Land Reform (Scotland) Bill

Written Evidence from Andy Wightman
11 August 2015

INTRODUCTION

I welcome the publication of the Land Reform (Scotland) Bill. It represents an important and meaningful stage toward the realisation of comprehensive land reform. I offer the following thoughts in relation to each Part of the Bill. My evidence is restricted to broad observations on the principles and objectives of the Bill.

PART 1 LAND RIGHTS AND RESPONSIBILITIES STATEMENT

I welcome the proposal to have a statutory statement of land rights and responsibilities. However, it is important that such a Statement has a clear purpose.

The proposal derives from the Land Reform Review Group's recommendation that "*The Scottish Government should develop a National Land Policy for Scotland, taking full account of international experience and best practice*." (LRRG report pg.168). Such a National Land Policy exists in many countries and provides the framework within which land rights are defined, allocated and exercised together with the rights and responsibilities involved. In the context of evolving international standards in land governance (see, for example the UN's *Voluntary Guidelines on the Responsible Governance of Tenure*[1]), National Land Policies are now being devised and implemented successfully in countries such as Kenya, Malawi and Bhutan.[2] Such jurisdictions are now some years ahead of Scotland in terms of providing a modern framework for Land Policy.[3]

The proposal in the Bill, however, is merely for a statement of the "*Scottish Ministers' objectives for land reform*" (section 1(2)). It may well be the case that a future Scottish Government has no objectives for land reform and thus the Statement will say nothing of any substance. There are three issues therefore.

1) Such a Statement should be more in line with the draft text contained in the December Consultation Paper, *A Consultation on the Future of Land Reform in Scotland*. It should be a statement of Land Rights and Responsibilities - a high-level set of principles that could underpin the development of a National Land Policy.

2) Such a Statement should be endorsed by the Scottish Parliament and not simply the Executive.

3) The Bill should contain commitment to the development of a National Land Policy

None of these proposals prevents Scottish Ministers developing and publishing their own statement of land reform at any stage if they so wish.

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[1] See http://www.fao.org/docrep/016/i2801e/i2801e.pdf

[2] See, for example National Land Policy of Bhutan http://www.gnhc.gov.bt/wp-content/uploads/2011/05/Draft-National-Land-Policy.pdf

[3] See, for example, http://www.uneca.org/stories/eca-germany-and-world-bank-launch-new-network-excellence-land-governance

PART 2 THE SCOTTISH LAND COMMISSION

I welcome the proposal to establish a Scottish Land Commission. In the past, important issues relating to land governance and land rights have often been neglected in policy-making. One good example is the neglect and unsatisfactory legal framework surrounding common good land. In a report published in 2005, we highlighted the real issues arising across Scotland.[4] Many of these issues remain unresolved. This topic would have been an ideal matter for the Scottish Land Commission to explore and advise upon. Had such a Commission been in existence we might be much further forward in modernising common good law.

My one key suggestion is that the Commission's remit should be expanded to include a statutory duty to develop and draft a National Land Policy to be approved by Parliament. This relates to points raised in relation to Part 1 above.

PART 3 INFORMATION ABOUT CONTROL OF LAND

In the December Consultation, the Scottish Government proposed that it should be incompetent in law for anyone wishing to own land in Scotland via a corporate entity (most typically a company) to do so via any such entity that was not registered in an EU member state. In other words, should anyone (literally anyone - Scot, a Peruvian or an Ethiopian) acquire land and seek to register their title in the Land Register in the name of a Bahamas company or a company in Grand Cayman, the Keeper of the Registers of Scotland would be legally bound to reject it. The person concerned would be required to resubmit the application in the name of a company that was registered in an EU member state.

In light of ongoing concerns about money laundering, criminality and transparency (most recently highlighted by Prime Minister David Cameron and Transparency International)[5] and in the context of commitments by EU member states to establish registers of beneficial ownership, this move was welcome and timely. By eliminating offshore tax havens from property ownership and insisting on EU incorporation, such landowners would then be legally accountable via Directors and would be required to submit publicly available Annual Returns and Accounts to the relevant Registry including details of the names of beneficial owners. This would represent a substantial step forward in international efforts to tackle the malign impact of secrecy jurisdictions and would set a leading example to the UK Government about how to tackle such impacts. In responses to the December consultation, 79% of respondents agreed with this proposal.

This proposal, however, has been dropped and does not appear in the Bill. What does appear is provision for Ministers to make regulations that would allow only those members of the public affected by land held in secrecy jurisdictions to request that information on beneficial ownership to be divulged. Such requests are to be made to the Keeper of the Registers of Scotland who, in turn, by Ministerial regulation, is given power to request information from, for example, Hanky Panky Corporation in Road Town, Tortola, British Virgin Islands.

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[4] Common Good Land. A Review and Critique by Andy Wightman & James Perman.

[5] See www.theguardian.com/politics/2015/jul/28/david-cameron-fight-dirty-money-uk-property-market-corruption AND www.transparency.org.uk/publications/15-publications/1230-corruption-on-your-doorstep/1230-corruption-on-your-doorstep

The arguments advanced by Scottish Ministers as to why the original proposal has been abandoned in the Policy Memorandum (para, 128) are unconvincing. It suggests that barring offshore companies would still allow trusts to own land. That is true but if that is deemed a problem then that should be dealt with on its own merits. It has no bearing on the question of whether to bar corporate entities. I have seen no evidence of offshore trusts owning land in Scotland (plenty offshore trusts hold financial assets). All of the reported instances are of companies.

The argument about companies owned by companies is also specious. By insisting that the parent company is registered in the EU, the primary purpose of ensuring transparency and accountability is significantly enhanced through the public availability of identified persons (Directors) with legal responsibility, through the enhanced availability of information available via annual returns, and through the liability of EU registered companies to disclose beneficial ownership under EU law.

I submit to the Committee that the original proposals contained in the December 2014 Consultation be re-instated in the Bill. This proposal would be effective in preventing the future use of offshore tax havens as places to incorporate and register title to land in Scotland. It also aligns itself well with the proposed register of beneficial ownership contained within Part 7 of the Small Business, Enterprise and Employment Act 2015. If re-instated then all titles held by legal persons will be within the EU and all such corporate entities will be required to disclose their beneficial ownership in a register.

The provision will have to be compatible with EU law - most importantly the Treaty on the Functioning of the EU (TFEU), Article 26 of which provides for the internal market and free movement of goods and capital. Article 345, however makes clear that this in no way prejudices the rules in Member States governing the system of property ownership.[6] Furthermore there is no discrimination involved. Individuals from anywhere in the world are all free to buy land in Scotland. They simply need to register it either in their own name or in an incorporated body registered in any member state of the EU. Inward investors, for example, typically set up UK subsidiary companies to hold assets and contract within the UK.

The provision should also be made retrospective. This would involve existing companies (such as Hanky Panky Corporation registered in the British Virgin Islands) being obliged to transfer title to an EU registered company. On one reading of the situation, this is problematic and, indeed, that is the view taken by the Scottish Government in the December consultation (para. 47). This view probably arises as a consequence of Article 1 Protocol 1 of the European Convention on Human Rights which provides 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.

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[6] See http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=en

Were this proposal to be applied retrospectively, it would require landowners who currently own land held by offshore entities to transfer ownership to a compliant entity such as the human beneficiary of Hanky Panky Corporation or an incorporated body registered within the EU. The ECHR obliges Governments to "s*ecure to everyone within their jurisdiction the rights and freedoms defined in the Convention*." Hanky Panky Corporation, it could be argued, is not within the jurisdiction of any contracting party to the ECHR and thus cannot argue any violation of convention rights.

But even if it was (because it has a registered interest in land in Scotland), such an obligation is arguably entirely consistent with the public interest provisions of the convention. Moreover, the beneficial owner would not be losing their beneficial ownership. They would still enjoy possession of their land but they would now have to make a different arrangement with regard to holding title to the land. Their convention rights would not have been violated.

The use of offshore secrecy jurisdictions to hold title to land is now increasingly regarded as problematic in relation to transparency and tax avoidance and evasion. In a speech on 31 Oct 2013, the Prime Minister said that,

"We need to know who really owns and controls our companies, not just who owns them legally, but who really benefits financially from their existence. For too long a small minority have hidden their business dealings behind a complicated web of shell companies, and this cloak of secrecy has fuelled all manners of questionable practice and downright illegality.

This summer at the G8 we committed to do just that: to establish a central register of company beneficial ownership. And today I'm delighted to announce that not only is that register going to go ahead, but it's also going to be open to the public." [7]

The Prime Minister has recently made further commitments to crack down on offshore secrecy jurisdictions and it seems odd that the Scottish Parliament should not do everything in its powers to assist this wider process.[8]

The proposals in the Bill are, essentially meaningless. There is no means of verifying that the information on controlling interests to be provided is correct as secrecy jurisdictions refuse to reveal such information. For example, in recent correspondence with HM Governor of the British Virgin Islands, he confirmed that the only circumstances in which the BVI would co-operate in the investigation of the beneficial ownership of a BVI company is under the terms of the BVI Criminal Justice (International Co-operation) act 1993.[9] Any investigation to satisfy Scottish authorities of the veracity of any answer to a request made under Part 3 of the Bill is constrained by the term of this Act.

The simplest and most effective means of ensuring full transparency is to make it incompetent to record a title in such jurisdictions in the first instance.

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[7] See www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013

[8] See http://www.theguardian.com/politics/2015/jul/28/david-cameron-fight-dirty-money-uk-property-market-corruption

[9] For text of Act see http://www.andywightman.com/docs/BVI_CJICA_1993.pdf

PART 4 ENGAGING COMMUNITIES IN DECISIONS RELATING TO LAND

I welcome this provision but consider that further thought should be given as to its status in relation to other elements of the Bill. For example, should a breach of the Guidance be a material consideration in Ministers' decision to consent to the right-to-buy powers in Part 5.

PART 5 RIGHT TO BUY LAND TO FURTHER SUSTAINABLE DEVELOPMENT

This provision adds to an already growing list of right-to-buy powers available to communities across Scotland. These include the original community right-to-buy in the Land Reform (Scotland) Act 2003 and the more recent right-to-buy abandoned, neglected or detrimental land in Section 74 of the Community Empowerment (Scotland) Act 2015.

I welcome this new provision but have the following concerns.

1) The so-called empowerment of communities through the provision of statutory rights to intervene in the land market is contingent on a high degree of capacity in terms of organisation and commitment to see through a complex and potentially controversial process. The Land Reform Review Group suggested that communities should have a suite of community land rights that were co-ordinated and straightforward to understand and implement (see Figure 7 of LRRG Report, page 102). This is an aspiration that the Committee might reflect upon in order to provide greater clarity and cohesion to the exercise of what is now a complex legal landscape.

2) The tests set out in Section 47(2) appear to set the bar very high in terms of eligibility. in particular, the requirement in Section 2(d) that "*not granting consent to the transfer of land is likely to result in significant harm to the community*" will probably be extremely difficult to establish. Given that the right-to-buy being established here is, in effect, a power of compulsory purchase exercisable by a community body, it needs to meet strict criteria. But these criteria should be framed around necessity and opportunity rather than potential harm. The should be available in circumstances where all reasonable efforts to acquire land in the community have been exhausted.

3) The requirement in Section 44 for the Keeper to establish yet another Register (the Register of Land for Sustainable Development) to add to the Register of Community Interests in Land, the Register of Crofting Community Rights to Buy, and the Register of Community Interests in Abandoned, Neglected or Detrimental Land, reflects a cumbersome administrative framework. These Register all require to be searched and none have any connection with the Land Register. Furthermore, none of the Registers currently established are easily searchable via a map-based interface. There is scope to make these Registers more transparent and integrated with the Land Register and to make the registration of interests a legal interest to be entered in the Land Register.

4) In general I do not believe that decisions on whether such rights should be granted to community bodies should be matters for Scottish Ministers. These are local land matters and could quite competently and properly be determined by Local Authorities. I accept that there is precedent for such a centralised system of decision-making but know of no other example in Europe where such matters are determined by Government Ministers.

PART 6 ENTRY IN VALUATION ROLL OF SHOOTINGS AND DEER FORESTS

I welcome the repeal of the exemption granted to subjects that were formerly liable for non-domestic rates prior to the Local Government etc. (Scotland) Act 1994. The abolition of the rates on shootings and deer-forests attracted considerable criticism at the time from opposition parties and by the then Chairs of Scotland's Rating Valuation Tribunals who, in a memorandum to the Secretary of State for Scotland, wrote,

"*Sporting estates like to describe themselves, when it suits them as being part of a sporting industry. In fact they are part of an inefficient trade which pays inadequate attention to marketing their product, largely because profit is not the prime objective. These sporting estates change hands for capital sums which far exceed their letting value and which are of no benefit to the area, and are often bought because there are tax advantages to the purchaser, not necessarily in the UK*."

Dismissing the argument that sporting estates provide employment and should therefore be freed of the rates burden, the chairmen's report points out that,

"..*local staff are poorly paid, their wages bearing no relation to the capital invested in the purchase price, and it is not unusual to find a man responsible for an investment in millions being paid a basic agricultural wage. Many of the estates use short-term labour during the sporting season, leaving the taxpayer to pay their staff from the dole for the rest of the year. Estates can in many cases be deliberately run at a loss, thereby reducing their owner's tax liability to central funds elsewhere in the UK*."[10]

In principle, there should be no exemptions from liability to pay some form of tax or rating on land but over the past 100 years, exemptions have been granted to, for example, agriculture, which have no rational basis and merely increase the burden of taxation on others. The inclusion of shootings and deer forests on the valuation roll should therefore be the beginning of a process of bringing all land back within the rating system. If certain properties are to be granted relief this should be on a discretionary and transparent basis with full justification.

The re-establishment of a local tax liability on land devoted to shooting and deer forests ends the indefensible abolition of this element of non-domestic rating by the Conservative Government in 1994. To most people, it might seem odd that, whilst the hair salon, village shop, pub and garage are subject to rating, deer forests and shootings pay nothing. To take one example, the Killilan deer forest near Kyle of Lochalsh is owned by Smech Properties Ltd., a company registered in Guernsey which, in turn, is owned by Sheik Mohammed bin Rashid al Maktoum, the King of Dubai and Prime Minister of the United Arab Emirates.

Killeen was included on the valuation roll in 1994 at a rateable value of £3500. By comparison, the local caravan site had a rateable value of £3100. Today, the caravan site has a rateable value of £26,250 and pays £12,127 per year in rates whilst one of the world's richest men, whose land is held in a tax haven has (unlike the local caravan site) paid no local rates for twenty years on the land he uses for shooting.

One of the consequences of exemptions from land taxes is that they become capitalised into the price of land. This is what has happened in agriculture where the value of

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[10] See http://www.andywightman.com/docs/herald_19940609.pdf

agricultural land far exceeds its earning capacity. These issues were explored in some depth in the Scottish Affairs Committee's Inquiry into Land Reform in 2014-2015.

In November 2012, the Scottish Government launched a public consultation - Supporting Business:Promoting Growth - exploring how the non-domestic rating and valuation appeals systems can support businesses and sustainable economic growth and on how to improve transparency and streamline the operation of the rating system. Included in the paper was a commitment to "*use the period until the next revaluation in 2017 to conduct a thorough and comprehensive review of the whole business rates system*." As far as I am aware this has not been carried out. I thus have two key issues with the Bill in relation to Part 6.

1) I am not convinced that simply re-setting the clock to 1994 and continuing with the same valuation methodology that was devised in the 19th century is appropriate. In 1854, when the rating system was introduced, many estates were occupied by sporting tenants who had long leases - often improving leases. Assessing the value based on the number of animals killed made sense as this reflected the rent paid by those who rented the land in order to kill them. This is seldom the situation today. An alternative approach would be to take estates as a whole, assess the rental value of the land and levy rates at the same rate (47p) as all other non-domestic subjects. Such an approach would be simpler and more equitable. It would also (since the abolition of rates has been capitalised into land values) reduce the price of land which would make it more available to a wider range of people.

2) The re-introduction of rating for shootings and deer-forests begs the question why agriculture and the exemptions (such as vacant land) remain. In May 2014, in response to a recommendation from the Land Reform Review Group that this exemption should be abolished, the Scottish Government emphasised that they had no plans to do so. This is a question that Parliament might probe more closely.

PART 7 COMMON GOOD LAND

Part 7 of the Bill makes a very modest amendment to the Local Government (Scotland) Act 1973 to allow a local authority to apply to the courts if it wishes to appropriate inalienable common good land - in other words to use it for an alternative purpose but retain ownership of it. Currently, councils can seek such authority where they wish to dispose of land (i.e. sell it) but not where they wish merely to change its use.

The result of this has been that Councils are faced with a time-consuming and expensive process of promoting private legislation such as happened in the case of Portobello High School. The proposed amendment allows the courts to be the arbiter of any such plans in the event of either a disposal or an appropriation.

This is a very modest and welcome reform that remedies the illogical position that a Council can potentially obtain court approval to sell inalienable land but has no powers at all to do something less drastic in the form of appropriating for another use. Application to the courts for approval in such matters was introduced following the abolition of local government by the 1973 Act in order to provide for a judicial means of securing changes to the status of common good land. The fact that the legislation omitted to make any provision at all for the appropriation of inalienable common good land is regarded as an omission on behalf of Parliament at the time. The Bill remedies that defect.

The wider question of reform in the law governing the status, ownership and management of Scotland's oldest form of community ownership of land remains unresolved. The Community Empowerment (Scotland) Act 2015 provides for a statutory register of common good land and consultation with communities over plans to sell but the underpinning legal framework remains archaic and complex. A fundamental review of this legal framework, however, is urgently needed.

PART 8-10

I have no comments on Parts 8-10 of the Bill.

OTHER MATTERS

The Bill provides a Parliamentary opportunity to implement some other statutory reforms related to land matters and I provide the following two suggestions.

Repeal the Division of Commonties Act 1695

This Act was enacted in the pre-democracy era to enable the landowners in a parish to appropriate a share of the common land of the parish. It was a Act that had dramatic and far-reaching consequences and was extremely effective in privatising Scotland's common lands to the extent that little remains. However, some parcels of commonties do remain across Scotland. Given their historic, cultural and legal importance, it would be appropriate to repeal the Act that would still allow them to be divided.

Protective Orders for Common Land

Over the past decade I have uncovered many examples of surviving parcels of common land. The main threat to their continued existence is the use of a non domino dispositions on behalf of (usually) neighbouring landowners) to appropriate the land into their ownership. The local community are never aware of the appropriation since there is no obligation to advertise such claims.

The Scottish Government's target to complete the Land Register within 10 years poses a heightened risk to surviving commons as it will be more likely that they are either intentionally or inadvertently included in applications to voluntarily register the large parcels of land in Scotland not currently on the Land Register. Again, local people will in complete ignorance of these claims as there is no obligation to advertise them to the public.

One useful reform would be to amend the Land Registration etc. (Scotland) Act 2012 to make provision for Protective Orders to be granted by the Keeper over land that does not have an identifiable owner and which appears to be a historic parcel of common land. Before any title could be registered by any party, the Keeper would be obliged to conduct a public consultation with the community affected to ascertain the true legal status of the land.

THANK YOU

Thank you for the opportunity to submit evidence.