European Law Review

2016

Disputed property rights: Article 1 Protocol No.1 of the European Convention on Human Rights and the Land Reform (Scotland) Act 2016

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Subject: Real property . **Other related subjects:** Human rights.

Keywords: Land use; Proportionality; Protection of property; Public interest; Real property; Scotland;

Legislation:

Land Reform (Scotland) Act 2016 (c.18)

ECHR

*E.L. Rev. 900 Abstract

The right to property contained within art.1 Protocol No.1 of the European Convention on Human Rights *has proved to be one of the most controversial and persistently disputed rights within the Convention. As land law reform has grown to become one of the most provocative issues in contemporary Scotland, it is helping to serve as a useful normative lens to highlight the limits of the right to property and the inherent difficulties that become apparent when grappling with the jurisprudence emanating from Strasbourg. This article will outline and question the recently passed* Land Reform (Scotland) Act 2016 *. In doing so, this article examines the limits of property as a "right" and the theoretical basis of such disputes. This article will emphasise the often irreconcilable disputes that arise when considering property rights, notably between public and private interest in relation to land—in particular, the difficulties inherent in defining principles such as "property", "public interest" and "just compensation". It will conclude by highlighting the problems inherent in applying* art.1 Protocol No.1 *and ask whether recent land law reforms comply with the Scottish Government's obligation to respect Convention rights.*

Introduction

On 16 March 2016 the Scottish Parliament passed the Land Reform (Scotland) Act 2016 (LR(S)A 2016 or the 2016 Act). This heavily amended Act represents a significant step in the debate over who owns and manages rural Scotland, as land law reform has become one of the most controversial, yet richly symbolic, legislative enterprises of the reconstituted Scottish Parliament.[1] The 2016 Act is part of a wider concerted drive to move away from the traditional dualistic pragmatisms of private and state ownership towards a pluralistic pattern in which multiple stakeholders, operating in a variety of forms, take up a more proactive role. When implementing distributive land law reform measures the Scottish Government faces some substantial challenges most notably the reality that the prohibition of the arbitrary deprivation of property ***E.L. Rev. 901*** conveys an idea that is both rudimentary and virtually uniform in legal systems.[2] Accordingly, altering existing ownership regimes and other real rights by legislation is fraught with difficulty.[3]

The human right to protection from arbitrary dispossession is today embodied in the right to property contained in art.1 of Protocol 1 (A1P1) of the European Convention on Human Rights (ECHR) which states that "every natural or legal person is entitled to the peaceful enjoyment of his possessions".[4] As Gerald Fitzmaurice asserted in *Marckx v Belgium*,

"the chief, if not the sole object of A1P1 was to prevent the arbitrary seizure, confiscation, expropriation, extortions, or other capricious interferences with peaceful possession that many governments are—or frequently have been—all too prone to resort to." [5]

The question remains to be answered whether the 2016 Act satisfies the requirements of justified deprivation under the tests outlined by the European Court of Human Rights in Strasbourg (ECtHR or the Strasbourg Court).

This article will first give a brief background to land law reform in Scotland and will then proceed to consider the vital questions that remain largely unanswered by the Strasbourg jurisprudence. This article will have to consider whether property is a human right, how interference with property rights is established, the lawfulness of such interference, its wider public benefit, and whether the LR(S)A 2016 can be considered a proportionate interference with property rights. This article will conclude by asking what the future holds for property rights in Scotland and ask whether the 2016 Act will be open to challenge on human rights grounds.

While land reform often raises multiple human rights concerns, including most notably art.8, but also art.6 and art.14 of the ECHR, this article will primarily focus on A1P1.[6] The 2016 Act has also highlighted concerns about rights emanating from a number of other international instruments such as the International Covenant on Economic, Social and Cultural Rights.[7] It should be remembered that these only have a very limited ability to inform policy considerations, unlike the ECHR, which is a fundamental part of Scots law.[8]

Application

Originally, the ECHR was binding on the UK simply as an international treaty.[9] This was transformed by the Human Rights Act 1998 (HRA), which came into force from 2000. The HRA states that primary and subordinate legislation must be given effect to in a way that is compatible with Convention rights.[10] Scotland as a distinct legal system has implemented the ECHR slightly differently from the rest of the ***E.L. Rev. 902*** UK through the Scotland Act 1998 (SA 1998).[11] Under the SA 1998, the Scottish Parliament is unable to make laws which are incompatible with the ECHR.[12]

The Land Reform (Scotland) Act 2016

The 2016 Act is part of a wider debate often referred to as the "Scottish land question".[13] This embodies the many questions asked about the legitimacy of the high concentration of land ownership in Scotland and the influences and privileges this has conveyed down the centuries.[14] Advocates of land reform argue that the inequalities of the current system are at the heart of wider social and economic injustices in rural Scotland.[15] Depending on which sources you choose, the 2016 Act is either a radical assault on property rights or will do little to resolve the grievances of rural Scotland.[16]

The LR(S)A 2016 builds upon the Land Reform (Scotland) Act 2003 (LR(S)A 2003 or the 2003 Act), which emerged from the recommendations made by Lord Sewel and the Land Reform Policy Group in 1999.[17] The 2016 Act was initially published on 23 June 2015 and has incorporated the findings of the Land Reform Review Group and the Agricultural Holdings Legislation Review Group.[18] Despite these calls for more radical reforms, the Bill that was passed on March 2016 was somewhat watered down.[19] About half of the Act, Pts 1 to 9, relates to land reform and the other half, contained in the longer Pt 10, concerns farm tenancies, following the Agricultural Holdings Legislation Review.

The Act establishes the Scottish Land Commission (the Commission),[20] which has a number of powers, including the power to acquire and dispose of land.[21] Its members, which include five commissioners and one tenant farming commissioner, are required to come from a variety of backgrounds and must have skills in a number of areas most notably for this paper, including human rights.[22] The ultimate role played by the Commission will be determined by the composition of its members and what comes from the ***E.L. Rev. 903*** *Land Rights and Responsibilities Statement*,[23] the strategic plan made under s.6,[24] and the programme of work prepared under s.7.[25]

Part 5 of the 2016 Act builds upon the community right to buy contained within Pt 2 of the LR(S)A 2003 and the Community Empowerment (Scotland) Act 2015 by introducing the "right to buy land to further sustainable development".[26] Part 5 allows communities, defined by postcode unit,[27] in the form of a company limited by guarantee[28] to register in the New Register and to apply to the Scottish ministers for consent to buy land for the proposed purpose of "furthering sustainable development".[29] It adds the ability for communities to apply for ministerial approval to acquire "neglected" or "abandoned" land against the consent of the owner.[30]

The ministers must not consent to the right to buy unless they are satisfied that[31] the transfer of land is likely to further the achievement of sustainable development in relation to the land, the transfer of land is in the public interest, the transfer of land is expected to result in significant benefit to the relevant community, is the only practicable, or the most practicable, way of achieving that significant

benefit, and is not anticipated to result in harm to that community.[32] When determining significant benefit to the community, the ministers must consider economic development, regeneration, public health, social wellbeing, and environmental wellbeing.[33]

The Act significantly strengthens the rights of tenant farmers, with Pt 10 altering the framework surrounding the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003.[34] Furthermore, the Act removes business rates exemptions for shooting and deerstalking estates[35] and attempts to ensure greater transparency and accountability for landowners in Scotland.[36] The right of responsible access contained within Pt 1 of the LR(S)A 2003 has also been slightly tweaked within Pt 9 of the 2016 Act.[37]

European human rights law and the right to property

The right to property within European human rights law is contained within A1P1, which states that:

"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. ***E.L. Rev. 904*** " [38]

This right was confirmed in the case of *Marckx v Belgium*, in which the Court stated that by recognising that everyone has the right to the peaceful enjoyment of his possessions, art.1 is in substance guaranteeing the right of property.[39] In *Oneryildiz v Turkey* the ECtHR went further and asserted that,

"the Court reiterates the key importance of the right enshrined … and considers that real and effective exercise of that right does not depend merely on the State's duty not to interfere, but may require positive measure of protection." [40]

The complex political backdrop which informed the drafting of A1P1 resulted in a form of wording that suffers from certain ambiguities. Although this uncertainty was recognised by the drafters, the intention seemed to be that clarity would properly be obtained through jurisprudence.[41] George Gretton draws attention to the problem that:

"To the private lawyer, the text of the ECHR comes as a shock. It is not legislation of any recognisable form, but rather a set of statements of certain liberal political ideas, of the sort one might expect to see in an election manifesto or in a letter to the editor. General principles claiming for themselves the status of law are unsettling enough, but one might at least hope that they would have the virtues which general principles can have: a philosophical depth, an inner coherence of conception, an elegance of expression which seduces assent, a fertility in consequences, a rootedness in tradition, a rhetorical aspiration to a coming golden age. A text with such virtues might thaw the frozen heart. Alas, such virtues are not easy to find in the ECHR." [42]

This confusion is exacerbated by the truism that what constitutes valid deprivation remains far more than a legal question but also incorporates economic, political, and social questions.[43] The result is that nowhere is the debate over land law reform in Scotland more fraught and misunderstood than regarding human rights implications.[44] However, the confusion that currently exists may emanate as much from Strasbourg as from Holyrood; as Tom Allen highlights, the development of general principles has not been the central goal of the European Court.[45]

Introduction to property theory

It is important to examine *property*, and its status as a *right* as the Scottish land reform debate is serving as a useful lens through which to consider these fundamental questions in relation to A1P1. The theoretical debate is the very foundation upon which all questions relating to property rest. While theory as such will not be explicitly articulated, it is always near the foundation of the disagreement.[46] Prior studies on land reform in Scotland have avoided opening up the theoretical debate in any great detail.[47] In the United ***E.L. Rev. 905*** Kingdom as a whole property law is often considered a dry practical area of law devoid of theoretical abstraction.[48] This is most likely because the foundation of property as a "right" remains fraught within a political and historical maze of competing schools of

thought.[49] As Joseph Singer emphasises, "when we move from identifying owners to defining the rights that go along with ownership, we move from simplicity to complexity".[50] Despite these difficulties, choices about property entitlements in relation to land ownership in Scotland are unavoidable, and, notwithstanding the incommensurability of values, rational choice remains possible through reasoned deliberation,[51] as an answer may only be sought within economic, moral, political, and legal theory.[52] Perfect theoretical coherence, as David Howarth stresses, "is not a necessary condition of effectiveness, in law".[53] However, it must still be shown to serve as a lens throughout which to analyse property relations.

This article is not attempting a complete study of the history of property rights; for a general insight readers should consult, *Richard Schlatter's Private Property: History of an Idea*.[54] For a detailed analysis of property theory readers should refer to *James Harris, Property and Justice*,[55] and for a comprehensive and succinct account *An Introduction to Property Theory by Gregory Alexander and Eduardo Peñalver*.[56]

The basis of property as a human right

Before proceeding, it is important to note that whether the right to property should be considered a human right remains controversial.[57] As Laws LJ held in the English case of *Chesterfield*,

"to some ears it may sound a little eccentric to describe, for example, Kwik Save's ownership of their shop in Stockton as a human right; but it is enough that ownership of land is recognised as a constitutional right. ***E.L. Rev. 906*** " [58]

Perhaps what leaves certain critics feeling uneasy is that, unlike absolute human rights such as the right to life or the prohibition of torture, which can never be qualified by states, the right to property is a "qualified right".[59] The concept of property as a "right" implies the importation of "trespassory rules"[60] or "exclusionary" principles[61] and therefore the denial of this right over that particular resource to others. As Harris highlights, "murder, assault, and rape are always moral wrongs. Theft is morally wrong only when this justice threshold is attained".[62] Despite this apparent hierarchy, Laurent Sermet is quick to note that,

"Just because the Convention bodies are cautious in the protection they offer … the central importance of those rights in a democratic society should not be forgotten." [63]

The *travaux préparatoires* of A1P1 highlight the difficulty of reaching a consensus, in a politically divided world, about whether property is a human right.[64] Britain's Labour representative Nally argued that "the basis of Europe's fight for survival is a struggle for the subordination of private property to the needs of the community".[65] In contrast, the French representative Bastid passionately argued for the inclusion of a property right as:

"Property is an extension of the man, and man cannot feel safe if he is exposed to arbitrary dispossession … I do not know if there is any right more ancient or more firmly established than the right to own property. In all civilised nations, there are rules to protect individuals against arbitrary confiscation." [66]

However, the result of such debates was a delay and the later inclusion of the right to property in the additional protocols, in a form that represented a compromise between competing ideals.[67]

While property remains a nebulous and often confused concept, its inclusion as a human right remains predicated on two main facets. Property rights have a facilitative function that manifests itself primarily through the utility of property, principally economic stability. Additionally, property rights are the manifestation of a conception of liberty and justice.[68] This ideal found its way into the French Declaration ***E.L. Rev. 907*** of the Rights of Man,[69] the Constitution of the US,[70] the Universal Declaration of Human Rights[71] and multiple other national and international human rights frameworks.[72]

The importance of property as a constitutional right is perhaps most prominent in economic theory. There is a well-documented link between institutions of secure property rights and economic development.[73] To Adam Smith, "we may observe that not only property but all other exclusive rights are real rights".[74] Property served as the foundation of exchange and as a vindication of the owner's legitimate expectations.[75] A major lesson of modern development economics is that secure property rights are an essential building block for long-term growth.[76] To Carol Rose,

"the lesson is clear: we are better off with secure property rights, which induce us to invest, trade, and gently monitor each other in ways that make us all better off." [77]

The economic benefits of stable property rights protection continues to be affirmed by modern legal and economic research.[78]

Property as a keystone right

While it is important to recognise the potential for criticism, the importance of property rights should not be underestimated.[79] Often cited is Locke's conception of property as central to life, liberty and property,[80] or the work of Hegel, to whom the right to property was essential to enable people to operate as autonomous and unique beings,[81] enabling the development of individual personality.[82] This has developed as part of a deeper consensus about the repugnance of lawless seizure of property.[83] It is now embodied in the modern view that respect for human rights requires that certain basic rights of individuals should not be capable ***E.L. Rev. 908*** in any circumstances of being overridden by the majority, even if they think that the public interest requires so.[84] Kevin Gray highlights that:

"One of the more ancient and majestic themes of global jurisprudence that private necessity can never demand that the lands of one individual be taken peremptorily and given to another individual exclusively for his or her personal benefit or profit. Such assertions of private eminent domain, even if accompanied by compensation, are anathema in all legal traditions. Were it otherwise, regimes of property would simply dissolve into the chaos of the commons, in which all resources are constantly up for grabs and in which the process of trading with assets is neither meaningful nor necessary." [85]

The qualified nature of property rights

It is important to remember that the right to property in A1P1 is a qualified right. Some scholars continue to misquote William Blackstone's conception of property as ones "sole and despotic dominion" to selectively forward an absolute right to property or a right that is entirely defined by its ability to exclude.[86] Such individualist conceptions should be discounted for perpetuating a "myth" absolute property rights.[87] While emphasising the importance of protecting individual property rights, the Institutional writer Erskine wrote that such rights, "must give way to the public necessity or utility." [88] Modern capitalism has become synonymous with redistributive state interventions coexisting with a background market economy,[89] as society could not function without certain restrictions and has come to recognise property rights as limited.[90] However, the individual entitlements of the owner remain key to our conception of property. As Allen notes,

"it is clear that most lawyers recognise the *twin ideas* that the sovereign has the power to take or regulate private property and that the individual should have some protection from the excessive use of this power." [91]

Property in thin air

Having established the importance of the right to property it is important to outline briefly what is meant by "property". As is highlighted above, this is an arduous task that often results in our conceptions of property vanishing into "thin air".[92] Despite these limitations as to the theoretical basis, it remains crucial ***E.L. Rev. 909*** to our understanding. The dominant theory of property in philosophy is that property is a "bundle of rights"[93] or a "bag of tools"[94] that owners have against the world. Each right is a "stick" in the "bundle", and together they form the total number of rights pertaining to that property. This developed out of the works of Wesley Hohfeld, who wrote two papers on legal reasoning published in the *Yale Law Journal* in 1913 and 1917[95]; and Anthony Honoré, whose paper "Ownership" combined existing theories with the conception of 11 "incidents of ownership".[96]

The bundle metaphor highlights that property involves not just "'one man' and his 'external things', but multiple parties tied together in a relationship that is social as well as legal".[97] As James Penner illustrates,

"there are any number of different kinds of rights, liberties, privileges, and so on in the bundle, and each of these substantial rights are rights in rem, thus rights associated with a myriad of 'companion' rights." [98]

Gregory Alexander notes that:

"The metaphor of property as a ‘bundle of rights’… was intended to signify three insights. First, it indicates that ownership is a complex legal relationship. Second, the metaphor illuminates the fact that the constitutive elements of that relationship are legal rights. Third, and most important, it underscores the social character of that relationship." [99]

However, in accepting the primacy of property rights, it must be highlighted that the bundle of rights metaphor entails far more than merely the rights of owners but extends in part to a social obligation on the owner to promote human flourishing.[100] It was considered radical in 1781 when William Ogilvie wrote that "the increase of public happiness, is the true primary objective which ought to claim the attention of every state".[101] Today this has developed as accepted practice and to some is the "moral foundation of private property".[102] Reflecting on the theoretical basis of A1P1, Maya Sigron concludes:

"It can be said that A1P1 reflects the philosophy of Locke and Hegel in that it understands the right to property as a fundamental right. Justifications for this classification are its impact on freedom, ***E.L. Rev. 910*** independence, and the development of personality. In addition to this individual function, A1P1 has a social function, which philosophers emphasised years before." [103]

The right to property contained within A1P1 is subject to limitations: first, from the applicability doctrines; secondly, from the specific limits in the second and third sentence; and thirdly from the general limits arising from the doctrines of legality and proportionality.[104] Each raises complex individual issues but they remain inherently related, as will become apparent in this article. The right to property remains a fundamental right that must be respected by the Scottish Government and as a result there exists a legal and moral obligation to respect the rights contained with A1P1.

The Land Reform (Scotland) Act 2016 and Article 1 Protocol No.1

This article has outlined the LR(S)A 2016 and has considered the importance, but complex nature, of property as a human right. It will proceed to examine the application of A1P1 to the LR(S)A 2016 to ask whether the Act complies with the Scottish Government’s ECHR obligations. When it comes to lawful deprivation there can be adduced from the existing jurisprudence a five-point test[105]:

1. Does the applicant hold possession?

2. Has an interference with A1P1 taken place? This involves considering the three rules set out in *Sporrong & Lönnroth v Sweden*:

   (a) General interference with the peaceful enjoyment of possessions;

   (b) Deprivation of possessions; and

   (c) Control of the use of those possessions.

   Does the state action fall within one of these three categories?

3. Was the action of the state lawful within the meaning of the article?

4. Did the action of the state pursue a legitimate aim in the public or general interest?

5. Did the action of the state strike a fair balance between the needs of the community and the burden placed on the individual applicant? This is also expressed by asking simply, was the interference proportionate?

If rules one and two are satisfied, then the applicant is a victim within the meaning of A1P1. The Court then turns to questions three, four and five to determine the validity of the interference.

Establishing victim status

Natural or legal persons who constitute a "victim" may instigate a challenge or rely on a Convention right in proceedings. This means that applicants have to show that they have been or are likely to be affected directly by the breach of the Convention.[106] To establish a violation of their property rights, applicants challenging the provisions contained within the LR(S)A 2016 will have to show that they hold "possession" and that they have suffered "interference". ***E.L. Rev. 911***

Step 1—establishing possession

A1P1 was intended to concern the right to "property". The test accepted by the Court is that the applicant must hold an economic interest or a legitimate expectation of acquiring an interest.[107] Applications relating to the 2016 Act will most probably not find the requirement of establishing "possession" particularly cumbersome and this will therefore not be considered in any more detail.

Step 2—establishing interference within the three rules of *Sporrong & Lönnroth v Sweden*

Once there is a finding that the applicant holds possession of land, property or related rights in Scotland, the Court must then turn to determining whether there has been "interference" with that possession.[108] The relationship between the different elements of A1P1 was somewhat clarified in *Sporrong & Lönnroth v Sweden* when the Court stated:

"The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the paragraph. The second rule covers deprivation of possession and subject it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary to the purpose; it is contained in the second paragraph." [109]

A state action which falls within one of these three rules constitutes interference.[110] The order given in *Sporrong* is slightly misleading, as before examining the first rule the Court must concern itself with questions of actual interference within the second and third rules. This does not necessarily mean that the first rule is of lesser importance, as if the facts do not show deprivation there remains the possibility that measures may constitute an interference with the peaceful enjoyment of property.[111]

Step 2—Sporrong rule 1, interference with the peaceful enjoyment of property

A1P1 protects against interference with the enjoyment of possession, and thus a broad range of state activities, which interferes with any of the normal consequences arising out of ownership or

possession, will be recognised as giving rise to an issue under the guarantee.[112] The Court has accepted that limitations placed on the right to dispose of possession[113] and legal impediments to peaceful enjoyment constitute violations of A1P1.[114]

In relation to the 2016 and the 2003 Acts, whether the mechanisms for community and crofters' rights to buy restricting an owner's ability to sell on the free market and only to registered communities would constitute an interference with peaceful enjoyment remains unanswered. In *Erkner v Austria* a permit that "was an initial step in a procedure leading to deprivation of possession"[115] constituted an interference with enjoyment. The Court appears to have placed considerable importance on the interference being a ***E.L. Rev. 912*** preliminary step that would ultimately culminate in a deprivation of the land.[116] Whether the measures in the Act such as the right to buy under Pt 5 [117] would constitute an interference with rule 1 of the *Sporrong* case remains a possibility.

Step 2—Sporrong rule 2, deprivation of property

The Court in *James v United Kingdom* affirmed that the deprivation of property is the most radical form of interference with property rights.[118] The ECtHR has taken a broad definition of deprivation as including expropriation and other loss of rights which flow from the legal consequences of property.[119] The deprivation must be definitive and involve an irrevocable expropriation or transfer of property rights.[120] In particular relation to the Act, the Court has ruled that this will include property, particularly land, taken under compulsory powers.[121]

Further, the Court ruled in *Papamichlopoulos v Greece* that, although ownership had not passed, the inability of the owner to dispose of his property had resulted in a de facto expropriation,[122] as had the imposition of statutory powers relating to the use of land.[123] However, whether the preliminary restrictions imposed by Pt 5 of the Act [124] and existing measures under Pts 2 and 3 of the 2003 Act [125] would constitute a de facto deprivation is once again unknown, and it is more likely that they would establish an interference with the peaceful enjoyment of possession within rule 1 outlined above. The importance of categorisation is that if an applicant can establish actual deprivation, it is generally accepted by the Court that deprivation should in almost all circumstances require compensation.[126] All measures transferring property contained within the Act will, therefore, require compensation, and even measures short of actual deprivation that constitute the "preliminary steps" may entitle applicants to compensation.

Step 2—Sporrong rule 3, interference with the control or use of property

States are permitted under A1P1 to pass measures to ensure the utilisation of property by the general interest, intended to "make the distinction between arbitrary confiscation and the social conception of property which allows it to be used by regulation legislation for the public good".[127] As Allen concludes, "the idea of 'control of use' therefore seems to apply to any control falling short of a deprivation of possessions".[128] This could potentially include limitations on the ability to sell on the free market under Pt 5 of the Act as well as other restrictive measures short of actual deprivation. However, the case law is ***E.L. Rev. 913*** so confused on this issue that it is impossible to do more than speculate that such measures could potentially satisfy the requirements of rules 1 and 2.

Step 2—establishing victim status under the Land Reform (Scotland) Act 2016

The Scottish Government faces the problem highlighted by Allen that "since all interferences are subject to the same test of proportionality, these distinctions no longer perform an important function".[129] Despite this, the Court appears unwilling to ignore the three-rule structure in *Sporrong*, although it is hard in practice to see what benefit following this structure has. When considering applications, national and international courts will continue to follow the somewhat confused jurisprudence. Measures that transfer property rights under the 2016 Act will clearly constitute interference under the *Sporrong* criteria, and other mechanisms short of actual deprivation that affect property rights have the potential to satisfy all three rules, meaning that applicants may not necessarily have to show actual deprivation of land to successfully challenge the 2016 Act. This leaves the Scottish Government in the uncomfortable position of potentially facing a very large number of applications.

Establishing the validity of a deprivation

Once possession is established and one or more of the three rules in *Sporrong* have been engaged, A1P1 will have been prima facie violated.[130] As noted above, the human right to property is a qualified right and can be deprived by states under certain circumstances. Accepting the limited nature of property rights, the second sentence of A1P1 reads:

"The proceeding 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."

It must therefore consider whether the LR(S)A 2016 meets the test of legal certainty, can be justified in the general or public interest, and whether there is a reasonable degree of proportionality between the means selected and the ends sought to be achieved. This is necessary to ensure that a fair balance between individual and collective interests has been maintained.[131] It is important to note that unless interference affects the rights of non-nationals, the primary focus will usually be Scots rather than international law.[132]

Step 3—the lawfulness requirement

The second sentence of A1P1 states that deprivation must be "subject to the conditions provided for by law", and proceeds to provide that states are permitted to enforce "such laws" as it deems necessary.[133] In practice, the Strasbourg Court is unlikely to question the determination of a national court unless it has been applied "manifestly erroneously or so as to reach arbitrary conclusions".[134] In *Špa#ek sro. v Czech Republic* the court said that "it is not for the Court to express a view on the appropriateness of the methods chosen by the legislature of a Contracting State".[135] Put succinctly, the ECtHR should not act as a court ***E.L. Rev. 914*** of final instance. It is not its function to deal with errors of fact or law allegedly committed by a national court.

However, national authorities are not given unlimited discretion. The law must exhibit certain formal qualities. This is consistent with the rule that administrative discretion is never unfettered.[136] The Court in *Carbonara and Ventura v Italy* highlighted that "the requirement of lawfulness means that the rules of domestic law must be sufficiently accessible, precise and foreseeable".[137] In *James* the Court stated that this related to the quality of the law, requiring it to be compatible with the rule of law.[138] However, the wording of the article is once again peculiar, as Gretton notes:

"This is not easy to understand, and indeed, may mean nothing. If the reference is to the ‘law’ of the ECHR it is superfluous. If the reference is to the ‘law’ of the state concerned, it borders on pointless, for what need is there to protect rights, which are anyway protected by internal law." [139]

Despite this, the courts have attempted to develop a set of principles stating that the lawfulness test implies qualitative requirements, notably those of accessibility[140] and foreseeability.[141]

The lawfulness requirement and sustainable development

The 2016 Act builds upon the 2003 Act and the principle that communities may acquire land to promote "sustainable development".[142] Part 2 of the 2016 Act also appears to give power to the Scottish Land Commission to intervene where a landowner is posing a barrier to "sustainable development",[143] and Pt 5 creates the community right to buy for sustainable development. The problem is that the term "sustainable development" has come in for persistent criticism owing to its opaque nature.[144] As already noted, the lawfulness requirement calls for a certain degree of precision. The use of the term "sustainable development" has come with only very limited guidance of its actual meaning. This is deeply problematic and could potentially leave an unacceptable level of insecurity surrounding perhaps the most important provisions.[145] The 2016 Act states:

"s.47

(2)

(a)

the transfer of land is likely to further the achievements of sustainable development in relation to land

(b)

the transfer of land is in the public interest

(c)

(i)

it is likely to result in significant benefit to the relevant community

(ii)

it is the only practicable way of achieving that significant benefit

(d)

not granting consent to the transfer of land is likely to result in significant harm to that community. ***E.L. Rev. 915*** "

Sustainable development is not a particularly novel or new term. It can be found in numerous national and international legal instruments. Often cited to outline sustainable development is the 1987 Bruntland Report, which stated that sustainable development was to ensure "that we meet the needs of the present without compromising the ability of future generations to meet their own needs".[146] Despite sustainable development becoming the main subject of thousands of meetings, policy statements and legal documents, considerable confusion remains as to what is meant by the term. As Andrea Ross notes:

"There seems to be very little understanding or coherent thought about what exactly sustainable development means and its role in governance. Confusion remains as to whether sustainable development is simply a matter for environmental policy makers, whether it is the same as climate change, and to what extent it is compatible with the pursuit of economic growth." [147]

Ross highlights that the three main facets of sustainable development—ecological, economic and social—are difficult to reconcile, and when attempts are made to combine them into one single concept, it is "left pointing in multiple directions without any central meaning"[148]:

"It seems unlikely that there exists one single measure of sustainable development which is capable of capturing that that is meant by ‘sustainability’. Rather, alternative indicators exist, each of which addresses a number of different understandings of what is the most important if development is to be sustainable. In other words, alternative definitions of sustainable development lead naturally to alternative ideal measures, although these measures vary in the extent to which they are empirically observable." [149]

One of the biggest concerns has to be that there is almost no guidance on the weight to be allocated to differing factors. The Scottish Government appears to overemphasise socio-political considerations to the detriment of economic and particularly environmental factors, which remain completely ignored. As Principle 4 of the Rio Declaration states, "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[150] This has resulted in a definition of sustainable development put forward by Holyrood that better resembles Pearce’s notion

of "weak sustainability" in which there is no place for the environment.[151]

The Scottish Government and courts—in relation to land reform—appear to have chosen to avoid making any definition, but instead have focused solely on social-political considerations to the detriment of building any coherence in the law. As the Strasbourg Court stated in *Malone v United Kingdom*,

"the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give individuals adequate protection against arbitrary interference." [152]

However, this does not mean that the term completely lacks legal force. As Klaus Bosselman notes, ***E.L. Rev. 916***

"while a legal system cannot on its own initiate and monitor social change, it can formulate some parameters for the direction and extent of social change." [153]

For example, sustainable development has been accepted as a legitimate consideration in English planning decisions[154] and notable within the *2005 Framework for Sustainable Development* published jointly by all the administrations in the UK.[155] In *Pairc Crofters Ltd v Scottish Ministers*, the Inner House ruled in a highly deferential manner that,

"the expression sustainable development is in common parlance in matters relating to the use and development of land. It is an expression that would be readily understood by the legislators, the Ministers and the Land Court." [156]

To some this has solved the issue and the 2016 Act can proceed without a workable definition of sustainable development.[157] Despite this, it cannot be ignored that this fundamental part of the LR(S)A 2016 has not been drafted with sufficient clarity, nor it is likely that a precise definition can be found.

The lawfulness requirement and community

The Scottish Government appears intent to focus its land reform programme on community ownership and engagement.[158] How to define "community" is deeply problematic as it is one of the most commonly used terms in development circles. It has been acknowledged as being highly elusive, with a multitude of differing interpretations.[159] As Thembela Kepe noted in relation to land reform in South Africa,

"defining the boundaries of 'local communities', and thus who should be included or excluded as beneficiaries of land reform, is highly problematic. As a result, the implementation of policies targeting 'communities' is met with numerous challenges." [160]

The Scottish Government has attempted to tackle this problem by offering a rather peculiar definition of community:

"Section 42 —

(9)

A community— ***E.L. Rev. 917***

(a)

is defined for the purposes of subsection (2), (3), (4) or (5) by reference to a postcode unit or postcode units or a type of area as the Scottish Ministers may by regulations specify (or both such unit and type of area), and

(b)

comprises the persons from time to time—

(i)

resident in that postcode unit or in one of those postcode units or in that specified type of area, and

(ii)

entitled to vote, at a local government election, in a polling district which includes that postcode unit or those postcode units or that specified type of area (or part of it or them) …

(11)

—postcode unit means an area in relation to which a single postcode is used to facilitate the identification of postal service delivery points within the area …."

[161]

Whether the use of a postcode in this instance is an adequate definition of "community" is highly questionable. This uncertainty is exacerbated as the 2016 Act fails to adequately explain the difference between community benefit and the public interest.[162] As Jill Robbie highlighted in her written evidence to the Scottish Parliament:

"The definition of community by reference to postcode in section 42(9) is unsatisfactory. I understand that this definition of community is consistent with that used in the Land Reform (Scotland) Act 2003 and the Community Empowerment (Scotland) Act 2015. However, postcode units are primarily designed to facilitate the delivery of mail, they do not, and cannot, have regard to the diverse factors such as shared culture, common language or interest in a particular cause, which could determine whether a group of people constitute a community." [163]

The result is that questions will remain over the Act's definition of community and whether it offers a workable definition that would satisfy the lawfulness requirement set by the ECtHR.[164]

General principles of international law

Potential applicants under A1P1 will have to consider "the general principles of international law". The Strasbourg Court has consistently held that the principles of international law referred to in A1P1 do not apply where a state has taken property from its own nationals.[165] In the *Lithgow* judgment, it was opined that,

"although a taking of property must always be affected in the public interest, different considerations may apply to nationals and non-nationals and there may well be a legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals." [166]

This may be applicable to the large number of foreign nationals who own land in Scotland, although just how this will influence applications remains confused within conflicting Strasbourg jurisprudence. [167]

The non-application of international law to nationals has been roundly criticised. Laurent Sermet illustrates that such principles, ***E.L. Rev. 918***

"conflict with the literal meaning Article 1 of the Convention, which refers to 'everyone'. Secondly, it stands in the way of systematic interpretation, since it has no objective or reasonable basis. Thirdly, it clashes with a teleological interpretation of the Convention, which sees it as basically aiming, in the long term, to eliminate all distinctions between nationals and non-nationals." [168]

In *James*, the Strasbourg Court held that the lawfulness requirement concerning A1P1 only conferred

domestic law standards and not an international standard of lawfulness on applications by nationals asserting that international law only applied to non-nationals.[169] However, in the *Gasus* case the Court put forward as one of its reasons for refusing to protect the German company that in agreeing to deliver goods to a Dutch company it had implicitly agreed to accept Dutch law, including appropriative aspects of Dutch law. The result was that the international law standards of lawfulness were not applicable to a non-national.[170]

The peculiar conclusion that can be drawn from this is that the international law standards of lawfulness do not apply to nationals and also do not apply to those who are not nationals. Under such reasoning, foreign landowners in Scotland, by owning land in Scotland, have implicitly agreed to Scots law, including the 2016 Act. This leaves the Scottish Government in the uncomfortable position of not being completely confident what law is applicable when determining expropriations under the 2016 Act. This is, however, not the fault of Holyrood but Strasbourg.

Step 4—is deprivation in the public/general interest

The public and general interest remains particularly ambiguous and difficult to define. While used interchangeably,[171] neither of these expressions has a fixed or clear meaning within Scots law. The Scottish judiciary have failed to rectify this as they have avoided making any direct pronouncements on its meaning.[172] The problem is exacerbated in relation to land reform as such questions highlight the conflicting, and often irreconcilable, pragmatisms of private and community interest in property.

In *Sporrong* the ECtHR stated that a balance must be struck between the "demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[173] The Grand Chamber held that,

"a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies to allow them to strike a fair balance between the various conflicting interests at stake." [174]

The ECtHR emphasised that national authorities are not debarred from making decisions without "comprehensive and measurable data" on "each and every aspect of the matter to be decided".[175] This is significant for the 2016 Act as a considerable amount of criticism concerns the economic viability of reform, which to many means that it is not in the public interest. This cannot be ignored, as the Strasbourg ***E.L. Rev. 919*** Court in *Lallement v France* found there to be an interference in which the division of a farm resulted in its becoming less profitable as a whole.[176]

A number of very central concerns remained unanswered in relation to whether the 2016 Act and the wider land reform movement in Scotland are really in the public interest. It has to be asked whether government spending, which one study by the Chartered Surveyors Smith Gore suggested could be more than £600 million,[177] in order to give a handful of communities the ability to make community purchases, is a justifiable use of public funds. It also remains to be seen if community ownership in most instances can even be economically successful. Notably the Isle of Gigha Heritage Trust, which undertook one of the first community buy-outs in Scotland, has been reported to be over £2.7 million in debt.[178] While these concerns are very real, going into any great detail for present purposes would be a futile task as the margin of appreciation means that whether the 2016 Act is in the public interest may not necessarily even have to be answered by the Scottish Government when facing potential applications.[179]

Despite this, the Scottish jurisprudence remains inconclusive. In *Salvesen v Riddell* the Supreme Court of the UK ruled that the uncompensated imposition of a heavily regulated agricultural tenancy under the Agricultural Holdings (Scotland) Act 2003 constituted a violation of property rights.[180] In this instance, Lord Hope ruled that "It is hard not to see this provision as having been designed to penalise landlords", and therefore it was "entirely arbitrary".[181] However, the Court of Session took a different—and highly deferential—approach in *Pairc Crofters v Scottish Ministers* , asserting that "the public interest is a concept that is to be found throughout the statute book. There is no need for a general definition of it".[182]

In practice it is almost impossible to envisage the Strasbourg Court ruling that the 2016 Act is contrary to the public or general interest. There is not a single case in which the Strasbourg Court has ruled that a state has acted outside of the public interest. The Court appears determined to maintain this record. In *Former King of Greece v Greece* the Court held that interference did serve a legitimate aim, but surprisingly just not the aims put forward by Greece.[183] In *James* the Court stated that states

should be given a wide margin of appreciation when striking this balance, "because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is" in the public interest.[184] The anxiety shown by various courts to outline a formal definition of public interest is problematic although to a certain extent unavoidable. Reed and Murdoch note that:

"A wide margin of appreciation is appropriate in applying these tests, since what an applicant is likely to be challenging in effect is the social or economic policy behind a decision affecting his property rights. The elimination of social injustice is properly a responsibility of the legislature; and in any case policy-making of this nature is not amenable to international judicial scrutiny." [185]

The Scottish Government and courts considering A1P1 applications have an extremely wide margin of appreciation in relation to the 2016 Act. Allen concludes that the effect is to make the degree of scrutiny of the legitimacy and rationality of an interference so low that it amounts to little more than a test of good ***E.L. Rev. 920*** faith, which is met by simple assertions on the part of the government.[186] All that appears to be required is that the Scottish Government believes its actions to be "necessary".[187] In relation to recent land reform in Scotland the Court will, under almost all circumstances be willing to accept the Scottish Government's justifications as the Strasbourg Court fears accusations of meddling in the internal affairs of signatory states.

Violations will be found only if the state action can be deemed to be "manifestly unreasonable".[188] Such a lax standard leaves serious concerns about the utility of the existence of the public interest requirement. As a result, the fear remains that,

"property as a jural category will have a severely diminished content. In effect, property will become a mere ticket entitling the holder, at the election of the state (or of a private sector delegate), to some form of monetary pay-off." [189]

As a result Kevin Gray, after considering the protection of property, tells readers:

"Make no mistake — property in land is not everything it is cracked up to be. It can be here today and gone tomorrow, leaving just a bag of coins in your hand. For those who think they own land, the clear message is that money is the sole asset to which their claim of 'property' can ultimately refer. Realty is always monetisable at the command of the state: money is fast becoming the measure of all value. Nowadays it often seems that the idea of property in the shape of an indefeasibly entitlement of control — is actualised only in the context of ideas themselves." [190]

Step 5—is the interference proportionate?

The final question to consider is whether the distributive measures contained within the 2016 Act constitute a proportionate inference with property right. The issue of proportionality becomes relevant once it has been established that the interference in question satisfies the requirement of lawfulness and is not arbitrary.[191] Proportionality is central to the jurisprudence of the ECHR; however, A1P1 remains oddly silent as the Court generally considers proportionality with reference to what is "necessary in a democratic society". The result is that the court has developed a "fair balance test", as was asserted by the Court in *Sporrong*:

"For the purposes of the latter provision [the first sentence of A1P1], the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." [192]

James shows that such a fair balance will not have been struck where the individual property owner is made to bear "an individual and excessive burden".[193] Building on the jurisprudence of *Sporrong*, it was shown that the principle of proportionality must strike a fair balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights.[194] The principle ***E.L. Rev. 921*** appears to be that there must be a reasonable relationship of proportionality between the means employed, and the aim pursued.[195]

Landowners in Scotland are clearly being singled out to bear an individual burden in relation to land reform. Whether this burden is excessive is significantly harder to answer. The intention of breaking up larger parcels of land may constitute a disproportionate interference owing to its ability to interfere with property and the disruptive measures this may have on the economic viability of farms and estates in Scotland. Landowners in Scotland face prolonged uncertainty. The Strasbourg Court has

accepted that measures facilitating a long period of uncertainty constitute disproportionate interferences with property rights.[196] This, combined with the significant public cost of implementing land reform and the lack of evidence to support the economic sustainability of community ownership, means that measures within the 2016 Act face the real possibility of imposing an individual and excessive burden on landowners in Scotland.

However, a number of factors will limit the likelihood of the 2016 Act being deemed disproportionate. First, it is important to remember that the fair balance test is not synonymous with the "least restrictive alternative" test.[197] This was shown in the case of *Mellacher*, where the Court was not willing to accept measures as disproportionate even if there exists an alternative solution provided that it remains "within the margin of appreciation".[198] Secondly, the courts have consistently held that the payment of compensation will be highly relevant to the "fairness" of the balance achieved. As regards deprivation, a "fair balance" requires the payment of some compensation in all but the most exceptional circumstances.[199] As the Court noted in *James*:

"As far as A1P1 is concerned, the protection of the right to property it affords would be largely illusionary and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment of whether the contested legislation represents a fair balance between the interest at stake and, notably, whether it does not impose a disproportionate burden on the applicants." [200]

The 2016 Act states that compensation will be paid at market value.[201] This value is to be determined by an independent and suitably qualified assessor.[202] The problem with this is that the concept of the open market automatically implies a willing seller and a willing buyer, both of whom in such forced sales are a hypothetical abstraction.[203] This makes determining just compensation a task fraught with operational complexity.[204] In *Waters v Welsh Development Agency* the court held that,

"it is unfortunate that ascertaining the rules upon which compensation is to be assessed can involve such a tortuous journey, through obscure statutes and apparently conflicting case-law." [205]

Despite this confusion, Lord Nicholls highlighted that, ***E.L. Rev. 922***

"in a modern democratic society … hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation. That is axiomatic." [206]

However, in practice, the ECtHR has been apprehensive to make inquiries into the adequacy of an award of compensation.[207]

The difficulty for the Scottish Government is that land reform is prohibitively expensive. The passing of the Act came with the news that the Scottish Land Fund—a fund set up by the Scottish Government to support land acquisitions—will be continued until 2020 and will have an increased budget of £10 million per year.[208] Individual elements of the pro-land reform agenda in Scotland have called for the Scottish Government to get "radical" and allow for deprivations below market value to "speed up" the process of deprivation. This far-reaching suggestion would be contrary to a principle that, as James Harris highlights, "has emerged as a settled feature of legal doctrine in both common and civil law systems since the seventeenth century". The granting of compensation below the equivalence principle has only been accepted by the ECtHR in "exceptional circumstances".[209] This was shown in the case of *Jahn v Germany* where the Strasbourg Court considered the "unique context"[210] of post-reunification German land re-organisation.[211] Outside such exceptional cases, if the amount paid is deemed to be "manifestly disproportionate",[212] this will serve as strong evidence towards a disproportionate interference.[213] In *JA Pye (Oxford) Ltd v United Kingdom*, the Grand Chamber ruled that:

"The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified."[214]

The Scottish Government must, therefore, maintain full compensation for all land reform measures.

Conclusions on proportionality and the Land Reform (Scotland) Act 2016

The proportionality of the distributive measures contained within the 2016 Act have to be called into question. In the majority of applications under A1P1, proportionality is most often the critical issue.[215] In practice, states will most often provide a legal basis for their interference and since the test of

public interest is so rarely enforced in any meaningful way, the question of balance becomes critical. [216]

While it remains unlikely that Scots or the Scottish Parliament will have much sympathy for landowners, it is important when considering the application of A1P1 to remember that the very reason for human rights is to protect minorities against the excesses of the majority. In stressing this, it is appreciated that calling landowners in Scotland a minority is controversial. In the 2013 Supreme Court case of *Salvesen v Riddell*, Lord Hope highlighted that "as a minority group *landlords, however unpopular, are as much* ****E.L. Rev. 923*** *entitled to the protection of the Convention rights as anyone*". [217] As Lord Bingham asserted in *Reyes v R.*, "in carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion". [218] His judicial reasoning appears to come, in part, from South Africa, as Lord Bingham cited with approval the Constitutional Court of South Africa in *State v Makwanyane* in which it was opined that,

"it is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected." [219]

It is essential that the courts do not abdicate their responsibilities by developing self-denying limits on their power. [220]

The limits of property law

This article has highlighted that when considering abstract legal terms such as "property", "public interest" and "sustainable development", we are attempting to grapple—as are the courts and the Scottish Parliament—with the inherent vagaries of politics, philosophy, economics and language. Unlike mathematicians, we cannot necessarily prove our conclusions through the luxury of a closed structure permitting verifiable and repeatable proofs. As such, all lawyers and politicians risk leaving their assertions vulnerable to different interpretations and susceptible in part to criticisms of didacticism. In undertaking this study, we have highlighted that questions over the "just" distribution and protection of property rights are not—as often asserted—binary. In an often inconceivably complex world, disparate claims to property can have elements of legitimacy and illegitimacy. This is particularly problematic for legal practitioners, as it limits their ability to offer comprehensive advice to allow clients to plan their affairs and appreciate their rights and obligations. As a result, poorly thought-out land law reforms have the potential to significantly increase the transactional and administrative costs associated with land ownership. [221]

Conclusion

The 2016 Act is a historic piece of legislation and as part of the wider movement potentially represents a significant step in the ongoing process of land law reform in Scotland. This article has illustrated that property is best considered as a bundle of rights that has developed into an accepted human right. Because of this the Scottish Government cannot ignore its obligations to respect the ECHR and the grundnorm of the repugnance of the lawless seizure of property. However, caution is necessary as the right to property remains a confused concept, and A1P1 is the result of a compromise between Member States and suffers from a lack of force when it comes to protection. Because of this, it remains unlikely that the overall purpose of land reform in Scotland will violate the "public interest" requirement of A1P1, but instead challenges will be based on the technical application and meaning of certain key terms.

The Act faces considerable challenges in relation to the legality and proportionality of Pts 2 and 5, which seek to deprive property rights. This will be particularly problematic in relation to the loose drafting of certain fundamental concepts such as "sustainable development" and "community", which remain ****E.L. Rev. 924*** unsatisfactorily outlined. Holyrood must avoid more drawn-out litigation like that of the infamous *Salvesen v Riddell* case, in which the Supreme Court found the Scottish Government to have legislated outside its competence. [222] It therefore remains that, unless the policy documents and advice issued by Scottish Parliament are suitably comprehensive, and come to properly incorporate the property law and human rights obligations highlighted in this article, the 2016 Act will remain at risk of introducing dangerously damaging principles, and will remain ripe for challenge.

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E.L. Rev. 2016, 41(6), 900-924

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