

COMMUNITY PROPERTY CLAIMS IN THE PERSONHOOD PERSPECTIVE: PART 2

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1 INTRODUCTION

This is the second instalment of a two-part article series aimed at examining community property claims through the lens of the personality theory of property. The overarching aim of these two articles is to expose the imbalance between communal and private property arrangements by justifying communal property claims through the use of the personality theory of property (also referred to as ‘property and personhood’, or the ‘personhood perspective’), which is traditionally used to justify private property claims. It is argued that if a community of users can establish a claim within the personhood perspective, that claim should be treated with the same respect as a private property claim founded through the same mechanism. Where competing claims to natural resources exist (with a specific focus on land), it should not always be the private property claim of an individual landowner that takes priority when the other claimant is a community of users. If both claims can be justified through the same mechanism, both should be treated with equal weight and consideration.

It will be remembered from part I that the Hegelian and neo-Hegelian conceptions of the personhood theory were introduced. In particular, the work of Professor Radin was explored. Radin presented a theory in which a fully constituted person projects his personality into the world and embodies their will and personality in external objects. The property relationships that arise from the projection allow the individual to express himself in the outside world. Radin’s formulation of the personhood theory is labelled as an ‘intuitive view’, and suggests that people possess objects that they feel are almost part of themselves because they “constitute ourselves as continuing personal entities in the world”.¹ In order to differentiate between those property claims that originate from the binding of one’s personality with an object, and those that derive from

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¹ MJ Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957, 959.

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purely instrumental means, a personal/fungible dichotomy of property claims was introduced.

It was noted in part I that the traditional role of a community in the personality theory of property is to act as an audience to property claims. In order to elevate the community to a position from which it can project its will into external objects requires a fundamental change in the way that society views a group, and also the inner workings of a group. In particular, the group must adopt one collective will that can be projected into the external world, rather than consisting of a collection of disparate and conflicting wills. Professor Waldron did not feel that such a change was an insurmountable hurdle, as the will of each individual is that “the goals of the community to which he belongs should be pursued and realised”.² Therefore, the real task is in establishing the collective goal of the community, and uniting its members.

The first step in the process of establishing a community that is able to project a united will into the external world was to establish which type of common-property regime this series of articles seeks to justify. After sampling a number of works, an undertaking that can be explored fully in part I of this series, it was established that the most sensible inquiry was to use the personality theory of property to justify a limited access common-property regime. As a result, and using the influential works of Professors Ostrom and Clarke,³ six community characteristics were proposed. These characteristics are fundamental for the establishment of a community that has the potential to project its will and personality into the external world and establish personal-property claims over natural resources, thus giving rise to a limited access common. The required six community characteristics are: exclusion of non-members, mutual self-interest, homogeneity of interest, cohesiveness, idiosyncratic regulation and sanctions.

The closing assertion of part I of this series was that, if a community exhibits the six required characteristics, and as such possesses a united collective will, there is no reason why this will cannot be projected into the external world and embodied in objects and resources. The projection and embodiment of will in such a way gives rise to a personal-property claim, as understood by the personality theory of property, which should

² J Waldron, *The Right to Private Property* (OUP 1988) 347.

³ See in particular A Clarke, ‘Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework’ (2006) 59(1) *Current Legal Problems* 319.

in turn defeat any competing fungible claims that often (but not always) characterise private property.

1.1 Part II

This instalment of the two-part article will apply the personality theory of property to the limited number of community claims that are recognised in English law. It will be shown that the personality theory of property is not yet operative in the community context, and does not protect community entitlement in the way that it protects the entitlement of private individuals. This instalment also explores why community entitlement to property fails to adhere to the personality theory, and points to the inconsistency between the nature of the community claim and the dominant narrative in property discourse. Finally, it will be suggested that whilst recent political initiatives purport to have given greater weight to community entitlements to property, this is in fact a ruse. The outcome of the policies aimed at recognising the community claim is little more than a perpetuation of the preference for private property initiatives.

The reluctant conclusion of this article series is that a community of users cannot establish an entitlement to the resource that they use through the personality theory of property. Whilst in theory claims of a community should be respected in the same way as claims of individuals under the personhood perspective, this is impossible as long as the dominant narrative of property is that of the self-interested individual. The English legal system does not understand the nature of communal claims, and all attempts to introduce policies and mechanisms that recognise and accommodate community claims to land have proved ineffective. Allocation of, and entitlement to, natural resources not only relies on the dominant property narrative, but also the political climate in which the narrative is developed. The political climate is such that promoting community entitlement to property is not advantageous to realising the economic aims of the government, which, in light of the recent economic downturn, and negative economic forecast following the United Kingdom's decision to leave the European Union, can only really favour the instrumental and fungible property claim.

2 PERSONAL AND FUNGIBLE CLAIMS IN THE COMMUNITY CONTEXT

Now that the theoretical framework of property and personhood and the requisite community characteristics have been identified, the remaining step is to assess the usefulness of the application of the

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dichotomy in justifying communal property claims. If the property and personhood theory is a sound justification for limited access communal property claims, these communal claims should be protected, and prioritised insofar as they are personhood-constituting claims.

However, Western legal systems do not, as a general rule, recognise communal property holding. There are only a small number of communal property claims that exist in English law, and even these are limited and under-developed. To assess whether the personhood perspective can justify these limited examples, they shall be analysed in the light of the personal/fungible dichotomy introduced in the first instalment of this two-part article series. The examples that will be pursued are rights of common over common land, the town or village green regime and assets of community value. If the personhood perspective does apply to communal property claims, these claims should be protected from competing fungible claims and lead to a stable community entitlement to property. However, as will be seen, this is far from the reality.

2.1 Competing Claims: The Continuum

The methodology for assessing whether communal property claims adhere to the personality theory of property employs the use of a continuum.

At either end of the continuum appear the personal/fungible dichotomous claims. Claims are then plotted on the continuum in a position that is commensurate with the level and nature of their interest. Those claims that are further towards the personal end of the continuum will have the status of personal-property claims, and those that appear towards the fungible marker will attain the status of fungible claims. In a clash of competing claims, those that are plotted further towards the personal marker will prevail over those that are plotted closer to the fungible marker; such is the normative effect of the personhood perspective. Therefore, if every claim could be plotted in this visualised way, there could be an instant assessment as to which claims should take priority over others. If two competing claims were plotted in exactly the same position, the method of adjudication between the claims would be a concept familiar to both property lawyers and the personality theory of property: time. The claim that was established first is the claim that takes priority.

To illustrate the use of the continuum: figure 1 depicts a claim that would be treated as personal, and which would take priority over a claim plotted in the way that figure 2 depicts, which is fungible. There is a presumption that those who hold land purely for instrumental value,

such as for commercial investment, will have a fungible claim to the property; and similarly those who use the land for residential or domestic purposes will be presumed to have a personal-property claim. However, the continuum does not shackle the property claim to its initial categorisation; the claim may move between fungible and personal, which is in accordance with Radin's personhood theory,⁴ as the claim can be simply re-plotted.



Furthermore, when adjudicating between competing claims, the continuum does not always assume that the paper-titleholder will only have a fungible claim, and that parties who use the land will establish a personal claim. The continuum allows the claims of all competing parties, or indeed communities, to be appropriately plotted on the continuum and document the wide range of interests that may exist. However, in order for the continuum to work satisfactorily, it is in fact the strength of the personal claim that should be documented on the continuum. For example, if person A valued their land as both an investment and as their home, and that value was evenly split, their interest would be plotted at the midpoint on the continuum. If person B only valued their land as their home, and had no regard for its value as an investment, their interest would be plotted almost squarely on the 'personal' marker on the continuum. If a competition arose between persons A and B over the land, the interest of B would be favoured on the basis that his interest leans further towards to personal end of the continuum than A's. However,

⁴ MJ Radin 'Property and Personhood' (1982) 34 Stanford Law Review 957, 966-967.

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plotting the interests in that way has no regard to the relative strengths of the personal value that persons A and B place on their property; it is assumed that person A places a lesser personal value on his land simply as a result of him also having a fungible interest. It is conceivable, and perhaps even inevitable, that devaluing A's personal interest as a result of a concurrent fungible interest will cause an injustice. For example, B may have no fungible interest in the land because it is a holiday home in a falling market, and it was always intended that he would derive enjoyment from the property from its occasional use and he accepted that there would be no financial gain (and perhaps even financial loss). On the other hand, person A attributes both a personal and fungible value to their land as it is their only home, and is their greatest investment in which all of their wealth has been invested. In that context, it is difficult to justify why B's claim would trump that of A, as the continuum dictates, given the clear disparity of the value of the land in favour of A. Therefore, it is imperative that the continuum is instead used to evidence the *strength* of the personal claim, as opposed to the claim made on balance between the fungible and personal markers. To that end, person A's interest would be plotted away from the midpoint of the continuum and further towards the personal marker; their personal claim is strong as the land is their only home. On the other hand, B's claim would likely fall away from the personal marker; the land is only one of a number of homes that they inhabit, and is not imperative to their security and being.

It should be also be noted that the personal/fungible dichotomy does not necessarily correlate to other dichotomies in property law, such as Rudden's 'things as thing'/'things as wealth',⁵ or the 'use value'/'exchange value' dichotomy. Use value, personal claims and things as thing cannot be used interchangeably. A commercial landholding may have a high use value, but would not be characterised as being valued for its status as a thing, nor as being subject to a personal claim. Therefore the scope of the inquiry in this article series is narrowly focused, and there are other possible frameworks that could be pursued in further work.

2.2 Common Land

The recognition of communal land rights in modern English law can be traced to the Commons Registration Act 1965, now replaced by the Commons Act 2006. The 1965 Act sought to preserve ancient commons

⁵ B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 Oxford Journal of Legal Studies 81.

through the registration of all communal rights and the land over which they were exercisable. The effect of the 1965 Act was that all commons must be registered, and a failure to register a right of common and the land over which it was exercisable resulted in its extinguishment.⁶

Communal land rights are a limited class, and have been defined as a right to ‘take or use some portion of that which another man’s soil naturally produces.’⁷ The class comprises six rights of common: pasture (right to graze), piscary (right to fish), turbary (right to take turf for fuel), marl (right to take sand or gravel), pannage (right to allow pigs to forage) and estover (right to take timber for housing). New rights of common may be created, but the circumstances in which this may happen are greatly restricted; no new rights of common may be created by prescription over land that is already registered as common land, as stipulated by section 6(1) of the Commons Act 2006, and recently reaffirmed in *R (Littlejohns) v Devon County Council*.⁸ New rights of common may only be created over land that is already registered as a common through express grant, and these new rights of common may not exist in gross.⁹ If a new right of common is created over land that is not already registered as common land, this will trigger the registration of the land as a common, as per section 6(5)(b) of the Commons Act 2006. Finally, new grazing rights may be refused registration by the commons registration authority if the authority believes that the land cannot sustain the right and risks the over-exploitation of the land.¹⁰ Variations of rights of common may be refused on the same grounds.¹¹

The interests of the commoners (the collective name for those who hold a right of common) can be described as a personal-property claim for the purposes of the continuum, which should be plotted according to figure 1. The commoners do not use the land for financial profit, but for survival, sustenance, and in some cases, recreational value. Historically the use of the common allowed the commoners to source food, fuel and materials for building their homes. In the modern context it is more likely that the exercising of many of these rights of common will be for recreational purposes (such as fishing), and those that are more

⁶ Commons Registration Act 1965, s1(2)(b).

⁷ GW Cooke, *Cooke’s Inclosure Acts* (V&R Stevens and Sons & Haynes 1864, 4th ed) 5.

⁸ [2016] EWCA Civ 446; [2015] EWHC 730 (Admin).

⁹ Commons Act 2006, s6(3).

¹⁰ Commons Act 2006, s6(6).

¹¹ Commons Act 2006, s7(5).

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pragmatically focused and archaic are unlikely to be used. The anomaly to this observation would be grazing, as a commoner may graze animals on the common as part of their commercial farming activities, although the economic benefit of grazing may still be viewed as running to the heart of their survival and sustenance. Furthermore, the commons register typically protects ancient rights of common, and it is likely that the commoners have developed as a community through their use of the common. The use of the common is the defining factor of their community and is likely to be constitutive of its identity. It would be unlikely that the commoners would be satisfied with an alternative plot of land, even if that land were able to support the same rights of common, because of the ancient nature of the rights that often are being exercised. The land is part of the community heritage, and is valued for this reason. Therefore, the claim of the commoners is not a fungible claim; they have developed an attachment to the land, and thus their claim is personal.

If the commoners do in fact establish a personal-property claim over the land, the use of the personhood perspective dictates that this should defeat the fungible interest of the landowner. In many ways this analysis holds true. The landowner is greatly restricted in the ways in which she may use the land, and may not carry out any works on the land such as fencing, erection of buildings or the digging of ditches or trenches without consent from the commons registration authority.¹² Almost every action that will result in preventing or impeding the access to the common will require consent from the registration authority,¹³ and in determining whether to grant the consent, the commons registration authority should have regard to the interests of those commoners who exercise rights of common. The effect of the registration of land as a common is to remove most of the fungible value of the land. The landowner is unlikely to be able to use the land for his own ends, and the value that he can extract from the land for himself will be limited.

Contrary to first impression, it can be argued that the priority given to the personal property claim of the commoners is an illusion, and the scheme of commons registration does not entirely adhere to the personhood perspective. However, the challenge to the personhood perspective does not arise from the fungible interest of the landowner, but rather the general public interest. It will be remembered that this series of articles is concerned with establishing limited access commons through the use of the personhood perspective; this ambition is hindered with the

¹² Commons Act 2006, s38.

¹³ Commons Act 2006, s38(2)(a).

scheme of commons registration as the limited access common enjoyed by the commoners is also subject to open access rights. For example, the common may be subject to the rights of public access under the Countryside and Rights of Way Act 2000, which prevents commoners from excluding persons who do not enjoy rights of common. Furthermore, commons councils must have regard to the public interest when discharging their functions,¹⁴ not just the interest of the commoners, as should the commons registration authority when determining whether to grant consent for works on the common.¹⁵ No special weight is given to the interests of the commoners in this balance of considerations.

If the personhood perspective were to hold true, the wider public interest would not affect the personal-property claim of the commoners. The personhood perspective is only concerned with claims that can be attributed to a distinct, defined and united will. Typically this is the will of an individual, or, as this paper contends, the will of a community that exhibits the five required characteristics. The public interest is a wide category of interests that could not substantiate nor establish a claim under the personhood perspective, as it would not meet these requirements. Therefore the public interest should not affect the entitlement of a community who have established a personal-property claim.

One reason for this tension between the interests of the public and the commoners, and the inconsistency between communal land rights in English law and the personhood perspective more generally, can be traced to the assertions of Professors Bromley and Clarke, which were noted in part 1 of this article series. There is a general and deep-set misunderstanding in our private property framework about the nature and different species of common-property. It is possible that this misunderstanding is manifested in the commons legislation of 2006 that appears to make provision for a limited access common, but is then subject to considerations that properly belong to an open access regime; a confusion that is not helped by peripheral legislation such as the Countryside and Rights of Way Act 2000.

A further way in which the commons registration system fails to protect the personal claim of the community can be found in the provisions that allow for deregistration of common land.¹⁶ If the personal claim of the local community is to be prioritised it seems inconsistent with

¹⁴ Commons Act 2006, s31(6).

¹⁵ Commons Act 2006, s39(1)(c).

¹⁶ Commons Act 2006, ss16-17.

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that prioritisation to allow for deregistration of common land and rights of common. The legislation attempts to strike a balance between the community claim and the fungible claim of the landowner that at least acknowledges that the community should not be deprived of the utility of the natural resource. Sections 16(2) and 16(3) of the Commons Act 2006 stipulate that, if the land to be deregistered is in excess of two hundred square meters, a parcel of replacement land must be registered as common land. However, if the area of land to be deregistered is smaller than two hundred square metres, section 16(4) does not require that replacement land be registered, but leaves the option open should the registration authority wish to do so.

The voluntary registration of replacement land does not protect the community entitlement, as the common may be lost and no replacement provided. Furthermore, the provisions for mandatory registration of replacement land are not satisfactory for the purposes of protecting the personal community claim, as the notion of replacement land treats the claim of the community as fungible. It is assumed that the land that the community has enjoyed could be substituted for land that would be of equal value to the community; however, under the personhood perspective, this would not be possible, as the community would have bound its personality with the land. The nature of a personal claim is that the pain caused by the loss of the physical property cannot be remedied by providing replacement property. Replacement common land will not have the same historic connection to the commoners who hold ancient rights of common. To suggest that the replacement land is a sufficient mechanism for protecting the community entitlement is misguided, and does not conceptualise the claim of the community in the appropriate way.

Finally, it may be argued that the community lacks the level of idiosyncratic regulation required in order to establish a collective will and a person-property claim in the first place. It is true that the commons registration scheme regime provides for some level of idiosyncratic regulation; part 2 of the Commons Act 2006 provides for the establishment of commons councils, which may manage the agricultural activities on the land, the vegetation on the land and the rights of common. However, the role of idiosyncratic regulation is diminished when it is remembered that the commons registration authority have the right to refuse registration of new grazing rights if it is thought that the land is unable to sustain this right. This decision-making power of the commons registration authority takes away some of the control from the commoners and the commons council, and places it with the state.

It is clear that the strongest example of communal land rights in English law does not adhere to the personality theory of property, and the

personal-property claim of the community is not properly acknowledged and accommodated. The provisions for deregistration and replacement of common land, the removal of some of the commons council decision making power, the consideration of the public interest, and the fact that the instances in which new rights of common may be created are actually quite restricted all lead to the conclusion that the scheme of commons registration is not an effective way of establishing a limited access common and community entitlement to land.

2.3 Town or Village Green

Another community claim that is recognised through the commons legislation of 1965 and 2006, and which will now be analysed through the use of the personhood perspective, is the town or village green.

Land can be registered as a town or village green ('TVG') pursuant to section 15 of the Commons Act 2006 (previously section 22 of the Commons Registration Act 1965). Under the Commons Act it must be shown that the land has been used 'as of right' for lawful sports and pastimes for a period of at least twenty years by the inhabitants of a locality, or neighbourhood within a locality. The requirement that the use must be 'as of right' has been taken to mean the tripartite test of *nec vi*, *nec clam* and *nec precario*: that the use must be without force, without stealth and without the licence of the landowner.¹⁷ The rationale behind these factors was explained by Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* as being that every legal system needs rules of prescription that protect long established de-facto enjoyment of land.¹⁸ Each of these three factors gives the landowner the opportunity to object to the use by the local inhabitants; if they do not object, they are deemed to have acquiesced in the use of the land. In essence, village green law is underpinned by the principles of prescription in English Law.¹⁹

Village green registration confers rights of recreation upon the users of the land who are from the relevant locality or neighbourhood within a

¹⁷ *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 A.C. 335, 350H (Lord Hoffmann).

¹⁸ *Ibid* at 349D.

¹⁹ Village green law is described as being "traceable" to prescription by Patten LJ in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250 [36].

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locality.²⁰ These use rights are arguably proprietary as they operate *in rem* and attach to the land; the rights of the local inhabitants (the community) survive any transfer or conveyance of the land. The practical effect of TVG status is that the land cannot be used in a way that is inconsistent with the use rights of the local inhabitants, which promotes the social value of land, often at the expense of the economic value of the land enjoyed by the landowner. Registration of land as a village green is often used as an attempt to thwart development, to the extent it has been referred to as “a weapon of guerrilla warfare against development of open land.”²¹

The TVG is a paradigm clash of claims over land. On the one hand there is the landowner who believes that they are absolutely entitled to the land, its capital value and, in most cases, exclusive control over its management and the right to realise the capital value. On the other hand there is the community (the inhabitants of a locality or neighbourhood within a locality) who engage in long use of the land and attribute other values to it; it is a social space and a recreational area, a space to which sentiments attach- their children grow up using the land, memories are made there and relationships with the other users forged. For the landowner to realise the full potential of his entitlement he must be free of the interest of the community of users. He must be free to sell the land, build on it or put it to any use that he so wishes, even if this use is inconsistent with the community interest. For the community to realise the full potential of their entitlement their use must be protected, and all inconsistent uses and interferences must be prohibited. For the landowner and the community to co-exist it is a fine balance, and one that is easily tipped. Legally, the landowner is in a far superior position: he holds the title to the land, and the community interest is hostage to the way in which he chooses to exercise his ownership rights. To redress the balance, legal recognition of the community entitlement is required, and this recognition is achieved through village green status.

If the interests of the local inhabitants and the landowner are plotted on the continuum, they occupy the positions depicted in figures 1 and 2 respectively. The local inhabitants establish a personal-property claim, owing to the social value that they attribute to the land, whereas the

²⁰ *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) [80] (HHJ Waksman QC).

²¹ *R (Lewis) v Redcar and Cleveland Borough Council and Another* [2010] UKSC 11 [48] (Lord Walker).

landowner leans towards a fungible claim. The local inhabitants would unlikely be satisfied with replacement land as any replacement land that had not been used for the requisite twenty year period would not have the same social value to the local inhabitants; there would be no long use from which the local inhabitants can form a connection constitutive of their identity. The landowner himself may have some tendencies that are consistent with a personal claim, however, by virtue of the fact that a community of users has been making use of the land for such a prolonged period it is unlikely that he regards the land as being constitutive of his personality. Furthermore, the landowner would likely be sufficiently compensated by either replacement land, or the monetary value of the land subject to the use of the local inhabitants. The consequence of these observations should be that the community entitlement takes priority over the entitlement of the landowner. This certainly appears to be the case at first glance, as the landowner is restricted in his entitlement to the land as he is prevented from using the land in a way that is inconsistent with the use rights of the local inhabitants. It seems as if the TVG regime adheres to the personhood perspective; however, the substance of the protection afforded to the community entitlement tells a rather different story.

Village green registration is not the stable protection of community entitlement that the personhood perspective envisages. Recent changes to the regime give a much weightier consideration to the landowner and the fungible claim, and markedly reduce the protection given to the personal-property claim of the community. For example, The Growth and Infrastructure Act 2013 amended the Commons Act 2006 to introduce additional bars to registration of land as a TVG. Section 15C now provides that registration will be barred where a trigger event under schedule 1A, which are all linked to planning applications, has occurred. There is a tremendous housing land supply shortage in England and Wales, and the sterilisation of potential development sites by village green registration is proving controversial. Any landowner who is seeking to realise the value of his land through development can thwart the rights of the community by submitting a planning application, which then tips the balance of protecting entitlements back in his favour. Furthermore, the personal-property claim of the community can be defeated by showing that the local inhabitants used the land pursuant to a statutory right to do so, as established in *R (Barkas) v North Yorkshire County Council*.²² The circumstances in which a successful application for village green registration can be made are rapidly narrowing, and the community

²² [2014] UKSC 31.

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entitlement is increasingly left without protection, regardless of the personal nature of their property claim. The fungible claim is taking precedence in the battle between competing claims.

Additionally, the provisions that apply to deregistration and replacement of common land also apply to town and village greens. As explored above in the context of common land, these provisions are wholly inadequate for the purposes of protecting the community entitlement, and mischaracterise the community claim as fungible.

The failure of the TVG regime to adhere to the personhood perspective and favour the personal claim is not an anomaly in English law. Most community entitlements suffer the same emasculated fate as the TVG legislation. The only way in which the failure of the personhood perspective in the context of the TVG can be defended is to question the characteristics of the community. It is questionable whether the local inhabitants possess all six of the characteristics required to present a united will that could be embodied in property in the way that Waldron suggested, as discussed in the first part of this article series and noted above. In particular, there may be an absence of idiosyncratic regulation. The community certainly possess the other required characteristics; indeed, the legal test for registering land as a village green requires them. The community must be cohesive and mutually self-interested, non-members of the community upon whom no rights have been conferred can be excluded from the land, and there is homogeneity of interest, and sanctions in the law of trespass if the scope of the use rights is exceeded (although, these sanctions are not imposed by the community in the way that Professors Ostrom and Clarke suggested). However, there is no idiosyncratic regulation in the TVG community. The only control that the local inhabitants have over the use will be determined by reference to the use over the requisite twenty-year period; the scope of of the legal right acquired by the local inhabitants will be set according to the scope of the use over the twenty years, and the local inhabitants may not exercise any further control or use of the land that was not engaged in during the acquisition period. Therefore, it is the landowner himself who often regulates the use of the land and determines who else may use it, not the local inhabitants. Furthermore, when regulating the use of the land, the only duty by which the landowner is bound is a duty not to interfere with the use of the relevant inhabitants.

In theory, the lack of idiosyncratic regulation weakens the argument for the community claim of a TVG to be protected though the framework of the personal-property claim. However, in reality the communities of local inhabitants often form interest groups that regulate the use and maintenance of the land, especially when the landowner has no use for the

land following its registration as a TVG. As with commons councils, the formation of these groups is not mandatory, nor are their regulations legally binding; yet, these groups are different from commons councils as they are not grounded in statute and afforded the same powers. Nonetheless, community interest groups do go some way to strengthening the presence of the required community characteristics. One example of such a group is ‘The Friends of the Trap Grounds’, which was established to campaign for the protection of the Trap Grounds in North Oxford. This land became the subject of the landmark case *Oxfordshire County Council v Oxford City Council and Another*,²³ which, following lengthy litigation, resulted in the registration of an area of scrubland as a TVG (in in light of more recent case law it is unclear whether the land would be registered if these circumstances arose now). The interest group now runs regular ‘work parties’ to maintain the land, holds an annual AGM, engages in educational activities and monitors the use of the land and wildlife. It seems very difficult in a situation such as this to suggest that the community does not possess the necessary characteristics to substantiate a personhood claim.

2.4 Assets of Community Value

The final community interest that will be considered in the framework of the personhood perspective is the asset of community value (‘ACV’) scheme, which was introduced as part of the wider movement of community empowerment under the Localism Act 2011.

The Department for Communities and Local Government observed that “[o]ver the past decade communities have been losing local amenities and buildings of great importance to them”.²⁴ A solution to this predicament that has been adopted is the assets of community value listing scheme, introduced by part 5, chapter 3, of the Localism Act 2011, and supplemented by the Assets of Community Value (England) Regulations 2012. The scheme allows community interest groups²⁵ to nominate land that is valued by the community to be included on a list of community assets. Land of community value is taken to mean land that “furthers the social wellbeing or social interests of the local

²³ [2006] UKHL 25.

²⁴ Department for Communities and Local Government, *Assets of Community Value- Policy Statement*, September 2011, 4.

²⁵ See Assets of Community Value (England) Regulations, regulations 5, 12 and Localism Act 2011, s89 for definitions.

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community”,²⁶ with ‘social interests’ further dissected to mean either religious, cultural or sport interests.²⁷ If the land is accepted for listing the community interest is protected in the sense that, if the landowner chooses to dispose of the land,²⁸ the community interest group are given a period in which to prepare a bid to purchase the asset. When the landowner indicates to the relevant authority his intention to sell, he triggers an interim period of six weeks (known as a ‘moratorium’) in which the community must express in writing its intention to make a bid.²⁹ If the community interest group evinces this intention within the six weeks, this period is extended to six months, in which the community must prepare and present their bid to the landowner.

On initial inspection, the ACV scheme appears to recognise a personal-property claim in favour of a community. The social interests of the community and its connection with the land is formally recognised and protected through the listing of the asset, which may in turn lead to its acquisition by the community. The claim of the community is treated as personal rather than fungible, as it is the particular listed asset that is protected, rather than the securing of a replacement asset.

Allowing communities to list assets of social value, with a view to their possible acquisition, can be extremely beneficial to a community. For example, the moratorium period alleviates the pragmatic and organisational problems that would plague a community group trying to put together a bid, which a private individual would not face, and gives ample time for the bid to be drafted and agreed upon by all the community members. Furthermore, the facilities that can be listed as an ACV are wide-ranging and include pubs, recreation grounds and local amenities. Only residential dwellings are excluded from potential ACV listing.³⁰ Therefore the community interest is recognised in a diverse range of situations, and can be recognised over land that is privately owned.

²⁶ Localism Act 2011, s88(1)(a).

²⁷ Localism Act 2011, s88(6).

²⁸ The only dispositions that are qualifying for these purposes are a disposition of the freehold interest with vacant possession and a grant of a lease for 25 years or more, see Localism Act 2011, s96; see also s95(5) for a list of excluded dispositions.

²⁹ Localism Act 2011, s95 and Assets of Community Value (England) Regulations, regulation 13.

³⁰ Assets of Community Value (England) Regulations, regulation 3 and schedule 1.

The fungible property claim of the landowner will be restricted by the listing of their land as an ACV, as they are required to allow the community to bid and must wait for them to do so. In addition, the personal claim established by the community affects the fungible claims of the landowner as designation of land as an ACV is a material planning consideration.³¹ This may hinder or prevent the development of the land by a landowner who is seeking to realise their fungible claim over the land. When the interests are plotted on the continuum the claim of the community seems to align squarely with figure 1, with the claim of the landowner often at figure 2, and it seems that the personal interest does indeed outweigh the fungible interest.

However, when more thoroughly analysed, designation of land as an ACV does very little to raise a presumption in favour of the community entitlement. For example, the type of group that can be recognised as a community interest group is limited by the statutory definition at regulations 5 and 12 of the Assets of Community Value (England) Regulations 2012. The group must have legal personality and be capable of holding title to property, which immediately discounts those communities that have not formalised their relationship in law, even if they have the required six characteristics. As noted throughout this article series, legal formalisation of the community relationship is a problem that plagues communal property arrangements more generally, and prevents de facto common-property arrangements being recognised in law. Furthermore, the right is neither a right to buy, nor a right of pre-emption; at best it is a right to be informed of the owner's intention to sell or grant a lease for 25 years or more. The only real benefit of the listing of the asset, which the landowner can apply to have reviewed,³² is to afford the community a greater amount of time in which to assemble their bid, yet there is still no guarantee that the landowner will consider their bid. The only duty that ACV listing imposes on the landowner is a duty to wait and see if the community wish to bid for their land; it is little more than an inconvenience to him. Additionally, once the moratorium period expires, the landowner enjoys an eighteen month protected period where no

³¹ Department for Communities and Local Government, *Assets of Community Value- Policy Statement* September 2011, 4. See also Department for Communities and Local Government, *Community Right to Bid: Non-Statutory Advice Note for Local Authorities* October 2012, para 2.20.

³² Localism Act 2011, s91.

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further moratorium can be triggered.³³ The community bid, and thus the personal claim of the community, is at the mercy of the market and other fungible claims over the land. A private purchaser could easily out-bid the community, or the landowner could wait out the moratorium period, and the personal-property claim of the community would be defeated by the landowner's fungible claim as they sought to realise the highest value of the land. In substance, the ACV scheme does not adhere to the personhood perspective, and it does not operate to protect and prioritise the community claim.

3 BARRIERS TO RECOGNITION

The three examples given above demonstrate that the property and personhood theory does not hold true for communal property claims in England. If anything, the strength of the entitlements plotted on the continuum operates in reverse when a community makes the personal claim, as the claims plotted towards the fungible marker seem to represent a stronger entitlement. This seems difficult to accept, as the reason for attempting to protect and prioritise these claims is not because they are communal, but because they are personal-property claims, which, in the personhood perspective, carry the strongest entitlement. Private property enjoys the privilege of being able to invoke the personhood perspective, and there seems no reason why it should not extend to a community, provided that the community exhibits the requisite characteristics to attain personhood status. Therefore, there appears to be a prejudice against communal property entitlements.

Professor Radin identifies what may be the cause of the failure of communal property claims to conform to the traditional application of the personhood perspective:

“If a dichotomy telescoping this continuum to two end points is to be useful, it must be because within a given social context certain types of person-thing relationships are understood to fall close to one end or the other of the continuum, so that decision makers within that social context can use the dichotomy as a guide to determine which property is worthier of protection.”³⁴

³³ Assets of Community Value (England) Regulations 2012, regulation 13; Localism Act 2011, s95.

³⁴ MJ Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957, 987.

Professor McDonald expresses the problem through the rights-duty correlate. He argues that if those who will be duty bound by the property rights that arise as the consequence of the communal property claim do not recognise those duties, there will be no recognition of the community's property right. The group must be understood to be a right holder *vis-à-vis* others in society.³⁵

Therefore it seems that the continuum will only work when the relationship between the person and the thing to which the person is laying claim is understood. If the relationship is not understood, the entitlement of the person to the thing claimed will not be properly understood and respected. As the personhood perspective works perfectly well when an individual claims an entitlement to property (consider for example the rights of persons in of actual occupation contained in the Land Registration Act 2002), and the only variant presented in the application of the personhood perspective in this inquiry is to substitute the individual for a community, it must be the presence of the community that causes the application to fail. The simple fact is that the decision maker plotting the claims on the continuum in the context of the English legal system, and the conception of property that the English legal system employs, does not understand the person-thing relationship when the person is not an individual seeking to establish private property, but rather a community seeking to establish a communal entitlement.

As the relationship between a community and a resource is not universally understood, it does not feature in the calculation for allocating resources. It is this lack of understanding about communal property that has ostracised community entitlement to natural resources, and prioritised private property and the fungible property claims of individuals over personal property claims of communities (as demonstrated above). For example, the lack of understanding about the nature of communal property is arguably what causes rights of common in the commons registration scheme to not enjoy an inherent priority over the claims of the general public. The open access rights of the general public usurp the rights of the commoners in the management of the common, as the wider 'public interest' must be considered in the management strategies of the common. Indeed, the conflation between limited access and open access communal property is rife throughout the commons literature, and is a

³⁵ M McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 Canadian Journal of Law and Jurisprudence 218, 220.

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mistake that Hardin himself makes in his landmark paper ‘The Tragedy of the Commons’.³⁶

To conclude that the non-understanding of the person-thing relationship, where the person is in fact a community, is the cause of the failure of the personhood perspective in the context of community claims is not surprising. It is something that is both explicit and implicit throughout commons scholarship, and a major contributing factor in the marginalisation of communal property arrangements. The more pertinent question is *why* do the decision makers, and the English legal system, not understand the person-thing relationship between the community and the land.

3.1 Universal Understanding of Property Signals

The reason for the misunderstanding (or non-understanding) of communal claims can be found in the scholarship of Professor Rose, who discusses the signalling of property ownership. She notes that possession is typically the basis of ownership. Possession communicates or gives notice to others of the possessor’s entitlement, an entitlement that is recognised in law.³⁷ Therefore, those who take possession of resources establish their entitlement and are recognised as owner. It is also often the case that the primary method of signalling entitlement, the act of taking possession, is supported through some secondary symbol, such as formal registration.

Rose’s account of property signalling cannot accommodate the property signals that a community transmit to the rest of the world. In the examples given in this paper, and with communal property more generally, the community does not ‘possess’ the resource over which it lays its claim. Rather, the community establishes its entitlement by individual members of the community using the resource, and sharing it with the other members of the community. In the context of a private property framework this sharing does not signal an owner-like entitlement; there is no exclusion of *all* others from the resource in the way that Blackstone envisaged, and there is no act of possession by one person.

Nonetheless, it seems that the English legal system has the potential to be able recognise a community entitlement to a limited access common;

³⁶ G Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243.

³⁷ C Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press Inc. 1994) 16, see also chapter one generally.

and it would require a small step to achieve this. It was noted in the first article in this series that, for a successful mutual self-interest common, the resource must be “just as private to the community as private property is to the private property owner.”³⁸ It was further argued that the community must exclude non-members of the community from the use of the resource, which led to the observation that limited access communal property bears some resemblance to private property³⁹ (although this resemblance was later limited through an analysis of the alienability of communal property). If these contentions are true, it is difficult to understand why the personhood perspective does not hold true for the community claim in the same way as it does for private claims, as they both share the same core of exclusion rights. The characteristics of the group seem to mirror the private individual in such a way that should allow the personhood theory to justify the personal claim of the community.

Therefore, there must be something else in the characteristics of the community that sets the quality and signalling of its personal claim aside from that of the individual. One possible solution is that, in reality, the community does not exclude others from using the resource, but rather they exclude others from exercising the same rights as themselves over the resource. For example, the local inhabitants in whose favour land has been registered as a TVG are able to exercise the rights of recreation that have been conferred on them, and no such rights are conferred on those who fall outside of the relevant locality or neighbourhood within a locality. Others may still use the land, but they may not do so in a way that is inconsistent with the rights of the local inhabitants, and the landowner may still exclude them. Similarly, only commoners who possess rights of common may exercise these rights, but this does not preclude others from using the common, provided that they do not interfere with the rights of common. Finally, those who fall outside of a community interest group do not enjoy the right to trigger a moratorium period when a landowner proposes to sell an ACV (however, it should be noted that the community interest group who triggers the moratorium does not necessarily need to be the same group that successfully applied for ACV listing of the land).

³⁸ A Clarke, ‘Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework’ (2006) 59(1) *Current Legal Problems* 319, 329.

³⁹ C Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press Inc. 1994) 117.

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The above observations are important because, as argued by Professor Rose, the property signal “must be in a language that is understood, and the acts of ‘possession’ that communicate a claim will vary according to the audience”.⁴⁰ The audience in the context of the English legal system are those who operate in a private property framework. This audience does not understand shared use where the only exclusion is from the particular bundle of use rights exercised by a community. Such use is not an act of possession that will communicate a claim to the audience, as it is not communicated in a language that the audience will understand, and this is the crux of the problem for the community claim. Whether the property claim is fungible or personal makes no difference for a community; the real hurdle is that the audience understands the property signals of individuals, not communities.

3.2 Dominant Property Narrative

The audience to property signals understand the dominant narrative of property discourse, and this narrative and understanding of the institution of property does not accommodate communal entitlement. The dominant narrative suggests that individuals have a natural desire to possess property. “The first instinct of the individual is to live and to prefer their own lives to the lives of others”,⁴¹ and life depends on property and the ability to appropriate resources for individual sustenance.⁴² Therefore, there is the desire to keep resources for one’s self and, when those resources become scarce, exclude others from sharing in its use; this has become widely regarded as the classical view of property.

Therefore, in a world of scarce resources, individuals become concerned with private property and maximising their entitlement in the allocation of resources. Individuals want to retain resources for their own use, and will exclude others to do this. Under the dominant narrative, this proposition is true even in communal property arrangements. The choices that face the individuals in a common-property arrangement where there is not enough of the resource to satisfy the preferences of every individual can be demonstrated in the well-known prisoners’ dilemma diagram below. In the diagram, to ‘cooperate’, members of the community would need to forgo some of their own use of the resource to ensure that the

⁴⁰ Ibid at 16.

⁴¹ T Hobbes, *Leviathan* (Prometheus Books, 1988) chapter 20.

⁴² J Locke, *Two Treatises of Government* (Cambridge University Press, 2013) second treatise, sec. 28.

resource can sustain the use of the other members of the community. To ‘cheat’, members of the community would maximise their use of the resource and take all that they can, with little regard for the amount of the resource remaining for the use of other members of the community.

	A. cooperates	A. cheats
B. cooperates	A gets a good allocation, B gets a good allocation.	A gets lots, B gets nothing.
B. cheats	B gets lots, A gets nothing.	A gets a small allocation, B gets a small allocation.

If ‘lots’ is taken to be x , a ‘good allocation’ is $> x/2$. A ‘small allocation’, would then be $< x/2$. This makes it easy to see which combination of actions give rise to the best solution for all, and the greatest overall product of the resource:

Cooperate - cooperate	$2 (> x/2)$
Cheat - cooperate	x
Cooperate - cheat	x
Cheat - cheat	$2 (< x/2)$

The best solution for the members of the community entitled to use the resource is to adopt a cooperate-cooperate arrangement, as the cumulative product of the resource is enhanced: $2(> x/2) = > x$. If a cheat-cooperate or cooperate-cheat situation emerges, then the resource will only ever produce x , and if a cheat-cheat situation occurs the resource will not even produce x as $2(< x/2) = < x$.

By choosing a cooperate-cooperate scenario, every member of the community will get a good allocation of the resource to meet their needs, and the resource can sustain the allocation and use. Furthermore, the cumulative product of the resource is enhanced. Therefore, to make a common-property regime work, every member of the community must choose to cooperate.

However, Professor Rose illustrates that the cooperate-cooperate arrangement is rarely reached.⁴³ The preference orderings of individuals do not lead to a relationship of sharing in which entitlements are equal, but rather a relationship in which the individual making the decision whether to cooperate or not gains the greatest possible entitlement. This does not mean that individuals do not wish for others to get a good

⁴³ C Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press Inc. 1994) chapter 2.

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allocation of the resource, and they are happy for others to receive an equally valuable allocation as themselves, provided that it does not impinge on their own. It is when the allocation of others affects their own allocation that individuals develop the ruthless self-interest that leads them to exclude others from the resource. The individual self-interest develops in order to protect ones' own allocation, and will always arise when the resource becomes scarce.

Even those anomalous individuals who do not follow the classical theory of property and choose to share property fall foul of the prisoners' dilemma when the resource becomes scarce; they too do not choose a cooperate-cooperate strategy. For example, those members of society who buck the trend and are benevolent have a genuinely greater concern for others than they do for themselves will opt to go without. They will opt to participate in a cooperate-cheat arrangement, in which they cooperate. Although this achieves their aim of giving others a greater allocation of the resource, it does not maximise the cumulative product of the resource.

Professor Rose suggests that the only individuals that will engage in a cooperate-cooperate arrangement and pursue the collective well-being will be those who "[do] not put her own well-being above yours, but is not a fool about needless self-sacrifice either".⁴⁴ She also demonstrates through a thought experiment that these individuals are in the minority,⁴⁵ and that a cooperate-cooperate arrangement will only exist if all the members of the community share this disposition. As soon as one self-interested individual infiltrates the community, there will be a 'cheat', and the product of the resource diminishes.

In short, the majority of society is either far too self-interested, or keen to fall on their sword, to choose a cooperate-cooperate scenario and maximise the product of the resource for the collective well-being.

3.3 Consequences

If the dominant narrative is as presented, it is no wonder that a community of users who select a cooperate-cooperate relationship and successfully manage a resource are not understood. Whether their claim is fungible or personal makes no difference, it is the prospect of having a successful communal property regime in which this claim can exist that is the stumbling block for the community. If the dominant narrative could rationalise communal property, then there would be no reason why the

⁴⁴ Ibid at 37.

⁴⁵ Ibid at chapter 2.

personal claim of a community could not be understood in the same way as that of an individual. However, as long as the cooperate-cooperate scenario and use by sharing is in the minority, this seems unlikely to happen.

It seems that Radin is correct to say that if the decision maker who is plotting the claim on the continuum and the audience to that claim do not have the necessary level of understanding, the dichotomy is useless as a guide to assessing which claims are worthier of protection. It makes no difference where the community claim is plotted on the continuum, as the person-thing relationship is not understood, and therefore the dichotomy is ineffective as a tool for adjudicating between competing claims of a community and a landowner. The outcome of plotting the community claim towards the marker of a personal claim, in practice, leads to a greater weight being placed on the fungible claim of the landowner, as it is the only recognised claim. This is in line with the dominant narrative that expects individuals to use resources by excluding others, and claims made by those who do not exclude others do not signal a claim that is recognised and protected when plotted on the continuum. If the interest plotted towards the personal marker had been that of an individual claimant, the personhood perspective would have operated to prioritise this claim and recognise that individual's better entitlement against all fungible claims. However, in a narrative where the focus is on maximising individual wealth and entitlement, the community claim, and the maximising of collective well-being and sharing, will never be understood.

4 CHANGING THE DOMINANT VOICE IN PROPERTY NARRATIVE

Professor Rose notes that the “dominant storyteller can make his position seem the natural one”.⁴⁶ Therefore, as long as it is the self-interested individual that is directing the property narrative, there seems little prospect of re-weighting the balance of the continuum to favour the personal claim of a community against fungible claims made by private individuals.

In her exposition of the personhood perspective, Radin suggests that a government concerned with the just distribution of resources could use the

⁴⁶ C Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press Inc. 1994) 39.

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personhood dichotomy as the source of a “distributive mandate”.⁴⁷ Under such mandate it would be the responsibility of the government to ensure that all citizens have the resources necessary to fully constitute their personhood. This may go so far as to require the government to “rearrange property rights so that the fungible property of some people does not overwhelm the opportunity of the rest to constitute themselves in property.”⁴⁸ Furthermore, if the concern is securing the resources required by each citizen to fully constitute themselves, it seems inconsistent not to afford the same concern to communities, especially where individuals can only constitute their personhood and identity within a community.

Interestingly, it seemed possible that there may be a shift in the dominant narrative of property rights. The Conservative-Liberal Democrat coalition government of 2010-2015 set out to pursue a policy of empowering local communities, and give effect to community claims to resources. This is a policy that has supposedly been pursued for some time; in 2008 the then Prime Minister, Gordon Brown, pledged to pursue policies “enhancing the power of communities”, “ensuring that their voices were heard” and “helping people...set and meet their own priorities”.⁴⁹ In 2010 David Cameron was elected as Prime Minister with his vision of the ‘big society’, the ideology that communities should be empowered to solve their own problems, via a transfer of power from the state to the people and local communities. The end goal was to “create communities with oomph- neighbourhoods who are in charge of their own destiny’ and communities that feel they can ‘shape the world around them’”.⁵⁰

The ‘big society’, whilst eventually abandoned, has resulted in a number of initiatives, which, although grounded in public law, have consequences for the allocation of, and entitlement to, resources. A prime example of such an initiative is the assets of community value scheme, discussed above. Another example of the ‘big society’ ideology in practice is a scheme that allowed local communities to apply to the ‘Big Society Bank’, a fund sourced by the state using the proceeds of dormant bank accounts, to receive funding to improve and support their

⁴⁷ MJ Radin ‘Property and Personhood’ (1982) 34 Stanford Law Review 957, 990.

⁴⁸ Ibid.

⁴⁹ Department for Communities and Local Government, *Communities in Control: Real People, Real Power* (Cmd 7427, 2008) foreword.

⁵⁰ David Cameron, 18 July 2010. Quoted from <http://www.telegraph.co.uk/news/politics/david-cameron/7897445/David-Cameron-launches-his-Big-Society.html> accessed 10 April 2015.

community. Four pilot areas were chosen, and the problem that these communities sought to address when given the power and funding to do so were problems of resource management. Communities in Windsor and Maidenhead sought to manage their local park and protect the community entitlement to use it, which entailed preventing development and use that was inconsistent with the social value that the community placed on the park. In addition, a community in Cumbria sought to secure funding to purchase their local pub that was in danger of closure. The community had formed an attachment to the pub over many years, providing the basis for a personal-property claim, which the funding from the 'Big Society Bank' helped realise.

First impressions of these schemes seem to suggest that the community claim over resources, and the entitlement to manage and direct how a resource should be used, is being recognised. Not only that, but the government are also actively promoting and enabling communities to realise their claim and entitlements. Most of the schemes stop short of transferring title to the land and resources in question to the local community, not least because of the limited capacity of groups to hold legal title to property, but there does seem to be a shift in the right direction. However, as has already been exposed with the examined community claims above, first impressions can be deceiving.

4.1 Trojan Horse

In reality, the idea of the 'big society' and empowering communities has had very little positive impact on community property claims. There has been no favouring of community entitlements as a result of the policies implemented, especially not when the community claims clash with those of private landowners. In fact, many of the policies implemented perpetuate the favouring of private property claims, but have all the clothing of respecting community entitlement. Communities were sold a false package under the coalition government; the understanding of communal property claims is just a façade, and the dominant narrative of property is just as prevalent as it ever was. The initiatives supposed to promote community property entitlements are little more than a Trojan Horse, perpetuating the preference for private property arrangements and individual wealth maximisation.

The reason for the continuing dominant narrative is easily explained. The political and economic climate of 2010-2015 did not lend itself to recognising community entitlements. The priority of the government has been to combat the recession and oversee the economic recovery of the country, and policies appropriate to this aim were pursued. In the

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framework of sustainable development, the economic aim was prioritised over the social and environmental aim. This immediately marginalises personal-property claims, especially those of a community, that carry little or no financial value. Instrumental property has more immediate value for the economy, and is more conducive to an upward economic trend, than property that is claimed on the basis of some emotional or social connection with others in a community.

There are clear examples of the coalition government actively pursuing the economic aim of sustainable development and seeking to realise the economic value of land, rather than the social value and community entitlement. One clear example can be taken from the communal property arrangements discussed earlier in this paper, the town or village green. Whilst it may be true that TVG status is used as “a weapon of guerrilla warfare against development of open land”,⁵¹ the act of the local inhabitants applying to register and protect the land cannot be ignored. Even if the application for TVG registration is what an objective observer may call ‘vexatious’, the fact remains that the local inhabitants as a community felt they had established a connection to the land that should be recognised and prioritised over the fungible claim of a developer or landowner. Provided that the legal test of section 15 of the Commons Act 2006 is met, it does not really matter what the motivation for the application and the community claim of entitlement is. However, the coalition government has not taken this strict stance, and have instead opted to amend the Commons Act 2006 through the Growth and Infrastructure Act 2013, as noted earlier in this paper. The effect of the amendments is to make it much harder to register land as a TVG, as section 15C of the Commons Act 2006 now contains a number of trigger events that will bar registration as a village green. All of these trigger events relate to planning applications over the relevant land, and thus prioritise the aim of development and maximising the economic value of the land, often at the expense of the social value attributed to the land by the local community. In essence, the fungible claim takes priority over the personal claim of the local inhabitants. The power of local communities to protect land that is important to them through the mechanism of TVG registration has been greatly diminished, and is now little more than a mechanism for favouring the fungible claim when the personal and fungible claims clash.

⁵¹ *R (Lewis) v Redcar and Cleveland Borough Council and Another* [2010] UKSC 11 [48] (Lord Walker).

The lack of protection for land valued by communities is hardly surprising, especially given that development and house-building have been the primary tools used by the coalition government to fuel the economic recovery. The government were never seriously going to favour the social aim of land and promote community entitlement, especially if that entitlement could impinge on the economic value of land. It is often the case that by recognising the social value of land, and community entitlement, the land becomes economically sterile and protected from development, with the TVG regime being a prime example. The National Planning Policy Framework explicitly adopts the stance that “significant weight should be placed on the need to support economic growth through the planning system”,⁵² highlighting the preference for, and greater weight placed on, the instrumental value of land.

The political climate also goes some way to explaining why the assets of community value scheme is diluted to the point of being inadequate to protect community entitlement to the local resources that they value. It is not on the political agenda of the Conservative party to inhibit the freedom of the property owning classes when they come to dispose of their property. Landowners can voluntarily enter into options to purchase and rights of pre-emption, but they will not be unilaterally imposed on a landowner in the way that would be necessary for the scheme to really recognise the community entitlement to resources that they use and value (note the stark contrast here with the Scottish community right to buy scheme). The ACV listing scheme only pays lip service to the notion of community entitlement to property, and in reality still perpetuates the private property claim of the landowner. The effect of the protected period afforded to the landowner, coupled with the possibility that the community bid could be outweighed by a private and fungible bid, or indeed that a private bid may even be preferred, rids the scheme of any real potential to protect community rights.

On the whole, it seems that when considering the allocation of resources and the structure of property rights it is not only necessary to consider the dominant property narrative, but also the wider political context in which that narrative takes place. When this is done, only one conclusion can be reached: the dominant narrative of property has not changed. The interest of private wealth is still favoured, and property rights have not been arranged to prevent the fungible property of

⁵² Department for Communities and Local Government, *National Planning Policy Framework* March 2012, para 18.

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individuals overwhelming the opportunity of communities to constitute themselves in property.

Sadly, it seems unlikely that the status quo will change anytime soon. At the time of editing this instalment of the article series it is less than a week since the United Kingdom held a referendum to determine its membership of the European Union. As the readership of this journal will know, a slim 52% majority of the electorate voted to leave the European Union, with a voter turnout of 72%. There are grave predictions of a negative economic shock and continued uncertainty. Already some of these predictions ring true, the pound sterling has fallen and risen sharply, as have the markets, and the country is in political turmoil. Against this volatile backdrop it seems most unlikely that any government that eventually finds itself in control will pursue anything other than achieving the most financially viable and economically supportive use of land, no matter what that governments underlying ideology may be. Such a policy direction will likely result in the continued favouring of private property, and community claims will continue to fall by the wayside.

5 CONCLUSION

Natural resources, such as land, are predominantly subject to private property claims. Whilst this is in line with the classical Blackstonian view of property, it fails to recognise the nature of the multitude of competing claims that exist over land. Some of these claims do not correspond with the traditional view of ownership, and focus on use by sharing rather than use by exclusion, and the right of a number of defined people to use the resource. English law does not generally recognise communal ownership, at least where there are more than four owners,⁵³ despite these communal claims existing in abundance. Until a legal mechanism is developed that can accommodate these communal property entitlements in our predominantly private property system, such claims will never attain more than a de facto status.

The first step towards recognising communal property claims and accommodating them in a classical view of property is to justify the communal claim. This two-part article has sought to achieve this justification by using the personality theory of property, a theory that is usually applied to justify private property claims. The theory makes a normative claim; that personal-property claims should be prioritised over

⁵³ The amount of legal title holders over land is limited to four, as per the Law of Property Act 1925, s34(2).

fungible claims, and that in the event of a clash between the two, there is a prima facie case that a fungible claim should yield to personal claims, save for exceptional circumstances. It has been argued that if a community can demonstrate a degree of cohesiveness, homogeneity of interest and mutual self-interest, idiosyncratic regulation and the practice of excluding non-members, it is possible that it can establish a group personhood and establish a personal claim to property. This in turn should take precedence over the fungible claims of landowners, and the community entitlement to land should be protected. The consequence will be that the use rights of the community are protected against inconsistent uses by the landowner, the community will have some rights of management and control over the land, and in some cases may even result in the transfer of title to the resource (provided there is an appropriate legal mechanism that allows communities to hold the legal title to property, which at present is difficult to achieve).

In practice, the personhood perspective rarely holds true for community property claims, and even in the limited instances where it does, the community entitlement is so heavily qualified that it does little to protect the personal-property claim of the community. The reality is that personal property claims established by communities often yield to the fungible claims of private landowners, and the few mechanisms that are present in English law to protect personal claims made by communities actually perpetuate this state of affairs. The scheme of listing assets of community value provides virtually no protection at all for the community entitlement, and the town or village green regime has become so diluted through economic policy that registering land as a TVG is now almost impossible where the land has any commercial value that could be realised.

The reason why the personhood perspective fails to justify community claims to land is not surprising. The classical view of property has become the dominant property narrative, and this narrative focuses on the self-interested individual who seeks to maximise their own wealth and exclude others from scarce resources. This narrative does not account for those who use land whilst sharing it with others, or those individuals who form a group of users that aim to enhance the collective well-being. Communal property has been marginalised, and communal property arrangements are seldom understood. As long as the property signals of a community are not understood by the audience in the context that they are made, personal-property claims established by communities will never be given the same status as those established by private individuals. Furthermore, until there is a better understanding of communal property arrangements by both the policymakers who plot the interests on the

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personal/fungible dichotomous continuum, and the audience who receive the property signals generated by the claim, the common-property arrangements that do exist will continue to be ineffective. For example, the scheme of commons registration in England could be much more effective in protecting the rights of the commoners. Yet, until there is a better understanding about the differences between limited access and open access commons, and the tension that occurs between the two, the commons registration scheme will never reach its full potential.

Some attempt has been made to address the imbalance between private and communal property entitlements, such as the assets of community value listing scheme and the big society project. However, these attempts have achieved very little, and have been hindered by the overarching aim of the collation and subsequent governments to revive the economy. Only policies that furthered the economic aim have been seriously pursued, some of which detrimentally affect community claims over land. The standout example of this is the Growth and Infrastructure Act 2013, enacted with the aim of promoting development and realising the economic value of land, even if that land could be subject to a personal-property claim of a community (such as TVG status). The instrumental value of resources and the fungible property claim has taken priority, and until the political climate changes, it is difficult to see how the dominant property narrative will either.

Therefore, until communal property claims are placed on a level footing with private property claims it seems unlikely that communal property entitlements will be justifiable, properly recognised or accommodated in English law. Equality between the two claims will entail the changing of the dominant property narrative, and until the political climate is such that will enable this to happen, it seems unlikely to be achieved. The Blackstonian classical view of property has held fast for hundreds of years, and unless there is some radical change in view, it seems that communal property arrangements will remain only de facto arrangements, searching for some validity and recognition in a world of private property claims.