Random Reflections on Scots Land Law's Continuing Evolution in the Light of, *inter alia*, an 1816 High Court Trial, Early Medieval Gaelic Law Tracts, the Crofters Act, the Mabo Judgement and FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests

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My starting point's a trial. A High Court trial. That took place in Inverness – 200 years ago next April.
The panel, the accused, was Patrick Sellar – factor and tenant farmer on the Sutherland Estate.
Sellar faced a whole variety of charges. Including culpable homicide.
But in the present context, that's not my concern.
It's something else entirely.
The fact that Sellar was also charged with 'setting on fire, burning, pulling down and demolishing ... barns, kilns, mills and other buildings'.

I've written quite a lot about the Highland Clearances.
But it was only when I started to research the background to the Sellar trial – for a just published book – that I properly explored the legal framework governing eviction.
The key statute, cited in the numerous eviction orders issued by your Sutherland Sheriff Court predecessors between 1812 and 1821, was a Scottish Parliamentary Act of 1555.
An Act Anent Warning Tenants.

Well, in this company, I hesitate to be definitive.
But this, I think, was the first appearance in Scots Law of the notion that tenants, as well as landlords, had rights in land they farmed ... but didn't own.
The 1555 Act, then, can arguably be seen as an initial step along a road that led, in time, to crofters first, then farmers, getting security of tenure.
No such security was contemplated back in 1555.
But from that point a tenant could no longer be ejected arbitrarily – as had previously been common.
A legal process was required.
This process, in 1756, was modified by the Court of Session.
But key features of the 1555 Act were retained.
Notably the provision that a tenant obliged to relinquish a farm at the May/June Whitsun Term was entitled to harvest such crops as had been sown or planted prior to his outgo.
In Sutherland this mattered.

It mattered especially to people evicted in June 1814 from a farm Patrick Sellar was then taking over – at Rhiloisk in Strathnaver.
When Sellar destroyed barns where grain was threshed, kilns where it was dried, mills, where it was turned into meal ... when he did these things, Rhiloisk's outgoers said ... he made it impossible for them to exercise their right – a right enshrined in law – to secure the crops they'd sown when still in full possession.

Now when, in 1555, the Scottish Parliament laid down that tenants quitting farms in early summer were nevertheless entitled, in the autumn, to take in those farms' crops ... this wasn't a wholly pro-tenant provision.
Underlying that arrangement was a 1555 assumption that, even when a farm's occupier was replaced, agricultural operations on the farm would continue as before.
And in such circumstances, it wasn't in anyone's interest, whether landlord or incoming tenant, for 'the whole arable part of a farm', as one eighteenth-century authority put it, to be left 'waste' – meaning untilled and uncropped.
Which would have been the case if harvesting rights were refused to outgoers who'd been in legitimate occupation when ploughing, planting, sowing all needed to be done.

But suppose, as was the case on Patrick Sellar's Rhiloisk farm, that one incoming tenant was taking the place of dozens of previous tenants.
Suppose, further, that this new – sheep farming – tenant was implementing a land use change so drastic that he had absolutely nothing to gain from keeping arable in good heart or barns, mills and kilns in good order.
What then?
While such a tenant, Patrick Sellar in this instance, was obliged to permit his farm's former occupants to harvest their grain, was he equally obliged to ensure that they had on-site access to kilns, mills and storehouses?
How, in other words, was legislation framed centuries in advance of the Sutherland Clearances to be interpreted in this new world where it might be to a landlord's benefit to depopulate an entire countryside and – because sheep farming made cropping redundant – give up completely on that countryside's cultivation?

Well, in the end, the law was found to be on Sellar's side.
This aspect of the case against him fell.
Like every other aspect.
And so Patrick Sellar went free.
Unsurprisingly.
Because, throughout the clearance period, law mattered less than where power lay and how such power was exercised.

In my book I call Sutherland's early nineteenth-century justice system, 'a Sutherland Estate subsidiary'.
Not, I think, an exaggerated claim.

The estate's owners were the Marquis and Marchioness of Stafford.
Duke and Duchess of Sutherland, as they afterwards became.
Britain's wealthiest couple – and politically influential.
So when the then Lord Advocate, Alexander Maconochie, was appointing a Sheriff of Sutherland, he took care to inform James Loch, the Staffords' land management supremo, that the suggested candidate, Charles Ross, would be successful only if this was 'agreeable to Lord and Lady Stafford' whose 'approval' of any such appointment, Maconochie wrote, he thought 'indispensable'.
Nor was Ross himself under any illusions as to where he stood in Sutherland's power structure.
This from a letter the sheriff sent the marchioness when taking up his post:
'I assure you ... [of my] most zealous wish to second [meaning assist] by every means in my power your extensive and benevolent plans for the improvement of Sutherland ... I have only to add that it will be most satisfactory to me at all times to have a communication of what may be your Ladyship's views as to anything to be done in the county.'
Sheriff Ross.

During the Sutherland Clearances – 'improvements' as their organisers called them – many thousands of people were evicted.
In Strathnaver, the Strath of Kildonan and Strathbrora, around two hundred townships, or communities, ceased totally to exist.
Each home in those communities destroyed.
The law and its enforcers providing no redress.

This, from the *Morning Chronicle*, then England's leading daily, 15 March 1820:
An editorial on clearance in the Highlands:
'There can be no doubt that by the law of this country ... [a landlord] is entitled, if his tenants have no [enforcable] claim to his land, to turn out whatever number of them he pleases ... But law is one thing and humanity may be another.'
Clearance, in other words, might be entirely legal.
But it was also wrong.

Which, of course, was what the mass of Highlanders believed.
Not least because they thought themselves to have had, under clanship, their own stake in the land.
Their chiefs, now landlords, disagreed.

They cited centuries-old charters – charters that remain today the basis of a lot of title-deeds.

However – and this is a big however – the monarchs granting charters to prominent Highland families lacked the means to make their writ run in the north.
In the Highlands, during clanship's heyday, the Scottish crown, the Scottish government were often pretty powerless.
Which is why a chief's prestige, position – everything – depended not on charters, titles and legalities ... but on the fighting men at his command.
Which meant that chiefs were very careful to nurture these men's rootedness in land they worked and lived on.
A point made forcefully by Thomas Douglas, Fifth Earl of Selkirk – bitter critic of clearance and a man who helped evicted families get away to what's now Canada.
Here's Selkirk:
'The peasantry of the Highlands ... well know of how little avail was a piece of parchment and a lump of wax under the old system of the Highlands ... The permanent possession which they always retained of their paternal farms they consider ... their just right from [their] share ... in the general defence, and [they] *can see no difference between the title of the chief and their own*.'
Lord Selkirk.

This notion of a customary right of occupation was, in Gaelic, known as *duthchas*.
It featured in no charters.
But something of it can be glimpsed in still more ancient sources.
Gaelic law tracts first set down in Ireland – in an era when – twelve, thirteen centuries ago – most of Scotland was just one component of a wider Gaelic world stretching from the Hebrides and Aberdeenshire to Kerry and Kinsale.

At this point, a slight digression.
Into another aspect of the law tracts.
One dealing with resources like timber, fish and game.
While accepting that there can be individual ownership of these, the law tracts are clear that use of them is open to the community at large.
By way of illustration, one law tract on what everyone may take from forest country:

The night's supply of kindling from every wood.
The cooking material of every wood.
The nutgathering of every wood.
The framework of every vehicle, yoke and plough.
Timber of a carriage for a corpse.

The shaft fit for a spear.
The tapering wood of the three parts of a spancel.
The making of hoops (for barrels).
The making of a churnstaff.

Scots Law, I think, is seldom so poetic.

These Gaelic law codes, incidentally, were the earliest compilations of their type to be set down in any European language other than Greek or Latin.
And the ethos they enshrine is one that lingers in the Highlands.

In present company, I think it safest, at this point, to engage only in hypothesis.
If, as a young lad in Argyll, I'd thought to take a salmon from a river.
With, perhaps, a rabbit snare fixed to a hazel stick.
And if I'd brought that salmon to my mother and we'd eaten it for tea ...
If, I repeat, I'd done that thing, well, then, whatever anti-poaching laws might say, whatever sheriffs like yourselves might rule, I wouldn't have thought that – morally, ethically – I'd been guilty of a crime.
And in so thinking, I'd have been in full accord with what's said in the law tracts.
Which entitled everyone, as a Gaelic proverb still has it, to a fish from the river, a deer from the hill and a tree from the wood.

Now I reckon that, should alleged poachers come before you, and should their lawyers cite the law tracts, you'd not be terribly impressed.
But there is, for all that, one segment of Scots Law that, since 1886, has given statutory force to law tract notions.

The clearances, I said, were not illegal.
But they were widely held to be unjust.
Not least because they were in breach, or so it was contended, of customary Highland rights to permanent – hereditary – occupancy.

Well, this same contention entered the political arena in the early 1880s.
When crofting areas erupted into anti-landlord rent-strikes, riot and disorder.
And when the Highland Land League demanded that all crofters get security of tenure.
On grounds, not least, that this would be to recognise, restore and rehabilitate those age-old rights of occupancy that clearing landlords had ignored and set aside.

Intriguingly, this reasoning was accepted by the UK's then Prime Minister – William Gladstone.
In the Highlands, Gladstone felt, property rights could not be seen as absolute.

They came with what he called ‘engagements’ with the region’s history.
Gladstone in 1885:
‘For it is ... this historical fact that constitutes the crofters’ title to demand the interference of Parliament. It is not because they are poor, or because there are too many of them, or because they want more land to support their families, but because those whom they represent had rights of which they have been surreptitiously deprived to the injury of the community.’
William Gladstone.

The Crofters Act of 1886, the legislation stemming from this thinking, is generally described as ‘radical’.
And so it was.
In the sense that it represented a drastic curtailment of landlords’ previous freedom to do much as they liked with their land.
Not just in relation to who occupied a croft.
But also in relation to the rent a crofter paid.
Rent levels, and much else, being determined henceforth, not by landlords, but by a judicial tribunal – the original Crofters Commission which, in 1912, evolved into the continuing Scottish Land Court.

But if the Crofters Act was indeed radical, it was also profoundly conservative.
Reaching back, as Gladstone indicated, to pre-capitalist, even pre-feudal, modes of governing relationships between a piece of territory and the people living on it.
It’s in this sense that the Crofters Act can – retrospectively – be seen to be a very early instance of approaches that are presently impacting on land law worldwide.
Approaches like that taken in the Australian High Court’s 1992 judgement in a landmark land rights case raised by a group of Torres Strait Islanders – their leader Eddie Mabo.

Torres Strait Islanders and other Aboriginal peoples occupied Australia for some sixty thousand years.
Then, in 1788, Britain claimed sovereignty over the country.
As in virtually all tribal or kin-based societies, Aboriginal people thought themselves – just as Highland clansfolk did – to have a deep, enduring link with such territory as they occupied.
Nothing of this was recognised by Britain – UK authorities holding Australia to be *‘terra nullius’* – or, from a legal standpoint, lacking organised society.
For much of the twentieth century, Australia’s government and courts adhered to this same notion.
The Australian High Court ruling, as late as 1979, that Australia, prior to 1788, ‘had no civilised inhabitants or settled law’.

It was thinking of this sort the Mabo judgement set aside and overturned:
‘The common law ... would perpetuate injustice it were to continue to embrace ... *terra nullius* and to persist in characterising the native inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.’
The High Court of Australia in 1992.
In words of similar import to those used by William Gladstone ...
When arguing that crofters were entitled to security of tenure because they or their predecessors had had ‘rights [in land] of which they [had] been surreptitiously deprived’.

From the Mabo Judgement there followed in short order a Native Title Act – and the consequent establishment of Aboriginal land rights across a good bit of Australia.
Much the same’s been happening elsewhere.
In Canada, the US, New Zealand, Asia, Africa, Latin America.
With country after country undertaking, for instance, to implement the 2007 UN Declaration on the Rights of Indigenous Peoples.
Which states:
‘Indigenous peoples have the right to own, use, develop and control the lands, territories and resources they possess by reason of ... traditional occupation’
In all such formulations, it’s possible, I think, to recognise the sort of reasoning that underpinned the Highland Land League ... the Gladstonian ... case for what became the Crofters Act of 1886.
Which makes for a nice piece of symmetry.
In that land-related legislation here in Scotland is today beginning to be influenced by what’s now happening internationally.

The land reform process in the Highlands didn’t end with the 1886 Act.
Seen widely as inadequate.
Because, though establishing (or re-establishing) security of occupancy, it didn’t restore to crofters land lost during clearance.
Cue further agitation and unrest.
And, in response to this, additional legislation.
The Congested Districts Act 1897.
The Small Landholders Act 1911.
The Land Settlement (Scotland) Act 1919.
All intended to facilitate, among other things, the acquisition by the state of previously cleared land on which, in the opening decades of last century, there were created many hundreds of new crofts.

Well, appetite for <u>that</u> kind of reform had gone by the mid-century.
But in 1992 demand for a new variant of reform took its place.

When the Assynt Crofters Trust succeeded in its bid to buy the Sutherland estate Trust members lived on.
Thereby getting underway the revolution – and it is a revolution – which, so far, has taken well over half a million acres into community ownership.

After some initial hesitation, successive governments have been supportive of such ownership.
Extending financial and other assistance.
By way of initatives such as the formation of the Community Land Unit at Highlands and Islands Enterprise in 1997.
A Scottish Land Fund in 2001.
A new Land Fund more recently.

And there's been equally supportive legislation.
A Transfer of Crofting Estates Act in 1997.
A Land Reform Act in 2003.
This Act intended:
'To make provision under which bodies representing rural and crofting communities may buy the land with which those communities have a connection'.

The 2003 Act, of course, was passed by the Scottish Parliament.
Where Ministers are more constrained than Mr Gladstone was in 1886.
Because of the Scottish Parliament being itself a creation of statute – the UK Devolution Act of 1998.
Which insists that, to be lawful, Scottish Parliamentary Acts must be compatible with the European Convention of Human Rights.
Including ECHR's Article One, Protocol One.
Which states:
'Every natural or legal person is entitled to the peaceful enjoyment of his possessions'.
Hence nervousness in Holyrood about potential legal challenges to the Land Reform Act.
Especially its Part Three.
Which, in effect, entitles crofting communities to take ownership of any tract of land in crofting tenure – and there are millions of acres of such land – irrespective of whether that land's on the market and irrespective, too, of whether or not its owner wants to sell.

Well, an ECHR-based challenge to the Land Reform Act's Part Three was duly mounted.
In connection with a crofting community's attempt to take ownership of the Pairc Estate in Lewis.

The issue to be determined by the Court of Session was whether the crofting community right to buy – as provided for by the 2003 Act – was, or was not, allowable in terms of what might be called Article One Protocol One's get-out clause.
A clause making it permissible for someone to be 'deprived of his possessions' as long as such deprivation is 'in the public interest and subject to conditions provided by law'.
Well, in the end, the Court of Session ruled that the 2003 Act's Part Three was not in breach of ECHR.

This from Lord President Gill's opinion:
'I conclude ... that when Ministers decide where the overall public interest lies, the central consideration will be that of balancing the harm to the landowner against the benefit of the proposal to the wider public, most notably in relation to strengthening the crofting economy. When they make that decision, the weight to be given to the landowner's interests is pre-eminently a matter for them ... Article One, Protocol One, requires only that any assessment of the public interest should not be manifestly unreasonable.'
Which produced this comment in an Anderson Strathern *Legal Update*:
'Anyone who thought that human rights might be the antidote to Land Reform, and Rights to Buy in particular, will have had their hopes dashed by [this] decision.'

Well, that Court of Session ruling was two years back.
And now it's pro-reformers who talk most of human rights.
Here's Professor Alan Miller, Scottish Human Rights Commission chair:
'Land reform raises ... human rights considerations which encompass a much broader set of issues than those we've heard discussed to date ... For example, the [1976] International Covenant on Economic, Social and Cultural Rights places a duty on Ministers to use the maxium available resources to ensure the progressive realisation of rights like the right to housing, food and emploment. Viewed through this broader human lights lens, land is ... a national asset with key questions arising of how to strike the most appropriate balance between the legitimate rights of landowners and the wider public interest.'
Alan Miller.
Commenting on the Land Reform Bill that's presently before the Scottish Parliament.

And in evidence to the relevant parliamentary committee, Community Land Scotland, representing this new sector, have been making the same point.
By way of urging that that the Land Reform Bill requires Ministers 'to have regard to the progressive realisation of human rights'.

As set out in the International Covenant on Economic, Social and Cultural Rights.
And the UN Food and Agricultural Organisation's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries.

Agreed in 2012, the Voluntary Guidlines are intended:
'To improve governance of tenure of land ... [and] to do so for the benefit of all ... the goals [being] food security ... poverty eradication ... social stability ... housing security ... environmental protection and sustainable social and economic development.'

The evicted Highlanders who saw in clearance a betrayal of their rights to homes and lands and livelihoods, didn't use that sort of language.
But they would have seen in what that language seeks to say, I think, a great deal of good sense.

Which takes me back to where I started.
And to this morning's theme – current prospects for Scots Law.

Well, I'm not qualified to make an overall assessment.
But in the area first of crofting, then of land reform more generally, Scotland's done, and is now doing, much that's most distinctive.
And has certainly no parallel in England.
I don't know where Scots Law more generally is headed, but, as far as I can see, Scots land law is continuing to develop in directions that are innovative, internationally-informed, progressive and ambitious.