

RESEARCH ARTICLE

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

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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 at 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 landlord’s 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 organised tenants to effectively contest and, in some respects, displace the logic of the property paradigm during the reform process.

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 law ‘from below’ approach for this purpose which draws on AJ van der Walt’s book *Property in the Margins*.¹ In that study of property in post-apartheid South Africa, 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 system. His 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 to analyse how statutory qualifications of the private landlord’s right to possession, the apex property right, have been

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

²*Ibid*, p 27.

reformed in Scotland following a process of ‘radical’ constitutional change in the form of political devolution. My mission differs from van der Walt’s in that this paper is not seeking to test whether there has been delivery of the constitutional promise of the 1998 devolution settlement for those ‘at the margins’; it is instead concerned with how those with ‘lesser rights’ have effectively contested – and, in some respects, displaced – the logic of the property paradigm in Scotland post-1998.

This paper demonstrates that the property paradigm is a feature of the property systems of England and Scotland and that it was substantially entrenched by the Housing Act 1988 and Housing (Scotland) Act 1988 which set in place a common private tenancy regime. While constitutional change created new potential for the various governments of the UK to break with that regime, it is argued that only in Scotland have qualifications to the landlord’s right to possession been expanded in a way that significantly undermines the property paradigm. The Private Residential Tenancy (Scotland) Act 2016 (as amended) abolished no-fault evictions, made all grounds for eviction discretionary and introduced indefinite tenancies, variable notice periods and rent controls in so-called rent pressure zones. The central argument presented here is that this reform cannot be fully understood without taking account of how Living Rent, a national tenants’ union, organised those with ‘lesser rights’ to engage with the law reform process to effectively challenge the logic of the property paradigm and strengthen housing rights for tenants.

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 played during the law reform process.³ This paper addresses a gap in the literature by shedding light on how Living Rent engaged with the Scottish government consultation mechanism as part of its campaign to expand housing rights for tenants. This is a novel analysis because, although law-making powers over property and housing have been devolved since 1998, the impact of this ‘radical’ constitutional change on property and housing systems in the UK remains relatively unexplored and undertheorised.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, the private rented sector is central to the contemporary housing crisis because it is the most expensive, insecure and unsafe housing in each part of the UK.⁷

The central argument is developed across the following structure. Part 1 draws on approaches to law ‘from below’ to set out the analytical framework. After critically engaging with the theoretical framework developed in *Property in the Margins*, it is argued 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 social movements, namely tenants’ unions, can contest the property paradigm. Part 2 demonstrates that the property paradigm functioned in a similar way in England and Scotland in relation to the law governing eviction of private tenants and that it was entrenched by

³P 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 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.

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

⁵Department 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.

⁶A Marsh and K Gibb *The Private Rented Sector in the UK* (Glasgow: UK Collaborative Centre for Housing Evidence, 2019) pp 5–7.

⁷H 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 Publishing, 2020) pp 10–11; J Rugg and D Rhodes *The Evolving Private Rented Sector: Its Contribution and Potential* (York: Centre for Housing Policy, 2019) p 19; Marsh and Gibb, above n 6, p 6.

Housing Act 1988 and Housing (Scotland) Act 1988.⁸ This section outlines how the revival of private renting occurred across the UK in parallel to a process of ‘radical’ constitutional change, in the form of political devolution, which transformed the legal response to the emerging crisis in the private rented sector. The section then identifies how the Scottish reforms are distinctive when compared to the post-1998 reforms of tenancy law in England and Wales which have retained core aspects of the Housing Act 1988. In part 3, the passage of the Private Residential Tenancies (Scotland) Act 2016 is analysed in granular detail to shed light on the important role played by Living Rent in politicising the law reform process, contesting the property paradigm, and campaigning for greater qualifications of the landlord’s right to possession.

1. Property, housing, and constitutional change ‘from below’

(a) Law ‘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 and exploited 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 systems which accords ownership a central place through its importance in underpinning 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 refuse to abide in the conventional property structures and roles of mainstream society because such ‘property outlaws’ are perceived as a threat to how a stable system of private ownership maintains social order.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 This in turn serves to both explain and help to justify the unequal distribution of property and power in society.¹⁷ Such approaches also tend to overlook the important role which social movements have played in contesting and shaping property systems and thus can relegate and diminish the agency and voice of those who are subject to the strong property rights of others.

⁸Hereafter, for simplicity, the term ‘Housing Act 1988’ is used and footnotes are used to elaborate differences. That Act is regarded as central to the process of housing financialisation. See D Madden and P Marcuse *In Defense of Housing: The Politics of Crisis* (London: Verso, 2016) pp 8–11, 18.

⁹O 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: Routledge, 2020) p 1.

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

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

¹²*Ibid*, pp 1–2.

¹³Van der Walt, above n 1, pp 231–233.

¹⁴*Ibid*, pp 231–232; JW Singer *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000) pp 3, 6.

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

¹⁶Van der Walt, above n 1, p 237.

¹⁷*Ibid*, pp 231–232.

In recent years, there has been increasing academic interest in approaches ‘from below’ to property. In *Property Rights from Below*, De Shutter and Rajagopal present a diverse set of essays which seek to challenge the growing sanctification of a Western understanding of property rights.¹⁸ These essays critique dominant conceptions of property rights and reveal how while the legal framework can facilitate the commodification of land it can also enable the ‘shift away from privatisation and commodification and toward the revival of the commons’.¹⁹ These studies illustrate how although property law aims to enhance stability it also engenders ‘cultural and political forces that contest and destabilise, creating chaos and confusion in the midst of seeming orderliness’.²⁰

These studies complement a growing body of scholarship in the field of housing where various scholars have rejected the centrality focus that dominates much of mainstream legal scholarship by theorising property and housing ‘with reference to the actual experiences of those who find themselves on the margins of society and of property distribution patterns’.²¹ This scholarship ‘from below’ has both tested how housing and property systems work from the perspective of housing/property outsiders²² and shed light on how those subject to the strong property rights of others have organised collectively to form social movements to contest dominant property models²³ and bring about a more egalitarian housing system.²⁴

This paper aims to contribute to this scholarship by analysing how private renting legislation in Great Britain (England, Scotland, Wales) has privileged the strong property rights of landlords and thereby facilitated the marginalisation of tenants. It is argued that following ‘radical’ constitutional change in the form of political devolution, tenants in Scotland have effectively challenged dominant property structures by forming tenants’ unions to contest Scottish renting reforms and secure greater housing rights for tenants.

This paper adapts AJ van der Walt’s *Property in the Margins* (2009) as a theoretical framework for this purpose. In that book, van der Walt’s mission was to test whether there had been delivery of the constitutional promise in post-apartheid South Africa.²⁵ To do this, he developed a perspective with which to reflect on a property system, in times of constitutional change, that sought to take seriously the property experiences of people who exist on the ‘margins of society’.²⁶ His primary focus was on investigating legal and judicial reactions to anti-eviction legislation and constitutional provisions that were designed to protect those with lesser rights (tenants) or no rights (occupiers).²⁷

Although van der Walt recognised the importance of collective action, his mission differs from mine in that he did not primarily engage with how those with ‘lesser rights’ can form social movements to contest the process of legislative change to curtail the strong property rights of landlords. Nevertheless, van der Walt’s model is particularly suitable for this project.²⁸ This is because it provides a novel means of analysing property and housing systems not from the centre, but from the perspective of those who are subject to the strong property rights of others. In addition, it provides an adaptable framework for explaining broad trends in tenants’ rights without getting bogged down in technical

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

¹⁹Ibid, p 9.

²⁰Peñalver and Katyal, above n 15, p viii; L Fox-O’Mahony and ML Roark *Squatting and the State: Resilient Property in an Age of Crisis* (Cambridge: Cambridge University Press, 2022) p 6.

²¹Van der Walt, above n 1, p 23.

²²L Fox-O’Mahony ‘Property outsiders and the hidden politics of doctrinalism’ (2014) 67 *Current Legal Problems* 409.

²³Peñalver and Katyal, above n 15, p viii; Fox-O’Mahony and Roark, above n 20, p 299.

²⁴M Jordan ‘Contesting housing inequality: housing rights and social movements’ (2023) *Modern Law Review* 1; A Fierro ‘Revolutionary politics of social rights? An ethnographic account of the homeless workers’ movement in São Paulo’ (2019) 47 *Millennium Journal of International Studies* 398.

²⁵Van der Walt, above n 1, p vii.

²⁶Ibid, p 24.

²⁷Ibid, p 43.

²⁸There are other theoretical frameworks that can be adapted to analyse property systems ‘from below’. See Fox-O’Mahony and Roark, above n 20; B Bhandar *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Durham, NC: 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).

detail. Finally, it provides a means of assessing the impact of different forms of constitutional change on various property systems. This makes it particularly suitable for this project which analyses legal developments made possible by a process of constitutional change in the form of political devolution.

(b) The property paradigm

The thesis advanced in *Property in the Margins* is that a property regime will tend to insulate itself against change, including democratic and constitutional change and transformation, ‘through the 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.²⁹ 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 considered 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’.³⁰ Within this paradigm, property interests are mainly valued according to their status as property rights, personal rights or no-rights, and also as strong rights, weak rights, or no-rights.

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, such that conflicts between interests are decided according to doctrinal rhetoric and logic and without reference to the wider context or the personal circumstances of the parties. The result is that the paradigm tends to justify ‘the more or less automatic rights-based (and often ownership biased) outcome of particular property disputes’.³¹

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 socio-economic assumptions about the central role of property in individual lives and in society. 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.³²

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’.³³ 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 and ultimately should fall away over time until ownership eventually resumes its natural ‘fullness’.³⁴

One of the paradigm’s most important features 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 this through a contextual analysis which recognises that property systems reflect their accompanying economic, social, and political system. Accordingly, within liberal Western systems, private property is privileged because of its importance in the free market economy.³⁵ 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.³⁶

²⁹Van der Walt, above n 1, p viii.

³⁰Ibid, p 27.

³¹Ibid, pp 27–28.

³²Ibid, pp 28, 37, 40.

³³Ibid, p 31.

³⁴Ibid, p 33.

³⁵Ibid, pp 20, 231.

³⁶Ibid, p 232.

Van der Walt rejected such approaches and instead sought to imagine a perspective that takes seriously the interests of those who are subject to the property rights of others. He contended that this required placing greater weight on the social position, economic status and personal circumstances of the parties involved in property relations or disputes and placing less weight on their legal status.³⁷

Analysing a property system in this way reveals how the property paradigm inherently privileges individual property rights against democratically sanctioned change including forms of regulatory state control. In doing so, it tends to stabilise the pre-existing distribution of property in society by securing current property holdings, as they are assumed to be lawfully acquired, socially important and politically legitimate.³⁸ Hence, in a society riven by inequality, the property paradigm can operate to frustrate social and economic reforms, thereby entrenching and exacerbating existing inequalities.

Van der Walt argued that one could assess the strength of the property paradigm in a 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 such restrictions are common in a landlord and tenant context in South Africa, England and Germany, even quite dramatic restrictions mostly failed to undermine the hierarchical power of the landowner's property rights.³⁹ This was because most legislative interventions amounted to little more than basic due process controls on eviction (eg limited grounds for possession, notice requirements, narrow forms of judicial supervision), that usually turn on factors that are within the landowner's control and which do not place any special emphasis on the personal or social circumstances of the occupier or the wider context.⁴⁰

By contrast, there were only isolated instances where controls imposed on the landowner's right to possession provide for context-sensitive adjudication where the judicial officer exercises a broad discretion that may prevent ownership from trumping non-ownership interests as a result of the wider context and/or personal circumstances of the tenant or occupier.⁴¹ Where such protections exist, van der Walt pointed out that 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. Consequently, they are either 'restricted in scope or are being eroded by changing economic policies'; in effect they are minimised by hesitant and sceptical judiciaries and by the doctrinal conservatism of scholars.⁴²

(c) Contesting the property paradigm

While recognising the exceptionally valuable insights generated in van der Walt's work, this paper critically adapts his theoretical framework to take account of the following limitations and argues that tenants in Scotland have effectively challenged, and in some respects displaced, the logic of the property paradigm by forming tenant unions and contesting law reform in Scotland.

The first limitation concerns how van der Walt focuses mainly on legal measures that qualify the property paradigm, namely procedural and substantive constraints on the landlord's right to possession, and then investigates legal and judicial reactions to those qualifications. This focus reflects van der Walt's mission, which was to test whether there had been delivery of the constitutional promise in post-apartheid South Africa. While he acknowledges that legislation can reinforce the paradigm for ideological and political purposes, such as in South Africa where statutory measures reinforced the landowner's right to possession in order to promote the exclusionary racial politics of the apartheid government, he pays much less analytical attention to how legislation can reinforce the property paradigm.⁴³ Yet if the property paradigm condemns some to the margins of social normality, then legal

³⁷Ibid, pp 238–245.

³⁸Ibid, p 77.

³⁹Ibid, p 56.

⁴⁰Ibid, pp 82, 130.

⁴¹Ibid, pp 80–81.

⁴²Ibid, pp 130–131.

⁴³Ibid, pp 59–62.

measures that reinforce that paradigm are likely to compound existing inequalities and so are worthy of greater attention. Accordingly, in the next section, van der Walt's property paradigm framing is used to show that the property paradigm exists in England and Scotland and that it was reinforced by legislation, in the form of the Housing Act 1988.

Next, van der Walt sought to assess the strength of the paradigm by analysing judicial reactions to constitutional and legal measures designed to protect those with weak or no rights against eviction. This is an important focus; however, he paid relatively little attention to how these measures were often developed through a highly contested law-making process.⁴⁴ This process can produce law and policy that can either reinforce and entrench the property paradigm or curtail and undermine it. The inherent contestability of this process explains why, as Fox-O'Mahony and Roark point out, 'aggregated communities', such as tenant unions or landlord associations, seek to influence state law and policy.⁴⁵ Focusing on how such aggregated communities engage with the law-making process can shed light on legislative challenges to the paradigm. This study examines how political devolution produced a new site of political contestation, namely the Scottish Parliament, and considers how Living Rent engaged with the Scottish law-making process to make renting law work for those 'at the margins'.

The final limitation of van der Walt's analysis relates to how he sought to 'imagine' a perspective from the margins.⁴⁶ To his credit, he recognised that social movements can be an important agent for legal and political change but he did not engage with the rich history of collective tenant organising to contest the strong property rights of landlords.⁴⁷ Yet by taking account of the actual practices of social movements of those with lesser rights that seek to challenge the property paradigm, it is argued that one can develop a more concrete perspective of those with lesser rights, than simply imagining such a perspective in the abstract.

There has been growing academic attention paid to struggles by social movements over housing – see for example Ireland,⁴⁸ Brazil,⁴⁹ England.⁵⁰ A recurring feature of these particular struggles is the central role of rights talk and practices. This tends to be used in both an expressive sense, to constitute the movement's collective identity and struggle (eg resisting the financialisation of housing), and in an instrumental sense, to set out a specific aim or demand (eg universal public housing).⁵¹ While social movements sometimes employ housing rights in highly legalistic ways (eg strategic litigation),⁵² they frequently conceptualise rights in broader, egalitarian and profoundly political ways to critique, challenge, and imagine alternatives to, the housing crisis.⁵³ In doing so, they express a collective voice and agency that offers valuable insights into how the property and housing system functions from the perspective of those with 'lesser' rights. This paper develops one such perspective by analysing how Living Rent organised tenants to contest the passage of the Private Residential Tenancies (Scotland) Act 2016 and secure greater housing rights for tenants.

2. The property paradigm, private renting, and 'radical' constitutional change in the UK

(a) Assessing the strength of the property paradigm

This section demonstrates that the property paradigm is a feature of the property systems in England and Scotland and argues that the strength of the paradigm, as it operated in the private rented sector,

⁴⁴See N Gray (ed) *Rent and its Discontents: A Century of Housing Struggles (Transforming Capitalism)* (London: Rowman & Littlefield, 2018).

⁴⁵Fox-O'Mahony and Roark, above n 20, p 299.

⁴⁶Van der Walt, above n 1, p 242.

⁴⁷See Gray, above n 44.

⁴⁸V Lima 'Urban austerity and activism: direct action against neoliberal housing policies' (2021) 36 *Housing Studies* 258.

⁴⁹Fierro, above n 24.

⁵⁰P O'Connell 'Human rights: contesting the displacement thesis' (2018) 69 *Northern Ireland Legal Quarterly* 19 at 27–29.

⁵¹N Stammers *Human Rights and Social Movements* (London: Pluto Press, 2009) pp 164–169.

⁵²S Wilson *Human Rights and the Transformation of Property* (Cape Town: Juta Press, 2021) pp 79–81.

⁵³Jordan, above n 24, at 24–27.

was substantially reinforced by the Housing Act 1988. This vitally important statute applied across Great Britain and set in place a common statutory tenancy regime that was inherited by the devolved governments in Scotland and Wales following the 1998 devolution settlement.⁵⁴

It is important to make clear that there is no UK property law or UK housing law. Rather, the UK is the site of three legal jurisdictions encompassing: Scotland; Northern Ireland; and England and Wales. Although Senedd Cymru (the Welsh Parliament) have introduced distinctive renting reforms which, as discussed below, apply in Wales, England and Wales still share a single legal jurisdiction.⁵⁵ Each jurisdiction has its own property law system and there are significant technical differences between these systems.⁵⁶ These technical differences have become more marked with political devolution, which has generated a remarkable volume of housing legislation since 1998. Of course, such differences present no special obstacle to comparative analysis.⁵⁷ This study follows van der Walt's approach and first identifies the strong property rights of the owner to evict a private tenant in both systems and then assesses how these rights are qualified by residential renting 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.⁵⁸ By contrast, property law in England and Wales, reflecting its common law heritage, does not have the same concept of absolute ownership or dominium.⁵⁹ 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.⁶⁰ The basic distinction is between the freehold estate, which is indefinite, and leasehold, which is time limited.⁶¹

Despite these 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 England and Wales. 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 occurs.

In addition to this functional similarity, there has long been strong similarity in the statutory qualifications of those strong property rights that stem from residential renting 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.⁶² Over time, these statutory measures came to govern many important aspects of the landlord and tenant relationship (eg termination, rent, repair).

The strong similarity in the interaction of these qualifications with the strong property rights of landlords is well illustrated in the case of eviction. In principle, the landlord has a strong right to possession that will trump the lesser rights of a renter. However, that strong right is subject to procedural

⁵⁴The Act did not apply to Northern Ireland and so this study does not consider developments there. For an overview of the development of housing law 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.

⁵⁵See R Rawlings 'The Welsh way/Y ffordd gymreig' in J Jowell and C O'Cinneide (eds) *The Changing Constitution* (Oxford: Oxford University Press, 9th edn, 2019) pp 307–309.

⁵⁶L 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).

⁵⁷See 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 Publishing, 2019); Fox-O'Mahony and Walsh, above n 56; Kolbert and Mackay, above n 56.

⁵⁸A Steven and G Gretton *Property, Trusts and Succession* (London: Bloomsbury, 4th edn, 2021) pp 25–27.

⁵⁹The 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.

⁶⁰B McFarlane et al *Land Law: Text, Cases and Materials* (Oxford: Oxford University Press, 5th edn, 2021) p 160.

⁶¹*Street v Mountford* [1985] UKHL 4.

⁶²P Robson *Housing Law in Scotland* (Dundee: Dundee University Press, 2011) pp 1–14. This was not the case in Northern Ireland. See Hadden and Trimble, above n 54.

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.⁶³

For over a century, the statutory qualifications of the landlord's strong property rights have been expanded and contracted as the political fortunes of landlords and tenants have waxed and waned.⁶⁴ However, the critical point is that until the devolution settlement in 1998 this process has unfolded in much the same way in Great Britain. This is clearly illustrated by the Housing Act 1988, which deregulated the private rented sector as part of a neoliberal project to return the tenancy regime to being governed by market forces.⁶⁵

Rejecting the strong qualifications of the landlord's right to possession contained in the Rent Act 1977 and Rent (Scotland) Act 1984, the drafters of the Housing Act 1988 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'.⁶⁶ 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.⁶⁷ Strong qualifications of the landlord's property rights were presented as unnecessary encumbrances that both undermined the function of housing as an economic asset and restricted labour mobility.⁶⁸

The Housing Act 1988 applied to all new tenancies, unless excluded, 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.⁶⁹ The assured tenancy retained many of the existing qualifications of the landlord's right to possession. Thus any contractual term or termination right was subject to the statutory 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.⁷⁰ 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.⁷¹

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.⁷² 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.⁷³ To further expedite the

⁶³cf 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, s 11 and sch 2.

⁶⁴W Wilson 'A short history of rent control' House of Commons Library, Briefing Paper Number 6747, 30 March 2017 pp 5–10.

⁶⁵See Madden and Marcuse, above n 8.

⁶⁶House 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.

⁶⁷White Paper, above n 66, 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.

⁶⁸Kemp, above n 66, pp 55–57.

⁶⁹The 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 62, pp 214–216.

⁷⁰Housing Act 1988, ss 5–8, 17 and sch 2; Housing (Scotland) Act 1988, ss 16–19, 31 and sch 5.

⁷¹Housing 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 62, pp 203–204.

⁷²Housing Act 1988, s 21; Housing (Scotland) Act 1988, s 33.

⁷³For England, see Nearly Legal 'Section 21 flowchart' (1 October 2021), available at <https://nearlylegal.co.uk/section-21-flowchart/>.

landlord gaining possession, an accelerated possession procedure was introduced, which allowed the landlord to obtain an order for possession without a court hearing.⁷⁴

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 landlord's right to possession. However, on the other, it substantially reworked those qualifications such that they would facilitate, rather than protect against, evictions by the landlord. The net effect was a dramatic entrenchment of the property paradigm as part of broader ideological project to commodify rented housing and this occurred across Scotland, England and Wales in much the same way.

(b) The revival of private renting amid 'radical' constitutional change

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 1988.⁷⁵ 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 more attractive by tax reliefs and rent subsidies, generated a flood of investment and the sector more than doubled in size in England, Wales and Scotland from 1998 to 2018.⁷⁶

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.⁷⁷ In the process, 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, unaffordable rents and relatively poorer housing conditions.⁷⁸ By the late 2000s, there were clear signs across Great Britain of an emerging crisis of insecurity and unaffordability in the 'revived' private rented sector.⁷⁹

The revival of private renting, and the emerging crisis, occurred in a radically changed UK constitutional landscape. The 1998 devolution settlement set in place a process of political devolution, involving the transfer of law-making power from the centre (UK Parliament) to Scotland, Wales and Northern Ireland.⁸⁰ Although a process of devolution has been ongoing in different forms since the eighteenth century, the scale of the transfer of legislative powers under the 1998 devolution settlement was exceptional.⁸¹ The 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. The process was designed to deliver a new style of politics that would reduce the democratic deficit associated with London rule by ensuring that political decisions would be made as close as possible to the citizen.⁸²

Devolution has been described by Vernon Bogdanor as 'the most radical constitutional change' in the UK in almost two centuries.⁸³ For Bogdanor, the radical nature of devolution here lay in how it sought to 'reconcile two seemingly conflicting principles, the sovereignty or supremacy of

⁷⁴In England these are set out in CPR 55, Part II.

⁷⁵P Kemp 'Private renting after the global financial crisis' (2015) 30(4) *Housing Studies* 601 at 606–612.

⁷⁶Marsh and Gibb, above n 6, pp 5–7.

⁷⁷Kemp, above n 75.

⁷⁸Carr et al, above n 7, pp 10–11; Rugg and Rhodes, above n 7, p 19; Marsh and Gibb, above n 6, p 6.

⁷⁹J Rugg and D Rhodes *The Private Rented Sector: Its Contribution and Potential* (York: Centre for Housing Policy, 2008) pp xvii, xxi.

⁸⁰D Torrance 'Introduction to devolution in the United Kingdom' House of Commons Library, Briefing Paper No 8599, 25 January 2022, p 5.

⁸¹J Mitchell *Devolution in the UK* (Manchester: Manchester University Press, 2009) pp 6–15.

⁸²A McHarg 'Devolution: a view from Scotland' (*Constitutional Law Matters*, 2022), available at <https://constitutionallawmatters.org/2022/05/23/devolution-a-view-from-scotland/>.

⁸³Bogdanor, above n 4, p 1.

Parliament and the grant of self-government in domestic affairs to Scotland, Wales and Northern Ireland'.⁸⁴ Despite the scale of legislative devolution, the 1998 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'.⁸⁵ 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. Indeed, the UK Parliament retains the right to legislate in all areas relating to Scotland, 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.⁸⁶

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.⁸⁷ Another defining feature of political devolution has been its asymmetrical nature. The Scottish Parliament, Senedd Cymru, and the Northern Ireland Assembly differ in size, composition, electoral system, devolved powers and in their system of government.⁸⁸ 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. A detailed discussion of these matters is beyond the scope of this paper and can be found elsewhere.⁸⁹ The crucial point, for present purposes, is that despite the asymmetries in institutional design and the various structural limitations, Scotland, Wales, and Northern Ireland all possess executive and legislative powers in relation to housing and this has transformed the law and policy response to the crisis in the private rented sector.

(c) Devolved reforms of the private tenancy regime

The impact of political devolution is particularly apparent in the case of housing law, where the Scottish Parliament, Senedd Cymru, and the Northern Ireland Assembly all enjoy broad legislative competence.⁹⁰ They have each introduced a range of housing law reforms in response to the revival of private renting, and the problems of insecurity and unaffordability associated with that sector. During the same period, the Westminster Parliament, legislating for England, has also introduced various reforms. In England, Scotland and Wales, reformers have introduced or proposed different reforms to the private tenancy regime under the Housing Act 1988.

Despite the various technical differences of these reforms, there is a strong degree of substantive continuity in how core aspects of the previous tenancy regime, relating to evictions and rent setting, have been retained in Wales and England; it is only in Scotland that a substantive break has occurred in these areas. This is an important policy difference and is not simply a matter of timing, particularly since the Welsh and English reforms took place after the Scottish reforms.

Perhaps the most technically distinctive reform was introduced by the Welsh Labour government.⁹¹ The Welsh reform was not primarily motivated with addressing insecurity or unaffordability, but

⁸⁴Ibid.

⁸⁵M Elliott 'Parliamentary sovereignty in a changing constitutional landscape' in Jowell and O'Connell, above n 55, pp 32–33.

⁸⁶See *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 Publishing, 2018) pp 159–167.

⁸⁷R Davies 'Return of the Welsh nation' (*Times Higher Education Supplement*, 12 September 1997).

⁸⁸B Dickson 'Devolution in Northern Ireland' in Jowell and O'Connell, above n 55, pp 247–252; A McHarg 'Devolution in Scotland' in Jowell and O'Connell, above n 55, pp 277–283; Rawlings, above n 55, pp 301–309.

⁸⁹M Keep 'The Barnett formula and fiscal devolution' House of Commons Library, Briefing Paper No 7386, 11 July 2022; Mitchell, above n 81, pp 1–16.

⁹⁰B Lund *Housing Politics in the United Kingdom* (Bristol: Policy Press, 2016) p 233.

⁹¹Welsh Government *Homes for Wales, A White Paper for Better Lives and Communities* (Cardiff: Welsh Government, 2012) pp 47–48; National Assembly for Wales Communities and Culture Committee *Making the Most of the Private Rented Sector in Wales* (Cardiff: National Assembly for Wales, 2011) pp 8–10.

rather was mainly driven by a concern to simplify and modernise the law, which was seen as overly complex.⁹² To meet this aim, the Welsh reforms introduced statutorily regulated contracts to be used by all rental providers, unless excluded.⁹³ This change was accompanied by a raft of consumerist measures, including tenant information rights, simplified notices, and the provision of mandatory written contracts.⁹⁴

Despite these changes, strong substantive continuity was apparent in how the standard contract used in the private rented sector was modelled on the assured shorthold. Thus, the notice-only ground for possession, which allows ‘no-fault’ evictions, was retained in Wales.⁹⁵ Likewise, the central role of mandatory grounds for possession was preserved for both the notice-only ground and serious rent arrears.⁹⁶ Finally, the Welsh reforms have not disturbed the market rent model that was central to the previous regime. Indeed, the Welsh reforms go further than the Housing Act 1988 by not including any restrictions on the setting of excessive rents.⁹⁷

Reformers in England have proposed, but not yet implemented, major reforms of the private tenancy regime. As early as 2019, the Conservative government proposed abolishing ‘no-fault’ evictions because of concern over its ‘unethical’ use for retaliatory evictions.⁹⁸ While this commitment was initially included in the Renters (Reform) Bill 2023, it was subsequently postponed, apparently indefinitely, pending reform of the courts system.⁹⁹ Strong continuity is apparent in the other provisions of the Renters (Reform) Bill 2023, which do not disturb the market rent regime and indeed seek to expand the role of mandatory groups of possession to include sale and a new rent arrears ground.¹⁰⁰ If implemented as presently designed, the English reforms would further entrench the property paradigm.

By contrast, the Scottish reforms, discussed below, are distinctive because of the extent to which they expand qualifications of the landlord’s right to possession and set rents, thereby marking a clear break with central tenets of the Housing Act 1988. The Private Residential Tenancy (Scotland) Act 2016 (as amended) abolished no-fault evictions, made all grounds for eviction discretionary and introduced indefinite tenancies, variable notice periods and rent controls in so-called rent pressure zones. There are excellent accounts of this Act which shed light on its content.¹⁰¹ 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).¹⁰² While these are important factors, they do not provide a convincing explanation for why the Scottish reforms went further in expanding qualifications of landlord’s property rights.

⁹²Written Statement – *Renting Homes (Wales) Bill 2015* 9 February 2015, available at <https://www.gov.wales/written-statement-renting-homes-wales-bill-2015>.

⁹³Law Commission *Renting Homes in Wales*, Report No 337, 2013, para 2.3.

⁹⁴*Ibid*, paras 2.1–2.56.

⁹⁵*Renting Homes (Wales) Act 2016*, s 215. The only situation in which the court may refuse an order is if possession is sought as part of a retaliatory eviction to avoid an obligation, for instance, to repair the property. See Welsh Government *Increasing the Minimum Notice Period for a ‘No Fault Eviction’* (Cardiff: Welsh Government, 2019) pp 4–5.

⁹⁶*Renting Homes (Wales) Act 2016*, s 216.

⁹⁷While rent reviews are limited to once per year, as with the AST, there is no equivalent prohibition on the charging of excessive rents contained in s 22 of the Housing Act 1988.

⁹⁸Ministry of Housing, Communities & Local Government (MHCLG) *Government Announces End to Unfair Evictions* (MHCLG, 2019), available at <https://www.gov.uk/government/news/government-announces-end-to-unfair-evictions>.

⁹⁹R Lott-Lavigna and S Gelder ‘“No-fault” evictions ban delayed indefinitely after landlord lobbying’ (OpenDemocracy, 2023), available at <https://www.opendemocracy.net/en/renters-reform-bill-section-21-evictions-michael-gove-no-fault/>.

¹⁰⁰Department of Levelling Up, Housing and Communities (DLUHC) *A Fairer Private Rented Sector* (DLHUC, 2022) ch 3.

¹⁰¹Robson and Combe, above n 3; Combe, above n 3; Robson and Combe, ‘The first year of the First-tier’, above n 3.

¹⁰²Walsh, above n 57, 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*

It is argued 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 tenants in politicising that process and contesting the acceptable parameters of reform. Through a granular analysis of the passage of the Private Residential Tenancy (Scotland) Act 2016, the next section reveals 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 challenged the property paradigm and made a case for expanding qualifications of the landlord's right to possession.

3. Contesting the property paradigm in Scotland

(a) *The rise of Living Rent*

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 effectively competed with, and displaced, the market for housing for rent or ownership.¹⁰³ However, in a few short decades, the situation was transformed by the right to buy and deregulation of renting. Consequently, the general 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.¹⁰⁴

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 tenant union, that was formed in 2016 around a popular campaign centred on the Scottish government consultation on tenancy reform in 2014.¹⁰⁵ Living Rent defines itself as a tenant 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'.¹⁰⁶

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.¹⁰⁷ In much the same way, they conceptualise the right to housing in expansive, political and egalitarian ways that extend beyond dominant legal institutional conceptions.¹⁰⁸ 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.¹⁰⁹

Justice 19 at 23–25; K McKee et al 'Housing policy in the UK: the importance of spatial nuance' (2017) 32(1) *Housing Studies* 60 at 70–72.

¹⁰³A Murie 'The housing legacy of Thatcherism' in S Farrall and C Hay (eds) *The Legacy of Thatcherism* (Oxford: Oxford University Press, 2014) p 147.

¹⁰⁴Scottish 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: Joseph Rowntree Foundation, 2020) pp 17–24.

¹⁰⁵E Saunders et al 'Rebuilding a shattered housing movement: Living Rent and contemporary private tenant struggles in Scotland' in N Gray (ed) *Rent and its Discontents* (London: Rowman & Littlefield, 2018) pp 101–102; N Gray et al 'Fighting for a living rent' (*Scottish Left Review*, 2019), available at <https://scottishleftreview.scot/fighting-for-a-living-rent/>.

¹⁰⁶Saunders et al, *ibid*, p 104.

¹⁰⁷*Ibid*; Living Rent *Tenants' Manifesto 2020/21* (Edinburgh: Living Rent, 2020) pp 1–4.

¹⁰⁸Jordan, above n 24, 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).

¹⁰⁹Gray et al, above n 105.

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.¹¹⁰ This paper is focused on how Living Rent have used Scottish government consultations as part of their campaigns for tenants' rights. Although Living Rent do not use the terminology of the property paradigm, their campaigns clearly aim to contest that paradigm, as entrenched by the Housing (Scotland) Act 1988, and bring about greater qualifications on the landlord's property rights.

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 the legal-liberal conceptualisation of the landlord-tenant relationship as simply a private contractual relationship between individuals with equal bargaining power.¹¹¹ 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.¹¹²

Living Rent argued that the tenancy regime privileged the landlord's 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.¹¹³ 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.¹¹⁴ 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 landlord's 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 SNP.¹¹⁵ 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.

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 emergence of legal difference be simply attributed to the housing politics of the SNP. Although the SNP has struck a more pro-regulation stance than the other main parties of government across the UK, reforming the private tenancy regime was not an immediate priority.¹¹⁶ The initial perception of the first SNP government (2007–2011) was that the tenancy regime it inherited was 'operating satisfactorily'¹¹⁷ 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.¹¹⁸

¹¹⁰Saunders et al, above n 105, pp 104–106.

¹¹¹Ibid.

¹¹²Ibid, p 114.

¹¹³Ibid, p 104.

¹¹⁴Living Rent, above n 107, pp 1–4.

¹¹⁵Walsh, above n 57, p 212; Moore, above n 102, at 445; Gibb, above n 102, at 23–25; McKee et al, above n 102, at 70–72.

¹¹⁶Scottish Government *Firm Foundations* (Edinburgh: Scottish Government, 2007) pp 28, 30.

¹¹⁷Scottish Government *Scottish Private Rented Sector Strategy Group Consultation Recommendations Report* (Edinburgh: Scottish Government, 2009) p 20.

¹¹⁸Scottish 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 116, pp 28, 30.

During the second SNP government (2011–2016) tenancy reform rose up the political agenda after the Scottish Private Sector Strategy Group identified tenants' need for greater stability.¹¹⁹ 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.¹²⁰ 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.¹²¹

Unsurprisingly, the proposed tenancy regime promised various technical changes but little substantive change in many areas.¹²² There would be an initial six-month statutory term¹²³ and there was no indication of any change to the market rents system.¹²⁴ The most notable changes were the proposals to end no-fault evictions¹²⁵ and introduce notice periods that varied according to the duration of the tenancy.¹²⁶ While ending no-fault evictions was presented as being necessary to improve stability for tenants, policymakers were careful to offset this change by proposing 'a modernised and simplified right of possession'.¹²⁷ 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).¹²⁸

If implemented in this form, the tenancy regime would have eliminated from judicial consideration in all 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 1988 in entrenching the strong property rights of landlords and reinforcing the property paradigm.¹²⁹ The Scottish government argued that such changes were necessary to safeguard the 'return on investment and income from rent' of landlords and prospective institutional investors and not jeopardise their access to buy-to-let financing.¹³⁰

(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.¹³¹ 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.¹³² Most notably, the campaign responses organised by Living Rent were at odds with the majority of other responses which

¹¹⁹Scottish Government *A Strategy for the Private Rented Sector in Scotland*, *ibid*, p 24.

¹²⁰*Ibid*, p 25.

¹²¹Scottish Government *Report of the Review of the Private Rented Sector Tenancy Regime* (Edinburgh: Scottish Government, 2014) pp 6, 7, 11–12.

¹²²The 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.

¹²³*Ibid*, at paras 37–41.

¹²⁴*Ibid*, at paras 65–70.

¹²⁵*Ibid*, at paras 25–30.

¹²⁶*Ibid*, at paras 42–44.

¹²⁷Scottish Government *Review of the Private Rented Sector Tenancy Regime*, above n 121, p 10.

¹²⁸Scottish Government *Consultation*, above n 122, at paras 45–52.

¹²⁹As Malcolm Combe explains, 'this was a feature rather than a bug' see Combe, above n 3, at 223.

¹³⁰Scottish Government *Consultation*, above n 122, at para 46.

¹³¹Scottish Government *Consultation on a New Tenancy for the Private Sector: Analysis of Consultation Responses* (Edinburgh: Scottish Government, 2014) at para 4.

¹³²*Ibid*, at para 1.9. Campaigns organised by Living Rent accounted for three quarters of all responses.

agreed that all grounds for possession should be mandatory¹³³ and that the Scottish government should not take any action with regard to rent levels.¹³⁴ By contrast, Living Rent rejected the exclusive use of mandatory grounds for possession as a ‘serious weakening of the rights of tenants’¹³⁵ and instead advocated that tenancies should be indefinite¹³⁶ and for the introduction of rent controls.¹³⁷

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 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.¹³⁸ One of the other 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 ‘to protect tenants from excessive increases in hot-spot areas’.¹³⁹

The second consultation generated three times as many responses, amid competing campaigns organised by Living Rent and the Scottish Association of Landlords (SAL).¹⁴⁰ 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.¹⁴¹ Instead, Living Rent made clear that all grounds should be discretionary to ensure that ‘tenants should have the right to contest all evictions’.¹⁴² On rent control, the SAL campaigns made clear its opposition to any rent control, outlining that ‘the sector should remain market-led’.¹⁴³ 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’.¹⁴⁴

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.¹⁴⁵ However it was not all one-way traffic. The government ruled out ‘any further general regulation of rents’¹⁴⁶ and the rent arrears ground of eviction remained a primarily mandatory ground,¹⁴⁷ while the category of mandatory grounds was expanded to include situations where the landlord wished to sell the dwelling.¹⁴⁸

The scale of Living Rent’s success in utilising 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

¹³³See Scottish Government *Analysis of Consultation Responses*, above n 131, at para 3.5.

¹³⁴*Ibid*, at paras 4.14–4.19.

¹³⁵*Ibid*, at paras 3.5 and 3.12.

¹³⁶*Ibid*, at paras 16–17.

¹³⁷*Ibid*, at paras 4.14.

¹³⁸Scottish Government *Second Consultation on a New Tenancy for the Private Sector* (Edinburgh: Scottish Government, 2015) pp 14–23.

¹³⁹*Ibid*, p 13.

¹⁴⁰Scottish Government *Second Consultation on a New Tenancy for the Private Sector: Analysis of Consultation Responses* (Edinburgh: Scottish Government, 2015) p 3.

¹⁴¹*Ibid*, pp 7–8.

¹⁴²*Ibid*, p 8.

¹⁴³*Ibid*, pp 73–74.

¹⁴⁴*Ibid*, p 74.

¹⁴⁵Private Housing (Tenancies) (Scotland) Act 2016, s 38.

¹⁴⁶Scottish Government *Second Consultation Analysis of Consultation Responses*, above n 140, p 71.

¹⁴⁷Private Housing (Tenancies) (Scotland) Act 2016, sch 3, ground 12.

¹⁴⁸*Ibid*, ground 1.

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 balance of rights and obligations. Instead, Living Rent emphasised the imbalance of power between landlord and tenant, as entrenched by the Housing Act 1988, as the central issue that must be addressed.¹⁴⁹

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 amendments and at each stage Living Rent have organised campaigns to push for expanding the qualifications of landlord's property rights.¹⁵⁰ Most notably, the Act was amended in 2020 to make all grounds for eviction discretionary.¹⁵¹ 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'.¹⁵² Furthermore, the Scottish government introduced an eviction moratorium and rent freeze in response to the cost of living crisis in 2022.¹⁵³ Although both measures are time limited, the Scottish government committed in 2022 to introducing a general system of rent controls on a permanent basis.¹⁵⁴

In aggregate, these measures represent significant qualifications of the landlord's 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 England and in Wales. 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 organised tenants to contest and, in some respects, displace the logic of the property paradigm. In doing so, Living Rent provide a model for other tenant unions and campaign groups including Acorn, Greater Manchester Tenants Union, London Renters Union, Generation Rent and others in campaigns over renting reform in England and Wales.

Conclusion

This paper has 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 with 'lesser' rights. Although the Housing Act 1988 formally qualified the landlord'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 a 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, by entrenching the property paradigm in this way, this reform helped to create conditions of precarity for tenants and those conditions proved fertile ground for Living Rent to organise tenants and undertake popular campaigns to contest that paradigm.

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

¹⁴⁹Saunders et al, above n 105, pp 110–114; Gray et al, above n 105.

¹⁵⁰G Maloney "Politics is a question of power – not simply of ideas". On Scotland's proposal for rent controls' (*GM Housing Action*, 27 August 2021), available at <http://www.gmhousingaction.com/scotland-rent-controls/>; Living Rent 'Protecting tenants during the pandemic' (Living Rent, 25 March 2020), available at https://www.livingrent.org/protecting_tenants_during_the_pandemic.

¹⁵¹Coronavirus (Scotland) Act 2020, sch 1; Coronavirus (Recovery and Reform) (Scotland) Act 2022, part 4.

¹⁵²Combe, above n 3, at 229.

¹⁵³Cost of Living (Tenant Protection) (Scotland) Act 2022, schs 1 and 2. See Combe, above n 3, at 226–229. See *The Scottish Association of Landlords v The Lord Advocate* [2023] CSOH 76.

¹⁵⁴Scottish Government *A Stronger & More Resilient Scotland*, above n 5.

of significant legal difference in the Private Residential Tenancies (Scotland) Act 2016, which has expanded tenant protections against eviction in a way that is at odds with how reforms in England and Wales have tended to preserve core features of the AST regime. 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 landlord's strong property rights 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. It is not possible to fully understand this development of significant legal difference without taking account of the reform process from which it emerged, and the important role which Living Rent played in politicising that process. Living Rent effectively used the consultation mechanism, as part of a broader campaign, to organise tenants, reject the logic of the property paradigm, and push for expanding qualifications of the landlord's 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 Western systems, 'private property naturally holds a central place in society though its importance in the free market economy'.¹⁵⁵ 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 tenant 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 weight to the collective voice and agency of marginalised and exploited tenants without reducing them to 'the status of weakness and dependence'.¹⁵⁶

Finally, this paper demonstrates that having 'lesser rights' 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. In Scotland, Living Rent effectively organised tenants to challenge the conventional property structures that contributed to their marginality and exploitation. Much of Living Rent's success in contesting the property paradigm can be attributed to their recognition of the limits of narrow legalistic 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.¹⁵⁷

¹⁵⁵Van der Walt, above n 1, pp 231–232.

¹⁵⁶Ibid, p 242.

¹⁵⁷Ibid, p 244.