

The Land Reform (Scotland) Bill and Human Rights: Key points and recommendations.

Megan MacInnes* and Dr Kirsteen Shields**

Working paper

Synopsis: This paper supports the view that human rights can be utilised as a progressive force in land reform in Scotland. Due to unprecedented levels of inequality in Scotland, the Scottish Government is obliged to take action to address the present situation of poor human rights for many in Scotland. Understanding land as a national asset is key to progress in this respect. Obligations to support human rights for all through land reform emerge from both the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights. Key recommendations to strengthen the Land Reform Bill in compatibility with international human rights standards are presented.

* Megan MacInnes is an independent consultant working on land reform, and is a part time Advisor with the international NGO Global Witness.

** Dr Kirsteen Shields is a lecturer in Public Law and Human Rights at the University of Dundee

1) The relationship between human rights and land reform

“Land, both rural and urban, is one of Scotland’s most fundamental and finite assets and is intimately linked to ideas of well-being, social justice, opportunity and identity and is key to both the success and development of its people and communities alike”.¹

This description of “land” given by the Scottish Government’s Policy Memorandum for the Land Reform (Scotland) Bill very clearly recognises the importance land plays in every part of everyday life across Scotland. This reflects international experiences, laws and standards in which secure tenure over land is seen as a fundamental pre-requisite to the achievement of human rights.²

In response to increased pressure on land globally, the international community adopted the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the context of National Food Security³ in 2012. These Guidelines are the first inter-governmental statement on how the governance of land tenure and human rights interact and *“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*

¹ Paragraph 3 of the Land Reform (Scotland) Bill, Policy Memorandum, as introduced in the Scottish Parliament on 22 June 2015.

² As described by Article 4.1 of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security, further elaboration of the relationship between land rights and the realisation of other fundamental human rights is given in the submission by the Scottish Human Rights Commission on the Land Reform (Scotland) Bill.

³ Further information about the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security is available here:

<http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

*land to development by promoting secure tenure rights and equitable access to land, fisheries and forests”.*⁴

The importance of securing land tenure rights and enabling equitable access to land, as a precondition for sustainable development and the realization of human rights obligations by States was given further weight through the inclusion of land within the Sustainable Development Goals, adopted at the UN General Assembly in September 2015.⁵ Under the first Sustainable Development Goal, to end poverty, ‘Target 1.4’ states: *“By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, **ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance**”* (emphasis added).

Secure land tenure remains a remote prospect for many communities around the world however. A global baseline assessment of land tenure security in 2015 found that although indigenous peoples and local communities claim or have customary use of 65% of the world’s land area, they lack legal rights to almost three quarters of this land.⁶ Subsequently, the organisations behind this study have launched a Global Call to Action on Indigenous and Community Land Rights, which aims to double the area of land recognised as owned or controlled by indigenous peoples and local communities by 2020.⁷

⁴ As described in the Preface of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security.

⁵ Further information is available here: <https://sustainabledevelopment.un.org/>

⁶ The full report is available for download at: http://www.rightsandresources.org/wp-content/uploads/GlobalBaseline_web1.pdf

⁷ Further information is available at: <http://landrightsnow.org/>

The Scottish Government defines “land reform” as measures which “*ensur[e] that public interest in relation to land rights and responsibilities around land are balanced with private interests*”⁸.

The Land Reform (Scotland) Bill (hereinafter “the Bill”) is an opportunity for the Scottish Government to demonstrate its commitment to human rights. The following sections detail the nature and scope of the Scottish Government’s obligations with regards to land rights under international and European law.

2) The Scottish Government’s human rights obligations

a) Introduction

It can be useful to think of the Scottish Government’s human rights obligations in relation to land within three groupings; the rights of the wider public, the rights of the tenants and the rights of the landowners. The following analysis focuses mainly on the Scottish Government’s obligations to the wider public generally and latterly to the balancing of rights between tenants and landowners. It should be noted that the rights of the landowners under the European Convention on Human Rights (ECHR) are limited by competing interests and key precedent to this effect is set out below. The following section considers the Scottish Government’s obligations under international human rights law and ECHR law.

A modern democratic conceptualisation of land ownership as a national asset to be used to serve the common good is embedded in international human rights law. This has been acknowledged in several international principles and interpretive documents; namely that access to land is necessary in order to facilitate the realization of these and other human rights.⁹

⁸ Paragraph 34 of the Land Reform (Scotland) Bill, Policy Memorandum, as introduced in the Scottish Parliament on 22 June 2015.

⁹ See, e.g., The Vancouver Declaration on Human Settlements, UN Conference on Human Settlements, Adopted June 11, 1976, General Principles: Land; Voluntary Guidelines of the Food and Agriculture

It is a particularly important basis on which rights inherent in the International Covenant on Economic, Social and Cultural Rights (ICESCR) may flow. Article 2(1) ICESCR places a duty on the Scottish Ministers to use the maximum available resources to ensure progressive realisation of the rights contained in the Covenant, this includes the right to housing, adequate food and an adequate standard of living.

Furthermore, obligations to address disadvantage as a priority are embedded in this Covenant. For example, ICESCR Sixth session (1991) General comment No. 4 on the right to adequate housing (Article 11(1) of the Covenant) states: “*States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.*” The CESCR further details that there is no reduction in these obligations in times of austerity, stating that protecting of such rights is “*perhaps even more pertinent during times of economic contraction.*”¹⁰

Article 11(2) states that States should develop agrarian systems as the most effective use of natural resources. UN Committee on Economic Social and Cultural Rights (CESCR) General Comment 12 states that socially impoverished groups should be given extra support. This is further supported by the 2014 factsheet of the Office of the High Commissioner for Human Rights which warns that a sole focus on the right to property may lead to violation of the right to adequate housing.¹¹

Organization of the United Nations (FAO), adopted 127th Session of the FOA Council, November 2004, Guideline 8B (Access to resource and assets: Land). Cited in Land Rights Issues in International Human Rights Law Elisabeth Wickeri Anil Kalhan, published by the Institution for Human Rights and Business, UK, 2010.

¹⁰ UN CESCR General Comment No 4 on the Right to Adequate Housing, UN Doc E/1992/23.

¹¹ Office of the High Commissioner for Human Rights, Fact Sheet No. 21/Rev.1, The Right to Adequate Housing, at page 7. Available here:

http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf

b) European Convention on Human Rights

At the European level, the Scottish Government's human rights obligations are set out in the European Convention of Human Rights (ECHR) and its accompanying Protocols, and the European Social Charter. The ECHR operates through a system of individual complaints from the European Court of Human Rights whereas the European Social Charter operates through a collective complaints system monitored by the European Committee of Social Rights.

The right to housing is not contained within ECHR but is part of the European Social Charter (revised 1996), Article 31. The latter, not being attached to a system of individual complaints, is not justiciable before the European Court of Human Rights. Nevertheless, in terms of a justiciable right to housing at the European level, the ECHR indirectly relies on a right to housing as some ECHR rights have are dependent on having housing, for example the right to respect for family life, private life and the home, the right to vote and the right to education. States have an obligation to positively protect ECHR rights and therefore may be in violation of the ECHR obligations if measures were not taken to remove or tackle obstacles to the realisation of those rights.

The right to property, protected under Article 1 Protocol 1 of the ECHR, has been considered extensively from the perspective that the Scottish Government's Land Reform (Scotland) Bill may interfere with landowners right to property. Under the ECHR, this right may be qualified by the public interest however and the jurisprudence of the European Court of Human Rights has established a wide margin of appreciation for States in deciding on justified interferences to the right to property.

Of further relevance to the Scottish context is that the right to property has been successfully upheld before the European Court of Human Rights in defence of tenant rights. Of particular importance is the finding that long leases have been established as possessions for the purposes of right to property arguments under the ECHR.¹² For example, in *Stretch v UK* 2003, an option in a 22 year lease to renew it for a further term of 21 years was considered to qualify as a possession for the purpose of right to property protection under ECHR Article 1 Protocol 1. Any interference by the State in that possession would therefore, accordingly, be required to be in the pursuit of a legitimate aim and proportionate to those aims (as set out in Article 1 Protocol 1 and established by the ECHR).

c) The status and relationship of these obligations

It is well established that the Scottish Parliament must legislate in compatibility with the rights set out in the European Convention on Human Rights, as set out in the Scotland Act 1998 s. 29. 2.(d).¹³ If Scottish Ministers do not do so, the legislation at issue may be struck down by domestic courts or may result in a decision from the European Court of Human Rights.

In addition to ECHR however, the Scotland Act 1998 Schedule 5 s.7(2).(a) also calls on the Scottish Ministers to observe and implement 'international obligations', including the International Covenant on Economic, Social and Cultural Rights and other core human rights

¹² See *James v UK* 86. (Contrary to *Partidis v Greece* – 5 months lease). Also in *Blecic v Croatia* 2004, it was held that tenancy amounts to property, therefore breaking tenancy requires legitimate aim and fair balance. In *Oneryildiz v Turkey* 2004, slum dwellers did not have expectation of obtaining property rights but nonetheless some proprietary interests were sufficiently established and recognised by the court.

¹³ Scotland Act s29. 1: An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. Follows, 2(d): A provision is outside that competence so far as any of the following paragraphs apply – (d)it is incompatible with any of the Convention rights or with Community law.

conventions.¹⁴ Under the Scotland Act 1998, Schedule 5, the implementation of international obligations is devolved and it is for the Scottish Ministers themselves to legislate in compatibility with their international obligations.

As such, the Scottish Government has equal binding obligations under ECHR (for example the right to property) in comparison to ICESCR and other core human rights conventions (for example the right to food and adequate housing). The difference being that the structure of the ECHR provides a justiciable route through individual complaints via the European Court of Human Rights, whereas complaints relating to economic, social and cultural rights (including the right to food and adequate housing) are considered by the European Committee of Social Rights.

d) Other relevant international human rights instruments

In addition to these examples of binding human rights obligations on the Scottish Government, international human rights instruments evolve and regularly updated. The two most recent and significant to Scotland's land reform debate are the UN Guiding Principles on Business and Human Rights (2011)¹⁵ and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the context of National Food Security (2012).¹⁶

¹⁴ The "core human rights conventions" are ICESCR, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. Further information is available here: <http://www.cesr.org/article.php?id=271>

¹⁵ The UN Guiding Principles on Business and Human Rights 2011, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁶ The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the context of National Food Security (2012), available at: <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

The UN Guiding Principles on Business and Human Rights stipulate that States should set out clearly the expectation that all business enterprises (“companies”) domiciled in their territory and/or jurisdiction respect human rights throughout their operations.¹⁷ Furthermore States should retain sufficient policy space to ensure they can fulfil their international obligations.¹⁸

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the context of National Food Security reiterate the importance that secure land tenure plays in enabling the progressive realization of other human rights, particularly economic, social and cultural rights.¹⁹ Building on the Guiding Principles, they recall that protecting and respecting human rights is not just the responsibility of States, but everyone, including companies, and if such rights are violated, then Governments have a duty to step in.²⁰

Whilst not binding like ECHR and ICESCR, the intention of both these instruments is to provide further guidance on how human rights in specific (and often particularly challenging) issues and areas can be realized.

3) How do these obligations transform into actual steps the SG must take to push the land reform agenda?

¹⁷ Principle 2, UN Guiding Principles on Business and Human Rights 2012, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁸ Principle 9, UN Guiding Principles on Business and Human Rights 2012, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

¹⁹ Article 4.1 of The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the context of National Food Security (2012), available at: <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

²⁰ Article 3.2 of The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the context of National Food Security (2012), available at: <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

There are three areas of the Land Reform (Scotland) Bill which could be strengthened with regards to the Scottish Government's human rights obligations.

a) Integrating human rights within the overarching objectives of the Bill

The Bill should include a statement at the outset which defines its aim in relation to human rights, specifically mentioning ICESCR. This will enable clear policy alignment with the Scottish Government's mandate and will facilitate consistent secondary legislation and court interpretation. It may also protect against any hypothetical or real ECHR complaints related to violation of Article 1 Protocol 1, as public interest arguments are considered legitimate reasons for interference with this right.

b) Strengthening the rights of communities and tenants

At present the criteria for the community right to buy set out in s. 47 of the Bill is so demanding that it is unlikely to be successfully met by applicants, and consequently its provision may not achieve the desired diversification of ownership. The double criteria of establishing significant benefit if the transfer of land is granted (s. 47 (c)) and significant harm if the transfer is not granted (s.47 (d)) is significantly high. It is recommended that the present threshold for the right to buy set out in s. 47 of the Bill is too high and the Bill should be revised to stipulate one or the other (harm or benefit) and not both simultaneously.

Two ways in which this could be done are firstly that the bar defining the benefit of the transfer of land be reduced from "only practicable way" (s. 47(2)(c)(ii)) to the "only or most practicable way". Secondly, that the definition of harm (s.47 (d)) be broadened out to include potential impacts on the sustainable development objectives of the community.

Part 10 of the Land Reform Bill introduces the creation of ‘Modern limited duration tenancies’ for a maximum tenancy period of 10 years. Section 74 (2) repeals section 5 of the Agricultural Holdings (Scotland) Act 2003 which introduced ‘Limited duration tenancies’. Section 5 of the Agricultural Holdings (Scotland) Act 2003 introduced ‘limited duration tenancies’ of a maximum length of 15 years to replace tenancy agreements under the Agricultural Holdings (Scotland) Act 1991 of a maximum length of 25 years. This continual pressure on reducing the lengths of tenancies is detrimental to tenure security, sustainable agriculture in Scotland and does not serve the wider aims of fairness and diversification in ownerships in Scotland. It is recommended that Part 10 of the Bill on Agricultural Holdings should be revised to offer a longer tenancy period.

c) Improving transparency and accountability of land ownership

A third area of the Bill which could be strengthened in relation to human rights are the sections on transparency (Part 3: information about control of land) and accountability (Part 4: engaging communities in decisions relating to land).

Currently the paragraph 35 of Part 3 of the Bill is entitled “right of access to information on persons in control of land” and aims to enable ‘affected persons’ to request information about who owns land. Paragraph 36 on “information pertaining to proprietors of land” strengthens the powers of the Keeper to request information about who owns land. However, there are some significant limitations to these suggestions, which could be remedied through applying a human rights approach, to ensure that the vision of the Bill’s Policy Memorandum, is met by the practice of the articles. At present the powers of the Keeper, to make sure that information requested by ‘affected persons’ is obtained (paragraph 35) and by the Keeper themselves (paragraph 36) is only voluntary, with no clear implications outlined if the information is

withheld, by the landowner. More concerning however is that without a robust definition of ‘controlling interest’ paragraph 36, 48A(2)(d) or ‘persons in control of land’ paragraph 35(2)(a), all that could be made public is the name of the “shell company”, not the ‘natural person’ (the individual human being) who ultimately owns or controls the land. Subsequently, neither paragraph in the Bill would be a change from the present situation.

The solution for this is threefold, firstly that the Bill amends a different section of the Land Registration etc. (Scotland) Act 2012, placing regulatory requirements on all land owners to disclose information about the owner and value of the land as a ‘general condition of the application’ at the point of registration. Secondly that the Bill defines the owner of the land about which information must be disclosed as any “person(s) of significant control”; a legal definition recognised in UK and European law, which goes beyond the legal entity owning the land, to the actual ‘natural person’ who owns or controls the legal entity, through shareholdings or other means.²¹ A third means of improving the transparency of land ownership and making sure those who own and make decisions about land are accessible and accountable, is to require that any company buying land in Scotland be registered within Europe (as suggested by the Land Reform Review Group).²² This also would be achieved most straightforwardly through amendments to the general conditions of application in the 2012 Act.

Parts 3 of the Bill (on transparency of land ownership) also serves to enable implementation of various other sections of the Bill. For example, it is not possible to hold land owners to account for decisions they make which affect local communities if their identity is not known (Part 4),

²¹ For further information please see the UK Small Business, Enterprise and Employment Act 2015 <http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted> and the European 4th Anti-Money Laundering Directive <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015L0849>

²² The rationale and details of the benefits of requiring companies to be registered in Europe before they can buy land in Scotland is further articulated in the submissions on the Bill by Global Witness and Andy Wightman, as well as here: <http://www.andywightman.com/archives/category/land-reform-bill-2015>

nor is it possible for Ministerial decisions about the right to buy for furthering sustainable development to be fair and appropriate (Part 5) if it is unable to contact the land owner in question.

The requirement that those who request information about land owners must prove they are 'affected persons' also highlights a difference between what the Bill proposes, and what is required under international standards, such as the Voluntary Guidelines mentioned above. Broader reforms are therefore needed to the Land Registration etc. (Scotland) Act to increase public accessibility of information within the Land Register, including making it fully available online for free, as is done in Denmark²³, as well as procedures to improve information sharing between the Land Register and other sources and databases of relevant spatial information.

The section of the Bill pertaining to accountability is Part 4, entitled "engaging communities in decisions relating to land" and the accompanying section of the Policy Memorandum states *"Scottish Ministers aim to promote more local and community involvement in land, help ensure greater accountability by land owners towards communities where their decisions can affect communities, and provide the appropriate tools to make changes where this is necessary to address the needs of local communities and overcome barriers to sustainable development"*. This vision is admirable, but weakened by the Bill's articles in part 4 which only introduce a Ministerial duty to issue "guidance" on engaging communities (s.37 (1)), rather than an obligation to oversee engagement and consultation directly. Part 4 could be strengthened in two ways to ensure this accountability requirement is in line with international standards: the requirement to engage with communities should be binding rather than voluntary; and the Bill

²³ For further information please see:

http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-38_International_Perspectives_on_Land_Reform.pdf

itself should detail concrete sanctions which will come into force should community engagement not be undertaken, or the results of it ignored.

4) Conclusion

The Land Reform (Scotland) Bill is an important opportunity for the Scottish Government to demonstrate commitment to human rights and to fulfil obligations under international and European law. However if policy discussions focus on rights protected by ECHR only and not the Government's wider obligations, then the Bill will remain powerless to achieve the genuine reform of land governance in Scotland which is so urgently needed.