Rights-based land reform in Scotland: Making the case in the light of international experience

A discussion paper for Community Land Scotland

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Woe unto them that join house to house, that lay field to field, till there be no place, that they may be placed alone in the midst of the earth!
Isaiah 5:8

The first man who, having enclosed a piece of ground, bethought himself of saying, 'This is mine', and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars and murders, from how many horrors and misfortunes, might not anyone have saved mankind by pulling up the stakes, or filling up the ditch, and crying to his fellows: 'Beware of listening to this imposter; you are undone if you once forget that the fruits of the earth belong to all, and the earth itself to nobody.'
Jean-Jacques Rousseau, *A Discourse on the Origin of Inequality*, 1755.

There was a big high wall there that tried to stop me; Sign was painted, it said private property; But on the back side it didn't say nothing; This land was made for you and me.
Woody Guthrie, 'This Land Is Your Land', 1944.

Land rights are fundamental to addressing the common challenges of humanity.
Antigua Declaration of International Land Coalition Members, 2013.

A process of land reform already underway [in Scotland] has potential to review the use of land as a key resource for the realisation of a range of human rights.
Scottish Human Rights Commission, Scotland's National Action Plan for Human Rights, December 2013, p. 35.

Introduction

Community Land Scotland (CLS), representing Scotland's community land owners, wants more communities to have the opportunity to take ownership of land and, with that objective in view, is in the business of promoting land reform.

Community Land Scotland represents Scotland's new generation of community land owners. Together our members are managing some 500,000 acres of land, home to some 25,000 people. We have a vision of more communities taking control of their land and reaping the benefits of that community ownership. To do that we want to help inspire aspirant communities and influence the public policies that can help them. We believe that you can't create an more socially just Scotland without tackling land ownership. Half of the entire country is held by just 432 owners and a mere 16 owners hold 10 per cent of Scotland. We want to see more of Scotland's land in the hands of Scotland's people and communities.

Community Land Scotland
http://www.communitylandscotland.org.uk/index.php/home/2

The case for community ownership is most commonly grounded on the economic, social and other benefits it delivers. This paper takes those benefits as proven. Its purpose is to explore means by which the case for land reform in general, and community ownership in particular, might be strengthened by establishing that communities have a ***right*** (irrespective of whether or not they exercise it) to control, benefit from and (ultimately) own land and other natural resources in their vicinity.

No such right is ***established*** by this paper. It is intended to do no more that provide a sketchy introduction to some concepts and precedents that could be drawn on in this connection. These concepts and precedents are mostly derived from the recently developed body of international law concerning the human rights of indigenous peoples. The paper does not contend that Scots, or any group within Scotland, are an 'indigenous people' of the sort with which this body of law deals. Rather the paper suggests (very tentatively) that the process by which the rights of indigenous peoples, not least their land rights, have achieved general acceptance is one that could, in principle, be repeated in the context of developing community land – and community resource – rights in Scotland.

By way of highlighting links between the Scottish situation and that of indigenous peoples, the paper starts by touching on the extent to which Scottish experiences (past and present) connect with the experiences (also past and present) of other parts of the world where, as in Scotland, people are endeavouring to counter injustices and inequities in the way that land and land-related resources are owned and managed. Actual and potential links of this kind are returned to in the paper's conclusion. There it is suggested that, as well as looking to learn from what indigenous peoples have accomplished in the field of human rights law, organisations like CLS might think about what assistance could be given from Scotland to peoples struggling to have restored to them land rights, territory and much else lost to them in the past.

By way of acknowledging its reliance on the work of others, as well as by way of indicating the possibility of (and perhaps need for) more thorough work in this area, the paper quotes extensively from a mass of readily available information about land rights, land ownership and land reform in a number of countries. Where this can be done, the paper provides web links to material thus reproduced.

1. Sutherland and Gambela: Land Grabbing Then and Now

Between 1813 and 1821 several thousand families were evicted from Sutherland's interior valleys – principally Strathbrora, the Strath of Kildonan and Strathnaver. The people thus evicted had lived in those localities for many generations. They were moved into newly created settlements on Sutherland's east and north coasts where, in place of the extensive areas to which they had previously had access, they were allocated diminutive smallholdings or crofts – with the aim of obliging them to engage in fishing. The land those people were forced to vacate – much of it held formerly under communal arrangements of one kind or another – was turned into large, commercially-managed farms. By its organisers, this transformation was called

improvement. By critics, it was called *clearance*. Its principal beneficiary was the Marquis of Stafford, afterwards Duke of Sutherland, an absentee landlord and one of the richest men in the world.

Lord and Lady Stafford were pleased *humanely* to order a new arrangement of this Country. That the interior should be possessed by Cheviot Shepherds [sheep farmers] and the people brought down to the coast and placed there in lotts [crofts] under the size of three arable acres, sufficient for the maintenance of an industrious family, but pinched enough to cause them turn their attention to the fishing. I presume to say that the proprietors *humanely* ordered this arrangement, because it surely was a most benevolent action to put these barbarous hordes into a position where they could better Associate together, apply to industry, educate their children and advance in civilization.
Patrick Sellar to A. Colquhoun, 24 May 1815: R. J. Adam (ed.), *Papers on Sutherland Estate Management*, 2 Vols., Edinburgh, 1972, I, p. 154.

Next morning we left Brora ... All was silence and desolation. Blackened and roofless huts, still enveloped in smoke – articles of furniture cast away as of no value to the homeless – and a few domestic fowls, scraping for food among hills of ashes, were the only objects that told us of man. A few days had sufficed to change a countryside, teeming with the cheeriest sounds of rural life, into a desert.
A. Sutherland, *A Summer Ramble in the North Highlands*, Edinburgh, 1825, p. 101.

In Ethiopia's Gambela province many thousands of families are today being removed from land they have occupied for many generations. The people thus turned out of their homes are being sent to new – and often distant – settlements. The land thus vacated – much of it held formerly under communal arrangements of one kind or another – is being turned into large, commercially-managed farms. By its organisers, this process is called *villagisation* and *development*. By critics, it is called *land grabbing*. Its principal beneficiary, in the Gambela case, is Saudi Star Agricultural Development, a company owned by Sheikh Mohammed Hussein Ali Al-Amoudi, a Saudi national an absentee landlord in relation to Gambela, and one of the richest men in the world.

Sheikh Mohammed Hussein Ali Al-Amoudi (born 1944/45) is a Saudi Arabian/Ethiopian businessman and billionaire who lives in Ethiopia and Riyadh, Saudi Arabia. As of 2011, *Forbes* has estimated his net worth at $12.3 billion, making him the 63rd richest person in the world. This listing also ranks him as the richest person in Ethiopia and the second richest Saudi Arabian citizen in the world.
Wikipedia
http://en.wikipedia.org/wiki/Mohammed_Al_Amoudi

George Granville Leveson-Gower, first Duke of Sutherland (1758-1833), known as Viscount Trentham from 1758 to 1786, as Earl Gower from 1786 to 1803, and as The Marquis of Stafford from 1803 to 1833, was a British politician, diplomat, landowner and patron of the arts. He is estimated to have been the wealthiest man of the nineteenth century.
Wikipedia
http://en.wikipedia.org/wiki/George_Leveson-Gower,_1st_Duke_of_Sutherland

While history never repeats itself exactly, there are striking parallels, as preceding paragraphs make clear, between what occurred in Sutherland two hundred years ago and what is taking place in Gambela today.

Omot Ochan was sitting in a remnant of forest on an old waterbuck skin, and eating maize from a calabash gourd … Behind him was a straw hut … A little way off were other huts, the remains of what was once a sizeable [community]. Omot said he and his family … had lived in the forest for ten generations … Our conversation was punctuated by the rumble of trucks … on a dirt road … Beyond the road, huge diggers were excavating a canal. Omot watched them. 'Two years ago the company [Saudi Star Agricultural Development] began chopping down the forest,' he said, 'and the bees went away. The bees need thick forest. We used to sell honey. We used to hunt with dogs too. But after the farm came, the animals … disappeared.'

F. Pearce, *The Landgrabbers: The New Fight over Who Owns the Planet*, London, 2012, pp. 3-4.

The Ethiopian government is forcibly moving tens of thousands of people in the remote western Gambela region, with villagers being told that their resettlement is connected to the leasing of large tracts of land for commercial agriculture, according to a human rights group. *Waiting for Death*, a Human Rights Watch (HRW) report, said the population transfers under the 'villagisation' programme are being carried out with little consultation or compensation. People are being moved to new villages that have inadequate food and lack health and education facilities, said HRW. Relocations have been marked by threats, assaults and arbitrary arrest for those who resist the move.

Guardian, 17 January 2012.

http://www.theguardian.com/global-development/2012/jan/17/ethiopia-relocation-programme-report

One of the more dramatic recent trends in Ethiopia, and Gambela in particular, is the leasing out of large land areas to agricultural investors. Since 2008 Ethiopia has leased out at least 3.6 million hectares of land nationally as of January 2011 – an area the size of the Netherlands. An additional 2.1 million ha of land is available through the federal government's land bank for agricultural investment. In Gambela 42 per cent of the total land area is either being marketed for lease to investors or has already been awarded to investors.

Human Rights Watch, *'Waiting Here for Death': Displacement and 'Villagization' in Ethiopia's Gambela Region*, 2012.

http://www.hrw.org/sites/default/files/reports/ethiopia0112webwcover_0.pdf

In recent years, Saudi Arabian companies have been acquiring millions of hectares of lands overseas to produce food to ship back home. Saudi Arabia does not lack land for food production. What's missing in the Kingdom is water, and its companies are seeking it in countries like Ethiopia ... One new plantation in Gambela, owned by Saudi-based billionaire Mohammed Al-Amoudi, is irrigated with water diverted from the Alwero River. Thousands of people depend on Alwero's water for their survival and Al-Moudi's industrial irrigation plans could undermine their access to it. In April 2012, tensions over the project spilled over, when an armed group ambushed Al-Amoudi's Saudi Star Development Company operations, leaving five people dead.

GRAIN, *Squeezing Africa Dry*, June 2012.

http://www.grain.org/article/entries/4516-squeezing-africa-dry-behind-every-land-grab-is-a-water-grab

An independent panel has called for an investigation into a World Bank-funded project in Ethiopia following accusations from refugees that the bank is funding a [villagisation] programme that forced people off their land. In a report seen by the Guardian, the inspection panel – the World Bank's independent accountability mechanism – calls for an investigation into complaints made by refugees from the

Anuak indigenous group from Gambela, western Ethiopia, in relation to the bank's policies and procedures.
Guardian, 19 March 2013.
http://www.theguardian.com/global-development/2013/mar/19/world-bank-ethiopia-villagisation-project

2. Land Grabbing Today: Extent and Consequences

What is presently happening in Gambela is taking place on a large scale internationally as both governments and corporations look to gain control of land wanted or needed with a view to exploiting its potential as a source of food, fuel, minerals and other commodities. Although by no means confined to the 'developing' world, 'land grabbing' of the Gambela type is especially prevalent there.

How people, communities and others gain access to land, fisheries and forests is defined and regulated by societies through systems of tenure ...Tenure systems increasingly face stress as the world's growing population requires food security, and as environmental degradation and climate change reduce the availability of land, fisheries and forests. Inadequate and insecure tenure rights increase vulnerability, hunger and poverty, and can lead to conflict and environmental degradation when competing users fight for control of these resources.
Food and Agriculture Organisation of the United Nations (FAO), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, pp. iv-v.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

In the past decade an area of land eight times the size of the UK has been sold off globally as land sales rapidly accelerate. This land could feed a billion people, equivalent to the number of people who go to bed hungry each night. In poor countries, foreign investors have been buying an area of land the size of London every six days. With food prices spiking for the third time in four years, interest in land could accelerate again as rich countries try to secure their food supplies and investors see land as a good long-term bet. All too often, forced evictions of poor farmers are a consequence of these rapidly increasing land deals in developing countries.
Oxfam Briefing Note, *'Our Land, Our Lives': Time Out on the Global Land Rush*, June 2012.
http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf

Millions of hectares of land in Africa, Asia and Latin America find their way into the hands of large-scale foreign investors each year ... It is often countries dealing with unstable situations when it comes to food, such as Saudi Arabia or India, that are keen to cultivate agricultural products abroad for their own population. Food corporation giants are also buying thousands of hectares of land and producing crops such as rice, soya or plants for the production of agro-fuels on an industrial scale. In addition, financial investors see the cheap land as a new opportunity to generate profit through speculation over rising prices. Land grabbing happens in almost all parts of the world, though on a greater scale in Latin America, Asia and sub-Saharan Africa.
Deutsche Welle, 'Land Grabbing: The Real Cost of Buying Cheap', 20 January 2014.
http://www.dw.de/land-grabbing-the-real-cost-of-buying-cheap/a-17151695

The total area of land controlled by foreign investors globally is similar to the size of Poland, according to the most up to date estimates contained in an online database that aims to document large-scale land acquisitions or 'land grabs'. The database, called the Global Observatory, reveals that investors have acquired 32.8 million hectares since 2000 – up from its 2012 estimates of 26.2 million hectares. Land grabs are often not conducted openly, which has made them difficult to monitor. However, the revamped online tool revealed this month (10 June), allows for the crowdsourcing and visualisation of data as well as the verification of sources of such data, to promote transparency and accountability in land and investment decisions.
Global Growing, 'Open data reveal extent of land grabbing', 24 June 2013.
http://global-growing.org/es/content/open-data-reveal-extent-land-grabbing-science-and-development-network

Developing countries are currently experiencing unprecedented pressures on their agricultural lands. This is happening due to a wide range of reasons including growing demand for food, animal feed, timber and biofuels combined with climate change and population growth leading to increased investment and speculation in agricultural lands. In recent years 'large scale land transactions' or 'land grabs' have been on the rise and many organisations have tried to map such growth trends and their frequent impact on local livelihoods and food security. While all data points to at least 83 millions of hectares (or more) of land being leased or sold to foreign investors in developing countries, the precise data is scarce due to an egregious lack of transparency involved in such transactions. The outcries against land grabs often come from the communities who – in many cases – use land, not necessarily holding a formal land title, that make them vulnerable to dispossession. Civil society has been vocal in its criticism of 'large scale land transactions' and issued numerous calls for a moratorium on land grabs and establishing norms and principles as to what constitutes good investment in agricultural lands.
ActionAid, A Brief Introduction to the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 2012, p. 9.
http://www.sida.se/PageFiles/80714/aa_ifsn_vgs_guide_23june2011.pdf

The land and resource rights and livelihoods of rural communities are being put in jeopardy by the prevailing model of large-scale land acquisition.
W Anseeuw, L A Wily et al., *Land Rights and the Rush for Land: Findings of the Global Commercial Pressure on Land Research Project*, International Land Coalition, p. 1.
http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf

In November 2011, Malian peasants converged on the southern village of Nyéléni to protest land sales to foreign interests. Other participants came from 30 different countries, speaking to the international nature of the threat of land grabs. At the conference, Ibrahim Coulibaly of the National Confederation of Peasant Organizations emphasised the human costs: 'We have seen an increase in land grabbing. Just in Mali alone the government has negotiated the lease of 544,500 hectares to just 22 foreign investment firms ... But these lands are not empty! People may not have legal titles, but they have been there for generations, even centuries.'
D. Borer and J. J. Morrissette, 'Land Grabs, Radicalization and Political Violence: Lessons from Mali and Beyond', *Ecco*, February 2013.
https://globalecco.org/en_GB/ctx-vol.-3-no.-1-article-2

Throughout the developing world, protests against land grabbing and organised campaigns for land rights result readily in violence. Much the same was once true of

Scotland – where, for example, the crofting population's late nineteenth-century push for security of tenure often led to clashes between crofters and the authorities.

A controversial foreign investment to produce agrofuels for Europe on 20,000 ha of farmland in Senegal has angered communities and sparked violent clashes between peasants and the police.
GRAIN, 'Who is behind Senhuile-Senethanol?', 8 November 2013.
http://www.grain.org/article/entries/4815-who-is-behind-senhuile-senethanol

On December 9, 2013, a meeting was called in Pujehun District over the lease of 6,500 hectares of prime farmland in this southeastern part of Sierra Leone. Local sources said elders called the meeting to allow people to again express their grievances to the Paramount Chief over the lease of land to the Socfin Agricultural Company. Hundreds were waiting in the village of Libby Malen for the chiefdom authorities to arrive when they learned that nine of their fellow villagers had been beaten and arrested by the police en route to the meeting. More than three hundred people immediately left the meeting to go to the police station in nearby Sahn and demand the release of the villagers. They were met along the way by an armed contingent of police who fired tear gas and live bullets into the crowd, leaving many people with serious injuries.
GRAIN, 'Sierra Leone farmers reject land grab for palm oil plantation', 7 January 2014.
http://www.grain.org/article/entries/4849-sierra-leone-farmers-reject-land-grab-for-oil-palm-plantation

In 1882 the [Skye] townships of Gedintailor, Balmeanach and Peinchorran [collectively known as the Braes] were connected with the rest of the island – as is still the case today – by the narrow road linking them to Portree ... On the northern outskirts of Gedintailor, the first of the three townships to be reached by anyone approaching from the Portree direction, that road threads its way through a narrow defile flanked on one side by a sheer drop into the sea and, on the other, by ... steeply rising slopes. As a result of their occupying this strategically located spot, at a stage in the proceedings when [Sheriff] William Ivory and his [50-strong] police brigade were still a mile or two to the south of them in Peinchorran and Balmeanach [where Ivory was supervising the arrest of a rent-strike's organisers], a large group of Braes residents succeeded in bottling the sheriff and his men into a locality where – with practically every crofting household in the vicinity mobilising against them – Ivory and his party were badly outnumbered. On realising just how hazardous his position had become, Ivory first instructed his constables to draw their batons. Next he told them to charge the folk occupying the Portree road. The immediate outcome of this latter command was a pitched battle – each repeated police baton charge floundering in the face of a hail of stones and other missiles thrown by the men, women and children holding the high ground to Ivory's left. With rain still lashing down, with yells and screams echoing all around, and with blood pouring from broken heads on both sides, the scene ... quickly took on the the character of one of those conflicts in which the clans of three or four centuries earlier had so often engaged. For a time, as fighting swayed back and forth, it seemed that the Braes people might actually force Ivory – who personally slipped and fell twice at the mêlée's height – to give up the five men he had arrested and whose release was the Braes people's key objective. But by means of a final, desperate charge, the sheriff's constables managed to break through the encircling crowd and – albeit in a state of some disorder – push on towards Portree with their captives.
J. Hunter, *Last of the Free: A History of the Highlands and Islands of Scotland*,

Edinburgh, 1999, p. 310.

3. Recognising Indigenous Land Rights – with particular reference to Australia

Land grabbing's adverse (sometimes extremely adverse) consequences are particularly marked in localities inhabited by indigenous or tribal groupings. Such groupings tend to occupy land (as is the case in Gambela) in accordance with customary tenurial practices and belief-systems that antedate the capitalist concept of property held by organisations or individuals of the sort that, subsequent to a land grab of the Gambela sort, generally take their place. By no means uncommon in today's world, such tenurial practices and belief-systems were once a lot more prevalent – not least in Scotland.

Mindanao groups [in the Philippines] concluded that land is a gift from God, the source of life, given to men to develop and return. Land cannot be sold, bought or subdivided ... The Episcopal Commission on Tribal Filipinos of the Catholic Church found from a consultation that tribal people reckoned the boundaries of their land by traditional landmarks, assumed that the natural resources belong to the land, and that these plants and animals, forests, water, fisheries, pasture, clay and rice terraces should be preserved to maintain the land's life-giving properties ... A Cordillera chief asked how a deed could prove that a man owns land – which would outlast him.

P. L. Bennagen, 'Indigenous attitudes towards land and natural resources of tribal Filipinos', NCCP Newsletter, Oct-Dec 1991, pp. 4-9: Summary.

http://www.popline.org/node/318692

Traditional Maori society did not have a concept of absolute ownership of land. *Whanau* (extended families) and *hapu* (sub-tribes) could have different rights to the same piece of land. One group might have the right to catch birds in a clump of trees, another to fish in the water nearby, and yet another to grow crops on the surrounding land. Exclusive boundaries were rare, and rights were constantly being renegotiated.

Encyclopaedia of New Zealand, 'Maori and land ownership'.

http://www.teara.govt.nz/en/land-ownership/page-1

Among many settled animist cultures, including the Wampanaog people on whose land [in Massachusetts] the Pilgrim [Fathers] had come to live [in 1620], parcels of ground could be used and occupied by individual families, even passed on to the next generation, often from mothers to daughters, but exclusive ownership of what was regarded as the fundamental life source was impossible. Massasoit, a Wampanaog leader who befriended later settlers, used an analogy common in such cultures to explain the relationship: 'The land is our mother,' he said, 'nourishing all her children, beasts, birds, fish and men. The woods, the streams, everything on it, belongs to everybody and is for the use of all. How can one man say it belongs to him?'

A. Linklater, *Owning the Earth: The Transforming History of Land Ownership*, London, 2014, pp. 25-26.

Most indigenous peoples have a special relationship to the land and territories they inhabit. It is where their ancestors have lived and where their history, knowledge, livelihood practices and beliefs are developed. To most indigenous peoples the territory has a sacred or spiritual meaning which reaches far beyond the productive and economic aspect of the land. In the words of UN Special Rapporteur Martinez Cobo, 'It is essential to know and understand the deeply spiritual special relationship

between indigenous peoples and their land ... For such people, the land is not merely a possession and a means of production ... Their land is not a commodity which can be acquired but a material element to be enjoyed freely.'
International Labour Organisation (ILO), *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, Rome, 2009, p. 91.
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf

Contemporary land grabs are often justified and rationalised in language redolent with the notion that the communities and tenurial systems being displaced or replaced are 'primitive' and 'inefficient' – as compared with the 'advanced', 'progressive' and 'productive' landholding structures resulting from land grabs. Terminology of this sort is similar to that used in connection with the Highland Clearances (including the Sutherland Clearances) in Scotland and with the colonisation (by Europeans) of countries like New Zealand, Australia, Canada and the United States – countries where, prior to colonisation, land was not generally regarded as anyone's exclusive 'property'. This approach reached its logical conclusion in Australia where that country's British conquerors and colonisers declared the areas they occupied to have been previously *terra nullius*, land without owners or ownership. In 1992, in a case brought by a group of Torres Strait Islanders led by Eddie Mabo, the High Court of Australia at last rejected the *terra nullius* concept and recognised that, prior to colonisation, both Torres Strait Islanders and Aboriginal people had possessed rights in, and title to, land. This judgement was followed by the Australian Parliament passing the Native Title Act of 1993 which, in words embodied in the Act, created 'a national system for the recognition and protection of native [or indigenous] title'.

Aboriginal people and Torres Strait Islanders occupied Australia for at least 40,000 to 60,000 years before the first British colony was established ... They spoke their own languages and had their own laws and customs. Those laws and customs were characterised by a strong spiritual connection to 'country' ... The British claimed sovereignty over part of Australia in 1788 and established a colony. In 1889, the British courts applied the doctrine of *terra nullius* to Australia, finding it a territory that was 'practically unoccupied'. In 1979, the High Court of Australia did the same, saying that Australia was a territory which, 'by European standards, had no civilised inhabitants or settled law' ... In 1992, nearly 200 years after the arrival of the British, the High Court of Australia made an historic decision. In *Mabo (No 2)*, the Court decided that the doctrine of *terra nullius* should not have been applied to Australia and that the common law of Australia would recognise native title. The landmark *Mabo (no 2)* decision led to the Australian Parliament passing the Native Title Act 1993.
National Native Title Tribunal [of Australia], 'Information about Native Title'.
http://www.nntt.gov.au/Information-about-native-title/Pages/History.aspx?Mode=TextOnly

The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.
High Court of Australia: Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).
http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html

This preamble sets out considerations taken into account by the Parliament of

Australia in enacting the law that follows [the Native Title Act 1993].

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms.

Preamble to the Native Title Act 1993 as Amended, 2013.

http://www.comlaw.gov.au/Details/C2013C00415

As made clear in the Preamble to the Australian Parliament's Native Title Act (set out above) and as indicated in later sections of this paper, the Mabo judgement is one aspect of the modern world's wider and wider acceptance of the principle that indigenous peoples' customary rights to land and other resources – whether in Australia or elsewhere – deserve legal recognition of a sort long denied to them in circumstances where such land and resources had been appropriated by others. Interestingly, a very early acceptance of this principle occurred in the area where Community Land Scotland has so far been most active – the Highlands and Islands of Scotland.

4. Recognising Indigenous Land Rights in Nineteenth-Century Scotland

In the British Isles all society was once tribal and kin-based. While it is impossible to be certain, it is likely that land was then regarded here in much the same way as it is still regarded in surviving tribal and kin-based cultures elsewhere. Something of this is evident in laws given written form as far back as the seventh and eighth centuries AD in the Gaelic-speaking part of the British Isles – an area including much of Scotland as well as all of Ireland. These show that while, even then, land as such had ceased to be a common resource, rights to key land-related resources – such as timber, freshwater fish and game – were not the exclusive prerogative of any set of individuals. Residual traces of such thinking continue to be evident in Scotland – more especially, perhaps, in localities that are, or were until comparatively recently, Gaelic-speaking.

The *tuath* [the basic territorial unit] of the early Gaelic world was not at all a communist society. Its farms, for instance, were occupied by particular families whose tenurial position the law tracts [of the early medieval period] guaranteed. But the people of the *tuath* ... made a marked distinction between what had been artificially created and what existed naturally. Both a cultivated field and the cultivator's home were clearly in the first category. Forests, mountains and the wild animals they supported were clearly in the second. It was consequently unlawful to take corn from your neighbour's field. But it was perfectly acceptable – provided that due attention was paid to the need to ensure that long-term output was sustained –

to take supplies of timber, nuts and other commodities from a wood. It was equally acceptable for individuals to go where they pleased in hill country and to take the game such country supported – provided again that such resources were not exploited to excess. Much the same sort of thinking was applied to watercourses – an important source of food. Thus a man, though not entitled to take as many fish as he liked, was certainly permitted to net or trap the occasional salmon for his family's consumption.

Anyone who knows the modern Highlands will recognise in that last stipulation the remote origins of the enduring conviction that, irrespective of our modern society's remarkably draconian laws on poaching, there is nothing morally wrong in taking 'a fish for the pot'. Folk memory – not just in this instance but in the still more generally applicable Gaelic proverb to the effect that everyone has a right to a deer from the hill, a tree from the forest and a salmon from the river – has both preserved the ethics of the *tuath* and employed those ethics in such a way as to provide a principled basis for actions which Scots law nowadays places on much the same basis as theft.

J. Hunter, *On the Other Side of Sorrow: Nature and People in the Scottish Highlands*, Edinburgh, 1995, p. 64.

The law recognised that certain personal 'necessities' suspended private property rights in particular instances; a man might take a single salmon from a stream or a single drawing of a net from a river or lake without infringing on the property rights of the owners; he could also cut a sapling for a riding crop or the shaft of a spear or commandeer a wagon to carry home a corpse. The gathering of nuts or kindling from woodlands was free to all equally ... Seaweed could be taken also ... As for wild beasts [such as deer], they belonged to whoever killed them.

J. R. Peden, 'Property Rights in Celtic Irish Laws', *Journal of Libertarian Studies*, I, 1977, p. 89.

Who owns this landscape? –
The millionaire who bought it or
the poacher staggering downhill in the early morning
with a deer on his back?

Norman MacCaig, 'A Man in Assynt': N. MacCaig, *Collected Poems*, London, 1993, p. 225.

Of particular significance in a land tenure context was the concept (widespread in the Highlands and Islands where it was commented on by early visitors like Edward Burt) that to occupy land – the more so if occupation extended across a number of generations – was to establish a right to such occupancy. One of several interconnected notions bound up in the (untranslatable) Gaelic term *dùthchas*, the belief in such a right helped underpin the structure of clan society as it endured in the Highlands into the mid-eighteenth century. When, during that century, the Highlands were fully integrated (in the post-Culloden period) into the British state and when, in consequence, clan chiefs were encouraged to transform themselves into commercially-minded landlords, traditional entitlements to security of occupancy were disregarded (indeed disparaged) by those in authority. This was bitterly resented by evicted tenants with results noted by a number of contemporary observers – notably Thomas Douglas, Earl of Selkirk, an impassioned critic of landowners of the sort responsible for the Sutherland Clearances. 'The permanent possession which they had always retained of their paternal farms,' Lord Selkirk commented of clearance victims, 'they consider only as their just right ... and [they] can see no difference between the title of the chief and their own.'

They entertain ... the notion ... that they have a kind of hereditary right to their farms, and that none of them are to be dispossessed unless for some great transgression.
E. Burt, *Letters from a Gentleman in the North of Scotland*, 2 vols., London, 1822, [originally published 1754 and written in the 1720s], II, p. 75.

It is not to be overlooked, that among the peasantry of the Highlands, and particularly among the tenants, a spirit of discontent and irritation is widely diffused ... The progress of the rise of rents, and the frequent removal of the ancient possessors of the land, have nearly annihilated in the people all that enthusiastic attachment to their chiefs, which was formerly prevalent, and have substituted feelings of disgust and irritation proportionally violent. It is not the mere burthen of an additional rent that seems hard to them: the cordiality and condescension which they formerly experienced from their superiors are now no more: they have not yet learnt to brook their neglect: they have not yet become accustomed to the habits of a commercial society, to the coldness which must be expected by those whose intercourse with their superiors is confined to the daily exchange of labour for its stipulated reward. They remember not only the very opposite behaviour of their former chiefs; they recollect also the services their ancestors performed for them: they recollect that, but for these, no estate could have been preserved: they well know of how little avail was a piece of parchment and a lump of wax under the old system of the Highlands: they reproach their landlord with ingratitude, and remind him that, but for their fathers, he would now have no property. *The permanent possession which they had always retained of their paternal farms, they consider only as their just right*, from the share their predecessors had borne in the general defence, *and [they] can see no difference between the title of the chief and their own* [italics added].
T. Douglas, *Observations on the Present State of the Highlands of Scotland*, London, 1805, pp. 119-20.

In Gaelic culture people belong to places, rather than places belonging to people. The phrase, *'Buinidh mi do ...'* meaning literally *'I belong to ...'* is used to express the enduring ties and associations of the place of one's birth. Gaelic has several words with a common root which are used for the interconnected concepts of one's heredity, identity, homeland, and inherited rights and duties: *dù*, *dùthchaich* and *dùthchas*. The ineffable quality of these terms, and the matrix of ideas and feelings that they evoke, has been noted since the sixteenth century.
M. Newton, *Warriors of the Word: The World of the Scottish Highlanders*, Edinburgh, 2009, p. 306.

The Highlands, it needs stressing at this point, were not colonised in the way that Australia was colonised – the relationship between Highlanders on the one side, and the Scottish or (from 1707) the British state on the other, being quite different to that between Australia's Aboriginal people and the British colonial authorities. While operating as quasi-tribal leaders in a Highland context, clan chiefs also operated on the wider Scottish and British stages – obtaining in consequence, from the later middle ages onwards, feudal and other titles to land. As Lord Selkirk recognised (in the passage reproduced above) those titles counted for little in earlier eras when a chief's power rested on the number of fighting men at his command – and when, in consequence, it would have been extremely rash of him to disturb traditional tenancy arrangements. But with clanship's eighteenth-century demise, and with a chief-cum-landlord's influence and prestige now dependent on his maximising his land-derived revenues, the earlier titles – recognised by the courts in a way that *dùthchas* never was

– became the legal basis both for ownership of a modern/capitalist type and for mass evictions of the Sutherland variety.

But if Highland landlords were thus able to rest their claims to ownership (and to their consequent ability to clear land as a prelude to letting this land to sheep farmers) on legally-recognised titles, the people they dispossessed continued to insist on their customary – or, as we might now say, indigenous – rights to the land they had lost. Their insistence on those rights was noted, for example, by the Napier Commission – the royal commission established in 1883 to enquire into the causes of the crofter protests (in the form of rent strikes and land seizures) then convulsing the Highlands and Islands.

The opinion so often expressed before us that the small tenantry of the Highlands have an inherited inalienable title to security of tenure in their possessions, while rent and service are duly rendered, is an impression indigenous to the country, though it has never been sanctioned by legal recognition, and has long been repudiated by the action [meaning clearance and eviction] of the proprietor.
Report of Her Majesty's Commissioners of Inquiry into the Condition of the Crofters and Cottars in the Highlands and Islands of Scotland, 5 vols., Edinburgh, 1884, I, p. 8.

Significantly, what the Commission called the 'indigenous' conviction 'that the small tenantry of the Highlands have an inherited inalienable title to security of tenure' was seized upon by Prime Minister William Gladstone, whose government established the Napier Commission, as the moral basis for the crofting legislation his administration enacted in the wake of the commission's report. Crofters or their forebears, Gladstone contended, had been 'surreptitiously deprived' by their landlords of 'rights' they or their forebears had formerly possessed. Hence the UK Parliament's entitlement, indeed duty as Gladstone saw it, to limit the previously unlimited freedom of Highlands and Islands landlords to do as they pleased with their land. It is in this sense that the Crofters Act of 1886 can be seen to rest on arguments that are by no means dissimilar to those advanced by the High Court of Australia in connection with the 1992 Mabo case. Just as Australian Aboriginal people had land rights of which (as the High Court recognised in 1992) they were deprived, so – in William Gladstone's opinion at any rate – had crofting tenants in the Highlands. And just as the Native Title Act of 1993 restored land rights to Aboriginal people, so the Crofters Act – in Gladstone's estimation – restored land rights to crofters.

Gladstone ... argued that the people [of the Highlands] had a historic title to the land which had been usurped by the proprietors for material gain, regarding that as a 'wrong' which ought to be redressed, despite the passage of time since the Clearances. The rights of property in the Highlands were not absolute, he argued, but came with 'engagements' in the shape of this history: 'For it is,' [Gladstone contended], 'this historical fact that constitutes the crofters' title to demand the interference of Parliament. It is not because they are poor, or because there are too many of them, or because they want more land to support their families, but because those whom they represent had rights of which they have been surreptitiously deprived to the injury of the community.'
E. A. Cameron, *Land for the People: The British Government and the Scottish Highlands, 1880-1925*, East Linton, 1996, p. 33.

Nor was this restoration in any way half-hearted. Croft rents – formerly a matter for landlords to determine – were from 1886 fixed (as they still are) by a judicial tribunal (originally the Crofters Commission and now the Scottish Land Court). More significantly still, crofters – who had previously held land (from which they could readily be evicted) on wholly insecure year-to-year tenancies – were granted what was and remains (in a British context) uniquely absolute security. Not only could crofters, from 1886, no longer be dispossessed. They became entitled to transfer their landholdings to other family members through as many generations as their families endured. This, as Gladstone intended, was to re-establish *dùthchas* in a modern guise.

It was also to put in place an enduring sense of the Highlands and Islands being, from a wider British perspective, an exceptional area meriting not just its own land laws – of a type refused to other parts of Scotland – but its own developmental institutions.

Thus agriculturalists in localities like Aberdeenshire, where in the 1880s there were more crofters/smallholders than in any of the so-called crofting counties (Argyll, Inverness-shire, Ross-shire, Sutherland, Caithness, Orkney and Shetland), were denied (despite their protests) security of tenure; and when, in the 1940s, security was eventually extended to tenant farmers it was of a notably less absolute sort than that granted to crofters 60 years before. Much the same pro-crofter discrimination is evident in tenant farmers still being refused a right-to-buy of the type made available to crofters in 1976. It is evident too in the Land Reform (Scotland) Act 2003 having granted crofting communities an absolute right to take into community ownership land in crofting tenure. Such land, it follows, can be taken over whether or not its landlord wishes to sell. This is not the case with regard to non-crofting land – communities wanting to obtain such land being entitled by the 2003 Act to do no more than register an interest in acquiring it if or when it comes on to the market.

Something of this is traceable to Gladstone's conviction that the Highland Clearances were a consequence of the loss to Highland people of longstanding rights in land – that conviction being reinforced by a strong sense, explicit in the then Scottish Secretary's 1965 statement of the case for the establishment of the Highlands and Islands Development Board (now Highlands and Islands Enterprise), that the wider state of which the Highlands and Islands were part was under an obligation to put right wrongs done to the region and its inhabitants in the past.

> For two hundred years the Highlander has been the man on Scotland's conscience ... No part of Scotland has been given a shabbier deal ... Too often there has only been one way out of his troubles for the person born in the Highlands – emigration .... If there is bitterness in my voice, I can assure the House that there is bitterness in Scotland, too, when we recollect the history of these areas ...
>
> William Ross, Secretary of State for Scotland: *House of Commons Hansard*, 16 March 1965.

Much of the present-day international community has similarly accepted that indigenous peoples – in Australia, New Zealand, North America, Latin America, Africa, Asia and (in the case of the Sámi for instance) some parts of Europe – are similarly owed help to combat what the United Nations High Commissioner for Human Rights calls 'the consequences of historical colonization and invasion of their territories'. Feeling of this sort underpins the international community's attempts to

strengthen (through the adoption of various declarations and conventions) the human rights (not least rights to land) of indigenous peoples – wherever they may be.

Indigenous peoples across the world experience the consequences of historical colonization and invasion of their territories ... In recent decades, the international community has given special attention to the human rights situations of indigenous peoples, as shown by the adoption of international standards and guidelines, as well as by the establishment of institutions and bodies that specifically target these peoples' concerns.
Office of the United Nations High Commissioner for Human Rights
http://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx

5. Convention No. 169 of the International Labour Organisation and United Nations Declaration on the Rights of Indigenous Peoples

The concept of people possessing rights by virtue simply of their being human is one which has evolved over several centuries. This concept was first given recognisably modern expression in the course of the American and French Revolutions.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
American Declaration of Independence, Philadelphia, 1776.

Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.
Declaration of the Rights of Man and of the Citizen, Paris, 1789.

The Second World War – or, more precisely, experiences (including the Holocaust) arising from Nazi domination of much of Europe during the early 1940s – gave rise to a widespread conviction that states should formally endorse and agree the principle that everyone, whoever they may be, has rights which governments everywhere should undertake to uphold and defend. Feeling to this effect was embodied, first, in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948 and, second, in the European Convention on Human Rights, as agreed by the Council of Europe and in effect from1953.

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.
Universal Declaration of Human Rights, Preamble, 1948.

The aim of the Council of Europe is the achievement of greater unity between its members and ... one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms.
European Convention on Human Rights, Preamble, 1953.

As is clear from these various conventions and declarations – whether the US Declaration of Independence in 1776 or the Universal Declaration of Human Rights in 1948 – rights (including rights to life, liberty, equality before the law, a fair trial,

freedom of movement or freedom from slavery) have historically been considered *civil, political and, above all, individual* in character. During the decades following the Second World War, however, there was growing recognition that people also have *economic, social and cultural rights* – for example, rights to a reasonable income, a decent standard of living, adequate housing and education.

In accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.
UN International Covenant on Economic, Social and Cultural Rights, 1976.
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

While such rights, just like civil and political rights, are thought to be *universal*, the international community (or the bulk of it in some instances) has also developed and endorsed statements of economic, social and cultural rights pertaining *collectively* to particular *groups*. Such statements include: the UN Convention on the Protection of the Rights of Migrant Workers (1990); and the UN Convention on the Rights of People with Disabilities (2007). Also in this category, and of particular importance in the present context, are: Convention No. 169 of the International Labour Organisation (ILO) on Indigenous and Tribal Peoples (1989); the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007); and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security issued by the UN Food and Agriculture Organisation (FAO) (2012).

Within Western thought since the eighteenth century, rights have been thought of and articulated mostly in terms of the *individual's* demands for freedom, equality, participation, and economic and physical security vis-à-vis the state ... [Today] authoritative discussion of human rights has become increasingly attentive to values supportive of human beings' associational and cultural patterns that exist independently of state structures. Accordingly, concepts of group or collective rights have begun to take hold in the articulation of human rights norms.
S. J. Anaya, *Indigenous Peoples in International Law*, Oxford, 2004, pp. 52-53.

Both ILO Convention No. 169 and the Declaration on the Rights of Indigenous Peoples deal with a whole range of cultural, linguistic, educational and other rights. But they also – as does FAO's Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests – set out to establish (and to have recognised by governments) various *rights in respect of the ownership, control and economic exploitation of land, fresh water, coastal seas and other natural resources*.

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or required. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
UNDRIP, Article 26.

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

6. How might the UN Declaration on the Rights of Indigenous People, together with related Conventions and Guidance Statements, be drawn upon in order to strengthen the case for land reform in Scotland?

Some of the groups thought increasingly to have particular rights, such as migrant workers or people with disabilities, are – in principle at least – readily definable. Indigenous peoples are not in this category. That is why the various Conventions, Declarations and other internationally-agreed statements dealing with the rights of such peoples do not *define* indigenous peoples – preferring instead to *describe* the different ways (varying from country to country and from region to region) in which peoples might be identified, by themselves and others, as indigenous.

The term 'indigenous peoples' is a common denominator for more than 370 million people spread across some 90 countries around the world. Given the diversity of indigenous peoples, there is a broad international consensus that a universal definition is neither necessary nor desirable. Instead, the recommended approach is to identify the peoples concerned in a given country context, putting particular emphasis on their self-identification as indigenous peoples.

Convention No. 169 of the International Labour Organisation (ILO) provides a set of subjective and objective criteria which are jointly applied to guide the identification of indigenous peoples in a given country. According to these criteria, indigenous peoples:

- Descend from populations who inhabited the country or geographical region at the time of conquest, colonisation, or establishment of current state boundaries;
- Retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status;
- Have social, cultural and economic conditions that distinguish them from other sections of the national community;
- Have their status regulated wholly or partly by their own customs or traditions or by special laws or regulations;
- Identify themselves as indigenous peoples.

Other characteristics highlighted by a number of institutions are:

- A special relationship with land and natural resources;
- A history of oppression and ongoing conditions of non-dominance;
- Aspirations to continue to exist as distinct peoples.

Birgitte Feiring, *Indigenous Peoples' Rights to Land, Territories and Resources*, International Land Coalition (ILC), Rome, 2013, pp. 14-15.

http://www.landcoalition.org/sites/default/files/publication/1615/IndigenousPeoplesRightsLandTerritoriesResources.pdf

Today the term *indigenous* refers broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others. Indigenous peoples, nations or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.

S. J. Anaya, *Indigenous Peoples in International Law*, Oxford, 2004, p. 3.

There have been attempts to argue that a number of the criteria determining that a particular group might be described as an indigenous people are present in parts of Scotland. The most ambitious such attempt was made in 2008 by Iain MacKinnon on behalf of the Scottish Crofting Federation – the Federation, on the basis of MacKinnon's work, going on to call on the Scottish Government to 'recognise crofters as indigenous people of the Highlands and Islands'.

The Scottish Crofting Foundation calls on government to: recognise crofters as indigenous people of the Highlands and Islands; respect the growing body of international law on indigenous peoples; and devolve power and decision-making on indigenous issues to the people who maintain the indigenous cultures of the Highlands and Islands.
Iain MacKinnon, *Crofters: Indigenous People of the Highlands and Islands*, Scottish Crofting Federation, 2008, p. 8.
http://www.crofting.org/uploads/news/crofters-indigenous-peoples.pdf

There are difficulties in the way of such an approach. While peoples recognised (both in their own countries and internationally) as indigenous – for example: First Nation, Métis and Inuit peoples in Canada; Maori people in New Zealand; Amazonian tribal people in Brazil; Native Americans in the US; Sámi people in northern Scandinavia; Aboriginal people in Australia – are generally happy to regard themselves (and to be seen by others) as indigenous peoples, there is little demand from crofters or any other group in Scotland to be so regarded. Nor is there much likelihood that, even if such demand were forthcoming, it would meet with a positive response politically – the UK Government, while welcoming the UN General Assembly's 2007 adoption of the Declaration on the Rights of Indigenous Peoples, having taken care to stress that no groups within the UK 'fall within the scope to of the indigenous peoples to which the Declaration applied', and the Scottish Government (so far as this paper's author is aware at any rate) not having disassociated itself from this position.

Karen Pierce, United Kingdom, welcomed the Declaration as an important tool in helping to enhance the promotion and protection of the rights of indigenous peoples ... National minority groups and other ethnic groups within the territory of the United Kingdom ... did not [however] fall within the scope of the indigenous peoples to which the Declaration applied.
UN Sixty-first General Assembly: Plenary: General Assembly Adopts Declaration on Rights of Indigenous Peoples, 13 September 2007.
http://www.un.org/News/Press/docs/2007/ga10612.doc.htm

This does not mean that rights of the sort MacKinnon highlighted in his 2008 paper – rights set out, to repeat, in Convention No. 169 of the ILO on Indigenous and Tribal Peoples, the Declaration on the Rights of Indigenous Peoples and FAO's Voluntary Guidance on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security – are irrelevant to the case for land reform in Scotland. If that case is to be reinforced by way of appeal to such rights, however, the way forward, especially in relation to CLS's key objective of expanding the area of land in community ownership, is not likely to be found in claims that Scotland contains indigenous peoples in the generally accepted sense of that term. Much more productive, surely, would be *some attempt to construct a human rights case for land reform in Scotland that, while making reference both to the land rights of indigenous peoples and to the thinking underpinning those rights, takes as its starting point*

Scottish communities as they are today – in all their ethnic, social, linguistic and other diversity.

7. Towards a Rights-Based Case for Land Reform in Scotland

It is only in the last year or two that the case for land reform in Scotland has begun to be framed in ways that take account of the possibility that this case might have a human rights dimension. Previously, human rights considerations tended to be cited in a land reform context – if cited at all – as reasons why land reform, especially far-reaching land reform, should not, or could not, be contemplated. This circumstance can be traced in part to worries about the implications for land reform of Article One Protocol One (A1P1) of the European Convention on Human Rights (ECHR) – A1P1 being clear as to everyone's entitlement to 'peaceful enjoyment' of their property.

Such worries have been aggravated in a Scottish context because the Scotland Act 1998 – the measure creating, and governing the operations of, the Scottish Parliament – states explicitly that a Scottish Parliamentary Act is not lawful if it infringes ECHR Provisions as incorporated into UK and Scots law by the Human Rights Act 1998. In these circumstances, and for all that the extraordinarily concentrated nature of land ownership in Scotland (where just 432 owners possess half the country's land area) was acknowledged by a big majority of MSPs in the post-devolution Scottish Parliament to be both inequitable and an obstacle to socio-economic development, ministers and (still more) their civil servants feared that measures which in any way smacked of land redistribution would be struck down by the courts on the grounds that such measures infringed ECHR-guaranteed property rights. Apprehensions of this sort go a long way to explain, in particular, the labyrinthine complexity of Part 3 of the 2003 Act – the part granting crofting communities an absolute right to buy the land around them. This complexity arose largely from attempts to 'ECHR-proof" what is, for all its increasingly recognised weaknesses, the most significant land reforming legislation of modern times in Scotland.

Landowning interests, for their part, took comfort from the supposition that ECHR A1P1 constituted something of a shield against either non-crofting communities or tenant farmers being granted rights to buy of the sort made available to crofting communities (always, as mentioned earlier, a special case) in 2003. But when a challenge to the Land Reform Act's Part 3 was mounted by a landowner on ECHR grounds, this challenge foundered on a Court of Session ruling in 2012 that absolute right to buy provisions can be compatible with ECHR A1P1.

I conclude therefore that when Ministers decide where the overall public interest lies, the central consideration will be that of balancing the harm to the landowner against the benefit of the proposal to the wider public, most notably in relation to strengthening the crofting economy. When they make that decision, the weight to be given to the landowner's interests is pre-eminently a matter for them. On that point, the landowner's entitlement to compensation may be a material consideration. A1P1 requires only that any assessment of the public interest should not be manifestly unreasonable.
Court of Session, Opinion of the Lord President [Gill] in the Cause of Pairc Crofters Ltd and Pairc Renewables Ltd against the Scottish Ministers, 19 December 2012.
http://www.scotcourts.gov.uk/opinions/2012CSIH96.html

Anyone who thought that human rights might be the antidote to Land Reform, and Rights to Buy in particular, will have had their hopes dashed by the decision of The First Division of the Inner House of The Court of Session in *Pairc Crofters Limited and Pairc Renewables Limited v The Scottish Ministers* issued on 19 December 2012.

Anderson Strathern Solicitors, Legal Updates, January 2013.

http://www.andersonstrathern.co.uk/legal-updates/land-reform-and-human-rights-jan-2013

That 2012 ruling should not, perhaps, have been quite the surprise it seemed to be in some quarters – A1P1 being clear that its provisions do not 'in any way impair' a state's entitlement 'to enforce such laws as it deems necessary to control the the use of property in accordance with the general interest'.

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 by law and by 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 general penalties.

Article 1 Protocol 1 of the European Convention of Human Rights

This point was underlined by Professor Alan Miller, chair of the Scottish Human Rights Commission, in a presentation to CLS's 2013 Annual Conference – Professor Miller commenting that, in relation to land reform, human rights obligations ought to be seen not as an 'inhibitor' but as a source of 'impetus'. Elaborating, Professor Miller stressed the need, in a land reform context, to have regard not simply to ECHR but to the entire body of human rights declarations, conventions and agreements to which the UK (and therefore Scotland under current constitutional arrangements) is signed up.

Professor Miller made the case why "human rights should not be seen as an inhibitor, but as an impetus for land reform". He noted that the European Convention of Human Rights (only one part of the human rights framework) should not be regarded as stopping further discussion on land reform, rather that it provides a framework in which a balance must be struck between individual rights and public interest.

Miller focused then on human rights as an impetus – in terms of how the values of human rights relate to land reform, and how international human rights dimensions can be of assistance to the movement towards land reform in Scotland ... Miller made reference to the Land Agency, proposed by Community Land Scotland in their submission to the Land Reform Review Group, as being in line with a human rights based approach; setting the context in which power is shifted and levelling the playing field so that genuine engagement can take place.

Miller moved on to discuss the place of land reform in the context of the International Covenant on Economic, Social and Cultural Rights, including such rights as the right to an adequate standard of living, to adequate housing, to the highest attainable standard of health (etc.) and placing an obligation on a state to ensure that it uses the maximum available resources for the progressive realisation of these rights.

Miller closed by highlighting two key steps for Scotland to take with regard to human

rights. Firstly noting the launch of Scotland's first National Action Plan for Human Rights which is to take place on 10th December 2013 (International Human Rights Day). This will identify a roadmap for the progressive realisation of internationally recognised human rights. Miller noted Community Land Scotland's submission to this plan, and that the question of land reform should sit well within it. Secondly, Miller noted the need for Scotland, irrespective of the outcome of the referendum, to incorporate these economic, social and cultural rights that exist internationally into domestic law so that individuals and communities are able to enforce these rights – thus carrying clear benefit in bringing forward the need for land reform.
Community Land Scotland, Annual Conference Report, June 2013, pp. 9-10.
http://83.223.124.6/~communi1/images/uploads/Community_Land_Scotland_Conference_Report_-_Annual_Conference_2013.pdf

In his CLS presentation, Alan Miller made particular reference to the International Covenant on Economic, Social and Cultural Rights which (as noted above) sets out rights to adequate living standards, adequate housing and the like. Here, by way of building on Professor Miller's comments, it is suggested that these comments can be seen as opening the way to a concerted attempt to utilise, in a Scottish land reform context, human rights concepts embodied in measures such as Convention No. 169 of the ILO on Indigenous and Tribal Peoples or the UN Declaration on the Rights of Indigenous Peoples.

No such attempt is made here. But ensuing paragraphs will perhaps serve to indicate how connections could be made between a range of CLS objectives (potential as well as actual) on the one side and, on the other, the thinking of individuals and institutions involved in establishing and enforcing the human rights of indigenous peoples.

Especially relevant in this connection is FAO's 2012 publication, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. Described by ActionAid, a human rights and anti-poverty NGO, as 'an unprecedented achievement' the *Guidelines* are the product of a 2009-12 consultative process organised by the UN Committee on World Food Security and involving 700 people from 133 countries. What is particularly important about the *Guidelines* in a CLS context is that – while 'deeply anchored in human rights language and principles' and while referring to the UN Declaration on the Rights of Indigenous Peoples as well as to related agreements – they are intended to apply universally and to be use by, among others, 'communities'. 'These Guidelines are global in scope,' the FAO makes clear. 'Taking into consideration the national context, *they may be used by all countries and regions at all stages of economic development and for the governance of all forms of tenure, including public, private, communal, collective, indigenous and customary*.' From this it follows that the *Guidelines* – in which the word *tenure*, incidentally, is used to signify everything having to do with the ownership, occupancy and use both of land and of land-related resources – are as applicable to Scotland as to anywhere else. And it is clear they have much to say, as does associated documentation, about matters of interest and concern to CLS.

Land rights are rapidly becoming the new political battleground, central to discussions on climate change, food security, poverty alleviation, corporate sustainability, gender equality, and even democracy itself.
Rights and Resources Initiative, Annual Review, 2013-14: Lots of Words, Little

Action, p. 5.
http://www.rightsandresources.org/documents/files/doc_6508.pdf

How people, communities and others gain access to land, fisheries and forests is defined and regulated by societies through systems of tenure. These tenure systems determine who can use which resources, for how long, and under what conditions.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. iv.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

The Voluntary Guidelines are – thus far – the only existing global reference for the best practices in governance of tenure of land, fisheries and forests backed by international consensus of governments, international organisations, civil society and the private sector ... The Guidelines are deeply anchored in human rights language and principles ... They are fundamentally consistent with the Universal Declaration of Human Rights and also refer to various United Nations instruments including the United Nations Declaration on the Rights of Indigenous Peoples.
ActionAid, *A Brief Introduction to Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, 2012, pp. 1, 4.
http://www.sida.se/PageFiles/80714/aa_ifsn_vgs_guide_23june2011.pdf

These Guidelines can be used by States; implementing agencies; judicial authorities; local governments; organizations of farmers and small-scale producers, of fishers and of forest users; pastoralists; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned to address tenure governance and identify improvements and apply them ... These Guidelines are global in scope. Taking into consideration the national context, they may be used by all countries and regions at all stages of economic development and for the governance of all forms of tenure, including public, private, communal, collective, indigenous and customary.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. 2.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

The European Union places a high emphasis on the Voluntary Guidelines as a tool which can help national governments and other stakeholders to strengthen the governance of tenure of the important resources on which so many around the world depend for their livelihoods ... The endorsement of the Voluntary Guidelines is the culmination of a participatory and multi-stakeholder process begun in 2009 and leading up to three rounds of negotiations held at FAO headquarters in Rome over the course of 2011 ... The European Union and its Member States engaged very actively in the process.
European Union, 'Committee on World Food Security adopts Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests', Brussels, May 2012.
http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/130169.pdf

Following paragraphs draw on material such as FAO's *Voluntary Guidelines*, the ILO's *Convention No. 169 on Indigenous and Tribal Peoples* and the *UN Declaration on the Rights of Indigenous Peoples* in order to illustrate how such material might be used to reinforce demands for legislatively-backed reform.

7a. Making the case for legislative action to: curb speculation in land; to limit the size of private landholdings; to redistribute land in order to expand community ownership; and otherwise regulate the land market in the public interest.

In response to CLS and other demands for action of this sort, landowning and other interests often imply or assert that for a Scottish Government to take such action would somehow be for it to embark on an 'extreme' or 'anti-market' course. Internationally agreed and rights-based statements relating to land reform and associated matters help give the lie to this.

All parties should recognize that no tenure right, including private ownership, is absolute. All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. 6.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

States should take measures to prevent undesirable impacts on local communities, indigenous peoples and vulnerable groups that may arise from, inter alia, land speculation, land concentration and abuse of customary forms of tenure. States and other parties should recognize that values, such as social, cultural and environmental values, are not always well served by unregulated markets. States should protect the wider interests of societies through appropriate policies and laws on tenure.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, pp. 19-20.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

States should provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards could include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval. States should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure right holders.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. 21.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

Redistributive reforms can facilitate broad and equitable access to land and inclusive rural development. In this regard, where appropriate under national contexts, States may consider allocation of public land, voluntary and market-based mechanisms as well as expropriation of private land, fisheries or forests for a public purpose ... States may consider land ceilings as a policy option in the context of implementing redistributive reforms ... In the national context and in accordance with national law and legislation, redistributive reforms may be considered for social, economic and environmental reasons, among others, where a high degree of ownership concentration is combined with a significant level of rural poverty attributable to a lack of access to land, fisheries and forests.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. 25.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

7b. Obtaining a greater community stake in natural resource development

CLS makes constant reference to the urgent need for communities to have a greater stake, preferably by way of ownership, in the development of natural resources such as those having to do with renewable energy generation. CLS is critical of the tendency for natural resources, not least in the wind power area, to be developed largely or exclusively for the benefit of externally-owned corporations acting in concert with private (often absentee) landowners – while affected communities are expected to be content with 'community benefit' payments amounting to no more than a tiny fraction of the revenues accruing to corporations and landowners. Internationally, a great deal has been said and written to the same effect. Also internationally, much emphasis is placed – just as it is placed by CLS – on the many benefits (by no means all of them financial) resulting from natural resource development being in non-external ownership.

Local autonomy (local control) is only a means to an end, the end being to transform the power relations that currently structure our political economy. Inherent in that goal is creating economic institutions that are participatory and democratic, and having that democratic control exerted at the local level.
J. DeFilippis, *Unmaking Goliath: Community Control in the Face of Global Capital*, New York, 2004, p. 2.

Control by indigenous peoples over development affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, customs and traditions, and to promote their development in accordance with their aspirations and needs.
UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Preamble.
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
ILO, Convention No. 169 on Indigenous and Tribal Peoples, Article 15.
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100897.pdf

The Special Rapporteur ... observes that the business model that still prevails in most places for the extraction of natural resources within indigenous territories is not one that is fully conducive to the fulfilment of indigenous peoples' rights ... The prevailing model of resource extraction is one in which an outside company, with backing from the State, controls and profits from the extractive operation, with the affected indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to profits gained by the [outside] corporation ... In contrast to the prevailing model ... indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources ... There are several notable cases in North America, for example, in which indigenous nations or tribes own and operate companies that engage in oil and gas production, manage electric power assets or invest in alternative energy ... When indigenous peoples choose to pursue their own initiatives for natural resource extraction within their territories, States and the international community should assist them to build the capacity to do so, and States should privilege indigenous

peoples' initiatives over non-indigenous initiatives.
UN Human Rights Council, Report of the Special Rapporteur [James Anaya] on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples, July 2013, pp. 3-6, 20.
http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf

When Native [American] nations make their own decisions about what developmental approaches to take, they consistently out-perform external decision-makers – on matters as diverse as governmental form, natural resource management, economic development, healthcare and social service provision.
The Harvard Project on American Indian Economic Development: What Works, Where and Why.
http://hpaied.org/about-hpaied/overview

Reclaiming traditional lands has been a primary concern of the Hopi Tribe for the last century. In 1996, significant land purchases became possible under the terms of a settlement with the U.S. government, but the tribal government then faced the problem of developing a plan for land reacquisition. In 1998, responding to this challenge, the Hopi Tribe created the Hopi Land Team. With the goal of striking a a balance between preservation and the future, the Team works to identify potential purchases, evaluate their cultural and economic signficance and potential, and recommend purchases ... The Land Team must consider the economic needs of the tribal government and citizens in its land purchases ... To further maximize economic gains, the tribal government chartered [i.e., established] an Economic Development Corporation to manage properties, including three commercial properties located within a lucrative Flagstaff retail office market and a travel plaza in Holbrook. It also chartered a portion of its ranch property, Three Canyon Ranch, as an agricultural corporation that produces high-value been products. Other ranchlands are under consideration for projects such as a bed-and-breakfast and a wind energy farm. Currently, projects resulting from Land Team efforts net approximately $750,000 [annually] for the Tribe, and future growth in revenues and job creation are expected as more plans come to fruition.
The Harvard Project on American Indian Economic Development: Honoring Nations: 2005 Honoree: The Hopi Land Team.
http://hpaied.org/images/resources/publibrary/Hopi%20Tribe%20Land%20Team.pdf

7c. Transparency

There have been frequent calls in Scotland in recent years for much less secrecy and much more transparency with regard to land transactions and the ownership of land – the nature of such ownership being all too readily concealed by vesting it in companies and other entitities which are then registered overeseas. These calls are fully in accord with internationally agreed statements to the same effect.

We welcome global activities to improve land tenure governance, including through access to information and participation of citizens in decision making. We acknowledge the importance of multilateral efforts to promote greater land transparency, in particular, the role of the Food and Agriculture Organisation (FAO) in providing global policy guidance for good land governance and transparency.
G8 Leaders Communique, June 2013.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf

Without transparency, accountability, and open debate, decision-making over land will continue to be swayed by vested interests at the expense of rural land users. Likewise, without transparency, land acquirers cannot be held accountable to contractual obligations, national laws, or voluntary guidelines. There is therefore a need to call for and enable inclusive national and local debates on large-scale land acquisitions (both in general and on specific applications) and on wider issues, with a view to developing agreed national frameworks for land-based investments, food security, and rural development. Likewise, it is necessary to support the capacity for collective action and networking by local populations.
W Anseeuw, L A Wily et al., *Land Rights and the Rush for Land: Findings of the Global Commercial Pressure on Land Research Project*, International Land Coalition, p. 8.
http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf

7d. Greater community involvement in, and ownership of, state-owned land and Crown-owned seabed

CLS is in favour of more state-owned land – notably, in a Scottish context, land managed on Scottish Ministers' behalf by Forestry Commission Scotland or by the Scottish Government's own agricultural department – being transferred to communities. CLS is also in favour of local communities being enabled to take control of Crown Estate assets – including the coastal seabed. These policies are fully in alignment with calls internationally for state-owned land, forests and fisheries to be managed in ways which give greater priority to securing public benefit.

Where States own or control land, fisheries and forests, they should determine the use and control of these resources in light of broader social, economic and environmental objectives.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. 12.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

States should develop and publicize policies covering the use and control of land, fisheries and forests that are retained by the public sector and should strive to develop policies that promote equitable distribution of benefits from State-owned land, fisheries and forests.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. 13.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

Access to and use of natural resources as a cornerston in sustaining indigenous cultures has recently obtained considerable international attention. Access to marine resources has become a key issue for many aboriginal peoples struggling to move from dependency on the nation-state to self-determining agency.
A Davis and S Jentoft, 'The challenge and the promise of indigenous peoples' fishing rights: From dependency to agency', *Marine Policy*, 25, 2001: Abstract.
http://www.sciencedirect.com/science/article/pii/S0308597X01000148

7e. Exploring the possibility of establishing in Scotland community rights to land from which communities were removed

As noted above (Section 4), the first significant land reform legislation applied to Scotland, the Crofters Act of 1886, was predicated on Prime Minister William Gladstone's acceptance that smallholding tenants in the Highlands had been 'surreptitiously deprived' (in Gladstone's words) of land rights which the 1886 Act was intended to return to them. While the consequent granting of legislatively-guaranteed security of tenure was welcomed by crofters, there continued to be strong feeling – both on the part of crofters and other Highlands and Islands groups – that *not just lost rights but lost lands* should be restored. During the early part of the twentieth century, successive UK governments responded to this pressure by acquiring a great deal of land – much of it cleared of people by its owners a century or so earlier – and putting this land back into crofting occupancy. This policy was known as 'land settlement' and the Scottish Government still owns much of the land – amounting to some 240,000 acres today – acquired to make it possible.

While land settlement reversed the impact of earlier clearances in the localities where it occurred – notably in Skye, Raasay and some parts of the Outer Isles – many of the areas from which people were removed in the nineteenth century have never been repopulated. There continues to be feeling, however, that – to some extent at any rate – this deficiency should be made good. This feeling was articulated recently by Community Land Scotland in the course of a CLS response to the publication by Scottish Natural Heritage (SNH) of a map showing, in SNH terminology, Core Areas of Wild Land.

The Scottish Government recently consulted on the Main Issues Report for the National Planning Framework 3 (NPF3) and draft revised Scottish Planning Policy (SPP). These consultation documents outlined the Government's existing approach to areas of wild land character and proposed a policy approach that refers to SNH's Core Areas of Wild Land 2013 map. We published this map in April 2013 ... Both the Main Issues Report for NPF3 and draft SPP consultations focused on questions of policy, in particular the principle of affording protection to the core areas of wild land identified on the map. Many responses ... considered this issue, and also commented on the map itself and the methodology used for its development. In light of these comments, the Scottish Government has asked SNH to provide further advice on the Core Areas of Wild Land 2013 map ... The purpose of this consultation is to obtain views on SNH's map of Core Areas of Wild Land 2013 and whether it effectively identifies this key natural heritage asset.
SNH Core Areas of Wild Land 2013 Map Consultation Paper, October 2013.
http://www.snh.gov.uk/docs/A1104206.pdf

The areas mapped have a significant overlap with the 'fragile areas' of Scotland. The map also overlaps with many areas purposefully and shamefully cleared by past generations of landowners. It is these actions to clear land which have given rise, in part, to any sense that such land is now [as SNH put it] 'uninhabited and often relatively inaccessible countryside where the influence of human activity on the character and quality of the environment has been minimal'. Viewed from today and the perspective of many living in or around these areas, the only reason they are uninhabited is because of past actions by owners. The impact of humans none the less remains significant, and there are strong feelings that it could have been and should have been even more significant down the ages, helping sustain more vibrant and sustainable communities today. The continuing ownership patterns of the land in question, putting much of it in very few hands, has perpetuated a situation where there has been no possibility of

significantly re-populating the land. The areas within the Core Wild Land identified will today still have a human population significantly below that which [they] sustained in times before the clearances ... It is the objective of many, consistent with wider economic and social development policy, that these areas should once again contain significant human population. There is at least a danger that the creation of any form of official map of such areas, designating them as wild land, would ... have the effect of preventing any re-population
Community Land Scotland, Response to SNH Wild Land Map Consultation, December 2013.
http://83.223.124.6/~communi1/images/uploads/Wild_Land_-_Dec_13.pdf

If the concept of reoccupying or repopulating land – such as the Sutherland straths emptied of thousands of people during the clearances referred to above (Section 1) – then CLS will not lack for internationally agreed declarations to the effect that, where people have been 'forcibly removed from their lands or territories', then these people, or their descendants, should have the right either to return to the areas in question or to be compensated financially in respect of the original expulsion.

Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.
UNDRIP, Preamble.
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior or informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option to return.
UNDRP, Article 10.
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
UNDRIP, Article 27.
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

1. Indigenous peoples have the right to redress, by means that can include restitution or, where this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
UNDRIP, Article 28.
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Where appropriate, considering their national context, States should consider

providing restitution for the loss of legitimate tenure rights to land, fisheries and forests. States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Where possible, the original parcels or holdings should be returned to those who suffered the loss, or their heirs, by resolution of the competent national authorities. Where the original parcel or holding cannot be returned, States should provide prompt and just compensation in the form of money and/or alternative parcels or holdings, ensuring equitable treatment of all affected people.
FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, 2012, p. 25.
http://www.fao.org/docrep/016/i2801e/i2801e.pdf

In the Scottish context, it is said often that land reform is not about righting past wrongs – that it is not, more specificially, about exacting some sort of 'revenge' for the Highland Clearances. But this is arguably to ignore or gloss over the extent to which the inequitability of Scotland's present-day land ownership structure is rooted in earlier injustice. The current proprietor of a depopulated Highland estate is clearly not personally responsible for its having been cleared forcibly two hundred years ago. But just as there may be a case for tackling current inequalities rooted ultimately in past slave-holding, there may equally be a case for setting about the restoration of population to some at least of Scotland's many once-occupied but subsequenctly cleared localities.

It is not easy to even begin to quantify what constitutes just reparations for horrors such as slavery in America ... Yet that is the ethical question reached when the past pushes its way uncomfortably into the present ... The answer is not about being individually responsible, through our genes, but collectively responsible for the structural inequalities that have passed down through generations to shape today's world ... For as long as structural inequalities persist, we cannot overlook how far the tentacles of history might reach into the present. The real challenge is to recognise, and address, how much the privileges of the past continue to benefit some, and wrong others, today.
N. Hanman, 'Should Benedict Cumberbatch say sorry for the slave-owners in his family?', *Guardian*, 2 February 2014.
http://www.theguardian.com/commentisfree/2014/feb/02/benedict-cumberbatch-sorry-for-slave-owners-family

8. Organisational and Procedural Lessons for Scotland from Overseas?

In its evidence to the Scottish Government's Land Reform Review Group, CLS advocated the creation of a Land Agency. One of this agency's functions, in CLS's view, would be to help negotiate and arbitrate transfers of land from its current owners to communities. Among the various judicial tribunals and other bodies dealing with indigenous land claims in countries like Australia, New Zealand and South Africa are some which engage in just such arbitration and negotiation. To establish what, if any, relevance their practices and procedures might have in the Scottish context is beyond this paper's scope. But there might well be merit in further investigation of this topic.

[The proposed Land Agency would be] a body with a duty to seek to secure greater

community ownership (or diversity of ownership) of land and to promote and take action to support, facilitate and broker arrangements to secure that outcome.

Specific duties:

- To promote community ownership of land.
- To assist and advise communities on processes to acquire land and to register an interest to buy and/or a request to buy.
- To inform owners of community interests to purchase and to seek to facilitate and broker voluntary transfers of ownership.
- To inform owners of requests to purchase and manage or arrange for the management of the 'mediated negotiation' with owners.
- To advise Ministers on land ownership questions and on sustainable development and public interest tests relating to any particular request to buy.

Duties on owners and community bodies:

- Duty on landowners to co-operate with the `land agency' and supply information requested by it as it endeavours to achieve its objectives.
- Duty on registered community bodies to co-operate with `land agency' and supply it with information requested as it endeavours to achieve its objectives.

Powers:

- To require information of landowners concerning the land in which an approved community body has expressed an interest, or request to purchase.
- To enter land for the purpose of mapping, etc associated with purchase.
- To assist communities with plans for land use, prior to purchase.
- To join in arrangements with others to achieve their objectives.
- To compulsorily purchase land and hold land for onward transfer to communities and/or to create new agricultural holdings for lease or purchase.
- Compulsion to sell powers (over private landowners) ...
- To secure valuations of the land in question.
- To give grants.

Such a `mediated negotiation' process could contribute significantly to real movement forward in securing more transfer of land into community ownership. While this negotiated approach is already advised and encouraged no specific powers or duties exist to assist any such process and such powers would be needed if this was to become a deliberate part of policy and future practise. Such an approach may appear more consensual, and less hostile than a straight power of an absolute right to buy for communities sitting alone, provided always such an absolute power existed as a backstop. Such a process, arguably, might be a contribution to helping sustain any ultimate right to purchase, in terms of ECHR considerations – as voluntary arrangements or negotiation had been offered and/or required before moving to an exercise of the absolute right to buy. Communities could become more confident in registering an interest to buy, or a request to buy, knowing that they could trigger a mediated process, with support from the `land agency'.

CLS, Evidence to the Land Reform Review Group, January 2013.

http://83.223.124.6/~communi1/images/uploads/Land_Reform_Review_Group_-_submission_for_first_call_for_evidence_-_as_submitted.pdf

The Land Claims Court was established in 1996. The Land Claims Court specialises in dealing with disputes that arise out of laws that underpin South Africa's land reform initiative. These include the Restitution of Land Rights Act 1994, the Land Reform (Labour Tenants) Act 1996 and the Extension of Security of Tenure Act 1997. The Land Claims Court has the same status as any High Court. Any appeal against a

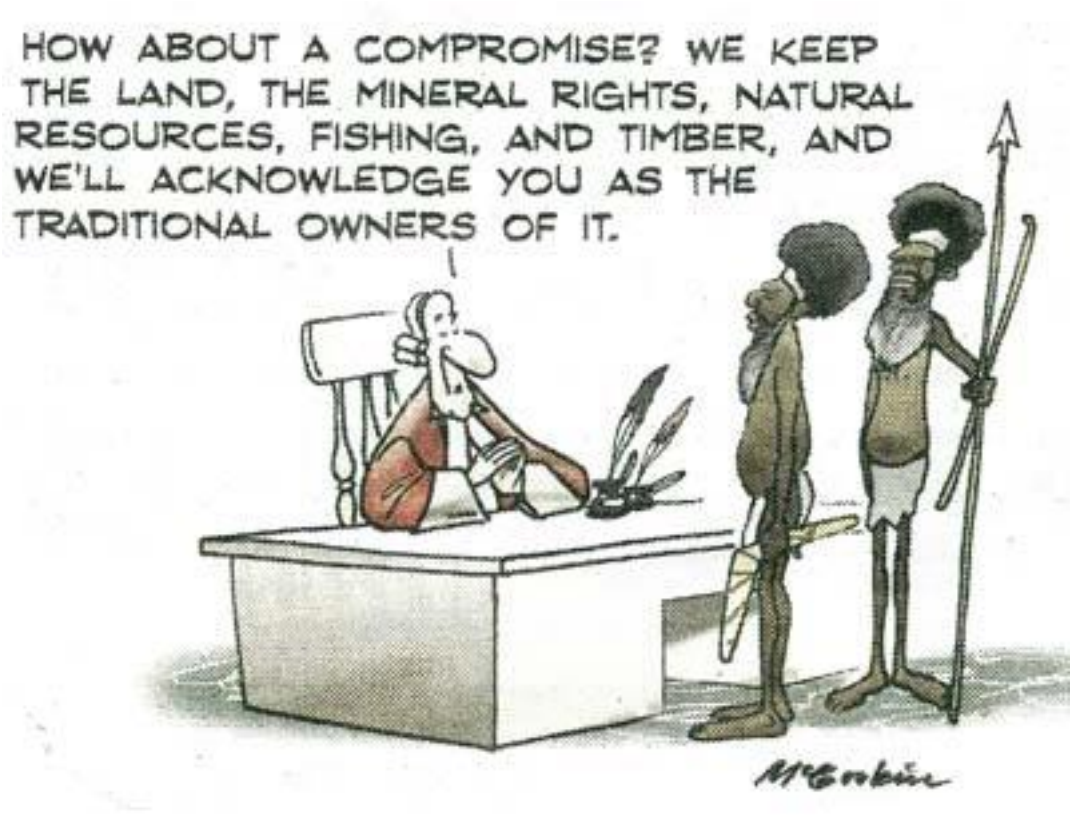
decision of the Land Claims Court lies with the Supreme Court of Appeal, and if appropriate, the Constitutional Court. The Land Claims Court can hold hearings in any part of the country if it thinks this will make it more accessible and it can conduct its proceedings in an informal way if this is appropriate.
Land Claims Court of South Africa.
http://www.justice.gov.za/lcc/about.html

The Maori Land Court (Te Kooti Whenua Maori) and the Maori Appellate Court (Te Kooti Pira Maori) ae continued under Te Ture Whenua Maori Act 1993. The Maori Land Court has been in existence in one form or another since the passing of the Native Lands Act 1862 and the Maori Appellate Court since 1894. The Maori Land Court has jurisdiction to hear matters relating to Maori land including successions, title improvements, Maoir land sales and the administration of Maori land trusts and Incorporations. It also has jurisdiction to hear cases under the Maori Fishereries Act 2004, the Maori Commercial Aquaculture Claims Settlement Act 2004 and a number of other statutes ... The Court and its administration recognises the special bond that Maori people have with [their] land. Thus the maintenance and preservation of the Court's record (containing as it does invaluable customary information including whakapapa or genealogy) remains a fundamental feature of the work of the Court. The conduct of a hearing of the Maori Land Court is determined by the judge hearing the case and he/she may apply and rules of marae kawa as the judge considers appropriate. In practice that means that nearly all Court hearings commence and conclude with a karakia (prayer) and mihi whakatu (greetings). Te Reo Maori (the Maori language) is often used in Court. Many of the cases heard in the Maori Land Court involve complex issues of law and fact. On some occasions they may also involve tikanga or customary concepts.
Maori Land Court
http://www.justice.govt.nz/courts/maori-land-court

The National Native Title Tribunal [of Australia] is an impartial, independent administrative agency. Established by the Native Title Act (NTA) 1993, the Tribunal came into operation in January 1994 ... The Tribunal is not a court and cannot decide whether native title exists or does not exist. However, the President of the Tribunal and its Members make arbitral decisions ... The Tribunal is responsible for a wide range of functions, and delivers a range of services, which are provided for under the NTA. These include: • Assisting people at any stage of proceedings brought under the NTA, including providing assistance in the preparation of a variety of native title applications; • Applying the registration test to native title claimant applications ... • Registering Indigenous land use agreements; • Notifying individuals, organisations, governments and the public of native title applications and Indigenous land use agreements; • Mediating between parties to assist them to reach agreement ... • Assisting parties to negotiate Indigenous land use agreements.
National Native Title Tribunal
http://www.nntt.gov.au/au/Pages/Tribunaloverview.aspx

The bodies whose functions are described above, it should be noted, are by no means immune from criticism. Especially from the indigenous side, they are regularly criticised as flawed, time-consuming and too prone to side, in some instances, with

non-indigenous interests – thus perpetuating, as claimed by the Australian cartoon below, colonial expropriation.



Native Title Issues and Problems
http://www.creativespirits.info/aboriginalculture/land/native-title-issues-problems

It needs recalling in this context that Scotland helped pioneer the establishment of judicial tribunals with responsibilities for the settlement of land-related disputes. The Crofters Commission as established by the Crofters Act 1886 was just such a tribunal (the present-day Crofters Commission dating from 1955 has quite different functions). In 1912 the Commission was renamed the Scottish Land Court and given new and wider responsibilities. The Land Court continues in existence. While headed by a judge, as it has been since the establishment of the original Commission in 1886, the court also consists of people (at least one of whom must be a Gaelic-speaker) with agricultural and other expertise. Like some of the overseas bodies mentioned above, the Scottish Land Court can and does convene anywhere (indoors and out). Nowadays usually more formal (and perhaps more legalistic) than in the past, Land Court proceedures nevertheless might bear examination if a Land Agency of the type called for by CLS is to be established.

A brass plate inscribed ‘Scottish Land Court’ adorning the door of 1 Grosvenor Crescent, Edinburgh, means little to passing townsfolk. But to the smallholder scraping a living off his patch of land in the deep Highlands, to the crofter in the lonely islands, it means a lot. The Court, without parallel in England and Wales, sits seldom in Edinburgh. The schoolroom or the village hall in Skye and the barn in Barra have known the call of the Court and seen the robed and wigged figure of the Chairman enter. Disputes over boundaries, rentals, compensation or payments, drainage, the hundred and one things that arise between landlord and tenant are settled by the Land Court usually on the spot. Its members can tell tales of stormy

passages to the Isles and horse and cart treks over rough roads ...

Daily Record, 20 October 1947.

R. J. MacLeod (ed), *No Ordinary Court: 100 Years of the Scottish Land Court*, Edinburgh, 2012, p. 122.

9. Scotland's International Responsibilities

This paper has drawn heavily on the experiences of the world's indigenous peoples and suggested that, in Scotland, we can learn from those experiences. Perhaps, however, the traffic should not be entirely in an inward direction. Perhaps we have some obligation, as the Scottish Human Rights Commission has indicated, to assist with international efforts to ensure that people everywhere, and not just here in Scotland, are helped obtain rights of the sort that so many of the international conventions, declarations and guidelines cited in this paper insist should be theirs.

Recognising that Scotland's human rights obligations do not stop at its borders, SNAP [Scotland's National Action Plan for Human Rights] will contribute to a Better World through action to ensure that Scotland gives effect to its human rights obligations at home and internationally.

Scottish Human Rights Commission, Scotland's National Action Plan for Human Rights, December 2013, p. 40.

There is some risk that readers of this paper, because of its having had much to say about the international community's efforts on behalf of indigenous peoples, might form the impression that all such peoples, whatever difficulties they may have encountered in the past, are today in secure possession both of their lands and of a measure of prosperity. Reports submitted recently to the UN General Assembly and to the UN Human Rights Council by James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, make clear that this is not so.

Canada, with its diverse and multicultural society, has been a leader on the world stage in the promotion of human rights since the creation of the United Nations in 1945. And it was one of the first countries in the modern era to extend constitutional protection to indigenous peoples' rights. This constitutional protection has provided a strong foundation for advancing indigenous peoples' rights over the last 30 years, especially through the courts ...

But despite positive steps, daunting challenges remain. From all I have learned, I can only conclude that Canada faces a crisis when it comes to the situation of indigenous peoples of the country. The wellbeing gap between aboriginal and non-aboriginal people in Canada has not narrowed over the last several years, treaty and aboriginal claims remain persistently unresolved, and overall there appear to be high levels of distrust among aboriginal peoples toward government at both the federal and provincial levels.

Canada consistently ranks near the top among countries with respect to human development standards, and yet amidst this wealth and prosperity, aboriginal people live in conditions akin to those in countries that rank much lower and in which poverty abounds. At least one in five aboriginal Canadians live in homes in need of serious repair, which are often also overcrowded and contaminated with mould. The suicide rate among Inuit and First Nations youth on reserve, at more than five times greater than other Canadians, is alarming. One community I visited has suffered a suicide every six weeks since the start of this year. Aboriginal women are eight times more likely to be murdered than non-indigenous women, and indigenous peoples face

disproportionately high incarceration rates.
UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Statement upon conclusion of visit to Canada, 15 October 2013.
http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada

The Special Rapporteur concludes that indigenous peoples in the United States – including American Indian, Alaska Native and Native Hawaiian peoples – constitute vibrant communities that have contributed greatly to the life of the country; yet they face significant challenges that are related to widespread historical wrongs, including broken treaties and acts of oppression, and misguided government policies, that today manifest themselves in various indicators of disadvantage and impediments to the exercise of their individual and collective rights ... In nearly all cases the loss of land meant the substantial or complete undermining of indigenous peoples' own economic foundations and means of subsistence, as well as cultural loss, given the centrality of land to cultural and related social patterns. Especially devastating instances of such loss involve the forced removal of indigenous peoples from their ancestral territories, as happened for example, with the Choctaw, Cherokee and other indigenous people who were removed from their homes in the south-eastern United States to the Oklahoma territory in a trek through what has been called a 'trail of tears', in which many of them perished.
UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in the United States of America, 30 August 2012, pp. 1, 11.
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/162/70/PDF/G1216270.pdf?OpenElement

We had hoped to report good news, to trumpet the rising tide of support for community forest land rights around the world in 2013. But while there were many encouraging pronouncements last year—from courts, governments, and some of the world's largest corporations —unfortunately, progress on the ground remains very limited. And worse, new research reveals a slowdown in the recognition of community forest land rights in developing countries over the last six years. Despite some high-profile wins, less new legislation has been passed since 2008 than in the preceding six years—and recent laws are weaker than before. None of these laws recognize land ownership, and the amount of forest land secured for community ownership since 2008 is less than 20 percent of that in the previous six years.
Rights and Resources Initiative, Annual Review, 2013-14: Lots of Words, Little Action, p. 1.
http://www.rightsandresources.org/documents/files/doc_6508.pdf

Lands were taken from indigenous peoples – and, as noted in relation to current events in Ethiopia's Gambela province (Section 1), are still being taken from indigenous peoples – in ways that are very similar to the ways in which lands were once taken from communities in Scotland. Our dispossessed, however, had one key advantage over most indigenous peoples. They were white. They were thus able, in many instances, to emigrate to areas of European settlement overseas – notably in the U.S., Canada, Australia and New Zealand. There, ironically, our emigrants very often became beneficiaries of the dispossession of indigenous peoples – Native American, First Nation, Métis, Inuit, Aboriginal and Maori – whose territories were lost in many instances to incoming settlers and colonisers from Scotland. Thus it came about that some 200 of the people evicted from the Strath of Kildonan in Sutherland in 1813 found themselves, just two or three years later, in conflict with Manitoba's Métis

people as a result of the Sutherlanders occupying land (where Winnipeg now stands) previously in Métis occupation.

In that particular conflict, as it happened, there were people of Scots extraction on both sides. Leading Métis people's efforts to expel the Kildonan refugees from early nineteenth-century Manitoba was a young man called Cuthbert Grant whose mother was of Cree and Québecois background and whose father was a fur trader from Strathspey.

Nor was this exceptional. In James Anaya's 2012 report on 'the situation of indigenous peoples in the United States of America' (part-reproduced immediately above), Anaya refers to the 'trail of tears' – the thousand-mile long march made by thousands of Cherokee people who, on the orders of the U.S. government and despite their having adopted an American-style constitution, were 'ethnically cleansed' from North Carolina and Tennessee prior to their being resettled on 'Indian Territory' in faraway Oklahoma. That march, in the course of which many Cherokee died, took place in 1838. Less than ten years later, however, the Cherokee people's principal chief, John Ross, a man more Highland Scottish than Cherokee by descent, was able to persuade his people to make a contribution to famine relief efforts in the Highlands and Islands where, at that point, widespread hunger had followed the failure of successive potato crops.

The scene of wretchedness which we witnessed [on crossing the ford between North Uist and Benbecula] was … heart-rending. On the beach the whole population of the country seemed to be met, gathering the precious cockles … I never witnessed such countenances – starvation on many faces – the children with their melancholy looks, big-looking knees, shrivelled legs, hollow eyes, swollen-like bellies – God help them, I never did witness such wretchedness!
Rev. N MacLeod in a letter of 1847 reproduced in: J N MacLeod, *Memorials of the Rev. Norman MacLeod, Edinburgh, 1898, pp. 221-22.*

John Ross never forgot his Scottish links. During the spring of 1847 he read of the efforts of a Philadelphia organization to aid the Highland poor – estimated to number three hundred thousand – who were suffering from famine. 'Have the Scotch no claim on the Cherokees?' Ross asked. 'Have they not a very special claim. They have.' Thus he wrote to the *Cherokee Advocate* to request that the tribe meet in Tahlequah to raise money for the cause. The Cherokees met, appointed a relief committee and, in May 1847, sent $190 to a New York bank 'for the relief of those who are suffering by the famine in Scotland'. Many an Oklahoma Indian surname today harkens back to a distant Scottish ancestor.
F M Szasz, *Scots in the North American West, 1790-1917*, Norman, 2000, p. 66.

Perhaps the time has come to repay the debt owed to Chief John Ross, to his Cherokee people and, even if less directly, to all the other indigenous peoples who have suffered much as the Cherokee did. This paper's author, it should be acknowledged, makes that suggestion in part because he has had the opportunity to explore Scots-Indigenous connections at first hand on the Flathead Indian Reservation in Western Montana where he was able to spend some time with a Native American family, McDonalds by name, whose heritage is simultaneously indigenous and Highland. This family (victims of a Scottish government in the course of the 1692 Massacre of Glencoe and victims of a U.S. government during the Nez Perce War of 1877) experienced persecution and oppression both here and in North America.

Today, family members, not least Joe McDonald, recently retired president of the Salish Kootenai Tribal College on the Flathead Reservation, have been engaged in developmental and other efforts recognisably akin to those engaged in by CLS and other organisations in a Scottish context.

In 1876 they wiped out General George A. Custer and his Seventh Cavalry at the Battle of the Little Bighorn. Now Chief Sitting Bull and his Sioux people have fled from the United States to Canada. Here in 1877 the Sioux are joined by the remnants of the latest Indian nation to make a stand against the U.S. army. They are the Nez Perce. Their survivors are led by Chief White Bird.

A young man follows White Bird to Sitting Bull's camp. He is White Bird's close relative and he aims to write about the Nez Perce War from the Nez Perce point of view. The young man's name is Duncan McDonald. Descended from both the chiefs of the Nez Perce and the chiefs of Scotland's most formidable clan, Duncan's family – first as Highlanders, then as Indians – have been victims of massacre and dispossession on two continents.

This book tells the McDonald family's truly amazing story. It is a story which spans more than thirty generations to link the Scottish Highlands with America's Rocky Mountain West. It is a story such as you will not have read before and will never read again.

J Hunter, *Glencoe and the Indians*, Edinburgh, 1996: Dust jacket blurb.

This book was begun in the naive conviction that it would have an unrelievedly happy ending. Its comparisons between the modern Scottish Highlands and the modern Flathead Reservation, it was anticipated, would be such as to allow the book's closing paragraphs to contend that Highlanders and Indians, two otherwise disparate peoples linked by the McDonald family, are today overcoming the legacies of their respective pasts in ways which will allow both Highlanders and Indians to reinvigorate their cultures, their languages and much else besides.

That may still happen. But to spend even a few days on the Flathead Reservation is quickly to discover that the task of linguistic renewal – to take a single example of the many such distinctions which clearly have to be made – is enormously more daunting here than in the Highlands ... The Flathead Reservation, by the standards of other such reserves, is relatively resource-rich and comparatively prosperous. But many of its Indian families nevertheless live permanently with deprivation of a kind long since eradicated in the Highlands – a region which, for all that it remains economically underprivileged in comparison with the rest of Britain, contains nothing approximating to the desperate poverty which is still to be encountered on the Flathead Reservation. In such circumstances, it can easily seem insensitive, indeed insulting, to tell Indian people that they ought to be giving a high priority to – and investing scarce finance in – the upkeep of a language which, for a century or more now, has been associated rather less with Indian advancement than with want, with hunger and with misery.

Outside the Mission Valley restaurant where these topics are being so assiduously debated, the sunset's afterglow is highlighting McDonald Peak. Inside, in response to yet another question from their Scottish guest, Gyda Swaney [a member of the McDonald family] and the friends she has arranged to be here, are making the point that their modest affluence – although newly gained in some instances – makes them, by definition, untypical of Indian people. For that reason, Gyda and her friends say, their views are not necessarily representative. It follows, they add, that they are quite possibly mistaken in their belief that, despite the numerous difficulties confronting them, Indians can – at one and the same time – maintain their cultural uniqueness and secure their economic betterment. But, mistaken or not, that is clearly this Indian gathering's collective opinion. 'We have a saying,' one man (a

Salish speaker) comments, 'that as long as our songs are sung our people will remain here. And our songs are being sung today more than they have been sung for many years.

J Hunter, *Glencoe and the Indians*, Edinburgh, 1996, pp.193-94.

PABLO. After hearing for more than two hours what a great guy he is, Salish Kootenai College President Joe McDonald took the microphone, chuckled a bit, and told several hundred people he had no choice now but to follow through on his retirement plans. 'I can't continue to be nice and patient and humble anymore,' McDonald joked.

Those were just three of countless words used repeatedly Thursday to describe the 77-year-old McDonald, who steps down June 30 not as the only president the tribal college has ever had, just the only one almost anyone remembers.

There from the start, McDonald has led SKC from its humble beginnings in the 1970s, when it offered a few college credits to a handful of students using borrowed classrooms across the Flathead Indian Reservation, to what it is today. And that, said Rick Williams, executive director of the American Indian College Fund, is 'the finest tribal college in the nation'.

'Salish Kootenai College,' added David Gipp, president of the United Tribes Technical College in North Dakota, 'is the national model for tribal colleges.'

Situated on a tree-covered 130-acre campus here, Salish Kootenai College offers bachelor's degrees in eight fields, associate's degrees in 14 more, and certificates in seven trade and vocational areas.

It has 53 buildings, more than 1,100 students, a faculty of 58, 181 employees, a $26 million annual budget and an $8 million endowment started with a $5 bill from McDonald.

'Before Joe, we had nothing,' said Bob Fouty, chairman of SKC's board of directors. 'We had no money, no campus, no classrooms, no faculty, no staff, no students. But we had Joe, and that was enough.'

The Missoulian, 17 June 2010.

http://missoulian.com/news/state-and-regional/article_e3c1352a-7a95-11df-ad03-001cc4c03286.html

Appendix: Land reform in Ireland and Continental Europe

Its concentrated land ownership pattern differentiates Scotland markedly from other European countries where, typically, land is owned by large numbers of people and where extensive estates of the Scottish sort are comparatively few – even, in some countries, non-existent. This constrast does not go back indefinitely in time. In the eighteenth century, Scotland's land ownership pattern (as concentrated then as now) was replicated in most European countries. In the course of the last 200 or more years, however, other countries have experienced land reforms which were intended to – and did – break up ownership patterns of the kind that Scotland continues to be stuck with.

In some countries, such as France, reform took place during periods of political and social revolution – with large estates being broken up by confiscatory mechanisms. In other countries land reform was brought about by constitutional and legal processes. But by whatever means it has been given effect, land reform in a European context has signified – has in fact meant – the transfer of agricultural land from (usually aristocratic) owners to the land's peasant or tenant-farming occupiers.

An early instance of such reform took place in Denmark where, towards the end of the eighteenth century, the aristocracy began to be bought out (with Danish royal government help) and ownership of land vested in owner-occupying farmers of the type who have ever since dominated the Danish countryside. Similar reforms were subsequently implemented elsewhere – notably during the first three or four decades of the twentieth century. Often reform was the work of conservative or right-wing regimes looking to win peasantries (whose discontents made them potentially revolutionary) to their side.

This was very much the case in Ireland where, at a point when all of Ireland was still in the UK, Conservative governments passed a series of Land Acts (most notably the so-called Wyndham Act of 1903) which, as had happened a hundred years before in Denmark, gave tenant farmers and smallholders an absolute right to buy their land – with government also advancing the cash (repayably over 50 or more years and amounting to several billion pounds at present-day values) that enabled them to do so. Land purchase policies of this type (which early twentieth-century Conservative governments also extended in a small way to the Scottish Highlands) were intended, in the Irish context, to 'kill Home Rule with kindness' by weaning Ireland's rural population away from nationalism. As shown by the events of 1916 and subsequently, land purchase most certainly did not have this effect. But it did result in Ireland (where large estates were formerly as dominant as in Scotland) being transformed into a country where, both north and south of the present border, rural land is overwhelmingly owner-occupied.

The Conservatives perceived Irish peasants' land hunger ... as being the basis of their opposition to the [British-Irish] union. This was translated into a policy which maintained there was no real demand for home rule [or devolution] in Ireland, but that there was real demand for land reform, and so by attending to this real demand (by selling tenants land through a series of beneficial reforms) they [the Conservatives] could kill home rule with kindness.
J. Ranelagh, *A Short History of Ireland*, Cambridge, 2012, pp. 166-67.

In the years immediately following the First World War, governments across central and eastern Europe (where a plethora of new states had emerged in the war's aftermath) did much the same as UK Conservative administrations had already done in Ireland. Their wooing of their peasantries was not driven by fear of nationalism (the governments in question being themselves strongly nationalist in orientation) but by a terror of communism of the sort that, on the back of worker-peasant collaboration made possible in part by the Russian communist leadership's commitment to confiscatory land reform, had come to power in the course of the 1917 Bolshevik Revolution.

Landed proprietorship is abolished forthwith without any compensation.
V. I. Lenin, Decree on Land: Article One, Petrograd, November 1917.

At a time when ruling elites feared the prospect of peasants and workers joining hands to seize power [as had happened in Russia], one of the main instruments for building up support [for newly established governments in newly established states] was land reform – sacrificing the aristocracy to save bourgeois society from the Bolshevik threat to do away with private property completely. Thus throughout eastern and central Europe [in the 1920s] large estates were parcelled out to create

a new class of peasant landholders. In general it was hoped that they would prove to be independent, democratic but conservative, immune to the blandishments of communism.

Mark Mazower, *Dark Continent: Europe's Twentieth Century*, London, 1998, p. 12.

Following the Second World War, as it happened, many of the central and east European countries where land reform had earlier been put in place with a view to safeguarding those countries from communism were themselves incorporated into the Soviet bloc – with the result that much of their agricultural land (as had happened in Russia itself during the 1930s) was nationalised and collectivised. Since communism's collapse in the later 1980s and subsequently, however, collectivisation has been reversed. The beneficiaries of resulting land restoration and redistribution programmes have not been the descendants of landlords who lost their land in the early twentieth century but a new generation (consisting in part of successors to families whose landholdings were lost in the course of collectivisation) of owner-occupiers. However, neither this development nor the existence in many countries of controls ostensibly intended to prevent land concentration, land grabbing (especially by non-resident purchasers) and related phenomena have prevented the re-emergence (by means of purchase from owner-occupiers, sales or transfers to 'oligarchs' of formerly collectivised land and other means) of increasingly concentrated ownership patterns.

The overall picture is complex and is not analysed here. It is suggested, however, that there may be scope for some collaboration (or at least contact) between organisations like CLS and the Scottish Tenant Farmers Association and organisations pressing for renewed land reform in continental Europe.

Land grabbing is widely assumed to be happening in the global South, but an in-depth analysis by a team of researchers shows that land grabbing is also creeping into Europe. The [researchers'] report, involving 25 authors from 11 countries, reveals the hidden scandal of how a few big private business entities have gained control of ever-greater areas of European land. It exposes how these land elites have been actively supported by a huge injection of public funds – at a time when all other public funding is being subjected to massive cuts. While some of these processes – in particular ever-increasing land concentration – are not new, they have accelerated in recent decades in particular in Eastern Europe. They have also paved the way for a new sector of foreign and domestic actors to emerge on the European stage, many tied into increasingly global commodity chains, and all looking to profit from the increasingly speculative commodity of land ...

The report highlights cases of Chinese companies in Bulgaria undertaking large-scale production of maize, of Middle Eastern companies in Romania embarking on large-scale production of grains ... Just like their counterparts in Ethiopia, Cambodia or Paraguay, all these large-scale land deals are being carried out in a secretive, non-transparent manner ... Outside the EU in Ukraine the 10 biggest agroholdings control about 2.8 million hectares, while some oligarchs own up to several hundred thousand hectares each ...

All of the cases examined in the study highlight how new movements, cross-class, rural and urban, are emerging in Europe. Their actions, as in many [other] regions of the world, are both ***defensive*** against land concentration and land grabs [and] also ***proactive***, seeking to occupy land and advance alternatives ...

In light of the findings of this report, the European Co-ordination Via Campesina (ECVC), supported by various organisations directly and indirectly involved in the

[compilation of] the report, put forward a set of demands addressed to national and EU governmental bodies to address the triangular issue of land concentration, land grabbing and barriers to entry to farming. Our main demands are:

- Land should regain importance as a public good. We must reduce the commodification of land and promote public management ...
- Access to land should be given to those who work it or those who want to work it in a socially and ecologically acceptable way ...

[National and EU bodies should]:

- Carry out redistributive land policies (land reform, land restitution, affordable land rentals and so on) in areas of concentrated ownership.
- Recognise historical use rights and communal land systems ...
- Strengthen or create the participation of local communities in decision-making on land use ...

European Co-Ordination via Campesina, Land concentration, land grabbing and people's struggles in Europe, April 2013, pp. 6-9.

http://www.eurovia.org/IMG/pdf/Land_in_Europe.pdf