



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Human Rights and the Work of the Scottish Land Commission

A discussion paper

Dr Kirsteen Shields
May 2018

LAND LINES

A series of independent discussion papers on land reform issues

Background to the 'Land Lines' discussion papers

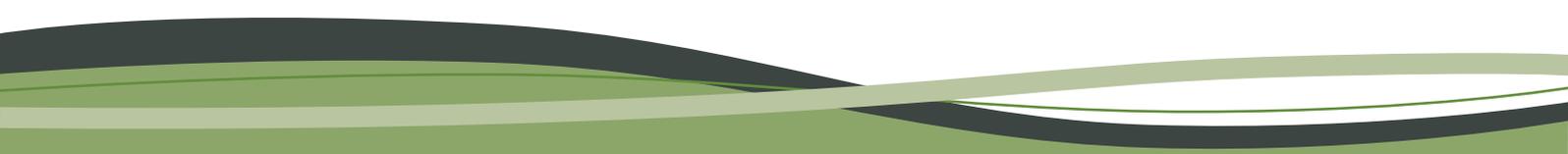
The Scottish Land Commission has commissioned a series of independent discussion papers on key land reform issues. These papers are intended to stimulate public debate and to inform the Commission's longer term research priorities.

The Commission is looking at human rights as it is inherent in Scotland's framework for land reform and underpins our [Strategic Plan](#) and [Programme of Work](#). This, the fifth paper in the Land Lines series, is looking at the opportunities provided by land reform for further realisation of economic, social and cultural human rights.

The opinions expressed, and any errors, in the papers are those of the author and do not necessarily reflect those of the Commission.

About the Author

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LAND LINES

A series of independent discussion papers on land reform issues

Summary

Keywords

Community; property rights; land; human rights; economic; social; cultural

Background

This report provides a primer on key human rights developments and obligations relevant to land reform. It explains the evolution in approach to human rights that is embodied in the Land Reform (Scotland) Act 2016 and it applies that approach to aspects of the Scottish Land Commission's four strategic priorities.

Main Findings

- The Land Reform (Scotland) Act 2016 strengthens community rights to buy, created obligations to consult communities in land reform processes, instigated the creation of the Register of Controlling Interests, and the completion of the Land Register and provided for the creation of the Scottish Land Commission.
- The Land Reform (Scotland) Act 2016 makes explicit reference to the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) as the guiding framework behind land reform in Scotland.
- The work of the Scottish Land Commission advances human rights in diverse ways including: strengthening community ownership; improving transparency of ownership; improving the quality and accountability of decision-making on land use; protecting the rights of tenants and small farmers.
- The Scottish Land Commission is subject to overlapping obligations in respect of human rights law, but is guided by the ICESCR approach embedded within the Land Reform (Scotland) Act 2016.
- The ICESCR approach represents a progressive and proactive approach to human rights focused on identifying the positive impact that change in land governance can have on human rights.
- The ICESCR progressive approach bears potential for land to be 'unlocked' in pursuit of human rights, through balancing the right to property with economic, social and cultural rights.
- The application of the ICESCR progressive approach to the Scottish Land Commission's four key areas of work is demonstrated. The four key areas are: the redevelopment of vacant and derelict land; increasing diversity of land ownership; improving community engagement in land use decision-making; and improving relationships between agricultural landlords and tenants.

“Who possesses this landscape?
the man who bought it or
I who am possessed by it?
False questions, for
this landscape is masterless
and intractable in any terms
that are human.”

An extract from Norman MacCaig,
'A Man in Assynt', 1967.

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1. The Jigsaw So Far

For many centuries Scotland has endured patterns of land ownership that inhibited capacity for wealth distribution and social justice. For a long time it was believed that there was no political or legislative means to challenge this. This changed with the creation of the Scottish Parliament in 1998.

On the creation of the Scottish Parliament competence to reform the law on land ownership in Scotland was given to the Members of the Scottish Parliament. The Scottish Government has since set out a commitment to radical land reform aligned with the vision that Scotland's land must be "*an asset that benefits the many, not the few*".¹ To this effect the Scottish Parliament has passed key pieces of legislation, most recently and most significantly, the *Land Reform (Scotland) Act 2016* (hereinafter, *LR(S) Act*).

The *LR(S) Act* strengthened community rights to buy, created obligations to consult communities in land reform processes, enhanced the transparency of the creation a Land Register and provided for the creation of the Scottish Land Commission. The Act also expressly includes reference to human rights in the fullest terms through reference to the *United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR)*. This serves as an important reframing of the key human rights aims of the Act which, as will be explained, bears potential to *unlock* land.

Early in the passage of the *LR(S) Act* some of the proposed measures were challenged by property rights questions that distracted from human rights ones. The *European Convention on Human Rights (ECHR)* right to property occasionally threatened to become the predominant 'human rights concern' of land reform.² This changed when the Scottish Parliament's Rural Affairs, Climate Change and the Environment Committee (RACCE) heard evidence³ that the 'right to property' can be limited in pursuit of the public interest, and that it can be balanced against other human rights.

Recognition that the *ECHR* right to property does not exist in isolation but exists in inter-relationship with all human rights, including economic, social and cultural rights, created a sea change in engagement with the human rights potential of the *LR(S) Act*. Rather than thwart the community ownership agenda through right to property claims, it became clear that human rights could legitimise and give structure to long-awaited changes in land ownership.

¹First Minister Nicola Sturgeon, Programme for Government 2014-15, set out before Parliament on 26 November 2014. Available here: www.theyworkforyou.com/sp/?id=2014-11-26.18.0

²Shields, K., 2015, 'Tackling the Misuse of Rights Rhetoric in the Land Debate', *Green's Scottish Human Rights Journal*, no. 68, 1, pp. 1-4.

³See Scottish Parliament Rural Affairs, Climate Change and the Environment Committee (RACCE) Evidence Session on Land Reform and Human Rights, 7th October 2015. Official report available here: www.parliament.scot/parliamentarybusiness/report.aspx?r=10140

Thus began an alliance between community land activists and human rights advocates, which continues to strengthen land reform now. As Peter Peacock has said “*the integration of economic, social and cultural rights to the land agenda changed everything. Suddenly there was a vocabulary and a structure to balance the interests involved.*”⁴

Subsequently express reference is made to the *ICESCR* within the *LR(S) Act*⁵, to the effect that the *ICESCR* provides definition to meaning of human rights for the purpose of the *LR(S) Act*, alongside the *Human Rights Act 1998*. Reference to the extensive provisions of the *ICESCR* is also embedded in the *Land Rights and Responsibilities Statement (LRRS)*⁶ which informs the work of the Scottish Land Commission.

Many challenges remain, particularly in making the benefits of land accessible to those communities that need it most, but there are now routes on the map, conversations to be had and work to be done.

2. THE SPACE BETWEEN LAND REFORM AND HUMAN RIGHTS

Land reform has enormous potential to contribute to the realisation of human rights in Scotland. That said, it can sometimes be difficult to identify or imagine the impact of land reform on human rights in real terms. As mentioned above, there was previously a common misunderstanding that the human rights dimension of land reform was the right to property.

The Scottish Land Commission is making links between land reform and human rights in diverse ways, including:

- Addressing constraints in the market for land for housing and development;
- Addressing issues of land ownership;
- Democratising land use decision making;
- Reviewing and regulating agricultural holdings.

⁴In interview for Scottish Parliament Information Centre (SPICe) Case-Study, Scottish Parliament, 10th October 2016.

⁵Land Reform (Scotland) Act 2016, Part 1 Section 1 (6) (b)

⁶Scottish Government's Scottish Land Rights and Responsibilities Statement (LRRS) published Thursday, September 28, 2017.

The final section of this paper looks at what it means to apply the *ICESCR* human rights approach (the approach embedded within the *LR(S) Act*) to these areas. These are neglected areas of land governance that will require new legal pathways and real cooperation to navigate.

It is too early to know the long-term outcomes of the *LR(S) Act* on human rights, but there are visible and direct benefits from land reform via community ownership projects in Scotland already. Some of these projects began under the pre-existing community right to buy before it was developed in the *LR(S) Act*, such as the example of the West Harris Trust below.

2.1 Example of community ownership as a catalyst for human rights

'Impact studies' assessing the impact of community ownership on human rights in Scotland will emerge over time.

Benefits from community ownership projects in Scotland already becoming visible. For example, on the Isle of Harris, the viability of the community was threatened by a declining population and the seasonal, unsustainable nature of housing and employment on the island. The declining population led to the closure of key public services such as the local primary school, thus accelerating the decline of community life.

The situation began to reverse when the West Harris Trust bought over 17,000 acres of land from the Scottish Government in January 2010 as documented by [Community Land Scotland](#). In partnership with the Hebridean Housing Partnership, the Trust built six affordable homes and have plans to build more. By providing access to decent affordable housing the community ownership initiative had a positive impact on the **right to housing**. The creation of a mixed business tourism development in a former school building provides several new full-time jobs to be created, impacting on the **right to work**. This regeneration may enable the key public services on the island to reopen, therefore may have knock-on effects on the **right to education**, the **right to cultural life** etc. There is also potential for community ownership initiatives to impact on the **right to health** and the **right to food** through enabling access to green spaces and supporting food growing projects.

All of these rights, to housing, work, education, cultural life, health and food – are termed economic, social and cultural rights (ESC rights) and are embodied in the *ICESCR*. Some of these rights, such as the right to housing, the right to work and the right to education are also beginning to receive fuller protection from the *ECHR* but they are presently under-developed in the jurisprudence of the European Court of Human Rights. Therefore, the *ICESCR* is the key legal instrument that protects ESC rights.

3. A DEEPER UNDERSTANDING OF ESC RIGHTS

What are ESC rights? ESC rights are sometimes misunderstood as a right to 'benefits' or to 'free things'. The inference then is, if there is no free housing there is no right to housing. In reality, there are many reasons why rights that are codified at the UN and European levels will not be heard and upheld in courts, not least due to resource constraints of claimants. Nonetheless, that many rights are routinely violated (for example the right to adequate housing) does not mean that the codification of those rights bears no significance.

Instead, ESC rights are best understood as shorthand for more complex obligations on the state. The following brief analysis of the right to adequate housing contained in the *ICESCR* Article 11 (1) is designed to demonstrate how ESC rights work in practice.

In real terms, the right to adequate housing confers obligations on the government relating to access to housing, planning for shortages, quality assurances and addressing distribution needs. These obligations can be distinguished on three levels; duties to respect, protect and fulfil.

RESPECT: According to the [UN Committee on Economic, Social and Cultural Rights \(CESCR\)](#), for the right to adequate housing, the duty to respect means the government should plan for the needs of the population and avoid actively undermining access to adequate housing. In particular there should be no forced evictions and no discrimination in relation to access to housing. Governments should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.⁷ ([See UN CESCR General Comment No 4, para 8 \(a\).](#))

PROTECT: Secondly, the duty to protect the right to adequate housing carries obligations to protect individuals' enjoyment of the right from interference from other actors. In this regard, according to the [UN Committee on the Right to Adequate Housing, Factsheet No 21](#), the state has duties in respect of availability, affordability and habitability, and in this respect protection from landlords and property developers. The obligation to fulfil also requires governments to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realise the right to adequate housing.⁸

⁷UN CESCR General Comment No. 4: The Right to Adequate Housing. Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23). At Para 8 (a). See: www.refworld.org/docid/47a7079a1.html

⁸ Office of the United Nations High Commissioner for Human Rights, Fact Sheet No 21 on The Right to Adequate Housing, 2009. See: www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf

FULFILL: Thirdly, the duty to fulfil means strengthening access to housing and, in some cases, land, and where necessary addressing barriers to access of disadvantaged groups. The UN Committee on Economic, Social and Cultural Rights (CESCR) stipulates: “*Within many States parties [governments] increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement*”.⁹

A progressive approach therefore considers the states responsibility in each of these aspects of human rights realisation.

The *ICESCR* is the core UN Covenant that protects ESC rights.

4. THE ROOT AND BRANCHES OF HUMAN RIGHTS IN THE SCOTTISH LAND COMMISSION’S WORK

The Scottish Government’s and the Scottish Land Commission’s human rights commitments come from overlapping sources; Scottish Parliament legislation, UK Parliament legislation, the European Convention on Human Rights and UN international human rights law.¹⁰

It is extremely important to know and trace these branches of commitments, as the *ECHR* and the *ICESCR* contain different human rights provisions and embody different approaches to human rights.

As a starting point, substantively and chronologically, like all public bodies, the Scottish Land Commission and its Commissioners are bound to observe human rights under the *Human Rights Act 1998*. The *Human Rights Act 1998* was passed by the UK Parliament and obliges all public bodies, as agents of the state, to respect the provisions of the *ECHR*.

The *ECHR* includes a wide range of rights, including the right to be free from discrimination (Article 14), the right to peaceful possession of property (Article 1, Protocol 1), and a variety of rights which are dependent on access to housing such as the right to education (Article 2, Protocol 1) and the right to vote (Article 3, Protocol 1).

⁹ Ibid at n6. Para 8 (e).

¹⁰ A note on Brexit: 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. These obligations are unaffected by Brexit. The ECHR however will continue in effect until the UK’s adoption of that instrument is expressly repealed. The EU Charter of Fundamental Rights and Freedoms also generates human rights obligations, however unlike the ECHR, this instrument will be subject to repeal on Brexit. The UK and Scottish Governments are also bound by the UN international human rights covenants and conventions, these obligations are unaffected by Brexit.

The human rights obligations and commitments embedded in the *Scotland Act 1998* are more extensive. The *Scotland Act 1998* creates obligations for the Scottish Government and its public bodies, (of which the Scottish Land Commission is one). The obligations in the *Scotland Act 1998* include an obligation to respect the *ECHR* but they also include obligations on the Scottish Government to directly respect 'international obligations' including the *ICESCR*.

The *ICESCR* is focused on ESC rights, and includes “*the right to an adequate standard of living, adequate for the health and well-being of himself and his family (the right to health), including food (the right to food), clothing, housing (the right to housing) and medical care and necessary social services*” (Article 11).¹¹ It also includes the right to work, (Article 6) and the right to take part in cultural life (Article 15).

Therefore, the *ECHR* and the *ICESCR* apply to the Scottish Land Commission *indirectly* because the Scottish Land Commission is a public body, essentially an agent of the state. The Scottish Land Commission is also subject to the *ICESCR* *directly* because the *LR(S) Act* itself and the *Land Rights and Responsibilities Statement* directly integrate reference to *ICESCR*.

The *LR(S) Act* embodies an understanding of land as a national asset to serve the common good and an understanding of the wide remit of human rights that includes not only property rights but also all other human rights, particularly ESC rights. This is consolidated by reference to the *ICESCR* within the *LR(S) Act*.¹²

Accompanying the *LR(S) Act*, the *Scottish Land Rights and Responsibilities Statement (LRRS)*, sets a declaration of intent that land should be used to promote the common good and human rights, and is the first such declaration in the world. The first Principle set out in the *LRRS* provides that: “*The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests.*”¹³

Of the various branches set out above, the most recent – the obligation to respect the *ICESCR* embedded within the *LR(S) Act* itself – serves as the root of a new progressive approach to human rights. It is this approach that guides the work of the Scottish Land Commission. The following section details how that approach has evolved and how it should be distinguished from the pre-existing approach.

¹¹ The full provision reads: “Article 11 (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All Children, whether born in or out of wedlock shall enjoy the same social protection.” UN *ICESCR* 1966. Available here: www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx

¹² At Part 1, Section 1 (6) (b); Part 4 Section 44 (11) (b); Section 56 (14) (b).

¹³ Scottish Government, *Land Rights and Responsibilities Statement*, Principle 1. Available here: www.gov.scot/Resource/0052/00525166.pdf

5. TRUE QUESTIONS: BEYOND A REDUCTIVE APPROACH TO HUMAN RIGHTS

During the passage of the *LR(S) Act*, the predominant human rights concern evolved from a preoccupation with property rights to a more balanced understanding of human rights encompassing ESC rights. This evolution in thinking can be traced through the series of questions that the RACCE Committee faced in the passage of the *LR(S) Act*.

In phase 1 of the debate was characterised by a risk mitigation approach to human rights. In other words, it was characterised by fear of liability before the European Court of Human Rights. The leading human rights question was not '*Does this [proposed law/policy/action] risk infringing human rights?*' but instead '*Does this risk infringing ECHR rights?*' As the right to property is expressly included in the *ECHR* (but the ESC rights mentioned are not), this question was reduced to; '*Does this risk infringing the right to property?*'

Although the right to property is explicitly included in the *ECHR*, and full ESC rights are not, the *ECHR* right to property is nevertheless not an 'absolute' right, nor a priority right, nor a trump card over all other rights and interests. Under the *ECHR* It is expressly stated that the right to property may be legitimately interfered with, or 'limited', in pursuit of the public interest, and that the public interest may be widely defined.

In the passage of the *LR(S) Act* to debate stage the question then became; '*Does this [law/policy/action] risk infringing the right to property and can that interference be justified in pursuit of the public interest?*' Put another way, the question became: '*Is there a public interest argument for infringing the right to property?*'

'Public interest' then became the moot point. On the basis that the European Court of Human Rights allowed states a wide discretion in defining the public interest, and on the basis that 'public interest' could be deemed to include protection of ESC rights, the question then became: '*Is there an ESC rights argument for infringing the right to property?*'

This then enabled concerns over housing, health, food, work and cultural life to serve as justifications for infringement of the right to property. In so doing the human rights focus shifted from avoiding human rights violations to actively pursuing positive human rights impacts. This latter approach envisages using, and in some cases *unlocking*, land in pursuit of the progressive evolution of human rights, particularly ESC rights. It is this approach which is embedded in the *LR(S) Act* through reference to the ICESCR.

6. A NEW PROGRESSIVE APPROACH TO HUMAN RIGHTS

The direct reference to the *ICESCR* in the *LR(S) Act* and in the *LRRS* is highly significant because of the content of the *ICESCR*. Besides elaboration of ESC rights, the *ICESCR* places an obligation on states to use its resources to their maximum availability to progress ESC rights. *ICESCR* Article 2 (1) provides that:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Land is understood as a resource for the purposes of this provision.

This provision is interpreted to include that states must take deliberate, concrete and targeted steps to progress ESC rights, and those steps should include the adoption of legislative measures – in other words changes in the law should be made in order to protect ESC rights. It also includes, the provision of judicial or other remedies, and the provision of administrative, financial, educational and social measures to enable the progress of ESC rights as stated in the UN CESCR [General Comment 9](#).¹⁴

The implication therefore is that land should be used to achieve progressively the full realisation of the rights to housing, health, food, work, cultural life etc. Furthermore, legislative and systemic changes should be made to support this commitment.

Whilst due regard is still to be heeded in respect of non-violation of human rights, it is established that progression of ESC rights may serve as a legitimate justification for interference with the right to property if that is deemed to be in the public interest.

The nub of the issue is now focussed on legitimising interference with the right to property in pursuit of the public interest in order to enable the positive impact of land reform on economic, social and cultural rights.

This represents a considerable departure from both the early debates around the passage of the *LR(S) Bill* which focused on the right to property (ECHR Protocol 1 Article 1). The pre-existing approach to human rights at the Scottish Parliament could be characterised as the *ECHR* risk mitigation approach.

¹⁴ UN Committee on Economic, Social and Cultural Rights, ‘General Comment 9: The Domestic Application of the Convention’, Nineteenth session, Geneva, 16 November-4 December 1998. Available here: www.refworld.org/docid/47a7079d6.html

The *LR(S) Act* embodies a new internationalist approach on human rights that seeks to drive real benefit for communities in Scotland. Consequently, in the context of the Scottish Land Commission's work that approach leads to a focus on identifying the positive impact that change in land governance can have on human rights.

This is a paradigm shift in approach.

7. USING HUMAN RIGHTS LAW TO DERIVE REAL BENEFIT FOR COMMUNITIES

The 'progressive approach' bears potential for land to be unlocked in pursuit of human rights. So far, community ownership initiatives have navigated this transition without infringing *ECHR* rights. However, as the Scottish Land Commission's work intensifies and it embarks on a radical land reform agenda, the Scottish Land Commission will begin to address entirely neglected aspects of our land governance structures and encounter entirely new legal problems.

In order to resolve these problems, increased attention must be made to the balance between the right to property and ESC rights. In some instances that means making the ESC rights arguments clearer and more tangible.

The Scottish Land Commission's programme of work for 2018-21 includes:

- addressing constraints in the market for land for housing and development;
- addressing issues of land ownership;
- democratising land use decision making;
- reviewing and regulating agricultural holdings.

The following four examples relate to each of these work strands respectively and considers the positive human rights impact that land reform initiatives could make in each of these four areas. Such positive impacts could be made by helping to remedy existing human rights violations, contributing to the fulfilment of human rights obligations, or supporting the progressive evolution of human rights.

7.1 Scottish Land Commission Objective: Redevelopment of Vacant and Derelict Land

The first strand of the Scottish Land Commission's programme of work is focused on governing land for housing and development, including the redevelopment of vacant and derelict land. In 2016 the *Scottish Vacant and Derelict Land Survey* recorded 2156 hectares (17%) of urban vacant land and 10,279 hectares (83%) as derelict land. This has been described by [David Adams](#) as 'two Dundees' worth of land.¹⁵

Much of this land has remained vacant or derelict for more than twenty years. According to the *Scottish Vacant and Derelict Land Survey* this has a disproportionate effect on disadvantaged communities: 59% of people living in the most deprived decile in Scotland are estimated to live within 500 metres of derelict land, compared to 13% of people in the least deprived decile.¹⁶

The reductive approach asks; '*Is there a risk of infringing the ECHR right to property?*'
The progressive approach asks; '*Can redevelopment progress ESC rights?*'

Under the progressive approach, redevelopment of vacant and derelict land could progress ESC rights in several ways. For example, by using vacant land to create space for affordable homes, redevelopment could progress the right to housing. Also, by using the land to create community greenspaces or other public goods, redevelopment could progress the right to food, the right to health (Article 12 ICESCR) and the right to take part in cultural life (Article 15 ICESCR).

There are useful examples of this approach being used elsewhere in Europe to fulfil international human rights obligations. In 2014, for example Spanish authorities began to fine banks for empty homes. Since 2014 more than 100 municipalities across Spain have approved motions to levy fines on banks with empty homes on their books. In 2015 Barcelona city council charged banks (BBVA, Banco Sabadell and Sareb) for homes that have been empty for more than two years.

The Spanish intervention was based on the *ICESCR* approach, and on the Article 2(1) obligation on states to use resources to their maximum availability to progress ESC rights. Barcelona's mayor, Ada Colau [reportedly](#), stated that "Public authorities have an obligation to use all possible resources to confront the housing emergency".¹⁷

¹⁵ David Adams, Scotregen Magazine, for SURF (Scotland's Independent Regeneration Network), 21 October 2015, 'Time to Call Time on Urban Vacancy and Dereliction in Scotland'. Available here: www.surf.scot/scotregen/call-time-on-urban-vacancy-and-dereliction-in-scotland/

¹⁶ Scottish Government, Scottish Vacant and Derelict Land Survey 2016, Tuesday, April 25, 2017. Available here: www.gov.scot/Publications/2017/04/3409

¹⁷ The Guardian, Thursday 10 September 2015, 'Barcelona fines banks €60,000 for empty homes'. Available here: www.theguardian.com/world/2015/sep/10/barcelona-fines-banks-60000-for-empty-homes

7.2 Scottish Land Commission Objective: Increase Diversity of Land Ownership

The second strand of the Scottish Land Commission's programme of work is focused on land ownership, including addressing issues arising from scale and/or concentration of land ownership. Concern about the scale and concentration of land ownership has been central to the land reform debate, as it is widely reported that fewer than half of Scotland's privately owned rural land is owned by fewer than 500 people.¹⁸

In considering how ownership monopolies can be challenged, the reductive approach asks; *'Is there a risk of infringing the ECHR right to property?'* Whereas, the progressive approach asks; *'Can redistribution of ownership progress human rights?'* – *'Can potentially improved human rights situations outweigh the protection of the right to property?'*

In order to answer these questions the progressive approach envisages the potential human rights benefits: *'Is there a shortfall in housing, employment, access to greenspace or cultural space that change in ownership could address?'* If so, the traditional problems of communities unable to grow or expand due to private ownership, often ownership of large parts of land by a single landowner, can be reframed as human rights, often ESC rights, arguments.

For example, in situations where communities need access to small amounts of land to build more houses, reframing the interests as a right to housing issue could help accelerate asset transfer and community ownership initiatives.

7.3 Scottish Land Commission Objective: Improve Community Engagement in Land Use Decision Making

The third strand of the Scottish Land Commission's programme of work is on land use decision making, particularly community engagement in land management decision making. *The LR(S) Act* sets out an obligation on the Scottish Government to issue guidance on engagement with communities on decisions relating to land which may affect communities.¹⁹ The LR(S) Act also states that; *'[I]n preparing guidance under subsection (1), the Scottish Ministers must have regard to the desirability of promoting respect for, and observance of, relevant human rights.'*²⁰ The Scottish Government is due to publish [guidance](#) on engaging communities in land use decisions this year, having undertaken consultation on the guidance.

¹⁸ Andy Wightman has estimated that half of the privately-owned rural land is in the hands of 432 people (Andy Wightman, *The Poor Had No Lawyers*, Birlinn, 1sted, 2010). This has been described by Tom Devine as "the most concentrated pattern of land ownership in Europe" (Tom Devine, 'The Scottish Nation: 1700–2000', Penguin, 1999 at 457).

¹⁹ Land Reform (Scotland) Act 2016 section 44.

²⁰ Ibid section 44 (a).

In approaching the need to engage communities in land use decisions, and in identifying the relevant human rights concerns, the reductive approach asks; *'Does the lack of community engagement in land use decision making risk infringing ECHR rights?'* As there is no right to community engagement nor 'public participation' established within the *ECHR* the human rights conversation might end there.

The progressive approach asks; *'Can community engagement in land use decision making have a positive impact on human rights?'* Or; *'Are there potential knock-on benefits for human rights from community engagement?'* Yes! Community engagement in land use decision making can reveal shortfalls in service provision and human rights gaps, that may not have been visible prior to community engagement and consultation. In so doing the scope of relevant human rights interests may be much wider than simply a right to participate. Engagement may reveal that the relevant human rights concerns relate to the right to education, the right to housing, the right to cultural life, the right to food, or any other right.

Moreover, community engagement in land use decisions is necessary to fulfil obligations under the *ICESCR* as the Committee on ESC rights has stated that policies, legislation and decision making should not be designed to benefit already advantaged social groups. In relation to the right to adequate housing, the *CESCR has stated*: *"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."*²¹ This entails an obligation to identify and prioritise those social groups that may be disadvantaged and hard to reach. In this respect, Scottish organisations have much to learn from international best practice in this area, in order to develop innovation in real engagement that generates meaningful change. For example the *Global Communities: Partners for Good model*²² used by *'Sowing Futures for Communities and At-risk Youth'*²³ programme in Brazil which focuses on enabling power shifts through building local capacity. According to international best practice there is a lot to be done in terms of resourcing communities *before* 'community engagement' can happen. The *Community Empowerment (Scotland) Act 2015* (which also references the *ICESCR*) is a major step in the right direction in terms of building capacity for community engagement in a wide range of issues, not only land reform.

²¹ CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant). Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23). Available here: www.refworld.org/docid/47a7079a1.html

²² See Global Communities: Partners for Good, Guide to Participatory Action for Community Enhancement (PACE) Available here: <https://www.globalcommunities.org/publications/2014-PACE-overview.pdf>
See in brief: 'Five Steps to Successful Community Engagement and Mobilization', Global Communities blogpost, 2015. Available here: www.globalcommunities.org/node/38087

²³ See overview via Global Communities: www.globalcommunities.org/brazil
Further info (in Portuguese) available here: www.globalcommunitiesbrasil.org/semendo-o-futuro.html

This obligation is bolstered by the obligation that states should use its resources to their maximum availability to progress ESC rights, and the [explicit guidance](#) that this extends to the provision of administrative, financial, educational and social measures to enable the progress of ESC rights.²⁴ In practical terms, this may mean taking extra measures to overcome social and financial barriers to encourage and enable all individuals to participate in community engagement activities. For some groups, meaningful engagement might require running events and information centres in accessible venues, in de-centralised and localised areas (rather than simply offering travel expenses to city centre events).

A progressive approach focused on the maximum realisation of human rights would also provide that human rights principles of participation, accountability, non-discrimination, legality and empowerment must be integrated into every stage of the redevelopment process. Such as is promoted by the Scottish Human Rights Commission under their developed 'PANEL' human rights based approach.²⁵ This would include engagement, consultation, review and publication with local residents, local community groups, and landowners on the function and design of the site.

The Scottish Land Commission's work can contribute to the wider agenda of community empowerment in Scotland by working to reach 'out of reach' communities, and also be working together with relevant organisations such as Community Land Scotland and the Scottish Human Rights Commission.

7.4 Scottish Land Commission Objective: Improving relationships between agricultural landlords and tenants

The fourth strand of the Scottish Land Commission's programme of work is on agricultural holdings. Recent court cases of *Salvesen v Riddell*, and *McMaster & Others v The Scottish Ministers*,²⁶ and the wider experience of tenanted farmers, exposed discontent within the agricultural holdings sector. In particular, there is a need for greater certainty and clarity on the relationships and the responsibilities of the landowners and tenants within the sector.

In respect of tenant farming, the human rights question was; '*Does granting security of tenure infringe the right to property?*' The next question of '*Can this infringement be justified in pursuit of the public interest?*' was not fully addressed, in part because the public interest benefit of ESC rights potential behind the dispute was not entirely clear or widespread.

²⁴ Office of High Commissioner for Human Rights, CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23). Available here: www.refworld.org/docid/4538838e10.html

²⁵ Scottish Human Rights Commission PANEL approach. See here: www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf

²⁶ For an overview see Shields, K, 2017, R.A. *McMaster and Others v. The Scottish Ministers: The Tenant Farmers Case*, (casenote) [2017] CSOH 46, *Juridical Review*, 2017.

In moving forward to address the conditions of tenant farmers more widely, the progressive approach can afford to ask; *'How can change in the law in this area have a positive impact on human rights?'*

The Scottish Land Commission's work can help improve human rights standards for tenant farmers by ensuring that the sector is better regulated. In this respect the SLC and specifically the Tenant Farming Commissioner is working to draft codes of conduct that will clarify the rights and responsibilities of landowners and tenants going forwards.

8. CONCLUSION

This report has sought to make sense of the many human rights dimensions and debates of Scottish land reform as they exist today. In so doing it is necessary to survey the extensive ground already covered by the many members and moments of the Scottish land reform movement. Thinking and consensus on human rights have progressed so quickly in recent years that what was once generally considered an insurmountable obstacle, the *ECHR* right to property, is now viewed as one of several considerations, rather than the primary consideration.

In developing newer and bolder thinking on human rights, particularly on ESC rights, the Scottish Government and the Scottish Land Commission is not only delivering for communities in Scotland, but also leading the way in best practice on human rights globally. The Scottish Land Commission is now tasked with the challenge of casting the net wider within Scotland and facilitating access to the benefits of land reform to all. So far, the Scottish land reform story is a success story, the challenge now is make it a commonly shared story.

9. REFERENCES

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8. Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No 21 on The Right to Adequate Housing*, 2009. See: www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf
9. Ibid at n6. Para 8 (e)
10. A note on Brexit: 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. These obligations are unaffected by Brexit. The ECHR however will continue in effect until the UK's adoption of that instrument is expressly repealed. The EU Charter of Fundamental Rights and Freedoms also generates human rights obligations, however unlike the ECHR, this instrument will be subject to repeal on Brexit. The UK and Scottish Governments are also bound by the UN international human rights covenants and conventions, these obligations are unaffected by Brexit

11. The full provision reads: “Article 11 (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All Children, whether born in or out of wedlock shall enjoy the same social protection.” UN ICESCR 1966.
Available here: www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
12. At Part 1, Section 1 (6) (b); Part 4 Section 44 (11) (b); Section 56 (14) (b)
13. Scottish Government, Land Rights and Responsibilities Statement, Principle 1.
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18. Andy Wightman has estimated that half of the privately-owned rural land is in the hands of 432 people (Andy Wightman, *The Poor Had No Lawyers*, Birlinn, 1sted, 2010). This has been described by Tom Devine as “the most concentrated pattern of land ownership in Europe” (Tom Devine, ‘*The Scottish Nation: 1700–2000*’, Penguin, 1999 at 457)
19. *Land Reform (Scotland) Act 2016 section 44*
20. *Ibid section 44 (a)*

21. CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant). *Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23)*. Available here: www.refworld.org/docid/47a7079a1.html
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