ASSEMBLING A SUSTAINABLE SYSTEM: EXPLORING THE SYSTEMIC CONSTITUTIONAL APPROACH TO PROPERTY IN THE CONTEXT OF SUSTAINABILITY

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I. INTRODUCTION

Property is an institution which can lead to the concentration of resource and power in the hands of too few people. The regulation of property rights can respond to this by aiming to limit the potentially negative effects the exercise of property rights can have on people and the environment. The issue of the extent to which property should be subject to regulation has been, and will continue to be, a highly controversial issue in many jurisdictions. These debates are only likely to become more heated as there are increasing pressures on land and other resources caused by global trends, such as intensifying environmental degradation, population growth, rising inequality and accelerating industrialization. This article explores the relationship between property and regulation within the context of the need to progress to a more sustainable way of life.

To investigate the relationship between property and regulation, this article compares the approach to property in the two jurisdictions of Scotland and South Africa. Arguably, these two

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countries could not be more different; everything from the weather to politics are worlds apart. In the past, comparative legal research could be justified with reference to both countries' mixed legal systems, but in light of South Africa's radical departure from its legal heritage after the end of Apartheid, this link has become tenuous. The dissimilarities between the two countries led Carey Miller to conclude in 2014 that "[t]he position regarding private law and the protection of the human right of property in South Africa and Scotland is too different for any comparative exercise to have primary utility."[1] This then raises the question: Why undertake comparative research between these two countries, especially in relation to topics as contentious as property law and sustainability that inevitably touch on the protection of property as a human right?

In this article, we question whether this dismissal of comparative research into constitutional property law questions in Scotland and South Africa should be reconsidered, especially in light of recent developments in Scotland. Specifically, this article analyzes the Scottish Government's Land Rights and Responsibilities Statement (LRRS)[2] and the reference to the United Nations Food and Agriculture Organization's (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)[3] in Scotland. In our view, these two documents are responses to certain problems caused or exacerbated by current property law regimes. These documents attempt to place property within a broader system of values that regulates the exercise of property rights. From this perspective, the LRRS and the VGGT have this in common with the South African Constitution. Furthermore, as is the case in South Africa, the Scottish Government's LRRS and FAO's VGGT also connect property rights with issues such as inequality, insecure tenure, environmental degradation, and climate change. These challenges are of a global scale and nature, and tackling them requires a reconsideration of property's role and place within a legal system. With sustainable development emerging as a

1. David Carey Miller, *The Human Right of Property in Land Law: Comparing South Africa and Scotland*, *in* PRIVATE LAW AND HUMAN RIGHTS 480 (2014).

2. SCOTTISH GOVERNMENT, SCOTTISH LAND RIGHTS AND RESPONSIBILITIES STATEMENT (2017).

3. FOOD AND AGRICULTURE ORGANIZATION 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).

key organizing principle for governance in some countries and regions,[4] and a transition to sustainability becoming ever more urgent, it is necessary to re-evaluate many areas of law, including property law, in light of such global challenges. The evaluation of property rights against a background of multiple complex contextual factors—in particular, dramatic socio-economic inequality—is an ongoing and expansive process in South Africa. Hence, this article argues that valuable lessons can be learned from the South African experience in this context.

Taking an approach which directly compares doctrinally different types of legal instruments, namely a supreme constitution with an international soft-law instrument and a national policy document, will necessarily be problematic. The fact that some underlying concerns behind these documents are similar is not enough to justify direct comparison between them. Fortunately, this is not our intention. Instead, this article explores the potential of an approach to property and its regulation, developed in South Africa, to inform us about soft law instruments that have emerged in places other than the particular context of South Africa. The question is: What can the South African systemic constitutional approach tell us about other documents that are also responding to complex property problems? This article proposes that the systemic constitutional approach in South Africa offers a useful example of the methodological and theoretical shifts that are required in legal systems, which are in the process of change, and here the change we focus on is the transition to sustainability.

The structure of this article is that, firstly, we describe the new developments in Scotland, introducing and analyzing both the Scottish Government's LRRS and the FAO's VGGT. Common features of these documents include a human rights-based approach to land governance, an emphasis on the responsibilities of the holders of land rights, and the placement of property within a broader system of values, which includes sustainable development.

Secondly, we outline aspects of Scots private law methodology, and also the Scottish legal system, which could minimize the potential transformative effect of these documents. Recent aca-

4. Demonstrated most recently by the adoption in 2015 of *Transforming our World: the 2030 Agenda for Sustainable Development*. *See* G.A. Res. 70/1 (Sept. 25, 2015).

demic work on property in Scotland has been focused on system-building and ensuring conceptual coherence. One key element of this property system has been a strict division between personal and real rights, with ownership - in principle absolute and exclusive - being at the top of the hierarchy of real rights. This traditional doctrinal research, and the resulting property law reform, has been viewed as separate from politically motivated reforms, such as creating rights for communities to buy land or providing access rights over privately owned land. There is also a rigid division between public and private law in Scotland, and as such the implementation of a human rights-based approach to land governance has not been widely discussed. These features create barriers for the implementation of the vision of the LRRS and VGGT.

Thirdly, we consider how the existing methodology in Scotland could be changed in order to realize the aims of the LRRS and VGGT, and we go on to discuss the systemic constitutional approach, which has been developed in South Africa to address some of the shortcomings of its previous private law methodology. This approach takes as its starting point that there is a single system of law and all sources of law are subject to the Constitution.[5] Property has a relatively modest role in this system.[6] Therefore, property rights may have to give way if a clash arises between a property right and a fundamental non-property right or value. This perspective avoids the paradox that can be created when property is seen as a keystone right, which can inhibit measures of regulation or redistribution. Rather, the regulation of property is an inherent part of a constitutional legal system and serves an important systemic purpose. Taking this "angle of approach"[7] shows a facilitative relationship between property and regulation.[8] Therefore, a sustainable property system can be

5. This point of departure is based on § 2 of the South African Constitution, which declares it the supreme law of the country and determines that all law or conduct contrary to the Constitution is invalid. S. AFR. CONST., § II, 1996.

6. The "modest systemic status of property" was a phrase coined by Van der Walt. André J. van der Walt, *The Modest Systemic Status of Property Rights*, 1 J.L. PROP. & SOC'Y 15 (2014).

7. The phrase "angle of approach" was used by Henk Botha at a workshop in 2007 and later in Henk Botha, *Refusal, Postapartheid Constitutionalism, and the Cry of Winnie Mandela*, *in* REFUSAL, TRANSITIONS, AND POST-APARTHEID LAW (2009), to avoid the "pretence of a technique that produces ready or final answers." *See* ANDRÉ J. VAN DER WALT, PROPERTY AND CONSTITUTION 105 (2012).

8. Elsabé van der Sijde, Reconsidering the Relationship Between Property and Regulation: A Systemic Constitutional Approach 172-73, 285-91 (Aug. 2015) (LL.D. dissertation, Stellenbosch University)."

achieved through regulation that promotes and protects the broader values of the legal system. This angle of approach complements, rather than hinders the vision contained in the LRRS and VGGT.

Finally, we consider what Scotland can learn from the South African experience. Adopting the single-system-of-law principle in Scotland would mean that the distinction between political and doctrinal property law reforms would melt away. It would also encourage engagement with areas such as environmental law, and investigation into how these rules affect the conceptualization of property. The argument that ownership is, in principle, absolute and exclusive would become untenable. Further, the angle of approach that this article proposes would require consideration of how fundamental rights and values, such as sustainable development, can be operationalized in legal analysis. We then discuss two concrete examples of cases. In one case, taking the angle of approach would indicate that legislative reforms are required and a different outcome to the case would then be possible. In the other, the angle of approach supports the decision. We conclude by admitting that there is no magic formula which will always provide the clear answers to property problems in the context of sustainability. However, in this article we are exploring how property law and private law methodology should be reconsidered in this context. As such, we adopt Michelman's stance when he says: "I am more interested in ways of thinking about certain legal problems, and in ways of saying what the significant factors are, than I am in doctrinally formulated summaries or predictions of outcomes."[9] Above all, we are seeking to contribute to the debate regarding the transition to sustainability and see the role of property as significant in that transition.

II. NEW DEVELOPMENTS IN SCOTLAND

A. BACKGROUND

The ownership of land and the exercise of ownership rights have been persistently problematic in Scotland.[10] As noted by the

9. Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 10 (1969).

10. For a historical overview, *see* Ewen A. Cameron, *Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880-1999*, *in* LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY 94 (2020); Malcolm Combe, *Parts 2 and 3 of the Land Reform (Scotland) Act 2003*, 3 JURID. REV 195 (2006); W. David H. Sellar,

historian Ewen Cameron, "[t]he land question has remained in the bloodstream of Scottish politics and in the cultural memory of Scotland."[11] One of the most prominent issues is that a range of historical factors have combined to result in a concentration of large areas of land in the hands of few people.[12] This inequality, of resource and of power, has numerous on-going consequences, many of which are still being explored.[13] Successive governments in Westminster have attempted to tackle issues related to land in Scotland, but the approach has been limited and piecemeal.[14] Only when Scotland acquired its own parliament in 1999, was there the possibility of a greater range of land reform measures, which could begin to deal with matters in a more comprehensive way.[15] By the time the Land Reform Review Group (LRRG) published its final report in 2014 entitled "The Land of Scotland and the Common Good," nineteen Acts of the Scottish Parliament were listed as containing land reform provisions, including the two particularly significant instances of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Land Reform (Scotland) Act 2003. The LRRS is a product of the latest instalment of land reform measures, which was instigated by the LRRG's report.[16]

B. LAND RIGHTS AND RESPONSIBILITIES STATEMENT

The LRRG was a working group set up by the Scottish Government with the remit to examine "the role of Scotland's system of land ownership in the relationship between the people and the

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The Great Land Debate and the Land (Scotland) Act 2003, 60 NORSK GEOGRAFISK TIDSSKRIFT [NOR. J. GEOG.] 100, 101 (2006).

11. Ewen A. Cameron, *Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880-1999*, *in* LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY 94, 109 (2020).

12. LAND REFORM REVIEW GROUP, THE LAND OF SCOTLAND AND THE COMMON GOOD 156-64 (2014); STEVEN THOMSON ET AL., REPORT TO THE SCOTTISH GOVERNMENT, THE IMPACT OF DIVERSITY OF OWNERSHIP SCALE ON SOCIAL, ECONOMIC, AND ENVIRONMENTAL OUTCOMES 19 (2106).

13. THOMSON ET AL., *supra* note 12; SHONA GLENN ET AL., SCOTTISH LAND COMMISSION, INVESTIGATION INTO THE ISSUES ASSOCIATED WITH LARGE SCALE AND CONCENTRATED LANDOWNERSHIP IN SCOTLAND (2019).

14. Ewen A. Cameron, *Still on the Agenda? The Strange Survival of the Scottish Land Question, 1880-1999*, *in* LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY 94 (2020); Malcolm Combe, *Parts 2 and 3 of the Land Reform (Scotland) Act 2003*, 3 JURID. REV 195 (2006).

15. LAND REFORM REVIEW GROUP, *supra* note 12, at 24.

16. Frankie McCarthy, *Property Rights and Human Rights in Scottish Land Reform*, *in* LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY 94, 215 (2020).

land of Scotland" in order to make proposals for land reform.[17] There was a significant amount of political and public engagement with issues related to land around this time in Scotland and important land reform legislation has been enacted in the past few years.[18] The parliamentary debates were backed by social movements like "Our Land," featuring people like prominent land campaigner, and now Member of the Scottish Parliament for the Scottish Green Party, Andy Wightman, which encouraged the government to be bold in its reforms, to challenge the current concentration of land ownership in Scotland, and to promote transparency of information about the ownership of land.[19]

A key product of the recent wave of reforms was the Land Reform (Scotland) Act 2016.[20] Among other things, the 2016 Act added to the growing list of community rights-to-buy[21] and also created a legislative basis for the Scottish Land Commission, a new body which has been tasked with reviewing, researching, and recommending changes to, the laws and policies relating to land in Scotland.[22] Section 1 of this Act also requires the Scottish Ministers to produce a Land Rights and Responsibilities Statement.[23] The LRRS has three aims which have been articulated by the Scottish Government: Firstly, to "inform the development of Government policy and action in relation to land"; Secondly, "to encourage and support others with significant responsibilities over land such as local authorities and large private land owners, to consider how their decision-making powers could contribute to realising the vision in the Statement"; Thirdly, "to encourage us

17. LAND REFORM REVIEW GROUP, *supra* note 12, at 15.

18. Such as the Community Empowerment (Scotland) Act 2015, (ASP 6), and Land Reform (Scotland) Act 2016, (ASP 18).

19. Michael Gray, *#OurLand Campaign Launches to Challenge @ScotGov Land Reform Proposals*, OUR LAND: SCOTTISH LAND FESTIVAL 2015 (Aug. 12, 2015): https://www.commonspace.scot/articles/2110/ourland-campaign-launches-to-challenge-scotgov-land-reform-proposals.

20. For a summary of the provisions of the Act, *see* Malcolm Combe, *Parts 2 and 3 of the Land Reform (Scotland) Act 2003*, 3 JURID. REV 195, 291 (2006).

21. On community rights-to-buy, *see* Malcolm Combe, *Legislating for Community Land Rights*, *in* LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY 154 (2020), and John A. Lovett, *Towards Sustainable Community Ownership: A Comparative Assessment of Scotland's New Compulsory Community Right to Buy*, *in* LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY 177 (2020).

22. Land Reform (Scotland) Act 2016, (ASP 18) § 22, ¶ 1. See the Scottish Land Commission's Website here: https://landcommission.gov.scot/.

23. *Id*. § 1, ¶ 1.

all to recognise our responsibilities as well as our rights in relation to land."[24]

In preparing the LRRS, the Scottish Ministers were required to have regard for, among other things, "promoting respect for, and observance of, relevant human rights"; "promoting respect for such internationally accepted principles and standards for responsible practices in relation to land as the Scottish Ministers consider to be relevant"; and "furthering the achievement of sustainable development in relation to land."[25] In this context, human rights has a broad meaning and includes those rights protected not just by the European Convention on Human Rights (ECHR), but also those contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[26] This means that not just civil and political rights, such as the right to life or the right to respect for private and family life are significant, but also economic, social and cultural rights, such as the right to an adequate standard of living and the right to participation in cultural life. In defining internationally accepted principles and standards, the 2016 Act makes specific reference to the FAO's VGGT, which are discussed in more detail further below.[27] The final LRRS was published on September 28, 2017. Within the resulting document, there are six principles which are worth quoting 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, help achieve social justice and build a fairer society.
>
> 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.
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> 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.

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24. SCOTTISH GOVERNMENT, *supra* note 2, at 6-4.
25. Land Reform (Scotland) Act 2016, (ASP 18) § 1, ¶ 3(a), (b), (g).
26. *Id.* § 1, ¶ 6.
27. *Id.* § 1, ¶ 5.

> 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 contribute to sustainable growth and a modern, successful country.
>
> 5. There should be improved transparency of information about the ownership, use and management of land, and this should be publicly available, clear and contain relevant detail.
>
> 6. There should be greater collaboration and community engagement in decisions about land.[28]

There are several important features of this new national policy document, many of which are intertwined. Firstly, the LRRS adopts a human rights-based approach to land governance. Previously, Article 1, Protocol 1 of the ECHR (Art 1, Pro 1) was the only right referred to in the land reform context.[29] Indeed, arguments based on Art 1, Pro 1 were often used in order to prevent land reform measures being implemented.[30] Following the publication of the Scottish Human Rights Commission's first Action Plan in 2013, there was greater recognition of the scope for the progressive realization of all human rights through the implementation of land reform including social, economic, and cultural rights.[31] When the newly established Scottish Land Commission published a Programme of Work for 2018-2021—which entails review of such diverse areas as redevelopment of vacant and dere-

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28. SCOTTISH GOVERNMENT, *supra* note 2, at 9.

29. McCarthy, *supra* note 16, at 214. The text of Art 1, Pro 1 reads:

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

30. *Id.* at 214-216. *See also* Kirsteen Shields, *Tackling the Misuse of Rights Rhetoric in the Land Debate*, 68 GREEN'S SCOTTISH HUM. RTS. J. 1 (2015). McCarthy argues in her chapter that the positioning of Art 1, Pro 1 as a barrier to land reform is a mischaracterisation. Using the work of Singer, McCarthy argues that Art 1, Pro 1 provides a way to ensure all interests in land are considered and is a valuable tool for implementing the vison of the LRRS. We respectfully differ in our analysis here by promoting our angle of approach which is explained further below.

31. SCOTTISH HUMAN RIGHTS COMMISSION, SCOTLAND'S NATIONAL ACTION PLAN FOR HUMAN RIGHTS 2013-2017 (2013).

lict land; community rights-to-buy; community engagement in land use decision-making and agricultural tenancies[32]—Shields argued that within these areas there is scope for the progressive realization of a range of human rights such as the right to food, health, housing, education, and the right to take part in cultural life.[33] The articulation of a broad human rights-based approach to land governance in the LRRS strengthens this viewpoint and marks a significant turning point in the understanding of the interaction between human rights and land reform.

A second connected point is that the LRRS emphasizes the responsibilities of holders of land rights. The advisory notes state that: "With all rights come responsibilities. Some of these are regulatory requirements, and others of an ethical nature . . . ."[34] There are responsibilities to communities on which decisions about land can have an impact and also environmental responsibilities to future generations. This is a robust recognition of the implications and consequences that the exercise of property rights can have on matters of social justice and environmental protection: the public nature of private rights. The role of regulation is explicitly recognized as placing duties on the holders of land rights which are designed to protect both people and the environment.[35] Furthermore, although there is discussion of a "balance" between public and private interests in Principle 1, the advisory notes to the LRRS do not suggest these are diametrically opposed. Rather, "[the] public interest should not necessarily be thought of in opposition to private interest. Public interest includes the effect on individuals who are also members of the public."[36]

Thirdly, it is recognized that the system of land rights and their regulation are embedded within a greater system of values, which includes sustainable development, community empowerment, and transparency of information. The UN's Sustainable Development Goals are mentioned in the LRRS as a relevant international standard and it is noted that the challenges the SDGs attempt to tackle such as "inequality, unsustainable consumption

32. *See* SCOTTISH LAND COMMISSION, MAKING MORE OF SCOTLAND'S LAND: PIR STRATEGIC PLAN 2108 TO 2021 (2018).

33. KIRSTEEN SHIELDS, SCOTTISH LAND COMMISSION, HUMAN RIGHTS AND THE WORK OF THE SCOTTISH LAND COMMISSION (2018).

34. SCOTTISH GOVERNMENT, *supra* note 2, at 11.

35. *Id.* at 25.

36. *Id.* at 13.

and production patterns, inadequate infrastructure and lack of adequate employment" are also reflected in the LRRS.[37] Values such as sustainable development, community empowerment and transparency of information are being consistently discussed within the Scottish context and pervade the policy landscape of the Scottish Government from the broad National Performance Framework[38] down to national sectoral policies such as the Scottish Rural Development Programme[39] and 2020 Challenge for Scotland's Biodiversity.[40]

Fourthly, although there is recognition in Principle 2 and 3 of the importance of diversifying ownership rights, there is also acknowledgement that access to land can be important for realization of human rights and the broader system of values and engagement with communities in decision-making in relation to land is important. In recent years, there have been a number of rights which have been granted to communities to allow them to force the transfer of areas of land in an attempt to fragment the concentration of ownership in Scotland.[41] Undoubtedly, redistribution of the benefits of land and natural resources is crucial to ensuring social equality, particularly when historically such benefits have been concentrated in the hands of a privileged few. However, a report commissioned by the Scottish Government in 2016, stated that "it is too simplistic to conclude that scale of land ownership is a significant factor in the sustainable development

37. *Id*. at 39.

38. SCOTTISH GOVERNMENT, NATIONAL PERFORMANCE FRAMEWORK (2018). This updated version of the Framework has been published since the LRRS was published. The Framework directly links each national indicator with the Sustainable Development Goals. However, it should be noted that the Scottish Government has tended to focus on the concept of "sustainable economic growth" rather than the broader concept of "sustainable development". For a critique of this, *see* Andrea Ross, *The Future Scotland Wants – is it really all about Sustainable Economic Growth?*, 19(1) EDINBURGH L. R. 66 (2015). Ross has pointed out recently that in relation to land reform, there has been a maturing of the implementation and delivery of sustainable development in Scotland, Andrea Ross, *The Evolution of Sustainable Development in Scotland – A Case Study of Community Right-to-Buy Law and Policy 2003-2018*, 11 SUSTAINABILITY 130 (2019).

39. SCOTTISH GOVERNMENT, SCOTTISH RURAL DEVELOPMENT PROGRAMME 2014 TO 2020 (2015).

40. SCOTTISH GOVERNMENT, 2020 CHALLENGE FOR SCOTLAND'S BIODIVERSITY (2013). The policy context of the LRRS is demonstrated in the useful table in SCOTTISH GOVERNMENT, SCOTTISH LAND RIGHTS AND RESPONSIBILITIES STATEMENT 42 (2017).

41. Combe, *supra* note 21; Lovett, *supra* note 21.

of communities."[42] This report identified general socio-economic factors such as regional economic growth, housing developments, infrastructure, and improved standards of living as being key forces of change.[43] This confirms the importance of not viewing property rights in isolation but seeing them as a functioning element of a system of governance, and this governance system then fitting within a broader social, economic, historical, and political context. Property rights are an important component of a governance system, but not the only component, and attention should also be paid to the position of those without property rights and how their human rights can be promoted in relation to the land. As argued in a recent Scottish Land Commission report, much of the inequality relating to land in Scotland emerges from an imbalance of power and participation.[44] Ownership is often central in determining the location of power, and therefore who decides the extent of participation in decision-making. However, the LRRS recognizes that there should be more opportunities for citizens to *have access* to land, that more communities should have the opportunity to *use* buildings and land which can contribute to their wellbeing and future development, and there should be greater *community engagement* in relation to decisions about land.

In relation to this point, beyond the LRRS, under section 44 of the Land Reform (Scotland) Act 2016, the Scottish Ministers were required to issue guidance about engaging communities in decisions relating to land. Subsequently, guidance has been issued by the Scottish Government on community engagement.[45] The purpose of the guidance is "to help ensure that people have the opportunity to be involved in decisions about land that affect them."[46] The guidance provides examples of informal engagement with communities including putting notices on community notice boards or posting on social media, which may be appropriate when there are decisions that can have moderately significant impacts on the local community.[47] Such decisions may involve

42. THOMSON ET AL., *supra* note 12, at 1.

43. *Id.*

44. GLENN ET AL., *supra* note 13, at 22, cited *supra* note 42..

45. SCOTTISH GOVERNMENT, GUIDANCE ON ENGAGING COMMUNITIES IN DECISIONS RELATING TO LAND (2018).

46. *Id.* at ¶ 14. *See also* SCOTTISH LAND COMMISSION, COMMUNITY ENGAGEMENT IN DECISIONS RELATING TO LAND (2019).

47. SCOTTISH GOVERNMENT, *supra* note 45, at 14.

short-term but disruptive activities in relation to land or activities carried out in irregular circumstances. Formal methods of engagement including publishing a written consultation, holding local meetings or "collaborating with a community to co-design a project," may be appropriate for decisions that will significantly impact the community such, as long-term changes to land use with effects on the local economy, society, culture or environment.[48] The guidance encourages engagement regardless of property rights and specifies the importance of engaging the vulnerable in society. The guidance states:

> In relation to poverty and social inequality, Articles 6 and 11 of ICESCR . . . are very relevant . . . these Articles provide for the right to work and the right to an adequate standard of living, including the rights to adequate food and housing and the right to a continuous improvement in living conditions. It is particularly important that people living in areas of poverty and social deprivation, in both urban and rural Scotland, are given the opportunity to engage with decisions about land that can help them improve their conditions in line with Articles 6 and 11 of the ICESCR.[49]

Failure to adhere to the guidance also has potential consequences, as when determining whether to grant an application by a community for the right-to-buy to further sustainable development, the Scottish Ministers may take into account the extent to which regard has been had to this guidance.[50] When outlining equality and engagement with ethnic groups, Scottish Gypsy/Traveller communities are also specifically mentioned.[51] This is a group which has suffered from discrimination in the UK and eviction due to unlawful occupation of land.[52]

Finally, the process of the creation of the LRRS was through democratic debate and participation. A draft of the LRRS was issued for public consultation between December 16, 2016, and March 10, 2017. The Government then issued a response to the

48. *Id.*

49. *Id.* at 18, ¶ 26.

50. Land Reform (Scotland) Act 2016, (ASP 18) § 56, ¶ (4).

51. SCOTTISH GOVERNMENT, *supra* note 45, at 19 ¶ 32.

52. For an overview of the case law in the English courts and European Court of Human Rights, see ANDRE J. VAN DER WALT, PROPERTY IN THE MARGINS 161-166 (2009). A Ministerial Working Group was also established in Scotland in 2018 on improving the lives of Scottish Gypsy/Traveller communities.

consultation results.[53] The Government also organised a public participation workshop to obtain feedback on the proposed LRRS.[54] As McCarthy comments, the values of our property system "have been the subject of sustained debate in this county for decades, and the current consensus is now encapsulated within the LRRS."[55] All of the listed features of the LRRS combine to provide a radical exposition of the vision of the system of land rights and their regulation in Scotland. This final point, however, serves to underline the democratic legitimacy of the document due to the participatory approach to policymaking. This is not a meaningless document that can be ignored or side-lined. Instead, as noted in the overview to the LRRS, this document intended to have far-reaching effects.[56] Not least, of course, the LRRS has implications for legal practitioners, legal academics, and law reformers.

C. VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY

As mentioned above, when preparing the LRRS, the Scottish Ministers had to have regard to the desirability of promoting respect for the FAO's VGGT.[57] The Scottish Ministers had the same duty when preparing the guidance on community engagement.[58] These are among the first examples of the VGGT being referred to in a national law context.[59] The resulting LRRS and guidance on community engagement make explicit reference to the VGGT,[60] and there are some significant similarities in the approach of the LRRS and the VGGT, which shows the influence of the latter on the former. Due to the important connection between the LRRS and the VGGT, and the similarities between the

53. SCOTTISH GOVERNMENT, LAND RIGHTS AND RESPONSIBILITIES STATEMENT: A CONSULTATION (2016); SCOTTISH GOVERNMENT, SCOTTISH LAND RIGHTS AND RESPONSIBILITIES STATEMENT: CONSULTATION RESPONSE REPORT (2017).

54. Held on October 19, 2016 at Reidvale Community Centre, Glasgow. Dr. Robbie took part in this workshop.

55. McCarthy, *supra* note 16, 234.

56. SCOTTISH GOVERNMENT, *supra* note 2, 6-7.

57. Land Reform (Scotland) Act 2016, (ASP 18), § 1, ¶ 3(b), ¶ 5.

58. *Id.* § 44, ¶ 2(b), ¶ 4.

59. Lorenzo Cotula, *International Soft-Law Instruments and Global Resource Governance*, 13 L. ENV'T & DEV. J. 115, 127 (2017).

60. SCOTTISH GOVERNMENT, *supra* note 2, at 39; SCOTTISH GOVERNMENT, GUIDANCE ON ENGAGING COMMUNITIES IN DECISIONS RELATING TO LAND Annex A, ¶ *supra* note 45, at 17 ¶ 24.

documents, this section will give some background to the VGGT, outline their content and compare them with the LRRS. The similarities between the documents indicate a global movement towards placing property within a broad system of values including respect for human rights and sustainable development. However, there is also a question raised when analyzing the VGGT of what the appropriate role of property is in tackling complex global challenges.

The FAO has been working on raising awareness of the good governance of land tenure for the last two decades.[61] This work has been upon the background that recent years have witnessed global transformations which have affected land and natural resource management and governance, including an increasing number of large-scale acquisitions of agricultural land in developing countries by powerful foreign public or private actors.[62] A recent Land Matrix[63] report summarizes that Africa is the most targeted continent for these types of transactions, with 422 completed agricultural deals since the year 2000, covering an area of almost 10 million hectares. Asia has the second largest number of deals, with 305 deals covering 4.9 million hectares.[64] The Land Matrix report provides an example of a large-scale land investment in the Yala Swamp in Kenya relating to 6,900 hectares of swampland. U.S. investor Dominion Farms Ltd. leased the area primarily to produce rice.[65] However, the draining of the swampland has affected the livelihoods of those who benefited from the swamp's natural resources, and 60% of the land has not been put to productive use.[66] The reasons for the so-called "land grabbing" have been connected with the attempt to obtain areas of land for food and energy production or control over freshwater resources.[67]

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61. *See* FAO Webpage: http://www.fao.org/tenure/en/.

62. *See* overview Cotula, *supra* note 59; Smita Narula, *The Global Land Rush: Markets, Rights and the Politics of Food* 49 STAN. J. INT'L L., 101 (2013); Amnon Lehavi, *Land Law in the Age of Globalization and Land Grabbing*, *in* COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES 290 (2017).

63. Land Matrix is an independent, global land monitoring initiative which tracks large-scale land acquisitions in low and middle-income countries. *See* Land Matrix: https://landmatrix.org/ .

64. KERSTIN NOLTE ET AL., INTERNATIONAL LAND DEALS FOR AGRICULTURE. FRESH INSIGHTS FROM THE LAND MATRIX: ANALYTICAL REPORT II 16 ¶ 2.4.1 (2016).

65. *Id* at 45 Box 13.

66. *Id*.

67. Lehavi, *supra* note 62; Jampel Dell'Angelo et al., *The Global Water Grabbing Syndrome*, 143 ECOLOGICAL ECON. 276 (2018).

When acquisitions take place, there can be forced evictions, widespread displacement of people and intense environmental degradation.[68] Vulnerable groups, such as local farmers, women, and indigenous people, can be among the worst affected by these transactions.[69] As such, the VGGT were produced in the context of significant problems caused by the acquisition of property rights in land and the exercise of these rights.

The VGGT were drafted in the institutional framework of the Committee on World Food Security (CFS)[70] and are the first global document which gives comprehensive guidance on the governance of land. The VGGT state that they are intended to "serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security."[71] The VGGT are obviously a different type of document when compared to the LRRS. They constitute an international soft-law instrument which is global in scope and this is noticeable in the extensive use of the concept of "tenure."[72] This term is quite deliberately vague and undefined so that it can be tailored to the specific context of national jurisdictions.[73] Nevertheless, there are some important normative similarities between the VGGT and LRRS. Both are responses to problems of inequality and environmental degradation which are caused or exacerbated by current property regimes. The angle of response in both documents shares important characteristics. The VGGT take a human rights-based approach to the governance of land. It is af-

68. *See generally* Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 503 (2011).

69. Lehavi, *supra* note 62, at 293.

70. Nora McKeon, *'One Does Not Sell the Land Upon Which the People Walk:' Land Grabbing, Transnational Rural Social Movements, and Global Governance*, 10(1) GLOBALIZATIONS 105 (2013).

71. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *supra* note 71, at 2 ¶ 2.2, 6 ¶ 4.2.

72. This can be defined as "the relationship, whether legally or customarily defined, between people, as individuals or groups, with respect to land." FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, LAND TENURE AND RURAL DEVELOPMENT 7 ¶ 3.1 (2002); *see also* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, RESPONSIBLE GOVERNANCE OF TENURE AND THE LAW 19 (2016).

73. There are implementation guides provided by the FAO. *See* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS: http://www.fao.org/tenure/resources/collections/governance-of-tenure-technical-guides/en/

firmed in the VGGT that they are complementary to, and support, national, regional and international initiatives which aim to promote human rights, and that States should ensure that all actions in relation to tenure are consistent with their existing obligations under national and international law, taking into consideration voluntary commitments of regional and international agreements.[74] The VGGT acknowledge the core role land plays in the fulfilment of human rights with the statement that States "should strive to ensure responsible governance of tenure because land, fisheries and forests are central for the realization of human rights, food security, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, and social and economic growth."[75]

The VGGT go on to consider an exceptionally broad range of issues with chapters on markets and investments,[76] restitution and redistribution,[77] valuation and taxation[78] as well as climate change and natural disasters.[79] Verstappen describes the VGGT as a "global empirical study on the main legal and governance shortages of tenure systems."[80] This broad and interconnected approach makes sense, as the VGGT were initiated and developed by the FAO in order to consolidate their policies in relation to land governance.[81] The public nature of private law is once again reaffirmed with matters of social justice and environmental protection being at the forefront of the Guidelines. In this context, it is envisaged that there is a system of regulation of tenure that promotes sustainable development, and which involves duties and respect for others' rights. The VGGT state:

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74. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *supra* note 71, at 2 ¶ 2.2, 6 ¶ 4.2.

75. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Id*. at 6 ¶ 4.1.

76. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Id*. at at 19-23.

77. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Id*. at 25-27.

78. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Id*. at 30-31.

79. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Id*. at 35-36.

80. Leon Verstappen, *Multilevel Governance of Property Titles in Land*, *in* REGULATORY PROPERTY RIGHTS: THE TRANSFORMING NOTION OF PROPERTY IN TRANSNATIONAL BUSINESS REGULATION 98, 109 (2016).

81. Philip Seufert, *The FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, 10(1) GLOBALIZATIONS 181, 183 (2013).

> All parties should recognize that no tenure right, including private ownership, is absolute. All tenure rights are limited by the rights of others and by measures taken by States necessary for public purposes. Such measures should be determined by law, solely for the purpose of promoting general welfare including environmental protection and consistent with States' human rights obligations. Tenure rights are also balanced by duties. All should respect the long-term protection and sustainable use of land, fisheries and forests.[82]

This paragraph is addressed to "all parties" and not just the States. However, in the remainder of the document, the directions are largely State-focused.[83] This is understandable due to the nature of the VGGT. The onus lies with States to create and improve systems of governance to fulfil the aspirations of the VGGT. Moreover, this speaks to one of the central challenges of property law in a modern context; the actions or inactions of private owners can have the greatest influence on the lives, aspirations and flourishing of others and yet it is the State which primarily has the responsibility for promoting, protecting and fulfilling human rights.

The VGGT also explicitly recognize that governance of land should be embedded in a greater system of values, many of which are shared with the LRRS. They list principles of implementation in the section on "Guiding Principles of Responsible Tenure Governance," which expressly connect land governance with human dignity, non-discrimination, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, rule of law, transparency, accountability, and continuous improvement.[84] Each value is given a short explanation and, under "holistic and sustainable approach," the document recognizes "that natural resources and their uses are interconnected," and adopts "an integrated and sustainable approach to their admin-

82. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *supra* note 71 at 6 ¶ 4.3.

83. There are however still some important acknowledgments of the responsibilities of non-State actors. *See* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Id.* at 6 ¶ 3.2, 19 ¶ 9.1, 20 ¶ 11.7, 23 ¶ 12.12.

84. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, *Id.* at 4-5.

istration."[85] This outlines the fundamental guiding values which are pervasive throughout the whole document.

Again, like the LRRS, the VGGT were drafted through a process of participation. Between 2009 and 2010, extensive multi-stakeholder consultations in the drafting process took place. Almost 700 people from 133 countries participated, representing the public and private sectors, civil society (such as social movements and NGOs), and academics.[86] The VGGT were then unanimously endorsed by the CFS in 2012. Seufert comments that it "is this experiment in global democracy that ascribes a high level of legitimacy and political weight to the Voluntary Guidelines."[87] This process also increases the likelihood of the VGGT being implemented into national legal orders and adhered to by a range of actors.[88]

There is, however, a point of divergence between the two documents. The VGGT arguably reveal the dichotomous nature of property rights to a greater extent than the LRRS. Both have been drafted in the context of the concentration of property rights and the exercise of those rights which have had negative social and environmental effects. The VGGT are then focused on protecting people with "legitimate tenure rights." "Legitimate" here does not mean merely those rights which have been formally recognized by law, but also those which are *socially* legitimate, such as customary and indigenous rights.[89] It is stated:

> States should recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from the infringement of tenure rights of others; and to meet the duties associated with tenure rights.[90]

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85. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *supra* note 71 at 5.

86. David Palmer et al., *Fostering a New Global Consensus: The Voluntary Guidelines on the Governance of Tenure*, 12(1) LAND TENURE J. 19, 30 (2012).

87. Seufert, *supra* note 81 at 184. *See also* David Palmer et al., *Fostering a New Global Consensus: The Voluntary Guidelines on the Governance of Tenure*, 12(1) LAND TENURE J. 19 (2012).

88. Cotula, *supra* note 59, at 118.

89. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, RESPONSIBLE GOVERNANCE OF TENURE AND THE LAW 19 (2016).

90. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *supra* note 71 at 3 ¶ 3.1(1).

This focus on protecting existing rights is due to the context of the large-scale acquisitions mentioned above which have infringed many such rights. As many legitimate tenure rights have not been identified or recognized, there is guidance in the VGGT for how informal tenure and customary tenure rights can be recognised.[91] However, the dominant focus is on those with *rights*. What about the people with no rights?[92] The centre of attention of the document is noted by Verstappen who states that "unlawful occupation as such is clearly not the focus of the Voluntary Guidelines."[93] However, often those without any legitimate rights, recognized either legally or socially, are in the most vulnerable positions, and will be among the most affected by the actions of landlandowners. What should be the responsible governance of tenure in relation to those with no rights? Vulnerable people include subsistence farmers,[94] nomadic pastoralists, indigenous people, gypsy travellers, homeless people, cohabiting partners with no formal right to occupy, those who use land informally or without the correct documentation, children, people who have historically been excluded from the land which is held by others and, crucially for sustainability, future generations.[95]

The VGGT are unclear whether the principle of "consultation and participation" extends to those without legitimate tenure rights. The explanation of this value in the guiding principles states "engaging with and seeking the support of those who, *having legitimate tenure rights*, could be affected by decisions, prior to decisions being taken, and responding to their contributions."[96] This appears to limit consultation only to those with rights whereas under "Rights and Responsibilities Related to Tenure" it is noted:

> States should welcome and facilitate the participation of *users of land, fisheries and forests* in order to be fully involved

91. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Id*. at 11-17.

92. This is recognized in Sofia Monsalve Suarez, *The Recently Adopted Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, *in* RIGHT TO FOOD AND NUTRITION WATCH 2012 37 (2012).

93. Leon Verstappen, *Multilevel Governance of Property Titles in Land*, *in* REGULATORY PROPERTY RIGHTS: THE TRANSFORMING NOTION OF PROPERTY IN TRANSNATIONAL BUSINESS REGULATION 98, 112 (2016).

94. De Schutter, *supra* note 68, at 524.

95. The issue of restitution of ancestral lands was a controversial issue in the drafting of the Guidelines. *See* Seubert, *supra* note 81, 185.

96. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *supra* note 71 at ¶ 3B.6 (emphasis added).

> in a participatory process of tenure governance, inter alia, formulation and implementation of policy and law and decisions on territorial development, as appropriate to the roles of the State and non-state actors, and in line with national law and legislation.[97]

This would include those who lack legitimate tenure rights but nevertheless use the land.

The VGGT do mention, in a small number of instances, that in relation to people who do not have legitimate tenure rights, States should prevent forced evictions which are inconsistent with their existing obligations under national and international law.[98] Further, it is stated:

> Evictions and relocations should not result in individuals being rendered homeless or vulnerable to the violation of human rights. Where those affected are unable to provide for themselves, States should, to the extent that resources permit, take appropriate measures to provide adequate alternative housing, resettlement or access to productive land, fisheries and forests, as the case may be.[99]

These are important provisions. However, it is clear that the focus of the VGGT is the protection and recording of existing legitimate tenure rights. This observation raises the question about the role of protecting tenure rights in promoting the broader values contained in the document. This is also an issue at the centre of the Scottish debates regarding the LRRS and the land reform process generally. What is the location and role of property and its protection within a system of diversified values which is attempting to tackle issues, such as inequality and environmental degradation, in order to support sustainable development? Before exploring that question more fully in section V, we will now consider the features of the Scottish legal system and private law methodology which may limit the potentially transformative effect of these documents.

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97. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY ¶¶ 4.10, 9.7, 12.10 (2012) (emphasis added). *See also id.* at ¶ 9.7 on indigenous and customary tenure systems and ¶ 12.10 on investments involving large-scale transactions.

98. *Id.* at ¶¶ 7.6, 10.6, 16.9 (2012).

99. *Id.* at ¶ 16.9 (2012).

III. BARRIERS TO REFORM IN SCOTLAND

In previous sections, we outlined important common features of the Scottish Government's LRRS and the FAO's VGGT which included: a human rights-based approach to the governance of land; a recognition of the broad consequences and implications the exercise of property rights can have on matters of social justice and environmental protection which requires the regulation of those rights; and an acknowledgement that land rights and their regulation are embedded in a greater system of values, with sustainable development being prominent among those values. We noted that both these documents had been created through participatory processes which enhances their democratic legitimacy and therefore underlines the need to give them due consideration. However, there are barriers in both private law methodology and the Scottish legal system which will inhibit fulfilment of the vision of both of these documents. To implement the vision in these documents, these elements of Scotland's methodology and system need to be reconsidered. Some of these barriers are considered in the following paragraphs.

When undertaking a review of Scottish property law in 2017, Steven quoted Walker from 1985 who noted: "The law of property was rather neglected."[100] Steven is pleased to note that the position has since then been transformed. "Property law today is arguably the engine room of Scots private law scholarship."[101] Steven notes the particular contribution of Reid and Gretton. The former is renowned in Scotland for his work in systematizing the body of Scottish property jurisprudence with *The Law of Property in Scotland*.[102] Both have published widely in matters of Scottish property law. They both also worked as Scottish Law Commissioners on property law projects including abolishing the feudal system as well as reforming the law of title conditions, tenements, and land registration. Due to the neglect which Scottish property law had suffered in the past, much of the recent academic research into, and reform of, property law has been focused on system-building; drawing out principles and aligning jurisprudence into a coherent whole, based on Scotland's primarily Roman law foundations. This work has contributed to maintaining

100. DAVID M. WALKER, THE SCOTTISH JURISTS 420 (1985).

101. Andrew J.M. Steven, *Scottish Property Law 2017*, 1 JURID. REV. 21, 29 (2017).

102. KENNETH G.C. REID, THE LAW OF PROPERTY IN SCOTLAND (1996). This first appeared as Vol. 18 of the Stair Memorial Encyclopaedia in 1993.

Scotland's identity as a Mixed Legal System, separate to and distinct from its English neighbour.[103] However, the methodology applied in this process could be described as a traditional doctrinal methodology which has its adherents in both Common law and Civil law jurisdictions.[104]

Abolishing the feudal system was an important step in this period of reform. Before abolition, although much of the system had been attenuated, the theoretical structure of feudalism remained. As stated in the Scottish Law Commission's *Report on Abolition of the Feudal System*:

> There is still a notional pyramid of interests in land with the Crown, the paramount superior, at the top and the owner of the *domininum utile* at the bottom. Each intermediate level in the pyramid is a separate estate in land, a mid-superiority or *domininum directum*, owned by a person who is a feudal superior in relation to the owner or owners at the level below and a vassal in relation to the owner or owners at the level above. The system is inherently and unnecessarily complex, involving as it does multiple "owners" of the same piece of land.[105]

The Abolition of Feudal Tenure etc. (Scotland) Act 2000 eradicated this archaic system and replaced it with a system of outright landownership. This was a doctrinally revolutionary step which allowed the conceptual structure of Roman law to be applied more fully to immoveable property – extending the concept of the unitary law of property.[106] The conceptual structure applied involves a strict division between personal rights and real rights,[107] with ownership being the main real right in the hierarchy of real rights.[108] The right of ownership is, in principle, abso-

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103. *See* Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5 (2003).

104. *See* Andrew Burrows, *Challenges for Private Law in the Twenty-First Century*, *in* PRIVATE LAW IN THE 21ST CENTURY (2017); Martin Dixon, *A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?*, *in* RESEARCHING PROPERTY LAW (2016); JAN M. SMITS, THE MIND AND METHOD OF THE LEGAL ACADEMIC (2012); Jan M. Smits, *What is Legal Doctrine? On the Aims and Methods of Legal-Doctrinal Research*, *in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE (2017).

105. SCOTTISH LAW COMMISSION, REPORT ON THE ABOLITION OF THE FEUDAL SYSTEM, ¶ 1.9 (1999).

106. REID, *Id.* at 102, at ¶ 1.

107. REID, *Id.* at 102, at ¶ 3 (1996).

108. REID, *supra* note 102, at ¶¶ 4-5 (1996).

lute and exclusive.[109] These are characteristics of the "Rights Paradigm" which have been interrogated in detail by Van der Walt.[110] To the extent that human rights were considered in the abolition of the feudal system, only Art 1, Pro 1 was discussed with regard to paying compensation to superiors who lost rights.[111]

The work of Gretton and Reid was vital work upon which all future research and reform builds. Yet, a divide began to be evident between doctrinal and political law reform in the area of property law. Again Steven, when reviewing the reasons that land law was being reformed in 2002, provided the following list: i) too much of land law is antique and outmoded; ii) too much has been left to common law which is in an unsatisfactory state; iii) some areas are unduly complicated; iv) some late-twentieth century legislation is problematic (like the Land Registration (Scotland) Act 1979); v) before the introduction of the Scottish Parliament, the law reform process was slow; and finally vi) "some are of the view that parts of Scottish land law need change for political reasons."[112] Within this last category, Steven explains:

> There is a reasonably widely held view that debtors need greater protection from mortgage lenders. Likewise, there is also a generally held view that rural land law needs to be overhauled, in particular with regards to access rights and allowing communities to buy the land where they live and work.[113]

Within this collection of reasons, the first five can be collated as doctrinal modifications and the remaining reason is politically motivated reform.

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109. REID, *supra* note 102, at ¶ 195 (1996). Reid notes there are qualifications to the assertion that ownership is absolute and exclusive, as there are, of course, numerous restrictions which exist at common law and in legislation on the exercise of ownership. *See also* WILLIAM M. GORDON & SCOTT WORTLEY, SCOTTISH LAND LAW Vol. 1, ¶¶ 13.01-13-15 (3rd ed. 2009). For a discussion regarding whether these limitations are internal or external to ownership, *see infra* Section IV.D.

110. ANDRE J. VAN DER WALT, PROPERTY IN THE MARGINS 27-41 (2009).

111. SCOTTISH LAW COMMISSION, REPORT ON THE ABOLITION OF THE FEUDAL SYSTEM, ¶¶ 5.65-5.69 (1999)..

112. Andrew J.M. Steven, *Scottish Law in a State of Reform*, J. BUS. L. 177, 178 (2002).

113. *Id.* at 178-79.

This separation between doctrinal and political property law reform has the effect in Scotland that the trends noted in the LRRS and the VGGT will be hampered in their implementation. The LRRS could be seen as an expression of political aspirations, which has little to do with the real scholarly work of private law which is focused on ensuring coherence, certainty and efficiency of the principles, rules and application of property law.[114] The LRRS, VGGT, and reform measures such as the new community rights-to-buy are not seen as affecting the substantive structure of property law, which seemingly remains intact. The hierarchy of rights with ownership, in principle absolute and exclusive, at the top is untouched. To many, documents such as the LRRS and the VGGT will be regarded as not affecting the doctrine of private law and can therefore be safely ignored.

The separation between political and doctrinal property law reform has now found institutional expression after the creation of the Scottish Land Commission. As mentioned above, this Commission was established under the Land Reform (Scotland) Act 2016,[115] and is occupied with reviewing, researching, and recommending changes to, the laws and policies relating to land in Scotland.[116] The Scottish Land Commission's work is underpinned by the LRRS and it has begun to issue a series of Protocols which clarify what is reasonably expected in implementing the LRRS.[117] In its Strategic Plan for 2018-2021, the priority areas for research and reform include measures to bring vacant and derelict land into use for housing, improving the effectiveness of community right-to-buy mechanisms, promoting inclusive decision-making in relation to land, and creating a better functioning system of tenanted agricultural land.[118] These are all areas which have been controversial in the past and are highly politically sensitive. Meanwhile, Scotland's primary law reform body, the Scot-

114. As commented by Malcolm Combe in relation to land reform legislation, "[t]he "bulwark" of Scots property remains secure." Malcolm Combe, *Part 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?*, JURID. REV. 195, 225 (2006).

115. Land Reform (Scotland) Act 2016, (ASP 18) §§ 4-21.

116. *Id.* § 22(1).

117. The first protocol was published in 2019. SCOTTISH LAND COMMISSION, COMMUNITY ENGAGEMENT IN DECISIONS RELATING TO LAND (2019). The Land Commissioners must have regard to the LRRS when exercising their functions. Land Reform (Scotland) Act 2016, (ASP 18) § 22, ¶ (3)(a)(i).

118. SCOTTISH LAND COMMISSION, MAKING MORE OF SCOTLAND'S LAND: OUR STRATEGIC PLAN 2018 TO 2021 13 (2018).

tish Law Commission, is also engaged in property law reform, with recent projects including implied enforcement rights of title conditions,[119] termination of commercial leases,[120] and heritable securities.[121] The LRRS is highly relevant to aspects of these projects, yet within the Scottish Law Commission's publications, there has been little substantive engagement with the principles of the LRRS. Consequently, the work of these two institutions is quite separate despite them both working in the area of property and land law reform. This again can limit the impact of the LRRS due to the lack of integration of the principles into new law reform proposals.

A further barrier to fulfilment of the vision of the LRRS and the VGGT is the lack of incorporation of social, economic and cultural rights into the national legal system. Scotland, unlike South Africa, does not have an all-encompassing constitutional dispensation. In South Africa, the systemic constitutional approach was developed in order to give effect to the new constitutional arrangement which had such wide-ranging implications on all areas of law.[122] By contrast, private lawyers in Scotland are only just starting to appreciate the importance of the incorporation of the civil and political rights of the ECHR. Writing in 2002, Gretton stated:

> To the private lawyer, the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) comes as a shock. It is not legislation of any recognisable form, but rather a set of statements of certain liberal political ideas, of the sort one might expect to see in an election manifesto or in a letter to the editor.[123]

It is an aspect of private law methodology which constructs a rigid division between private and public law, which, up to now has

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119. SCOTTISH LAW COMMISSION, SECTION 53 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003 (2018); SCOTTISH LAW COMMISSION, REPORT ON SECTION 53 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003 (2019). This latter report makes brief mention of the LRRS in ¶ 1.14.

120. SCOTTISH LAW COMMISSION, ASPECTS OF LEASES: TERMINATION (2018).

121. SCOTTISH LAW COMMISSION, HERITABLE SECURITIES: PRE-DEFAULT (2019). Again, this Discussion Paper makes brief mention of the LRRS at ¶ 12.19. Again, this Discussion Paper makes brief mention of the LRRS at ¶ 12.19, note 21.

122. *See infra* Section IV.

123. George L. Gretton, *Property Rights*, *in* HUMAN RIGHTS AND SCOTS LAW 275 (2002).

been difficult to pierce.[124] Indeed, as mentioned above, the focus has been primarily on understanding the effect of Art 1, Pro 1 on property law reform, and this has largely been characterised as a shield against reform.[125]

When discussing the implementation of social, economic, and cultural rights in Scotland, Boyle provocatively asks: "Why would public lawyers concern themselves with the full breadth of economic, social and cultural rights if the domestic system has not incorporated them? Why seek to invoke international instruments in court that have not been incorporated into domestic law?"[126] This query has even more resonance with private lawyers. The lack of direct incorporation of economic, social and cultural rights in Scotland means that, although legislative proposals, government policies and practices may be nested within a broad conception of human rights, if a land reform provision is challenged in court, on the basis of being in contravention with Art 1, Pro 1 of the ECHR, there could not be a direct rebuttal based on the argument that the legislation is contributing to the realization of a right to an adequate standard of living. The argument could only be that a land reform provision is compliant with Art 1, Pro 1 due to being in the "public interest," with social, economic, and cultural rights being used to interpret that requirement.[127]

Nevertheless, Boyle states direct incorporation is only one method of implementation of human rights, which can take many forms including pre-legislative scrutiny of legislation as well as making economic, social and cultural rights part of the everyday

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124. The division between public law and private law is connected to the division between doctrinal and political law reform. Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982): "What were the concerns that created a virtual obsession with separating public and private law, both conceptually and practically, during the nineteenth century? Above all was the effort of orthodox judges and jurists to create a legal science that would sharply separate law from politics."

125. *See supra* Section II.B.

126. Katie Boyle, *The Future of Economic, Social and Cultural Rights in Scotland*, 23 EDIN. L. REV. 110, 110 (2019). *See also* Katie Boyle, *Model of Incorporation and Justiciability for Economic, Social and Cultural Rights*, SCOTTISH HUMAN RIGHTS COMMISSION (Nov. 2018), https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf; KATIE BOYLE, ECONOMIC AND SOCIAL RIGHTS LAW: INCORPORATION, JUSTICIABILITY AND PRINCIPLES OF ADJUDICATION (2020).

127. See McCarthy, *supra* note 16, 232-235.

decision-making of the executive.[128] In relation to land reform, Scotland has made important steps towards this implementation by requiring consideration of social, economic and cultural rights in preparing the LRRS. Consideration of such rights is also present in the work of the Scottish Land Commission.[129] Boyle therefore concludes: "The questions that remain outstanding are not whether ESC rights are justiciable but relate to how to adjudicate these rights in a constitutionally appropriate way in any given context."[130] In other words, economic, social and cultural rights are *already* relevant, but there has not been sufficient attention given to how to mainstream the consideration and implementation of these rights into reform measures, policies and, of course, academic research and legal practice. We will consider how social, economic, and cultural rights may be relevant in a concrete case in section V below.

The ambiguity of the implementation of social, economic, cultural and also environmental rights has been at the core of a recent report to Scotland's First Minister from the Advisory Group on Human Rights Leadership.[131] This report proposes a new framework of human rights implementation with the value of human dignity at its core.[132] The report recommends a new Act of the Scottish Parliament which would not only restate the civil and political rights contained in the Human Rights Act 1998, but also directly incorporate economic, social and cultural rights, including a right to a healthy environment.[133] It is stated that the Act must include an obligation on courts and tribunals to have regard to international law including UN treaties as well as an obligation to read legislation as far as possible in a way which is compatible with the rights contained in the Act.[134] Remedies for

128. Katie Boyle, *The Future of Economic, Social and Cultural Rights in Scotland: Prospects for Meaningful Enforcement*, 23 EDIN. L. REV. 110, 111-12 (2019).

129. *See also* Land Reform (Scotland) Act 2003, (ASP 2) § 98, ¶ 5A, which requires that Ministers have regard to the International Covenant on Economic, Social and Cultural Rights when making decisions under specific sections of that Act. This section was added by the Community Empowerment (Scotland) Act 2015, (ASP 6) sch. 4, ¶ 8, ¶ 6(b).

130. Boyle, *supra* note 128.

131. FIRST MINISTER'S ADVISORY GROUP ON HUMAN RIGHTS LEADERSHIP, RECOMMENDATIONS FOR A NEW HUMAN RIGHTS FRAMEWORK TO IMPROVE PEOPLE'S LIVES, (2018).

132. *Id*. at 8.

133. *Id.* at 32-35.

134. *Id.* at 34.

infringement of human rights are included in the report with both the "declaration of incompatibility" and the "strike down" power being discussed.[135] It is clear then, that a stronger form of justiciability of social, economic, cultural and environmental rights is being recommended. This would change the significant asymmetry in the enforceability of civil and political rights as opposed to social, economic, and cultural rights which currently exists in Scotland. The First Minister has stated that she will set up a taskforce in order to take forward the recommendations in the Report.[136] It is therefore becoming ever more important to consider social, economic, cultural and environmental rights in the constellation of human rights considerations and how this affects reform, research and practice in each individual area of law. With the broad consequences that property law can have, scrutiny of this area of law cannot be excluded.

In order to implement a broader consideration of human rights in the context of property law, and to implement the other elements of the LRRS and VGGT, such as placing property within a system of values, the private law methodology of Scotland requires revision. Indeed, for one trained in the methodology of private law, even if sympathetic to the cause of land reform, it is difficult to know *how* to use and analyze documents such as the LRRS. McCarthy, when writing a blog on the LRRS, states:

> I tend to respond to consultations with my legal academic hat on, meaning that I am using my disciplinary training to identify potential legal problems with the topic of the consultation, rather than giving a personal opinion on whether the Government *should* be trying to do what it's doing. That approach leaves me with little to say on the LRRS since, as far as I can see, it has almost no legal consequences at all.[137]

McCarthy notes that she does not see this as a problem and that clarifying the Government's policy ambitions shines a light on the

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135. *Id.* at 34-35.

136. See announcement made on Dec. 12, 2018: https://firstminister.gov.scot/human-rights-day/)..

137. Frankie McCarthy, *Scotland's Land Rights & Responsibilities Statement – not a legal document*, FRANKIE MCCARTHY, A BLOG (Feb. 26, 2017): https://drfmccarthy.wordpress.com/2017/02/26/scotlands-land-rights-responsibilities-statement-not-a-legal-document/. Combe agrees with McCarthy's analysis. *See* Malcolm Combe, *Land Rights and Responsibilities Statement: A Consultation Response*, MALCOLM COMBE, BASE DRONES (Mar. 9, 2017): https://basedrones.wordpress.com/2017/03/09/land-rights-and-responsibilities-statement-a-consultation-response/.

values of property law. This is a positive step, but the question remains: What is the meaning and import of this expression of values on our approach to property law?[138] Our argument here is that barriers in private law methodology can limit the potential of documents such as the LRRS and the VGGT as well as the capacity of researchers to make use of them. This approach to doctrinal property law is not limited only to Scotland.[139] As commented by Verstappen: "The societal issues surrounding property rights in general and land in particular are much broader than a lawyer with a typical private law background could possibly think."[140]

In this section, we have outlined certain features of private law methodology and the legal system in Scotland, which may limit the implementation of the vision contained in the LRRS and the VGGT. The division between political and doctrinal law reform measures was identified as a feature that avoids interference with the hierarchy of rights and principle of absolute and exclusive ownership. A strict division between public law and private law, and the lack of direct incorporation of social, economic, and cultural rights into the Scottish legal system were also identified as barriers to fulfilment of the aspirations of the LRRS and VGGT. In the next section, we explore the development of the systemic constitutional approach which emerged in South Africa after the end of Apartheid. We argue that the South African experience sheds light on the ongoing process of land reform in Scotland and more broadly how this relates to the regulation of property in the context of sustainability. The development of South Africa's post-Apartheid property law highlights how problematic adherence to these aspects of private law methodology can be when it marginalizes pressing social issues.

IV. DEVELOPMENT OF THE SYSTEMIC CONSTITUTIONAL APPROACH IN SOUTH AFRICA

A. BACKGROUND

Given South Africa's socio-political history, it was clear during the negotiations for a peaceful transition to a new democratic regime that large-scale reforms of the property system would be

138. McCarthy subsequently uses the publication of the LRRS as offering an appropriate moment for reflection on how Art 1, Pro 1 of the ECHR has been used in the context of the land reform debates. *See supra* note 16, at 232-35.

139. *See* VAN DER WALT, *supra* note 52, 18-19.

140. Verstappen, *supra* note 80, at 98.

needed to successfully facilitate meaningful socio-economic transformation.[141] Immediately, issues of land reform, including restitution, redistribution and tenure security, were identified as being of paramount importance in relation to the transformation of the existing property system.[142] These commitments were set out in section 25 of the Constitution of the Republic of South Africa, 1996.[143] However, the vision of section 25 of the Constitution ex-

141. For a succinct overview of the revolutionary nature of the South African Constitution, *see Introduction to the Constitution and the Bill of Rights in* THE BILL OF RIGHTS HANDBOOK 2-7 (2013), and the works cited there.

142. *See e.g.*, Provision of Land and Assistance Act 126 of 1993; Restitution of Land Rights Act 22 of 1994; Land Reform (Labour Tenants) Act 3 of 1996; Extension of Security of Tenure Act 62 of 1997; Land Restitution and Reform Laws Amendment Act 63 of 1997; Land Restitution and Reform Laws Amendment Act 18 of 1998; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. *See also* JUANITA M. PIENAAR, LAND REFORM 173-190 (2014).

143. § 25 of the Constitution of the Republic of South Africa, 1996 is the property clause and reads:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application—
   a. for a public purpose or in the public interest; and
   b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
   a. the current use of the property;
   b. the history of the acquisition and use of the property;
   c. the market value of the property;
   d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
   e. the purpose of the expropriation.
4. For the purposes of this section—
   a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
   b. property is not limited to land.
5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from

tended well beyond land reform. It included all forms of property within its ambit[144] and made clear that all property was held subject to the possibility of constitutionally-valid deprivation.[145] Section 25 thus created the possibility for new and potentially more extensive regulation of property rights in pursuit of constitutional objectives.[146] The Constitution, especially section 25, and its approach to the protection and regulation of property attempted to mediate the tension between the need for change[147] and a need for stability within property law.[148]

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the provisions of this section is in accordance with the provisions of section 36(1).

9. Parliament must enact the legislation referred to in subsection (6).

S. AFR. CONST. § 25, 1996.

144. Textually, § 25, ¶ 4(b) only indicates that "property" is not limited to land, but no definition is provided. However, since then, the Constitutional Court on numerous occasions has taken a generous approach to what will be included in the constitutional notion of property. In *Shoprite Checkers (Pty) Ltd v. Member of the Exec. Council for Econ. Dev., Envtl. Affairs and Tourism, E. Cape and Others* 2015 (6) SA 125 (CC) ¶ 36 (S. Afr.), Froneman, J. stressed that it is necessary to "seek our own constitutional conception of property within the normative framework of the fundamental values and individual rights in the Constitution."

145. In South African law, "deprivation" is the broader term used to refer to all types of regulation imposed on all types of property on the basis of the State's police power, while the narrower term "expropriation" is used to denote the taking away of private property by the state for a public purpose or in the public interest. The two types of State action are authorized by separate constitutional provisions (§ 25, ¶ 1 and § 25, ¶ 2 respectively), but deprivation has been interpreted so widely as to encompass the narrower category of expropriation within its ambit. *See* ANDRE J. VAN DER WALT, CONSTITUTIONAL PROPERTY LAW 190-192 (2011); BJÖRN HOOPS, THE LEGITIMATE JUSTIFICATION OF EXPROPRIATION: A COMPARATIVE LAW AND GOVERNANCE ANALYSIS 375 (2017).

146. This was confirmed by Madlanga, J. in *Daniels v. Scribante and Another* 2017 (4) SA 341 (CC) ¶ 49 (S. Afr.) where the Court held that where tenure security is at stake, both positive and negative obligations are imposed on private landowners to ensure the realization of others' constitutional rights (which includes the right of security of tenure and the right to dignity in the particular matter).

147. In the face of growing political pressure to "open up" property to groups who have previously been excluded based on racially discriminatory policies. *See e.g.*, Theunis Roux, *Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law*, 121 S. AFRICAN L.J. 466, 467 (2004). Underkuffler's characterization of the tension between the "idea of change" and "the idea of property" aptly describes the same tension that exists in South African law. *See* Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015 (2013) ("The core difficulty, I shall argue, is the collision of the idea of property with the idea of change. It is the inability of the Court to intellectually reconcile the incompatibility of the ideas of property and change-indeed, to acknowledge the problem of property and change-that lies at the core of its incoherent takings jurisprudence.").

148. In light of South Africa's commitment of "transformative constitutionalism", there was a commitment to protect existing or vested property rights to stabilize the

Initially, many private law academics were sceptical of the impact of these reforms on private law and preferred to leave it to public law lawyers to carve out "pockets" of reform.[149] These "pockets" allowed for interpretation and application of reform-orientated legislation without affecting the structure and logic of property law,[150] essentially continuing to respect a strict divide drawn between private law and public law.[151] Many significant changes were introduced by legislation, but these pockets of reform were seen to be carved out of "normal" property law – meaning that property law continued to exist in its common law form,[152] but with areas such as the landlord-tenant relationship, minerals, water, environmental regulation, and land use management increasingly regulated through statute.[153] Changes within property law were fairly limited when not introduced by legis-

economy during this time of transition. On this dichotomy, *see* André J. van der Walt, *Normative Pluralism and Anarchy: Reflections on the 2007 Term*, 1 Const. CT. REV. 77, 84-85; 91-92 (2008).

149. VAN DER WALT, *supra* note 7, at 1-2.

150. This development was in part caused by the "dual apex system" that was initially in place in South Africa: the (then newly-created) Constitutional Court would be the highest authority on constitutional matters and the Supreme Court of Appeal would retain its authority over "all other matters." This structure was eventually changed through the Constitution Seventeenth Amendment Act 72 of 2012.

151. Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA Vol. 1,, 11.2 (2nd ed. 2005); S LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 59 (2010). Although the divide formally still exists in South African law, the boundaries are becoming less and less clear in many areas of law. *See* Andre J. van der Walt, *The Public Aspect of Private Property*, 19:3 SA PUB. L. 676, 696-98 (2004); JOHAN VAN DER WALT, THE FUTURE AND FUTURITY OF THE PUBLIC-PRIVATE DISTINCTION IN THE VIEW OF THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS 115-16, 124-133 (2002).

152. *See e.g.*, the detailed overview of legal developments Susan Scott, *Recent Developments in Case Law regarding Neighbour Law and Its Influence on the Concept of Ownership*, 16 STELLENBOSCH L. REV. 351, 351-377 (2005), where nuisance, encroachment, access rights, and the right to a view are set out. From the discussion it is evident that constitutional considerations are of no or little importance to legal developments in these fields. It remains almost exclusively matters of common law (private law). In the context of nuisance caused by "squatters" (Scott's term), Scott merely mentions that while it should be dealt with as a normal nuisance situation, a judge, when making his order, should take heed of the procedural protection offered to illegal occupiers in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

153. *See e.g.*, Rental Housing Act 50 of 1999; Extension of Security of Tenure Act 62 of 1997; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Mineral and Petroleum Resources Development Act 28 of 2002; South African National Water Act 36 of 1998; National Environmental Management Act 107 of 1998.

lation.[154] Many private law specialists engaged with constitutional and legislative reform measures, but they focused on "whether (and how far) established property rights could (and should) be insulated against political changes."[155] This position meant that there was no uniform understanding of what the impact of the Constitution would be on private property rights, nor what "outcome," in terms of the Constitution's influence, was desirable.[156] Moreover, it was not clear how previously non-justiciable values such as equality, dignity or freedom would be incorporated into the established logic of private law doctrine that was primarily aimed at promoting and protecting certainty and efficiency within the system.[157]

Van der Walt extensively argued that the traditional private law approach of the "rights paradigm," with a hierarchy of rights in which ownership is the so-called "trump-all" right,[158] was ill-suited to give effect to a new understanding of constitutionally-protected property rights and what this would mean in the South African context.[159] The hierarchy-of-rights logic (which Scotland and South Africa share) allows for primarily abstract, syllogistic reasoning in property disputes.[160] Consequently, little or no value or attention is given to any relevant contextual factors, such as the historical, economic, social, or political context surrounding a dispute or the personal circumstances of the parties.[161] This ap-

154. André J. van der Walt, *Ownership and Eviction: Constitutional Rights in Private Law*, 9 EDINBURGH L. REV. 32 (2004); André J. van der Walt, *Legal History, Legal Culture and Transformation in a Constitutional Democracy*, 12 FUNDAMINA 1 (2006).

155. VAN DER WALT, *supra* note 7, at 1-2.

156. For a succinct overview of the academic debates at the time, *see* VAN DER WALT, *supra* note 7, at 1-8.

157. *See generally* VAN DER WALT, *supra* note 52, at 27-41 (discussing the doctrinal framework within which property interests are traditionally considered).

158. *Id.*; Andre J. van der Walt, *Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law*, 11 S. AFR. J. ON HUM. RTS. 169 (1995); ANDRE J. VAN DER WALT, PROPERTY AND CONSTITUTION 113-171 (2012).

159. VAN DER WALT, *supra* note 52, at 20 (highlighting the tension between "a moral and political impulse to reform and a cultural or doctrinal tendency to resist or minimise change.").

160. *Id.* at 27-28 (2009).

161. *Id.* Although Van der Walt writes extensively on the position in South African legal doctrine and theory, he points out that the hierarchical ordering of property rights occurs in both common law and civil law jurisdictions. *Id.* at 28. He argues that the features of both systems that allow for this hierarchical approach to property rights stem from socio-political and socio-economic assumptions and rhetoric about

proach to property disputes would not realize any of the transformative outcomes that the Constitution set out to achieve and would eventually undermine the peaceful political settlement and fail to create any real long-term stability and security in society.[162]

This resistance of property law to adapt fundamentally to the challenges posed by the new constitutional dispensation was directly addressed in *Shoprite Checkers v. MEC, Economic Development*.[163] The Constitutional Court had to decide whether liquor licenses constituted "property" for constitutional purposes (and thus were worthy of constitutional protection) and, if liquor licenses did constitute property, whether the regulatory regime change that did away with an entire type of license constituted an arbitrary deprivation of that property.[164] In a somewhat complicated division of the bench, three judgments were written by Justice Froneman, Deputy Chief Justice Moseneke, and Justice Madlanga, respectively, which speaks to the contentious relationship between property and regulation.[165] At the heart of all three judgments is the question of how economic interests fit into a

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the importance of property (both for individuals and for society) rather than from legal tradition or doctrine. *Id*.

162. *See* VAN DER WALT, *supra* note 52, at 6 (arguing that the peaceful political settlement in South Africa can only bring lasting security and stability if accompanied by significant social and economic transformation).

163. *Shoprite Checkers (Pty) Ltd. v. Member of the Exec. Council for Econ. Dev., Envtl. Affairs and Tourism, E. Cape and Others* 2015 (6) SA 125 (CC) at ¶ 34 (S. Afr.) (acknowledging "the contested nature of our country's conversation about the protection of property and the potential danger this holds for the success of our constitutional project.") [hereafter *Shoprite Checkers v. MEC, Economic Development*]. Van der Sijde, *supra* note 8, at 130, 138, 208-09, 280-82; *Reconsidering the Relationship Between Property and Regulation: A Systemic Constitutional Approach,* 130, 138, 208-09, 280-82 (2015) (unpublished LL.D. dissertation, Stellenbosch University) (highlighting the tension between traditional property rights and regulation of the economy in the public interest).

164. *Shoprite Checkers v. MEC, Economic Development at* ¶ 1.

165. The matter was heard by eleven justices in total. The majority on the legal question of whether liquor licenses constituted "property" that stood to be protected by § 25 of the Constitution was made up of the judgments of Froneman, J. (with three justices concurring) and Madlanga, J. (with one justice concurring). Madlanga. J.'s judgment agrees that liquor licenses are property but disagreed with Froneman, J. on whether the regulatory regime change amounted to an arbitrary deprivation. *Shoprite Checkers v. MEC, Economic Development* at ¶ 5. *Id.* The Moseneke, D.C.J. judgment (with four justices concurring) disagrees that the interest amounts to a property right, but agrees that the regulatory measure passes constitutional muster. *Shoprite Checkers (Pty) Ltd. v. Member of the Exec. Council for Econ. Dev., Envtl. Affairs and Tourism, E. Cape and Others* 2015 (6) SA 125 (CC) at ¶ 5 (S. Afr.).

democratic legal system that is committed to promoting dignity, equality, and freedom. Moseneke, D.C.J., in his concurrence, questioned whether certain economic interests ought to be included in the definition of "property" for purposes of section 25. In fact, Moseneke, D.C.J. perfectly captured the problem that arises when the traditional view of property is protected too strongly in times of transformation. He stated:

> If a liquor licence is seen as "property" then a strong entitlement is created in the hands of the licence holder. This would tip the scales and arguably diminish the ability of the Legislature to effectively regulate an industry where regulation is of paramount importance. Whether a liquor licence should constitute "property" should never be decided in a vacuum. The form that the permission and its regulation takes is always contingent on changing norms and policy positions. These norms would include where, when and what alcohol may be traded.[166]

Moseneke, D.C.J. is expressing the concern that when an interest is viewed as "property," it can become insulated against (even legitimate) democratic control, and a fear that a vested interest can only be regulated in light of "changing norms and policy positions" under the most radical of circumstances.[167] Even then, an interference with the vested interest will have to be justified and likely will be interpreted to interfere as little as possible with the rights of the owners. While this strong position of protection safeguards an individual against arbitrary government action, it can make property rights unresponsive to democratic change.[168]

The purpose of section 25(1) was to make sure that all property is responsive to reform measures,[169] although it has not always succeeded in doing so.[170] The main judgment of Froneman,

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166. *Id.* at ¶ 120 (Mosenake, D.C.J., concurring).

167. *Shoprite Checkers v. MEC, Economic Development at* ¶¶ 115, 120, 125 (Moseneke, D.C.J., concurring).

168. *See* Van der Sijde, *supra* note 8, at 204-08, 280-84 (2015).

169. For a detailed discussion on the purpose(s) of the property clause in the South African Constitution, *see* VAN DER WALT, *supra* note 145, at 16-55.

170. Consider, for instance, *Betta Eiendomme (Pty) Ltd v. Ekple-Epoh* 2000 (4) SA 468 (W) 475 ¶ 10 (S. Afr.) where Flemming, D.P.J. held that:

> [T]he right of ownership as recognised before the Constitution has not been affected by the Constitution. Compare s 39(3) of the Constitution. No necessity arises to restrict rights of an owner against an illegal occupier to "promote the values that underlie" the Constitution or to "promote the spirit purport and objects of the Bill of Rights". . . . Similar to the inflatable ball, ownership still re-

J. in *Shoprite* takes the view that if an appropriate balance cannot be struck between stability and reform, it would endanger the ultimate success of the entire peaceful democratic transition.[171] Froneman, J. held:

> The question of property is fiercely contested in South African society. There is, as yet, little common ground on how we conceive of property under section 25 of the Constitution, why we should do so, and what purpose the protection of property should serve. *This exposes a potential fault line that may threaten our constitutional project.* This judgment suggests that our evolving conversation on this issue should continue to seek our conception of property within the framework of values and individual rights in the Constitution.[172]

And later:

> All property is subject to the law and regulation by the law. In that wide sense, the holding of all property is dependent on state "largesse". The intensity of regulation may depend on the purpose for which the property is held and the purpose for which regulation is considered necessary. The purpose for which property is held may have a close relationship with a person's fundamental rights. That may, in general, require greater judicial scrutiny of its regulation. A more tenuous link may justify less intrusion.[173]

The majority of the Court concluded that section 25 of the Constitution could be applied in a context-sensitive manner that avoids the pitfalls of overinflating the property concept and shielding it too carefully from regulation.[174] It thus recognized liquor licenses as property (setting the scene for other licenses and similar economic interests to be recognised and protected as property) and scrutinized whether the regulatory regime change

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flates to its full content as and when any burden such as the rights created by tenancy falls away. In the absence of legislative interference, postulating that nothing more is known than that the plaintiff is owner and that the defendant is in possession, it is right and proper that an owner be granted an ejectment order against someone who has no business interfering with the possession.

171. *Shoprite Checkers v. ME, Economic Development* at ¶ 4.

172. *Id.* (emphasis added).

173. *Id.* at ¶. 60.

174. *Id.* at ¶¶ 46-51.

amounted to an arbitrary deprivation of property.[175] The majority found that the regulation passed constitutional muster.[176] It is striking how the main, concurring, and dissenting judgments in *Shoprite Checkers v MEC, Economic Development* are concerned with how property and its regulation fit into the bigger constitutional legal system.[177] The main and concurring judgments also illustrate two potential responses to the fear that existing protection for established or vested rights may undermine democratic reform initiatives.[178] Thus, the dispute perfectly captured the systemic importance of the relationship between our understanding of property and the role of democratic control over property. If the effect of the constitutional protection of an entitlement as "property" is to shield it from legitimate State control, the effect is a skewed concept that unjustifiably prioritizes private interests above the public interest.[179]

B. TWO SENSES OF SUSTAINABILITY

Addressing the role and importance of property within a constitutional legal order in South Africa is linked to sustainability in two senses. Firstly, sustainability refers to the continuation of the legitimacy of the property system within the broader constitutional legal system.[180] Due to the historical, socio-economic, and political context in South Africa, for the property regime to be "sustainable," it is crucial that inequality and other socio-economic challenges be addressed.[181] The need for real transfor-

175. *Id.* at ¶¶ 70, 83 (assuming diamond dealer licenses were property for constitutional purposes*); S. Afr. Diamond Producers Org. v. Minister of Minerals and Energy N.O. and Others* 2017 (6) SA 331 (CC) at ¶ 57 (S. Afr.).

176. *Id.* at ¶¶ 83, 90.

177. *Shoprite Checkers v. MEC, Economic Development* at ¶ 4, 103 (Moseneke, D.C.J., concurring), 138-39 (Madlanga, J., dissenting).

178. Van der Sijde, *supra* note 8, at 95, 130, 204-08, 280-84, 291-93, 299; *see also Shoprite Checkers v. MEC, Economic Development at* ¶¶ 46, 103 (Moseneke, D.C.J., concurring).

179. VAN DER WALT, *supra* note 52, at 212-13.

180. Here, "legitimacy" refers to the enhanced democratic legitimacy provided through participatory policy-making mentioned above, which focuses on procedural legitimacy (*see supra* Sections II.B and II.C above) and substantive legitimacy, in the sense that the outcomes of the transformative process match the goals of the transformation. It touches on some aspects of John Rawls' concept of political legitimacy as it has been developed in, for example, JOHN RAWLS, *Introduction to the Paperback Edition*, *in* POLITICAL LIBERALISM xxxv-lx; (1996); JOHN RAWLS, POLITICAL LIBERALISM 372-439 (1993); JOHN RAWLS, THE IDEA OF PUBLIC REASON REVISITED (1971).

181. VAN DER WALT, *supra* note 52, at 6.

mation remains evident; without actual social and economic transformation that provides tangible benefits to the poor and marginalized, the system will become increasingly unstable and lose any claim to legitimacy.[182] For example, if the pressure of inequality becomes too great, it may lead to social unrest or, in extreme cases, even civil war.[183] If the resistance to transformation is institutionalized (as a stand-off between a reform-orientated parliament and a conservative/anti-reform judiciary), it may lead to constitutional amendments that lessen existing constitutional protection.[184] This transformation will necessarily require some degree of short-term instability in the context of existing property rights, but without the concomitant upheaval that results from genuine doctrinal, theoretical, and methodological changes needed to reflect and respond to the reform measures, no real or sustained transformation is possible.[185] The commitment to transformative constitutionalism remains an on-going challenge that straddles both political debate and legal reform.[186]

Most recently, political engagement has focused on whether transformation of landholding patterns has been slowed down by the demand for compensation when the State seeks to expropriate

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182. *Id*. at 220.

183. Consider for instance the devastating result of the Marikana miners protesting the (in their view unfair) allocation of the extraordinary wealth created by mining in South Africa where forty-four people were killed. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 46-80 (2014) characterizes the Marikana massacre as a "distributional conflict" that arose from the vast difference between the wretched living conditions of the workers and the excessive profits taken by Lonmin Plc.

184. Consider for example the "long and bitter struggle (1950-1978) between the Indian parliament and the judiciary" regarding the property clause which resulted in its removal from the section of the Constitution dealing with fundamental rights, and saw it replaced with a much lesser form of protection for property (merely stating that deprivation of property shall not be effected by administrative decree) in a different section of the Indian Constitution 1950. VAN DER WALT, *supra* note 7, at 7, note 7.

185. VAN DER WALT, *supra* note 52, at 4-6 (discussing theories of change without disturbing existing property rights and the need for precisely such disturbance in order to ensure that the new political order obtains legitimacy).

186. The term "transformative constitutionalism" was first used by Karl Klare as shorthand for South Africa's commitment to using the law to transform society. *See* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 150 (1998), where it is explained that "transformative constitutionalism" means the "long term project of constitutional enactment, interpretation, and enforcement committed . . . to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." *See also* Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. ON HUM. RTS. 403, 404 (2010).

land.[187] This debate shows that the exact scope and extent of reform measures that is required to create an equitable and sustainable legal system is not decided in a one-off manner; rather, it is a highly dynamic and contextual process that continuously evaluates whether the property system is producing outcomes that are in line with the values of the broader constitutional legal system.

Secondly, South Africa is also actively engaging in creating a legal framework to promote and facilitate sustainable development.[188] Pressing environmental concerns have come to the forefront in South African property law and demand attention concurrently with socio-economic transformation initiatives. With national and international commitments to sustainable development, South Africa can hardly afford to wait to resolve its Apartheid-inherited challenges regarding inequality before responding to the environmental crisis. Sustainability, in this context (which is perhaps more familiar), refers to meeting the needs of the present without compromising the ability of future generations to meet their own needs.[189] South Africa's vision of sustainable development is stated as follows:

> South Africa aspires to be a sustainable, economically prosperous and self-reliant nation state that safeguards its democracy by meeting the fundamental human needs of its people, by managing its limited ecological resources responsibly for current and future generations, and by advancing efficient and effective integrated planning and governance through national, regional and global collaboration.[190]

Achieving sustainability in both respects touches on the theoretical and methodological shifts needed in private law doctrine to support large-scale transformation. Thus, the next section dis-

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187. *See e.g.*, Nkanyiso Sibanda, *Amending Section 25 of the South African Constitution to Allow for Expropriation of Land Without Compensation* 35 S. AFRICAN J. ON HUM. RTS., 129-146 (2019) for an overview of the continuing nature of the political and legal engagement with the land reform process.

188. South Africa has adopted progressive environmental legislation in line with its constitutional obligation in § 24 of the Constitution, that guarantees the right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the benefit of present and future generations.

189. This definition being adapted from the definition of sustainable development in WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 8 (1987).

190. DEP'T OF ENV'T AFF. & TOURISM, PEOPLE-PLANET-PROSPERITY: A NATIONAL FRAMEWORK FOR SUSTAINABLE DEVELOPMENT IN SOUTH AFRICA 8 (2008).

cusses the most influential example in South Africa of such a shift. Van der Walt's theory regarding the modest systemic position of property rights shows the dynamic nature of the property system. Moreover, it offers a useful theoretical and methodological framework in which to situate property rights vis-à-vis other rights and interests, in a manner that supports and promotes property rights' responsiveness to democratic reforms.

C. THE MODEST SYSTEMIC STATUS OF PROPERTY RIGHTS

Van der Walt, in his seminal article concerning the limited systemic role that property rights play in the legal system, explores the appropriate place of property in the constitutional context and develops a view of property's role in relation to the right to "life, dignity, equality, free movement, free speech or assembly."[191] His theory is both descriptive and normative, showing that in case law, non-property rights are often prioritized above property rights, but that this prioritization is justifiable in light of the social or democratic importance of the non-property right.[192] Thus, there are important systemic, constitutional reasons for this structure of prioritization.[193]

According to Van der Walt's theory, the pre-eminence of property rights is not always justifiable or even appropriate despite property's esteemed status as protecting individual liberty.[194] Non-property rights should be protected in their own right where possible, rather than doing so through property rights.[195] This approach counteracts an "over-inflation" of the property notion.[196] When property is allegedly protected to at least partially guarantee or protect other non-property rights, the importance of property protection becomes overemphasized.[197] In a legal system, the institution of private property will often clash with the promotion of other rights, objectives or values, and property

191. VAN DE Walt, *supra* note 6, 27-29.

192. *Id*. at 29-30

193. *See id*., where it is argued that in certain cases property rights yield (and in fact ought to yield) to other, non-property constitutional rights, because of the "systemic importance" of the non-property right(s).

194. *Id.* 32-33.

195. *Id*. at 31.

196. *Id*. at 25.

197. *See id*. at 34-35 (responding to James W. Ely's contention in JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2nd ed. 1998)).

rights may have to give way to systemically more important rights, objectives or values.[198] Van der Walt's analysis specifically deals with the right to life, human dignity, equality,[199] free speech, and assembly rights, and evaluates the role of property in relation to these fundamentally important human rights.[200] He shows that the methodology employed is often not one of balancing, but rather evaluating the role and purpose of each right, and protecting these rights in relation to the fundamental values of the legal system.[201] Van der Walt concludes that:

> [P]roperty rights are not the condition on which democracy depends; instead, they are circumscribed, defined, by the demands of living in a democratic society – the structure of our democracy is the condition for and the guarantee of property rights. Protecting property rights is a legitimate objective of the legal order, but relative to the primary norms that prescribe how we want to live in society it is a systemically modest one.[202]

Van der Walt's "modest systemic status" approach fits in neatly with the work he had done previously on the development of the unity of the legal system.[203] The "single-system-of-law" principle was first set out by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*[204] when the Court stated: "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[205]

In this case, Chaskalson P., writing for the full bench, had to address the question of the courts' powers to review (and possibly set aside) the decision of the President of the country to bring

198. *Id.* at 43.

199. These three rights are the so-called "immutable rights" in the South African Constitution. *See id*. at 45.

200. *Id.* at 62 (categorizing these rights as "other constitutionally stronger non-property rights.").

201. *See id*. at 51.

202. *Id*. at 102.

203. ANDRE J. VAN DER WALT, PROPERTY AND CONSTITUTION 19-184 (2012).

204. *Pharm. Mfr. Ass'n of S. Afr. v. In re The President of the Republic of S. Afr.* 2000 (2) SA 674 (CC) at 36-44(S. Afr.).

205. *Id.* at 44.

democratically-enacted legislation into force.[206] To found the jurisdiction of the Constitutional Court, Chaskalson P. had to address the following contention: if the question was whether the President acted *ultra vires* by signing into force an Act of Parliament before the accompanying regulations were ready, that would render the finding by the court *a quo* a common law finding, since the doctrine of *ultra vires* already existed under the common law, long before the dawn of the new constitutional era in South Africa.[207]

Chaskalson P. refused to accept the argument that grounds of review which existed under the common law would continue to exist separate and distinct from the Constitution.[208] He held that all exercises of public power were subject to the Constitution, which includes the doctrine of legality (and concomitantly the prohibition against *ultra vires* actions) and therefore constituted a "constitutional matter" for jurisdictional purposes.[209] Thus, while the case dealt with the exercise of public power and judicial review, it had special implications for the development of property law in the constitutional era because it too was an area of law where many citizens, lawyers, and judges would have preferred for parts of the common law to continue to exist "separate and distinct" from the influences of the Constitution.[210]

This judgment was the impetus for a complete re-evaluation of how different areas of law would be affected by the transforma-

206. *Id.* at 1-2.

207. *Id.* at 14-21. This was the approach of the Supreme Court of Appeal (SCA) in an earlier decision, *Commissioner of Customs and Excise v. Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v. Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA) (S. Afr.), wherein the SCA found it "unnecessary" to refer to the provisions of the Interim Constitution of the Republic of South Africa 200 of 1993 (which was applicable at the time) because the common law concept of judicial review was sufficient reason to set the particular decision aside. *See Pharm. Mfr. Ass'n of S. Afr. v. In re The President of the Republic of S. Afr.* 2000 (2) SA 674 (CC) at 27-33. Finally, it should be noted that, at the time that this case was before the Court, South Africa still endorsed a dual-apex system of courts, which meant that the Constitutional Court only had jurisdiction over constitutional matters, while the Supreme Court of Appeal remained the highest court of appeal over "other," notably common law, matters. *See supra* note 150 (stating that this structure was abandoned through constitutional amendment in the Constitution Seventeenth Amendment Act 72 of 2012).

208. *Pharm. Mfr. Ass'n of S. Afr. v. In re The President of the Republic of S. Afr.* 2000 (2) SA 674 (CC) at 36-44 (S. Afr.).

209. *Id.* at 14-20.

210. *Id.* at 36-44.

tive power of the Constitution. According to Van der Walt, what became known as "the single-system-of-law principle" had an important impact on two aspects of South African law.[211] First, it clarified the hierarchy between the various sources of law by making all sources of law fully subject to the Constitution.[212] Second, the single-system-of-law principle also "shifted the debate" when it came to addressing the conflict between reform and protection of the property regime.[213] Thus, the binary mind-set of either reforming property rights or protecting them was done away with. Instead, both the protection of existing property rights and reform initiatives had to promote the same objective; the advancement of the spirit, purport, and objectives of the Bill of Rights.[214]

Van der Walt's modest systemic status theory cautions against placing property rights in an undue position of primacy within the legal system.[215] He shows that both descriptively and normatively, there are situations where the protection of property rights is a secondary concern, and is only allowed to the extent that the primary non-property right allows for it. These scenarios are not exceptions, but instead point towards a more appropriate understanding of the role and function of property rights in the legal system.

D. A SYSTEMIC CONSTITUTIONAL APPROACH TO PROPERTY AND REGULATION

Building on Van der Walt's work on the modest systemic status of property rights, together with his work on the single-system-of-law principle,[216] Van der Sijde argues for the reconsideration of the relationship between property and regulation. This reconsideration is necessitated by the finding that the two existing theoretical positions in private law fail to explain adequately the nature of limitations placed on ownership in a constitutional context.[217] In South Africa's pre-constitutional private law, the limitation or qualification of an owner's rights by way of regulatory measures imposed through statute or the common law were

211. VAN DER WALT, *supra* note 7, at 19-21.
212. *Id.* at 20.
213. *Id.*
214. *Id.* at 19-21.
215. Van der Walt, *supra* note 6, at 26-27.
216. VAN DER WALT, *supra* note 7, at 19-24.
217. Van der Sijde, *supra* note 8, at 87-92.

understood as either inherent or external to the concept of ownership.[218] An absolutist view of ownership as the fullest, most complete, property right, is conceptualised as a natural, pre-social right that is unlimited in principle.[219] Limitations are imposed in practice, but they are "external and temporary interferences with an otherwise unlimited right" and the expectation is that the right will revert to its full, unregulated, unlimited form in time.[220] In terms of the inherent-limitation view, at least some limitations are inherent to the individual entitlement, and ownership does not exist in a truly absolute form in practice or in theory.[221]

This inherent/external question regarding the nature of limitations is discussed in private law theory because of the underlying assumptions and logic of the hierarchy of rights that is central to the Roman Dutch private law system.[222] In Scotland, although the internal/external question has not been explored in detail, the external limitation view is the one that is currently most prevalent.[223] However, both existing private law theories re-

218. VAN DER WALT, *supra* note 52, at 29-32.

219. For an overview of the different meanings of "absoluteness" in South African law, *see* Andre J. van der Walt & Priviledge Dhliwayo, *The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis*, 134 S.A.L.J. 34, 49 (2017).

220. Van der Sijde, *supra* note 8, at 11-12. This view is often explained by using the metaphor of an inflatable balloon that can temporarily withstand an interference, but will revert to its full, unlimited form in due course. *See Betta Eidendomme Pty. Ltd. v. Ekple-Epoh 2000* (4) SA 468 (W) at 475 (S. Afr.) (using this metaphor to explain the doctrinal view of ownership even after the 1996 Constitution had come into effect). This debate is analogous to the debate in U.S. scholarship regarding whether there is an essential core to property and the extent to which this core is or should be subject to regulation. *See* Katrina M. Wyman, *The New Essentialism in Property*, 9 J. L. ANALYSIS 183 (2018). Our thanks to Prof. John Lovett for bringing the similarities between these debates to our attention.

221. Since § 25, ¶ 1 of the Constitution clearly makes all property subject to lawful, legitimate ("non-arbitrary") State action, the absolutist view has become theoretically unsustainable in South African law, and property is treated as being inherently limited by the potential of valid deprivation (by the State). See for instance the remarks by the Constitutional Court to this effect in *Reflect-All 1025 CC and Others v. MEC for Public Transport, Roads and Works, Gauteng Provincial Gov't and Another* 2009 (6) SA 391 (CC) ¶ 31 (S. Afr.) ("property rights under our constitutional dispensation cannot be properly understood outside its historical context, formulation and social framework") and ¶ 34 ("However, property rights in our new constitutional democracy are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes.")

222. Van der Sijde, *supra* note 8, at 67-68, 87-92, 149-150; Van der Walt, *supra* note 6; VAN DER WALT, *supra* note 152, at 29-31; Scott, *supra* note 152..

223. WILLIAM M. GORDON & SCOTT WORTLEY, SCOTTISH LAND LAW Vol. 2, ¶ 29.14 (3rd ed. 2020).

garding limitation only deal with property rights as individual entitlements, and fail to address the systemic role and purpose of limitations.[224] The protection, or inversely, the limitation, of individual entitlements is only one aspect of the functioning of the system of private property.[225] The focus on individual entitlements can obscure other considerations, especially in a time of large-scale or fundamental transformation. Therefore, neither of these approaches is particularly useful when transformation of the larger system and its values is ongoing. Van der Sijde thus proposes a "systemic constitutional approach" to the regulation of property rights that moves away from focusing on the inherent/external nature of limitations and instead, explores the important systemic purpose of regulation.[226] In this view, regulation (or limitation) is not seen as inherent or external to an individual entitlement, but as inherently part of the constitutional legal system. Accordingly, both property rights and limitations exist together within the larger legal system as two components of the bigger system that work together to ensure that the system can function effectively. This amounts to a facilitative view of the relationship between property and regulation. A sustainable property system can be achieved through regulation that promotes and protects the values of the broader legal system.[227]

Approaching the issue of democratically mandated new or increased regulation of property from this systemic constitutional point of departure allows for a more nuanced deliberation to take place. As Freyfogle points out: "Property's social and moral complexities have always existed, even when covered up. Surely an open embrace of them can yield better outcomes for all."[228] The value of acknowledging property's social and moral complexities within its broader legal and socio-political context was evident in

224. Van der Sijde, *supra* note 8, at 87-92.

225. *Id.* at 173.

226. Van der Sijde, *supra* note 8, at 18-22, 288-296.

227. Van der Sijde, *supra* note 8, at 151, 172-173, 288-296. *See also* JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 141 (2000); Eric T. Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430, 430-454 (2013) (discussing the idea of using property rights to promote human flourishing specifically with reference to the South African context.) A great deal of work on the development of human flourishing as justification for private property has also been done by GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (2018).

228. Eric T. Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430, 453 (2013).

the 2017 decision of the South African Constitutional Court in *Daniels v. Scribante.*[229] In this case, the Court was asked to give effect to a previously marginalized, protected-occupier's rights in a situation where the occupier's rights ran contrary to a landowner's rights.[230] Ms. Daniels was a single mother who had lived in a small dwelling for sixteen years on a farm owned by Chardonne Properties CC.[231] The dwelling lacked basic amenities and Ms. Daniels sought to improve the dwelling by installing an indoor water supply, a washbasin, a second window and a ceiling.[232] As the Court observed, these were by no means luxury improvements, and Ms. Daniels was willing to carry the cost of the improvements.[233] The company owning the farm prevented Ms. Daniels from completing the improvements.[234] Consequently, Ms. Daniels approached the Court for a declaration to the effect that her statutory right to reside includes a right to make improvements to the dwelling.[235]

Instead of merely balancing the competing interests, or starting with determining the rights of the owner (as would be the case when either an absolute or inherently limited approach to ownership is adopted),[236] the Court first set out the social, politi-

229. 2017 (4) SA 341 (CC) (S. Afr.). The applicant, Ms. Daniels, is a protected occupier in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). ESTA forms part of the land reform program in South Africa that aims to improve precarious tenure for farm workers and their families. For a helpful summary of the facts and broader implications of the case, *see* Juanita M. Pienaar et al., *Land matters and rural development*, 33 S. AFRICAN PUB. L. 1, 18-27 (2018); Nkanyiso Sibanda, *Amending Section 25 of the South African Constitution to Allow for Expropriation of Land Without Compensation*, 35 S. AFRICAN J. HUM. RTS. 129, 139-142 (2019). For a more critical discussion of the case, *see e.g.*, Ernst J. Marais & Gustav Muller, *The Right of an ESTA Occupier to Make Improvements Without an Owner's Permission after Daniels*, 135 S. AFRICAN L. J. 767 (2018) and the response to Marais and Muller by Dennis M. Davis, *The Right of an ESTA Occupier to Make Improvements Without an Owner's Permission After Daniels: a Different Perspective*, 136 S. AFRICAN L. J. 420, 420-432 (2019).

230. *Daniels v. Scribante and Another* 2017 (4) SA 341 (CC) ¶ 11 (S. Afr.).

231. *Id.* at ¶¶ 4-7.

232. *Id.* at ¶¶ 4-7. It was not contested that in its unimproved condition, the dwelling was not suitable for habitation and constituted an infringement of Ms. Daniels and her children's rights to dignity.

233. *Id.* at ¶¶ 7-8.

234. *Id.* at ¶ 9.

235. *Id.* at ¶ 9-10.

236. As discussed earlier, both of these approaches to ownership, while potentially yielding very different outcomes in regulation disputes, start with ownership at the front and center of a property dispute.

cal and historical context that led to the reform-orientated legislation that afforded Ms. Daniels the right to reside.[237] The Court sought to establish the scope and content of the rights of the marginalized rights-holder, Ms. Daniels, whose rights previously would have been subordinated to ownership in the rights hierarchy.[238]

The Court held that the Extension of Security of Tenure Act 1997 (ESTA) was enacted to reform tenure that was legally insecure as a result of past racially discriminatory laws or practices.[239] ESTA should be interpreted to transform, in a tangible and substantial way, the position of people in a situation like that of Ms. Daniels. Thus, in a situation where the legislation is not clear regarding the rights and obligations of the protected occupier, purposive interpretation is appropriate to give effect to the transformational aims of the legislation.[240] Consequently, the Court was willing to accept that the relevant statutory provisions should be interpreted to include the right to make improvements.[241]

The Court then sought to place the owner's right in an appropriate context. Owners of private property are not expected to take on the responsibilities of the state by upgrading dilapidated housing; however, they could not prevent lawful occupiers from effecting these improvements themselves.[242] There is no justifiable reason for owners to have such a power as an incident of their ownership right.[243]

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237. Both the judgment of Madlanga, J. (first judgment) and Froneman, J. (second concurring judgment) took unusual care to set out the historical context that led to the applicant's precarious situation. *See Daniels v. Scribante and Another* 2017 (4) SA 341 (CC) ¶¶ 1-4, 14-23, 109-132.

238. Consider Madlanga, J.'s framing of the issues before the court, with its focus on the parameters of the rights of the occupier (Ms. Daniels). *See id.* at ¶ 11.

239. § 25(6) of the Constitution mandates the creation of transformation-orientated legislation such as ESTA. *See Daniels v. Scribante and Another* 2017 (4) SA 341 (CC) ¶ 13.

240. *Id.* at ¶¶ 23-26.

241. *Id.* at ¶¶ 57, 71.

242. Insofar as the legislation made provision for an occupier to be compensated for improvements upon departure, the Court held that this was only a possibility, not a certainty, and a cost order would be subject to judicial oversight to ensure a fair and equitable balance between the parties. *Id.* at ¶¶ 37-58.

243. The Court briefly refers to the test in § 36 of the Constitution, the limitations clause, which states that the rights in the Bill of Rights may only be limited by law of general application to the extent that the limitation is "reasonable and justifiable in

Finally, the Court evaluated how best to give effect to the competing constitutional commitments of the lawful occupier's right to dignity and security of tenure vis-à-vis the landowner's right to exclude.[244] Even if there was a right to improve the property, it could be made subject to the landowner's permission and the landowner, by virtue of the right to exclude, could have the final say over which contractors (if any) could be used, and when such third parties may gain access to the property.[245] The Court held that the consent of the landowner is not required, but declared that there should be meaningful engagement by the occupier with the owner to reconcile the rights and interests of the parties involved.[246] This interpretation strengthened the otherwise weak bargaining power of the occupier, while recognizing that no one may exercise their right in total disregard of another that stands to be affected by it. The owner can therefore still approach the Court for protection of their property right if the occupier does not seek genuine engagement to decide when and in what manner the improvements should be made.[247] The Court's approach to the interpretation of statutory property rights resulted in strong, meaningful protection of the protected occupier's dignity and security of tenure, and implemented genuine reform as envisioned by the relevant legislation.[248]

In 2018, the North Gauteng High Court, Pretoria, adopted a similar type of approach in investigating a community's unique ties to their land, acknowledging and valuing interests in relation to land that previously would not have been taken into account.[249] The case dealt with an Australian mining company's bid to obtain a license to mine titanium in the Umgungundlovu area in South Africa where a community of over 600 people had lived for many generations.[250] Beyond recognizing the burial grounds of the community's ancestors as worthy of legal protection, the Court acknowledged the strong character of support and cooperation that existed within the community, and recognized the impact the

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an open and democratic society based on human dignity, equality and freedom." *Id.* at ¶ 160.

244. *Id.* at ¶¶ 33-36, 54

245. *Id.* at ¶¶ 59-60.

246. *Id.* at ¶¶ 59-65.

247. *Id.* at ¶ 65.

248. Extension of Security of Tenure Act 62 of 1997.

249. *Baleni and Others v. Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) ¶¶ 7, 13, 15-17 (S. Afr.).

250. *Id.* at ¶¶ 7, 16-20.

mining operations would have on the social fabric of the community.[251] The Court ordered that full and informed consent from the community must be obtained before the Minister of Mineral Resources could grant a mining right, thus ensuring that the community is empowered to decide which interests in their land they wish to prioritize.[252] The basis for the Court's order was its findings regarding the relationship between the Mineral and Petroleum Resources Development Act 28 of 2002 (which merely requires consultation with the community) and the Interim Protection of Informal Land Rights Act 31 of 1996 (which requires the consent of the community), both of which were applicable to the dispute.[253] The Court held that the two Acts must be read together, and that it would best give effect to the purpose of the Interim Protection of Informal Land Rights Act to protect informal rights of customary communities by giving the community the right to decide about "what happens with their land."[254] By requiring consent instead of mere consultation, the Court significantly strengthened the position and the rights of customary communities and recognized their close ties to their land in a real and meaningful manner.

To summarize, private property effectively requires at least some forms of regulation to exist.[255] Property does not and cannot function in a "regulation free" zone.[256] The question then becomes what the purpose of regulation is, what objectives it seeks to promote and what this means for the position of property rights in the legal system. Importantly, regulation is more than just the question of the limitation of an individual right or entitlement; it is a mechanism through which the broader goals, values, and objectives of the entire legal system are promoted and unwanted systemic effects, such as extreme wealth disparity or environmental degradation, can be minimized. Understanding regulation through the lens of the systemic constitutional approach highlights the important function that regulation fulfils within the

251. *Id.* at ¶¶ 13-18.

252. *Id.* at ¶ 84.

253. *Id.* at ¶¶ 63-84.

254. *Id.* at ¶ 83.

255. JOSEPH W. SINGER, NO FREEDOM WITHOUT REGULATION. THE HIDDEN LESSONS OF THE SUBPRIME CRISIS 2 (2015).

256. *Id.* at 16-17.

broader legal context.[257] Regulation recognizes and controls the effects that the exercise of property rights have on others, including on marginalized communities and the environment.[258] Property law, as a social, legal, and political construct, functions within a complex legal system, and we require tools to manage these challenges of complexity and ensure the implementation of legally and morally legitimate reforms.[259]

V. LESSONS OF THE SYSTEMIC APPROACH TO PROPERTY

A. ADOPTING A SYSTEMIC APPROACH IN SCOTLAND

In this section we consider what we can learn from the South African experience and what light this experience sheds on some of the challenges currently facing the realization of the vision contained in the LRRS and the VGGT in Scotland. The pedigree of the systemic constitutional approach is rooted within the political, social, economic, and historical context of South Africa. Other jurisdictions may not necessarily be facing such threats to the sustainability of the property system, in terms of the first meaning explained above, referring to the continuing legitimacy of the system.[260] Nevertheless, the story of transformation and property law has larger implications. South Africa shows us how transformation can be prevented or minimized when reform is required of a system that is creating unjust, discriminatory, or destructive outcomes. This transformation is difficult because property law, and application of the existing private law methodology, has a propensity towards stability and certainty, which can be significantly challenged in a time of greater change and transition. Although this article is focused on Scotland and South Africa, this limiting feature of property can be found in other jurisdictions. Elements of the "Rights Paradigm" are prevalent in both Civil

257. Elsabé van der Sijde, *Tenure Security for ESTA Occupiers: Building on the Orbiter Remarks in Baron v. Claytile*, 36 S. AFRICAN J. ON HUM. RTS. 74, 74-92 (2020).

258. *See* Joseph W. Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 LOY. L. REV. 243, 342-43 (2006).

259. Van der Sijde, *supra* note 8, at 251-278; VAN DER WALT, *supra* note 7, at 22-44, 140-42. For an in-depth argument in favor of regulation as a tool for minimizing unwanted system effects resulting from the exercise of property rights, *see* JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 7-9, 147-178 (2000).

260. *But see* Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847 (2013) (analyzing the importance of resilience in a property law system).

Law and Common Law Countries, together with the division between public law and private law.[261]

In the case of South Africa, the direction of transformation was undeniable – there was a new democratic order established with a constitutional framework. However, in many different contexts, there may be issues of pressing importance which need to be addressed by comprehensive measures which reform, amend or impact the property regime. The transition to sustainability is the key transformation that we focus on here, and the popular demand for transformation, particularly in relation to the environment, is shown by events such as millions of people participating in the international strikes and protests in September 2019 to demand action to address climate change[262] and the establishment of groups such as Extinction Rebellion[263] which uses nonviolent civil disobedience to compel government action regarding climate change and biodiversity loss. If greater regulation of property is required now, and will be required in the future, in order to achieve the aim of sustainability in the sense of meeting the needs of the present without compromising the ability of future generations to meet their own needs, it is important to consider how to give effect to this regulation. How should reform measures be analyzed, how will they fit with the current property system and how will they contribute to addressing the challenges which have prompted their enactment? These are questions that will not be satisfactorily answered purely using private law methodology, which is based on the hierarchy of rights and the division between public law and private law, and here we argue that the systemic approach has value.

The South African experience shows us the importance of appreciating that property law operates as part of a single system of law. Holding fast to the existing private law methodology could mean that property lawyers will not engage substantively with reform measures designed to tackle issues of inequality or environmental degradation, or consider human rights jurisprudence.

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261. John A. Lovett, *Property and Radically Changed Circumstances* 74 TENN. L. REV. 463, 474-476 (2007); ANDRE J. VAN DER WALT, PROPERTY IN THE MARGINS 12-52 (2009); Lynda L. Butler, *Property's Problem with Extremes* 55 WAKE FOREST L. REV 1, 31-51 (2018).

262. Sandra Laville and Jonathan Watts, Across the Globe, Millions Join Biggest Climate Protest Ever, The Guardian (Sept. 23, 2009): https://www.theguardian.com/environment/2019/sep/21/across-the-globe-millions-join-biggest-climate-protest-ever.

263. Extinction Rebellion: https://extinctionrebellion.uk.

By starting with the single-system-of-law principle in Scotland, the distinction between political and doctrinal property law reforms would melt away. The measures which have been implemented in order to, for example, provide access rights over privately owned land,[264] provide opportunities for communities to force transfer of land,[265] protect debtors from the enforcement of mortgages,[266] or protect residential tenants from being evicted,[267] would be seen as part of the functioning system of property, which is part of the broader system of law. These property law reforms or court decisions have clearly been implemented or decided in order to provide opportunities to share the benefits of land with a greater number of people or to protect those who are vulnerable. This view also encourages an engagement with other areas of law such as environmental law, and a consideration of how these rules affect our understanding and conceptualisation of property.

Taking this perspective means the claim that ownership is in principle an absolute and exclusive right becomes untenable. For instance, can we still insist that ownership is in principle an absolute right in light of the plethora of environmental regulations which restrict the rights of a landowner?[268] Or is the vision contained in the LRRS that holders of land rights should act as stewards of Scotland's land resource for future generations a more accurate representation of the legal framework? Can we still insist that ownership is an exclusive right when everyone has a right of responsible access over land?[269]

Further, this single legal system is based on certain fundamental rights and values. Within a constitutional arrangement, like South Africa, these fundamental rights and values are clearly articulated.[270] Otherwise, these values must be ascertained

264. Land Reform (Scotland) Act 2003, (ASP 2) pt. 1.

265. *Id.* pts. 2, 3 and 3A; Land Reform (Scotland) Act 2016, (ASP 18), pt. 5.

266. Mortgage Rights (Scotland) Act 2001, (ASP 11); Homeowner and Debtor Protection (Scotland) Act 2010, (ASP 6).

267. *See* discussion *infra* Section V.B.

268. *See* Jill Robbie, *Moving Beyond Boundaries in Pursuit of Sustainable Property* Law, *in* SUSTAINABILITY AND PRIVATE LAW 59 (2019).

269. Land Reform (Scotland) Act 2003, (ASP 2) pt. 1. *See also* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739 (2011).

270. *See* S. AFR. CONST. §1, 1996 (listing, *inter alia*, human dignity, the achievement of equality and the advancement of human rights and freedoms as paramount founding values).

through analysis of the legal sources which includes documents like the LRRS and VGGT. This is the importance of the angle of approach aspect of Van der Sijde's work. The starting point of analysis can often determine the outcome of that analysis. Van der Sijde promotes starting from a position of the single system of law, with property and regulation as inherent parts of this system, and with fundamental values at the core. As shown above, in the context of Scotland, a human rights-based approach to property governance which includes social, economic, and cultural rights is becoming more pervasive – a trend which is set only to continue if the Advisory Group on Human Rights Leadership's recommendations are implemented. Human dignity is promoted as being at the centre of this new framework.[271] Beyond fundamental human rights, further values, such as sustainable development, community empowerment and transparency are present in the LRRS and VGGT, as well as the general policy landscape in Scotland. As such, values which were previously non-justiciable in a legal system can become central to the operation of the system. Van der Sijde's analysis provides an approach which directs attention towards these values and creates the space for consideration of how these values should be operationalized in legal analysis. If a system which fundamentally values sustainable development is producing unsustainable outcomes, with particular property rules being a contributor to these outcomes, this can be a lens through which one can critique those rules.

This raises a related point about the location and weight of the protection of property in a system of fundamental rights and values. As noted above, primacy is often accorded to property as protecting individual liberty.[272] This promotes a view of property as the keystone right. There is, however, a paradox contained in this view, which has been discussed by Van der Walt. Due to the current unequal distribution of property rights, to provide everyone with property rights will necessarily require infringements or amendments to existing property rights.[273] A conflict has then been established between someone with an existing property right and someone with no right, in a system where property

271. FIRST MINISTER'S ADVISORY GROUP ON HUMAN RIGHTS LEADERSHIP, *supra* note 131, at 8..

272. *See* discussion *supra* IV.C. S*ee also* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2nd ed. 1998).

273. Van der Walt, *supra* note 6, at 31. *See also* Singer, *supra* note 227..

rights have been prioritized as a keystone right. Overcoming the primacy of property in this situation can be incredibly challenging and can take the focus away from those who are most vulnerable. The role of property becomes over-inflated, which again entrenches the position of those with property rights.[274] Van der Walt argues that in order to evade this paradox, property needs to be placed within a broader system of values, where the needs of those who are vulnerable are given attention.[275] We are by no means denying that redistribution of land should be implemented. Such measures can be crucial to tackling inequality or to ensure environmental protection. However, the prioritization of property protection or transfer of property rights, may not lead to a sufficiently comprehensive response to the complex problems related to property, which may require a multi-faceted remedy.[276] Examples of seeing beyond the centrality of property rights in Scotland are providing a right of responsible access over land, or encouraging engagement with communities in relation to decisions about land. As noted above, the protection of property does seem to be predominant in the VGGT, which gives rise to concerns about the paradoxical status of property in that document.[277]

The last lesson to be taken from the South African experience, and from this comparative exercise, is that the way property operates and functions in a legal system – the consequences and implications of property rules – is highly relevant to ongoing research and reform. Due to the flexibility of the exercise of property rights – as a tool for environmental protection or as a shield against protection measures; as a way to enhance the security of vulnerable or marginalized people and as weapon to displace them – it is crucial to engage with a contextual understanding of the operation of property within a particular setting. This involves attempting to understand the social, economic, political, and historical background of property regimes, and allowing that experience to feed into the consideration of how to proceed. As noted by Van der Walt:

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274. *See* Franklin Obeng-Odoom & Frank Stilwell, *Security of Tenure in International Development Discourse*, 35 INT'L DEV. PLANNING REV. 315, 318 (2013).

275. *See* JENNIFER NEDELSKY, LAW'S RELATIONS 231-76 (2011).

276. Thomson et al., *supra* note 13, at 1-10..

277. *See* discussion *supra* Section II.C.

> [R]ecent experience shows that even lawyers and politicians who are in favour of significant reforms favour a forward-looking, political approach that avoids backward-looking re-assessment of and interference with existing rights and with the system of property law as such. Given the protective and confirming tendencies of doctrinal tradition, such a restrictive approach will very likely restrict or even prevent real change.[278]

We are therefore arguing against a reductionist view to solving property problems, which sees property doctrine as a neutral set of rules to be applied in an abstract manner. In Scotland, that means engaging with the context of property rights and the effect the exercise of these rights has had. Indeed, this context is very much alive in the political debate,[279] if not the legal one.

B. THE APPLICATION OF THE SYSTEMIC APPROACH IN TWO CASES

At this point, we wish to discuss two concrete cases. In the first case, taking the suggested angle of approach would indicate legislative reforms are required and a different outcome to the case would then be possible, in the other the angle of approach supports the decision. The first case is *Burnet v. Alpha*[280] a decision of the Housing and Property Chamber of the First-tier Tribunal for Scotland. Scotland has recently reformed its residential tenancy regime with the Private Housing (Tenancies) (Scotland) Act 2016.[281] One of the policy objectives of this Act is to "improve security of tenure for tenants and provide appropriate safeguards for landlords, lenders and investors."[282] A significant element of the 2016 Act is the removal of the "no-fault" ground for repossession, which means that the landlord cannot ask the tenant to leave the property just because their tenancy agreement has come to an end.[283] A landlord will only be able to reclaim posses-

278. VAN DER WALT, *supra* note 52, at 18-19.

279. *See* discussion *supra* Section II.B.

280. *Burnet v. Alpha* FTS/HPC/EV/19/0069, (2019) HPC 1, 2 (Scot.).

281. The protection afforded to residential tenants in Scotland has varied over the years based on the political party in power at the particular time. For an outline of the changes made through the years, *see* PETER ROBSON & MALCOLM COMBE, RESIDENTIAL TENANCIES: PRIVATE AND SOCIAL RENTING IN SCOTLAND Ch 1 (4th ed. 2019).

282. Private Housing (Tenancies) (Scotland) Bill: Policy Memorandum 2015 (SP Bill 79), ¶ 11.

283. Private Housing (Tenancies) (Scotland) Act 2016, (ASP 19) § 44.

sion of the property if either the tenant wishes to leave[284] or by satisfying to the First-tier Tribunal that one of the eighteen grounds for eviction applies.[285] If one of the eviction grounds applies, then the First-tier Tribunal will issue an eviction order.[286] Some of the eighteen grounds are mandatory, giving the Tribunal no scope for discretion, such as when the landlord intends to sell, refurbish or live in the property.[287] In contrast, some grounds are discretionary, meaning that the Tribunal must consider whether it is reasonable to issue the eviction order and this includes where the tenant is in breach of an obligation under tenancy agreement (other than to pay rent) or the tenant has been in rent arrears for three or more consecutive months, where the arrears are less than one month's rent.[288] The 2016 Act came into force on December 1, 2017, and the First-tier Tribunal has heard over 300 cases regarding eviction since then.[289] So far, eviction has been granted in 95% of cases.[290]

In *Burnet v. Alpha*,[291] the landlord sought an order for eviction in terms of the ground that the landlord intended to sell the property.[292] The respondents had occupied the property by virtue of a private residential tenancy, which commenced on August 15, 2018.[293] A notice to leave had been served on the respondents on November 28, 2018, seeking their removal.[294] By December 27, 2018, the respondents failed to vacate the premises and so the landlord sought an eviction order.[295] The respondents argued that they were actively looking for alternative accommodation.[296]

284. *Id.* at § 50, ¶ 1.

285. *Id.* sch. 3, §§ 1-18.

286. *Id.* § 51, ¶ 1.

287. *Id.* sch. 3, §§ 1, 3, 4.

288. *Id.* sch. 3, §§ 11, 12.

289. See an overview of the emerging jurisprudence in Peter Robson & Malcolm Combe, *The First Year of the First-Tier: Private Residential Tenancy Eviction Cases at the Housing and Property Chamber*, 4 JURID. REV. 325 (2019).

290. *Id.* at 330..

291. *Burnet v. Alpha* FTS/HPC/EV/19/0069, (2019) HPC 1, 2 (Scot.).

292. Private Housing (Tenancies) (Scotland) Act 2016 (ASP 19) sch. 3, ¶ 1.

293. *Burnet v. Alpha* [2019] FTS/HPC/EV/19/0069, (2019) HPC 1, 2 (Scot.).

294. *Id.*

295. As the respondents had occupied the property for less than six months, the landlord was required to wait twenty-eight days before raising the action for eviction. *See* Private Housing (Tenancies) (Scotland) Act 2016, (ASP 19) § 54, ¶ 2(b)(i), ¶ 3(a).

296. *Burnet v. Alpha* FTS/HPC/EV/19/0069, (2019) HPC 1, 2 (Scot.).

However, they had a daughter with "special needs,"[297] and had been unable to find suitable alternative accommodation.[298] The respondents suggested three months would be sufficient to find such accommodation.[299] The Tribunal was satisfied with the evidence that the landlord intended to sell the property, and therefore granted the order for eviction.[300] The Tribunal had no discretion here, as this was a mandatory ground.

Taking the angle of approach provides a lens through which to critique this case. As noted above, this legislation has been passed to improve security of tenure whilst having appropriate safeguards for landlords. Yet, the lack of discretion on the part of the Tribunal in relation to the mandatory grounds is a weakness in the legislative regime that significantly undermines the protections provided to tenants.[301] Why should the Tribunal not consider whether it is reasonable to grant the eviction order in where the landlord intends to sell, whereas it will have such discretion where there is breach of a tenancy agreement? Robson and Combe state that the:

> [R]ange of reasons whereby an eviction order must be granted to a landlord recognises the right of landlords to manage and dispose of their own property irrespective of the fact that the tenant may have a strong attachment to the rented home they are occupying and possibly a need to stay there for medical, schooling or family reasons.[302]

The discrepancy between the discretionary and mandatory grounds was highlighted by McCarthy when the Bill was going through Scottish Parliament. McCarthy's argument was that the obligation on the Tribunal to grant an eviction order without con-

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297. What these needs are is not specified in the report. However, the term suggests the daughter had a physical or mental disability.

298. *Burnet v. Alpha* FTS/HPC/EV/19/0069, (2019) HPC 1, 2 (Scot.).

299. *Id.*

300. *Id.* at 3.

301. Robson and Combe state regarding the 2016 Act, "For tenants, they have some more certainty about their future with a non-specified tenacy duration. In reality, however, the extensive mandatory eviction grounds offer no guarantees. For protection, tenants will have to rely on a market with a satisfactory supply such that any eviction will be only a temporary hiccup and that the pool of similar housing in the area will offset the impact of the landlords' extensive rights to evict." PETER ROBSON & MALCOLM COMBE, RESIDENTIAL TENANCIES: PRIVATE AND SOCIAL RENTING IN SCOTLAND ¶ 1-29 (4th ed. 2019).

302. PETER ROBSON & MALCOLM COMBE, RESIDENTIAL TENANCIES: PRIVATE AND SOCIAL RENTING IN SCOTLAND ¶ 10-04 (4th ed. 2019).

sidering the circumstances of the case, is likely to be a disproportionate interference with the tenant's rights under Art 8 of the ECHR, which provides the right to respect for a private and family life.[303] McCarthy explains that it is clear in relation to tenants of local authorities that the circumstances of the individual case must be considered to ensure the proportionality of the eviction.[304] This principle could then be extended to leases between private individuals or entities because the court is an organ of the State, and it should not act in a manner incompatible with ECHR rights.

This argument, based on the ECHR, has now been rejected by the United Kingdom Supreme Court in the case of *McDonald v. McDonald*[305] and the subsequent European Court of Human Rights decision of *F.J.M. v. United Kingdom*.[306] The European Court of Human Rights stated that if the domestic courts were able to override the balance struck between ECHR rights in legislation, then the ECHR would become directly enforceable between private citizens.[307] However, using the suggested angle of approach may reopen this contentious issue. We would begin with the principle that there is a single system of law which is built upon fundamental rights and values. Property serves a relatively modest role in this system insofar as other fundamental rights and values are (or should be) given effect to before a property right is secured or protected. The regulation of property is an inherent part of this system and regulation serves the broader values of the system. The provisions in, and the policy of, the 2016 Act engages with the themes in the LRRS and VGGT that there should be a human rights-based approach to the governance of land, which includes economic, social and cultural rights, and which emphasizes the responsibilities of the holders of land

303. Frankie McCarthy, *Opinion: Frankie McCarthy*, L. SOC'Y OF SCOT. (Jan. 18, 2016): https://www.lawscot.org.uk/members/journal/issues/vol-61-issue-01/opinion-frankie-mccarthy/. *See also* Frankie McCarthy, *Private Housing (Tenancies) (Scotland) Bill – Response to Call for Evidence*, FRANKIE MCCARTHY: A BLOG (Nov. 16, 2015): https://drfmccarthy.wordpress.com/2015/11/16/private-housing-tenancies-scotland-bill-response-to-call-for-evidence/.

304. Citing *Manchester City Council v. Pinnock* [2011] 2 AC 104 (UKSC); *South Lanarkshire Council v. McKenna* (2013) SC 212 (Scot.). *See also* Frankie McCarthy, *Human Rights and Discrimination*, *in* LEASES Ch. 16 (2015); Frankie McCarthy, *Human Rights and the Law of Leases*, 17(2) EDINB. L. REV. 184 (2013).

305. *McDonald v. McDonald* (2017) AC 273 (UKSC).

306. *F.J.M. v. United Kingdom*, No. 76202/16, Eur. Ct. H. R. ¶ ¶ 16, 46 (2018).

307. *Id.* at ¶ 42.

rights. Eviction from one's home may not only interfere with the tenant's right to respect for her private and family life, but also the right to an adequate standard of living, including the right of housing.

The United Nations Committee on Economic, Social and Cultural Rights has recently stated that all people should have a degree of security of tenure, including those in rented accommodation, whether public or private.[308] It has further stated that when "eviction is justified, the relevant authorities must ensure that it is carried out in accordance with legislation that is compatible with the Covenant, including the principle of human dignity contained in the preamble, in accordance with the general principles of reasonableness and proportionality."[309] Regulating the process of eviction as between private individuals of course also involves engaging with the protection of the landlord's property under Art 1, Pro 1. However, as highlighted above, property serves a relatively modest role in the system of law, which may have to give way when other fundamental rights, such as when the right to private and family life, and the right to housing are involved. Taking this perspective, we would suggest a legislative amendment to the 2016 Act so that in all cases of eviction, the Tribunal should consider whether is it reasonable to grant the eviction order.[310] In making that decision, the Tribunal can consider the individual circumstances of the case and should deliberate regarding which other fundamental rights or values of the system are engaged or implicated.

There could be an additional element to be considered here, again, inspired by the South African jurisprudence. In the cir-

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308. *See* U.N. Econ. & Soc. Council, Comm. On Economic, Social, and Cultural Rights, *Djazia v. Spain*, ¶ 2.4, 13.2, 16.5, 18, U.N. Doc. E/C.12/61/D/5/20165 (July 21, 2017). Here, Spain was found to have violated the right to housing of the applicants by the UN Committee through evicting a family at the request of a private landlady without providing them with alternative accommodation.

309. U.N. Econ. & Soc. Council, Comm. On Economic, Social, and Cultural Rights, *Djazia v. Spain*, ¶ 13.4, U.N. Doc. E/C.12/61/D/5/20165 (July 21, 2017).

310. McCarthy provides an example of the potential amendment to the wording of the 2016 Act in Frankie McCarthy, *Private Housing (Tenancies) (Scotland) Bill – Response to Call for Evidence*, FRANKIE MCCARTHY: A BLOG (Nov. 16, 2015) https://drfmccarthy.wordpress.com/2015/11/16/private-housing-tenancies-scotland-bill-response-to-call-for-evidence/. Temporary amendments were made to the 2016 Act during the Coronavirus pandemic to make all eviction grounds discretionary. Coronavirus (Scotland) Act 2020, (ASP 7) sch. 1, § 1. These amendments could be made permanent.

cumstances of the case, it may be reasonable to grant the eviction order, but there is a secondary consideration of *when* the eviction order should be granted. South African cases have established that private entities are not required to provide housing for occupiers indefinitely, thus fulfilling the responsibilities of the State. However, landlords' rights to possession may be subject to some delay in order to accommodate the immediate needs of the occupiers.[311] In the consideration of *when* to grant an eviction order, the availability of suitable alternative accommodation should be a relevant consideration. To take this approach in relation to the Scottish legislation would suggest an additional amendment to the 2016 Act that the date that the eviction order is implemented should also be reasonable. If these amendments were made to the legislation, this would allow the court to grant the eviction order in *Burnet v. Alpha* if it was deemed reasonable in the circumstances, but only after the period of three months had passed in order to allow sufficient time for the family to find alternative accommodation.

The second case we will discuss is *Salmon Net Fishing Ass'n of Scotland v. Scottish Ministers*.[312] Here, taking the suggested angle of approach would support the decision of the court. This case was a decision of the Outer House of the Court of Session, in a petition for judicial review by an association representing the interests of people holding title to salmon fishings,[313] against legislation that prohibited retaining salmon caught in coastal waters -the Conservation of Salmon (Scotland) Regulations 2016,[314] to-

311. *See Johannesburg Metro. Mun. v. Blue Moonlight Prop. 29 (Pty) Ltd.* 2012 (2) SA 104 (CC) at ¶ 96-97, 104(e)(iii) (S. Afr.); *City of Johannesburg v. Changing Tides 74 (Pty) Ltd.* 2012 (6) SA 294 (SCA) at ¶ 18 (S. Afr.). An example of the application of these principles is in the South African case of *Berman Bros. Prop. Holdings (Pty) Ltd. v. Madikana* 2019 (2) SA 685 (WCC) at 3 (S. Afr.), where an eviction order was deferred until one of the children in the property finished her school year, taking into account the requirement in the Constitution to consider the paramountcy of the interests of children. This decision was based on the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

312. *Salmon Net Fishing Ass'n of Scotland v. Scottish Ministers* (2020) SC 11 (Scot.). *See also* Colin Reid, *Fishing Ban Did Not Breach Property Rights*, 198 SCOTTISH PLAN. & ENV'T L. 42 (2020).

313. In Scotland, salmon fishing rights are a distinct property right which can be held separately from the ownership of land. *See generally* KENNETH G.C. REID, THE LAW OF PROPERTY IN SCOTLAND ¶¶ 320-30 (1996).

314. Conservation of Salmon (Scotland) Reg. 2016 reg. 3, as amended by Conservation of Salmon (Scotland) Reg. 2019 reg. 2.

gether with a related compensation scheme.[315] The petitioners argued that the 2016 Regulations and compensation scheme were in breach of Art 1, Pro 1 of the ECHR because they did not strike a fair balance between the property rights of the petitioners and the general interests of the wider community.[316] Lord Pentland in the Outer House described the background of the 2016 Regulations, which were a response to the European Commission considering that the United Kingdom had failed to take sufficient conservation measures in relation to Atlantic salmon populations in Scotland in light of declining salmon populations.[317] A review between 2018-2019, based on scientific studies, indicated that the prohibition should remain in place for an indeterminate period as there was no evidence that salmon populations would recover in the foreseeable future.[318] A compensation scheme was then offered by the Scottish Ministers, which was to be a one-off payment intended to allow those with salmon fishing rights to cease their operations based on the net profits of individual fishermen for a ten-year period.[319]

Lord Pentland decided that there had not been a violation of Art 1, Pro 1 in this case.[320] His Lordship considered that the interference with the property of the fishermen through the prohibition on fishing was based on sound reasons of conservation and environmental protection, and to ensure compliance with requirements of European Union law.[321] In these circumstances, there was not an entitlement to receive full compensation for all the financial losses which may flow from the measures.[322]

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315. *Salmon Net Fishing Ass'n of Scotland v. Scottish Ministers* (2020) SC 11, ¶ 2 (Scot.).

316. *Id.* at ¶ 4 (Scot.).

317. Salmon are a protected species under the European Union's Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna. As the United Kingdom has now left the European Union, it is unclear to what extent environmental governance standards will be maintained. *See* Annalisa Savaresi, *Environmental Governance in Scotland after EU Exit*, SV 20-02 (2020), https://sp-bpr-en-prod-cdnep.azureedge.net/published/2020/1/9/Environmental-Governance-in-Scotland-after-EU-Exit/SB%2020-02.pdf.

318. *Salmon Net Fishing Ass'n of Scotland v. Scottish Ministers* (2020) SC 11, ¶ 19, 21 (Scot.).

319. *Id.* at ¶ 44. The salmon fishing rights were not extinguished; they could merely not be exercised for the foreseeable future. *Id.* at ¶ 27.

320. *Id.* at ¶ 65.

321. *Id.* at ¶ 65, 67.

322. *Id.* at ¶ 65.

The angle of approach would support this decision. There is a single system of law, which includes provisions implementing European Union directives. This system of law is founded on fundamental rights and values, which include sustainable development and environmental protection. The holders of property rights have responsibilities due to the effect the exercise of their rights can have on the environment. The regulation of property, in this instance an indeterminate prohibition on exercise of fishing rights, is an inherent part of this system and is intended to serve the broader values of the system. As stated by the VGGT, "[a]ll should respect the long-term protection and sustainable use of land, fisheries and forests."[323]

VI. CONCLUSION

The function of property in the modern context is dichotomous. On the one hand, the institution of property is vehemently defended for its role in promoting individual liberty and creating a space free from the threat of State interference, which is conducive to economic prosperity. On the other hand, there is a societal interest in property that strongly rejects the idea of allowing rights-holders to use and exploit their property without due regard for the effects of such use on society or the environment. There is no magic formula that will always provide clear answers or that can successfully sidestep having to make difficult decisions regarding the purpose of property in society, as well as the priorities of each legal system. However, we suspect that an approach that prides itself in being abstract in application, which focuses primarily on stability and certainty, purposefully leaving very little room for contextual considerations, and which functions optimally in a hierarchal way, is not the way to give effect to the democratic call for change evident in both the LRRS and VGGT.

Within this article, we have explored new developments in property law reform in Scotland, and how the impact of these reform measures could be limited by current features of private law methodology and the Scottish legal system. We analyzed the South African experience of transformation of its property regime and considered the developments on both the theoretical and methodological level which have emerged to implement that

323. FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS, *supra* note 71 at ¶ 4.3.

transformation. In our view, the new approach to property and regulation in South Africa, as seen in the systemic constitutional approach, sheds light on the challenges facing the Scottish regime and suggests an equally pressing need for a new angle of approach. In this process, we have disputed the claim quoted in the introduction that constitutional property law questions in Scotland and South Africa are "too different for any comparative exercise to have primary utility."[324] In fact, we claim that South Africa's experience may contain important lessons for a property system, like Scotland, which is undergoing a period of transformation.[325] Ensuring the full implementation of such a transformation is necessary if we are going to have a chance to tackle the global challenges which currently make up our unsustainable way of life.

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324. David Carey Miller, *The Human Right of Property in Land Law: Comparing South Africa and Scotland*, *in* 18 PRIVATE LAW AND HUMAN RIGHTS 480 (2014).

325. Indeed, hints at a systemic approach have also been made with South Africa, particularly in relation to attempts to tackle social injustice and environmental degradation within the context of property law. *See, e.g.*, Nicole Graham, *Owning the Earth*, *in* EXPLORING THE WILD: THE PHILOSOPHY OF EARTH JURISPRUDENCE (2011); Joseph W. Singer, *Property as the Law of Democracy*, 63 Duke L.J. 1287 (2014); FRITJOF CAPRA & UGO MATTEI, THE ECOLOGY OF LAW: TOWARD A LEGAL SYSTEM IN TUNE WITH NATURE AND COMMUNITY (2015); Lynda L. Butler, *Property's Problem with Extremes* 55 WAKE FOREST L. REV 1, 31-51 (2018).