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Scottish land reforms set to accelerate

Rosamond McDowell and Alistair Anderson delve into the complex legislative agenda governing land rights north of the border

Almost 40 years ago, in 1977, John McEwen, a forestry consultant, published a book entitled 'Who Owns Scotland?'. His study revealed that ancient British families dominated the scene, controlling lucrative salmon beats and deer stalking. For many decades, British gentry, in addition to their estates in England, had owned shooting estates in the Borders, Highlands or islands of Scotland.

In 1996, updates were published to McEwen's work, alleging that half of Scotland was now owned by just 500 people, few of whom were actually Scots, nor even British, and that millionaires worldwide were buying up tracts of land in Europe's last great wilderness. These new absentee land-owners were leading, so it was said, to neglect of Scotland's land, with farms being abandoned and mountains being 'closed to visitors', sparking a political debate with a long tail.

The Scotland Act 1998, introduced by the Labour government, brought with it the devolution of power to a Scottish parliament, together with the idea of land reform. With the SNP's success in the 2015 general election, their manifesto promise to 'ensure Scotland's land reform debate focuses on how Scotland's land can be best managed in the public interest to ensure it is of benefit to all of the people of Scotland' calls into question how Scotland's estate owners might be affected by the proposals, and what legal rights existing owners have to protect their land.

Being pushed through as a priority by the SNP-led Scottish government, the Community Empowerment Bill is in the final stage of its journey in the Scottish Parliament, and the introduction of the Land Reform Bill is awaited. The main proposals are:

> Extending the availability of the existing pre-emptive right to buy, which allows communities to register an interest in land which affords them the opportunity to buy that land when it comes up for sale.

> Giving all communities a compulsory right to buy land which is deemed to be neglected or abandoned and which is preventing sustainable development within the community. In contrast with the pre-emptive right to buy, it is thought that this right will apply whether or not an interest has been registered and whether or not the land is up for sale.

What is unclear in the draft legislation is what constitutes 'neglected or abandoned land', particularly with regard to rural land - will communities now have the right to buy areas which are not actively managed, for example moorland?

> Limiting the legal entities (including individuals or bodies) that can own land in Scotland in order to increase transparency, address tax avoidance and promote wider ownership. The concerns are that there will be a loss of inward investment, and discouragement of a free market.

> Creating a single database to hold details of all land ownership within ten years. Increasing transparency is a good thing, but the work and professional fees involved in fulfilling this aim will be considerable.

> Introducing a sustainability test which will give power to Scottish ministers and/or public bodies to intervene in situations where the scale or pattern of land ownership in an area, and the conduct of a landowner, is acting as a barrier to sustainable development. This will almost certainly lead to challenges by landowners.

> Setting up a Scottish Land Reform Commission to provide oversight of land reform issues and to monitor the impact of legislation.

Only time will tell how the proposals will impact on landowners in Scotland. Even if the proposed legislation makes it through parliament, it will be susceptible to challenge, particularly if it has the potential to infringe human rights. The Scottish government must ensure that all legislation which it passes is compatible with the European Convention on Human Rights, and specifically Article 1 of Protocol 1, namely the right to peaceful enjoyment of property.

A balance must be struck between public and private interests in implementing the proposals, and the Scottish government would need to defend such a challenge (which may be brought by any person who considers his rights to have been violated) by showing that the aim of the reforms is sufficiently important to justify limiting such a fundamental right, as well as being proportionate and the least restrictive alternative.

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If the legislation survives legal challenge, individual decisions made by Scottish ministers and public bodies may nonetheless be the subject of challenge by means of judicial review, the traditional means of challenge to any action by a public body, which in Scotland extends also to actions by private bodies.

In practical terms, landowners may wish to consider measures to demonstrate that they are already working with the community in, for example, providing affordable housing, rural employment and enterprises. Collaboration between the estate and the community, which is already happening in many cases, is one way of showing that land does not necessarily need to belong to the community to deliver public benefit.

The wind of change in Scotland is strong. It is hoped, however, that the land reform proposals will ultimately deliver a fair balance between public and private interests, with the new Land Reform Commission as guarantor.

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