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## Chapter 9

### Property Rights and Human Rights in Scottish Land Reform

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#### *Introduction: Human rights in the Scottish land reform debate*

The realisation of many human rights is impossible without land. A cursory glance at Scotland's international human rights obligations, which include protections in respect of health, housing, employment and property itself, makes clear that careful management of this critical and limited resource will be essential for fulfilment of these obligations to the greatest extent possible. The centrality of this relationship is recognised in Scotland's first Land Rights and Responsibilities Statement (LRRS), which sets out in its opening paragraph that:

The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The framework should support sustainable economic development, protect and enhance the environment, help achieve social justice and build a fairer society.<sup>1</sup>

Appendix A to the LRRS clarifies the legal instruments in which 'relevant' human rights are identified, including international, European and domestic sources.<sup>2</sup> The LRRS's Advisory Notes and case studies provide examples of what a 'human rights approach' – in other words, an approach which actualises rights across the spectrum to the greatest extent possible – to

land reform might look like.<sup>3</sup> The task for government, public authorities and landowners of every type is to make decisions around land that best support all relevant rights.

The emphasis placed by the LRRS on the full range of Scotland's human rights commitments reflects a shift in the land reform conversation. Over the previous 20 years, the discussion seldom engaged with human rights, with one exception, namely the right to peaceful enjoyment of possessions set out in Article 1 of the First Protocol (A1P1) to the European Convention on Human Rights (ECHR). In the Scottish Law Commission's programme of property law reform work in the early part of this century, A1P1 was the only right given detailed consideration.<sup>4</sup> The same approach was taken by the Scottish Executive when introducing draft legislation on land: see, for example, the Policy Memorandum accompanying the first Land Reform (Scotland) Bill, in which two brief paragraphs note the ECHR rights potentially engaged by the Bill with specific reference to A1P1, before concluding that 'the Executive is satisfied that the provisions in the Bill on community ownership and crofting community ownership are compliant with the Convention'.<sup>5</sup>

Increased interest in the role of other human rights in relation to land reform became notable around the time of the publication of the Scottish Human Rights Commission's first Action Plan in 2013. This programme, focused on enhancing awareness and integration of the entire suite of human rights across Scottish public life, specifically referenced the significance of land 'as a key resource for the realisation of a range of human rights' and identified the ongoing land reform process as an opportunity for progressive realisation of those rights.<sup>6</sup> As the land reform conversation moved to focus on the development, enactment and implementation of the Land Reform (Scotland) Act 2016, human rights other than A1P1

received far greater attention than previously. Their significance is now cemented in the LRRS commitment to a human rights approach to reform noted above.

The publication of the LRRS offers an appropriate moment for reflection on how the human rights conversation evolved. In the lead up to the 2016 Act, a political and media narrative emerged in which A1P1, representing the claims of existing landowners, was positioned as a barrier to reform. Scholars noted that it was being used as a ‘red card’ to obstruct debate about land reform and deployed as a ‘trump card’ over competing interests in land.<sup>7</sup> Media commentators suggested it was ‘by far the biggest hurdle’ and provided a ‘constraint’ by which the SNP government found ‘its hands partially bound’.<sup>8</sup> The authority of other human rights instruments, particularly the International Convention on Economic, Social and Cultural Rights, was called upon to overcome this barrier, implying an opposition between the (A1P1) rights of landowners, and the (ICESCR) rights of the rest of society in relation to land. Two comments bookending the 2016 Act debates illustrate the perceived conflict. First, in the Report of the Land Reform Review Group, the document instigating and delineating the conversation which eventually produced the 2016 Act, compliance with fundamental human rights was defined as part of the ‘common good’ towards which all land reform measures should be aimed, with the observation that:

The traditional focus in discussion in Scotland about human rights and land reform has been the balance to be struck between private property rights and the public interest under Article 1 of the European Convention on Human Rights First Protocol...However, as the work of the Scottish Human Rights Commission demonstrates, the relationship between human rights and land in Scotland is not only about the principle in that Protocol.<sup>9</sup>

Then, in the final debate in the Scottish Parliament, immediately preceding the vote which passed the Act into law, Mike Russell MSP commented:

Land reform in Scotland is hard to do at this time because of the European convention on human rights. I am not in any sense against the ECHR, but as we heard at the start of the debate, land reform post-ECHR tends to be focused on individuals' property rights. There are other rights, and those rights are expressed in a range of documentation, including the [ICESCR and further instruments now identified in Appendix A to the LRRS].<sup>10</sup>

In this chapter, I argue that the political and media positioning of AIP1 as a barrier to land reform is a mischaracterisation. AIP1 may have been cast in this role partly because of successful legal challenges to earlier land reform legislation under its auspices, but doctrinal analysis of the limited available case law demonstrates little support for construction of AIP1 as a landowner's right. Drawing on a theoretical model developed by US constitutional property scholar Joseph Singer, I argue that AIP1 understood correctly provides a valuable framework for ensuring *all* interests in land are given due consideration. I also argue that, as the only directly justiciable right available, AIP1 can provide an essential tool for enforcing the LRRS commitment to land reform informed by all relevant human rights.

The chapter is in four parts. First, an outline of Scotland's human rights framework is provided, so that the constellation of potentially competing claims on land and their interaction can be understood. Secondly, an analysis of the AIP1 case law on land reform reveals the attenuated nature of the protection it provides to landowners. Thirdly, Singer's

citizenship model of property rights protection is explained, and the case is made for it as an appropriate interpretation of A1P1. The final section will draw the threads together and argue for a revised understanding of A1P1 as a key enforcement mechanism for all human rights within land reform.

### *Section I: Scotland's human rights framework*

#### (1) International and European human rights obligations

Scotland and the United Kingdom are subject to an interlocking framework of global, European and domestic human rights obligations.<sup>11</sup> At the global level, the United Nations is the key proponent of international human rights standards, developed post Second World War through the International Bill of Rights and subsequent treaties (such as the Convention on the Rights of the Child).<sup>12</sup>

Rights contained within these instruments can be split into two broad categories. The first are civil and political rights, contained primarily within the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

Murdoch describes rights within this category as grounded in the Western liberal democratic tradition, stressing protection for personal integrity, procedural propriety in the determination of civil and criminal actions, protection for democratic processes and the promotion of religious tolerance and plurality of belief.<sup>13</sup> Freedom from arbitrary deprivation of property is included within this category.

UDHR rights were implemented in the European legal order by way of the ECHR, and its protections also overlap significantly with those in the ICCPR.<sup>14</sup> The protection provided to property in A1P1 of the ECHR is as follows:

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 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.

At the time of writing, the UK's continued adherence to the ECHR is not beyond doubt, although the process of withdrawing from the Convention would be legally complex.<sup>15</sup> Since predictions as to the eventual resolution of these issues are highly speculative at present, this chapter assumes the ECHR will continue to apply to the UK for the foreseeable future. Whilst a member of the European Union, the UK is also signatory to the Charter of Fundamental Rights of the European Union. Since the land reform legislation in Scotland has not generally been introduced in pursuance of underlying EU regulation (*Aklagaren v Hans Akerberg Fransson* 2013), the Charter is unlikely to have much significance and will not be considered further here.

The second broad category of rights applicable in the UK and Scotland are economic and social rights, contained primarily within the International Covenant on Economic, Social and Cultural Rights (ICESCR). Murdoch describes these as forming the basis of socialist

conceptions of human rights, and the extent to which they can or should be recognised as legal obligations is the subject of considerable debate.<sup>16</sup> ESC rights fall within seven headings: workers' rights; the right to social security and social protection; protection of and assistance to the family; the right to an adequate standard of living; the right to health; the right to education; and cultural rights.<sup>17</sup>

The Scottish land reform programme, with its focus on sustainable development across economic, social and environmental spheres (see Ross, chapter 10), has intersections across the full range of these entitlements.<sup>18</sup>

## (2) UK and Scottish human rights obligations

Under section 50 of the Scotland Act 1998, the Scottish Government is obliged to act compatibly with the UK's international obligations, which include those contained in the UN and European instruments described above.

The rights contained within the ECHR have also been directly incorporated into UK domestic legislation by the Human Rights Act 1998 (HRA), with additional Convention-related obligations in the Scotland Act 1998. The combined effect of these pieces of legislation in Scotland is that, first, any purported legislation of the Scottish Parliament which cannot be given effect in a way compatible with Convention rights will be considered *ultra vires* the Parliament and therefore 'not law' (Scotland Act, s 29(1)). Secondly, any public authority act (defined to include omissions) which is not compatible with Convention rights will be unlawful (HRA, s 6; Scotland Act, s 57).

## (3) Enforcing human rights



The mechanisms available for enforcement of our human rights obligations vary depending on the source of the right in question.

Rights contained within the ECHR can be directly enforced against Scottish or UK public authorities, including both governments, through court action. The UK first recognised the jurisdiction of the European Court of Human Rights in Strasbourg in 1966, and once the HRA came into force in 2000, it was competent for these proceedings to be raised in the domestic courts (HRA, s 7).<sup>19</sup> Where a court or tribunal in the UK is faced with a Convention rights question, it is obliged to ‘take account of’ relevant jurisprudence of the Strasbourg court (HRA, s 2(1)). Domestic jurisprudence has interpreted this obligation to mean that a Strasbourg decision should be followed unless there is a strong reason to deviate from it (*R (Anderson) v Secretary of State for the Home Department* 2002; *R (on the application of Ullah) v Special Adjudicator* 2004).

Rights contained within the ICESCR and other UN Conventions are not directly justiciable. In other words, it is not possible for a person to raise an action in a domestic or international court in respect of a contended violation of these rights by the state. Compliance is enforced instead through various international law mechanisms, chief amongst which is a UN monitoring process.<sup>20</sup> In respect of each Convention, a scrutiny committee has been established, composed of international experts in the field. Member state governments are obliged to report to each committee at regular intervals (usually once every five years) in respect of progress with implementing the relevant Convention. The committee scrutinises the report and produces Concluding Observations, commending good practice where appropriate and highlighting areas of concern where state compliance with its obligations is lacking. The committee has no power to compel a state to take (or refrain from) action.

However, criticism in the Concluding Observations is a form of political censure intended to motivate states to improve their practices. At domestic level, similar monitoring is carried out by the Joint Committee on Human Rights at Westminster and the Equality and Human Rights Committee at Holyrood. Other non-judicial domestic enforcement mechanisms can also be identified.<sup>21</sup>

This distinction between the direct justiciability of ECHR rights and the enforcement mechanisms available in respect of UN Convention rights may create an impression that the former category of rights is more ‘real’. Since the ECHR rights are largely civil and political, it is the social and economic rights set out in the ICESCR which are at risk of being perceived to have a lower status. If the human rights of primary relevance to the land reform debate are the right to property and the social and economic rights outlined above, and if A1P1 is the only one of those rights that can lead directly to legal action against the government, it may be understandable that A1P1 is the right with which stakeholders – including government, landowners and others – have historically been preoccupied.

Although ICESCR rights cannot be directly enforced in court, they may nevertheless have an influence on domestic judicial decision-making. In the Supreme Court decision in *R (on the application of JS) v Secretary of State for Work and Pensions* (2015: [137]), Lord Hughes noted that an international treaty which has not been incorporated into domestic law may nevertheless be relevant to the court in three ways, two of which are relevant to the land reform discussion. First, if the construction of domestic legislation is in doubt, the court may conclude that it should be construed so as to adhere to the UK’s international obligations. Secondly, where claims are brought under the HRA, and there is a sufficiently close connection between the Convention right under consideration by the court and an

international treaty obligation, international law requires the court to have regard to that obligation in interpreting the Convention right (see also *Moohan, Petitioner* 2014: [63]-[64] and [78]). In *Re (JS)*, the petitioners argued that the introduction of a benefit cap in the UK unjustifiably discriminated against women in contravention of their rights under A1P1 together with article 14 of the ECHR, which provides for freedom from discrimination in relation to exercise of any other Convention right. The petitioners sought to rely on provisions relating to child welfare within the United Nations Convention on the Rights of the Child as an aid to interpretation of article 14 of the Convention. The Supreme Court was not satisfied that freedom from discrimination was sufficiently closely connected to protection of child welfare for the UN Convention to be relevant in this case. However, it is possible to imagine ICESCR rights becoming relevant to an interpretation of the public interest requirement of A1P1 in a land reform context. This proposition remains untested, but the possibility is important in understanding A1P1's potential value as a tool for rights-compliant land reform, discussed further in Section IV below.

### *Section II: A1P1 in the courts – a significant hurdle to land reform?*

A1P1's reputation as a barrier to land reform presumably emerged in part from challenges to pre-2016 Act legislation by landowners who contended their property rights had been violated. As the second ever case in which Scottish Parliament legislation had been found to contravene the ECHR, *Salvesen v Riddell* (2013) attracted particular attention. One Edinburgh law firm reported that:

the Scottish Parliament was left with something of a bloody nose by the courts declaring one of its flagship provisions non-compliant with human rights.<sup>22</sup>

Land reform campaigner Lesley Riddoch suggested there was subsequent timidity by the Parliament around agricultural land reform ‘because it feared further legal challenge’.<sup>23</sup>

A finding that Scottish Parliament legislation is contrary to human rights should always be significant, of course, and will inevitably impact on the public and political perception of land reform. However, the extent to which A1P1 has hindered land reform from a *legal* perspective should not be overblown. In fact, there have only been three litigated cases to date. The scope of the cases has been limited – no case yet has offered a central challenge to a land reform measure, with the focus instead on procedural aspects or exceptions to the general rules. The findings against Parliament have been more limited still. An analysis of each case serves to make the point.

(1) *Pairc Crofters Ltd v Scottish Ministers* (2012)

The first human rights challenge to land reform concerned the crofting community right to buy provided by Part 3 of the Land Reform (Scotland) Act 2003. The crofting community represented by the Pairc Trust had made a successful application to buy the ownership and tenancy of land in South East Lewis. Pairc Crofters Ltd and Pairc Renewables Ltd – the owner and tenant respectively of the land in question – challenged the outcome of the application as contravening their rights under A1P1 and article 6 of the ECHR. No argument was made that the introduction of a right to buy was in itself a violation of A1P1. The litigation concerned the procedure by which the right was exercised.

The petitioners’ complaint centred on the requirement for property rights holders to be given a reasonable opportunity to put their case to the decision-maker when deprivation of those rights was at issue. Deprivation of property through state action can only be justified under

A1P1 where it is lawful, pursues a legitimate aim in the public interest and strikes a fair balance between the needs of the state and the right of the applicant without imposing an individual and excessive burden (*James v UK* 1986: [50]). Meeting those conditions requires respect for due process when determining that the deprivation should occur. The petitioners argued that the relevant provisions of the 2003 Act, and the accompanying Crofting Community Right to Buy (Ballot) (Scotland) Regulations 2004, failed to respect due process at four stages in the procedure, including during the crofting community ballot on whether an application to buy should be made, and when Ministers were making their determination on whether to grant or refuse an application.

The Inner House of the Court of Session found no violation of Convention rights. In broad terms, the court was satisfied that the extent of landowners' opportunities to participate in the process was sufficient for the requirement of due process, and that the obligation on Ministers to make decisions 'in the public interest' throughout the procedure necessarily required Ministers to take landowners' interests into account. Lord Gill noted:

Section 72(4)...provides that the public interest includes the interests of any sector of the public, however small, which in the opinion of Ministers would be affected by the exercise of the right to buy. That plainly includes the interests of the landowner.<sup>24</sup>

Any decision taken by Ministers in a specific case would be open to challenge by a landowner if it were manifestly unreasonable.

The A1P1 challenge represented by *Pairc* was therefore limited and ultimately unsuccessful. There is little here to support the perception of A1P1 as a significant barrier to reform.

(2) *Salvesen v Riddell* (2013)

The background to *Salvesen* is legally and factually complex but must be understood to contextualise the significance of the decision. Salvesen owned a farm in East Lothian which was subject to a tenancy agreement. The tenant was a limited partnership comprised of the Riddell family (who occupied the farm) as general partners, and an agent of the landlord as limited partner. The creation of a limited partnership composed of the landlord and the intended occupiers of the land had become a common mechanism for circumventing the security of tenure provided by the Agricultural Holdings (Scotland) Act 1991 in the years following its introduction. Where the tenancy was held by limited partnership, although the tenancy itself was secure against the landlord, the *tenant* could be dissolved relatively easily, achieving the same end goal of terminating tenants' rights over the land. The Scottish Government sought to neutralise the effect of this mechanism which undermined the policy ambitions pursued through the security of tenure regime. Section 72 of the Agricultural Holdings (Scotland) Act 2003 accordingly provides that, where a limited partner seeks to terminate a limited partnership prior to the agreed end date of the tenancy, the general partners may send a notice asserting their intention to continue the tenancy nevertheless, holding as tenants in their own right.

The clause which became section 72 was not included in the Bill which became the 2003 Act when it was introduced into Parliament by the Scottish Government on 16 September 2002. A proposed amendment to the Bill incorporating this provision was published on 3 February 2003. Anticipating that many landlords might seek to avoid its effects by taking steps to dissolve affected limited partnerships before the Act came into force, the amendment specified that the provision would apply to any attempted termination from 4 February 2003

until a later date to be determined. Actions taken during the remaining hours of 3 February 2003 were not covered however, and landlords including Salvesen took steps to dissolve affected limited partnerships before close of business on that day. A subsequent amendment published on 10 March 2003 backdated the provision to apply to any attempted termination from the date of the Bill's introduction on 16 September 2002. Accordingly, although Salvesen's actions were not caught by the provision when he took them on 3 February 2003, they were retroactively caught by the provision following the amendment of 10 March 2003.

The March amendment also introduced a new provision which became section 73 of the 2003 Act. Section 73 enables a landlord in a tenancy which had been continued under section 72 to terminate the tenancy on its agreed end date through service of a notice. This provision was, however, only available to landlords who took steps to dissolve affected limited partnerships from 1 July 2003 onwards. Landlords who had acted between 16 September 2002 and 30 June 2003 had no power to terminate the tenancy.

Following Salvesen's steps to dissolve the partnership on 3 February 2003, the Riddell family asserted their right to continue the tenancy under section 72. Salvesen raised a court action contending, amongst other things, that section 72 of the Act was contrary to A1P1. The argument, though not pressed in the initial round of litigation in the Scottish Land Court, was successful in the Inner House of the Court of Session, which found section 72 as a whole to contravene A1P1. The Supreme Court made a narrower finding, upholding the Inner House's decision only to the effect that section 72(10) – the subsection that prevented landlords in Salvesen's group benefitting from section 73 – contravened A1P1.

The decision focused on the difference in treatment between landlords like Salvesen who took steps to terminate limited partnerships between 16 September 2002 and 30 June 2003, and those who took steps from 1 July 2003 onwards. The latter group benefitted from section 73: the former did not. The interference with the property rights of landlords in the former category was therefore significantly greater. Based on Ministerial statements at the time the March amendment was introduced and the circumstances surrounding its introduction, Lord Hope noted that it was hard not to see section 72(10) as having been designed to penalise landlords who acted to terminate limited partnerships on 3 February. He did not consider this punitive justification fair, or reasonably related to the aim of the legislation as a whole, which was focused on enhancing the security of agricultural tenants and streamlining the operation of the sector. Accordingly, the interference with the rights of landlords in the former category was disproportionate. Lord Hope also noted that the former category was not composed solely of landlords who acted on 3 February, and since no justification was offered for the differential treatment of other landlords caught within this group, their inclusion seemed arbitrary, again in contravention of A1P1.

The detail of the Supreme Court's finding is critical to understanding its significance for the overall land reform programme. The subsection of the 2003 Act which violated A1P1 applied only to agricultural landlords who had taken steps to dissolve limited partnership between 16 September 2002 and 1 July 2003, and concerned only the circumstances in which such landlords could terminate the secure 1991 Act tenancies which may have been acquired by general partners as a result. The overwhelming majority of the 2003 Act, including the key provisions creating a pre-emptive right to buy for agricultural tenants and strengthening security of tenure in the sector, were not called into question. Moreover, the reason why the subsection contravened A1P1 was that it was intended to have a punitive effect on the



landlords concerned. The current land reform programme pursues a complex set of policy objectives, but punishment of property rightsholders is nowhere to be found within them. Any precedent set by the case is extremely narrow in scope, and it seems difficult to imagine how a similar set of circumstances could emerge.

Accepting this argument does not deny that the *Salvesen* decision is significant. Most obviously, it was of critical importance to every person in a relevant limited partnership in the relevant period. The impact of the decision on the lives of people affected was unarguably profound. This argument also does not concede that the *Salvesen* decision was correct. Arguments can and have been made that the court's application of A1P1 was misguided.<sup>25</sup> The point I make is simply that the scope of the *Salvesen* decision is so limited that it cannot support a characterisation of A1P1 as a significant hurdle to land reform. Far from being struck down, the major reforms brought about by the 2003 Act were not even in question.

### (3) *McMaster v Scottish Ministers* (2018)

If *Salvesen* was limited in scope, the decision in *McMaster* which resulted directly from it was even more so. The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 was enacted to address the aspects of section 72 of the 2003 Act which *Salvesen* had found to contravene A1P1. One effect of the Order was that landlords in *Salvesen*'s category – those who had acted to terminate limited partnerships between 16 September 2002 and 30 June 2003 – were no longer barred from making use of section 73 of the 2003 Act to terminate a tenancy on its agreed end date. Allowing this category of landlords to make use of section 73 resolved the A1P1 issue in *Salvesen*. However, it created a new A1P1 issue for tenants under the continued leases.

The petitioners in *McMaster* were former general partners who had become tenants through section 72. Under the law apparently in force at the time they asserted their rights, they had acquired secure tenancies in respect of which section 73 did not apply. Following the finding in *Salvesen* that section 72(10) was ‘not law’, and the resulting enactment of the Order, the petitioners continued to hold those tenancies. However, section 73 now did apply, meaning the security of their tenure was much reduced. In the cases of many of the petitioners, landlords had already exercised their rights under section 73, meaning the tenancies were at an end. The Order contained no scheme for compensation related to its effects on tenants, and where individual petitioners had sought compensation from the government, their claims had been refused. The petitioners contended that their rights under A1P1 had been violated.

In the first judicial consideration of the dispute, in the Outer House of the Court of Session, Lord Clarke found that the Order effected a control of the use of the tenancies by changing the conditions under which they could be terminated. It was not in dispute that the control was lawful and pursued a legitimate aim in the public interest. However, if the reduction in security of tenure had resulted in loss to the petitioners which had not been compensated, this would amount to a disproportionate interference with the petitioners’ A1P1 rights. It was not possible to say whether loss had been suffered in any specific case because the relevant facts had not been placed before the court. Lord Clarke indicated that, to ensure A1P1 compliance, compensation should be provided where petitioners could demonstrate specific losses directly caused as a consequence of their reasonable reliance on the pre-Order level of security of tenure, and for associated frustration and inconvenience. However, the value of that compensation should be offset against the windfall benefit to the petitioners of the security of tenure enjoyed in the period between their acquisition of the tenancy and the enactment of the Order. Should there be a case where application of these principles demonstrated an overall

loss to a person in the petitioners' position, and no compensation was paid by the government, that person's rights under A1P1 would likely be violated. This analysis was approved by the Inner House on appeal.

Again, there may be arguments about the approach taken to A1P1 in this case. However, as with *Salvesen*, the decision's scope in relation to the broader land reform programme is very limited. Successive findings of A1P1 contraventions by the Scottish Parliament are no doubt embarrassing politically and may influence the opinion of the public, but from a legal perspective, A1P1 has done little to stand in the way of reform. The idea reiterated in Parliamentary debates that the ECHR makes land reform 'hard to do' is not, in my submission, borne out by the jurisprudence. Based on the case law to date, A1P1 has proved very little hindrance to land reform.

### *Section III: Reconstructing A1P1 – the citizenship model*

Reported cases cannot, of course, tell the whole story. If Parliament suspects legislation will contravene A1P1, it should not pass it in the first place, after all. Perhaps the challenge presented by A1P1 is best represented not by the flaws which have been found in the legislation introduced so far, but the restrictions it has placed on the development of land reform legislation in the first place.

It is impossible to know exactly how A1P1 concerns have influenced the land reform programme pursued by government to date. In this section of the chapter, however, I argue that A1P1 need not prove a barrier to broad scale and radical land reform. This argument draws on insight from US scholarship, particularly the work of Joseph Singer. The

misconstruction of A1P1 that has dominated the 2016 Act discussion encapsulates what Singer terms the ‘castle model’ of human rights protection of property. He argues that a ‘citizenship model’ is a better way of understanding how this protection is meant to operate. I transplant this argument to the European context, arguing that the citizenship model is an accurate interpretation of the text of A1P1 and its jurisprudence. I go on to argue that this citizenship model approach to A1P1 helps us to understand how ESC rights, far from being contradicted by A1P1, can actually be enforced *through* A1P1. Employing the citizenship model suggests that, far from inhibiting an LRRS-style human rights approach to land reform, A1P1 is actually the only mechanism by which individuals can ensure it takes place.

#### (1) Singer and the citizenship model

Protection of property rights against unjustified interference by the state is a common provision in constitutional documents and Bills of Rights throughout the world.<sup>26</sup> At its heart, this protection recognises that, because land is fundamental to the fulfilment of basic human needs such as food and shelter, secure rights in property (not necessarily ownership rights, it should be noted) are a prerequisite to independent political participation. If state authorities have the power to dispossess citizens at will, dissent becomes dangerous, and debate may be stifled or absent. Expropriation of dissenting voices is a common tactic of dictatorial regimes. Protection of property rights is therefore essential to democracy.<sup>27</sup> The nature of property rights and the extent to which they should be protected to meet this democratic need is a central question in political and legal debate.<sup>28</sup>

In recent decades, the richest source of legal scholarship on this issue has been the ‘takings clause’ of the Fifth Amendment to the United States constitution, which simply states: ‘nor shall private property be taken for public use, without just compensation’. As the number of

decisions handed down by the US Supreme Court in respect of this clause has grown, concern has developed amongst scholars as to the coherency of the emerging doctrine, with one commentator pointedly describing the jurisprudence as ‘a muddle’.<sup>29</sup> The extensive literature suggests the roots of the confusion lie in a debate, poorly articulated within the jurisprudence, as to the values which property law was created to protect in the first place.<sup>30</sup> Numerous underpinning values can be suggested for a property rights system, such as the protection of individual liberty, the maximisation of preference-satisfaction or the promotion of human flourishing. The contended incoherency in the takings jurisprudence is said to result from the Supreme Court implicitly accepting different underpinning values for property rights in different situations, which inevitably leads to different findings about the extent to which state action impinging on those rights for the benefit of others can be justified.<sup>31</sup>

Singer’s work does not deny the existence of these competing justificatory values for property rules, nor does he argue for one justification over others. Instead, he suggests we accept that property is a contested concept, with the property law rules in place in any society at a given time representing nothing more than the current compromise as to the weight various values should be accorded. In his view, ongoing alteration of property rules is not only inevitable, but a healthy indication of a society that continues to address and readdress the compromise it has struck as circumstances change.<sup>32</sup>

In Singer’s paradigm, the court plays an essential role by providing a forum in which compromises around property rules can continue to be negotiated, with the judiciary holding the other branches of government to account if they stray too far.<sup>33</sup> Performing this role effectively requires the court to ask the correct questions which, in Singer’s view, the US Supreme Court does not always do. The difficulty here comes back to the court’s implicit

acceptance of property as a coherent concept referable to one underlying value. Singer identifies two models of decision-making commonly employed by the US Supreme Court.<sup>34</sup> In the first, the claimant's property is her castle, within which she has absolute dominion, and any government interference with that freedom must be justified. The castle model has obvious resonance with the libertarian understanding of property. In the second model, property rights are legitimised by the investment the owner has made in the property, and are protected so long as that expectation of protection is justified by the investment made. This model resonates with economic understandings of property. In both cases, the concept of ownership is considered fundamentally incompatible with the idea of obligation, and the burden is placed on the state to justify limits on the presumed absolute power of owners.<sup>35</sup>

The problem with these models, in Singer's view, is their failure to acknowledge obligations as inherent to ownership. They suggest that property rules do no more than delineate the entitlements of individual rights holders – entitlements with which the state should not interfere. This description of property law rules does not acknowledge the full extent of their effect. For Singer, property law rules structure the society in which we live. This is a consequence of the fact that property, particularly land, is a finite resource. For many civil and political rights, such as the right to a fair trial or to freedom of speech, upholding my rights does not deny anyone else – every person can enjoy the right to the maximum extent possible. Where land is concerned, however, upholding my ownership rights necessarily denies the rights of other people over that land. Another way of expressing this is to say that property rules involve allocation of scarce resources. Since land is a resource every human being needs to survive, the allocations we choose to make through our property law system affect everyone. This structuring effect of property law explains why it is legitimate to expect

owners and other rights holders in land to undertake responsibilities towards the rest of society.<sup>36</sup>

To perform its function effectively in takings cases, the court must take the systemic effect of property rules into account. By denying that social obligation is inherent to ownership, the castle and investment models hinder that process. Singer therefore develops an alternative framework – the citizenship model – that is better adapted for consideration of property’s systemic effects.

Singer’s citizenship model starts from the assumption that obligations are inherent to property rights. The liberty that property secures for me is only legitimate to the extent that the same liberty can be secured for you. He explains:

The citizenship model seeks to confer freedom and equality on all persons, spreading rights to all, but it simultaneously places owners in the role of guardians of social order. This position of guardianship entails duties to refrain from actions that endanger the underpinnings of a free and democratic society that treats all individuals with equal concern and respect...Property serves social as well as individual functions.<sup>37</sup>

Accordingly, the core of constitutional property is not protection from *any* obligation at all, as the castle and investment models might suggest. Rather, constitutional property provides protection from obligations that are *unjust* in the sense that they go beyond those that a reasonable citizen should be expected to undertake. Framing the question in this way focuses attention on identifying the correct obligations, and prevents a construction of constitutional

property that ignores the responsibilities that must result from property's systemic effects. It also forces a conversation in which the values which are being given preference within the property law system must be articulated, and a compromise acknowledged. As Singer suggests, the citizenship model:

... invites debate about what obligations we have as citizens in a free and democratic society, bound to laws adopted by elected officials, but protected by certain basic constitutional rights. Further it asks us what kind of property regime we want the law to support.<sup>38</sup>

The citizenship model cannot tell us which obligations are just and which are unjust. Making this determination is the essence of the compromise that property law must always represent. However, Singer notes that, in a democratic country bound by the rule of law, we must start with the presumption that lawful obligations are both legitimate and reasonable as well as fair and just.<sup>39</sup> Legislation passed by a democratically elected Parliament represents the compromise currently acceptable to society, in other words. A constitutional property right is designed to protect against obligations that, despite being acceptable to society as represented by Parliament, fail to respect certain minimum standards. Constitutional jurisprudence helps us to understand what those standards are.

## (2) The citizenship model and A1P1

Singer developed the citizenship model to deal with constitutional protection of property rights in a context where the values underpinning those rights were a matter of debate. It is this aspect of Singer's model that makes it so suitable for use in relation to A1P1. Some constitutional documents set out in clear terms the purpose of the protection they provide,



with section 25 of the South African constitution perhaps the most well-known example. By contrast, the drafters of the ECHR were keen to avoid framing the property protection in a way that enshrined a particular political or economic understanding of property's purposes. At the time of the ECHR's drafting, European governments occupied a range of points on the political spectrum from right to left. Consensus on some minimum level of protection appropriate for property rights proved impossible. The text which became A1P1 was a long-negotiated compromise, within which states were intentionally given considerable freedom to pursue the economic and political policies around property that their elected legislatures viewed as appropriate. Minimum standards would, it was hoped, emerge through the case law.<sup>40</sup>

To date, the European Court of Human Rights jurisprudence has maintained a wide margin of appreciation for states in this respect. The standards which have emerged generally focus around the *processes* by which property rights are impacted by the state, rather than the purposes of state action. A1P1 jurisprudence categorises state actions into three categories. In a deprivation of possessions, a person loses ownership of their property, whether through legal loss of title or through restraint of their rights so severe that their legal rights lose all practical meaning. A control of use involves a less dramatic regulation of property rights. An interference with the peaceful enjoyment of possessions covers state action which does not fit easily into the other two categories (*Sporrong and Lönnroth v Sweden* 1983: [61], *James v UK* 1986: [37]). Regardless of the category of the interference, state action must meet three conditions. It must be lawful, in the sense of meeting the usual rule of law guarantees of legitimacy, foreseeability and non-arbitrariness. It must pursue a legitimate aim in the public interest, in relation to which the court allows a very wide margin of appreciation to states – no A1P1 violation under this head has ever been found in a case where the state has presented

an objective of any kind for their actions. Finally, the interference must be proportionate, in the sense of striking a fair balance between the effect on the person concerned and the public interest (*James v UK* 1986: [50]). The only rule as such that can be discerned in respect of proportionality is that, outwith exceptional circumstances, fair compensation must be provided for a deprivation of possessions or it will not be proportionate (*Lithgow v United Kingdom* (1986): [120], *Jahn v Germany* (2006): [94]). Beyond that, it is possible to identify a number of factors that the court will consider in reviewing proportionality, which include the opportunity for the person concerned to put their case to the relevant public authority, the significance of the public interest objective pursued, and the level of compensation available if any, with the weight placed on these factors varying from case to case.<sup>41</sup>

Faced with this explanation of the protection of property provided by the text of A1P1 and the Strasbourg jurisprudence, the utility of the citizenship model is obvious. A1P1 *necessitates* the discussion of property's justificatory values that the citizenship model is designed to elicit. In its recognition that the public interest may override peaceful enjoyment of possessions, A1P1 *incorporates* the idea of obligation as inherent to ownership on which the citizenship model is based. In its refusal to set safeguards beyond concern for appropriate process and compensation for deprivation, A1P1 jurisprudence *requires* discussion of justificatory values to take place at domestic level. The citizenship model of constitutional property protection makes perfect sense for the protection provided by A1P1.

#### *Section IV: the citizenship model, A1P1 and Scottish land reform*

Reflecting on the debates around the 2016 Act with the benefit of the analysis above offers some insight on the way A1P1 has been characterised. The idea of A1P1 as a landowner's

right, an obstacle to land reform, relies on a 'castle model'-type conceptualisation of ownership, in which obligations on owners are alien. This characterisation is not supported by the case law, in which the highly limited scope of A1P1 challenges to date has resulted in minimal restriction on the ongoing land reform programme. This characterisation also conflicts with the text of A1P1 and the jurisprudence of the Strasbourg court, in which the obligations inherent in ownership are clearly recognised and the margin of appreciation given to states to pursue projects around property is wide.

I have focused on the citizenship model here in the hope of disrupting this prevailing characterisation of A1P1. In my argument, disruption would be desirable first because the prevailing characterisation is incorrect as a matter of law. As my analysis above indicates, the citizenship model is a much better fit for the protection offered by A1P1. It emphasises that the role of the court is to identify *unjust* obligations on owners, a determination that can only be reached through consideration of the values underlying our system of property law. Those values have been the subject of sustained debate in this country for decades, and the current consensus is now encapsulated within the LRRS. A correct understanding of A1P1 allows us to both recognise and expect that the court will take these values into account when determining when an obligation on a landowner goes too far.

In addition, far from undermining the significance of ESC rights in relation to land reform, reconstruing A1P1 in line with the citizenship model has the benefit of providing a clear framework within which those rights can be taken into account by a court. The appeal to international human rights instruments has clearly influenced government and Parliament in the recent land reform discussions, and that influence is to be welcomed. However, our ability to enforce continued adherence to those commitments on the part of our public

authorities is restricted by the fact they are not directly justiciable. Adopting a citizenship approach to A1P1 enables its justiciability to be used in the service of the whole constellation of human rights. These rights, and the commitment to them within the LRRS, encapsulate the values that the court must address when determining the correct balance between the public interest and the needs of the landowner. Within the citizenship framework, a close connection between the directly justiciable A1P1 and the non-incorporated ICESCR – a connection, it will be recalled, that it is necessary to show before an unincorporated instrument can be relied upon by the court – will be easier to establish. A1P1 becomes an enforcement tool for ESC rights, rather than a barrier to their realisation.

Publication of the LRRS represents a significant milestone in Scotland's land reform journey. Its commitment to the full range of Scotland's human rights obligations might be seen by some as a victory over the impediment of A1P1. By reconstruing A1P1 in line with Singer's citizenship model of constitutional property protection, I hope that the property right may come to be seen as an integral and complementary aspect of the human rights approach to land reform, rather than a hurdle.

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<sup>1</sup> *Scottish Land Rights and Responsibilities Statement*, (Edinburgh: Scottish Government, 2017), 9.

<sup>2</sup> *Ibid*, 35-40.

<sup>3</sup> *Ibid*, 13-16.

<sup>4</sup> Scottish Law Commission, *Report on Abolition of the Feudal System* (Edinburgh: HMSO, 1999), 5.65-6.58; Scottish Law Commission, *Report on Real Burdens* (Edinburgh: HMSO, 2000), 14.12-14.29; Scottish Law Commission, *Report on Law of the Foreshore and Seabed*

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(Edinburgh: HMSO, 2003), 1.17; Scottish Law Commission, *Report on Conversion of Long Leases* (Edinburgh: HMSO, 2006), 1.12.

<sup>5</sup> Scottish Parliament, *Policy Memorandum on the Land Reform (Scotland) Bill (SP Bill 44)*, (Edinburgh: Scottish Parliament, 2001), 39-40.

<sup>6</sup> Scottish Human Rights Commission, *Scotland's National Action Plan for Human Rights 2013-2017* (Edinburgh: Scottish Human Rights Commission, 2013), 39.

<sup>7</sup> A. Miller, 'Land, owned privately or otherwise, is a national asset that should serve the public interest', *The Herald*, 10 April, 2015:

<<https://www.heraldsotland.com/opinion/13209283.land-owned-privately-or-otherwise-is-a-national-asset-that-should-serve-the-public-interest/>> (last accessed 27 May 2019); K.

Shields, 'Tackling the misuse of rights rhetoric in land reform debate', *Scottish Human Rights Journal* 68 (2015), 1-4.

<sup>8</sup> A. Tickell, 'Land reform: through the looking glass', *Lallands Peat Worrier*, 24 June 2015, <http://lallandspeatworrier.blogspot.com/2015/06/land-reform-through-looking-glass.html> (last accessed 27 May 2019); A. Massie, 'The SNP's land reform fantasy world', *The Spectator*, 20 August 2016, <<https://www.spectator.co.uk/2016/08/the-snps-land-reform-fantasy-world/>> (last accessed 27 May 2019).

<sup>9</sup> Land Reform Review Group, *The Land of Scotland and the Common Good* (Edinburgh: Scottish Government, 2014), 22-23.

<sup>10</sup> Scottish Parliament, Official Report, (16 March 2016: cols 50-51).

<sup>11</sup> For a detailed exploration of this complex area, see P. Alston and R. Goodman (2012), *International Human Rights* (Oxford: Oxford University Press, 2012); J. L. Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (4<sup>th</sup> edition, Edinburgh: Bloomsbury Professional Ltd, 2017).

<sup>12</sup> Alston and Goodman, *International Human Rights*, 139-144.

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<sup>13</sup> Murdoch, *Reed and Murdoch*, 2.03.

<sup>14</sup> W. A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), 1-2.

<sup>15</sup> J. Wadham, H. Mountfield, E. Prochaska, and R. Desai, *Blackstone's Guide to the Human Rights Act 1998* (Seventh edition, Oxford: Oxford University Press, 2015), 16-2; A. McHarg, 'Will devolution scupper Conservative plans for a "British" bill of rights?', *UK Human Rights Blog*, 2 October 2014, <<https://ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights/>> (last accessed 27 May 2019); C. Gearty, 'The Human Rights Act should not be repealed', *UK Constitutional Law Association Blog*, 17 September 2016, <<https://ukconstitutionallaw.org/2016/09/17/conor-gearty-the-human-rights-act-should-not-be-repealed/>> (last accessed 27 May 2019); K. Boyle and E. Hughes, 'Identifying routes to remedy for economic, social and cultural rights', *The International Journal of Human Rights*, 22:1 (2018), 46.

<sup>16</sup> Murdoch, *Reed and Murdoch*, 2.03; Alston and Goodman, *International Human Rights*, 291-310.

<sup>17</sup> Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights* (Geneva: United Nations, 2008), 2.

<sup>18</sup> K. Shields, *Human Rights and the Work of the Scottish Land Commission: A Discussion Paper* (Inverness: Scottish Land Commission, 2018).

<sup>19</sup> Wadham et al., *Blackstone's Guide*, 24.

<sup>20</sup> For an overview, see Alston and Goodman, *International Human Rights*, 691-693.

<sup>21</sup> Boyle and Hughes, 'Identifying routes,' 52-54.

<sup>22</sup> A. Drane and L. Tainsh, 'Scottish Government Agricultural Holdings Review – Final Report 2015', *Davidson Chalmers: News and Insight*, 28 January 2015, <<https://www.davidsonchalmers.com/news-and-insights/scottish-government-agricultural->

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holdings-review-%E2%80%93final-report-2015> (last accessed 27 May 2019).

<sup>23</sup> L. Brooks, ‘Campaigners call for land reform as Scottish farmer faces eviction’. *The Guardian*, 10 November 2015,

<<https://www.theguardian.com/politics/2015/nov/10/campaigners-protest-at-farmers- eviction-due-to-land-reform>> (last accessed 27 May 2019).

<sup>24</sup> *Pairst Crofters Ltd v Scottish Ministers* (2012), [2012] CSIH 96; 2013 *Scots Law Times* 308.

<sup>25</sup> M. M. Combe, ‘Human rights, limited competence and limited partnerships: *Salvesen v Riddell*’ 32 *Scots Law Times (News)*, 2012, 193-200; A. McHarg and D. Nicolson, ‘*Salvesen v Riddell*’ in S. Cowan, C. Kennedy and V. Munro, *Scottish Feminist Judgments: (Re)creating the Law from the Outside In* (Oxford: Hart, 2019).

<sup>26</sup> G. S. Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (London: University of Chicago Press, 2006), 1-26.

<sup>27</sup> F. I. Michelman, ‘Property as a constitutional right’ 38 *Washington & Lee Law Review* (1981), 1097-1114.

<sup>28</sup> For an overview see G. S. Alexander and E. M. Peñalver, *An Introduction to Property Theory* (New York: Cambridge University Press, 2012).

<sup>29</sup> Rose 1984: 561

<sup>30</sup> G. Calabresi and A. D. Melamed, ‘Property rules, liability rules and inalienability: one view of the cathedral,’ 85, *Harvard Law Review* (1972), 1089-1128; R. A. Epstein, *Takings: private property and the power of eminent domain* (Cambridge, Massachusetts: Harvard University Press, 1985); J. Nedelsky, *Private property and the limits of American constitutionalism: the Madisonian framework and its legacy* (London: University of Chicago Press, 1990); C. M. Rose, ‘“Takings” and the practices of property: Property as wealth, property as “propriety”’ in C. M. Rose, *Property and persuasion: essays on the history,*

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*theory, and rhetoric of ownership* (Boulder, Colorado: Westview Press, 1994), 49-71; G. S. Alexander, *Commodity & Propriety: Competing visions of property in American legal thought 1776-1970* (London: University of Chicago Press, 1997); J. W. Singer, *Entitlement: The Paradoxes of Property* (New Haven & London: Yale University Press, 2000); L. Underkuffler, *The idea of property: its meaning and power* (Oxford: Oxford University Press, 2003); R. A. Epstein, *Supreme neglect: how to revive constitutional protection for private property* (New York: Oxford University Press, 2008).

<sup>31</sup> Rose, 'Takings' and the practices of property; Alexander, *Commodity & Propriety*.

<sup>32</sup> Singer, *Entitlement*, 19-55; 197-216.

<sup>33</sup> Singer, *Entitlement*, 215-216.

<sup>34</sup> J. W. Singer, 'The ownership society and takings of property: castles, investments and just obligations', *Harvard Environmental Law Review*, 30 (2006), 314-316.

<sup>35</sup> Singer, 'The ownership society,' 329.

<sup>36</sup> Singer, *Entitlement*, 144-178; see also Underkuffler, *The idea of property*, 132-149.

<sup>37</sup> Singer, 'The ownership society,' 329-338.

<sup>38</sup> Singer, 'The ownership society,' 336.

<sup>39</sup> Singer, 'The ownership society,' 659.

<sup>40</sup> F. McCarthy, 'Protection of Property and the European Convention on Human Rights' 6 *Brigham-Kanner Property Rights Conference Journal* (2017), 317-18.

<sup>41</sup> McCarthy, 'Protection of property,' 309-315.