

Short speeches on Land Reform and Human Rights.

Below are four short (5 minute) speeches delivered at a panel breakout session at the Scottish Human Rights Commission “Innovation Day” Conference held at Dynamic Earth, Edinburgh on 9th December 2015.

The speeches, in turn, were delivered by: Peter Peacock of Community Land Scotland; Megan MacInnes of Global Witness; Dr Kirsteen Shields of Dundee University; and Christopher Nicholson of the Scottish Tenant Farmers Association.

The speeches were to give perspectives on the difference Human Rights thinking has been making to land reform policy and law in Scotland currently, and taking a slightly forward look on what more is to be done.

There is also a position from Scottish Land and Estates who were invited to participate but unable to attend the event.

Peter Peacock – Community Land Scotland

Land Reform and Human Rights

When I re-engaged in land reform issues about 4 years ago, human rights questions were often featuring in discussion.

However, that discussion was very narrowly focussed on private property rights of often very large landowners, which many represented were wholly protected by the European Convention of Human Rights (ECHR).

It was as if human rights obligations were a “red card” to further land reform.

Now, for an organisation committed to arguing for land reforms, this was not at all helpful!

Community Land Scotland (CLS) come to this debate from the point of view of tackling community decline and disadvantage, by empowering communities through new land rights and ownership of their land.

And really nowhere in the land debate of 4 years ago was there discussion about the human rights:

- of declining communities
- of their need for adequate housing
- to a more sustainable future, and so on...

So, we were anxious to bring these issues into focus – to seek to bring more balance to the debate.

That was when we began to explore the wider world of human rights, something with which we were then not familiar.

We began to engage with the Scottish Human Rights Commission.

We explored land reform in an international context, where human rights thinking was more apparent.

We increasingly spoke of fairness, social justice, and equalities, in policy submissions we were making about land reform.

It was through exploring the human rights questions that we were able to sharpen our own thinking on how policy toward land reform might develop.

And, we have found it helpful to locate our arguments within a framework of international obligations and agreements.

The International Covenant on Economic, Social and Cultural Rights requires a signatory state to use the maximum of its available resources, including legislation, to progressively realise human rights.

In these terms land becomes a key national resource to help advance human rights.

I am pleased to say that over the last 4 years we have seen tangible evidence of a shift in policy thinking.

The Land Reform Review Group, Chaired by Alison Elliot, seemed to us to be influenced by engaging with human rights thinking.

They articulated the view that land policy, ownership and use should be public interest matters.

Their Report 'The Land of Scotland and the Common Good' has been influential, in our view, in subsequent policy and law making.

The recently approved Community Empowerment Act extends community rights to buy land, even when there is not a willing seller of that land.

This was something we argued for strongly, but that argument inevitably engages ECHR based property rights.

While being mindful of that, the Community Empowerment (Scotland) Act 2015 has broken new ground by requiring Scottish Ministers in certain decisions about a community right to buy, to have regard to the International Covenant on Economic, Social and Cultural Rights.

We would argue, helping explicitly balance their decisions within a wider frame of considerations than solely ECHR.

But the Act went further, influenced by a further proposal we made from our learning about human rights approaches.

It is not only rights that are important, but how we as a society engage to resolve our differences.

So the Act, gives powers to Scottish Ministers to facilitate mediation in land questions between land owners and communities.

CLS and SLE (Scottish Land and Estates), not natural allies(!) are now working toward an agreed protocol for owners and communities on the potential voluntary transfer of land to communities.

And, the Land Reform Bill currently before Parliament takes matters further still.

The Policy Memorandum is full of references to land reform policy achieving greater fairness, social justice, and honouring human rights obligations.

Land reform policy seems now explicitly linked to achieving wider social goals encapsulated in human rights obligations.

We have been arguing to see the current Land Reform Bill strengthened with more references the realisation of human rights.

And we have been very pleased to see a well-argued and thorough section on land and human rights in the Stage 1 Report on the Bill by the Rural Affairs Committee.

These Parliamentarians are clearly saying they want explicit references to the realisation of human rights on the face of the Land Reform Bill.

So, for us, engaging with and articulating human rights thinking, is bringing tangible change in policy making and in the law.

However, we believe much more still needs to be done to explore all our international obligations and agreements.

In our case, looking for the implications for future land policy.

We want to see government in its law-making become more relaxed and confident they can both meet all ECHR obligations, and positively advance wider human rights too.

So, further incorporation of human rights thinking and obligations into Scots law, it seems to us, is both desirable and possible.

Thank you for listening.

ENDS

Megan MacInnes - Global Witness

As someone who has worked on human rights and land reform internationally for the past decade, it's difficult to imagine how we came to the situation Peter just described where discussions in Scotland about human rights focused on only one instrument and were being used to block land reform. This is completely the opposite of how human rights and land reform interact in most of the rest of the world.

Those involved in land reform around the globe use what is called a "human rights approach" in everything they do:

- using rights to food and adequate housing for securing and registering land titles and protecting against so-called land grabbing;
- referring to rights against discrimination, to ensure that everyone has secure land rights – women, marginalised groups, ethnic minorities ...
- relying on rights to freedom of expression, assembly and association, to be able to speak out when land rights are not respected

And this human rights approach is increasingly used, because Scotland is not the only country where land issues are coming to the fore, be it in different ways. Increasing human populations and commercial demand for food, fuel and natural resources, in a resource-constrained world – are all increasing pressure on land, on local communities, and on Governments.

Human rights are at the heart of these tensions – how to balance the needs of the individuals with the common good, public interests versus private interests, and genuinely sustainable development. And we still have a long way to go - a global assessment of tenure security found that although indigenous peoples and local communities claim or have customary use of 65% of the world's land, they lack legal rights to almost three quarters of it.

This human rights approach to land reform includes economic, social and cultural rights (such as the right to food and adequate housing) and civil and political rights (for example freedoms of speech, association and assembly). These are part of the international bill of human rights, which the Scottish Government has obligations to fulfil. But the international community has responded to this increasing pressure on land, by building on these frameworks in a number of important ways:

1) In 2012 the UN Committee on World Food Security adopted the **Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries**. These Guidelines are the first inter-governmental statement on how the governance of land tenure and human rights interact and (to quote) *“contribute to the global and national efforts towards the eradication of hunger and poverty, based on the principles of sustainable development and with the recognition of the centrality of land to development by promoting secure tenure rights and equitable access to land”*.

2) The importance of securing land tenure and equitable access to land, as a pre-condition for sustainable development and the realization of other human rights obligations was given further weight through the inclusion of land within the **Sustainable Development Goals**. These SDGs, adopted by the UN General Assembly in September, include **ownership and control of land** as part of target 1 – to end poverty.

3) A related development is the recognition that securing land rights, doesn't just involve the substantive right itself, but also depends on people having access to information and grievance mechanisms in place for when things go wrong. One of the most important commitments to improve **transparency and accountability** is the Open Government Partnership, launched in 2011 by 8 countries, including the UK, which includes guidance on land.

So, what does all of this mean for Scotland, particularly in relation to land reform? From the perspective of Global Witness there are a number of ways in which here in Scotland we can further utilise human rights thinking and apply it in land-related policy, laws and practice.

First, Scotland has to move from this cynical approach to human rights of focusing only on the European Convention of Human Rights, at the expense of other obligations. Additionally, although human rights are fundamental and universal, the UN Committee on Economic, Social and Cultural Rights has called on Governments to particularly consider disadvantaged groups, saying ***“Policies and legislation should not be designed to benefit already advantaged social groups at the expense of others.”***

This holistic and comprehensive approach to human rights enables us to be bold in our aspirations for land reform. Huge steps have been taken already – as Peter described. The current Land Reform Bill has a section dedicated to land rights and responsibilities, and its policy memorandum highlights the importance of economic, social and cultural rights. Moreover, the Rural Affairs, Environment and Climate Change Committee Stage 1 report on the Bill published last week urges the Government to be even bolder.

But it's not just about this Bill (or the Community Empowerment Act); it's about ensuring we have a progressive human rights agenda across policy and law-making, in rural and urban areas. It's about seeing what can be done to incorporate human rights into new policies, for example Scotland's land use strategy, and conversely ensuring that land is part of the National Action Plan for Human Rights. It's also about using human rights to help navigate efforts to protect our environment for example SNH's mapping of wildlands at the same time as promoting urgently needed affordable housing, jobs and economic opportunities in rural areas.

Dr Kirsteen Shields – Dundee University

I'm a lecturer and to make them laugh, I used to say to students it's a great time to be alive, now I say it's a great time to be able to vote. That is particularly so in Scotland and we should recognise that we are fortunate to be having this debate on land reform, and to have a First Minister who is committed to human rights. We must also acknowledge the hard work of the RACCE in producing a Land Reform (Scotland) Bill Stage 1 report that is both rigorous and inclusive.

Many have expressed the opinion that the Bill could be more radical. I believe it can and will become more so in Stage 2, and moreover that a correct interpretation of the European Convention on Human Rights would support the inclusion of reference to and respect for economic, social and cultural rights in the Bill.

The focus of the Scottish Human Rights Commission's event today is on economic, social and cultural rights, particularly the 'incorporation' of those rights. The SHRC have achieved a great deal in support of esc rights in their short history.

We have just heard from Participation and the Practice of Rights and the Edinburgh Tenants Federation on working together with the SHRC to improve awareness of and action on housing rights in Edinburgh. It is moving to hear their testimony. That work is vitally important, especially when we know that economic, social and cultural rights are, by default, treated as second class rights. – That is a status quo that must be challenged.

I am going to talk briefly about the relationship between property and esc rights and then about the direction of channel of the European Convention on Human Rights case law on rights related to land reform.

A. The relationship between property and esc rights.

As Megan (MacInnes) has just described, treating land as a national asset is globally recognised as the established method of ensuring that all members of society benefit from the resource of land.

When I gave oral evidence to the RACCE Committee I chose the right to housing as an example of where land reform could support the Scottish Government's human rights obligations. Equally, I could have discussed how greater distribution of land could support the right to food, the right to work, right to health, or an adequate standard of living etc.

Should the economy be the key concern, - a healthy economy needs all of those things as much as it needs property rights.

Moreover the Scottish government is obliged to protect these rights, - *politically and legally, internally and externally.*

in terms of the relationship between rights and property, we are operating on an acute asymmetry. We should not talk of balance but of asymmetry between property rights and economic, social and cultural rights.

For example, economic, social and cultural rights are enshrined in legal covenants at the highest level. Yet they are routinely violated, and this is despite the relative wealth of our nation. The routine violation and entrenched inequality of economic, social and cultural rights is often based on an assumption that the existing distribution of property is to remain largely undisturbed.

Yet why? Property law is man-made law like all others. Property law has not been a neutral apolitical practice up until now. It has always represented the interests of the few over the many. As the legal theorist, Jeremy Waldron, puts it; *"When a conservative government in the West says, for example,*

in response to some plea for welfare provision, 'The money simply isn't there,' what is usually meant is that it would be impolitic to try and raise it from existing income earners by taxation."

In this way property rights have long defined the space available to economic, social and cultural rights.

We are now seeing increased motivation to 'disturb property rights', as demonstrated by the support for the Scottish Government's Land Reform (Scotland) Bill. - Is this legitimate? The question should not be is it legitimate to disturb property rights but is it legitimate not to.

B. Land reform and the ECHR.

Where land meets rights is also where politics meets law. The Scottish Government, *politically*, has an obligation to pursue land reform on the basis of its democratic mandate, and *legally*, by virtue of the international covenants at the UN level and also the ECHR at the European level.

If law and politics are at odds, if a legislative body and the judiciary are in conflict we risk running into judicial review or declarations of incompatibility. Yet there is reason to believe that politics and law (in this instance as embodied by the Scottish Government and the European Court of Human Rights) are synchronised on the issue of progressing economic, social and cultural rights.

Legally, the politics of land reform is bolstered by the legal forces both internationally and at the ECHR. The European Court of Human Rights continues to operate on the basis that the national political is best placed to decide on allocation of resources, - but within reason. For this reason, the ECHR provides that states may legitimately intervene in Article 1, Protocol 1 on the grounds of 'public interest'.

On deciding what constitutes the public interest member states are granted a wide margin of appreciation (discretion). The elimination of social injustice is properly considered a responsibility of the legislature and falls within the 'public interest'.

There's also cause to be optimistic about the protection of tenant's rights at the European Court of Human Rights. These rights can be developed in two directions. Firstly in understanding leases as property under Article 1 Protocol 1 ECHR.

Property is not confined to land or immoveable property at the ECHR. A 22 year lease was held to constitute property in the landmark case of *Stretch v UK*. In that case it was held that the state's action preventing the renewal of the lease constituted a violation of the right to property.

As another example, the Court has also interpreted pension rights to qualify as property for the purposes of Article 1 Protocol, on the basis that removal of the pension rights removed the individual's "sole means of subsistence" in the case of *Apostolakis v Greece* in 2009.

Secondly protection for tenants rights may be developed through the right to a home under Article 8 ECHR. The (European) Court has emphasised that "*the loss of one's home is the most extreme form of interference with the right to respect for the home*" in *Kay and Others v UK* 2010 para 68. Subsequently measures interfering with these rights *must* be subject to scrutiny on the grounds of proportionality.

Kay v UK and related decisions at Strasbourg have resonated throughout UK domestic law and led judges to protect tenants' rights within UK courts. For example in *London Borough of Hounslow v Powell* ([2011] UKSC 8 (23 February 2011)) the Supreme Court held that to evict someone from their council home on the grounds of £3500 arrears would amount to a violation of Article 8 ECHR. Lord Hope made it clear this ruling was in line with the ECHR, commenting that the "*time had come to*

accept and apply the jurisprudence of the European court". See also Manchester City Council (Respondent) v Pinnock (Appellant).

That the press are not so interested in these cases does not affect their standing in the UK courts.

- Parliaments are another matter.

Thanks for listening.

Christopher Nicholson – Scottish Tenant Farmers Association

Human rights and tenancy reform. How human rights obligations have shaped current farm tenancy reforms.

Scotland's agricultural tenanted sector is characterised by its concentrated pattern of land ownership and the resulting imbalance of power between landlord and tenant. For over 130 years successive tenancy reforms have attempted to address the problems arising from this imbalance of power.

The current tenancy reform, now part of the Land Reform Bill, was initiated 5 years ago when the SNP manifesto included a commitment to undertake a full review of farm tenancy legislation, and human rights issues have been a key feature of the debate that followed.

In the context of farm tenancies, human rights can apply to landlords, tenants and the wider public.

But the debate has tended to focus on the rights of landlords who argue that the European Convention of Human Rights would prevent any interference of their property rights by Government.

It is an easy and effective argument for landlords to make since ECHR serves to limit the actions of Government and is the only human rights obligation incorporated into domestic law.

A Supreme Court decision in 2013 which found that a part of the 2003 Agricultural Holdings Act was not compliant with ECHR adds weight to that argument.

Our domestic legislation must comply with ECHR, and there is genuine concern within Parliament and Government about breaching landlords' ECHR property rights.

That means tenancy reform progresses with extreme caution due to concerns over ECHR compliance.

ECHR also applies to agricultural tenants who have property rights determined by their interest in their leases.

However it is difficult to see how ECHR can act as a catalyst for reform of farm tenancies, and instead it will act to limit change.

For an organisation seeking meaningful reform of farm tenancy legislation, ECHR appeared to us as a significant hurdle.

We believe that the debate around human rights and tenancy reform in Scotland is still in its early stages, though that debate is broadening by bring in other international human rights obligations.

These include the International Covenant on Economic, Social and Cultural Rights, and the United Nations' Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forestry.

These are the human rights obligations that could be a catalyst for further reforms of the tenanted sector.

And these human rights obligations will add to the debate because a farm tenancy is much more than simply a landlord's and tenant's property right in a business contract.

Farm tenancies are important for our food security, they strengthen rural communities, in particular remote and fragile communities, and they provide homes and employment in rural areas.

These other human rights obligations can help address the rights of tenants and the wider public.

The recent Scottish Government review of farm tenancy legislation mainly focused on balancing the contractual relationship between tenant and landlord.

In contrast, The Land Reform Review Group addressed tenancy issues raised by the wider human rights frameworks, noting that tenanted land tends to be concentrated in the more marginal rural areas, and recognising the contribution tenant farming families make towards creating stronger and more resilient rural communities.

As the Land Reform Bill progresses through Parliament, our understanding of the wider human rights frameworks is developing. Greater integration of human rights could strengthen the Land Reform Bill.

Holyrood's Rural Affairs Committee recently published their Stage 1 report on the Bill, part of which addresses human rights issues. While recognising ECHR's status in our domestic law, the Report noted that lack of legal status should not prevent the other wider human rights obligations underpinning the Bill. That could shift the balance between ECHR property protection and wider human rights, though we still have a hierarchy of human rights obligations with ECHR incorporated into Scots law but the others not so.

The challenges provided by human rights obligations make for a steep learning curve for stakeholders and policy makers, and the scrutiny of the drafting of legislation from a human rights angle is a time consuming necessity.

With parliamentary time and civil servant Bill team time being limited resources, this scrutiny may limit what reforms are achievable in any one Parliament.

It may be a long journey ahead, but it is becoming clear that land and tenancy reform could allow us to meet the obligations attached to international human rights standards. A greater understanding and acceptance of human rights will allow reforms to progress with confidence.

Furthermore, the human rights thinking brings greater public interest in land reform, and also brings together separate stakeholders under the umbrella of land reform, as can be seen here today. All a positive step forward.

Scottish Land and Estates

This line was agreed with SLE who were invited but unable to attend the event, to enable a response to a question from the Chair of the session seeking to draw out that - no doubt, SLE may take a different view from CLS on all this?

“SLE come at the issues from a different starting point. They have a concern to ensure that in all this debate about land and human rights, property rights, the rights of owners to their property, is not set aside or diminished within debates about other human rights.

“In this regard SLE would point to the special place of the ECHR in Scottish law, and within ECHR there are specific protections to private property rights which cannot be overridden lightly, and should only be so overridden as a last resort.

“However, SLE do not argue that other human rights are not important and they have made clear to me nor do they seek to paint private property rights as absolute rights. Rather, that in considering issues to do with any potential compulsory changes in land ownership, the considerations of Ministers must properly account for owners’ rights under ECHR, whilst seeking to ensure that measures are proportionate and balanced.”

CVs for the speakers.

Peter Peacock is a freelance policy consultant who acts as the Policy Director for Community Land Scotland. He has had a long association with advancing the community ownership of land; had a 30 year career in Scottish politics at both local and national level; has worked in the third and private sectors; and served on a number of national bodies.

Megan MacInnes is based in Applecross and is the Land Advisor for the international NGO Global Witness. She has spent the last ten years working on how land reform and human rights interact, particularly within international frameworks.

Dr Kirsteen Shields is a lecturer in constitutional law and human rights at the university of Dundee. She holds a PhD from the University of London and has undertaken extensive research on agricultural workers and producers in South Africa, Bolivia and Cuba. She has published on diverse aspects of international law, constitutional law and the governance of natural resources.

Christopher Nicholson is the Chairman of the Scottish Tenant Farmers Association, the only organisation in Scotland dedicated to representing the interests of tenant farmers. He is a tenant farmer from Dumfries and Galloway, and has been involved with tenancy matters for the past 10 years.