

'The law of a different land': colonisation and crofting commons in the Highlands and Islands of Scotland

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ABSTRACT

Since its creation in British law in 1886, crofting has been recognised as a system of land tenure unique to the Highlands and Islands of Scotland. However, before and since the 1886 Crofting Act the area's traditional landholding arrangements have been characterised as problematic and efforts made for their reform.

This article examines some of these externally-led reforms which have established crofting as a hybrid tenure system in which individual and collective rights are both present. Considering the 1886 Act pivotal, it begins by describing the introduction of crofting as a commercial intervention in indigenous landholding systems and shows how crofting tenure as state law was created both as a result of, and in resistance to, this intervention. Next, it examines further reform processes subsequent to the 1886 Act and concludes by analysing some key contemporary reforms.

The article employs two complementary theoretical perspectives. The first is to construe the reforms in terms of the two concepts recognised by Elinor Ostrom as being ideological prescriptions employed by outside actors to resolve so-called 'tragedies of the commons' – 'privatisation' and 'Leviathan'.

The putative 'tragedies' which external actors believe they have identified and seek to resolve are not linked primarily to resource depletion but instead to related 'problems' of economic inefficiency and social or cultural inadequacy. The cultural and economic motivations for repeated intervention in communal governance systems associated with the area's indigenous Gaelic culture means the reforms should also be considered from the perspective of theories on colonialism and informal imperialism.

KEYWORDS: Crofting; Commons; Land Tenure; Reform; Colonialism; Imperialism

INTRODUCTION

Since its creation in British law through the Crofters Holdings Act of 1886, crofting has been recognised as a system of land tenure unique to the Highlands and Islands of Scotland. However, both before and since the 1886 Act elite members of Scottish and British society have regarded land holding arrangements in the Highlands and Islands as a ‘problem’ (or as part of a problem) in need of reform.

With this article I offer a general outline of the development of crofting as a hybrid system of land tenure in which individual and collective rights are both present. I will begin by describing the historical background to the introduction of crofting as a form of landholding in the west Highlands and Islands in the late 18th and early 19th centuries. Then I will detail some aspects of how this tenure has operated in the past and present, as well as some of the governance pressures it has faced and is currently facing.

The perspective I am adopting is to focus on past and present externally-led attempts to reform land use and governance in the Highlands and Islands. I view these reforms through the lens of the two concepts recognised by Elinor Ostrom as being ideological prescriptions employed by outside actors to resolve the so-called ‘tragedy’ of many common pool resource systems – ‘privatisation’ and ‘Leviathan’.

‘Privatisation’ is the belief that dividing a commons into a private property regime will bring order, stability and sustainability; ‘Leviathan’, that order can be established by making people “responsible to a coercive force outside their individual psyches” – to quote Garrett Hardin’s words. Usually this external coercive force takes the shape of the state. (Ostrom 1990: 8-15)

In the case of crofting tenure I argue that the putative ‘tragedies’ which external actors believe they have identified and seek to resolve are not linked primarily to resource depletion but instead to related ‘problems’ of economic inefficiency and social or cultural inadequacy. I argue that these cultural and economic motivations for repeated externally led coercive interventions in the traditional land governance systems of the west Highlands and Islands mean that the reforms need to be construed from the perspective of theories on colonialism and informal imperialism. (Osterhammel 2005: 16f, 109f. Walker 2007)

In making this argument it is crucial to state at the outset that crofting tenure itself is not indigenous to the Highlands and Islands. Although ‘crofts’ were part of manorial tenure systems in 13th century England and the word was in use in Lowland Scotland in the medieval period (Homans 1975. Markus et al 1995: 112-116), they only appeared in the west Highlands and Islands with the arrival of English language monoglot surveyors who were hired to apply the ideology of ‘improvement’ to the area’s lands in the late 18th and early 19th centuries. Moreover, the transition to a crofting system in the area was one that was generally opposed by those on whom it was being imposed.

What preceded crofting is usually known as ‘*dùthchas*’ in the Gaelic language native to the west Highlands and Islands. I’m describing *dùthchas* as a Celtic system of

native title associated with traditional clan society and collective rights. The evidence is that it operated largely on the basis of communal and familial land rights and management practices. (Carmichael 1884: passim. MacInnes 1996: 14-24. Cregeen 2014: 123-141) Beyond its role in land governance, the word *dùthchas* is a key concept in Gaelic culture and is used to express a person's sense of identity and belonging as a lacework of interrelated familial, territorial and historical concerns. (MacInnes 2006: 279)

As a case study of the development of crofting I will focus on the traditional territories of *Clann Dòmhnail* – and for the benefit of non-Gaelic speakers I will refer to this clan from now on simply as Clan Donald – on the Hebridean island of Skye. I will chart the emergence of crofting in the 19th century as a significant agrarian development in an already centuries old history of territorial marginalisation and political and cultural oppression endured by the Gaels of Scotland. This history is now beginning to be construed by historians as a process of 'internal colonisation' instigated by the kingdom of Scotland. (Goodare 2004. MacGregor 2006. MacCoinnich 2008. Cathcart 2009. MacGregor 2012. See also Hechter 1999 and McDonald 1999)

Gaels are a traditionally Gaelic speaking indigenous minority within Scotland and I should say that I identify myself as a Gael and that I grew up in and belong to Sleat, a peninsula on the island of Skye. This is an area which forms part of my historical case study and part of my own sense of *dùthchas*.

I argue that during the course of the 19th century two significant and related movements can be identified in the transition of land governance in areas of the Highlands and Islands from the variety of traditional *dùthchas* systems towards crofting as a single hybrid system of tenure which emerged as both the result of and in resistance to developments in a longstanding colonial situation.

- Firstly, the gradual imposition of the individualism inherent in 'improving' ideologies of late 18th and 19th century Lowland Scottish society onto *dùthchas* systems, and subsequent indigenous resistance to the 'privatisation' of their traditional lands
- Secondly, the late 19th century breaching of the 'Leviathan' of the British state into the disordered governance of land and natural resources in the Highlands and Islands of Scotland – a disorder that had been created by the imposition of 'privatisation' and indigenous resistance to it

Therefore, the historical analysis of crofting in this article can be divided into three broad periods:

1. The situation before the 1886 Crofting Act when crofting existed as an innovative hybrid tenurial system which was being imposed on pre-existing but unrecognised indigenous landholding arrangements
2. The post-1886 settlement's recognition of crofting as a hybrid system of tenure and subsequent governance contests
3. Contemporary conflicts over crofting governance

This paper will be divided into three main sections. Each section corresponds to one of the three periods described above and each will describe developments in landholding arrangements in the west Highlands and Islands in the respective periods.

Between the first and second parts there will be a brief supplementary section which suggests that the implementation of what in 1886 became crofting law in the Highlands and Islands bears strong relationship to the application of colonial power in the overseas empires of modern European nation states.

Between the second and third sections (between the past and the present, effectively) there will be a brief supplementary section outlining a theory of informal imperialism and suggesting that present-day crofting governance relations might productively be understood in these terms. This is because throughout the historical and contemporary manifestations of ‘privatisation’ and ‘Leviathan’ a constant thread is the efforts of external agencies to impose innovative forms of governance and control on an unwilling indigenous majority. This majority population, in response, organises itself to employ a variety of means of resistance as part of an on-going struggle for the freedom to be able “to think and act differently”. (Tully 2008a: 144)

1. THE GÀIDHEALTACHD BEFORE CROFTING LAW

i. the internal colonisation of Gaelic Scotland

Sleat is a long peninsula in the south of Skye that in 1469 was granted by the then head of Clan Donald, John MacDonald, to his brother Hugh – or *Uisdean* in Gaelic. (Nicolson 1994: 21) Sleat thus became part of the *Sliochd Ùisdein* – the MacDonalds of Sleat – who were to hold it through the destruction of Clan Donald power by the government of Scotland during the following centuries.

A brief summary of this process of destruction is to say that in Gaelic the head of Clan Donald in the 15th century was known as *Rì Innsi Gall* – which can be translated as ‘King of the Hebrides’ – a title which members of the family had held since at least the 12th century. In Latin charters (and apparently without reference to the Scottish Crown), they had adopted the title *Dominus Insularum* – ‘Lord of the Isles’ – during the 14th century. (Woolf 2004: 102ff. Oram 2004: 123)

Their independent attitude and apparent indifference towards the Scottish claim of sovereignty over the Hebrides (as by treaty in 1266 Scotland had acquired the Hebrides from Norway as a *dominio* of Scotland) led Clan Donald into centuries of antagonistic relations with the Scottish Crown. The transfer of the Sleat peninsula to *Uisdean* took place shortly before the Scottish Crown formally made forfeit the title ‘Lord of the Isles’ and took it into their own hands (indeed, the title ‘Lord of the Isles’ is currently in the hands of Prince Charles). (MacDougall 1997: 100ff)

Direct efforts at colonising parts of the west Highlands and Islands subsequently followed in the late 16th and early 17th centuries. Concurrent to these military

invasions, punitive legislative measures were also introduced against the area's clan chiefs, particularly in the early 17th century. These entrenched the domination of the Scottish Crown in the area by introducing laws which, for instance, forced the leaders of Gaelic society to send their children for an English language education outside the *Gàidhealtachd*¹ and into the mores of non-Gael Scottish society. (MacGregor 2006) In other colonial contexts, the alienating effects of such policies targeted at children have been described in terms of 'colonisation of the mind'. (Wa Thiong'o 1986)

Native leaders were also rewarded with elite British titles as they became progressively deracinated and decultured from indigenous norms and more tightly assimilated into the elite socio-political networks of British imperial society. (MacInnes 1996: 233) For instance, in 1617, *Dòmhnall Gorm Og*, the chief of the Macdonalds of Sleat, was appointed 'Sir Donald' by King James VI of Scotland – less than 20 years after *Dòmhnall Gorm Mòr*, his uncle and predecessor as clan chief, had been intriguing with the English queen to rebel against the Scottish monarch. (Nicolson 1994: 54, 77. MacCoinnich 2002: 147f)

This process of assimilation continued through the 18th century. In 1776 Alexander MacDonald, a direct descendant of *Dòmhnall Gorm Og* and the then chief of the kindred of Sleat, was made the first Lord MacDonald. His son, also called Alexander, succeeded him in 1795. Although the younger Alexander was largely absent from the Sleat peninsula during his chieftainship, preferring to live in England (Nicolson 1994: 239), around 1815 he built a large castle at Armadale in the south of the peninsula. This building was on a scale of opulence previously unknown to the area. It was designed by the prolific architect Gillespie Graham and is described in the following terms on the website of the Royal Commission on the Ancient and Historical Monuments of Scotland:

Armadale's lavish interiors were among Gillespie Graham's most accomplished in this style, with fan vaultings, gothic mouldings, statues in pinnacled niches and, through the arcaded hall, a great staircase of Strath marble adorned with a stained glass window (Miers 2007, quoted on RCAHMS 2015)

¹ This is the name used by Gaels to refer to that part of the territory of Scotland associated with Gaelic speaking people. It has diminished over centuries and is generally only used today to describe the Hebridean islands and some areas of the north-west mainland of Scotland.



Figure i: A painting of Armadale Castle made by the artist William Daniell in 1815 during his tour of the Highlands (Garvey 2009: 37). See John Garvey's book on William Daniell (Garvey 2009) for more details about this artist. See also the work of Anne Macleod (Macleod 2012) for the influence of visiting artists on perceptions of the Highlands and Islands in the 18th and 19th centuries. (Copyright: public domain)

During a period of famine in the west Highlands and Islands in the 1830s a Government Inspector visited Lord MacDonald's new home. In his journal he recorded that the castle had cost £20,000 to build – £13,000,000 in today's prices². (MacAskill 2011)

In order to meet the costs associated with a lifestyle of such conspicuous consumption, in the early 19th century Lord MacDonald also embarked on a radical tenurial rearrangement of the land on his estates. The individualisation of landholding patterns that this entailed was a practical implementation of the ideology of 'improvement' that had swept late 18th century Scotland. This ideology's foremost proponent was Adam Smith whose book *The Wealth of Nations* had been published in the 1776 and outlined the rationale of and for 'improvement'. (Devine 2006)

ii. "to colonise at home": 'privatisation' as a means to 'improve' the land and people of the Gàidhealtachd

Aside from his having a family connection to one of the leading practical agricultural 'improvers' of the time, Lord MacDonald's decision to radically disrupt the communal land holding patterns on his estates would have been strongly influenced

² The calculation can be carried out on the website 'Purchasing Power of British Pounds from 1264 to Present: <http://www.measuringworth.com/ppoweruk> (accessed 20th October 2011). My thanks to the historian John MacAskill for pointing me to this website.

by Smith's arguments in *The Wealth of Nations* and so I shall briefly rehearse these arguments here, with a particular emphasis on Smith's advice on land use.

Although Adam Smith is now considered 'the father of modern economics' and his work proclaimed by proponents of protectionism and the free market alike, *The Wealth of Nations* must be considered in relation to the contexts for which it was written. Chief among these was the late 18th century relationship between Britain and America. Smith believed that Britain should relinquish its colonial possession across the ocean because it was a longstanding financial burden on the country. (Smith 1904: IV.7.152) However, he acknowledged that Britain would not do this willingly and, emphasizing the huge public debt that repeated wars in America had accrued for the nation, he offered other means of seeking to reduce the country's debt burden.

He argued that Britain would require either considerable reduction in public expense or "some very considerable augmentation of the public revenue" to "liberate" the country's indebtedness. (Smith 1904: V.3.67) It was for this reason that Smith recommended that Britain's two main sources of revenue, land and capital stock, should be employed as efficiently as possible in order to service the debt burden.

Smith's underlying argument, that agricultural 'improvement' was a necessity for the wealth of the nation and, moreover, that undertaking such work successfully would demonstrate the "skill, dexterity and judgment" of the nation's 'improving' class, was taken forward by the British Government which set up a Board of Agriculture and Internal Improvements. This board's first chair was Sir John Sinclair of Caithness, who was among the foremost 'improving' landlords of his time and was married to Lord MacDonald's sister. Sinclair's massive two volume '*General Report of the Agricultural State and Political Circumstances of Scotland*' was written, he said, to promote the "future improvement and prosperity of the country". (Sinclair 1814a: 3)

The report was a blueprint for agricultural improvement and its second chapter asserted that it sought to achieve internally what Britain had failed to achieve in America. "The improvement of the northern parts of the kingdom", it stated, was "in other words...to colonise at home". (Sinclair 1814a: 120)

Its authors extolled private property and excoriated alternatives:

The best constitution of property in land, to excite and encourage agricultural improvements, would infer, that sole command and control over it, that excludes all obstruction to management, as also that absolute power of disposal, which would secure to the industrious improver the full possession of the fruits of his application of labour and capital. (Sinclair 1814b: 252f)

It was in this milieu that the lands of Clan Donald were reconstituted at the beginning of the 19th century. The work was carried out by a surveyor called John Blackadder who lived in Berwickshire some two hundred miles or so south east of the island of Skye. Blackadder produced two reports on the redistribution of the extensive Clan Donald estate. Although Lord MacDonald had no intention of giving anyone else "sole command and control" over parts of his estate, Blackadder's proposals were in line with the recommendations in Sinclair's 'General Report', proposing enclosure of

what had been communally held lands into individual apportionments as far as was practically possible. However, in practice, as I describe in more detail later, what was enclosed was generally only the arable land of each township.

According to Blackadder's initial recommendation, all the people who were until that point living on land jointly held "ought to be removed to allotments of a few Acres, less or more according to the quality of the soil, in the most eligible situations for that purpose, where such small possessions do not interfere with or mar the laying out of a better farm". (Blackadder 1800: 14) These 'allotments' or 'small possessions' later became generally known as 'crofts'.

Blackadder's use of the word 'mar' discloses that the real money from the new system was expected to come from the big new single occupier farms, created out of the old joint holdings, which were to be leased by 'Southern Overseers'. On many estates, and in particular on Lord MacDonald's, the small tenants were to be retained on their 'allotments' or 'crofts' as a cheap and convenient labour force for the – at that time – lucrative but also highly arduous seaweed harvesting industry. (Macinnes 1996: 223)

In his second report in 1811, Blackadder elaborated further on his intentions to "allot out into small possessions the least profitable parts of the estate". This he said was "strongly recommended, as by that means it will be more rapidly improved, and a greater number of people retained thereon". (Blackadder 1811: 3)

As in 1799, Blackadder operates on the principle that his plans will 'improve' Lord Macdonald's estates. The 'improvements' of which the surveyor writes emerge as threefold and connected.

- The first of these is improvement of the land itself – his plans centre around the "*arable and improvable parts of these farms*". (Blackadder 1811: 2)
- Implicit in the improvements to the land is a second improvement: the need to 'improve' Lord MacDonald's finances. In Blackadder's plans the hill grazings were not to be enclosed and allotted because of the costs involved: "*It must be understood that it is only the arable part of the farms that can be allotted out into separate possessions for however desirable it might have been to lay the grazings out in the same way, this cannot be done without greatly lessening the value thereof.*" (Blackadder 1811: 2)
- Thirdly, the surveyor predicts an influx of "*substantial farmers and graziers so that by a proper adjustment of the Society the improvement and dignity of the whole may go together*". (Blackadder 1811: 3) Thus the third improvement, according to Blackadder, was to the character of the native population, under the influence of settlers from the 'south'. (Blackadder 1800: 88)

We can see that in principle Blackadder's aim was to individualise all of the Clan Donald estate. However, due to practical economic considerations only the arable areas were individualised while the pasture land remained in common. Thus the changes represented only a 'quasi-privatisation' approach to the perceived economic

inefficiency of the indigenous system and thus it set the foundation for the distinctive hybrid system of crofting tenure.

The kind of redistribution I have described on Clan Donald land took place on estates throughout the west Highlands and Islands during the 18th and 19th centuries. (Cregeen 2014. Macinnes 1996. Hunter 2000) These changes were predicated on a shift in the perceptions of the clan elite as to their relationships with their traditional lands and people. According to the historian Allan Macinnes, “they abandoned traditional concepts of heritable trusteeship, their *dùthchas*, in favour of the legalistic concept of heritable title, their *oighreachd*, to enhance their assimilation into the Anglo-Scottish landed classes”. (Macinnes 1996: 233)

Collectively, such redistributions constitute the first significant movement in the transition from *dùthchas* to crofting in the Highlands and Islands and from a variety of more communally oriented indigenous tenure systems to the single state-recognised system post-1886.

***iii. “will not be bound down...to do what other people think right for them to do”:
‘improvement’ by force***

In the early 17th century coercion had been necessary to deracinate and Anglicise the west Highland and Islands clan chiefs into the cultural norms of another society. In the early 19th century Blackadder suggested that coercion would also be necessary to impose the ideology and practice of ‘improved’ land use on the people of the same area. In one of his reports he wrote that in conversations with the indigenous population he had discovered “an independent cast of mind which will not be bound down (as the Farmers in other countries generally are) by Covenants in Leases to do what other people think right for them to do, if they do not think the thing proposed right themselves”. (Blackadder 1800: 86f)

Yet Blackadder was convinced of the righteousness of his plans. While he praised the character of the people he had met, according to the surveyor their joint farms lay “in the most unhopely and inconvenient form that it is possible to imagine” and their management system by which land was redistributed between them every few years was, in his words, “careless and slovenly”. Any justification they might have had for their land use practices had, he said, “been exploded upon the introduction of just ideas and real improvements in Agriculture”. (Blackadder 1800: 12) This patronising attitude about the failings of what he had found there and the confident assertions about what his intervention would achieve seem similar to some of those that accompany externally-led development projects today whose proponents, often without due regard to the knowledge, practices and priorities of the people whose world they intend to ‘develop’, assume their work will ‘improve’ the lives of the local populations. (Ostrom 2011)

Predecessors of such attitudes can also be found in the imperial mission. The eminent historian of colonialism, Jürgen Osterhammel, has observed that Blackadder’s attitude on the need for a higher status minority to take responsibility for improving a social context is typical of political organisation in colonial relationships and was “respected as humanitarian intervention”. (Osterhammel 2005: 109)

He argued that colonialism is a relationship of domination in which the colonisers' ability to coerce exists within an "unchanging complex of rule, exploitation and cultural conflict in ethnically heterogeneous political structures that had been created by influence from without". (Osterhammel 2005: 26) The next section of this essay will assess externally induced conflict in the late 19th century *Gàidhealtachd*, which resulted in no small part from differences in the understanding and expectations of those who lived by the norms of a culture of 'property' and those who sought to maintain their *dùthchas*.

2. THE POST-1886 SETTLEMENT AND ON-GOING CONFLICT

i. "the law of a different land": state recognition of crofting tenure

Coercive imposition of the new land distribution system required indigenous communities to be redistributed. These redistributions included their removal from land, their relocation on marginal land, their non-voluntary migration to new lands away from their traditional areas. Although historians argue over the benefits of the new arrangements, they were associated in popular consciousness with impoverishment.

Native resistance to the new arrangements occurred sporadically throughout the 19th century. However, it came to a peak in the 1880s when techniques of resistance included rent strikes, destruction of landlord property and violent confrontations with a range of law officers. (Meek 1995: 88, 107, 110, 115) Press coverage of these events led to gunboat diplomacy and the deployment of Royal Marines in the north west, and in particular in the north of Skye where the civil disobedience was well organised and widespread.

This resistance provoked the entrance of 'Leviathan' in the person of the British state and led to the second significant movement in the transition from *dùthchas* to crofting. The Government created a Royal Commission to look into the conditions in the Highlands and Islands and following its report an Act was passed in 1886 which enshrined crofting in the legislative framework of UK law and which gave crofters a series of rights in land which they considered part of their *dùthchas*. (Hunter 1995: 65)

These rights included: the secure right to use and occupy (but not to own) their croft land and the right to pass it to a chosen successor within their family; the right to fair rents fixed by an impartial body; and the right to compensation for any improvements if they were removed from the croft. It also affirmed their right to a share in the township's common grazings – that part of the commons system which had not been 'privatised' during the earlier redistributions – and to other ancillary rights such as to seaweed for fertiliser, peat for fuel, heather for making rope, and to a 'noust' – a place on the shoreline to draw up a boat. (MacCuish and Flyn 1990: 4f, 40-43)

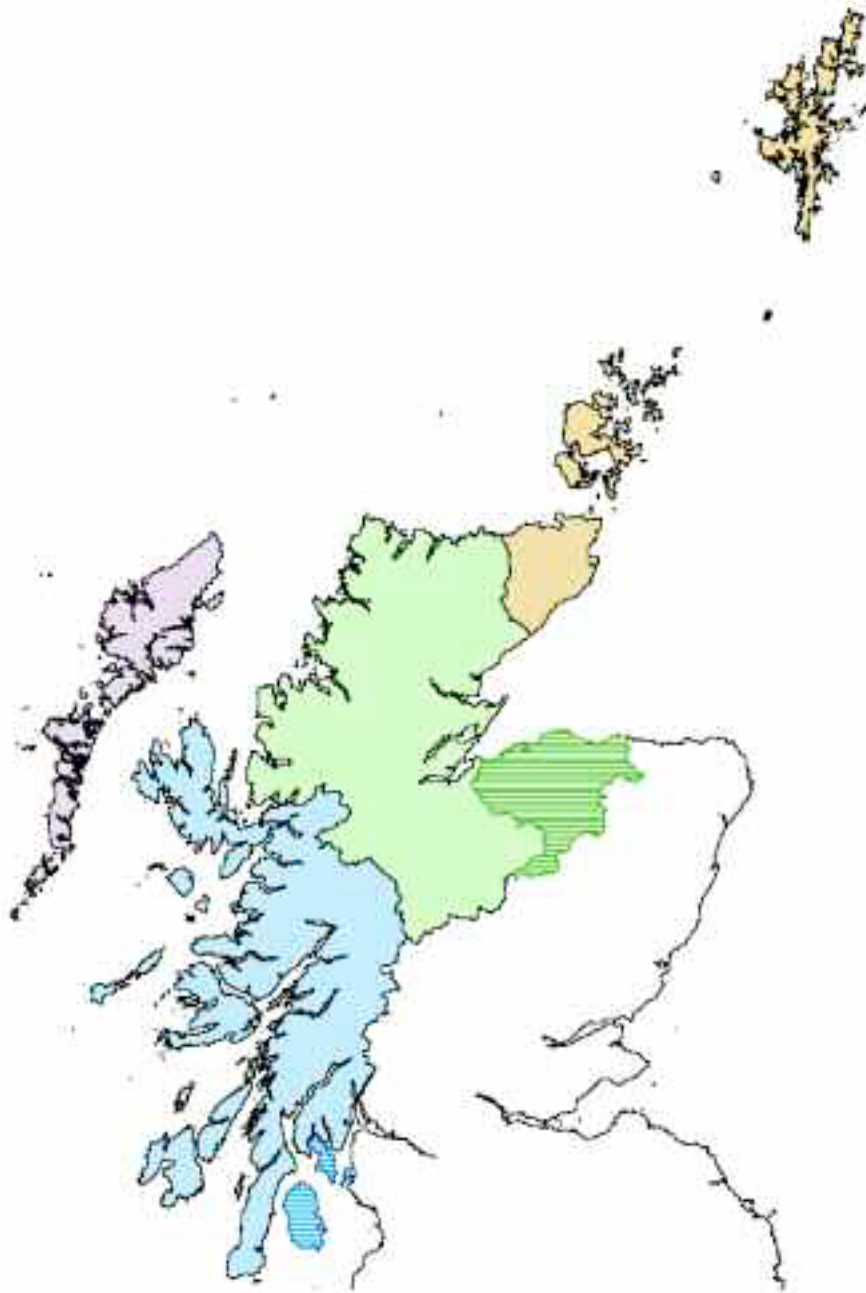


Figure ii: A map showing the present territorial extent of the Crofting Counties of Scotland (Copyright: Scottish Government)

These rights applied only to smallholding tenants in the seven crofting counties of the Highlands and Islands (see figure ii). British political and legal authorities of the time went so far as to describe these changes as moves to protect the old tenure of *dùthchas*. (Crofters Commission 1902: lxxxvii, lxxxviii.)

Given that the new rights did not extend to re-collectivising the earlier privatisation of arable land that had previously been held in common in the *dùthchas* systems, this protection can only be described as partial. However, the legal recognition of crofting

has certainly marked out the Highlands and Islands as unique in terms of its landholding relationships and may help to explain why the crofting lawyer Derek Flyn described crofting tenure, when he spoke to the Scottish Parliament in 2007 during discussions on its reform, as “the law of a different land”. (Flyn 2006)

Yet those discussions remind us that the rights established in 1886 are not the end of the story. Although Gaels had won legal recognition for integral parts of their ancestral land rights system, the underlying principles and assumptions of the political ideologies which produced the kinds of land governance systems against which Gaels had taken a stand in the 1880s did not go away. Crofting law has evolved in the 130 years since then and the old ideological prescriptions of ‘privatisation’ and, more often, ‘Leviathan’ have had a key role in the nature of that evolutionary process.

ii. The Highland ‘problem’ and refusals to acquiesce

Throughout the 20th century powerful external actors have repeatedly intervened in the crofting system in order to bring it more into line with more general societal expectations. An attitude common to many of these actors is exemplified in the report of a 1928 UK Parliamentary Committee on land resettlement in the Highlands and Islands:

The problem in the Highlands involves historical, racial, economic and social considerations. We are dealing with a community which has refused to acquiesce in any of the attempts to change the method of holding or using land which have been made in the last 150 years, and the legislature has been compelled to meet the claims it has made to be allowed to live its life in its own way. (cited in Fraser Grigor 2000: 209)

Externally initiated attempts to change the methods of holding and using land in the Highlands and Islands based on the principles of ‘privatisation’ and ‘Leviathan’ continued throughout the second half of the 20th century³.

Following the Second World War, the scarcity of provisions in Europe encouraged politicians in many countries, including the UK, to create policies encouraging agricultural modernisation – intensifying and specialising agricultural production and concentrating agricultural resources in fewer hands – in order to maximise the production of food and fibre. This is an approach known as ‘productivism’. (van Leeuwen 2010: 18)

The sociologist Anthony Giddens has linked the pursuit of productivist economic policies to the development of a societal ethos which insinuates that work as paid employment is the way to a worthwhile life.

Productivism can be seen as an ethos in which ‘work’, as paid employment, has been separated out in a clear-cut way from other domains of life. Work becomes a standard-bearer of moral meaning – it

³ The following analysis draws heavily on James Hunter’s valuable 20th century history of crofting. (Hunter 1991)

defines whether or not individuals feel worthwhile or socially valued.
(Giddens 1994: 175)

In the immediate post-war years, as productivist policies began to be implemented in UK agriculture, both the Scottish Office of the UK Government and 'The Highland Panel' – a board of parliamentarians, councillors and other senior figures – highlighted "the failure of the crofting localities to contribute properly to the national food production effort". The Government set up a new Committee of Inquiry whose remit included special reference to "the secure establishment of a smallholding population making full use of agricultural resources and deriving the maximum benefit therefrom". (Hunter 1991: 78f)

In the same period Adam Collier, a young economist who had worked in Highland development in the 1930s, began work on providing a more detailed statistical resource of the crofting areas to provide, for example, an analysis of crofters' sources of livelihood and standards of living.

Although Collier felt that too much discourse on crofting was based on emotion rather than reason, in the introductory section of a collection of his work titled 'The Crofting Problem' he outlines a perspective on 'Highlanders' (by which he means Gaels) that, enfolding metaphysical and ethical considerations, seems not only to critique productivism as an ethos but also to suggest that productivism is an ethos applicable only for those too poor to be able to "achieve freedom from labour":

The usual aim (and result) of modern individualism is the attempt to mechanize the material and practical life in order to achieve freedom from labour. This is seen in a developed form in the liberty permitted by our society to the individual to support himself on the returns from money invested without necessarily working himself, but it is inherent in all use of machinery. The Highlander's thought has a different orientation and content. It is meditative rather than analytic, imaginative but not inventive, concerned with the past rather than with the future, with self-cultivation rather than control over material environment and with integration rather than efficiency or acquisition. At its most characteristic, practical questions are not its exclusive or first concern. It is not a substitute for labour but a concomitant of it. Thus the Highlander finds the opportunity for the self-cultivation, the contemplation which he values so highly, not in the split work-and-leisure existence of the city worker, but in his traditional form of life, wherein work and leisure are interwoven from day to day and hour to hour. (Collier 1953: 7)

Although it is not without problematic generalisations, from Collier's observations can be distinguished a personality that fits Anthony Giddens' description of traditional societies in which work is not "readily distinguishable from other activities". (Giddens 1994: 176) Such a personality would fit poorly into the general ethos of productivism and the particular post-war British political milieu where productivist policies were being applied. Indeed, rather than cultivate a crofting ethos of the type outlined by Collier, the period since the end of the Second World War has seen wave after wave of policies seeking to reform it.

The Committee of Inquiry report in 1954 proposed the creation of a Crofters Commission with the duty of regulating and developing crofting. Subsequent Government policy briefings made clear this was to mean a focus on agricultural development. (Hunter 1991: 91)

The Commission's first chair, Sir Robert Urquhart, whose previous position had been as Her Britannic Majesty's Ambassador to Venezuela, was an advocate of the 'productivist' agenda, calling on "crofters to increase their agricultural output by five per cent annually between 1956 and 1959" (Hunter 1991: 103) A key development policy of the Commission was township reorganisation with a central tenet of this policy being to enlarge and amalgamate holdings in order to make more crofters into full-time agricultural specialists. (Hunter 1991: 82, 106ff)

After initial attempts at this development goal ended in failure Urquhart called for draconian additional powers for the 'compulsory reorganisation' of townships so that the Commission could forcibly amalgamate or impose sub-tenants upon crofts it considered underused or unused. A leader of the crofting union for the Western Isles, one of the strongest crofting localities, complained that the Commission was seeking a narrow bureaucratic solution to a much more complex economic problem, as part of which the young men of many crofting townships had to leave their communities to find work (Hunter 1991: 117f) The Member of the Parliament for the Western Isles agreed and condemned the Commission for "asking for power, publicly, to discipline and humiliate the crofters for failing to do what no Honourable Member of this House would find himself more able to do than the crofters and that is to wrest a living out of...miserable patches of bog". (Hunter 1991: 122)

The more draconian proposals were dropped from legislation passed in 1961 but a residue was built into crofting law, further increasing its complexity. 'Leviathan' having thus been largely repelled, around a decade later the Commission tried again to reform crofting into the productivist agenda; this time drawing on the ideology of 'privatisation' for "the conversion of crofting tenure into owner-occupancy". According to the Commission, its case was overwhelming. It held that crofting's specialised and complex legal system was an impediment to "the orderly development of the Highlands and Islands economy". (Hunter 1991: 131f) Again the proposals were subject to intense contention and criticism from crofters and members of the Highland clergy among others such that, again, the most radical proposal – this time for crofting to become a completely owner-occupancy system – was dropped. However, a less radical, but much disliked, proposal which gave each crofter a right to buy their croft if they wished was built into crofting law, further increasing its complexity. (Hunter 1991: 137-148)

In fact, it could be argued that this proposal was not 'externally led', as Ostrom's hypothesis on reform of the commons requires. The proposal had been developed from a suggestion that came originally from crofters themselves. This original request from the Federation of Crofters Unions was modest. It was for crofters to have a right to buy their croft in certain circumstances; a request the Commission then transformed into the proposal for mandatory owner-occupancy. The crofters' original request was made in response to the fact that when land was being taken out of crofting tenure in the 1950s and 1960s for use in development projects associated with the wider productivist agenda in the Highlands and Islands – such as for the

creation of a pulp mill in Lochaber in 1965 (Hunter 1991: 130) – the crofter was only entitled to the agricultural value of the land. This was usually a pittance. The landlord, on the other hand, was entitled to the development value of the same ground, usually a much greater amount. (Hunter 1991: 130f)

It is possible that the effects of the individualism inherent in the earlier ‘privatisation’ reforms of the ‘improvement’ era were an influence in the crofters’ original request, if we consider that request as a response to inequalities which had already been deeply sedimented into the landholding system during previous centuries during the break-up of clan society. As already mentioned, in clan society the chief did not own the land but held it on behalf of the people in ‘heritable trusteeship’, or *dùthchas*. However, despite granting crofters use and occupation rights to the land, the Crofting Act of 1886 did not recognise the traditional collective ownership structure of *dùthchas*. Instead, crofting law sat within and conformed to the legalistic concept of individual heritable title, or *oighreachd* under which croft land was still ultimately owned by landlords. (Macinnes 1996: 233)

This state of affairs undermines the claims made by late 19th and early 20th century British authorities’ to have protected the *dùthchas* system. Moreover, the lack of recognition for the traditional ownership arrangements may have underlain the injustice that crofters felt each time land was removed from them for development purposes.

My argument here is that the imposition of the legal norm of individual title to land had an origin in a change of perception that had taken place in the minds of clan elites centuries beforehand, and that this perception had become so engrained in the discourse of political debates on land issues in the mid-20th century west Highlands and Islands that expressions of the old ownership structure had almost disappeared from view.⁴

This lack of recognition – an inability or refusal to acknowledge and accommodate – of the legitimacy or existence of indigenous landholding arrangements appears to place crofting advocates in the 20th century within a ‘structure of domination’. This form of structure was described by Michel Foucault as “a strategic situation more or less taken for granted and consolidated by means of a long-term confrontation between adversaries” (Foucault 1982: 795)

A structure of domination is more than simply the substance of a coercive power relationship that exists to make certain aspirations unrealisable – an overt constraint on political action. It is also a pervasive and unseen constraint which affects the ability to think – channelling flows of discourse in ways that generate and maintain a socio-cognitive environment in which certain thoughts become or remain unthinkable. (Tully 2008a 31-36)

⁴ The absence of expressions of the traditional ownership patterns in public discourse in the mid-20th century does not mean that it was not being articulated in communal life as, for instance, the author David Craig discovered on the Isle of Skye in the 1980s. (Craig 1990: 35) Since then, in many parts of the west Highlands and Islands, there has been an irruption of the old awareness back into public discourse and action, with community land ownership becoming firmly established as the norm in the Outer Hebrides.

The initial limited ‘privatisation’ proposal for individual crofters to have the choice to take ownership of their land – which the Commission then sought to make a mandatory and final settlement on all crofters – was a response created from inside a structure of domination in which traditional understandings of landownership had become so deeply sedimented and covered over in political discourse by the governing assumptions of Scots law on property that those subject to this form of domination were compelled to address their situation using the terms of the structure of domination in and by which their complaint had been established and maintained. This enabled the Commission to make a proposal which was presented as answering the complaint but which would, in fact, further entrench the norms of the domination system in the lives and minds of those subject to it – further eroding the dominated population’s ability to think and act differently⁵.

iii. ‘Leviathan’ and ‘privatisation’ as techniques of informal imperialism

I suggested, in section 1. iii., that the historical imposition of ‘privatisation’ and ‘Leviathan’ agendas on common pool resources in the Highlands and Islands can productively be understood in terms of the theoretical perspective on colonialism introduced by the German historian Jürgen Osterhammel.

The period of formal European colonialism overseas was formally ended in 1960 when the United Nations’ Resolution 1514 granted independence to ‘Colonial Countries and Peoples’ and “confirmed the norm of independent statehood for colonial territories with their colonial boundaries intact”. (Anaya 2004: 54)

However, ‘the tragedy of decolonisation’ is that many formally decolonised territories have developed centralized and often highly militarised regimes characterized by political oppression, economic inequality and environmental destruction. Moreover their resources are often still subject to unsustainable exploitation for the benefits of foreign corporations and societies rather than in favour of their own citizens who often live in extreme poverty. It has been argued that this situation is legitimised by international law and global governance systems and that the period since 1960 has marked a movement away from colonial imperialism towards what is called informal imperialism.

The Canadian political philosopher, James Tully, argues:

[T]he dominant forms of representative democracy, self-determination and democratisation promoted through international law are not alternatives to imperialism, but, rather, the means through which informal imperialism operates against the wishes of the majority of the population of the post-colonial world. (Tully 2008b: 158)

Drawing on Tully’s work, Neil Walker, Regius Professor of Public Law and the Law of Nature and Nations at Edinburgh University, has outlined a theory of informal

⁵ This argument is deeply indebted to the work of James Tully, in particular his article ‘Democracy and globalisation – a defeasible sketch’. His article suggests there may be parallels between the metaphysical problem facing crofters struggling to for rights to enable them to continue traditional ways and the struggles of indigenous peoples in Canada. (Tully 2008b: 67f)

imperialism which relates to current national and global legal and political configurations. (Walker 2007: 1, 11)

He argues that this description applies widely, not only to “imperial throwbacks” like the George W. Bush regime in the USA, but also to the workings of the contemporary state system and of larger organisations such as the European Union and other post-Bretton Woods institutions of global governance.

For Walker the informal imperial system at different levels of governance is characterised by four general features: firstly, “cumulative inequality” which operates in a mutually reinforcing fashion over various sectors by a range of mechanisms of control and persuasion; secondly, the requirement and ability to make “knowing intervention in one or more of various aggressive forms – political, legal, economic and, in the last resort, military”; thirdly, the willingness and ability to modify itself as required in order “to retain the authority-in-the-last-instance of the imperial system”⁶; finally, it is resilient, highly durable and indefinitely extendable. (ibid: 4f)

Walker contends that informal imperialism’s institutional structure, “aided and abetted by a universal meta-narrative of legal and cultural development, is implicated in the pattern of Western political and economic hegemony”. (ibid: 3)

From such a perspective, the on-going coercive impositions of ‘privatisation’ and ‘Leviathan’ as the two strategies for reforming common pool resource systems can be understood as existing within, and mandated by, a broader structure of domination which political action is the practice of imperial power.

3. ‘LEVIATHAN AND PRIVATISATION IN CONTEMPORARY CROFTING GOVERNANCE

In the context of crofting governance, genealogies of the two strategies can be drawn into the present. ‘Privatisation’ approaches have recently been recommended by a free market economist and a crofting lawyer (Blundell 2006. Wilson 2010: 15), but it is the ‘Leviathan’ strategy that predominates reform agendas for the governance of crofting today.

A recent example of the latter is in the way in which a political decision to clarify the boundaries of croft holdings has been implemented. Crofting lawyers have long criticised the lack of ‘certainty’ regarding croft boundaries and called for the creation of a comprehensive map based crofting register to resolve this issue. The Scottish Government used the Crofting Reform Act of 2010 to accede to this request by making the mapping of croft boundaries compulsory, despite some crofting communities saying they did not feel the need to map their crofts in this way.

⁶ According to Professor Walker the ability to modify is required because the imperial mindset is “threatened to the extent that certain social relations escape its logic”. Therefore it is “prepared to adapt and to be flexible in its own terms to the extent necessary to maintain its hegemony rather than founder on its own rigidity”. (Walker 2007: 5)

When the content of the Government's proposals for the register of crofts was unveiled concerns were expressed and criticisms made of the 'trigger-point' approach by which they were proposing to populate the register. This method obliges a crofter to draw up their croft boundaries individually on the first occasion that they approach the Crofting Commission with a regulation request after the new law creating the register had been passed. The boundaries put forward would be sent out to neighbouring landholders and open to challenge by them.

A report from the Scottish Parliament's then Rural Affairs and Environment Committee (RAE) outlined widespread criticism of the 'trigger-point' approach: crofters complained about it in their submissions (RAE 2010: Sections 261, 270-273); practically all third sector organisations had reservations about it (RAE 2010: Section 258); crofting lawyers had nothing good to say about it (RAE 2010: Section 290). Indeed, the entire RAE committee expressed their concern that "it might lead to an increased risk of boundary disputes and to individuals incurring costs over and above registration fees". (RAE 2010: Section 302)

The general view was that the trigger-point system had the potential to open up, in an unhelpful way, many dormant croft boundary disputes which in fact require careful negotiation and mediation for their resolution. The parliamentary spokesman of the Scottish Crofting Federation, the crofters' representative organisation, said the organisation totally rejected the trigger-point proposals, declaring them "colonial" and adding:

Government officials saying 'you will do it or else' in this age of supposed enlightened government does not go down well at all. Crofting communities are capable of mapping themselves should they wish to. (WHFP 2010: 7)

The SCF proposed an alternative collective approach called 'community mapping' by which, as part of a mediated process, the crofters of a township could work collaboratively to map their lands. The SCF pointed out that the process could also be used as part of a wider asset-mapping exercise to support endogenous development.

Despite winning strong backing from crofting lawyers, third-sector organisations and some government agencies, this potential community development tool was not given meaningful support by Scottish Government who clearly favoured the 'trigger-point' approach and chose to press ahead on that basis. The Government's comments, as reported in the RAE committee report, appear to show that they over-relied on the advice of civil servants who had given little regard to the views of stakeholders and little thought to the possible consequences of the method. (RAE 2010: Section 274)

Another 'Leviathan' reform imposed under the same Act is the 'duty-to-report' by which every crofting township common grazings committee – a committee which exists in each township to manage and regulate use of the township's grazings land – must report periodically to the Commission on the state of crofting activity in their township. The vice-chair of the SCF responded: "This new duty to police crofts and grazings usage puts an unreasonable and unwelcome obligation on crofters to shop each other to the commission." (Macleod 2012: 2)

This compulsory legislative requirement was imposed without any public consultation – having been introduced as an amendment by a Member of the Scottish Parliament during the final stage of the legislative procedure. Its timing is particularly perverse as it is an added administrative burden on common grazings committees at the end of a ten year period when, according to the Scottish Government’s own figures, more than one-third of all these committees have disbanded (from 853 out of a total of 1070 in 2003, to just 518 out of 1070 in 2012). This collapse in this township level commons governance system is believed to be related to a large decline in livestock on the hills that is partially due to other recent changes in Government agricultural policy support which have adversely affected crofting areas. (CPGoC 2013: 4f)

CONCLUSION

This article has assessed some historical and contemporary changes in tenurial arrangements in the west Highlands and Islands of Scotland in order to test Elinor Ostrom’s hypothesis that externally led strategies for averting the so-called ‘tragedy of the commons’ can be classified in terms either of ‘privatisation’ or of the ‘Leviathan’ of coercive external control over governance of the resource.

It seems that some of the major attempts to reform landholding arrangements in the west Highlands and Islands can indeed be understood in terms of these two strategies for change. In the earlier of the two ‘privatisation’ reforms analysed in this article – the creation of individual crofts in the 19th century – it seems clear that in this case ‘quasi-privatisation’ was externally led as well as also being a coercive approach to changing the working of the commons. However, in the other ‘privatisation’ reform examined – that which was instigated in the 1960s and 1970s – it has been argued that the proposed tenurial changes were not instigated externally, but had derived instead from a proposal made by rights-holders.

As a result this example does not conform to Ostrom’s hypothesis – indeed it undermines one of its premises. However, the hypothesis can be maintained if the intervention is understood more broadly as existing within a longstanding structure of domination in which governance relations are characterised by the practices and logic of informal imperialism as a mode of power. In order to strengthen the claim of Ostrom’s hypothesis, it may be useful to examine whether other instances of the erosion of common pool resources systems by ‘privatisation’ and ‘Leviathan’ can also be helpfully construed as part of an ongoing struggle within an informal imperial context.

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