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Eyolf Jul-Larsen
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Introduction¹

In recent literature there exists general agreement that institutions regulating access to arable land in sub-Saharan Africa are characterised by ambiguous and open-ended rules and norms. Due to the importance of land as a resource and new (or sometimes recurring) policies for regulation of land, a discussion has emerged regarding the consequences of this open-endedness for the social transformation in African societies. The question asked is: which groups seem to profit the most from a contextualised and extremely negotiable manner of dealing with claims and disputes regarding access to land? Is it - like one may observe in many places in Latin America, Asia and Eastern Europe - 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, or – on the contrary - is it the poorest who manage to impede the accumulation of wealth by utilising the ambiguity and open-endedness in the access regulating institutions to their own favour?

This debate must be considered separate and different from a much older and more comprehensive debate about the adequacy and the efficiency of existing methods of land tenure (generally referred to as customary tenure) even though the former debate has emerged as a result of the latter. The question now is not whether customary tenure impedes or favours agricultural growth and economic development, but whether the ambiguity of these institutions are serving the richer and more powerful segments of society in their struggle for accumulation of wealth and power, or – on the contrary - whether it functions to protect poor farmers who still very much dominate in African agriculture. Crucial to this debate is the question of who is conceived to have developed ‘custom’ and who controls it. Important contributions by E. Colson² and M. Chanock³ showed how close custom, as it emerged in Zambia and Malawi, were linked to the interests of the colonial administration in the two territories. Others, such as S. Berry⁴ and S.F. Moore⁵ also argue that the emergence of customary law to a large extent must be seen as the project of the colonial state. However,

‘[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 to perpetual contest’.⁶

¹ This article received funding through CMI’s project ‘The poor and the Judiciary’ funded by the Research Council of Norway. We wish in particular to thank magistrates in Thyolo and Mangochi districts for their open and kind collaboration as well as Siri Gloppen and Magnus Hatlebakk at CMI for valuable support and comments.

² E. Coulson, ‘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.

³ M. Chanock, *Law, custom and social order: the colonial experience in Malawi and Zambia*, (Cambridge, Cambridge University Press, African studies series 45, 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 : Heinemann Educational Books, Social history of Africa series, 1991), pp. 61-84.

⁴ S. Berry, ‘Hegemony on a shoestring, Indirect Rule and Access to Agricultural Land’ *Africa*, 62, 3 (1992), pp. 327-355; Berry S. (2002), "Debating the land question in Africa", *Comparative Studies in Society and History*, 44, 4:638-68 (1992, 2002).

⁵ S. F. Moore, ‘Changing African Land Tenure: Reflections on the Incapacities of the State’, *European Journal of Development Research*, 10, 2 (1998), pp. 33-49.

⁶ Berry, Hegemony on a Shoestring, p. 345.

Pauline Peters is among those who most consistently have been arguing that parts of the research on African land tenure may have gone too far in emphasising the processual character and the open-endedness attached to the land regulating institutions. According to Peters there are reasons to believe that the negotiability has its clear limits as what J.C. Scott⁷ called a 'weapon of the weak' and that ambiguity systematically are helping the more resourceful groups of society in a manner that contributes to increased inequality and to acceleration in the on-going 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 a broad and general research material⁸ and sometimes more specifically upon her own empirical data from Malawi.⁹

In this paper we shall critically discuss Peters' argument with reference to an analysis of available literature and our own empirical data from Malawi's southern Region which is the same area as where Peters has been working. Although analyses on economic change between various socio-economic groups are limited, we share her concern about increased socio economic inequality at the national as well as at the local levels. Classes in the sense of stable and distinct socio-economic groups with great variations in access to material assets are not easy to find at the local level, but nationally it probably makes sense to talk of an emerging formation of classes. However, increased social differentiation in a mainly agricultural society does of course not *a priori* mean that the land tenure system is accelerating such a process. We shall show how Peters' analysis put too little emphasis on other and more important modes of appropriation of surplus in Malawi's political economy such as international aid and labour migration in particular. It is mainly through surplus appropriation at this level that it is possible to understand how the national and local elites have emerged and are being reproduced. The wealthier segments of the population continue to invest in other sectors than agriculture since the latter is still considered risky with low profitability. A recent assessment of poverty and vulnerability in Malawi reveals extremely egalitarian patterns in customary land distribution as well as a surprisingly low level of commercialisation of agricultural products deriving from Malawian smallholders.

Our analysis of a number of court cases regarding land supports the views of the constructivist school¹⁰ in that the characteristics of customary tenure are important elements explaining this state of affairs. Various normative regulations embedded in customary tenure such as inheritance, investment of work and financial transactions continuously produce dilemmas that are utilised to keep foreigners at a distance and limit the land expansions of wealthy villagers. Furthermore, we show that Peters puts too little weight on the overall development in Malawi's agricultural sector. When people invest in agriculture it mainly takes place in the private sector, often called the estate sector, which is defined as external to customary tenure, and where land is privately owned or leased on long term contracts with government. If people prefer to invest in estate land it is precisely because of much better security on investments in the estate sector compared to the situation on customary land. But even estate land is challenged by the customary tenure. The demarcation of what is estate land and what belongs to customary land is subject to continuous negotiation and re-definition. Our study shows that local farmers and the traditional authority, over time, manage to re-appropriate estate land into customary land thereby safeguarding the interests of

⁷ J. C. Scott, *Weapons of the Weak, Everyday Forms of Peasant Resistance*, (New Haven and London, Yale University Press, 1985).

⁸ 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.

⁹ 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*, 28, 1 (March 2002), pp. 155-178; Peters, P.E. and D. Kambewa, 'Whose Security? Deepening Social Conflict over 'Customary' Land in the Shadow of Land Tenure Reform in Malawi', (Harvard University, CID Working Paper No. 142, March 2007).

¹⁰ One of the most influential representatives of this school is S. Berry. See references to her work elsewhere in the text.

the poor local farmers at the expense of the estate owners. It is therefore possible to say that the ambiguity and open-endedness of customary tenure to a large extent explains why the estate sector has not grown more than it has since it was created.

Most of our data derives from four shorter fieldworks in Thyolo and Mangochi districts in Malawi's Southern Region in the period from June 2005 to March 2007. After initial investigations regarding levels and types of land conflicts we started to look at land conflicts which had reached the court system. After the identification of approximately 120 court cases in three Magistrates' Courts, 45 cases were selected for further analysis.¹¹ The main selection criteria were of a purely practical nature: the case should be closed, a verdict pronounced and the court files should be available. Less than ten cases were not included due to their content. They were all border conflicts between smallholders involving very small land areas. In addition to the court files which often proved to be more comprehensive than we initially had feared, we had the opportunity to discuss all cases with the magistrates who ruled the cases. Finally, approximately 20 cases were made subject to a more detailed investigation through interviews with representatives of the traditional authority who had been directly or indirectly involved in the case. In this type of research, based upon short visits to the sites, the danger of misunderstandings are considerable and one of our concerns was not to give concerned people a pretext for a re-play of the case. For ethical reasons we therefore avoided interviews with the individual plaintiffs and defendants. A different approach would have forced us to reduce the number of cases under detailed investigation further.

Smallholders in southern Malawi, and the role of agriculture in the formation of national and local elites

40 percent of Malawi's 12 million inhabitants live in the rural areas of the Southern Region. The population density is among the highest in rural Africa and reaches 146 per km² (97 and 268 for Mangochi and Thyolo districts respectively).¹² In most of the Shire Highlands (including Thyolo) virgin land is almost non-existent. In lower lying areas such as the in the Shire Valley (including Mangochi) virgin land of some quality is scarce but may still be found. Cultivated land is mainly rain fed and used for staple crops such as maize. A smaller part is wet land or *dimba* often used for horticulture. Some smallholders also cultivate cash crops such as burley tobacco, cotton, tea, paprika, groundnuts and chilli, but in limited amounts. Amongst smallholders, the distribution of landholdings is mostly concentrated between 0.2 and 2 hectares.¹³ The average size of the largest 20 percent of all holdings is 3 ha. Poverty is a common feature in the smallholder sector. With a poverty line at MK 16,165¹⁴ per year and an ultra-poverty line at MK10, 029, 64 percent of the rural population in the south was classified as poor and 32 percent as ultra poor in 2005. This is significantly higher than in the less populated regions in the centre and the north of the country. For the country as a whole the poverty and ultra-poverty rates are 52 and 22 percent respectively. Poverty rates have been fairly stable in the period between 1998 and 2005.

Since the start of the colonial era the role of agriculture in the social differentiation processes has varied. Initially, it played an important role in the creation of the first elites. Already in 1894 the newly appointed commissioner of the protectorate approved 69 land claims covering approximately

¹¹ The numbering of cases in the Magistrates' courts is somewhat confusing. Most common is that each magistrate keeps his/hers own numbering and one may therefore find more than one case with the same case number in the same court. In this paper cases are referred to according to our own numbering system.

¹² 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.

¹³ Unless otherwise stated, all figures in this paragraph are quoted from Republic of Malawi & World Bank, *Malawi: Poverty and Vulnerability Assessment, Investing in our Future*, (June 2006), available at http://www.aec.msu.edu/fs2/mgt/caadp/malawi_pva_draft_052606_final_draft.pdf, retrieved on 3 December 2007.

¹⁴ The exchange rate at time of assessment was 1USD = 135 Malawi Kwacha.

15 percent of the land area.¹⁵ Except for huge concessions in the northern and central parts granted first to the African Lakes Company and later transferred to the British South African Company most of the estates were found in the Shire Highlands in the south. Needless to say, almost all who received the so called certificate of claim and who were of European origin became the first elite in the territory. But the protectorate never became a settler state like in neighbouring Southern Rhodesia (Zimbabwe). It was British imperial interests rather than the immediate interests of a newly established land owning class who were to guide the politics in the protectorate. Colonial administrators and estate owners could have close social contacts, but their relations were also characterised by clear conflicts regarding policies of land and agriculture.¹⁶ Many estate owners in the 1940s and 1950s chose to sell, mainly due to economic problems but partly as a result of disagreements with the agricultural policies.

Since independence the government has chosen to lease out estate land rather than sell it and the 1970s and 1980s saw a dramatic growth in leaseholds as well as in the areas under cultivation. It is estimated that the total number of estates grew from 250 in 1970 to some 30 000 farms in 1995 covering an area in 1995 around one million hectares.¹⁷ Of this only 34 000 ha was freehold land, mostly large tea plantations in the Shire Highlands and in Thyolo district in particular, the rest is leasehold. Leaseholds are generally much smaller than the old freehold estates and range from 10 to 500 ha. Before 1980 the expansion of leaseholds mainly involved larger companies, but this has changed. In 1995, 70 percent of all estates were less than 30 ha.

In Malawi like in most of sub-Saharan Africa the most prominent and powerful elites have emerged and are being reproduced through their political control rather than through their control of production.¹⁸ However, parts of this elite have been able to convert their influence into large estate holdings. The introduction of a multi-party system in 1994 has not changed the elite structure in any fundamental way.¹⁹ It is beyond doubt that, after independence, a close correlation exists between affiliation to the national elite and access to leaseholds and that this situation persists. President Banda made systematic use of leasehold contracts as an incentive for political loyalty. But it is not through their control of land that big leaseholders constitute a socio-economic elite, it is the other way around. The political liberalisation in 1994 implied that foreign aid increased substantially. One of the main foci, not only among the present elite, but also among a large part of an educated middleclass in the urban areas is to secure as much access to the aid flows as possible. International aid may have become the main driver in the class formation processes at national level today.

At the local level the creation of the estates opened up for some social differentiation with a more complex organisation of work. All estates had their foremen (*capitaō*) who supervise and control the work and who thereby also receive privileges. Such functions came to be closely related to and overlapping with positions in the traditional authority system as this system evolved since the first decades of last century. But privileges and wealth were first of all achieved as a result of contacts with and positions in the colonial administration. The first economic elites to emerge locally were those who got education in the mission schools and later salary-based positions and jobs within the colonial and national administration. This wealth opened up for a certain degree of private local investments even though economic failures were (and are) as common as the successes. Another important opportunity was through labour migration mainly to South Africa and Southern Rhodesia.

¹⁵ B. Pachai, *Malawi: the History of the Nation*, (London, Longman, 1973).

¹⁶ L. White, *Magomero: Portrait of an African village*, (Cambridge: Cambridge University Press, 1987).

¹⁷ 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).

¹⁸ G. C. Z. Mhone (ed.), *Malawi at the Crossroads, the Post-Colonial Political Economy*, (Harare, SAPES Books, 1992).

¹⁹ H. Englund (ed.), *A Democracy of Chameleons, Politics and Culture in the New Malawi*, (Stockholm, Nordiska Afrikainstitutet, 2002).

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 the labour migration varied substantially according to areas. In Mangochi it was very common and this explains why the economic differentiation is more pronounced in this area than in many other places in Malawi. In Thyolo labour migration abroad was more seldom probably because of the big tea estates. Their role was ambiguous. On the one hand they represented a deeply hated system of forced labour (*thangata*) which tended to exploit the smallholders in the area. On the other hand they provided opportunities for limited cash incomes without having to move.

The labour migrants often remitted, but more common savings were invested upon return of the migrant. McCracken²⁰ shows how the labour migration led to a considerable technological and economic development in the fisheries of the southern part of Lake Malawi in the late 1940s and 1950s. Our own work²¹ confirms that local investments in Mangochi, either from national wage labour or labour migration abroad, continued into the 1990s. It also illustrates the diversity of the investments (e.g. in transport, trade, rest houses, maize mills, brick production, animal husbandry etc.) and how this gave room for a group of 'lords' who developed limited economic powers locally. Only small parts of the investments seem to have been invested in agriculture, and when it was the case it was in leasehold rather than in customary land. Since the 1980s labour migration among the local population started to diminish and has now stopped completely. Even though migration from some areas like Mangochi remains high it has changed from labour to trade migration and the chances of generating surpluses have been dramatically reduced.

One of the reasons why the labour migrants preferred to invest in estates rather than in customary land may have been a prohibition to produce burley tobacco on customary land which the new government introduced in the late 1960s. When this prohibition was lifted around 1990 it opened up a new investment venue for wealthier smallholders which they received eagerly. Another possible reason for limited investments in customary land could be the marketing restrictions established by government on cash crops in general which forced the smallholders (at least formally) to sell their crops to government agencies (Admarc) at artificially low prices and which lasted for approximately the same time period as the prohibition on production of tobacco. In 2005, between 70 and 80 percent of the total production and 50 percent 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 Southern Region than in the rest of the country.²²

Also people associated with what is now called the traditional authority also represent a kind of local elite. The institution has its roots back to the first years of last century when the colonial power established their 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. It constitutes a hierarchy of local leaders starting with the chiefs on top, through sub chiefs, group village head and the village head who constitute the lowest level. The traditional authority has a strong legitimacy and the leaders are often found to be wealthier than the population in general, even though our work also revealed that many – even at the level of chiefs – remained poor. However, the assets controlled by wealthy local leaders were found, either to originate from transfers from the national political elite or from non-agricultural productive activities often outside the village. In one village in

²⁰ J. McCracken, 'Fishing and the Colonial Economy: the Case of Malawi', *Journal of African History*, 28, 3 (1987), 413-429.

²¹ 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, 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.

²² Republic of Malawi and World Bank, *Poverty and Vulnerability Assessment*, pp. 152-153.

Mangochi we found close economic collaboration between two or three households organised around the village headwoman²³ which 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 their important role in the distribution of customary land we have never observed or heard that members of the traditional authority control larger areas of customary land for their own private purposes than the rest of the population. Neither did we hear of leaders who had invested in estate land. This may probably be explained by the difficulties such investments could create due to their local functions.

Even though it is approximately 15 years since the restrictions were lifted, the lifting does not seem to have influenced the distribution in smallholder agriculture very much. The recently published poverty and vulnerability assessment draws a picture of a smallholder sector in 2005, which is land-egalitarian with a subsistence-oriented structure.²⁴ Among the 2.4 million rural households in Malawi 11 percent are landless while 75 percent cultivate plots less than 2 ha. Only 13 percent has landholdings larger than 2 ha.²⁵ 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 while it is 1.1 ha in the wealthiest quintile. At the same time only 52 percent of all households in the country sold some portion of their agricultural production on the market.²⁶ Neither did market relations vary much between the wealthiest and the poorest quintiles; 40 percent among the poorest and 57 percent among the wealthiest sold a portion of their crop at the market.

The assessment also confirms what is indicated above. Local wealth, rather than being generated in 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 numbers of richer households for whom farming is only a marginal activity'*.²⁷ The assessment also shows how a higher share of households under the poverty line (0.95) has access to land compared to those above this line (0.84). Even for high quality *dimba* wetland the share with access is higher among the poor.²⁸

Until now it does not seem as if customary agriculture has been important in the processes of economic differentiation or in formation of the Malawian elites. Like in so many other African countries it has been access to state resources which has and continues to be the crucial element in these processes coupled with whatever funds that have derived from international labour and trade migration. There is no doubt that the present elites use agriculture as an opportunity to invest parts of their wealth, but when doing so it seems mostly to be the urban elite who invests in the estate sector. Part of the reason is undoubtedly connected to the government's restrictions which until early in the 1990s were imposed on the customary sector but it remains to see how the tenure of customary land in itself affects the differentiation processes.

²³ It is quite common to find female village heads and more seldom group village heads. We have not met or heard of any cases of female chiefs.

²⁴ *ibid.* pp. 151-165.

²⁵ In rural southern region the figures are 13, 79 and 8 percent respectively.

²⁶ The figure is 45 percent for rural southern region.

²⁷ *ibid.*: 155

²⁸ *ibid.* p.153

Recurring dilemmas in customary tenure: inheritance vs. work vs. assets

This paper looks at the empirical evidence on how customary tenure in all its facets affects the differentiation processes. It does not present a comprehensive analysis of the development and functioning of customary tenure in the country. Such contributions already exist²⁹ and we mainly base our analysis on them. In different ways they all support what in the two last decades have become the dominant interpretations of customary law and land tenure in sub-Saharan Africa.³⁰ Custom as well as local authority is a direct product of the colonial development in the 20th century and of the needs and interests of the colonial powers. Customary law is based on a mixture of pre-colonial regulatory principles as well as various practical regulations deemed useful and adequate by the colonial administrations. Likewise, the local traditional authority derives its power and legitimacy on a combination of government support and on shared myths of descent and origin. Obviously, it became difficult to converge the meaning of these sometimes very different norms and regulations into some sort of coherent social basis and the result has been that practice related to customary law is characterised considerable ambiguity, lack of predictability and where the local actors are left with ample room for manipulation and redefinition of what a case is all about.

The fact that the formal judicial system through the Magistrates Court and the High Court has, since the political liberalisation in 1994, taken over the functions of the old Traditional Court which were controlled by the chiefs does not seem to have changed much to this picture. Formal jurisdiction (like e.g. the land act in function) continues to refer to traditional law as the main regulating principle. Given its ambiguity the courts therefore often rely on the traditional authority for defining the content of traditional law. Furthermore, local leaders, from family heads to chiefs, continue to be directly involved in solving local conflicts before they reach the courts. The court cases show that even District Commissioners sometimes were included in the chain of conflict resolving meetings before a case went to court. This system of conflict resolution is not only a question of brokerage; the leaders also pronounce verdicts and a considerable amount of pressure is put on the parties to accept the solutions they pronounce. The system has been called the *customary justice system* and we find the concept useful since it reveals how the customary realm is reproduced and even expanded into what – for lack of better expressions – is often described as the modern or formal judicial sector, irrespective of the abolition of important customary institutions such as the Traditional Courts.

In the customary tenure, rights to land are never exclusive, but shared between the individual and various groups to which every person has to be part of. In Malawi's Southern Region the most important group regulating rights to land is the matriliney (*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 matriliney or in the village. In both cases these principles may create difficulties if the spouse holding hereditary rights is the first to die. At the end of the funeral ceremonies (*nsudzulo*) the remaining spouse may be requested to move back to her or his village. The principle of *chikamwini* opens for a very strong *de facto* control of the land by the sisters in the

²⁹ See e.g. Channock, Law, Custom and Social Order; Channock, Paradigms, Policies and Properties; P. E. Peters 'Revisiting the puzzle of matriliney in South-Central Africa', *Critique of Anthropology* 17, 2 (1997), pp. 125-146; Peters, Bewitching Land; White, Magomero.

³⁰ See e.g. S. Berry, *No Condition is Permanent, the Social Dynamics of Agrarian Change in Sub-Saharan Africa*, (Madison, University of Wisconsin Press, 1993). For a more synthesised presentation of the debate, see Peters, The limits of negotiability

lineage and land is most often transferred directly from women to their daughters. 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 who controls virgin land and who can allocate parts of that land to strangers who want to settle in the village. In both districts conflicts between lineage heads (*mwimbumba*) and traditional authority regarding land which 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 J-P. Chauveau³¹ has a point when he claims that labour often is a more fundamental regulating norm than inheritance since hereditary rights vanish quickly unless the land is in continuous use. 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. The dominant reason behind the conflicts studied lies in the dilemma between work and descent and conflicts derive from disagreements about how to draw the line between the two principles. 27 of the 45 selected court cases concerned dilemmas between descent and work in one way or another. *Grosso modo* the dilemma was found to manifest itself in four different ways.

In Thyolo the most frequent type are conflicts among members of the same *mbumba* – often cousins - where the person who has worked the land over some time is being challenged by another due to different interpretations of who in the *mbumba* gave the land to whom. The second type and quite common in Mangochi are conflicts between newcomers given land by the traditional authority and persons from the already established *mbumba*. ‘Newcomer’ is here relative since many of them may be 2nd generation and the conflicts are often recurring phenomena which have lasted over longer periods of time. The dilemma is the same: the former has cleared and developed the land while the latter claim it was given to them or their parents. Thirdly, some conflicts in Thyolo are connected to old abandoned estate land taken over by the government and redistributed to the villagers. This practice which has lasted since well before independence has deliberately been used by the national authority to try to establish competing individual land rights for men which could be transferred from fathers to sons. As observed by both Peters³² and White³³ 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. Several of the court cases date back more than 40 years. Finally a limited number of court cases are connected to the principles of *chikamwini* and *chitengwa* and men or women who may have worked a plot of land the whole of their adult life are refused to remain on the land of their late spouses’ *mbumba*.

It is not possible to find any patterns of preference either for inheritance or for work in the court cases, whether we look at the magistrates’ or previous verdicts 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. Besides, the relationship between inheritance and work does not correlate with social differentiation. In some cases, like in those implying *chikamwini* or *chitengwa* the weakest party is most often the person who claims rights through his or her work. In cases of redistribution of old estate land the weakest party can easily prove to be those claiming rights through descent.

³¹ 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).

³² Peters, Revisiting the Puzzle and Peters, Bewitching Land.

³³ White, Magomero.

However, two relevant aspects seem possible to generalise upon. One is related to the time it takes to settle a case. Not only does it take time to go through the whole chain in the customary justice system, but old cases have also a tendency to re-occur in slightly new dresses. One case regarding old estate land distributed in 1964 (T19) where sisters of the buyer claimed the land rights at the expense of the buyer's adopted son was settled in the magistrates' court in 2004 and the son was given the land. In our follow up of the case in 2007 we found that the conflict was still alive, but now it was other persons from the same *mbumba* who claimed the rights referring to a combination of inheritance and work invested on the land at the expense of the same son. The 'new' case was at present dealt with by the village head and the group village head who both were new and had not participated in the original case. The oldest conflict in our material concerned land given to a group of newcomers to Mangochi from Liloma Island in 1917 (M10). The conflict started less than ten years after their arrival and seems to have been recurring ever since each time someone saw a use for it. As a result of these types of conflicts land is often lying idle for shorter or longer periods and even though smallholder agriculture does not require much physical investments it is not difficult to understand how customary land demonstrate clear limitations for someone interested in expanding cultivation in order to increase ones wealth.

A second generalised pattern is connected to the arguments used by the parties, the witnesses as well as those pronouncing verdicts. A phenomenon like the welfare situation of the parties is often made relevant as an argument, particularly in the case of extreme poverty. Both traditional leaders as well as magistrates may openly refer to the welfare situation of the parties as an element in the background for their verdict. It proves what many have said before us that the customary justice system tends to be more concerned with the social cohesion at local level than with the rights of the individuals as such.

A third regulating principle is different types of monetary transactions. A variety of local arrangements have always existed to secure temporary access to land for individuals without permanent rights in an area, normally referred to as rent (*kubwereka munda*). This can be arrangements between an individual and a village headman, a head of lineage or the head of a particular household. Rights involved as well as level of compensation vary almost from case to case and it is difficult to say exactly when money entered as a part of the rent arrangements. Rent easily lead to conflict when an individual can start claiming more permanent rights due to the work invested in the land.³⁴ However, a new element has emerged in the last decades, in particular in the Shire Highlands. As opposed to leases people have now started to talk of sales (*kugulitsa munda*). Several authors³⁵ have observed the same and relate its emergence to increased population density. Sale of land must be considered particularly relevant with reference to processes of social differentiation.

In the common rhetoric about customary tenure sale in the sense of exclusive individualised transference of rights is considered a contradiction in terms. Nevertheless, all traditional leaders and magistrates indicate that something resembling sales have become common in areas within Thyolo district even though the sums of money involved generally remain modest. Going through the court registry in Thyolo also show that such land sales have become an important source of dispute and 10 of the 21 selected court cases from Thyolo deal with such conflicts. In Mangochi district sales of

³⁴ When urban people who rent plots for cultivating their own maize are being moved from one plot to another it is often an illustration on how the holder try to avoid such claims from emerging.

³⁵ 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. Kaarhus, 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.

this kind is reported to be very rare and our data shows no cases. Instead it was common that land was rented for periods varying between three and ten years. Conditions and prices seemed to vary a lot from one area to another. Several of the court cases from Mangochi make reference to rent (in one it is claimed that rights have been transferred permanently), but no court case seems to have derived from conflicts related to the rent as such.

Most traditional leaders and magistrates indicate that they accept the practices of land sales as a new element of customary tenure. Chiefs 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 jurisdiction area. In our discussions they explicitly considered such sales as exclusive transactions 'A sale is a sale' and 'selling land is like selling a pair of shoes' were recurring ways to express their interpretation of the new phenomenon. However, much as customary tenure now seems to recognize sale, a lot of confusion exists regarding who is entitled to sell land (i.e. the individual or the *mbumba*). In addition there is also a continuous dispute about the role of the Traditional Authority in the transactions and we found in many of these cases that the level of conflict within the traditional authority could be as high as between the parties. Furthermore, it proved that the traditional leaders are far less rigid in their legal practice than what they sound like from our discussions. If a seller expresses remorse the customary justice system will do what it can to find ways to retransfer the land in question, normally through back-sale. In all the cases examined, conflict arose either as a result of disagreement about mandate to sell or of remorse from the seller. In cases where 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 be in favour of the buyer. However, this only happened in 2 of the 10 cases.

In five cases traditional leaders and magistrates offered the seller the option to buy back the land. In another (T6) a brother who was living away from the village of birth had, together with a sister, inherited a *dimba* garden from their father. At the death of the father the two agreed to raise a tombstone at his grave with money from the sales of bananas 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 MK2000 despite resistance from the sister. The court ruled for the buyer³⁶ but advised the sister to refund the money if she wanted to lay claim to the land. In terms of our argument the buyer was entitled to the land and yet the magistrate still put in a "buy back" clause. In the second case where rights were given to the buyer (T3) we did a follow up. According to the village head it proved that despite the ruling in 2003 the land in question was now back in the hands of the complainant who had lost the case and her *mbumba*. In their study from Zomba, Peters and Kambewa³⁷ also came across the phenomenon where family members had to put up money to buy land from a brother who was intent on selling it to strangers and they demonstrate the uncertainty connected to this type of transactions from the point of view of the buyer.

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 one had stayed on the piece of land. In general the villagers, the traditional authority and the customary justice system all try as much as possible to secure land from being 'taken away' by way of sales.

The court cases on customary tenure whether they regard the dilemma between inheritance and work or between inheritance and sale demonstrate how difficult it is to make use of customary land to accumulate landholdings. It seems as if those with legitimate rights of inheritance or those who can document long time presence on the land seem to stand a good chance in keeping control over it. This may be the reason why we find few strangers among the buyers of land in cases. Local

³⁶ The cousin was the defendant in the case while the sister was the plaintiff

³⁷ Peters and Kambewa, Whose security.

communities have so many means to exclude people who they do not want. Witchcraft accusations, spreading of unfavourable rumours and small actions of sabotage are all well documented strategies to exclude others. In one of her articles Peters³⁸ bases most of her argument upon observed exclusions as a result of witchcraft allegations within families. However, the problem is that there is nothing in her data that indicates significant socio-economic differences between those who exclude and those being excluded. Over many years the overall message from studies on witchcraft in Africa has been that witchcraft allegations have a socially levelling functions rather than the contrary. Besides, her field data also reveals that those being excluded often manage to find new land in other areas and landlessness is therefore avoided. Land exclusion processes do therefore not necessarily lead to processes of social differentiation, even less to the formation of classes.

Smallholders' trespass on estate land; the dynamics of the Malawian land structure

Smallholders do not only fight and quarrel with each other. Conflicts between holders of customary land on one side and private land holders on the other are as common and as old as conflicts between customary landholders. In a national study about estate land L. D. Mapemba³⁹ claims that 2/3 of the estates in Malawi have been encroached sometimes in their existence, but most of the conflicts never reach the courts. We found no court cases in Thyolo and eight in Mangochi which concerned allegations from estate holders against local farmers encroaching on their land⁴⁰. This geographical imbalance has also been observed by others. In a sister study to that of Mapemba, Steele *et.al*⁴¹ shows that encroachment on tea estates in Thyolo is less frequent than in the rest of the country. The reasons are compound. On the one hand the great majority of estates in Mangochi are much younger than the tea estates in Thyolo who mostly were established as freeholds at the turn of last century. Exact borders are often not well known in Mangochi. The much wealthier estates in Thyolo also employ private security firms. Besides, in Mangochi government's expropriation of customary land mainly took place after independence and the risk of conflict is obviously greater when cultivation takes place on land which is collectively remembered to have been cultivated by the near parents of the present population. More idle land is found in Mangochi and that increases the risk even further.

The difference in number of court cases is not exclusively linked to the importance of encroachment practices. The economic and social relationships in Thyolo between the tea estates and the local population are old and well established where the estates have a long register of means in handling controversies that may arise. They therefore seldom need the courts, but manage to impose acceptable solutions in collaboration with the traditional authority and the persons involved.

Even though conflicts between estate holders and holders of customary land neither concern customary tenure nor the customary justice system as such, the cases clearly reveal how much easier it is for estate holders to maintain land security and exercise rights compared to holders of customary land. As long as a valid lease contract, including survey notes, can be produced magistrates and judges say they consider such cases as uncomplicated and straightforward and they

³⁸ Peters, *Bewitching Land*.

³⁹ 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)

⁴⁰ 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).

⁴¹ 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).

have to judge in favour of the estate. In all the eight cases we examined judgements were in favour of the estate holders. Access to freehold no longer exists and access to leasehold requires wealth as well as connections to the wealthiest and most influential members of the elite. For village members leasehold is seldom a realistic option to increase ones land. Nevertheless, the trespass cases clearly illustrate how increased legal coherence improves on the predictability and security connected to investments in land for the wealthier segments of the population.

However, the question of encroachment on estates also reveals how private land in Malawi cannot be seen in complete isolation from customary tenure and the weaknesses embedded in the concept of a dualistic land structure. People encroach on estates for various reasons but in all eight cases the leaseholders were people from outside the district in which the estate was located, and in most cases the encroachment took place when the land was lying idle. Hence, according to the principles of customary tenure, traditional leaders and encroaching farmers maintained in court that they did not understand why trespass in their case had to be considered an offence.

In one case (M1) the plaintiff sued six men that had encroached on the estate of his mother. He also complained that the locals were making 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 had occupied. In their defence the defendants said 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 [buildings] is far from this place'. The village head indicated that the land he had given the defendants was one he had inherited from his parents. He also alleged that the mother of the plaintiff had once begged him to remove the people in exchange for MK 30, 000 and that this deal should not be made known to 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. Due to the existence of a valid deed the magistrate ruled in favour of the plaintiff and ordered the defendants to vacate the land until December 2014 when the lease expires.

Encroachments of this type were sometimes situated in a politicised rhetoric which improved the argument for re-appropriation. It was argued that when the one-party government of Dr. Banda in the 1970s and 1980s expropriated land to give (lease) to its political allies, it was futile and even dangerous to resist or to oppose the government even if the local farmers considered the land in question as theirs. 'Now was the time for justice to be restored' was the message between the lines.

Our findings support Mapemba⁴² when he claims that an important reason why estates are abandoned is because of long lasting disputes between estate holders and the local farmers. It proves that the leasers often have severe difficulties to stand the pressure established by the local villages. In the first instance the conflicts lead to reduced cultivation and increased areas of idle land which in the next instance lead to more encroachment and increased conflicts. Finally the lease holder may decide to abandon the estate all together. Mapemba reports that much of the idle estate land is being used by villagers from neighbouring villages and that the compliance with previous rulings generally is weak. In two of the eight cases village heads and their subjects were convicted for contempt of court for not abiding with earlier rulings to vacate the estates.

Re-appropriation of estate land also takes place through negotiation between estate owners and the traditional authority. We observed how a chief in Mangochi was in tactful dialogue with several estate owners, whose land for various reasons was lying idle. Rather than confrontation his approach was a request based on the argument that acute shortage of customary land combined with idle estate land easily could produce serious conflicts. In two cases the chief obtained an informal

⁴² Mapemba, *The Abandonment of Estates*.

temporary permission for the surrounding villagers to cultivate on parts of the idle land. The two estates belong to persons originating from the district and whether estates owners from other districts would allow such arrangements is another question. It still remains to be seen though how they will affect coexistence in the future, but the work invested by the villagers will certainly not make it easy for the estate holders to reclaim his land. Also in Thyolo⁴³ and Zomba⁴⁴ it is reported that estates have found it difficult to evict villagers who initially were temporarily permitted to live and cultivate on their land. Steele *et al.* also alludes to the fact that most plantations in Thyolo, at some stage have relinquished land areas to villagers in neighbouring villages on a more permanent basis.

There can be little doubt that Malawian entrepreneurs interested to expand their agricultural activities will prefer investments in private rather than in customary land. The possession of a deed does certainly not provide full security of tenure, both national authorities as well as the neighbouring populations may challenge their rights. However, compared to the inherent dilemmas produced by the ambiguities in customary tenure, the security on own investments seems much better on private land. The widespread encroachment practices by smallholders on private land also demonstrate how private land, despite some of it having originated more than a century back in time, still is very much subject to re-negotiation, re-definition and re-appropriation into customary land. By 1894 her Majesty's Commissioner Harry Johnston had approved 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 In the meantime the area first decreased considerably before it started increasing again sometimes in the 1960s or 70s. Whether it is still on the increase or it has started to decrease is not possible to say. Our concern is simply to show that the system of customary tenure –even within a realm external to its own legal mandate – still proves an effective means when rural people try to protect themselves against the expansion of wealthier and more powerful segments of the population. The customary system has its own ways of getting back what it deems belongs to itself.

Conclusions

Despite increased social and economic differentiation in the Malawian society and no reduction in the level of poverty among the millions of rural smallholders, we find that the inherent ambiguities and contradictions in customary tenure tend to increase the land security among smallholders rather than to reduce it. Few - if any - indications in our data point towards something else, whether we talk of the country's political economy in general, the existing land distribution patterns or the way conflicts over land are being dealt with. The study of what we have called the 'customary justice system' shows how difficult it is for more powerful and/or wealthier people to utilise the system. This is particularly true if they are considered foreigners in the village, but it also applies for the local elites. Over the years the traditional authority has in many ways increased its powers and its position. They even managed to stop the introduction of a new land policy approved by government in 2002.⁴⁷ Despite this power the traditional leaders do not increase their own landholdings in the villages. Instead of investing in customary land the local elites choose other venues deemed more

⁴³ Steele *et al.*, *The Tea Plantations of Malawi*

⁴⁴ White, *Magomero*.

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 which was returned to the colonial administration during the 1930s.

⁴⁶ Anon., *Land People and Production*.

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. 213-225.

interesting. This socially levelling effect also applies with reference to the struggles regarding the legal classification of different land areas. We agree with 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 explicitly is state property and not because of the ambiguities in the customary tenure. We have illustrated how those ambiguities continuously are being successfully used by the local populations to re-appropriate estate land which government so easily took from them. As may have been noted we have all the way made extensive use of Pauline Peters' own excellent analyses on customary tenure in Malawi which in our opinion more tend to support rather than to contradict our conclusions.

As discussed in the introduction, a conclusion that poor people manage to use customary tenure and the customary justice system to improve on their land security does not automatically mean that the system can be considered well adapted as a mechanism in the efforts to improve smallholder agriculture and improve its productivity. Such a debate is a different one and requires a very different type of data and analysis. But improved agricultural production seems by everyone to be considered a crucial element in the combat against poverty in sub-Saharan Africa. We may therefore very well find ourselves confronted with a tremendous paradox in that customary tenure is found to protect the land security of the poor at the same time as it may be found to complicate changes deemed necessary in the combat against poverty. As we see it, too little emphasis has until now been put on this dilemma and how it can be dealt with.

⁴⁸ Peters, *The Limits of Negotiability*.

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SUMMARY

It has been argued that the ambiguities in Malawian customary tenure may aggravate processes of social differentiation and class formation. The article investigates this viewpoint based on the situation in the rural areas in Malawi's Southern Region. The political economy at national as well as local level does not indicate that accumulation of customary land has become important in understanding the increased economic differences between the elites and the great majority of smallholders. At the same time, the patterns of land distribution and commercialisation in smallholder agricultural production indicate the same. Customary land remains very equally distributed and the level of commercialisation of agricultural products is surprisingly low. An analysis of 45 court cases on land conflicts in the Thyolo and Mangochi Districts shows this to be intimately connected with the recurrent dilemmas produced by the inherent ambiguities in customary tenure and that it is mainly the smallholders who manage to secure their interests through this tenure. Finally, the paper demonstrates how the norms and regulations guiding customary tenure are continuously and successfully being utilised by the local population to re-appropriate land which government has allocated as leaseholds to estates outside the realm of customary tenure. The study thereby supports that customary tenure tends to increase rather than reduce land security for the poorer segments of the population.

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