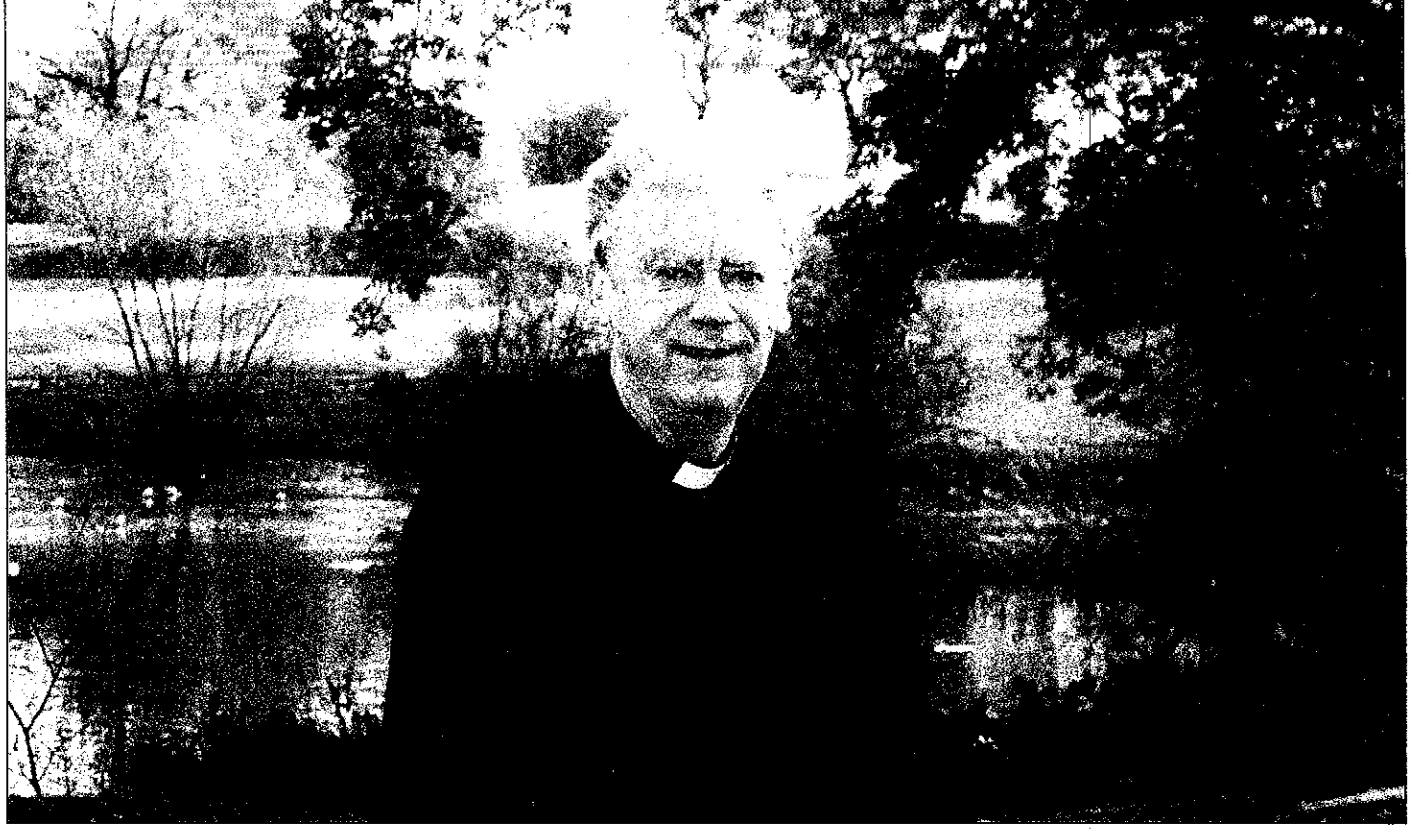

■ Canon Kenyon Wright

Politics: Rules for the New Paradigm

SCOTLAND's land reform agenda requires strategic thinking, warns a leading architect of the coalition representing civic organisations.

Land reformers had an obligation to ensure that parliament remained bound by the tough and unique set of rules which it had agreed to adopt, said Canon Kenyon Wright at a conference of the Land Reform Convention (LRC) on Nov. 20. He listed the rules.

- Power would be shared between the legislature and the people.
- The Executive is accountable to Parliament and to the people.
- Parliament must be accessible and responsive and must develop procedures that make possible the participative approach to the development of policy and legislation.
- Equal opportunity. Parliament's committees, said Canon Wright, were conceived as alternative centres for developing policies and laws. They were not meant to just respond to action by the Executive.

He urged the 150 land reform activists who met in Stirling to remain vigilant about the enforcement of the five tests against which the effectiveness of legislation should be assessed. Those tests were:

1. What problem is the proposed legislation intended to address? What is the strategic thinking behind it? "Politicians hate strategic thinking," said the canon. "It implies looking long-term."
2. What options were examined, and why was this particular option chosen?
3. What consultation was undertaken before the proposal was framed?
4. What were the financial implications as far as could be seen?
5. What was the impact on human rights, sustainable development, equal opportunities and on the communities on the islands off the Scottish coast?

Said Canon Wright: "The LRC should use this formula when we look to the future. The great reformers always taught us that reformation is not something that takes place once. Land reform is not a once-off event: it is a process that needs longer term strategic thinking".

He wanted the reformers to be partners with parliament in the development of policy. This was essential because land and our relationship with it was vital for a healthy society. It was our home, our heritage and part of our harmonious relationship with one another.

SCOTLAND: 3 PAGES OF ANALYSIS ON LAND REFORM

For the canon, who played a leading role in a previous convention which helped to drive the devolution campaign, land reform would be the litmus test for Scotland's new politics.

"Land reform may well be the test of the Scottish Parliament's ability to reshape our society. Land reform may be perhaps the crucial test of the ability of the Scottish Parliament to make a real difference. Land reform is the symbolic test of the integrity of parliament.

"This convention could be a real pioneer for a new way of working in what has to be a participative – and not purely representative – democracy in Scotland."

The LRC – which represents charities, trade unions, local governments and the churches – should expect to participate in shaping policy at every stage, said the canon, rather than just responding to government proposals.

He pointed out that for Christians, the land issue had greater claim to be the central motif of the Old Testament than any other subject. Theology could justify the claim that there would be a restoration of rights in both heaven and on earth. But Canon Wright did not rely exclusively on biblical authority. He acknowledged that "power is the key" when it came to resolving disputes over the ownership and use of land.

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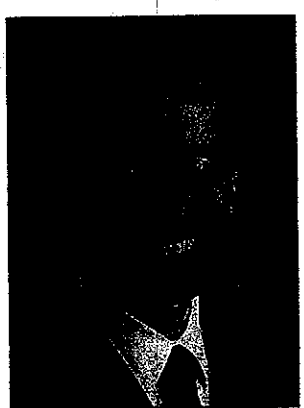

■ Angus Mackay

WITH A CENTURY of waiting since the land question last passed a legislator's lips, Scotland set itself on a course of hoped-for reform. Civil society, the creative force behind the reforming agenda, built the pressure for change. The Scottish Parliament is now running to catch up. Unfortunately, it faces two problems with its very first land bill.

The first problem is a deeply flawed legislative process. The second problem is that the actual legislation is fundamentally flawed. These could have been dismissed as the teething troubles of a constitutional resettlement. Unfortunately they are potentially fatal because of Parliament's enthusiastic reaction to its task. The true strength of the very real arguments that favour the radical overhaul of Scotland's land tenure system seem to be overwhelming Parliament and blinding it to the reality of what it is doing.

Among all the land reform policy proposals presented to the electorate, only one clearly stood out by virtue of its universal support: the reform or abolition of the feudal system of land tenure. From the Tories yielding support for "specific land reform to update the feudal system", through to the Scottish Socialist Party calling for "an end to Scotland's feudal landholding system", the differences in policy were only of depth and tone. This unanimity was all very gratifying, but when all the politicians agree on something, you can be sure of something going wrong somewhere. And so, here, it was.

The government's 1998 consultation was not all-encompassing. It did not cover, with equal attention, or openness to response, the whole range of the land reform agenda. The process did not seem to encourage public engagement in the reform of the tenure system itself. Instead, building a sense of almost cabalistic and reverential mystery, the ongoing consultation papers referred to another process of idea formulation and policy development, parallel to the public one, going on more or less privately elsewhere. The Scottish Law Commission, we were told, was at work on the reform of land tenure law. A difficult, technical, specialist legal matter, placed in safe hands, was the message we were asked to accept.

THE EXECUTIVE claimed in its Feudal Bill's accompanying "Policy Memorandum" that "the Executive and previously the Scottish Office consulted the public in a number of ways." It then lists only two ways in which it did so. The memorandum went on to claim that the general land reform consultation exercise revealed "overwhelming and substantial support for the abolition of the feudal system". This, indeed, it did. What it did not reveal was anything about the nature of the public reaction to the Commission's or Executive's actual proposals for reform.

In February 1999, with the public consultation process "completed", the Commission finally published its Report: with a hefty purchase-price tag, a consultation-exhausted land reform community did not, perhaps, examine the Report with due care. The Commission proposals were well developed, so well as to include a draft bill.

Four months later, on June 30, the Justice Department sent a letter to "all interested parties" announcing that the Minister intended to lay before parliament "with only minor modifications" the draft Bill prepared by the Commission. This seemed to come as a surprise to the land reform community, which had expected the proposals to be the subject of participative public discussion, at the very least - especially since the conclusions of the Commission's report had in some respects differed substantially from their 1991 findings. The Executive's letter added: "in view of the wide degree of knowledge which already exists on the Commission's proposals, the Executive does not propose to have a formal consultation exercise at this stage."

In retrospect - with the clarity, then dimmed by twelve month's consultations, now regained - this government statement can be seen for what it was. It is no less than an admission by the Executive that its own purpose in any "consultation" would be simply the better imparting of public "knowledge" of the Executive's already formulated, cut and dried proposals. Still, the letter ended upbeat and conscience-salving - "If, however, you wish to make comments" then they would be considered, if submitted within 37 days.

THIS APPROACH to "open" government and the legislative process should be compared with the "Principles" set out in the Report of the Consultative Steering Group on the Scottish Parliament, prescribing operating standards - "The Scottish Parliament should ... make possible a participative approach to the development, consideration and scrutiny of policy and legislation ... [and] adopt an "open" legislative process ... to allow maximum consultation ... with groups, individuals and forums outside Parliament".

The Executive received around 65 responses to its June letter. The Executive is refusing to allow their release for public examination. A "bureaucratic procedural error" on its part "requires" it to regard these public representations as private correspondence. The Justice Department has intimated that it intends to correct this situation, by seeking the consent to publish of all the respondents individually; but this may "unfortunately take a little time". Freedom of Information? Meanwhile the legislation rolls on.

This state of affairs puts the Executive and the legislative process in what many might regard as a difficult situation. It means that, regarding the reform of the land tenure system

- ☒ the present nature and extent of support for, or objection to, what is being proposed by the executive, cannot be publicly scrutinised or assessed; and
- ☒ the Executive's response to any objections or comments it has received, cannot be judged; and
- ☒ their democratic mandate for introducing very substantial reforms cannot be confirmed.

The Executive seems unabashed.

In 1991, the then Tory government decided that Scotland's 900 year-old feudal system was overdue for reform: land tenure was seen as a faulty part of the conveyancing system. In the prevailing political climate, few voices seemed to argue the contrary - and correct - position: namely, that the land tenure system is the underlying, philosophically based, constitutional framework, that establishes, shares and regulates the rights and duties that subsist between individuals and society at large, over the territory of the nation; and that conveyancing is the subpart - the technical administrative process of competently transferring legal title between holders.

From this fallacious starting-point, the Commission's work proceeded; purportedly as a purely technical legal matter, with no policy

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■ Jim Wallace

direction thought needed. But this did not of course preclude the necessity for philosophical and even political and policy inputs. In the absence of direction from other sources, the Commission seems to have taken the initiative: it "interpreted" its own brief. It seems the non-elective Scottish Law Commission, a friendly group of six men sharing social and professional viewpoints that might be described as uncommon, drew upon their shared personal experiences, beliefs and consciousness, to create the philosophical foundation and structure of the Bill that is before us today.

The philosophical underpinnings of the Bill depart substantially from the legal status quo, as well as from what is arguably the popular cultural viewpoint in Scotland today. The Bill was developed with no democratic mandate or authority. Some measure of Scotland's well developed popular land culture could have formed the foundation for its new legal system of land tenure. However, the ideas underlying the Bill seem quite alien to Scotland's culture, and its common law, and its traditions of the land - it misses a great opportunity. Just as the Scotland Bill opened with "There shall be a Scottish Parliament", so the tenure reform bill might yet have "The community of Scotland affirms its ultimate interest in the land of Scotland."

With a limited, almost "closed" consultation, in the manner of the day, the Commission published a report in 1991. The report sat on the shelf until 1997. The incoming New Labour government directed the work be the basis of the Commission's 1999 Report and Bill.

ON November 9 and 17 last year, the Justice and Home Affairs Committee of the Parliament, deliberating the principles of the Feudal Abolition Bill, took evidence from six invited bodies, including Scottish Environment Link (the umbrella organisation for environment groups in Scotland), the Scottish Land Reform Convention (the broad-based civic forum for land reform), and Land Reform Scotland (the campaign organisation). All three NGOs made substantial criticisms of the legislative process.

Link pointed out that "the [1991] consultation did not reach far in to the public domain, despite its far reaching implications". And "This so-called [1999] consultation process [on feudal reform] is in stark contrast to the consultation process for the rest of the government's land reform programme", and concluded that the consultation was "inconsistent with the government's own commitment ... on the "Sharing of Power". The Convention argued that "the consultation process has been flawed ... and inadequate". Land Reform Scotland complained that the consultation was "at best extremely lacking, but arguably misused in attempts to seek political legitimacy for the proposals".

On November 24, an Executive motion asking Parliament to commend its consultation process was debated. The Minister, Jim Wallace, talked only about the Executive's reform plans until interrupted, when he mentioned consultation for a reluctant minute. The ensuing parliamentary debate only touched on, and discussed not at all, complaints of the feudal reform consultation process. In closing the debate for the Executive - the danger of difficult questions having passed - the Deputy Minister, Angus MacKay, was very keen to then remind Parliament of the motion - "the Executive has gone out of its way to make the process of consultation ... as thorough, open and lengthy as necessary....We are happy to take a consultative approach all the way through to the legislation's enactment."

This self-congratulatory oratory should be seen in the context of the substantial criticism of the consultation process being levelled by civic society - criticism reiterated directly to the Deputy Minister only the previous week, when he attended the Scottish Land Reform Convention's annual conference. The Executive's parliamentary motion could be read as a cynical (and successful) attempt to co-opt the authority of Parliament to its cause, when popular opinion was moving against it. Perhaps another example of the yet enduring weakness of Parliament, within the existing constitutional framework?

NOW, A BILL is passing through the Parliament which will have massive constitutional implications: yet it is built on philosophical foundations which lack democratic mandate; it has haywire policy connotations; and contents which have not been the subject of public participative debate. Where are the "new politics" of Scotland?

The legislative process that has brought the Abolition of Feudal Tenure etc. (Scotland) Bill, has been fundamentally flawed, and at odds with Scotland's stated aspirations for standards of governance. While the bill is pretended to be simply a technical spring cleaning of an archaic property system, it is not - it is a constitutional Trojan horse. And our new Parliament will let it through our gates at its peril.

LAND REFORM is for the public interest. That is its point. Land reform is not a process that is promoted with a view to establishing, reinforcing, or extending the private rights of individuals. Land reform seeks to properly define and secure the duty of all citizens, individually and collectively, towards the land that has been entrusted to them. Land reform sets itself the task of redefining and rebalancing the distribution of public and private rights and obligations. This process entails the removal of undue privilege where it has arisen, and re-establishing natural, just or lawful rights that have, over time, been lost.

Oddly, within the draft Feudal Abolition Bill itself, there is only passing and peripheral reference (twice in the context of "Conservation Burdens") to the matter of the public interest. In the Bill's accompanying Explanatory Note there is even less convincing reference. Within the Bill's Policy Memorandum, designed to set out the policy context of the proposed legislation, there is, unbelievably, no reference to the public interest whatsoever. This begs the question as to how to legislate in the public interest without any mention of that interest?

"Ownership" of land in Scotland is, at present, legally, only the "dominium utile" or the "use" of the land. The present Bill would convert this to private "ownership", clean and simple. In the process would be lost the ultimate public interest of the community of Scotland in the land of Scotland. It must be seen as a vast transfer of rights over Scotland's land and natural resources, presently held in disparate ways, into private ownership. This Bill will make all Scots, who are presently stewards of Scotland, aliens on the land of others. Scotland will become a syndicate of privately (or otherwise) owned sites, trading under the name of "Scotland".