

**LAW AND DEVELOPMENT: PATRICK MCAUSLAN'S ODYSSEY 1961-2011
A CELEBRATION OF THE WORK OF PROFESSOR PATRICK MCAUSLAN
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Putting the law into context: An appreciation of Patrick McAuslan and his influence

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This event has confirmed me in the view that we have all been following Patrick in our careers – and not only because he was there first! As with so many academics with a strong research focus, I first came across him through his writings. I actually met him for the first time at a conference on land issues hosted by INLOGOV at Birmingham University in 1989. I remember chatting with him during a lunch break and was surprised to find an almost subversive aspect to his views on the role of law and land management! Having graduated as an architect and civic design in 1968 at the time of the student protests, my generation were up for change and I must say regarded the legal profession as serving the interests of the status quo. It was only in 1987 when I was on the management council of the International Year of Shelter for the Homeless in 1987 that I had reason to question this as the council was chaired by Lord Scarman, a person whose intellectual rigour was matched by his commitment to social justice and fairness.

Patrick displayed the same intellectual rigour and sense of social justice. He gave a clear impression that the law has been used too often by elites to reinforce their interests and that whilst this may have been most directly expressed under colonialism, the tendency remained a barrier to the development of socially acceptable land development. Needless to say, I found this a highly encouraging perspective from a professor of law.

I began my career on land and housing issues in 1970 and was fortunate in working with John Turner, as well as reading other progressive thinkers. It was therefore extremely encouraging to meet Patrick and his colleagues at the INLOGOV seminar and learn about case studies of land tenure and policy issues. At that time, I had just completed a review of the literature on land tenure issues for the World Bank which had been commissioned as a contribution to the Bank's housing sector report. It involved reviewing well over a hundred official and grey cover documents and academic publications, in addition to materials I had in my own collection while based at the then Oxford Polytechnic – now Oxford Brookes University.

As I read the mass of material, it became more and more clear that land tenure was a highly complex issue and that any understanding had to include a wide range of historical, cultural and political aspects, as well as of law. My review sought to express this complexity as clearly as possible and concluded that policy on tenure should be cautious and build on what already worked and enjoyed social legitimacy, rather than imposing externally formulated concepts. To my surprise, this assessment was not well received by the Bank and I was told that it would not be included in the sector paper, even though no substantive criticisms were offered. (The reason for the Bank's rejection became clear when the sector paper was published in 1993 with the title 'Housing: Enabling Markets to Work'. For me, this suggested that the Bank had hijacked the concept of enabling people, as promoted by John Turner and others, and put it at the service of markets).

My admiration for Patrick was based on his desire that the law should be put at the service of those who needed its protection most. At the time, Structural Adjustment Programmes were being imposed on a wide range of aid recipient countries and all too often reduced access to services and facilities for those most in need. To meet a lawyer who was both socially committed and highly influential was a great opportunity. This was reinforced when I was invited to take up a post at the Development Planning Unit in University College London and in about 1992 we found ourselves sharing an office.

At that time, Patrick was teaching part-time at both Birkbeck and UCL, not to mention on frequent assignments for the UN and World Bank and writing extensively! This meant that his part of our office was often empty. However, when he did come in, he would be quickly followed by a queue of students seeking his response to their research papers. Patrick's desk was opposite mine, so our chairs were facing each other. During the course of his tutorials with students, he would refer to a publication and recover it casually from under the piles on his desk, or lean backwards and pull it from the shelf without even looking behind him! To me, what appeared as a random pile was obviously a model of good organisation!

My one disappointment during our time at DPU was that we never managed to have lunch together or get to know each other on a personal level. However, when the time came for us to leave the DPU in the mid 1990s, he was extremely helpful and we have remained in touch since.

Our most intense collaboration (so far!) was between 2001-03, when we were both working on a World Bank capacity building project for the Maldives Housing and Urban Development Board. Each day, we would meet for breakfast in the hotel and watch the news on BBC World. It was then that I discovered Patrick's dry sense of humour and heard how he used Basil Fawlty as a case study of an individual railing against a system with which he could never cope! I remember he had differences with the then

Attorney-General, but his stand stood him in good stead later when the opposition won the elections and the new A-G was quick to seek his advice.

We also overlapped on a DFID project to strengthen local government capacity for land management and housing provision in Lesotho, where Patrick was involved in drafting various land and planning laws.

No matter where he was or what he was doing, he would always respond with detailed and constructive comments and suggestions, but I was honoured that he agreed to contribute to a book I was editing on land, rights and innovation. This was published in 2002 and his chapter had the aptly provocative title “Tenure and the law: the legality of illegality and the illegality of legality”!

The focus of Patrick’s chapter was on the link between law and principles of social justice. He stressed that “while a strategy of enablement is to be the preferred mechanism for providing access to land and ensuring security of tenure, the role of governments does not stop at enabling land markets to operate efficiently and transparently, important though these matters are. Governments must also direct their attention to considerations of equity in the operation of land markets - land markets must be enabled to work for the benefit of all, and all must be enabled to participate on an equal and fair footing in the land market.” He condemned the way in which land is often manipulated by the powerful for their own benefit and perfected the clinical expression of outrage against such exploitation.

Such awareness has been central in helping to frame my own career. This has always focused on land issues in an urban context and I was not well informed about how these issues applied in a rural context. However, as urban areas have expanded inexorably into their rural hinterlands, the real area of interest for both analysis and action has become the rural-urban fringe. This is where the urban-based statutory, imported, or inherited concepts of landholding and management practices tend to give way to the rural-based indigenous, or local concepts and practices. I would therefore like to conclude my contribution with a brief summary of three case studies which demonstrate the need for realising and maintaining a balance between the legal and the social and moral aspects of land policy and practice which Patrick’s work so eloquently illustrates.

The first of these examples relates to the concepts by which land is held and policies seeking to improve this. As most of us are well aware, individual property ownership has been widely promoted in recent years by various governments and international agencies, including the World Bank. It has been claimed that this provides not only full security of tenure, but enables owners to “enliven dead capital” and raises property values which can be used as collateral to access formal credit and thereby lift people out of poverty.

Suspensions that this approach was politically motivated founded, prompted me to propose a research project with colleagues which was funded by DFID in 2006. The project was in two stages, stage 1 of which consisted of a review of the literature and stage two of empirical case studies undertaken with local researchers. The findings found mixed evidence that titling improved tenure more than other options and may even provoke market-driven displacement, whilst it was common for tenants to be forced out as land values and rents increased. Neither was there much evidence of increased buying and selling as most new owners regarded their properties as homes and not commodities to exchange on the open market. In summary, the research helped to explode the myth that property ownership improved access to credit or improved access by the poor to land and, with other research, contributed in a small way towards more pragmatic approaches to tenure policy by the World Bank. (I remember John Bruce telling me once that maybe the Bank had over-egged the omelette on tenure policy).

The second experience relates to Lesotho, where I was working on a DFID capacity building project for the Lands, Survey and Physical Planning Department of the Ministry of Local Government between 1998-2000. The Land Law at the time restricted the powers of traditional chiefs in allocating land to rural areas, where customary laws applied and did not permit them to do so in urban areas where statutory law applied. However, as the capital Maseru expanded, neither the state nor the formal market were able to meet demand for housing, so people simply went to the local chiefs who photocopied pre-1980 Form Cs and continued as before. They did not enjoy legal authority, but they certainly enjoyed social legitimacy and it is instructive that in the riots of 1998 which resulted in many government buildings being damaged and set on fire, the offices representing the chieftdom were untouched.

We proposed a system which tried to reconcile the two systems of land administration by proposing village councils in which we assumed that the chiefs would assume the chairman roles in the short to medium term, but would gradually be replaced once a new generation of professionally competent people were ready to assume responsibility.

My third example is of Cambodia where I had undertaken research with local professionals for UN-HABITAT in 2003. As a result of this, I was invited in 2009 to join a World Bank Inspection Panel investigation into the Cambodian Land Management and Administration Programme which had resulted in the eviction of settlers in a central area of the capital, Phnom Penh.

The Panel's report was presented at a Board meeting of the Bank in March 2011 and found that whilst the project provided 1.24 million land titles in rural areas, residents in the affected area of Phnom Penh were denied access to due process of adjudication of

their property claims and were displaced in violation of the policies the Bank had agreed with the Government for handling resettlement. Management did not adequately follow up on strengthening public awareness and community participation, and there were delays in implementing dispute resolution mechanisms and the assistance to improve state land management. The Panel also found management was too slow to respond to the evictions. To its great credit, the Bank accepted these findings and initiated efforts to resolve the issue.

These experiences yielded a number of valuable lessons. First, they confirmed me in the view that individual property ownership has its limits in improving access to land for the poor and security of tenure for existing residents. They also reinforced the view that a policy that is effective in one context may prove counter-productive in another. The allocation of land titles proved popular and cost effective in Cambodia's rural areas, where demand was modest and the risk of disputes correspondingly small, but was highly contentious in urban areas where demand and potential disputes were more significant.

However, the most significant conclusion that I drew from these experiences is that an excessively legalistic, or bureaucratic approach to the analysis of land markets and the formulation of land tenure and land management policies is likely to fail, or to exacerbate existing problems. As Patrick has argued, social legitimacy is essential.

By assessing its own failings openly and honestly, the World Bank has learnt from the experience and is now monitoring the institutional, social and political impacts of its policies on land more fully. Its current Mission Statement quotes an Egyptian novelist to the effect that "you can tell a clever man by the answers he gives. You can tell a wise man by the questions he asks". It is clear by the way that he puts law into its broader social, institutional and moral context that Patrick is more than just clever.

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