Community Rights and Access to Land in Scotland[22]

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The purpose of the paper was to give a flavour of the great land debate which has been raging in Scotland for some years, and of which the most tangible outcome so far has been the Land Reform Scotland Act. This Act, passed by the Scottish Parliament in January 2003, contains provisions permitting general public access to land, and allowing for the community purchase of land. Before moving on to the land debate, the paper considered a number of preliminary points: the history of commons or "commonties" in Scotland; whether anything approximating to an *allemansrett* might be said to exist in Scotland; the Trust concept; and two myths regarding ownership and access.

Commons or commonties

The history of commons in Scotland, or "commonties", as they are often referred to, is very different from the better known history of the commons in England. In Scotland division and enclosure of common land came rather later than in England, and does not appear to have been, at least at first, so socially disruptive. The last purely Scottish Parliament before the Union with England in 1707 passed some significant agricultural legislation, including the Winter Herding Act of 1686, the Runrig Lands Act of 1695 and the Division of Commonties Act, also in 1695. This last provided for the division of commonties among the various interested proprietors, although excluding from its ambit commonties in which the Crown was one of the proprietors, and the commonties of royal burghs. Some royal burghs, especially in the Borders, have continued to guard their commons jealously until the present day. Following the 1695 and later Acts there were great changes in farming practice in Lowland Scotland in the 18th century, often involving enclosure and eviction. Although there were some demonstrations and riots this was a largely peaceful process when compared to the trauma of the "Highland Clearances" in the following century (see further below).

Does anything approximating to an "allemansrett" exist in Scotland?

Although there was a wide-spread belief in the existence of a general public right of access to land in Scotland prior to the Land Reform Act, a right often referred to as "the right to roam", this was controversial, and in the opinion of some, including the speaker, a myth not founded upon law (see *Two myths* below).

However, there are some longstanding public rights to the "foreshore" in Scotland, that is, the land between the high and low watermarks of ordinary spring tides. Although traditionally couched in the language of feudal land lawyers, these rights amount in effect to an *allemansrett*. There is, it is said, an inalienable Crown right in the foreshore, in order to safeguard its use by the public for the purposes of navigation, fishing and (in all likelihood) recreation. There is also a public right of navigation in non-tidal waters. As one of Scotland's older authoritative legal writers, John Erskine of Carnock, writing in the 18th century, put it, the Crown's right in such matters is "truly no more than a trust for the behoof of the people."

The Trust concept in Scotland

As the above quotation illustrates, the concept of a "trust", so closely associated with English law, is well known in Scotland also, and has proved extremely useful. However, the trust

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concept, as received and adapted into Scots law, is free from many of the abstruse technicalities of English law – there being, for example, no division in Scots law between "common law" and "equity" – and is therefore, it is suggested, much more suitable for export.

Many trusts hold land in Scotland, some of them expressly for the benefit of the public. For example, the National Trust for Scotland, established in 1931 as a charity "to protect and promote Scotland's natural and cultural heritage for present and future generations to enjoy", owns many properties in Scotland, including castles, houses great and small, gardens and areas of natural beauty. It enjoys wide public support. A more recent established Trust is named after the celebrated John Muir (1838-1914), one of the pioneers of the world conservation movement. Muir was born in Dunbar, near Edinburgh, but emigrated when young to the United States. The John Muir Trust was formed in 1983 to protect and conserve wild places and to increase awareness and understanding of their value. It now owns and manages 20,000 hectares in the Highlands and Islands, including Ben Nevis, the highest mountain in Britain. An interesting variation on the trust theme, the Stornoway Trust, was established by Lord Leverhulme, about 80 years ago. Leverhulme, a wealthy industrialist, was the proprietor of Lewis and Harris in the Outer Hebrides. He set up the Stornoway Trust, with trustees partly *ex officio* and partly elected, to own and administer the greater part of the land in the parish of Stornoway in the northern part of Lewis for the benefit of the inhabitants of the parish. A further variation on the theme is the Shetland Amenity Trust in the Northern Isles.

In addition to these private trusts, there are also some public bodies which hold or care for land in trust. The most notable of these is Historic Scotland, the rough equivalent of "English Heritage", an executive agency which looks after many ancient monuments and historic buildings, from the royal castles of Edinburgh and Stirling to neolithic structures such as Maes Howe in Orkney.

More recently, and rather belatedly, two National Parks have been established in Scotland, the Loch Lomond National Park in 2002, and the Cairngorm National Park in 2003.

Two myths

Two myths regarding the ownership of and access to land have been very influential in Scotland:
(i) The first is encapsulated in the phrase "the right to roam", already mentioned. The belief that there is (or was, before the passing of the Land Reform Act) a right to roam, was regarded by many as no myth, but as a legal right. This belief was deep seated and widely held, especially in the Highlands, yet it appeared to have no basis in strict law. Even judges, however, were not unsympathetic towards the belief. For example, in a case concerning public rights of way heard in 1866, the judge, Lord Deas, observed:

"I have been familiar with hills myself on which I would have thought it a most invidious thing if I had been prevented from going to the top and down again, and I never knew of anybody so prevented. But that did not give a right, and could not be pretended to have been done in exercise of a right."

The debate regarding access to land quickened towards the end of the 20th century, together with a parallel debate concerning the ownership of land, to such an extent that it became almost an article of faith among many hill walkers and ramblers that there was a "common law" right to roam.

(ii) The second myth which is regularly put forward is that in the days of the clans
land was held in common, or at least in trust for all the clansmen. Unfortunately, those who assert this myth of primitive clan communism have shown a distinct lack of intellectual rigour

about what is meant by a "clan", about what period of time is under discussion, and about how the clans acquired their land in the first place. The thesis has, in fact, no basis in law or history. It has, however, proved surprisingly powerful and re-surfaces at regular intervals. For example, in a letter written to *The Times* newspaper dated 25th January 2003 Ian Sandison asserted that:

"Clans had territory. The "laird" [i.e. the chief] led the clan in protecting it. It was never his to sell and no one had any right to give him title to it."

This bold assertion drew a response from Lord Jauncey, a retired Lord of Appeal in the House of Lords no less [effectively, a supreme court judge], who replied on 30th January:
"Sir, Mr Ian Sandison states that no one had any right to give the laird title to clan territory. King James V had no doubt that he had such right when, for example, in 1539 he granted to Donald Mackay in Strathnaver extensive lands in and around that strath [valley]. The Great Seal Register abounds with similar grants of land in the crofting counties by different monarchs in favour of individuals."

A third letter, however, written on 3rd February, reverted to the original proposition.

Another manifestation of this type of myth has been provided by the recent saga of "Who owns the Cuillins?", the Cuillins being the name of the famous and much photographed mountain ridge in the island of Skye. The MacLeods have been major landowners in Skye, including the area of the Cuillins, for over 700 years, the title to the land being in the name of the chief of MacLeod. The Cuillins were put up for sale recently by the chief of MacLeod at an asking price of £10 million pounds. His right to do so was challenged in some quarters on the basis that no-one could, no-one should, be able to lay claim to the high mountain tops and sell them like any other piece of land. It was the first time, it would appear, that such a claim had been made in a court of law in Scotland. The court scrutinised the title deeds, heard arguments on the law, and found in favour of MacLeod, as they were bound to do. Not long afterwards Ben Nevis, the highest mountain top in the British Isles, was purchased by the John Muir Trust, as already mentioned.

The Land Debate and the Land Reform Act

The fact that the beliefs described above as "myths" were so widely and so strongly held was symptomatic of a deep dissatisfaction with the pattern of landownership in Scotland, especially in the Highlands. The last few decades of the 20th century saw a growing debate on landownership which, in turn, contributed to the demand for radical land reform. The Scottish Parliament (re-)established in 1999, made land reform one of their key objectives.

Three background factors which helped to drive this debate were:
1) The scandal of the "Highland Clearances" – the terrible clearances from the land of peasant cultivators, known as "crofters", which took place all over the Highlands and Islands of Scotland in the 19th century: clearances in the name of "improvement"; clearances to make way for sheep. These clearances caused great hardship and huge dislocation of population. They gave rise to lasting bitterness which was only partly assuaged by the passage of a number of Acts from 1886 onwards designed to alleviate and safeguard the condition of the crofting population. A number of publications – plays, poetry and books – in the second half of the 20th century retold the story of the Clearances, and told it from the point of view of the crofters. It is difficult to believe that the land debate has not been motivated, at least in part, by a desire to put right the injustices of the past.

2) A second factor was the fact that rather too few people owned rather too much of the land in Scotland. Various figures have been quoted: that 1200 people own two-thirds of Scotland; or that

100 people own 60 per cent of the Highlands. In fairness it should be said that the quality of much of the land is very poor. Nevertheless, the imbalance regarding ownership is the worst in Europe.
3) A third factor was concern that many of these landlords were absentee, with no personal stake in the land, and not infrequently non-Scottish: for example, Dutch, German or Arab. There was also some difficulty in ascertaining who really owned the land behind the front of, for example, a trust in Liechtenstein, a bank in Sweden, or a company in the Bahamas.

Community buyouts

As a result of these factors there was a perceived lack of democratic control – a "democratic deficit"; also, and more emotional, a perception that there were ancient wrongs to be righted. Partly as a consequence, a succession of "community buyouts" of land have taken place from 1993 onwards, supported both by private donations and by the public purse. Two years ago a "Land Fund" was established, funded by lottery money, to assist such buyouts.

The crofters of Assynt in the west of Sutherland achieved the first community buyout in 1993, becoming the owners of their own land. Further high profile community buyouts followed, for example, in the island of Eigg, in the island of Gigha, and in the estate of North Harris in the Outer Hebrides. These community buyouts commanded widespread public support, and the psychological effect was incalculable. One of those involved in the North Harris buyout spoke of:

"A historic day for North Harris. For the first time ever, the people of North Harris can look at their land and know that it belongs to them."

However, the buyouts have not been uncontroversial. Concern has been expressed about the amount of public money involved, about the difficulties of repaying large public loans and about the long-term viability of some of the enterprises.

The Land Reform Bill/Act

Planning for land reform was already under way before the Scottish Parliament was reconstituted. There was a climate in favour of reform, as has been seen. Norway, and Scandinavia generally, were looked to as possible models. A Land Reform Policy Group was set up by the UK government in 1997. The main recommendations of this Group were accepted, namely: 1) "to create a right of responsible access to land for recreation and passage"; 2) "that rural communities should be able to buy land when it is put on the market"; and 3) "that crofting communities should be able to buy land at any time".

The Scottish Parliament, established in 1999, made land reform a priority. A Draft Bill for consultation was published in February 2001. This elicited more than 3,500 responses – a quite unprecedented number. It seemed that the draft pleased nobody: it was heavily criticised by both landowners and land reformers. In November 2001 a Land Reform Bill was introduced to the Scottish Parliament. Its aims were broadly in line with those of the Land Reform Policy Group: namely, to provide for responsible public access to land; to allow for community purchase of land by way of pre-emption; and to give crofting communities an absolute right to purchase land. In introducing the Bill, Scotland's first, and much lamented, First Minister, Donald Dewar, said that "The good landlord has nothing to fear." Some landlords, indeed, including the Queen at her Balmoral estate, had effectively operated an open access policy for years.

The Draft Bill was under consideration in the Scottish Parliament for over a year. It was debated extensively, and in public, in Committee. Many witnesses were called, or volunteered to give

evidence to the relevant Committees. As regards access, the existence or otherwise of a "right to roam" remained controversial. Some viewed the Act as declaratory of the old "common law". Others considered it to be a new departure. The debate was wide ranging. What restrictions should be placed on the public right of access? Should the right only operate between sunrise and sunset? What was the position about access for commercial purposes? How far should the right apply, for example, to mountain guides, riding schools or photographers? Should golf-courses be exempt? Should there be a procedure for suspending access rights in some circumstances? If so, who should operate it? Should there be core path networks? Should there be an "Access Code"? These and many other questions were debated in detail. In the event, the Act gave "a right to responsible access to land for recreation and passage." The right was widely interpreted, and relatively few restrictions were placed upon it. There was to be a Scottish Outdoor Access Code for guidance. Local authorities had a duty to plan paths. Access disputes were to be resolved, in the first instance, by local access forums, with a further appeal, if necessary, to the Sheriff or local judge.

The second part of the Bill allowed for community purchase of land, as and when it came on the market - that is, it gave a right of pre-emption. Questions arose in Committee as to how to define a community, how to constitute a community and, crucially, how to ensure a valuation that was fair to both sides. It was decided that a community should be defined by postcode area, and could be as few as twenty people. In order to exercise the right of pre-emption, the community must constitute itself as a company limited by guarantee, and register an interest in the land. The valuation of the land could include salmon fishing rights and mineral rights.

The third part of the Bill allowed crofting communities a right, not of pre-emption, but of compulsory purchase. One point at issue here was, given that not all those in a "crofting community" would actually be crofters, how large a majority of crofters should be in favour of the community purchase. This was hotly debated. The Scottish Crofting Foundation argued for a 75 per cent majority, but in the event it was decided that a bare majority of crofters would be sufficient. It was confirmed that the crofting community should have a right to purchase at any time, although the purchase should be compatible with sustainable development, and in the public interest. The valuation should take into account the cost of disturbance, and the effect of the purchase on the land remaining with the landlord. It might include salmon fishings and mineral rights. The crofting community must constitute itself as a company limited by guarantee in order to purchase.

The Land Reform Act was passed in January 2003, and received the royal assent in February. The Act itself, together with much accompanying material, is to be found on the Scottish Parliamentary website (www.scottishparliament.uk). The Act remained controversial to the end. In its regular column entitled *Debate of the Week*, *The Herald* (based in Glasgow) highlighted the Land Reform Act on 25th January 2003, noting comments made in newspapers of varying descriptions as follows:

Daily Record "The historic Land Reform Bill is one of the all-too-few occasions when the Scottish Parliament has proved its worth. The bill may not right ancient wrongs, but it will bring some fairness to the countryside."

Daily Mail "This legislation is dangerously flawed. It is inspired by class hatred, combined with an alarming urban ignorance of how our rural economy works ... This is a charter to turn us into the Albania of northern Europe, except Albania has recently repealed such tyrannical laws."

The Press and Journal (Aberdeen) "It was certainly a momentous day for the Scottish Parliament. Whether the passing of the ... bill will come to be seen as a momentous day for

Scotland and Scots is another matter. As ever, the broad jubilation which surrounds populist legislation might yet melt away once the detail becomes clearer."

The Scotsman (based in Edinburgh) "When all is said and done, this is flawed legislation. The heart of the problem lies in the attempt by the parliament to place severe limits on the rights of a landowner to use and dispose of their property."

The Herald itself commented, "If handled properly with appropriate back-up, land reform can become an economic regenerator, reversing centuries of decline." On the previous day the *Herald* had hailed "a historic day for Scotland", and written, "This bill is built on good intentions and fine principles. How land reform works in practice is what really matters ... It will not be easy ... [but] the risk must be taken."

The London *Times* had noted that the Act was, " an attempt to redress a longstanding social injustice", but went on to comment, "That may explain why the proposed legislation is long on ambition but short on good sense."

The debate continues, as does the programme of land reform.