



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Land and Human Rights Advisory Forum

Note of Meeting – 11/01/22

General Discussion

Members discussed a number of issues relating to land and human rights, including:

- What needs to be considered when balancing property rights with economic, social, and cultural rights, and the right to a healthy environment within existing frameworks?
- How is the balance between such rights best struck when using, for example, a Public Interest Test intervention as proposed by the Commission?
 - How would consistency of approach operationally, and in the courts, be best supported?
- What needs to be done to ensure powers to enable the compulsory taking of property can be seen to serve a legitimate interest, be proportionate, and be lawful?
- Are there any unintended consequences likely to arise?

In summary consideration of these and other points made are noted here, in no particular order.

Recent UK Supreme Court ruling

Members considered the impact of a recent ruling on Bills intending to incorporate international treaty obligations into Scots Law, noting there was a degree of uncertainty after the UK Supreme Court decision and also that the ruling had been subjected to critique. There was related discussion about some of the implications and responses raised by legal commentators.

Members believed the rulings would not be a barrier to introducing mechanisms such as those proposed by the Scottish Land Commission (SLC), although focus on careful drafting will be required.

Public Interest

Members considered that although the “public interest” is often used quite freely, a lack of legal or detailed definition is appropriate, and that a flexible and evolving policy framework would be the best way to articulate the public interest. Members noted that this is the long-standing approach used in development planning, and that property owners, developers, public authorities, and courts are all comfortable with this approach.

Such an approach relies on a clear legal framework to set out the boundaries, but within the policy space created there is an ability to act flexibly and responsively in addressing

individual and unique circumstances in the public interest. Differing levels of legal weight can be set by determining what should sit within legislation, statutory guidance, and policy.

As such, members considered that “public interest” could act as a facilitator of reform, rather than a barrier to it.

International Perspectives

In considering the interaction between Human Rights and Sustainable Development Goals (SDGs), members noted that at a UN level they are very closely related, and that around 90% of SDGs have clear alignment with corresponding Human Rights. Members consider this linked approach embodies maximalist aspirations to fulfilment, and should be considered in the Scottish context.

Members noted that in other jurisdictions the appropriateness of interventions is measured against a broader “reasonableness test” rather than the “four tests of proportionality” and that there is ample room to question how closely Scottish judicial reasoning sticks to proportionality in the future.

Members noted that in jurisdictions with written constitutions, property rights are not necessarily, and sometimes rarely, the starting point for judicial inquiry. As such, a broader perspective and interpretation could be possible, with members noting that the lack of specific legislation is not necessarily a barrier to more holistic interpretations, nor does reforming interpretations of existing legislation require new legislation.

The role of Non-Ownership Rights

Members noted that a range of property rights exist between ownership and non-ownership (in particular under crofting tenure and through secure agricultural tenancies), and that better use of both existing frameworks, tools, and legislation, as well as this legal space, should be considered by the Commission and Scottish Government to further land reform.

Members considered this approach may lead to interesting questions around compensation, as the creation of such secure rights is set purely against rents.

In specifically considering crofting, members noted that crofting legislation came from a perspective of securing individual and community rights in land, and provides a valuable lesson in informing modern land reform perspectives.

SLC Proposals

Members recommended that the framework around the proposed Public Interest Test on Transfers (PIT) should consider specific reference to fulfilling economic, social, and cultural rights, as well as better reflect the SDGs and the Right to a Healthy Environment. This could allow the test to:

- ensure transfers have a net positive effect, supporting a maximalist approach to human rights fulfilment – going far beyond a minimum “do no harm” threshold,
- provide additional guidance and considerations for decision makers,
- make such rights justiciable.

Members considered potential unintended consequences from the operation of the PIT could include:

- impacts from UK fiscal policy – particularly where the Scottish Government has no means to ameliorate such changes,
- changing the investment environment – although members considered this a short term effect while mechanisms bed in,
- potential ambiguity in determining the public interest in some individual cases,
- transfers realising negative equity that otherwise would not have been the case.

Members reaffirmed that they do not consider there to be any significant barriers in principle to SLC's proposals being brought forward into legislation.

Perceptions of "Land Reform"

Members reflected that for many "land reform" still has strong rural, and particularly Highlands and Islands, connotations. Members felt that while the Commission and Scottish Government have been active in changing perceptions, more could be done to expand the discourse to lowland and urban Scotland, and that future legislation and policy needs to reflect the whole country in a holistic manner. To that end framing land reform as both a tool to deal with issues in the present, and also a framework for developing a sustainable future, would be helpful.

Members discussed, without coming to a consensus, whether there may be occasions when shifting focus from "who" owns land to "why" land is (or has to be) owned may help focus discourse on issues, and may be easier to communicate. This could in turn place all landowners on an equal footing in justifying ownership.

Members felt that land reform discourse, particularly in relation to forthcoming legislation and potential interventions, would benefit from a broader evidence base. In particular:

- links to the marine environment/seabed
- robust examination of the wide range of benefits achieved through land reform, and a move away from seeing reform as a zero-sum game
- taking an approach that joins up issues and charts holistic options for the future, moving away from the often perceived adversarial or competitive tone of debate
- building clear practical links with SDGs, as articulated through Scotland's National Performance framework.

In turn this should lead to a wider range of expertise and voices contributing to the evidence base, supporting development of more robust and holistic proposals.

Links

Members shared links to items of interest:

<https://ukconstitutionallaw.org/2021/10/15/mark-elliott-and-nicholas-kilford-devolution-in-the-supreme-court-legislative-supremacy-parliaments-unqualified-power-and-modifying-the-scotland-act/>

<https://www.stornowaygazette.co.uk/news/environment/pairc-estate-and-its-lessons-for-land-reform-3518604>

<https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2016/07/impact-diversity-ownership-scale-social-economic-environmental-outcomes/documents/00502355-pdf/00502355-pdf/govscot%3Adocument/00502355.pdf>

<https://www.bbc.co.uk/programmes/m00106b7/episodes/guide>