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Security for Many or Surplus for the Few? Customary Tenure and Social Differentiation in Southern Malawi*

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It has been argued that the ambiguities in Malawian customary tenure may aggravate processes of social differentiation and class formation. The article investigates this claim based primarily on data from the rural areas in the Southern Region. An analysis of the political economy at the national and local level indicates that accumulation of customary land is not a significant factor accounting for increased economic differences. At the same time, land distribution in smallholder agriculture remains quite equal. A review of 45 court cases of land conflict in the Thyolo and Mangochi districts shows that the inherent ambiguities in customary tenure make accumulation of landholdings difficult and often serve the interests of the poor. Wealthy people prefer to invest in private land that the government has allocated to estates outside the realm of customary tenure, and the various logics of customary law in the long run facilitate a re-appropriation of private land into customary land. The article maintains that the reason why little attention has been given to the role of customary tenure in increasing rather than reducing land security for the poorer segments of the population reflects an over-emphasis on a transaction-oriented approach in the analysis of customary law. Some of the egalitarian and communal norms underlying customary tenure continue to be important in shaping everyday legal practice in Malawi.

Introduction

There is general agreement in the recent literature that institutions regulating access to arable land in sub-Saharan Africa are characterised by ambiguous and open-ended rules and norms. There is less agreement, however, on the consequences of this open-endedness for social transformation in African societies. The central question in the emerging discussion on this subject is whether certain groups profit more consistently and systematically than others in a context for dealing with claims and disputes regarding land rights that is ambiguous, variable and negotiable. Is it the most powerful and most resourceful groups among the population that manage to impose their interests and appropriate land at the expense of the weaker and poorer groups in society, as one may observe in many places in Latin America, Asia and Eastern Europe? Or – on the contrary – do the poorer social segments succeed in utilising the

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ambiguity and open-endedness in the legal system to their own advantage and thereby impede the accumulation of wealth by the better endowed and more powerful? The present study addresses this question by means of an empirical analysis based on a set of court cases in Malawi.

This debate cannot be seen in isolation from wider debates about how to understand African legal systems in general and customary law in particular. The concept of legal pluralism was initially elaborated by political scientists and jurists in the 1960s, and was meant to describe a situation where different legal *corpi*, such as customary law and European law, operated simultaneously in a community and shaped the room for action under conditions of social conflict and contested social control. As such, the concept was very rule-centred.[1] Better understanding of the origin and functioning of customary law – not as 'tradition', but mainly as a product of colonial interests and colonial rule – led to the emergence of a different conceptual understanding.[2] Legal pluralism in Africa as well as customary law came to be understood as the hybridisation of various legal logics that merged into one colonial legal system, ridden by ambiguities, contradictions and unpredictability.[3] An important implication of such an interpretation is that it renders the study of legal conflicts transaction-oriented. Instead of examining conflicting legal *corpi*, analysts focus on interactions between actors in an ambiguous and contradictory social setting.

The initial debate about the social consequences of ambiguity for people's access to land can be situated within this action-oriented approach to legal plurality and customary law. S. Berry argues that:

> [u]nder indirect rule, colonial regimes incorporated on-going struggles over power and social identity into the structure of colonial administration, and elicited conflicting testimonies from their African subjects concerning the meaning of 'native law and custom'. As a result, property rights and labour relations were neither transformed according to the English model nor frozen in anachronistic 'communal' forms, but instead became subjects of perpetual contest.[4]

This 'perpetual contest' creates a very unclear and unpredictable situation where it is impossible to draw firm conclusions about which, if any, groups achieve hegemony in the legal sphere. In Berry's view, no groups have hegemony in legal matters, and access to land is continually subject to negotiation.[5]

Although she shares Berry's overall understanding of African legal systems, Pauline Peters is among those who have argued that the conclusion regarding open-endedness has been taken too far in relation to land issues. She claims that negotiability has clear limits, because contestation about what prevails as rules and laws may be systematically exploited by the more resourceful groups of society, thus serving to increase inequality and accelerate the ongoing process of class formation in Africa in general and in Malawi more specifically. She develops this argument in several articles where she sometimes draws upon broad and

1 F. von Benda-Bechmann, *Legal Pluralism in Malawi, Historical Development 1858–1970 and Emerging Issues* (Zomba, Kachere Series, Kachere Monographs no. 24, 2007, [1970]).
2 E. Colson, 'The Impact of the Colonial Period on the Definition of Land Rights', in V. Turner (ed.), *Colonialism in Africa* (Cambridge, Cambridge University Press, 1971), pp. 193–215; M. Chanock, *Law, Custom and Social Order: the Colonial Experience in Malawi and Zambia* (Cambridge, Cambridge University Press, 1985); M. Chanock, 'Paradigms, Policies and Properties: a Review of the Customary Law of Land Tenure', in K. Mann and R. Roberts (eds), *Law in Colonial Africa* (Portsmouth, NH, Heinemann Educational Books, 1991), pp. 61–84.
3 S. Berry, *No Condition is Permanent, the Social Dynamics of Agrarian Change in Sub-Saharan Africa* (Madison, University of Wisconsin Press, 1993). For other contributions along a similar line, see Mann and Roberts, *Law in Colonial Africa*.
4 S. Berry, 'Hegemony on a Shoestring, Indirect Rule and Access to Agricultural Land', *Africa*, 62, 3 (1992), p. 345.
5 See also Berry, No Condition is Permanent and S. Berry, 'Debating the Land Question in Africa', *Comparative Studies in Society and History*, 44, 4 (2002), pp. 638–68.

general research material[6] and sometimes more specifically upon empirical data from Malawi.[7]

This article critically discusses Peters' argument with reference to both secondary literature and empirical data collected from Malawi's Southern Region, the same area where Peters has been working. Even though poverty levels seem to have remained stable, we agree that there are signs of increased socio-economic inequality, at least during the last decade. It does not follow, however, that the land tenure system is necessarily or significantly accelerating such a process. In the second section we argue that from the perspective of political economy, there is no evidence that agriculture is important for the formation of wealth and elites, either at national or local level. As in most African countries, national elites are formed and reproduced through their access to state funds. At the local level, elites have been formed through access to state salaries or through international migration. Recent rural welfare surveys also show a very egalitarian distribution of customary land in the country. The third section examines how some recurring dilemmas connected to the principles of inheritance, work and assets are being resolved in the customary justice system. The court cases reveal how the legal system in some respects serves to reproduce an egalitarian land distribution. Finally, we show that in conflicts between smallholders and private estate holders, the estate holders always seem to win in the short run, but, in a longer time perspective, local farmers seem to succeed in re-appropriating land they have previously lost. There is historical evidence that less land is allocated for estate agriculture today than in 1894.

One reason why our study reaches conclusions that differ so greatly from that of Peters is the importance we attach to some of the normative elements underlying customary tenure. Moving slightly away from the exclusively transaction-oriented approach of Berry and others enables us to see how egalitarian and communal values behind the many rules and regulations continue to influence land conflict processes. This focus reveals how a rudimentary framework of a legal corpus that may be called customary law is part of what shapes everyday legal practices, mainly for customary land, but also to some extent for all land in Malawi.

Most of our data were obtained during four short periods of fieldwork in Thyolo and Mangochi districts in Malawi's Southern Region in the period from June 2005 to March 2007. After initial investigation of the levels and types of land conflicts, we focused on land conflicts that had reached the court system. After initially identifying approximately 120 court cases in three magistrates' courts and the High Court, 45 cases were selected for further analysis.[8] The analysis is not based exclusively on what happens in court. The files generally give a good background on how the case had been handled previously by local leaders and the Traditional Authority. The court cases can therefore be considered as representative. The main criteria for selection were that the case should be closed, a verdict pronounced, and the court files should be available. Less than ten cases were excluded due to their content. These were border conflicts between smallholders involving very small land areas. In addition to the court files, which often proved to be more comprehensive than we had initially expected, we had the opportunity to discuss all cases with the magistrates who ruled on the

6 P.E. Peters, 'The Limits of Negotiability: Security, Equity and Class Formation in Africa's Land System', in K. Juul and C. Lund (eds), *Negotiating Property in Africa* (Portsmouth, NH, Heinemann, 2002), pp. 45–66; P.E. Peters, 'Inequality and Social Conflict Over Land in Africa', *Journal of Agrarian Change*, 4, 3 (July 2004), pp. 269 – 314.

7 P.E. Peters, 'Bewitching Land: the Role of Land Disputes in Kin to Strangers and in Class Formation in Malawi', *Journal of Southern African Studies* [*JSAS*], 28, 1 (March 2002), pp. 155–78; P.E. Peters and D. Kambewa, 'Whose Security? Deepening Social Conflict over "Customary" Land in the Shadow of Land Tenure Reform in Malawi', *Journal of Modern African Studies*, 45, 3 (September 2007), pp. 447–72.

8 The numbering of cases in the magistrates' courts is somewhat confusing. Most common is that each magistrate keeps his/her own registry and one may therefore find more than one case with the same case number in the same court. In this article, cases are referred to according to our own numbering system.

cases. Approximately 20 cases were selected for detailed investigation through interviews with representatives of the Traditional Authority directly or indirectly involved. For ethical reasons and to avoid misunderstandings to the effect that our intention was to reopen the court cases, we did not interview individual plaintiffs and defendants.

Smallholders in Southern Malawi and the Role of Agriculture in the Formation of National and Local Elites

Almost five million people live in the rural areas of the Southern Region. The population density is among the highest in rural Africa and reaches 146 per km^2 (97 and 268 for Mangochi and Thyolo districts respectively).[9] In most of the Shire Highlands (including Thyolo), virgin land is almost non-existent. In lower lying areas such as in the Shire Valley (including Mangochi), good quality virgin land is scarce but may still be found. Agriculture depends mainly on rain-fed staple crops (maize), with a smaller part being wetland (*dimba*) often used for horticulture. Some smallholders also cultivate cash crops such as burley tobacco, cotton, tea, groundnuts and vegetables, but in limited amounts. Poverty is notable, and in 2005 64 per cent of the rural population in the south was classified as poor, and 32 per cent as ultra poor. Poverty rates have been fairly stable since 1998.[10]

The colonial administration subdivided land into three categories, first into crown land and private land; the later part of the crown land was classified as native land. Private land played an important role in the creation of elites in the early colonial period. Except for some huge concessions in the northern and central parts that later reverted to government, most of the estates were freeholds, located in the Shire Highlands in the south. The settlers of European origin became part of the first elite in the territory, but the protectorate never became a settler state like neighbouring Southern Rhodesia (Zimbabwe). In the 1950s, many estate owners chose to sell, partly due to economic problems and partly due to frustration with the new policies of 'self governance' and subsequent changes in regulations regarding land and agriculture. At the time of political independence in 1964, freeholders were few and poorly organised.

The Land Act of 1966 reiterated existing division between public, private and customary land, although no physical demarcation between the various categories was established. Customary land is to be tenured according to customary law. Private land is defined either as freeholds or leaseholds, and rights are individualised and exclusive. Since independence, the government has chosen to lease rather than sell estate land, and the 1970s and 1980s saw a dramatic growth in leaseholds. The total number of estates grew from 250 in 1970 to some 30,000 in 1995,[11] at which time they covered around one million hectares. Of this, only 34,000 ha was freehold land, mostly large tea plantations in the Shire Highlands and in Thyolo district in particular. Today, most estates remain under the control of representatives of the founding families. Very few of the owners have taken Malawian citizenship.

Leaseholds are generally smaller than the old freehold estates. Before 1980 they could reach up to 500 ha and mainly involved larger companies that often were in the hands of the national political elite. Land leases were one of the tools Dr Banda systematically used

9 Republic of Malawi, *The 1998 Population and Housing Census* (Zomba, National Statistics Office, 1999), available at http://www.nso.malawi.net/data_on_line/demography/census_98/analytical_report.pdf, retrieved on 3 December 2007.

10 Republic of Malawi & World Bank, *Malawi; Poverty and Vulnerability Assessment, Investing in our Future*, (Washington, World Bank, June 2006), available at http://www.aec.msu.edu/fs2/mgt/caadp/malawi_pva_draft_052606_final_draft.pdf, retrieved on 3 December 2007.

11 All figures in this paragraph are quoted from Anon., 'Land People and Production on the Estates of Malawi; a Guide to the Surveys of the Estate Land Utilisation Study 1995–7' (unpublished report produced as part of the Estate Land Utilisation Study, Lilongwe, 1997).

to reward political loyalty. Wealthy urban traders of Asian origin could also invest in these leaseholds, provided they had the right connections within the national elite. Several estates established in this period still remain. During the 1980s policy shifted towards the establishment of much smaller estates. In 1995, 70 per cent of all estates were less than 30 ha,[12] a significant proportion of them are tobacco estates in the Northern and Central Regions, but they are also numerous in Mangochi. The holders of these modest leaseholds come from a variety of backgrounds. Most are urban dwellers with capital accumulated through private business or government salaries, or a combination of both. These owners do not belong to the national elite but are often loosely classified as middle class. A small minority resides in the rural areas, but not necessarily in the area where the estate is located. We shall return to the characteristics of these local elites below.

In Malawi, as in most of sub-Saharan Africa, the most prominent and powerful elites have emerged and are being reproduced through their hold on political power rather than through their control of production.[13] It has been established that, after independence, a close correlation existed between affiliation to the national elite and access to leaseholds, and this situation persists today. But it is not through control of land that leaseholders constitute a socio-economic elite, it is the other way around. The political liberalisation in 1994 implied that foreign aid increased substantially and international aid appears to be the main driver of the class formation processes at national level today. One of the main foci, not only by the present elite, but also among a large part of the educated, urban middle-class is to secure as much access to aid flows as possible. At present ODA/GDP is very close to 30 per cent.[14]

The first economic elites to emerge locally were educated in mission schools and later secured salary-based positions and jobs within the colonial and national administration. Their wealth (however modest) permitted a certain degree of private local investment even though economic failures were (and are) as common as successes. Another important venue for upward economic mobility was labour migration, mainly to South Africa and Southern Rhodesia. It was part of the colonial policy of the Protectorate to provide these countries with additional labour in the mines and in estate agriculture. The importance of labour migration varied substantially in different areas. In Mangochi it was very common, and explains why economic differentiation is more pronounced in this area than in many other places in rural Malawi. In Thyolo, labour migration abroad was less common because of the big tea estates in the district.

It was common for labour migrants to invest their savings after they returned home. John McCracken shows how returned migrants were behind considerable technological and economic development in the fisheries of the southern part of Lake Malawi in the late 1940s and 1950s.[15] Our work confirms that local investments in Mangochi financed by savings from urban wage labour or labour migration abroad continued into the 1990s.[16] This research also shows the diversity in investments (e.g. in transport, trade, rest houses, maize mills, brick

12 *Ibid.*

13 G.C.Z. Mhone (ed.), *Malawi at the Crossroads, the Post-Colonial Political Economy* (Harare, SAPES Books, 1992).

14 T. Moss and A. Subramanian, 'After the Big Push? Fiscal and Institutional Implications of Large Aid Increases' (Center for Global Development, Working Paper 71, October 2005) p. 6, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984061, retrieved on 12 April 2008.

15 J. McCracken, 'Fishing and the Colonial Economy: the Case of Malawi', *Journal of African History*, 28, 3 (1987), pp. 413–29.

16 M. Hara and E. Jul-Larsen, 'The "Lords" of Malombe; an Analysis of Fishery Development and Changes in Fishing Effort on Lake Malombe, Malawi', in E. Jul-Larsen, J. Kolding, J. Raakjær Nielsen, R. Overå and P. van Zwieten (eds), *Management, Co-management or No Management? Major Dilemmas in Southern African Freshwater Fisheries* (Rome, FAO, Fisheries Technical Paper 426/2, 2003), pp. 179–200, available at http://www.fao.org/docrep/006/y5056e/y5056e00.htm, retrieved on 3 December 2007.

production, animal husbandry etc). Only a small part of the investments is directed towards agriculture, and when this happens it is in leasehold rather than in customary land. Since the 1980s, labour migration among the local population started to diminish and has now stopped completely. At present, most local entrepreneurs have great difficulties in maintaining whatever modest wealth they may have.

People associated with what is called the Traditional Authority also represent a local elite. The institution has its roots back in the first years of last century when Britain established its colonial administration, but it was only with the Native Authority Ordinance in 1933 and the establishment of indirect rule in 1936 that the authority was institutionalised. The Traditional Authority constitutes a hierarchy of local leaders with chiefs on top, followed by sub-chiefs, group-village heads and village heads at the lowest level. Generally, the Traditional Authority in Malawi commands a strong measure of legitimacy and enjoys considerable respect. This does not signify, however, that office-holders can automatically convert their power into material wealth. Even though traditional leaders are often found to be wealthier than the population in general, this research revealed that many – even at the level of chief – remained poor. Assets controlled by wealthy local leaders were mainly found to originate from transfers from the national political elite, but could sometimes derive from non-agricultural productive activities. In one village in Mangochi we found a close economic network including at least three households associated with the village headwoman.[17] The collaboration included labour migration to Blantyre, an international civil servant, a petrol station in town as well as a shop, a maize-mill and fishing boats operated from the village. Despite the important role of the Traditional Authority in the distribution of customary land we have never observed or heard that any of the local leaders cultivate larger areas of customary land for private purposes than the rest of the population. Neither did we hear of leaders who had invested in estate land.

One of the reasons why those within the local elite preferred to invest in estates rather than in customary land may have been the Special Crops Act, introduced in the late 1960s, which prohibited production of burley tobacco on customary land. When this prohibition was lifted in 1990, it opened up a new investment channel that wealthier smallholders eagerly seized upon.[18] In 2005, between 70 and 80 per cent of the total production and 50 per cent of the exports of burley tobacco derived from customary land where some 350,000 households were involved. However, the relative share of tobacco smallholders is much lower in the Southern Region than in the rest of the country.[19]

Nevertheless, although the production restrictions on customary land were lifted 15 years ago, the deregulation does not seem to have greatly influenced the distribution of land in smallholder agriculture. The recently published poverty and vulnerability assessment draws a picture of a smallholder sector in 2005 that is egalitarian in terms of land holdings, and oriented towards subsistence.[20] Among the 2.4 million rural households in Malawi, 11 per cent are landless, while 75 per cent cultivate plots less than 2 ha. Only 13 per cent have landholdings larger than 2 ha.[21] The difference in size of landholdings related to the wealth of the households is very small. In the bottom wealth quintile the average size is 0.9 ha, which rises to 1.1 ha in the highest quintile. Only 52 per cent of all households in the country had sold some portion of their agricultural production on the market,[22] and market relations

17 It is quite common to find female village heads, and more seldom group village heads. There are no female chiefs in the two districts covered by this study, but they are reported to exist elsewhere (P. Kishindo, personal communication).
18 The act was repealed in 1996.
19 Republic of Malawi and World Bank, Poverty and Vulnerability Assessment, pp. 152–53.
20 *Ibid.*, pp. 151–65.
21 *Ibid.*, In rural Southern Region the figures are 13, 79 and 8 per cent respectively.
22 *Ibid.*, The figure is 45 per cent for the rural southern region.

varied little between the wealthiest and the poorest quintiles; 40 per cent among the poorest and 57 per cent among the wealthiest had sold a portion of their crop.

The 2006 poverty assessment also confirms that local wealth, rather than generated through agriculture, seems to derive from surplus generated in other activities: 'The percentage of households with less than 0.2 ha is similar across all wealth quintiles. This reflects the fact that there are a large number of richer households for whom farming is only a marginal activity.'[23] The assessment also shows that more households below the poverty line (0.95) have access to land than households above this line (0.84). Even for high quality *dimba* wetland, the percentage of those who have access to land is higher among the poor.[24]

To sum up, smallholder agriculture appears to have played a minimal role in the processes of economic differentiation or in the formation of Malawian elites. As in so many other African countries, access to state resources has been and continues to be the crucial element in these processes, coupled with whatever funds are generated by international labour and trade migration. The existing elites invest part of their wealth in agriculture, but this seems mostly to be urban elites and the middle-class who invest in the estate sector where, at least on paper, regulations are clearer and negotiability less pronounced. Part of the reason is undoubtedly connected to government restrictions imposed on the customary sector until early in the 1990s. We discuss below how the ambiguities of customary tenure in themselves affect preferences.

Recurring Dilemmas in Customary Tenure: Inheritance, Work and Assets

This article does not present a comprehensive analysis of the development and functioning of customary tenure in Malawi. Such contributions already exist and this analysis draws on them.[25] Most studies support what in the last two decades has become the dominant view of customary law and land tenure as shaped by interaction with the colonial legal system. This interpretation provides important insights, as shown by the following example.

During the Banda era from 1961 to 1994, the Traditional Courts gradually became effective but also hated instruments of the president's repression of political opponents and enemies. As a result, and in anticipation of judicial reform, the Constitutional Assembly in 1994 dismantled the Traditional Courts. The reform has still not taken place, and in the meantime the magistrates' court and High Court have taken over the functions of the Traditional Court. Yet this change in the judiciary does not seem to have influenced legal practice regarding customary land issues very much.

The Land Act continues to refer to traditional law as the only source of regulating principles. Given the ambiguity of these principles, and the relative unfamiliarity of magistrates and judges with many of the different local regulations, the courts often, but certainly not always, rely on the Traditional Authority for defining the content of traditional law. The court files show how a chain of conflict resolution meetings – often over many years – normally involves the whole range of local leaders, from family heads to chiefs, before a case reaches court. This system not only depends on brokerage, but the leaders also pronounce

23 *Ibid.*, p. 155.
24 *Ibid.*, p. 153.
25 See, for example, Channock, 'Law, Custom and Social Order'; Channock, 'Paradigms, Policies and Properties'; P.E. Peters, 'Against the Odds; Matriliny, Land and Gender in the Shire Highlands of Malawi', *Critique of Anthropology*, 17, 2 (1997), pp. 189–209; Peters, 'Bewitching Land'; L. White, *Magomero: Portrait of an African Village* (Cambridge, Cambridge University Press, 1987).

verdicts and considerable pressure is put on the parties to accept their judgements. The whole system – including the courts – has been called the *customary justice system*. The concept is useful in that it reveals how the customary realm is being reproduced far within what is often described as the modern or formal judicial sector, even though important institutions such as the Traditional Courts have been abolished.

This example certainly justifies the reading of African legal systems as inseparable, interactive entities. Nevertheless, if stretched too far, the transaction-orientated implications that follow from such a reading may also obscure the understanding of what is actually going on, since too much focus on individual strategies tends to neglect how the norms and values of the different legal logics also contribute to the formation of everyday legal transactions. As customary law implies that land is more than an economic asset and commodity, but is also a cultural and social value intimately connected to people's identities, statuses and social networks, it is important to avoid analysing land conflicts mainly with reference to the actors' strategic interests. Deeply rooted, underlying norms and values may also constrain actions.

Below, we analyse the various land conflicts not only with reference to economic and strategic interests, but also norms and values. We do so irrespective of whether the conflicts are positioned within the realm of customary tenure, or result from confrontations between customary and European-inspired tenure. We agree with Comaroff and Roberts who argue on the basis of work in Botswana that it is necessary to view negotiation in the legal field not only as transactions, but also as operating within a limited frame of normative principles.[26] The question then remains '... how may we arrive at an understanding of the relationship between rules and processes that depends on neither pure transactionalism nor simple jural determinism?'.[27] We shall address this question below, by investigating how negotiation over land is centred and structured around tensions emerging within or between the principles of descent, work and assets.

Since land is so closely connected to identity, rights can never be exclusive, but are shared between the individual and various groups to which other people belong. In the Southern Region, the most important group regulating rights to land is the matriliny (*mbumba*). Since the common pattern of residence is for the husband to settle in the village of the wife (*chikamwini*), the man seldom holds inheritance rights to the land where he lives and works even if his children do. In the opposite case, where the wife moves to the village of the husband (*chitengwa*) neither the woman nor her children will have hereditary rights to the land she works. *Chitengwa* is common if the husband claims leadership rights in the matriliny or in the village. In both cases these principles may create difficulties if the spouse holding hereditary rights dies first. At the end of the funeral ceremonies (*nsudzulo*) the spouse may be requested to move back to her or his village. The principle of *chikamwini* opens a very strong *de facto* control of the land by the sisters in the lineage and land is most often transferred directly from women to their daughters. In this way, many of the known contradictions embedded in matrilineal descent are avoided.[28] Another important group is the village, which is an assembly of lineages and where the village head is supposed to be a descendant of the village founder. He or she is part of the Traditional Authority that controls virgin land and can allocate parts of that land to strangers who wish to settle in the village.[29] In both districts under study, conflicts between lineage heads (*mwinimbumba*) and Traditional Authority

26 J.L. Comaroff and S. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago and London, University of Chicago Press, 1981).
27 *Ibid.*, p. 19.
28 See Peters, 'Revisiting the Puzzle of Matriliny in South-Central Africa', pp. 125–46.
29 P. Kishindo, 'Dynamics of Land Tenure: A Village Case Study', in T. Takane (ed.), *Current Issues of Rural Development in Malawi* (Chiba, Institute of Development Economies, 2006), pp. 1–22.

regarding land that for various reasons had been (temporarily) abandoned by a *mbumba* were common.

The most important competing principle to inheritance is labour that individuals invest in the land. Rights to land are always intimately connected to an active use of it and Chauveau rightly notes that labour is often a more fundamental regulating principle than inheritance, since hereditary rights vanish quickly unless the land is kept in continuous use.[30] Clearing virgin or abandoned land is particularly important with regard to land claims and may be used as a strategy to increase the landholdings of an individual or a family. In the cases examined in this article, we found that the main reason behind disputes was competing claims based on work and descent, and disagreements about how to reconcile or order the two principles. Slightly over half of the selected court cases (27 out of 45) involved disputes of this kind. *Grosso modo* the conflicts manifested themselves in four different ways.

In Thyolo, the most frequent type of conflict is between members of the same *mbumba* – often cousins – where the person who has worked the land over some time was challenged by another due to different interpretations of who in the *mbumba* gave the land to whom. The second type of conflict, quite common in Mangochi, is between newcomers given land by the Traditional Authority and persons from the already established *mbumba*. 'Newcomer' here is a relative term since many are second generation, and the conflicts are often recurring phenomena that have lasted over long periods of time. The issue in this type of conflict is the same as in the first: the 'newcomer' has cleared and developed the land while the other party claims it was given to him/her or to his/her parents or the chiefs. The third type of conflict in Thyolo occurs in relation to old abandoned estate land, sold or expropriated by the government and redistributed to villagers. This practice, which originated well before independence, was consciously used by the national authorities to establish competing individual land rights for men that could be transferred from father to son. As observed by both Peters and White the court cases also show how in such cases the man's sisters or others in the *mbumba* are quick to present their claims, often at the expense of the widow and the children.[31] Finally a limited number of court cases are connected to the principles of *chikamwini* and *chitengwa*. Men or women who may have worked a plot of land the whole of their adult life are not allowed by their late spouse's *mbumba* to remain on the land.

The outcome of the 27 court cases did not show any patterns of preference for inheritance versus work as the guiding principle. This holds true for decisions by the magistrates – who make the 'final' decisions if the case passes through the entire process – as well as for verdicts pronounced at earlier stages in the customary justice system. Each case is dealt with in contextual terms, and verdicts seem to a large extent to depend on the trustworthiness of the parties and their witnesses. Moreover, it is impossible to draw any conclusions about how these types of conflicts affect economic differentiation, based on which principle is given preference in court. In some cases, as in those involving *chikamwini* or *chitengwa*, the weakest party is most often the person who claims rights through his or her work. In cases of redistribution of estate land, the weakest party often made his or her claim based on descent or kin affiliation.

Despite this diversity, the cases exhibit two patterns that are important with respect to the role of customary land in economic differentiation processes. The most important relates to the long time it often takes to settle cases within the customary justice system. Not only does it take time to go through the whole chain of instances, but old cases have a tendency

30 J.P. Chauveau, 'How Does an Institution Evolve? Land, Politics, Intergenerational Relations and the Institution of the *Tutorat* amongst Autochthones and Immigrants (Gban Region, Côte d'Ivoire)', in R. Kuba and C. Lentz, *Land and the Politics of Belonging in West Africa* (Leiden and Boston, Brill, 2006).

31 Peters, 'Against the Odds'; Peters, 'Bewitching Land'; White, *Magomero*.

to re-occur over time in slightly new dresses. To give the reader an idea of the complexity of these cases we shall review one case (T19) in some detail.

Detailed Review of Case Study T19

The case centred around an area of old estate land in Thyolo, distributed in 1964 where two men claimed rights. The plaintiff was the adopted son of a policeman serving in Zomba who claimed his father had bought the land just before retirement when he was to settle in the village with his wife and her children from a previous relationship. The defendant was a retired labour migrant who claimed he had bought the land for a sister, then living in Balaka. The contesting buyers were from the same village, but not the same *mbumba*. The confusion was connected to the policeman having a party membership card (MCP), while the other did not. The plaintiff started to cultivate and it was only on a visit home in 1965 that the defendant realised the land he had paid for was being used by others. The conflict went to the village head and upwards, who all gave the defendant the right to the land, but, since he was not present, it was the retired policeman who continued cultivating it until he died in 1976, when it was taken over by the plaintiff. Only in 1999 did the defendant raise the case before the chief. The adopted son had by then gone into trade and had left hired workers to cultivate the disputed land. The chief ruled in favour of the defendant, and the plaintiff was forced to vacate the land and present his case in the magistrates' court in 2004. The magistrate ruled in favour of plaintiff with reference to the long time (35 years) his family had been working on the land.

In following-up the case, in 2007, we found that the plaintiff had taken back the land, but also that the conflict was still alive. However, now it was representatives from the *mbumba* of the plaintiff's father who claimed rights to the land, referring to a combination of inheritance and work invested on the land during the years they had been hired by the plaintiff to work on the land. The 'new' case in 2007 was dealt with by the village head and the group village head, both of whom were new and had not participated in the original case.

This example demonstrates that the way we have simplified conflicts in this article as pivoting around two principles, and hides what in reality is a series of conflicting considerations including: adoption, *chitengwa*, work vested in land, political affiliation, rights of labour migrants and use of hired labour (*ganyu*). A full analysis of legal practice in all its facets would require much more detailed analysis than can be included here. From the point of view of the argument developed here, however, the case demonstrates the length of time and the possibilities for legal replay that are embedded in such processes.

In another case (M10) from Mangochi, we found that the conflict reflected in the case probably dated from sometime in the 1920s. It concerned land given to a group of 'newcomers' to Mangochi from Likoma Island in 1917 and the controversy seems to have generated a number of new conflicts through the years whenever someone found it useful. The specific conflict reflected in our case dates back to 1966 when the village head temporarily allowed a more recent newcomer to settle on part of the land allocated to the Likoma people until a permanent place could be found. The last newcomer never moved and subsequently opposed efforts on the part of a nephew of the initial holder from the Likoma group to build a house on the land. In his verdict, the magistrate tried to accommodate both parties by giving both parties some concessions, although the outcome is unclear.

The implications of such drawn-out or recurring disputes are important for the main thesis of this article. Of particular importance is the fact that disputes often result in land lying idle for shorter or longer periods. Even though smallholder agriculture does not require much capital investment, it is easy to understand how this outcome of disputes on customary land

creates clear limitations for someone interested in expanding cultivation in order to increase personal or family wealth.

The second generalised pattern reflected in the cases is connected to the arguments used by the disputing parties, the witnesses as well as those pronouncing verdicts. The welfare of the parties is often considered a relevant argument, particularly in cases of extreme poverty. Both traditional leaders and magistrates sometimes openly refer to the welfare of the parties as a consideration in their verdict. Translated into a modern language of human rights, one could say that 'a principle of need' seems to apply in customary law. This consideration reinforces conclusions others have drawn regarding customary law in sub-Saharan Africa: it tends to be more concerned with social cohesion at the local level than with the rights of individuals.

The third regulating principle concerns different types of monetary transaction. A variety of local arrangements have always existed to secure temporary access to land for individuals who lack permanent rights in an area, normally referred to as rent (*kubwereka munda*). This can take the form of arrangements between an individual and a village head, a head of lineage or the head of a particular household. Rates of compensation and other rights or obligations vary almost from case to case and it is difficult to say exactly when money entered as a part of the rent arrangement. Renting easily leads to conflict when renters can start claiming more permanent rights due to the work invested in the land.[32] However, a new element to renting has emerged over the last decades, particularly in the Shire Highlands, where people have started to talk of sales (*kugulitsa munda*), rather than leases. Several authors have observed this phenomenon and relate its emergence to increased population density.[33]

Such sale of land is of particular interest in the context of processes of social differentiation. Sale in the sense of exclusive individualised transference of rights is considered a contradiction in terms due to the many meanings of 'land'. Nevertheless, all traditional leaders and magistrates indicate that something resembling sales has become common in areas within Thyolo district, even though the sums of money involved generally remain modest. The court registry in Thyolo also shows that such land sales have become an important source of dispute: about half of the selected court cases from Thyolo (10 of the 21) deal with such conflicts. In Mangochi, by contrast, sales of this kind are reported to be very rare and we found no court cases related to sales. Instead, land was commonly rented for periods varying between three and ten years. Although there may be references to rent in the court cases, none seemed to have derived from conflicts related to the rent.

Most traditional leaders and magistrates in Thyolo indicate that they accept the practice of land sales as a new element in customary law. Chiefs seemingly do so despite the fact that it reduces their influence on distribution of land and their control over who can claim permanent rights to land in their area of jurisdiction. In discussions with us, chiefs explicitly said they considered such sales to be exclusive transactions. 'A sale is a sale' and 'selling land is like selling a pair of shoes' were recurring ways of expressing their interpretation of the new phenomenon. Although customary tenure now seems to recognise sale, much confusion exists regarding who is entitled to sell (i.e. the individual or the *mbumba*) and what should be the role of the Traditional Authority in the transactions. In many cases we found that the level of conflict within the Traditional Authority could be as high as between the disputing parties.

32 When urban people who rent plots near the urban centres to cultivate their own maize are being moved from one plot to another this is often an illustration of how the landholder tries to avoid such claims from emerging.

33 Peters and Kambewa, 'Whose Security?'; T. Takane, 'Customary Land Tenure, Inheritance Rules, and Smallholder Farmers in Malawi' Institute of Developing Economies, Japan, Discussion Paper No. 104, available at http://www.ide.go.jp/English/Publish/Dp/pdf/104_takane.pdf; retrieved on 3 December 2007; S. Holden, R. Kåarhus and R. Lunduka, '*Land Policy Reform: The Role of Land Markets and Women's Land Rights in Malawi*' (Ås, Norwegian University of Life Sciences (UMB), Noragric Report No. 36, 2006), available at http://www.umb.no/noragric/publications/reports/NoragricRep36.pdf, retrieved on 3 December 2007.

Furthermore, traditional leaders used far less rigid interpretations of sale in their legal practice than they expressed in discussion with us. If a seller expresses regret, the customary justice system will do what it can to find ways to retransfer the land in question, normally through allowing the seller to buy back the land. A sale is not just a sale, after all. In all the ten cases examined, conflict arose either as a result of disagreement about a mandate to sell or regret on the part of the seller. In cases where someone in the Traditional Authority witnessed the sale, and there was enough evidence that the transaction had taken place, one would expect that pronouncements by the local leaders and the magistrates would favour the buyer. However, in the court verdicts this only happened in two of the ten cases.

In five cases, traditional leaders and magistrates offered the seller the option of buying back the land. In another case (T6) a brother and businessman living in Mwanza, together with a sister, had inherited a *dimba* garden from their father. On their father's death, the two agreed to erect a tombstone at his grave with money from the sale of bananas that the sister grew in the garden. However, she used the money for something else, and the brother had to pay for the stone. He therefore sold the garden to a cousin for MK2,000 despite resistance from his sister. The court ruled in favour of the buyer, but at the same time advised the sister to refund the money if she wanted to lay claim to the land.[34] In other words, sale was not quite a sale: the buyer was entitled to the land but the magistrate still put in a 'buy back' clause. In the second case, where rights were given to the buyer (T3), a brother, with the consent of the *mwinimumba*, sold land out of the *mbumba* that his sister claimed belonged to her. When we followed up on the case, the village head informed us that the land in question was now back in the hands of the sister, despite the ruling in 2003, but he claimed not to know how it had happened.[35] In the remaining cases, the magistrates looked at the circumstances surrounding the sale, such as reasons that led to the sale or the length of time the owner had stayed on the piece of land. In general, the villagers, the Traditional Authority and the customary justice system of which they are a part, try as much as possible to prevent land from being 'taken away' by way of sales.

These court cases – whether related to principles of inheritance, work or sale – demonstrate the difficulties of making use of customary land to accumulate land holding. It appears that parties with legitimate rights of inheritance, or who can document long-time presence on the land, have a good chance of keeping control over it. This may be the reason why we find few strangers among the buyers of land in the cases we examined. Local communities have numerous means to exclude people whom they do not want. Witchcraft accusations, the spreading of unfavourable rumours and small actions of sabotage are all well-documented strategies of exclusion.

Smallholders' Trespassing on Estate Land

Smallholders do not only fight and quarrel with each other. Conflicts between holders of customary and private land are as common and as old as conflicts between customary landholders. A study by Mapemba shows that all the abandoned and dormant tobacco estates in Southern Region covered by his study were subject to encroachment.[36] The fact that an estimated 600,000 ha[37] (approximately 60 per cent) of all private land in the country

34 The cousin was the defendant in the case while the sister was the plaintiff.

35 In their study from Zomba, Peters and Kambewa came across cases where family members had to put up money to buy land from a brother who was intent on selling it to strangers. They also emphasise the uncertainty connected with this type of transaction from the point of view of the buyer. See Peters and Kambewa, 'Whose Security?'

36 L.D. Mapemba, 'The Abandonment of Estates; A Report of the Exploratory Study of Abandoned Estates 1997' (unpublished report produced as part of the Estate Land Utilization Study, Lilongwe, 1997).

37 Republic of Malawi and World Bank, Poverty and Vulnerability Assessment, p. 156.

is lying idle, gives an indication of the scope of this phenomenon. Although the decreased price of tobacco is an important explanation for why land is left idle, long-standing conflicts with smallholders are also part of the picture. In Mapemba's study, owners nationwide most commonly cited economic problems as the reason why an estate had been closed, but in highly populated areas the author concludes that land conflicts over long running disputes with local farmers is the most important reason.[38]

We found no court cases in Thyolo concerning allegations from estate holders of encroachment by local farmers, but there were eight such cases in Mangochi.[39] This imbalance between the two districts has also been observed by others. In a parallel study to that of Mapenda, Steele *et al.* show that encroachment on tea estates in Thyolo is less frequent than in the rest of the country.[40] There are several reasons for this. The great majority of estates in Mangochi are much younger than the freehold estates in Thyolo. Government expropriation of customary land in Mangochi mainly took place after independence, and the potential for conflict is obviously greater when cultivation occurs on land that is collectively remembered as having been cultivated by the near-parents of the present population. There is more idle estate land in Mangochi, which further increases the risk. In Thyolo, the estates are wealthier and the owners employ private security firms. Unlike Thyolo, exact estate borders in Mangochi are seldom known.

The difference in the number of court cases between the two districts does not simply reflect the frequency of encroachment. The economic and social relationships in Thyolo between the tea estates and the local population are old and well established. The estates have a wide register of responses for handling controversies that may arise. As a result, disputes seldom reach the courts, but are settled as the Traditional Authority and the parties involved collaborate to find acceptable solutions.

As long as a valid lease contract, including survey notes, can be produced, magistrates and judges say they consider cases of encroachment uncomplicated and rule in favour of the estate. Since the plaintiffs in all eight of the cases we examined were able to produce the requested documentation, all judgements favoured the estate holders. This illustrates perfectly how much easier it is for estate holders to maintain control over the land and exercise estate rights according to the Land Act, as compared with practices and principles of customary tenure. Legal predictability improves and thereby also enhances security connected to land investments and business in general, not only on paper, but also in practice.

However, the conflicts over encroachment on estates also demonstrate that private land tenure in Malawi may be less predictable than suggested above and cannot be seen in isolation from many of the underlying norms in customary tenure and customary law. In practice, the dualistic land structure proves to be less clear-cut than it appears in the codified law, rendering the security and the predictability in private land tenure we have just described somewhat less obvious. People encroach on estates for various reasons, but in all the eight cases examined, the encroachment took place when the land was lying idle. With support in the normative basis for customary law, traditional leaders and encroaching farmers often consider idle land as free land regardless of its legal status; they consistently maintain

38 Mapemba, 'The Abandonment of Estates'.

39 Many of the cases include allegations from one complainant against several defendants. The total number of defendants in the eight cases is uncertain since one of the cases is raised against a village headman and an unspecified number of villagers (M6).

40 R.J.G. Steel, J.L. Bosworth, S.J. Gosage and C. Mataya, 'The Tea Plantations of Malawi: a Report of the Tea Estates Surveys 1996 and 1997' (unpublished report produced as part of the Estate Land Utilization Study, Lilongwe, 1997).

in court that they do not understand why trespassing in such a case should be viewed as an offence.

In one case (M1), the plaintiff sued six men who had encroached on the estate of his mother – a business woman in Ntcheu – which made it hard for him to graze his cattle. Efforts through the Traditional Authority and the District Commissioner to get the people off the land proved futile. Some had already built permanent structures on the plots they occupied. The defendants argued that the land was given to them by the village headman and that '[i]t did not look like a place owned by a person' and '...the estate [building] is far from this place'. Appearing as a witness, the village head confirmed that the land he had given the defendants was land he initially had inherited from his kinfolk before the estate existed. He also alleged that the mother of the plaintiff had once begged him to remove the people in exchange for MK30,000 and to conceal the deal from the chief. He indicated that when he consulted the chief, the latter told him not to remove the people. The chief even provided each of the six defendants with a 'letter of authority' saying they were rightfully occupying the land. Nevertheless, the estate holder produced a valid deed, which in the event trumped the 'letter of authority' from the chief. The magistrate ordered the defendants to vacate the land, but with concessions to the lease: 'until December 2014, when the lease expires'.[41]

Conflicts over encroachment were sometimes couched in politicised rhetoric that strengthened the argument for re-appropriation of land previously seized and redistributed by the government. It was argued that when the one-party government of Dr Banda in the 1970s and 1980s expropriated land to give leases to political allies, it was not only futile but dangerous to resist or oppose the government, even if the local farmers considered the land in question as theirs. The political liberalisation in 1994 made restitution seem both possible and right: 'Now is the time for justice to be restored' was the message between the lines of smallholders who defended their trespass on estate land. A highly politicised case that reached the High Court in 2006 (M6), involved a village head and most of the farmers in his village who had encroached on idle estate land. The then-Minister of Agriculture had to intervene personally and pacify the encroachers by promising them land elsewhere. The farmers received extensive positive press coverage and massive sympathy in the rural areas. The post-1994 governments have not yet conceded to this type of pressure, however, and the courts continue to uphold the word of the law. So although smallholders' arguments, as shown, do not stand in court they certainly influence legal practice over the long term.

Despite the court rulings, leaseholders often have severe difficulties withstanding the pressure established by local villagers, and the conflicts lead to more idleness that in turn creates more encroachment and further conflict. Our data show that in two of the eight cases examined, both village heads and their subjects were convicted for contempt of court for not having abided by earlier rulings to vacate the same estates on which they were again alleged to have trespassed. Compliance with previous rulings is weak and the repeated replays may in the end tempt the leaseholder to abandon the estate altogether.

Re-appropriation of estate land also takes place through negotiation between estate owners and the Traditional Authority. We observed how Chief Chimwala in Mangochi district was in tactful dialogue with several estate owners controlling land that, for various reasons, was lying idle. Rather than confrontation, his approach was to request access, based on the argument that acute shortage of customary land combined with idle private land

41 In an interview, the magistrate admitted that this formulation was added because he had some sympathy for the defendants' case. Whether the lease shall be renewed or not lies outside the magistrate's mandate.

produced serious conflicts. In two cases the chief obtained informal temporary permission from two estate owners originating from the district for the surrounding villagers to cultivate part of the idle land. It remains to be seen how these arrangements will affect coexistence in the future, but the labour invested by the villagers on their land will certainly not make it easy for the leaseholders to reclaim it. In Thyolo[42] and Zomba[43] it is likewise reported that estates have found it difficult to evict villagers who were temporarily permitted to live on and cultivate the land. Steele *et al.* alludes to the fact that, at some stage, most plantations in Thyolo have relinquished land to villagers in neighbouring villages on a more permanent basis.[44]

There can be little doubt that Malawian entrepreneurs interested in expanding their agricultural activities will prefer to invest in private rather than customary land. The possession of a deed certainly does not provide full security of tenure – notwithstanding magistrates' favourable rulings – as both national authorities and the neighbouring populations may challenge their formal rights. But compared with the inherent dilemmas produced by the ambiguities in customary tenure, the security on investments seems much better on private land. The widespread encroachment by smallholders demonstrates how private land remains subject to re-negotiation, re-definition and re-appropriation into customary land, despite ownership established in some cases more than a century ago. In 1894, Her Majesty's Commissioner, Harry Johnston, approved 69 private land claims in Nyasaland covering 1.5 million ha.[45] By 1995 the estimated land area under the control of estate holders was close to 1 million ha.[46] Over that period, estate land first decreased considerably before it started increasing again sometime in the 1960s or 1970s. The present trend is difficult to determine due to lack of accurate data. The point here is simply that the ambiguity and negotiability inherent in customary law – even within a sector external to its own legal mandate – still functions as an effective means for rural people to protect themselves against the expansion of wealthier and more powerful segments of the population.

Conclusion

Too much transactionalism in the recent literature on customary land tenure and customary law in sub-Saharan Africa helps explain why important processes in the daily lives of many rural people have been neglected. While we agree with the general proposition that 'traditional law is not very traditional', we have argued here that some of its underlying norms can usefully be considered a skeletal frame of a legal corpus that guides and shapes negotiations and conflict strategies of parties that clash over land rights. In the context of customary tenure, the egalitarian and communal ideologies and values that underlie customary law are sometimes a bulwark against the accumulation of land and increased economic differentiation.

Despite increased social and economic differentiation in Malawi and stable levels of poverty among rural smallholders, we find that the inherent ambiguities and contradictions in customary tenure tend to increase rather than reduce land security. Few if any indications point in the other direction, whether we consider the country's political economy in general, the patterns of existing land distribution, or the way conflicts over land are being dealt with in what we have called the 'customary justice system'. The cases we have considered show

42 Steele *et al.*, 'The Tea Plantations of Malawi'.
43 White, *Magomero*.
44 Steele *et al.*, *ibid.*
45 Pachai, *Malawi: The History of the Nation*, p. 100. The figure of 1.5 million ha is not directly comparable to today's figure. It includes large areas controlled by the British South Africa Company that reverted to government in the 1930s.
46 Anon, 'Land People and Production'.

how difficult it is for more powerful and/or wealthier segments of the population to manipulate the ambiguities of the system according to their interests. This is particularly true if these elites are considered foreigners in the villages, but it also applies to local elites.

Over the years, the Traditional Authority has in many ways increased its powers and its position. It even managed to stop the introduction of a new land policy approved by the government in 2002.[47] Despite their power, traditional leaders do not increase their own landholdings in the villages. Instead of investing in customary land, the local elite choose other venues. Entrepreneurs consider other options more interesting and more rewarding; local leaders find other options that will conflict less with the principal norms underlying the customary system on which their own status and mandate are based. This social levelling effect also applies with reference to conflict over the legal classification of different land areas. We agree with Pauline Peters when she reminds us how easy it is for the government to expropriate customary land under the existing judicial arrangements.[48] However, that is because all land in the country is explicitly classified as state property and not because of the ambiguities in customary tenure. We have illustrated how the local population has persistently and successfully used these ambiguities to re-appropriate estate land that the government so easily took from them.

Throughout this article, we have made extensive use of Peters' in many ways excellent analyses of customary tenure in Malawi. One of her contributions is entitled 'The Limits of Negotiability: Security, Equity and Class Formation in Africa's Land System'. We agree that 'everything is not negotiable' and that there are limits regarding the outcome of continuous negotiation. However, we have shown that the limits are not to be found in the power of the wealthy to exploit legal ambiguity for their own interests, as is the case in many other parts of the world. Rather, the limits are to be found in the normative basis of customary law, where the underlying egalitarian and communal values continue to influence legal practice in land conflicts. The result is to facilitate both land security and land equity among the many poor smallholders of Malawi.

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47 Government of Malawi, 'Malawi National Land Policy' (Lilongwe, Ministry of Lands, Physical Planning and Surveys, January 2002). See also P. Kishindo, 'Customary Land Tenure and the New Land Policy in Malawi', *Journal of Contemporary African Studies*, 22, 2 (2004), pp. 213–25.
48 Peters, 'The Limits of Negotiability'.