Contesting the property paradigm amid 'radical' constitutional change: Living Rent and the Private Residential Tenancies (Scotland) Act 2016

Journal:	*Legal Studies*
Manuscript ID	Draft
Manuscript Type:	Research Article
Keywords:	property, devolution, constitutional change, Living Rent, Private Residential Tenancies (Scotland) Act 2016, housing

Abstract: This paper examines the interaction between 'radical' constitutional change, in the form of political devolution, and property systems in the UK, from the perspective of those on the margins of those systems. The paper adopts a property 'from below' approach and critically applies the theoretical framework developed by AJ van der Walt in Property in the Margins. In that book, van der Walt outlined how property systems frequently operate to resist democratic and constitutional change and transformation through the functioning of the property paradigm, which refers to a set of doctrinal, rhetorical and logical assumptions and beliefs about the relative value and power of discrete property interests in law and in society. Building on van der Walt's work, this paper takes eviction, which represents the property owners apex right, as a case study and considers how qualifications of that right have been reformed by the Private Residential Tenancies (Scotland) Act 2016. It is argued that while the strength of the property paradigm is apparent in both English and Scottish property systems, Living Rent, a national tenants union in Scotland, have adapted to the new constitutional settlement to effectively contest, and in some respects displace, the logic of the property paradigm.

SCHOLARONE™
Manuscripts

Contesting the property paradigm amid 'radical' constitutional change: Living Rent and the Private Residential Tenancies (Scotland) Act 2016

Abstract

This paper examines the interaction between 'radical' constitutional change, in the form of political devolution, and property systems in the UK, from the perspective of those on the margins of those systems. The paper adopts a property 'from below' approach and critically applies the theoretical framework developed by AJ van der Walt in *Property in the Margins*. In that book, van der Walt outlined how property systems frequently operate to resist democratic and constitutional change and transformation through the functioning of the property paradigm, which refers to a set of doctrinal, rhetorical and logical assumptions and beliefs about the relative value and power of discrete property interests in law and in society. Building on van der Walt's work, this paper takes eviction, which represents the property owners apex right, as a case study and considers how qualifications of that right have been reformed by the Private Residential Tenancies (Scotland) Act 2016. It is argued that while the strength of the property paradigm is apparent in both English and Scottish property systems, Living Rent, a national tenants union in Scotland, have adapted to the new constitutional settlement to effectively contest, and in some respects displace, the logic of the property paradigm.

For Review Only

Keywords: property, devolution, constitutional change, housing, Living Rent, Private Residential Tenancies (Scotland) Act 2016

Introduction

This paper examines the interaction between 'radical' constitutional change in the form of political devolution, and property systems in the UK. The paper adopts a property 'from below' approach for this purpose which draws on AJ van der Walt's book *Property in the Margins*.[1] In that book van der Walt demonstrated how rich theoretical and practical insights can be revealed by analysing a property system in times of constitutional change from the perspective of those on the margins of that property system. That analysis revealed how property systems frequently operate to resist democratically sanctioned and constitutionally mandated change and transformation through the functioning of the property paradigm, which refers to a set of doctrinal, rhetorical and logical assumptions and beliefs about the relative value and power of discrete property interests in the law and in society.[2] This paper critically applies van der Walt's theoretical framework in a UK context by focusing on the right to possession, the property owners apex right, and considering how qualifications to that right have been expanded by the Private Residential Tenancies (Scotland) Act 2016 in a way that tends to undermine the property paradigm.

For Review Only

The central argument developed here is that this important instance of legal difference cannot be fully understood without taking account of how social movements of marginalised tenants have adapted to the new constitutional settlement in order to effectively contest, and in some respects displace, the logic of the property paradigm. Although there are excellent accounts of the Private Residential Tenancies (Scotland) Act 2016, there has been little attention paid to the role which Living Rent, a national tenants union in Scotland, played during the law reform process.[3] This paper

[1] AJ van der Walt *Property in the Margins* (Oxford: Hart, 2009).

[2] Ibid, p 27.

[3] P Robson and M Combe *Residential Tenancies: Private and Social Renting in Scotland* (Edinburgh: W Green, 4th edn, 2019); M Combe 'Shifting grounds for private renters in Scotland: Eviction after the Coronavirus (Recovery and Reform) (Scotland) Act 2022 and during the Cost of Living (Tenant Protection) (Scotland) Act

addresses a gap in the literature by shedding light on how Living Rent adapted to the new constitutional paradigm and used the Scottish government consultation mechanism to organise marginalised tenants, reject the logic of the property paradigm, and campaign for expanding qualifications of landlords property rights.

This is an novel analysis because although law making powers over property and housing have been devolved since 1998, the impact of 'the most radical constitutional change' for nearly two centuries on property systems in the UK remains relatively unexplored and undertheorized.[4] Tenancy reform is a live issue and this paper sheds light on the different legal measures that have been introduced post-1998 in response to the housing insecurity that is an all too common feature of private renting across the UK.[5] This issue has assumed greater significance over the past two decades due to the revival of private renting, which has doubled in size across the UK and accommodates a fifth of all households.[6] Indeed, private renting is central to the contemporary housing crisis because it is private rented housing which is the most expensive, insecure and unsafe housing in each part of the United Kingdom.[7]

For Review Only

2022' (2022) 4 *Juridical Review* 222; P Robson and M Combe 'The first year of the First-tier: private residential tenancy eviction cases at the housing and property chamber' (2019) 4 *Juridical Review* 325.

[4] V Bogandor *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1998) p 1.

[5] Department for Levelling Up, Housing and Communities *A Fairer Private Rented Sector CP 693*, June 2022 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083381/A_fairer_private_rented_sector_print.pdf; Scottish Government *A Stronger & More Resilient Scotland: The Programme for Government 2022-23* (Edinburgh: Scottish Government, 2022) p 25.

[6] A Marsh and K Gibb *The private rented sector in the UK* (Glasgow: UK Collaborative Centre for Housing Evidence, 2019) pp 5-7.

[7] H Carr et al 'Introducing Precarisation: Contemporary Understandings of Law and the Insecure Home' in H Carr et al (eds) *Law and the Precarious Home* (Oxford: Hart, 2020) pp 10-11; J Rugg and D Rhodes *The Evolving*

This analysis is also important because it reveals fresh insights into the Housing Act 1988 which is a key piece of the legal architecture in the process of housing financialization.[8] In particular, the paper sheds light on the role of the Housing Act 1988 in the revival of private renting, in the contemporary crisis of precarity for tenants and in the emergence of legal difference in Scotland. It is argued that the Housing Act 1988 entrenched the logic of the property paradigm as part of a neoliberal project to commodify rented housing. In doing so it helped to create conditions of precarity for tenants which proved fertile ground for tenant organising to effectively challenge the property structures that contributed to their marginality.

The central argument is developed across the following structure. In part one, I draw on property theory 'from below' to set out the analytical framework. In particular, I critically engage with the theoretical framework developed in *Property in the Margins* and argue that valuable insights can be generated by adapting that framework to analyse how legislation can entrench the property paradigm and to take account of how marginalised renters form social movements to contest the property paradigm. In part two, I outline the 'radical' nature of political devolution as a form a constitutional change and explain how legislative competence over property and housing has been devolved under that settlement. I then argue that prior to 1998 the property paradigm functioned in a similar way in England and Scotland in relation to the law governing eviction of private tenants. I support this argument by reference to how the Housing Act 1988 and Housing (Scotland) Act 1988 established a common set of qualifications to the landlord's strong right to possession in both England and Scotland. In part three, I apply the theoretical framework developed here to analyse the passage of the Private Residential Tenancies (Scotland) Act 2016. Through a granular analysis of the

---

Private Rented Sector: Its Contribution and Potential (York: Centre for Housing Policy, 2019) p 19; Marsh and Gibb, above n 6, p 6.

[8] M Byrne 'Generation rent and the financialization of housing: a comparative exploration of the growth of the private rented sector in Ireland, the UK and Spain' (2020) 35(4) *Housing Studies* 743 at 751-752. See D Madden and P Marcuse *In Defense of Housing: The Politics of Crisis* (London: Verso, 2016) pp 8-11, 18.

For Review Only

law reform process, I draw attention to the important role played by Living Rent in politicising the reform process, contesting the property paradigm, and campaigning for greater qualifications of the landlords' right to possession.

1. Property 'from below'

In recent years, there has been growing interest in approaches to law 'from below'.[9] Such approaches provide a method with which to decentre dominant, often Western, accounts of the law and legal change and reveal valuable insights into how law relates to the 'base' and how resistance to law by marginalised communities and peoples can shape its development.[10] As Oliver De Shutter and Balakrishnan Rajagopal explain 'a central element of such approaches… is the role of social movements and dissident understandings and ideas and to reinterpret them as being more central to the understanding of law and social sciences'.[11]

Although well established in other areas of law, approaches 'from below' are relatively underdeveloped in property scholarship.[12] Instead, much of mainstream property law and scholarship is dominated by a centrality focus that assigns the status of having property to the centre and relegates not having property to the margins of social normality.[13] This arguably reflects the pervasive influence of economic liberalism in Anglo-American and European Civil Law property

For Review Only

[9] O De Shutter and B Rajagopal 'Property rights from below: an introduction to the debate' in O De Shutter and B Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (London and New York: Routledge, 2020) 1.

[10] B Rajagopal *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) p 2.

[11] De Shutter and Rajagopal, above n 9, p 1.

[12] Ibid, pp 1-2.

[13] van der Walt, above n 1, pp 231-233.

systems which 'assigns ownership a central place through its importance in the free market economy' and because it is assumed to enhance personal and civil liberty.[14]

Indeed, as Eduardo Peñalver and Sonia Katyal point out, property scholarship often takes a particularly dim view of those on the margins who refusal to abide in the conventional property structures and roles of mainstream society because such 'property outlaws' are perceived as a threat to 'the important role that property plays in maintaining social order through a stable system of private ownership'.[15]

Such attitudes and approaches are unfortunate because they narrow the frame through which a property system can be analysed, thereby limiting ways of understanding power, privilege and status in law and society.[16] In addition, it can overlook the important role which social movements of those on the margins have played in contesting and shaping property systems and thus relegating the agency and voice of those who are subject to the strong property rights of others. Assigning the status of having property to the centre and not having property to the margins of social normality is also problematic because it serves to both explain and justify 'the unequal distribution of property and power in society'.[17]

In recent years, there has been increasing academic interest in approaches 'from below' to property. In *Property Rights from Below*, Oliver De Shutter and Balakrishnan Rajagopal present a diverse set of essays which seek to challenge the growing sanctification of a Western understanding of property

For Review Only

---

[14] Ibid, p 231-232; JW Singer *Entitlement: The Paradoxes of Property* (New Haven and London: Yale University Press, 2000) pp 3, 6.

[15] EM Peñalver and SK Katyal *Property Outlaws: How Squatters, Pirates and Protesters Improve the Law of Ownership* (New Haven and London: Yale University Press, 2010) p 10.

[16] van der Walt, above n 1, p 237.

[17] Ibid, pp 231-232.

rights.[18] These essays critique dominant conceptions of property rights and reveal valuable insights into how social movements have organised to challenge, and imagine alternatives to, dominant property models.[19] They shed valuable light on how the legal framework can facilitate the commodification of land but can also enable the 'shift away from privatization and commodification and toward the revival of the commons'.[20]

These studies tend to support Eduardo Peñalver and Sonia Katyal's claim that although property law 'aims to enhance stability by establishing a system of clear and fixed rules, dividing public from private' it also 'motivates cultural and political forces that contest and destabilize, creating chaos and confusion in the midst of seeming orderliness'.[21]

In different ways, property scholarship 'from below' attempts to break with the centrality focus that dominates much of mainstream property law and scholarship by theorising property 'not with reference to the central property status of property institutions or the property holdings of the advantaged, but rather with reference to the actual experiences of those who find themselves on the margins of society and of property distribution patterns'.[22]

---

[18] De Shutter and Rajagopal, above n 9, p 203.

[19] JP Thompson 'Forging a single proletariat' in O De Shutter and B Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (London and New York: Routledge, 2020) pp 71-87; SK Katyal and EM Peñalver 'Urban squatters' in O De Shutter and B Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (London and New York: Routledge, 2020) pp 88-112; S Sauer and LF Perdagao de Castro 'Land and territory: struggles for land and territorial rights in Brazil' in O De Shutter and B Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (London and New York: Routledge, 2020) pp 113-130.

[20] De Shutter and Rajagopal, above n 9, p 9.

[21] Peñalver and SK Katyal, above n 15, p viii; L Fox-O'Mahoney and ML Roark *Squatting and the State: Resilient Property in an Age of Crisis* (Cambridge: Cambridge University Press 2022) p 6.

[22] van der Walt, above n 1, p 23.

For Review Only

One of the pioneering works in this field is AJ van der Walt's *Property in the Margins* (2009).[23] In that book, van der Walt set out to better understand the tension between constitutional change and transformation and property stability in the context of post-apartheid South Africa. To do this, he turned away from existing abstract theoretical analyses of property as an institution of social, political and economic ordering.[24] Instead, he sought to theorise property from deep inside the property regime by developing a perspective with which to reflect on a property system that takes seriously the property experiences of people who exist on the 'margins of society'.[25]

There are various theoretical frameworks that can be adapted to analyse property systems 'from below' but van der Walt's framework is particularly suitable for present purposes because it was designed to analyse the impact of different forms of constitutional change on property systems.[26] Although van der Walt was primarily interested in analysing developments in South Africa, he made clear that the framework was of general application. Indeed, he applied it to explore the impact of the constitutional change and transformation in post-apartheid South Africa, the domestic incorporation of the European Convention on Human Rights (ECHR) on English renting law, and constitutional challenges to rent control legislation in Germany.[27]

(a) The property paradigm

The thesis advanced in *Property in the Margins* is that a property regime will tend to insulate itself against change, including democratically sanctioned social and political transformation, 'through the

[23] ibid.

[24] Ibid, p vii.

[25] Ibid, p 24.

[26] Fox-O'Mahoney and Roark, above n 21; B Bhandar *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Durham, North Carolina: Duke University Press, 2018); Peñalver and Katyal, above n 15; N Blomley *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004);

[27] van der Walt, above n 1, pp 41-52.

Cambridge University Press

For Review Only

security and stability seeking tendency of tradition and legal culture, including the deep assumptions about security and stability' embedded in, what van der Walt refers to as, the property rights paradigm.[28] He contends that this process becomes acutely apparent when one reflects on a property system from the perspective of those on the margins of that system.

The term property paradigm refers to 'the doctrinal framework within which property interests are traditionally considered and discussed' and this is 'depicted as a set of doctrinal, rhetorical and logical assumptions and beliefs about the relative value and power of discrete property interests in the law and in society'.[29] Within this paradigm, 'property interests are primarily valued according to their status as either property rights, personal rights or no-rights, and also as either strong rights, weak rights, or no-rights'.[30]

The two most significant features of the property paradigm are that property interests are ordered hierarchically, in the sense that strong property rights such as ownership or the right to possession, are more important than lesser or no property rights, and abstractly, 'in the sense that doctrinal rhetoric and logic will determine how conflicts between different interests are decided in any specific instance, without reference to the concrete context or the personal circumstances of the parties'.[31] The result is that the paradigm 'justifies the more or less automatic rights-based (and often ownership biased) outcome of particular property disputes'.[32]

These features cannot be explained as the inevitable result of legal tradition or doctrine. Instead, van der Walt explains that the property paradigm is underpinned by a set of socio-political and

[28] Ibid, p viii.

[29] Ibid, p 27.

[30] Ibid.

[31] Ibid, p 28.

[32] Ibid, p 27.

Cambridge University Press

For Review Only

socio-economic assumptions about the central role of property in individual lives and in society.[33] Although often unarticulated by scholars and courts, he identifies how these assumptions are consistent with core tenets of political and economic liberalism, including individual self-determination, rational maximisation of personal preferences and the free market.[34]

The strength of the property paradigm gives rise to a series of important legal and social consequences. Even where ownership (or the right to possession) is restricted by constitutional or statutory measures, for instance to protect occupiers from eviction, such measures often fail to 'overcome the rhetorical power of the ideal notion of ownership presented by the rights paradigm in its abstract or absolute form'.[35] This rhetoric presents ownership (or the right to possession) as the apex right and insists that restrictions on such rights must be exceptional, carefully justified, time limited and ultimately should fall away overtime until ownership eventually resumes its natural 'fullness'.[36]

(b) Centrality-Marginality and the property paradigm

One of the most important features of the property paradigm is how it imparts a centrality-marginality logic that pervades the property system and determines how people and interests are treated within that system and in society. van der Walt elaborates how positions of centrality and marginality are constructed through a contextual analysis that is founded on the recognition that 'property regimes reflect the characteristics of their accompanying economic, social and political system'.[37] Accordingly, within liberal capitalist systems, 'private property naturally holds a central

For Review Only

---

[33] Ibid, p 28.

[34] Ibid, pp 37, 40.

[35] Ibid, p 31.

[36] Ibid, p 33.

[37] Ibid, p 20.

place in society though its importance in the free market economy'.[38] Thus, ownership and the rights of owners are treated as being central and normal. By contrast, the status of having lesser forms of property or not having property at all is relegated to the margins of social normality.[39]

van der Walt rejected such approaches and instead sought to develop a de-centred perspective with which to reflect on a property system by imagining a perspective that includes 'in a meaningful way, the interests of those who are not 'normally' considered part of the property elite without automatically reducing them to the status of weakness and dependence'.[40] Adopting a marginal perspective requires focusing 'attention much more on the social position, economic status and personal circumstances of the parties involved in property relations or disputes and less on their legal status or established property rights.'[41] However, it also requires a recognition of how for those on the margins, 'the law mostly shines in its absence' or it is 'present in its status as protector of others' rights and punisher of those who infringe those rights'.[42] Therefore, the best place to discuss property law is 'as it appears in its absence, in its confrontation with poverty, slavery or unlawful occupation of land and buildings'.[43]

Viewing the property system from the perspective of those 'whose lives are shaped and affected by the property holdings of others' reveals valuable insights into the property paradigm and its wider legal and social consequences.[44] In particular, it becomes clear that the property paradigm inherently privileges individual property rights against democratically sanctioned change including

[38] Ibid, p 231.

[39] Ibid, p 232.

[40] Ibid, p 242.

[41] Ibid, p 245.

[42] Ibid, pp 236-237.

[43] Ibid, pp 238-239.

[44] Ibid, pp 238-239.

For Review Only

forms of regulatory state control.[45] In doing so, it tends to stabilize 'the current distribution of property holdings by securing the extant property holdings on the assumption that they are lawfully acquired, socially important and politically and morally legitimate.'[46]

It follows that the property paradigm is not neutral but rather operates in a highly political way. As van der Walt points out, 'in a society characterised by social, economic and political inequality and marginalisation, paradigmatic support for the power hegemony of the privileged could restrict or frustrate social and economic reform'.[47] The result is that the rights paradigm helps to entrench 'unequal socio-economic power relations in favour of current holders of paradigmatically dominant property interests'.[48]

van der Walt argued that one could assess the strength of the property paradigm in a given system by analysing the extent to which legal restrictions on the landowner's right to possession (the apex property right) tend to undermine the paradigm. He found that although restrictions on the landowner's right to evict are common in a landlord and tenant context in South Africa, England and Germany, 'even quite dramatic' restrictions mostly fail to undermine the hierarchical power of the landowner's property rights.[49] Instead, the vast majority of legislative interventions amount to little more than basic due process controls on eviction (eg limited grounds for possession, notice requirements, narrow forms of judicial supervision),[50] that usually turn on factors that are within the

For Review Only

[45] Ibid, p 40.

[46] Ibid, p viii.

[47] Ibid, p 40.

[48] Ibid, p 77.

[49] Ibid, p 56.

[50] Ibid, p 130.

landowner's control and which do not place any special emphasise on the personal or social circumstances of the occupier or the wider context.[51]

By contrast, he found there were only isolated instances where controls imposed on the landowner's right to possession provide for context-sensitive adjudicative where the judicial officer exercises a broad discretion that may prevent ownership from trumping non-ownership interests as a result of the general socio-economic context and/or the personal circumstances of the tenant or occupier.[52] van der Walt pointed out that where such protections exist, they are often met with 'staunch resistance' because they threaten to undermine the integrity of the paradigm and represent a challenge to established power hierarchies.[53] Consequently, they are either 'restricted in scope or are being eroded by changing economic policies' and in effect minimised by 'hesitant and sceptical judiciaries' and by the doctrinal conservativism of scholars.[54]

(c) Property in the margins: Insights and limitations

van der Walt makes a convincing argument that property systems often function, through the device of the property paradigm, to preserve the *status quo* and resist constitutionally and democratically sanctioned change that could improve conditions for those on the margins. His analysis demonstrates the value of theorising property with reference to the experiences of those on the margins of the property system and he makes a convincing case for the need for property scholarship to account for 'the effect that enforcement of strong property rights has on marginalised property holders and users'.[55]

For Review Only

[51] Ibid, p 82.

[52] Ibid, pp 80-81.

[53] Ibid, p 60.

[54] Ibid, pp 130-131.

[55] Ibid, p ix.

Despite the valuable insights generated, there are some limitations to van der Walt's analysis. The first concerns how he focuses mainly on legal measures that qualify the property paradigm and then investigates reactions to those qualifications. Although he acknowledges that legislation can interact with the paradigm in different ways, he pays much less analytical attention to the ways that statute can reinforce that paradigm for ideological and political purposes.[56] This is unfortunate because examining how legislation may reinforce the paradigm can shed further light on its operation. After all, if the property paradigm condemns some to the margins of social normality then measures that reinforce that paradigm are likely to compound marginality.

The second relates to how he constructs his perspective from the margins. van der Walt set out 'to imagine a perspective on property that includes, in a meaningful way, the interests of those who are not "normally" considered part of the property elite.'.[57] This is an important challenge to the centrality focus that dominates much of property theory. However, there are other more direct means of developing a more concrete perspective from the margins. One way to do this is engage with the collective voice and agency of social movements of those on the margins that seek to challenge the property paradigm and bring about radical social change. Although van der Walt recognised that social movements can be an important agent for legal and political change, he did not engage with the rich history of collective tenant organising to contest the strong property rights of landlords.[58] To his credit, he acknowledges this as a limitation of his study and concluded his book by issuing an injunction to scholars to take seriously the strong marginal positions of such 'property' outsiders.[59]

For Review Only

---

[56] Ibid, pp 60-62.

[57] Ibid, p 242.

[58] N Gray (ed) *Rent and its Discontents: A Century of Housing Struggles (Transforming Capitalism)* (London: Rowman & Littlefield, 2018).

[59] van der Walt, above n 1, p 243.

In this paper, I build on van der Walt's work in two ways. In section 2, I analyse the interaction between the Housing Act 1988 and the property paradigm and consider how that legislation both qualified and reinforced the strong property rights of landlords. In section 3, I build on van der Walt's perspective from the margins by drawing on the actual practices of social movements of marginalised tenants in Scotland engaged in concrete struggles to contest the property paradigm and expand qualifications on landlord's property rights.

2. Renting amid 'radical' constitutional change

In this section, I outline the 'radical' constitutional change brought about by the 1998 devolution settlement. Detailed accounts of this settlement can be found elsewhere however for present purposes, I focus on how legislative competence over property and housing has been devolved to the Scottish Parliament.[60] I then apply van der Walt's theoretical framework to analyse the English and Scottish property systems. Despite various significant technical differences between these systems, I argue that immediately prior to the 1998 devolution settlement both systems functioned in a way that is consistent with the property paradigm. This is demonstrated through an analysis of qualifications of the private landlord's right to possession, the property owners apex right, contained in the Housing Act 1988 and Housing (Scotland) Act 1988. This analysis reveals strong similarity in residential renting laws at the point of political separation in 1998 and this commonality sets the scene for the discussion of the post-1998 reforms in Scotland in section 3.

(a) 'Radical' constitutional change in the UK

Devolution has been described by Vernon Bogandor as 'the most radical constitutional change' in the UK in almost two centuries.[61] Devolution, here, refers to a process involving the transfer of

---

[60] J Jowell and C O'Cinneide (eds) *The Changing Constitution* (Oxford, OUP, 9th edn, 2019); J Mitchell *Devolution in the UK* (Manchester: Manchester University Press, 2009); Bogandor, above n 4.

[61] Bogandor, above n 4, p 1.

For Review Only

power from the centre (UK Parliament) to the nations and regions of the United Kingdom.[62] In one form or another, this process has been ongoing since the 18th century, however the scale of the transfer of legislative powers under the 1998 devolution settlement was exceptional.[63] This settlement involved the establishment of governmental institutions, with law making powers in certain policy areas, in Scotland and Wales and the re-establishment of governmental institutions, under different arrangements, in Northern Ireland. For Bogandor, the 'radical' nature of devolution here lay in how it sought to 'reconcile two seemingly conflicting principles, the sovereignty or supremacy of Parliament and the grant of self-government in domestic affairs to Scotland, Wales and Northern Ireland'.[64]

Despite the scale of legislative devolution involved, the devolution settlement did not turn the UK into a federal state. Rather, as Mark Elliott explains 'one of the hallmarks of devolution is that the national legislature, far from *transferring* legislative competence, merely *shares* such competence with devolved institutions'.[65] The devolved institutions owe their legal existence to legislation enacted by the UK Parliament, which can, as a matter of strict law, repeal or extinguish those institutions.[66] Indeed, the UK Parliament retains the right to legislate in all areas relating to Scotland,

For Review Only

[62] D Torrance 'Introduction to devolution in the United Kingdom' House of Commons Library, Briefing Paper Number 8599, 25 January 2022, p 5.

[63] Mitchell, above n 60, pp 6-15.

[64] Bogandor, above n 4, p 1.

[65] M Elliott 'Parliamentary sovereignty in a changing constitutional landscape' in J Jowell and C O'Cinneide (eds) *The Changing Constitution* (Oxford, OUP, 9th edn, 2019) pp 32-33.

[66] Ibid, pp 33-34.

Wales and Northern Ireland. However, by convention, the UK Parliament will not normally legislate on devolved matters except with the consent of the devolved legislature.[67]

Although the institutional framework was set in place in 1998, devolution has proved to be a process, rather than an event, and the devolution settlement has been amended substantially and a greater range of powers have been devolved over time.[68] One of the defining features of devolution has been its asymmetrical nature. The Scottish Parliament, Senedd Cymru (Welsh Parliament), and the Northern Ireland Assembly differ in size, composition, electoral system, devolved powers and in their system of government.[69] Despite these differences, it is now the case that Scotland, Wales and Northern Ireland all possess executive and legislative devolution.

For Review Only

There are various structural limitations that stem from the devolution settlement and which, amongst other things, determine how the devolved administrations are funded by the UK Parliament.[70] A detailed discussion of these matters is beyond the scope of this paper and this can be found elsewhere.[71] The crucial point, for present purposes, is that despite the asymmetries in the institutional design and the various structural limitations, devolution has transformed law making in

---

[67] See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [136-151]. Also see A McHarg 'Constitutional Change and Territorial Consent: the *Miller* Case and the Sewel Convention' in M Elliott *et al* (eds) *The UK Constitution After Miller: Brexit and Beyond* (Oxford: Hart, 2018) pp 159–67.

[68] R Davies 'Return of the Welsh Nation' (Times Higher Education Supplement, 12 September 1997).

[69] B Dickson 'Devolution in Northern Ireland' in J Jowell and C O'Cinneide (eds) *The Changing Constitution* (Oxford: OUP, 9th edn, 2019) pp 247-252; A McHarg 'Devolution in Scotland' in J Jowell and C O'Cinneide (eds) *The Changing Constitution* (Oxford: OUP, 9th edn, 2019) pp 277-283; R Rawlings 'The Welsh Way/Y Ffordd Gymreig' in J Jowell and C O'Cinneide (eds) *The Changing Constitution* (Oxford: OUP, 9th edn, 2019) pp 301-309.

[70] M Keep 'The Barnett formula and fiscal devolution' House of Commons Library, Briefing Paper Number 7386, 11 July 2022.

[71] Ibid; Mitchell, above n 60, pp 1-16.

the UK. This is particularly apparent in the case of property and housing. Legislative competence in this area has been devolved to the Scottish Parliament, Senedd Cymru (Welsh Parliament), and the Northern Ireland Assembly.[72] It is this extension of law making power which has created the potential for significant legal difference to emerge post-1998 between the renting laws of England and Scotland, as discussed in section 3.

(b) The property paradigm in England and Scotland

Before describing and analysing the legal difference that has emerged in Scotland since 1998, it is necessary to outline some key features of the English and Scottish property systems. This is important because it contextualises subsequent legal developments, thereby allowing legal difference to emerge more clearly, but also because it justifies the comparative analysis of English and Scottish property law, which is the subject of this paper. Although trite, it is important to state that there is no UK property law or UK housing law. Rather, the UK is the site three legal jurisdictions encompassing England and Wales, Scotland and Northern Ireland. Each jurisdiction has its own property law system and there are significant technical differences between these systems.[73] Of course, such differences present no special obstacle to comparative analysis.[74] Over the years there have been a number of insight comparative analyses of these systems.[75] The novelty of this study stems from its subject matter, tracing the impact of devolution on residential renting laws governing

For Review Only

[72] B Lund *Housing Politics in the United Kingdom* (Bristol: Policy Press, 2016) p 233.

[73] L Fox-O'Mahony and R Walsh 'Land Law, Property Ideologies and the British-Irish relationship' (2018) 47(1) *Common Law World Review* 7; C Kolbert and A Mackay *History of Scots and English Land Law* (Edinburgh: Geographical Publications Ltd, 1978).

[74] G Samuel *An Introduction to Comparative Law Theory and Method* (Oxford: Hart, 2014) 25.

[75] E Walsh 'Security of tenure in the private rented sector in England: balancing the competing property rights of landlords and tenants' in B McFarlane and S Agnew (eds) *Modern Studies in Property Law, Volume 10* (Oxford: Hart, 2019); Fox O'Mahony and Walsh, above n 73; D Large 'The Land law of Scotland – A comparison with American and English concepts' (1986) 17(1) *Environmental Law* 1; Kolbert and Mackay, above n 73.

eviction in England and Scotland, and from the method used, critically applying van der Walt's property paradigm model to describe and compare these systems.

Following van der Walt's approach, I structure this comparison by first identifying the strong property rights of the owner to evict a private tenant in both systems and then assess how these rights are qualified by residential landlord and tenant statutes. To begin with, Scots law is a hybrid legal system and so its property law has both common law and civil law heritage. The civil law influence is particularly apparent in how in Scottish property law, ownership is understood as a singular, unitary and absolute right which provides the owner of land with certain rights of use, enjoyment, and disposal.[76] By contrast, English property law, reflecting its common law heritage, does not have the same concept of absolute ownership or dominium.[77] Instead, it is organised around the doctrine of estates. This defines a set of exclusive possession and use rights over land for different periods of time.[78] The basic distinction is between the freehold estate, which is indefinite, and leasehold, which is time limited.[79]

Despite these fundamental technical differences, there is strong functional similarity in the role played by the right of ownership in Scottish law and the right to possession in English law which enables comparative analysis. Using van der Walt's terminology, in both systems, these rights constitute the apex property right which confers on the owner, strong property rights that, in principle, will trump lesser property rights or no property rights where a conflict arise.

[76] A Steven and G Gretton *Property, Trusts and Succession* (London: Bloomsbury, 3rd edn, 2017) p 24.

[77] The only 'absolute' owner of all the land is the Crown. See K Gray 'Property in Thin Air' (1991) 50(2) *The Cambridge Law Journal* 252 at 252-253.

[78] B McFarlane et al *Land Law: Text, Cases and Materials* (Oxford: Oxford University Press, 5th edn, 2021) p 160; P Birks 'Five Keys to Land Law' in S Bright and D Dewar (eds) *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) pp 462–3.

[79] *Street v Mountford* [1985] UKHL 4.

For Review Only

In addition to this functional similarity in English and Scottish property law, there has long been strong similarity in the statutory qualifications of those strong property rights that stem from residential landlord and tenant law. This reflects how key statutes applied, more or less uniformly, across Great Britain for well over a century prior to the 1998 devolution settlement.[80] Overtime, these statutory measures came to govern all of the vital aspects of the landlord and tenant relationship (ie termination, rent, repair).

The interaction of these qualifications with the strong property rights of owners is well illustrated in the case of eviction. In principle, the owner or landlord has a strong right to possession that will trump the lesser property rights of a renter or occupier. However, that strong right is subject to procedural and other qualifications as provided in residential landlord and tenant statutes. These statutes have tended to provide that contractual termination rights are subject to a statutory scheme, that formal notice must be given to end a tenancy, a recognised reason for termination must be given, and evictions are subject to judicial supervision.[81]

For over a century, the statutory qualifications of landlords' strong property rights have been expanded and contracted as the political fortunes of landlords and tenants have waxed and waned.[82] However, the critical point is that until the devolution settlement in 1998 this process has unfolded in much the same way in Scotland and England. In order to understand how the law has changed in Scotland since 1998, it is necessary to explain the nature of the common legal qualifications that were in place prior to the 1998 devolution settlement.

For Review Only

---

[80] P Robson *Housing Law in Scotland* (Dundee: Dundee University Press, 2011) pp 1-14. This was not the case in Northern Ireland. See T Hadden and D Trimble *Northern Ireland Housing Law: The Public and Private Rented Sectors* (Belfast: SLS Legal Publications, 1982) pp 11-15, 121-122.

[81] cf Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, s 1(3) and Rent Act 1977, s 98 and sch 15; Rent Act (Scotland) 1984, s11 and sch 2.

[82] W Wilson 'A short history of rent control' House of Commons Library, Briefing Paper Number 6747, 30 March 2017, pp 5-10.

(c) The Housing Act 1988 and the property paradigm

In 1998, the content of the qualifications of private landlords' right to possession in England were set out in the Housing Act 1988. The same essential qualifications were implemented in Scotland through the Housing (Scotland) Act 1988 and together this set in place a common statutory regime that applied to private residential tenancies across Great Britain.[83] The Housing Act 1988 is often characterised as a 'radical' reform that deregulated the private rented sector as part of a neoliberal project to return the tenancy regime to being governed by market forces and transform the sector into a site for speculative investment.[84] Consequently, the Act, in combination with the deregulation of mortgage lending and the privatisation of public housing, has been regarded as laying the foundations for the process of housing financialization that took hold in subsequent decades.[85]

In many ways the Housing Act 1988 was a reaction against the 'protected tenancy' regime, which preceded it. Under that system, tenants were provided with strong procedural and substantive legal protections against eviction.[86] Most notably, the grounds for possession were limited and the main 'fault based' grounds (ie arrears, breach of terms) were discretionary in nature, that is, the court was only to award possession where it was reasonable to do so.[87] This broad discretion allowed the court to take into account the circumstances of the parties and the wider context.[88] This constituted a significant qualification of the property paradigm, because it meant that landlords' right to possession was, at least in theory, subject to factors outside of their control.

For Review Only

---

[83] Hereafter, for simplicity, the 'Housing Act 1988' is used to refer to both Acts and technical differences are accounted for in the footnotes.

[84] Byrne, above n 8, at 751.

[85] Ibid, at 751-752.

[86] M Partington *Landlord and Tenant* (London: Weidenfeld and Nicholson, 2nd edn, 1980) pp 417-440; A McAllister *Scottish Law of Leases* (Totten: Bloomsbury, 4th edn, 2013) pp 428-436.

[87] Rent Act 1977, s 98 and sch 15, Part I; Rent (Scotland) Act 1984, s 11 and sch 2, Part I.

[88] *Cumming v Danson* [1942] 2 All ER 653; *Burgh of Paisley v Bamford* [1950] SLT 200.

This was unacceptable to the drafters of the Housing Act 1988 who instead presented a new vision for private renting which was 'very much to do with its immediate access characteristics and its ability to facilitate labour mobility'.[89] In this vision, ownership was presented as the natural or normal tenure of choice and the individual private renter was reimagined as a transitional household, moving through the sector rather than making a home there.[90] Strong qualifications of landlords' property rights were presented as unnecessary encumbrances that both undermined the function of housing as an economic asset while restricting labour mobility.[91]

Reformers were wary of creating a political scandal by simply removing legal protections against eviction and instead devised an imaginative approach that gave the appearance of continuity, while radically reducing the quality of those legal protections.[92] The Housing Act 1988 would not repeal the protected tenancies regime, instead it would only apply to new tenancies which would be either assured tenancies, the default tenancy modelled on the protected tenancy, or assured shortholds (AST)/short assured tenancies (SAT) in Scotland, a low security variant of the assured tenancy.[93]

The appearance of continuity was immediately apparent in the case of the assured tenancy. This retained many of the same qualifications of the landlords right to possession that applied to

For Review Only

---

[89] House of Commons, Department of Environment *Housing: The Government's Proposals* White Paper Cm 214 September 1987, p 2; P Kemp *Private Renting in Transition* (Coventry: Chartered Institute of Housing, 2004) pp 55-57.

[90] House of Commons, Department of Environment *Housing: The Government's Proposals* White Paper Cm 214 September 1987, p 24; J Hohmann 'Resisting Dehumanising Housing Policy: The Case for a Right to Housing in England' (2017) 4(1) *Queen Mary Human Rights Review* 1 at 11-15.

[91] Kemp, above n 89, pp 55-57.

[92] Robson, above n 80, pp 72-73.

[93] The requirement to serve additional notice to create an AST was removed in England in 1996 when the AST was made the default tenancy. Housing Act 1996; s. 96. There was no similar change in Scotland. See Robson, above n 80, pp 214-216.

Protected Tenancies. Thus, any contractual term or termination right, was subject to the statutory security regime which provides a set of defined grounds for possession, succession rights, formal notice requirements, and that a court order was required to end a tenancy and evict a tenant.[94] One subtle, but significant, change was the expansion in the range of mandatory grounds for possession, most notable for rent arrears, which had been a discretionary ground under the previous regime.[95]

The impact of the protections provided under the assured tenancy was substantively reduced by the AST/SAT. The defining feature of this tenancy was that after expiry of a six month period, it could be ended by notice without the landlord having to give a reason.[96] While it remained the case that the landlord must obtain a court order, the notice only ground of possession was mandatory and so the court was compelled to order possession once the ground was established and it had no capacity to consider the wider context or individual circumstances of the tenant.[97] To further expedite the landlord gaining possession of ASTs, an accelerated possession procedure was introduced which allowed the landlord to obtain an order for possession without a court hearing.[98]

In summary, the Housing Act 1988 interacted with the property paradigm in two different but related ways. On one hand, it provided a range of formal qualifications on the owner's right to possession. However, on the other, it substantially reworked those qualifications such that they would facilitate, rather than protect against, evictions. The net effect was a dramatic entrenchment of the property paradigm as part of broader ideological project to commodify rented housing.

For Review Only

[94] Housing Act 1988, ss 5-8, 17 and sch 2; Housing (Scotland) Act 1988, ss 16-19, 31 and sch 5.

[95] Housing Act 1988, sch 2, Part I, ground 8; Housing (Scotland) Act 1988, sch 5, Part 1, ground 8. See D Cowan *Housing Law and Policy* (Cambridge: Cambridge University Press, 2011) p 281; Robson, above n 80, pp 203-204.

[96] Housing Act 1988, s 21; Housing (Scotland) Act 1988, s 33.

[97] For England, see Nearly Legal, 'Section 21 flowchart' (1 October 2021), available at https://nearlylegal.co.uk/section-21-flowchart/.

[98] In England these are set out in CPR 55, Part II.

Deregulation did not produce an immediate change in the fortunes of private renting. Indeed, it was a decade later when the first signs of a revival of private renting became apparent. This development reflects a range of demand and supply factors that extend beyond the Housing Act 1988.[99] Nevertheless, by enabling landlords to set rents as they please and evict tenants with relative ease, it helped to create conditions that were favourable for speculative investment. The subsequent introduction of buy-to-let mortgages in the mid-1990s, made all the more attractive by tax reliefs and rent subsidies, generated a flood of investment and the sector more than doubled in size across Britain from 1998 to 2018.[100]

Much of the demand for private renting has stemmed from the growing numbers of households, priced out of ownership or faced with growing social housing waiting lists.[101] In the process, more and more households have been channelled towards the AST/SAT tenancy regime which privileged the property rights of landlords above most other considerations. This exposed many households to insecurity, in the form of 'no fault' evictions, unaffordability rents and relatively poorer housing conditions.[102] By the late 2000s, there were clear signs across Britain of an emerging crisis in the 'revived' private rented sector.[103]

For Review Only

3. Renting and resisting in Scotland

The renting crisis unfolded in a radically changed constitutional context in which the devolved governments had legislative powers over property and housing matters. Although there were signs that the tenancy regime under the Housing Act 1988 was exacerbating this crisis, the first major

---

[99] P Kemp 'Private Renting After the Global Financial Crisis' (2015) 30(4) *Housing Studies* 601 at 606-612.

[100] Marsh and Gibb, above n 6, pp 5-7.

[101] Kemp 'Private Renting After the Global Financial Crisis', above n 99.

[102] Carr et al, above n 7, pp 10-11; Rugg and Rhodes, above n 7, p 19; Marsh and Gibb, above n 6, p 6.

[103] J Rugg and D Rhodes *The Private Rented Sector: its contribution and potential* (York: Centre for Housing Policy, 2008) pp xvii, xxi.

tenancy reform did not materialise until the late 2010s when the Scottish Government passed the Private Residential Tenancy (Scotland) Act 2016. This reform is distinctive not simply for being the first to occur but rather for the extent to which it expanded qualifications of the landlords' right to possession. There have been subsequent significant reforms of the tenancy regime in Wales[104] and Northern Ireland[105] and reform proposals in England,[106] however none have gone as far as the Scottish reforms in expanding tenant protections against eviction.

There are excellent accounts of the Private Residential Tenancy (Scotland) Act 2016 which shed light on its content and how it has been subsequently amended.[107] There have also been insightful comparative studies of post-1998 renting reforms in the UK. These accounts tend to explain the Scottish reforms as the inevitable result of devolution or attribute the nature of the reforms to the housing politics of elite political actors, namely the Scottish National Party (SNP).[108] While these are important factors, they do not provide a convincing explanation for why the Scottish reforms went

For Review Only

---

[104] Welsh Government *Renting Homes (Wales) Act 2016 Explanatory Notes,* (Cardiff: Welsh Government, 2016; Welsh Government *Renting Homes: A better way for Wales* (Cardiff: Welsh Government, 2013) p 16; Welsh Government *Homes for Wales, A White Paper for Better Lives and Communities* (Cardiff: Welsh Government, 2012) p 36.

[105] Northern Ireland Assembly *Private Tenancies Bill: Explanatory and Financial Memorandum* (Belfast: Northern Ireland Assembly, 2021).

[106] *A Fairer Private Rented Sector CP 693*, above n 5; T Amodu 'Opening Pandora's box? Capturing the edifice of "hopefulness" in the private rented sector' (2023) *Legal Studies* 1-18.

[107] Robson and Combe, above n 3; Combe, above n 3; Robson and Combe, 'The first year of the First-tier', above n 3.

[108] Walsh, above n 75, p 212; T Moore 'The convergence, divergence and changing geography of regulation in the UK's private rented sector' (2017) 17(3) *International Journal Of Housing Studies* 444 at 445; K Gibb 'Housing policy in Scotland since devolution: divergence, crisis, integration and opportunity' (2015) 23(1) *Journal of Poverty and Social Justice* 19 at 23-25; K McKee, J Muir and T Moore 'Housing policy in the UK: the importance of spatial nuance' (2017) 32(1) *Housing Studies*, 60 at 70-72.

further in expanding qualifications of landlord's property rights. In this section, I argue that the highly politicised reform process, from which the Private Residential Tenancy (Scotland) Act 2016 emerged, is a vitally important factor in the development of this significant legal difference and that this process cannot be fully understood without taking account of the important role played by social movements of marginalised tenants in politicising that process and contesting the acceptable parameters of reform.

To develop this argument, I critically apply the property 'from below' approach outlined in section 1. Rather than imagining a perspective from the margins, I instead develop a more concrete perspective that draws on the actual practices of Living Rent, a national tenants union, engaged in concrete struggles to contest the property paradigm. Through a granular analysis of the passage of the Private Residential Tenancy (Scotland) Act 2016, I reveal how Living Rent organised tenants to contest and politicise reform. In doing so, they effectively displaced dominant narratives that presented reform as a technocratic modernisation exercise that did not require dramatic changes to the balance of power in the landlord-tenant relationship. In this way, Living Rent's campaigns effectively contested the property paradigm and made a case for expanding qualifications of landlords' right to possession.

(a) Living Rent and the housing crisis

The UK housing crisis has taken on a particular dimension in Scottish cities. Historically, Scotland was the site of the most extensive commitment to public housing in the UK. In parts of Glasgow, more than half of the housing stock was public rented housing and it effective competed with, and displaced, the market for housing for rent or ownership.[109] However, in a few short decades, the situation was transformed by the right to buy and deregulation of renting. Consequently, the general

[109] A Murie 'The housing legacy of Thatcherism' in S Farrall and C Hay (eds) *The Legacy of Thatcherism* (Oxford: Oxford University Press, 2014) p 147.

For Review Only

problems associated with the housing crisis across the UK including the shortage of social housing, housing cost inflation, evictions and poor-quality housing are present in Scottish cities.[110]

These conditions have proved fertile ground for the development of movements of resistance to the housing crisis. One such movement is Living Rent, a national tenants union that was formed in 2016 by various tenant groups and campaigners that coalesced around a popular campaign centred on the Scottish government consultation on tenancy reform in 2014.[111] Living Rent defines itself as a tenants' union that is committed to fostering 'solidaristic mass movements around private and social housing across Scotland' and fighting for 'tenants' rights and decent and affordable housing for all'.[112]

Although Living Rent began from a campaign around law reform, and housing rights talk is central to how they constitute their collective identity and struggles, they do not limit themselves to narrow, legalistic aims or methods. Rather, they aspire to a more ambitious and explicitly egalitarian future in which the role of the private market is diminished and public housing is available to all.[113] In much the same way, they conceptualise the right to housing in expansive, political and egalitarian ways

For Review Only

---

[110] Scottish Government *Private sector rent statistics: 2010-2021* (Edinburgh: Scottish Government, 2021) pp 3-4; Scottish Government *Housing Statistics 2019: Key Trends and Summary* (Edinburgh: Scottish Government, 2019) pp 3-4; Scottish Government *Scottish House Condition Survey 2019: Key Findings* (Edinburgh: Scottish Government, 2020) pp 9-10; Joseph Rowntree Foundation *Poverty in Scotland 2020* (York, UK: Joseph Rowntree Foundation, 2020) pp 17-24.

[111] E Saunders, K Samuels and D Stratham 'Rebuilding a Shattered Housing Movement: Living Rent and Contemporary Private Tenant Struggles in Scotland' in Neil Gray (ed) *Rent and its Discontents* (London: Rowman & Littlefield, 2018) pp 101-102; N Gray, J Simons and B Walker 'Fighting for a living rent' (*Scottish Left Review,* 2019), available at https://www.scottishleftreview.scot/fighting-for-a-living-rent/.

[112] Ibid, p 104.

[113] Ibid; Living Rent *Tenants' Manifesto 2020/21* (Edinburgh: Living Rent, 2020) pp 1-4.

that extend beyond dominant legal institutional conceptions.[114] For Living Rent, the right to housing is not merely about realising minimum legal protections but instead involves a profoundly political commitment to challenging the neoliberal commodification of housing while advocating for the primacy of the social function of housing as a home.[115]

To realise their aims Living Rent use a range of tactics including conventional lobbying as well as direct action to defend against evictions and poor housing.[116] This paper is focused on how Living Rent have used Scottish government consultations as part of its campaigns for tenants' rights. Although Living Rent do not use the terminology of the property paradigm, its campaigns clearly aim to contest that paradigm, as entrenched by the Housing (Scotland) Act 1988, and bring about greater qualifications on landlords' property rights.

For Review Only

From the outset, Living Rent campaigners identified the tenancy regime under the Housing (Scotland) Act 1988 as being central to the housing crisis. Living Rent rejected its legal-liberal underpinning notion whereby the landlord-tenant relationship was conceptualised as simply a private contractual relationship between individuals with equal bargaining power.[117] Instead, Living Rent presented the landlord-tenant relationship as inherently exploitive and based on the fundamental imbalance of economic power between the landlord, who owns scarce residential housing as an investment asset, and the tenant, who needs a home.[118]

---

[114] M Jordan 'Contesting Housing Inequality: Housing Rights and Social Movements' (2023) *Modern Law Review* 1 at 24-27; R Serpa and E Saunders 'Towards an Effective Right to Housing in Scotland' in G Gall (ed) *A New Scotland: Building an Equal, Fair and Sustainable Society* (London: Pluto Press, 2022).

[115] Gray et al, above n 111.

[116] Saunders et al, above n 111, pp 104-106.

[117] Ibid.

[118] Ibid, 114.

Living Rent argued that the tenancy regime privileged the landlords strong property rights and compounded the marginalisation of tenants in order to emphasise the exchange value of housing over its use value as a home.[119] Thus, they argued, it was a vital part of the process of state promoted housing commodification that has been central to neoliberal capitalism in the UK since the 1980s.[120] Consequently, they contended that contesting and overturning this regime was a vital step towards addressing one of the root causes of the housing crisis.

(b) Technocratic reform but substantive continuity?

The Private Residential Tenancies (Scotland) Act 2016 significantly extended legal qualifications of landlords' property rights and it represents an instance of significant legal difference between Scotland and England. The emergence of legal difference has been attributed to constitutional change in the form of devolution and/or the housing politics of the Scottish National Party.[121] While both factors are important, they do not offer a convincing explanation for this development. This becomes apparent through a granular analysis of the law reform process which reveals the important role played by Living Rent in politicising that process and contesting the acceptable parameters of reform.

For Review Only

Legal difference cannot be explained as an inevitable result of political devolution given that this major reform of the tenancy regime did not materialise until nearly two decades after the 1998 devolution settlement. Nor can the emergency of legal difference be simply attributed to the housing politics of the SNP. Although the SNP have struck a more pro-regulation stance than the other main parties of government across the UK, reforming the private tenancy regime was not an

[119] Ibid, 104.

[120] Living Rent, above n 113, pp 1-4; Jordan, above n 114.

[121] Walsh, above n 75, p 212; Moore, above n 108, at 445; Gibb, above n 108, at 23-25; McKee et al, above n 108, at 70-72.

immediate priority.[122] The initial perception of the first SNP government (2007-2011) was that the tenancy regime they inherited was 'operating satisfactorily'[123] and its primary concern was maintaining the flexibility of the sector and increasing the supply of private rented housing by creating conditions favourable to private institutional investors.[124]

During the second SNP government (2011-16) tenancy reform rose up the political agenda after the Scottish Private Sector Strategy Group identified tenants' need for greater stability.[125] The government responded by commissioning a review of the tenancy regime, but in doing so, it made clear that regulatory changes should not 'constrain growth' by compromising the attractiveness of the sector to institutional investors and lenders.[126] Consequently, the Review Group developed a technocratic case for reform that was directed at 'clarifying, simplifying, modernising and standardising the private tenancy' but which steered clear of proposing dramatic changes to the balance of rights and obligations under the existing regime.[127]

For Review Only

---

[122] Scottish Government *Firm Foundations* (Edinburgh: Scottish Government, 2007) pp 28, 30.

[123] Scottish Government *Scottish Private Rented Sector Strategy Group Consultation Recommendations Report* (Edinburgh: Scottish Government, 2009) p 20.

[124] Scottish Government *A Strategy for the Private Rented Sector in Scotland* (Edinburgh: Scottish Government, 2013) pp iv, 1; Scottish Government *Homes Fit for the 21st Century* (Edinburgh: Scottish Government, 2011) p 14; Scottish Government *Firm Foundations*, above n 122, pp 28, 30.

[125] Scottish Government *A Strategy for the Private Rented Sector in Scotland* (Edinburgh: Scottish Government, 2013) p 24.

[126] Ibid, p 25.

[127] Scottish Government *Report of the Review of the Private Rented Sector Tenancy Regime* (Edinburgh: Scottish Government, 2014) pp 6, 7, 11-12.

Unsurprisingly, the new tenancy regime promised various technical changes but little substantive change in many areas.[128] There would be an initial six month statutory term[129] and there was no indication of any change to the market rents system.[130] The most notable changes were the proposals to end no fault evictions[131] and introduce notice periods that varied according to the duration of the tenancy.[132] While ending no fault evictions was presented as being necessary to improve stability for tenants, policy makers were careful to offset this change by proposing 'a modernised and simplified right of possession'.[133] This involved a major expansion in the role of mandatory grounds of possession such that under the new tenancy regime all of the grounds of possession would be mandatory (breach, arrears, sale, etc).[134]

If implemented in this form, the tenancy regime would have eliminated from judicial consideration in eviction cases the wider context of the dispute and the personal circumstances of the parties. Instead, it would justify the more or less automatic strong property rights based outcome of eviction cases. Thus, it would have gone further than even the Housing Act (Scotland) 1988 in entrenching the strong property rights of landlords and reinforcing the property paradigm.[135] The Scottish government argued that such changes were necessary in order to safeguard the 'return on

For Review Only

[128] The technical changes included introducing a new model tenancy agreement, simplifying notice requirements and tenancy 'roll over' arrangements. See Scottish Government *Consultation on a New Tenancy for the Private Sector* (Edinburgh: Scottish Government, 2014) p 12.

[129] Ibid, at paras 37-41.

[130] Ibid, at paras 65 19-28.

[131] Ibid, at paras 25-30.

[132] Ibid, at paras 42-44.

[133] Scottish Government *Review of the Private Rented Sector Tenancy Regime*, above n 127, p 10.

[134] Scottish Government *Consultation,* above n 128, at paras 45-52.

[135] As Malcolm Combe explains 'this was a feature rather than a bug' see Combe, above n 3, at 223.

investment and income from rent' of landlords and prospective institutional investors and not jeopardise their access to buy-to-let financing.[136]

(c) Contesting the Private Residential Tenancies (Scotland) Act 2016

Reform took a decisive turn when the Scottish government launched a public consultation in 2014 on the tenancy reform proposals. The consultation generated over two and a half thousand responses and signalled a stinging rebuke of the proposed tenancy regime.[137] The majority of respondents made clear that the proposals did not go far enough in protecting tenants. However, it was the nearly two thousand responses organised by Living Rent which tipped the scales on most issues.[138] Most notably, the campaign responses organised by Living Rent were at odds with the majority of other responses which agreed that all grounds for possession should be mandatory[139] and that the Scottish government should not take any action with regard to rent levels.[140] By contrast, Living Rent rejected the exclusive use of mandatory grounds for possession as a 'serious weakening of the rights of tenants'[141] and instead advocated that tenancies should be indefinite[142] and for the introduction of rent controls.[143]

The Scottish government responded by amending the reform proposal and launching a second consultation in 2015. While re-committing to abolishing no fault evictions, the revised proposals

For Review Only

---

[136] Scottish Government *Consultation,* above n 128, at para 46.

[137] Scottish Government *Consultation on a New Tenancy for the Private Sector: Analysis of Consultation Responses* (Edinburgh: Scottish Government, 2014) at para 4.

[138] Ibid, at para 1.9. Campaigns organised by Living Rent accounted for three quarters of all responses.

[139] See Scottish Government *Analysis of Consultation Responses,* above n 137, at paras 3.5.

[140] Ibid, at paras 4.14-4.19.

[141] Ibid, at paras 3.5 and 3.12.

[142] Ibid, at paras 16-17.

[143] Ibid, at paras 4.14.

broke with the exclusive use of mandatory grounds for possession and instead redesignated a number of grounds as discretionary – although sale and rent arrears were to remain primarily mandatory grounds.[144] One of the more notable changes was in relation to rent regulation. While careful to rule out 'any further general regulation of rents', the Scottish government indicated it was considering targeted rent regulations that 'to protect tenants from excessive increases in hot-spot areas'.[145]

The second consultation generated three times as many responses, amid competing campaigns organised by Living Rent and the Scottish Association of Landlords (SAL).[146] These campaigns were diametrically opposed on the use of mandatory grounds of possession and rent control. In contrast to the SAL, Living Rent advocated for ending no fault evictions and rejected the use of mandatory grounds for possession.[147] Instead, Living Rent made clear that all grounds should be discretionary to ensure that 'tenants should have the right to contest all evictions'.[148] On rent control, the SAL campaigns made clear its opposition to any rent control, outlining that 'the sector should remain market-led'.[149] By contrast, Living Rent advocated for a system of rent control under which local authorities would 'be able to implement special local measures when housing costs are more than a third of tenants' incomes'.[150]

For Review Only

---

[144] Scottish Government *Second Consultation on a New Tenancy for the Private Sector* (Edinburgh: Scottish Government, 2015) pp 14-23.

[145] Ibid, p 13.

[146] Scottish Government *Second Consultation on a New Tenancy for the Private Sector*: *Analysis of Consultation Responses* (Edinburgh: Scottish Government, 2015) p 3.

[147] Ibid, pp 7-8.

[148] Ibid, p 8.

[149] Ibid, pp 73-74.

[150] Ibid, p 74.

The proposals were amended once again and the revised proposal was implemented into law by the Private Residential Tenancy (Scotland) Act 2016. In addition to a raft of technical changes, the Act abolished no fault evictions, introduced indefinite tenancies and variable notice periods. Furthermore, it introduced targeted rent regulations designed to limit rent increases in 'hot spot' areas.[151] However it was not all one way traffic. The government ruled out 'any further general regulation of rents'[152] and the rent arrears ground of eviction remained a primarily mandatory ground[153] while the category of mandatory grounds was expanded to include situations where the landlord wished to sell the dwelling.[154]

The scale of Living Rent's success in utilizing the consultation mechanism, in combination with lobbying and direct action, to politicise tenancy reform is striking. The campaign responses organised by Living Rent stand out because they were at odds with the majority of non-campaign responses which tended to endorse the Scottish government's proposals to expand the role of mandatory grounds for possession and not take any general action to control rents. Crucially, Living Rent's campaign posed a direct challenge to the narrative that tenancy reform was largely a technocratic project that could realise apparently politically neutral objectives of modernisation and simplification without requiring dramatic changes to the existing set of rights and obligations. Instead, Living Rent emphasised the imbalance of power between landlord-tenant, as entrenched by the Housing Act (Scotland) 1988, as the central issue that must be addressed.[155]

Living Rent's campaigns to politicise and contest tenancy reform did not end once the Private Residential Tenancy (Scotland) Act 2016 was enacted. The Act has been subject to numerous

For Review Only

[151] Private Housing (Tenancies) (Scotland) Act 2016, s 38.

[152] Scottish Government *Second Consultation Analysis of Consultation Responses*, above n 146, p 71.

[153] Private Housing (Tenancies) (Scotland) Act 2016, sch 3, ground 12.

[154] Ibid, ground 1.

[155] Saunders et al, above n 111, pp 110-114; Gray et al, above n 111.

amendments and at each stage Living Rent have organised campaigns to push for expanding qualifications of landlords' property rights.[156] Most notably, the Act was amended in 2020 to make all grounds for eviction discretionary.[157] Although this was a 'time limited' change in response to the covid-19 pandemic, it has been repeatedly extended and now forms 'the baseline legal position'.[158] Furthermore, the Scottish government introduced an eviction moratorium and rent freeze in response to the cost of living crisis in 2022.[159] Although both measures are time limited, the Scottish government committed in 2022 to introducing a general system of rent controls on a permanent basis.[160]

In aggregate, these measures represent significant qualifications on the landlords right to possession, and other property rights, and so tend to undermine the strength of the property paradigm. In this respect, they distinguish the tenancy regime under the Private Residential Tenancy (Scotland) Act 2016 from other private tenancy regimes that have been introduced or proposed in the UK.[161] While wider contextual factors including the covid-19 pandemic and the cost of living crisis have shaped these developments, it is equally clear that legal difference cannot be fully understood without taking account of how Living Rent adapted to the new constitutional settlement and

For Review Only

[156] G Maloney 'The fight for rent controls: A question of power' (Red Pepper, 22 August 2022), available at https://www.redpepper.org.uk/the-fight-for-rent-controls-a-question-of-power/; Living Rent 'Protecting Tenants During the Pandemic' (Living Rent, 25 March 2020), available at https://www.livingrent.org/protecting_tenants_during_the_pandemic.

[157] Coronavirus (Scotland) Act 2020, sch 1; Coronavirus (Recovery and Reform) (Scotland) Act 2022, part 4.

[158] Combe, above n 3, at 229.

[159] Cost of Living (Tenant Protection) (Scotland) Act 2022, schs 1 and 2. See Combe, above n 3, at 226-229.

[160] Scottish Government *A Stronger & More Resilient Scotland,* above n 5.

[161] *A Fairer Private Rented Sector CP 693*, above n 5; Northern Ireland Assembly *Private Tenancies*, above n 105; Welsh Government *Renting Homes (Wales) Act 2016 Explanatory Notes*, above n 104.

organised marginalised tenants to contest and, in some respects, displace the logic of the property paradigm.

Conclusion

In this paper, I have critically applied the theoretical framework developed by AJ van der Walt in *Property in the Margins* to analyse the English and Scottish property systems in times of 'radical' constitutional change from the perspective of those on the margins of those systems. This paper sheds light on the dual interaction of the Housing Act 1988, a key piece of the legal architecture in the process of housing financialization, and the property paradigm. While this Act provided a range of formal qualifications on the owner's right to possession, its substantive effect was to rework those qualifications such that they would facilitate, rather than protect against, evictions. The net effect was a dramatic entrenchment of the property paradigm as part of broader ideological project to commodify rented housing. In doing so, it exacerbated a range of inequalities that have become increasingly apparent with the revival of private renting over the past two decades. Yet this analysis 'from below' also reveals how the Housing Act 1988 contained within it the seeds of its own downfall. By entrenching the property paradigm, it helped to create conditions of precarity for tenants and those conditions proved fertile ground for Living Rent to organise marginalised tenants and undertake popular campaigns to contest that paradigm.

For Review Only

This analysis also offers insights into how 'radical' constitutional change, in the form of devolution, interacted with property systems in the UK and how different policy responses to the crisis in the 'revived' private rented sector have emerged since 1998. Clearly devolution facilitated the development of significant legal difference in the Private Residential Tenancies (Scotland) Act 2016 which has expanded tenant's protections against eviction. However, this should not be taken to indicate the weakness of the property paradigm in Scottish law. Rather, the strength of that paradigm is apparent in the initial tenancy reform proposal which would have reinforced the strong property rights of landlords by making all grounds of possession mandatory. To understand why this

did not come to pass, it is necessary to break with overly narrow approaches that explain reform as the inevitable result of devolution or as resulting from a top down elite driven process.

When the reform process is analysed 'from below', a more nuanced picture emerges. It is true that law reform in Scotland was made possible by constitutional change and that it has been shaped by the housing politics of the SNP as well as wider developments including the covid-19 pandemic and the cost of living crisis. However, I have argued that it is not possible to fully understand this development of significant legal difference without taking account of the reform process from which the Act emerged, and the important role which Living Rent played in politicising that process. Living Rent effectively adapted to the new constitutional paradigm and used the consultation mechanism, as part of a broader campaign, to organise marginalised tenants, reject the logic of the property paradigm and push for expanding qualifications of landlords property rights.

This study also provides insights into how positions of marginality and centrality are constructed and contested within property systems. Recognising that 'property regimes reflect the characteristics of their accompanying economic, social and political system', van der Walt identified how within liberal capitalist systems, 'private property naturally holds a central place in society though its importance in the free market economy'.[162] In much the same way, the status of having lesser forms of property or not having property at all is relegated to the margins of social normality. The same centrality logic was replicated by the Housing Act 1988 which is underpinned by the notion that renting is transitory and that the 'natural' or normal tenure of choice is ownership. To be a renter in a 'property owning democracy' is to be on the margins of the property system and of society. However, this paper has demonstrated that it is not necessary to 'imagine' the perspective of a tenant on the margins of such a system. Rather, a more direct way of developing this perspective involves taking seriously the actual practices of tenants unions, such as Living Rent, engaged in concrete struggles to contest the property paradigm. This provides a method that builds on van der Walt's work and which gives

[162] van der walt, above n 1, pp 231-232.

For Review Only

weight to the collective voice and agency of marginalised tenants without reducing them to 'the status of weakness and dependence'.[163]

Finally, this paper demonstrates that marginality does not necessarily equal weakness and that positions of marginality and centrality within property systems are not static but are often dynamic, contingent, and inherently open to contestation.[164] In Scotland, Living Rent effectively organised marginalised tenants into a national tenants union which effectively challenged the conventional property structures that contributed to their marginality. Much of Living Rent's success in contesting the property paradigm can be attributed to its recognition of the limits of narrow, legalistic and juridical aims and methods. Instead, Living Rent present their campaign for legal reforms to expand tenant rights as but one part of a wider political struggle to challenge the commodification of housing. In this way, like so many social movements before them, Living Rent's campaigns are important because they make it 'possible or easier to imagine or accept similar changes again' elsewhere in the UK, and indeed further afield.[165]

For Review Only

[163] van der walt, above n 1, p 242.

[164] Ibid, pp 243-246.

[165] Ibid, p 244.