Use: A Discussion Paper’ (2022) Scottish Land Commission, [2, <www.landcommission.gov.scot/downloads/628de8eb9c11a\\_Land%20Lines%20Natural%20capital-carbon%20offsetting%20and%20land%20use.pdf>](https://www.landcommission.gov.scot/downloads/628de8eb9c11a_Land%20Lines%20Natural%20capital-carbon%20offsetting%20and%20land%20use.pdf) accessed 08/08/2024.

environmental law, ecology and property.<sup>422</sup> This may represent a shift towards recognising the inherent value of nature. Yet, as is argued in this section, the operation of natural capital markets like VCMs ultimately rely on and entrench the further dissection of Earth systems into packageable assets. VCMs are highly abstract in this regard; the potential for carbon to be sequestered in trees or prevented from leaking into the atmosphere in peatlands has been assigned a tradeable value. What is consequently traded within VCMs is not a physical attribute *per se* but rather the *lack* of an attribute, in other words the removal or absence of carbon in the atmosphere. The units generated from these actions arise from, and are subject to, complex methods of accounting in order to verify their status as ‘offsets’. These valuation methods enable the alienability of carbon units between private actors on an unregulated market. VCMs, therefore, present further opportunities for widescale commodification of land and extraction of wealth from that land.

It should be noted prior to expanding on the above points that many argue that this dephysicalisation is precisely what allows for effective environmental action.<sup>423</sup> Advocates for market-based approaches such as VCMs tend to subscribe to the Coasean theory that the surest way to protect a thing is to create and allocate property rights in that thing.<sup>424</sup> Holly Doremus explains the point:

When the value of a resource exceeds the costs of identifying and enforcing property rights, the story goes, people get together and formally or informally create some kind of property right. The call for recognition of property rights can result from crowding on the commons, an increase in the value of an exploited resource, a decrease in the cost of dividing the commons, or some combination of factors.<sup>425</sup>

In the context of environmental protection, this theory manifests as ‘free market environmentalism’ (FME). FME relies on dephysicalisation; natural attributes must be disaggregated from their spatial realities and abstractly allocated some kind of value, best achieved through the creation of a right relating to that thing, whether a contractual right or

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<sup>422</sup> Davies *et al* (no 28), 43.

<sup>423</sup> See, for example, T L Anderson and D R Leal, *Free Market Environmentalism* (1991); J H Adler, ‘Taking Property Rights Seriously: The Case of Climate Change’ (2009) 26 *Social Philosophy and Policy* 296 – 316; K M Wyman and A Minelli, ‘Propertizing Environmental Attributes’ (2022) 39 *Yale Journal on Regulation*, 1334 - 1391; A Lucas, ‘The Significance of Property Rights in Biotic Sequestration of Carbon’ in A McHarg, B Barton, A Bradbrook and L Godden (Eds) *Property and the Law in Energy and Natural Resources* (2011).

<sup>424</sup> R H Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law and Economics* 1 - 44.

<sup>425</sup> H Doremus, ‘Climate Change and the Evolution of Property Rights’ (2011) 1(4) *UC Irvine Law Review* 1091, 1094.

property right.<sup>426</sup> It is argued that good stewardship will flow as a consequence; firstly, because the allocation of such rights will notionally increase the desire to trade in the first instance and, secondly, because rational individuals with their liberty fully intact and free from state interference should ensure care for a thing which holds some kind of transferable value.<sup>427</sup> Indeed, FME goes beyond normal Coasean economics, departing from the argument that state regulation may be permitted to correct ‘externalities’ produced by the market.<sup>428</sup> FME rejects the premise of externalities in the case of environmental protection; the state should not be permitted to regulate to address environmental issues. Instead, proponents argue that these externalities must be viewed rather as opportunities for the allocation of more, or stronger, property rights.<sup>429</sup> Within the FME paradigm, measures such as VCMs are seen as the most sustainable routes to achieving net zero precisely because a dephysicalised understanding of property allows society to ‘internalise negative externalities through the development of markets for them which may reduce pollution more efficiently than traditional forms [of regulation].’<sup>430</sup> In this regard, FME fully commits itself to dephysicalisation; the only way to ensure protection of the environment is for place to be further broken down into packageable assets which can be assigned a value and transferred between free individuals.<sup>431</sup>

#### 4.3.2 Extractive ownership

##### 4.3.2.1 *Entrenching the person/thing dualism*

Although supporters of FME argue that dephysicalisation is necessary to ensure efficient market-based measures, such thinking often ignores the *consequences* of that dephysicalisation in the spaces wherein property is enacted. Dephysicalisation creates placeless environments wherein any non-human aspect is viewed instrumentally. Land, and

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<sup>426</sup> Anderson and Leal (no 423), 4.

<sup>427</sup> See Wyman and Minelli (no 423), 1353-1355.

<sup>428</sup> Externalities are costs which arise through transactions yet are ‘external’ to the market process and thus are unaccounted for (pollution from industrial processes is one such example).

<sup>429</sup> See Adler (no 423), 301: ‘[w]hereas the conventional environmental protection paradigm seeks to ‘internalize externalities’ and cure market failures through regulations, taxes and other government interventions, FME calls for extending markets through the recognition and protection of private property rights in ecological resources.’

<sup>430</sup> Wyman and Minelli (no 423), 1348.

<sup>431</sup> *ibid.*, 1334. See also Van der Walt, ‘Modest Systemic Status of Property Rights’ (no 37), 17. Van der Walt explains that this reliance on property as a formalistic, rule-setting tool which is ‘systemically simple’ and functions only to ‘coordinate human interactions relating to things’ is described by Jane Baron as ‘Information Theory’, referencing J B Baron, ‘The Contested Commitments of Property’ (2010) 61 *Hastings Law Journal* 917-968. Ultimately, this is intended to keep information costs low to ensure a functioning market.

‘nature’, remain categorised as alienable ‘things’. Geographer Fiona Mackenzie critiques the ‘neoliberalisation of nature’ from this angle, which she argues,

‘proceeds through the exploitation, or degradation, of biophysical resources...Through ongoing processes of enclosure and privatization of land, forests, oil, fish stocks and, for the purposes of producing energy from renewable sources, the wind and water from the rivers and the sea, nature is recruited in the interest of capital accumulation. Exposing more of the ‘nonhuman world’ to the market...overlaps closely with the strategy of accumulation by dispossession...’<sup>432</sup>

Here, there is a ‘capital-climate contradiction’ at play.<sup>433</sup> This arises in the first instance because of the dephysicalisation of place, whereby natural attributes are separated from their biotic realities and reduced to ‘a pool of commodified and not-yet-commodified resources.’<sup>434</sup> What follows this dephysicalisation is an ongoing and extractive process of commodification whereby complex social and ecological realities are made to fit within the simple, bright-line rules of the free market. Land, and an increasing number of natural attributes, are made capital. But this commodification is unsustainable. Such capitals ‘defend or restore profits by strategies that degrade or fail to maintain over time the material conditions of their own production.’<sup>435</sup> This highlights the paradoxical nature of VCMs: wealth maximisation cannot be reconciled with ecological sustainability because the latter cannot support the conditions necessary for the former.<sup>436</sup> The dynamism and complexity of the natural world is reduced to a series of static commodities with no material ties, meaning Earth systems are continually pushed beyond what they are capable of producing. Rural spaces are continually ‘financialised’, which has the effect of ‘narrowing...property’s purpose to a singular focus on profit seeking.’<sup>437</sup> As Jessica Shoemaker argues, this commodified and financialised view of property ‘flattens land use choices.’<sup>438</sup>

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<sup>432</sup> Mackenzie, *Places of Possibility* (no 107), 26

<sup>433</sup> D Stuart, R Gunderson, and B Petersen, ‘Climate Change and the Polanyian Counter-movement: Carbon Markets or Degrowth?’ (2019) 24(1) *New Political Economy* 89, 93.

<sup>434</sup> *ibid.*, 92.

<sup>435</sup> J O’Connor, *Natural Causes: Essays in Ecological Marxism* (1998), 162.

<sup>436</sup> Nicole Graham argues that this paradox exerts such strength that it has become ‘mythological’, outlining that the ‘instrumentalism and entitlement that...characterises environmental markets [is the reason] that they cannot deliver a sustainable people-place relation. The mythology of environmental markets is that they can.’ See Graham, ‘The Mythology of Environmental Markets’ (no 232), 152.

<sup>437</sup> Shoemaker, ‘Papering Over Place’ (no 65), 137.

<sup>438</sup> Shoemaker, ‘Re-Placing Property’ (no 49), 816.

Yet, policymakers in Scotland simultaneously espouse the need to address climate change whilst actively narrowing the field of political possibilities through market-based measures. ‘And why shouldn’t they?’ asks Graham: ‘[p]rivate property and rights to exploit natural resources have been the foundation of the current economy since its institution. To not strive towards greater production and more growth is not only antithetical to current socioeconomic conditions, it is heretical.’<sup>439</sup> Indeed, the adherence to the ‘green finance gap’ produced by the Green Finance Institute without reasonable scrutiny as to its figures displays the reluctance of policymakers to challenge dominant interests.<sup>440</sup> As such, land, for the purposes of VCMs, only matters insofar as it contains (or can contain) trees or peatland because these things have been attributed a new value as an asset class. Sequestered or stored carbon is now alienable as a separate commodity. These are the competing signals that VCMs send; on the one hand recognising that climate change must be addressed, yet on the other entrenching the instrumentalism and commodification of the ownership model.<sup>441</sup>

However, this paradox is presented by the Scottish Government as a ‘win-win’ situation: efforts at tackling emissions are made, whilst enabling economic growth. Therefore, state efforts for land use change, especially as far as afforestation and peatland restoration are concerned, should be directed towards incentivising private investment. This is visible in a Scottish policy context regarding land use change for emissions reduction; most policy measures are non-interventionist, instead aiming to facilitate investment. To take a practical example in Scotland, in 2025 Gresham House, a large private forestry asset management company based in London<sup>442</sup> recently closed a funding drive for its ‘Forest

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<sup>439</sup> Graham, ‘The Mythology of Environmental Markets’ (no 232), 161. Graham does not write from a Scottish perspective but the insight is nevertheless accurate in the Scottish policy landscape. See also W Boyd, ‘The Poverty of Theory: Public Problems, Instrument Choice and the Climate Emergency’ (2021) 46 *Columbia Journal of Environmental Law* 399, 479: ‘[t]hinking about climate change as an economic problem (as problem of market failure) is part of the problem – a symptom of our great derangement...such a view turns the problem into one of improper incentives and faulty price signals rather than a broad public problem that requires a sense of ownership and responsibility...’ These arguments speak to the ‘success’ of the ownership model within a wider liberal capitalist system, discussed further in the context of VCMs in section 4.4.

<sup>440</sup> See above at section 4.2.2 which outlines some of the critiques of the finance gap identified by the Green Finance Institute, which largely form around the criticism of the *source* of these figures, in that the Green Finance Institute is arguably representative of vested private financial interests.

<sup>441</sup> See Graham (no 232), 154: ‘[t]he concept of dephysicalised property feeds unsustainable people-place relations, yet it is claimed that it will deliver the opposite in the context of environmental markets.’

<sup>442</sup> Gresham House is the general name attributed to all Gresham House corporate activities. The primary corporate entity is Gresham House Ltd., a private company. Gresham House Ltd is owned by SeedBidCo Ltd, a company registered in Guernsey, though the ultimate controlling entity is Searchlight Capital III SED, a limited partnership registered in the Cayman Islands. See A Wightman, ‘Is Gresham House the Third Largest Landowner in Scotland?’ (2025) <<https://andywightman.scot/2025/02/is-gresham-house-the-third-largest-landowner-in-scotland/>> accessed 03/09/2025.

Fund VI’ at £375 million.<sup>443</sup> The funding drive included a number of private investors, including pension funds and the Development Bank of Japan.<sup>444</sup> Enabled by such funding, Gresham House has, in the past few years, become one of the largest landowners in Scotland, acquiring around 55,000 hectares of land.<sup>445</sup> These funding rounds are utilised to purchase further land and to plant trees – largely non-native Sitka Spruce – on that land, both for timber and for natural capital projects.<sup>446</sup> Gresham House, along with most proponents of such natural capital investment, argue that this external investment will not only lead to financial forestry returns (largely from the sale of the timber) but will also ‘contribute to carbon reduction, biodiversity preservation and flood mitigation.’<sup>447</sup> This is not an entirely private endeavour. Gresham House are financially backed by the Scottish Government: the publicly-owned Scottish National Investment Bank invested £50 million into the Gresham House Forest Growth and Sustainability LP – the Scottish Limited Partnership which owns much of the 55,000 hectares of land in Scotland.<sup>448</sup> On top of this, Scottish Government grants support most of the up-front costs of the tree growing activities which take place following the purchase of land by Gresham House.<sup>449</sup> Gresham House estimates that projects resulting from this funding round will sequester 4.7 million tonnes of carbon dioxide over the next 25 years.

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<sup>443</sup> See Development Bank of Japan, ‘DBJ Makes Investment in Gresham House Forest Fund VI LP’ (2025) <[www.dbj.jp/en/topics/dbj\\_news/2025/html/20250627\\_205989.html](http://www.dbj.jp/en/topics/dbj_news/2025/html/20250627_205989.html)> accessed 22/07/2025.

<sup>444</sup> See Impact Investor, ‘Gresham House Closes Forest Fund at £375 Million’ (2025) <<https://impact-investor.com/gresham-house-closes-forest-fund-at-375m/>> accessed 22/07/2025.

<sup>445</sup> Although, this is disputed by Gresham House itself. During an evidence session for the Net Zero, Energy and Transport Committee in February 2025, a representative stated that Gresham House actually owns very little land, and it is the *management* of large areas of land that they oversee. See Scottish Parliament, Net Zero, Energy and Transport Committee meeting 04/02/2025, <[www.scottishparliament.tv/meeting/net-zero-energy-and-transport-committee-february-4-2025](http://www.scottishparliament.tv/meeting/net-zero-energy-and-transport-committee-february-4-2025)> accessed 01/07/2025. However, as Andy Wightman argues, this is not entirely transparent. See A Wightman, ‘Is Gresham House the Third Largest Landowner in Scotland?’ (no 442). Gresham House Ltd. does not *directly* own much land in Scotland – thus the assertion of the representative in the evidence session is correct to an extent. However, it is the General Partner in a number of Scottish Limited Partnerships which do own the land in question. The General Partner controls the activities of a Scottish Limited Partnership, and so in these instances it is Gresham House Ltd. that ultimately has the power to make land use decisions in relation to these areas of land.

<sup>446</sup> See Gresham House, ‘Forestry and Nature-Based Investments’ <<https://greshamhouse.com/real-assets/forestry/>> accessed 03/08/2025. It is stated that ‘[i]nvestment in forestry diversifies an investment portfolio and provides exposure to potential increases in the value of timber, carbon credits, natural capital and underlying land value. We have a multi-decade track record investing in forestry as a source of natural capital...Our forestry investments involve the ownership of...land on which sustainable timber, carbon sequestration and other natural capital opportunities can be created, managed and optimised.’

<sup>447</sup> See Gresham House, ‘Gresham House Celebrates Final Close of Forest Fund VI at £375mn’ (2025) <<https://greshamhouse.com/news-media/gresham-house-celebrates-final-close-of-forest-fund-vi-at-375mn-500mn/>> accessed 23/07/2025. The activities which will take place will include a mixture of timber extraction and carbon sequestration projects under the WCC.

<sup>448</sup> Scottish National Investment Bank, ‘Supporting Woodland Creation in Scotland with Gresham House Forestry Fund’ (2021) <<https://www.thebank.scot/media-centre/bank-branches-out-to-back-forestry-fund>> accessed 03/09/2025.

<sup>449</sup> Primarily through the Forestry Grant Scheme (see no 408).

Aside from the clear instrumentalism of land-as-investment within this example, the singular focus on carbon *sequestration* as a measure of sustainable land use perpetuates an extractive view of land in the context of the climate emergency. Whilst Sitka Spruce plantations do sequester carbon,<sup>450</sup> this does not give the whole ecological picture. The issue with such accounting exercises is that they disguise wider material impacts from land use change. As Nicole Graham states, the paradoxical nature of natural capital markets is that the pricing methods are routinely presented as accurate, yet to make the value of nature contingent on market forces is a fallacy:

‘[such] valuation methods are themselves part of the culture and discourse of commodification, and thus are incapable of transcending the logic of their own creation to be useful in valuing the environment. One of the main reasons for this failure is that these methods evaluate things in isolated units rather than in relationships.’

Gresham House’s land use projects rely on this separation exercise. Carbon is separated from its environmental conditions and assigned a value based on the levels of storage of that carbon in the trees that is estimated to take place. That value then feeds into a separate valuation of the project and the land itself. Yet none of these valuation exercises are contingent on the land itself. The VCM projects to take place as part of Gresham House’s funding round will predominantly take place in forestry plantations, as a form of mixed investment with timber extraction. Yet the carbon accounting methods fail to account for the material realities evident in these spaces. In Scotland, 71% of all tree cover is coniferous, with 65% being non-native species, predominantly Sitka Spruce.<sup>451</sup> This is because most tree cover of this type is commercial plantation crop. Sitka is chosen due to its quick yield time, which can be harvested in as little as 30 years. Sequestration accounting is thus often negated by the commercialisation of these trees: their quick turnaround for processing and use means that the carbon that is sequestered is often released back into the atmosphere.<sup>452</sup> Such plantations may actually be emitting carbon.<sup>453</sup> For example, soil is often a more effective storer of carbon than vegetation.<sup>454</sup> Yet,

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<sup>450</sup> Royal Society of Edinburgh, ‘Inquiry into Public Financial Support for Tree Planting and Forestry’ (2024), 34, <<https://rse.org.uk/wp-content/uploads/2024/02/RSE-inquiry-into-public-financial-support-for-tree-planting-and-forestry-2024.pdf>> accessed 23/07/2025.

<sup>451</sup> Forest Research, ‘Forestry Facts and Figures 2024’, 27, <<https://cdn.forestryresearch.gov.uk/2024/09/FFF2024-2-WEB.pdf>> accessed 03/09/2025.

<sup>452</sup> Royal Society of Edinburgh (no 450), 31.

<sup>453</sup> M Smyth, ‘Plantation Forestry: Carbon and Climate Impacts’ (2023) 130 Land Use Policy 106677 - 106682.

<sup>454</sup> Royal Society of Edinburgh (no 450), 34. In long-established woodlands, the soil can contain as much carbon as the trees and in peaty soils the carbon stored can far exceed the amount of carbon in the trees.

significant disturbance in both the planting and felling stages of commercial plantations leads to carbon leakage.<sup>455</sup>

The dephysicalised nature of property further enables these projects to take place *anywhere*, as long as there is enough physical space to make the project economically viable. However, where trees are planted is critical in a climate perspective because soil type matters: as explained above, soil disturbance leads to carbon leakage and trees planted in soils with deep peat risk releasing massive quantities of the long-stored carbon in those soils.<sup>456</sup> Sitka plantations are also ecologically sparse because of the densely packed nature of the trees. Commercial crops are created firstly through ground preparation, with trees subsequently planted around 2 metres apart in blocks. Dense planting means that forest understories are non-existent, with almost no ground vegetation.<sup>457</sup> This produces dark, dead spaces, wherein the resulting acidification of soils and water affects invertebrate fauna as well as fish, birds, and other wildlife across these areas.<sup>458</sup> This is against a background of systematic decline of biodiversity in Scotland.<sup>459</sup>

The social impacts of such land investment decisions also often go unchecked. For example, such large-scale land projects serve to deepen the concentration of private land ownership in Scotland through inflated land values following speculative land purchases as well as the long-term locking-in of that land use. For example, Gresham House is now the second largest private landowner in Scotland following years of such land purchases.<sup>460</sup> This removes many opportunities to own such land from anyone *except* large-scale, anonymous corporate investors, or those landowners already in possession of large areas of land.<sup>461</sup> Although carbon sequestration markets are beginning to show signs of cooling off

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<sup>455</sup> *ibid.*, 34 – 35. See also Smyth, (no 453). Felling and cultivation are often carried out mechanically to accelerate commercial forest establishment and these techniques are often very intensive, including ploughing, ripping, mounding and scarifying.

<sup>456</sup> Royal Society of Edinburgh (no 450), 32.

<sup>456</sup> Graham (no 373), 35.

<sup>457</sup> The Royal Society of Edinburgh (no 450), 37.

<sup>458</sup> See, for example, T R Nisbet and C D Evans, ‘Forestry and Surface Water Acidification’ (2014) Forestry Commission <[https://cdn.forestresearch.gov.uk/2022/04/FCRN016\\_46PkzE8.pdf](https://cdn.forestresearch.gov.uk/2022/04/FCRN016_46PkzE8.pdf)> accessed 24/07/2025.

<sup>459</sup> See NatureScot, ‘State of Nature: Scotland’ (2023), <<https://stateofnature.org.uk/wp-content/uploads/2023/09/TP26056-SoN-Scotland-summary-report-v5-1.pdf.pagespeed.ce.EIp-TYaoGQ.pdf>> accessed 07/09/2025. The report also highlights at 29 the important point that Sitka spruce self-seeds at great rates, meaning the trees spread beyond the boundaries of the plantation and colonise neighbouring habitats.

<sup>460</sup> See A Wightman, ‘Gresham House is Now Scotland’s 2<sup>nd</sup> Largest Landowner’ (2025) <<https://andywightman.scot/2025/08/gresham-house-is-now-scotlands-2nd-largest-landowner/>> accessed 03/09/2025. This aspect is discussed in further detail in section 4.3.3, below.

<sup>461</sup> For example, one of the properties acquired by Gresham House following the Forest Fund IV funding drive was Griffin Forestry Estate, near Perthshire. This spans around 5,560 hectares. The sale price publicised was £145 million, the largest of any sale of land of this kind. See A Campsie, ‘Huge Scottish

in Scotland,<sup>462</sup> this presents its own issues as investors pull out of afforestation and peatland restoration projects having already set the land use change in motion.

Thus, facilitative state action in free market environmentalism, such as this, naturalises the dephysicalisation of property, supporting and enabling the trade of everything ‘capable of being traded (and arguably, things that should not be traded).’<sup>463</sup> This, ultimately, entrenches the nature/culture dualism in the property paradigm, reducing meaningful places to abstract spaces of commodified assets which can be alienated between private actors. Nature is ‘out there’ to be used for anthropogenic economic gain. The debate in chapter 2, regarding land as ‘use’, highlights the danger of continuing to entrench the further commodification of natural attributes such as trees, soil and peatland. Indeed, VCMs encourage the creation of spaces of ‘use’ in the perpetuation of monocultural plantations, wherein the complexities of social and biotic processes within rural spaces become subject to a crude cost-benefit analysis which is divorced from any social and biophysical realities. Instead, natural attributes are reframed in novel terms such as ‘carbon credits’ that can be ‘simply defined, measures and exchanged across time and space,’ to achieve private offsetting.<sup>464</sup> Complex climate pathways are reduced to linear problems with linear solutions. Perversely, the Scottish Government’s wider goal of net zero emissions by 2040 is unlikely to be achieved through such land use change measures, even though this is precisely what they promise. Net zero is only achievable as a policy goal when considering unavoidable emissions; it is the state whereby remaining unavoidable emissions are offset by carbon sequestration. This is the policy goal, yet because of the narrowing effect the ownership model exerts on policy measures, the main response so far in Scotland within the important context of land use has been to support VCMs either through public subsidies or policy direction and facilitation. In turn, this encourages a business-as-usual approach to emissions *reduction*, which is essential for net zero. As Wightman argues, net zero is not adequately defined from a business perspective – many companies are claiming to offset emissions but are only offsetting a fraction of their emissions, and others are using offsetting to reduce *all* of their carbon emissions, avoidable

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Forest Sold for £145 to Gresham House’ The Scotsman (2025), <<https://www.scotsman.com/news/environment/huge-scottish-forest-sold-for-ps145m-to-investors-in-astronomical-sale-5281664>> accessed 29/08/2025.

<sup>462</sup> Scottish Land Commission, ‘Rural Land Market Insights 2025’ (no 387).

<sup>463</sup> Graham (no.373), 153.

<sup>464</sup> W Beck and R Bartel, ‘Apples and Oranges? Exchanging offsets for a place agency-based approach’ in R Bartel and J Carter (Eds) *Handbook on Space, Place and Law* (2021), 259.

or otherwise.<sup>465</sup> Indeed, as the Climate Change Committee note, there is a risk that VCMs could actually contribute to increased emissions because they may facilitate continuing emissions from business who may be ‘relying on projects whose emissions savings are overstated.’<sup>466</sup> All the while, VCMs are attracting investment that could be better directed in reducing emissions at source, rather than relying on offsetting.<sup>467</sup> Further, timescales are important to consider; the time for new woodland to begin sequestering carbon is measured in decades. This does nothing in the next 20 years which are vital for achieving net zero by 2045.<sup>468</sup> Indeed, thinking beyond net zero, the risk to wider Earth systems posed by VCMs is that they encourage climate change to be seen as tomorrow’s problem: emissions are allowed to continue as normal with the promise of future sequestration. This ignores current biophysical limits of Earth systems, which are being pushed beyond their capabilities. Carbon sequestration can be a useful tool for overall climate change mitigation, but for it is in danger of becoming a panacea, at least in a Scottish land use context.

#### 4.3.2.2 *On propertising carbon*

The current discussion on commodification of carbon leads to a necessary legal point to be made on propertising that attribute; a recurring theme in debates around VCMs.<sup>469</sup> Whether or not carbon credits can be the objects of property from a doctrinal Scots law perspective is, at the time of writing, unsettled. Indeed, this is not a central question that this thesis seeks to answer, yet it is nonetheless important to address the implications of propertisation in the context of ongoing commodification of natural attributes. There are, currently, policy discussions in both Scotland and the UK regarding ‘digital assets’ and their status as property rights. Consultees in these discussions generally support the position that legislation is the most effect way to resolve uncertainty about the status of digital assets in Scots law.<sup>470</sup> However, it is possible for carbon credits to be imagined as ‘digital assets’, meaning they could soon be the objects of property rights in Scots law. Indeed, it is entirely possible for the Scottish government to legislate to the effect that carbon credits

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<sup>465</sup> A Wightman, ‘Why Scotland Should Stop Selling Carbon’ (2023) <<https://andywightman.scot/2023/11/why-scotland-should-stop-selling-carbon/>> accessed 15/07/2024.

<sup>466</sup> Climate Change Committee, ‘Voluntary Carbon Markets and Offsetting’ (no 385), 38 and 41.

<sup>467</sup> *ibid.*, 32.

<sup>468</sup> Wightman, ‘Why Scotland Should Stop Selling Carbon’ (no 465).

<sup>469</sup> Wyman and Minelli (no 423); A Lucas, ‘The Significance of Property Rights in Biotic Sequestration of Carbon’ in A McHarg, B Barton, A Bradbrook and L Godden (Eds) *Property and the Law in Energy and Natural Resources* (2011), 437. Lucas explains that, for VCMs to be effective, ‘the nature and ownership of sequestration rights must be reasonably certain.’

<sup>470</sup> Scottish Government, ‘Digital Assets and Private Law’ (no 418) accessed 21/07/2025.

are a property right. However, there remains the question of whether they *should* be attributed this legal status.

As mentioned in section 4.2, carbon credits are currently not formally designated as objects of property, in other words they are not currently subject to the ‘real right’ of ownership like other corporeal and incorporeal things – land, buildings, minerals, stocks and shares, and so on. Instead, the rights between the parties involved in VCM projects are enforced via other means of property law, primarily standard securities. Personal rights – those arising through contracts – are also at stake, but these are not enforceable against the world like property rights are. Therefore, and as per the reasoning of FME, many investors are keen for carbon credits to be elevated to the status of property rights to protect investment interests and secure certainty within the market.

The responses to the consultation on digital assets in Scots law are illuminating for the current context of VCMs. Property jurist Kenneth Reid, for example, states that, in the context of cryptocurrencies as a digital asset, ‘[i]n my view, cryptocurrencies are already property.’<sup>471</sup> Jill Robbie, however, whilst recognising the uncertainties in the area, questions the wider consequences of recognising digital assets as property.<sup>472</sup> Robbie argues that carbon credits may be included as a category of digital asset, and thus can be subject to proprietary rights if this Bill is passed. She points to the power that property bestows upon a holder, and the protections that arise as a consequence,<sup>473</sup> stating that, ‘[r]ecognising a thing as the object of property can restrict the possibility of future regulation of that thing...to tackle ongoing social and environmental consequences.’<sup>474</sup>

It remains to be seen how this will play out. The consultation is the first stage in the potential introduction of a similar bill to the Property (Digital Assets etc.) Bill, applicable to the rest of the UK. However, there are clearly risks associated with recognising carbon credits as property rights. Property, after all, allocates power. The recognition of carbon credits as proprietary rights would be an example of the further deepening of

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<sup>471</sup> See Response of Prof Kenneth Reid to Scottish Government Consultation on Digital Assets and Private Law, Response no 7000045 (2025) <[https://consult.gov.scot/financial-services/digital-assets-in-scots-private-law-consultation/consultation/view\\_respondent?uuId=7000045](https://consult.gov.scot/financial-services/digital-assets-in-scots-private-law-consultation/consultation/view_respondent?uuId=7000045)> accessed 21/07/2025.

<sup>472</sup> Response of Prof Jill Robbie to Scottish Government Consultation on Digital Assets and Private Law, Response no 346545808 (2025) <[https://consult.gov.scot/financial-services/digital-assets-in-scots-private-law-consultation/consultation/view\\_respondent?uuId=346545808](https://consult.gov.scot/financial-services/digital-assets-in-scots-private-law-consultation/consultation/view_respondent?uuId=346545808)> accessed 21/07/2025.

<sup>473</sup> For example, the holder of a proprietary right in a digital asset would be protected under Article 1, Protocol 1 to the European Convention on Human Rights.

<sup>474</sup> See Robbie (no 472).

dephysicalisation in the property paradigm, recognising a new ‘thing’ of property, whereby that ‘thing’ is technically not even a physical thing – a carbon credit represents the *removal* or *storage* of carbon dioxide.<sup>475</sup>

However, whether or not carbon credits are, or are not, designated objects of property is not determinative of the current critique in this chapter. The fact remains that property rights remain in other natural attributes, for example trees or peatland, through their attachment to land, and the same critiques may still be made about market-based approaches to climate change. The point here is that the very *possibility* of propertising carbon is indicative of an approach which commodifies land. Property law in Scotland is socially determined; changing attitudes towards land in the past have led to legal changes.<sup>476</sup> It remains the case that, as Margaret Davies states,

‘[[l]iberal cultural can imagine a wide variety of resources as property, including water, other people, land, land that others have an enduring connection to, the moon, a right of way, a poem...Not all of these resources are in fact turned into property by law but they are *imaginable* as property. It is evidence of the perniciousness and emptiness of this concept of property that is extendable equally to a person (through the now-defunct concept of slavery) and to a plastic bucket, and that it can imagine land as two-dimensional space without ecological characteristics or heritage.’

### 4.3.3 Individualistic ownership

#### 4.3.3.1 *Entrenching estrangement*

Dephysicalisation is the result of (and embeds) the nature/culture dualism; anything capable of being viewed as property is alienable. The owner, as the active subject, is at will to dispose of their thing, the passive object, however they see fit. Thus, property is a private institution, which privateness is protected through a rigid public/private divide. Proponents of VCMs will generally subscribe to the argument that a public problem like climate change can effectively be managed in a manner consistent with individual preferences. This is because ‘the wealth of the property owner is at stake if bad decisions are made.’<sup>477</sup> The argument is tempting in both land and climate change perspectives: rational individuals will be incentivised to preserve an asset that they can transfer at some

<sup>475</sup> See, for example, the discussion in section 3.3.2.2 on minerals being designated as ‘conventional separate tenements’. Their legal designation as property rights enabled their protection from interference by third parties, entrenching the power that owners hold over both the land and people on that land.

<sup>476</sup> For example, and as stated in the above footnote, mineral rights as ‘conventional separate tenements’.

<sup>477</sup> Anderson and Leal, *Free Market Environmentalism* (no 423), 4.

point in the future for capital gain, therefore land and natural attributes should be classified as assets. What is more, private individuals who own these things will, according to FME, have a more intimate knowledge of that thing because of the incentive to preserve. Therefore, in a land context, the argument follows that landowners with private ownership rights over land have a deeper connection to, and stewardship over, that land.

However, while markets may successfully reflect individual consumer inclinations, they are ‘incapable of reflecting collective environmental values because most environmental resources are incapable of being accurately priced.’<sup>478</sup> In other words, the emphasis on individual welfare maximisation short-circuits the complexities of the biophysical intricacies of Earth systems and social relations on land. Indeed, the argument that private individuals will make better decisions for the land because they are incentivised to do so in a market setting holds little water beyond purely economic considerations. The ‘rational consumer’ argument within Coasean economics is becoming less tenable as climate change worsens. For example, a polluting multinational fossil fuel company looking to invest in offsetting opportunities in Scotland will look to maximise *their own* economic performance first and foremost. Investors in natural capital markets will, clearly, only engage with such projects if they can generate a return on their investment. For carbon markets specifically the expected returns are often higher than other investment projects due to the ‘risks’ involved.<sup>479</sup> Therefore, VCMs are only deemed ‘successful’ or ‘viable’ where sufficient profit is to be made, which necessitates the absence of regulation as well as the input of vast public funds which socialise the risks whilst privatising the rewards.<sup>480</sup>

Thus, the decision to offset is taken as a means to preserve economic, rather than ecological, futures. Private solutions to a public problem like climate change are framed in

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<sup>478</sup> M C Blumm, ‘Fallacies of Free Market Environmentalism’ (1992) 15(2) Harvard Journal of Law and Public Policy 371, 372.

<sup>479</sup> Around 10-12% is usually expected by pension funds investing in carbon management projects, for example, which is described as ‘competitive’. See C Mackenzie, ‘Can UK Forest Carbon Projects Deliver Competitive Investment Returns?’ (2025) <<https://bccas.business-school.ed.ac.uk/research/thought-leadership/can-uk-forest-carbon-projects-deliver-competitive-investment-returns>> accessed 02/09/2025.

<sup>480</sup> See L Macfarlane, ‘Briefing: Can Private Finance fix Scotland’s Nature Crisis?’ (2024) Scottish Parliament <<https://www.parliament.scot/-/media/files/committees/net-zero-energy-and-transport-committee/correspondence/2024/natural-capital-finance-submission-future-economy-scotland.pdf>> accessed 28/08/2025. Macfarlane doubts the policy of the Scottish government to attract private investment in nature restoration projects because increasing private investment often does not have the effect of reducing the need for public subsidies. He argues that ‘luring private finance introduces new costs and risks into restoration projects.’ For example, he states that ‘[d]ue to the need to pay investor returns, the lifetime costs of the de-risking projects are more than 30% higher than the project without private finance. These returns represent additional costs that need to be recovered before the project can break even.’ This is especially the case if a ‘price-floor guarantee’ for carbon is introduced, as has been suggested by policymakers.

terms of individual rights; if nature can be attributed a monetary value and made alienable then it will be saved because the certainty and stability-seeking nature of the ownership model will ensure its protection. Such a view not only abstracts the right of ownership from material realities, enabling extractive land uses, estranged from the physical limits of the spaces in which they are enacted, but also bestows the holder of the right with strong exclusionary powers which estrange people from these spaces, inhibiting meaningful land-based connections. Owners are largely able to exclude any unwanted interference, both from the state and from other individuals. The individualism promoted by the ownership model, therefore, inhibits both access to land by non-owners and shields property holders from meaningful regulation of the exercise of their ownership right. In a Scottish context, this has led to the privatisation of rural places, wherein they have become, over the years, reflective of ‘use’ or ‘delight’. As explained in chapter 2, this has enabled extremely concentrated patterns of land ownership to remain in Scotland. As Jessica Shoemaker explains,

‘existing owners can amass so much private power that they are difficult to regulate – both because this accumulated private power can dwarf local public resources and because a vast right to exclude can also isolate non-owners from engaging, connecting, and otherwise being empowered to know about...what transpires on vast islands of now-private space.’

Thus, VCMs are playing a strong role in, at the very least, maintaining an extremely concentrated pattern of ownership in Scotland, enabling private land use decisions to be enacted across vast spaces, with very little possibility of state regulation. This brings risks of absentee ownership, where decisions made about land are made without proximity to, or local knowledge of, that land. According to Jessica Shoemaker, absenteeism ‘can occur across multiple scales.’<sup>481</sup> She explains that a ‘single landlord living across town or even out of state is absentee, as are many institutional or foreign owners.’<sup>482</sup> In the context of VCMs in Scotland, corporate ownership is at the root of many of the concerns around absenteeism. Thus, absenteeism does not necessarily mean that the owner is geographically domiciled outside Scotland (though this is often the case). With such corporate ownership, the absenteeism is presented through layers of corporate structuring and myriad investors. This obscures the decision-making source of corporate owners, whose focus is generating returns for investors with little or no tie to the land at stake. Thus, the benefits of

<sup>481</sup> Shoemaker, ‘Papering Over Place’ (no 65), 135

<sup>482</sup> *ibid.* Shoemaker caveats the negative aspects of absenteeism by explaining that there are certain positives associated with it. For example, it may allow for more flexible and accessible possession opportunities such as leases.

landownership in corporate absenteeism are often exported across the globe, rather than being felt in the impacted communities.<sup>483</sup> For example, forest ownership in Scotland has, in recent years, become more concentrated in corporate owners domiciled outside Scotland.<sup>484</sup> Private forest area expanded by almost 12% in the 10 years between 2012 and 2022, increasing by around 20,000 hectares,<sup>485</sup> with an increase in investment owners, who form the largest proportion of private forest owners.<sup>486</sup> The majority of forests are not only privately owned, but are owned by absentee owners.<sup>487</sup> Certain landowners engaging in VCMs may utilise voluntary guidance on community benefit,<sup>488</sup> or on community participation in decision-making,<sup>489</sup> but there is doubt regarding the ability of these processes to produce community benefit or to ground the land use decisions in local needs.<sup>490</sup> Such critiques arise from the potential misgivings of such participatory methods to reflect the complexities of the networked relations within place. ‘Successes’ in this regard often render both human and non-human communities as ‘homogenous entities.’<sup>491</sup> Such frameworks risk ‘depoliticising environmental challenges and overlook the power politics at play’ in such land use decisions and ownership structures.<sup>492</sup>

A recent example is illustrative of the issues of entrenching individualism through land use change. In 2020, drinks company BrewDog purchased Kinrara, a former sporting estate in the Cairngorms National Park spanning around 3,767 hectares. The project, backed by an impressive marketing campaign, was dubbed the ‘Lost Forest’, with BrewDog planning to create a new growth forest and take part in the growing VCM for woodland in Scotland.

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<sup>483</sup> *ibid.* See also Shoemaker, ‘Re-Placing Property’ (no 49), 816, in the context of industrial agriculture as a land use type.

<sup>484</sup> A Wightman, J Hollingdale, ‘Forest Ownership in Scotland in 2022’ (2023) <[https://www.forestpolicygroup.org/wp-content/uploads/2023/11/FPG\\_Forest\\_Ownership\\_Nov23\\_Report\\_1.pdf](https://www.forestpolicygroup.org/wp-content/uploads/2023/11/FPG_Forest_Ownership_Nov23_Report_1.pdf)> accessed 24/07/2025.

<sup>485</sup> *ibid.*, 5.

<sup>486</sup> *ibid.*, 18.

<sup>487</sup> *ibid.*, 19.

<sup>488</sup> For example, see Scottish Land Commission, ‘Route Map for Community Benefit from Natural Capital Projects’ (2024) <[www.landcommission.gov.scot/downloads/67f626a7a454d\\_Community%20benefits%20from%20natural%20capital%20investment%20-%20Route%20Map.pdf](http://www.landcommission.gov.scot/downloads/67f626a7a454d_Community%20benefits%20from%20natural%20capital%20investment%20-%20Route%20Map.pdf)> accessed 03/09/2025.

<sup>489</sup> Scottish Government, ‘Guidance on Engaging Communities in Decisions Relating to Land’ (2018) <[www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/04/guidance-engaging-communities-decisions-relating-land/documents/00534291-pdf/00534291-pdf/govscot%3Adocument/00534291.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/04/guidance-engaging-communities-decisions-relating-land/documents/00534291-pdf/00534291-pdf/govscot%3Adocument/00534291.pdf)> accessed 03/09/2025.

<sup>490</sup> C Hafferty *et al* ‘Unpacking the Politics of Nature-Based Solutions Governance: Making Space for Transformative Change’ (2025) 163 *Environmental Science and Policy* 103979-1 – 103979 - 11.

<sup>491</sup> *ibid.*, 103979-4.

<sup>492</sup> *ibid.* As the authors argue, whilst there may be good intentions at play, the focus on ‘measurable, predictable outcomes to qualify for funding sidelines less tangible social aspects, which are often treated as unintended consequences...from nature-based solution interventions rather than deeply intertwined with landscapes and ecosystems through long histories of co-existence between people and nature.’

However, critics have been vocal about the ecological consequences of this rapid land use change.<sup>493</sup> For example, the stated environmental aim of the forest – to increase tree cover – has not been met and looks unlikely to be met in the future; more than half of the planted trees have died, and the smaller areas of broadleaf plantation has suffered a 95% mortality rate.<sup>494</sup> Additionally, the local community has raised concerns with regard to certain social consequences, such as a loss of recreational access capabilities to the land.<sup>495</sup> The fact that the project (along with most VCM projects) relied on public subsidies for initial capital costs has also been a source of criticism – not least that it is receiving a further £3 million of Scottish Government funding to replace the deceased trees.<sup>496</sup> This is in addition to the accusations of ‘greenwashing’ levelled at the company.<sup>497</sup> Crucially, the decisions that are made about Kinrara are made by an absentee corporate entity which is primarily seeking a return on the land to distribute to a diffuse group of global investors by generating and selling carbon credits to companies looking to offset emissions, which – as argued in section 4.3.2 – will likely do little more than preserve business-as-usual emissions and maintain the concentrated pattern of private ownership in rural Scotland. The socioecological needs of the spaces of Kinrara are not considered, because they are not required to be under the tropes of the ownership model.

The example above is not an isolated case. Such is the nature of this rise that many are now dubbing these new owners and investors ‘green lairds’.<sup>498</sup> This is an explicit comparison with the lairds (Scots for ‘lords’) who were implicated in the land use changes associated with the Clearances.<sup>499</sup> The comparison is accurate insofar as it depicts two types of

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<sup>493</sup> N Kempe, ‘BrewDog’s Dead Forest and the Dead-Hand of Scotland’s Forestry Grants System’ (2024) <<https://parkswatchscotland.co.uk/2024/04/14/brewdogs-dead-forest-and-the-dead-hand-of-scotland-s-forestry-grants-system/>> accessed 21/08/2024. The article details several ecological concerns including inadequate deer population control, threats to endangered species including capercaillie, inappropriate seed sourcing creating a lack of genetic tree diversity, and the impact of tree planting on soil health.

<sup>494</sup> N Spoward, ‘Fears BrewDog’s Lost Forest Could Be Lost Cause Amid Late Replanting’ (2025) The National <<https://www.thenational.scot/news/24314124.fears-brewdogs-lost-forest-lost-cause-amid-late-replanting/>> accessed 21/08/2024.

<sup>495</sup> N Kempe, ‘BrewDog’s Dead Forest and the Lost Recreational Experience’ (2024) <<https://parkswatchscotland.co.uk/2024/04/17/brewdogs-dead-forest-in-the-cairngorms-national-park-and-the-lost-recreational-experience/>> accessed 21/08/2024.

<sup>496</sup> N Kempe, ‘BrewDog’s Lost Forest: A landscape Disaster and Abuse of Public Money’ (2023) <<https://parkswatchscotland.co.uk/2023/02/06/brewdogs-lost-forest-at-kinrara-a-landscape-disaster-and-abuse-of-public-money/>> accessed 26/08/2024; <[www.scotsman.com/hays-way/brewdog-to-replace-250000-dead-trees-in-ps27m-scottish-highlands-forest-scheme-5041539](http://www.scotsman.com/hays-way/brewdog-to-replace-250000-dead-trees-in-ps27m-scottish-highlands-forest-scheme-5041539)> accessed 25/07/2025.

<sup>497</sup> S Carrell, ‘Lost Forest: Why is BrewDog’s Green Scheme Causing Controversy?’ (2022) The Guardian, <[www.theguardian.com/environment/2022/mar/05/lost-forest-why-is-brewdog-green-scheme-causing-controversy](http://www.theguardian.com/environment/2022/mar/05/lost-forest-why-is-brewdog-green-scheme-causing-controversy)> accessed 21/08/2024.

<sup>498</sup> John Muir Trust, ‘The Rise of Green Lairds’ (2022) <[www.johnmuirtrust.org/whats-new/news/1165-the-rise-of-green-lairds](http://www.johnmuirtrust.org/whats-new/news/1165-the-rise-of-green-lairds)> accessed 21/08/2024.

<sup>499</sup> See section 3.3.2.1.63

absentee owners: historic ‘landlords’ who usually owned traditional estates; and modern corporate owners with vast lists of shareholding investors seeking returns. The ‘green’ aspect of this nomenclature encapsulates the capital-climate contradiction inherent in VCMs: the attempt to intertwine potentially climate change mitigating land use change (afforestation and peatland restoration) with liberal capitalist logic which commodifies and extracts from the land. This comparison highlights how VCMs are actively producing and perpetuating places of ‘use’ in rural Scotland; the sudden increase in the value of carbon sequestration means that property is mobilised to gain private ownership of land to change the use of that land to a very particular kind of space, with little-to-no public input, risking the further concentration of land in fewer absentee corporate owner and ossification of an extreme power imbalance. Consequently, projects such as the Lost Forest risk doing very little for climate change mitigating land use change, and indeed risk inhibiting alternative land use changes with stronger climate credentials.

#### 4.4 Voluntary carbon markets and performative property

##### 4.4.1 Perpetuating land as ‘use’ in the climate emergency

Section 4.3 explains the various ways in which VCMs entrench the tropes of the ownership model in the property paradigm. Consequently, this enacts changes to the physical and social spaces in which VCM projects take place. These changes not only ossify concentrated private ownership but are also unlikely to contribute meaningfully to mitigating the climate emergency because the basic tenet at the core of VCMs is commodification and extraction, enabled by a dephysicalised property paradigm.

These issues highlight the current problems with land use change brought about by VCMs in the context of the climate emergency. What does that mean for the wider property paradigm as we move further into the climate emergency? Chapter 1 highlighted that property is relational – it is contingent upon space (both physical and social) to imbue it with meaning. In the context of the climate emergency, ‘anonymous, disconnected, placeless environments,’<sup>500</sup> inhibit the mitigating of climate change because they are based on metrics far removed from ecological reality. If these are the kinds of spaces produced by VCMs, what effect do these changing spaces have for property? This is an important question because of the cyclical and relational nature of law and space: if both remain

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<sup>500</sup> Shoemaker, ‘Papering Over Place’ (no 65), 127.

placeless and disconnected from ecological realities, very little will ever be done to tackle climate change from a land use perspective.

Section 1.3.4 highlighted the aspects of performativity inherent in the ownership model. Performativity theory presents property not as a naturally occurring, pre-political institution but instead as produced through ongoing social interactions or ‘performances’. These performances can range vastly in scale, from neighbourly interactions<sup>501</sup> to international geopolitical interventions.<sup>502</sup> The point is that performances make property because they simultaneously reiterate the same property actions – enclosure, exclusion, and extraction, for example – whilst citing similar actions from the past as justification.

Nicholas Blomley argues that the ownership model is a *successful* performance, hence why it has dominated the property paradigm.<sup>503</sup> It is successful, he argues, because it is so well-suited to an extractive capitalist political system. When viewing VCMs from this performative perspective, what can be seen is the production of spaces which ingrains the ownership model. VCMs produce ‘successful’ performances of property because they prop up the extant system. The fencing-off of land<sup>504</sup> and the designating of that land for one particular use references previous historic acts of enclosure in Scotland; the further concentration of ownership is unchallenged because what is in fact a highly unnatural state of affairs in Scotland has been normalised over centuries of concentration; the treatment of a further natural attribute (carbon) as an asset class reiterates analogous examples from the past, such as mineral extraction.<sup>505</sup> Through such property performances it becomes clearer that many crucial land use change decisions in Scotland have, for so long and so often, been made without reference to the physical limits of the spaces where the change is to take place, by very few people, and for individual and extractive reasons. VCMs utilise property as a tool of commodification, entrenching the person/thing divide in law. Both property and space are imagined as static, rather than involving networked relations of human and non-human actors. This severely restricts the range of possible land use possibilities that can take place in the context of the climate emergency, limiting such measures to those that serve vested interests, entrenching power dynamics on land already extremely concentrated in very few private hands and placing the decision-making power –

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<sup>501</sup> Blomley, ‘Performing Property’ (no 68).

<sup>502</sup> Davies, ‘Can Property be Justified?’ (no 131), 1109.

<sup>503</sup> Blomley, ‘Performing Property’ (no 68).

<sup>504</sup> See section 4.3.3.1 and the example of the Lost Forest.

<sup>505</sup> See section 3.3.2.2.

including what kinds of actions to take in response to climate change – in those hands. The changing of physical and social space at the behest of private interests is ingrained in the fabric of rural Scotland.<sup>506</sup> All of this is at once enabled by law and constitutes law itself.

In this regard, the window of possibilities in a policymaking setting are narrowed considerably. Performativity produces property, which in turn affects space; these changes produce our agency as human actors. As Blomley argues, ‘we emerge as subjects...through these very performances.’<sup>507</sup> Policy choices can alter land use, yet the range of policy imaginaries is constrained by such performances, which produce stasis in the property paradigm by upholding commodifying and extractive land uses, furthering the already deeply-embedded nature/culture dualism in Scotland. Nature remains ‘othered’ to human, rendering vast rural spaces in Scotland as ‘use’. These performances are reiterated in a feedback loop through such policy choices. William Boyd argues that, ‘[p]olicy instruments perform substantive ideological work in formatting problems. By shaping the ways in which we come to see problems, they condition the possibilities for response.’<sup>508</sup> In other words, property *choices* inform property *possibilities*. As Blomley explains, because property is made and re-made through property performances, it is ‘open to surprise and complexity, yet also capable of fixity and sedimentation.’<sup>509</sup>

This chapter has highlighted some of the ways in which Scottish Government policy actively promotes VCMs and associated land use changes.<sup>510</sup> These decisions are made based on a general vision that promotes the simultaneous need to reduce emissions whilst promoting economic growth in Scotland. In a political landscape dominated by liberal capitalism, such choices appear to be the only viable possibilities. At this epistemic level, VCMs represent a continuation of outmoded, 20<sup>th</sup> century Coasean ideas which presume natural resources are limitless and replenishable. They reiterate a dephysicalised notion of the natural world; any natural attribute can be separated from its spatial realities and

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<sup>506</sup> The debates in chapter 3 on ‘use’ and ‘delight’ as two sides of the same coin highlight this assertion, yet an analogous example is worth highlighting. VCM projects and deer forests at the end of the 19th century: as markets shifted and sheep pasturing became less valuable, deer stalking increased in popularity. As a result, the number of forests increased rapidly during this time in order to host the growing interest in this sport. However, much like in the present case of VCM forests, those who owned the land where deer forests could be planted benefitted greatly from an unearned increment; where deer forests held no value in previous years, they gained value which the owners neither created nor predicted. See Alexander, ‘The Sporting Life’ (no 230), 350.

<sup>507</sup> Blomley, ‘Performing Property’ (no 68), 25.

<sup>508</sup> Boyd, ‘Poverty of Theory’ (no 439), 468.

<sup>509</sup> Blomley, ‘Performing Property’ (no 68), 25.

<sup>510</sup> See sections 4.2.2, 4.3.1.1, 4.3.2.2, and 4.3.3.1.

attributed some kind of property value.<sup>511</sup> The Scottish Government's policy responses to the growth of VCMs in Scotland highlights the narrowing effect of market-based approaches to climate change on regulatory measures regarding land use change. For example, the question of whether VCMs should be operational *at all* is rarely given due consideration.<sup>512</sup> Instead, the focus of the state has been to encourage these markets and produce voluntary policy to guide, rather than to regulate. Scottish Government policy on VCMs is non-regulatory, and much state action is directed towards monetary incentives – tax breaks, subsidies and government investment.<sup>513</sup> Yet this state action (or inaction) ultimately endorses VCMs as a means to reach net zero. The only regulation of the market is created by the market players themselves.<sup>514</sup> This represents climate change as a simple, linear problem which can be solved through market-based measures and a light-touch regulatory approach. This is because 'in a political and economic context that is highly supportive of development in spite of anticipated [social and environmental] impacts...offsets are favoured...to facilitate *development*.'<sup>515</sup> Thus, VCMs do little to confront the ownership model; they do not decentre any of the tropes in ways that may facilitate new performances of property. They instead perpetuate an ongoing

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<sup>511</sup> Graham (no 373), 154.

<sup>512</sup> There has been some consideration given to this question, though. See Robbie and Jokubauskaite, 'Carbon Markets' (no 390), 15-16; A Wightman, 'Why Scotland Should Stop Selling Carbon' (no 465).

<sup>513</sup> To illustrate, much of the impetus for the Scottish Government's endorsement of VCMs derives from the 'green finance gap' of £20 billion, issued by think tank Green Finance Institute. However, this figure is frequently cited by the Scottish Government with little-to-no critical analysis of its terms or sources. The Green Finance Institute is a not-for-profit company wholly owned by the City of London Corporation, run by bankers, and has been closely scrutinised by organisations outwith government which highlight certain flaws in the calculations. Yet, notwithstanding the potentially unsound calculation of the £20 billion figure, the Scottish Government is clear in its support for VCMs as a means to address the need for private investment in the transition to net zero. See A Wightman, 'We Are Asking the Wrong Question' (2024) <<https://www.holyrood.com/comment/view,if-the-answer-to-scotlands-climate-goals-is-private-finance-then-we-are-asking-the-wrong-question>> accessed 27/08/2024; J Hollingdale, 'The Credibility Gap for Green Finance' (2023), <<https://www.communitylandscotland.org.uk/wp-content/uploads/2023/08/The-Credibility-Gap-for-Green-Finance-Jon-Hollingdale-19.08.2023.pdf>> accessed 27/08/2024. Regarding the largest component of the finance gap – 'climate mitigation through bio-carbon' – which accounts for £9 billion, Hollingdale argues that the majority of costs relate to land acquisition and financing rather than the creation of woodland itself; the actual costs of delivering climate mitigation through bio carbon is far smaller. See also L Macfarlane, 'Is the Finance Gap for Nature Really £20 billion?' (2023) Future Economy Scotland <<https://www.futureeconomy.scot/posts/44-is-the-finance-gap-for-nature-really-20bn>> accessed 27/08/2024. Macfarlane argues that the £20 billion figure is used too readily as the impetus for VCM promotion. The £20 billion gap is often referred to, yet it is £9 billion of the identified finance gap which specifically relates to land use to reduce greenhouse gas emissions and increase carbon sequestration, which is where sequestration and carbon storage projects, like VCMs, fit. Macfarlane also criticises the lack of inclusion of terminal values (to reflect the fact that a valuable asset like land will increase over time), suggesting that the £20 billion gap does not reflect the capital gains associated with land ownership.

<sup>514</sup> Indeed, as Robbie states, the whole apparatus relies on 'two PDFs and a website.' See Net Zero, Energy and Transport Committee, Official Report 18 June 2024, <<https://parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15943>> accessed 29/08/2024.

<sup>515</sup> W Beck, R Bartel, 'Apples and Oranges' (no 464), 259. Emphasis added.

commodification of the natural world, confining the ability to respond adequately to the climate emergency.

#### 4.5 Conclusion

VCMs are seductive for policymakers because they appear to be a win-win situation: reduce emissions by increasing tree cover and restoring peatland while at the same time encouraging inward investment. Yet, as Wightman argues,

‘[c]urrently, government is sleep-walking into a future of global capital and carbon markets with no clear policy on whether and why offsetting should even be supported and no clear plan as to the extent to which alternative policy measures could deliver landscape scale nature restoration.’<sup>516</sup>

This chapter has argued that VCMs entrench the ownership model; they are strongly representative of a paradigm which is abstract, extractive and highly individualistic. VCMs actively produce forms of property performances which entrench this unsustainable property paradigm. VCMs imagine land as capital, and property as facilitative of that relation, yet property is ‘located always and already in socioecological relationships in and across time and place.’<sup>517</sup> Land use change for effective climate mitigation action is possible, and perhaps learning can be taken from VCMs in this regard. Policymakers may learn to reject the seductiveness of market-based approaches based on their promise of certainty and simplicity, understanding that further dephysicalisation is neither necessary for climate change mitigation nor sustainable in that regard. Such recognition may include acknowledgement of the wider damage that the commodification of land inflicts on Earth systems; though commercial forestry may promise emissions reductions, most of these forests are ecologically lifeless, and often fail to generate the carbon sequestration promised. Further, an abstract and highly complex system of carbon accounting for the purposes of offsetting will, ultimately, do little to reduce emissions in real terms because it obscures the long-term effects of those emissions taking place *now*. State intervention which denies further dephysicalisation, which does not commodify nature, and which ‘[deconstructs] existing relationships of excludability and control,’<sup>518</sup> and which belies the reduction of rural spaces in Scotland to those of ‘use’ may represent a learning experience

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<sup>516</sup> Wightman, ‘Why Scotland Should Stop Selling Carbon’ (no 465).

<sup>517</sup> M Davies *et al*, ‘Property Within Habitat’ (no 28), 48, referencing V Holmes and S Rice, ‘Our Common Future: The Imperative for Contextual Ethics in a Connected World’ in R Mortensen, F Bartlett and K Tranter (Eds), *Alternative Perspectives on Lawyers and Legal Ethics* (2011), 56.

<sup>518</sup> *ibid*.

from VCMs in Scotland. Ultimately, sustainable places cannot be produced through unsustainable understandings of property.

# Chapter 5: Recent Land Reform in Scotland – Land Management Plans

## 5.1 Introduction

VCMs are an example of a non-regulatory policy approach by the Scottish Government to an activity which changes land use in often extreme ways. This chapter moves further along the regulatory spectrum, looking at a policy measure which attempts to *alter* the exercise of ownership, rather than encourage a certain land use activity or indeed redistribute that ownership. This chapter examines Land Management Plans (LMPs) as a key regulatory instrument within Scotland's modern land reform agenda, specifically analysing their potential to decentre the ownership model in addressing the climate emergency. It focuses on how mandatory LMPs for large landowners could impose new, positive obligations, such as contributing to net zero targets and ensuring community engagement, directly onto the right of ownership. The analysis assesses whether this policy represents a sufficient performative challenge to the entrenched, individualistic, and extractive logic of property, or if its diluted form in the Land Reform (Scotland) Bill risks reinforcing, rather than reforming, the status quo.

## 5.2 Land Reform in Scotland

### 5.2.1 A brief explainer

Land Reform in Scotland can be tied to the introduction of the Crofters Holdings (Scotland) Act 1886 – the first measure to recognise the injustices caused by an unequal distribution of land ownership in Scotland. However, this chapter is concerned with modern land reform in Scotland, comprising the suite of regulatory measures addressing land use and redistribution introduced following Scottish devolution in 1999.<sup>519</sup> Broadly, land reform in Scotland can be described as a process through which state measures alter the management, use and ownership of land in the public interest.<sup>520</sup> To date, there have been two major land reform acts passed by the Scottish Parliament: the Land Reform

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<sup>519</sup> The Scotland Act 1998 legally re-established the Scottish Parliament (s1(1)), which had been dormant since the Acts of Union in 1707.

<sup>520</sup> Scottish Parliament Information Centre, 'Routes to Further Land Reform' (2023) <<https://spice-spotlight.scot/2023/12/15/routes-to-further-land-reform-the-origins-of-current-scottish-government-proposals/>> accessed 05/03/2025.

(Scotland) Act 2003,<sup>521</sup> and the Land Reform (Scotland) Act 2016.<sup>522</sup> These have featured a mixture of redistributive and regulatory measures aimed at altering management and use of land. Chapter 6 deals with the former, regarding the redistributive effects of state-facilitated community ownership. This chapter analyses aspects of the latter – how do measures specifically aimed at land management and use affect the property paradigm? What are the potential effects for the climate emergency? In this context, this chapter specifically analyses policy measures to introduce so-called Land Management Plans.

### 5.2.2 The Land Rights and Responsibilities Statement: The first steps towards integrating broader obligations in ownership?

Before discussing LMPs in more detail, it is worth noting the importance of Part 1 of the 2016 Act, which introduced the Land Rights and Responsibilities Statement.<sup>523</sup> This is a non-binding, legislatively-mandated ‘statement of principles for land rights and responsibilities in Scotland.’<sup>524</sup> As will be explained in section 5.2.3, it has the potential to play a strong role in regulatory measures for land use and management in Scotland and, in that regard, is a potentially important part of LMPs. The LRRS was first published in 2017, following the process set out in section 2 of the 2016 Act.<sup>525</sup> According to the same process, the LRRS was subsequently reviewed and a new version published in September 2022 following the passage of 5 years since its implementation.

The aims of the LRRS are threefold:<sup>526</sup> (1) to inform the development of land policy; (2) to ‘encourage and support others with significant responsibilities over land (including both private and public landowners); and (3) to ‘encourage all of us to recognise our

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<sup>521</sup> Discussed in section 3.3.4.2 in the context of the ‘right to roam’ in Scotland.

<sup>522</sup> The Community Empowerment (Scotland) Act 2015 is also of note, considering the changes it introduced to the 2003 Act as well as introducing certain land reform measures in its own right.

<sup>523</sup> See Scottish Government, ‘Land Rights and Responsibilities Statement’ (2022) <<https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement-2022/>> accessed 03/09/2025.

<sup>524</sup> Land Reform (Scotland) Act 2016 s1(2).

<sup>525</sup> Land Reform (Scotland) Act 2016 s2(1) states that Scottish Ministers must publish the first LRRS and lay it before Parliament before the end of the period of 12 months beginning on the day on which this section comes into force. Section 2(1) came into force on 1 October 2016 following the passing of The Land Reform (Scotland) Act 2016 (Commencement No.1 and Transitional Provisional) Regulations 2016, and the first version of the LRRS was duly published in September 2017.

<sup>526</sup> Scottish Government, ‘Scottish Land Rights and Responsibilities Statement: Advisory Notes’ (2022), 3 <[www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2022/09/scottish-land-rights-responsibilities-statement-2022-advisory-notes/documents/scottish-land-rights-responsibilities-statement-2022-advisory-notes/scottish-land-rights-responsibilities-statement-2022-advisory-notes/govscot%3Adocument/scottish-land-rights-responsibilities-statement-2022-advisory-notes.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2022/09/scottish-land-rights-responsibilities-statement-2022-advisory-notes/documents/scottish-land-rights-responsibilities-statement-2022-advisory-notes/scottish-land-rights-responsibilities-statement-2022-advisory-notes/govscot%3Adocument/scottish-land-rights-responsibilities-statement-2022-advisory-notes.pdf)> accessed 05/03/2025.

responsibilities as well as our rights in relation to land.’<sup>527</sup> The requirement for Scottish Ministers to consider these broader values and instruments means that the LRRS – from the outset – attempts to ‘place property within a broader system of values that regulates the exercise of property rights.’<sup>528</sup> In other words, a holistic approach to land ownership is woven into the fabric of the LRRS.

With regard to the content of the LRRS, it is underpinned by a single ‘vision’ for land ownership and use, envisaging,

‘[a] Scotland with a strong and dynamic relationship between its land and its people, where all land contributes to a modern, sustainable and successful country, supports a just transition to net zero, and where rights and responsibilities in relation to land and its natural capital are fully recognised and fulfilled.’<sup>529</sup>

An immediate connection between land use and the climate emergency is visible within the vision. This includes reference to a ‘just transition’ to net zero, suggesting a recognition of the necessity of achieving social justice within land use change for reaching the legally binding target of net zero by 2045 in Scotland.<sup>530</sup> ‘Natural capital’ is also included as an

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<sup>527</sup> *ibid.*, 4: the LRRS is based on a human rights approach, ‘recognising that the way land is owned and used contributes to the fulfilment of many human rights.’

<sup>528</sup> J Robbie and E Van der Sijde, ‘Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability’ (2020) 66 *Loyola Law Review* 553, 554. To illustrate: For example, in preparing the LRRS, Scottish Ministers must ‘have regard to the desirability’ of various factors not normally accounted for in the property paradigm in Scotland. It is worth noting a number of these: firstly, ‘promoting respect for, and observance of, relevant human rights’. See the Land Reform (Scotland) Act 2016 s1(3)(a). ‘Human rights’ are defined in section 1(6)(a) as meaning rights under the European Convention on Human Rights. However, the 2016 Act goes a step further, adding that human rights may be any ‘other human rights contained in any international convention, treaty or other intentional instrument ratified by the United Kingdom...’ See Land Reform (Scotland) Act 2016 s1(6)(b). The section specifically includes reference to the International Covenant on Economic, Social and Cultural Rights. Further, section 1(3)(b) states that Scottish Ministers must have regard to the desirability of promoting ‘internationally accepted principles and standards for responsible practices in relation to land.’ This is further explained in section 1(5) as including the principles contained in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT). For more on the VGGT see: Food and Agriculture Organisation of the United Nations (FAO), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012).

<sup>529</sup> Scottish Government, ‘Land Rights and Responsibilities Statement’ (no 523).

<sup>530</sup> The term ‘just transition’ is broad and contested, and no attempt will be made here to engage with it as a term. It is defined for the purposes of the LRRS as meaning ‘reaching a nature-rich, net-zero future with a climate resilient economy in a way that is fair and tackled injustice and inequality. The process and the outcome should both be fair, considering the impact on people and the sharing of any benefits that arise.’ See Scottish Government, ‘Scottish Land Rights and Responsibilities Statement Advisory Notes’ (526), 5.

auxiliary term to ‘land’.<sup>531</sup> Together, this points to a relatively holistic vision of what ‘land’ encompasses.<sup>532</sup>

There are, following on from the vision, 7 principles which are worth setting out in full:

‘1. The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The framework should support sustainable economic development, protect and enhance the environment, support a just transition to net zero, help achieve social justice and build a fairer society for the common good.

2. There should be a more diverse pattern of land ownership and tenure, with more opportunities for citizens to own, lease and have access to land.

3. More local communities should have the opportunity to own, lease or use buildings and land which can contribute to their community's wellbeing and future development.

4. 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 should contribute to wider public benefit, sustainable growth and a modern, successful country.

5. Land ownership, management and use should deliver a wide range of social, environmental, economic and cultural benefits.

6. There should be transparency about the ownership, use and management of land, and this information should be publicly available, clear and contain relevant detail.

7. There should be meaningful collaboration and community engagement in decisions about land.’

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<sup>531</sup> See Davies *et al* (no 28), 43 where the authors state, in relation to the term natural capital, that this is an example of ‘cross fertilisation of property and ecosystems...conceiving of ecological inputs to social and economic systems as natural capital...’ However, see chapter 3, which casts doubt on instrumental terms such as ‘natural capital’. Indeed, Davies *et al* critique the term at 44: ‘[t]he quantification of ecological benefits in these quasi-property measures...reinforce an anthropocentric paradigm by valuing nonhuman ecology largely in terms of the extent to which it serves human needs.’

<sup>532</sup> It is worthy of note that the inclusion of these terms – just transition, net zero and natural capital – were new additions to the updated 2022 version of the LRRS. This, firstly, highlights the links being made at the state level between the legally binding target of net zero (which was enshrined in law after the first version of the LRRS) and land use. Secondly, being that the updates were made following a public consultation, it is indicative of a change in public perception towards the use of rural land in Scotland wherein the wider socio-ecological effects of land use are beginning to gain wider recognition.

It is worth commenting on the climate change related aspects of these principles. Principle 1 bears a strong resemblance to the more general vision of the LRRS, stating that private interests (including the right of ownership in land) must be balanced with public interests, again pointing to the view of the Scottish Government that property sits within a broader system of values.<sup>533</sup> Within these values are included environmental protection and enhancement, with a second reference to a ‘just transition to net zero’. Principles 2 and 3 relate to diversification of land ownership and so have more relevance to the discussion in chapter 5. Principles 4 and 5 are linked insofar as they highlight the public effects of private land use decisions, advocating for owners to exercise *responsibilities* as well as rights and in so doing deliver a wider range of *public* benefits, including the achievement of environmental aims.<sup>534</sup> Principles 6 and 7 are also interrelated, and indeed are the most closely linked with LMPs as a policy measure. They both relate to the desirability of (1) increased transparency of land use decision making, and (2) community engagement on land use decisions. This indicates a shift towards greater accountability for land use decisions by owners and, as a corollary, greater scrutiny.

Although the LRRS is a non-binding statement of principles (rather than a legally mandated code of conduct, for example), what is clear from the content of both the vision and principles of the LRRS, as well as the provisions within the 2016 Act requiring Scottish Ministers to have regard to wider values when drafting the LRRS, is that there are links being made at a state level in Scotland between land use, ownership and wider socio-environmental issues such as climate change. Such values will necessarily involve the recognition of greater obligations within private ownership, as will be explored in this chapter. As such, the LRRS can be seen as a first step in state regulation which looks to imbue ownership with a deeper sense of obligation.

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<sup>533</sup> Robbie and Van der Sijde (no 528). See also Scottish Government, ‘Scottish Land Rights and Responsibilities Statement 2022: Advisory Notes’ (2022) at 9, where it is stated that ‘public interest should not be thought of in opposition to private interest.’

<sup>534</sup> The reference to ‘land rights’ in principle 4 is not limited to ownership. The Scottish Government expand on the point regarding responsibilities, advising that such responsibilities extend to not just owners but ‘all those who hold land rights, whether through ownership, lease, partnership, use or other decision-making powers...’ See Scottish Government, ‘Scottish Land Rights and Responsibilities Statement: Advisory Notes’ (526), 24. However, mixed messaging appears on the same page, where it is stated that ‘for the purposes of this Statement, meeting high standards of ownership, management and use goes further in saying that *landowners* should take decisions about their land in ways that support social and economic development and protect and enhance the environment...’ To be sure, owners hold the strongest rights over land under Scots law. Therefore, it seems that clearer messaging about responsibilities within *ownership* is missing from the LRRS.

### 5.2.3 The Land Reform (Scotland) Bill 2024: ‘Land Reform in a Net Zero Nation’

The LRRS contains what are relatively progressive statements of aspirational land use change. Yet the voluntary status of the LRRS leads most lawyers to disregard the relevancy of the LRRS for property law. This may hamper its effectiveness in challenging the ownership model in isolation. Yet, as argued throughout this thesis, as a form of property performance in the context of similar progressive performances, such a ‘non-binding’ statement can ossify to have legal force; repeated change in a social setting can have fundamental impacts on the property paradigm. Therefore, it is important to view measures such as the LRRS in the context of similar measures.

In this regard, the Land Reform (Scotland) Act 2016 also established the Scottish Land Commission.<sup>535</sup> As already outlined in chapters 2 and 3, the SLC is a non-departmental government body which provides strategic policy advice to Scottish Ministers as well as supporting behavioural change regarding land use through its ‘good practice programme’.<sup>536</sup> The SLC is thus tasked with taking forward the *development* of land reform in Scotland.<sup>537</sup> One of the first major policy programmes of the SLC focused on issues associated with the scale and concentration of private rural land ownership in Scotland. Many of these issues have already been discussed in this thesis,<sup>538</sup> so do not warrant full exposition here. It is, however, worth noting that one of the primary findings of the SLC was that whilst large-scale landownership does not necessarily lead to negative social and environmental outcomes, there is convincing evidence that it is rather the *concentration* of ownership that is detrimental.<sup>539</sup> The evidence suggests that these effects arise ‘because landowners have the power to decide who can access land, when, for what purpose and at what price. *This power is created by the current system of private property*

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<sup>535</sup> Land Reform (Scotland) Act 2016 s4(1).

<sup>536</sup> See Scottish Land Commission, ‘Good Practice’ <[www.landcommission.gov.scot/our-work/good-practice](http://www.landcommission.gov.scot/our-work/good-practice)>. The good practice programme is an important aspect of the SLC’s work and aims to embed meaningful, long-term behavioural change relating to land use and ownership.

<sup>537</sup> Under the Land Reform (Scotland) Act 2016 the SLC must prepare a strategic plan (s8(1)) setting out its objectives and priorities (s8(2)(a)). Its current strategic plan (up to 2026) can be viewed at <[https://www.landcommission.gov.scot/downloads/6543c9e88bf40\\_SLC%20Strategic%20Plan%202023-2026\\_English%20Digital%20FINAL.pdf](https://www.landcommission.gov.scot/downloads/6543c9e88bf40_SLC%20Strategic%20Plan%202023-2026_English%20Digital%20FINAL.pdf)> (last accessed 19/08/2025). Its current strategic priorities are ‘people, power and prosperity’.

<sup>538</sup> See sections 3.3 and 4.3.3.

<sup>539</sup> See Scottish Land Commission, ‘Scale and Concentration of Ownership’ <<https://www.landcommission.gov.scot/our-work/governance-ownership/scale-and-concentration-of-land-ownership>> accessed 07/09/2025.

*rights...*<sup>540</sup> As such, many of the issues that the SLC seeks to address are those specifically brought about by the ownership model.

Consequently, the SLC has issued a number of policy proposals aimed at addressing the impact of the effects of concentrated land ownership.<sup>541</sup> These proposals are threefold: firstly, a ‘public interest test’ on large-scale land acquisitions;<sup>542</sup> secondly, a ‘statutory review mechanism’ which would provide a means of state intervention with private land ownership to enforce the principles of the LRRS;<sup>543</sup> and thirdly, related to this review mechanism, a requirement for large estates to prepare and publicise ‘land management plans’ (LMPs), which are intended to ‘demonstrate delivery against the LRRS’, connecting with ‘local priorities, opportunities and public policy.’<sup>544</sup> This would include setting out ‘how the management of the landholding supports the principles of the LRRS and contributes to relevant land use, economic and community development priorities, and opportunities as expressed in community plans, regional and national policy.’<sup>545</sup> The SLC suggests that this would lead to a requirement to include a community engagement plan setting out how the land owner is embedding the community in their decisions.<sup>546</sup> Statutorily mandated LMPs would only apply to landholdings over a certain threshold, to ensure that disproportionate administrative burdens do not befall smaller landholdings.<sup>547</sup> LMPs already exist in practice – they are not a creation of the SLC. For example, John Muir Trust – an interest group which owns seven estates in Scotland – has developed

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<sup>540</sup> Scottish Land Commission, ‘Investigation into the Issues Associated with Large Scale and Concentrated Landownership in Scotland’ (2019), 56, <[www.landcommission.gov.scot/downloads/5dd7d6fd9128e\\_Investigation-Issues-Large-Scale-and-Concentrated-Landownership-20190320.pdf](http://www.landcommission.gov.scot/downloads/5dd7d6fd9128e_Investigation-Issues-Large-Scale-and-Concentrated-Landownership-20190320.pdf)> accessed 07/09/2025. See also Scottish Land Commission, ‘Review of Scale and Concentration of Land Ownership: Report to Scottish Ministers’ (2019), 4 <[www.landcommission.gov.scot/downloads/5dd7d77021f04\\_Report-to-Ministers-Scale-and-Concentration-Land-Ownership-FINAL-20190320.pdf](http://www.landcommission.gov.scot/downloads/5dd7d77021f04_Report-to-Ministers-Scale-and-Concentration-Land-Ownership-FINAL-20190320.pdf)>: ‘[I]and ownership and use are intimately connected. Existing research and our call for evidence demonstrates the inherent power of decision making and influence that is associated with land ownership.’

<sup>541</sup> Scottish Land Commission, ‘Legislative Proposals to Address the Impact of Scotland’s Concentration of Land Ownership’ (2021) <[www.landcommission.gov.scot/downloads/601acfc4ea58a\\_Legislative%20proposals%20to%20address%20the%20impact%20of%20Scotland%E2%80%99s%20concentration%20of%20land%20ownership%20-%20Discussion%20Paper%20Feb%202021.pdf](http://www.landcommission.gov.scot/downloads/601acfc4ea58a_Legislative%20proposals%20to%20address%20the%20impact%20of%20Scotland%E2%80%99s%20concentration%20of%20land%20ownership%20-%20Discussion%20Paper%20Feb%202021.pdf)> accessed 07/09/2025.

<sup>542</sup> *ibid.*, 36 – 44.

<sup>543</sup> *ibid.*, 32 – 35.

<sup>544</sup> *ibid.*, 30. The recommendation of the SLC is that LMPs could either be a standalone legislative requirement, or could be integrated as part of a statutory set of Codes of Practice, forming part of a wider ‘Land Rights and Responsibilities Review.’ For the purposes of this chapter, LMPs are considered in isolation from such statutory Codes of Practice as the latter has not been brought forward in legislative form.

<sup>545</sup> *ibid.*

<sup>546</sup> *ibid.*, 30 – 31.

<sup>547</sup> *ibid.*

management plans for each of its estates.<sup>548</sup> These LMPs are publicly available and outline the vision of John Muir Trust for each estate, delineating the ways in which the management of the land is contributing to the ambitions of the interest group.<sup>549</sup> However, the policy proposals of the SLC instead seek to standardise the creation, publication and use of LMPs for large landowners.<sup>550</sup> However, according to the SLC, state-led, regulatory *enforcement* of LMPs on large landholdings would increase transparency of land use decision making.<sup>551</sup> This would, as a result, alleviate some of the issues associated with concentrated land ownership without necessarily engaging in property redistribution. Following the delivery of the SLC's advice, the Scottish Government issued a public consultation on a new Land Reform Bill, entitled 'Land Reform in a Net Zero Nation',<sup>552</sup> taking forward the recommendations made by the SLC and, in name at least, seemingly making a firm commitment to connecting land use change with the legal requirement to reach net zero emissions by 2045.<sup>553</sup>

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<sup>548</sup> See John Muir Trust, 'Land In Our Care' <[www.johnmuirtrust.org/land-in-our-care](http://www.johnmuirtrust.org/land-in-our-care)> accessed 03/04/2025. Each estate – Ben Nevis, East Schiehallion, Glenlude, Knoydart, Quinag, Sandwood and Skye – has its own management plan.

<sup>549</sup> As stated in its management plan for Ben Nevis, for example, the purpose of the John Muir Trust is to 'conserve, protect and restore wild places for the benefit of all. Our vision is a world where wild places are valued for present and future generations. One of the ways we work towards this is by taking on stewardship of wild places, and working with the community to protect and repair them.' See John Muir Trust, 'Management Plan for Ben Nevis Estate' (2023), 4, <[www.johnmuirtrust.org/assets/000/002/930/2023\\_Nevis\\_Management\\_Plan\\_original.pdf?1685612889](http://www.johnmuirtrust.org/assets/000/002/930/2023_Nevis_Management_Plan_original.pdf?1685612889)> accessed 03/04/2025. See also Scottish Land Commission, 'Land Management Planning: John Muir Trust' <[www.landcommission.gov.scot/our-work/good-practice/transparency-of-ownership-and-land-use/land-management-planning-john-muir-trust](http://www.landcommission.gov.scot/our-work/good-practice/transparency-of-ownership-and-land-use/land-management-planning-john-muir-trust)> accessed 03/04/2025.

<sup>550</sup> Indeed, the SLC, as part of its 'good practice programme' has already issued a template LMP to support landowners in providing information about the ownership and use of the land. See Scottish Land Commission, 'Good Practice Guidance: Providing Information on Who Owns Land in Scotland' <[www.landcommission.gov.scot/downloads/5e99a6262f615\\_TEMPLATES%20Land%20Use%20and%20Management30.03.20.pdf](http://www.landcommission.gov.scot/downloads/5e99a6262f615_TEMPLATES%20Land%20Use%20and%20Management30.03.20.pdf)> accessed 03/04/2025.

<sup>551</sup> Scottish Land Commission, 'Review of Scale and Concentration of Land Ownership' (no 540), 8. The threshold to cross to be a 'large landholding' was suggested as between 1,000-3,000 hectares.

<sup>552</sup> See Scottish Government, 'Land Reform in a Net Zero Nation: Consultation' (2022) <<https://www.gov.scot/publications/land-reform-net-zero-nation-consultation-paper/>> accessed 01/04/2025. The consultation opened in July 2022, closing in October 2022, asking a total of 51 questions. There were 537 responses, most of which can be viewed here: <[https://consult.gov.scot/agriculture-and-rural-economy/land-reform-net-zero-scotland/consultation/published\\_select\\_respondent/](https://consult.gov.scot/agriculture-and-rural-economy/land-reform-net-zero-scotland/consultation/published_select_respondent/)> accessed 07/09/2025.

<sup>553</sup> The Bill ended Stage 1 of the parliamentary process to decide if it should become an Act on 26 March 2025. It passed stage 2 on 24 June 2025, and is now in stage 3 of the parliamentary review process, with several potential amendments tabled before it can become an Act of the Scottish Parliament. The Net Zero, Energy and Transport Committee – tasked with reviewing the Bill and taking evidence regarding its points – issued its report on the initial version of the Bill on 19 March 2025. The Report suggests a number of changes, but LMPs are one area which received broad support. The recommendations from the Committee regarding other aspects of the Bill will not be considered in this chapter. See Scottish Parliament Net Zero, Energy and Transport Committee, 'Stage 1 Report on the Land Reform (Scotland) Bill' (2025) <<https://bprcdn.parliament.scot/published/NZET/2025/3/19/3dce404f-b786-4553-95f7-d683987ecc3a-1/NZETS062025R05.pdf>> accessed 01/04/2025. The proposed introduction of compulsory LMPs for large-scale landowners generally garnered positive support, with 77% of all respondents agreeing that there should be a duty on large-scale landowners to publish LMPs, with transparency and accountability, as well as a

### 5.2.3.1 Legislative provisions relating to LMPs

Following the ‘Land Reform in a Net Zero Nation’ consultation, the Scottish Government introduced the Land Reform (Scotland) Bill on 14 March 2024, with an amended version subsequently published on 25 June 2025. The Bill integrates certain recommendations of the SLC, albeit in a very modified form. The statutory review mechanism for the LRRS was not taken forward, but the Bill does include LMPs. Section 1(4) of the Bill would insert new provisions into the Land Reform (Scotland) Act 2016, giving Scottish Ministers the power, through regulation, to impose obligations on a landowner for the ‘purpose of promoting community engagement in relation to land.’<sup>554</sup> Compulsory LMPs, if introduced, will only apply to landholdings over 1,000 hectares (or over 1,000 hectares and more than 25% of an inhabited island).<sup>555</sup>

This is narrower than the advice given by the SLC in two ways. Firstly, the obligations on landowners set by Scottish Ministers under section 44A only capture those relating to ‘community engagement’; this may suggest that the only goal of LMPs is community engagement, rather than wider socio-climatic issues expressed through net zero. Certainly, section 44B(1) appears concerned mainly with community engagement: the LMP must be

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means of ensuring compliance with the LRRS, were commonly cited reasons for agreement among respondents. Although this is a clear majority of respondents, landowner respondents tended to disagree with the introduction of compulsory LMPs. The Bill was then further amended under stage 2, with the amended version published 25 June 2025. See Scottish Parliament Bill 44A Land Reform (Scotland) Bill [as amended at Stage 2] Session 6 (2025) (the ‘Land Reform (Scotland) Bill 2025’).

<sup>554</sup> Land Reform Bill 2025 s44A(1). The new provisions regarding community engagement obligations would include a new s44A – 44M. Note that references to s44A(1) in this chapter are made directly, instead of indirectly referencing the operative part of the Bill (s1(4)).

<sup>555</sup> Although, this is not so straightforward. The proposed legislative provisions on this point are rather confusing. S44A(3) states that LMPs are only relevant for land to which s44D applies. S44D(2)(a) and (b) state that ‘land’ in this regard is a landholding exceeding 1,000 hectares, whether as a single holding or a composite holding. S44D(4)(a) states that a ‘single holding’ is the whole of a contiguous area of land in the ownership of one individual or a number of individuals; in other words, the land is all connected without being interrupted geographically by another, separate, landholding. S44(4)(b) states that a ‘composite holding’ is ‘two or more single holdings’ if the conditions in subsection (5) are met. The conditions in subsection (5) begin by requiring that a boundary of holding A touches a boundary of holding B (subsection (5)(a)). Then, it must be ascertained through subsection 5(b)(i) or (ii) that there is some kind of connection between the owners of each holding: the owner of holding A is either ‘also the owner of another single holding that forms part of a composite holding of which holding B forms part’ or they are ‘connected to the owner of another single holding that forms part of a composite holding of which holding B forms part.’ ‘Connection’ can be found where those persons are companies in the same group; that one has a controlling interest in the other, or a person holds a controlling interest in them both. This is, for all intents and purposes, confusing. The explanatory notes provide some clarity, giving an example wherein ‘if A Ltd and B Ltd are part of the same company group and A Ltd owns 2,000 hectares adjoining B Ltd’s 2,000 hectares, the combined single holdings of A Ltd and B Ltd would be treated as forming a 4,000-hectare composite holding. [Community-engagement provisions] would apply to the land comprising that composite holding, and therefore regulations could... [impose] obligations on both A Ltd and B Ltd in relation to that land.’ See Land Reform (Scotland) Bill Explanatory Notes (2024) <[www.parliament.scot/-/media/files/legislation/bills/s6-bills/land-reform-scotland-bill/stage-2/spbill44as062025.pdf](http://www.parliament.scot/-/media/files/legislation/bills/s6-bills/land-reform-scotland-bill/stage-2/spbill44as062025.pdf)> accessed 07/09/2025.

made publicly available; there must be engagement with communities on the development and significant changes to the plan (which wording implies that such engagement cannot be a mere box ticking exercise); and the plan must be reviewed and revised (if appropriate) every 5 years. However, the rest of the provisions suggest that whilst community engagement is an important aspect of LMPs, wider considerations are at stake. For example, section 44B(3) provides that the *content* of the compulsory LMPs must include not only information on the ownership structure and the owner's long-term objectives for the land (including its potential sale), but also how the owner is managing, or intends to manage, the land in a way that contributes towards achieving net zero by 2045, adapting to climate change and increasing or sustaining biodiversity.<sup>556</sup> Secondly, where the SLC advised that LMPs directly demonstrate 'delivery against the LRRS', the LRRS is linked (albeit circuitously) to LMPs through Scottish Ministers being obliged to be 'informed by the LRRS' when making the relevant regulations under section 44A.<sup>557</sup>

Notwithstanding the changes made to the SLC advice following the consultation leading up to the introduction of the Land Reform (Scotland) Bill, the fact remains that LMPs if introduced would impose obligations on large landowners that, previously, have not existed. Further, LMPs are backed up by a statutory enforcement mechanism found in section 44E: any alleged breaches of the obligations imposed by regulations under section 44A (in other words, the duty to create and publish an LMP) can be reported to the newly-created Land and Communities Commissioner,<sup>558</sup> by a set group of bodies.<sup>559</sup> Ultimately, a fine not exceeding £40,000 may be imposed if the Land and Communities Commissioner finds that a breach has occurred.<sup>560</sup>

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<sup>556</sup> S44A(3)(d)(i)-(iii) respectively.

<sup>557</sup> S44A(4).

<sup>558</sup> The Land and Communities Commissioner is a new post which would be created under the terms of the Land Reform Bill. Section 6(2)(a)(a)(ii)(c) would insert a new section 4(4)(c) into the 2016 Act which provides for the establishment of the Land and Communities Commissioner. A newly inserted section 4(9) states that the Land and Communities Commissioner has the functions conferred by section 38A. This newly-inserted section 38A provides for the functions of the Land and Communities Commissioner, including the enforcement of the obligations imposed by regulations under section 44A.

<sup>559</sup> Section 44E(2). These include properly constituted community bodies, Historic Environment Scotland, local authorities, Scottish Environmental Protection Agency and Scottish Natural Heritage (functioning as NatureScot).

<sup>560</sup> Section 44H(2) sets out the requirements necessary for a fine to be imposed, including that the person committing the breach has had an opportunity to remedy the breach and has refused to make an agreement or refused to fulfil an agreement which has been reached (section 44H(2)(a)(i) and (ii)). Section 44H(3) states that a lesser fine not exceeding £1,000 may be imposed for failing to provide information to the Land and Communities Commissioner under section 44G(3).

Therefore, LMPs are envisaged as being a measure through which large landowners are compelled to not only be transparent about their ownership, but also to publicise how they are connecting their right of ownership within a wider set of socio-environmental obligations, including the achievement of net zero by 2045. Contrasted with policy on VCMs, LMPs are an attempt to intervene with ownership via regulation of the private management of land for public interest outcomes; land reform which seeks to regulate and shape the exercise of ownership, rather than redistribute it, to reconcile private ownership with other public interests, including tackling land-based emissions.<sup>561</sup> Though the question of ‘management’ is often framed as separate from that of ownership,<sup>562</sup> it is difficult to see how widescale changes to land management can be made without engaging with ownership, as it is ultimately determinative of the land use. In this regard, this chapter argues that although LMPs are ostensibly engaged in regulating the management of land by owners, they nevertheless carry the potential to impact on the ownership model and, in so doing, lead to land uses that mitigate the climate emergency.

### 5.3 Land Management Plans and the Ownership Model

The ownership model has been described and critiqued throughout this thesis. However, it suffices to restate its core terms. This thesis contends that the ownership model can be distilled into three ‘tropes’. Firstly, it presents property as an abstract right, dephysicalised from the material realities of the places it is enacted. Through these processes of dephysicalisation, the property right itself becomes a tradable commodity, allowing for the movement of property rights between private actors in the marketplace without consideration of the limits of the land itself. Secondly, the ownership model presents property as instrumental, existing only to secure the extraction of resources for the maximisation of individual welfare. Land, and the spaces wherein land is located, are commodified; made as objects and ‘resources’ to be used to extract maximum economic value for the owner. Finally, property is presented through the ownership model as being a wholly individual institution. The rights exercised through property are done so

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<sup>561</sup> Indeed, in their advice, the SLC have been open about this: much of the SLC’s policy work on addressing concentrated land ownership patterns has focused on changing or influencing the *exercise* of ownership rights. See, for example, Scottish Land Commission, ‘Investigation into Concentrated Ownership’ (no 540).

<sup>562</sup> *ibid.*: ‘[the issue of] who owns Scotland, and how much of it they own, has been central to the land reform debate for decades. While many people are utterly convinced that landownership is a key determinant of rural development outcomes, others insist...what is important is *how land is managed*.’ See, for example, Scottish Land and Estates, ‘New Land Reform Bill is ‘Destructive’ Attack on Land Businesses’ (2024) <<https://www.scottishlandandestates.co.uk/news/new-land-reform-bill-destructive-attack-land-businesses>> accessed 07/09/2025.

privately. It is generally accepted in liberal property theory that securing property rights is one of the major routes to securing individual freedom: with secure ownership rights comes the ability to acquire and use material resources to maximise individual welfare, to the exclusion of others. Therefore, a necessary corollary of this right is the ability to exclude others from using those same resources or being involved in the decisions about them. The result is to secure what is seen in liberal property theory as the core goals of certainty and stability. Consequently, the institution of property is shielded from regulation and change.

As this thesis has argued, if policy measures for land use change in Scotland are to meaningfully contribute to the mitigation of the climate emergency their enactment must challenge, rather than entrench, the ownership model. This section argues that, whilst LMPs as a policy measure do challenge the ownership model, as a policy measure it risks dilution in favour of vested landed interests.

### 5.3.1 Abstract

This thesis has, so far, argued that the abstracting from property the ‘right’ of ownership, and the attribution of value in that right, rather than the ‘thing’ itself, is the foundation on which the ownership model is built. This dephysicalisation has had a marked effect on rural spaces in Scotland; the makeup of rural Scotland has largely been divided into spaces of ‘use’ and ‘delight’ through this concentration, with both representing an ingrained nature/culture dualism. The ontological separation of nature from culture means that land use decisions are made with reference to factors external to the material realities of the land itself.<sup>563</sup>

What difference would the imposition of LMPs make to this state of affairs? Imaging a situation where an investment company purchases a large estate called Glenfurly Estate, spanning 5,000 hectares with the intention of afforestation for timber production and carbon market engagement, it is possible to extrapolate a number of outcomes that LMPs may generate. In various ways, LMPs attempt to focus the attention of the new owner on some of the material consequences of its land use decisions. For example, following the process set out in the Land Reform (Scotland) Bill, the regulations imposing LMPs

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<sup>563</sup> For example, although attitudes to land as ‘delight’ are often framed with reference to conservation efforts, as argued in section 2.3.3, such efforts often risk the perpetuation of an imaginary of nature as wilderness, free from human interaction. Land is commodified, but the value is problematically ecocentric.

introduced by Scottish Ministers must be ‘informed by the LRRS.’<sup>564</sup> As stated above, the LRRS includes environmental considerations – specifically a ‘just transition to net zero’ – as both an essential part of the overall ‘vision’ for land ownership and use in Scotland but also as part of the first principle of the LRRS. The ethical achievement of emissions reductions – specifically through the involvement of the local community in land use decisions – is thus a driving force of statutory LMPs.<sup>565</sup> However, this remains a potentiality; the LRRS is only to ‘inform the regulations’ imposing obligations such as LMPs. If implemented with this wording, it is not clear quite whether this would materialise.

However, whilst the LRRS may not be adequately integrated into the Bill as currently drafted, the provisions in sections 44B(3)(d)(i) to (iii) explicitly require the company to set out how they are managing the land in a way that contributes towards the achievement of net zero, which also shows adaptation to climate change and which increases or sustains biodiversity. Therefore, the company’s decision to engage in land use change for the purposes of afforestation would be made publicly available in their LMP,<sup>566</sup> which has been developed through engagement with the local community, including the opportunity for ‘significant changes’ to be made.<sup>567</sup> In this regard, that decision which (as argued in chapter 3) is based largely on economic factors external to the material realities of place would become subject to both environmental limits and local priorities.

This is, in many ways, a placed approach to property which presents the ownership right of the company as contingent upon material spatial arrangements, including local needs and public issues such as climate change. As such, the imposition of direct obligations on large landowners in this manner can be seen to challenge processes of dephysicalisation. Decisions previously made with both the social and physical spatial environment as peripheral to the investment company must now be made through direct engagement with environmental considerations, including local human communities, non-human communities and the impact on Earth systems. An optimistic view of LMPs in this regard suggests that the land use decisions of the investment company would no longer be made

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<sup>564</sup> Section 44A(4).

<sup>565</sup> References to net zero in both the vision and the principle 1 are preceded by the necessity for a ‘just transition’ to net zero.

<sup>566</sup> Section 44B(1)(a). See also section 5.3.3.

<sup>567</sup> Section 44B(1)(b).

*solely* with reference to abstract economic metrics; instead, the material, spatial conditions of the land may play a greater role in determining the use.

This being said, regulatory measures which limit the exercise of ownership already exist in certain public law enactments. Indeed, the company would be subject to limitations imposed through environmental and planning law. For example if part of Glenfurly Estate is designated as a Site of Special Scientific Interest (SSSI) there will be certain duties and restrictions imposed according to the terms of that designation,<sup>568</sup> and the new planting activities may require an initial Environmental Impact Assessment,<sup>569</sup> which may follow certain initial planning consultation processes. There may also be private law obligations such as a public right of way through which the company must yield access to the public. Is the imposition of obligations through LMPs adding anything different? Three responses are worth noting in this regard. Firstly, such public law constraints tend to be specific in their scope, for example SSSIs will relate to a defined aspect of conservation such as a particular species of bird, and a public right of way will be limited in its terms and exercise. The obligations imposed by LMPs are potentially far broader. For example, the requirement to contribute to the achievement of net zero can be construed in a very extensive manner as far as land use decisions are concerned.<sup>570</sup> Secondly, existing legal constraints tend to be constructed in a negative manner: the landowner is obligated *not* to do something. The obligations within LMPs, including stricter reference to the LRRS, largely impose *positive* duties on landowners. Thirdly, and as a direct result of the first and second points, the imposition of broad, positive obligations points to a far deeper engagement with property. Rather than simply being another set of constraints on an otherwise conceptually absolute notion of property, the imposition of obligations via LMPs can be viewed as an *ex ante limit* on the right of ownership itself.<sup>571</sup>

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<sup>568</sup> A SSSI is a designated ‘natural’ area which can include a range of non-human habitats and species. See Scottish Government, ‘Biodiversity’ <[www.gov.scot/policies/biodiversity/sites-of-special-scientific-interest/#:~:text=Sites%20of%20Special%20Scientific%20Interest%20\(SSSIs\)%20form%20a%20set%20of,using%20UK%2Dwide%20selection%20criteria.](http://www.gov.scot/policies/biodiversity/sites-of-special-scientific-interest/#:~:text=Sites%20of%20Special%20Scientific%20Interest%20(SSSIs)%20form%20a%20set%20of,using%20UK%2Dwide%20selection%20criteria.)> accessed 07/09/2025. Powers to create SSSIs are found in the Nature Conservation (Scotland) Act 2004.

<sup>569</sup> See Scottish Forestry, ‘What is an Environmental Impact Assessment?’ <[www.forestry.gov.scot/support-regulations/environmental-impact-assessment#:~:text=An%20EIA%20is%20used%20to,trees%20or%20short%20rotation%20coppice](http://www.forestry.gov.scot/support-regulations/environmental-impact-assessment#:~:text=An%20EIA%20is%20used%20to,trees%20or%20short%20rotation%20coppice)> accessed 07/09/2025.

<sup>570</sup> However, this may conversely be construed as a drawback. See section 5.3.4 for further discussion.

<sup>571</sup> On this point, see further discussion in section 5.3.3.

### 5.3.2 Extractive

From the point of view of the investment company, it is entitled – as a right flowing from ownership – to use the land how they see fit. It may extract economic value from the land in Glenfurly according to the abstract metrics that have been assigned vis-à-vis dephysicalised property. This bestows on the company the ‘power to shape physical and social space.’<sup>572</sup> Chapter 3 argued that the type of land use stemming from the purchase of land in the current example by the investment company – afforestation for the purposes of timber extraction and VCM engagement – is unlikely to contribute to emissions reductions, and will instead perpetuate the notion of land of ‘use’. Land, and its constituent parts, are assets according to such an approach. An alternative situation may be imagined, wherein a different land use change occurs – for example, where instead of an investment company it is an international mining company purchasing the land. In this situation, the land use change will almost certainly create, rather than reduce, carbon emissions; the thing of value is the mineral under the ground which has been valued separately from its material surroundings. The spaces of Glenfurly are, in both examples, rendered as ‘use’. These spatial consequences inhibit, rather than enable, effective mitigating action for climate change. This, the ownership model tells us, is property: the right to control and sue a thing by a person. Ownership gives the holder of the right control over the thing, and the ownership model renders imaginable an increasing list of ‘things’ without reference to their physical setting.

The ownership model thus frames property as an institution guaranteeing *rights* to use a thing. Absent in this conceptualisation is the concurrent need for responsibility, or to go further, *obligation*. As argued in chapter 2, the ‘exercise of rights...shape and structure the physical space in which we live.’<sup>573</sup> Therefore, decisions made by an owner to use land have important climatic consequences. Dan Matthews, in his work *Earthbound*, discusses the writing of philosopher Simone Weil, who ‘was keenly aware of the inadequacies of modernity’s obsession with *rights* and who insisted on recognising the *priority of obligation*.’<sup>574</sup> Obligation is, in this regard, wide ranging and eschews precise definition, yet it is in its ‘rootedness’ in the material conditions of human and non-human life on Earth

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<sup>572</sup> Babie, ‘Private Property and Climate Change’ (no 102), 500.

<sup>573</sup> *ibid*, 498

<sup>574</sup> D Matthews, *Earthbound: The Aesthetics of Sovereignty in the Anthropocene* (2021), 42, referencing S Weil, *The Need for Roots* (2001), 2.

that it provides a potential remedy to the extractivism within modern land use practices.<sup>575</sup> Property rights, thus conceived, are imagined as both contingent upon and subordinate to the notion of obligation, which exists prior to those rights. This rings true in the context of the climate emergency; the existence of property rights is deeply reliant upon the existence of material conditions – if one were to own a beach which is subsumed by rising sea levels, that right scarcely means anything.

This is echoed by Joseph Singer, who argues that legal systems take for granted that owners have obligations as well as rights, and that one purpose of property law is to *regulate* property use so as to protect neighbouring owners as well as non-owners in society.<sup>576</sup> This regulation often comes from state measures, which Singer argues are the means through which obligations are often enacted in private ownership; without regulation limiting the unfettered exercise of ownership, property would cease to exist precisely because regulation ensures balance between competing interests.<sup>577</sup> Land reform, in this context enacted through the introduction and enforcement of mandatory LMPs for large landowners, can ensure that the fiercely-guarded individualism at the heart of the ownership model is balanced with the recognition that obligations towards non-owners and things seen as ‘external’ to the sphere of ownership – human communities, non-human communities, Earth systems such as climate – are also inherently affected by ownership. Regulation, therefore, integrates further obligations into ownership; the direct incorporation of net zero and biodiversity obligations in LMPs extends those obligations not just to other human communities but to wider ecological phenomena (including non-human communities) and Earth systems, aiming to address the climate emergency. This is a challenge to the extractive logic within the ownership model; LMPs utilise obligations as a means of addressing the continued commodification of the land.

As argued throughout this thesis, no single measure has the capacity to unilaterally challenge the ownership model to the extent that the property paradigm itself changes to provide more ecologically balanced outcomes. The person/thing dualism present in the property paradigm is not changed through one regulatory intervention. Nevertheless, LMPs can have an impact on the ownership model. Instead of viewing place as a package of discrete assets, the obligations enforceable via LMPs suggests a move towards a more

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<sup>575</sup> *ibid.*

<sup>576</sup> J W Singer ‘How Property Norms Construct the Externalities of Ownership’ in G S Alexander and E M Peñalver (Eds) *Property and Community* (2009), 57 – 79

<sup>577</sup> See, generally, Singer, *Entitlement* (no 105).

holistic, place-based attitude towards ownership which accounts for the need for large landowners in Scotland to account for environmental and social issues caused through land use. Through the LMP process, attitudes towards land use are informed according to a wider set of values as expressed through both the LRRS, and those values in section 44B(3) of the Land Reform Bill, which includes the achievement of net zero, adapting to climate change and increasing and sustaining biodiversity.<sup>578</sup> Though these requirements are potentially integrated into the Bill in too nebulous a manner or indeed without sufficiently defined parameters for action or strong enough enforcement mechanisms (as in the case of the requirements under s44B(3)), such recognition of a wider set of values – including the relationality of property and responsibilities as an inherent part of the ownership of large areas of land – is, at the very least, made visible through this state regulation.

### 5.3.3 Individualistic

Institutional Writer Erskine’s famous dictum in Scots law is that ownership is the ‘right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction.’<sup>579</sup> This view of ownership in Scots law is commensurate with the ownership model: the owner is set apart from both the state and from no-rights holders, afforded unilateral power to ‘use and dispose’ of the thing owned to the exclusion of other human and non-human communities. There can be certain sanctioned acts which are contrary to this (the caveat of ‘except in so far as we are restrained by law or paction’) but these are viewed as necessarily evils. Interference by the state or other individuals in the property rights of an individual is seen as unnatural in the ownership model. Therefore, it must be justified in the strongest terms and will almost always be a temporary limit on the right of ownership, often highly specific in its terms and operation.<sup>580</sup> Yet, as Joseph Singer contends, property is a ‘paradox’, in that

‘[w]e invite owners to use their property for their own purposes, in their own manner, and at a time of their own choosing...Yet, the various tensions embedded in the property system require us to impose obligations on owners – obligations to use their property in a manner that is not inimical to the legitimate interests of others. Entitlement initially appears to abhor obligation,

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<sup>578</sup> Section 44B(d)(i)-(iii).

<sup>579</sup> Erskine II, 1, 1. See section 3.2 for further discussion.

<sup>580</sup> Van der Walt, *Property in the Margins* (no 31), 41.

yet on reflection we can see that it requires it. Indeed, it is the tension between ownership and obligation that is the essence of property.’<sup>581</sup>

Therefore, looking at the investment company’s acquisition of Glenfurly Estate: property law signals that its right to use and dispose of the land is unlimited right of ownership is unlimited, determined only by its own choices. Of course, this is not true – the right of ownership is limited – but the *signal* suggests otherwise.<sup>582</sup> The ownership model signals to non-owners, and to the state, to ‘keep off’.<sup>583</sup> As Laura Underkuffler states, a ‘declaration of right clothes an interest with awesome rhetorical, political, and legal power. ‘I have a right’ is a challenge to the world; my interest, which I assert, is – presumptively, at least – superior to all non-rights interests with which it may conflict.’<sup>584</sup> In Scots law, the unititular nature of the right of ownership, as discussed in chapter 2, gives the owner of the thing a greater degree of rhetorical power than is afforded in common law systems.<sup>585</sup> This unititular right may be limited by certain interferences, but *never* is it divisible between persons.<sup>586</sup> Restrictions are generally temporary in nature; where they are not (such as the case of subordinate real rights like servitudes) they are limited in scope, for example the necessity for proximity between the respective holders of the right of ownership (the ‘burdened’ property) and the servitude right (the ‘benefitted’ property). That subordinate real right will also be limited in its exercise; for example, servitude rights in Scots law are limited by their type.<sup>587</sup>

Ownership is, therefore, imagined and practiced as an exclusionary right. The ownership model renders property as *private* property.<sup>588</sup> This is the case in a spatial sense; one of the key powers of ownership is the right to physically exclude non-owners from the land owned. Therefore, the power bestowed by ownership, and the consequences of the land use

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<sup>581</sup> Singer, *Entitlement* (no 105), 204

<sup>582</sup> See discussion in section 2.2.3. See also Singer, *Entitlement* (no 105), 8 – 9, referencing L Underkuffler-Freund, ‘Property: A Special Right’ (1996) 71(5) *Notre Dame Law Review* 1033, 1034. ‘[o]ur ideology and our practice diverge in sharp and irreconcilable ways. Laura Underkuffler-Freund usefully explains that the idea of property revolves around absolutist conceptions, but that the institution of property in the real world involves – and has always involved – substantial limitations on the rights of owners.’

<sup>583</sup> Van der Walt, ‘Modest Systemic Status of Property’ (no 37), 23.

<sup>584</sup> L Underkuffler, *The Idea of Property: Its Meaning and Power* (2003), 65

<sup>585</sup> See section 3.2.

<sup>586</sup> See section 3.2.

<sup>587</sup> Servitudes are similar to easements in common law. They are rights, good against the world, allowing a right of an adjoining property to be on or to cross neighbouring property. In Scots law, servitudes are a form of ‘subordinate’ real right, stemming from the right of ownership, rather than being a divided stick in a larger bundle of sticks making up the property. Servitudes are limited by their constitution: for example, a servitude created solely for access on foot on a neighbouring property cannot then be used to justify laying a pipe underneath that same land, or indeed for *anyone* to make of that same right of access.

<sup>588</sup> Blomley, *Unsettling the City* (no 71), 2.

decisions made by the owner in the physical world, are obscured by its privateness. This can make sense in certain domestic settings – the owner of an urban dwelling may have a legitimate expectation that strangers will not use their small garden for access when there is a public road. However, in the context of this thesis – rural place in Scotland – the justifiability of a right of almost total exclusion is more difficult. As argued in section 3.3.4.2, access rights under the 2003 Act are an example of a challenge to the perceived privateness of rural land presented in the ownership model. LMPs may present a similar challenge to the privateness of property.

In Scotland, privately made, individual decisions over rural land do not just affect the decision-maker. Looking back to the fictional example used throughout this section, the 5,000-hectare Glenfurly Estate will have a diverse socio-ecological make-up, spanning multiple and varied landscapes with diverse topography and ecosystems of human communities and non-human communities. The decisions made over that large area of land thus have tremendous spatial implications, not least for the continued anthropogenically-charged changing of Earth's climate. The introduction of LMPs suggest a recognition of these implications; that ownership of such a vast area of land is a very *public* issue. Where an LMP is made mandatory, the decision-making processes over large areas of rural land are changed from a presumptive privateness to a mandated publicness: there must be consultation with those human communities affected; aspects of biodiversity must be considered; more general obligations contained in the LRRS must also be accounted for; and, finally, the landowner must show how they are contributing to the achievement of net zero through emissions reduction action. If the landowner fails to carry out these obligations, they may be subject of an investigation and eventual fine by the Land and Communities Commissioner.<sup>589</sup>

Therefore, LMPs represent an attempt to resolve some of the tensions between rights and responsibilities within the existing property paradigm. Singer notes that this resolution in normal circumstances of ownership materialises through 'privatising obligation.'<sup>590</sup> In other words, owners are encouraged to act in a caring manner but any government regulation to that effect is unwarranted. He explains that,

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<sup>589</sup> Land Reform (Scotland) Bill 2025 s44E.

<sup>590</sup> Singer, *Entitlement* (no 105), 16.

‘[this] attempts to separate the private and public world. The private world is where owners are free to satisfy solely their own interests or to look outside themselves and tend to the interests of others if they like. The public world is where limits are placed, through regulation, on the liberty of owners to act as they please.’<sup>591</sup>

Indeed, there is a long-held view of large estate owners in Scotland as ‘stewards’ of the land, particularly among the more traditional rural landowners in Scotland.<sup>592</sup> For example, in a recent publication *Scottish Land and Estates*, the membership body of large estate owners in Scotland, simultaneously recognises the concentration of ownership in rural Scotland whilst attesting to its benefits:

‘Scotland’s 1,125 rural estates cover a combined area of approximately 4.1 million hectares, around 57% of Scotland’s rural land. Those familiar with the sector are well aware of the contribution estates make to the Scottish economy and society, but outwith the sector this contribution is not well recognised...Their contribution to the environmental, economic and community outcomes is particularly large...’<sup>593</sup>

In the same publication, estate owners are described as being ‘stewards of the natural environment’, ‘place makers’, ‘engines of the rural economy’, ‘gateways to nature’, and ‘community anchors’.<sup>594</sup> In other words, state intervention is not necessary because the concentration of ownership in this group of owners has led, on the whole, to positive outcomes for Scotland’s rural places.

However, this idea of stewardship speaks to Singer’s ‘privatised obligation.’ It entrenches the strict public/private binary which upholds the individualism of property, maintaining exclusionary practices whilst shielding ownership from outside interference. Thus, landowners can attest to the obligations inherent in large-scale ownership without necessarily being bound to them. Whilst certain private landowners do seek to work with

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<sup>591</sup> *ibid.*

<sup>592</sup> See A McKee *et al*, ‘The Scottish Private Estate’ in J Glass *et al* (Eds), *Lairds, Land and Sustainability: Scottish Perspectives on Upland Management* (2013), 65. The authors state here that a ‘salient argument often made in favour of [large] private landownership is that the long-term perspective associated with ancestral ownership and the prospect of passing on land to future generations offer the potential to deliver long-term stewardship...The historically paternalistic character of private landownership meant that lairds [Scots for ‘lords’ or ‘landlords’ in rural settings] had a traditionally patriarchal relationship with tenants, with clear control over the availability of housing, employment and development opportunities on the estate.’ See also discussion in section 3.3.2..

<sup>593</sup> Scottish Land and Estates, ‘The Contribution of Rural Estates to Scotland’s Wellbeing Economy’ (2023) <[www.scottishlandandestates.co.uk/sites/default/files/inline-files/The%20Contribution%20of%20Rural%20Estates%20to%20Scotland%27s%20Wellbeing%20Economy%20-%20Full%20Report.pdf](http://www.scottishlandandestates.co.uk/sites/default/files/inline-files/The%20Contribution%20of%20Rural%20Estates%20to%20Scotland%27s%20Wellbeing%20Economy%20-%20Full%20Report.pdf)> accessed 29/07/2025.

<sup>594</sup> *ibid.*

local communities and may have altruistic motives including emissions reductions,<sup>595</sup> LMPs seek to make public this privatised obligation. This regulatory move within a broader land reform regime shifts a historically private decision-making power to a process which involves explicit recognition of obligation in large scale ownership. For the investment company owner of Glenfurly, it challenges the expectation that its decisions over Glenfurly Estate are entirely private.

In this regard, it can be said that LMPs promote transparency over privacy: the (partial) integration of the LRRS within LMPs means that the principles of transparency of ownership and decision-making is ingrained in LMPs.<sup>596</sup> Not only this, but the LMP itself must be publicly available.<sup>597</sup> The decision-making power is, therefore, widened considerably beyond just the owner. To illustrate, the purpose of LMPs, according to section 44A(1) is to promote community engagement in relation to the land owned. The LMP must be made through ‘significant engagement with communities’, which engagement can include ‘significant changes’.<sup>598</sup> Quite what this will mean in practice remains to be seen, but at the very least there is visible here a challenge to the private/public division within property presented by the ownership model. This is particularly important in a Scottish context: section 3.3 outlines that many of the land use change decisions which altered the spatial realities of place for generations were made privately by very few individuals, leading to widespread negative social and environmental consequences. LMPs represent an opportunity to introduce more accountability to land use change decisions which affect thousands of hectares of rural land. Further, such a change signals an opening for values commensurate with *change* to permeate property; making ownership contingent on issues of public interest – climate, biodiversity, community sustainability – consequently minimises the importance of certainty for the landowner.

Therefore, what might the investment company’s response to the introduction of compulsory LMPs be? Based on the above discussion it is not too presumptuous to suggest that they may resist this imposition of broad obligations, arguing that it is the lack of certainty for the landowner and possible land investors over the ability to exercise the right

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<sup>595</sup> See P Wagstaff, ‘What Motivates Private Landowners’ in J Glass *et al* (Eds), *Lairds, Land and Sustainability: Scottish Perspectives on Upland Management* (2013), 86 – 106.

<sup>596</sup> For example, principle 6 of the LRRS states that there should be ‘transparency about the ownership, use and management of land, and this information should be publicly available, clear and contain relevant detail.’ See Scottish Government, ‘Land Rights and Responsibilities Statement (no 523).

<sup>597</sup> Land Reform Bill s44B(1)(a).

<sup>598</sup> Land Reform Bill s44B(1)(b).

of ownership untrammelled by outside interests that will lead to negative consequences, as well as possible human rights challenges under A1P1 of the ECHR. The response of Scottish Land and Estates (SLE) to both the Land Reform Bill and the SLC proposals that the Bill is based on gives an indication of the possible response.<sup>599</sup> For example, regarding the proposals put forward by the SLE in its 2019 report, which formed the basis of the Land Reform Bill, SLE states that it,

‘[does] not consider the strident proposals [made by the SLC] reflect the success of current guidance-led approach...[nor are they] commensurate to the public’s interest in the subject of land reform...The proposals are *not a proportionate response*...and have *not been adequately justified*. There is no evidence to suggest that landholdings not having a management plan will be detrimental to the community.’<sup>600</sup>

The response is commensurate with the privateness of property presented in the ownership model: any interference with private property rights by the state must be ‘adequately justified’ and be a ‘proportionate response’. These are direct links to the requirements under A1P1 that state regulation of private property rights must be justified and proportionate, and thus a more-than-gentle nod to the possibility of legal challenges to the eventual new Land Reform (Scotland) Act. Instead, a voluntary approach should be continued wherein obligations remain privatised. This line of argument is repeated in their response to the consultation on the Land Reform Bill, wherein it is stated that compulsory LMPs are inappropriate because land owners often run their land as a business; it will thus be ‘inappropriate to expect landowners to demonstrate how and where they are investing their money.’<sup>601</sup>

Thus, according to SLE, not only are the measures disproportionate and thus open to legal challenges, but if they are imposed then there will be negative environmental consequences (because large landowners already contribute to environmental goals through good

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<sup>599</sup> It is, of course, possible that the investment company buying Glenfurly would not be represented by SLE, but most large landowners in Scotland are represented by the organisation. Therefore, the response of SLE can be taken as representative of the majority of large landowners in Scotland.

<sup>600</sup> Scottish Land & Estates, ‘Legislative Proposals to Address the Impact of Scotland’s Concentration of Land Ownership: SLE Response’, <[www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20Response%20to%20Discussion%20Paper.pdf](http://www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20Response%20to%20Discussion%20Paper.pdf)>, 1, accessed 21/09/2025.

<sup>601</sup> Scottish Land and Estates, ‘Land Reform in a Net Zero Nation: Consultation Response’ (2022) <[www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20response%20to%20Land%20Reform%20in%20a%20Net%20Zero%20Nation%20Consultation.pdf](http://www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20response%20to%20Land%20Reform%20in%20a%20Net%20Zero%20Nation%20Consultation.pdf)>, 24.

stewardship)<sup>602</sup> and negative *social* consequences through a drop in investment in rural Scotland. These points are pre-empted by Joseph Singer (albeit in an American context):

‘...people long for owners who act honourably and recognise obligations to those who are vulnerable to their decisions...At the same time, any attempt to mandate such actions will be resisted on the grounds that such regulations interfere with the liberty of business owners to manage their property as they please and would inhibit business investment *so as to make everyone worse off*; mobility of both capital and labour is a *crucial ingredient of economic efficiency and social welfare*.’<sup>603</sup>

The investment company owner of Glenfurly may, therefore, argue that a voluntary, guidance-led approach to engaging with obligations in landownership is the most appropriate course of action. Any state intervention regarding the imposition of obligations would be unjustified and unnecessary. In other words, ‘keep off.’<sup>604</sup>

#### 5.3.4 Land Management Plans as a sufficient challenge to the ownership model in the context of the climate emergency?

The above discussion highlights the ways in which LMPs can challenge the tropes of the ownership model. In so doing, such a policy measure presents opportunities for land use change that tackles the climate emergency.<sup>605</sup> The imposition of new and potentially wide-ranging obligations on large landowners is rare in a Scottish context, so any such regulatory measure destabilise, to varying extents, the status quo. This is particularly so in the context an evolving programme of land reform in Scotland.

However, there is a danger of overstating the significance of this policy measure in isolation. Indeed, the focus on land *management* and *use* generally follows the rhetoric of vested landed interests, who insist that such land management is a separate issue from that ownership.<sup>606</sup> In other words, there may be a sense that LMPs shift the focus away from the right of ownership itself, failing to adequately confront it. For example, the specific incorporation in the Land Reform (Scotland) Bill of an obligation for a landowner to show

<sup>602</sup> See, for example, Scottish Land and Estates, ‘The Contribution of Rural Estates to Scotland’s Wellbeing Economy’ (2023) <[www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20Wellbeing%20Report%20Executive%20Summary.pdf](http://www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20Wellbeing%20Report%20Executive%20Summary.pdf)> accessed 22/09/2025.

<sup>603</sup> Singer, *Entitlement* (no 105), 202. Emphasis added.

<sup>604</sup> Van der Walt, ‘Modest Systemic Status of Property Rights’ (no 37), 23.

<sup>605</sup> In particular the obligation in the Land Reform (Scotland) Bill section 44B(3)(d)(i), to account for land use which is actively contributing towards emissions reductions and the achievement of net zero by 2045 appears to be a positive addition in this regard.

<sup>606</sup> M M Combe, ‘The Environmental Implications of Redistributive Land Reform’ (2016) 18(2) *Environmental Law Review* 104, 113.

how they are contributing to the achievement of net zero can be viewed positively for the achievement of climate targets.<sup>607</sup> Although, as explained in chapter 3, climate action can often be utilised as a justification for the maintenance of the status quo.<sup>608</sup> As Scottish Land and Estates argue with regard to LMPs, ‘[all] a private landowner can do is give due consideration to [community] voices but ultimately must take decisions which accord with their own legitimate objectives as long as the community is aware and have been afforded the opportunity to comment.’<sup>609</sup> Looking back to the fictional example of Glenfurly Estate, a relevant person for the purposes of the Land Reform (Scotland) Bill may submit a report of an alleged breach of an obligation imposed through an LMP (for example, failing to contribute to the achievement of net zero).<sup>610</sup> The Land and Communities Commissioner may decide to investigate, but if the company can show that the community has been consulted and that it has considered the responses, and that the action constitutes a legitimate business aim which has considered net zero alternatives but found them to be unviable, it may be unlikely that action can be taken. Even in the situation whereby the investigation concludes that there has been a serious breach, the sanction for a breach of obligation cannot exceed £40,000.<sup>611</sup> This leads to the legitimate question whether this amount is a serious incentive to follow the obligations contained in a compulsory LMP. It may be, but equally this figure may be one that can be subsumed within the wider business plan. In the same situation, it is highly likely that the company which has purchased Glenfurly will be able to successfully argue that it is contributing to net zero through its engagement with natural capital markets, as it intends to use the land to grow trees. As chapter 3 argues, whilst such activities ostensibly represent opportunities to offset emissions, contributing to net zero, they in fact present greater risks to real-term emissions reductions. In other words, net zero may be used to legitimate further extractive land uses.

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<sup>607</sup> Land Reform (Scotland) Bill section 44B(3)(d)(i),

<sup>608</sup> See section 4.4.1, in the context of VCMs.

<sup>609</sup> Scottish Land and Estates, ‘Land Reform (Scotland) Bill: Response to SLC Advice to Ministers’ (2025), 3, <[www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20-%20Response%20to%20SLC%20Advice%20-%20Part%201.pdf](http://www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20-%20Response%20to%20SLC%20Advice%20-%20Part%201.pdf)>, There is a further point here regarding corporate land ownership, which can be linked with ‘absentee’ ownership as critiqued in sections . The basic point is related to SLE’s comment regarding the landowner’s ‘own legitimate objectives.’ For corporate owners, those objectives are *legally bound* to the maximisation of profits for shareholders. In the context of the current discussion, there is thus a tension between state-mandated obligations under the Land Reform (Scotland) Bill, such as the achievement of net zero, and legal duties to maximise shareholder returns.

<sup>610</sup> A relevant person under section 44E(2)(a) – (e) is either a duly constituted community body, Historic Environment Scotland, the local authority, the Scottish Environmental Protection Agency, or Scottish Natural Heritage.

<sup>611</sup> Section 44H(3).

In this regard, despite the potential wider challenges to the ownership model presented in the introduction of LMPs, the above suggests a reluctance on the part of the Scottish Government to introduce more fundamental changes to the status quo. As Andy Wightman suggests, in the drafting of the Land Reform (Scotland) Bill Scottish Ministers may have ‘created a straitjacket for themselves.’<sup>612</sup> Here, Wightman is referring to the use of the SLC reports as an evidence base for the Bill.<sup>613</sup> He argues that too much reliance has been placed on these reports within the drafting of the Bill. This is because, as he argues, the Scottish Ministers are ‘extremely nervous about legal challenges.’<sup>614</sup> This is arguably evidence in itself of the strength of the ownership model in the Scottish property paradigm – any interference with ownership must be justified in the strongest terms; if it is not, it shall be subject to challenge under A1P1 to the ECHR for breaching the property rights of the individual. The drafting of the Bill is suggestive of this, for example the oblique incorporation of the LRRS in section 44A(4). This circuitous integration – through Scottish Ministers being compelled only to ‘consult’ the LRRS when making the relevant regulations bringing LMPs into force – seems like a missed opportunity to fully operationalise the LRRS and turn aspirational, voluntary responsibilities into actionable obligations. This retains the privatisation of obligations.<sup>615</sup> Large rural landowners in Scotland can remain to be seen as ‘stewards’ of the land rather than owners with legal obligations including contributing to the achievement of net zero.

This ties to a further question about the definition of ‘large’ landowners. As currently drafted, the Land Reform (Scotland) Bill states that ‘large’, for the purposes of LMPs, is 1,000 hectares or more. However, estates under this arbitrary figure also have the potential to contribute greatly to the achievement (or inhibition) of net zero through land use change. In addition to geographical scale, there is also a question of temporal scale. As currently drafted, LMPs would be required to be drafted and published on a five-year basis.

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<sup>612</sup> A Wightman, ‘Where Now For the Land Reform (Scotland) Bill?’ (2025) <<https://andywightman.scot/2025/03/where-now-for-the-land-reform-scotland-bill/>> accessed 22/09/2025.

<sup>613</sup> His argument relates mainly to the provisions of the Bill which are not covered in detail in this chapter, but the critique bears relevance regardless.

<sup>614</sup> Wightman, ‘Where Now for the Land Reform Bill?’ (no 612). As can be seen in section 5.3.3 legal challenges from groups representing landowners are often floated by these groups in reaction to suggested reform. Indeed, SLE, along with other member groups including the Scottish Association of Landlords, recently challenged legislation introduced as a result of Scottish Government policy on renter protection following the COVID-19 pandemic and the cost-of-living crisis in Scotland. See *Scottish Association of Landlords v Lord Advocate* [2023] CSOH 76 (SAL). The challenge failed but is an example of the litigiousness of groups representing landowners. For commentary on this challenge, see M M Combe and J Robbie, ‘The Cost-of-Living Crisis and Property Regulation’ (2025) 29(2) *Edinburgh Law Review* 323 – 330.

<sup>615</sup> See Singer, *Entitlement* (no 105), 16 on ‘privatised obligations’.

However, the timescales for sustainability are, by their very nature, longer. For example, net zero in Scotland must be achieved by 2045. There is, therefore, a question whether the timescales for LMPs are out of step with these wider geophysical timescales and may lead to a fragmented temporal approach.<sup>616</sup>

Ownership dictates land use, and land use change is critical for the achievement of emissions reductions to mitigate the climate emergency. Although the arguments presented in section 5.3.1 to 5.3.3 suggest that LMPs contain the potential to exert a destabilising effect on the ownership model in Scotland, there remains a question whether the current drafting of the Land Reform (Scotland) Bill is sufficient for this task. Does it truly exceed ‘the normal, day-to-day business of state regulatory action,’ in the words of Van der Walt?<sup>617</sup> Or is it an example of regulatory change which does not challenge or reconsider ‘existing values or assumptions about the place and role of property in society’?<sup>618</sup>

#### 5.4 Land management plans and performative property

This thesis contends that, because land use is a determinant factor in climate change, action to mitigate climate change is, in many ways, dependent on how property is understood and practiced. Repeated actions in social contexts over time have the potential to subvert the norms of the property paradigm. As Nicholas Blomley states, ‘active forms of engagement, communication and interaction...help constitute the world in particular ways.’<sup>619</sup> Such performances are, by their very nature, diverse, ‘implicating both people and things, ideas and actions, and operating at many scales and sites, both formal and everyday.’<sup>620</sup> Indeed, chapter 3 highlights examples of various historic and contemporary property performances, and how many of these have flowed from regulatory action. Chapter 4 adds to these discussions the performative aspects of VCMs, and how policies bolstering natural capital markets continue an unsustainable pattern of land use. In other words, through the representations and practice of property, the ownership model is often ingrained and re-ingrained, shaping not just law but the spaces where law is enacted. However, it is also often confronted and challenged through various performances. Sections 5.3.1, 5.3.2, and

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<sup>616</sup> This has been raised by Andy Wightman: see A Wightman, ‘Where Now for Land Reform?’ (no 612), <<https://andywightman.scot/2025/03/where-now-for-the-land-reform-scotland-bill/>> accessed 22/09/2025.

<sup>617</sup> Van der Walt, *Property in the Margins* (no 31), 213. Van der Walt here is referring to action including that which is perceived as ‘normal’: planning, building and development controls; licencing and regulation of firearms, businesses selling controlled medicines or the rental housing market.

<sup>618</sup> *ibid.*

<sup>619</sup> Blomley, ‘Performing Property’ (no 68), 33.

<sup>620</sup> *ibid.*

5.3.3 highlighted the ways in which LMPs, as a policy measure, can facilitate such challenges, yet which are tempered by the arguments presented in section 5.3.4. For centuries, large landowners in rural Scotland have acted in accordance with their own private interests. Examples throughout this thesis highlight this: the Clearances; mining activities; grouse moors; plantation forests; conservation practices. These land uses legitimise further spatial enclosures. This not only structures property, but also shapes social and physical spaces. A landowner fencing off land and erecting signs warning off potential access-takers due to tree planting activities is engaged in a form of performance. The physical enactments of ownership thus not only shapes physical space – in the context of commercial plantations one can imagine machined troughing and draining changing the biophysical make-up of the land. But, in addition, through such a performative act the social aspects of space are altered;<sup>621</sup> what spatial connections are now possible? Which are made impossible? Reality is constructed through these everyday acts referencing similar, repeated actions in the past.<sup>622</sup> Through such repeated actions, the instrumentalisation of Earth systems is normalised and owners are institutionally rewarded as a result.

Yet, as this thesis argues, the re-enactment of the ownership model is ‘not a closed loop.’<sup>623</sup> The ‘very necessity that property has to be performed’ ensures the possibility for change.<sup>624</sup> Sections 5.3.1, 5.3.2, and 5.3.3 highlight a number of these possible rearticulations. Property decisions are made more contingent upon spatial arrangements, for example net zero and biodiversity requirements, as well as the inclusion of the local community on land use decisions. These represent positive, *ex ante* obligations, stitched into the fabric of large-scale ownership which present opportunities to conceptualise property ‘*ab initio* as based on ecological dependence.’<sup>625</sup> The commodification of land is also confronted through more holistic decision-making according to an increasingly wider set of values.<sup>626</sup> This can form part of a wider ‘long-standing strategy...to posit duties and

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<sup>621</sup> *ibid.*, 36.

<sup>622</sup> *ibid.*, 37. ‘[a]n instance of the ownership model...has performative power not only due to its citational ability to reference innumerable other such manifestations, but also through its sedimented, repetitive, duplicated form.’

<sup>623</sup> *ibid.*

<sup>624</sup> *ibid.*

<sup>625</sup> Davies *et al.*, ‘Property Within Habitat’ (no 28), 42. As the authors explain: ‘[i]nstead of accepting human dominance and improvement as the fundamental hallmarks of property, greater attention needs to be paid to the contributions of ecosystems, including as human and nonhuman habitats, to many forms of production that constitute ‘property’.’

<sup>626</sup> LMPs are, in this regard, one step to recognising this kind of wider obligation. See Robbie and Van der Sijde (no 528), 554 where the authors state that documents like the LRRS, which may be operationalised

obligations for humans in regard to their behaviour towards the environment.’<sup>627</sup> The public/private narrative upheld within the property paradigm is also decentred; the inclusion of local non-owners presents a challenge to the exclusionary nature of the ownership model, making previously private decision-making processes contingent upon local needs. Certainly, these possible rearticulations of property will not all happen at once; nor will they necessarily happen quickly (especially given the sparsely populated nature of much of Scotland’s rural land). However, over time they present opportunities for interactions between owners and non-owners and humans and non-humans that destabilise the otherwise successful performances of the ownership model. This is particularly so as part of a wider land reform regime in Scotland,<sup>628</sup> presenting an opportunity for regulation to facilitate land use change in rural Scotland which mitigates the climate emergency. Of course, and as detailed in section 5.3.4 there are aspects of compulsory LMPs that may hinder the challenges to the ownership model presented above, and there remains scope for improvement in this regard.

## 5.5 Conclusion

In conclusion, though LMPs present a theoretically significant challenge to the ownership model by embedding socio-environmental obligations into large-scale landownership, their practical impact remains contingent on robust implementation. The current drafting of the Land Reform Bill, shaped by fears of legal challenges under AIP1 from vested interests, delivers a diluted version of the policy that may privatise obligation rather than enforce it. However, as Van der Walt cautions, ‘in order to discuss the effects of change on stability it is necessary to distinguish between different kinds of change in a property regime.’<sup>629</sup> For Van der Walt, there is on the one hand large-scale, fundamental alterations to a regime which can occur suddenly; and on the other, incremental developments.<sup>630</sup> This second category generally does not challenge the overall legal framework. However, Van der Walt argues that incremental developments which regulate property can ‘reach a cumulative level where the foundations of the property system are threatened.’<sup>631</sup> As such, when viewed not in isolation but as part of an incremental and performative process of change,

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through LMPs, attempt to ‘place property within a broader system of values that regulates the exercise of property rights.’

<sup>627</sup> Davies *et al*, ‘Property Within Habitat’ (no 28), 15.

<sup>628</sup> Another facet of land reform – the Community Right to Buy – will be discussed in chapter 6.

<sup>629</sup> Van der Walt, *Property in the Margins* (no 31), 216.

<sup>630</sup> *ibid.*, 216 – 217.

<sup>631</sup> *ibid.*, 217.

LMPs create a crucial opening for new, more sustainable property performances. They initiate a slow but necessary recalibration of the property paradigm, gradually aligning land use with the biophysical limits of the Earth and the urgent demands of the climate crisis.

## Chapter 6: The Community Rights to Buy Land

### 6.1 Introduction

This chapter analyses the Community Rights to Buy Land (CRtB) as the most radical, redistributive instrument within Scotland's land reform agenda.<sup>632</sup> Moving beyond the voluntary and regulatory measures discussed in previous chapters, the CRtB framework empowers communities to directly acquire land either through registering a pre-emptive right to buy, or through a state-facilitated compulsory transfer from a private owner, fundamentally altering ownership patterns. The analysis traces the evolution of these rights from their historical roots in early community buyouts to the sophisticated, and often procedurally complex, statutory mechanisms established by the Land Reform (Scotland) Acts 2003 and 2016.

This chapter assesses whether this direct redistribution of ownership successfully challenges the ownership model, and whether it consequently enables land use change that effectively mitigates the climate emergency. Section 6.3 highlights the credentials of the CRtB as a framework which challenges the ownership model, whilst also grappling with the significant procedural and conceptual challenges that currently limit its impact. Section 6.4 concludes the chapter by discussing aspects of the legislation in a performative setting. This discussion highlights an inherent tension in legislating for a grassroots movement like community ownership: between top-down and bottom-up visions of sustainability. Whilst recognising this tension and the need for further changes in the CRtB framework, the chapter concludes that a legislative framework for community ownership does not preclude the kinds of processes of 'commoning'<sup>633</sup> arising from community ownership. Instead, it explores the possibilities for contestation and compromise within community ownership that can not only challenge the ownership model's tropes but inform a property paradigm which is grounded, obligational and community-led. The CRtB framework represents a profound ideological, though iterative, shift which, despite shortcomings of the legislation,

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<sup>632</sup> As this chapter explains, there are multiple forms of community rights to buy. Where this chapter refers to 'CRtB' it is referring to the overall policy framework, including all legislative provisions relating to the CRtB.

<sup>633</sup> See Mackenzie (no 107) and further discussion on this point in section 6.2.2.

cannot be overlooked in the context of the climate emergency and indeed may lead to wider learnings beyond Scotland.<sup>634</sup>

## 6.2 The community rights to buy land

### 6.2.1 Community ownership in Scotland generally

On 12 November 1932 Viscount Leverhulme constituted the Stornoway Trust.<sup>635</sup> Around 69,000 acres of land was subsequently transferred to the Trust, including over 40 townships, 1,300 crofts, 200 allotments, farmland as well as a castle.<sup>636</sup> Reasons for the transfer may not have been entirely altruistic,<sup>637</sup> nevertheless this estate remains in the ownership of the Stornoway Trust. Trustees are elected by resident members within the trust estate and are themselves members of the local community.<sup>638</sup> The Stornoway Trust represents the first example of modern community ownership of land in Scotland. The next significant community buyout did not materialise until 1993, when the Assynt Crofters' Trust purchased the North Lochinver Estate. This re-emergence of community ownership appeared to start a trend.<sup>639</sup> The Isle of Eigg Heritage Trust purchased the Isle of Eigg in 1997; the Knoydart Foundation purchased Knoydart Estate in 1999; and the Isle of Gigha Heritage Trust purchased the Isle of Gigha in 2002. 208,597 hectares (around 2.5% of all land in Scotland) is now community-owned.<sup>640</sup>

The term 'community ownership' in this chapter refers to ownership of land by a community of 'place' rather than a community of 'interest'. For example, the Stornoway Trust represents the interests of the geographical Stornoway community. The Trust is the

<sup>634</sup> This last point is explored further in section 8.3.3.

<sup>635</sup> Deed of Trust for Stornoway Trust, 1, <[https://www.stornowaytrust.org.uk/\\_files/ugd/699ad3\\_26547f723a8b4ebabe06793b9d8490f1.pdf](https://www.stornowaytrust.org.uk/_files/ugd/699ad3_26547f723a8b4ebabe06793b9d8490f1.pdf)> accessed 17/10/2025.

<sup>636</sup> Stornoway Trust, 'The Trust' <<https://www.stornowaytrust.org.uk/the-trust>> accessed 17/10/2025.

<sup>637</sup> See E A Cameron, 'Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880-1999' in M Combe, J Glass and A Tindley, *Land Reform in Scotland: History, Law and Policy* (2020) at 108. Cameron suggests that given the 'economic circumstances of the time and dormant state of the land market, [the transfer] was less altruistic than it might seem.'

<sup>638</sup> See Stornoway Trust (no 635), 1.

<sup>639</sup> See Cameron (no 637), 108.

<sup>640</sup> Scottish Government, 'Community Ownership in Scotland 2023' (2024) <[www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/11/community-ownership-in-scotland-2023/documents/community-ownership-in-scotland-2023---report/community-ownership-in-scotland-2023---report/govscot%3Adocument/Community%2BOwnership%2Bin%2BScotland%2B2023%2B-%2BReport.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/11/community-ownership-in-scotland-2023/documents/community-ownership-in-scotland-2023---report/community-ownership-in-scotland-2023---report/govscot%3Adocument/Community%2BOwnership%2Bin%2BScotland%2B2023%2B-%2BReport.pdf)> accessed 31/07/2025. This report includes further detail of the breakdown of the land type. For example, four areas of land held in community ownership constitute 53% of all land area in community ownership, with the remaining percentage comprising land areas under 1 hectare.

legal owner of the property but is accountable to the local community. In this way, the right of ownership is exercised directly through the people who live within that place, through some form of legal body such as a trust or company. Communities of ‘interest’ can also own land. For example, the John Muir Trust – a charity which purpose is to ‘conserve, protect and restore wild places for the benefit of all’<sup>641</sup> – owns a significant amount of land in Scotland, including vast areas at Ben Nevis, Glenlude, Knoydart and Skye.<sup>642</sup> The ‘community’ that the John Muir Trust represents is not geographically linked to a specific place.<sup>643</sup>

Community ownership is a response to the highly concentrated patterns of private ownership in Scotland. Jayne Glass *et al* argue that community ownership seeks to tackle issues of ‘insecurity, neglect and disempowerment linked to localised rapid community decline’ brought about through ‘neglectful and absentee private ownership.’<sup>644</sup> Therefore, community ownership has come to be viewed by some as existing in opposition to ‘typical’ private ownership; communities work together to gain control of land use decision-making from the hands of a few individuals. Traditionally, community ownership has been a rural phenomenon in Scotland. However, there is an increasing number of urban community buyouts.<sup>645</sup>

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<sup>641</sup> See John Muir Trust, ‘The Land We Care For’ <[www.johnmuirtrust.org/land-in-our-care](http://www.johnmuirtrust.org/land-in-our-care)> accessed 24/02/2025.

<sup>642</sup> See John Muir Trust, ‘Who We Are’ <[www.johnmuirtrust.org/about-us/who-we-are](http://www.johnmuirtrust.org/about-us/who-we-are)> accessed 24/02/2025.

<sup>643</sup> Some further discussion on communities of interest is included in section 3.3.3.2, but the present discussion is limited to that of ‘communities of place’ which are geographically linked, in this case through statute, to a particular location.

<sup>644</sup> A McKee, J Glass, A Lawrence, R McMorran, ‘Community Landownership: Means and Outcomes – Experiences of Community Acquisition Processes in Scotland’ in N Gallent, M Gkartzios, M Scott and A Purves (Eds), *Postcapitalist Countrysides: From Commoning to Community Wealth Building* (2025), 145. The authors continue, citing R McMorran, R Scott and M F Price, ‘Reconstructing Sustainability: Participant Experiences of Community Land Tenure in North West Scotland’ (2014) 33 *Journal of Rural Studies* 20-31, stating that ownership ‘is therefore increasingly viewed as a mechanism for facilitating community retention and growth, employment creation and facilitating inward investment and capacity building.’

<sup>645</sup> Scottish Government, ‘Community Ownership in Scotland 2023’ (2024) <[www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/11/community-ownership-in-scotland-2023/documents/community-ownership-in-scotland-2023---report/community-ownership-in-scotland-2023---report/govscot%3Adocument/Community%2BOwnership%2Bin%2BScotland%2B2023%2B-%2BReport.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/11/community-ownership-in-scotland-2023/documents/community-ownership-in-scotland-2023---report/community-ownership-in-scotland-2023---report/govscot%3Adocument/Community%2BOwnership%2Bin%2BScotland%2B2023%2B-%2BReport.pdf)> accessed 31/07/2025. The vast majority of community owned land is rural, mostly located in the local authority areas of Highland, Argyll and Bute, and Na h-Eileanan Siar. The total number of community owned areas comprise 20%, although the area of land they cover is significantly lower (just over 1% of the total community-owned land area). However, this can be explained by the nature of urban land being smaller in area. For examples of case studies in urban settings, see Community Land Scotland, ‘Community Ownership – Shaping the Future of Our Towns (2021)’ <<https://www.communitylandscotland.org.uk/community-ownership-shaping-the-future-of-our-towns/>> accessed 31/07/2025.

## 6.2.2 Community ownership and ‘commoning’ the land

In legal terms, community ownership in Scotland is unusual. According to some, it creates a new form of property ownership.<sup>646</sup> In a strictly legal sense, this is not the case. The right being exercised is that of ownership by a legally-recognised body, like a company, which is *representative* of the community. This is principally because, as outlined in section 3.2, ownership in Scots law is unititular; it cannot be split or divided between people. Modern community ownership, therefore, is not to be conflated with earlier examples of common land in Scotland.<sup>647</sup>

However, similarities have been drawn between modern community ownership and common land. Indeed, this chapter takes a broad view of what constitutes such ‘commons’. Fiona Mackenzie argues that the literature on land commons ‘has tended to focus analytically on the economic and institutional dimensions...’<sup>648</sup> She rejects such ‘instrumental commons’.<sup>649</sup> Referencing Nicholas Blomley, Mackenzie instead looks to the ‘crucial political and ethical dimensions’ of the commons,<sup>650</sup> wherein such dimensions are ‘sustained by deeply entrenched values and beliefs.’<sup>651</sup> These beliefs coalesce around essential processes of contestation within the community, yet are often ultimately positioned in opposition to commodification of the land for the private extraction of wealth. Such processes ‘trouble’ the ownership model in important ways, as discussed in section 6.3, making ‘visible an alternative optic to that of commodification.’<sup>652</sup> Mackenzie argues that it is ‘here that a counterhegemonic commons...is created.’<sup>653</sup> Therefore, this chapter argues that the CRtB, as a policy measure, represent a step *towards* a wider relational process of ‘commoning’ of the land; creating opportunities for an ownership held

<sup>646</sup> A McKee *et al* (no 644), 143 citing M Hoffman, ‘Why Community Ownership? Understanding Land Reform in Scotland’ (2013) 31 *Land Use Policy* 289 – 297 and J A Lovett, ‘Towards Sustainable Community Ownership: A Comparative Assessment of Scotland’s New Compulsory Community Right to Buy’ in M Combe *et al* (Eds) *Land Reform in Scotland* (2020), 177 – 212.

<sup>647</sup> For example, see A Wightman, *The Poor Had No Lawyers* (no 223), 66 – 88 regarding the commonties in Scotland. See also discussion on commonties in 3.3.2. For a comparative perspective on community ownership with international contemporary examples of communal and municipal ownership, see Scottish Land Commission, ‘International Experience of Community, communal and municipal ownership’ (2020) <[https://www.landcommission.gov.scot/downloads/5e8c3b7d19cf3\\_LAND%20FOCUS\\_International\\_Experience\\_April%202020.pdf](https://www.landcommission.gov.scot/downloads/5e8c3b7d19cf3_LAND%20FOCUS_International_Experience_April%202020.pdf)> accessed 17/10/2024.

<sup>648</sup> Mackenzie, *Places of Possibility* (no 107), 21, referencing E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

<sup>649</sup> Mackenzie, *Places of Possibility* (no 107), 21, referencing N Blomley, ‘Enclosure, Common Right and the Property of the Poor’ (2008) 17(3) *Social and Legal Studies* 311, 318.

<sup>650</sup> *ibid.*

<sup>651</sup> N Blomley, ‘Enclosure, Common Right and the Property of the Poor’ (2008) 17(3) *Social and Legal Studies* 311, 320.

<sup>652</sup> Mackenzie, *Places of Possibility* (no 107), 70-71.

<sup>653</sup> *ibid.*, 71.

collectively by a spatially-linked community of users who all contribute to the regulation of that use.<sup>654</sup> This chapter argues that this can be achieved through the CRtB; statutory recognition of a dynamic, contestable set of social relations and practices through which a community may collectively manage and sustain itself and its environment in opposition to the logics of the ownership model. This argument, in particular, is explored further in section 6.4 following a descriptive account of how the CRtB challenge the ownership model, particularly in relation to the possible tensions between such a process of commoning and the top-down, state-led requirement of land use change for climate change mitigation targets (such as net zero). However, before such discussion it is important to delineate in greater detail how the CRtB function as a legal vehicle.

### 6.2.3 Community rights to buy: community ownership as part of land reform in Scotland

The CRtB are not an original creation of the Scottish Government. Community buyouts in the 1990s including Eigg, Knoydart, and Assynt clearly inspired a policy development which viewed community ownership as an appropriate vehicle for land redistribution, set against a history of dispossession and de-peopling in rural areas of Scotland. As Calo *et al* state, the CRtB ‘did not occur in isolation nor were they legal break-throughs only.’<sup>655</sup> Rather, the new laws arose through a political momentum that was backward-looking, in invoking a ‘shared memory of eviction, expulsion and a lack of control’<sup>656</sup> on the part of many rural communities to redistribute land which had become concentrated through ongoing property relations, but a *legal* framework that was distinctively forward-looking in connecting land ownership with a wider set of values including human rights, the public good and sustainability.<sup>657</sup>

The CRtB have become, to an extent, synonymous with land reform in Scotland.<sup>658</sup> However, land reform in Scotland is not defined by community ownership; it is an ongoing

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<sup>654</sup> Blomley, ‘Enclosure’ (no 651), 318. This is thus different to ‘open access’ regimes that are not subject to formal ownership rights or legal forms of control: see Mackenzie, *Places of Possibility* (no 107), 21.

<sup>655</sup> A Calo, K Shields and A Iles, ‘Using Property Law to Expand Agroecology: Scotland’s Land Reforms Based on Human Rights’ (2022) 50(5) *Journal of Peasant Studies* 2075-1, 2075-17.

<sup>656</sup> *ibid.*

<sup>657</sup> *ibid.*, 2093.

<sup>658</sup> Land reform is primarily discussed in section 5.2, as well as section 3.3. See also M Combe, J Glass and A Tindley, ‘Introduction’ in M Combe, J Glass and A Tindley, *Land Reform in Scotland: History, Law and Policy* (2020), 7 – 8, though the authors here point to various ideas of ‘community’ being central to land reform legislation going back to the Crofters Holding (Scotland) Act 1886. See also at 6 – 7, where they discuss the factors relevant to land reform as including political issues such as devolution which allowed for greater autonomy in administrative and political decision making relating to land ownership, but also stating, ‘[t]hat being the case, history has axiomatically contributed to the situation that prevails today, and historic

process, rather than a single set of policy recommendations or legal changes.<sup>659</sup> This section considers the three main CRtB in Scotland: firstly, a ‘pre-emptive’ right to buy wherein a community body registers an interest to buy land in advance of it being put up for sale; and two ‘expropriation’ rights to buy wherein communities can force the transfer of land where (a) it can be shown that the land is abandoned and neglected or detrimental, and (b) the community, rather than the landowner, will further the achievement of sustainable development through ownership of the land.<sup>660</sup>

### 6.2.3.1 *The Community rights to buy: the pre-emptive right to buy*

In 2003, the first piece of legislation forming the contemporary land reform regime in Scotland was passed. The Land Reform (Scotland) Act 2003 (the ‘2003 Act’) introduced several recommendations from the 1999 report of the LRPG.<sup>661</sup> Parts 2 and 3 of the 2003 Act established new powers for communities to acquire land.<sup>662</sup> Specifically, Part 2 provides communities with a pre-emptive right to buy land (the ‘pre-emptive CRtB’). In

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lessons can and do inform what happens in the present day...’ A policy orientation towards increasing community ownership of land crystallised following Scottish devolution and the formation of the Scottish Parliament in 1999. This policy orientation was due in large part to the recommendations from the LRPG in 1999. This group was set up by a UK government but with an eye firmly cast on a devolved executive in Scotland. See LRPG ‘Recommendations for Action’ (1999) Scottish Office, 8 – 9. The recommendation was brief, yet would set the tone for much of the ensuing land reform policy, recommending ‘legislation to give duly constituted community bodies a community right to buy land in areas of special importance in rural Scotland as and when it changes hands. This would apply to the same land as would the power to allow time to assess the public interest. The community right to buy would apply to property only at the point when the owner chooses to dispose of it...The legislation would provide that, when relevant property in the areas concerned is offered for sale, a community group which satisfied a Scottish Minister that community purchase by that group would be in the public interest could exercise a right to buy...Such community bodies would have to demonstrate that they were representative of and supported by the local community, had the sustainable development of that community as their primary object, and were properly constituted.’

<sup>659</sup> Lord Sewel, Chair of the LRPG, stated in 1999 that it ‘is crucial that we regard land reform not as a once-for-all issue but as an ongoing process.’ See LRPG ‘Recommendations for Action’ (1999) Scottish Office, 1. As chapter 5 outlines, other examples of regulatory interventions exist within the land reform regime which do not involve the redistribution of ownership.

<sup>660</sup> It should be noted that these are the three ‘main’ community rights to buy. Two others exist, which are not covered in any depth in this thesis. These comprise, firstly, the right for crofting communities to buy certain land, found in Part 3 of the Land Reform (Scotland) Act 2003. This is a very narrow right and space constraints restrict the ability to discuss this in depth. Secondly, Part 5 Community Empowerment (Scotland) Act 2015 provides for communities to apply for ‘asset transfer requests’. These are requests for state property to be transferred to a community. As this thesis focuses on privately-held property this provision is not discussed.

<sup>661</sup> For further discussion on this report and its findings, see M Combe, ‘Legislating for Community Land Rights’ in M Combe, J Glass and A Tindley, *Land Reform in Scotland: History, Law and Policy* (2020), 159 - 163. See also LRRG, ‘The Land of Scotland and the Common Good’ (2014) Scottish Government, 15 - 16.

<sup>662</sup> Part 3 provides communities in crofting areas of the Highlands and Islands the power to force a sale of land under crofting tenure, common grazings and other relevant property including salmon and fishing rights within eligible croft land, though this chapter does not deal with these rights in detail primarily because they are rarely utilised and are very narrow in their terms, save for limited discussion in the context of the ownership model in section 6.3.3. It should also be noted that some limited powers for communities in the Highlands and Islands to acquire crofting land held by the state already existed by virtue of the Crofting Estates (Scotland) Act 1997.

other words, a landowner who decides to sell land must first offer it to a community body if that community body has validly registered an interest to buy the land. The legal route to achieving this is, in many respects, quite complex, but is worth outlining in some detail.

Before a community can register their interest in acquiring land there are certain procedural steps to be met. Principally, the community must incorporate a suitable legal body capable of holding land, representative of the community.<sup>663</sup> This can be, for example, a company limited by guarantee, so long as its articles of associations meet certain requirements.<sup>664</sup> These include a definition of the community to which the company relates,<sup>665</sup> that it must not have fewer than 10 members,<sup>666</sup> at least three quarters of whom must be members of the community,<sup>667</sup> and provision that any surplus funds or assets of the company are to be applied for the benefit of the community.<sup>668</sup> A community body can alternatively incorporate as a Scottish Charitable Incorporated Organisation or a community benefit society, both having the same statutory requirements stated above.<sup>669</sup> The body – whichever form it takes – must satisfy Scottish Ministers that they have a commitment to furthering sustainable development.<sup>670</sup> For pre-emptive CRtB applications, evidence must be presented to Scottish Ministers that there is local support for the transfer.<sup>671</sup> This should happen before the land in question is put up for sale, yet late applications may be accepted if there is significantly strong evidence for local support.<sup>672</sup>

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<sup>663</sup> Land Reform (Scotland) Act 2003 Section 34.

<sup>664</sup> 2003 Act Section 34(1).

<sup>665</sup> 2003 Act Section 34(1)(a).

<sup>666</sup> 2003 Act Section 34(1)(c).

<sup>667</sup> 2003 Act Section 34(1)(d).

<sup>668</sup> 2003 Act Section 34(1)(g).

<sup>669</sup> 2003 Act Section 34(1A) and (1B).

<sup>670</sup> 2003 Act Section 34(4), although sustainable development is not defined in the 2003 Act. On this point, see A Ross, 'The Evolution of Sustainable Development in Scotland: A Case Study of Community Right to Buy Law and Policy, 2003-18' in M Combe, J Glass and A Tindley, *Land Reform in Scotland: History, Law and Policy* (2020), 236 – 263. Sustainable development requirements appear throughout the legislation, and will be explored in more detail in section 6.3.2.

<sup>671</sup> Land Reform (Scotland) Act 2003 Section 38.

<sup>672</sup> The procedure for this is laid out in Section 39 of the 2003 Act. This was the case in the application for the community acquisition of Rhubodach Forest in Bute in 2009. See Application by Bute Community Land Company to Register an Interest in The Rhubodach Forest, Isle of Bute (15 September 2009) CB00111. The late application was accepted due to evidence of strong local support (section 39(3)(b) – a figure of 25% of the local community in support was reached by Scottish Ministers) and it being in the public interest under section 39(3)(c). This process has generally been criticised as communities are expected to be extremely proactive in earmarking land for future purchase. Therefore, the new Land Reform (Scotland) Bill as currently drafted extend the opportunity for communities to make late applications under a proposed new Section 39ZA inserted into the Land Reform (Scotland) Act 2003, though the provisions are not easy to understand. The modifications will mean that, even where a community does not have an interest to buy registered, if the land in question is a large landholding (over 1,000 hectares in this instance), the local community must be given the opportunity to register an interest to buy the land at least 30 days in advance of any transfer taking place. See M Combe, 'Land Reform (Scotland) Bill' (2024) <<https://bellcaledonia.org.uk/2024/03/27/land-reform-scotland-bill/>>. However, as Andy Wightman points

Successful applications are registered in the Register of Community Interests in Land.<sup>673</sup> Even if a successful application is made, approvals of the community,<sup>674</sup> as well as Scottish Ministers are necessary prior to the transfer taking place.<sup>675</sup>

Between the opening of the RCIL in 2004 and the time of writing,<sup>676</sup> there have been 276 applications under Part 2 of the 2003 Act.<sup>677</sup> Of these, 50 have been accepted for registration, with 24 of those registered applications proceeding to the activation of the CRtB. This means that only 8.7% of all applications since 2004 have resulted in a successful triggering of the pre-emptive CRtB. This is tempered somewhat in that some registered applications may have involved eventual transfers to the community outwith the CRtB scheme, and indeed because the right is a pre-emptive one, many landowners may simply not have decided to sell the land. However, since 2017, there has been a decline in the number of both applications and activations,<sup>678</sup> suggesting a potential lack of community resourcing and resilience, or indeed a growing apathy towards the pre-emptive CRtB.

### 6.2.3.2 *The Community rights to buy: the expropriation rights to buy*

What appears to be a low uptake of the pre-emptive CRtB may have prompted a policy departure from community rights to buy as the driving force of land reform in Scotland. Yet, following the overall majority won by the Scottish National Party in the Scottish parliamentary elections in May 2011, further commitments were made to increase opportunities for community ownership.<sup>679</sup> Following a period of policy development,<sup>680</sup>

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out, this effectively leads to two pathways to making late applications which may confuse matters significantly. See A Wightman, 'Clan Donald and the Land Reform (Scotland) Bill' (2025) <<https://andywightman.scot/2025/03/clan-donald-and-the-land-reform-scotland-bill/>> accessed 31/07/2025.

<sup>673</sup> The Register of Community Interests to Buy Land is available to search online. See <<https://rcilcb.ros.gov.uk/>> accessed 24/09/2025.

<sup>674</sup> Section 51(1) of the 2003 Act provides that community approval is reached by way of ballot.

<sup>675</sup> The criteria for ministerial consent are found in section 51(3)(a) to (e) and include factors such as the community body remaining constituted as it is for the purposes of section 34, that the community body will further the achievement of sustainable development, and that the purchase of the land is in the public interest.

<sup>676</sup> Up to date as of 26/09/2025.

<sup>677</sup> See the Register of Community Interests in Land <<https://rcilcb.ros.gov.uk/entire-register>> accessed 26/09/2025.

<sup>678</sup> Ibid.

<sup>679</sup> The LRRG was set up in 2012 to make recommendations for further land reform policy and then-First Minister Alex Salmond committed in 2013 to bring one million acres of land in Scotland into community ownership. On this matter (including the reference to Alex Salmond's commitment) see M Combe (no. 661), 161. See also LRRG, 'The Land of Scotland and the Common Good', at 97 <[www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2014/05/land-reform-review-group-final-report-land-scotland-common-good/documents/00451087-pdf/00451087-pdf/govscot%3Adocument/00451087.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2014/05/land-reform-review-group-final-report-land-scotland-common-good/documents/00451087-pdf/00451087-pdf/govscot%3Adocument/00451087.pdf)>. Here, it is discussed that the low uptake of the pre-emptive CRtB: '[t]he number of applications to register a pre-emptive right to buy has also followed what can be seen

two new acts were introduced which provide for new community rights to buy. The crucial difference is that these new rights involve the compulsory transfer of land from a private owner to a community. Thus, whilst ‘expropriation’ is the term used here, the state does not end up owning the land, rather the forced transfer to the community body is facilitated by the Scottish Government.

Firstly, the Community Empowerment (Scotland) Act 2015 (the ‘2015 Act’) inserted a new Part 3A into the 2003 Act which enables communities to make an application to purchase ‘eligible land’ land which either (1) is ‘abandoned or neglected’ or (2) causes ‘harm’ to the ‘environmental wellbeing’ of the community (the ‘abandoned, neglected or detrimental CRtB’).<sup>681</sup> This community right to buy is more radical than the pre-emptive CRtB insofar as it triggers the forced transfer of ownership from a private owner to a community body, facilitated by the Scottish Ministers. The abandoned, neglected or detrimental CRtB is an ‘either-or’; an application for an involuntary transfer of land must select whether it is proceeding on the basis that the land is *either* abandoned or neglected land, or it is detrimental land. What constitutes either type of land is laid out in secondary legislation.<sup>682</sup> For applications to buy land which is argued to be ‘abandoned or neglected’ Scottish Ministers should have regard to matters such as the physical condition of the land, the designation or classification of the land, and the use or management of the land.<sup>683</sup> For those relating to land which is argued to be ‘detrimental’, Scottish Ministers must consider the use or management of the land as well as the extent to which there has been any actual

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as the wider loss of momentum over recent years in the growth of local community land ownership due to a range of difficulties faced by communities. Two thirds of the applications under Part 2 were in the first four years after the Act came into force and the number of applications a year declined to 8 in 2009/10...’

<sup>680</sup> See LRRG, ‘The Land of Scotland and the Common Good’ (no 679), 81 where it is stated that part of the remit of the LRRG was to assist with the ‘acquisition and management of land...by communities to make stronger, more resilient and independent communities which have an even greater stake in their development.’ The report contains several recommendations, many of which were taken forward by subsequent land reform acts.

<sup>681</sup> Land Reform (Scotland) Act 2003 section 97C(1), (2)(a) and (b) respectively. It should be noted that, in addition to providing a new CRtB, the Community Empowerment (Scotland) Act 2015 also widens the definition of eligible land for the pre-emptive CRtB to include urban land, whereas previously the right was only exercisable for rural land. See section 36 of the 2015 Act, which amends the Land Reform (Scotland) Act 2003 section 33. In addition, it also provides for ‘asset transfer requests’ to be made by relevant community bodies, whereby land owned by public bodies could become subject to such a request and transferred to communities. This is set out in Part 5 of the 2015 Act. Asset Transfer Requests are not discussed as part of this chapter because the point of analysis is on the redistribution of private, rather than public, ownership.

<sup>682</sup> See the Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on transfers and Dealing) (Scotland) Regulations 2018 (SSI 2019/201) (the ‘2018 Regulations’).

<sup>683</sup> 2018 Regulations, Regulations 2(2)(a) – (c), 3, 4 and 5.

harm to the environmental wellbeing of a relevant community.<sup>684</sup> However, even where the land is found by Scottish Ministers to be ‘abandoned or neglected’ or ‘detrimental’, that is not the end of the story: ministerial consent must also be formally sought,<sup>685</sup> as well as a balloting process to gauge wider community support.<sup>686</sup>

Secondly, the Land Reform (Scotland) Act 2016 (the ‘2016 Act’) introduced a further route for involuntary transfer of land from a private landowner to a community. This can be achieved where the community is able to demonstrate that it will use the land to further sustainable development (the ‘sustainable development CRtB’).<sup>687</sup> The sustainable development CRtB contains similar requirements to the pre-emptive CRtB and the abandoned, neglected or detrimental CRtB.<sup>688</sup> However, there are further substantive requirements for a community to satisfy Scottish Ministers that the transfer of the land in question will further the achievement of sustainable development. These requirements are found in the ‘sustainable development conditions’<sup>689</sup> which include that the transfer is likely to further the achievement of sustainable development,<sup>690</sup> that the transfer is in the public interest,<sup>691</sup> that the transfer will benefit the community,<sup>692</sup> and that not granting the application would result in harm to the community.<sup>693</sup>

Therefore, not only must community bodies wishing to apply for the sustainable development CRtB meet the same tests for furthering sustainable development as with the

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<sup>684</sup> 2018 Regulations, Regulations 2(3)(a) and (b), 5 and 6. Regulation 6 outlines the matters relevant to ‘environmental harm’, including whether the use or management of the land or building has resulted in a ‘statutory nuisance’ – defined in Regulation 6(2) as a statutory nuisance within the meaning of section 79(1) of the Environmental Protection Act 1990 – and whether the land or building has been subject to enforcement action under the Antisocial Behaviour (Scotland) Act 2004.

<sup>685</sup> Land Reform (Scotland) Act 2003 s97H(1)(a) – (h). These include factors such as that the transfer will be in the public interest and compatible with furthering the achievement of sustainable development, but other conditions go further than those for the pre-emptive CRtB. A number of these will be discussed throughout this chapter, but they include conditions such as that the ‘achievement of sustainable development in relation to the land would be unlikely to be furthered by the owner of the land continuing to be its owner.’

<sup>686</sup> 2003 Act s97J.

<sup>687</sup> This is contained in Part 5 of the 2016 Act.

<sup>688</sup> For example, the 2016 Act section 49 details similar requirements for how a community body is to be incorporated.

<sup>689</sup> 2016 Act s56(2).

<sup>690</sup> 2016 Act s56(2)(a). This is additional to the requirement for the main purpose of the community body to be consistent with furthering the achievement of sustainable development, as per section 49(7), which is also applicable for community bodies under pre-emptive CRtB and abandoned, neglected or detrimental CRtB (see, respectively, Land Reform (Scotland) Act 2003 ss34(4) and 97D(6)). However, it goes further in its requirement for the transfer to be ‘likely’ to achieve sustainable development, which requires more than the body being ‘consistent with’ the achievement of sustainable development.

<sup>691</sup> 2016 Act s56(2)(b). Again, however, there are analogous provisions in the Land Reform (Scotland) Act 2003 for the pre-emptive CRtB and the abandoned, neglected or detrimental CRtB. See, respectively, sections 38(1)(e) and 97H(b)(i).

<sup>692</sup> 2016 Act s56(2)(c)(i).

<sup>693</sup> 2016 Act s56(2)(d).

other community rights to buy,<sup>694</sup> but they must also meet the further ‘sustainable development conditions’. Tests of ‘significant benefit’ and ‘harm’ in section 56(2) subsections (c) and (d) are further defined in section 56(12), which states that Scottish Ministers must consider the likely effect of granting (or not granting) consent to the transfer on the lives of the persons comprising that community with reference to economic development, regenerations, public health, social wellbeing and environmental wellbeing.<sup>695</sup> Interestingly, Scottish Ministers must also have regard to ‘relevant non-Convention human rights’ when considering an application for the sustainable development CRtB.<sup>696</sup> This is further defined as human rights *other* than those within the meaning of section 1 of the Human Rights Act 1998.<sup>697</sup> Therefore, this includes any 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...’<sup>698</sup> It has, therefore, been suggested that this displays the beginnings of a progressive realisation of a broader range of human rights within a property context.<sup>699</sup>

### 6.2.3.3 *Community right to buy review*

Sections 6.2.3.1 and 6.2.3.2, above, highlight the three main statutory routes for communities to become the owners of land in Scotland. As a form of regulatory intervention for changing land use, they represent the strongest form of measure analysed in this thesis. This is especially so given the existence of the expropriation rights to buy. As has been noted, other statutory routes exist but are not dealt with in this thesis. Additionally, non-statutory community ownership exists in tandem with the statutory framework, and community buyouts may occur completely independently of the CRtB.<sup>700</sup> One of the most immediate issues with the CRtB, evident from the above discussion, is that the legislation is highly procedural and difficult to navigate and employ. Due to the fact

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<sup>694</sup> These requirements are found in section 49 of the 2016 Act.

<sup>695</sup> 2016 Act section 56(12)(a) – (e).

<sup>696</sup> Section 56(13)(a).

<sup>697</sup> 2016 Act section 56(14). Section 1 of the Human Rights Act 1998 effectively incorporates the European Convention on Human Rights into domestic UK law. Therefore, these rights include such things as the right to life, the right to privacy, the right to peaceful enjoyment of one’s possessions.

<sup>698</sup> 2016 Act section 56(14)(b).

<sup>699</sup> See W M Gordon, revised and updated by J Robbie, ‘Social Control of Land Use’ in W M Gordon and S Wortley, *Scottish Land Law, Vol II* (2020) paras 29-03 – 29-12; K Shields, ‘Dancing With Lairds: Lessons from Scottish Land Reform’ in W Wolford, N Peluso and M Goldman (Eds), *The Social Lives of Land* (2024), 225 – 364; K Shields, ‘Human Rights and the Work of the Scottish Land Commission’ (2018) Scottish Land Commission <[www.landcommission.gov.scot/downloads/5dd6a5d2e58f3\\_Land-Lines-Human-Rights-Kirsten-Shields-May-20182.pdf](http://www.landcommission.gov.scot/downloads/5dd6a5d2e58f3_Land-Lines-Human-Rights-Kirsten-Shields-May-20182.pdf)> accessed 24/09/2025.

<sup>700</sup> See section 6.2.1.

that land is being transferred without full consent of the owner,<sup>701</sup> CRtB applications will only be accepted if every part of the procedure has been met by the community body. It means that only communities who are sufficiently well-equipped, knowledgeable and resilient will meet the threshold.

Such procedural rigour may stem from the fact that the Scottish Government was wary of a challenge under the ECHR; there is always a risk that a legal process for the transfer of ownership from an unwilling seller which is not sufficiently rigorous would not meet the proportionality test applied in potential human rights claims under the private property protection clause in the ECHR.<sup>702</sup>

However, the intensity of the procedural hurdles which communities face risks curtailing community ownership by increasing the likelihood of rejection for purely procedural, rather than any substantive, reasons.<sup>703</sup> Communities must be sufficiently robust and often well-resourced in order to meet both the administrative and substantive burdens expected of them by the legislative framework. The rights may exist, and in that regard they can be seen as potential routes to more democratic and locally-contingent land governance, yet the reality is that many communities will be unlikely to comprehend the legislation without professional (and costly) guidance and may be unable to meet every procedural requirement.

While procedural issues may cause issues in relation to communities accessing land, it has been argued that the existence of the legislative framework, in itself, can produce an increase in community ownership. For example, Lovett and Combe argue that, due to the existence of the CRtB,

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<sup>701</sup> In the case of the pre-emptive CRtB the owner is not free to choose *who* they may sell to (therein their core right of *abusus* within the right of ownership is curtailed). The abandoned, neglected or detrimental CRtB and sustainable development CRtB are tantamount to compulsory purchase, wherein all aspects of the right of ownership are forcibly transferred to another individual at the behest of the state.

<sup>702</sup> Article 1, Protocol 1.

<sup>703</sup> For example, in *Hazle v Lord Advocate* (Kirkcaldy Sheriff Court, 16 March 2009 (unreported)) another challenge by a landowner to a successful registration of a pre-emptive CRtB. The Sheriff found in favour of the landowner, inter alia because the maps accompanying the application did not contain Ordinance Survey grid references as required by the Community Rights to Buy (Specification of Plans) (Scotland) Regulations 2004. The landowner, however, knew precisely where the land was and the application itself contained a specific Ordinance Survey grid reference. In addition, the Sheriff accepted a further argument that, in accepting that the community body had a 'connection' to the land under s38 of the 2003 Act, the Scottish Ministers failed to distinguish which test within s38 had actually been applied in their reasoning. Therefore, the community failed to gain ownership of the land through a procedural failure outwith their control. See M M Combe, 'An Analysis of Part 2 of the Land Reform (Scotland) Act 2003 Using Case Law Relating to the Community Rights to Buy (2023) University of Strathclyde, 4 <<https://strathprints.strath.ac.uk/87147/>> accessed 12/03/2025.

‘[c]ommunities can now bring property owners, whether owners of large rural estates or even an entity as historically powerful as the Church of Scotland, to the bargaining table to discuss the transfer of property either in the shadows of the new legislation or under the formal auspices of that legislation.’<sup>704</sup>

As Calo *et al* state, the ‘threat of communities pursuing their legal entitlement to force a sale acts as a *powerful informal mechanism* to increase negotiation and mediate conflicts...The mere spectre of the right being enforced may reshape power relations...’<sup>705</sup>

Nevertheless, the effective functioning of the CRtB remains of political importance. At the time of writing, the Scottish Government is consulting on a review of the CRtB.<sup>706</sup> The overall aim is to simplify the statutory framework. Several potential changes are suggested in the consultation, including consolidating the existing CRtB down to two: one compulsory and one non-compulsory.<sup>707</sup> Other changes mooted include changing the voting thresholds for the community ballots indicating community support of acquiring the land, as communities have indicated that the current levels are restrictively high, as well as changes to the late application process to reflect the fact that there are an increasing number of ‘off-market’ sales taking place, to which communities are not able to respond to through the late application process.<sup>708</sup> It remains to be seen what the outcomes of this review will be beyond a recognition by the Scottish Government that the CRtB are often too convoluted to meet their intended purpose of increasing the redistribution of land in Scotland, though the changes currently mooted do not appear to radically alter the CRtB framework.

### 6.3 The CRtB as a challenge to the ownership model

Notwithstanding the potential for administrative complexities within the CRtB framework, it remains the case that they are the strongest form of state intervention with ownership assessed in this thesis. Chapter 4 argues that VCMs – as a form of arms-length, facilitative and market-based approach – fails to challenge the ownership model. As such, the land use

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<sup>704</sup> J A Lovett and M M Combe, ‘The Parable of Portobello: Lessons and Questions from the First Urban Acquisition Under the Scottish Community Right-to-buy Regime’ (2019) 80(2) *Montana Law Review* 211, 222.

<sup>705</sup> Calo *et al* (no 655), 2075-22.

<sup>706</sup> Scottish Government, ‘Community Right to Buy Review: Consultation’ (2025), <[www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2025/07/community-right-buy-review-consultation/documents/review-community-right-buy-draft-consultation/review-community-right-buy-draft-consultation/govscot%3Adocument/review-community-right-buy-draft-consultation.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2025/07/community-right-buy-review-consultation/documents/review-community-right-buy-draft-consultation/review-community-right-buy-draft-consultation/govscot%3Adocument/review-community-right-buy-draft-consultation.pdf)> accessed 04/08/2025.

<sup>707</sup> *ibid.*

<sup>708</sup> *ibid.*

change that it brings about struggles to contend with the necessary material changes needed in the climate emergency. Chapter 5 introduces LMPs, which represent a stronger form of regulation but one which stops short of redistributive measures. LMPs interact strongly with certain tropes of the ownership model, in particular challenging the individualism within ownership, making land use decisions more contingent upon local needs as well as certain planetary boundaries such as climate change. Yet LMPs also represent a weak form of compromise between vested interests and the need for land use change in the public interest. Therefore, this tentatively suggests a correlation between regulation and the decentring of the ownership model. Applying the same analysis to the strongest form of redistributive regulation in the Scottish context – the CRtB – does this show that the CRtB are the policy measure in Scotland most closely resembling a ‘true’ challenge to the ownership model? Does community ownership necessarily mean sustainable land use change, which will reduce emissions and mitigate the climate emergency?

### 6.3.1 Abstract

The success of the ownership model in the modern property paradigm is attributable to its dephysicalisation. The right of ownership of land is detached from the physical limits of that land, enabled by, and entrenching, the nature/culture dualism. As chapters 2, 3, 4 and 5 have highlighted, this has important spatial consequences, including extreme anthropogenic environmental changes leading to the climate emergency. These consequences have compounded over many years,<sup>709</sup> such that policy interventions for land use change must seek to challenge, rather than entrench, this trope of the ownership model. The question is whether and to what extent the CRtB represent such a challenge to the ownership model’s abstractness.

The exercise of the right of ownership by a community occurs through locally produced, spatially contingent processes. It is a direct response to the spatial consequences of dephysicalised property, coupled with hyper concentrated patterns of private land ownership which have fostered major land-based inequities and environmental harm. Local needs are prioritised over market-based metrics of success. With regard to the CRtB legislation specifically, it is notable that spatial contingency is enshrined in the legal

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<sup>709</sup> As explained in chapter 3, there is no defined historical ‘start point’ for the development of the current property paradigm, but it can be attributed in many ways to the development of Enlightenment thinking. Particularly in Scotland, early economists like Adam Smith aided the development of dephysicalisation. See sections 3.2 and 3.3 for further discussion.

framework. Principally, all three of the main CRtB require that the community has a sufficient ‘connection’ to the land.<sup>710</sup>

To expand this point on ‘connection’: dephysicalisation has enabled the hyper-concentration of land ownership in Scotland, along with increasing levels of absentee ownership.<sup>711</sup> Ownership rights are separated from their material settings, such that private ownership requires no physical possession of the land. Indeed, the separation of the legal right of ownership from the factual possession of the thing owned is a crucial aspect of Scots property law.<sup>712</sup> Land, through this process, becomes capital.<sup>713</sup> As discussed in sections 2.2.1 and 2.2.2, this is viewed as positive within the extant political system because the certainty of legal rights – being as they are unattached to the material aspects of land – brings about political and economic stability. This severance, however, denies the limits of Earth systems, enabling and indeed encouraging land use that uses up more natural attributes than can be replenished. In this way, the prioritisation of economic stability, particularly of the individual rights holder, over the stability of Earth systems is a key contributing factor in why land use is a key contributor to the climate emergency.

The CRtB depart, to an extent, from dephysicalised property. Principally, this is through ensuring that physical possession is an *inherent* part of the right of ownership. Although the CRtB operate through the right of ownership, which remains exercisable by a single legal person (either a company limited by guarantee, community benefit society, or a Scottish charitable incorporated organisation) the requirement of a ‘connection’ between that body and the land is a step towards destabilising the nature/culture dualism. For a community body to succeed with an application, it must prove that it is sufficiently connected to the

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<sup>710</sup> Land Reform (Scotland) Act 2003 sections 38(1)(b)(i) and (ii) provide that Scottish Ministers shall not approve the registration of community interest to buy land unless it can be shown that a ‘significant number’ of the members of the community have a connection with the land, and that the land is ‘sufficiently near to the land [which is subject to the application] is sufficiently near to land with which those members of the community have a connection’; sections 97H(1)(h)(i) and (ii) provide that Scottish Ministers shall not consent to an application made for the abandoned, neglected or detrimental CRtB unless the same conditions can be shown as those in s38(1)(b)(i) and (ii); the Land Reform (Scotland) Act 2016 sections 56(3)(g)(i) and (ii) provide the same conditions for the sustainable development CRtB.

<sup>711</sup> See, for example, the discussion in section 4.3.3 on how VCMs are entrenching this dephysicalisation.

<sup>712</sup> In Scots legal doctrine, possession is treated separately from ownership. An individual can hold the right of ownership without necessarily possessing the property. Leasing is a common example: the landlord has the legal right of ownership, whereas the tenant factually possesses the property. However, the landlord will have the *right* to possession, stemming from their ownership, and can enforce this against the tenant’s factual possession (within certain parameters depending on any legal restrictions on doing so, which certainly exist in residential tenancies but which do not warrant a full exposition herein). K G C Reid, ‘Possession’ *The Laws of Scotland: Stair Memorial Encyclopaedia* (vol 18, 1996), paras 114 – 192.

<sup>713</sup> Graham, *Lawscape* (no 6) 42 – 45.

land in question.<sup>714</sup> This connection is material – the community represented by the community body must be *physically* present on the land to proceed with an application. For example, the community body must be made up from a majority of members of the local community.<sup>715</sup> In contrast with dephysicalised property, which is predicated on economically contingent values, the right of ownership is *located* in a specific place and is valued according to locally-produced priorities. In a question of whether community landownership is better-suited to environmental outcomes like mitigating climate change, it can be said that the requirement for a spatial connection between the owner and the land lends itself to decisions based on the limits of that land, rather than abstract economic metrics. These locally-produced valuations are, themselves, subject to continual contestation and change based on the priorities of the community, enabling an approach which can adapt to the needs of the land, embracing property’s relationality and tapping into locally-produced spatial knowledge and care.<sup>716</sup>

Recent CRtB applications highlight this point. For example, in an application in 2019 by the Helensburgh Community Woodlands Group to compulsorily acquire land through the abandoned, neglected or detrimental CRtB, the requirement for Ministerial consent to the application in s97H(1)(h)(ii) of the 2003 Act – that the land is sufficiently close to land which members of the community have a connection – was scrutinised by Scottish Ministers.<sup>717</sup> The evidence provided by HCWG in support of its connection to the land is of note in this regard.<sup>718</sup> The land subject to the application was said to be close to land which is commonly used for community-based activities, including sporting and

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<sup>714</sup> See footnote 709. In each case, the provisions on ‘connection’ are procedural. For example, if, as a matter of procedure, a ‘significant number of the members of the relevant community to which the application relates’ do *not* have a ‘connection with the land’ then the application will be rejected by Scottish Ministers.

<sup>715</sup> Land Reform (Scotland) Act 2003 s34(A1)(1)(d) and s97D(2)(d); Land Reform (Scotland) Act 2016 s49(2)(d).

<sup>716</sup> Shoemaker, ‘Re-Placing Property’ (no 49), 855 – 861. It should be noted that even outwith the CRtB legislation, community ownership, generally, has been recognised as bringing with it the possibility for more environmentally sensitive land uses. For example, the Isle of Eigg is owned by the Isle of Eigg Heritage Trust which represents the members of the Eigg community, following a community buyout in 1997. The island is now completely self-sufficient, creating its own, locally produced energy through solar, wind and water power. See Isle of Eigg, ‘Our Green Journey’ <<https://isleofeigg.org/our-green-journey/>> accessed 24/09/2025. Similar initiatives can be seen on the Isle of Uist and the Isle of Lewis: see R McMorran and A Scott, ‘Community Landownership: Rediscovering the Road to Sustainability’ in J Glass *et al*, *Lairds, Land and Sustainability* (2013), 161 – 163 where community landownership is linked with ‘reconfiguring community-natural resource relationships’.

<sup>717</sup> See Application by Helensburgh Community Woodlands Group for Consent to Exercise Right to Buy Land at South of Cumberland Avenue, Helensburgh, G84 8QP (9 December 2019) AB00001 (‘Helensburgh Application’)

<sup>718</sup> See Helensburgh Application, Ministerial Decision Notice (18 August 2020), 26 – 27.

recreational activities.<sup>719</sup> In the application the community describes the ways in which local people-place connections are made, for example through formal and informal activities such as walking, group sports, meetings, and games. Such evidence of physical ‘connection’ between community members and land displays the everyday workings of property which are often obscured by the ownership model; the ways through which property is actively produced through socio-spatial interactions.<sup>720</sup> For HCWG, the connection between the community and this land was stronger than that held by the current owner, who they argued was both absent and negligent in the exercise of their ownership right. Although HCWG ultimately failed in their application, Scottish Ministers agreed that they had a sufficient connection to the land.

Similarly, in a more recent CRtB application by a community body named Poet’s Neuk under the sustainable development CRtB, Poet’s Neuk successfully argued that the land was sufficiently near land to which members of the community have a connection.<sup>721</sup> The land in question was a patch of ground in the town of St Andrews belonging to a private company. Poet’s Neuk argued that the then-owners of the land were preventing the achievement of sustainable development; it was in a dilapidated state and – similar to the Helensburgh Application – sought to develop the site, including a café, for which no planning permission had been granted. Poet’s Neuk applied under the sustainable development CRtB to change the area of land from its run-down state into a community garden, with a focus on social cohesion, greenspace and environmental outcomes through reducing and sequestering local transport-based emissions. Poet’s Neuk argued that their connection to the land was being prevented by the negligence of the current owner in allowing the land to fall into disrepair; their ability to access a public space (the space in question was previously accessible to the public prior to the disrepair) was denied through the land use decisions of the owner.<sup>722</sup> Poet’s Neuk stated that the land is centrally located

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<sup>719</sup> Ibid., 27: ‘[t]hese include the local Kidston Park...the frontage of the Clyde itself...and Ardencaple Tower...In the past, people could enjoy walking from Kidston Park alongside the Clyde, up Cumberland Avenue, through the land, then climb up to Ardencaple Tower and onwards to Castle and Duchess Woods and beyond.’

<sup>720</sup> See P Babie, ‘The Spatial: A Forgotten Dimension’ (2013) 50 San Diego Law Review 323, 325-326, wherein he describes the ‘spatial dimensions’ of property: the ‘space or the place in which...any...human activity takes place...the space where property exists, operates and has meaning in people’s lives, the space in which the relationships that constitute property exist...’

<sup>721</sup> Land Reform (Scotland) Act 2016 s56(3)(g)(ii). See Decision Notice by the Scottish Ministers on Application by Poet’s Neuk for Consent to Exercise Right to Buy Garden Ground Opposite 1 Greyfriars’s Garden, St Andrews (1 February 2023) SD00002 (‘St Andrews Application’). Further discussion is had on this application and the resulting legal appeal in section 6.3.2.

<sup>722</sup> See St Andrews Application (no 721), 16, where Poet’s Neuk describe the ways in which the community has come together to attempt to improve their connection with the land: ‘from time to time, members of

within the defined community, highlighting geographic connection, as well as social importance, being part of a number of oft-used community sites in the area.<sup>723</sup> In addition, the plans put forward by Poet's Neuk were argued to lead to further connections being made, to which the Scottish Ministers agreed stating that,

'The transfer of land to the community body would bring private land that has been neglected over a number of years into public use...By being in community ownership it could help to reduce social isolation by providing an area where people can meet and chat in the centre of St Andrews. The creation and maintenance of the garden will provide volunteers with opportunities... and the proposed educational aspect of this project...would benefit the local community...The land, as it currently stands, remains unused and uncared for with no purpose and does not benefit anyone in the area...'<sup>724</sup>

In the case of Poet's Neuk, the Scottish Ministers approved the activation of the sustainable development CRtB and, following an unsuccessful legal challenge by the original landowner,<sup>725</sup> the land is, at the time of writing, in the process of being transferred to the community body from the private owner.

There are, however, certain interpretive issues bound up with a term such as 'connection'. In particular, there is an important question over who is, ultimately, deciding the parameters of that connection. How is connection to be legally determined by a judge, for example, if a community is to challenge a ministerial decision denying a sufficient connection to the land? There is a risk of setting a precedent of narrow interpretations, which may restrict future possibilities. In the case of *West Register (Property Investments) Ltd. v Lord Advocate*,<sup>726</sup> the land owner appealed against the registration of a pre-emptive CRtB. The Sheriff rejected the assertion that the community body had a connection to the land: 'bare residence' was characterised here 'as a passive act.'<sup>727</sup> There must be evidence of further interaction between the resident and the land for connection to be established. The fact that members of the community in this case were spread over a large area lent

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the...community have themselves tidied up the site...[this] provides only a minimal temporary improvement...'

<sup>723</sup> *ibid.*

<sup>724</sup> *ibid.*, 6.

<sup>725</sup> *Forthtaly Limited Employee Trust v The Scottish Ministers* [2025] SC DUN 24, discussed in further detail in section 6.3.2.

<sup>726</sup> Selkirk Sheriff Court, 11 March 2015 (unreported).

<sup>727</sup> M Combe, 'An Analysis of Part 2 of the Land Reform (Scotland) Act 2003 Using Case Law Relating to the Community Rights to Buy' (2023) University of Strathclyde, 5 <<https://strathprints.strath.ac.uk/87147/>> accessed 12/03/2025.

itself to insufficient connection.<sup>728</sup> In a rural Scottish context, such reasoning could present barriers to communities being able to prove sufficient connection in a legal sense, even if that may exist on a spatial level. Many rural areas of Scotland are sparsely populated, in many cases through socially unjust processes of dispossession. To what extent are residents expected to interact with the area of land? Is this to be assessed on a quantitative, rather than qualitative, basis? If so, residents of sparsely-populated landscapes will find it almost impossible to prove connection to a court.

### 6.3.2 Extractive

The above discussion suggests that, as a policy intervention for land use change, the CRtB have a destabilising effect on the abstract nature of the ownership model. This concurrently affects the trope of extractivism that flows from dephysicalisation: the manifestation of dephysicalisation in the property paradigm is the separation between ‘person’ (or subject) and ‘thing’ (or object), with the former having the perceived absolute right to use that thing, independently of its material value or limits.<sup>729</sup> The CRtB present an opportunity to challenge these processes through a ‘commoning’, rather than commodification, of the land.<sup>730</sup>

Geographer Fiona Mackenzie describes this as a process of ‘de-commodification’ of land through community ownership.<sup>731</sup> Residents must use the land to survive and thrive. In this regard it can be suggested that *any* use of land is extractive. However, arguments of decommodification reject a reductive view, instead viewing community ownership as a challenge to the ‘metabolic rift’ deeply embedded in land commodification.<sup>732</sup> Crucially, for Mackenzie, community ownership troubles the homogenising tendencies of the ownership model, wherein communities base their land use on the material limits of the land as well as its possibilities; giving as well as taking from the land. One case study evaluated by Mackenzie is that of community wind power, wherein communities on the Isle of Lewis own the land on which wind-powered renewable energy projects take place. She argues that such community ownership leads not only to the sustainable generation of locally-produced, locally-used energy, but that the surplus electricity generated can be sold

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<sup>728</sup> *ibid.*

<sup>729</sup> See further discussion in sections 2.2.2, 4.3.2, and 5.3.2.

<sup>730</sup> Mackenzie (no 107).

<sup>731</sup> *ibid.*, 38.

<sup>732</sup> See A Byer, *Placing Property* (no 130).

to the national grid for profit, which profits are then reinvested back into the community.<sup>733</sup> This process is made ‘according to the priorities of a community...rather than to distant shareholders or to an individual owner’s bank account.’<sup>734</sup> Through this, the ‘norms of commodification are disrupted.’<sup>735</sup> In the Scottish context, this disruption confronts and contests the usual patterns of concentrated private ownership, distributing the economic benefits of ownership more widely and, crucially, contributing to people-place connection through a form of ‘social nature’.<sup>736</sup> Therefore, for Mackenzie, though anthropogenic extraction from land still occurs with community ownership extraction, the *ends* to which these practices are intended to meet in fact contribute to this process of de-commodification. Jayne Glass *et al* argue that such ends may include communities ‘uniting around a locally conceived and constructed vision of sustainability that prioritises investment in infrastructural and housing initiatives...and reconstructing community-environment relationships.’<sup>737</sup> For example, a study of 53 community landowners and their responses to climate change found that 39% were using the land both for generating renewable electricity and for developing food production projects which are designed to tackle food insecurity in tandem with reducing greenhouse gas emissions.<sup>738</sup> Environmental sustainability is often a central shared aspiration in the context of community ownership, precisely because local people tend to hold rich knowledge of spatial conditions.<sup>739</sup> To illustrate further, since its successful buyout of the Isle of Eigg in

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<sup>733</sup> Mackenzie (no 107), 127 – 166.

<sup>734</sup> *ibid.*, 30. See also M Satsangi and A Purves, ‘Making a Postcapitalist Countryside? Community Landownership in Scotland’ in N Gallent *et al*, *Postcapitalist Countrysides* (2025), 128: ‘retaining benefits within the community and local cycling of surpluses from activities is key, marking a break from the extraction of surplus value by a single private landowner possibly remote to the location where they are generated.’ Think has clear links with Marx’s critique of the metabolic rift: see A Byer (no 42), 37 – 52.

<sup>735</sup> Mackenzie (no 107), 30. See also Shoemaker, ‘Papering Over Place’ (no 65), 136 wherein she describes commodification as ‘a sense of disconnect...that separates a more fungible ‘estate’ or asset from the living natural and social ecology of ‘land’.’ For Shoemaker, place connections cannot be easily valued, bought and sold. They exist in ‘our individual and collective imaginations and lived experiences. Commodification, on the other hand, refers to a way of thinking about space that scrubs many of these unique features of a place.’

<sup>736</sup> Mackenzie (no 107), 45.

<sup>737</sup> R McMorran and A Scott, ‘Community Landownership: Rediscovering the Road to Sustainability’ in J Glass *et al*, *Lairds, Land and Sustainability* (2013), 165. The authors state that this building of community resilience is echoed in other empirical studies, which suggest that the ‘direct involvement of community members in all aspects of management work is building up and enhancing a local skills base in land management, business development, developing grant application, leadership and project management.’

<sup>738</sup> B Macauley and C Dalglish, ‘Community Landowners and the Climate Emergency’ (2021) Community Land Scotland, 22 <[www.communitylandscotland.org.uk/wp-content/uploads/2022/08/Community-Landowners-the-Climate-Emergency\\_Report.pdf](http://www.communitylandscotland.org.uk/wp-content/uploads/2022/08/Community-Landowners-the-Climate-Emergency_Report.pdf)> accessed 20/08/2025. See also 24 where it is stated that this policy direction recognizes the ‘active contribution that communities are making to address the climate emergency. They also recognize the need for communities to be involved if Scotland’s emissions reductions...goals and targets are to be achieved in just and sustainable ways.’

<sup>739</sup> See M Daniels, C Mallows, B Macauley, R Bryce, ‘Biodiversity and Community Owned Land in Scotland – An Analysis (2025) <[www.communitylandscotland.org.uk/wp-content/uploads/2025/07/Biodiversity-and-community-owned-land-in-Scotland—an-analysis-july-2025.pdf](http://www.communitylandscotland.org.uk/wp-content/uploads/2025/07/Biodiversity-and-community-owned-land-in-Scotland—an-analysis-july-2025.pdf)> accessed 26/08/2025.

1997, the Isle of Eigg Heritage Trust set up Eigg Electric, a community owned company which provides for all of the Island's energy needs through renewable energy sources generated on the island itself.<sup>740</sup> In this regard, community ownership presents an opportunity for the community to 'interpret and communicate the environment,' to 'enhance environmental awareness.'<sup>741</sup> In other words, the Trust has implemented a form of ownership which is place-based, recognising both the ecological limits of Eigg whilst also harnessing natural attributes in a sustainable way to contribute towards the sustainability of the island community. Eigg is not an outlier with regard to community land use decisions based on environmental ends.<sup>742</sup>

Therefore, whilst the CRtB legislation is grounded in redistributive land justice,<sup>743</sup> such social ends are ultimately conducive to, and facilitative of, environmental ends including climate change mitigation.<sup>744</sup> To this end, the CRtB legislation facilitates ongoing processes of de-commodification which facilitate more socially and environmentally sustainable land uses. To illustrate further, all CRtB contain provisions ensuring that any surplus profits must be reinvested for the benefit of the community.<sup>745</sup> Economic considerations clearly factor in land use decisions made by communities, but those considerations are ultimately for the sustainability of the local community, rather than far-off, private corporate considerations. Land use decisions are thus contingent upon spatial

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<sup>740</sup> Isle of Eigg Heritage Trust, 'Eigg Electric' <<http://isleofeigg.org/eigg-electric/>> accessed 13/03/2025.

<sup>741</sup> McMorran and Scott, 'Community Landownership' (no 737), 164.

<sup>742</sup> See Mackenzie (no 107), 79 – 119 where she argues that community landownership creates a 'working nature' whereby the nature/culture dualism is troubled by a reconnection of people with their material environments. In this chapter, Mackenzie provides case studies of community landownership that complements, rather than conflicts with, the protection of nature because of the situatedness of communities in place. This troubling of the nature/culture dualism changes spaces previously characterised as 'delight' through conservation practices – both for grouse moors and by conservation groups – opening space for new spatial possibilities which work *with* nature.

<sup>743</sup> For example, see LRP, 'Recommendations for Action' (no 659), 1. This report, which led to the creation of the 2003 Act, was aimed at securing 'greater local involvement and local accountability.'

<sup>744</sup> M Combe, 'The Environmental Implications of Redistributive Land Reform' (2016) 18(2) Environmental Law Review 104, 118. Combe states that the initial policy development of the 2003 Act makes clear that 'shaking the existing ownership pattern as a way of dealing with damage to the environment was part of the thinking...' Combe here quotes paragraph 3.2 from LRP, 'Identifying the Solutions' (1998) Scottish Office: '[the theme of] increased diversity in the way land is owned and use, as the best way of dealing with damage to the local community or environment which can result from monopoly ownership, and of encouraging the fullest possible exploitation of rural development opportunities.' Indeed, as land reform progressed into the 2010s, the 2014 Report of the LRRG was initially sanctioned with part of its remit being to 'generate, support, promote and deliver new relationships between land, people, economy and environment in Scotland.' See LRRG, 'The Land of Scotland and the Common Good' (2014) Scottish Government, 5.

<sup>745</sup> Land Reform (Scotland) Act 2003 ss34(1)(g), 34(1A)(i), 34(1B)(i) and ss97D(2)(g), 97D(3)(i), 97D(4)(i). The Crofting CRtB also contains the same requirements but as stated in footnote 660 this CRtB is not dealt with in depth in this thesis.

conditions, rather than legal duties towards a diffuse group of shareholders with no connection to the land.<sup>746</sup>

The link with sustainable development is also strongly suggestive of an imbuing of environmental considerations within community ownership vis-à-vis the CRtB framework. For example, the community body must satisfy ministers that its *main purpose* is the furthering of the achievement of sustainable development.<sup>747</sup> In addition, for all types of CRtB application, Scottish Ministers must consider that the transfer of land is ‘likely to further the achievement of sustainable development in relation to the land.’<sup>748</sup> It is, however, the case that ‘sustainable development’ is a contested term with diverging meanings,<sup>749</sup> with many of these ascribed meanings being anthropocentric in nature.<sup>750</sup> This thesis does not intend to expand on, or debate, the precise meanings of sustainable

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<sup>746</sup> In a UK context, directors of companies are generally liable to the company, but can be in situations liable to shareholders. For example, the Companies Act 2006 s172 compels directors to promote the success of the company. Shareholders may bring a derivative claim against directors if this is not upheld.

<sup>747</sup> Land Reform (Scotland) Act 2003 ss34(4), 97D(6); Land Reform (Scotland) Act 2016 s49(7) (emphasis added).

<sup>748</sup> Land Reform (Scotland) Act 2003 ss38(1)(b), 74(1)(j), 97G(6)(a)(ii); Land Reform (Scotland) Act 2016 s56(2)(a). This last section is part of a wider suite of ‘sustainable development conditions’ built into the 2016 Act: see s56(2).

<sup>749</sup> In a Scottish Government policy setting the so-called ‘Brundtland definition’ is preferred, though UK-wide policy on sustainable development has also been referred to, which expands on this definition. G H Brundtland, ‘Our Common Future’ (1987) World Commission on Environment and Development, para 27: ‘[h]umanity has the ability to make development sustainability to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs.’ Regarding Scottish sustainable development policy, see A Ross, ‘The Evolution of Sustainable Development in Scotland: A Case Study of Community Right to Buy Law and Policy, 2003 – 18’ in M Combe *et al*, *Land Reform in Scotland* (2020), 240 – 245. Ross outlines three distinct ‘eras’ of sustainable development policy in Scotland. The first is defined by a Statement published in 2002 which represents essentially a facsimile of the Brundtland definition. See Scottish Executive, ‘Meeting the Needs...Priorities, Actions, and Targets for Sustainable Development in Scotland (2002)’. The second era began in 2005, with a shared UK policy document setting out five principles: (1) living within the Earth’s environmental limits; (2) ensuring a strong, healthy and just society; (3) achieving a sustainable economy; (4) promoting good governance; and (5) using sound science responsibly. See UK Government, Scottish Executive, Welsh Assembly and Northern Ireland Office, ‘One Future – different paths: The UK’s Shared Framework for Sustainable Development’ (2005), 8 (‘Shared Framework for Sustainable Development’). For Ross, the third ‘era’ has seen the Scottish Government taking a greater role in defining sustainable development. This can be seen particularly in the adoption of the United Nations ‘Sustainable Development Goals’. For more information on these goals see UN General Assembly Res 70/1 (21 October 2015). See also Scottish Government, ‘Scotland and the Sustainable Development Goals’ (2020) <[www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2020/07/scotland-sustainable-development-goals-national-review-drive-action/documents/scotland-sustainable-development-goals-national-review-drive-action/scotland-sustainable-development-goals-national-review-drive-action/govscot%3Adocument/scotland-sustainable-development-goals-national-review-drive-action.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2020/07/scotland-sustainable-development-goals-national-review-drive-action/documents/scotland-sustainable-development-goals-national-review-drive-action/scotland-sustainable-development-goals-national-review-drive-action/govscot%3Adocument/scotland-sustainable-development-goals-national-review-drive-action.pdf)> accessed 27/09/2025. However, Scottish Ministers, in the context of reviewing CRtB applications, adopt the Shared Framework for Sustainable Development. For example, see *St Andrews Application* (no 721) and *Forthtlay Ltd Employee Trust v Scottish Ministers* [2025] SC DUN 24, paragraph 52.

<sup>750</sup> This is a wider argument which is not engaged with in this chapter. For example, Kotzé and French argue that the Goals are anthropocentric in nature and do little to contribute to wider ecological goals. See L J Kotzé and D French, ‘The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene’ (2018) 7 *Global Journal of Comparative Law* 5 - 36.

development, other than to note that there is necessarily an environmental element to sustainable development regardless of precise definitions.<sup>751</sup> In this regard, it is worthwhile exploring the approaches of community bodies to this question in CRtB applications, as well as the responses of Scottish Ministers.

Looking back to the discussion on the Helensburgh Application in section 6.3.1, the decision shows that whilst the Scottish Ministers were satisfied that the main purpose of HCWG was to further the achievement of sustainable development as per section 97D(6) of the 2003 Act, they did not find that HCWG met the threshold to show that transferring the land to the community would further the achievement of sustainable development. In their application, HCWG related their plans directly to five of the United Nation's Sustainable Development Goals:<sup>752</sup> 'Quality education'; 'Make cities inclusive, safe resilient and sustainable'; 'Take urgent action to combat climate change and its impacts'; and 'Life on land'.<sup>753</sup> HCWG stated that, conversely, the current landowner was effectively 'sitting' on the land awaiting a rise in value: it had applied for planning permission several times for a housing development each which were unsuccessful.<sup>754</sup> The site had been cleared of over 100 trees by the owner in anticipation of permission, in contravention of a Tree Preservation Order over those trees. Nevertheless, HCWG failed to convince Scottish Ministers that it would further the achievement of sustainable development. This was despite allegations that the existing land use in question raised significant safety concerns within the community, was the site of increasing non-native plant species and illegal fly-tipping, and to which the owners had prevented public access since 2007.<sup>755</sup> Notwithstanding these considerations, the *economic* considerations of sustainable development appeared to outweigh the *environmental* considerations. HCWG failed to present a viable plan for how the change in land use would lead to economic gain. Quite why the Scottish Ministers only assessed the economic plans of HCWG as part of an overall assessment of 'sustainable development' remains unclear. Sustainable development,

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<sup>751</sup> See A Ross, *Sustainable Development Law in the UK: From Rhetoric to Reality?* (2011), 3 – 4: sustainable development can be seen to 'permit an encourage concurrent dialogues on environmental protection, social and economic development, human rights, governance, justice and other issues amongst states, individuals and organisations with very different views, priorities and agendas.'

<sup>752</sup> UN General Assembly Res 70/1 (21 October 2015).

<sup>753</sup> See Helensburgh Application (no 717), 16 – 20.

<sup>754</sup> *ibid.*, 6. HCWG argued that the land was 'held speculatively by the current owners...in the hope that they will eventually succeed in overcoming longstanding Council planning policy, which designates the land as an Open Space Protection Area.'

<sup>755</sup> See J Robbie, 'Babes in the Woods: The Decision of the Scottish Ministers on the Application of Helensburgh Community Woodlands Group to Exercise the Right to Buy Abandoned, Neglected or Detrimental Land' (2021) 25(3) *Edinburgh Law Review* 347, 349.

after all, is not solely concerned with economic drivers.<sup>756</sup> As Jill Robbie states, the ‘contrast between the two competing visions of ownership involved is vivid.’<sup>757</sup> The owners’ treatment of the land ‘revealed that they saw the land as a fungible asset,’<sup>758</sup> whereas HCWG ‘engaged with the history of the land, and sought to restore native ecosystems as well as enhance the health, education and skills of local people.’<sup>759</sup> In other words, the decision here was between ownership based on local knowledge and care, reinvesting profits back into community benefit, and ownership which had been argued to be not only neglectful but which views land instrumentally, purely as an asset.

More recently, however, the Poet’s Neuk ministerial decision is suggestive of a more holistic approach.<sup>760</sup> The Scottish Ministers in this decision looked at a number of elements in their analysis of sustainable development. Economic considerations were relevant but were explicitly set against a wider evaluation, including social sustainability,<sup>761</sup> and environmental sustainability (which centred on the importance of greenspace in urban areas for improving air quality and capturing greenhouse gases).<sup>762</sup> The Scottish Ministers found in favour of Poet’s Neuk. Whilst Ministerial decisions under the CRtB legislation do not create precedent, the Ministers’ decision was recently subject to a legal challenge by the landowner.<sup>763</sup> This challenge failed on a number of grounds, and is the first such challenge to reverse a trend of legal decisions relating to the CRtB finding in favour of the landowner.<sup>764</sup> Whilst the Sheriff acknowledged that more weight had been placed on environmental considerations by Scottish Ministers, he rejected the claim of the landowner that the only relevant considerations for Scottish Ministers were economic considerations such as achieving a sustainable economy.<sup>765</sup> Following the potentially narrowing effect of

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<sup>756</sup> See Ross, *Sustainable Development Law in the UK* (no 751). Indeed, in the original policy development behind the introduction of the CRtB, the LRPG stated that the ‘objective for land reform is to remove the land-based barriers to the sustainable development of rural communities. Sustainable development is not something that can be readily defined...but in practice it will consist of development which is planned with appropriate regard for local communities, local employment *and the environment*. It therefore needs an integrated approach which takes account of social and economic *as well as environmental aspects*.’ See LRPG, ‘Recommendations for Action’ (no 659), 4 (emphasis added).

<sup>757</sup> See Robbie, ‘Babes in the Woods’ (no 755), 354.

<sup>758</sup> *ibid.* Part of this argument relates to the fact that the owners had, on several occasions, unsuccessfully applied for planning permission and were engaged in a further application. For this reason, Robbie argues that they ‘just needed the grant of planning permission to enhance [the land’s] financial value.’

<sup>759</sup> *ibid.*

<sup>760</sup> See discussion on the St Andrews Application in section 6.3.1.

<sup>761</sup> St Andrews Application (no 721), 3.

<sup>762</sup> *ibid.*, 5.

<sup>763</sup> *Forthtaylor Limited Employee Trust v The Scottish Ministers* [2025] SC DUN 24.

<sup>764</sup> See M Combe, ‘An Analysis of Part 2 of the Land Reform (Scotland) Act 2003 Using Case Law Relating to the Community Rights to Buy (2023) University of Strathclyde <<https://strathprints.strath.ac.uk/87147/>> accessed 12/03/2025.

<sup>765</sup> *Forthtaylor Limited Employee Trust v The Scottish Ministers* [2025] SC DUN 24, paragraph 54.

the Helensburgh Application decision, the St Andrews Application decision, along with the Sheriff's rejection of the landowner's appeal, suggests that the CRtB legislation supports a decentring of extractive logic within ownership, countering imaginaries of land as 'use'.<sup>766</sup>

The above discussion highlights that community ownership has the potential to challenge the commodifying impacts of the ownership model and, in this challenge, contribute to mitigating the climate emergency through land use change. However, this is not to deny that communities do not also play a role in commodifying nature: the harnessing of wind power on Eigg, for example, or the ability of community owners to set up and run a VCM project. These are examples of commodification of natural attributes – wind and carbon. Yet such commodification can be viewed as a means of communities working *with* rather than *against* nature. As Fiona Mackenzie argues, such utilisation of nature can 'become the means through which people reposition themselves vis-à-vis both property and an economy that...is more 'place-attached', community owned, led and controlled.'<sup>767</sup> What is more, any surplus from such projects are re-invested in the community, enabling the sustainability of the community itself rather than the extraction of wealth to globally situated shareholders and investors. This is also a view of nature which counters the imaginary of land as 'delight'.<sup>768</sup> Community ownership contests such notions through a 'local reworking of concepts of nature and sustainability, away from the idea of a 'preserved wilderness' towards one of the 'working wild' where active engagement with, and sustainable consumption of, the environment play key roles in local development.'<sup>769</sup> In this regard, community ownership 'extracts the idea of 'wild'...and opens up the meanings of nature and the wild to new configurations.'<sup>770</sup> Further, it has been argued that communities will, by default, manage natural attributes more sustainably because of higher levels of motivation, knowledge and experience relating to those aspects of nature

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<sup>766</sup> See section 3.3.1.

<sup>767</sup> See Mackenzie (no 107), 159 referencing J K Gibson-Graham, *A Postcapitalist Politics* (2006), 87, where Gibson-Graham state that such community owned projects has 'communal appropriation and distribution of surplus', and is 'environmentally sustainable', 'small scale', 'locally self-reliant', and 'culturally distinctive', and 'socially embedded'. Mackenzie uses the example of the community-owned island of Gigha, where 'well-documented evidence of the significance of community ownership of a wind farm and of its contribution to the creation of a community economy is found.' These include 'a housing improvement and building programme, new business premises and businesses, and a growth in population of close to 50 per cent...'

<sup>768</sup> See section 3.3.3.

<sup>769</sup> See Mackenzie (no 107), 29. See also McMorran and Scott, 'Community Landownership' (no 737), 170 where the authors discuss that community ownership in many case studies has been shown to lead to a 'local reworking of concepts of nature and sustainability, away from the idea of a 'preserved wilderness' towards one of the 'working wild' where active engagement with, and sustainable consumption of, the environment play key roles in local development.' See more generally M Combe, 'The Environmental Implications of Redistributive Land Reform' (2016) *Environmental Law Review* 18(2) 104, 112 – 116.

<sup>770</sup> See McMorran and Scott, 'Community Landownership' (no 737).

‘inextricably bound up with [community] livelihoods.’<sup>771</sup> Therefore, through community ownership – a spreading out of decision making power relating to a place to the community *within* space – certain recurring spatial consequences for rural place in Scotland through attitudes of use and/or delight are challenged.

### 6.3.3 Individual

JW Singer expresses the individualism at the heart of the ownership model by highlighting its lack of *obligation*. This ‘privileges...the life of the owner,’<sup>772</sup> over other non-owning human and non-human communities, as well as Earth systems themselves. However, this aspect of the ownership model is destabilised by community ownership; the ‘we’ within Singer’s ‘conceptual space’ is broadened to include entire communities, rather than an individual person or company. In this regard, community ownership poses a form of challenge to the ownership model by disrupting the binary private/public. Fiona Mackenzie argues that destabilising the ownership involves, firstly, recognising that other rights to purely private rights of individuals exist within the context of the property paradigm, and secondly that property relations are social relations. For Mackenzie, community ownership represents an opportunity to imbue obligations of responsibility and care in landownership, which are spread out among entire communities, thus resisting the privatisation of obligations.<sup>773</sup> Such values are increasingly important in tackling wider public problems like the climate emergency.

The CRtB are a set of policy measures which directly interfere with the property rights of the individual in order to redistribute to a wider group of people. The value of *individual* welfare maximisation through land use decision-making power is superseded by the needs of local communities. The certainty sought through the right of ownership remains, but the outcome of that certainty is the resilience of the community – the sustainability of a given place – rather than the certainty of, for example, investment returns. Thus, the resilience of the community sustainability is prioritised over imperatives for the economic growth of the individual. In this regard, Van der Walt’s statement that reforms to ownership rights are almost always restricted to the ‘creation of new rights...without affecting existing

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<sup>771</sup> *ibid.*,170, referencing S M Evans and A C Birchenough, ‘Community-Based Management of the Environment: Lessons from the Past and Options for the Future’ (2001) 11 *Aquatic Conservation* 137 - 147.

<sup>772</sup> Singer, *Entitlement* (no 105), 6.

<sup>773</sup> Singer, *Entitlement* (no 105), 16.

rights'<sup>774</sup> is contested; property rights are fiercely guarded, yet the CRtB framework is a state intervention which redistributes those property rights to a specific group of people, at times without the consent of the owner. Existing rights are very much affected.

Community ownership highlights the social and political nature of property, traditionally obscured by the privateness of the ownership model. It provides a forum wherein the powers that are bestowed by property are contested in a public forum; by publicly registering an interest in land under the RCIL, or by applying to have the land transferred to them, communities are able to highlight *why* land is important in achieving wider public goods, including not just the sustainability of the community but wider climate goals, and why that is not being achieved by an individual landowner. This is particularly important in the context of Scotland, where concentration of private land ownership remains extremely high, and the decisions of one owner can affect entire, and indeed multiple, landscapes. Thus, the contestation of the privacy of property by communities challenges the focus on exclusion within the property paradigm. The usual consolidation of property powers in a singular owner sends a 'simple message' to others, which is to 'keep off'.<sup>775</sup> This preserves the narrative that property is simply a set of rules delineating and enforcing the rights of the owner. However, as argued in chapter 1, property is not simple; it is inherently socially and spatially relational.<sup>776</sup> The embeddedness of people within place is a reality which is not reflected in the ownership model. Instead, property is presented as an exclusionary tool which is used to exert power over spaces and the human and non-human communities within those spaces, particularly so in the Scottish rural experience. The CRtB present an opportunity to emphasise common, rather than individually perceived, space; generating a dynamism in ownership which prioritises multilateral and ongoing processes of compromise and cooperation, rather than unilateral and exclusionary decision-making power which has persisted across Scottish landscapes for generations. This is a political and legal opportunity to recognise the heterogeneous nature of communities, enabling property to reflect messy socio-spatial realities,<sup>777</sup> countering the 'estranged' and displaced decision making which often occurs in a Scottish rural context wherein decisions are made regarding vast landscapes by those without attachments to specific space nor with

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<sup>774</sup> Van der Walt, *Property in the Margins* (no 31), 31 – 32.

<sup>775</sup> Van der Walt, *Property in the Margins* (no 31), 4.

<sup>776</sup> See 1.3.3.

<sup>777</sup> See McMorran and Scott, 'Community Landownership' (no 737), 149: community ownership relates to an 'enhanced and locally defined narrative of community development, rooted in the community itself rather than imposed from outside agencies...' See also Mackenzie (no 107), 23, where she explains that collective claims to property 'trouble the right to alienate – i.e. where property is removed as a commodity from circuits of local or global capital...there is...a direct assault on processes of enclosure and privatisation.'

knowledge about the socio-ecological limits of those spaces.<sup>778</sup> Instead, the CRtB enable ‘identity-forming experiences with space, the promotion of stewardship...relations, stable community connections and...shared human flourishing.’<sup>779</sup> By placing the right of ownership directly with those embedded in the ‘material experience of the land itself’,<sup>780</sup> community ownership undoes these processes of estrangement.

In other words, community ownership is premised on the simple assertion that the people who are spatially embedded – imbuing spaces as meaningful ‘places’ – are more likely to base their practices on their locally-produced knowledge of the limits of the land, as they are engaging with these limits on an intimate, day-to-day basis.<sup>781</sup> This is a form of ownership which is driven by locally-produced narratives, rather than far-off motives determined by economic, or indeed specific environmental, priorities. In a Scottish context, this is a counter-response to historic processes of widescale land enclosure and privatisation. In turn, community ownership has increasingly been recognised to result in far-reaching economic, social and environmental outcomes through processes of commoning, including ‘enhanced participatory governance and rebuilding of community capacity.’<sup>782</sup>

However, similar to the discussion in section 6.3.1, hermeneutic issues will continue to persist with a contested term like ‘community’; concerns over whether a dynamic term such as ‘community’ can be accurately distilled into legislation; questions over who is exactly represented by the community body and who has the right to be involved in decision-making, and when; questions regarding what community needs take priority, and why. Indeed, issues of intra-community disputes are not uncommon in experiences of community ownership. For example, Jayne Glass *et al* highlight through certain case studies that,

‘conflicts can erupt in conjunction with buyouts, both within communities and between communities and other stakeholders, based on conflicting values and differing definitions of what constitutes the ‘community’... For example, in

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<sup>778</sup> See Shoemaker, ‘Papering Over Place’ (no 65), 138. See also section 3.3 for historic and contemporary examples of estranged land use decision-making in Scotland, as well as the arguments relating to VCMs are representative of estranged decision-making in section 4.3.

<sup>779</sup> Shoemaker, ‘Re-Placing Property’ (no 49), 870.

<sup>780</sup> *ibid.*

<sup>781</sup> Jessica Shoemaker refers to this as an aspect of ‘place attachment’. See Shoemaker, ‘Re-Placing Property’ (no 49).

<sup>782</sup> A McKee *et al*, ‘Community Landownership’ (no 644). For example, the authors argue at 154 that the CRtB are often deployed as a means of tackling out-migration, which is a particular problem in relation to young people who struggle to find employment and to afford housing in rural areas.

Breakish...the conflict centred around the contested identity(ies) of the community itself and whether crofters as well as non-crofting ‘incomers’ should have voting rights...’<sup>783</sup>

Such case studies highlight the practical, day-to-day difficulties of enacting ‘community’ within the confines of the CRtB.<sup>784</sup> For the community on Breakish, on the Isle of Skye, the CRtB brought problematic implications with differing interpretations of community. A community-owned wind farm was proposed. However, the proposition was that the wind farm was to be built on common grazings – an area of common ground used to graze animals from various crofts in the community but owned by a single owner (which would be the community body exercising the CRtB). As Glass *et al* outline in the quote, above, the competing definitions of community – the crofting community who used the common grazing and the legislatively defined community body – led to conflict. According to Brown, this highlights that the ‘bureaucratic solution to the problem of defining ‘the community’ – postcodes and the electoral roll – is not necessarily successful, and can be used by either side to fuel community divisions...’<sup>785</sup> The issue of defining the relevant community was recently at stake, proceeding to the Inner House of the Court of Session.<sup>786</sup> In this case, crofters clashed with the owner of the common grazings, which happened to be a community body – the Stornoway Trust (thus the land was ‘community owned’ but used as common grazings for the crofting communities). The case concerned, similar to that in Breakish, plans for a windfarm. However, this case centred on the fact that *both* the crofting community and the community owner had competing plans for a wind-powered renewable energy project on the land. Ultimately, the crofters’ claim was dismissed. This case did not concern the CRtB but serves to highlight that even those within the community may contest that a landowning community body truly represents the needs of the local community.

For Brown, therefore, the top-down definition of a dynamic and contested term like ‘community’ risks the ‘construction of a commons...[determined] between communities

<sup>783</sup> McMorran and Scott, ‘Community Landownership’ (no 737), 142.

<sup>784</sup> This chapter does not attempt to settle on a definition of community, except as to comment on the tensions between top-down deployments of the term (via the CRtB legislation) and bottom-up ideas of community. However, see A Brown, ‘Crofter Forestry, Land Reform and the Ideology of the Community’ (2008) 17(3) *Social and Legal Studies* 333, 335 referencing R Liepins, ‘New Energies for an Old Idea: Rewording Approaches to ‘Community’’ (2000) 16 *Contemporary Rural Studies* at 23. Liepins describes three potential pillars of the term ‘community’: firstly as a signifier of ideas about certain social relations; secondly as a form of praxis wherein people conduct their lives; and thirdly as spaces that form the platforms for the material and immaterial embodiment of ‘community’.

<sup>785</sup> Brown (no 784), 345.

<sup>786</sup> *Crofters having rights in the common grazings of Sandwickhill North Street v Crofting Commission* [2020] CSIH 49.

and the neo-liberal state,<sup>787</sup> which employs ‘centralised techniques or technologies of government – electoral registration, postcode-mapping and community consultation...’<sup>788</sup> This critique is echoed by Fiona Mackenzie, who cautions that a ‘politics of a local commons is not necessarily progressive: it may support a neoliberal agenda.’<sup>789</sup>

However, these critiques are based on specific and highly context-specific issues of contestation. Whilst it is true that the construction of community is top-down, the possibilities of ‘community’ to be a contested term (in a positive way) remain open. As Brown contends, in differing contexts in Scotland a geographically prescribed definition of community can ‘challenge the power of landowners’, particularly where there is ‘no historically imagined ‘community’ based on land use.’<sup>790</sup> The challenge for these communities, according to Brown, is to ‘create a viable commons of ownership.’<sup>791</sup> Notwithstanding such concerns, these questions are an important part of community ownership itself; they contribute to the organic development of the community through participatory, continuous and democratic dialogue. As Jayne Glass *et al* argue, ‘conflict and its management...represent core and necessary components of community development activity. These findings suggest that processes of geographic representation...offer potential for managing conflict...’<sup>792</sup> In other words, contestation – as an inherent part of community relations – is important to reflect within ownership if the property paradigm is to move beyond an emphasis on the individual.

Law undoubtedly struggles to ascribe meaning to a dynamic term like ‘community’. As Brown argues in the context of the tensions between crofting communities and communities defined under the CRtB, ‘[l]egally speaking, there is no such thing as the crofting ‘community’ – there are only individual registered crofters and grazing committees.’ In other words, law can only ever approximate what a community may be. This is a flaw of utilising a legislative framework to drive a grassroots movement like community ownership. However, as section 6.4 will discuss, viewed as part of a wider, iterative shift towards a ‘commoning’ of the land, the tension between bottom-up and top-down deployments of ‘community’ is not insurmountable, and may indeed present further

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<sup>787</sup> Brown (no 784), 346.

<sup>788</sup> *ibid.*, 346.

<sup>789</sup> Mackenzie (no 107), 22. Mackenzie argues that it is therefore necessary to link local commons with wider movements, protesting ‘against a neoliberal form of globalisation’, citing Blomley, ‘Enclosure’ (no 651), 324.

<sup>790</sup> Brown (no 784), 347.

<sup>791</sup> *ibid.*, 347.

<sup>792</sup> McMorran and Scott, ‘Community Landownership’ (no 737), 167-168.

opportunities to re-shape the property paradigm to better tackle the challenges of the climate emergency.

#### 6.4 The CRtB and performative property: commoning and climate change

Property is not a naturally occurring phenomenon. It is continually made and remade through everyday interactions, reflecting the relationality of law and space.<sup>793</sup> Policy measures inform these interactions, not just by affecting land use change through regulatory changes such as the CRtB legislation, but also through facilitating the ways in which people interact with and through space. The CRtB, much like LMPs and VCMs, represent a form of ‘property choice’.<sup>794</sup> These property choices compound over time, actively producing the property paradigm which, in turn, yields physical consequences for space itself. This thesis has, so far, argued that a property paradigm shaped by the ownership model causes spatial consequences which contribute to the climate emergency. It has further argued that policy measures represent opportunities to facilitate property performances. These performances can easily entrench the ownership model – as can be seen with VCMs – or indeed have their effectiveness curtailed by the performative ‘success’<sup>795</sup> of the ownership model in a wider capitalist system which rewards vested land interests – as is the case with the watered-down vision of LMPs currently envisaged by the Land Reform Bill. However, policy measures can also facilitate property performances which contest the dominance of the ownership model, providing space for the production of alternative visions of property better-adapted to tackle climate change. Therefore, this section draws from Fiona Mackenzie’s compelling argument that community ownership represents a departure from the binary, anthropocentric view of rural place in Scotland;<sup>796</sup> from ‘use’ and ‘delight’ instead to places of ‘possibility’,<sup>797</sup> and outlines what this may mean for ownership in the context of the climate emergency.

In a performative setting, ‘possibility’ can refer to the transformative alternatives and potentialities for property enabled through the everyday workings of property in space. The ownership model belies new possibilities, instead fostering the status quo. In the context of the climate emergency this is no longer justifiable. New political imaginaries are required beyond the tropes of the ownership model, and the CRtB open space for such imaginaries

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<sup>793</sup> See sections 1.3.3 and 1.3.4 for an overview of these concepts.

<sup>794</sup> Shoemaker, ‘Re-Placing Property’ (no 49).

<sup>795</sup> Blomley, ‘Performing Property’ (no 68), 42 – 45.

<sup>796</sup> On this binary, see section 3.3.2 and 3.3.3.

<sup>797</sup> Mackenzie (no 107).

to germinate and flourish. Performativity theory suggests that performances produce the world, not just law.<sup>798</sup> In this regard, they also produce the social relations which shape both social and physical space. Ownership of land by a community ‘repositions’ people towards property,<sup>799</sup> which carries the potential for powerful changes to spatial arrangements. In other words, community ownership opens the possibility of undoing dominant norms of property (the ownership model) which rely on tropes of abstraction, individualism and extraction; communities are enabled to continuously engage in the ‘doing’ of property in ways that challenge these tropes, reconfiguring their relationships among one another and with the spaces they inhabit. The exercise of ownership, therefore, becomes spatially contingent, based on the physical limits (and possibilities) of the land as prescribed by local knowledge, exercised often more democratically than by a single (and in the context of rural Scotland, often absent) owner. This, in turn, reworks people’s relationship with ‘nature’, challenging the normalisation – vis-à-vis the ownership mode – of nature as an ‘accumulation strategy for capital,’<sup>800</sup> and instead creates a ‘working nature’<sup>801</sup> wherein people are embedded in the spaces they inhabit, fostering relations of care and collective responsibility through everyday and ongoing interactions between people and space. The spatiotemporal patterns which are produced by community ownership over time – Mackenzie’s idea of people being ‘repositioned’ with space<sup>802</sup> – present opportunities to iteratively challenge the ownership model, highlighting the possibility for an alternative property paradigm that prioritises forms of collective care and responsibility for Earth systems. However, it must be added that without further state intervention, particularly in making the CRtB more streamlined and less procedurally rigorous, as well as providing further avenues of funding for communities to front the capital costs of transfers, the cumulative effects of community ownership may not be able to materialise in the first place.

There is a risk of hyperbole in this analysis, particularly when considering the necessity of *cumulative* performances over time to challenge the ongoing reiterative performances of the ownership model (such as VCMs). For example, viewing the CRtB on a purely quantitative scale, since 2003 only 175 CRtB applications have been approved by Scottish

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<sup>798</sup> Blomley, ‘Performing Property’ (no 68), 39: ‘performativity does not suppose a divide between human agents that arrange and assemble, and things that have been arranged’

<sup>799</sup> Mackenzie (no 107), 21.

<sup>800</sup> C Katz, ‘Whose nature, whose culture?: Private productions of space and the ‘preservation’ of nature’ in B Braun and N Castree (Eds) *Remaking Realty* (1998), 46.

<sup>801</sup> Mackenzie (no 107), 29. Mackenzie terms this ‘social nature’, encapsulating the ways that nature is reworked once land is brought into community ownership, challenging the nature/culture dualism.

<sup>802</sup> *ibid.*, 54.

Ministers from a total of 268 applications,<sup>803</sup> and only 2.7% of Scotland's total land area is in community ownership as of December 2023.<sup>804</sup> In addition, as a legal form, the CRtB are no different to 'normal' ownership by a legal body such as a corporation which is representative of a wider group. Processes of 'commoning'<sup>805</sup> land through community ownership may also be constrained by a top-down, legislative approach to community ownership; there is a risk that by attempting to control such a process – rooted in organic, locally-prescribed visions of sustainability – the Scottish Government is in danger of steering such processes of commoning towards those dictated by instrumental, economic logic only,<sup>806</sup> restricting political opportunities. Additionally, an ongoing policy review of the CRtB suggests that the framework is not operating as intended, potentially hampered by a cautious and overly procedural approach which appeases vested landed interests. Yet, when viewed through the lens of performativity, the CRtB represent a strong challenge to the tropes of the ownership model which offer potentially transformative changes to the property paradigm. As a policy measure, the CRtB open space for new prefigurations of property, which can be counterposed to the binaries enacted vis-à-vis the ownership model: nature/culture; subject/object; public/private and use/delight. Policy measures produce 'specific representations of the problem or issue to which they are directed.'<sup>807</sup> As Boyd explains, they perform 'substantial ideological work in formatting problems.'<sup>808</sup> Thus, instead of viewing the climate emergency as a problem to be addressed through market-based measures based on the status quo, the CRtB as representative of a policy choice suggest a move towards formatting the problem as not a simple accounting exercise to be 'solved' through, for example, offsetting schemes, but rather as part of a wider transition to a more sustainable form of land ownership.

As discussed in section 6.3.3, community ownership can lead to intra-community tensions which can often get in the way of progressive land use change, with such tensions arising

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<sup>803</sup> Scottish Government, 'Community Right to Buy Review: Consultation' (2025) 3, <[www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2025/07/community-right-buy-review-consultation/documents/review-community-right-buy-draft-consultation/review-community-right-buy-draft-consultation/govscot%3Adocument/review-community-right-buy-draft-consultation.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2025/07/community-right-buy-review-consultation/documents/review-community-right-buy-draft-consultation/review-community-right-buy-draft-consultation/govscot%3Adocument/review-community-right-buy-draft-consultation.pdf)> accessed 20/09/2025.

<sup>804</sup> Scottish Government, 'Community Ownership in Scotland in 2023' (2024) 1, <[www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/11/community-ownership-in-scotland-2023/documents/community-ownership-in-scotland-2023---report/community-ownership-in-scotland-2023---report/govscot%3Adocument/Community%2BOwnership%2Bin%2BScotland%2B2023%2B-%2BReport.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/11/community-ownership-in-scotland-2023/documents/community-ownership-in-scotland-2023---report/community-ownership-in-scotland-2023---report/govscot%3Adocument/Community%2BOwnership%2Bin%2BScotland%2B2023%2B-%2BReport.pdf)> accessed 28/09/2025. See also section 6.2.3.

<sup>805</sup> Mackenzie (no 107), 38.

<sup>806</sup> Mackenzie (no 107), 21.

<sup>807</sup> Boyd, 'Poverty of Theory' (no 439), 471.

<sup>808</sup> *ibid.*, 468.

from different ideas about community need, or indeed who the community actually comprises. However, it is in these processes of community compromise that new forms of property may be performed into being: through negotiation, conflict, compromise, and everyday democratic participation in land use decision-making and land management. Fiona Mackenzie argues that ‘commoning’ is not simply the existence of common property, but rather an ongoing social process; a set of practices through which communities actively make and maintain shared spatial relationships. It is thus a performative and relational practice, wherein people work together to reclaim land, revalue it in material terms and govern it collectively.<sup>809</sup> This contributes to a re-embedding of people within spaces imbued with meaning, fostering land use practices of environmental care fundamentally based on the ecological limits and social lives of those spaces.<sup>810</sup> Such reconfiguring of the property paradigm opens space for ownership to be a fundamental tool in mitigating, rather than contributing to, the climate emergency.

A recent example of large-scale community acquisition of land is illustrative. Over two separate transactions, the Langholm Initiative – a community development trust representative of the communities of Eskdale – purchased approximately 10,500 acres of grouse moor and woodland from the Buccleuch Estate, formerly the largest private landowner in Scotland. Eskdale is a former textile town which has experienced continued economic decline and out-migration since the 1980s. The community buyout of this land has been made with the intention to reverse these processes; the Langholm Initiative itself was set up in 1994 as a partnership between private and public sectors to respond to these issues.<sup>811</sup> The community trust is now in the process of changing the 10,500 acres of land from an area dedicated largely to grouse moor to the ‘Tarras Valley Nature Reserve’.<sup>812</sup> On the face of it, it is possible to suggest that this is simply the transference of one form of attitude to place – ‘use’ – to another – ‘delight’ – insofar as an area marked for economic purposes (shooting) is now being used for conservation purposes (rewilding). However, this is why the *form* of ownership matters. As argued throughout this chapter, the

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<sup>809</sup> Mackenzie (no 107), 21 – 24.

<sup>810</sup> This echoes Jessica Shoemaker’s theory of ‘placemaking’. See Shoemaker, ‘Re-Placing Property’ (no 49), 828 – 853. Shoemaker utilises the term to describe the ways through which property law shapes spatial relationships, creating ‘places’ – spaces imbued with human meaning. Property law thus does not just govern legal rules which are applied to prevent and solve disputes arising through the enactment of property, but instead shape how places are imagined and constructed.

<sup>811</sup> See The Langholm Initiative, ‘The Langholm Initiative’ <[www.langholminitiative.org.uk/about](http://www.langholminitiative.org.uk/about)> accessed 07/03/2025.

<sup>812</sup> See Tarras Valley Nature Reserve, ‘Welcome to the Tarras Valley Nature Reserve’ <[www.tarrasvalleynaturereserve.org/](http://www.tarrasvalleynaturereserve.org/)> accessed 07/03/2025.

democratisation of land use decision-making means a sharing, rather than concentration, of power. The stated aim of the Tarras Valley Nature Reserve is to foster within the local community a ‘strong sense of ownership and connection with the land,’ to ‘leave behind a legacy that is rich in nature, cultural heritage and economic opportunities.’<sup>813</sup> Place, rather than profit, appears to be the key driver of land use change decisions. This highlights that community ownership is a dynamic, ongoing process, based on spatial relations and responsibilities, emerging through continual collective choices which are open and contested rather than private and fixed.<sup>814</sup> Goals of economic certainty are overridden by place-based goals of community and environmental resilience. The decision to create a nature reserve is one based on community co-creation and shared values of stewardship and environmental concern, rather than displaced decision-making (either by private individuals or, indeed, interest groups).

It is worth noting that the Langholm buyout took place outwith the CRtB regime. This may lend credence to the critique of the CRtB that the regime risks curbing such processes of commoning through attempting to control the parameters of the process and potentially steering it towards economic contingency, rather than spatial contingency. Indeed, the difficulties communities face in navigating the legislation and the resources required to get to the point of submitting an application are barriers to the proliferation of community ownership. However, the point remains that the *outcomes* of a successful CRtB application lead to community ownership which leaves room for new land and political possibilities. The ongoing social processes, practices and relations formed through community ownership are not curtailed by the legislative requirements imposed by the CRtB. Indeed, these requirements may even ensure land use that mitigates the climate emergency in a socially equitable way, as discussed in more detail below, through the incorporation of sustainable development. Finally, for communities like those in Langholm, having the CRtB as a ‘backstop’ is a strong potential tool for negotiating with landowners, for example if the community struggles to engage with the landowner, the ‘threat’ of a state-

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<sup>813</sup> Tarras Valley Nature Reserve, ‘Our Work’ <[www.tarrasvalleynaturereserve.org/our-work/](http://www.tarrasvalleynaturereserve.org/our-work/)> accessed 07/03/2025.

<sup>814</sup> The Langholm Initiative runs an ‘open door’ policy, and has in place an ongoing programme of community engagement, with over 50 local events over the past few years. See Tarras Valley Nature Reserve, ‘Our Five Year Plan’ <[www.tarrasvalleynaturereserve.org/our-5-year-plan/](http://www.tarrasvalleynaturereserve.org/our-5-year-plan/)> accessed 07/03/2025. See also C Hafferty *et al*, ‘Unpacking the Politics of Nature-based Solutions Governance: Making Space for Transformative Change’ (2025) 163 *Environmental Science and Policy* 103979-1 - , 103979-4: ‘[i]nstead of procedural and fixed, participation should be understood as a dynamic process emerging through collective action and continuous co-construction.’

backed community buyout may provide further resilience for the community in such negotiations.<sup>815</sup>

What of the linkages between the CRtB and wider state-led environmental targets, specifically the legally binding target of achieving net zero emissions by 2045? Certainly, and as has been argued throughout this chapter, community ownership can be congruous with environmental action. However, there is a risk of disconnect between the messy, complex, lived reality of communities, wherein communities with agency over land – including holding the right of ownership – may look to ‘culture’ sustainability transformations through slow and deliberate processes of land use change,<sup>816</sup> and the metrics-led, top-down nature of state targets for climate change like net zero which ultimately seeks to control transformations.<sup>817</sup> The CRtB may inadvertently ‘fail’ in certain emissions accounting exercises; communities may find it difficult to reconcile specific emissions-reducing action and land use change for local priorities, whereas other land uses, for example VCMs, may ‘succeed’, for example in providing measurable emissions reduction data. Conversely, there is also a danger present in the Scottish Government being overly prescriptive with the CRtB by including specific emissions reduction targets in line with net zero in future legislative reforms. In this regard, the CRtB risk attempting to ‘control’ rather than ‘culture’ transformative land use change vis-à-vis community ownership, creating ‘top-down’ communities, which are ‘deployed in an abstract manner and...used to contain citizens and corral subjectivities.’<sup>818</sup> In other words, using ‘community’ as a means to delegate environmental responsibilities away from the state.<sup>819</sup>

However, such concerns risk deploying classic liberal methodologies for property – deploying a ‘hands off’ approach to community ownership in the name of property freedom. The CRtB do not preclude the possibilities for progressive environmental action through community ownership, particularly when viewed through a performative lens. Terms like sustainable development, which are already ingrained in the CRtB framework, are indeed top down, but represent wider goals which leave enough space for communities to iteratively work through in the process of commoning the land. The state may set the

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<sup>815</sup> Mackenzie (no 107), 53: ‘the...[CRtB] legislation provided a legitimating discourse for community purchase [outwith the CRtB legislation].’

<sup>816</sup> C Hafferty *et al* (no 814), 103982 - 3.

<sup>817</sup> *ibid.*

<sup>818</sup> G Taylor Aiken, ‘One-Way Street? Spatiality of Communities in Low Carbon Transitions in Scotland’ (2018) 36 *Energy Research and Social Science* 129, 131.

<sup>819</sup> *ibid.*

wider goals, but the specifics of the land use changes are left for the local community to deploy according to their own priorities. For example, Fiona Mackenzie traces the ways in which community owners in the Outer Hebrides utilise local autonomy to manage the natural attributes of the island to generate sustainable energy sources, in one case study through the generation of wind power.<sup>820</sup> What is more, these communities were not specifically working towards any top-down, state-led goals like net zero, but instead were challenging the privatisation of energy and neoliberal market-based logic. In other words, by challenging the ownership model, land use consequently shifted to practices which were more grounded in ecological and environmental limits, based on a collective responsibility and care for the places where these communities exist. Top-down sustainability commitments were, largely, absent or not required for these consequences to arise, and thus strongly suggests that community ownership sits comfortably within wider sustainability goals, including climate change mitigation. This is a powerful cascade effect which highlights the importance of recognising the performative nature of property: of communities firstly obtaining ownership of land; then forming a ‘post-ownership identity’ set within ‘locally prescribed narratives of sustainability’<sup>821</sup> which is constantly shaped and re-shaped through open and communal conflict and contestation; which identity allows for both changes to social space – in a ‘collective increase in confidence and ambition among local communities’ – which concomitantly impacts physical spaces through a ‘reconstructing community-environment relationships.’<sup>822</sup>

This engages property with a politics of uncertainty. Embedded notions of property such as community ownership can allow for the complexity of property relations to be reflected in property paradigms, wherein property, as an institution, is enabled to ‘remain in the mess,’<sup>823</sup> through a commitment to relational processes based on the material realities of the spaces where it is exercised. Performativity highlights the ways through which the privateness of property is ‘normalised’ through everyday interactions and language – ‘this is my land’, for example – which ‘images, stories and legends add up to an absolutist account of property.’<sup>824</sup> The CRTB enable a repositioning of this discourse, highlighting the importance (and existence) of the ‘we’ and ‘our’ in the property paradigm; opening new possibilities for land use more suited to combating climate change.

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<sup>820</sup> Mackenzie (no 107), 127 – 172.

<sup>821</sup> McMorran and Scott, ‘Community Landownership’ (no 737), 165.

<sup>822</sup> *ibid.*, 166.

<sup>823</sup> Fox O’Mahoney and Roark, *Squatting and the State* (no 95), 214 – 215, citing J Law, *After Method: Mess in Social Science Research* (2004).

<sup>824</sup> Babie, ‘Property and Climate Change’ (no 102), 499.

## 6.5 Conclusion

The CRtB represent the most direct and potent challenge to the ownership model within Scotland's property paradigm. By legally mandating a connection to place and facilitating the transfer of land from absent private owners to embedded communities, the CRtB framework actively counters the tropes of abstraction, extractivism, and individualism. It re-embeds ownership within social and ecological contexts, prioritising community resilience and sustainable development over profit maximisation, enabling land use practices based on local knowledge and care. This redistributive approach holds significant promise for enabling the kinds of deep, place-based land use changes necessary to mitigate the climate emergency, moving beyond the limitations of market-based or purely regulatory measures.

However, the transformative potential of the CRtB is currently hampered by its complex, procedurally onerous, and cautious legislative framework, which risks appeasing vested interests and limiting accessibility for less-resourced communities. In the context of a deepening climate emergency, whilst not a panacea, the CRtB should be viewed as a performative opening; a policy choice that creates space for alternative visions of property, based on collective values of care and responsibility for land which arise through processes of contestation and negotiation. When successful, it allows communities to develop a 'post-ownership identity'<sup>825</sup> rooted in locally-produced narratives of sustainability which provide space for effective climate change mitigation through land use change. However, for the potential of the CRtB in this regard to be fully realised, as a catalyst for systemic change in the property paradigm, the framework must be streamlined and strengthened, empowering communities to not just own land, but to actively reshape the very meaning of property towards a more collective and ecologically responsible future.

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<sup>825</sup> McMorran and Scott, 'Community Landownership' (no 737), 165.

# Chapter 7: Policy Conclusions in the Context of Scotland and the Climate Emergency – Building a Framework for Land Use Policy Design

## 7.1 Introduction

Global temperatures are continuing to increase. Climate records are routinely being broken, with 2024 heralding the warmest year on record at 1.6°C above the pre-industrial average.<sup>826</sup> Although the consequences of anthropogenically induced climate change have become increasingly clear,<sup>827</sup> with multiple other Earth systems having already crossed safe thresholds for a sustainable future,<sup>828</sup> property – as perceived vis-à-vis the ownership model – remains largely unchanged and seemingly immutable. Yet, as this thesis has argued, the ownership model is a cause of land use which contributes to climate change, as well as an inhibitor of preventative action through regulation. Three policy measures have been presented which, in the Scottish context, have the potential to change land use to mitigate climate change. Each of these measures represent a certain point on a regulatory spectrum, from least intervention with property rights to most. Arising from this discussion is the conclusion that policy measures are linked with property law on a deeper level than most policymakers might initially realise. Property, through the right of ownership, largely dictates how land is used. In Scotland, this claim is taken to its extremities due to the hyper-concentration of private rural land ownership. Notwithstanding the typical representation of the property paradigm as resistant to change, this thesis has argued that policy measures have considerable influence on property.<sup>829</sup> This is important because the property paradigm must be subjected to widescale change if land use is to meaningfully contribute to mitigating the climate emergency. It has been argued that such change must represent a move away from the prevailing Western ownership model of property. Therefore, successful land use policy must actively decentre these tropes and facilitate a

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<sup>826</sup> Climate Change Committee, ‘Scotland’s Carbon Budgets: Advice for the Scottish Government’ (2025) at 20 – 21. See also Copernicus Climate Change Service, ‘The 2024 annual climate summary: global climate highlights 2024’ (2025) <<https://climate.copernicus.eu/global-climate-highlights-2024>> accessed 10/06/2025.

<sup>827</sup> IPCC, ‘Climate Change 2023’ (no 1), 5: ‘[e]vidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has further strengthened since [the previous IPCC report]...Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric and coastal and open ocean ecosystems.’

<sup>828</sup> W Steffen *et al*, ‘Planetary boundaries: Guiding human development on a changing planet’ (2015) 347(6223) *Science* 1259855-1 – 1259855-10.

<sup>829</sup> See sections 1.3.4, 2.3, 3.3, 4.4, 5.4 and 6.4, as well as further discussion in chapter 8.

shift towards a property paradigm that is instead relational, embedded and obligational rather than abstract, extractive and individual. This basic point provides an initial framework for policymakers engaged in the design of land use change policy for climate change mitigation.

This thesis has argued that change in the property paradigm arises through iterative performances in spatial settings, yet such performances can also lead to sedimentation. Policy measures thus have a facilitative role in these performances, as has been addressed throughout this thesis. This point will be concluded in chapter 8. For present purposes in this chapter, it suffices to assert that it is imperative that land use change policies not only recognise the importance of property – that it dictates land use, especially so in a country with such concentrated patterns of private land ownership – especially in the context of climate change, but also acknowledge the importance of policy interventions in shaping the property paradigm through facilitating new performances that challenge the ownership model. In this regard, well-designed policy measures for land use change in the context of the climate emergency are essential in shaping the property paradigm for long-term change which cements relationality, embeddedness and obligations at the heart of property. This thesis has argued that such change will better-enable long-term land use changes that mitigate, rather than contribute to, the mitigation of climate change.

Therefore, this brief chapter highlights a possible analytical framework for policymakers at the initial stages of policy design for such land use change. Such a framework is based on the evaluation of a policy measure to enact land use which *challenges* rather than *entrenches* the tropes of the ownership model. This discussion outlines that such a framework must evaluate policies based on their capacity to ground property in its material settings, leading to the de-commodification of land as a distinct asset and the separation of the economic benefits from the physical consequences of land use, whilst legally embedding positive duties of care and obligation within ownership which benefit wider human and non-human communities as well as the individual. Crucially, in a Scottish context, the ownership model analysis taken outlines that such outcomes are likely to be achieved through a diversification of ownership and land use decision making, redistributing power over land to include local communities and align land use decisions with both local and planetary wellbeing. The approach to land use change policy taken in this thesis has focused on the relationship between such policy and the achievement of climate change mitigation. However, it can be utilised across the spectrum of sustainability

encapsulating, for example, specific socio-cultural issues and other environmental issues such as biodiversity loss.

## 7.2 Challenging the ownership model through a land use policy analysis framework

The ownership model, as this thesis contends, is an insufficient vision of property in the context of the Anthropocene. That is to say, it is ill-equipped for dealing with the significant ruptures to Earth systems (including climate change) to which land use change contributes. It is a property imaginary which has taken root not only in Scotland but in Western legal systems generally. It broadly describes a way of treating property which prioritises the owner above all else: they may use the property as they wish; exclude others from it; and are immune from being divested of the property without adequate compensation.<sup>830</sup> This is not to say that these aspects are inherently unjust, or unsustainable in a climate change context, but where the ownership model is presented as the *only* model of property, and an immutable one, such hegemony is a cause of the physical consequences, including climate change, discussed in this thesis. The ownership model thus remains the reason why private property struggles to contend with climate targets such as net zero; it presents property as benign and pre-political, yet this obscures the reality of property as an institution of power, determining relations among human, non-human, living and non-living.<sup>831</sup> Property is, therefore, not an institution which simply regulates the relationship between a person and the thing owned. It is part of a relational, spatial network, forming and allocating power.<sup>832</sup> In this regard, the parameters of the ownership model have important implications in the climate emergency precisely because of its role in regulating the relationships between people and place.

This thesis has set out three ‘tropes’ within the ownership model. Firstly, it is abstract: the ownership model relies on the removal of material spatial limits from the property right itself. Secondly, because the right of ownership is valued in abstract, rather than material, terms, property is rendered an extractive institution. Land is commodified; treated in instrumental terms as a ‘resource’ from which wealth can be extracted far away from the material consequences of that extraction. Thirdly, property has become synonymous with ‘liberty’, insofar as property structures who has, and does not have, access to land to fulfil

<sup>830</sup> J W Singer, *Entitlement: The Paradoxes of Property* (2000) at 2-3.

<sup>831</sup> R Bartel and J Carter, ‘Where to from Here? From Law to Place and Back Again’ in R Barel and J Carter (Eds) *Handbook on Place, Place and Law* (2021), 382.

<sup>832</sup> Blomley, *Territory* (no 43), xiii.

the pursuit of freedom. This results in both the ‘concentration of decision-making power about a certain thing in the hands of the owner,’ and secondly as ‘the exclusion of any unwanted intrusion on the thing by a third party.’<sup>833</sup>

This thesis focuses on rural Scotland, where private ownership is extremely concentrated. The material consequences of the ownership model are, therefore, concentrated. In this way, private property in Scotland is made visible as part of the public problem of climate change as the land use that takes place is not only dictated by a small number of people, but is intimately bound-up with the tropes of the ownership model. Yet it is also fundamentally part of the solution: land use can accelerate or mitigate CO<sub>2</sub> emissions and it is property that dictates land use change, particularly in a jurisdiction like Scotland where private land ownership is widespread yet highly concentrated. As such, the property paradigm must be brought into question and challenged.

Therefore, a framework for policymakers arises in three parts. Firstly, an analysis of the ownership model is necessary; the recognition of the existence of the ownership model in the Scottish property paradigm, followed by an understanding of how this impacts land use choices and the material consequences of these choices in a climate change context. Land uses made possible through the ownership model are those conforming to the abstract, extractive and individual tropes of the ownership model, meaning that such land use not only contributes to climate change but crowds out other policy possibilities.

Second is an evaluation of new policies, encouraging policymakers to ask of a potential land use policy whether that policy is likely to entrench the tropes of the ownership model: to what degree is the policy (a) contributing to land use which is dephysicalised; (b) enabling further commodification of land or natural attributes and the extraction of economic value far away from the physical consequences of that extraction; and (c) further the view of land as a resource for private welfare maximisation, enclosing and bracketing-off of land use decisions from public examination. Policymakers may not land on precise answers for the analysis of each trope, yet such an initial questioning exercise opens legitimate critical space for responding to a complex, multi-layered problem such as climate change, rather than seeking easy solutions. It widens the debate around instrument choice, bringing into focus considerations previously obscured and providing different

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<sup>833</sup> U Mattei, A Quarta (no. 151), 14.

avenues for government problem solving in the context of land use in the climate emergency.

The final aspect of this framework is the promotion of positive alternatives in the context of the climate emergency. This opens space for what type of land use to *avoid* but what to *promote*. The first question in this regard would read along the lines: does the policy enable land use which is more grounded, placed in the material limits of the Earth? The initial policy design would thus consider the material consequences of the land use change. That leads to further possible avenues: whether the policy requires decision-making to be based on local, situated knowledge; whether it prioritises the health of certain Earth systems like climate over abstract, fungible metrics (such as carbon credits); whether it creates a tangible connection between the land use decision-maker and the land affected by their decision. Secondly, does the policy enable land use which is obligational rather than extractive? In this regard, wider values of responsibility and stewardship are preferred over value extraction, analysing possibilities including: framing land use in terms of environmental *duties* rather than simply rights; ensuring that the benefits generated from the land (economic, ecological and social) are reinvested locally rather than extracted to distant shareholders; and preventing – or at the very least limiting – commodification of further natural attributes like carbon. Finally, policymakers would engage in an assessment of whether the land use would be more relational, recognising the networked relationality of human and non-human with an interest in not only the land but the survival of the Earth's systems themselves through mitigating climate change. Initial questions may span from those relating to the democratisation of land use decision-making power; collective ownership or use models; promoting transparency of decision-making and giving a formal voice to non-owners. Such questions may promote land use which fosters genuine destabilisation of the ownership model. This approach offers flexibility in approaches whilst enabling a placed vision of land use. Indeed, similar approaches are already taking place at a policy level in different jurisdictions. For example, the 'doughnut model' of economics envisaged by economist Kate Raworth<sup>834</sup> – wherein economic decisions are made on the basis of planetary boundaries whilst also meeting social goals – is beginning to embed in municipal planning in places like the Dutch city of Amsterdam,<sup>835</sup> and the

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<sup>834</sup> See K Raworth, *Doughnut Economics: Seven Ways to Think Like a 21<sup>st</sup> – Century Economist* (2017).

<sup>835</sup> See Doughnut Economics Action Lab, 'Amsterdam City Doughnut' (2020) <<https://doughnuteconomics.org/stories/amsterdam-city-doughnut>> accessed 01/06/2025.

Swedish town of Tomelilla.<sup>836</sup> Though not a framework specifically aimed at land use change and property, like the ownership model framework discussed here,<sup>837</sup> doughnut economics is an example of the potential for new frameworks to influence policy and, in turn, influence wider changes in the context of the climate emergency.

### 7.3 Applying the framework

This thesis has engaged with this framework in the context of three existing policies: VCMs, LMPs and the CRTB. It has highlighted that these three policies sit on a spectrum of state intervention. Indeed, the analysis shows that the deeper the level of state engagement with land use change, the more likely the policy is to challenge the ownership model. Yet this is tempered somewhat by the discussion above: even if the level of state intervention is high, where that intervention serves to entrench the ownership model then it is unlikely to lead to land use that mitigates the climate emergency.

#### 7.3.1 Voluntary carbon markets

Although VCMs appear initially to be a positive means of changing land use to contribute to climate change mitigation, the ownership model framework analysis highlights the opposite outcomes are likely. Firstly, VCMs are inherently abstract. Their operation is predicated on the notional sequestration and storage of carbon; the resulting ‘value’ lies in the packaging of this carbon management into discrete credits which can be traded to offset continuing emissions by corporate actors. Secondly, commodification is what follows from the abstract and individual nature of VCMs. The dephysicalisation of property rights from place not only allows for the separation of place into distinguishable parts, but these parts are then treated as assets indistinguishable from their material conditions. The term ‘natural capital’ itself is indicative of the ‘capital-climate contradiction’ at play in VCMs.<sup>838</sup> Crucially, commodification of natural attributes is not only paradoxical, but it is unsustainable: wealth maximisation cannot reflect the limits of Earth systems. Nature is conscripted to serve the goals of capitalism through the continuous enclosure and

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<sup>836</sup> See A Sykes, ‘How Doughnut Economics is Reshaping a Swedish Town’ (2021) *The Guardian*, <<https://www.theguardian.com/environment/2025/jul/17/doughnut-economics-tomelilla-sweden-decision-making-town-planning>> accessed 18/09/2025.

<sup>837</sup> Doughnut economics is, by its name, a model focused on economy, rather than specifically property, and takes from similar movements such as the ‘degrowth’ movement of economics. See, generally, M Schmelzer, A Vetter and A Vanistjan, *The Future is Degrowth: A Guide to a World Beyond Capitalism* (2022).

<sup>838</sup> D Stuart, R Gunderson, B Petersen, ‘Climate Change and the Polanyian Counter-Movement: Carbon Markets or Degrowth?’ (2019) 24(1) *New Political Economy* 89, 93.

privatisation of its various attributes: land; forests; wind; water; and now carbon. Profits are generated from the non-human world and distributed among a dispersed group of owners disconnected from the land itself. Lastly, VCMs rely on the trope of individualism within the ownership model. Market-based approaches to climate change are predicated on the notion that ‘public interest’ is no more than the aggregate of individual interests.<sup>839</sup> However, markets cannot accurately reflect biophysical realities – these material aspects of Earth systems are ‘incapable of being accurately priced.’<sup>840</sup> Individual welfare maximisation may be an appropriate goal in certain contexts, but it is not appropriate for emissions reduction action; the two aspects are at odds with one another – economic growth is predicated on the use of natural attributes. Collective problems such as climate change cannot be solved purely through the lens of individual rights. Therefore, using the ownership model framework in this way highlights the risks of employing policy strategies aimed at facilitating VCMs. Such an analysis suggests that outright prohibition of carbon markets would be the most sensible policy decision. This may be unlikely given the strength of vested economic interests, yet at the very least this analysis may prevent *further* facilitation of carbon markets; for example, such a framework has the potential for cross-pollination, reaching those policymakers engaged in the Digital Assets (Scotland) Bill. The resulting analysis would thus recognise the risks of designating carbon credits as digital assets, making them subject to proprietary rights and the strong protections that these bring.<sup>841</sup>

### 7.3.2 Land management plans

Following chapter 4, chapter 5 discusses compulsory LMPs as an example of a policy intervention with stronger regulatory aspects when compared with VCMs whilst stopping short of compulsory transfers of ownership. It may, in this regard, represent a policy measure which conforms to the third part of the framework: promoting positive alternatives. Chapter 5 concludes that LMPs, as they are currently envisaged by the Land Reform (Scotland) Bill, present a modest challenge to the ownership model. LMPs can challenge the dephysicalised aspects of land use decision making, both in a social and environmental setting: large landowners must engage with the local community on their plans for the land, and those plans must also detail how the landowner is contributing to the achievement of net zero, thus placing the exercise of ownership in the context of

<sup>839</sup> M C Blumm, ‘Fallacies of Free Market Environmentalism’ (no 478), 389.

<sup>840</sup> *ibid.*, 372; Graham, ‘The Mythology of Environmental Markets’ (no 232), 161.

<sup>841</sup> As discussed in section 4.3.2.2.

material, spatial conditions. The capacity of LMPs to make public what have traditionally been fiercely guarded, private land use decisions through the requirement not only to consult the local community on land use decisions but also to make the LMP publicly available also presents a fundamental challenge to the trope of individualism within the ownership model. In Scots law, the unititular nature of the right of ownership gives the owner of the thing a great amount of legal, as well as rhetorical, power. The owner, with their strongly protected right of ownership, is set against non-owners, furnished with the right to exclude those non-owners both physically and with regard to the decisions being made about that land. LMPs pose a challenge to these property assumptions by making the land use decisions about large-scale rural land subject to both local priorities, as well as wider public interest concerns including climate change. In a rural Scottish context, traditional landowners have tended to view themselves as stewards of the land, providing both environmental and social benefits through what they see as a personal connection to the land, which has been passed down through generations. However, the achievement of ambitious climate change targets like net zero requires large-scale land use change, and such change may not be congruous with a private landowner's business plans. This 'privatised obligation' is unlikely to be sufficient to meet a very public problem like the climate emergency.<sup>842</sup> In other words, LMPs can provide a means through which public obligations can filter through to large-scale private landownership. However, the shift towards transparency of land use decision making presented by LMPs suggests that land use practices over large areas are subjected to further scrutiny beyond the possible public law restrictions already in place, and indeed may be changed or rejected entirely. Such decisions are filtered through the process of the LMP: the land use decision would form part of a five-year LMP which will have been made in consultation with the community, and that LMP must show how the landowner is contributing to the achievement of net zero, adapting to climate change and improving biodiversity.

LMPs thus envisaged can provide benefits for the achievement of land use change for climate change mitigation, principally because through these challenges to the ownership model the exercise of the right of ownership becomes subject to broader values; obligations towards the environment are imposed *ab initio* on large scale ownership insofar as those decisions must be made in consultation with the local community and with broader public values – such as net zero – being visibly taken into account. However, this

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<sup>842</sup> Singer, *Entitlement* (no 105).

is a favourable reading of current policy. Although benefits for climate change mitigation may stem from the introduction of compulsory LMPs, such a regulatory move arguably does not do enough to challenge the tropes of the ownership model. Most obligatory aspects of the Land Reform Bill are watered-down in favour of protecting existing property rights. For example, if the land use decision is of a type that is environmentally damaging, it may also be unlikely that action can be taken in the first place: an alleged breach of obligations under the statutory framework may be submitted, and it may even be taken forward by the newly-created Land and Communities Commissioner, yet if the land use constitutes a legitimate business aim and the landowner can show that other alternatives have been considered but are unviable, then it seems unlikely that enforcement action can be taken in the first place. Further, the current drafting of the Bill misses the opportunity to incorporate the LRRS into LMPs in a way that gives it legal effect. Current drafting states that Scottish Ministers must only have regard to the LRRS in the drafting of the relevant enabling regulations, yet the initial advice of the SLC was that the LRRS should be made to be more akin to a statutory code of conduct for large landowners, with legal measures for enforcement. This stronger regulation would more meaningfully challenge the tropes of the ownership model and regulate ownership in a way that takes stock of the physical limits of the land.

### 7.3.3 Community rights to buy

Chapter 6 concluded that not only do the CRtB avoid reinforcing the tropes of the ownership model, but play a strong role in challenging them and promoting land uses that are grounded, obligational and relational. In a policy perspective, viewing the three policies analysed in this thesis as existing on a spectrum – from least state intervention to most – community rights to buy represent the strongest example of regulatory action of the three. That is, rather than a market-based approach or a regulatory approach to ownership, community rights to buy change who holds the right of ownership itself. Not only that, but the CRtB legislation defines the parameters of the right of ownership once transferred to the community body. Consequently, chapter 6 argued that the CRtB represent the greatest challenge to the ownership model of the three policy measures analysed in this thesis. In this regard, it holds strong potential for unlocking land use which contributes to the achievement of net zero. Yet, it cannot be seen as a panacea, especially in its current form.

The CRtB directly challenge the three core tropes of the traditional ownership model. The right of ownership is exercised by the community *in situ*, meaning that the right is more

likely to be valued according to locally-produced needs, contingent on the material limits (as well as possibilities) of the land. This directly challenges further dephysicalisation of property. This is reflected in the legislation itself: for example, community bodies must display sufficient ‘connection’ to the land which is the subject of the application. This means that connection to a physical place is an *ab initio* condition of the right of ownership itself; ‘connection’ to the land is a legislative requirement for community bodies, though this term is a double-edged sword, as explained in section 6.3.1.<sup>843</sup> These processes of contestation contribute to wider challenges to the commodification of land through the ownership model. Community ownership is premised on the simple assertion that the people living in a place are more likely to base their practices on the local limits of that place because they are engaging with those limits on a daily basis. The CRtB legislation thus embeds a placed model of ownership in the governance model it produces, for example in its requirement for the surplus profits from land use to be reinvested into the community, as well as having requirements for furthering the achievement of sustainable development baked into the fabric of the legislation. Therefore, a mix of social justice and environmental considerations within the CRtB makes them well placed to deliver a just transition to net zero – a major policy goal of the Scottish Government.<sup>844</sup> Finally, as a form of collective ownership, the CRtB directly challenge the individualism of the ownership model. The CRtB affect existing rights in a profound way, redistributing the right of ownership itself, with routes to do so without the consent of the owner. The CRtB are also inclusive, challenging the exclusionary nature of the ownership model; community ownership prioritises multilateral and ongoing processes of compromise and cooperation, rather than unilateral and exclusionary decision-making power. This counters the kinds of displaced decision making which often occur in a Scottish rural context, wherein such decisions are made regarding vast landscapes by those without attachments to specific places and without knowledge about the land. In the above ways, the CRtB present a strong challenge to the ownership model and, in so doing, represent an opportunity for land use change which contributes to wider climate change policy outcomes. Although, the

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<sup>843</sup> For example, whilst ‘connection’ suggests a recognition of the importance of people-place connection in ownership, it has been narrowly defined in a legal setting, with issues of interpretation around what constitutes ‘substantial connection’, which is open to interpretation due to a lack of Scottish Government guidance. There appears to be an opportunity here for further clarification of the term, even within non-binding guidance.

<sup>844</sup> See, for example, Scottish Government, ‘Programme for Government 2025 – 2026’ <[www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2025/05/programme-government-2025-26/documents/programme-government-2025-26/programme-government-2025-26/govscot%3Adocument/programme-government-2025-26.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2025/05/programme-government-2025-26/documents/programme-government-2025-26/programme-government-2025-26/govscot%3Adocument/programme-government-2025-26.pdf)> where it is outlined that a ‘just transition to net zero’ is a key driver of policy.

CRtB are not explicitly linked with climate change, for example not having specific emissions-reduction targets woven through the legislation, the CRtB are premised on people-place connection and local, democratised decision through a statutory lens of sustainable development which is congruous with land use that mitigates the climate emergency.

However, community ownership cannot be viewed as the only viable alternative to the ownership model. Chapter 6 highlights certain issues inherent in the current CRtB framework. For example, communities who have land transferred to them through the statutory process may not necessarily make decisions that reduce land-based emissions. Whilst certain obligations are woven into the right of ownership through the legislative framework, these do not necessarily preclude land uses that might degrade land in certain ways that lead to emissions. For example, a community may take over a commercial forestry plantation and maintain that land use whilst still remaining within the parameters of their obligations under the Land Reform Acts. Indeed, they may look to use forestry as an entry into the production of carbon credits for sale to companies for offsetting purposes; the flexibility of a term like ‘sustainable development’, woven into the fabric of the CRtB, is a double-edged sword in situations like these where communities may prioritise economic development over environmental concerns. As chapter 6 explains, however, in the context of net zero a placed vision of ownership matters: community owners have been shown to be engaged in climate action not as an end in itself but because it results in wider social, economic and environmental benefits for the community.<sup>845</sup> In other words, community owners are more likely to base land use decisions on the material conditions of the land. The Scottish Government has also recognised the importance of locally-produced, community-based action for climate change mitigation.<sup>846</sup> Indeed, the Climate Change Plan adopts a so-called ‘place-based approach’ at the heart of its climate policy,<sup>847</sup> integrating

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<sup>845</sup> See section 6.3.2.

<sup>846</sup> B Macauley and C Dalglish, ‘Community Landowners and the Climate Emergency’ (no 848), 22.

<sup>847</sup> Scottish Government, ‘Update to the Climate Change Plan 2018 – 2032: Securing a Green Recovery on a Path to Net Zero’ (2020), 51 <[www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/12/securing-green-recovery-path-net-zero-update-climate-change-plan-20182032/documents/update-climate-change-plan-2018-2032-securing-green-recovery-path-net-zero/update-climate-change-plan-2018-2032-securing-green-recovery-path-net-zero/govscot%3Adocument/update-climate-change-plan-2018-2032-securing-green-recovery-path-net-zero.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/12/securing-green-recovery-path-net-zero-update-climate-change-plan-20182032/documents/update-climate-change-plan-2018-2032-securing-green-recovery-path-net-zero/update-climate-change-plan-2018-2032-securing-green-recovery-path-net-zero/govscot%3Adocument/update-climate-change-plan-2018-2032-securing-green-recovery-path-net-zero.pdf)> where it is stated that “[p]lace is where people location and resources combine to create a sense of identity and purpose. It is at the heart of addressing the needs of communities and realising their potential. In order to prioritise place and local communities, and to encourage better collaboration and community involvement in decision-making, the Scottish Government...[has] ‘Place Principle’. This principle underlines a commitment to work with local communities in order to improve the lives of people, support inclusive and sustainable economic growth, and create more successful places.’ However, the Climate Change Plan fails to link community ownership with

communities in climate action in a way which makes them ‘active partners in delivering change, rather than just consultees or the subjects of climate education programmes.’<sup>848</sup> Discussion in section 6.3.2, though there are potential interpretative issues related to the sustainable development aspects of the CRtB legislation, the fact that the right of ownership is contingent upon sustainable development – which can encompass holistic environmental and social values – highlights the potential to contribute to net zero. The lack of specific obligations relating to climate targets and the lowering of land-based emissions does not preclude the addition of such obligations in the future; additional mechanisms can be introduced to the CRtB framework that set certain emissions reduction targets, and communities can agree within themselves the best means of achieving such targets.<sup>849</sup> Such an approach would mix top down attempts to control land use for climate change mitigation through the provision of specific ends (net zero) with organic, socially just means of achieving these ends (community ownership).

The current ongoing review of the CRtB is an opportunity for the merits and demerits of the current framework to be reckoned with on a deep level, and for more specific linkages with climate change and community ownership to be made. Yet, in others, they fall well short of the kind of radical changes needed in policymaking. The number of transfers that have taken place through the CRtB remains low, and both the timescales and (often voluntary) labour required to get these transfers over the line can be breathtaking.<sup>850</sup> Thus, communities making use of the CRtB tend to be those most economically capable; those in lower socioeconomic areas risk being left behind. As Lovett and Robbie state,

‘[d]espite having some of the most progressive and widely admired land reform laws in the world, supporters of the land reform agenda in Scotland are still left wondering why more has not been achieved.’<sup>851</sup>

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the place-based approach touted in the policy. In a wider sense, this is indicative of a failure to link land use change with ownership and difficult, but necessary, task of challenging long-held assumptions about the exercise of private ownership.

<sup>848</sup> B Macauley and C Dalgligh, ‘Community Landowners and the Climate Emergency’ (no 848), 22.

<sup>849</sup> For example, following the introduction of the Land Reform (Scotland) Bill as an Act, mandatory LMPs will also apply to community bodies owning over 1,000 hectares of land. Under s44B(3)(d)(i) of the Land Reform (Scotland) Bill (as currently drafted) such community bodies will need to show how they are contributing to the achievement of net zero.

<sup>850</sup> See J A Lovett and J Robbie, ‘Bloom on my Peaceful Grave’: *Forthtay Limited Employee Trust v Scottish Ministers* (2025) 230 *Scottish Planning and Environmental Law* 83-85.

<sup>851</sup> *ibid.*, 85.

The CRtB review appears the perfect forum for meeting this challenge, yet the suggestions from policymakers so far have been lukewarm. Increasing community capacity and skills building, in the form of further state funding, is at risk of being a missed opportunity.<sup>852</sup> As detailed in chapter 3, large sums of public funds are already used to facilitate private development in the context of VCMs, yet only a fraction of this is used to support communities through the Scottish Land Fund. As Community Land Scotland – the membership group for community landowners – state, the CRtB will be more effective if there is a ‘clear policy intention...that [the Scottish Government is] pursuing further community ownership and diversified landownership more generally.’<sup>853</sup> It seems unlikely that this will be achieved through an independent government review of the CRtB.

#### 7.4 Conclusion

To conclude, this thesis offers groundwork for a policy analysis framework for land use change in Scotland in the context of the climate emergency. Such a framework works in three parts: it identifies how the ownership model enables land use that contributes to climate change whilst crowding out sustainable alternatives; it evaluates new land use change policies to determine if they entrench the tropes of the ownership model; and promotes policies that decentre the ownership model through land uses that are grounded, obligational and relational, limited by the material conditions of Earth systems. Applying this framework to the three policy measures assessed in this thesis: the facilitative policy measures relating to VCMs should be rejected as they profoundly reinforce all three tropes of the ownership model; LMPs present a viable alternative land use change with regard to action to tackle climate change by presenting a challenge to the ownership model, yet the modesty of this challenge reveals the power that the ownership model still exerts on the possibilities for policy; finally, the CRtB represent the strongest challenge to the ownership model and provide a possible foundation for further land use change that is grounded, obligational and relational, yet the analysis highlights the pitfalls of the legislation as it currently operates. Finally, and as a corollary point to the analysis, on a practical level such

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<sup>852</sup> *ibid.*

<sup>853</sup> Community Land Scotland, ‘Community Right to Buy Review: Community Land Scotland Response’ (2025), 9 <[www.communitylandscotland.org.uk/wp-content/uploads/2024/10/Community-Right-to-Buy-review-CLS-response.pdf](http://www.communitylandscotland.org.uk/wp-content/uploads/2024/10/Community-Right-to-Buy-review-CLS-response.pdf)> accessed 29/09/2025.

a framework can foster a more cogent, coherent and joined-up policy approach to land use change, particularly in the context of emissions reductions in the climate emergency.<sup>854</sup>

This is not to suggest that the only, or perhaps best, way to challenge the ownership model is through state intervention, but this is not the case. There are many routes to challenging the ownership model that do not involve top-down regulatory action. However, this thesis is concerned with the impact of state action in the form of law and policy, and its interaction with the property paradigm. As has been discussed throughout this thesis,<sup>855</sup> state regulatory interventions for land use change carry with them the potential to profoundly impact the ownership model. In this regard, when viewed through the lens of performativity, such regulation may facilitate property performances ‘on the ground’, in spatial settings, that actively shape and reshape the property paradigm. Well-designed policy is therefore necessary if the property paradigm is to change to reflect the material conditions, and limits, of Earth systems and, consequently, be an active contributor in mitigating the climate emergency.

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<sup>854</sup> For example, see Scottish Government, ‘Scotland’s Third Land Use Strategy’ <[www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/scotlands-third-land-use-strategy-2021-2026-getting-best-land/documents/scotlands-third-land-use-strategy-2021-2026-getting-best-land/scotlands-third-land-use-strategy-2021-2026-getting-best-land/govscot%3Adocument/scotlands-third-land-use-strategy-2021-2026-getting-best-land.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/scotlands-third-land-use-strategy-2021-2026-getting-best-land/documents/scotlands-third-land-use-strategy-2021-2026-getting-best-land/scotlands-third-land-use-strategy-2021-2026-getting-best-land/govscot%3Adocument/scotlands-third-land-use-strategy-2021-2026-getting-best-land.pdf)> accessed 23/09/2025. The land use strategy makes explicit ties between land use and climate change and supports a ‘landscape and ecosystems’ place-based approach which ‘recognises that all aspects of the environment, including humans, are interrelated and should not be viewed in isolation,’ yet simultaneously, the Scottish Government facilitates the expansion of VCM projects, which deny such interrelations. At the same time, the ongoing land reform regime appears to be splintering in various directions, with a new Land Reform (Scotland) Act on the horizon which excludes changes to the CRtB (instead relegating these to an internal government review process), and instead contains new regulatory measures including LMPs.

<sup>855</sup> See sections 1.3.4, 2.3, 3.3, 4.4, 5.4 and 6.4.

# Chapter 8: Property Conclusions in the Context of Scotland and the Climate Emergency – Performing the Future

## 8.1 Introduction

This thesis has adopted a national-level analysis of law in the context of climate change, addressing the possibility for state regulation of land use to contribute to, or inhibit, land use which mitigates the climate emergency. Chapter 7 discusses the policy conclusions of this thesis, outlining a policy analysis framework based on uncovering and challenging the ownership model that can be used in policy design for land use change to mitigate climate change. In the wider Scottish Government policy context of the achievement of net zero by 2045, such an approach can assist policymakers in both avoiding land uses that entrench the ownership model as well as promoting those that decentre the ownership model and promote land use change which contributes to the mitigation of climate change whilst also being socially equitable.

This chapter addresses the wider question of the role of property law in the deepening climate emergency. Beyond the legal target of net zero emissions by 2045 in Scotland, the climate emergency will still persist. Land use will continue to emit carbon dioxide and push Earth systems beyond their material limits if the system of property law enabling land use choices remains entangled with the ownership model. Therefore, there must be engagement with the question of how the property paradigm itself is changed beyond *ad hoc* challenges to the ownership model.

Chapter 7 alluded to policy measures as a vehicle for such potential change to the property paradigm. Therefore, this chapter takes the discussions throughout this thesis on performativity in a property setting,<sup>856</sup> and draws conclusions on the assertion that state policy measures can shape, and indeed play a role in *reshaping*, the property paradigm through facilitating new property performances that challenge the ownership model. Specifically, it draws conclusions from throughout the thesis on the extent to which these possibilities can pave the way for land use which is more in tune with ecological limits and

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<sup>856</sup> See sections 1.3.4, 2.3, 3.3, 4.4, 5.4, 6.4.

the social impacts of land use change, and the impact this may have for mitigating the climate emergency. This chapter confronts the question of change as oppositional to certainty; engaging with the question of what an *uncertain* property paradigm might look like and why this may be desirable in the context of the climate emergency. Performativity theory is used to discuss the ways in which property changes over time along with spatial changes, and how these changes inform one another. The chapter then turns to the reconciliation of performativity theory with regulation, arguing that regulation, whilst often used to ensure certainty, remains necessary for these counter-performances to arise. Finally, the global applicability of this thesis, set as it is within the national jurisdiction of Scotland, is outlined.

## 8.2 Change vs certainty

This thesis contends that property is a cause of anthropogenic climate change. The core components of property law developed in Scotland at a time where natural attributes – water, fossil fuels, flora, and so on – were presumed to be not only abundant but inexhaustible.<sup>857</sup> An understanding of the interconnectedness of Earth systems, including the corollary effects of certain land uses on the planet’s climatic stability, was yet to be formed. Instead, property derives from an anthropocentric understanding of Earth, as something to be conquered and used. It is a paradigm steeped in the dualism nature/culture, manifesting in property law as the separation between person and thing, with the right to the thing being valued independently from the thing itself.<sup>858</sup> Therefore, the things reduced to ‘objects’ of property are only ever valued in an abstract way, removed from their material spatial settings, allowing for a land use model of continuing destructive extraction of natural attributes. Although societal understandings of Earth systems and their continued demise at the behest of anthropogenic climate change have developed, property is yet to experience any significant change. This is, in large part, because it is not viewed as a cause of these problems. Property developed before technological advances provided ‘new methods of capture and operation that greatly increased resource use,’<sup>859</sup> which have accelerated the types of land uses which have been key contributors to climate change.

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<sup>857</sup> See L Butler, ‘Property, Climate Change, and Accountability’ in N Graham, M Davies and L Godden (Eds), *The Routledge Handbook of Property, Law and Society* (2023), 287. Butler writes from a US perspective, though in a Scots law specific context the argument is largely analogous. See chapter 3, in particular sections 3.2 and 3.3.

<sup>858</sup> See section 3.2. and Graham, *Lawscape* (no 6) 23 – 50; for a very brief Scots law perspective see Institutional Writer, Bankton’s *Institute* at I,3,I: ‘...for only rights are the object of laws.’

<sup>859</sup> Butler, ‘Property, Climate Change, and Accountability’ (no 857), 287.

This had led to increasing air and ocean temperatures, rising global sea levels, retreating of glaciers, and increasing unpredictability of weather systems, which are occurring with more regularity and violence than ever before in the relatively stable geological period of the Holocene.<sup>860</sup> These effects have been shown to be a consequence of more than a century of net greenhouse gas emissions from land use and land use change by humans.<sup>861</sup> As Lynda Butler argues,

‘[t]he consequences of this singular focus [on economic progress] can be seen in the problems that result from the absence of a braking system strong enough to constrain operations and avoid extreme poverty, extreme concentration of wealth, and extreme environmental harm. Of these, climate change is the extreme that threatens the entire world.’<sup>862</sup>

This thesis has highlighted the need for property to change in the context of the climate emergency. A question arising from this assertion is *what* that changed property system might look like. This thesis has posed the making of alternatives in oppositional terms to the ownership model: property that is materially located, based on ecological limits and values of obligation instead of abstract indicators of value; that is interconnected with material human and non-human networks instead of a purely individual institution. Through such a repositioning, as oppositional to the ownership model, property can be seen as a phenomenon arising through complex, interconnected and, crucially, *messy* social and biophysical relations. In this regard, Gibson-Graham ask the initial question,

‘[w]hat if we were to depict social existence at loose ends with itself...rather than producing social representations in which everything is part of the same complex and therefore ultimately ‘means the same thing’ (for example capitalist hegemony)?’<sup>863</sup>

Nicholas Blomley expands on this provocation, extending ‘social existence’ to the property paradigm, asking ‘[w]hat if we were to similarly depict property ‘at loose ends’ and refuse its circular and settled self-representation?’<sup>864</sup> He continues: ‘[i]f we accept property – as defined by the ownership model – as a hegemonized claim, rather than an assured reality, certain possibilities emerge.’<sup>865</sup> This thesis has explored the ways through which these

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<sup>860</sup> Intergovernmental Panel on Climate Change, ‘2023 Report’ (no 827), 46.

<sup>861</sup> *ibid.*, 42.

<sup>862</sup> Butler, ‘Property, Climate Change, and Accountability’ (no 857), 288

<sup>863</sup> Gibson-Graham, *The End of Capitalism* (no 72), xxxix.

<sup>864</sup> Blomley, *Unsettling the City* (no 71), 14.

<sup>865</sup> *ibid.* Blomley explores the processes of ‘unsettling’ the ownership model and perceived certainty of property in an urban setting, where constant challenges to the hegemony of the ownership model can be perceived in everyday workings of property relations: squatting; anti-homeless activism; indigenous tenure

possibilities are rendered visible, or invisible, vis-à-vis state policy measures. This discussion has taken place in the context of rural land in Scotland and policy measures implemented by the Scottish Government because it is concerned with the Scottish property paradigm.<sup>866</sup> These policy measures have been analysed for their capacity to either entrench the ownership model, or challenge it. This is because the tropes of the ownership model can be attributed to land use outcomes that not only contribute to the climate emergency, but which inhibit different land uses that can successfully contribute to its mitigation. Therefore, the fundamental locus for discussion here is a tension between change beyond the ownership model and the certainty of remaining with the current property paradigm.

The question arising is what that change may look like. Others have explored how property may be adapted to reflect the interconnectedness of Earth systems and the complexity that arises from that: Margaret Davies, Lee Godden and Nicole Graham argue for a system of property which is situated ‘within habitat’;<sup>867</sup> Lynda Butler advocates for property to be recognised as a ‘complex system’ which promotes ‘fundamental political values and economic activities without undermining the integrity of core biophysical and social systems’;<sup>868</sup> in *Law and Nature*, David Delaney argues that law is not external to nature but is an active agent in shaping the environment, and is also shaped *by* those environments, thus calls for a recognition of property’s political nature and role in shaping both social and physical space;<sup>869</sup> Nicholas Blomley argues for the recognition of *existing* alternative forms of property that decentre the hegemony of the ownership model (particularly in an urban setting);<sup>870</sup> A J Van der Walt similarly rejects this hegemony, arguing that property is not a unified, universal ‘truth’ but instead is formed among other constitutional values and is thus ‘marginal’ in its systemic status, with its meaning being contextually

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claims. He argues, however, that many processes uphold the hegemony of the ownership model: gentrification and zoning laws are two examples explored.

<sup>866</sup> This paradigm is, of course, influenced by global systems of capital which have shaped it to be largely analogous to most other Western property paradigms. Therefore, whilst the thesis is concerned primarily with Scots law, it has relevance in a wider context.

<sup>867</sup> Davies *et al*, ‘Property Within Habitat’ (no 28). The authors argue that ‘habitat’ refers to the ‘socioecological complex of resources and relationships needed by organisms to sustain life and to flourish.’

<sup>868</sup> Butler, ‘Property, Climate Change, and Accountability’ (no 857), 289. ‘[a]bsent such a view, Western style property regimes will fail to take into account the significant role that property plays in contributing to climate change.’

<sup>869</sup> See discussion in section 1.3.3; see also D Delaney, *Law and Nature* (2009). As explained in chapter 1, footnote 37, this thesis has deliberately omitted Earth Jurisprudence and the related ‘Wild Law’ formulations of law.

<sup>870</sup> Blomley, *Unsettling the City* (no 71), though his work extends to rural settings: see Blomley, *Territory* (no 43).

contingent;<sup>871</sup> J W Singer argues that the right of ownership itself is dependent upon obligations and responsibilities for its continued existence, and does not operate in isolation of others;<sup>872</sup> Fox O'Mahoney and Roark argue for a vision of property which is based on the idea of vulnerability, whereby property can no longer justifiably be defined as a static and exclusionary institution, but rather as an adaptive and embedded, and argue for more community-based alternatives to private property.<sup>873</sup>

Many of these critiques of property recognise that property is relational; that it is dependent on spatial processes for its existence. Property not only shapes these spaces but is shaped *by* them, and because property is situated in these human and non-human networks it is inherently *uncertain*: any stability that exists is 'constantly being produced by dynamic systems,'<sup>874</sup> not by property itself. Yet the ownership model promises the opposite; of property as a touchstone of certainty. This promise, however, has come at a massive cost to Earth systems, which are now struggling to cope with the anthropogenic demands placed upon them.

The discussion in this thesis has sought to apply this debate, specifically as it concerns climate change, to a specifically Scottish setting. In the tension between certainty and change in the property paradigm in Scotland, what effect does state regulation have? What are the consequences for land use, where that land use may be changed to mitigate the climate emergency? Climate change will not be 'solved' even if net zero emissions are achieved in Scotland by 2045. Therefore, the wider question that this thesis has sought to ask is to what extent these policy measures can contribute to a changing property paradigm that is nestled within, rather than separate from, Earth systems, enabling land uses that are more attuned to the biophysical limits of land. How can property – and thus land use stemming from the right of ownership – be *less* abstract, extractive and individual? A major part of this question necessarily involves the recognition of the relationality of property; as a system ingrained in both social and physical spatial networks. In the setting of rural land in Scotland, a relational view of property engages with the possible *consequences* of land use change resulting from the property paradigm. This thesis has outlined two dominant land use 'types' which have arisen through an ingraining of the

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<sup>871</sup> Van der Walt, 'Modest Systemic Status of Property Rights' (no 37); Van der Walt, 'Tradition on Trial' (no 35); Van der Walt, *Property in the Margins* (no 31).

<sup>872</sup> Singer, *Entitlement* (no 105).

<sup>873</sup> Fox O'Mahoney and Roark, *Squatting and the State* (no 95)

<sup>874</sup> Davies *et al*, 'Property Within Habitat' (no 28).

ownership model in property; land as ‘use’ and land as ‘delight’. Both types entrench the tropes of the ownership model, maintaining land enclosures and often environmentally destructive land use practices. Fundamentally, these land use types are legitimised by, and embed, the dualism nature/culture. Therefore, an epistemology of land based on recognition of the interconnectedness of property and space suggests a need for an embedded property paradigm, which enables and legitimises land use based on spatial limits which can not only contribute to state-delineated climate targets (like net zero) but ensure the sustainability of embedded land use *beyond* such temporal deadlines. This thesis has drawn from Nicholas Blomley’s discussions on property as an institution performed into being to argue that such performances can iteratively shape the property paradigm, and that state regulation has a role to play in facilitating performances that are more grounded, obligational and relational. The next section will explore this argument in more detail.

### 8.3 Performing changes to property in the climate emergency

#### 8.3.1 Performing changes to property

The above section 8.2 outlines that although the extant system is resistant to change, it is nevertheless necessary in the context of the climate emergency. Such change can take many forms; this thesis has argued that to tackle climate change, property must be less reflective of the tropes of the ownership model, to be more grounded in the material conditions of Earth systems, integrating and encouraging obligation towards those systems, and more relational, taking into account the other human and non-human communities present on land. However, in the tension between change and certainty, the latter tends to win in political systems that deeply intertwined with a capitalist logic.<sup>875</sup> Such logic views land instrumentally, leading to the breakdown of Earth systems. The property system – defined by the ownership model – is bound up as part of this relationship. This leads to the assertion that change is needed if the property system is to adequately respond to the climate emergency, rather than contribute to it. However, as Jessica Shoemaker states, if indeed property has gained the appearance of naturalness through its entanglement with the capitalism system, it can ‘come to seem inevitable and out of our collective control.’<sup>876</sup> Van der Walt argues in similar terms, stating that the certainty guaranteed by the extant

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<sup>875</sup> See J K Gibson-Graham, *The End of Capitalism* (no 71), ix. Gibson Graham here reference F Jameson, *The Seeds of Time* (1994), xii: ‘[i]t seems to be easier for us today to imagine the thoroughgoing deterioration of the earth and of nature than the breakdown of late capitalism; perhaps that is due to some weakness in our imaginations.’

<sup>876</sup> Shoemaker, ‘Papering Over Place’ (no 47), 131.

property paradigm insulates that system from transformative reform.<sup>877</sup> Such insulation continues in the face of the increasingly unjustifiable consequences of the ownership model, particularly in light of worsening climate extremes being seen on the global level, the effects of which are often disproportionately distributed.<sup>878</sup> Therefore, the corollary to the above question of *what* a changed vision of property may look like is the question of *how* to achieve that.

This thesis has argued that performativity theory can highlight the ways in which property changes iteratively. As Nicholas Blomley argues, the ownership model is not so much real as it has proved to be ‘successful’ in a capitalist system.<sup>879</sup> The tropes of the ownership model – that it is abstract, extractive and individual – marry well with a system that is predicated on economic growth at the expense of Earth systems. As such, property helps to maintain the political status quo. Paul Babie argues that the link between property and climate change is made clear in this link, adding that ‘we cannot be but pessimistic about the future of property...[but] if we can change the way that people think about property, we may be able to change the way it is used by them.’<sup>880</sup> Certain performances of property that challenge the status quo – squatting,<sup>881</sup> indigenous land claims and acts of protest,<sup>882</sup> informal land uses,<sup>883</sup> processes of land commoning<sup>884</sup> – all contribute to a normalisation of property as a site of relationality, contestation and inclusion grounded in material realities, rather than an abstract tool of exclusion and wealth extraction.

Viewing property as a system which is vulnerable to change through such performances opens possibilities for the merging of descriptive and normative approaches to property:<sup>885</sup> factually describing the present has performative, normative effects in prescribing future possibilities.<sup>886</sup> As Davies *et al* state, ‘[w]e have choices about how we produce the

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<sup>877</sup> Van der Walt, *Property in the Margins* (no 31), 1 – 26.

<sup>878</sup> Countries in the Global South contribute least to greenhouse gas emissions but have been shown to suffer the most extreme effects of climate change. See, Intergovernmental Panel on Climate Change, ‘Climate Change 2023: Synthesis Report: Summary for Policymakers’ (2023), 4 <[www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](http://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf)>, which states that climate change exacerbates existing inequalities, with marginalized and poor communities less able to adapt and recover.

<sup>879</sup> Blomley, ‘Performing Property’ (no 68), 42 – 44.

<sup>880</sup> Babie, ‘Private Property and Climate Change’ (no 102), 495.

<sup>881</sup> Fox O’Mahoney and Roark, *Squatting and the State* (no 95); Blomley, *Unsettling the City* (no 71) 29 – 74.

<sup>882</sup> Davies, ‘Can Property be Justified?’ (no 58), 1108.

<sup>883</sup> Blomley, *Unsettling the City* (no 71); Van der Walt, *Property in the Margins* (no 31), 133 – 168.

<sup>884</sup> As explored in chapter 6 in the context of community ownership of land.

<sup>885</sup> Davies *et al*, ‘Property Within Habitat’ (no 28), 34.

<sup>886</sup> *ibid.*, citing J Law and J Urry, ‘Enacting the Social’ (2004) 33 *Economy and Society* at 396.

world.’<sup>887</sup> Yet these choices are made up from a huge variety of sources; property is a ‘composite sociolegal concept, everyday practical and legal form with no single foundation or rationale.’<sup>888</sup> This thesis has shown some of the ways in which property has developed in tandem with spatial developments in historical and contemporary Scotland. New performances are multi-directional and can lead to many different possible futures.

### 8.3.2 Reconciling performativity with regulation

In the context of performativity theory, this thesis has contended that state regulation can guide and facilitate new property performances which align with the necessary addressing of existential crises like the climate emergency. There are, of course, other ways of situating property in material spatial realities.<sup>889</sup> In much of his work, A J Van der Walt confronts the tensions between stability and change in a regulatory setting.<sup>890</sup> He argues that systemic change is that which is of ‘such a nature and magnitude that it undermines or threatens the fundamental assumptions, the structure, the rhetoric or the systemic logic of the entire property regime.’<sup>891</sup> This suggests that changes, particularly from a regulatory standpoint, must be groundbreaking or in some way revolutionary. However, he contends that, ‘even small regulatory interventions that regulate property holdings can reach a cumulative level where the foundations of the property system are threatened.’<sup>892</sup> In a move similar to that of performativity theory, he argues that this works both ways: interventions can just as easily justify the extant system where they arise through that system.<sup>893</sup> Instead, for Van der Walt, it is those policy changes that are based ‘purely...on policy considerations informed by general socio-economic conditions or the personal circumstances of the occupier’ which mean that it becomes progressively more difficult to

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<sup>887</sup> Davies *et al*, ‘Property Within Habitat’ (no 28), 34, citing J Law and J Urry, ‘Enacting the Social’ (2004) 33(3) *Economy and Society* 390, 396 - 397.

<sup>888</sup> *ibid.*, 34. As discussed in section 1.3.4, this can be linked with ‘rhizome theory’. See Deleuze and Guattari (no.70). This work is cited by A Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Landscape, Atmosphere* (2014), 59: ‘Deleuze and Guattari argue that the rhizome provides a better model for thought, as it does not require a central point, is not hierarchical, and allows heterogeneous connections between parts to be formed...[this] reflects the openness of biological systems.’

<sup>889</sup> This includes many different, and often overlapping, methods, including legal education (see Davies *et al*, ‘Property Within Habitat’ (no 28), 46 – 48; J Dehm; N Graham and Z Nay (Eds), *Becoming a Climate Conscious Lawyer* (2025)); increased interdisciplinary situating law among wider disciplines; as well as grassroots and extra-legal measures.

<sup>890</sup> For example, see Van der Walt, *Property in the Margins* (31).

<sup>891</sup> *ibid.*, 217.

<sup>892</sup> *ibid.*

<sup>893</sup> *ibid.*, 225. The example is given of changes that serve the ‘legitimate state purpose of ensuring public health and safety and guaranteeing equality before the law and administrative justice.’

explain these restrictions on ownership as systemically ‘normal.’<sup>894</sup> In other words, the more that these regulatory actions that challenge the ownership model are repeated, the more they are normalised; the more they are normalised, the ‘more significant the threat that is posed to the paradigm.’<sup>895</sup>

Therefore, within the context of performativity, regulation plays an important part. It may at first appear paradoxical to suggest that not only do changes to property arise through messy, complex, interrelated and networked material interactions, and that these changes ought to situate property as part of these relational networks, whilst simultaneously stating the need for regulation which is often viewed as a top-down means of ‘controlling’ transitions; regulation as the proverbial bull in a china shop. Therefore, there may be calls in this regard for the state to pull back from regulatory action to change land use in the context of the climate emergency; particularly so in the case of community ownership and participatory-led approaches. However, this thesis has argued that regulation and iterative, performative changes are not irreconcilable. In fact, taking from Joseph Singer, it has argued that regulation is an *essential* part of property,<sup>896</sup> that it facilitates property performances and must be guided to facilitate those types of performances that produce a more sustainable form of ownership.

Amanda Byer argues that,

‘[p]roperty, as currently configured...constrains our ability to see land beyond ownership, eschewing such insights in favour of technical solutions that are State-driven and entrench commercial and elite interests in land.’

This thesis has not sought to disagree with this point; indeed, it forms the benchmark of many of the arguments made. However, whilst state-driven solutions are often technical, and whilst they do often entrench commercial interests, this does not necessarily need to be the case. Scotland has provided a framework for a radical reshaping of land relations through its land reform regime. It is true that elite interests have sought to intervene in this process, with some successes.<sup>897</sup> Yet, this thesis has argued that such regulation can provide space for new property performances to arise. As Nicholas Blomley argues,

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<sup>894</sup> *ibid.*

<sup>895</sup> *ibid.*

<sup>896</sup> Singer, *Entitlement* (no 105), 56 – 94.

<sup>897</sup> For examples, see the discussion on the watering down of LMP proposals in sections 5.2.3.1 and 5.3.3 due to fears over AIP1 claims. Similarly, see discussion on the effects of vested land interests on the development of the CRtB framework at sections 6.2.3.3 and 6.3.3.

‘[p]roperty claims are continuously remade and re-enacted, and, as such, open to surprise and complexity.’<sup>898</sup> Such remaking and re-enacting can reflect property’s relationality and contingency upon the material limits of Earth systems, allowing closer relationships to be formed between human and non-human communities; for deeper people-place connections to be made and embedded. This, over time, can change the property paradigm beyond the ownership model, to a view of property as inherently relational and spatially contingent. This thesis has contended that such changes are an inherent good for climate change mitigation.

Although policy measures can facilitate such property performances, they are equally (if not more) likely to create those that lead to ‘fixity and sedimentation’<sup>899</sup> of the ownership model. It is far easier to facilitate performances which clearly reiterate previous performances, which are themselves tied to the hegemony of the property status quo. This can be seen, for example, in the discussion in section 4.4 regarding VCMs and land as ‘use’. In this regard, policy measures for land use change – in particular those regarding climate change mitigation – must attempt to steer clear of a hierarchy of values whereby certainty sits atop. There is an extent to which ‘remaining in the mess’,<sup>900</sup> can allowing space for contestation, heterogeneity and variation, rather than seeking to control climate-related land use change in the interests of capital. In the context of their effects on changing the property paradigm, policy measures introduced for land use change should recognise that space is always contested, and is always in a state of ‘becoming’, intertwined with law.<sup>901</sup> Nicholas Blomley argues that such contestations are relational: ‘they are not situated between two autonomous political positions, so much as they are constituted by articulations, flows and heterogeneity.’<sup>902</sup> Yet, policy measures for land use change can often fall into the trappings of vested capital interests, which seek to represent spaces as static and unchanging. This justifies the maintenance of rural spaces in Scotland as sitting between a binary of ‘use’ and ‘delight’; inert spaces of anthropogenic value extraction. However, this thesis argues that regulation can be a platform through which new challenges the ownership model can arise; facilitating new property performances which, over time, alter the property paradigm to one better-suited to the limits of Earth systems.

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<sup>898</sup> Blomley, ‘Performing Property’ (no 68), 25

<sup>899</sup> *ibid.*

<sup>900</sup> J Law, *After Method: Mess in Social Science Research* (2004).

<sup>901</sup> Blomley, *Unsettling the City* (no 71), 53.

<sup>902</sup> *ibid.*

As explored in this thesis, a wider policy goal of reaching net zero emissions in Scotland by 2045 risks narrowing the approach to land use in the context of climate change.<sup>903</sup> The urgency of such a goal, although based in scientific reasoning and evidence, can ‘divert attention and resources away from other political concerns, including a wider set of justice and well-being goals.’<sup>904</sup> Such an all or nothing approach risks ‘flattening land use choices’,<sup>905</sup> when in fact multi-faceted and diverse land use which tackles land inequality is what is most likely to contribute to a sustainable transition to decarbonisation. Therefore, whilst the setting into law of the requirement to reach net zero by 2045 can be viewed in a positive light – for example in its agenda-setting role – there is a risk that its focus on offsetting emissions legitimises extractive land uses like VCMs, rather than focusing on reducing emissions at source. Section 6.4 confronted this in the context of the CRtB, wherein legislating for a form of grassroots commoning risks marginalising local knowledge based on local spatial limits and possibilities through ‘dominant framings that prioritise urgent action...’<sup>906</sup> Thus, net zero risks entrenching a view of nature as something external to culture, to be simultaneously ‘saved’ whilst utilised for that very task (through the deployment of renewable energy, nature-based solutions, ‘rewilding’ and so on). Even if net zero is achieved, if the transition is not socially just then it will not be sustainable. People-place connections are vital in achieving a long-term sustainable future. There are clear links between former ‘transitions’ to an industrial society and their socio-environmental consequences,<sup>907</sup> and the current transition to a decarbonised society. Therefore, net zero as a target must allow flexibility for the accommodation of local needs within a wider framework of climate change mitigation through land use change.

However, multiple pathways to a changed property paradigm – which works against, rather than arises from, the ownership model – can exist simultaneously. It is also possible for these routes to be contested; that is what gives them credibility. Whilst net zero is a policy goal which carries the risk of restricting possibilities, it is equally wide enough to be positioned within placed visions of ownership and indeed can form part of their creation. This thesis has contended that climate targets, specifically net zero, can indeed guide new property performances that challenge the ownership model and lead to changes in the

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<sup>903</sup> See, for example, section 6.4.

<sup>904</sup> C Hafferty *et al*, ‘Unpacking the Politics of Nature-Based Solutions’ (no 490), 103979-3.

<sup>905</sup> Shoemaker, ‘Re-Placing Property’ (no 49), 816.

<sup>906</sup> C Hafferty *et al*, ‘Unpacking the Politics of Nature-Based Solutions’ (no 490), 103979-3.

<sup>907</sup> See discussion in Chapter 3, specifically in sections 3.3.1 and 3.3.2.

property paradigm, fostering possibilities for climate change mitigation, rather than inhibiting them.

### 8.3.3 Application beyond Scotland

It is perhaps not appropriate to give explicit global learnings in the context of this thesis based specifically on the policy measures analysed. In many ways the problems and solutions arising from these measures are contextually grounded in the social, geographical, political and historical specificities of Scotland. However, that is not to say that general themes cannot be extrapolated. In particular, the use of regulation to alter the property paradigm is often overlooked and understated in Western legal systems, indeed deliberately so. As Calo *et al* state, '[t]hat the government has the power to intervene in property distribution is overlooked within the Global North land debates to such an extent that it is sometimes assumed that the state does not hold that power, let alone have a responsibility to use it to intervene...'<sup>908</sup> Thus, changes to property rights are often minimised to those having the least possible impact.<sup>909</sup> Changes to land use for wider issues of public interest are usually hived off to other areas, such as taxation, planning and environmental regulation.<sup>910</sup> This thesis has sought to highlight the ways in which state intervention can both uphold and legitimise the status quo as well as challenge it. As William Boyd notes, often the *choice* of policy measure adopted by a state can limit the capacity to respond to public issues like climate change, because they narrow the field of possibilities.<sup>911</sup> As chapter 4 argues, VCMs represent such a narrowing.

However, Scotland's land reform framework has provided a platform for new possibilities to arise in the property paradigm. As such, the Scottish case can provide global learnings insofar as it demonstrates that 'to change land access patterns in Scotland's context, it is necessary to change property law...'<sup>912</sup> This is particularly the case when viewed through the lens of performativity. The land reform regime in Scotland, as shown here through regulatory interventions like LMPs and redistributive measures such as the CRtB, establishes the basic fact that the state can intervene with property rights. It provides

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<sup>908</sup> Calo *et al* (no 655), 2075-26.

<sup>909</sup> Van der Walt, *Property in the Margins* (no 31), 39; Van der Walt, 'Tradition on Trial' (no 35), 184 – 185.

<sup>910</sup> Byer, *Placing Property* (no 42), 63; Calo *et al* (no 655), 2075-26: '...interventions in property rights are within the remit of the state, however, they rarely occur beyond the realm of taxation [even then it's rarely done] and environmental regulation...'

<sup>911</sup> Boyd, 'Poverty of Theory' (no 439).

<sup>912</sup> Calo *et al* (no 655), 2075-26.

opportunities for property to be reworked in ongoing social processes. In establishing the land reform regime, the Scottish Government ‘invited, encouraged and enabled scrutiny of the role of private property rights...’<sup>913</sup> In particular, in the context of the CRtB, as a potential form of ‘commoning’,<sup>914</sup> attention must be paid to the opportunities to widen such processes to those situated in other jurisdictions. As Fiona Mackenzie argues, for such processes of commoning to truly counter the hegemony of the ownership model there must be efforts to ‘suture’ these ‘local claims to a commons to a global movement protesting against a neoliberal form...’<sup>915</sup> For Mackenzie, this reduces the risk of a wholly top-down approach to community ownership.<sup>916</sup>

As it currently exists, the land reform regime in Scotland sits somewhat on the fence; both challenging ownership and utilising it, providing for a suite of progressive redistributive measures in the CRtB which are predicated on sustainability, whilst also showing signs of watering down future possibilities in anxiety of legal challenges based on the protection of private property rights, insofar as LMPs and future reform of the CRtB are concerned. However, at the very least, such a willingness to intervene in the property paradigm, challenging (to varying extents) the tropes of the ownership model, provides, as Calo *et al* state, a ‘roadmap’ through which new property possibilities arise,<sup>917</sup> recognising the relationality of law and space, and in so doing decentring the hegemony and ‘success’ of the ownership model in central property framings, providing for more sustainable models of land use predicated on the interconnectedness of Earth systems. In the context of the climate emergency, this is not only possible but is absolutely necessary.

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<sup>913</sup> *ibid.*

<sup>914</sup> Mackenzie (no 107), 22 - 24.

<sup>915</sup> *ibid.*, 22, referencing K Bakker, ‘The ‘Commons’ versus the ‘Commodity’: Alter-Globalization, Anti-Privatization, and the Human Right to Water in the Global South’ (2007) 39(3) *Antipode* 430 – 455.

<sup>916</sup> *ibid.*

<sup>917</sup> *ibid.*, 27.

## Conclusion

This thesis begins with the assertion that the climate emergency demands a critical re-examination of the fundamental institutions that structure our relationship with the land. It concludes by affirming that the ‘ownership model’ of property is not a neutral backdrop to this existential emergency but an active and problematic agent within it. The analysis in this thesis has shown that the ownership model not only generates unsustainable land use practices which contribute to the climate emergency, but prevents alternative land use practices which mitigate climate change. Therefore, it is necessary for property law to change beyond the ownership model. This thesis argues that, as a phenomenon that is spatially produced and spatially productive, one route to changing property is to recognise the importance of property performances. Further, it has been argued that state regulation plays an active role in facilitating property performances – both those that *contribute* to the entrenching of the ownership model, and those which *challenge* it. The task in the context of the climate emergency is to find, and enable, regulation which performs the latter role.

The examination of three distinct policy approaches – Voluntary Carbon Markets (VCMs), Land Management Plans (LMPs), and Community Rights to Buy (CRtB) – reveals a spectrum of efficacy in challenging the ownership model. VCMs, though presented as innovative market solutions, ultimately reinforce the status quo: by further separating land into tradeable carbon credits, they deepen the dephysicalisation of property; by commodifying natural attributes for profit, they accelerate the extraction of these attributes to the detriment of Earth system; and by concentrating benefits and decision-making power in the hands of absentee corporate owners they entrench individualism. They represent a failure of imagination, attempting to solve a crisis created by capitalist logic with more of the same logic, thereby risking little more than ‘greenwashing’ and the further financialisation of nature. In contrast, LMPs and the CRtB represent more profound interventions. LMPs, as proposed in the Land Reform (Scotland) Bill, directly challenge the individualism of the ownership model by mandating transparency and community engagement in land use decisions. As a policy measure, this begins to confront abstraction by requiring landowners to articulate how their management contributes to wider public environmental goals like net zero and biodiversity. However, as currently conceived, the potential of LMPs is limited. The reliance on a diluted regulatory framework and limited enforcement mechanisms means LMPs may only modestly disrupt extractive practices, leaving large landowners with the final say in land use decisions. The most radical

challenge to the ownership model comes from the CRtB framework. These policies simultaneously redistribute ownership to heterogeneous groups of people with specific connections to the land, whilst also regulating that right in the public interest, including with reference to environmental action through aspects such as sustainable development being woven into the fabric of the CRtB. The CRtB legislation counters abstraction by legally mandating a ‘connection’ between the community and the land it seeks to own. They disrupt extractive patterns by prioritising locally-determined sustainable development over profit maximisation and redistributing benefits within the community. Most significantly, they dismantle individualism by replacing private, exclusionary decision-making with collective, participatory governance. Community ownership, while not without its own internal tensions and conflicts, fosters a placed relationship with the land, one that is more likely to be guided by local knowledge, long-term stewardship, processes of compromise and an understanding of material limits.

Therefore, the overarching conclusion is that the potential for any land use policy to contribute meaningfully to mitigating the climate emergency is intrinsically linked to its capacity to destabilise the tropes of the ownership model. A policy that leaves the model intact will inevitably produce land use outcomes that perpetuate the very structures that caused the crisis. The climate emergency is not just a technical problem requiring market fixes; it is a socio-ecological crisis that calls for a foundational rethinking of how we organise our relationship with land. This necessitates moving away from a paradigm of ownership based on exclusion and extraction and towards one of responsibility, relation, and care. This journey is not one of finding a single new ‘model’ to replace the old, but of embracing the messy, contested, and performative nature of property. It requires a shift from an ideology of certainty promised by the ownership model to an acceptance of change and adaptive management based on ecological and social feedback. State policy measures for land use change, whilst important in guiding performances on the ground, must be mindful of the tendency to dominate and control transitions (such as the decarbonisation of land use), through metrics-based, all-or-nothing approaches, and must instead facilitate property performances that can reflect the spatial contingency – that is the inherent messiness of spatial relations – of property. The CRtB are one example, but it cannot stand alone in this task nor is it currently well-equipped to do so. The Scottish land reform experiment, with its flaws and its ambitions, offers a valuable roadmap. It demonstrates that the state has both the power and the responsibility to intervene in property relations for wider public problems like climate change. It shows that property is a choice made from multiple, often disparate, smaller choices which ‘weigh some place relations over others or

allow for ownership without any attachment at all.’<sup>918</sup> The task ahead is to make choices that consciously perform a new property paradigm into being; one that is embedded in the interconnected network of human and non-human communities, ensuring that the decisions made over the land are made with the limits of that land and the urgency of the climate emergency at their forefront.

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<sup>918</sup> Shoemaker, ‘Re-Placing Property’ (no 49), 821.

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