

THE VAGARIES OF CONSULTING ON LAND POLICY AND LAND LAW REFORM IN AFRICA 1994-2006

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INTRODUCTION

Simply described, a national land policy defines what actions a government intends to take in managing the country's land and related natural resources. In eastern and southern Africa, the period 1990-2006 was one of unprecedented attempts to reform land policy and related laws. In southern Africa international donors and funding agencies sought to support a peaceable transition to multi-racial democracy. In East Africa, land tenure reform and related legal reforms were linked to the peace building effort following civil conflicts. Policy objectives included the harmonisation of received law and customary law, and the transformation of colonial systems of land administration and urban planning, better to serve the majority of the population. Policy and related legislative reform progressed in several countries, particularly where efforts were made to integrate customary and statutory land administration in a national system, and decentralise authority over land administration. Regrettably, despite promulgating good laws, governments have subsequently amended or implemented them in a way that undermines their worthy aims. In some countries, tension between democratic and traditional forces has frustrated land law reform. In others, there are doubts about the transparency and honesty of the declared land policy aims and whether they are really designed to include the rural poor.

In the 1990s, Professor Patrick McAuslan was one of a few independent international legal advisers called upon to assist Governments with the reform of land and planning law in Anglophone Africa. The nature and degree of his involvement differed in each country. In Tanzania 1996-97 he worked on a new legal framework for land administration and management. In Uganda, he helped draft the Land Act 1998 to provide people with secure rights to their land, release their potential for development and provide a lasting basis for the settlement of longstanding disputes inherited from the colonial era. He was invited to become the senior technical adviser to the Land Act implementation project the following year. With the author, he joined a team in Lesotho in 2001, undertaking a national land policy review; similarly in Botswana in 2002 he provided legal support to a national land policy review process. In 2003 he returned to Lesotho to draft a national land code and in Rwanda in 2006 he was asked to set out the scope and content of a new law to provide the detailed legal structure for a new system of land tenure. In other countries, he continued to provide advice on aspects of land policy, also drafting bills relating to aspects of tenure reform and/or physical planning. And, of course, returning annually to Birkbeck to teach.

Because of the prominence often given by national constitutions to the powers of the state and to the rights of citizens, land law reform was invariably politically sensitive and complex and therefore challenging for those at the heart of the process, especially for an adviser-cum-legal-draftsperson from the former colonial power. When drafting such laws, Patrick

McAuslan sought to surround himself with a panel of knowledgeable nationals with whom preliminary drafts could be shared and discussed. He would remind critics that his drafts had to be consistent with declared policy, provided they met legal and humanitarian standards and principles. When policy was not clear, he saw it as his responsibility to help public officials clarify their position. If issues were not resolved, the acceptability of his drafts would be undermined. There were several occasions when his work came to a halt in the absence of clear and acceptable policy guidelines on important issues. On such occasions, Patrick would calmly and steadfastly remind public officers of their responsibilities, signalled by the international agreements to which their governments had signed up; for example the Istanbul Declaration on Human Settlements and the UN-Habitat Agenda (1996) which provide the international policy and legal context for any assessment of a country's land laws and policies. Later he would return to such matters in his writings, modestly reflecting upon the challenges and disappointments he had encountered.

CONTRARY PERSPECTIVES IN TANZANIA 1996-1997

For those working on land rights in Africa in the 1990s, Tanzania provided an example of an outstanding land policy and land tenure reform process. It began when the Minister for Lands decided that a national consultative process was required to develop a new land policy. The Presidential Commission of Inquiry into Land Matters was launched in 1991, and in the following year the Commission travelled to all but two districts, held meetings, heard and read complaints, met officials and travelled internationally. Patrick McAuslan was meanwhile with UN Habitat in Nairobi (1990-93) and was invited to submit evidence to the Commission in neighbouring Tanzania. Professor Issa Shivji of the University of Dar es Salaam was the Chairman of the Commission (1991-92) and a founder and the Executive Director of the Tanzanian Land Rights Research and Resources Institute - Hakiardi (Shivji 1999). The principal recommendation of the Commission was to vest the radical title of most of the country in village communities and to remove control over tenure administration from the executive to an autonomous Land Commission. This was not supported by the Government and the report of the Presidential Commission of Enquiry remained unpublished until 1994 (United Republic of Tanzania 1994).

In 1993, the Ministry published a green paper on the draft National Land Policy (NLP) which nevertheless drew heavily upon most of the other recommendations of the Shivji Commission. It was presented to Cabinet in December 1994 and was the subject of a public workshop in January 1995. The NLP was approved by Parliament in July 1995 (United Republic of Tanzania 1995). The Tanzanian Government approached the British Government to make Professor Patrick McAuslan available to assist with the drafting of the land laws to implement the NLP. He commenced work in January 1996, assisted by a four-person Tanzanian Support Group (McAuslan, 2013).

My first sight of the draft of the Tanzanian Land Bill was in September 1997 when I chanced to meet Patrick McAuslan in Swaziland. I was briefly in the Kingdom advising on land policy, while he was drafting a land resettlement bill with Lionel Cliffe, covering the statutory resettlement arrangements and compensation of people displaced by public works. I had come from Pretoria, where I was assigned as an adviser in the Land Policy Branch of the

new South African Department of Land Affairs under the Mandela government (1994-99). The Tanzanian Land Bill was therefore of great interest. One of my tasks was to act as secretary of a team guiding the draft of a land tenure reform bill, in the course of which we were wrestling with issues relating to the continuing retention of the State's radical title to land in the former Bantustans.

I had read Professor Issa Shivji's conference paper on 'Contrary perspectives on Rights and Justice in the Context of Land Tenure Reform in Tanzania' (Shivji 1997) and was aware that he had singled out Patrick McAuslan for criticism, principally on the grounds that his draft endorsed the 'feudal notion' that the radical title to land in Tanzania should remain vested in the state, with all the bureaucratic controls that this would involve. I was keen to know how Patrick's work was progressing and his views on the topic. He gave me his draft of the Land Bill to read and I recall being awed by its great detail, breadth and depth, but was tested by its length – 164 pages! As it turned out, the draft was revised and divided into two and brought before the National Assembly in November 1998, finally to be passed in February 1999 as the Land Act and the Village Land Act.

By the beginning of 1998, Patrick's drafting work in Tanzania on the Land Bill had come to an end and his attention had turned to the need for training Ministry officials and to the design of a public awareness and sensitisation programme.¹ The new legislation would introduce far reaching changes in the administration of land and the operation of a land market in Tanzania. The related administrative work of the Ministry would have to be based on clear and detailed rules of law, designed to introduce transparency, legality and fairness into the allocation and management of public land in the country.

The management of village land would be vested in village organisations and the status of village land would be strengthened, making it much harder for it to be appropriated by central government for 'public purposes'. The process of individualisation of title and the granting of 'customary rights of occupancy of indefinite duration' by villages to individuals and families was to commence. A new statutory framework for the exercise of rights in land through market processes – leasing, mortgaging, buying and selling, creation of servitudes such as easements – would come into being. A new system of land courts was to be established to handle all land cases from the village upwards. Specific provisions had been written into the Bill to enhance the opportunities for women to obtain rights in land and challenge practices which discriminated against them.

Taken together, these changes caused some alarm. Officials in the Ministry would have to find new ways to do things. More important, these same officials would rightly perceive that opportunities for rent-seeking would be reduced by the new law. A significant reduction in the need to obtain official consent to land transactions, mandated by the NLP, was being queried by middle-level officials. They were concerned about a reduction in open-ended discretions and their displacement by standard forms and feared an increase in outside

¹ The following three paragraphs are based on correspondence in August 1998 between Patrick and DFID Kampala, copied to colleagues, in connection with planning a training and sensitization programme in Uganda following passage of Uganda's Land Act 1998.

challenges to their decisions. Patrick McAuslan was also concerned about potential opposition to the Bill from the intellectual and academic community. Within some of the more articulate opposition parties, there were lawyers who had been campaigning against the Bill. They argued that the new laws and practices would disadvantage village peasants and favour the urban elite and ‘kulak’ class. He was aware of their resentment of his ‘foreign input’ into land law reform and of being left out of the process.

On the occasions when his drafts were criticised by Issa Shivji and others, Patrick McAuslan stoically pointed out that it was not in his powers to alter government policy on such a fundamental issue as the state’s radical title. His work could not usurp that of the Attorney General, charged with producing Bills for submission to Cabinet and the National Assembly. He recognised that if tenure reform was to be successful, it had to be accompanied by a major five-year, innovative national training programme on the law and its implementation, for village-level officials to judges. He set out proposals for such a programme, but in the event, the scale and scope of follow-up to the legislation was a disappointment. It was several years before the required manuals explaining the Village Land Act in simple terms became available (Alden-Wily 2003).

Some two decades later and in his final published work, albeit in a footnote, Patrick McAuslan (2013) returns to the issue of the opposition he met in a mild understatement:

“As many people involved in land in Tanzania are aware, there has been something of a difference between Issa Shivji and myself on the genesis and content of the land laws enacted in Tanzania in 1999. This is not the place to reprise these differences.” (McAuslan 2013, 96)

In this book, he sets out the sequence of events which led to his assignment to Tanzania. He explains the process of his appointment to assist with the drafting of the land laws to implement the NLP which he commenced in late 1995, including a prior meeting at the faculty of law in Dar-es-Salam in which he informed Issa Shivji of what he was being asked to do.

Was Patrick McAuslan right to adhere to the NLP in drafting the law? Most certainly yes, for such were the terms of his appointment. Whatever he felt personally about this key element of the NLP, there was no alternative but to accept it as ‘the bedrock of the land law’. However, he did his best to push the envelope as far as possible and give ‘village land, the land used by the majority of people in Tanzania’ ... ‘greater protection than it had had hitherto’ ... The law “provides for an elaborate mechanism for the transfer of village land to general public land”. (McAuslan 2013, 99)

Issa Shivji was no doubt entitled to criticise the Government’s decision to disregard the findings and recommendations of the Land Commission with regard to the radical title. In 2013, the state had yet to establish many of the village-level institutions necessary for the implementation of the law, failing to provide true land tenure security to villages.

The Village Land Act’s multiple protections for the land rights of communities are secure and good only until the state decides otherwise. This is due to the varying definitions of ‘General Land’ in the two Acts. The Land Act’s definition of General Land as ‘all public land which is

not reserved land or village land and includes unoccupied or unused village land' (Land Act 1999, Article 2) means that the state has the right to rezone what it feels to be 'unused' Village Land as General Land. Also, under Article 4 section 1,2 the state may compulsorily acquire even clearly used village land for 'investments of national interest' and rezone it as General Land. There are no clear mechanisms in the Village Land Act through which communities can appeal or block such reclassifications of their lands (Knight 2010, Adams and Knight 2013).

One must give Patrick McAuslan the last word on this very point:

“..while drafting I was aware that there were real dangers in creating an administrative system that had the Commissioner of Lands both exercising powers through officials, yet was the person to whom one complained about the behaviour of those officials; in a sense both gamekeeper and potential poacher. I therefore suggested a dedicated land ombudsman as a safeguard for those subject to official power over land. The Tanzanian Support Group was unanimous in rejecting this suggestion: in the words of one member, there were already too many ways for people to complain about government action and it was not desirable to add to them”. (McAuslan 2013, 115)

COUNTERPOINT IN UGANDA 1998-99

Patrick McAuslan's work in Uganda in 1998 was a welcome change from Tanzania. There was broad based support for his participation in revising the draft Land Bill. Initially engaged to address a workshop by the Uganda Land Alliance, a consortium of small NGOs involved in land rights advocacy, he was soon invited to work closely with the responsible Sessional Committee of Parliament and the Ministry of Water, Lands and Environment (MWLE) to help resolve the problems that had been encountered in drafting the law. On the other hand, his assignment to the MWLE as a senior adviser on the Land Act Implementation Project (LAIS)² in 1999 was less opportune. He carefully documented both episodes (McAuslan 1998, 2003) which are an invaluable source on Uganda's most important tenure reform and the initial efforts to implement it, a process which has only very recently been revived.

Apart from visits to Uganda to attend workshops in connection with the Land Act 1998, my work with the Department of Land Affairs was keeping me in South Africa. However, I was regularly updated on the Bill's progress by Patrick McAuslan in connection with the LAIS. In September 2001, I was recruited by the MWLE to work with Michael Aliber on an economic and financial analysis of the Land Sector Strategic Plan for the implementation of the Act. At that stage, difficulties were still being encountered in putting in place the decentralised institutions for implementing the Land Act. It was not until 2013 that Uganda finally published a NLP (Republic of Uganda 2013).

Patrick McAuslan often reminded us that a detailed understanding of the historical context of a country is essential for judging the appropriateness of a proposed tenure reform. This was particularly the case in Uganda, where internal politics had long been dominated by competition for control over land between the four traditional kingdoms and other major chieftainships and central government. Under the British in 1900, the leaders of the Baganda

² The project was officially named 'Securing Sustainable Livelihoods through Land Tenure Reform' by DFID.

and their followers acquired the equivalent of registrable freehold rights as individuals, known as 'mailo' tenure in view of the basis of its allocation in multiples of square miles.

At the time of Uganda's independence in 1962, some 13 per cent of the country's land was owned in freehold exclusively by Africans and most of the remainder was administered under indirect rule as crown land. President Milton Obote's desire to strengthen his position soon led to confrontation with the Baganda. Under the 1967 Constitution, all official estates and all land formerly held by the Land Board of a Kingdom or District was vested in the Uganda Land Commission. Then, under General Idi Amin, the Land Reform Decree of 1975 vested all land in the Uganda Land Commission as public land and converted all freeholds, including mailo, into leaseholds. The customary use and occupation of public land was able to continue, but without the protection of the previous tenancy legislation (West 2000). In practice, the Land Reform Decree was never fully implemented in the absence of an effective land administration and without peace and security in the countryside.

In 1986, the National Resistance Movement (NRM) under President Museveni began to restore stability and economic growth. Over the period 1986-1995, several attempts were made to produce a NLP with a view to encouraging land-related investments. Keen to facilitate such a process, the World Bank and USAID funded a major study which reported in 1989, but which did not result in the much needed policy and legislation. Further consultations took place and a new draft bill was formulated, but was never tabled in Parliament. Finally, the elements of the required reform were included in Chapter 15 of the 1995 Constitution which required Parliament to enact a law before 2 July 1998 (Republic of Uganda, 1995).

The 1995 Constitution vested all land in the citizens of Uganda, provided for customary, freehold, mailo and leasehold tenures and decentralised most of the powers and responsibilities of the Ministry of Lands and the Land Commission to District Land Boards. It provided for persons occupying land under customary tenure to obtain certificates of customary ownership or convert to freehold by registration. It restored mailo tenure and granted secure occupancy to *bona fide* tenants, both pending the enactment of an appropriate law by Parliament. Patrick McAuslan's 1998 paper entitled 'As Good as it Gets' was a reference to the 1995 Constitution that gave erstwhile tenants ownership rights, individually on mailo land and/or collectively on Public Land. He was rightly suspicious of the 'Washington Consensus' on property rights and often reminded us of the importance of customary tenure in protecting the rural poor from landlessness. The Constitution provided for the conversion of leasehold to freehold in respect of leases of Public Land, again in accordance with provisions to be agreed by the legislature. In the absence of a detailed NLP, it was up to the legal draftspersons to state how these brave policy pronouncements were to be realised.

By March 1998, efforts to finalise the constitutionally-required Land Bill appeared to have stalled. At the eleventh hour, in late April, Patrick McAuslan was invited to participate in a workshop organised by the Forum for Women in Democracy (FOWODE). The meeting was designed to sensitise MPs and launch a public debate on the Land Bill, which had recently

been published in the March edition of the Government Gazette. He was asked to consider whether the Bill as drafted was workable and whether it provided for accountability. He replied that he was unable to say as he found the draft unclear and pointed to some examples. Diplomatically, he set out his arguments as follows:

‘It is with some trepidation then that I have come to the conclusion that the Land Bill as it stands at present needs more work to be done on it if it is to provide the foundation for a new workable and accountable system of land management in Uganda. Law alone is not a sufficient basis for effective and equitable systems of land managementbut it is a necessary basis and an inadequate law, particularly one that leaves so many issues unresolved, gives such wide and unstructured discretionary powers to officials and official bodies and if not meshed in with existing land laws as is the case with the Land Bill, will run a very grave risk of exacerbating the land problems of the country, rather than providing the basis for their solution. It would be a great pity if the philosophy behind the Land Bill – provide the people with secure rights to their land and so release their potential for development, provide a lasting basis for the settlement of longstanding disputes between citizens – failed to be realised because the contents of the bill made it impossible to be realised.’ (McAuslan 1998, 13)

In the opening paragraph to the paper, he puts his finger on the government’s principal motivation for the proposed Land Act, namely its desire to lay the groundwork for the development of a land market, based on individual ownership. He cannily reminded participants of the nub of the vigorous public debate on the recently gazetted draft bill, a debate which ‘pitted the local politics of land and dictates of the market for land’ (p 1). As he explains in his paper:

‘If I have spent some time in setting the scene in Uganda, it is because as I did so, it seemed to me as if some of the lessons that could have been learned from the colonial past in Uganda not just for Uganda but generally in respect of land tenure reform in Africa have been but imperfectly learned by the protagonists of market-orientated tenure reforms in both national and international aid and lending institutions.’ (McAuslan 1998, 4)

Returning to the history of land relations in Uganda, in his paper, he referred to a series of ‘time-bombs’ and ‘poison pills’ embedded in the colonial legacy and the 1962 independence settlement, the consequences of which had not been adequately dealt with in the Land Bill. First, the ‘Uganda Agreement’ of 1900, between the British Government and the Buganda Kingdom, confirmed the Kingdom’s ownership of half of the total land area of Buganda. This land was vested in the Kabaka and some 4000 other Baganda notables as freehold, or ‘mailo’ as it was termed. At the time, much of this land was not vacant but occupied by peasants, not necessarily Baganda. Mailo tenure was abolished by the Land Reform Decree 1975 but was understandably resurrected by the 1995 Constitution as it had been the subject of prior assurances given to mailo tenants by the NRM before coming to power. In 1998, this land was populated by the descendants of the original mailo owners and their tenants, with multiple, overlapping and conflicting interests and rights in land which they regarded as theirs by virtue of customary law.

Secondly, under the same British Uganda Agreement in 1900, a large part of the Bunyoro Kingdom was prejudicially included in the territory of the Buganda in Kibaale District³, the so called 'lost counties of the Bunyoro Kingdom. Prior to independence in 1962, it was agreed between the British and the Ugandan authorities that a referendum would be held in the 'lost counties' to determine whether the land should be returned to the Bunyoro Kingdom or remain as part of Buganda. Not surprisingly, the Banyoro who constituted a majority in the lost counties voted to re-join Bunyoro, leaving the legal position of the Baganda landlords and Banyoro tenants unresolved.

A third 'time-bomb' was the division by the colonial authorities of Buganda into two categories: mailo of some 9000 square miles and another 9000 square miles referred to as crown land (West 1972). On mailo, customary rights were not recognized. Nor were they recognized on crown land. Customary occupiers were regarded as tenants-at-will on both mailo and crown land. When freehold or leasehold titles were granted on this land, customary occupiers were expected to move, or remain as tenants-at-will of the new owners.

As a result of Patrick McAuslan's comments on the Land Bill at the FOWODE workshop for parliamentarians, he was asked by the Minister to assist in the preparation of the Ministry's amendments to the Bill. He was also asked to support the work of the Parliamentary Sessional Committee which was in the process of examining the Bill.⁴ He describes how he found himself in the position of an unofficial liaison person between the Ministry and the Sessional Committee and involved not just in drafting technical amendments but in what might be called drafting policy amendments. Thus in the absence of an explicit national land policy and with only the bare bones of the directives and articles in the 1995 Constitution at hand, it was necessary to develop the detail of the proposed law from other laws and statements by the president and ministers on such matters as agricultural development, environmental protection and poverty reduction since the proposed law had been represented at various times as being a positive contribution to all these matters.

The Land Act 1998 *inter alia* provides for the issue of Certificates of Customary Ownership; for their conversion into freehold titles; for the grant of land in freehold; for the establishment and management of Communal Land Associations; for the registration of interests; and for restrictions on the transfer of land by family members; all to be administered through District Land Boards, Land Tribunals and parish-level Land Committees.

Patrick McAuslan had long been a strong advocate of strengthening women's land rights (McAuslan 2010) and what became of 'the lost amendment' was a source of personal frustration. In 2010, he wrote:

"In Uganda, after the saga of the 'lost amendment' to the Land Act 1998 when an amendment to improve women's rights to land was never formally passed although generally agreed to in

³ The former Kibaale District has since been subdivided into the districts of Bulisa, Hoima, Kibaale, Kiriandongo and Masindi, which now have a total population in excess of 1.5 million.

⁴ The Land Bill published in the Government Gazette in March 1998 had already received its first (formal) reading in Parliament. After that it passed to the Sessional Committee of Parliament for amendment. At that stage the Committee invited Patrick McAuslan to assist in rewriting the Bill, which then went back to Parliament for a second reading and passed through with very little debate.

the last hectic hours of getting the Bill through the National Assembly by the deadline stipulated in the constitution, I worked with women's groups and the relevant Minister to put together an amendment to the Act to reinstate the lost amendment. The President then announced that any such amendment would threaten the social and economic stability of Uganda – a very unlikely scenario. This did not stop women's groups from continuing to argue for the amendment nor myself from continuing to help them.” (McAuslan 2010a)

He spent much of the following year in Uganda as an unfulfilled senior technical adviser to the 'Land Act Implementation Project' (LAIS) from April 1999 to March 2000. He was profoundly disappointed and disillusioned by the lack of support from the staff of the Ministry of Lands and DFID. Ministry officials set out to sabotage the project, as its purpose was to implement the Land Act, which in accordance with the Constitution was to decentralise land management to the districts, thus removing power and 'benefits' from officials at the centre. He described the difficulties he faced in a self-deprecating paper for the Lincoln Institute in 2003. He concluded that the creation, passage and implementation of the new land law was a 'major exercise in institutional reform, and such exercises generate a whole host of problems, challenges and opposition that need to be addressed if reform is to have any chance of being successful' (McAuslan 2003).

Problems relating to the slow progress with land reform also arose from the severe constraints on resources at district level, personnel and funds. The Land Act 1998 decentralised land administration to district land boards and other district and sub-county structures, namely the District Land Office and Land Registry, the District Land Tribunal and the Sub-County Land Committee. The cost of creating the decentralised land administration system in the 69 districts exceeded the resources available, despite the Land (Amendment) Act 2004, which limited the number of the prescribed institutions. Land administration was just one of the functions of cash-strapped district governments. The Land Boards, where they had been established, were not able to cope with the demands placed upon them. Matters which could have been sorted out by the Land Boards went to the District Land Tribunal; there were only 18 circuits to serve 69 districts. One chairperson had to cover up to 4 or 5 districts, thus a large backlog of unheard land cases built up. In desperation, people were taking their land disputes to the magistrates' courts.⁵ These problems might have been avoided if there had been a detailed NLP, backed by the necessary budget in 1998.

I returned to Uganda briefly in early January 2014, a few weeks after Patrick's death, as part of an effort led by the Ford Foundation Program Officer Dr Margaret Rugadya, to help the Ministry raise World Bank funds for the implementation of the NLP (Republic of Uganda 2013), a consultative policy process in which she had been greatly involved (Rugadya and Scalise 2013). The Land Act 1998 remains central to the NLP and the legal framework for the land tenure reform process in Uganda.

⁵ Notes of a meeting between the author and Richard Oput, Coordinator, Land Tenure Reform Project (LTRP), MWLE Kampala, 7 June 2006.

THE LAND POLICY PAPER THAT NEVER WAS: LESOTHO 2001⁶

In former Basutoland, the role of the king and the chiefs was central to land governance. Land was held in trust by the king for his subjects. Except within the confined administrative seat of the colonial government in Maseru, chiefs were delegated certain administrative rights and responsibilities, including that of presiding over customary courts. They were required to provide residential and arable land for all married men, but not for women. The same principle applied to the allocation of grazing for their stock. A Mosotho tribesman was entitled to land without giving anything for it, but he had a duty to use and maintain it. Although the concept of individual absolute ownership was unknown, the rights to residential land tended to be exclusive and heritable.

Following Lesotho's independence in 1966, there had been moves towards more democratic forms of government. These included attempts to replace land administration by the chiefs with a more accountable system under the supervision of central government. The Land Act of 1979 aimed to supplant customary tenure with land administration under Roman-Dutch law by nationalising all rights to land. This caused tension between the state and the traditional authorities who insisted that it was unconstitutional for any authority other than the king to "make grants of interests or rights in or over such land, to revoke or derogate from any allocation or grant that has been made". Although, the Constitution also provided that the power vested in the King "shall be exercised in accordance with this Constitution and any other law".⁷

By 1996, about 30 per cent of the population of 1.84 million were living in urban areas, with Maseru, the capital, accounting for largest share, as a result of high rural to urban migration and large numbers of mineworkers returning from South Africa as a result of the restructuring of the mining industry. The great majority of Maseru residents inhabited informal settlements on land previously under the administration of local chiefs, without security of tenure, clean water or main drainage. The long-running dispute between the Maseru authorities and the traditional leaders also added to the difficulties of developing sound agricultural land use policies. Insecurity of tenure made farmers reluctant to invest in the land. Piecemeal amendments to the Land Act 1979 had not addressed the fundamental problems of legal dualism (Adams and Turner 2005).

With the new millennium, there was growing recognition that policies were needed for an efficient land market and fair procedures and just compensation for compulsory acquisition of land. Customary land tenure and the Deeds Registry Act, 1967 – an essential adjunct of land held under the Land Act 1979 – discriminated against women's rights to land: to acquire land; to hold land with a secure legal title and to pursue legal remedies with respect to land. Past governments had done nothing to tackle this matter, which offended fundamental human rights. Finally, the Land Act and amendments thereto discriminated against foreigners, discouraging incoming investment. Banks were reported to be reluctant to lend money for

⁶ The information sources on Lesotho in 2001 and 2003 are mainly from the author's record of assignments as team leader in both periods.

⁷ In terms of Lesotho Constitution 1993, Chapter IX, Section 108 (1) and 108 (2) (Government of Lesotho 1993).

land and housing development due to what they considered to be political interference in the land market. Real estate agencies were almost entirely absent due to the impossibility of making a business out of facilitating property transactions.

In 2001, Lesotho was receiving assistance, from the World Bank and bilateral donors, including DFID, for the Agricultural Policy and Capacity Building Programme - APCBP (Selebalo and Effler 2002). Government was encouraged by the donors to agree to drawing up a national land policy as a necessary prelude to drafting a new land code. The Land Policy Review Commission (LPRC) headed by a distinguished judge had visited Uganda, Malaysia and Germany and toured Lesotho holding public meetings in every district between March and June 2000, conducting hundreds of interviews and receiving many written submissions. A principal recommendation of the Commission's report was that:

'For the avoidance of doubt the present customary land tenure system must be abolished forthwith as it is not conducive to efficient land management and/or administration, security of tenure, high productivity and economic development. Accordingly all land (including agricultural land) that was held under customary tenure shall henceforth be held on leasehold tenure.' (Ramodibedi et al 2000, 116)

Government's response to the Commission's recommendations was awaited. Although not published in full, the principal recommendations were widely known. A task force in the Directorate of Lands, Housing and Urban Development in the Ministry of Local Government (MoLG) had been appointed to prepare government's response to the report in the form of a White Paper on National Land Policy. DFID consented to provide technical assistance, Patrick McAuslan and myself,⁸ as well as the necessary running costs for the preparation of a draft White Paper and public consultation. It was agreed that the draft White Paper would be presented to the public, although the form which the consultation would take was to be decided by the Cabinet.

By January 2001, stability had returned to Lesotho following the SADC military intervention and peace-keeping operation in 1998, although Maseru still bore some of the scars of widespread arson and rioting. The political situation under the Interim Political Authority was uncertain and to some degree fragile. General elections were planned for May 2002, under a yet-to-be tested system of proportional representation. However, senior officials in the executive branch of government could not be sure that a decision on the sensitive issue of public consultation on a new land policy would be supported by their interim Minister or indeed by the National Assembly when it was eventually reconvened. Unfortunately, this fault line between the executive and the legislative branch in matters relating to land policy and land law reform widened rather than closed over the next few years and left many issues unresolved.

⁸ This was not Patrick's first assignment to Lesotho. He worked on the town and country planning law and compulsory acquisition law on a DFID consultancy in 1996 – 97, which sought to adapt planning laws to the developing democratic local government. I had been involved in the preparation of the White Paper on National Land Policy and the preparation of land tenure reform laws in the former 'homelands' of RSA.

Patrick McAuslan was sceptical about the feasibility of implementing the recommendation of the Commission to abolish customary tenure 'forthwith'. He circulated an internal note on the subject to the task force.

"The central issue of the Report is the future place of customary law in the land tenure system of Lesotho. The Commission proposes the abolition of customary land tenure and its replacement by leasehold and freehold title.The Commission's view is that customary tenure has failed to provide a viable equitable and effective system of land tenure and has contributed to land degradation. It is also clear, reading between the lines that the Commission is of the opinion that the abolition of customary land tenure will deal a death blow to the chiefs' role in land management which they also wish to abolish.

The problem with the proposal is that almost certainly it will not work. Customary law will go 'underground'; it won't disappear. No country in Africa has succeeded in 'abolishing' customary law though many have tried it." (McAuslan 2001, 1)

He gave examples (e.g. Kenya and Tanzania) where attempts to replace customary tenure with 'modern' statutory law and tribunals with jurisdiction over customary tenure disputes within registered areas had not succeeded.

Patrick McAuslan's proposals for land tenure law reform were central to the Draft White Paper (MoLG 2001, para 31-33), which was submitted to Cabinet in June 2001. It proposed to develop a new national law that would reconcile customary and statutory land allocation. This would combine knowledge of Basotho culture and traditions with the experience of land laws and institutions of neighbouring countries, where they had proved successful in grappling with similar problems. It would provide for the confirmation and continuation of existing customary family rights, which were exclusive and heritable and for the large areas of rangeland that would remain communal. It would also provide for common law leases for non-customary land use (residential, commercial and industrial) limited in time and subject to eventual reversion to the community. Such leases would be registrable under the Deeds Registry Act and would be mortgageable and transferable to eligible persons, without the consent of the allocating authority. This was consistent with what was happening elsewhere in southern Africa, given the need to be competitive in attracting foreign investment. The new law should take into account, *inter alia*, the content of rights (e.g. to occupy and use, to transact, to exclude others and rights of enforcement), new allocations, confirmation and conversion of existing rights, demarcation, recording and registration, dispute resolution, cancellation, expropriation and land rights administration.

With regard to 'the land laws and institutions of neighbouring countries, where they have proved successful in grappling with similar problems', members of the task force from the Directorate of Lands in Lesotho spent a week in Botswana in March 2001, hosted by the Ministry of Lands, Housing and Environment, where land administration had been a co-operative exercise between customary and contemporary land administration over the previous three decades.

At the end of February 2001, the Draft Land Policy paper was expected to be the subject of broad consultations at district level followed by a final consultation workshop. Unfortunately, this was not possible because the Cabinet had yet to approve the draft document. On the

morning of Tuesday 19 June 2001, we were invited to wait outside the Cabinet meeting room while it considered a briefing paper summarising the issues in the draft White Paper. After two hours, the Government Secretary emerged from the Cabinet meeting with the instruction that the Principal Secretary for Local Government and his advisers should proceed with finalising the draft along the lines which were felt to be acceptable to Government. Sadly, no feedback was received from the Cabinet before our work in Lesotho came to an end. The Draft Land Policy paper was not approved for release before the election in May 2002, by which time Government's response to the report of the LPRC was more than a year overdue.

‘A REFORM TOO FAR’: LESOTHO 2003

Back in Lesotho, following the May 2002 elections, a new minister assumed the Local Government, Lands and Housing portfolio. At the request of DFID, I flew from Botswana to Lesotho to meet the Minister⁹ on 14 October 2002 to respond to her Ministry's request for assistance from DFID with the revision of the land legislation. I was informed that this was an item on the agenda each week in Cabinet and therefore had a high priority. I explained that DFID wanted to know the status of the Draft White Paper on Land Policy to ensure that the legal draftsman did not waste time revising legislation only to be told that it wasn't what was wanted. The Minister responded that she wanted the drafting of the land policy and the land legislation to go in parallel and what she required was a white paper which took the form of a 'legislative draft'. She said that the policy paper had to set out the details necessary for the National Land Code. She wanted the Land Code drafted immediately, before the next Cabinet meeting!

The APCBP donors were also keen to ensure that there would be rapid progress with the legislative drafting during the last year of their support project. Accordingly, the Aide Memoire of their December 2002 Supervision Mission stated that work on the land policy, the drafting of the Land Code and implementation planning should be done concurrently, for which technical assistance would be provided by DFID. It also stated that the drafts of the Land Code¹⁰ and the Land Reform Strategic Plan (LSSP) should be completed by the end of June 2003. The decision to run the policy development process concurrently with the legal drafting stemmed as much from the donors as from the Minister. To reduce the risk of the proposed tenure reforms being over ambitious and too costly to implement, as had occurred in Uganda, it was agreed that work on the financial and organisational implications of the reforms should be carried out by Michael Aliber and Lala Steyn in concert with the policy and legal drafting.

Patrick McAuslan returned to Lesotho in March 2003 to commence the legal work assisted by two Basotho counterparts. The Draft White Paper on Land Policy that we had helped to write in 2001 had not been published; nor had the September 2000 report of the Land Policy Review Commission (LPRC), to which the Draft White Paper was meant to be a response. The Ministry's policy guidance for the drafting of the Land Code was limited to a short paper dated November 2002, which included the Cabinet's response to the LPRC. At the time,

⁹ The Hon. Pontšo Sekatle

¹⁰ This was to comprise the Land Bill, the Town and Country Planning Bill and the Land Acquisition and Compensation Bill.

Cabinet and the Minister were intent on controlling encroachment of informal settlements on agricultural land by demolishing houses and prosecuting offenders.¹¹

The drafting programme, led by Patrick McAuslan, was designed to create a new legal framework for the management of land in Lesotho, based on the accepted policies developed in the LPRC and other land policies of Government, revising and in many areas replacing the existing statutory land laws of Lesotho. The Land Bill was to provide for the grant of land titles, for the conversion of titles, for better securing of titles, for land administration and for the provision of a new system for the settlement of land disputes. The overarching principles of the Land Bill were threefold.

Principle one: land occupied by citizens and others would be held as a lease, deriving its legitimacy and legality from the Constitution. Leases would be of three types:

- **Primary leases** would replace the former allocations of land under the Land Act 1979 which had been meant to replace the customary land tenure system. The foundational law that would apply to primary leases would be the ‘common law’, formerly ‘customary law’.¹² The term ‘primary’ would be given to the lease as it was intended for the time being to be the primary form of landholding in Lesotho.
- A **Demarcated Lease** would be available to citizens via a process of adjudication of common law interests in land held as a primary lease. Those wishing for greater clarity of their rights would be able to obtain a demarcated lease, registrable in a local register, stating the location and boundaries of the land and the rights and responsibilities of the leaseholder. Such leases would be fully marketable and could be used as security for a loan. It would be for holders of demarcated leases to move from common law to Roman-Dutch law as the foundational law of the lease.
- A **Registrable and Qualified Lease** would be an existing lease of the Land Act 1979. It was proposed to call it ‘registrable’ as it would have to be registered in the central Deeds Registry, subject to being surveyed in accordance with the prevailing regulations. The difference to the existing lease under the Land Act 1979 would be the introduction of the qualified lease. This would be a registrable lease, but without the full trappings of final registration.

Principle two: Land management was to be devolved from the centre to elected local authorities. The issuance of primary and demarcated leases was to be managed entirely by local authorities, which would be required to operate in a transparent and fair manner. Registrable leases would also be allocated by local authorities, but, as was the case with leases under the Land Act 1979, the legal process of granting the lease and the registration of the lease would be managed by central government and decisions on dispositions of leases would involve advice from a Land Markets Board, a central agency. While most registrable leases would be for residential purposes and held by citizens, these would also be the

¹¹ In April and May 2004, 201 cases were prosecuted in Maseru. Most of the accused were women (UN-HABITAT 2005, p 41).

¹² The reasons for recognizing customary law as the common law are explained below

principal form of tenure for commercial, industrial and public land holdings and foreign investment.

Principle three required the transparent and consistent regulation of the land market. Instead of a rather secretive process of decision-making about what dispositions could be granted and what could be exempted from regulation carried out by the Minister (which in practice often meant by officials with no particular expertise in land markets), it was proposed that the regulation of the land market was to be more transparent with criteria for decision-making set out clearly and a Land Markets Board established. A small expert body would provide advice to the Minister, guiding the operation of the land market and the principal actors in order to ensure the growth of an efficient and equitable market.

The financial and institutional planning for the implementation of the legislation was believed to have gone well. Patrick McAuslan had conscientiously involved his Basotho colleagues in the legal drafting process and they had presented the penultimate draft of the Land Bill at a two-day workshop 2-3 June 2003 with members of the Department of Lands, Surveys and Physical Planning (LSPP). This was followed by a meeting with the Minister on 12 June 2003. A number of features of the draft Bill proved to be sticking points with the Minister, but none of them was judged at that stage to be unresolvable.¹³

First, the use of the term ‘common law’, a central definition in the draft Bill, to mean customary law, was thought to be confusing. Lawyers in Lesotho colloquially referred to Roman-Dutch law as the common law, a misnomer as it had never been the common law of Lesotho, that is to say the law common to all Basotho and recognised as such. Sebastian Poulter, a noted scholar on Lesotho law, had stated that ‘the common law had been introduced specifically to meet the needs of the white population...’ (Poulter 1979, 14) In the commentary to the Draft Bill, Patrick McAuslan explained that the real common law of Lesotho had hitherto been called customary law, but to continue to refer to the basic land law of Lesotho as customary law and the basic land tenure as customary tenure was outmoded. In 2000, the LPRC had recommended that the customary land tenure system be abolished forthwith and that land be held under a new Land Act in future. While this recommendation had been accepted, the Government had also recognised that there was a need to define customary tenure clearly which meant that there had to be some set of legal rules which governed and regulated the incidents of the form of tenure under which the vast majority of Basotho occupied and used land. The alternative, to impose Roman-Dutch law on tenure relations throughout Lesotho, would have resulted in widespread disregard of the law and a situation where the vast majority of the population, technically, would be in illegal occupation of their land. Patrick McAuslan’s solution to this seeming conundrum – abolish customary law but still use it to define rights to land for the majority of the population – was to rename customary law as common law – as the law common to all Basotho, thus

¹³ Patrick McAuslan’s notes of his meeting with Hon. P. Sekatle, Minister of Local Government, Lands and Housing, 13 June 2003 to discuss the Draft Land Bill.

deliberately severing it from its traditional roots which, as the LPRC had demonstrated, had given rise to inequity and inefficiency in land relations.¹⁴

The Minister's exception to the proposal to establish a semi-independent Land Markets Board was, in retrospect predictable. Apart from the additional expense involved, she felt it potentially undermined her authority in matters of land allocation. She rejected the idea that politics shouldn't play a role in deciding on dispositions. She also didn't like the provision that the Minister 'may' give policy directives to the LMB. If the Minister 'may' then this meant that someone else could as well. Who were these other people or authorities that could give policy directives to the LMB? Couldn't the LMB, if it had to, be merely advisory to the Minister or just another Division in LSPP?

After the meeting, Patrick McAuslan reflected on what the Minister had said. A superficial reaction was to say that at the end of the day, if the LMB was not wanted, it would not fly. Clearly there was a problem of 'letting go' which he had experienced in both Tanzania and Uganda – particularly the latter where a refusal to 'let go' by central government officials had more or less killed the Land Act 1998. A refusal to let go in Lesotho would more or less kill a land market.

What the Bill was proposing was that whereas Ministers had been making virtually all the decisions about dispositions, the new position, via the LMB, would be that they would have virtually no say. This was a step too far. It was unrealistic to expect Ministers to take such a large leap into the dark. Whatever the practice in other countries, where the private sector provided services and managed resources in a market environment, regulated by government agencies, such an approach was not appropriate for land or at any rate land in Lesotho. The Minister's views probably reflected a majority opinion in the Cabinet. In a note on the meeting to team colleagues, immediately following his meeting with the Minister, Patrick McAuslan concluded that:

'when push comes to shove, the Government will opt for a fudge on land markets; yes in theory; not really in practice since continued Ministerial hands-on decision-making on dispositions would be incompatible with the kind of land market which would persuade investors to invest in land and agriculture. But that will be for Ministers to learn the hard way. Interestingly on the same day as the meeting, *Mopheme, the Survivor*, a local newspaper reported a speech by the Minister of Agriculture urging Basotho to develop commercial agriculture, (calling on) foreign investors to invest in commercial agriculture and "conceding that the present land tenure system in Lesotho posed serious limitations to accommodate productive commercial agriculture." Could there be a better illustration of the pitfalls of drafting land laws without a land policy in place?'

Sadly, uncertainties about the Government's policy position on key aspects of the proposed land tenure reforms resulted in the eventual shelving of the Draft Land Bill in 2004, which was considered by aficionados to have provided imaginative and sensible means of resolving Lesotho's endemic land problems. These remained largely unresolved for another six years, until the passing of the Land Act 2010 and the related Land Administration Authority Act

¹⁴ The foregoing paragraph is based on Patrick McAuslan's commentary to the Draft Land Bill, June 2003.

2010. Patrick McAuslan's efforts were not entirely unappreciated. In 2010, the Director General and Chief Executive of the Land Administration Authority of Lesotho wrote of the draft legislation:

'The Land Bill, 2004 was innovative in both what it did and produced; regularisation would formalise urban tenures and different types of lease would provide different access points to the formal system depending on people's needs and means; however, the Bill was a reform too far and it didn't receive the support necessary to progress to law.' (Johnson 2010)¹⁵

SOME SATISFACTION: BOTSWANA 2002

In the second half of 2002, Patrick McAuslan and I were involved in a review of the land policy of Botswana, which unlike the other country examples recalled in this chapter was directly funded by the Government¹⁶. Here, Seretse Khama in 1966 had transformed himself into a democratic President of an independent country and in so doing had carried the chiefs with him. Moving quickly with the Tribal Land Act 1968, he had placed the administration of customary land in the hands of Tribal Land Boards, from which chiefs were eventually excluded, but compensated in other ways. Thus land administration in Botswana had been a co-operative exercise between tradition and modernity, while in Lesotho it had been a confrontation.

The context of policy development in which we worked in Botswana was well understood. Up until 2002, the nation's iterative land policy reviews had followed a process extending up to two years and consisting of: (i) a commission of inquiry (or an expert review), calls for written submissions as well as the convening of public meetings with a wide range of stakeholders; (ii) the preparation of a draft report, oral presentations and discussions at a national workshop covered by the media; (iii) a draft paper debated in Parliament; (iv) the publication of a government white paper setting out the policy change adopted, the recommendations which had been accepted, amended, deferred or rejected, with a justification for government having done so; (v) finally, where relevant, the drafting of laws or amendments of existing laws (Adams et al 2003).

Our six months' assignment in Botswana was gratifying. Patrick McAuslan excelled both as Legal Adviser and pedagogue. He was one of a team of ten consultants, half of whom were Botswana, charged with conducting a review of the nation's land-related policies and laws. The PS of the Ministry of Lands was charming, accessible, and very knowledgeable on the subject of land (see Mathuba 1989, 2001). The Legal Adviser's terms of reference were to review the outputs of the national legal specialists and the work undertaken by the team, including the draft reports of the Land Policy Review (Government of Botswana, 2003). He

¹⁵ Johnson (2013) further points out that The Land Act 2010 and the Land Administration Authority Act 2010 were enacted under the auspices of the Land Administration Reform Project and the support of the Millennium Challenge Corporation. Under the Land (Amendment) Act of 2012, the statutory post of the Commissioner of Lands was taken out of the public service and brought under the Land Administration Authority. Similar amendments to the Deeds Registry Act 1967 and the Land Survey Act 1980 took the posts of the Land Registrar and Chief Surveyor out of the public service to consolidate all administration functions under the Land Administration Authority.

¹⁶ Commenting on an earlier draft, Michael Aliber, the team's economist, reminded me of this important point, which underlines the strong commitment of the then Government to the resolution of its land policy issues.

made two extended visits to Botswana, during July/August and November 2002 and drafted the final chapter of the Review, namely 'Legal Aspects', covering recommendations on women's land rights, the Tribal Land Act, the Town and Country Planning Act, The State Land Act, land ownership by non-citizens, as well as land registration and survey and the Land Tribunal.

Foresightedly, Patrick McAuslan set out proposals for recasting all three land laws – the Tribal Land Act, the State Land Act and the Land Control Act – into one new Land Act divided into chapters dealing with tribal land, state land and land ownership by non-citizens. A further chapter would deal with the Land Tribunal system. Common sets of definitions and of general and miscellaneous powers applicable to all land matters were to be part of the new Act, which would be easier to use and of benefit to officials, professionals and lay users alike. He saw the proposed Act as the first step towards the longer term goal of a National Land Code for Botswana. Another of his proposals was the creation of a Greater Gaborone Land and Planning Authority.

The Tribal Land Act is now well overdue for revision and possible incorporation in a unified law (Knight 2010). There are an increasing number of voices raised in the press about tenure insecurity on Tribal Land, particularly for pastoralists (Adams 2013), and falling standards of governance by the Land Boards. The Greater Gaborone City-Region is not yet recognised as a separate entity for planning and development purposes, although a recent study seeks to make a case for its recognition and provides a strategy for its planning and development control.¹⁷

FULL SPEED AHEAD IN RWANDA 2006

Rwanda has the highest density of population on rain-fed arable land in Africa. In 2001, 60 per cent of rural households held less than a hectare of land. In the period 1960 – 1990, the population of Rwanda increased from 2.75 to 7.03 million, but in 1994 the year of the genocide, it fell back to 5.2 million (Mushara 2001, 7). André and Platteau (1995) reported the findings of an in-depth case study of a very densely populated area in the northwest of Rwanda, which they conducted during the period 1988-1993. They concluded that the pervasive incidence of land disputes and the threat of landlessness led to rising tensions in social relations and paved the way for more overt expressions of disharmony and violence. They made the connection between these conditions and the civil war that broke out in 1994.

Prior to independence, land in Rwanda was held according to customary law and the received Belgian law. According to custom, usufructuary rights were allocated by traditional leaders and thereafter passed down the male line. After Rwandan independence in 1962, under Article 108 of the new Constitution 1962, Belgian land law continued to be recognised as binding. Article 109 provided for an 'organic land law' which would determine how customary laws would be codified and harmonised with constitutional principles. Land continued to be legally held by customary occupiers, but following the decree law No. 9/76 of 4 March 1976 'all land not held under the written law and (whether) *affected or not by*

¹⁷ <http://www.greatergaboronecity-region.info/>

customary law (italics added) or (by) land occupation belongs to the State'. In 2001, nationwide consultations by the National Unity and Reconciliation Council revealed that land disputes had become 'the greatest factor hindering sustainable peace' (Musahara and Huggins 2005, 275). Another four years elapsed before the passage of new land legislation, an indication of the sensitivity of the subject. However, the new Constitution was adopted by a national referendum in May 2003, the National Land Policy was finalised and released in 2004 and the 'Organic Law Determining the Use and Management of Land' (OLL) was passed in 2005 (Republic of Rwanda 2003, 2004 and 2005 respectively).

In 2006, Patrick McAuslan and I joined a two-year, DFID-funded project, contracted to HTSPE Ltd and led by Clive English, to assist the Ministry of Lands, Environment, Forestry, Water and Mines (MINITERE) to prepare a country-wide tenure reform programme. It aimed 'to secure the land rights of all citizens including the poor and vulnerable, whilst also supporting national economic development and promoting environmental sustainability' (HTSPE 2006). The project involved the planning of systematic land registration throughout the country, an essential part of which was a programme of 'field consultations' in representative districts by a team of young Rwandan graduates led by Elizabeth Daley (Daley *et al* 2010). Patrick McAuslan was asked to consider the legal framework required for the new system of tenure mandated by the Organic Land Law 2005, which abrogated all legal provisions contrary to the law, including customary law. This was his first visit to post-conflict Rwanda, which continued to experience turmoil in land relations with returning waves of refugees (Bruce 2009). He relished the challenge of getting to grips with an unfamiliar legal system and the intricacies of the tri-lingual OLL, drafted in French, translated into Kinyarwanda, the language spoken by most Rwandans, and then into English. The OLL provided the enabling legal framework for land tenure reform. Other legal and administrative instruments were understood to be needed for its implementation.

Until his arrival, there was some uncertainty in the project team as to the meaning of some of the clauses in the OLL.¹⁸ By careful analysis of the French version and by reference to the NLP, which was clearer and more specific on issues of tenure than the OLL, he was able to answer important questions relating to the nature of the land rights created by the law.¹⁹ He confirmed that it was Government's intention to grant title to rural peasants only in the form of an emphyteutic (long term) lease and that any proposal to grant them freehold rights would be unacceptable. In an internal briefing paper²⁰ he explained that the OLL was a fresh start and that the old law and the problems to which it gave rise were to be left behind. However, he reasoned that before the new law could truly and effectively be brought into operation, a detailed and comprehensive law had to be written covering, tenure on individual land; leasing

¹⁸ Uncertainties evidenced by correspondence between the HTSPE UK office and Kigali 07.07.2006

¹⁹ The use of the word 'ownership' in relation to land rights in Rwanda under the OLL had been the source of some confusion. Elaborating on the nature of the land rights created by the OLL, he explained that the meaning of the word 'ownership' in the law had to be understood in terms of Article 30 of the Constitution and Article 3 of the OLL which affirmed that 'the state had 'supreme power to manage all the national land and guarantees the right to own and use the land'. In other words, the state held the allodial title or dominium over land in Rwanda. Article 5 of the OLL permitted any natural or legal person who 'owns land through various means' to own it on a long-term lease (i.e. an emphyteutic lease) in conformity with the provisions of the OLL.

²⁰ 'Basic Rwandan Land Law' unpublished draft Patrick McAuslan, 20.07.2006

of State and Local Authority land; title demarcation; adjudication and registration; and dispositions. These were not the only subjects on which new and detailed laws needed to be written, but they were the most important. Without them, people's legal rights and ability to hold land, transact land and develop it would at best be cloudy and at worst non-existent.

In the seven opening pages of his main paper in Rwanda (McAuslan 2006), he set out the basic principles to be taken into account in the design and implementation of the land tenure reforms envisaged in the NLP and the OLL. These were derived from his earlier work for the UNCHS Urban Management Programme (McAuslan 1992) and the Istanbul Declaration on Human Settlements and the Habitat Agenda (1996), to which Governments, including Rwanda, had committed themselves. In retrospect, this may seem unduly pedagogic, but in 2006 land administration and management in Rwanda was rudimentary. MINITERE had less than a handful of professionally qualified land administrators and capacity building was a central function of the DFID Project.²¹ At that stage, rural and urban land registration was limited to a manual system. The Ministry held over 20,000 land applications yet to be processed, which had accumulated over the previous decade. These were mainly for urban land other than in Kigali City, which had its own land administration system (HTSPE 2006).

Patrick McAuslan advised that while a strategy of enablement was to be the preferred mechanism for providing access to land and ensuring security of tenure, the role of Government should not stop at enabling land markets to operate efficiently and transparently. It should direct its attention to considerations of equity and social justice in the operation of land markets. Government at all levels and institutions of civil society should be involved in working together to remove obstacles to obtaining land and providing security of tenure via the market. Government should desist from actions penalising people, especially the poor and disadvantaged, which lessened their opportunities to obtain and hold on to small parcels of land. He drew attention to a situation in which land consolidation and land sharing should meet the tests of administrative justice and that these should be comprehensively covered by the law. Further, he noted that the OLL contained some important articles on consent to land transactions by family members, but which confined consents to (a) joint owners and (b) with respect to spouses, those who were legally married. He argued that if family members were joint owners, then they should be a party to any legal transaction by virtue of their joint ownership. If consent was to have any usefulness, it needed to apply to family members, particularly spouses who were not joint owners of the land. Another concern was the reference to a spouse legally married. Quoting Rose (2004), he pointed out that there were a huge number of 'illegal' marriages and therefore 'illegal' spouses were left without the protection of the law. He concluded that the emphyteutic lease envisaged by the OLL should be covered by a branch of public law, namely the law governing relations between the state and the citizen. In keeping with the philosophy of the OLL, he recommended that a new statutory code of land tenure and land transactions law should be developed that combined the general principles of customary tenure and existing statutory land laws from the Civil Code.

²¹ Within a few years, the Ministry built up a cadre of talented and strongly motivated staff, refreshingly free of the rent seeking behaviour associated with land administrators in neighbouring countries.

The bare essentials of his proposals were contained in the Strategic Road Map (Sagashya and English 2009). However, the comprehensive Land Tenure Decree he envisaged was never drafted. Presidential and ministerial decrees (relating to leases, land registration, land sharing, etc.) appeared during 2007-2011 enabling the OLL to come into effect. In the absence of the proposed Land Tenure Decree, subsequent restrictions placed by other government programmes, such as land consolidation and rural resettlement, reduced the rights of farmers to use land and profit from it as they saw fit (Huggins 2014).²²

Following a programme of pilot trials in 2008, the systematic land registration programme was implemented by the Ministry during 2009-2013 and covered some 10.4 million land parcels, a process in which the great majority of rights holders are believed to have willingly participated. Thus, in the period 2005-2013, the implementation of Rwanda's NLP was extraordinarily rapid. However, doubts remain about the impact of other government programmes on the security of tenure of title holders who are required to participate in them and the impact of land registration on the welfare of women and children, particularly for those in polygamous relationships. Other questions have arisen about the number of intra-family disputes that have surfaced as a result of the adjudication and titling process, even if boundary disputes between neighbours may have decreased. In his final published work, Patrick McAuslan (2013) revealed his scepticism of the outcome of the process of the systematic land registration programme on the livelihoods of the poor and the motives of the Government.

What appears at first sight to be an excellent example of market-led land reform fully in keeping with modern 'international standard' approaches to land management seems on a deeper and more careful analysis to be a reform *designed* to benefit the urban elites at the expense of the rural poor and to make matters worse, re-exacerbate the long-standing tensions between Tutsis and Hutus. (page 137)

His view was based upon the writings of four respected, but nonetheless critical studies, conducted in the period 2002-2011, that is several years before the completion of the systematic land registration process. As yet, there is no rigorous quantitative evaluation of the longer-term impact of the programme on the tenure security and rural livelihoods of the poor and vulnerable (Adams 2013a).

CONCLUDING COMMENT

In the Preface to his final work, Patrick McAuslan (2013) describes his 'lifetime's commitment to grappling with the endlessly challenging and fascinating topic of land law in the region' (page x). His book provides us with an authoritative and scholarly review of development and change in the land laws of seven countries in Eastern Africa over the period 1961-2011.

The foregoing account describes some of the background to his consultancy assignments in three of these countries - namely Tanzania, Uganda and Rwanda. To these three countries, I

²² In June 2013, the OLL was repealed and replaced by the Law Governing Land in Rwanda (No. 43/2013 of 16/06/2013). The extent to which this new law has taken account of Patrick McAuslan's concerns could not be addressed in this chapter.

have added two more in Southern Africa - Lesotho and Botswana. I have described his interaction with public officials, with civil society, with donors and with his colleagues, and the underlying thinking behind the bills that he drafted, the high hopes that his work inspired and the not infrequent disappointments, sometimes followed by a reassuring note to colleagues explaining why he failed to win over a Minister and why it was to be expected. I understand why Patrick found this work 'endlessly challenging and fascinating', sometimes disappointing, but not 'deeply depressing'²³. There have been disappointments, but not depression. Work with colleagues from host countries, who continue to strive to overcome the problems of a dysfunctional land administration, was invariably stimulating. Joint efforts to devise solutions were sometimes rewarded, but whatever the outcome we learnt from the process. As Patrick reminded us:

There is always more to be learned; never think you know it all. Wherever you work and whoever you work with, you can always learn from them as they will have had experiences you have not had and they will have an understanding of their own country and its problems that however much reading you do you will never be able to come close to. You may be a consultant but you are still and always a student. (2010a)

On reading an earlier draft of this chapter, Stephen Berrisford, a close associate of Patrick McAuslan, familiar with Patrick's work in Lesotho in 2003 and the eventual implementation of the Lesotho Land Act 2010, with support from the Millennium Challenge Corporation, commented as follows:

I think that the story would be more interesting if there was more reflection on how the two DFID-funded initiatives ultimately transmogrified into the Millennium Challenge sponsored process (but maybe that's for a separate publication?).²⁴

In Lesotho in 2003, as in other countries and at other times, Patrick McAuslan's contribution may not have been immediately appreciated, but it encouraged and inspired subsequent reforms. I trust that the principles and standards that he set in the region will continue to inspire those that follow.

²³ See In Memoriam: Professor Patrick McAuslan MBE: by Professor John McEldowney, http://www2.warwick.ac.uk/institute/news/intnews2/in_memoriam_mcauslan/

²⁴ Stephen Berrisford personal communication 31 December 2014.

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