

POLICY BRIEF

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A Review of the Legal Protections for Scottish Semi-Ancient and Ancient Woodland

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A Review of the Legal Protections for Scottish Semi-Ancient and Ancient Woodland¹

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Key message:

Scotland is renowned for its ancient woodlands, which cover around 1% of its land area. These sites occupy a unique position within Scotland's natural environment, their complex biodiversity having accumulated over centuries. Many of the species that thrive in ancient woodlands are distinctive of their locality and slow to colonise new areas. These characteristics serve to render ancient woodlands a rare cultural heritage resource, which links the natural with the human and the present with the past. It is, thus, no exaggeration to say that the value of ancient woodlands is irreplaceable.

Environmental and human rights law contribute to the protection of these woods, but there are areas in which improvements can be made to increase the efficacy of the relevant regulations.

¹ The present policy brief is a compilation of SCELG's submissions in the context of Petition PE01812 'Protect Scotland's remaining ancient, native and semi-native woodlands and woodland floors', which was submitted to the Scottish Parliament by Audrey Baird and Fiona Baker on behalf of Help Trees Help Us <<https://www.parliament.scot/GettingInvolved/Petitions/ancientwoodlands>> accessed 19 January 2021.

Challenges Associated with Brexit and the Need for a Renewed Engagement with International Environmental Law

Institutional and substantial gaps as well as a high probability of regression in environmental regulations have resulted from Brexit. These problems are exacerbated by delays in setting up a new post-Brexit framework as a result of the pandemic and the associated lockdown. Yet, it is time to act, and if Scotland wants to present itself as a world-leader in environmental protection and climate action, it must take Brexit as a starting point for the development of more efficient environmental regulations, including for its ancient woodlands.

The EU has already taken steps in this direction, its network of protected areas comprising several old-growth forests. Authorities, landowners, and managers are encouraged to actively protect these areas by focusing on their non-wood benefits and making full use of existing financial incentives for site protection where needed. Going forward, the relevant standards of stewardship are expected to become even more stringent. The EU Biodiversity Strategy for 2030 provides for the **strict protection of at least a third of the Union's protected areas, including all remaining primary and old-growth forests²** More recently, a resolution of the European Parliament on deforestation recognised that **"ancient and primary forests should be considered and protected as global commons, and that their ecosystems should be granted a legal status"**.³

These and future developments can serve as an inspiration for Scotland, which has expressed its eagerness to stay aligned with EU law. This is notably the role of the Continuity Bill (Scotland) (2020), which

² European Commission, 'EU Biodiversity Strategy for 2030: Bringing Nature back into Our Lives' COM(2020)380 final.

³ European Parliament Resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)), para 79.

aims “to enable provision to be made that corresponds to provision in EU law.”⁴ The Bill transposes some of the **core principles of EU environmental law**: the precautionary principle, the prevention principle, the polluter pays principle, and the principle of rectification at source.⁵ These principles must continue to guide Scotland’s action towards the effective protection of its ancient woodlands.

Post-Brexit, this action will be directed by pertinent international legal instruments to which the UK is a signatory. One such instrument is the **European Landscape Convention (ELC)**, which deals with the protection, management and planning of European landscapes.⁶ The Convention requires Parties to take action towards conserving and maintaining “significant characteristic features” of landscapes.⁷ This obligation carries particular import in the present context since **the character and biodiversity of landscapes are closely linked**. Indeed, many of the features that contribute most to our appreciation of landscapes – trees and hedges, ancient woodlands, the flowers of old meadows, pastures and heaths – are an essential part of the natural environment. Parties must, therefore, give due regard to these elements when discharging their duties under the ELC.⁸ These include the duty to identify the landscapes forming part of their territory, analyse their characteristics and the forces and pressures transforming them, and take note of any changes. Also included is the duty to assess the landscapes thus identified, considering the particular values assigned to them by the interested parties and the population concerned. Finally, Parties must carry out a participatory process for the definition of landscape quality objectives, which must then be implemented through appropriate instruments.

This emphasis on public participation highlights the relevance of another instrument to which the UK is a

signatory: the **Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters**.⁹ The Convention recognises that every person has the right to live in an environment adequate to their health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.¹⁰ It further acknowledges that, to be able to assert this right and observe this duty, citizens must have **access to information, be entitled to participate in decision-making, and have access to justice in environmental matters**.¹¹ The Convention applies in full and with equal force during the COVID-19 pandemic and in the subsequent economic recovery phase, and the binding rights set out therein cannot be reduced or curtailed for the sake of convenience.¹²

Against this background, we believe that there is scope to strengthen the statutory framework pertaining to ancient woodlands. Crucially, any attempt at reform must pursue complementarities and synergies with the ongoing work of the **National Taskforce for Human Rights Leadership**. The latter seeks to establish a statutory framework for human rights that can bring internationally recognised human rights – including the right to a healthy environment – into domestic law.

With COP 26 and the statutory recognition of a right to a healthy environment looming on the horizon, it becomes clear and necessary for Scotland to push forward its policies to ensure the robust protection of its ancient woodland. Crucially, any relevant initiative must take reflect the obligations that the UK has undertaken as a matter of international environmental and human rights law, which continue to bind it post-Brexit.

⁴ UK Withdrawal from the European Union (Continuity) Bill (Scotland) (2020), preamble.

⁵ Ibid, Section 9.

⁶ European Landscape Convention (opened for signature on 20 October 2000, entered into force 1 March 2004) ETS No. 176 (hereinafter ‘the ELC’).

⁷ ELC, art (1)(d)).

⁸ ELC, art (6).

⁹ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into

force 30 October 2001) 2161 UNTS 447 (hereinafter ‘the Aarhus Convention’).

¹⁰ Aarhus Convention, preamble.

¹¹ Ibid.

¹² UNECE, ‘Statement on the Application of the Aarhus Convention during the COVID-19 Pandemic and the Economic Recovery Phase’ (September 2020) UN Doc ECE/MP.PP/C.1/2020/5/Add.1, para 4.

The Link between Biodiversity and Cultural Rights

Ancient woodlands constitute special, fragile ecosystems. Unless properly assessed and managed, human activities can disrupt their equilibrium, disturbing and displacing native wildlife. To the extent that it encroaches upon people's ability to enjoy access to sites of national and universal ecological and cultural significance, such interference may constitute a violation of the environmental and cultural rights of present and future generations.

The 1992 UN Convention on Biological Diversity (CBD), to which the UK is a signatory, identifies cultural importance as one among several reasons for protecting biodiversity.¹³ Its drafters were 'conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components'.¹⁴ This statement is meant to guide Parties in the discharge of their obligations under the Convention. Among these is the obligation to establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.¹⁵ Prime candidates for inclusion in this system are 'ecosystems and habitats containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes'.¹⁶ Ancient woodland ticks a lot of these boxes. It is hardly surprising, then, that CBD Parties have noted 'the exceptional importance of primary forest for biodiversity conservation' and 'the urgent necessity to avoid major fragmentation, damage and loss of primary forests of the planet'.¹⁷

Failure to protect ancient woodland may constitute a violation of these provisions and, by extension, an infringement upon cultural rights related to the natural environment. Relevant in this regard is Resolution A/HRC/RES/37/17 on 'Cultural Rights and the Protection of Cultural Heritage'. Adopted in 2018 by the UN Human Rights Council, the Resolution 'calls upon all States to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage' (Paragraph 1).¹⁸ It further states that the violation or abuse of this right 'may threaten stability, social cohesion and cultural identity'.¹⁹ In response, it 'invites States to adopt effective strategies to prevent the destruction of cultural heritage'.²⁰

An important element of the Resolution is the emphasis it places on the universality of cultural rights and the consideration due to future generations. **The Resolution's penultimate paragraph calls for the development of appropriate tools for the dissemination of an approach to the protection, restoration, and preservation of cultural heritage which promotes 'universal respect for cultural rights by all.'**²¹ Elsewhere in the Resolution it is stated that 'damage to cultural heritage, both tangible and intangible, of any people constitutes damage to the cultural heritage of humanity as a whole'.²² A parallel can be drawn between these provisions and the CBD's assertion that 'the conservation of biological diversity is a common concern of humankind'.²³ The notion of 'common concern' is used within international environmental law to convey that an obligation is owed to the international community as a whole. Reading the Resolution through the prism of the CBD, one can find in it an implicit recognition of the universal value of biodiversity as a component of cultural heritage. Crucially, the rights and duties stemming from this recognition concern not only present, but also future generations. According to the CBD, it is to the benefit

¹³ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 69, preamble (hereinafter 'the CBD').

¹⁴ CBD, preamble.

¹⁵ CBD, art (8).

¹⁶ CBD, art (7)(a) and annex I.

¹⁷ CBD COP Decision 14/30, 'Cooperation with Other Conventions, International Organisations and Initiatives' (30 November 2018) UN Doc CBD/COP/DEC/14/30, para 43.

¹⁸ UNGA Res 37/17, 'Cultural Rights and the Protection of Cultural Heritage' (9 April 2018) UN Doc A/HRC/RES/37/17 (hereinafter 'UNGA Res 37/17').

¹⁹ UNGA Res 37/17, preamble.

²⁰ UNGA Res 37/17, para 11.

²¹ UNGA Res 37/17, para 14.

²² UNGA Res 37/17, preamble.

²³ Ibid.

of both that biological diversity must be conserved and sustainably used.²⁴ The Resolution adds that the 'duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of cultural heritage belongs primarily to the State on whose territory it is situated.'²⁵

Taken together, these provisions amount to a clear assertion of Scotland's responsibility to protect its ancient woodland as a cultural heritage resource. This responsibility is owed to both present and future generations.

Recommendations for Strengthening the Statutory Framework

In support of obligations of international law and pre-existing standards set by the EU, it is important for the Scottish Government to take strategic action and strengthen current laws and legislation to support these targets. We believe that changes could be made to the enforcement of the Forestry (Environmental Impact Assessment) (Scotland) Regulation 2017²⁶ by Scottish Forestry to strengthen protection of these woodlands from development projects by including more types of development that would trigger an Environmental Impact Assessments (EIA). If this were applied, a wider range of developments, including bike paths, could trigger an EIA which would ensure sustainable practice. We also encourage consideration to be given to the governance for the protection of ancient monuments and archaeological areas in Scotland as it could offer further protection to ancient woodlands also through the strengthening of current legislation such as the Historic Environment (Amendment) (Scotland) Act 2011.²⁷

Environmental Impact Assessment

There currently is no effective mechanism in place to guide what is considered a 'man-made' trail within the Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017.²⁸ The current laws do highlight the necessity for an EIA for proposed forest road but due to mountain bike trails consisting of mud and other natural elements, these do not necessarily meet this requirement.²⁹ Though the current law states that the assessment must ensure that there is "not a single effect on the environment", it is evident that this regulation is lenient as studies have shown that nature trails destroy key ecological systems which should see more thorough repercussions.³⁰ At present, decisions regarding the nature of harm of these projects are the responsibility of the relevant planning authority, but as these mountain trails have been approved, this displays that these authorities were incorrect in deeming there to be no ecological damage. Henceforth, it is recommended that forest road regulation should be made clearer within the assessment protocol to ensure that these trails are not permitted.

Amendments should be made to the forestry regulations to ensure that the EIA process does not allow for loopholes that could cause destruction of ancient forestry and Scottish biodiversity. This regulation should ensure that any type of road construction be considered under the EIA process, including where sources and materials of trails are natural. We believe that the current penalty for breaching the EIA system of £5000 per tree fallen is lenient.³¹ Instead it is suggested that applicants pay a reparation fee as this would ensure responsibility to repair the damage caused and allow the ecosystem to regenerate. Moreover, a reparation fee would ensure more cohesion between local authorities.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/113).

²⁷ Historic Environment (Amendment) (Scotland) Act 2011.

²⁸ Ibid.

²⁹ Ibid, part 2.8.

³⁰ Mark Ballantyne and Catherine Marina Pickering, 'Recreational Trails as a Source of Negative Impacts on the Persistence of Keystone Species and Facilitation' (2015) 159 Journal of Environmental Management 48.

³¹ Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017, part 8.

Ancient Monument Example

The assessment report on the Felling Regulations 2018 recognises the heritage value of ancient woodlands, and the 2014 Scottish Planning Policy states that ancient woodland should be protected from adverse impacts arising from development.³² However, this is not sufficient to offer adequate protection to Scotland's native woodland as it does not prevent small-scale developments in close proximity to native woodlands from causing habitat and biodiversity disruption.³³ The discretion given to local authorities to decide whether a development requires planning permission means that EIAs can be completely avoided where a local authority decides a development does not need planning permission.

As previously stated, planning permission and an EIA should be necessary if there is any chance of the development causing a disruption and should be mandatory in close proximity to ancient Scottish woodlands.

The Felling Regulations 2018 Assessment Report's recognition of ancient woodlands as heritage merits the introduction of protection that reflects this status.³⁴ Through this, Scotland's ancient buildings are considered heritage and as such are subject to strong protection. Scotland's ancient monuments are protected under the Ancient Monuments and Archaeological Areas Act 1979, which directs Historic Environment Scotland to compile and maintain a schedule of ancient monuments and further protects these monuments by making it an offence to carry out unauthorised works, with ultimate authority for permitting any works to these monuments lying with the relevant Minister.³⁵ The Historic Environment (Amendment) (Scotland) Act 2011 makes provision

for Scottish Ministers to compile and maintain an inventory of gardens designed landscapes and battlefields.³⁶ These pieces of legislation provide a model upon which stronger protection for Scotland's ancient woodlands might be based. **The Native Woodland Survey of Scotland has identified Scotland's native and ancient woodlands and we believe that this can form a basis for the formation of a list of these woodlands to be subject to strong protection.**³⁷

Conclusion

As the UK begins life outside of the EU and with COP26 fast approaching, a review and strengthening of the current woodland protections seem appropriate. The Continuity Bill (Scotland) (2020) does invoke hope that Scotland will continue to welcome the external influence of the EU on the obligations for international law on biodiversity, human, and cultural rights. Several actions can be taken to strengthen protections of Scottish woodland through the implementation of mechanisms such as the National Taskforce for Human Rights Leadership, amendments to the EIA process, and utilization of governance methods used in other conservation areas. It is clear that there is space for positive change to the regulations and statutory framework protecting ancient woodlands in Scotland and the government would do well to start to implement changes with COP26 on the horizon.

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³² Felling Regulation (Scotland) 2019 (SSI 2019/49); Scottish Government, *Scottish Planning Policy* (Scottish Government, revised December 2020), 45 (hereinafter 'the Scottish Planning Policy').

³³ Scottish Planning Policy, 53.

³⁴ Felling Regulation (Scotland) 2019, part 1.

³⁵ Ancient Monuments and Archaeological Areas Act 1979 (c46).

³⁶ The Historic Environment (Amendment) (Scotland) Act 2011, part 2.

³⁷ 'Scottish Forestry Open Data', (Scottish Forestry) <<https://open-data-scottishforestry.hub.arcgis.com/>> accessed 19 January 2021.



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