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# The Evolution of Sustainable Development in Scotland—A Case Study of Community Right-to-Buy Law and Policy 2003–2018

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**Abstract:** Effective ownership, management and access to land are central for sustainable development and can impact significantly on the opportunities for local enterprise. In 1998, Scotland’s Land Reform Policy Group concluded that ‘Land reform is needed on the grounds of fairness and to secure the public good’ Consequently, Scotland has introduced various schemes that facilitate or compel the transfer of land from an existing landowner to a community body. Sustainable development is a primary objective of all these regimes making them exceptional both in UK and global terms and worthy of in depth examination. This article critically explores how the laws and policies relating to sustainable development within these community right-to-buy regimes have matured and evolved from their introduction in 2003 to the present. It reveals the beginning of a fourth era in sustainable development policy in Scotland which moves away from a single ‘one size fits all’ approach to one where both sustainable development itself and wider sustainable development equations are tailored to land-use in Scotland and to the needs of each of the different community right-to-buy regimes. These developments evidence a significant maturity in the implementation and delivery of sustainable development in Scotland.

**Keywords:** Implementation of sustainable development; sustainable development equations; land reform; Community right-to-buy; Scotland; legislation; public interest; human rights

## 1. Introduction

Over thirty years have passed since the World Commission on Environment and Development defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’ (‘the Brundtland definition’) [1]. Since then sustainable development has become a significant objective worldwide and the Brundtland definition its most widely accepted iteration. The Brundtland definition encourages discourse by bringing together different and conflicting interests but it also allows a wide range of different interpretations (and hence, outcomes) to be considered legitimate [2]. To that end, states, international organisations, businesses and individuals have tried various ways of moving beyond the rhetoric provided by the broad parameters of Brundtland to deliver the transformational change needed to address modern challenges such as poverty, climate change and biodiversity. During this time, law and policy, like other tools, have been used to varying degrees of success. Effective ownership, management and access to land are central for sustainable development and can impact significantly on the opportunities for local enterprise [3] (para. 2.5). In 1998, Scotland’s Land Reform Policy Group concluded that ‘Land reform is needed on the grounds of fairness and to secure the public good’ [3] (para. 2.2) and following on from this, Scotland has introduced various schemes that facilitate or, in some cases, compel the transfer of land from an existing landowner to a community body. Sustainable development is a primary objective of all of these regimes. This article critically

explores how the law and policy relating to sustainable development in the context of the various community right-to-buy regimes in Scotland have matured and evolved from their introduction in 2003 to the present. Importantly, it uncovers a new era in sustainable development policy in Scotland that has the potential to move well beyond the rhetoric of sustainable development to deliver transformational outcomes.

The Land Reform (Scotland) Act 2003 (LRSA 2003) gives certain community bodies a pre-emptive community right-to-buy land (that is to say, a right of first refusal) where there is a willing seller [4]. The same Act also creates a right for crofting community bodies to compulsorily acquire crofting land in certain circumstances [5–7]. More recently, the Community Empowerment (Scotland) Act 2015 (CESA 2015) introduces Part 3A into LRSA 2003 which creates a right for community bodies to compulsorily acquire land that has been abandoned or neglected or somehow managed in a way that is detrimental to a community's 'environmental wellbeing' [8]. Also, the Land Reform (Scotland) Act 2016 (LRSA 2016) Part 5 introduces community rights to compulsorily acquire land to further the achievement of sustainable development [9]. This chapter refers to these rights collectively as the community right-to-buy regimes. The regimes all share an express requirement that communities wishing to exercise any of the rights to buy must have sustainable development at the heart of their community body and of their proposals for the land [10].

Arguably, sustainable development is a poor champion for any of its component parts whether economic, social or environmental. Rather, as Ross contends, it is most usefully viewed as a framework or forum for sometimes complementary, but often conflicting, factors to be raised and the best solution found [11]. Even within its own parameters, this view of sustainable development requires a balancing of factors. States often define sustainable development for their own purposes by simply referring to the Brundtland definition which offers little assistance in relation to the priority afforded to different factors [12]. Occasionally, states, usually in policy statements, adapt the Brundtland definition to reflect needs and priorities relevant to their own circumstances, or the political priorities of the current government in power. The detail on what factors should be considered and the priority among them may be set out as a tailored interpretation of sustainable development or as a defined process for assessing what is considered sustainable development for that particular state [13]. The conventional wisdom is that having a common understanding or clear vision of sustainable development across government is helpful for delivering sustainable development outcomes [14,15].

Alternatively, the balancing can occur outside the interpretation of sustainable development, where sustainable development is expressly balanced against other factors. This wider decision making process can usefully be described as the 'sustainable development equation' [16]. These are usually set out in the enabling legislation itself. Decisions about what factors should be raised and the priority afforded to each in any given sustainable development equation can vary significantly among regimes [12] (chapter 8). Often, within these equations, sustainable development appears as a secondary obligation to be considered in the exercise of a primary function or obligation. For example, under the Climate Change (Scotland) Act section 92(1) the Scottish Ministers must take into account the need to exercise their functions in a way that contributes to the achievement of sustainable development.

In contrast, all of Scotland's community right-to-buy regimes have sustainable development as a primary duty and it equates to or has priority over the other duties or objectives within the various decision making provisions or sustainable development equations. Additionally, the more recent 2015 and 2016 regimes include provisions that tailor the interpretation of sustainable development for their specific purposes by narrowing its scope and setting out conditions for assessing what is sustainable. The combination of this regime-specific tailoring of sustainable development and its status as a primary objective make Scotland's community right-to-buy provisions exceptional in UK and global terms and worthy of in-depth examination.

The article begins by examining sustainable development as a policy goal within Scotland to uncover three distinct eras of sustainable development policy. It then briefly explains the background

to sustainable development within the community right-to-buy provisions introduced in the LRSA 2003 Parts 2 and 3 as well as the policy that details how sustainable development is to be defined and assessed within these regimes. This section reveals a gap between current Scottish Government policy on sustainable development and that used to assess sustainable development for the purposes of Parts 2 and 3 of the LRSA 2003. The article then explores how the interpretation of sustainable development itself and the process of assessing what is sustainable development has developed and been specifically tailored to the particular context of compulsory acquisition by community bodies within the more recent community right-to-buy regimes established by the CESA 2015 (in Part 3A LRSA 2003) and Part 5 of the LRSA 2016. Next, the article analyses how the relationship between sustainable development and the public interest and human rights within sustainable development equations has evolved from 2003 to 2016. The article concludes that the new community right-to-buy regimes herald the beginning of a fourth era in sustainable development policy in Scotland which moves away from a single 'one size fits all' approach for the whole of Scotland to one where both sustainable development itself and wider sustainable development equations are tailored to the specific requirements of individual regimes and contexts.

## 2. Sustainable Development in Scotland

Most statutory provisions that refer to sustainable development leave defining sustainable development and even the process of assessing what is sustainable development to policy, to allow flexibility for changing times and different political ambitions. This is certainly the case in Scotland where since 2003 there have been three significant eras of sustainable development policy. Each reflects the political priorities of the governments in power at that time and for that time.

When the LRSA 2003 was passed, the Scottish Government (known then as the Scottish Executive) policy on sustainable development was set out in a Statement published in 2002 entitled *Meeting the Needs . . . Priorities, Actions and Targets for sustainable development in Scotland* [17]. The Statement described sustainable development as combining economic progress with social and environmental justice. It endorsed the widely-accepted Brundtland definition of sustainable development yet also recognised the need to define the term further. It set out a vision based on the following principles:

have regard for others who do not have access to the same level of resources, and the wealth generated; minimise the impact of our actions on future generations by radically reducing our use of resources and by minimising environmental impacts; live within the capacity of the planet to sustain our activities and to replenish resources which we use [17] (p. 3).

The vision resonates with the aims of the right-to-buy regimes enacted the following year, especially its reference to environmental justice which it defined as:

'fundamentally [ . . . ] ensuring that people do not live in degraded surroundings and it means not making unrealistic demands on the environment to absorb waste and pollution.' [17] (p. 4). While quite progressive in its vision, the language in the statement is weak ('have regard to') and thus was aspirational rather than driven by outcomes. Moreover, the statement's scope was limited to three priority areas—resource use, energy and travel instead of working across all aspects of government and governance [17] (pp. 5–6).

The second era began in 2005 when the UK, Scottish, Welsh, and Northern Ireland administrations, jointly produced *One Future—Different Paths: The UK's Shared Framework for Sustainable Development*, which set out five principles:

1. living within the Earth's environmental limits;
2. ensuring a strong, healthy and just society;
3. achieving a sustainable economy;
4. promoting good governance; and
5. using sound science responsibility [18] (p. 8).

Importantly, the previous focus on high economic growth in sustainable development across the UK was replaced by a goal of a sustainable economy. This change, combined with the explicit acknowledgement of the Earth's environmental limits, demonstrated a deeper commitment to ecological sustainability [19] (pp. 5, 162–169). The Framework received global acclaim and is held out as good practice [20] (p. 34). In late 2005 Scottish Executive published *Choosing Our Future—Scotland's Sustainable Development Strategy* which closely followed the Framework [21]. It was more committed to economic growth than the UK Framework, but throughout, environmental objectives and actions are listed ahead of social and economic goals, thus reinforcing a vision based on limits rather than tradeoffs.

The third era followed the Scottish National Party (SNP)'s success in the Scottish Parliament election in May 2007. The SNP government replaced the previous government's sustainable development strategy with its own *Economic Strategy* and *National Performance Indicators* [22]. While recent Scottish policy continues to state the Government's support for the five principles in the 2005 *UK Shared Framework for Sustainable Development* [23] (para 2.5) but it is clear that the Government's approach to sustainable development is now more focused on economic growth than sustainable economy [24].

The *Economic Strategy* defines sustainable development using the Brundtland definition, however, since 2007 the Scottish Government largely avoided using the term [24] (p. 82). Instead, the emphasis is on the Scottish Government's adopted overall objective: 'To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth' [25] (p. 13). 'Sustainable economic growth' is left undefined in the *Economic Strategy* although the approach is characterized by four key priorities: sustainable investment in people, infrastructure and assets; innovation and openness; inclusive growth and international outlook [25] (p. 36). The Strategy was updated in 2011 and 2015, however, the overall approach to sustainable development has remained largely constant [25,26]. The 2015 *Economic Strategy* added two key pillars to the approach to sustainable economic growth: increasing competitiveness and tackling inequality. As will be discussed below, the LRSA 2003 does not define sustainable development so current policy on sustainable development is very influential in terms of the delivery of the statutory aims.

### 3. Sustainable Development and the Land Reform (Scotland) Act 2003 Parts 2 and 3

Despite Scotland's unsettled history surrounding land ownership and use, the main emphasis of the LRSA 2003 was not about righting any past wrongs but rather on increasing the opportunities for local enterprise and addressing concerns about the concentration of land ownership in Scotland among a few large estates some of whom had non-resident or absentee owners [6] (p. 89). As Combe explains it was only after the passage of the Scotland Act 1998 and the creation of the Scottish Parliament that there was a legislative forum with the time and the inclination to address land reform issues in Scotland [6] (p. 88). With devolution imminent, the Scottish Office established the Land Reform Policy Group (LRPG) in 1997 to study the system of land ownership in Scotland. It reported in 1998 that 'the overriding objective of rural policy and thus land use should be to foster the sustainable development of rural communities and remove land based barriers to development' [3] (paras 2.2, 2.5). This established a strong link between sustainable development and issues of fairness associated with the balancing of the public interest with private property rights.

Interestingly, in 1998 the LRPG provided a contextualised definition of sustainable development: 'development that is planned with appropriate regard for its longer term consequences and is geared

towards assisting social and economic advances, that can lead to further opportunities and a higher quality of life for rural people whilst protecting the environment'. The definition continues, stating that 'in this context sustainable development requires an integrated approach to be taken in the key areas of economic, social and environmental policy' [3] (paras 2.4–2.6). However, as the Land Reform (Scotland) Bill passed through the Parliament in 2002, legislators chose to drop the definition of sustainable development to leave the term undefined [27] (p. 899).

As originally passed, Part 2 of the LRSA 2003 creates a pre-emptive right for community bodies to acquire rural land in certain prescribed circumstances. Part 3 creates a right to compel a sale of crofting land in certain prescribed circumstances for crofting communities. The provisions in Part 2 were extended to include urban land in 2015 under the Community Empowerment (Scotland) Act 2015 (CESA 2015) but remain otherwise largely unchanged.

Consistent with the drafting of UK legislation generally, and despite its importance, sustainable development does not feature as the overall aim of Parts 2 and 3 of the LRSA 2003. Instead, sustainable development is set out as an objective for the acquiring community body regarding its proposals for the land, and as a duty for the Scottish Ministers supported by strict administrative procedures. Section 34(4) provides that a body is not a community body unless Ministers are satisfied that the main purpose of the body is consistent with furthering the achievement of sustainable development. The same rule applies to crofting community bodies under Part 3, section 71(4). Section 38(1) provides that 'Ministers shall not decide that a community interest is to be entered in the Register [28] unless they are satisfied that—(b) that the acquisition of the land by the community body to which the application relates is compatible with furthering the achievement of sustainable development [29]. The strong substantive provisions relating to sustainable development are supported by serious procedural consequences for noncompliance in administrative law and company law. The project cannot proceed unless the community interest is registered. Indeed, research by Fox and later Pillai found several applications have been rejected because either the community purposes were not consistent with sustainable development or because the community's proposals for the land were not compatible with sustainable development [27] (p. 901), [30] (p. 47).

Parts 2 and 3 create obligations on both sides of the regulatory equation. On one hand, they require community bodies and interests to have a sustainable development objective that is enforceable by procedures, and on the other hand, they impose a substantive duty on the Scottish Ministers. For example, the LRSA 2003 section 51(3) provides that Ministers shall not consent (to a proposal by a community to buy land) 'unless [ . . . ] Ministers are satisfied that (among other things) what the community body proposes to do with the land is compatible with furthering the achievement of sustainable development.' [31]. The mandatory language not only creates a strong obligation but also creates a legal rule as it sets out how the Scottish Ministers are actually to make the decision. This combination of a strong substantive purpose focused on sustainable development backed up by administrative procedures arguably creates a powerful legislative partnership in relation to sustainable development with real potential to deliver transformational change [12] (chapter 8).

That is not to say that no other objectives or duties are relevant to the community right-to-buy regimes in Parts 2 and 3. On the contrary, several other obligations play an important part of the decision making processes or wider sustainable development equations. First, the Scottish Ministers are subject to certain general obligations. For example, under the Scotland Act 1998 the Scottish Ministers must not do anything that is incompatible with the European Convention on Human Rights (ECHR) (s.57(2)) or the UK's international obligations (s.58 (3)). Moreover, the Climate Change (Scotland) Act 2009 places a duty on public bodies, including the Scottish Ministers, to exercise their functions in the way best calculated to contribute to the delivery of climate change targets and deliver any climate change programmes. These duties are put in a wider context by an additional obligation to act in a way that it considers is most sustainable [32]. Likewise, the Scottish Ministers are under an obligation in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions [33]. While symbolic, these obligations remain outside the

specific decision making equation set out in a regime's enabling legislation and, as shown by Ross and Zasaite, this may limit their influence in practice especially in court [16]. A full analysis of the impact of these general obligations in community right-to-buy regimes is beyond the scope of this article.

Within the provisions of Parts 2 and 3 of the LRSA 2003 themselves, several requirements exist that operationalise certain values within property, administrative and company law. These relate mainly to the ownership of land, its location, the interests of tenants, its connection with and proximity to the community and notice requirements forming conditions precedent that are considered important for ensuring the regime operates as it is intended. It is not the aim of this article to explore these procedural obligations in any more detail.

More substantively, the public interest is also a key objective and duty in Parts 2 and 3. The LRPG in 1998 argued that: 'the public interest in securing sustainable rural development may justify a range of public sector intervention measures to bring about outcomes which would not happen if development was left solely to market forces' [3] (para 2.6). While the LRPG quote above seems to indicate that sustainable rural development would always be in the public interest, as enacted the LRSA 2003 provisions in Parts 2 and 3 seem to address the possibility at least that a proposal could arguably be consistent with sustainable development but not be in the public interest. To this end, the public interest is considered alongside but separately from sustainable development in the relevant sustainable development equation. Section 51(3) provides that Ministers shall not consent to the exercise of a community right-to-buy (the pre-emptive right) unless they are satisfied that the proposed purchase of the land is in the public interest. The Act does not define public interest any further nor does it consider its relationship with private interests.

The Scottish Ministers have been willing to enforce this requirement and Pillai found that applications had been rejected for failing to be in the public interest [27] (p. 901). In *Holmehill Ltd v The Scottish Ministers and Anor* the court held that

'As sustainable development clearly underlies the Act, an ambition to prevent development is a factor that may be taken into account in construing public interest. The guidance at para 30 makes it clear that applications which aim to subvert the planning process are not considered to be in the public interest' [34] (p. 101), for commentary see [35].

The guidance referred to by the court is discussed in detail below [36,37].

The influence and impact of the right-to-buy provisions in terms of both the community body's aims and the suitability of community interests clearly depend on the interpretation given to sustainable development at any given time. Yet, the LRSA 2003 provides no definition of sustainable development or its relationship with the public interest which, as noted above, is also left undefined. By failing to do so, much of the balancing process is moved into the political arena. The approach taken to sustainable development will decide not only what factors are to be taken into account in decision making but also the weight to be afforded to each. The result is that sustainable development at any given time is what the Scottish Government says it is and, as discussed above, that can change significantly over time and for different contexts.

It is unsurprising that more detailed policies exist that specify how sustainable development is to be assessed under Parts 2 and 3 of the LRSA 2003. The Guidance for the Part 2 Community Right-to-buy (CRBG) and Part 3 Crofting Community Right-to-buy (Crofting Guidance) provide specific instructions on the objectives, operation and processes of the two regimes. While the law on Parts 2 and 3 of the LRSA 2003 is now fifteen years old, the policy in relation to both is relatively recent. There have been three iterations of the CRBG in 2004, 2009 and 2016 and two sets of Crofting Guidance in 2004 and 2009 [36,37]. Interestingly, there is no perceptible change in the sustainable development guidance in these versions to reflect each of the Scottish three different eras of sustainable development policy in Scotland since 2003. Indeed, even the latest 2009 Crofting Guidance and 2016 CRBG continue to describe the Scottish Government's approach to sustainable development as being set out in the 2002 document *Meeting the Needs—Priorities, Actions and Targets for Sustainable Development in Scotland*

relying on the policy that dates back to when the two regimes were introduced [36] (para 87). Nowhere in either Guidance is reference made to the *Economic Strategy*, or the Scottish Government's central purpose of 'increasing sustainable economic growth'. Clearly, the reasons for producing detailed updated policy in 2009 and 2016 was not to reflect changes in overall Scottish Government sustainable development policy despite this being very much the case. One can only speculate why such important central policy has been largely ignored by those responsible for drafting the detailed policy on an important aspect of the government's land reform agenda. Pillai describes the result in practice as the regime 'generating its own rhetoric largely based on CRBG guidance' [27] (p. 904).

Indeed, the CRBG and Crofting Guidance provide significant detail as to what type of information is needed to satisfy Ministers in relation to sustainable development. Recall that under Part 2, Ministers must be satisfied that the registration of a community interest (and also the exercise the community body's right-to-buy) is compatible with 'furthering the achievement of sustainable development' [38]. Part 2 is a pre-emptive right and requires a willing seller. In contrast, Part 3 creates a right to force a sale of crofting land to a crofting community. Despite their differences, the two sets of guidance in relation to sustainable development policy are very similar.

Para 85 of the CRBG provides that 'Applications to register a community interest in land have the best chance of success if they explicitly address the likely overall impacts of land registration in terms of environmental, economic and social benefits . . . ' Interestingly, it goes on to indicate that 'The Act does not require that every element of any planned development be compatible with the achievement of sustainable development, but that the acquisition of the land as a whole should be compatible with furthering sustainable development.' The 2004 CRBG stopped at this point. In contrast, more recent 2009 and 2016 versions continue: 'Proposals for developments that might result in lasting significant environmental damage are likely to fail to meet this legislative requirement' [36] (para 85). Thus, projects such as community renewable energy projects may be very positive for the community but this needs to be balanced with any impact they may have on water, land and the environment. Moreover, the guidance provides that 'proposals to prevent any development or those that aim simply to maintain the status quo [ . . . ] will be construed as not being compatible with furthering sustainable development' [36] (para 85), [37] (para 100). These new paragraphs show an evolution in the interpretation of sustainable development within the right-to-buy guidance. The first prioritises the prevention of significant environmental damage and the second discourages action aimed at stifling innovation and positive change. These policy changes create a bespoke approach to sustainable development tailored to the needs of these specific regimes.

The CRBG also suggests community bodies set out the positive economic, social and environmental consequences of their aspirations. It suggests community bodies produce a long-term plan to demonstrate how they would achieve sustainable development [36] (para 86), [37] (para 101). The long-term element of sustainable development is very clear and the guidance states there is an expectation that 'the exercise of a community right-to-buy *deliver lasting benefits to your community*' [36] (para 89), [37] (para 103).

Unlike previous guidance and the current Crofting Guidance 2009, the CRBG 2016 also provides very detailed advice in relation to what the actual proposals should contain to demonstrate compatibility with furthering the achievement of sustainable development and advises the use of separate headings for social, environmental and economic development. Social development could, for example, include: clear community benefits; the direct improvement or creation of specified local services; and infrastructure in the short term. The examples given as environmental development include: the improvement or provision of new amenity for locals and visitors in terms of access, interpretation and education; the enhancement of natural resources, wildlife or habitats; and short term negative impacts that are outweighed by longer term advantages to the community. Examples of economic sustainability include: the creation of new jobs or protection of existing local jobs; and the diversification of the economic base of the area [36] (para 89).

Both the CRBG 2016 and the Crofting Guidance 2009 also influence how the wider sustainable development equations operate for Parts 2 and 3 of the LRSA 2003 respectively. Both provide advice in relation to what is the public interest stating that community bodies should show how the proposed acquisition would bring real benefits to the whole of the community and not just the community body itself. Likewise, the community body should consider and show that such benefits are not outweighed by any disadvantages to the wider community, the environment or the economy, or are not disproportionate to the degree of any harm to private interests as a result of the registration and the exercise of the right-to-buy [36] (para 90), [37] (para 108). These provisions acknowledge the need to consider the impact on the private property rights of the existing owner in the decision making process [39].

Thus, over the years the various versions of the detailed guidance on the two original community rights to buy (CRBG and Crofting Guidance) have failed to respond and reflect changes in wider Scottish Government policy on sustainable development and instead refer to 2003 Scottish Government policy on sustainable development which has a strong emphasis on social and environmental justice. However, the policy has not stood still, rather it has evolved independently of Scottish Government policy on sustainable development to, for example, increase the emphasis on preventing significant environmental harm, and acknowledging wider interests. The result has been a widening gap between the approach taken to sustainable development under the community right-to-buy regimes and Scottish Government policy more generally.

This inconsistency can cause difficulties for the right-to-buy regimes which are so dependent on the definition of sustainable development to function. If applicants and decision makers are unsure of what sustainable development means in the context of land reform they will be reluctant to move away from the status quo. This slows down the land reform process. Moreover, those investing in change need some certainty that it will continue to be acceptable and viable as sustainable development in years to come. The result is a need for consensus about the meaning of sustainable development in the context of land reform. There is also a need for more practical, and arguably bespoke, iterations of sustainable development, its component parts and its relationship with other interests within wider sustainable development equations.

#### **4. Evolution of the Definition of Sustainable Development in the Community Right-to-Buy Regimes**

Allowing more tailored, regime-specific approaches to sustainable development may be a means of bridging the policy gap that currently exists. Historically, little attempt has been made to contextualize sustainable development within a state for different sectors—education, forestry or health. This is likely partially due to a resistance from defining sustainable development in any detail at all and also perhaps due to concerns that different approaches would lead to inconsistent decision making and confuse regulators and the regulated alike [12] (chapter 4). Yet, regulatory regimes, often very appropriately, are designed to champion a particular aspect of sustainable development, whether that is cultural heritage, community engagement, biodiversity or a low carbon economy [16] (p. 108). As such, the tensions and connections within sustainable development itself vary in different contexts and may need to be treated differently. Both law and policy can be used to do this.

To this end, there appears to have been an acceptance by both Government and Parliament that land use requires a more bespoke approach to sustainable development. This acceptance is visible both in the interpretation of sustainable development used in the new community right-to-buy regimes and also in the sustainable development equations used for decision making in these regimes. It is also visible in what can be referred to as ‘bridging policies’ that aim to show how land reform and the community right-to-buy fit within wider Scottish Government sustainable development policy.

The Scottish Government’s *Economic Strategy* sits in the middle of its policy framework. Its overall purpose is ‘To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth’ [25]



(p. 13). The purpose is to guide all government action and, consequently, policy produced for different sectors and jurisdictions should, arguably, be largely consistent and aimed at delivering that purpose. Several high level policies have connections with land use and management [23,40,41]. Of these, the *Land Use Strategy* is likely the most important [42]. It is to promote long-term, well-integrated, sustainable land use delivering multiple benefits for all in society. It uses the Brundtland definition of sustainable development and has three key objectives:

- Land-based businesses working with nature to contribute more to Scotland's prosperity
- Responsible stewardship of Scotland's natural resources delivering more benefits to Scotland's people
- Urban and rural communities better connected to the land, with more people enjoying the land and positively influencing land use [42] (p. 6).

The approach to sustainable development in the *Land Use Strategy 2016* (and its 2011 predecessor) is aligned with that of the *Economic Strategy* in so much as it focusses on prosperity. It also contextualises the Government's approach to sustainable development for land use by adding an emphasis on stewardship and promoting an ecosystem services approach to land use [42,43] and in this regard provides a bridge between the *Economic Strategy* and the detailed community right-to-buy guidance, albeit an implicit one.

Law can also be used to set out a more bespoke interpretation or approach to sustainable development which acknowledges and perhaps prioritises certain factors and recognizes how the tensions inherent in sustainable development are likely to play out in any given context. While the LRSA 2003 is silent as to the meaning of both sustainable development and the public interest as well as their relationship to one another, the drafting of the newer legislation is more ambitious.

Part 3A was added to the LRSRA 2003 by the CESA 2015 and creates a right for community bodies to compulsorily acquire land that has been abandoned or neglected or somehow managed in a way that is detrimental to a community's 'environmental wellbeing'. Unsurprisingly, given the more interventionist nature of this right and its impact on the land-owner, more protection is afforded to the current owner and the consent process is more detailed. Pursuant to section 97H Ministers must not consent to an application unless they are satisfied, among other things, that the exercise by community body of the right-to-buy is compatible with furthering the achievement of sustainable development in relation to the land. Importantly, this provision slightly redefines the meaning of sustainable development for this particular right-to-buy so that it differs even from the right to compel a sale of crofting land as set out in Part 3 of the LRSRA 2003. Notably, the Scottish Ministers must be satisfied that the proposal is compatible with furthering the achievement of sustainable development of the land as opposed to sustainable development more generally. This arguably creates a narrower interpretation of sustainable development that is focused on land. In the context of these decisions, this will include the land subject to the buyout, its surrounding areas, its characteristics, its use in the short and longer term as well as the sustainable development of land more generally in Scotland and elsewhere.

Also under Part 3A, where there is evidence that the existing arrangements are resulting in harm to the environmental wellbeing of the relevant community (the so-called 'detrimental land'), the decision making process or sustainable development equation is adapted. Under section 97H(5) Ministers must not consent to the application unless they are satisfied that (a) the exercise by the community body of the right-to-buy is compatible with removing, or substantially removing, the harm to the environmental wellbeing of the relevant community; (b) community body has, before the application is submitted, made a request to the relevant regulator(s) (if any), to take action that could, or might reasonably be expected to, remedy or mitigate the harm, and (c) (regardless of the above) the harm is unlikely to be removed, or substantially removed, by the owner of the land continuing to be its owner.

This decision-making process specific to detrimental land [44] prioritises removing harm to the environmental wellbeing of a relevant community within the meaning of sustainable development. Its procedural requirements then set standards that ensure the harm is significant and that the current owner has been given the opportunity to resolve the problem.

The LRSA 2016 also introduces new right to compulsorily acquire land—this time to further sustainable development. To access this right, community bodies must show their proposals and aims are more than simply consistent or compatible with the furtherance of sustainable development; they must satisfy Ministers that their proposal will further sustainable development. This is a more onerous test. The rules for this regime (once they are in force) will be the most comprehensive and given the emphasis on sustainable development, it is unsurprising that lawmakers have decided to include more detail about how sustainable development is to be interpreted. Section 56 provides that Ministers must not consent to an application to buy land unless they are satisfied that application meets the sustainable development conditions and certain procedural requirements [45]. The introduction of sustainable development conditions in statute is a unique development for Scotland, where the definition and interpretation of sustainable development has up until now been left to policy and guidance and allowed to change with new governments and political priorities [46,47].

There are four sustainable development conditions set out section 56(2):

- (a) the transfer of land is likely to further the achievement of sustainable development in relation to the land,
- (b) the transfer is in the public interest,
- (c) the transfer of land is likely to result in significant benefit to the community and is the only practicable, or most practicable, way of achieving that benefit, and
- (d) that not granting consent to the transfer is likely to result in significant harm to the community.

Interestingly, the public interest has changed from being a factor to be balanced with sustainable development in the wider sustainable development equation to now being within the assessment of what is sustainable development itself. Moreover, as discussed below, the meaning of public interest is expanded in subsequent provisions. This is also true for some of the other sustainable development conditions. For example, section 45(10) provides that in determining what constitutes significant benefit to the community or harm to the community, the Scottish Ministers must consider the likely effect of granting (or not granting) consent to the transfer of land or tenant's interest on the lives of the persons comprising that community with reference to the following considerations—

- (a) economic development,
- (b) regeneration,
- (c) public health,
- (d) social wellbeing, and
- (e) environmental wellbeing.

The conditions differ significantly from the Scottish Government's goal of 'increasing sustainable economic growth' and add substantial detail to the wider parameters of the Brundtland definition to prioritise: the sustainable development of land; significant benefits to the community and the avoidance of harm to the community as well as bringing the public interest explicitly back into the definition of sustainable development.

Thus, while the definition of sustainable development within the guidance on the original community right-to-buy regimes has evolved, it has not been in line with wider Scottish Government sustainable development policy. The *Land Use Strategy* makes some inroads in bridging that gap and demonstrates an acceptance within the Scottish Government to tailor sustainable development to the particular needs of land use but unfortunately this is not reflected in the most recent iterations of the guidance for Parts 2 and 3. The more recent community right-to-buy legislation shows a willingness

on the part of legislators to provide more contextualised interpretations of sustainable development within the law itself tailored to the needs of those specific regimes.

### **5. Evolution of the Role of the Public Interest and Its Relationship with Sustainable Development in the Community Right-to-Buy Regimes**

While it is difficult to imagine an interpretation of sustainable development that does not include some element of public interest at least on paper, as noted above, the public interest is considered separately from the factors considered inherent in sustainable development itself in the sustainable development equations and relevant guidance for the community right-to-buy regimes in the LRSA 2003. In contrast, as one of the sustainable development conditions in LRSA 2016 the public interest is explicitly part of the assessment of what is or is not sustainable development. Whether the public interest is considered inside or outside the approach to sustainable development likely makes little impact on actual decision making. Rather, its value is more symbolic. Whereas previously, sustainable development was considered separately from the public interest, in the context of Part 5, sustainable development by definition must be in the public interest.

Part 5 also sets criteria that must be considered in assessing what is or is not in the public interest. Section 56(10) provides that in determining whether a transfer of land is in the public interest the Scottish Ministers must take into account any information given under section 55(2)(a) which relates to the owner's or any tenant's views on the likely impact on themselves of the community body's proposals for the land as well as their own current or intended use for the land. Ministers must also consider the likely effect of granting or not granting consent to the transfer on land use in Scotland. Thus, in assessing the public interest, Ministers must consider the broader interests of land use in Scotland, the private interests of the current owner or tenant and the likely impact of the community body's proposals on those private interests. This then informs what is or is not considered sustainable development.

The public interest thus plays a crucial role in balancing the conflict between the community interests and those of the individual. The balancing of these is subject to the ECHR which has its own jurisprudence on public interest [48,49] and the next section examines changes in the relationship between human rights, public interest and sustainable development since 2003.

### **6. Evolution of the Relationship between Human Rights with Sustainable Development in Scotland's Community Right-to-Buy Regimes**

The 2003 community right-to-buy regimes were largely predicated on the grounds of fairness and securing the public good. More specifically, the vision developed by the LRPG for the pattern of land ownership in the future in Scotland sought to: increase diversity in the way land is owned and used; encourage the fullest possible exploitation of rural development opportunities; and increase community involvement in land ownership and use, to ensure that local people are not excluded from decisions which affect their lives [50].

At the time, these community interests were promoted and protected through the objectives of furthering sustainable development and being in the public interest as well as certain procedural obligations such as those to ensure sufficient community proximity and community approval [51]. These original right-to-buy provisions are silent in relation to the human rights of the wider community or those of individual land owners and tenants. However, the power to force or direct a sale from one private individual to a community body does not sit comfortably with the right to enjoy peaceful enjoyment of possessions under Article 1 Protocol 1 of the ECHR which states that 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' Under the Scotland Act 1998, the Scottish Ministers must act in accordance with the ECHR [52].

It is unsurprising that Article 1 of Protocol 1 to the ECHR has been used to challenge various land reform measures that deprive individuals of certain property rights or control their use of property. For example, in *Salvesen v Riddell* the imposition of a potentially open-ended agricultural lease under the LRSA 2003 section 72(10) on a land-owner without compensation was held to be discriminatory and arbitrary and as such, was a violation of Article 1 Protocol 1 [53].

However, the ECHR right to property can also be used to impose positive obligations on states to ensure individual welfare for all citizens by creating a process for balancing private property rights with the public interest [54,55]. The European Court on Human Rights has taken the view that the national authorities are best placed to appreciate what is 'in the public interest' both in relation to the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. To this end the court has given states a wide margin of appreciation to determine what is 'in the public interest' for their state unless that judgement be manifestly without reasonable foundation [56–60]. In *Pairc Crofters Ltd* [61] the Court of Session held that Part 3 of the LRSA 2003 was compatible with both the landlord's and interposed tenant's rights under the ECHR Article 6(1) (fair hearing) and Article 1 Protocol 1. The Scottish Ministers had to take into account the interests of persons who might be adversely affected, which included the landlord and tenant and the Ministers' central consideration in deciding where the overall public interest lies would be that of balancing harm to the owners against the benefit of the community's proposal to the wider public, and the weight to be given to the owner's interests was a matter for Ministers. Article 1, Protocol 1 required only that any assessment of public interest should not be manifestly unreasonable.

Beyond the jurisprudence, there has also been a noticeable trend in the Scottish land reform debate to move away from using human rights solely as a means of preventing change to one that supports and promotes change. The Land Reform Review Group in 2014 commented that 'Human rights have traditionally been a prominent part of the land reform discourse, with the UN Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights Article 1, Protocol 1 providing a framework which seeks to balance the right of the population to an adequate standard of living, with the right of the individual to the peaceful enjoyment of his or her possessions' [62].

Indeed, LRSA 2016 generally and more specifically, the new community right-to-buy provisions introduced by the CESA 2015 and the LRSA 2016 promote a 'human rights based approach to land reform' [63] which in turn, is reflected in the sustainable development equations for these regimes. The influence is evident in several respects.

First, perhaps in response to the *Pairc* case, the balancing of the public interest and private interests of the land owners and occupiers is more expressly set out in the sustainable development equations within the new legislation, albeit differently in each. The sustainable development equation set out in Part 3A of the LRSR 2003 (right for community bodies to compulsorily acquire land that has been abandoned or neglected or somehow managed in a way that is detrimental to a community's 'environmental wellbeing') requires Ministers to actively compare the capacity and desire to further the achievement of sustainable development of the proposer to that of the current owner in the decision as to whether or not to force a sale.

In contrast, under section 56 in Part 5 of the LRSA 2016 the public interest is included as one of the sustainable development conditions and is now part of the assessment of what is or is not sustainable development. As discussed above under section 56(10) the views of existing owners and tenants on the likely impact of the proposal on them as well as the likely impact of the proposal on land use in Scotland more widely are expressly part of the public interest and in turn, part of the assessment of what is or is not sustainable development.

The LRSA 2016 also contains two provisions that move human rights to the forefront of land use policy in Scotland. Firstly, section 1 imposes a duty on the Scottish Ministers to prepare and publish a land rights and responsibilities statement (LRRS) setting out principles for land rights and responsibilities in Scotland and then section 3 then imposes a duty on the Scottish Ministers, in exercising their functions and so far as reasonably practicable, to promote the principles set out

in LRRS. The first LRRS was produced in 2017. Its aims are threefold: to inform the development of Government policy and action in relation to land; to promote good practice by encouraging and supporting others with significant responsibilities over land; and to encourage everyone to recognise their responsibilities as well as their rights in relation to land [64]. Moreover, the LRRS goes some way to addressing the policy gap described earlier and in sharp contrast to the CRBG 2016 and Crofting Guidance 2009, it explicitly states in Annex B that it is to sit alongside the *Land Use Strategy* in the Scottish Government's policy framework [64]. It also makes reference to current Scottish Government policy on sustainable development noting that 'sustainable development is strongly linked to inclusive growth, a long-term aim of the Scottish Government which means "growth that combines increased prosperity with tackling inequality; that creates opportunities for all and distributes the dividends of increased prosperity fairly"'. It requires managing the land sustainably so that it can continue to deliver these benefits over time' [64] (p. 14). Importantly, the LRRS also provides guidance as to the relevance of various international human rights treaties and to international principles including the ECHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and others [64] (p. 36).

The LRSA 2016 also requires the Scottish Ministers under section 44(1) to issue guidance about engaging communities in decisions relating to land which may affect communities. This section requires the Scottish Ministers to have regard to the desirability of promoting respect for and observance of relevant human rights and internationally accepted principles and standards for responsible practices relating to land [65]. It is not a strongly worded obligation but symbolic nonetheless. Then, Part 5 of the Land Reform (Scotland) Act 2016 provides that: 'In determining whether an application to buy land meets the sustainable development conditions [ . . . ] the Scottish Ministers may take into account the extent to which, in relation to the relevant community, regard has been had to guidance issued under section 44.' Thus, the guidance is part of the assessment process for determining sustainable development under Part 5. The first Guidance issued under section 44(2) is expressly set out as part of the Scottish Government's policy framework, aligned with the LRRS [66]. In relation to the community right-to-buy regimes, para 15 provides that the guidance supports a change across all of urban and rural Scotland, so that engagement and collaboration with local communities about significant issues is the norm and local cities and land owners see each other as partners in achieving sustainable development. Annex A of the Guidance details the meaning of fairness, human rights and equalities in the context of engaging communities in decisions relating to land and makes reference to the ICESCR [66] (Annex A, para 24).

These two final provisions and the statutory guidance produced pursuant to them herald a new era for the way sustainable development is interpreted in land use decisions that is much more tailored as to how it relates to other obligations (notably human rights) in decisions about land. Moreover, the content of the policy fits within Scotland's wider policy framework on sustainable development while also addressing specific needs relevant to land ownership, management and use.

## 7. Analysis and Conclusions

The pre-emptive community right-to-buy regime under Part 2 and the right of crofting communities to force a sale of crofting land in Part 3 of the LRSA 2003 were created to promote the furtherance of sustainable development predicated on fairness and the public good. The LRSA 2003 left defining sustainable development to policy to allow the flexibility to accommodate changing times and political priorities. Since then there have been three different eras of sustainable development policy in Scotland however, interestingly, the community right-to-buy policy on sustainable development has failed to reflect these changes and instead has evolved independently resulting in a divergence between it and in wider Scottish Government policy. Scotland's *Land Use Strategy* goes some way towards bridging this gap but even its aims and objectives have yet to be properly incorporated within the specific guidance on Parts 2 and 3 of the LRSA 2003.

Moreover, while the LRSA 2003 expressly requires consideration of the 'public interest' in decision making process, it is silent about the human rights justifications for the land reforms it creates as

well as their impact on the human rights of existing owners and tenants. Unsurprisingly, this silence has led to uncertainty and a challenge under the ECHR. The introduction of new and arguably more interventionist community right-to-buy regimes in 2015 and 2016 seem to have provided an opportunity to address some of these shortcomings.

Interestingly, much of the change has been instigated using legislation. Some of the legislation applies to land use decisions generally. Other legislative change is only relevant to the new more interventionist right-to-buy regimes. Some of the legislative change is directed at the meaning and interpretation of sustainable development itself in the context of community right-to-buy decisions while others address how sustainable development relates to other factors within wider decision making processes or sustainable development equations, notably, human rights.

The newer legislation provides more detail on how sustainable development is to be interpreted and interestingly, this differs in different contexts. For example, the right for community bodies to compulsorily acquire land that has been abandoned or neglected or somehow managed in a way that is detrimental to a community's 'environmental wellbeing' limits the scope of sustainable development to the sustainable development of land. Moreover, where land management may cause environmental harm additional weight is given to reducing that harm within the interpretation of sustainable development. Under Part 5 of the LRSA 2016 (the right to compel a sale to further the achievement of sustainable development) Ministers are to be satisfied that certain statutory sustainable development conditions are met before granting consent. While an always important part of the sustainable development equation for community right-to-buy regimes, under Part 5 the public interest is explicitly included in the list of sustainable development conditions and thus, expressly part of the process for assessing what is considered sustainable development.

The new regimes also expressly include the interests and plans of the current owner's or any tenant's interests within the decision making process, thus, expressly acknowledging the potential impact of these regimes on Article 1 Protocol 1 of the ECHR right to property. Legislation has also been used to introduce a 'human rights approach' to land reform that expressly refers to rights beyond the ECHR such as those under the ICESCR. This has been made operational mainly through the introduction of statutory guidance incorporated into the wider sustainable development equations for all land use decisions including the community right-to-buy regimes.

All of this equates to a move away from relying on policy to define sustainable development to an increased use of binding legislative conditions and rules to inform decision making on sustainable development. Legislation is also being used to impose obligations to produce policy on particular land use and public engagement matters and to have regard to that policy in the right-to-buy sustainable development equations.

These changes herald a fourth era for sustainable development in Scotland which moves away from a single centralised approach to one that is tailored to context of land in Scotland and then further tailored to the needs of each of the different community right-to-buy regimes. There clearly has been a recognition that the generic objective of 'increasing sustainable economic growth' set out in the *Economic Strategy* needs some refinement for land use purposes particularly given the obvious tensions created by community right-to-buy regimes between public and private interests and their potential to stop or prevent environmental harm. To this end, the public interest and human rights, especially in relation to community engagement and the rights of the current owner, have clearly defined roles in the decision-making processes relating to land. These developments show a significant evolution in the implementation and delivery of sustainable development in Scotland. It takes time for a country to move away from rhetoric and it takes experience to acknowledge that a one size fits all approach to may not be suitable in all cases. It then takes time for that country to develop suitable and genuinely sustainable, bespoke solutions that use legislation and policy to best effect.

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