SCOTTISH LAND COMMISSION
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Balancing rights and interests in Scottish land reform

A discussion paper

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LAND LINES
A series of independent discussion papers on land reform issues

Background to the ‘Land Lines’ discussion papers

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

With a Land Reform Bill planned for this parliament, consideration of human rights law and implications will be central to consideration of any new proposals addressing land ownership. In particular, understanding the way measures to further economic, social and cultural rights interact with private property rights will be a key element in developing effective approaches. This paper considers the current legal context in order to support consideration of proposed measures and the challenges and tests that will need to be addressed.

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

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About the Author

James Mure is a Queen's Counsel (QC) in practice at the Scottish Bar. He is a specialist in the judicial review of decisions by public bodies, including the Scottish Parliament, Scottish Ministers, local authorities and professional associations. James has appeared in many of the court cases that have clarified the devolution settlement in Scotland since 1998, including most recently the UK government's references to the Supreme Court of two bills in the Scottish Parliament seeking to incorporate international rights instruments into Scots law. James regularly advises on property and planning matters, and was an adviser to the independent Commission on a UK Bill of Rights, which reported in 2012.

Summary

Keywords

Land reform; property rights; public interest; fundamental rights

This paper sets out the legal framework in which policymakers and legislators considering reform of Scottish land law require to balance property rights and the public interest.

Property rights in Scotland have long been protected under both the common law and statute. More recently, international treaties entered into by the United Kingdom have not only obliged the state to protect property rights but also to promote fair use and access to land for the public as a whole. The incorporation of the European Convention on Human Rights into domestic law in the Human Rights Act 1998, and the limits placed on the devolved institutions by the Scotland Act 1998, have created a legal framework the limits of which are still being worked out.

The concept of the 'public interest' is a broad one, and democratic legislatures like the Scottish Parliament have a broad discretion in identifying what is in the public interest. When it comes to particular legislation, however, and especially individual decisions that have an impact on a person's property rights, it ultimately falls to the independent judiciary to consider the evidence and to apply legal rules to decide whether in the circumstances the individual property owner has been asked to bear an excessive burden in order to allow the public interest to be promoted.

As previous research commissioned by the Scottish Land Commission shows, many European countries have laws restricting the acquisition, use and management of land, some of which go further than Scots law currently does. As long as all parties abide by the legal framework discussed in the paper, there is in principle no reason why similar measures could not be introduced in Scotland.

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1. Introduction

Land reform in Scotland has a long history.[1] Feudalism, the Highland clearances, agricultural improvement and model villages, crofting rights, the land nationalisation movement, and the influence of land reform in Ireland: all these have provided fertile ground for debate for more than two centuries. And while political and economic circumstances have changed since the 19th century, debate continues about who should own land in Scotland and how it should be managed. This paper discusses how to balance property rights (including human rights) connected with the use and ownership of land, with the general public interest. It is not a paper on history or policy. Rather, it seeks to give the general reader an overview of the legal framework within which contemporary land reform must operate. The last twenty years have seen several important new statutes, culminating in the Land Reform (Scotland) Act 2016 ("the 2016 Act"). With the Scottish Land Commission publishing a series of papers about concentration of land ownership, and about the public interest in greater community participation in land management and use, the need to understand the legal framework has never been greater. Any land reform agenda needs to be based on a good understanding of the nature of the property rights that exist under Scots law, and of what it means to allow those rights to be interfered with in the public interest.

2. Property rights: their origin and content

2.1 Introduction

In a modern democratic society with a market economy, property rights are fundamental. The common law approach is evident from a celebrated 18th century case, *Entick v Carrington* (1765) 19 State Tr 1029, in which Lord Camden CJ said (at p1060):

> *"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole."*

That quotation is interesting for the early recognition that property rights may be removed or controlled in the general public interest, if the law so provides. This remains the position today. In their Land Rights and Responsibilities Statement, prepared under Part 1 of the 2016 Act, the Scottish Ministers' first principle states: "People should have confidence that there is a fair and balanced system of decision-making in relation to land." Those values of fairness and balance are central to the lawfulness of any land reform. But before we can consider balance, we must identify in general terms the nature, meaning and scope on the one hand of property rights, and on the other hand of the public interest that may justify interfering with those rights.

1 For an invaluable guide, see *Land Reform in Scotland: History, Law and Policy* (eds. Combe, Glass & Tindley), Edinburgh University Press (2020).

2.2 Property rights

Those owning property have the protection of the law. The power of the state enforces the criminal law against theft and criminal trespass. But property owners also need protection against public authorities, to ensure that they do not take and use powers that render property rights precarious or even worthless. Among the best known of these protections is Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("the Convention"), which provides:

1. 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.

2. 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.

This protection has formed part of UK domestic law since it was included in the Convention rights set out in the Human Rights Act 1998 ("HRA 1998"). It imposes a limit on the powers of both the Scottish Parliament and Scottish Government under the Scotland Act 1998 ("SA 1998"), for neither the Parliament nor Ministers have any power to make legislation (or otherwise to act, or fail to act), in such a way as to violate the rights set out in A1P1.

However, Scots law did not need to wait for 1998 to protect property rights from state interference. The UK Parliament has often legislated for the compulsory acquisition and redistribution of property, and has generally compensated owners for their loss. Even today many of the laws and principles concerning compensation for compulsory acquisition of land date back to the UK Parliament's Railway Acts of the 1840s. The types of loss for which compensation is paid, and the measure of that compensation, may vary according to the circumstances of each case, but the principles have remained relatively constant over time. Moreover, judges have been astute not to construe Acts of Parliament as interfering with property rights without appropriate compensation, unless the statute clearly says so.

These common law and statutory protections long pre-date the HRA 1998, and are grounded in the democratic nature and values of the UK's constitution. The guarantees set out in the Convention are stated at a high level of generality and are fulfilled by means of more detailed and established rules in domestic law. As Lord Reed put it in R *(Osborn)* v Parole Board [2014] AC 1115 at §55 & §62:

> *"[T]he protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our own legal system. […] [T]he ordinary approach to the relationship between domestic law and the Convention [is] that the courts endeavour to apply and if need be develop the common law, and interpret and apply statutory provisions, so as to arrive at a result which is in compliance with the UK's international obligations, the starting point being our own legal principles rather than the judgments of the international court."*

Similarly, Lord Cooke of Thorndon said in R *(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at §30: "The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them." In the past decade in particular, while parties may have argued their points based on Convention rights, the higher courts have often found that the answer lies in domestic rights that reflect constitutional values. As Lord Mance put it in *Kennedy v Charity Commissioner* [2015] AC 455 at §46:

> *"Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law."*

There are differences between the protections afforded by the HRA 1998 Convention rights, and the common law rights recognised under our constitution. The HRA 1998 creates positive obligations on the state, which must not violate the protected Convention rights.

a) Section 3 HRA 1998 obliges courts, so far as it is possible to do so, to read and give effect to both primary legislation (principally, Acts of the UK Parliament) and subordinate legislation (including Acts of the Scottish Parliament, and regulations and orders made by Scottish Ministers), whenever enacted, in a way which is compatible with the Convention rights.

b) Section 6 makes it unlawful for a public authority (other than the UK Parliament) to act, or to fail to act, in a way which is incompatible with a Convention right.

c) The principle of UK Parliamentary sovereignty is maintained by section 4, which makes clear that if an Act of the Westminster Parliament is found to be incompatible with a Convention right, that Act remains in full force and effect and cannot be quashed by a court. Rather, the court may make a declaration of incompatibility, leaving it ultimately to Parliament to decide whether, and if so how, to amend the relevant provisions. This does not apply to Acts of the Scottish Parliament, which for the purpose of the HRA 1998 are included in the term "subordinate legislation". This reflects the prevailing understanding of the UK constitution, namely that since it is sovereign, the Westminster Parliament's laws may not be struck down by any court. However, as a devolved legislature with broad but defined powers, the Scottish Parliament cannot pass an Act that is outside the powers given to it under the SA 1998, and hence its Acts may be struck down by the courts where they exceed the Parliament's powers.

The Convention rights incorporated into UK law by the HRA 1998 therefore have a special place. By contrast, it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom. The reason is that treaties are concluded by the executive (i.e. the UK government) exercising

powers under the Royal Prerogative. Those powers do not include the power to alter domestic law or to confer rights on individuals (or indeed remove rights from them) without the intervention of an elected legislature. One consequence is that a UK court of law cannot determine whether the UK has violated its obligations under unincorporated international treaties. As Lord Reed put it in *R (SC) v Work and Pensions Secretary* [2021] 3 WLR 428 at §91:

> *"[F]or a United Kingdom court to determine whether this country is in breach of its obligations under an unincorporated international treaty, and to treat that determination as affecting the existence of rights and obligations under our domestic law, contradicts a fundamental principle of our constitutional law."*

Different strands of property rights therefore exist under (i) the common law, i.e. judgments made by the courts over time and which express constitutional values reflecting our polity and society; (ii) domestic statutes made by legislatures within the UK, which generally provide quite detailed provisions; and (iii) international treaties, some of which (like the Convention) are now part of domestic law, but which generally lay down principles and not detailed legal rules. Several points are worth making about this background.

Compliance with A1P1 and the other Convention rights set out in the Human Rights Act 1998 is far from being the only requirement of legislation or of executive decision. The common law and other domestic statutes must also be complied with, and should be the starting point of any analysis. Indeed, understanding what it means to comply with the broad language used in an international rights treaty such as the Convention requires us to examine our domestic law in the first instance.

The judge-made common law seeks to ensure, so far as possible, that the UK's domestic law complies with the country's international obligations as contained in conventions and agreements not yet enacted into domestic law by any Parliament. Thus the courts can and do have regard to unincorporated international conventions where appropriate, albeit these are not yet part of domestic law. So far as the language admits, the courts interpret and apply domestic statutes so as not to be inconsistent with established rules of international law. Similarly, judge-made common law will be interpreted and developed, where possible, so as to comply with the UK's international obligations. However, it is important to remember that an unincorporated treaty confers no rights that are directly enforceable in the UK courts. When it comes to interpreting and applying the Convention rights, which since 1998 have formed part of UK domestic law, the courts may have regard to obligations arising under international law, but in doing so they are not *applying* those obligations since they arise only on the international and not the domestic plane.

The courts have held that while the UK Parliament may legislate to override fundamental rights, it must do so using clear language, confronting clearly what it is doing. As Lord Hoffmann famously put it in *Reg. v Home Secretary, ex parte Simms* [2000] 2 AC 115 at p131E-G:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

The same is true for the Scottish Parliament, for when the UK Parliament passed the SA 1998:

"it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot have intended to establish a body that was free to abrogate fundamental rights or to violate the rule of law." [2]

Moreover, authority to restrict private property rights must come from the legislature. The Scottish Ministers cannot themselves restrict property rights without parliamentary authority.

In relation to property rights, there is in particular the principle repeated in *Re Peacock* [2012] 2 Cr App R (S) 81 at §33 per Lord Walker: "the well-established principle of statutory construction that property rights are not to be taken away without compensation unless Parliament's intention to expropriate them has been expressed in clear and unambiguous terms". This principle applies equally to the Scottish Parliament. And any survey of the case law shows that expropriation of land without compensation is rare indeed. When the state is considering compulsory acquisition of land, as provided for under various statutes, the authority is under an onus to establish a compelling case in the public interest. Where there is no actual deprivation of property, this presumption for compensation does not apply. Many laws have an impact on property rights: local and national taxes, planning laws, landlord and tenant laws, environmental regulations, laws on the protection of wildlife. The fact that these laws may impact on one's enjoyment of land does not mean that compensation is payable. In most cases, such laws are proportionate to their aim and do not attract a right to compensation.

As a devolved legislature, the Scottish Parliament's role in relation to international affairs is restricted. International relations are a reserved matter, although the Scottish Parliament does have the legislative competence to observe and implement international obligations and obligations under the Convention: §7 of Schedule 5 to the SA 1998. International human rights obligations may be observed in different ways. A domestic legislature with the requisite powers may choose to pass its own

2 *AXA General Insurance Ltd v H M Advocate* [2012] 1 AC 868 at §153 per Lord Reed.

detailed laws that ensure that the legal system complies with the treaty's more broadly worded provisions. Alternatively, the legislature may choose to incorporate the treaty wholesale, either by declaring its terms to be part of domestic law, or more often by passing an Act that contains the relevant provisions of the treaty in a schedule. The Scottish Government's present policy is to seek to incorporate further human rights treaties into Scots law. The precise manner in which this is done can raise problems, however, particularly when it comes to the interaction between the terms of the treaty being incorporated, and existing or future legislation passed by the UK's sovereign Parliament at Westminster. These difficulties have been recently highlighted in the Supreme Court's judgment[3] finding that parts of the Scottish Parliament's recent bills that seek to incorporate two international treaties into Scots law would be outside the Parliament's legislative competence as they would modify section 28(7) of the SA 1998, which provides: "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland." The Scottish Parliament will have the opportunity to reconsider these bills in light of the judgment of the Supreme Court. The Scottish Government has recently reiterated its commitment in particular to the incorporation of rights contained in the UN Convention on the Rights of the Child. The Supreme Court's judgment has come under criticism in some quarters for its apparent imposition of more constraints on the Scottish Parliament than were evident from earlier interpretations of the SA 1998. However, the land reforms being considered by the Scottish Land Commission would not be implemented in the same manner. Moreover, land tenure is clearly not a reserved matter under the SA 1998. As long as any reforms are rational and do not violate fundamental rights, they ought to be capable of being legislated for within the legislative competence of the Scottish Parliament.

The Convention is unusual in having its own court to interpret and apply its provisions on application by those alleging violations of their rights. This provides UK courts and tribunals with an evolving set of precedents which, under section 2 HRA 1998, they are obliged to take into account when determining a question which has arisen in connection with a Convention right. The International Covenant on Economic, Social and Cultural Rights ("the Covenant") has no such court or case law. However, under the Covenant, what are called "general comments" are prepared for, and considered by, the UN Economic and Social Council's Committee on Economic, Social and Cultural Rights. At present, the Committee is considering draft general comment no. 26 on land and economic, social and cultural rights. The current draft, on which the UK government has made observations, stresses the need for states to "facilitate secure, equitable and sustainable access to, use of and control over land for those who are landless or live in poverty…". The challenges for states clearly differ widely according to the development of each country's economy and the composition of its society. Scotland does not experience the problems some less developed states face, of access to land for growing food, or for indigenous peoples oppressed by colonisation. The draft general comment also repeats (at §34) the widespread obligation on states to ensure that any deprivation of land rights is accompanied by fair and prompt compensation, which balances the rights of the individual and the

3 *References by the Attorney General and the Advocate General for Scotland on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and on the European Charter of Local Self Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, 2021 SLT 1285.

wider interests of society. Incorporation of the Covenant is not necessary in order to push ahead with a land reform agenda. The values found in the Covenant's articles can be pursued in Scotland through individual Acts of the Scottish Parliament, and by ministerial decisions that have regard to its values.

A wide variety of rights are recognised and protected in a modern democratic society. Very few, however, are absolute rights in the sense that no limitation of the right can be permitted. Some rights set out in the HRA 1998 allow for interference by the state in the general interest of the public: e.g. articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association) and A1P1 (protection of property).

But there are many rights woven into the fabric of our democratic constitution. Democracy in the UK, as elsewhere in the world, has both a formal and a substantive nature. The formal part concerns the rules for free elections and the meeting of a legislature, with majority rule. The substantive part enshrines fundamental values and human rights; the separation of powers and the independence of the judiciary; and the rule of law, ensuring that all persons and bodies within the state are obliged to obey the law and hence executive action may be reviewed for lawfulness in the courts.

When the courts are asked to identify and protect common law constitutional rights, judges are encouraged to look for "a tradition of special respect for an underlying interest", founded in the expectations of citizens and legislators operating in a liberal democracy, informed by a wide range of sources.[4] Like Convention rights protected under the HRA 1998, such domestic rights may be overridden, but at a political price. And whereas proportionality applies to Convention rights, judicial review of devolved legislation and ministerial decisions engages a somewhat less strict test of reasonableness.

2.3 The public interest

Various terms are used in legislation and policy to denote the broad interest of a society: 'public interest,' 'general interest' and 'public purpose' to name but three. These terms are used in a very wide range of contexts, including:

- Disclosures made on the context of employment contracts
- Aspects of the law on freedom of information
- Ministers' rights to intervene in corporate mergers and acquisitions
- The law on compulsory purchase of property
- The law on discharge of restrictive covenants
- The law of defamation.

4 See two articles by Sales LJ (now Lord Sales JSC) writing extra-judicially: Rights and fundamental rights in English law (2016) 75 Cambridge Law Journal 86; Partnership and challenge: the courts' role in managing the integration of rights and democracy 2016 Public Law 456.

A recent judgment of the Supreme Court shows how courts and tribunals may be required to weigh up the public interest in specific factual circumstances. In *Millgate Developments v Alexander Devine Children's Cancer Trust* [2020] UKSC 45, the court explained that applicable legislation had obliged the Upper Tribunal "to determine whether it was contrary to the public interest for the 13 housing units not to be able to be used. The waste involved would be a very strong factor indicating that that would indeed be contrary to the public interest. To be weighed against that would be the public interest in the hospice providing a sanctuary for children dying of cancer which would be protected by the continuation of the restrictive covenant. Two competing uses of the land are therefore pitted against each other. It is the resolution of a land-use conflict that we are here dealing with." While some commentators criticise the use of such broad terms as 'public purpose' and 'public interest,' the courts have, for at least two centuries, shown themselves willing and able to determine disputes about such concepts in particular factual situations.

The concept of 'public interest' is therefore intrinsically broad, and it is unusual for legislation to define it with any clarity. There are various theories about how to characterise and identify the public interest in a modern democratic state. It has been said, for example, that: "Hobbes tended to conceive of the public interest in terms of a preponderance of power, Hume in terms of a preponderance of opinion, and Bentham in terms of a preponderance of utility."[5] But when it comes to a particular context, it is generally unhelpful to define it in any detail. Behind the concept is the idea that the elected government should serve the people and that in a modern society there exists a general interest in the fair and efficient use of resources, and in such values as transparency, fairness and accountability.

The European Court of Human Rights at Strasbourg has found a wide variety of purposes to be within the notion of public interest under A1P1, including:

- Elimination of social injustice in the housing sector
- Securing land in connection with the implementation of a local land development plan
- Protection of the environment
- Regulatory measures in the area of housing, which serve the purpose of social protection of tenants
- Nationalisation of specific industries
- Measures to ensure the transition from a socialist to a free-market economy in central and eastern Europe.

5 See P Hacker's review in the journal MIND of "The public interest and individual interests": Virginia Held (New York: Basic Books, 1970; and the discussion in McHarg: Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights (1999) 62 Modern Law Review 671.

The Strasbourg court affords a margin of appreciation to the state's legislatures in implementing social and economic policies, and respects each legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation. As a result, it is rare for the Strasbourg court to find that no public interest exists. In institutional terms, it is important that the public interest in a particular context is set by the democratically elected legislature. That gives it legitimacy and authority. The concepts of public interest and public purpose are not static. They are determined by the values of society at a particular time through the political process, and will vary between societies and across time within each society.

At the international level of the Strasbourg court therefore, the concept of the public interest is necessarily extensive, and the state legislature has a wide margin of appreciation. As the court's Grand Chamber put it in *Nagy v Hungary* (App. No. 53080/13; 13 December 2016) at §113:

> *"Moreover, any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions. The notion of "public interest" is necessarily extensive. In particular, the decision to enact laws concerning social-insurance benefits will commonly involve consideration of economic and social issues. The Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation."*

The public interest to be pursued by a measure is generally evident from the articulation of the legislative provisions themselves. One can therefore infer from the text, the scope and nature of the public interest being pursued. The nature of the issue to which the legislation is directed will also emerge from reports prepared and consulted on before the legislation was passed, whether drafted by ministers or by expert bodies such as the Scottish Land Commission: see e.g. *Martin v Most* 2010 SC (UKSC) 40. How precise should the legislation be in articulating the public interest being pursued? In the UK, the purpose of legislation emerges from the words used by Parliament, though general direction may also be evident from the long title of the Act, and sometimes from statements of purpose or of principle set out in a particular provision of the Act: see e.g. section 1 of the UK Withdrawal from the European Union (Legal Continuity) Bill. The interpretation of statutes is a matter for the independent courts, and they will interpret the Act according to the traditional canons of construction. The legislative intent is therefore not for legislators to dictate by what they say in debate. Rather, it is a matter that is taken by the courts from the text used in the Act as passed, set against the background of policy including earlier reports and memoranda directed at the particular mischief that the Parliament seeks to address in passing the bill.

When providing memoranda about professed compliance with human rights, ministers cannot speak for Parliament and merely set out the opinion of the minister, on advice: see Lord Reed PSC in *R (SC) v Work and Pensions Secretary* [2021] 3 WLR 428 at §§165-166 & 170. The reasons a government has for formulating and introducing proposals cannot be taken to be identical to the reasons why individual members of the Parliament voted to pass the bill. And the opinion expressed by the minister introducing a bill, whether under section 19(1)(a) HRA 1998 or section 33(1) SA 1998, has no legal significance beyond that – an expression of informed opinion.

In some statutes, the law offers more specification. Thus section 74(1) of the Land Reform (Scotland) Act 2003 ("the 2003 Act") provides that Scottish Ministers shall not consent to an application by a crofting community body for consent to buy croft land unless they are satisfied (among other things) that it is in the public interest that the right to buy be exercised. Section 74(2) then provides:

> *"For the purposes of subsection (1)(n) above, the public interest includes the interest of any sector (however small) of the public which, in the opinion of Ministers, would be affected by the exercise of the right to buy, and such a sector includes a community as defined for the purposes of section 34(1)(a) above and a crofting community as defined for the purposes of section 71(1)(a) above."*

No such extended definition is offered in respect of the public interest criterion for ministerial consent to a community body's application under Part 3A of the 2003 Act.

Statutory guidance (i.e. guidance that an Act obliges ministers to prepare and publish) may also be provided to explain public interest considerations in particular contexts. Thus guidance on public interest criteria has been published in connection with ministerial intervention in potential corporate mergers under the Enterprise Act 2002; and the meaning and application of the public interest test under the Freedom of Information (Scotland) Act 2002. Guidance on the Scottish Government's policy on the exercise of compulsory purchase powers in Scotland discusses the public interest but does not seek to define it: see Circular 6 of 2011 at §§9-16. Since only the Parliament can authorise interference with property rights, it is important that guidance on the meaning of public interest is statutory guidance and can be considered by the legislature. Statutory guidance will then be given great weight by the courts when determining disputes about the meaning and reach of the public interest in that particular context: *R (on the application of Munjaz) v Mersey Care NHS Trust* [2016] 2 AC 148.

Another option is for the statute to include provisions that direct the minister or other public authority to have regard to particular matters: see e.g. section 98(5A) of the 2003 Act, which obliges ministers to have regard to the Covenant when making certain decisions.

The Court of Session has already rejected the suggestion that the term "public interest" in the 2003 Act is too vague to have legal force. In *Pairc Crofters Limited v The Scottish Ministers* 2013 SLT 308 at §57, Lord President Gill said:

> *"Likewise I consider that there is nothing in the submission that the expression "public interest" lacks any legal force. 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. It is for the Land Court and the Ministers to assess the public interest on the facts and circumstances of the case. A general statutory definition of the public interest, if one could be devised, would be unhelpful."*

More recently, the Supreme Court has had cause to discuss the public interest in relation to town and village greens, without suggesting that the term requires further definition in statute: see *Regina (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2021] AC 194. Indeed, courts recognise that Parliament legislates in the public interest when, for example, it acts to allow compulsory acquisition of property.

Domestic rule of law values, and the Strasbourg court's case law, require that laws be sufficiently accessible and foreseeable. Context is everything, but the courts will expect laws to be formulated with sufficient precision to enable citizens to regulate their conduct by foreseeing, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. It is recognised, however, that absolute certainty of foreseeability is not possible, since too much rigidity makes laws unworkable: *Centro Europa 7 Srl and Di Stefano v Italy* [GC] (App. No. 38433/09) 7 June 2012 at §§141-142. Clarity and procedural safeguards are also important, including ensuring that individuals have a reasonable opportunity of presenting their case to the authority concerned for the purpose of effectively challenging the measures that interfere with the rights guaranteed. Procedural safeguards are particularly important where the content of the substantive law is itself expressed in broad terms.

3. Balancing protected rights and the public interest

It is for our democratic legislatures to identify and to define the public interest. However, as we have seen, the legislature does not always specify what it means by the expression 'public interest'. And given the multiplicity of factual circumstances in which the public interest may fall to be applied, it is often necessary to state the public interest at a high level of generality. Two points are worth making at the outset. First, the concept of the public interest is relevant at two levels. At the level of the general statute, the policy purpose should be sufficiently clear for the court to understand that the provisions have a legitimate aim and are suitable for achieving it. And at the level of the individual case, when it comes to the public authority for determination, it must be clear that the public interest applies. Second, the concept of incompatibility with a fundamental right suggests an inconsistency between the statutory provision and the protected right. The mere fact that a public authority might exercise a statutory power

in a manner that is incompatible with a Convention or other fundamental right does not necessarily mean that the statutory provision itself is incompatible with the right. The true question is whether that violation was compelled or at least countenanced by the legislative provision: see e.g. *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at §57; *Human Rights Law in Scotland* (Reed & Murdoch; 4th edn) at §1.59.

It falls to judges to interpret legislation and to review executive decisions for their lawfulness. How then can the courts weigh in the balance individual rights and the public interest? What tools do the courts have?

Clearly, the courts interpret and apply the nature, scope and depth of the particular rights. The courts have regard to the case law of the Strasbourg court; and they also apply the domestic common law in relation to property according to the values inherent in our democratic constitution.

Legislation setting out the framework for reform, based on a democratic conception of particular public interests, does not tend to focus on the impact on specific rights. This can make it hard to predict how courts will interpret legislation, and how judges will seek to reconcile the pursuit of the public interest with the rights that may be affected. As a consequence, citizens can find it hard to know in advance what impact the new law may have on their affairs. Reference to fundamental rights, with open textured language, brings with it a risk of vagueness, leaving more power to the courts. It may also distort positive legal norms into vague and uncertain standards or principles. As Sales LJ put it in the second article cited above: “It also involves a practical transfer of law-making power from legislature to the courts, as the decision-makers on the ground, operating this interpretive regime when applying the standards in the particular cases that come before them.” Development of the law by the courts can therefore come at a price: uncertainty for the legislature (what will the courts make of our text?) and for the individual, who finds it difficult to plan his affairs. Important rule of law values such as certainty and foreseeability are then in danger.

If the government and legislature expressly consider the protected right when preparing and debating legislation, that clearly helps the court. But the more abstract the formulation of the right, the less clear and foreseeable the law and the greater the role of the courts. So what fixed, objective points exist for the evaluation by the courts of conduct by decision maker or legislator?

To test whether an interference with the A1P1 Convention right is proportionate, and does not impose an unfair burden on the property owner, the courts use a four-stage proportionality analysis. First, the court asks whether the legislative aim being pursued is sufficiently important to justify interference with the fundamental right. As we have seen, the courts take the view that in the context of social and economic policy, it is not for the courts to engage in an intensive review of the purpose being pursued. The judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation.

At the second stage, the court asks whether there is a rational connection between the means chosen by the decision-maker (the legislator or the actual decision maker in the particular case) and the aim being pursued. This stage will generally be met if it can be shown that the implementation of the measure can reasonably be expected to contribute towards the achievement of the objective being pursued. Where a measure or decision is based on an evaluation of complex facts or considerations, the court allows room for the exercise of judgment by the legislator or decision-maker, who bears democratic responsibility.

The third stage requires the court to ask whether there was a less restrictive measure which could have been used without compromising the achievement of the aim being pursued. The Supreme Court has made clear that while the limitation on the protected right must be one that it was reasonable for the legislature to impose, the courts are not called on to substitute their own judicial opinion as to where the precise line should be drawn, or to identify and apply the strictest test. As Lord Neuberger and Lord Dyson put it in *Beghal v DPP* [2016] AC 88 at §76:

> *"In our view, it is not correct to say that in every case where the issue of necessity or proportionality arises the executive must produce positive evidence to show that the means which it has adopted to meet the objective in question is no more than is required. In some cases, it would be tantamount to proving a negative, which is often hard and sometimes impossible. It is important to be realistic as well as principled when assessing the proportionality of any means adopted: the need for a degree of reality in relation to proportionality was acknowledged by Lord Reed JSC in Bank Mellat (No 2), at p 791, para 75."*

The first three parts of the analysis are all necessary conditions for the lawful restriction of fundamental rights, but even if met they are insufficient. At the fourth and final stage of the proportionality analysis, the court asks whether a fair balance has been struck between the rights of the individual and the general interest of the community, including the rights of others. Because the right under A1P1 is a free-standing substantive right in domestic law, the intensity of review by the court is greater than the traditional 'unreasonableness' test in classic judicial review of actions by public authorities. As Lord Reed put it recently in *DPP v Ziegler* [2021] 3 WLR 179 at §130 (references omitted):

> *"It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard."*

This fourth stage balances the proper purpose of the law on one side of the scales, and on the other side the harm that the law causes to the individual's protected right. This test is value-laden, examining the real result of the law's application on the constitutional right and asking whether the legislation or decision imposes an "individual and excessive burden" on the property owner. The court will compare

the weight of the marginal social importance of the benefits to be gained by limiting the property right, against the social importance of preventing harm to that right. The courts can have regard to a wide range of issues at this point: the availability and amount of any compensation payable; the fairness of the procedures used; data that may justify the executive's assertion that the public interest will benefit, or by contrast data that may indicate an unfair loss to the property owner; and the values of the society as expressed in its legislation and common law. This is often a mixed question of fact and law for the court; and its application varies according to the context. As Lord Reed put it in *AXA General Insurance Ltd v Lord Advocate* [2012] 1 AC 868 at §131:

> *"The intensity of review involved in deciding whether the test of proportionality is met will depend on the particular circumstances."*

4. A right to acquire property?

Article 17 of the Universal Declaration of Human Rights provides:

> *"(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."*

The state may, however, enact rules that effectively bar particular persons from owning certain property, or confer particular rights to buy on a section of society, often existing tenants. The property rights protected under law concern lawfully acquired possessions. Restrictions on the sale of land will amount to an interference with the right freely to dispose of one's possessions; but if proportionate, will not be unlawful.

Similarly, A1P1 protects existing possessions, including land and contractual rights. It does not give anyone the right to acquire property. It is not hard to find provisions in our existing law that regulate the transfer of land. Apart from compulsory purchase, there are also elements of the law of agricultural holdings, the community right to buy, and regulation of new housing developments in national parks in order to promote affordable housing for permanent residents. However, since A1P1 protects existing contractual rights, including option agreements to buy land, any reform would have to consider its impact not only on present owners of land, but also those persons who at the time of the legislation hold contractual rights in relation to land, including option rights. The compatibility of new legislation with existing rights will depend on all the circumstances, but there will certainly be groups whose purely contractual rights will be affected.

While the fact that the United Kingdom is no longer a member of the EU may afford a little more flexibility to the Scottish Parliament, the effect of domestic legislation on foreign nationals, and their rights under international investment protection agreements, would need to be carefully considered. A recent example is found in the case of *Commission v Hungary* (Case C-235/17; 21 May 2019) decided by the Grand Chamber of the Court of Justice of the European Union but with reasoning based not only on the EU's Charter of Fundamental Rights of the EU but also on the Convention. The court noted that contractual rights of use or usufruct over immovable

property amount to possessions protected by A1P1. Hungary's cancellation of those rights without compensation was found to be a deprivation of property which, in the particular circumstances, was held not to be in the public interest and in the absence of compensation was held not to satisfy the requirement of proportionality. The Commission's decision to take proceedings against Hungary is alluded to in its interesting "Interpretative Communication on the Acquisition of Farmland and European Union Law" (2017/C 350/05), which discusses both the legitimate purposes for regulating agricultural land markets, and the need for member states to ensure that limits are proportionate and comply with EU law.

5. Examples of land reform in Europe

Many states that are signatories to the Convention operate restrictions on the acquisition, use and management of land: see the report commissioned by the Scottish Land Commission "Research on interventions to manage land markets and limit the concentration of land ownership elsewhere in the world" *(Glass et al, 2018)*. It is interesting that few of these restrictions have come before the European Court of Human Rights at Strasbourg. Given the wide margin of appreciation afforded to the state, court challenges tend to turn on their own facts and in particular on the proportionality of the measure's application to the claimant.

For example, in *Hakansson and Sturesson v Sweden* (app. no. 11855/85; 21 February 1990) the applicants bought an agricultural estate at a compulsory auction sale and were required to obtain a state permit in order to be able to retain the land for more than two years. Their subsequent application for the permit was refused on the ground that the estate was a "rationalisation unit" under legislation designed to promote the rational development of agricultural enterprises. When, after two years, their land was sold cheaply at a further compulsory auction sale, the applicants claimed that their A1P1 rights had been violated. The court found that when the applicants bought the land they had taken into account the risk of not obtaining such a permit, and that the resale price, though low, was reasonably related to the land's value. The legislation itself was not found to be unlawful.

6. Conclusions

Elements of any land reform agenda will excite debate and opposition. However, there exists a constitutional framework within which Scotland can develop lawful reforms in this area. It is for the Scottish Parliament to debate and enact such reforms, and it is important that the Parliament is well informed and open in that legislative process. Experience in other countries, and an understanding of Scots law and procedure, show that there is no obvious barrier in law to the introduction of reforms of the type discussed by the Scottish Land Commission in its recent papers. If the settled view of the Scottish Parliament is that such reforms are necessary, then the task for legislators, ministers, courts and officials will be to ensure that the law is clearly stated, that procedures are fair and transparent, and that each use of the new powers is properly justified.