The Land Reform (Scotland) Act 2016: another answer to the Scottish land question

Malcolm M Combe[*]

This paper reassesses the perennial Scottish land question following the passage of the Land Reform (Scotland) Act 2016. It largely builds on an earlier article written in the aftermath of a similarly named statute, the Land Reform (Scotland) Act 2003, reflecting on developments that have taken place since then. That article concentrated on community rights of acquisition. New community rights will be an important part of the analysis here, but the opportunity will also be taken to comment on other provisions in the 2016 Act that form a more holistic land reform package than the 2003 Act.

LAND LAW REFORM – THE LAND QUESTION IN 2016

Land law reform entails interference in the regulation of land by the State, but even that simple explanation requires a degree of clarification. Some clarification will be provided in this article. Those seeking more detailed – and hopefully not too dated – clarification can find it in an article by this author published in this journal ten years ago.[1] In fact, that article begins with a similar sentence to the opening sentence here. That overlap serves to introduce the point that the legal and physical landscape of Scotland has not actually changed dramatically in those ten years and many points discussed in that article still stand.

As explained in that previous article, and elsewhere, it is the *policy* oriented interference in land regulation that tends to be the focus when people speak of land reform, rather than uncontroversial attempts to modernise, simplify or consolidate the law that all legal systems can be expected to engage with from time to time. Like the earlier paper, it is the politically motivated change to a system of land organisation that this paper is focussed on. The earlier paper took the Land Reform (Scotland) Act 2003 as its focal point; this paper scrutinises the similarly named Land Reform (Scotland) Act 2016.

To an extent, this article tracks the earlier article, but it also seeks to develop the ideas advanced there and analyse what else has happened in the intervening period. With that in mind, it is worth considering both the title and the conclusion of the earlier article. Did Parts 2 and 3 of the Land Reform (Scotland) Act 2003, which brought in a pre-emptive right of community acquisition for rural Scotland and a crofting community right of acquisition for the Highlands and Islands, provide a definitive answer to the Scottish land question? Those who have heard of Betteridge's law of headlines will suspect that the answer to that question is 'no' (Betteridge's law being a maxim which is to the effect that any headline ending with a question mark can be answered in the negative). Those who read to the end of the earlier article will know that it concluded it was not the end,

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[*] Lecturer, University of Aberdeen. From 2013-2014 the author was an adviser to the Scottish Government appointed Land Reform Review Group. I am grateful to Sam Read-Norrie for his research assistance in the preparation of this article.

[1] Malcolm M. Combe, 'Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?' 2006 Jur. Rev. 195.

although that legislation was an important staging post on what seems to be a land reform journey. Those who read to the end of this article will not be surprised that there is no declaration that the 2016 Act is a definitive answer to the Scottish land question either, but the 2016 Act provides an even more important staging post. As shall be seen below, it impacts on more areas than its earlier namesake and, perhaps most importantly, it introduces a new statutory body called the Scottish Land Commission that will have an important and symbolic role for land reform across the whole of Scotland.

THE SCOTTISH CONTEXT – WHY REFORM?

The overall context

The 2003 Act provides the baseline for this analysis and only a brief consideration of arguments for and against land reform from before that date will be provided here.[2] Unsurprisingly, history looms large in those arguments. The earlier paper provides a limited overview of how the military response that defeated the Jacobite rebellions of the 18th century and the legislative response that accompanied it,[3] coupled with an underlying system of property law that allowed Scotland's landowners to use, enjoy and abuse their properties as they saw fit, allowed clearance and/or improvement to take place across the whole of Scotland, but most infamously in the Highlands and Islands.[4] All of that, and much more, eventually contributed to a period of social unrest in the late nineteenth century. This was addressed by the first British drive for Scottish land reform, with the formation of the Napier Commission in 1883[5] and the landmark Crofters Holdings (Scotland) Act 1886. Following this specific intervention to set crofting on a statutory footing,[6] similar Acts were passed to regulate the position of landlord and tenant throughout Scotland, and a degree of State-led re-settlement onto land that had been cleared of human occupants also occurred.[7]

The late 19th and early 20th century reforms, augmented by later legislation which fortified the position of tenants (most notably tenants of agricultural holdings, granting them

[2] Combe, above, n. 1, pp.197-200.
[3] Of the Clan Act, also known as the The Highland Services Act 1715, the Tenures Abolition Act 1746 and the Heritable Jurisdictions Act 1746
[4] Since that earlier paper, James Hunter has released an important and highly detailed text on a locality that was particularly affected. J. Hunter, *Set Adrift Upon the World: The Sutherland Clearances* (Birlinn: Edinburgh, 2015).
[5] See further A. D. Cameron *Go Listen to the Crofters* (Acair: Stornoway, 1986). The documents are available online at https://www.whc.uhi.ac.uk/research/napier-commission.
[6] Crofting is a form of landholding peculiar to certain parts of Scotland which gives the crofter (tenant) almost absolute security of tenure. The legal framework that established crofters as creatures of statute began with the Crofters Holdings (Scotland) Act 1886 and is now found in the Crofters (Scotland) Act 1993, as (substantially) amended. For an overview of the history of crofting, the starting point for any study is J Hunter's *The Making of the Crofting Community* (Birlinn: Edinburgh 2000) (first published 1976).
[7] This involved the Congested Districts Board, under the Congested Districts (Scotland) Act 1897, the Board of Agriculture for Scotland, created by the Small landholders Act 1911, and the Land Settlement (Scotland) Act 1919.

security of tenure),[8] did not completely remove the desire for further reform from some quarters. Moving into the 1990s, Scotland's concentration of landownership and its unregulated land market (that is to say, the ability to acquire land without based on the ability to meet a price set by the seller, without any residency or other requirement) continued to attract comment.[9] Community buyouts as a solution to the issues faced by residents in places like Assynt, Eigg and Gigha brought land reform back into the media spotlight.[10] Parliament also took a certain level of interest, with several statutes relating to Scottish land law being passed.[11] Labour's election in 1997 led to the formation of the Land Reform Policy Group, which demonstrated the Government's intent to embrace land reform in Scotland,[12] and The Scotland Act 1998, which provided a forum where land reform legislation could be crafted.

Numerous legislative measures relating to land law were passed in the first term of the new devolved administration,[13] including the Land Reform (Scotland) Act 2003. That statute has three parts, conferring:

- rights of outdoor access to all, if those rights are exercised responsibly and subject to certain exclusions relating to the character of the land;[14]

- a right of first refusal to land for properly constituted community bodies that have registered a community interest in land over a defined area and thereafter followed a statutory process as and when the existing owner decides to transfer that land (with that process including a local ballot to ensure there is adequate support by the community, approval by the Scottish Ministers that the transfer is both compatible with the public interest and the goal of furthering sustainable

[8] First by way of the Defence General Regulations 1939 (no. 69) (4A), which required Ministerial consent for certain notices to quit owing to the importance of food security in the Second World War, then by way of the Agriculture (Scotland) Act 1948 which gave the Scottish Land Court a role in the operation of notices to quit where a tenant served a counter-notice. The 1948 Act was quickly consolidated in the Agricultural Holdings (Scotland) Act 1949, and the regime is now found in the Agricultural Holdings (Scotland) Act 1991 (as amended) and the Agricultural Holdings (Scotland) Act 2003.

[9] Consider Andy Wightman, *Who Owns Scotland* (Canongate: Edinburgh, 1996), Robin Callander, *How Scotland is Owned* (Canongate: Edinburgh, 1996), Andy Wightman, *Scotland: Land and Power* (Luath Press: Edinburgh, 1999).

[10] An overview of various community acquisitions can be found in J. Hunter, *From the Low Tide of the Sea to the Highest Mountain Tops: Community Ownership in the Highlands and Islands of Scotland* (The Islands Books Trust: Kershader, 2012).

[11] Namely the Agricultural Holdings (Scotland) Act 1991, the Crofters (Scotland) Act 1993 and the Transfer of Crofting Estates (Scotland) Act 1997.

[12] Three publications were produced by the Land Reform Policy Group and published by the Scottish Office: *Identifying the Problems* (1998); *Identifying the Solutions* (1998); and *Recommendations for Action* (1999).

[13] Such as the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, to name but two.

[14] See further R. R. M. Paisley, *Access Rights and Rights of Way* (2006) (The Scottish Rights of Way and Access Society (Scotways): Edinburgh, 2006). The most detailed treatment is provided by J. A. Lovett, 'Progressive property in action: the Land Reform (Scotland) Act 2003' (2011) 89 Nebraska Law Review 739. See also Malcolm M. Combe, 'Get off that Land: Non-Owner Regulation of Access to Land' 2014 *Juridical Review* 287.

development, and payment of either a mutually agreed or statutorily set value to the outgoing owner);

- a right to force a sale for properly constituted crofting community bodies over a croft land and certain other land in the crofting counties of the Scottish Highlands and Islands, where a statutory process is followed (with that process also involving a local ballot, approval by the Scottish Ministers, and payment to the outgoing owner).

The Scottish Parliament has also legislated on matters relating to the heavily regulated leases in the rural sector, namely agricultural holdings and crofts. Part of its agricultural holding reforms introduced a pre-emptive right of acquisition for agricultural tenants, who could register an interest in their holding in the hope of acquiring the land should the landowner ever choose to sell.[15] That potential tenant right of acquisition can be contrasted with the much stronger right of acquisition that a crofter has in relation to his croft, which can be used to force a sale from a crofting landlord.[16]

The context since 2003

All of these measures have been innovative for Scotland in their own ways. The interaction between owners, communities and other stakeholders with them has contributed to a wider understanding of what can, and cannot, be achieved with them. The debate has also moved on in political terms, in related policy areas like community empowerment, and in terms of the treatment of human rights. Each of these will now be considered.

Developments on the ground

There have been a number of community transfers under the scheme of Part 2 of the 2003 Act, albeit the impact has not been profound in terms of numbers of activated community interests in the Register of Community Interests in Land.[17] In terms of qualitative rather than quantitative impact, recent Scottish Government commissioned research seems to indicate a positive trend in terms of community and other benefits across a range of aspects (subject to unavoidable caveats relating to this being somewhat early to measure all outcomes and indeed the inherent difficulty of measuring certain outcomes).[18] In terms

[15] S.25 of the Agricultural Holdings (Scotland) Act 2003.
[16] That scheme is found in the Crofters (Scotland) Act 1993, ss.12-19A, after initial introduction by the Crofting Reform (Scotland) Act 1976.
[17] The RCIL currently shows 19 of 200 registered community interests have been activated (see https://www.eservices.ros.gov.uk/rcil/ros/rcilcb/presentation/ui/pageflows/viewRegister.do?rcD%2BfT9n8rXeO191NUzMlA%3D%3D=iCH2NbqCmJqUnWD8KodeHw%3D%3D). Perhaps this lack of profound impact should not be unexpected, as it was noted prior to enactment (by Ross Finnie MSP, the then Minister for Environment and Rural Development) that this right of was not about 'significant redistribution of land': Justice 2 Committee, Stage 1 Report, para 75 (SP Paper 541 at *http://archive.scottish.parliament.uk/business/committees/historic/justice2/reports-02/j2r02-02-vol01-02.htm#2*).
[18] See C. Mulholland, G. McAteer, C Martin, L Murray, R Mc Morran, E Brodie, S Skerratt and A Moxey, *Impact Evaluation of the Community Right to Buy* (Scottish Government Social Research: Edinburgh, 2015)

of the scheme of the legislation, it can be noted that communities need to take care to navigate its provisions, and also that certain communities who thought they were navigating along the land reform process (having obtained Scottish Ministerial consent for that) have been challenged through litigation.[19] This might be indicative of certain problems with the legislative scheme for community acquisition,[20] but (as noted below) the recent Community Empowerment (Scotland) Act 2015 has made improvements in this area.

The impact of the crofting community right to buy, or at least the potential spectre of it, has been more noticeable. This too has been the subject of litigation, and indeed remedial legislation to allow a crofting community body to acquire the tenant's interest in an interposed lease,[21] but the one 'hostile' [22] buyout at Pairc on the Isle of Lewis eventually resulted in a transfer to the relevant community, after the landowner's human rights challenge to the scheme of Part 3 was unsuccessful.[23] It has also contributed to various transfers of land (particularly in the Western Isles) in the limited area where it operates without the need to resort to litigation.[24] All of this chimes with earlier commentary that Part 3 of the 2003 Act marks a 'fairly radical step away from the traditional protection afforded to Scotland's landowners'.[25]

The political context

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at *http://www.gov.scot/Publications/2015/10/8581*. This looked at the impact of the legislation on local communities in the period from 2004 to 2014.

[19] Consider the cases of *Holmehill Limited v The Scottish Ministers* 2006 SLT (Sh Ct) 79 and *Hazle v Lord Advocate* (Kirkcaldy Sheriff Court (ref B270/07), 16 March 2009), discussed and critiqued in Malcolm M. Combe, 'No Place like *Holme*: Community Expectations and the Right to Buy' (2007) 12 Edin. L.R. 109 and Malcolm M. Combe, 'Access to Land and to Landownership' (2010) 14 Edin. L.R. 106 respectively. See also *West Register (Property Investments) Ltd. v Lord Advocate* 11 March 2015, Selkirk Sheriff Court (unreported), discussed in K. G. C. Reid and G. L. Gretton, *Conveyancing 2015* (Avizandum, 2016) pp.37-39.

[20] This view is evident in the Final Report of the Land Reform Review Group, The Land of Scotland and the Common Good (The Scottish Government: Edinburgh, 2014), Part 4 (Local Community Land Ownership), Section 17 (Local Community Land Rights), 17.1 (Right of Pre-emption).

[21] That remedial legislation, in the form of a new s 69A of the 2003 Act was introduced by the Crofting Reform etc. Act 2007, followed on from the case of *Scottish Ministers v Pairc Trust Ltd* 2007 SLCR 166.

[22] Press & Journal, 'Pairc Estate in hands of community after Scotland's first hostile land buyout' 6 December 2015 *https://www.pressandjournal.co.uk/fp/news/islands/771128/estate-in-hands-of-community-after-scotlands-first-hostile-land-buyout/*.

[23] *Pairc Crofters Limited and Pairc Renewables Limited v The Scottish Ministers [2012] CSIH 96*. See further M. M. Combe, 'Ruaig an Fhèidh' (2011) 56(5) J.L.S.S. 54 and 'Ruaig an Fhèidh: 3' (2013) 58(2) J.L.S.S. 31. The human rights point is analysed further below.

[24] See Hunter, above, n 10.

[25] David L. Carey Miller and Malcolm M. Combe, The Boundaries of Property Rights in Scots Law, vol 10.3 EJCL, (December 2006), *http://www.ejcl.org/103/art103-4.pdf*. Radical as that change is to a property lawyer, MacKenzie has argued that the real radical effect of Part 3 is 'the troubling of the norms of property law through which class interest is brokered', and it is the 'threat to the commodification of land' that was behind the staunch opposition to land reform: A. Fiona D. MacKenzie, *Places of Possibility: Property, Nature and Community Land Ownership* (John Wiley & Sons: Chichester, 2012) p.48.

That notwithstanding, the desire for land reform has continued to simmer in some quarters.[26] In terms of government activity, after something of a land law reform hiatus in the second and third terms of the Scottish Parliament[27] the Scottish Government appointed a group to look at land reform in 2012, and this Land Reform Review Group produced its Final Report in 2014. That contained 62 recommendations as to what the Scottish Government should do.[28] Perhaps prejudging that report somewhat, in 2013 the then First Minister Alex Salmond announced a commitment to bringing 1 million acres of Scotland (approximately one-twentieth of its land area) under community ownership.[29] Meanwhile, a group with a specific focus on agricultural holdings was also formed, which produced its own Final Report containing 49 recommendations about the tenant farming sector in January 2015.[30]

Following this a further consultation on what the legislation should actually contain was undertaken, before a draft bill (containing reforms to the agricultural holdings regime) was published before the Scottish Parliament's 2015 summer recess. A further Call for Evidence about the terms of that bill was made by the relevant scrutinising Scottish Parliament Committee. Running alongside this, the Scottish Affairs Committee got involved in the debate at a UK level. Although no Westminster legislation followed (or is likely to follow) from that intervention, the Committee gathered evidence and published two reports which add to the contemporary debate.[31]

The related statutory context

There have also been separate but related statutory developments for community empowerment and renewal, by way of the Community Empowerment (Scotland) Act 2015. There are a number of strands to that statute, dealing with matters like community planning, access to allotments for small-scale food production, and a right for a community to request assets from the public sector. The 2015 Act also amends the 2003 Act. Some of these amendments finesse the existing scheme, which should make the process more flexible for communities.[32] Another widens the scope of the pre-emptive

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[26] Consider books like Andy Wightman *The Poor Had No Lawyers: Who Owns Scotland (and How They Got it)*, which was first released in 2010 but is now in its 4th edition (Birlinn: Edinburgh, 2015) and Lesley Riddoch, *Blossom: What Scotland Needs to Flourish* (Luath Press: Edinburgh, 2013).

[27] Which is not to say no land related statutes were passed: consider the Crofting Reform etc. Act 2007, the Private Rented (Housing) Scotland Act 2011 and the Wildlife and Natural Environment (Scotland) Act 2011.

[28] Final Report of the Land Reform Review Group, above, n. 20. See Malcolm M. Combe, 'Land Reform Revisited: The Land of Scotland and the Common Good' (2014) 18 Edin. L.R. 410.

[29] 'I believe it is possible, I believe it is necessary for us to set a target of one million acres of Scotland in community land ownership by 2020': Alex Salmond, Speaking at the Community Land Scotland Annual Conference, 2013, quoted at *http://www.gov.scot/Topics/Environment/land-reform/MillionAcres*. Further details of the Scottish Government's steps in this area can also be found at that link.

[30] Final Report of the Review of Agricultural Holdings Legislation (The Scottish Government: Edinburgh 2015) and *http://www.gov.scot/Publications/2014/07/5054*.

[31] Scottish Affairs Committee, *Eighth Report – Land Reform in Scotland: Interim Report* (2014), at *http://www.publications.parliament.uk/pa/cm201314/cmselect/cmscotaf/877/87702.htm* and Scottish Affairs Committee, *Eighth Report – Land Reform in Scotland: Final Report* (2015) at *http://www.publications.parliament.uk/pa/cm201415/cmselect/cmscotaf/274/27402.htm*.

[32] These reforms came into force on 15 April 2016, per The Community Empowerment (Scotland) Act 2015

community right to buy to the whole of Scotland (rather than simply rural Scotland).[33] Most dramatically, a new right of community acquisition has been amended into the 2003 Act.

When it comes into force, the new Part 3A of the 2003 Act will allow communities to acquire a particular parcel of land where that area has been 'wholly or mainly abandoned or neglected' or somehow managed in a way that was detrimental to a community's 'environmental wellbeing'.[34] Like the community right to buy found in Part 2 of the 2003 Act, such an acquisition is predicated on a community body registering an interest with the approval of the Scottish Ministers. In a manner that is more like the crofting community right to buy, such a transfer can be compelled without the existing owner's consent.

The human rights context

A power like the one just described, to force a sale from one private individual to another entity (albeit the embodiment of a community) or another individual, raises the issue of human rights law and particularly the right to enjoy peaceful enjoyment of your possessions. My 2006 paper considered the human rights of both the pre-emptive (Part 2) and forced sale (Part 3) rights to buy but, like other property law analyses of human rights law, it tended to focus on the European Convention on Human Rights being deployed in a manner that might stymie land law reform.[35] Of particular note here is Article 1 of the First Protocol to the European Convention on Human Rights, which operates to regulate deprivations and controls of property.[36] This is undoubtedly important in the context of land law reform in Scotland, as evidenced by the recent *Salvesen v Riddell* litigation (which related to the imposition of a potentially open-ended agricultural lease on a landowner without compensation).[37] That being said, it is clear a non-arbitrary deprivation

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(Commencement No. 3 and Savings) Order 2015 (SSI 2015/339). Flexibility has been improved by, for example, allowing for the community body to be Scottish charitable incorporated organisation or a community benefit society where previously they had to be a company limited by guarantee and by reducing the minimum number of members from 20 to ten: Community Empowerment (Scotland) Act 2015, s.37, which amends the 2003 Act, s.34.

[33] Community Empowerment (Scotland) Act 2015, s.36, which amends the 2003 Act, s.33.

[34] S.74, introducing a new Part 3A to the 2003 Act. A Scottish Government consultation on this matter ended June 20, 2016 - *https://consult.scotland.gov.uk/community-land-team/abandoned-land*.]. What is meant by environmental wellbeing in this context is considered in M. M. Combe, 'The environmental implications of redistributive land reform' (2016) 18(2) Environmental Law Review 104 at p.122.

[35] Cf. G. L. Gretton and A. J. M. Steven, *Property, Trusts and Succession*, (Bloomsbury: Haywards Heath, 2nd edn 2013), paragraph 13.2, considering the possibility of vertical and horizontal effect of the ECHR, but the analysis there is restricted to the ECHR alone.

[36] Article 1 Protocol 1 provides that 'no-one shall be deprived of his possessions except in the public interest', but the State can 'control the use of property in accordance with the general interest'.

[37] The case turned on s.72 of the Agricultural Holdings (Scotland) Act 2003, and culminated in the UK Supreme Court case of *Salvesen v Riddell* [2013] UKSC 22. The various steps of that saga are analysed in Malcolm M. Combe, 'Human rights, limited competence and limited partnerships: *Salvesen v Riddell*', 2012 Scots Law Times 193, 'Peaceful enjoyment of farmland at the Supreme Court' 2013 Scots Law Times 201 and 'Remedial Measures in Agricultural Holdings' 2014 Scots Law Times 70.

with proper compensation and in the public interest can be acceptable.[38] The *Salvesen* saga is somewhat counterbalanced by the case of *Pairc Crofters Limited and Pairc Renewables Limited v. The Scottish Ministers*,[39] which rejected a landowner's challenge to the scheme of the crofting community right to buy as a whole.[40]

In addition to those noteworthy domestic cases, the years since that paper have demonstrated something of a trend in the Scottish land reform debate to move away from human rights being a purely blocking force to prevent change. (The only point the earlier paper did note was a comparative one, namely that the property clause of the South African constitution expressly includes the 'nation's commitment to land reform' within the definition of public interest,[41] but that point was more of a scholarly glance than something Scotland could definitively latch on to.) Now, there seems to be much more awareness of other human rights instruments that might actually be a driver to reform, particularly the International Covenant on Economic, Social and Cultural Rights with its commitments towards food and housing.[42] The work of the Scottish Human Rights Commission to publicise this, via public events[43] and parliamentary evidence,[44] was

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[38] *Holy Monasteries v Greece,* Series A, no 301-A, (1995) 20 EHRR 1. It can also be noted that any objection to land reform measures that seek to facilitate transfer to an essentially private interest from another private owner can be met by the case of *James v UK*. (1986) 8 E.H.R.R. 116, as '[t]he taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being "in the public interest"'(at para 41).

[39] [2012] CSIH 96.

[40] This was fortunate for the writer, as my 2006 paper asserted that the crofting community right to buy would not be in breach of Article 1, Protocol 1: Combe, above, n. 1, p.210.

[41] Constitution of the Republic of SA (Act No. 108 of 1996) s.25(4).

[42] Article 11 of the International Covenant on Economic, Social and Cultural Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976).

[43] One of the first public airings of the possible impact of the International Covenant on Economic, Social & Cultural Rights that the writer is aware of was when Professor Alan Miller (the then chair of the Scottish Human Rights Commission) and the writer were part of a discussion at the an event called The Gathering 2013 on February 27, 2013, entitled 'Land Reform and Human Rights: What are the connections?' A later event hosted by the Scottish Human Rights Commission on December 9, 2015, 'Putting justice into social justice', continued in this vein.

[44] In evidence relating to the then Community Empowerment (Scotland) Bill, Professor Alan Miller (at column 46, on 3 December 2014) made the following contribution: 'human rights does not begin and end at the European Court of Human Rights in Strasbourg; there is a much broader framework of international human rights that are relevant to the Government and the Parliament, but which are largely invisible. The Scotland Act 1998 calls on the Scottish ministers to observe and implement international obligations, of which one—but only one—is the International Covenant on Economic, Social and Cultural Rights, which places a duty on the Scottish ministers to use the maximum available resources to ensure progressive realisation of the right to housing, employment, food and so on—that is, it sees land as a national asset, which is to be used for the progressive realisation of what we might call sustainable development. Therefore, what human rights provides is a broader impetus for land reform, rather than an inhibition, as is suggested in the way that the issue is currently couched—that is, in questions about whether a landowner has a red card that can be used with reference to the ECHR to stifle discussion about different use of the land. That is what is missing from the policy framework.' See *http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9669&mode=pdf*. Turning to the pre-legislative scrutiny of what became the 2016 Act, Graeme Dey MSP, who sat on the Rural Affairs, Climate Change and Environment Committee , was moved to specifically acknowledge the contribution of Eleanor Deeming (of the Scottish Human Rights Commission), Dr. Kirsteen Shields (of the University of Dundee)

important in this regard. That awareness is such that ICESCR is now explicitly referred to in both land reform statutes.[45] Whilst ICESCR is not (yet) expressly incorporated into the Scottish legislative process in the way that the European Convention on Human Rights is,[46] all of this makes clear that human rights are no longer seen as simply a barrier to reform.

It can also be noted that the European Convention on Human Rights carries certain *positive* obligations for signatory states. This means conceptualisations of the right to property do not necessarily stop at the negative obligation on states not to interfere, rather there might be a positive obligation on a state to ensure individual welfare for all citizens.[47] One example is Article 8, which provides (subject to qualification) that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. In *Codona v United Kingdom* it was held that a positive obligation might arise, but only where the authorities had accommodation suitable for gypsy travellers at their disposal and were making a choice between offering such accommodation or accommodation which was not.[48] As noted by Kenna, 'Passive non-interference by states where people's Convention rights are at stake is not sufficient to ensure that these rights are respected.'[49] The right to a home is also asserting itself in interesting areas where previously it did not, notably in relation to private tenancies. In her evidence relating to the Private Housing (Tenancies) Scotland Bill, Dr. Frankie McCarthy of the University of Glasgow highlighted Strasbourg case law to the effect that human rights apply where a court becomes involved in enforcing a private tenancy agreement.[50] Whilst an English court has not quite found a clear enough line of precedent from Strasbourg to apply this domestically,[51] McCarthy observes (with reference to extra-judicial comments of the

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and Megan MacInnes (of Global Witness) in this regard at Stage 3 of the Land Reform (Scotland) Bill (Column 238) Official Report 16 March 2016 at *http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10440&mode=pdf*. Their contribution, which looked at ICESCR, the Universal Declaration of Human Rights and the European Social Charter was made to the Rural Affairs, Climate Change and Environment Committee 07 October 2015 Official Report, beginning at Column 3 *http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10140&mode=pdf*.

[45] The 2016 Act, s.1(6)(b), s.44(11)(b) and s.56(14)(b) and 2003 Act s.98(5A) (as inserted by the 2015 Act, schedule 4, paragraph 8).

[46] Although falling short of an absolute commitment to incorporation, in her opening address at the Scottish Human Rights Commission event on December 9, 2015 First Minister Nicola Sturgeon welcomed the fact the event would 'explore implementing and incorporating into Scots law some of the key international human rights treaties – for example the Covenant on Economic, Social and Cultural Rights'. See *http://news.scotland.gov.uk/Speeches-Briefings/SNAP-Human-Rights-Innovation-Forum-2040.aspx*

[47] A point touched on in Reed and Murdoch *Human Rights Law in Scotland* (Bloomsbury: Haywards Heath, 3rd edn 2011), 8.06.

[48] *Codona v UK* (App. No.485/05), admissibility decision of February 7, 2006. See also *Chapman v UK*, (2001) 33 E.H.R.R. 18.

[49] Padraic Kenna, 'Housing rights: positive duties and enforceable rights at the European Court of Human Rights', E.H.R.L.R. 2008, 2, 193.

[50] *Lemo v Croatia* (App No 3925/10) (10 July 2014). For a comparative perspective, consider the Prevention of Illegal Eviction and Unlawful Occupation of Land Act No. 19 of 1998 in South Africa and related case law such as *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[51] *McDonald v McDonald* [2014] EWCA Civ 1049.

Supreme Court judge Lord Neuberger)[52] that, 'It seems only a matter of time until this finding is explicitly made by the domestic courts.'[53] When coupled with the prevailing debate and innovative statutory language about human rights already mentioned, it seems clear that the narrative has shifted.

A stage for more reform?

That mixture of factors, not to mention important international developments in relation to sustainable development[54] and best practice for agriculture,[55] have all informed the debate to allow for further land reform.

The most recent legislative activity comes in the form of the Land Reform (Scotland) Act 2016, which introduces another community right to buy land.[56] In an apparent pattern towards stronger land reform, this can also operate without a willing seller, and as shall be seen it operates where the community has a plan for that land to further sustainable development and transfer to the community is demonstrably preferable to leaving ownership undisturbed. There is also a stronger right to buy for some agricultural tenants, to allow tenants under the Agricultural Holdings (Scotland) Act 1991 to acquire a holding when a landlord is in material breach of an order of the Scottish Land Court or an arbitral award.[57] These measures can lead to a reallocation of ownership without the existing owner's consent – and as such can be categorised as land reform in a redistributive sense – but the rest of the 2016 contains many important provisions for Scotland's legal and physical landscape. This paper will comment on each area in turn, reflecting on the impact that they might have, before offering some concluding thoughts.

THE 2016 ACT

The legislation splits into 12 parts and two schedules. Parts 11 and 12 are worthy only of passing comment, promising a review of small landholdings legislation and dealing with functional matters respectively. The two schedules contain amendments to legislation to cater for the new community right to buy and agricultural holdings reforms. That leaves ten parts which are all largely standalone in terms of the impacts they will have. This note will work through them in turn.

The land rights and responsibilities statement

[52] Lord Neuberger at a conference at the Supreme Court of Victoria, Melbourne, 'The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience', August 8, 2014, at paragraph 28 *https://www.supremecourt.uk/docs/speech-140808.pdf* .
[53] Available at *http://www.parliament.scot/S4_InfrastructureandCapitalInvestmentCommittee/General%20Documents/(069)DRFrankieMcCarthyUniverstiyOfGlasgowNov2015.pdf*.
[54] In 2015, the UN launched 17 Sustainable Development Goals and 169 targets https://sustainabledevelopment.un.org/?menu=1300
[55] Voluntary Guidelines on Responsible Governance of Tenure of the Food and Agriculture Organization of the United Nations (Rome, 2012).
[56] Part 5.
[57] This change is made by the introduction of a new Part 2A to the Agricultural Holdings (Scotland) Act 2003. It follows Recommendation 21 of the Agricultural Holdings Legislation Review Group, above, n. 30.

Part 1 of the 2016 Act begins by placing an obligation on the Scottish ministers to 'prepare and publish a land rights and responsibilities statement'. This is 'a statement of principles for land rights and responsibilities in Scotland'. In terms of what it will contain, ministers must have regard to seven factors when preparing the statement, namely: promoting respect for, and observance of, relevant human rights; promoting respect for such internationally accepted principles and standards for responsible practices in relation to land as ministers consider relevant; encouraging equal opportunities; reducing the inequalities of outcome resulting from socio-economic disadvantage; community empowerment; increased diversity of landownership; and furthering sustainable development in relation to land. None of these seem particularly objectionable, although diversity of landownership is perhaps the most curious inclusion, as that seems to indicate facilitation of transfer in certain circumstances.

As things stand, there are no sanctions for non-compliance mandated. If there were, A1P1 would likely be engaged, in terms of that being a control. In the absence of actual sanctions for landowners, perhaps the most important thing to note is that new Land Commissioners (more on which below) must have regard to the land rights and responsibilities statement.[58] The statement must be finalised by ministers within one year of the provisions coming into force, and then ministers will be obliged to promote the statement and review it every five years.[59]

The Scottish Land Commission

The 2003 Act deposited new rules, then left society and Scotland's existing institutions to engage with those new rules. The 2016 Act takes a different approach. Alongside its raft of reforms, it introduces a new statutory body, the Scottish Land Commission. The Commission will have a membership of five Land Commissioners and one Tenant Farming Commissioner.[60] Those Land Commissioners will have six functions 'on any matter relating to land in Scotland',[61] including to review the impact and effectiveness of any law or policy, to recommend changes to any law or policy, to provide information and guidance, and related matters.[62] Meanwhile, the Tenant Farming Commissioner will have eight functions, focussing on the specialist area of agricultural holdings, including the preparation and promulgation of codes of practice.

The Commission as a whole is to be recruited on the basis of expertise and experience in land reform, law, finance, economic issues, planning and development, land management,

[58] S.22(3)(a)(i).
[59] By dint of The Land Reform (Scotland) Act 2016 (Commencement No. 1 and Transitional Provision) Regulations 2016 (SS1 193/2016), these provisions will come into force on October 1, 2016. The duty to promote will then commence on October 1, 2017.
[60] S.4(4).
[61] No interpretive aid is offered as to what is meant by 'land' in this context, although it can be noted that for the purposes of the new right to buy it is clarified that land (in relation to Part 5) includes bridges and other structures built on or over land, inland waters, canals, the foreshore, and salmon fishings in inland waters or mineral rights which are owned separately from the land in respect of which they are exigible.
[62] S.22.

community empowerment, environmental issues, human rights, equal opportunities, and the reduction of inequalities of outcome which result from socio-economic disadvantage.[63] That list expanded as the bill progressed and, following evidence and representations by the writer, a commitment to the Scottish Gaelic language was also introduced.[64] Scottish Ministers must take every reasonable step to ensure that at least one of the Commissioners is a Gaelic speaker.[65] In this regard, an analogy can be made with the provision for Gaelic in the Scottish Land Court Act 1993 and the Crofters (Scotland) Act 1993. Whilst it is acknowledged there may not be as pressing a need for a knowledge of Gaelic as there was in the era when crofting law and the Scottish Land Court were introduced, owing to the fact almost all Gaels are fluent in English, there are other arguments for the express inclusion of a commitment to Gaelic in the legislation. That might be by way of a legal commitment to a minority language,[66] or perhaps even a slight benefit of bringing understanding of Gaelic place names and an associated awareness of the history and perhaps even the use of such land. Additionally, the very fact of involving someone with some knowledge of Gaelic could introduce perspectives to land policy that have thus far been excluded.[67] Meanwhile, the Tenant Farming Commissioner must meet an additional requirement of expertise or experience in agriculture, which reflects their important role for the let farming sector in particular.

Important as its functions are, perhaps the most important thing about the Scottish Land Commission is its very existence. It embodies a pan-Scotland approach that will keep land reform on the policy agenda, not to mention it could develop an important steering role as regards the existing Scottish institutions. One minor criticism of the new Commission can be made vis-à-vis those existing institutions, namely that it will share an acronym with two other bodies with interested in Scottish land law, namely the Scottish Law Commission and the Scottish Land Court. The new SLC might have avoided this fate if Parliament had opted for one of the other names mooted, such as the Scottish Land and Property Commission[68] or the Scottish Land Reform Commission.[69] Perhaps the former was a bit unwieldy, while being branded with 'reform' might have been a tad inflammatory to some.

Transparency

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[63] S.11(1)(a).
[64] Available at *http://www.parliament.scot/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/(133)_Combe_Malcolm.pdf*. See also my blog post of August 11, 2015, *Coimisean Fearainn na h-Alba – Ainm Gàidhlig, ach an e sin e?* at *https://basedrones.wordpress.com/2015/08/11/coimisean-fearainn-na-h-alba-ainm-gaidhlig-ach-an-e-sin-e/*.
[65] 2016 Act, s.11(2).
[66] Consider the Gaelic Language (Scotland) Act 2005 and European Charter for Regional or Minority Languages.
[67] This is not to say that Gaels have been excluded from important policy shaping positions in modern Scotland, but actively including them might make for a new dynamic. See further BBC News, December 7, 2015, 'Coimiseanair Gàidhlig "a dhìth"' at *http://www.bbc.co.uk/naidheachdan/35025746*.
[68] Final Report of the Land Reform Review Group, above, n. 20, Part 9 (Way Forward), Section 33 (Land Reform, Common Good and the Public Interest), paragraph 18.
[69] Which was aired in the Scottish Government's 2014 consultation, that closed on February 10, 2015. *http://www.gov.scot/Topics/Environment/land-reform/consultation*.

The pattern and distribution of landownership in Scotland is the cause of recurring comment, particularly in relation to rural areas (where there has been a perception that estates can exert a large amount of influence),[70] but also in relation to urban and peri-urban areas, where there might be 'banking' of land, denying an alternative use. Making a proper analysis of the extent to which these things are happening, or working out who communities need to communicate with to resolve any difficulties, is not always a simple process, owing to the occasionally patchy information about who controls what at present. That patchiness may relate to a lack of clearly mapped data on easily accessible public registers for land, or to a lack of clarity about who directs a landowning entity that is not a natural person.

In relation to the former, Scotland has a long history of public registration of matters relating to land, although it only embraced registration of title relatively recently,[71] and is in the process of transitioning to a full, map-based registration of title system.[72] Completion of the Land Register has a target date of 2024, by way of a multi-pronged approach of incentivising voluntary registration, increasing the triggers for first-registration in the Land Register (such as by closing the Register of Sasines to standard securities), and a process of Keeper-induced registration.[73] All of this should mitigate that aspect of information patchiness.

As for the latter, the extent to which ownership by non-transparent entities is a problem is difficult to gauge. In proceedings at the Scottish Parliament's Rural Affairs, Climate Change & Environment Committee in the run-up to the 2016 Act, an estimate that some 750,000 acres of Scotland was owned via non-transparent entities was discussed and not doubted.[74] To bring greater publicity, Part 3 of the 2016 Act stipulates that ministers introduce regulations 'requiring information to be provided about persons who have controlling interests in owners and tenants of land'. Further regulations may allow the Keeper to require information from owners and registered tenants. Much of this scheme is left for the future, and it is possible that matters will be overtaken by a drive towards

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[70] As discussed in the Final Report of the Land Reform Review Group, above, n. 20, Part 6 (Land Ownership and Use).

[71] The Land Registration (Scotland) Act 1979.

[72] Scotland has operated a system of deeds registration for the transfer of land since the Registration Act 1617, before moving to a map-based system of registration of title that has been phased in since the Land Registration (Scotland) Act 1979. The transition has been slow, but is perhaps nearing resolution, with both the Scottish Government and Registers of Scotland committing to a rapid completion of the coverage of the Land Register to the whole of Scotland, in line with the recent Land Registration etc. (Scotland) Act 2012. See further: *http://news.scotland.gov.uk/News/Target-set-to-register-all-of-Scotland-s-land-cc8.aspx*.

[73] See further *https://www.ros.gov.uk/about-us/land-register-completion*.

[74] Official Report of the Rural Affairs, Climate Change and Environment Committee, 7 September 2015 Report, Col 71 (Scottish Parliamentary Corporate Body: Edinburgh) at *http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10075&mode=pdf*. The figure appears in the magazine *Private Eye* Issue 1395 (26 June 2015). As for the implications of non-transparent ownership, George Monbiot provides one example of the 'legal knots' occasioned by a structure involving companies based in Liechtenstein (although that situation was further complicated by the death of the Italian 'landowner', who left no will): G. Monbiot, *Feral*, (Penguin: London, 2014) 99. The transparency point has also been made by Wightman, above, n. 26, chapter 29. These concerns have led to legislation aimed at improving access to information about who controls land, in Part 3 of the 2016 Act.

transparency at a UK level, but it is clear that this will have an impact for non-human landowners and those who are in a position to influence such entities.

Community engagement

Part 4 began as a rather bare duty on ministers to introduce guidance about engaging communities in decisions relating to land which may affect them. Whilst that remains the core effect of s.44, as the bill progressed the section became substantially longer: initially the guidance was to focus on furthering the achievement of sustainable development; after stage 2 it also included 'relevant human rights', equal opportunities and aspects of social justice; and at stage 3 it was further expanded to bring in internationally accepted principles and standards for responsible practices in relation to land.

There is a duty on ministers to report on how things are going after an initial three year period and then every five years. Presumably, if things are going well and landowners are engaging with communities in decisions that affect them, no further legislation will follow. If otherwise, the soft model of regulation could be replaced by something stronger. That said, parts 4 and 5 are tied together, as ministers can take into account the extent to which regard has been had to s 44 guidance in determining whether an application to buy land under Part 5 meets the 'sustainable development conditions' to be met on a community buyout.[75] This means the guidance could be important in certain contexts when a community tries to force a sale.

Further community right to buy

As just noted, Part 5 of the 2016 Act brings another right of acquisition to communities, making four in all, namely:

- a right of first refusal over land targeted by a local community body (2003 Act, part 2);
- a right to force a sale of crofting land (2003 Act, part 3);
- a right to force a sale of neglected, abandoned or environmentally detrimental land targeted by a community body (2003 Act, part 3A); and
- a right to force a sale of land to further sustainable development (2016 Act, part 5).

Like the rights to buy crofting land and neglected, abandoned or environmentally detrimental land, this new right goes beyond pre-emption and allows for compulsion (for value)[76] when a properly constituted community body's scheme is demonstrably better than an existing land use. Such profound effects will not be unlocked automatically and, as with all the existing rights of acquisition, Ministerial consent is needed. Such consent can only be given where ministers are satisfied that procedural requirements have been met, including a requirement that the land is eligible. Land cannot be eligible if it is the current owner's home or croft land,[77] but can still, it seems, be eligible even if it is used

[75] S.56(4).
[76] That value can be agreed between buyer and seller or set under s.65.
[77] S.46.

for agricultural or business purposes.[78] The buyout must also have been approved by the community in a ballot.[79]

The central feature of the new right of community acquisition has a certain familiarity. Sustainable development has had a role to play in community rights to buy from the outset, so much so that steps for recognition as a community body,[80] some acts of registration,[81] and the exercise of the right itself[82] are all predicated on satisfying Scottish Ministers that they are compatible with furthering the achievement of sustainable development. In relation to the 2003 statute, Ross characterised sustainable development as a 'primary duty' on the decision-makers at the approval stage, which 'has priority over any other duties or objectives',[83] so its application and interpretation is of crucial importance.

Exercise of the new right to buy must meet the 'sustainable development conditions'. As per the existing rights to buy, this will only be the case if the transfer of land is likely to further the achievement of sustainable development in relation to the land and is in the public interest. Also as per existing legislation, neither public interest nor sustainable development is defined,[84] but this has not been seen as problematic in litigation,[85] and it is generally accepted that sustainable development takes in social, economic and environmental concerns.

Where the 2016 Act differs from all the existing rights is in asking that more hurdles than public interest and sustainable development be cleared. The transfer of land must also be likely to result in 'significant benefit' to the relevant community, and must be 'the only practicable, or the most practicable, way of achieving that significant benefit'.[86] There is then a further test that 'not granting consent to the transfer of land is likely to result in

[78] Attempts at Stage 3 to introduce carve outs for agricultural land (by Michael Russell MSP) and productively managed land (whether agricultural land or otherwise) (by Alex Fergusson MSP) were both unsuccessful (see amendments 7 and 107 in the marshalled list of amendments at Stage 3 respectively).
[79] Ss.56-57.
[80] The 2003 Act, s.34(4) and s.71(4), for the community right to buy and crofting community right to buy respectively. When it is brought into force, s.97D(6) will have the same effect for bodies seeking to acquire abandoned, neglected or environmentally detrimental land.
[81] The 2003 Act, s.38(1)(b)(ii), this test being relevant when a community is seeking to acquire land that is nearby to land that its members have a substantial connection thereto.
[82] The 2003 Act, s.51(3)(c), s.74(1)(j) and s.97G(6)(ii). (The latter, for abandoned, neglected or environmentally detrimental land, is not yet in force.)
[83] A. Ross, *Sustainable Development in the UK: From Rhetoric to Reality?* (Earthscan: Abingdon, 2012) p.191.
[84] It can be recalled that a conscious decision was taken by the legislature not to define the term 'sustainable development' in the 2003 Act. Holyrood even went so far as to drop a definition as the bill passed through Parliament, to leave the term untrammelled by statutory language. Combe, above, n 1 pp. 219-222.
[85] *Pairc Crofters Ltd v Scottish Ministers* [2012] CSIH 96, commented on by Malcolm M. Combe, 'Ruaig an Fhèidh: 3' (2013) 58(2) J.L.S.S. 31. That is not to say interpretive issues around sustainable development do not remain: see Ross, above n. 83, chapter 8 and particularly at 193, where she analyses situations where economic, social and environmental considerations have all been given different weightings in decisions relating to sustainable development.
[86] S.56(2)(c).

harm to that community'.[87] Those additional conditions introduce the ideas of 'significant benefit' and 'harm' to the fore, both of which are to be determined by an analysis of a community's economic development, regeneration, public health, and social and environmental wellbeing.[88] (None of these terms are defined, but environmental wellbeing features in the right of acquisition in part 3A of the 2003 Act.)[89] Another innovative feature of Part 5 as compared to the other rights of acquisition is that a community may nominate a third party acquirer, albeit the transfer to such a nominee would still need to meet all the tests already mentioned, *mutatis mutandis*. This might open up scope for funding and partnerships that have not been possible under existing statutory schemes.

Taken together with the new framework for community engagement and the existing community rights to buy, it can be seen that a community now has a number of tools to encourage or even force land to be used in a certain way that is more suited to its needs, subject to due process being followed and certain, often stringent, tests being met.

Taxation of Shootings and Deer Forests and Deer Management

Part 6 represents a clear example of a fiscal step towards land reform, changing the treatment of shootings and deer forests – or, to be exact, removing a relief that was conferred in the 1990s.[90] This will re-enter shootings and deer forests into the valuation roll, although some businesses may be able to benefit from other reliefs (such as those for small business) if they are eligible. The interaction between taxation and land use can also be seen in statutes well away from land reform, such as the recent surcharge for Land and Buildings Transaction Tax on second homes.[91]

Deer management will also be affected by a regulatory as well as a fiscal change, with a new Part 8 reforming the law for this activity that affects large areas of Scotland. An important ecological consideration is the lack of any natural predator for the four species of deer in Scotland, which necessitates human management of those deer populations. Amongst other things, the 2016 Act allows for the imposition of deer management plans in certain circumstances[92] and will provide a power for the relevant authority to request information about a landowner's planned management activities, rather than simply report on what has taken place (as was previously the case under the Deer (Scotland) Act 1996).[93]

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[87] S.56(2)(d).
[88] S.56(12).
[89] The 2003 Act, s.97C(2)(b)
[90] S.74 of the 2016 Act does this by amending the Local Government etc. (Scotland) Act 1994, s.151.
[91] The Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016 amends the Land and Buildings Transaction Tax (Scotland) Act 2013 to introduce an additional dwelling supplement that results in a charge of an additional 3% LBTT liability for each transaction for £40,000 or more which would leave someone owning more than one dwelling (and that dwelling is not to replace their current residence). Consider also the options available for local authorities to remove any empty property discount or set a council tax increase in relation to long term unoccupied homes (but not second homes): see *http://www.gov.scot/Topics/Government/local-government/17999/counciltax/Secondhomes*.
[92] 2016 Act, s.80.
[93] 2016 Act, s.81.

Common Good Land

Part 7 of the 2016 Act is only one section long. Its existence owes much to the *Portobello Park Action Group Association v City of Edinburgh Council* litigation,[94] which related to the ultimately unsuccessful appropriation (i.e. usage of common good land for another function without a transfer of ownership) of an area of parkland for use as a school. The mischief identified in *Portobello* is addressed by the 2016 Act, s.77, which amends the Local Government (Scotland) Act 1973, s. 75 to allow appropriation of common good land to be approved by court, in the same manner as 'disposal' of such assets was already catered for.[95]

Access rights

The 2003 Act introduced the new regime of responsible access to the outdoors in Scotland. That is largely undisturbed by the 2016 Act, but Part 9 makes some changes relating to the review and amendment of core paths (the network that all local authorities are responsible for to give the public reasonable access in their area).[96] There is also one reform in relation to instigating a court action against someone allegedly taking access in a way that is not responsible. In a 2014 article, the writer suggested wider reform might be appropriate to the dispute resolution regime for conflicts between access takers, to offer an alternative to a sheriff court action.[97] Whilst that point was taken on board by the Committee scrutinising the legislation,[98] it did not find its way into the final text. Section 84 is instead restricted to a provision which requires notice of any court action about the conduct of an access taker to be served on that access taker.

Agricultural Holdings

The remainder of the 2016 Act contains a raft of reforms to the agricultural holdings regime, with much of the work of the Agricultural Holdings Legislation Review Group being reflected in it. These are detailed and worthy of much closer analysis than will be undertaken here, but a brief overview of the key provisions and comment on one of the more controversial aspects follows.

Two new fixed-term letting vehicles are introduced, with the new 'modern limited duration tenancy' replacing the 'limited duration tenancy' that was itself introduced by the

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[94] [2012] CSIH 69.
[95] See further Malcolm M. Combe, 'Lessons in Scots law: the common good school' (2013) 17 Edin. L.R. 63.
[96] S.83.
[97] Combe, above, n.14.
[98] See Rural Affairs, Climate Change and Environment Committee, *Stage 1 Report on the Land Reform (Scotland) Bill* (2015) at paragraph 399, where it was stated that the Committee 'recommends that the Scottish Government considers the merits of expanding the role of Local Access Forums to allow them to deal with minor access rights disputes.' The Report is available at *http://www.parliament.scot/S4_RuralAffairsClimateChangeandEnvironmentCommittee/Reports/RACCES042015R10Rev.pdf*. The Scottish Government did not take that recommendation forward.

Agricultural Holdings (Scotland) Act 2003.[99] MLDTs retain the same required minimum duration of ten years as the LDT regime, but these will provide greater flexibility to new entrants through the provision of a break option for such persons.[100] Where tenants remain in occupation of land with an expired short limited duration tenancy (that being the other letting vehicle introduced by the Agricultural Holdings (Scotland) Act 2003), their lease will be automatically converted to a modern limited duration tenancy of ten years,[101] but where tenants continue occupation of land under an expired MLDT, this will be extended by seven years as opposed to ten years (as is the case with LDTs).[102] Different rules relating to fixed equipment will also be applied to MLDTs,[103] but there remains no sanction for failure to maintain a record of fixed equipment.[104] The requirement on landlords under the LDT regime to renew or replace fixed equipment rendered necessary by natural decay or fair wear and tear remains,[105] but the new regime provides that this will be subject to the agreement of the parties.[106] There is also an entirely new vehicle called the repairing tenancy, which is suitable for land that is in need of improvement and must run for a minimum of thirty-five years.[107] Short limited duration tenancies and 1991 Act tenancies are unaffected by these reforms, but there are provisions for conversion of 1991 Act tenancies to modern limited duration tenancies.[108]

The existing pre-emptive right to buy that 1991 Act tenants have enjoyed since the passage of the 2003 Act continues, subject to a reform that removes the requirement to register before that right can be exercised.[109] This could help to avoid confrontation between landlord and tenant, especially if the act of registering an interest is seen to be inflammatory. A more radical reform is the already highlighted right to buy that will allow 1991 Act tenants to acquire a holding when a landlord is in breach of her obligations to such an extent that she is in material breach of an order of the Scottish Land Court or an

[99] 2016 Act, s.85, introducing a new s.5A and 5B to the Agricultural Holdings (Scotland) Act 2003.
[100] 2016 Act s.85, introducing a new s.5B to the Agricultural Holdings (Scotland) Act 2003. Subsection (3) leaves the definition of a 'new entrant' to be established by the regulation-making powers of the Scottish Minsters.
[101] 2016 Act, s.85, introducing a new s.5A(2) to the Agricultural Holdings (Scotland) Act 2003. It should be noted that conversion to MLDT treats the original SLDT as if it were intended to last ten years, as opposed to adding an additional ten years to the duration of the tenancy.
[102] 2016 Act, s.87, introducing a new s.8E to the Agricultural Holdings (Scotland) Act 2003. However, parties may stipulate to extend MLDTs even further than the prescribed seven years through written agreement, s.8E(2).
[103] 2016 Act, s.88, introducing a new s.16A to the Agricultural Holdings (Scotland) Act 2003. One important change is the schedule of fixed equipment must be agreed before the expiry of the period of 90 days beginning with the commencement of the tenancy, as opposed to the LDT period of six months.
[104] Numerous submissions to the Agricultural Holdings Legislation Review Group requested that an offence for such failure should be established to prevent later disputes between landlords and tenants with regards to, for example, rent reviews. See Final Report of the Review of Agricultural Holdings Legislation, above, n. 30, paragraph 145.
[105] 2016 Act s.88, introducing a new s.16A(5)(a) to the Agricultural Holdings (Scotland) Act 2003.
[106] The Agricultural Holdings Legislation Review Group recognised that it has become increasingly common for tenants to take on greater responsibility for financing fixed equipment, where in return land will be let at a lower rent. Final Report of the Review of Agricultural Holdings Legislation, above, n. 30, paragraph 236.
[107] 2016 Act, s.92, introducing a new s.5C to the Agricultural Holdings (Scotland) Act 2003.
[108] 2016 Act, s.90, introducing a new s.2A to the Agricultural Holdings (Scotland) Act 2003.
[109] 2016 Act, s.99.

arbitral award. (An even more radical option of a right for a tenant to force a sale from her landlord was occasionally discussed but found no place in the final statute.)[110]

Provision is made in relation to improvements to a farm, both from the perspective of the tenant[111] and from the perspective of the landlord.[112] There are new rules in relation to rent reviews,[113] moving the rent review calculation from an open market basis to one largely based on the productive capacity of the holding. Inheritance and transfer of tenancies also receives some attention, with the list of people to whom holdings can be assigned[114] or bequeathed[115] expanding. These reforms flow from the recommendations of the Agricultural Holdings Legislation Review Group (although perhaps without following them to the letter).[116]

The changes to assignation and succession do not allow a lease to be passed to absolutely anyone, and as such the landlord still has a chance of getting the land back without being subject to a lease where there is no-one suitably close (in terms of relationship by blood or marriage/civil partnership) to the outgoing tenant to take it from them. That said, late in the parliamentary process a reform was made which might allow a secure lease to be passed to someone outwith those recognised proximate relationships.

This controversial, and highly complex, reform is headed 'Relinquishing and assignation of 1991 Act tenancies', which will change the law in a way that makes it more difficult for a landowner to retrieve vacant possession of land currently subject to such tenancies. The 2016 Act will still allow a landlord to get the land back, but not for free: it introduces a mechanism for the landlord to pay a sum to the tenant to buyout that lease. Exactly what this sum might be is not yet clear, but apparent 'grapevine' reports that the formula provided in the new s.32L of the 1991 Act is roughly equivalent to 25% of the open market value of the farm have been rebuffed in industry press.[117] Where the landlord does

[110] The Final Report of the Land Reform Review Group, above, n. 20, suggested this might be a possibility (Part 7 (Agricultural Land Holdings), Section 28 (Tenant Farms) paragraph 48), but the Final Report of the Review of Agricultural Holdings Legislation, above, n. 30, said concluded this would not be in the interests of the tenant farming section (paragraph 24 and 199-208).
[111] 2016 Act, Part 10, Chapter 8 introduces an 'Amnesty for tenant's improvements', giving tenants a period of three years to obtain compensation for an improvement that they would not otherwise be able to claim compensation for.
[112] 2016 Act, Part 10, Chapter 9
[113] 2016 Act, Part 10, Chapter 5.
[114] 2016 Act, s.103. There are provisions for a landlord to object to an assignee, although those are highly restricted when the assignee is a near relative.
[115] 2016 Act, s.107.
[116] For example, the AHLRG expressed the view that an assignee who was already the occupier of an independent viable unit elsewhere could be objected to by the landlord 'to prevent that tenant from accumulating tenancies and so keeping the holding available for re-letting to another tenant' (above, n.30, at paragraph 168). This has not been reflected in the 2016 Act.
[117] The formula itself begins with the 'value of the land to which the holding relates if sold with vacant possession' less 'the value of the land if sold with the tenant still in occupation', which sum is then divided by two and adjusted for improvements. The assertion that this should somehow equate to 25% of the open market value is critiqued in The Scottish Farmer, June 25, 2016, 'Tenants Take Your Time!', which featured sceptical quotes from Angus McCall of the Scottish Tenant Farmers' Association and Andrew Thin, the

not wish to pay that sum, the tenant can then assign the lease to 'an individual who is a new entrant to, or who is progressing in, farming'.[118]

There have been indications that landowners may challenge this particular reform on human rights grounds as an unfair interference with their property rights.[119] As evidenced all too clearly in the *Salvesen* case, Scottish legislation is susceptible to challenge in court if it is not within devolved competence, for example by not being compatible with the European Convention on Human Rights. Notwithstanding any potential court challenge, there is also the wider issue of what these reforms will do in terms of landowner confidence to make further land available for lease. The implementation of Part 10 of the 2016 Act was always going to be closely monitored anyway, but exactly how much farmland is let (under whatever letting vehicle) will be subject to increasing scrutiny in the years to come.

CONCLUSION

As this article goes some way to demonstrate, a lot has happened in relation to Scottish land reform in the past decade or so, and there is a lot in the most recent Land Reform (Scotland) Act that captures that zeitgeist.

The introduction of the Scottish Land Commission, a statement which will remind landowners of their responsibilities as well as their rights, and guidance for engaging communities in decisions relating to land which may affect them are all innovative and important provisions. Other aspects are perhaps not so innovative. In terms of redistribution, the legislation passed in 2003, 2015 and 2016 still focusses on community ownership or, in the case of secure 1991 Act tenancies, transfer to a tenant. Such reforms are predicated on their being on a community or a tenant, meaning that any reform of land ownership (and associated use) will only happen where there is already someone (or some people) on the ground, or on the fringes of such areas. It is perhaps for this reason that the Scottish Green Party has discussed making use of provisions like the Land Settlement (Scotland) Act 1919 to allow land reform to affect a wider area. Another point worth noting is that, even with the increased flexibility that comes from allowing community bodies to be Scottish charitable incorporated organisations or community benefit societies as well as companies limited by guarantee, these vehicles must still be grounded in a community of *place*. There is no particular scope for a community of *interest*. It can also be observed that the focus is still on the form the body must take, rather than the rules of it. This contrasts both with the approach to similar community bodies in South Africa[120] and, more strikingly, another bit of the Community Empowerment Act.[121]

Scottish Government's Independent Adviser on Tenant Farming, available at *http://www.thescottishfarmer.co.uk/news/14583165.Tenants_take_your_time_/*.

[118] S.32U.

[119] See the news release of Scottish Land & Estates, 'Landowners highlight fears for future of tenant farming sector' at *http://www.scottishlandandestates.co.uk/index.php?option=com_content&view=article&id=4855:landowners-highlight-fears-for-future-of-tenant-farming-sector&catid=71:national&Itemid=107*.

[120] See the South African Communal Property Associations Act No.28 of 1996.

[121] S.19.

What can be said of the more recently introduced community rights of acquisition is that they clearly have more clout than the right introduced by Part 2 of the 2003 Act. Interestingly, it can be recalled that at the third stage of the first Land Reform Bill the SNP (then in opposition) attempted to introduce a power of compulsory acquisition in certain circumstances, but Roseanna Cunningham MSP's amendment was defeated.[122] In government, the SNP have introduced two further rights of acquisition, but they have not gone so far as to introduce the power that the now Cabinet Secretary for Environment, Climate Change and Land Reform, the very same Roseanna Cunningham, called for. There are also certain recommendations of the Land Reform Review Group that have not found form in legislation, such as the proposed cap on landownership.

Of course, there are also many other ways land reform can be effected away from a statute with those magic words in the title. The role of taxation has already been mentioned. Planning law might also be used to drive change, perhaps via compulsory purchase or innovative usage of planning permission rules,[123] can be used to implement change, as could another device mooted by the Land Reform Review Group, the compulsory sale order.[124] Succession law might have a part to play, especially in the context of the proposed removal of the distinction between moveable and heritable property when it comes to the ability to disinherit a child or spouse/civil partner.[125] Ending the current system, which allows land to be passed on death without any fixed shares in it, could have an effect in terms of stopping estates remaining as one large entity without compulsory division, but (at the other end of the spectrum) blanket application of a system of fixed shares could render some smaller holdings unviable. In any event, reform of the law relating to succession from human beings can only go so far when land can be owned by companies or other entities, for the simple reason that juristic persons can live for much longer than humans.

Entire articles could (and perhaps should) be written about the impact of succession on land reform, but what is to be made of the matter at hand, namely this newest land reform statute? As stated earlier in this article, the 2016 Act is not a definitive answer to the Scottish land question. It should not have been expected to be. What it will be is 'a[nother] platform upon which we can build on for the future'.[126] This does lead to the rather inevitable and frustrating conclusion that there will need to be a period of reflection to see

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[122] Amendment 214. *Official Report* January 23 2003 14360-14370. It might also be recalled that Part 3 of 2003 Act allows reform to occur without the need to rely on the circumstances of the seller, a fact which appealed so much to the Justice 2 Committee that they called for an extension of the crofting counties to allow the absolute right to have wider effect. Justice 2 Committee *Stage 1 Report on the Land Reform (Scotland) Bill – SP Paper 541* at para 125.

[123] In the Cornish town of St Ives residents have used planning law to block the construction of any homes that are not for full time residents (BBC News, May 6, 2016 'St Ives referendum: Second homes ban backed by voters' at *http://www.bbc.co.uk/news/uk-england-cornwall-36204795*).

[124] Final Report of the Land Reform Review Group, above, n. 20. Part 4 (Local Community Land Ownership), Section 17 (Local Community Land Rights), paragraph 33.

[125] See 'Consultation on the Law of Succession' on the Scottish Government's website, which ran from 26 Jun 2015 to 18 Sep 2015, available at *http://www.gov.scot/Publications/2015/06/7518*.

[126] To adapt the words of Lord Sewel, in the foreword of the Land Reform Policy Group *Recommendations for Action*.

what happens to that platform and what schemes are launched from it. What can be stated now is that the debate surrounding the Scottish land question has markedly developed in recent years and the Scottish Parliament will have plenty to do in the current parliamentary term, both in terms of implementation of the 2016 Act and perhaps even further measures to pick up on some of the things omitted from it.