Reforming the public and private law of the tenement

Reforming the Public and Private Law of the Tenement

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I. INTRODUCTION

The law of the tenement in modern times is often thought of as a domain of private law where multiple owners' interactions with property are brokered and regulated by reference to those ownership interests. This essentially private property[2] dynamic has been the hallmark of much doctrinal literature and its account of the common law, as well as recent statutory developments. It has also been a central underlying assumption of policy making in recent times that tenements and their maintenance are the responsibility of owners.

However, running in parallel to the private law dimension is an important public law dimension – a feature of the broader law of the tenement that is sometimes overlooked in scholarship. In recent years the law of the tenement has been substantially altered, if not quite entirely overhauled, by various statutory interventions: primarily in various Housing Acts and by the Tenements (Scotland) Act 2004. Part of this package of statutory reforms has been the augmentation of the potential role and involvement of local authorities in educating, facilitating, and, in some cases, requiring owners of properties in tenements to maintain and repair their tenement buildings. Statutory powers, for example, were granted to local authorities to pay the share of an owner in relation to tenement costs in certain circumstances (known as 'missing share' powers). However, it is important to recognise, we suggest, that these latest local authority powers are simply recent and additional examples within a longer, more complex and frequently overlooked tradition of public authorities' investiture with statutory powers relating to tenements (and other buildings) to secure a public good of safe and properly maintained buildings.[3] Thus, any attempt to critically assess the law of the tenement must consider the public law and the private law dimensions in tandem. Equally, any attempt to reform the law for policy purposes must do likewise.[4]

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[1] We are grateful to Professors George Gretton, Chris Himsworth, Jane Mair and Kenneth Reid for various helpful comments on earlier – and rather different – drafts of this paper.

[2] It was not always known as, or indeed would fall under what we might today call 'property law'. Much was, and to some extent still is, governed by the law of neighbourhood, common interest and aspects of the law of delict. A substantial role operating within those areas of law that might now be seen as a public and regulatory one was that of the Dean of Guild: see e.g., J Campbell Irons, *Manual of the Law and Practice of the Dean of Guild Court* (Edinburgh: W. Green, 1895), pp.201ff. Similarly, the older reports of 'public police' actions are of the same ilk.

[3] See e.g., J Campbell Irons, *The Burgh Police (Scotland) Act, 1892* (Edinburgh: W. Green, 1893); J Campbell Irons, *Manual of the Law and Practice of the Dean of Guild Court* (fn. 2).

[4] Aspects of the law of the tenement – the creation of compulsory owners' associations, which will have a role in relation to maintenance of the tenement – are currently being considered by the Scottish Law Commission (the 'SLC'): see the SLC, *Discussion Paper on Tenement law: compulsory owners' associations* (SLC No. 176, 2024).

Our aim in this article is to review the overall law of the tenement and offer an analysis that may be helpful for future law reform thinking in this field. We examine the private and public law aspects in turn, demonstrating that each dimension retains some complexities. Yet, more fundamentally, our review surfaces three connected broader issues that pose challenges for law reform in this area.

First, we argue that the overall body of law relating to the upkeep and maintenance of tenements betrays divergent presumptions about the appropriate scale – both spatially and temporally – at which the law should operate. In other words, within the overall law of the tenement we can observe parallel presumptions regarding the scale of the social problem to be ameliorated by law: that it is spatially narrow and short-term, yet also spatially broad and long-term. Thus, as Valverde might put it, the law of the tenement contains two "chronotopes",[5] which broadly map onto the private law and public law dimensions. The private law dimension frames the problem as revolving around individual tenements and the private interests of owners for the duration of their ownership (thus narrow and short-term), whereas the public law dimension frames it as revolving around Scotland's whole tenement stock and the public's interest in these buildings' safety for the duration of their existence (thus broad and long-term).

Second, we suggest there are also distinct legal rationalities at play concerning the appropriate *modus operandi* of the law – whether it should be formal or substantive in character. This concerns the law's functioning. "Formal" law is instrumental in character, creating, for example, frameworks or processes whereby others may determine the content of people's legal rights and obligations. "Substantive" law, by way of contrast, is more interventionist, providing the substance of legal rights and obligations itself.[6] We see evidence of both within the law as it stands.

Whereas the above two points relate to the overall complexity of the body of law relating to the upkeep and maintenance of tenement property, our third suggestion is that there are significant gaps in our empirical knowledge about how key actors – both public and private – engage with this body of law. This matters for law reform. Until such times as those gaps are sufficiently filled, any law reform effort may prove to be wide of the mark.

The remainder of this article proceeds as follows. In the next section (section II), we review the private law dimensions of the law of the tenement, critically assessing the reforms of the Tenements (Scotland) Act 2004 ("the 2004 Act") in relation to owners' decision-making processes about repairs and the upkeep of tenement properties. We argue that the 2004 Act introduced countervailing pressures as regards the promotion of tenement repair, risking the effectiveness of the reform effort. In the section that follows (section III), we focus on the public law dimension of the law of tenement. We examine, compare, and assess various statutory powers given to local authorities,[7] focussing particularly on those regarding 'missing shares' and the apportionment of liabilities. We argue that the law here is complex and

[5] M Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York: Routledge, 2015).
[6] See TT Arvind, S Halliday and L Stirton, 'Judicial Review and Administrative Justice' in M Hertogh *et al* (eds) *Oxford Handbook of Administrative Justice* (New York: Oxford University Press, 2022).
[7] Whilst our focus here is on local authorities, it is worth noting that missing shares powers have been extended to Registered Social Landlords, private bodies that exercise public housing functions. Section 174A of the Housing (Scotland) 2006 Act gave Scottish Ministers a power to make regulations bestowing a 'missing share' power on RSLs, which occurred by way of Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018 (SSI 2018/301).

potentially confusing, with overlapping regimes of statutory powers, creating a challenge for local authorities in understanding and exercising their powers. In section IV, in considering the public and private dimensions of the law of the tenement together, we suggest a high-level analysis of the various policy emphases that inhere in this complex field of law. We also set out the relevant knowledge gaps that exist in relation to how key actors engage with this body of law, which also matters for policy. The article then concludes briefly by summarising our primarily (and necessarily) diagnostic analysis, and the ideas and empirical research projects that we think beneficial to an informed curative approach to outstanding issues in relation to the law of tenement.

II. THE PRIVATE LAW OF THE TENEMENT

The maintenance of tenements in Scotland represents a classic problem of collective action. When people acquire individual flats, a certain amount of common property comes with them.[8] Since the enactment of the Tenements (Scotland) 2004, "scheme property" is also part of the collective and social dimensions of tenement flat ownership. The upkeep of the parts of the tenement beyond the confines of one's individual flat is, in the vast majority of cases, and at least to some extent, a matter for common decision-making with one's fellow owners within the tenement.

Historically, Scots law militated against successful collective action in matters of common property, including tenements. Decision-making about common property generally required unanimity amongst owners,[9] albeit that doctrine retained some ambiguity and enjoyed sometimes slender authority.[10] As a decision-making system, it was generally ineffective, inclining toward inertia.

It was for this reason that the Scottish Law Commission ("the SLC") recommended major reforms to the law of the tenement in 1998.[11] The intention was to "ensur[e] that repairs are carried out and that decisions are reached on other matters of mutual interest and concern".[12] The law reform programme – enacted in the 2004 Act – contained three notable contributions. First, a new and expansive concept of "scheme property" was introduced, encompassing common property, parts of the tenement in relation to which more than one

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[8] D Weatherall, F McCarthy and S Bright, "Property Law as a Barrier to Energy Upgrades in Multi-Owned Properties: Insights from a Study in England and Scotland" (2018) 11 *Energy Efficiency* 1641–1655.

[9] At common law, theoretically at least, certain 'vital works' or 'necessary operations' might not need unanimous agreement, though this begged the definitional question of what constituted vital work or necessary operations. See GJ Bell, *Principles of the Law of Scotland* (Edinburgh: T. Clark, 4th edn, 1839), §1075; J Rankine, *The Law of Land-Ownership in Scotland* (Edinburgh: W. Green, 4th edn, 1909), pp.590–91. For a modern authority see *Thomas Dagg & Sons Ltd v Dickensian Property Co Ltd* 2005 GWD 6-84.

[10] The SLC pithily summarised this in their 1998 Report (SLC, *Report on the Law of the Tenement* (SLC No. 162, 1998), at para 2.1): "By the end of the twentieth century tenements comprised more than a quarter of the occupied housing stock in Scotland, but the law remained based on a handful of reported cases and on the disputed extrapolations of professors."

[11] SLC, *Report on the Law of the Tenement* (fn. 10). The project had been initiated some time earlier in 1990, as the first of the topics to be examined in the reform of property law which formed a substantial part of the Fourth Programme of Law Reform: see the SLC, *Discussion Paper on Law of the Tenement* (SLC No. 91, 1990).

[12] SLC, *Report on the Law of the Tenement* (fn. 10), at para. 1.2.

owner is subject to a maintenance burden, plus the roof, solum, foundations, external walls, gable walls and load bearing walls.[13] Second, a decision-making process about "scheme property" was introduced which marked a move away from the general common law requirement of unanimity: owners can make "scheme decisions" on the basis of majority votes.[14] Third, a relatively simple calculus for the apportionment of liability between flat owners was established.[15]

Significantly, however, these reforms represent "default" provisions in the sense that they only come into play in the absence of regulation via existing real burdens.[16] In other words, where existing real burdens stipulate decision-making procedural requirements, set out repair, maintenance and payment obligations, or apportion liabilities between owners, such express provisions in the title deeds trump the innovations of the 2004 Act.[17]

These reforms undoubtedly represented a significant advance in the private law of the tenement, part of the "revolution" in Scots land law taking place around the turn of the century.[18] Yet, there are grounds for uncertainty about the extent to which they were capable of triggering an increase in the incidence of tenements repairs. Legal reforms are by themselves perhaps unlikely to solve all the difficulties of addressing tenement disrepair, but there is an important sense, we suggest, in which the specific nature of the 2004 reforms may have introduced or sustained countervailing pressures as regards the promotion of tenement repair.

The prospect of successful collective action amongst tenement flat owners is undermined, we suggest, by certain structural issues particular to the legal regime of the 2004 Act. By 'structural issues", we refer to the provisions relating to the means by which putative repairing obligations crystallise for flat owners, as well as the nature of those obligations. Our argument is that the attempt to shift owners' decision-making towards a majority votes system may be undermined by the fact that the default scheme imposed by the Act makes its provisions subject to the terms of existing private title-based real burdens. This becomes clear if we think about the empirical stages involved in tenement repair decisions and analyse the role of the 2004 Act in facilitating or hindering progression through these stages.

Decision-making about the repair of tenements can be broken down analytically into five main stages (see Table 1 below). First, a problem must be identified and accepted by the flat owners as a repair that should be carried out. Not all flat owners may agree that an

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[13] The 2004 Act Sch.1(TMS, r.1.2).
[14] The 2004 Act Sch.1(TMS, r.2).
[15] The 2004 Act Sch.1(TMS, r.4.2). Where the costs relate to common property, they are shared according to the proportions in which the owners share ownership. Where costs related to 'scheme property', costs are shared equally amongst flat unless one flat has a floor area that is more than 1.5 times larger of another. Where so, costs are shared proportionate to respective floor areas. The most recent SLC publication indicates that they are minded to retain this approach: see SLC, *Compulsory Owners' Associations* (fn. 4), para. 10.13.
[16] The absence of regulation via real burdens can be a result of there being no real burdens, or because existing burdens are 'defective or lacking': see R Rennie, *Land Tenure and Tenements Legislation* (Edinburgh: Thomson/W. Green, 3rd edn, 2009), p.275.
[17] Sometimes the regime created by the title deed will be a basic or very wide one that requires some robust interpretation: see the relevant clause in the title in *Boatland Properties v Abdul* 2014 SCLR 792, at [69]–[71] *per* Sheriff McGowan. Discussed in KGC Reid and GL Gretton, *Conveyancing 2019* (Edinburgh: Avizandum, 2020), p.186 et seq.
[18] See, for example, A J M Steven, "Revolution in Scottish Land Law" (2004) 8 *Electronic Journal of Comparative Law* < https://www.ejcl.org/art83-5/> (accessed 9 December 2024).

identified problem is one that requires immediate resolution. An occasional roof leak associated with particularly heavy rainfall, or a leaking rhone, for example, may be deemed important repairs by some but not by all.

Second, flat owners must accept that they owe a repairing obligation as regards the identified problem. The limited case law in this field offers some examples of situations where this issue has been the subject of dispute, particularly with regard to idiosyncratic parts of tenements. In *Humphreys v Crabbe*,[19] for example, the downstairs neighbour in a Victorian villa that had been split horizontally into two separate flats rejected any repairing obligation in relation to the roof of the upper flat.[20] In *Hunter* v *Tindale*,[21] the owner of a pend rejected any obligation in relation to the repair of the archway over the pend, arguing that the pend did not form part of the tenement.[22] The more common situation of windows and skylights being installed in roofs raised the question, disputed in *Waelde v Ulloa*,[23] of whether they form part of a tenement building.[24]

Third, owners must agree about whom to commission to carry out the repair. Such decisions will be based, no doubt, on quotations tendered. Issues such as the appropriate number of quotations to obtain, the tenderers' reputation, and the costs, timing and mode of repair each have the capacity to be the source of disagreement.

Fourth, flat owners must accept the quantum of their apportionment of liability towards the costs of the repair.[25] For reasons discussed further below, where this is governed by real burdens it is not always a straightforward matter.

Finally, flat owners must then actually pay what they owe.

Stage 1	Acceptance that a repair is needed
Stage 2	Acceptance of a repairing obligation
Stage 3	Agreement to a work tender
Stage 4	Acceptance of apportionment of liability
Stage 5	Payment of share owed

Table 1: Decision-making stages

[19] *Humphreys v Crabbe* [2016] CSIH 82; 2017 SCLR 699.
[20] Denying (unsuccessfully) any such liability under the title deeds and or under the Tenement Management Scheme ("TMS") and attendant provisions of the 2004 Act.
[21] *Hunter v Tindale* 2012 SLT (Sh Ct) 2.
[22] While ultimately unsuccessful on appeal to the sheriff principal, the argument of the owner of the pend (the defender) had been successful at first instance before the sheriff, which gives some context to the view held by the defender.
[23] *Waelde v Ulloa* [2016] SC EDIN 30; 2016 GWD 11-221.
[24] Dormer windows appear to have exercised interest, and the Scottish Parliament Working Group on Maintenance of Tenement Scheme Property has recommended that dormer windows be expressly included as 'scheme property': see RICS, *Working Group on Maintenance of Tenement Scheme Property: Final Recommendations Report* (2019), p.11 < https://www.befs.org.uk/wp-content/uploads/2019/06/Working-Group-on-Maintenance-of-Tenement-Scheme-Property-Final-Recommendations-Report.pdf> (accessed 9 December 2024).
[25] On which see the remarkable case of *DH v SI* [2021] SC FAL 014; 2021 GWD 10-134, discussed in R Gale, "Deciding on Tenement Repairs: *DH v SI*" (2022) 26 Edin LR 262; K G C Reid, G L Gretton and A J M Steven, *Conveyancing 2021* (2022).

The major innovation of the 2004 Act was to facilitate action in relation to two of these decision-making stages: stage 1 – acceptance that a repair is needed; and stage 3 – agreement about whom to commission to carry out the repair. As noted above, in both regards, the Act replaced the common law requirement of unanimous decision-making: any disagreements amongst owners can be brought to a resolution through majority voting, subject to some minimal procedural requirements.[26] Alternatively, if a deadlock prevents a majority decision being made — for example, where there are two owners and one objects to the repair[27] — the owner(s) wishing to take action can seek an order from the court.[28]

This statutory scheme only has effect, of course, if the burdens do not provide otherwise. However, certainly in relation to older tenements, it is relatively rare for title conditions to stipulate decision-making procedures.[29] Thus, the 2004 Act represents an important advance for many tenements.

However, this advance is undermined by remaining difficulties in Stages 2, 4 and 5. As regards stages 2 and 4, it is significant that the 2004 Act stipulates that the provisions of existing burdens take precedence over the statutory default rules. The higher ranking of burdens may militate against owners reaching agreement about repair for the following two reasons. First, there might be a problem of clarity or comprehensibility.[30] Burdens, by nature, grow old. Theoretically, they are open to alteration,[31] but not without difficulty, even where there is agreement amongst interested parties.[32] In practice, then, they are mostly fixed in time and, as they age, the risk of them becoming anachronistic increases. For example, the

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[26] The Act, however, stipulates that procedural irregularities do not affect the validity of 'scheme decisions': the 2004 Act Sch.1(TMS, r.6(1)).

[27] This is essentially what happened in *Humphreys v Crabbe* (fn. 19): see at [28] *per* Lord Glennie.

[28] The 2004 Act s.6. In this regard, while majority decision-making may be typical, the statutory regime for scheme decisions, depending on the sheriff's exercise of the wide discretion in subsection 6(2), cannot simply be said to be one requiring majority-based decision making to take action.

[29] See e.g., these shrieval observations on a real burden: "Now it is clear that, in the present case, Clause (Fourth) does not provide anything very elaborate by way of procedure. It appears gives [sic] carte blanche to the majority to do as they wish. The only limitation on what works the majority of owners may instruct derives from the word "repairs". The clause has been deliberately framed so as to avoid the need for consent on the party of the minority, who become obliged to pay a share of the costs thereby incurred." *Boatland Properties v Abdul* (fn. 17), at [19].

[30] D Weatherall, F McCarthy and S Bright, "Property Law as a Barrier to Energy Upgrades" (fn. 8) 1641–1655.

[31] A real burden can be varied (and entirely discharged) by the Lands Tribunal upon application to it: Title Conditions (Scotland) Act 2003 ("the 2003 Act") s.90(1). It is, of course, also open to the benefited proprietor to expressly vary or discharge a burden (effective upon registration of a deed or minute of waiver or discharge): the 2003 Act ss.15 (for praedial burdens) and 48 (for personal burdens). If the burden is a 'community burden' (see s. 25) there are special rules recognising the potential difficulty of securing the active consent and participation (not least actually signing the deed) of all benefited proprietors, and the rules provide for discharge or variation consent by a mere majority of benefited proprietors or adjacent proprietors (subject to a right of recourse to object at the Lands Tribunal which may then have to adjudicate): see the 2003 Act ss.33&35. Many tenement burdens are community burdens.

[32] Where an application is unopposed the Lands Tribunal will grant the variation 'as of right' (i.e. automatically): the 2003 Act s.97(1). However, this automaticity is not applied where the burden is a facility burden, a service burden, or a community burden that pertains to sheltered or retirement housing: the 2003 Act s.97(2). When considering an application pertaining to these types of burden the Tribunal must conduct a substantive assessment (as it would for an opposed application), using specified criteria or 'factors' (see s.100), to determine whether the variation sought by the application would be reasonable to grant: the 2003 Act s.98. This need for a substantive assessment for facility and service burdens, even when unopposed, is of significance in tenement law because many real burdens associated with a tenement will be service or facility burdens: see the 2003 Act s.122(1)&(3)(a).

apportionment of liability may be determined according to a calculus (such as feuduty or rateable value) that is obsolete and so difficult for owners to work out.[33] In other cases, the character of the tenement ownership can change, posing problems.[34] Moreover, the distribution of liability according to title deeds (and the terms used to achieve it) can, at times, be rather intricate, to say the least. The SLC's Report offers some examples, one of which (albeit not necessarily a typical one) is reproduced here:

> A repair is carried out to the roof. In the case of four of the flats the split-off disposition imposes a one eighth liability for roof repairs. The split-off dispositions of all eight flats convey a right of common property in the roof along with the other proprietors… The four flats with the real burden are liable for a one eighth share. The "missing" one half share is then divided amongst all eight owners equally (since each has an equal *pro indiviso* share in the roof). Hence the first four flats must each pay three sixteenths of the cost while the remaining four flats pay only one sixteenth of the cost.[35]

Second, there is the problem of fairness. An historic method of apportioning liability, even if clear, may be inconsistent with modern sensibilities around fairness. As the SLC's example above demonstrates, the distribution of liabilities can be somewhat skewed within a tenement. Yet, whereas the distribution governed by title conditions is static, social perceptions of fairness are dynamic. Thus, even if a skewed distribution made sense in the 19th century (and was not simply the product of poorly thought-through split off dispositions), there is no guarantee it will feel fair to all owners in the 21st century.

There is some evidence that perceptions of fairness may have shifted over time. Certainly, the mechanisms of apportioning liability used in legal instruments have developed.[36] The apportionment of liability in burdens has sometimes matched varying feuduties, which most likely reflected differences in the perceived value of properties. In other circumstances, burdens have tied apportionment of liability to Valuation Rolls.[37] Thus, in some situations, flats on different levels of the tenement, despite having identical floor space, may, because of differences in feuduties or valuations, have been subject to varying liabilities for common repairs and maintenance. In Edinburgh's New Town, for example, first floor flats with larger front windows and higher ceilings, have sometimes attracted higher feu duties or rateable valuations for amenity, and hence a higher apportionment of the costs of

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[33] The fact that the calculus is now obsolete does not affect the validity of the burden, so long as, theoretically, it can be worked out. Nor would it matter that a calculus is not contained in the deed setting out the burden, so long as reference is made to a public document which can be used to work it out. See the 2003 Act s.5.

[34] See *Smith v Lewis* 2022 SLT (Lands Tr) 61, where the burden's cost apportionment was varied by the Lands Tribunal to reflect the substance of the TMS's default floor area rule (the 2004 Act Sch.1(TMS, r.4.2(b)(i)) where the division (and to some extent re-unification) of flats caused disagreement. In so doing the Tribunal did not mince its words: "When a title condition prescribes fixed shares based on the number of flats in a tenement and that number changes that seems to us *to require a change* in the allocation arrangements." (at [28], our emphasis). Another example of such a change is *McCabe v Killcross* 2013 SLT (Lands Tr) 48.

[35] SLC, *Report on the Law of the Tenement* (fn. 10), para. 5.68.

[36] See SLC, *Compulsory Owners' Associations* (fn. 4) at Appendix B, para. 29 indicating the different calculi for cost allocation uncovered by their survey of title deeds. The fact that 38 of the sample of 235 are classified as 'other', as distinguished from 'equal division', 'feuduty/rateable value', and 'size of flat', suggests quite a diverse set of express real burden provisions on apportionment of costs are extant.

[37] See, e.g., *Patterson v Drouet* 2013 GWD 3-99.

common repairs. Yet, by contrast, the default method of apportioning liability within the Tenement Management Scheme ("TMS") rules of the 2004 Act is firmly one of equality between flats – unless some flats have a significantly larger floor area than others (a floor area of "more than one and half times" the size). [38] In modern times, then, a greater stress is placed on equality, except in cases of significant size difference, measured in two dimensions. In earlier times, size differences may have taken more account of the third dimension of height, and perceptions of relative value may have included additional considerations.

These two issues – clarity and fairness – may militate against agreement amongst owners in stages 2 and 4: acceptance of the repairing obligation and the apportionment of liability may be more likely where the rules are easily understood and regarded as fair by all. The legal superiority of real burdens sustains the possibility of disagreements amongst flat owners about whether a repairing obligation is owed and/or how much they should pay towards the costs. Thus, while the 2004 Act attempted to move repairs decision-making towards a system of majority voting, this effort is potentially undermined by the capacity of dissensus concerning the meaning of the real burdens to foster discontent – discontent that cannot be overruled by a majority voting system. In this way, stages 2 and 4 of the repairs decision-making process represent a requirement of unanimity amongst owners, which may well reduce the incidence of repairs being carried out. That legal advice might be taken with respect to the true meaning or correct legal interpretation of a real burden is not an answer to this point, given that the need to resort to such advice might well disincentivise action or simply not be financially feasible.

Problems at stages 2 and 4 ultimately may lead to problems at stage 5, the payment of money to satisfy a share owed.[39] Even if a majority of owners agree that a repair needs to be carried out and nominate a contractor to conduct the works, if unanimity is not reached among all owners about who owes what, then one can expect difficulties of payment. Thus, whilst the 2004 Act introduced majority voting in a formal sense, in substance unanimity is still required.[40] The attempt to increase the incidence of tenement repair by way of private law reforms may thus have been incomplete.

In light of the above limits of the private law of the tenement, we now turn to consider what we loosely term the "public law" of the tenement, giving particular attention to how "missing share" and other powers seek to address the difficulty of requiring near functional unanimity generally, and in relation to the stage 5 payment of shares difficulty in particular.

III. THE PUBLIC LAW OF THE TENEMENT

[38] The 2004 Act Sch.1(TMS, r.4.2(b)(i)).

[39] The profile of flat owners has changed somewhat following the global financial crisis of 2008. Increasingly, people have invested their capital in rental flats, thus increasing the proportion of absentee landlords within the owner population. This, in turn, might well increase the risk of some absentee owners being difficult to contact.

[40] See also, D Robertson, *Why Flats Fall Down: Navigating Shared Responsibilities for their Repair and Maintenance*, < https://www.befs.org.uk/wp-content/uploads/2020/01/BEFS-Why-Flats-Fall-Down-November-2019.pdf> (accessed 9 December 2024).

In this section we assess the public law of the tenement, by which we mean the body of law pertaining to powers given to local authorities to intervene, usually at their discretion, in the maintenance of a tenement generally, and their powers to pay "missing shares" to cover costs associated with such maintenance.

As noted above, the law of the tenement has been substantially altered by various recent statutory interventions: primarily in various Housing Acts and by the 2004 Act, which in turn might shape private ordering by owners and their behaviours.[41] Part of the package of statutory reforms has been the augmentation of the role for local authorities in educating, facilitating, and, in some cases, requiring owners of properties in tenements to maintain and repair their tenement buildings. Within that package was the introduction of "missing share" powers allowing local authorities to pay the share of an owner in relation to tenement costs in certain circumstances. These local authority powers are simply recent and additional examples within a longer, more complex and frequently overlooked tradition of public authorities' investiture with statutory powers relating to tenements (and other buildings) to secure a public good of safe and properly maintained buildings.[42] In the sense of a legal chronotope, this historic tradition of "public law" powers has been more concerned with a broad and long term policy of promoting well-maintained buildings as part of a safe spatial built environment across the long term. Indeed, to some extent their very existence recognises the difficulties inherent in securing the collective action of the private law of the tenement, and the limitations of its more particular and shorter term chronotope discussed above.

Here we examine, compare, and assess various statutory powers given to local authorities. We are not aware of any such extant detailed published assessment focusing on these particular "missing shares" and apportionment of liability powers from a legal perspective, and so, to our knowledge, this is the first such combined evaluative assessment of a selection[43] of legislative regimes.[44] Here we review the missing shares powers granted to local authorities, comparing and assessing the regimes of two statutes: the Housing (Scotland) Act 2006 and the 2004 Act,

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[41] On the potential importance of statutory interventions as formative events in terms of shaping doctrine and the intellectual landscape or framework of an area of 'common' or 'private' law see: TT Arvind and J Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Oxford: Hart, 2020); TT Arvind and J Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart, 2013). There is a large literature on how, in turn, doctrinal law will influence actors or prompt 'private ordering' — local authorities and flat owners being the actors of interest here — see e.g., well-known works such as RH Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1978–79) 88 Yale LJ 950; RC Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Harvard University Press, 1991). There are implications for the sustainability and utility of observing a distinction between a 'public' and 'private' classification of law which we cannot do justice to here, but for an accessible overview see TW Merrill "Private and Public Law", in AS Gold *et al* (eds), *The Oxford Handbook of the New Private Law* (New York: Oxford University Press, 2020), Ch 35.

[42] See e.g., J Campbell Irons, *The Burgh Police (Scotland) Act, 1892* (fn. 3); J Campbell Irons, *Manual of the Law and Practice of the Dean of Guild Court* (fn. 3).

[43] We offer here an analysis of a selection of powers held by local authorities; we do not purport to be definitive: there are other statutory powers in this area which could benefit from further examination in light of the issues raised by this article.

[44] There are of course important sources of information which have mentioned such powers: for example, D Robertson, *Common Repair Provisions for Multi-Owned Property: A Cause for Concern* (2019), at pp.33–34 < https://www.befs.org.uk/wp-content/uploads/2019/01/Common-Repair-Provisions-for-Multi-Owned-Property-in-Scotland-2019.pdf> (accessed 9 December 2024).

before we examine and assess additional statutory local authority powers that have the potential, practically speaking, to operate very similarly those in the 2006 and 2004 Acts.

Our review of this "public law" of the tenement concludes that the existing legislative regime is complex. We show that the missing share powers given to local authorities by different pieces of legislation are not the same, and, furthermore, prompt questions about how local authorities are to be expected to respond to this complexity.

(1) Local authority missing share powers

(a) Housing (Scotland) Act 2006[45]

Section 50 of the Housing (Scotland) Act 2006 ('the 2006 Act') gives local authorities the power to pay the share of repair costs that a flat owner, being obliged to pay that share after a majority decision or where the owners are "required" to carry out maintenance,[46] has failed to pay themselves.[47] The non-paying owner in question must have been duly served with notice requiring the deposit of their share in a maintenance account,[48] setting out the details of the nature of the repair, its estimated cost, the basis for that estimate being reasonable, the repair timetable, and so on.[49] In this way, the local authority is said to be empowered to pay "the missing share" representing what would have been the flat owner's share of the repair costs. An assessment of the provisions of section 50, and outlining how it interacts with other local authority powers, shows that the law here is complex, sometimes apparently overlapping, and not always obviously coherent.

Perhaps the most likely situation where owners will be so "required" (as opposed to the "majority decision" route) is where a "work notice" has been issued[50] or in connection with a 'maintenance plan' set up following a 'maintenance order'.[51] It is open to question to what extent the section 50 power will realistically be available under the first limb ('required maintenance') if the only legal obligation 'requiring' such maintenance are real burdens, as it may well be unclear (in the absence of involving lawyers/litigation) from their terms relating to substance and procedure (if any) whether maintenance (and what is meant by

[45] We begin with the 2006 Act because its missing share power provision (s.50) was enacted before the missing share provision to be found in the 2004 Act (s.4A, which was inserted by the Housing (Scotland) Act 2014).
[46] The 2006 Act s.50(1)(a)(i)–(ii). It is applicable to flats in a tenement because it applies where "the owners of two or more houses which form part of the same premises are responsible by virtue of a real burden or otherwise for maintaining any part of those premises": the 2006 Act s.50(1)(a).
[47] Specifically, the statutory power is to pay the share of the estimated repair cost into a maintenance account: s.50(3).
[48] Defined as 'a bank or building society account opened for the purpose of holding money to be used to pay costs incurred in connection with any work carried out for the purpose of maintaining premises consisting of two or more houses' The 2006 Act s.194(1). A pedant might suggest that the 'maintenance account' identified in the 2004 Act (Sch.1(TMS, r.3.3)) is more permissive: there is no suggestion that the account must have been 'opened for the purpose' of meeting maintenance costs; rather a mere nomination of any account will be sufficient. Whether the difference is deliberate or material seems unlikely, but it is another ostensible difference in the regimes.
[49] The 2006 Act s.50(5).
[50] The 2006 Act s.30.
[51] The 2006 Act s.42.

"maintenance") can be said to be required of the owners.[52] "Required" in this context likely means subject to an already extant and enforceable legal obligation, and as such exercise of the power is much more likely to arise where there is a maintenance plan or a majority agree to carry out such maintenance. Such a majority agreement, it should be noted, seems a stand-alone one under section 50(1)(a)(ii) and is not necessarily one that has been (or has to be) reached under the provisions of rule 2 of the TMS under the 2004 Act. That said, it seems to us that where a majority decision to undertake maintenance has been taken under the TMS (or indeed under a real burden that makes provision for such decision making) there is no reason that such a decision cannot also stand as a majority agreeing for the purposes of satisfying the 2006 Act, section 50(1)(a)(ii) (where a majority of owners have agreed to carry out maintenance). Indeed, one might also say that such a majority decision reached under the TMS (or such a decision pursuant to a real burden) generates an extant and enforceable legal obligation that also satisfies section 50(1)(a)(i) (where the owners are "required" to carry out the maintenance).[53]

(b) Tenements (Scotland) Act 2004

The Housing (Scotland) Act 2014[54] amended the 2004 Act to insert a new section 4A which provided that local authorities have the power to pay a 'missing share' of an owner in similar — but not the same — terms to those which appear in section 50 of the 2006 Act outlined above. Thus, section 4A of the 2004 Act provides that local authorities have the power to pay a missing share where an owner is unable or unwilling to pay their share of scheme costs, or where they cannot be identified or found.[55]

Yet, while similar to the equivalent terms of the 2006 Act, we may observe that section 4A provides that the local authority can pay a missing share relating to "scheme costs",[56] and does not use the terminology of section 50 of the 2006 Act, which provides that the "missing share" that can be paid will be one where a majority decided to carry out such maintenance or they are "required" to do so.[57] Whilst "scheme costs" will often be a result of a majority "scheme decision" (see the 2004 Act Sch.1(TMS, rr. 4.1(a)&2.5)), they are not always so incurred. It is quite possible that a real burden might provide for an alternative decision-making regime that is not by a majority which will similarly constitute a 'scheme decision' (the 2004 Act Sch.1(TMS, r.1.4(b)), which, in turn, can similarly have missing shares paid by the local authority. Likewise, it is not clear that all the various examples of "scheme costs" outlined at the 2004 Act Sch.1(TMS, r.4.1(a)–(i)) will follow from a deliberative and democratic decision-making process by the owners (e.g. most obviously (d) costs recoverable by a local authority for work done on scheme property under any enactment). All this is because section 4A simply (with an express exception we will touch

[52] See text to fnn. 31–33 above, and e.g. the burden in *Boatland Properties v Abdul* (fn. 17).
[53] The section 50 power of the 2006 Act is not restricted to buildings technically defined as a 'tenement', unlike the 'missing share' power set out in section 4A of the 2004 Act, applying instead where there are 'owners of two or more houses which form part of the same premises', with premises broadly defined: the 2006 Act, s.194.
[54] Ss.85(1)(b)&104(3).
[55] The 2004 Act s.4A.
[56] The 2004 Act s.4A(1).
[57] The 2006 Act s.50(1)(a)(i)–(ii).

upon in a moment) provides for an owner's share of scheme costs to be paid by the local authority; it does not provide that a local authority can only pay an owner's share of scheme costs incurred after/by/as a result of, etc., a scheme decision which has been taken.

One form of "scheme cost" is specifically excluded from the section 4A missing share power: "a sum representing an owner's share of scheme costs which are attributable to a scheme decision mentioned in rule 3.1(e) [to arrange a common policy of insurance to satisfy section 18 of the 2004 Act] of the [TMS]".[58] It is not clear what (if any) significance is to be given to the drafting decision to refer to scheme costs of a particular type as created by a scheme decision, rather than stating that a local authority cannot pay a share of scheme costs falling under TMS rule 4.1(f) ("the cost of any common insurance to cover the tenement"). As it is drafted, it seems to place some significance upon a scheme decision having been taken. Whether that framing of "the exception to the rule" should suggest that "the rule" in section 4A(1) should be read into to say something like "a sum representing an owner's share of scheme costs which are attributable to a scheme decision" is perhaps stretching matters.

(c) Comparing the 2006 and 2004 Acts

In the above section, we observed that one of the major differences between the two statutory regimes concerns the nature of the costs recoverable under missing shares provisions: whilst the 2006 Act places an emphasis on majority decision-making, the 2004 Act simply anchors the statutory power in "scheme costs". Yet, further detailed scrutiny of the provisions raises some questions about whether there are in fact further differences.

Some of the differences, admittedly, seem minor. The 2006 Act presumes the existence of a maintenance account for all repair costs, whereas the newer provisions of the 2004 Act require a maintenance account only where owners are required to deposit more than £100 each, or more than £200 in a 12 month period;[59] and (2) the 2004 Act provisions, unlike those of the 2006 Act, empower local authorities to recover administrative expenses as well as the missing share.[60] Another apparent difference, though it is not clear how important in practice it is,[61] is a requirement under the 2006 Act that the local authority receives an application to so act from "any of the owners concerned";[62] there is no mention of a preceding "application" to the local authority relating to the exercise of the power in the 2004 Act. Yet, we would

[58] The 2004 Act s.4A(2).
[59] The 2004 Act Sch.1(TMS, r.3.3).
[60] The 2004 Act s.4A(5).
[61] It is not too hard to conceive scenarios in which the 2006 Act power could be inhibited if this 'application' element is indeed conditional to the exercise of the local authority's discretion. For example: if there is a tenement building consisting of six flats, all but one of which are owned by the local authority (i.e., 'council houses', making the tenement a 'mixed block'), the sole private owner cannot be found or is unable to pay his/her/their/its share, and more pertinently for our example, no application can be made (through absence) or will be made (by decision) to the council to pay that share. If the need for an application to the local authority is a necessary precursor, then arguably it could bar the local authority's recourse to the 2006 Act power in our example, though a further possibility is that the reference in the subsection to 'application of *any* of the owners' would mean that the local authority could make the application to itself, though the oddness of that construction needs little further comment.
[62] The 2006 Act s.50(3).

draw attention to a difference arguably more substantive: the grounds upon which the local authority can exercise the missing share power.[63]

The grounds upon which the local authority can choose to pay a share are framed differently under the 2004 Act and the 2006 Act. Under the 2006 Act the local authority may pay the share where the owner is unable to pay the share,[64] where it is unreasonable to require the owner to pay the share,[65] and where the owner cannot be identified or found.[66] Under the 2004 Act the local authority may pay an owner's share if the owner is unable or unwilling to do so,[67] or the owner "cannot, by reasonable inquiry, be identified or found."[68]

The results are curious. The test for the assessment of whether an owner cannot be found or identified is arguably less arduous under the 2004 Act than the 2006 Act because of the former's parenthetic "by reasonable inquiry".[69] Likewise, the 2004 Act is more facilitative to local authority intervention by authorising a payment where the owner is "unwilling" to pay,[70] a ground which is not present in the 2006 Act. On the other hand, the 2006 Act allows the council to make a payment where it would be "unreasonable to require the owner to pay the share"; [71] no such basis for intervention can be found in the 2004 Act. This might also explain why section 4A of the 2004 Act has no equivalent to subsection 50(4) that provides that the local authority "may request the owner who has failed to comply to make representations to the authority, by such date as the authority may specify, about the owner's financial circumstances." But as an explanation it is not greatly convincing since both missing share provisions provide for the local authority paying when the owner is "unable" to pay,[72] and it seems likely that to properly make that determination under either of those provisions the local authority might benefit from such information about the owner's financial circumstances. It is, therefore, striking that there is no such express provision for the local authority exercising power under section 4A of the 2004 Act.

A possible explanation is that the local authority is under no obligation to pay the share anyway.[73] It might be thought that the owner will be actively volunteering such

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[63] There are other differences. For example, section 50 the 2006 Act is restricted to allowing local authorities to pay for missing shares of 'maintenance costs'; whereas section 4A of the 2004 Act allows local authorities to pay missing shares with respect to 'scheme costs' which potentially includes other costs in addition to those associated with 'maintenance'.

[64] The 2006 Act s.50(2)(c)(i).

[65] The 2006 Act s.50(2)(c)(ii). The provision does not specify that reasonableness in the context is to be determined by the local authority, and so it is presumably an objective standard. Given the context is that it is a prelude to an exercise of discretion on the part of the local authority on whether to pay, this might not be as significant in practice as it might otherwise have been; but if such decisions are amenable to judicial review, then it might become important in any review of this reasonableness assessment as a prior step to the exercise of the discretion to make the payment.

[66] The 2006 Act s.50(2)(c)(iii).

[67] The 2004 Act s.4A(1)(a).

[68] The 2004 Act s.4A(1)(b).

[69] The 2004 Act s.4A(1)(b).

[70] The 2004 Act s.4A(1)(a).

[71] The 2006 Act s.50(2)(c)(ii).

[72] S.50(2)(c)(i) of the 2006 Act and s.4A(1)(a) of the 2004 Act.

[73] The discretionary nature of the local authority's power has been considered more generally significant in the design of the legislation, not least during legislative scrutiny in response to local authority concerns concerning resourcing. For example, during the passage of the Housing (Scotland) Act 2006 the Communities Committee noted of such discretion: "The Committee considers that the largely discretionary nature of the powers for local authorities contained in the Bill mean that the successful implementation of certain of the Bill's provisions may

information, or that the local authority could ask for it anyway when deciding how to exercise its discretion, and it is a matter for the owner to decide whether to hand it over to the local authority. Indeed, it might well be the non-paying owner seeking to persuade the local authority to intervene in some cases. Such a legislative perspective would arguably miss some of the reality in many cases which may be that the local authority is not really in a "position of power" or dealing with an owner "keen to please"; rather, the local authority is quite possibly involved precisely because the owner is recalcitrant, withdrawn, hostile, secretive, etc.

(d) Significance and implications of the differences

We have set out a detailed evaluative comparison between the two statutory regimes because we believe understanding those differences is of potential significance for the activity of local authorities in this area. The law here is intricate and complex. Selecting which power to exercise seems an unenviable task for the local authority in the current state of the law. Indeed, the practice and activity of local authorities in this area is difficult to gauge, an issue we return to in Section IV.

(2) Other local authority powers with potential to function like missing share powers

In addition to the main missing shares powers available to local authorities under the 2004 and 2006 Acts assessed above, there are other legislative provisions that provide local authorities with similar powers, and it would be remiss not to review them here in summary as part of our analysis of the public and private law of the tenement.

(a) Civic Government (Scotland) Act 1982

All councils in Scotland are given authority by the Civic Government (Scotland) Act 1982 ("the 1982 Act) to take actions "in relation to buildings in need of repair",[74] and therefore such an authority clearly extends to tenement buildings as well.[75] The grounds for intervention on the part of a local authority are that it is "necessary in the interests of health or safety or to prevent damage to any property" to "repair immediately a building".[76] If the

be substantially dependent on the financial and human resources of local authorities. While it recognises the role for the Scottish Ministers in issuing guidance or orders on various parts of the Bill and notes the increases in the private sector housing grant over recent years, the Committee emphasises the importance of monitoring processes in ensuring that local authority powers are used to address problems of disrepair in local areas and that sufficient resources are allocated to local authorities to enable this." Communities Committee, *Stage 1 Report on the Housing (Scotland) Bill* (7th Report, 2005, Session 2, SP Paper 387) at para 66 (see also para 20).

[74] Civic Government (Scotland) Act 1982 s.87. On what constitutes 'a building' for the purposes of the 1982 Act see *City of Edinburgh District Council v Gardner* 1990 SLT 600; *Gardner v Edinburgh District Council* 1991 SC 402; *Acorn Properties v City of Edinburgh Council* 1994 SCLR 370.

[75] Though it does not extend to land associated with them. It is restricted to objects or structures 'fixed to a building or forming part of the land and comprised within the curtilage of a building': the 1982 Act s.87(2).

[76] The 1982 Act s.87(3).

local authority does validly exercise such powers[77] under the 1982 Act it can recover its expense from the owner of the building.[78] Most importantly for our purposes, where there are multiple owners of the building — as with tenements — the local authority may "apportion such expense among them and recover from each *the appropriate sum*".[79] There is no express requirement in the legislation for such apportionment to be set by the local authority in equal shares or for it to follow any scheme in the real burdens or the default apportionment of the TMS. Whether the "appropriate sum" will be assessed from a starting point of equal liability or some other basis is not clear, but it seems to imply a discretion to determine the appropriate sum. Equality of liability may seem the likely[80] starting point for a local authority in such a situation,[81] but that will not necessarily be so.[82] Furthermore, the fact that the local authority "may remit any sum or any part of any sum due to them"[83] adds a further dimension that certainly has the potential to disturb an equal apportionment of payments made.

Such remissions may come functionally close to a "missing share" power, but it will not be the same: the power is not to pay an owner's share and then be empowered to recover it from them; rather, it is to do the work and then choose not to claim that share of liability from the owner. Much may depend on what the local authorities decide to do in terms of remitting the sum, given they can do so "as they think fit".[84] The breadth of action authorised by "as they think fit" is of potential importance in understanding what the local authority might achieve in terms of a "functional missing share".

(b) Housing (Scotland) Act 2006

[77] Space prohibits detailed discussion here, but a local authority is also given other powers by Part 8 of the 1982 Act that allow it to require action to be taken by owners with respect to lighting, cleaning and painting of common stairs, etc and if action is not taken it can conduct those works and recover costs in a manner similar to section 87. A notable feature of all these powers whereby the local authority is itself undertaking the requisite works, including those under section 87, is that 'on site' resistance to their exercise by the owner can amount to a statutory offence: the 1982 Act s.101.

[78] The 1982 Act s.87(4).

[79] The 1982 Act s.87(4).

[80] On whether it is a 'good' starting point, see the comments concerning equal liability at text to n 101.

[81] See e.g., in *Howard v Hamilton District Council* 1985 SLT (Sh Ct) 42, where the local authority exercised analogous powers in the Building (Scotland) Act 1959 to repair an external staircase of a four flat property, and fixed each property with a 1/4 share. The deed of conditions imposed similar liability for the matters which it governed. The Sheriff (Macphail) noted that the statute was silent on the allocation of liability with respect to commonly owned property, and therefore suggested that "in that situation equity demanded that such expense should be allocated on a fair and reasonable basis." (at 44). In this case, given what had been agreed as the basis of liability under the deed of conditions (i.e., equal liability) for that matters it governed, the Sheriff was unable to see how the council's decisions to allocate equal liability could be seen to be prejudicial.

[82] For example, in *City of Edinburgh District Council v Gardner* 1990 SLT 600, the local authority allocation of liability in relation to flats in a tenement was by rateable value. Similarly, in *University Court of the University of Edinburgh v City of Edinburgh District Council* 1987 SLT (Sh Ct) 103, at 106 there was an obiter suggestion that the apportionment of costs by the local authority (and any appeal against that apportionment) might be used in what might be termed a 'qualitative' manner in order to reflect the different tangible effects of the disrepair and remedial repairs upon the flats of the individual owners (the suggestion in the case was that only one of a number of flats was in fact blighted by 'dry/wet rot').

[83] The 1982 Act s.87(4).

[84] The 1982 Act s.87(4).

Successive Housing (Scotland) Acts[85] have also contained provisions empowering local authorities to require owners of houses to carry out work. In the absence of action on the part of the owner, the local authority can take action and recover expenses.[86] Such powers were themselves successors of those which feature in a long history of local authorities and their local government predecessor bodies' public safety or "public police" powers. The current law is the 2006 Act. A local authority can by a "work notice"[87] require the owner of a house to bring it into a reasonable state of repair.[88] Failure on the part of the owner to comply with the particulars[89] of the work notice authorises the local authority to undertake work specified in the notice (and certain specified works beyond those identified in the notice).[90] Where such work is undertaken by the local authority, it can recover those expenses from the owner of the house concerned,[91] including, if it wishes, by way of instalments.[92] Section 59 of the 2006 Act is silent with respect to the apportionment of liability by the local authority against multiple owners and it does not expressly provide for the remission, etc., of liability for shares like the 1982 Act above. It might be that the drafting of the 2006 Act places the emphasis upon the fact that the local authority "may" recover expenses, and that silence concerning the manner in which that will be done in terms of the more detailed aspects of apportionment/remission implies discretion in the local authority as to those details. Even if that is so, the discretion on the part of the local authority will not be an unlimited one[93] and there is provision for an appeal for a person "aggrieved" by a demand seeking recovery of expenses.[94] For present purposes, our interest lies in the fact that one could argue the minimalist exposition of the local authority's right to recover expenses in these terms might point to an ability to exercise a discretionary absorption of expenses that might otherwise be claimed from owners along the lines discussed above in relation to the 1982 Act: thus constituting another functional equivalent to a "missing share" power.

(c) City of Edinburgh District Council Order Confirmation Act 1991

For the sake of completeness in this review of alternative statutory powers that may operate similarly to the main "missing shares" powers of the 2004 and 2006 Acts, it is helpful to mention the distinctive powers given to certain local authorities, which we might regard as "legacy" powers under legislation that consolidated powers enjoyed by the older

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[85] Housing (Scotland) Act 1969 ss.24&25; Housing (Scotland) Act 1987 ss.108&109 (now repealed); the 2006 Act ss.30,35,&55.
[86] See *Lindsay v Glasgow City Council* 1998 Hous LR 4.
[87] The 2006 Act ss.30(2)&62.
[88] The 2006 Act s.30(1)(b).
[89] On which see the 2006 Act s.30(3)–(5).
[90] The 2006 Act s.35.
[91] The 2006 Act s.59(1)(a). Decisions under the predecessor legislation also recognised that where a local authority facilitated arrangements by or with private owners this could be regarded as work undertaken by it for the purpose of recovering expenses: see *Crawford v City of Edinburgh District Council* 1994 SLT 23; *Gardner v MacNeal* 2001 Hous LR 8.
[92] The 2006 Act s.59(4).
[93] See e.g., a decision under the not unrelated grants element of the 2006 Act: *Hussain v Glasgow City Council* [2017] CSIH 69; 2018 SC 144.
[94] The 2006 Act s.64(1)(d)(i).

"Corporations".[95] Here, we focus on the statutory powers of City of Edinburgh Council ("Edinburgh Council"), under the City of Edinburgh District Council Order Confirmation Act 1991 ("the Edinburgh Act") as an exemplar of such "legacy" powers.

The Edinburgh Act bestows a number of powers on Edinburgh Council which have a distinctly "public" law element to them, being ostensibly about the council's role (presumably on behalf of the "community" and for the "public good")[96] in ensuring the proper maintenance of buildings in Edinburgh by their owners. The powers granted to Edinburgh Council are different, and potentially far more extensive and easier to engage than the powers discussed above. By what is sometimes referred to as a "statutory notice scheme", Edinburgh Council can order the owner of a building "to execute any works necessary for securing, restoring or repairing such [a] structure, fixture, wall or fence" when it "has become insecure, worn out, or damaged or is in need of repair" due to "decay, or in consequence of storm or otherwise".[97] Edinburgh Council's powers under the Edinburgh Act are made expressly applicable to tenements.[98]

It is striking that the requisite severity of degradation or dilapidation might suggest a lower bar for intervention than previously discussed powers, and thus entail a considerable discretion granted to the Council.[99] If the owner fails to take action, the council can carry out the works and recover reasonably incurred expenses.[100] Where the building is a tenement "the owner of every part of such building which is separately owned" shall be deemed to be the owner, and "[e]very owner of every such part of such building shall be liable in equal shares to the Council"[101] for any expenses incurred by the Council in relation to ordering or executing works. One might observe that this division of liability in "equal shares" is different from the default rules of the TMS in the Tenements (Scotland) Act 2004, subsection 4(6) and TMS rule 4.2, being ostensibly simpler.

Space prohibits further discussion here of the details of this very intricate area, suffice to say for present purposes that there is scope for a different quantum of liability under the TMS or a real burden and the equal apportionment of statutory liability for expenses under the Edinburgh Act. This is not, of course, a missing share power, but it does relate to liability for tenement maintenance. The "public law" liability under the Edinburgh Act is framed to

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[95] The historical development of local authority powers from the Burgh Police Acts through to how they have a potentially ongoing relevance in 'Corporation Order Confirmation Acts' are an article in themselves, but we summarise the position in Edinburgh as an indicative type of their class.
[96] See e.g., *Smith v Giuliani* 1925 SC (HL) 45, at 49 *per* Lord Haldane.
[97] The Edinburgh Act s.24(1).
[98] A 'tenement' for the purposes of the Edinburgh Act is defined in section 2 in terms differing slightly from the other legislation considered in this article, including requiring it 'two or more dwelling-houses in separate occupation', so it is not clear that tenements under the various pieces of legislation all mean the same thing.
[99] See e.g., *Gardner v Edinburgh City Council* 2006 SLT (Sh Ct) 166.
[100] The Edinburgh Act s.26; see also s.57(1). Similar provision for emergency works without notice is also made by s.24.
[101] The Edinburgh Act s.27(2).

convenience recovery by Edinburgh Council.[102] These apparently wide powers[103] continue to be available to Edinburgh Council in addition to those contained in the 2006 Act and the 2004 Act, though following a well-publicised controversy in the 2000s about the use of such powers, there has been a suggestion that Edinburgh Council is less likely to utilise these powers unless "there is a defect in a building which may be a risk to safety or health, to require 'make safe' work to reduce or remove the danger and protect the safety and health of passers-by."[104]

IV. UNPACKING POLICY PERSPECTIVES

Housing condition statistics suggest that problems of tenement disrepair in Scotland continue. The Housing Condition Survey 2022 indicated that 71% of pre-1919 properties, many of which are tenements, suffered from disrepair in relation to critical elements.[105] The policy community has, accordingly, recently turned its attention again to the problem. A recent Working Group of the Scottish Parliament called for further law reform.[106] The Scottish Government responded by making a reference to the SLC in 2022 to review the law of the tenement,[107] and to prepare a draft Bill by Spring 2026.

The prospect of law reform – both in Parliament and via the SLC – is very welcome. The challenge, of course, is to reform the law in ways that will ameliorate the problem. In this section and the next, building on sections II and III, we offer an analysis that we hope will be valuable in this regard. There are two steps to the analysis, both of which, we suggest, are important for law reform thinking: 1) a reconsideration of both the private and public law dimensions of the law of the tenement in tandem (discussed here in section IV), and 2)

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[102] This approach might well be justified on policy grounds as appropriate given Edinburgh Council's status as a public body carrying out public good activity. It might also be the case, in legal terms, that the legislation is more likely to be read as being compliant with the human rights requirements of European Convention on Human Rights (ECHR), as made applicable domestically by the Human Rights Act 1998. Shortly put, specifically saving the 'private law' rights of owners to seek relief against each other might justify the 'public law' apportionment of liability. Human rights arguments have been raised in cases concerning apportionment of liability: see e.g., *City of Edinburgh District Council v Gardner* 1990 SLT 600, at 604. See more generally on the interface of human rights protections of property within the context of tenements: SLC, *Compulsory Owners' Associations* (fn. 4), Ch 3; F McCarthy, 'Making Scottish apartment law sustainable', in M Habdas *et al* (eds) *Rethinking Expropriation Law IV: Takings for Climate Justice and Resilience* (The Hague: Eleven International, 2024).

[103] Though it should be said that notices are subject to appeal to the sheriff court: the Edinburgh Act s.28.

[104] Written Evidence from the Scottish Government Bill Team to the Infrastructure and Capital Investment Committee scrutinising the Housing (Scotland) Bill (2014), in Scottish Parliament, *Passage of the Housing (Scotland) Bill 2013* (SPPB 205) at pp.1022–1023 <http://archive2021.parliament.scot/largePDF/BBV_205_final.pdf > (accessed 9 December 2024).

[105] Scottish Government, *Scottish House Condition Survey: 2022 Key Findings* (2024) at p.111 < https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/02/scottish-house-condition-survey-2022-key-findings/documents/scottish-house-condition-survey-2022-key-findings/scottish-house-condition-survey-2022-key-findings/govscot%3Adocument/Key%2BFindings%2B2022%2B-%2BAll%2Bchapters%2B-%2BFinal%2B-%2BNo%2Bwatermark.pdf > (accessed 9 December 2024). See also the discussion on the broadly similar figures for 2017 in D Robertson, *Why Flats Fall Down* (fn. 40) at p.14.

[106] RICS, *Working Group on Maintenance of Tenement Scheme Property: Final Recommendations Report* (2019) (fn. 24).

[107] See above at fn. 4.

identifying the empirical data which may assist policy decision-making relating to tenement flat owners, as well as local authorities (discussed in section V below).

The first of our analytical steps involves a reconsideration of both the private and public law dimensions of the law of the tenement in tandem, with a view to identifying the various legal policy positions that inhere within this complex body of law. We develop this high-level analytical framework by way of "ideal types", in the sense set out by Max Weber.[108] Weber's ideal types were "exaggerated or one-sided depictions that emphasize particular aspects of what is obviously a richer and more complicated reality", as Kronman puts it.[109] The use of ideal types thus simplifies the doctrinal complexity of the law. Yet, this is precisely their value as an analytical device. It allows us, from a high vantage point, to identify some basic contrasting features within the current overall law of the tenement.

One of the insights of Weber's work was that ideal types can be developed by combining key dimensions of the social phenomenon under study. Our suggestion is that within the current law of the tenement we can identify two dimensions of legal thought. Each dimension concerns a particular legal matter, containing contrasting positions on the issue: (1) about whether the problem is one of public, as opposed to private responsibility; and (2) about whether the law's role in addressing the problem should be formal rather than substantive in character. The combination of the two dimensions produces four ideal types of legal thought within the law of the tenement (see Figure 1 below). Ideal type 1 emphasises private responsibility and formal legality; ideal type 2 emphasises private responsibility and substantive legality; ideal type 3 emphasises public responsibility and formal legality; and ideal type 4 emphasises public responsibility and substantive legality.

Using the private/public distinction as a horizontal axis, and the formal/substantive distinction as a vertical axis, the ideal typical schema can be presented as follows:

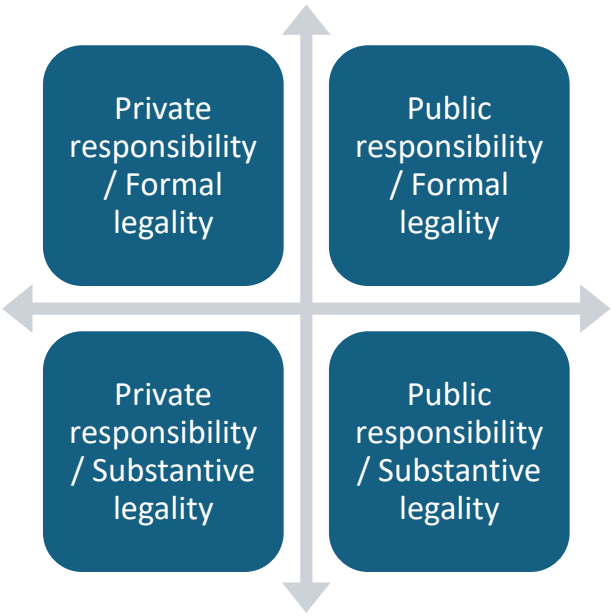

Figure 1: Ideal types within the law of the tenement

[108] M Weber, *Economy and Society* (Berkeley: University of California Press, 1978).
[109] AT Kronman, *Max Weber*, (Stanford: Stanford University Press, 1983), p.7.

Our suggestion is that there is evidence of three of the above four ideal types within the current law of the tenement. First, the combination of private responsibility and formal law captures much of a system of real burdens. The law of real burdens offers a framework for the creation by others of obligations or restrictions on land use. The law does not create those itself – it merely enables the creation of obligations or restrictions and then enforces them. Second, by way of contrast, the combination of private responsibility and substantive law captures the essence of the tenements management scheme under the 2004 Act, absent real burdens. In other words, the statutory scheme to regulate repairs when real burdens do not exist or are otherwise inoperative, is an exercise of the legislator introducing substantive rights and obligations for flat owners. Third, the combination of formal law and public responsibility can meaningfully be related to the sets of statutory powers granted to local authorities to pay missing shares or exercise equivalent powers. Significantly, the law grants the local authority a discretion rather than imposing a duty: the local authority itself decides whether to place itself under a practice obligation. By way of contrast, if some form of missing shares or equivalent statutory duty existed, it would sit well within the fourth ideal type quadrant which is currently empty: the combination of substantive law and public responsibility (see Figure 2 below).

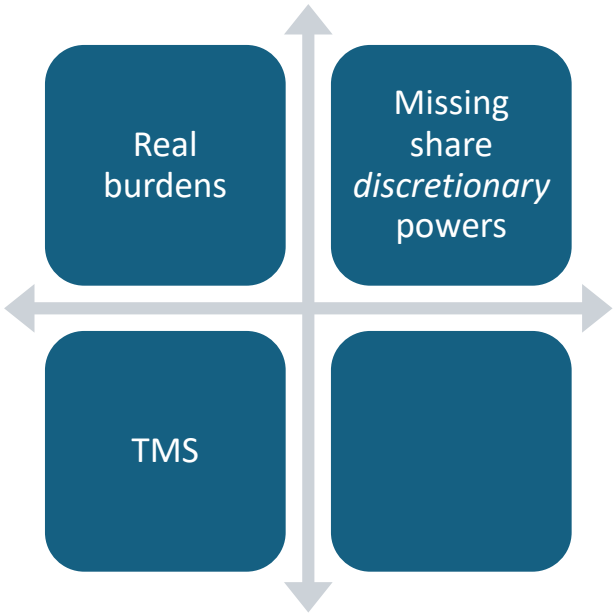

Figure 2: Legal Schema within the law of the tenement

The use of ideal types in this way portrays the complexity of the law of the tenement once the public and private law dimensions are considered in tandem. This helps us see, first, that the dominant image within legal scholarship of tenement law revolving narrowly around private property rights and obligations is somewhat unbalanced. This partial image overlooks an extensive history of the statutory grant of public powers to support tenement maintenance and repair as a public good. Our development of ideal types helps us observe, second, that the character of law in this field is also varied, comprising both formal and substantive elements.

In setting out our ideal typical schema, which emphasises oppositional rationalities, the temptation may be to imagine that the policymaker is offered a stark choice about which ideal

type to back. But this would be to misunderstand the purpose of the use of ideal types. Our aim here is simply to demonstrate that (and illustrate how) the overall law of the tenement has, for a very long time, been complex, sustaining different emphases on the question of public / private responsibility and formal / substantive legality. And in describing the law of the tenement as "complex", it is important to stress that we do not mean to suggest that it is also, therefore, incoherent. In the real world of policy development (as opposed to the artificial world of ideal typical analysis), the challenge is not to choose *between* ideal typical positions, seeking a perfect and discrete legal rationality. Rather, the policy goal is to work out how to harness the power of being able to draw on those diverse positions. In other words, the ambition here should be about how best to *combine* the different ideal typical positions within law reform so that, overall, the law contributes effectively to the promotion of tenement repair and maintenance. The legal policy question is about which combinations of public and private law, and formal and substantive legality, work best at supporting tenement repair and maintenance at any given period. In short, it is possible – indeed, preferable – for different positions within the ideal typical schema to operate symbiotically.

Nonetheless, the challenge of working out how to reform the law to maximise the power of the diverse positions requires empirical knowledge about how key actors, both public and private, operate in relation to law in the context of tenemental repairs. Good law reform should thus be a socio-legal exercise. Yet, there is currently only very limited evidence on this question.[110] More empirical studies are needed. In the section that follows, accordingly, we sketch out an empirical research agenda that should be helpful for policy work in this field.

V. EMPIRICAL KNOWLEDGE GAPS

Identifying empirical data which may assist policy decision-making relating to tenement flat owners, as well as local authorities, constitutes the second step of our analysis informing the efficacy of law reform. We outline some types of relevant data we think potentially significant below.

(i) Tenement Flat Owners

In relation to flat owners, more could be understood about which of the five stages outlined above in Section II feature as barriers to successful intra-tenement decision-making. Equally, it may be helpful to understand which stages, if any, stand out as being particularly significant. Policy priorities may vary according to whether the apportionment of liabilities proved to be a major stumbling block, as opposed to, for example, a simple inability to pay.

A better understanding of the empirical role of real burdens in repairs decision-making would also be beneficial. The prioritisation of real burdens over the TMS may lose some appeal if the social reality of tenement life is that they are generally not understood or relied upon in repairs decision-making. Whilst lawyers may understand the importance of

[110] The only empirical study, to our knowledge, is I Cairns *et al*, "Under One Roof: The Social Relations and Relational Work of Energy Retrofit for the Occupants of Multi-Owned Properties" (2024) 190 *Energy Policy* 114166.

turning to real burdens in the context of land disputes – and expect their clients to share that sensibility – the social reality may be quite different. It would be helpful to understand the terms of reference used in lay disputes about, for example, the existence and apportionment of liabilities. Specifically, we know very little about the role of social perceptions of fairness in repairs decision-making and the related handling of disputes.[111] It may be, for example, that owners rely on, or negotiate around conceptions of fairness in the absence of any knowledge of, or reference to the terms of real burdens. Data on such questions would surely be relevant to the appropriateness of, for example, privileging substantive statutory legal provisions over the older formal system of real burdens.

(ii) Local Authorities

As noted in Section III, local authorities have at their disposal a rather complex – potentially baffling – set of powers that relate to problems of tenemental disrepair. The public law here is like a rather messy toolbox, with an array of statutory provisions that, to varying extents, overlap. The first set of empirical questions, then, is about local authorities' knowledge and understanding of their legal powers.

Second, there is a set of questions around local authorities' use of their powers. We know little about what powers are used, the extent to which they are used, and whether the selection of which statutory powers to exercise reflects conscious deliberation. Of course, it is also important to know why powers are *not* used – why local authorities decline to exercise their discretion to pay missing shares (or their equivalent). One could well imagine that a failure to exercise powers could be related to local authorities' legal knowledge and understanding, given some of the legal complexities set out in Section III. But equally, there are likely to be reasons of resources, both human and financial.[112] Data on this question – about, for example, the extent to which paid missing shares are recovered by local authorities – would be helpful for policy decisions about whether statutory duties, as opposed to powers, are an appropriate policy response. Lower financial costs by way of the successful and timely recovery of missing shares may strengthen the argument for the retention of powers rather than the imposition of duties. An empirical review of local authority practices – models of success and failure from a financial and human resources perspective – would surely be relevant for law reform decisions.[113]

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[111] See the interesting related information gathered by the SLC on the terms of burdens, and the fact that many anticipate arbitration, and calls for more arbitration: SLC, *Compulsory Owners' Associations* (fn. 4) at paras 11.41ff; and Appendix B, at para. 30.

[112] Space prohibits extensive comment here on the potentially important issue of the local authority's role as an owner of property in 'mixed blocks' of privately and publicly owned flats, usually arising following the exercise of the 'right to buy' by some but not all owners in a tenement, but it is useful to highlight the issue. Such local authorities with potential interests and duties *as an owner*, say, for example, to its tenants in such a block, may have a more ostensible interest and different considerations to ponder in deciding whether to exercise such powers under the current law. Thus, any data derived from our suggested empirical research agenda that illuminates 'mixed block' practice could provide valuable insights into local authority motivations and any extent to which the exercise of discretionary powers in such contexts might be functionally coerced.

[113] We might add that creating or publishing such data would also meet the call noted above (at fn. 73) by the Communities Committee that "emphasise[d] the importance of monitoring processes in ensuring that local authority powers are used to address problems of disrepair in local areas and that sufficient resources are allocated to local authorities to enable this".

Third, there are questions about the relationship between local authority action and the effective fulfilment of the public function of promoting the maintenance and safety of tenement property. It is clear that local authority intervention in tenemental disputes around repairs and maintenance could take a number of forms. In evidence taken during the legislative scrutiny of the 2006 Act, representatives of local authorities recognised that the new legal regime would require them to balance a number of roles:

> Councils will need to be concerned with not just enforcement but trying to avoid reaching the enforcement stage. … We need to be able to tell owners that, although their problem with their roof is a one-off, such repairs are an inevitable part of owning a property.[114]

Thus, in addition to the role of enforcer, local authorities may also perform the roles of educator, facilitator and mediator. A recent, albeit small, study by Cairns et al[115] suggests, in relation to energy efficiency tenemental work, that local authority intervention can be effective in helping tenemental work get completed. A larger scale review of models of success and failure with respect to repairs being carried out would surely, then, be relevant for law reform thinking.

VI. CONCLUSION

In this contribution we have sought to demonstrate the importance of taking the public and private law regimes of the law of the tenement together when thinking about the law of the tenement. Adopting this intellectual stance allows an assessment of the law of the tenement which we suggest offers richer insights than the sum of the doctrinal parts of either the private or public doctrinal law. Those insights include glimpsing a duality in temporal and spatial scope, which we summarised by use of the notion of the "chronotope", across public long-term/broad and private short-term/narrower perspectives; but they also extended to potentially revealing different degrees of formal and substantive approaches to collective decision making by owners and how that might be informed by involvement of local authorities.

By identifying the current law of the tenement's hybrid express real burden and default TMS approaches to private law owners' decision making, it was possible to outline a suggestive five step decision making model that we argue assists in clarifying analytically how problems in such collective action can arise. Securing payment for incurred costs, the fifth stage in our model, has the potential to be materially impacted by the fact that sitting alongside the private law regime are a diverse set of discretionary powers held by local

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[114] Councillor Sheila Gilmore (COSLA) giving evidence to the Communities Committee 12th April 2005, Housing (Scotland) Bill: Stage 1, <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=218&mode=html> (accessed 9 December 2024).

[115] I Cairns *et al*, "Under One Roof" (fn. 110) 114166.

authorities allowing them to pay (or absorb) a “missing share” of an owner in a tenement building.

The different types of missing share power, and other equivalents, show that the approach to apportioning liability potentially differs across the various powers, and clarity is not always obvious as the law seemingly oscillates between equal liability, equal liability with some fine tuning for larger flats, and a discretion to apportion liability in unequal shares. A related point is that the liability is sometimes framed in terms of a “public law” debt which is set by reference to matters extraneous to the private law ownership and accessory interests, while some of the statutory powers are said to rest upon taking account of the private law ownership situation within the tenement.

Having considered the private law of the tenement as it now stands, taking account of the challenges with collective decision making, alongside an exposition of the local authorities’ public law powers, it was possible to analyse how the public and private might influence each other and be manifested in the functioning of the law of the tenement. This in turn led to an analysis which allowed our contribution to take shape as identifying, framing, and, we hope, clarifying some outstanding questions which we suggest will enrich thinking about any future reform of tenement law. We sought to communicate this by way of an ideal type legal schema. But in order to know more about these issues, we further concluded by identifying what we do not know about the empirical usage of local authority powers, leaving a picture which is potentially materially incomplete. This is all the more so because of what we identified in the paper about what we do not know in empirical terms about owners’ interactions, attitudes, behaviours, etc., either. Drawing together the various aspects of the paper, we suggest potentially fruitful ways of thinking about the issues and some empirical work that might be done to provide a full picture of the maintenance aspect of the law of the tenement that harnesses both the public and private dimensions of the law. Ultimately, we suggest, by examining the often-overlooked importance of the longstanding and evolving mutuality of public and private dimensions of tenement law, and developing our diagnostic two-step analysis identifying policy positions inherent in different ideal types of legal framework and empirical data desiderata about actors’ attitudes and behaviour, this article contributes important insights for law reform.