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REVIEW ARTICLE

Cause and consequence in law and development

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Patrick McAuslan, *Bringing the Law Back In: essays in land, law and development* (Aldershot: Ashgate. 2003)

> The title of the book sums up my overall stance: there is an important role for law in development generally and in land reform in particular and it is, in my view, wholly beneficial that after almost three decades of virtually ignoring the role of law in development … international financial institutions, aid agencies and scholars in the West are beginning to appreciate and reaffirm both its centrality to development in practice and its centrality to understanding the process of development and change in societies in developing countries.
>
> (McAuslan 2003: vii)

> He who is able to translate others' interests into his own language carries the day.
>
> (Latour 1983: 144)

INTRODUCTION

After almost three decades in the wilderness, Patrick McAuslan's new book pleads for the law to be brought back in to development. It provides a lively account of 35 years work as a technical legal consultant on land matters all over the world. Ranging from urban planning in Bangladesh to land law in Tanzania, McAuslan has occupied a key position in the world of technical legal consultancy. In that time, he has also published extensively on his work and this book brings together a number of important essays. The book will provide little which is new for those who are familiar

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I first raised the ideas contained in this paper at a 'History and Politics of Africa' seminar at Queen Elizabeth House, Oxford in May 2003. My thanks to Gavin Williams, Robin Palmer and other participants on that occasion for a thought-provoking discussion. Thanks also to John Harrington for discussing this paper with me.

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with McAuslan's corpus, and it is somewhat disappointing that the author chose not to update these essays (some were written as long ago as 1988, a long time in the politics of land reform). Although this does have the merits of avoiding a sanitised account of his involvement in land reform, the publication of the book might have been seen as an opportunity to comment on the many contentious issues which have characterised 'new wave land reform in an era of neo-liberalism' (Bernstein 2002: 433), including his own role in it. Despite these limitations, McAuslan's book provides a sometimes vivid account of his work in land law reform and evokes the world of international donors, lawmakers, consultants, ministry officials and bureaucrats with some skill. It will function as an important primary source for those interested in contemporary law and development and in the global politics of land reform.

In the first part of this review article, the main themes of the book and more widely of McAuslan's career as a technical legal consultant are explored. The publication of this account of many years' work of a legal academic in technical consultancy provides us with valuable insights, and is an important source for those interested in policy-making on land at national and international levels. In the second part of this review, I draw on Bruno Latour's theory of the creation and working of networks (Latour 1983; see also Braithwaite & Drahos 2000) to make some preliminary observations about the entrepreneurial activities of those involved in technical legal work. I seek to explore a question posed by McAuslan in his book but one which is not in my view adequately addressed: why it is that in recent years land reform has come in practice to mean land *law* reform.[1] More broadly, I ask: what might the efforts of scholars like McAuslan tell us about what has recently been hailed as a revival in law in development scholarship and practice?

THEMES

The role of law

The key chapter on this theme is suggestively entitled 'Making law work: restructuring land relations in Africa' (McAuslan 2003: 245). The author points out that:

> the twin emphasis of donors, led by the World Bank, on 'good governance' and the market economy as the keys to social and economic regeneration in Africa are increasingly seen as necessitating a greater reliance on legal forms and a legal culture similar to those operating in Western, market oriented economies; conscious moves to adapt legal and judicial systems to that end are thus increasingly part of aid programmes.

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The way in which McAuslan frames his discussion of the rule of law in this passage, and in the book as a whole, does not enable him to explain adequately the curious translation of land reform into an issue of law reform. His approach neglects the important role of agency: the efforts of key individuals in the land reform process have ensured that legal solutions have been sought for the problems of land relations. As I show in the discussion of network theory below, it is precisely through the entrepreneurial activities of scholars and other professionals that law has come to have a central place in land reform. McAuslan has been an active entrepreneur in the cause of land law reform. This is confirmed by his use of chapter headings such as 'Bringing the law back in' (*ibid.*: 106) and 'Making law work' (*ibid.*: 245). McAuslan notes with approval that amongst international donors there is a 'commitment to developing a legal response to land reform, to seeing land reform as being, in part, land *law* reform' (*ibid.*: 248, author's emphasis). If legal solutions have been sought for Africa's perceived land problems, this is in no small part due to McAuslan himself.

In recent years, commentators have pointed to a revival of interest in law and development scholarship and practice (Baxi 2003; Kennedy 2003). As an area of academic research and of policy, law and development can be traced to the late 1960s. Newly independent African states embraced an ideology of developmentalism which gave the state a central role in bringing about economic growth. Scholars of law and development, many of whom were based in African law schools and also in the United States (Ghai 1987; Seidman 1972), looked to development studies, economics and politics to inform their work. The main concern of these scholars was to provide technical assistance to government ministries, and to boost their administrative efficiency in order to bring about development. The law and development movement had a pragmatic and instrumentalist view of the role of law. They saw law as a discipline whose ends should be determined by other disciplines, such as political economy (Harrington & Manji 2003). Furthermore, lawyers were positioned by class to play a central role in what Samir Amin (2000: 32) has characterised as the 'Bandung (bourgeois national) project' of developmentalism. By the mid-1970s, law and development began to decline as it became clear that it would not achieve the task of using law to bring about development. A great deal of self-critical writing sought to analyse why the lofty aims of the movement had not been achieved (Merryman 1977; Trubek & Galanter 1974). It seemed that both as an area of scholarship and as a policy-oriented practice, the methods, outlook and objectives of law and development had been abandoned.

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Since the late 1990s however there has been a resurgence of writing and interest in law and development (Chibundu 1997; Ginsburg 2000; Houtzager 2001; Rose 1998). It is important to place McAuslan's writing in the context of this revival. Indeed, the author himself invites us to do so by giving his book the title *Bringing the law back in*. McAuslan's self-perception is important: as I show in the second part of this essay, he is eager to communicate a sense of continuity between his recent work and that of early law and development scholarship. As he argues, it is 'wholly beneficial that after three decades of virtually ignoring the role of law in development', it should now be recognised once again that law is central to the development process (McAuslan 2003: vii). After all, McAuslan points out, despite being sidelined by international donors and scholars, law 'by definition continued to be used' for the purpose of development in the third world (*ibid.*: vii). For McAuslan, tales of law and development's demise were both premature and inaccurate.

Following Bernstein (2002), the revival described above might be characterised as 'new wave law and development in an era of neo-liberalism'. That land law reform is at the core of the neoliberal economic programme was powerfully signalled by former US President Clinton's speech to the British Labour Party Conference in 2002. He said (Clinton 2002):

> I have just come here from a trip to Africa which provided me with all kinds of fresh evidence of the importance of politics … In Ghana … a new President is working with a great Peruvian economist, Hernando de Soto, to bring the assets of poor people in to the legal system so they can be collateral for loans.

As Clinton's words demonstrate, out of office he remains committed to the neoliberal agenda pursued by his administration, as evidenced by the coming into being of the North American Free Trade Agreement and the establishment of the World Trade Organisation. As such, his role has been to act as 'World President of the Third Way' (Callinicos 2001: 2–3):

> At the global level, the imposition of neo-liberal orthodoxy at least in part reflected a conscious strategy pursued by successive American administrations in order to maintain US hegemony in the post-Cold War era: the very name attached to these policies – the Washington Consensus – is symptomatic of the role played in their implementation by the institutional complex binding together the US Treasury, the IMF, and the World.

Clinton is not alone in his endorsement of the work of de Soto to formalise land tenure in the developing world (*Accra Daily Mail* 20.9.2002; see also Kennedy 2003). The importance to a functioning market economy of a legal system which promotes certainty is cited by McAuslan as the main reason why law must be brought 'back in' (McAuslan 2003: 256;

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see also World Bank 2003). Indeed, it is to be expected that de Soto's programme will become increasingly influential. High-level meetings have recently taken place between de Soto and members of the British government which have had some impact on thinking within the Department for International Development, and which may well influence Britain's overseas development policy in coming years.[2]

The question whether any differences can be discerned between old and new law and development has occupied a number of scholars (Baxi 2003; Tamanaha 1995). One key difference is that as it was originally conceived, law in development was concerned with, and sought to serve, the developmental state (Harrington & Manji 2003). What I have characterised as 'new wave law in development' has as its context the neoliberal state in an age of globalisation. McAuslan's attempt to bridge old and new law in development and to demonstrate the existence of some continuity between them suggests that, for him, the value of this perspective was never in doubt. An instrumental approach to law had not been abandoned – it continued to be used in the third world – but, in McAuslan's view, it must be resurrected amongst international financial institutions, aid donors and scholars. This is the task the author sets himself in the book and in his wider contribution as a technical legal consultant: he seeks to revive the 'long narrow networks' (Latour 1983: 166) of law and development which had fallen into disuse amongst international financial institutions, donors and scholars since the mid-1970s. This is a point which is taken up in the second part of this review.

Emerging from the wilderness years, law in development has come once again on to the international agenda through the efforts of scholars such as McAuslan. Its original concern with the economic growth of the developmental state has transmogrified into the promotion of good governance and the rule of law (Dezalay & Garth 2002; Faundez 1997; Kennedy 2003). One effect of the intervening quiet years is that today's adherents to law in development profess a healthy measure of scepticism about the instrumental use of law. McAuslan (2003, 14) acknowledges, for example, that 'altering the legal framework of land relations will not automatically result in an altered approach to land relations'. This modesty in relation to the likely impact of the author's own discipline can be contrasted with the optimism – some would say bullishness – of the original law in development movement. In the self-critical words of its leading scholars (Trubek & Galanter 1974):

> we devised grand plans to re-educate third world lawyers to understand the mix of pragmatic instrumentalism and liberal idealism that had been the staple of our legal education … we would strengthen legal institutions just as [United States

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Agency for International Development] agricultural technicians were transforming small yellow eggs into large white ones.

The use of law to bring about development is however a project about which McAuslan is ambivalent. In places, he explicitly rejects the idea, which he states is common in development and aid contexts, that 'law is … the technical and relatively uncontentious means through which policy can be implemented' (2003: 251). Instead, he openly acknowledges the political nature of his work as a technical legal consultant and draftsperson. He entitles one section 'drafting laws as practicing politics', another 'drafting as politics' (*ibid.*: 252). However, when he is presenting an account of the more difficult scenarios and hostile work environments with which he has had to grapple (*ibid.*: 330), he contradicts this perspective. His appeal is to a professed Weberian rationality. Of his work on the Ugandan Land Act Implementation Study, which he describes as meeting with 'bureaucratic sabotage' by the Ministry of Lands, McAuslan (*ibid.*: 342) writes:

> I concentrated on getting the job done … This, it must be admitted, was not always successful, and this was usually because the root cause of the blockage was not susceptible to [the] rational Weberian type administrative solutions which I was apt to suggest … the expert … is usually not himself … sufficiently versed in the nuances of African public administration which often relies far more on informal networks to get things done than formal rules and procedures … I relied on the formal bureaucratic procedures to get things done … I had a great many contacts in the higher reaches of the Ugandan political and legal establishment: I did not make use of them. I played it by the book.

Neither does the contradictory position of those who fund technical legal assistance give the author a great deal of pause. McAuslan notes that the stated position of the World Bank on such funding is that it 'should ensure that its legal assistance projects are in accordance with its policy of non-interference in the politics of its member countries' (World Bank 1995: 5) whilst also holding that 'in the light of the close linkages between economic and legal reforms, it is important that any assistance to the borrowing countries' legal reforms should be part of the Bank's country assistance strategies that identify reform priorities in a range of areas' (*ibid.*). As McAuslan points out, these positions are hardly reconcilable. It would have been informative had the author attempted to address this tension. His contribution to drafting land policy and ultimately legislation in a number of African countries – with the support of the British Department for International Development, for example – has not been uncontentious (Manji 1998; Shivji 1997a), and McAuslan's treatment of the political or technical nature of his work is left unsatisfying incomplete in the book.

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It is nonetheless useful to learn of the reasons why McAuslan (2003: 8–15) places his faith in the law to achieve equity, efficiency and certainty in land relations, these being values he explicitly cites as 'essential national interests' which should be enshrined in any national land policy. In explanation, he (*ibid.*: 248, author's emphasis) gives the experience of South Africa where:

> law was used to abolish law. Land reform in South Africa then must include land *law* reform because it seeks to change the nature of the legal regime and legal culture that applies to African-held land. It is to replace, at best, licences or permits held at the mercy of administrators or chiefs, with *rights* guaranteed by law.

In Tanzania the same reasoning pertains (*ibid.*: 249, author's emphasis):

> land reform is preeminently land *law* reform: the substitution of a law to facilitate the *right* of citizens to access and hold land, for a law which had facilitated the state's *administrative control* over the citizens' access to land.

Legal methodology

From the evidence of McAuslan's book, one of the most important questions facing a technical consultant who has been charged with drafting new land laws is the style of that legal drafting. This is an issue of legal methodology, and broadly speaking centres on the question of how much law to use. The importance of legal methodology lies in the fact that the style of legal drafting that is chosen will determine how much power is allocated to bureaucrats through land laws. Tanzania's recent efforts at land reform – beginning in 1991 and culminating (formally at least) in the passing of the Land Act 1998 and the Village Land Act 1998 – provides an excellent example of contestation over issues of legal methodology. It is an experience in which McAuslan played a central role.

There was considerable disagreement over this issue in Tanzania when McAuslan was commissioned to draft the new land law. An interesting feature of the Tanzanian debate over land reform is that the two main protagonists who played prominent roles in the formulation of land policy are both legal academics. Issa Shivji, professor of law at the University of Dar es Salaam, chaired the Presidential Commission of Inquiry into Land Matters which reported in 1992 (URT 1994). The recommendations of the Commission did not find favour with the government, which failed to issue a white paper in response to its findings and thus sidelined the report (Chachage 1995; Tsikata 2003). The British Overseas Development Agency (since renamed the Department for International Development) then funded McAuslan, professor of law at the University of

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London, to draft the new land policy and legislation. The Tanzanian experience of land reform was marked by fierce disagreements between McAuslan and Shivji about the purpose and direction of such reform, the content of the proposed legislation and the legal methodology to be adopted. Perhaps by virtue of being members of the academy, Shivji and McAuslan spoke and wrote about their views on land reform – and their differences with each other – in great detail, enabling those studying the politics of land to follow closely the course of the debate (Manji 1998; Sundet 1997).

As regards legal methodology, the main disagreement between McAuslan and Shivji focused on what might be described as the 'more law/less law' divide. In Shivji's view, the proposed land bills were unworkable because they set out in intricate detail the powers and responsibilities of bureaucrats in the land administration machinery and sought to exert detailed control over their actions. Shivji was critical of this approach, arguing that it trampled on traditional community methods of controlling the exercise of discretion by public officials (Shivji & Kapinga 1997; Wily 1998). McAuslan, on the other hand, adhered to the view that it was important for the new land law to set out in as much detail as possible the duties of those charged with the administration of land. He recommended and sought to achieve 'a detailed and inevitably lengthy new land code in which legal rules and checks and balances replace reliance on administrative and political action based on goodwill and common sense – which, according to the evidence, are in short supply where land relations are concerned' (McAuslan 2003: 254).

These different approaches to the methodology of land law cannot be understood apart from the wider disputes about the purpose and direction of land reform which characterised the Tanzanian experience. The Report of the Shivji Commission made a number of key recommendations which aimed to increase security of tenure for the peasant producer. These were *inter alia* that radical title to land be divested from the government and vested in the village assemblies and an extra-executive body to be called the National Commission of Lands, and that the powerful Ministry of Lands be abolished.[3] The approach taken by McAuslan was diametrically opposed to that of the Shivji Commission. McAuslan's bills, which passed into law in 1998, had as their objective the creation of a suitable environment for investment in land by large-scale foreign buyers and the setting up of an efficient system for a market in land.

These differences in approach between Shivji and McAuslan had a profound impact on their perceptions of the appropriate legal methodology to be adopted in Tanzania. Revisiting the debate over legal methodology

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in the book under review here, McAuslan (2003: 252) represents Shivji's position as follows:

> Law was, and to some extent still is, perceived in Tanzania as an impediment to change; therefore, where the law has to be used, the style of drafting has tended to be one of conferring powers on officials, with few safeguards or external controls.

This is a somewhat unfair characterisation of Shivji's position as contained in his academic papers (1997a, 1997b). As Shivji has made clear, there existed a number of mechanisms for community control of public officials charged with the allocation of land and other tasks such as dispute resolution. It would have been more accurate for McAuslan to acknowledge that it was the land bills' creation of a vast new machinery of land administration which then necessitated the drafting of detailed legal provisions. Under the scheme recommended by the Shivji Commission, a far smaller land bureaucracy would have come into being and a less precise conferral of exact powers might indeed have been workable.

McAuslan's (2003: 253) account does not admit that the style of legal methodology he has embraced is necessitated in part by the style of land administration he favours. Instead, he stereotypes Shivji's approach as follows:

> the clear message of the Presidential Commission was that the new law should be similar to that which it will replace in terms of drafting style, with a few broad strokes of the legal pen giving vast powers to legally unqualified people and relying on their innate common-sense and sense of justice to get things done.

McAuslan views his approach to legal methodology as challenging 'long-standing Tanzanian legal traditions' (*ibid.*: 254) and rather simplistically puts at least some of the opposition to his approach down to 'path dependency' (*ibid.*: 253). That Tanzania's 'traditions' regarding legal methodology stem from and have been shaped more widely by its tradition of land administration is nowhere acknowledged.

It is necessary to place McAuslan's approach to legal methodology – and more importantly his contribution to the reform of land law in the developing world – in the context of his wider academic work. As a British academic, McAuslan is first and foremost a public lawyer, and it is from this perspective that he approaches the task of drafting land policy and legislation. As McAuslan acknowledges, both private and public law operate to define property rights (*ibid.*: 258). Furthermore, when land is allocated by the state, this requires the private citizen to deal with public officials so that 'land law ceases to be a matter of private law, but becomes part of public law; it is in fact, administrative law' (*ibid.*: 255). McAuslan's

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ideas of the role which law should play in regulating land relations derive predominantly from public law. Notions such as public accountability or the exercise of discretion, which play a prominent role in the book, can only be understood as deriving from McAuslan's wider work as a public lawyer (Loughlin 1992). Indeed, McAuslan (2003: 225) refers to 'using law as an administrative tool'. Similarly, his caution about public officials and bureaucrats derives from his public law background: 'officials armed with powers and subject to few or no restraints, cannot be relied upon to behave reasonably' (*ibid.*: 255).

For McAuslan (*ibid.*: 256), the South African approach to legislative drafting which favours detailed codes of law is the most workable:

> Administrative law or administrative justice requires that official power be bounded by legal rules, be exercised in accordance with certain principles of fairness, allows for hearings and appeals, and be subject to review. How else can this be done except through statutory provisions which go beyond merely granting powers to officials, to setting out the matter and form of their exercise and control?

Thus, a dual test had to be applied to new Tanzanian legislation (*ibid.*: 256):

> did it create a new substantive land law, appropriate to the conditions of Tanzania; and, did it provide a suitable legal framework for the exercise of powers by officials?

So far, this review has focused on McAuslan's self-perception and on his conviction that more rather than less law was the best approach to drafting Tanzania's new land bills, a conviction which derives, as I have shown, both from his assessment of Tanzania's needs and from his own training as a public lawyer. Having made the case for this approach, he cites another reason for its adoption, which relates to the first theme of the book discussed above, that of the role of law. According to McAuslan (*ibid.*: 256), the existence of the market requires more rather than less law: 'once the land law recognises and protects private rights, and facilitates dealings with those private rights in the market place the law has to be much more specific, detailed and clear'. The law must provide for the market's need for certainty, an objective which characterises new wave law in development in an age of neoliberalism.

McAuslan's discussion of the market's need for detailed and specific law is suggestive. However, it does not make explicit the nature of the market which it is being sought to promote, that is, one which is dominated by foreign investors. A similar task had faced another, earlier legal scholar and technical legal consultant: when Professor L. C. B. Gower of University

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College London was charged with drafting a new company law for the newly independent Ghana, he grappled with similar issues of legal methodology to those faced by McAuslan. For Gower (1961: 5–6), the issue was whether to give the Registrar of Companies enhanced powers:

> It would, no doubt, have been possible to produce something shorter by adopting a different drafting technique … I am certainly not averse to giving the Registrar enhanced powers … [but] if one goes too far in the way of substituting administrative discretion and regulation for fixed statutory rules one destroys certainty.

Gower, unlike McAuslan, was explicit about the likely negative impact of awarding wide discretionary powers, which he suggested would be felt even if such discretion were to be properly exercised (*ibid.*: 11):

> The man-on-the-spot knows that discretions are exercised fairly and reasonably; the men-at-home read the regulation, see the width of the discretions, and fear and expect the worst. And, of course, it is the fearful men-at-home who control the purse-strings and decide what capital is invested in Ghana. The lesson, once again, is that legislation and regulations affecting the foreign investor should be drafted in such a way as to encourage him to hope and expect the best rather than to fear the worst. It is no answer to say that when he (and his capital) arrives they will find that his fears are unfounded; he will never arrive to find out.

This section has served as a reminder that in the present day as in the past, struggles over legal methodology are not intra-legal technical battles but are deeply imbricated in political and economic choices. Gower was a participant in technical legal work funded at the time by the Britain–Ghana technical assistance programme. If his project was located within early law and development (Harrington & Manji 2003), McAuslan's work reincarnates its concerns. In the second part of this review, I argue that this explains why the networks of law and development have been revived at this time.

TOWARDS A NETWORK THEORY OF LAND LAW REFORM

The objective of the remainder of this paper is to interrogate McAuslan's painstaking self-portrayal in *Essays in Land, Law and Development*. It hopes to recover a sense of agency in the increasingly important world of technical legal consultancy, and thus to excavate the relationship between law and politics which I argue has been masked in McAuslan's book. To draw on Latour's account of his task in studying Pasteur's laboratory, my aim here is to study McAuslan as a man 'acting on society' and to ask how and why he has come to be a 'credible spokesman' for land law reform (Latour 1983: 157).

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The importance attached by McAuslan to a revival in law in development is suggested in key sections of the book entitled 'bringing the law back in' (2003: 106–36) and 'making law work' (*ibid.*: 245–74). The book is clearly underpinned by a desire to explain the curious fact that land reform has come to mean land *law* reform. McAuslan's writing affords us valuable insights into the role of law-makers, ministry officials, land administration bureaucrats, civil society groups, international financial institutions and donor governments. We are given a ringside view: it is not common to read such detailed accounts of how these different actors in the land law reform field operate and interact.[4] This is valuable to anyone studying land reform either in specific countries (Tsikata 2003; Walker 2003) or at the international level (Manji 2003).[5] In the remainder of this paper, however, I seek to explore the contemporary land reform debate from a different angle. We learn a great deal from McAuslan's book about those who seek legal solutions to land issues. What of those who promote such legal solutions?

Despite drawing attention to the prominence of law in the land reform process of recent years, McAuslan does not provide an adequate explanation of this phenomenon. Tellingly, McAuslan (2003: 248, author's emphasis) employs an impressive range of passive grammatical constructions whenever he writes of recent preferences for land law reform. We are told, for example, of 'the commitment to developing a legal response to land reform, to seeing land reform as being, in part, land *law* reform', and that 'land reform … is itself increasingly presented as being a candidate for legal – that is, Western-type legal – solutions' (*ibid.*: 245). The use of the passive voice leaves us with a sense of the inevitability of choosing law reform as the way to alter land relations.

Writing of the recent revival in law and development, Kennedy (2003: 17) offers an insightful characterisation of development's contemporary embrace of the rule of law. Kennedy argues that there is an unarticulated hope amongst practitioners and scholars that opting for law might substitute for, and thus avoid confrontation with, 'perplexing political and economic choices'. It is precisely their hope that law might substitute for these choices that 'encourages people to settle on the legal choices embedded in one legal regime as if they were the only alternative' (*ibid.*: 19). Kennedy's observation that 'the "rule of law" promises … a domain of expertise, a program for action, which obscures the need for distributional choices or for clarity about how distributing things one way rather than another will, in fact, lead to development' (*ibid.*) illuminates the dark shadows of McAuslan's book. It reminds us that it is not just the question of why law has been chosen, or even the nature of the legal regime chosen,

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that should concern us. It is also the fact that, in opting for law and for 'the idea that building the rule of law might *itself* be a development strategy' (*ibid.*: 17, author's emphasis), law and development practitioners and scholars have excluded contestation over economic and political choices.

McAuslan's account of recent experiences of land law reform is thus partial at best. It suggests that international financial institutions, bilateral donors and national governments have of their own accord looked to the legal sphere for solutions to land problems. This depiction obscures the reality that in the past decade or more, legal responses to problems of land relations have been energetically promoted. We gain little sense from the book that as well as those who seek legal solutions, we should pay attention to the role played by those who advocate them. As Kennedy's work has shown, there is nothing inevitable about opting for law or, more precisely in this case, about altering land relations through law. This has occurred as a result of a series of political choices, a fact that remains concealed in McAuslan's account. Is it possible that studying the storyteller, McAuslan himself, might allow us to explore the important role he has played in promoting legal solutions?

Bruno Latour's (1983) theory of the means by which networks are created, sustained and fall into disrepair provides us with a useful starting point. Latour sought in his work to destabilise the distinction, hitherto commonly respected by social scientific accounts of science, between micro level studies (which entailed 'studying micronegotiations inside scientific disciplines') and macro level accounts (which involved 'studying organizations, institutions, public policy') (*ibid.*: 142). Instead, Latour argued for the need to get inside the 'sacred walls of these temples' and to recognise that 'nothing extraordinary and nothing "scientific" was happening' (*ibid.*: 141). The importance of Latour's contribution to the sociology of science lay in focusing 'on the construction of the lab and its position in the social milieu' (*ibid.*: 142). Just as this paper seeks to explain why it is that land reform has come to mean land law reform, Latour also sought to explain a curious phenomenon: that in the year 1881, the French popular and semi-popular press was full of stories about the work going on in Pasteur's laboratory, and specifically inside his petri dishes: 'Somehow, something is happening in these dishes that seems directly essential to the projects of … many groups [veterinary groups, farmers] expressing their concern in the journals' (*ibid.*: 143).

For Latour (*ibid.*), 'this interest of outsiders for lab experiments is not a given: it is the result of Pasteur's work in enrolling and enlisting them'. In seeking to explain how this occurs, Latour (*ibid.*: 145) elucidates three necessary 'moves'. Move one entailed 'capturing others' interests'

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(*ibid.*: 144). Latour shows that before Pasteur's intervention diseases were local events on which there existed only 'careful, variable, prudent and uncertain knowledge' (*ibid.*). The task facing Pasteur was 'to learn from the field, translating each item of veterinary science into [his] own terms' (*ibid.*). Pasteur, working on a makeshift lab on the farm itself, learning from the field and functioning in the centre of a world previously 'untouched by laboratory science' (*ibid.*), achieved this preliminary step by successfully translating issues of veterinary science into his own terms.

The second move necessary to establishing Pasteur's science as an 'obligatory point of passage' is described by Latour (*ibid.*: 146) as 'moving the lever point from a weak to a strong position'. This is done by making the hitherto invisible micro-organism visible inside the laboratory: 'having designated the micro-organism as the living and pertinent cause, he can now reformulate farmers' interests in a new way: if you wish to solve *your* problem you have to pass through *my* lab first' (*ibid.*, original italics). Move three then involved 'moving the world with the lever' (*ibid.*: 150). The importance of this move lies in the fact that something more than lab studies must take place if the interests of different groups which have been enrolled are not to fade and disperse (*ibid.*). Interestingly, Latour characterises the translation of interests by Pasteur (essentially 'solve your problems through Pasteur's laboratory') as part of a contract 'the counterpart of which is now expected from Pasteur' (*ibid.*). What was entailed in performing this part of the contract? The answer is 'a return to the farm to show results', a return which Latour characterises as a 'staging' in the sense of a performance (*ibid.*: 152). Before this move was made, the contract was simply 'solve your problems through my microbiology'. After the staging of the return to the farm, the translation was 'if you want to save your animals from anthrax, order a vaccine flask from Pasteur's lab' (*ibid.*). Latour calls this 'the displacement of laboratories' (*ibid.*).

The importance of this analysis, for our purposes, resides in its explicit acknowledgement and elaboration of the ways in which interests are translated and, furthermore, in its refusal to heed the boundaries between inside and outside which scientific disciplines are designed to respect. For Latour, it is precisely by overlooking the moves set out above that we enable mystified versions of scientific activity to be promulgated. How might we employ Latour's insights into the sociology of science to model McAuslan's work? How might we identify the moves necessary to establishing land law reform as an obligatory point of passage?

To begin with, drawing on network theory as elaborated by Latour enables us to understand the work of early law in development scholars

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who crafted for themselves a central role on the developmental state. In the social sciences, such scholars sought to promote their own discipline as *the* discipline of the independence era (Harrington & Manji 2003). In the African context, this can be explained by a particular historical conjuncture. Legal scholars moved to fill the void left by anthropology, the dominant discipline of the colonial period. Whereas anthropology had become discredited in the eyes of the leaders of newly independent states, law was relatively untainted by the colonial project. Legal solutions were thus sought to the problems of development (hence Gower's involvement in drafting company law in Ghana, discussed above). A legal training came to be considered a desirable qualification for work in the vast government bureaucracies developed after independence. In this period the implicit message was 'if you want to solve your political, economic, institutional or intellectual problem regarding Africa, you must pass through the legal academy first' (*ibid.*: 131–2).

Similarly, Latour's network theory provides us with some potentially fruitful starting-points for thinking about the contemporary land law reform process. Drawing on Latour's explanatory framework, we can suggest a number of moves executed by those who advocate legal solutions to land problems. Move one consists in capturing the interests of others, in 'convincing others of what their interests are and what they ought to want and to be' (Latour 1983: 144). In the field of land reform, McAuslan has played a key role in advocating the resolution of land problems through the use of law. Contrary to the picture portrayed by McAuslan, the interest in land law reform which has characterised the last decade is predominantly a consequence and not a cause of McAuslan's efforts. Technical legal consultants have successfully intervened to assist in the difficult task of addressing contradictory demands in relation to land. Rural inhabitants in Tanzania for example wished the government to address problems of land grabbing, as well as the chaotic state of the land tenure system. However, the main impetus for embarking on the land reform process came from international financial institutions, which saw land reform as intricately connected to questions of good governance and the efficient operation of a market economy. As the Tanzanian experience amply demonstrates, the demands of the Bretton Woods institutions and foreign investors are wont to take precedence over the needs of the rural poor. In opting for legal solutions, the boundaries between what the international financial institutions want and what McAuslan 'makes them want' (*ibid.*: 144) have been increasingly blurred. They 'accepted to pass through [his] hands in order to solve their problems' (*ibid.*: 150). As experts, the skill of land-related technical legal consultants lies in 'fostering interest groups

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and persuading their members that their interests were inseparable from [the experts'] own' (*ibid.*: 150).

The second move elaborated above would entail McAuslan in identifying the pertinent cause of the problem faced by African societies. This might be summed up in the following diagnosis: if you have lacked development, it is because 'dead capital' is tied up in your land (de Soto 2000; World Bank 2003). Such an analysis has widespread currency at the present time (Kennedy 2003; Manji 2003; Manji 2005). Having designated informal land tenure as the cause of underdevelopment, McAuslan propagates the message that (to paraphrase Latour) if the third world wants to solve *its* problem, it must formalise land relations by passing through *his* law lab.

The third necessary move requires the technical legal consultant to guard against the interests he has captured fading and dispersing. He must emerge from his law lab and return to 'the farm' to show his results. The staging of results 'on the farm' is the crucial third step which transforms the message from 'if you want to solve your development problems solve them through my land law', to 'if you want to save your countries from underdevelopment, if you want to alleviate poverty, order a law from my lab'. The work of technical legal advisers can be interpreted as attempts to translate the interests of a number of important actors into the language of African law reform. As McAuslan puts it (2003: 272):

> Lawyers, and particularly academic lawyers … face … the challenge of scholarship; to rise above the merely descriptive and analytical approach to writing about land law and adopt a more policy-oriented and innovative approach which offers new models and creative ideas as solutions to practical problems of land management; and, if the opportunity presents itself, to become involved in the challenging business of turning these ideas and models into legislative drafts – a scholarly endeavour, for which creative and not just critical scholarship is needed.

For Latour, the effect of networks is to collapse space. He points out that 'the negotiation of the equivalence of non-equivalent situations is always what characterises the spread of a science' (1983: 155). The process of negotiating equivalence has been a characteristic of McAuslan's work in African land law. McAuslan has been responsible for drafting the land laws of numerous African countries. Although a comparative study of these land laws awaits its author, McAuslan's cumulative work on land law reform has clearly entailed the collapsing of geographical space. To what extent, for example, Lesotho's new provisions on spousal co-ownership of land will resemble existing Ugandan law (Manji 2003) remains to be seen, but it can be suggested that similar legal provisions will come to

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characterise the land laws of countries which have recently undergone reform. It is also important to recognise the political and economic context in which equivalence is negotiated. Latour (1983: 155) provides the following metaphor to explain the structural context for the spread of science: 'Scientific facts are like trains. They do not work off their rails. You can extend the rail and connect them but you cannot drive a locomotive through a field.' For the purposes of understanding contemporary African land reform, the rails which carry the locomotive of the law are constructed, extended and maintained by multilateral and bilateral aid donors such as the World Bank and the British Department for International Development. Such donors have played a central role in encouraging and funding land law reform in Africa since the early 1990s.

In the passage cited above, McAuslan refers to the need for creative scholarship. From the evidence of McAuslan's book and his wider contribution as a technical legal adviser, the reach of his creativity has stretched not just to the drafting of new land laws. The real innovation forged by scholars such as McAuslan lies in reviving the 'long narrow networks' of law in development and seeking ways to sustain them into the future. As he writes (2003: 270): 'new land laws providing for major programmes of land reform must also involve the training of those who are to implement the laws and those who are to use them'. For McAuslan (*ibid.*: 271), it is the academic branch of the legal profession which will face the challenge in setting up programmes of training and public education. The ongoing relevance and future success of the network is thus guaranteed.

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The account of land reform presented by McAuslan in the book under review here neglects the fact that the translation of issues of land reform into technical, legal questions was not inevitable. This paper has argued that cause and consequence must be distinguished in law in development. Law has played a central role in African land reform, and this is a consequence of the activities of scholars and others in the legal field who work to enlist and enrol the interests of outsiders (Latour 1983: 142). Similarly, law and development came into being as a result of the efforts of legal scholars who sought to translate the interests of newly independent states into issues of law. After having fallen into disuse for some time as interests faded and dispersed (*ibid.*: 150) it is now being revived by the efforts of scholars such as McAuslan who, in their work as technical legal advisers, seek to 'bring the law back in'.

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In his book, McAuslan makes the important point that even when international financial institutions and donor governments had lost interests in using law to bring about development, in the real circumstances of the third world the importance of law was never diminished. Not only was the law still used to bring about development, there was also quite rightly an ongoing faith in what might be achieved through law. This is an important discursive and political move by the author: there is a suggestion that the law never went away, and that the network of law in development continued to operate even when international financial institutions and some scholars had taken their eyes off it. Seen in this light, all that is needed is a decision on their part to participate once again in the network of law and development. Perhaps the book has been given the wrong title: McAuslan is not so much trying to bring the law back in as to bring scholars and international financial institutions back to the law.

The objective of this paper has been to cast light on the central role played by figures such as McAuslan in the practice of law and development and, more specifically, in the land reform process. In order to do this, it has been important not to leave undisturbed the boundaries between law and the society on which it works. This paper has sought to show that the law lab of the technical legal consultant has been a neglected component of the land reform process in Africa. In doing so, it has refused to be prudish in matters of law 'much like the Victorians who watched kids crawling all over the place, but repressed the vision of sex as the cause of this proliferation' (Latour 1983: 153). The aim of this paper has been to refuse the mystification of technical legal work and to begin to separate cause and consequence in the recent revival of law and development.

NOTES

1. The emphasis here is my own, but the point is made by McAuslan (2003: 248).

2. Julian Quan, Land Policy Adviser 1998–2003, Department for International Development, UK, (personal communication, December 2003).

3. The government did not look with pleasure on recommendations that would abolish its monopoly of the radical title to land and thereby substantially alter the structure of the state. The Commission's report was designed not to operationalise a land market, but on the contrary to control the alienation of land and guarantee security of tenure for peasant producers. In Shivji's assessment, in appointing the Commission of Inquiry into Land Matters, 'what was anticipated was a report that would rationalise and legitimate the impending liberalisation of land in line with the policy diktat of the international financial institutions' (Shivji: 1997a, 2–3).

4. For an extraordinary 'blow by blow' account, see chapter 13 entitled 'Men behaving badly: a narrative of land reform', McAuslan (2003: 310–52).

5. To the cast listed above must also be added the purported 'beneficiaries' of land reform. Theirs are the subaltern voices of contemporary land reform. *Hatukushirikishwa* – we were not consulted – remains the 'battlecry of the people' today just as it was when they gave evidence to the Shivji Commission in 1991 (see Shivji 1997b).

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Editorial note

Patrick McAuslan has been invited to reply to this review article, but was unable to prepare his reply in time for this issue; we hope to publish this in a future issue.

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