

**The Scottish Human Rights Commission**

**Consultation Submission – Future of Land Reform in Scotland**

**February 2015**

**Introduction**

The Scottish Human Rights Commission welcomes the opportunity to provide comments to the Scottish Government policy development on the Future of Land Reform in Scotland. The Commission welcomes the Government's general vision for land reform and recommends it develops a human rights-based approach to any future policy development. A human rights-based approach to land rights brings an additional perspective to the value of land, as an economic, social and cultural asset, and provides guidance as to how to determine the public interest as regards land reform and land use. This paper outlines why human rights need to be more widely understood as an impetus for, and not an inhibition on, land reform in Scotland.

A human rights framework provides a non-political and non-partisan mechanism within which a fair balance is struck between the legitimate property rights of the landowner and the public interest served by land reform. In fact, under human rights law there is no an “absolute right to property” belonging to landowners which can inhibit land reform. Nor is there an “absolute right to buy” by individuals or communities. Such an approach unhelpfully polarises the current debate and inhibits the possibility to understand land as a national asset. It is in this way that human rights should be understood.

This approach frames the UN Sustainable Development Goals, which are currently being drafted, and which need to also inform the present debate on land reform in Scotland as they identify land as key element for the post-2015 development agenda.

It is crucial to recognise that as a result of the Scotland Act 1998 the human rights framework operating in Scotland includes the European Convention on Human Rights (ECHR) but is not limited to it. It also includes the broader range of United Nations human rights treaties which are obliged to be observed and implemented in Scotland.[[1]](#endnote-1)

**The European Convention on Human Rights**

In terms of the ECHR the right to property is protected under Article 1 of its Protocol No. 1. It guarantees the right to property in following terms:

 ‘*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

 *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’*

While Article 1 of Protocol No. 1 protects individuals or legal persons from arbitrary interference by the State with their possessions, it also recognises the right of the State to control the use of or even deprive individuals or legal persons of property belonging to them. Accordingly, the right to protection of property is not an “absolute” right.

Furthermore, interference with this right can be allowed (only) if:

 it is prescribed by law,

 it is in the public interest, and

 it is necessary in a democratic society.

In the current context, the notion of “public interest” is necessarily an extensive one, normally left to the State to define subject to the above conditions. It is also noteworthy from these conditions that there is similarly not an ‘absolute right to buy’ under human rights law. Therefore, the ECHR neither provides a veto for landowners nor a trump card for land reformers to buy land. Using a human rights based approach would facilitate a more constructive dialogue between current land owning interests as they interact on this issue avoiding the perceived necessity of litigation.

**Legal Framework:** The UK is formally committed to a range of international human rights instruments in addition to the European Convention on Human Rights. <http://human-rights-convention.org/>

The**Scotland Act 1998** links competence of Scottish Government and Parliament with ECHR rights and European Law, including *the Charter*, and also provides for observance and implementation of UK’s international obligations, in particular: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

-International Covenant on Economic, Social and Cultural Rights (ICESCR)

-International Covenant on Civil and Political Rights (ICCPR)

-International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

-Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

-Convention on the Rights of the Child (CRC)

-Convention on the Rights of Persons with Disabilities (CRPD)

**The Broader Human Rights Framework**

By virtue of the Scotland Act 1998, paragraph 7(2) of Schedule 5 to the Scotland Act 1998, international obligations should be also observed and implemented within devolved areas by both the Scottish Government and Parliament. In relation to land there are a number of provisions that are relevant for the current policy development.

Land rights can be understood as either as a self-standing right for certain beneficiaries (indigenous and specific communities) or as an essential component for the realisation of other human rights, particularly economic social and cultural rights such as the right to an adequate standard of living (Article 11 ICESCR), including food and water, right to housing and the right to development.

Despite the absence of a clear reference to land rights within the main international human rights instruments, there has been an increased focus within international jurisprudence on land rights as a human rights issue.

The UN Committee on Economic, Social and Cultural Rights recognises the link between access to natural resources and the enjoyment of the right to an adequate standard of living particularly on relation to housing[[2]](#endnote-2) and food, as well as the special vulnerability of those who depend on natural resources, where it notes that:

 *‘[s]ocially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.’[[3]](#endnote-3)*

Under article 11, paragraph 2 (a), of the Covenant, States are committed to ‘*developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources’.*

As noted by the former UN Special Rapporteur on the right to food, “*this should be understood as encouraging agrarian reform that leads to more equitable distribution of land for the benefit of smallholders, both because of the inverse relationship between farm size and productivity and because small-scale farming (and more closely linking the farmer to the land) may lead to a more responsible use of the soil*.”[[4]](#endnote-4)

In addition, Article 2(1) of ICESCR sets out State parties' key obligations with regard to the implementation of the rights in the Covenant. According to that provision, States are under a duty to take steps to the *maximum of their available resources*, using *all appropriate* means, to achieve the full realisation of Covenant rights progressively.

The Committee is clear that "by all appropriate means" must be interpreted in the fullest sense possible. Measures which may be considered "appropriate" for the purposes of article 2 (1) include, but are not limited to legal, administrative, financial, educational and social measures.

States should allocate the maximum available resources (including land) to achieve the core obligations in the Covenant. Where States fail to do so, they must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

Land rights have been recognised as a central point within the issue of gender equality. The Convention on Elimination of Discrimination Against Women (CEDAW) makes specific mention of land rights in its Article 14. In inviting States Parties to take all appropriate measures to eliminate discrimination against women in rural areas, Article 14 calls on States to ensure that women

 *“have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes”*

These human rights provisions recognise the crucial importance of land, whereby land plays a socio-economic role which provides a degree of stability and security for individuals. The control and ownership of land by vulnerable groups also serves as an empowering resource and helps to balance social and economic relationships.

**Sustainable Development Goals**

It is important to recognise the broader framework within the sustainable development debate, particularly the impact of future Sustainable Development Goals in Scotland.

The United Nations is in the process of defining a post-2015 development agenda. This agenda will be launched at a Worldwide Summit in September 2015, which is the target date for realising the United Nations Millennium Goals. The new agenda originated from the Rio+20 outcome document: The Future We Want, which resolved to establish an inclusive and transparent inter-governmental process to establish a set of sustainable development goals (SDGs). It was further agreed that SDGs were to be action-oriented and universally applicable to all countries while taking into account different national realities, capacities and levels of development and respecting national policies and priorities.

The SDGs are currently being elaborated through extensive consultation process, the input of the Open Working Group (States representing the 5 global regions) and the UN Secretary-General input. The process of arriving at the post 2015 development agenda is Member State-led with broad participation from Major Groups and other civil society stakeholders, including NHRIs[[5]](#endnote-5). The United Nations plays a key role facilitating the global conversation and supporting Member States by providing evidence-based inputs, analytical thinking and field experience.

The current draft of the SDGs reiterate the significance of land for the development agenda. In particular, to end hunger, achieve food security and improved nutrition, and promote sustainable agriculture (Goal 2); to achieve gender equality and empowerment (Goal 5) and to protect, restore and promote sustainable use of ecosystems, forests and reverse biodiversity loss (Goal 15).

As the national plans for the SDGs are adopted and implemented next year, we need to examine the broader framework in order to use land as an asset that contributes to environmental objectives, meets the needs of all people in existing and future communities, and builds a strong and sustainable economy providing prosperity for all.

**In conclusion,** land reform raises a number of important human rights considerations which encompass a much broader set of issues than those covered by Article 1 of Protocol No. 1 of the ECHR. The Commission calls for the present debate on land reform to take advantage of the benefits provided by the human rights framework as outlined above. Such a framework serves to reduce unnecessary polarisation as well as recourse to litigation and provides a process whereby a fair balance is struck between the landowner and the public interest served by land reform. This will also enable Scotland to meet its responsibilities in terms of the pending UN Sustainable Development Goals.

The Commission would be very pleased to provide any clarification or other assistance on this issue.

SHRC.

1. Paragraph 7(2) of Schedule 5 to the Scotland Act 1998 [↑](#endnote-ref-1)
2. ICESCR General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant)

The Committee has notably focused on the situation of landless persons highlighting how the lack of access to land fundamentally impinges on the realisation of their right to adequate housing. [↑](#endnote-ref-2)
3. ICESCR General comment No. 12 The right to adequate food (art. 11 (1) of the Covenant) [↑](#endnote-ref-3)
4. A/57/356 and Olivier De Schutter, The Emerging Human Right to Land: International Community Law Review 12 (2010) 303–334. [↑](#endnote-ref-4)
5. See NHRIs position on post-2015 agenda here http://nhri.ohchr.org/EN/News/Documents/ICC%20Chairperson%20Letter%20on%20SDG.pdf [↑](#endnote-ref-5)