scottish universities insight institute

mobilising knowledge for a better Scotland

(Un)Earthing New Pathways for a Justice Transition:
Cultivating Hope and Food on Contested Terrains in Scotland, Amazon and the Arctic

Final Report – Annex 2

Unearthing new perspectives on and from Scottish land reform

Malcolm Combe (University of Strathclyde)

This part of the report, by Malcolm M Combe of the University of Strathclyde Law School, is in three parts. Part A offers an overview of contemporary land reform in Scotland and the legal tools provided. Part B is an adapted script from a presentation delivered at the "Navigating new pathways…" event hosted at the University of Strathclyde on 21 June 2022. Part C is an adapted script from a presentation delivered at the Strathclyde Centre for Environmental Law and Governance (SCELG) Colloquium in May 2022.

Part A: Land reform in Scotland – an overview

The story of Scottish land reform is a long one, involving agrarian reform and land use change and various legal responses to that, including the important protections contained in the Crofting Acts (first introduced to the Highlands and Islands in the late 19th century). As part of this SUII knowledge exchange exercise, we learnt about much of this on Skye from the local community and expert historians; indeed, there was some overlap between these two categories. We also reflected on this at events in Govan, Glasgow hosted by GalGael.

Despite that long history, this part of the report offers some analysis from the somewhat arbitrary but also useful starting point of Scottish devolution and the establishment of the Scottish Parliament (with the passage of the Scotland Act 1998).

An introduction to the current legal situation for Scottish land reform

Essentially, since the late 90s there has been a movement towards the reform of the distribution of land across society and aspects of regulation of land ownership in Scots law, which has led to some legal devices being brought in. We now have two Land Reform (Scotland) Acts, from 2003 and 2016, which put communities in a privileged position in relation to land assets that are local to them in some circumstances.

One way to think of land reform is reform to change the owner of land; that is to say, reallocating the right of ownership somehow, essentially because you think a new owner might do better than the current owner, for whatever reason. In this context, it is worth acknowledging the strong right of

ownership in Scots property law (drawing on its Roman law traditions), which gives a landowner a strong agenda-setting role.

The two modern ways that Scotland has catered for this is through rights of acquisition for certain prioritised people or associations of people: some tenants can have a right to buy in particular contexts, such that they can buy their landlord's interest, and communities – that is people living in a particular area – can benefit from a right to buy. The focus here is on the latter, but for completeness it can be noted that since 1976 crofting tenants have had a right to become owners of their croft, although with crofting law being what it is (with controls, obligations and duties that stick around even for owner-occupier crofters) the exercise of this right might not have a massive impact, literally, on the ground. This right to buy is now in the Crofters (Scotland) Act 1993. There are also weaker rights to acquire in relation to other rural tenancies, such as the entitlement to register to gain a right of first refusal (pre-emption) in relation to any secure agricultural holdings in Scotland (let under the Agricultural Holdings (Scotland) Act 1991).

Returning to community acquisition, Part 2 of Land Reform Scotland Act 2003 allows properly constituted community bodies (i.e. members of a community who join together to form a juristic entity, normally a company limited by guarantee but also SCIOs or ComBen societies) to acquire land. They must comply with section 34 of the legislation – and be suitably local, and locally accountable. They also need Scottish Ministers (or indeed civil servants) to agree they are geared towards "sustainable development". Where this all happens, they can target local land to obtain a right of first refusal by registration of an interest in the Register of Community Interests in Land. This is maintained by the Keeper of the Registers of Scotland. It used to be the case that this right only applied to rural areas, but the Community Empowerment (Scotland) Act 2015 expanded this right to buy to the whole of Scotland, urban and rural. Assuming you register, then when the targeted land becomes available, a local ballot is held to ensure support of the local residents to exercise of the right, then consent will be granted by the Scottish Ministers if community acquisition is in the public interest.

There are also stronger rights to buy – on a forced basis – for: some specific crofting land and related land in the Highlands and Islands; a narrow class of land that has been mismanaged in some way (since 2018); an even narrower class of land when current owner is somehow operating as a barrier to sustainable development (since 2020).

Land law reform, its context, and in context

That is but a brief overview of the law: see further Malcolm M. Combe, "Legislating for Community Land Rights", in Malcolm M. Combe, Jayne Glass and Annie Tindley, *Land Reform in Scotland: History, Law and Policy* (2020, Edinburgh University Press). A brief overview of the context is provided there to, but for now it can be noted that the statutory developments followed on from a context of extra-statutory developments towards community ownership, in places like Eigg and Gigha. There was also a buyout in the crofting area of Assynt. In 1997, a law was passed to allow the UK Government to divest itself of its croft assets and give them to a local community. A legacy of post-WWI land settlement activities meant there was still some government owned land, and the Transfer of Crofting Estates (Scotland) Act 1997 gave a model for community transfer. This legislation has been used in west Harris. All of this was influential in leading to community models for land acquisition when the Scotland Act 1998 was passed and the Labour Government at Westminster, then the Lib-Lab administration at Holyrood, were deciding what to do.

This eventually found legislative form in Parts 2 and 3 of the Land Reform (Scotland) Act 2003, and as noted above it had a particular focus on any community land project being tailored to sustainable

development, plus any acquisition would need to be locally approved and also classified by Scottish Ministers as being in the public interest. All subsequent rights to buy have also called for similar requirements, or indeed had an even stronger role for sustainable development. This is not defined in the legislation: see further Andrea Ross, "The Evolution of Sustainable Development in Scotland: A Case Study of Community Right to Buy Law and Policy" in Combe, Glass and Tindley, *Land Reform in Scotland: History, Law and Policy*. To simplify, this involves a consideration of social, economic, and environmental issues, and not sacrificing the needs of the future, when making decisions today.

As for what is in the public interest, again this is not defined, but it is more settled in property (and human rights) circles than sustainable development. Scottish land reform cannot ride roughshod over human rights. The European Convention for the Protection of Human Rights & Fundamental Freedoms – the ECHR – contains several relevant human rights that a state must consider before land reform:

Article 1, Protocol 1 provides everyone should generally be allowed peaceful enjoyment of property without interference/deprivation/controls. That is probably the main provision to consider.

Article 6 (the right to a fair hearing) and Article 8 (private and family life, including the home) could also crop up if the legislative scheme was not properly balanced or people's residences were targeted. The provisions in Scots law invariably do not allow forced transfer of a home, and more general safeguards are incorporated to ensure the fairness of the processes. Nothing further will be said of this ECHR articles accordingly.

Returning to the key provision of A1P1, there have been Scottish land reform cases about this. It may help to position these on a spectrum. First, you have the case of *Salvesen v Riddell* [2013] UKSC 22 at one end of the spectrum. There, a land law reform, in terms of section 72 of the Agricultural Holdings (Scotland) Act 2003, sought to confer a very secure tenancy on certain rural occupiers of land, but this was a breach of the landowner's property rights. Compare that to the case of *Pairc Crofters Ltd v Scottish Ministers* [2012] CSIH 96; 2013 S.L.T. 308, which ruled the crofting community right to buy under Part 3 of the Land Reform (Scotland) Act 2003 not a breach of A1P1. That Part 3 right to buy is the strong, buy at any time right; if that is fine, presumably weaker pre-emptive rights are fine too.

That is the context where human rights (and a public interest test) might prevent reform, but a developing part of the story in Scotland is where human rights might drive reform. The International Covenant on Economic, Social and Cultural Rights, particularly article 11, may be particularly relevant here, which seeks to ensure a right to an adequate standard of living and includes the provision of adequate housing, food and water.

Returning to the mechanics of the main community right to buy in Scotland, found in Part 2 of the 2003 Act, when targeted land is exposed for sale by the owner a local ballot held to gauge support, and assuming the process is followed in the statutory timescales – the community can get the land. They must pay the appropriate value – they don't get it free. They can agree a value, or there is a valuation process. Grant funding might help a community. In terms of section 56, a community has eight months between telling Scottish Ministers they want to buy and paying the price – quite tight, really.

For information, as things stand this scheme only applies when the land itself is sold, meaning share transfers in landowning entities do not trigger the community right to buy.

A consideration of how this has worked in practice can be found in John A Lovett and Malcolm M Combe, "The Parable of Portobello: Lessons and Questions from the First Urban Acquisition Under the

Scottish Community Right-to-Buy Regime" (2019) 80 Mont. L. Rev. 211 https://scholarworks.umt.edu/mlr/vol80/iss2/3/

As noted, there are now further rights to buy, including a new Part 3A of the 2003 Act (introduced by Community Empowerment (Scotland) Act 2015, s. 74). This means communities incorporated as a suitable body will be given the right to acquire land if (in opinion of Scottish ministers): it is wholly or mainly abandoned or neglected; or the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community". What this means is explained in legislation: The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018. This right has never been successfully deployed.

Finally, there is a scheme in Part 5 of the Land Reform (Scotland) Act 2016, giving a right to buy available for a community (or a community's nominee) when a landowner is blocking sustainable development, provided certain "sustainable development conditions" are met, alongside "procedural conditions". The procedural conditions are akin to what existing rights to buy need (suitable body, community approval – or where there is a nominee purchaser, that nomination process has been validly carried out and approved). Then you have the sustainable development conditions, which start in familiar terms (relating to furthering the achievement of sustainable development in relation to the land, and the transfer of land being in the public interest), and then there are additional points that: the transfer of land is likely to result in significant benefit to the relevant community to which the application relates and is the only practicable, or the most practicable, way of achieving that significant benefit; and lastly that not granting consent to the transfer of land is likely to result in harm to that community. These are high hurdles to clear.

One alternative scheme is worth mentioning in passing, namely asset transfer requests give another way for communities to get some assets from public sector bodies (and only such public bodies). Where a request is made, under Part 5 of the Community Empowerment (Scotland) Act 2015, this must be properly considered by the public body.

Part B: The state we are in: new approaches to land governance in Scotland

Presentation of Malcolm M Combe to the NAVIGATING NEW PATHWAYS FOR OUR RIGHTS, OUR LAND AND COMMON JUSTICE event on 21 June 2022.

The adapted text of the presentation made at SUII at the Collins Building at the University of Strathclyde follows.

Hi everyone, thanks for welcoming me to this event. Thanks also to Brian for pulling everything together.

When Brian Garvey asked me to finalise my title, I took a little while to finalise this. I could have simply trotted out my usual "land reform in Scotland; here's the current law", or considered "here are some cases where the ECtHR has ruled about deprivation or control of property, in terms of the 'Property Clause' [or 'Takings Clause'] of A1P1 of the ECHR".

I didn't want to do that though. Instead, I wanted to think about "pushing the envelope", and where Scots law might be moving to anyway, and where it might be encouraged to move towards. There are emerging treatments of human rights and property theory that might help here.

The title for my paper is “The state we are in: new approaches to land governance in Scotland”.

This is a bad pun playing on the two meanings of the word “state”. The best pun on this was already taken, in a 2002 article in the Journal of Business Law by an Edinburgh Uni Professor Andrew Steven (177-94) entitled, “Scottish land law in a state of reform”.

That raises my first point though – we are in a state of reform; we are – geographically – in a polity, a jurisdiction, of reform.

Scots law is adapting. We have a context that is receptive to change.

Professor Gregory Alexander, in a paper in the Illinois Law Review (“The Sporting Life: Democratic Culture and the Historical Origins of the Scottish Right to Roam”, 2016 U. Ill. L. Rev. 321), drew attention to the culture of Scotland that was receptive to the introduction of the right of responsible access at the time the first Land Reform Act was passed – we’ve got two now, so you need to differentiate them, remember. Also, we have jealous glances from some activists down south, where the English campaign for a right to roam has only gone so far, and their community rights to acquire land are comparatively weaker despite the fact all these measures came after the turn of the millennium. We also now have a standing body – the Scottish Land Commission – with an overarching role looking at land reform, and in recent years we have either had a Minister or a Cabinet Secretary with “land reform” in her title.

Being receptive to an idea is not enough to get it over the line though, not least given the context that we have here such that the Scottish Parliament must legislate within the bounds of the devolution settlement, including the ECHR. Being receptive is undoubtedly important though, and that sits in the backdrop of what happens here.

So what is the state of the law in our state of reform? In land reform terms, I mean, and here, I’m focussing on redistributive steps. There are other land reform types, perhaps change tenure arrangements (like we did early in the 2000s with the abolition of feudal tenure) or changing the entitlements that arise with ownership across the board (consider access rights, affecting all landowners).

What we have at the moment begins with the Land Reform (Scotland) Act 2003. In terms of Part 2 of 2003 Act, properly constituted community bodies (a juristic entity – one of three legal forms), who Scottish Ministers (i.e. civil servants) agree are geared towards sustainable development [a term undefined in the act, which we can maybe discuss later], can target local ~~rural~~ land to obtain a right of first refusal (pre-emption, or “first dibs”) by public registration of an interest in the Register of Community Interests in Land, maintained by the agency Registers of Scotland.

Note the scored out “rural” – by the Community Emp (Scotland) Act 2015, that was previously a rural only measure (10K population or less)

Assuming valid registration, when affected land becomes available, a local ballot is held to ensure the support of the local residents to exercise of the right, then consent will be granted by the Scottish Ministers if community acquisition is in the public interest – I will come back to public interest.

Also, there are three stronger rights to buy – on a forced basis – for:

- some specific land in the Highlands and Islands (namely land under crofting tenure or closely linked to crofting land. Technically this right has not been used to force a transfer, but it has, shall we say, “encouraged” sales to communities;

- a narrow class of land that has been mismanaged in some way (this right was introduced by CE(S)A 2015, and in play since 2018) – that is land that is A N D;
- an even narrower class of land when current owner is somehow operating as a barrier to sustainable development, and strict sustainable development conditions are met (since 2020).

To explain quickly how we got to these community rights, and glossing over A LOT OF Scottish history, some community ownership schemes came into being without any specific legal regime to help them, then there was facilitated transfer catered for in the late 90s. We then had devolution, and then that gave us the 2003 Act. [More detail is provided in Part A of this section of the Report.] The law is now in place, so let's consider some interesting human rights points relating to it, and what else might be influential in future.

First of all, I mentioned public interest earlier, as communities can't exercise a right to buy unless it's in the public interest. The protection of property is important in the ECHR – of many terrible things that happened in WW2, pilfering property was such a thing. So states shouldn't be able to meddle with property rights. This is not ABSOLUTE though. Cf prohibition of torture – that is absolute.

No question though that Scots property law is underpinned by a strong ownership right and the associated entitlements of landowners, and Scotland's pretty traditional approach to human rights and land that has generally prevailed until now. That being said, Scotland is moving a bit now though, with ICESCR and food governance stuff featuring in Scottish statutes.

Human rights can be deployed as a shield against change, then. But human rights instruments can also be used in a swashbuckling way, to instigate change.

The ECHR is maybe not the most swashbuckling of instruments though. A1P1 is a right to protect property *when you have it*. It is not a right to your own allocation of property. It is not a right to 10 acres each. So those who have property can try to to fight off reform attempts, this much is true.

But…

It's not as simple as just saying "no, you can't take away property" – Frankie McCarthy's chapter in the edited collection *Land Reform in Scotland: History, Law and Policy* helps explain that.

Then, other human rights (and other human rights instruments) can come into play.

I've mentioned A1P1, but as a reminder the ECHR also stresses people have a right to a home, which can be relevant to land use and land decisions that affect someone's established way of life. I'm also aware of colleagues (such as Dr Elaine Webster) considering notions of dignity and culture, and whilst it seems unlikely this would feed directly into Scottish land law it might be the kind of thing that could be raised in and around discussions for future measures. Separately, I know in Wales the insidious damage second and holiday homes are doing to language communities is something that has been actively thought about in planning policies of Isle of Anglesey County Council & Gwynedd Council. When there was a newspaper report about something similar in a traditionally Gaelic area in Scotland this was met with predictable mockery from some quarters of the internet, but I wouldn't be so hasty about dismissing this.

What else? One might make a tentative allusion to the International Covenant on Economic, Social and Cultural Rights, particularly article 11, which seeks to ensure a right to an adequate standard of living and includes the provision of adequate housing, food and water.

As things stand, this is not directly justiciable in a Scottish court. You can't raise an argument about this in the same way you can the ECHR (the latter being hardwired into the devolution settlement).

But we should be going in that direction, subject to some slight hurdles (as we have seen with the UNCRC and the local government bills). People like my colleague Professor Alan Miller will be able to tell you more about these rights overall though.

What other legal options are out there? I'll mention one for completeness, then quickly move on. Are we going to give legal personality to natural features (as has been seen in New Zealand and South America)? Certainly not overnight, anyway; it seems fair to say Scots law has not got to the stage of recognising this.

What I will mention thought is the right to a healthy environment. Again, this is something that is not entirely new – in Mark Stallworthy's book *Sustainability Land Use and the Environment* from 2002 he has a chapter on it – it's just the issue of getting it before the right forum. Another colleague here who can tell you about this is Professor Elisa Morgera – she written widely on corporate, environmental accountability in international law, and wrote about this particular topic in a recent blog post: https://oneoceanhub.org/making-progress-on-the-international-recognition-of-the-human-right-to-a-healthy-environment/. She begins her post by noting international recognition of the human right to a healthy environment by the Human Rights Council in October 2021. In a recent resolution on 'The human right to a clean, healthy and sustainable environment', the Council "recognize[d] the right to a clean, healthy, and sustainable environment as a human right that is important for the enjoyment of human rights." Morgera noted that this recognition can be seen as the culmination of decades of interpretation of existing international human rights law in conjunction with international environmental law, as summarized in the 2018 UN Framework Principles on Human Rights and the Environment.

What else? I spoke to Brian about what else I might include in this talk, and he reminded me of Ana Laide's work in Brazil, in the Volta Grande of Xingu, which has involved mobilisation that has halted the encroachment of a mining project (for now, at least) and the fact that the right of traditional communities to free, prior and informed consent was not respected meant a successful legal action. There might have also been some licensing law involved, but let's focus on the free and informed consent point.

This space afforded by this legal manoeuvring allowed the communities to reoccupy the land with a view to securing it.

"Free and informed consent" – Daria Shapovalova might be the person to tell us more on that. Vulnerable as their situation is, this forced input is something that indigenous peoples benefit from. Now, it's a prickly issue when it comes to drawing analogies between for example Highlanders and indigenous peoples, given the intermingling of populations and Highlanders' active participation in society, but is there something that we could somehow tease out?

And is there anything else in Scotland that might have an impact? Could economic, social and cultural rights, or the right to food, or the right to a healthy environment, potentially provide a chink in the armour of landed power relations, and thereby afford space for community access and socially just use of resources?

The law might be an imperfect tool for this, but with suitable community activism it might create space.

Here's an example, relating to access to justice (which brings in the right to a fair hearing under article 6 ECHR). There is something called the Aarhus convention. You may have heard of it. It is relevant for environmental litigation. If you can find an environmental point in relation to a landowner or

developer's plans, raise it. You'll likely get assistance to do so, or at least you'll be more likely to get help than you might otherwise, and that might open up the chance of a protective costs order (or protective expenses order, in Scots law parlance).

Another short-term consideration is that the existing law does have some exhortations to get communities involved. Part 4 of the Land Reform (Scotland) Act 2016 encourages land owners to tick a box of engagement, and there is the Land Rights and Responsibilities Statement (almost a soft instrument) – further developments are perhaps to come here. Reminding land owners of this might at least make them think.

Finally, is property law *more generally* moving when it comes to being socially just and all that? Here I will make quick reference to the emerging work of Professor Bram Akkermans at Maastricht (developing the social obligation theory of property law of Gregory Alexander), do we need to reconceptualise the theoretical justification of property? In his recent inaugural lecture, after a property and sustainability conference I was lucky enough to participate in, he pushed for property rights to be recognised and justified when they contribute to planetary flourishing. I would recommend his inaugural lecture on YouTube [also discussed below in Part C].

So that is the state we are in. We are in a state of reform, but we are maybe not quite where many of us want to be. Projects like this give us a chance to try to get there, wherever there might be.

Part C – Presentation to the SCELG X Colloquium

(Un)earthing New Pathways for a Justice Transition…in Scotland and Brazil

The adapted text of the presentation made at the Collins Building at the University of Strathclyde on 4 May 2022 follows.

As I begin, I will just take off my MacLeod of Harris tartan face mask. I'll come back to some MacLeod chat later. Before you ask, there is no particular significance to this MacLeod mask – basically Kilbarchan Pipe Band, of which I am a member, got a load of tartan back in the day and has used the tartan since for its uniform. I do have a MacLeod great grandparent though, so I can just about claim it for myself…

Hi everyone, thanks for welcoming me to SCELG 10. This is also, I think, despite joining the School in December 2019, the first time I've spoken in person at such an event, and my second time attending an event (in person). It's great to be here.

When the call went out as to what I might speak about, I did ponder this for a while. I recently spoke at a property law and sustainability conference, musing about how traditional approaches to property law can leave matters of biodiversity to landowners, and how this played out in relation to a non-domestic animal that is heavily regulated in Scotland, the deer.

We can talk about all of this over coffee later – deer being something I have on the brain owing to my involvement with the Scottish Government's Deer Working Group – but for this I decided to set myself the challenge of talking about a fresh project, and it really is fresh, namely a comparative, interdisciplinary project that has been supported by the Scottish Universities Insight Institute (SUII).

Basically, this project was all about land; land as a resource, as an investment, and for its extractive value. There is also an emerging concern – currently playing out in a Scottish context – about the financialisation of land for the carbon and green economy. A notable example of that is where

Brewdog bought land at Kinrara, Speyside, to create its "lost forest". It is reported they the gamekeepers who worked there lost their jobs in the aftermath of that with the houses they'd been living in being sold, despite the family connections that existed for these individuals in that place.

Back to this SUII project then. The project was sparked by our non-law colleague Dr Brian Garvey, a Senior Lecturer in Work, Employment and Organisation.

Here he is looking all professional in his staff profile picture, and here he is speaking just last Saturday at GalGael in Govan, Glasgow.

More on GalGael later – the word though is about a joining of Scots Gaelic and non-Gaelic cultures, "Gal" means non-Gael, and "Gael" of course refers to the traditional (dare I say indigenous? Probably not) occupiers of the Scottish Highlands and Islands. More on that later too.

Anyway, Brian has done some work in Brazil in the past, and more specifically he has worked with the Munduruku people, who are based in the state of Pará.

Primarily they live around the Cururu River (a Tapajós River tributary – pardon my Portuguese), and they only have one river system, I understand, that has not yet been ecologically damaged by extractive industries (notably mining – you'll know about logging of the Amazon Rainforest, I'm sure, but there is a gold rush too).

Here are some recent stories, from the UN and a rights defender, about what has been happening to the Munduruku: https://www.ohchr.org/en/press-releases/2021/06/brazil-un-experts-deplore-attacks-illegal-miners-indigenous-peoples-alarmed; https://www.frontlinedefenders.org/en/case/increased-violence-munduruku-territory-puts-indigenous-hrds-higher-risk; and https://lac.unwomen.org/en/noticias-y-eventos/articulos/2021/04/press-release---ataque-asociacion-de-mujeres-munduruku-brasil.

It took one of the delegates three days to get out of her home area before she was even in a position to leave Brazil, owing to how closely planned her extrication had to be (together with the remoteness).

As for the two inspirational women who joined us in Scotland, these were Maria Leosa Munduruku and Ana Laide Barbosa, then another two joined the party (including someone recording a film), along with Maria Leosa's daughter.

So where could we take Brazilians to learn about land issues in Scotland? We opted for the Isle of Skye, and here we are at the site of a 19th century land struggle on the approach to Glendale (where British marines were deployed to face off against agitating crofters). Again, I can talk about the Crofters' Wars of the late 19th century, or the post-Clearances resettlement after World War 1 as part of the land for heroes policy, if you like over coffee, but we wanted it to be about the present day.

Let's fast forward to the year 2000, when the people of Dunvegan put up a community cairn, in a hill above their village and bay.

Well, I say it's their village, but there is a large landowner in this area.

Dunvegan is the seat of MacLeod of MacLeod, one of the clan chiefs who ultimately managed to become proprietor of land after the collapse of the Gaelic clan system, which finally ceased in the aftermath of the Battle of Culloden in 1746.

He owns approximately 40,000 hectares in Skye.

So whilst this cairn was supposed to be a sign of community engagement and vitality, the cairn is only part of the story.

At the site of the cairn, we noticed some very young trees. A member from the local community who joined us noted she hadn't seen this planting before.

Anyway, this scheme has been in the news. The Times reported "A total of 371,875 trees will be planted and the carbon offset is estimated to exceed 40,000 tonnes over 65 years."

"The focus will be on planting trees which used to grow on the fertile peat soil, including birch, rowan, cherry, willow, hawthorn and sycamore. The project is being overseen by Scottish Woodlands Ltd. It will be treble the size of the contiguous woodlands around Dunvegan Castle and its gardens."

I found a quote on SLE's website with a Community Council chair welcoming the development, CC's being a statutory forum that can input into local planning processes, and this tree-planting does seem instinctively to be a good thing in a climate change context, but not everyone is keen on how this has been handled.

I know this, cos I spoke to them. [Sorry for the lack of formal citation.]

Anyway, there was a £1m grant here, from Scottish Government and EU sources.

That's £1m for someone with a fair bit of land anyway.

To paraphrase our Strathclyde colleague Matt Hannon, at the same time as these exciting schemes are happening, community groups are struggling to deliver sustainability projects and (in relation to Hannon's research interests) the community energy sector is not as vibrant as it might be. Hannon's research and indeed activism (through his Local Zero podcast) argues a lack of accessible finance is both a cause and consequence of this. [A relevant article, co-authored by Hannon, can be found here: https://www.nature.com/articles/s41560-019-0546-4].

I mentioned energy there, and that makes for another quick analogy. This new scheme in Dunvegan has no community benefit fund. With wind turbine developers, you might get a fund set up, where the community get to spend a small proportion of any profits on e.g. local paths. Not here apparently.

Some general context – when it comes to land use, Scotland, and the Scottish Highlands and Islands in particular, has quite a story to tell. I can't tell it all here, but I will steal the title of a 1970s play (written by a man from Liverpool in England, actually) to simplify the story – that play was called "The Cheviot, The Stag and the Black, Black Oil", and essentially it named three commodities that were prioritised over the traditional practices of those who lived in rural Scotland – the cheviot being a type of sheep, that was more profitable to landowners than rent-paying (but insecure) peasants, so those peasants were shifted off the land, then we moved to the Victorian era of the stag (so deer), then lastly the black, black oil was of course north sea oil and gas.

Landowner decisions were crucial in these twists and turns of Scottish land use. And they still are crucial. When you own land, you get to use it and enjoy its fruits. We all know that, right? That strong agenda-setting role can be crucial.

What would come next in the title of a revamped "Cheviot and Stag…"? The green, green lairds?

A report in The Scotsman from 17 April 2022 by the journalist Dani Garavelli considered green lairds (and also it was there reported that Brewdog had indeed "laid off gamekeepers and sold off their houses"). And I think it's fair to say Scotland is realising this presents issues. Savills recently noted that in 2020 Scotland's so-called poor livestock land values increased some 17.5% during 2020. (This isn't

just a Scottish issue: a recent BBC Alba programme compared the situation between Wales and Scotland, where Welsh farmland is being lost to forestry investment).

So that's where we're at in Scotland, what did the visitors make of this? What did they learn? What did we learn?

Here are some thoughts that I remember.

Free and informed consent – vulnerable as their situation is, that's something that the Munduruku and other indigenous peoples benefit from. Is there something that we could somehow tease out from this for Scotland?

Here's another comment: "Denying access to the water was like denying access to your mother". To explain the context of this, the foreshore in Scotland, as a default, is owned by the Crown (with some public rights in relation to it). There are places where the foreshore is privately owned though – John MacAskill's *Scotland's Foreshore: Public Rights, Private Rights and the Crown 1840 – 2017* (EUP, 2020) charts the history of this if you are interested. Dunvegan is such a place. This is relevant in terms of activities that can be undertaken there, including for example landing a boat with a catch. At one stage there was a comment along the lines of living a traditional way of life, e.g. by fishing etc., can itself become an act of resistance. This also conjured ideas of Pacha Mama – or Mother Earth – and of giving legal personality to natural features (as has been seen in New Zealand and South America), but it seems fair to say Scots law has not got to the stage of recognising this.

When generic stories were mentioned about feeling disempowerment and inability to do something, the visitors queried "What have you done [to agitate]?" There was perhaps some bemusement at what little was happening in the face of what seemed to be obstructionism. But the reply came that people knew from history that if they kicked up a fuss, then the next appeal to goodwill might be refused.

Now, I'm conscious that the rest of this presentation might be a bit like a cobbled together school report of "what I did on my holidays", but here goes anyway.

After our activities at Dunvegan, we explored a community owned area (at Glendale) and a nearby active croft, we then engaged in some discussions and workshopping. The "we" here involved Brian and me, the aforementioned Brazilians, Scottish delegates from anthropology, land management, history, arts and activism backgrounds.

Brian Garvey facilitated a "river of life" exercise, where we volunteered points about connections to land, drivers towards more sustainable land use (perhaps including land redistribution), barriers to that, and ways to navigate them. We do need to write that up, but there were many similarities (albeit we don't have a Bolsonaro). We also had an interesting human rights discussion, with both systems essentially recognising and being underpinned by a strong, neoliberal property right and the associated entitlements of landowners, and we spoke of Scotland's pretty traditional approach to human rights and land that has generally prevailed until now. That being said, Scotland is moving a bit now though, with ICESCR and food governance stuff featuring in Scottish statutes and bills, and also does have some exhortations to get communities involved – Part 4 of the 2016 Act encourages land owner's to tick a box of engagement, and there is the Land Rights and Responsibilities Statement (almost a soft instrument) – further developments are perhaps to come here. There were undeniably differences though – the human rights environment in Brazil for the indigenous people is *very* different indeed, per reports about threats and attacks.

Also, whilst Scots law might be moving a bit here, is property law *more generally* moving? Here I will make quick reference to the emerging work of Professor Bram Akkermans at Maastricht (developing the social obligation theory of property law of Gregory Alexander), do we need to reconceptualise the theoretical justification of property? In his recent inaugural lecture, after that property and sustainability conference that I mentioned, he pushed for property rights to be recognised and justified when they contribute to planetary flourishing. I would recommend his inaugural lecture on YouTube.

We also engaged in some cultural exchanges – here's us having a ceilidh, in the Highland sense, in the youth hostel Brian and his family stayed in. Note the traditional dress of Maria Luisa Mendonca and her daughter.

To give everyone a laugh, I thought I might highlight one cultural exchange I participated in. If you look up images of Munduruku people, you might see pictures of decorated bodies, either tattooed or decorated with dye, with different patterns for men and women. Here is an example of a decoration for a man – the tortoise – on my right forearm! I'm told it's to last ten days or so…

We then had a cultural exchange event at GalGael's premises in Scotland. Brian Garvey spoke, Maria Luisa and Ana Laide spoke (through a translator – hat-tip to Maria di Lima), and Community Land Scotland and others were present to engage in discussions.

What next? Watch this space. Sorry if that's a bit of a tame conclusion, and I'm also conscious at the moment this is but a comparison of two different domestic contexts rather than something about global environmental law, but if nothing else I hope you've enjoyed my pictures.

I also know this week the Brazilian delegation went on to Brussels, and were I think at the European Parliament today, so hopefully they have learned from us as well. I also know it's not all doom and gloom for the Munduruku, as when we were away there was an important decision refusing a licence for a mining concession. This is definitely a situation to keep an eye on, and I sincerely hope we can learn from each other.

END