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The Land Question in Malawi: Law, Responsibilization and the State

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A thesis submitted in partial fulfilment of the requirements for the degree
of Doctor of Philosophy in Law

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Declaration

This thesis is solely the work of the author. Parts of the thesis have been published prior to submission to The University of Warwick. However, no part of the thesis has been submitted for publication or published prior to the commencement of the author's period of research for the degree of Doctor of Philosophy in Law at this University. The thesis has not been submitted previously for an award of a degree at this or another University.

Abstract

This thesis argues that the land question in Malawi can be resolved through the emergence of a responsabilized State under people-generated responsabilization. People-generated responsabilization is a holistic, bottom-up approach to tackling asymmetrical access to, and ownership of, land in the country. This, it is suggested, must entail proactive, people-based action for a triangulated approach to land reform involving law, macroeconomic frameworks like poverty reduction strategies, and the adherence to the terms of governing under the Constitution.

The broad context of the research is that since the mid-1990s, Malawi has joined the 'new wave' of land reform. The new wave takes place amidst the re-conceptualization of 'development' in development discourse through a supposedly decentred focus on economic growth. The new donor consensus is that land reform must be more human-centred and foster pro-poor economic growth. It is in this environment that Malawi adopted the National Land Policy in 2002. The Policy is meant to guide the country's land reform and contribute to sustained economic growth.

The new wave is problematic since it perpetuates land reform approaches of the law and development movement whereby land reform becomes land law reform. The 'customary' space is subjected to a process of formalization and privatization of the right to property in land ostensibly to boost economic growth. This approach is narrow and undermines the resolution of a land question. Using the Foucauldian 'idea' of governmentality, the thesis examines situations and processes that have entrenched the land question in Malawi. There is a multiverse of the parochial interests of the State, the Bretton Woods Institutions, 'commercial' farmers, and the land deprived. The narrow focus on land law reform demonstrates the dominance of market as value and entrenches the land question in Malawi.

Introduction

I THE CONTEXT

Land reform continues to dominate debate in development discourse. At the turn of the 1990s, there has emerged what has been referred to as a ‘new wave’ of land reform which has been cross-spatial and pervasive in Africa, Asia and Latin America. This new wave of land reform supposedly adopts a ‘human-centred’ approach with a decentred focus on economic growth as a measurement of (national) development.¹ The new wave is really part of a continuum. In sub-Saharan Africa, for instance, land reform has been omnipresent in various shades since the onset of informal imperialism and the entrenchment of European domination on the continent under the new imperialism period.² The impetus for land reform in postcolonial Africa has been multifarious. This has included the desire to address the historically situated problem of access to available arable land for the land deprived; the eradication of impoverishment; the guarantee of food security; and the assurance of economically efficient land use for the growth of the colonial, and later, postcolonial economies.

Land reform proceeds on an aspiration ‘to improve by altering’; ‘to correct an error’ or ‘to remove a defect’; and indeed ‘to make better’.³ This need to improve through altering, correcting errors, removing defects, or making better implies the existence of an underlying ‘problem’ with a status quo relating to the land relations in a country. This problem with land relations does not relate to land for its own sake. It refers to the relation of the human being as a member of society – a social being – and land as a resource for a livelihood. The problem is what has been referred to as the land question. Land reform is (ideally) a strategy to address a land question.

In sub-Saharan Africa, while there is a plethora of literature on land reform, the opposite is the case regarding literature on the African land question or land

¹ See for example C Toulmin & J Quan ‘Evolving Land Rights, Tenure and Policy in Sub-Saharan Africa’ in C Toulmin & J Quan (eds.) *Evolving Land Rights, Policy and Tenure in Africa* (London: DFID, 2000); and World Bank *Land Policies for Growth and Poverty Reduction* (Washington, DC: World Bank, 2003). There is a detailed discussion of the new wave of land reform under section II of this Chapter. Cf. S Adelman & A Paliwala ‘Law and Development in Crisis’ in S Adelman & A Paliwala (eds.) *Law and Crisis in the Third World* (London: Hans Zell, 1993) 1–26.

² ‘Informal imperialism’ refers to the arrival of white missionaries and ‘entrepreneurs’ in Africa prior to the 1880s. ‘The new imperialism period’ refers to the period following the Berlin Conference on the partition of Africa in 1884 and the start of the First World War: See for example K Shillington *History of Africa* (New York: St. Martin’s Press, 1995).

³ See CT Onions *The Oxford Dictionary of English Etymology* (Oxford: Clarendon Press, 1966) on the definition of ‘reform’.

questions of specific countries. However, the determination of the nature of the African land question is important because it has implications for the ‘purpose’ and ‘direction’ of land reform on the continent generally and indeed in particular countries.⁴ A clearly defined land question must lead to clearly established purpose and direction of land reform. However, if there is a key conception where confusion and dissensus looms large then it is the nature of the African land question. This confusion and dissensus has undermined the purpose and direction of land reform on the continent. There are two levels through which one can engage with the determination of the African land question. The first level is spatial and the second is conceptual.

At the spatial level, it is not clear from the scholarship whether there is a continent-wide African land question or it is more precise to discuss a host of African land questions where each question is peculiar to a specific country.⁵ At the conceptual level, the debate has centred on the nature of land tenure in the pre-colonial and the postcolonial African society. This debate has focused on the presence or absence of individual tenure as opposed to communal tenure in land.⁶ It has also raised fundamental issues regarding the conception of ‘right’, ‘property’ and ‘tenure’.⁷ So far, the approaches to the African land question reveal its complication such that its analysis, if at all, must be wary of essentialism. This complication is particularly exacerbated by the multiplicity of interests of various constituencies competing for the control of access to available arable land. Sara Berry states:

The significance of land conflicts for contemporary processes of governance and development in Africa lies not only in the way they have been shaped by past events, but also in their salience as arenas for the production of history.

Because they often involved multifaceted debates over power, precedence and entitlement, struggles over land have also varied in intensity and outcome, depending on the particular social, economic, and political contexts in which they occurred. By drawing attention to the

⁴ On the debate on the purpose and direction of land reform: See A Manji *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (London: Zed Books, 2006).

⁵ See for example S Moyo (2004) ‘African Land Questions, the State and Agrarian Transition: Contradictions of Neoliberal Land Reforms’ [on file with the author]; A Mafeje ‘The Agrarian Question, Access to Land, and Peasant Responses in Sub-Saharan Africa’ Civil Society and Social Movements Programme Paper Number 6 (Geneva, UNRISD, 2003); S Berry ‘Debating the Land Question in Africa’ (2002) 44(4) *Comparative Studies in Society and History* 638; and H Bernstein, ‘Rural Land and Land Conflicts in Sub-Saharan Africa’ in S Moyo & P Yeros (eds.) *Reclaiming the Land: The Resurgence of Rural Movements in Africa, Asia and Latin America* (London; New York: Zed Books, 2005) 67–101.

⁶ See for example PE Peters ‘Inequality and Social Conflict Over the Land in Africa’ (2004) 4(3) *Journal of Agrarian Change* 269.

⁷ See for example K Akuffo ‘The Conception of Land Ownership in African Customary Law and Its Implications for Development’ (2009) 17 *African Journal of International and Comparative Law* 57.

ubiquity of land conflicts in Africa in recent years, and to commonalities in the causes of land scarcity and the debates it engenders, I am not attempting to reduce the land question to a single story, but rather to emphasize the importance of situating land struggles in specific historical contexts, taking account of the way multiple interests and categories of people come into play, and impinge on one another, as people seek to acquire, defend, and exercise claims on land.⁸

Beyond this avowed complication of the African land question, history and context must be taken into account in its examination.⁹ History and context are important precisely because of the complication of the land question itself and the nuances that have shaped specific land struggles in different African countries.¹⁰ However, there are commonalities that may be attributed to the African land question for analytical purposes. These commonalities are the nature of colonial capitalism,¹¹ the law and policy framework of the emergent postcolonial State,¹² and economic globalization.¹³ These commonalities are a means of concretizing the history and context of the African land question and may assist in unravelling the nuance and complication around the question.¹⁴

There is also a socio-economic explanation to the African land question. The African postcolony is replete with the absence of a significant non-agricultural economic base. In this respect, the land question is intertwined with the agrarian question; the latter being concerned with land use for optimal agricultural productivity

⁸ See S Berry, note 5, 640.

⁹ See S Berry, note 5.

¹⁰ See for example S Berry, note 5, 639.

¹¹ For the 'macro-regions' shaped by colonialism in sub-Saharan Africa: See S Amin *Unequal Development: An Essay on the Social Formations of Peripheral Capitalism* (Hassocks: Harvester, 1976) cited in H Bernstein, note 5, 68–70. For accounts of the colonial encounter in Malawi and its effect on land relations, see for example B Pachai *Land and Politics in Malawi, 1875–1975* (Kingston, Ontario: Limestone Press, 1978); C Baker *Seeds of Trouble: Government Policy and Land Rights in Nyasaland, 1946–1964* (London, New York: British Academic Press, 1993); MRE Machika *Law and Economic Development: A Study of Land Law and Agriculture in Malawi, Kenya and Zambia* (PhD Thesis, University of Birmingham, 1983); C Ng'ong'ola 'Design and Implementation of Customary Land Reforms in Central Malawi' (1982) 26(2) *Journal of African Law* 115; C Ng'ong'ola, *Statutory Control of Land and the Administration of Agrarian Policies in Malawi* (PhD Thesis, University of London, 1983); C Ng'ong'ola 'The State, Settlers, and Indigenes in the Evolution of Land Law and Policy in Colonial Malawi' (1990) 23(2) *The International Journal of African Historical Studies* 27; and FE Kanyongolo 'Land Occupations in Malawi: Challenging the Neoliberal Legal Order' in S Moyo & P Yeros (eds.), note 5, 118–141.

¹² See for example H Bernstein, note 5; FE Kanyongolo, above; MRE Machika, above; G Mhone 'The Political Economy of Malawi: An Overview' in G Mhone (ed.) *Malawi at Crossroads: The Postcolonial Political Economy* (Harare: SAPES Trust, 1992) 1–33; C Ng'ong'ola 'The Post-colonial Era in relation to Land Expropriation Laws in Botswana, Malawi, Zambia and Zimbabwe' (1992) 41(1) *International and Comparative Law Quarterly* 117; and S Moyo & P Yeros 'The Resurgence of Rural Movements under Neoliberalism' in S Moyo & P Yeros (eds.), note 5, 8–64.

¹³ See for example S Moyo 'Land in the Political Economy of African Development: Alternative Strategies for Reform' (2007) XXXII (4) *Africa Development* 1.

¹⁴ See S Moyo, note 5, 29–30, and 32.

in a political economy.¹⁵ The quest for access to available arable land for the land deprived remains a never-ending struggle.¹⁶ Indeed, in the context of Zimbabwe, Lawrence Tshuma states:

[T]he land question goes beyond the mere concentration of land in a few hands which is the economic basis for the domination and exploitation of those without land. In addition, the land question has a political aspect which usually assumes the form of state support for exploitative landlord/tenant relations. There is thus an articulation of class domination and exploitation through the ownership of land with state domination.¹⁷

The power dimension to a land question that Tshuma has highlighted implicates the postcolonial State in perpetuating a scheme of asymmetrical land relations. Sam Moyo has gone a step further to suggest that the African land question is now 'unique' and 'embeds' both global capital and the postcolonial State – and the interests that are thus represented – in the desire to control access to land for purposes of mineral resources exploitation, agricultural production, biotechnology, tourism and forestry. This new dimension in the control of land has continued to fortify issues such as rural-to-urban migration; rural, urban and peri-urban land deprivation; gender disparity in access to available arable land which favours men over women; and the support of the estate sector over the smallholder sector.¹⁸

When the analysis of a land question focuses on a specific country, there are important nuances that arise from the peculiarity of its history and context. In the case of Malawi, there is a detailed discussion of the evolution of the land question in Chapter 4. In general terms, land alienation underpins the land question in Malawi and this has perpetuated the lack of access to available arable land on the part of the land deprived. The 'unique' elements that scholars such as Moyo point out have since emerged in relation to the African land question also surface in Malawi. Indeed, it is possible to embrace issues relating to migration, urbanization and gender disparity in considering the land question in Malawi. However, in this thesis, the following four dimensions embody the nature of the land question in the country:

- (a) The nature of colonial capitalism;
- (b) The neopatrimonial nature of the postcolonial State;
- (c) The normative issue of the conception of the 'customary' space; and

¹⁵ See for example L Tshuma *Law, State and the Agrarian Question in Zimbabwe* (PhD Thesis, University of Warwick, 1995); and S Moyo, note 5.

¹⁶ See S Moyo, note 5; and FE Kanyongolo, note 11, 126.

¹⁷ See L Tshuma, note 15, 21.

¹⁸ See S Moyo, note 5; and S Moyo, note 13.

- (d) The multifaceted interests of the postcolonial State; the Bretton Woods Institutions, particularly the World Bank and the International Monetary Fund; the *Achikumbe*; and the land deprived.

The first and second dimensions are discussed in Chapter 4. There is a discussion of the normative basis of the third dimension in Chapter 1; and a more empirical account in Chapter 4. In relation to the fourth dimension, the *Achikumbe* and the land deprived must be clarified.

In relation to the nature of colonial capitalism and the land question in Malawi, the regional context to land alienation in the country is that Malawi as a British protectorate was a source of cheap labour that supported mineral resource exploitation in South Africa, Zimbabwe and, to a lesser extent, Zambia.¹⁹ The national context is that under a process of semi-proletarianization, there was an assured supply of cheap wage labour for an emergent estate sector, particularly in the Shire Highlands in southern Malawi, and over time, the rest of the country. There has also been a process of entrepreneurization under the *Achikumbe* policy scheme.²⁰

The nature of the neopatrimonial State²¹ is discernible from the ‘philosophy’ of the various Administrations in the country; namely, that of President Hastings Kamuzu Banda (the ‘Banda Administration’) between 1964 and 1994; President Bakili Muluzi (the ‘Muluzi Administration’) between 1994 and 2004; and President Bingu wa Mutharika (the ‘Mutharika Administration’) from 2004 to date.²² There are at least two strands to the nature of the neopatrimonial State and its implications for the lack of access to available arable land for the land deprived. The first strand relates to the law and policy framework that was introduced under the Banda Administration. First, the Banda Administration perpetuated colonial practice where labour migration to other countries in the region, particularly South Africa, continued. Second, the Administration favoured the estate sector over the smallholder sector as

¹⁹ The British declared their colonial authority over Nyasaland (as Malawi was then called) through a notification issued by the Foreign Office on 14 May, 1891 and published in the London *Gazette* on 15 May, 1891. The colonization lasted until 6 July, 1964 when Malawi was granted independence: See MRE Machika, note 11, 46. The territory was initially named British Central Africa protectorate and was re-named Nyasaland under the Nyasaland Order-in-Council of 6 July, 1907. See also HL Duff *Nyasaland under the Foreign Office* (London: George Bell & Sons, 1903) 1–15.

²⁰ See FE Kanyongolo, note 11 and S Thomas ‘Economic Development in Malawi since Independence’ (1975) 2(1) *Journal of Southern African Studies* 30.

²¹ Neopatrimonialism generally refers to a status quo where political legitimacy is based on patronage as opposed to principle: See the detailed discussion on the nature of the neopatrimonial State in Malawi in Chapter 4.

²² There is a detailed discussion of the three Administrations in Chapter 4.

the key to national economic growth. Hence, while the colonial State largely restricted land alienation to the Shire Highlands in southern Malawi, the Banda Administration rolled out a national plan for the emergence of the *Achikumbe* throughout the country. Third, the Banda Administration also practised patronage which had implications for the land question, albeit, the patronage was policy-driven. The Mutharika Administration is generally similar to the Banda Administration to the extent that the latter two strategies of the Banda Administration largely underpin the Mutharika Administration's development agenda. Lastly, the second strand of the nature of the neopatrimonial State is that under the Muluzi Administration the resolution of the land question was undermined since the Administration was dogged by what has been termed the 'democratization of corruption'.²³

Regarding the conception of the 'customary' space, there is a liberal tilt to its conception which has been influenced by the dominance of market as value. The conception of the 'customary' space has implications for the interpretation of 'right', 'property' and 'tenure'. The interpretation of these 'norms' has, in my view, influenced the often automatic transition from land reform to land law reform in countries such as Malawi.

Under the fourth dimension, the *Achikumbe* refers to a coterie of 'progressive', landowning, 'smallholder' farmers and big estate farmers. The big estate farmers are the historically, land owning class in the country while the progressive, landowning, smallholder farmers comprise erstwhile subsistence farmers, 'senior politicians, civil servants, retirees, and formerly non-agrarian business people'. This category of smallholders has been described as 'progressive' because they were receptive to, and benefited from, targeted agricultural extension methods, agricultural credit markets and farm input subsidy programmes.²⁴ The *Achikumbe* have been crucial for the sustenance of Malawi's bimodal agricultural policy based as it is on an estate expansion strategy for increased agricultural production as opposed to universal

²³ See D Booth *et al.* 'Drivers of Change and Development in Malawi' Overseas Development Institute, Working Paper Number 261 (Brighton, 2006).

²⁴ See S Thomas, note 20, 38–39. See also G Mhone, note 12; FE Kanyongolo, note 11, 123; and M Chipeta 'Political Process, Civil Society and The State' in G Mhone (ed.), note 12, 34–49, 35–36, 41. These politicians, civil servants, retirees and business people were often loyal to the ruling political party structure of the postcolonial State: See the discussion in Chapter 4.

support for subsistence smallholders.²⁵ There is a detailed discussion of this policy in Chapter 4.

The discussion in Chapter 5 shows that it is not very clear from the statistics how much of the land area that is suitable for cultivation in the country is available under public landholding or is already in private landholding. This lack of clarity, as it will be shown, has implications for the resolution of the land question. However, it is estimated that as much as 10.48 million people – almost 80 per cent of the population of Malawi – have landholdings of less than 0.5 hectares.²⁶ Indeed, at the turn of the 2000s, the national average per capita of cultivated land area was set at 0.22 hectares; with the ‘ultra poor’ holding 0.16 hectare per capita and the ‘non-poor’ holding 0.28 hectares.²⁷ On this basis, for analytical purposes, the land deprived, under this thesis, refers to households with no access to arable land or has access to less than 0.5 hectares of arable land per household. In this thesis, the postcolonial State, the Bretton Woods Institutions, the *Achikumbe* and the land deprived constitute the key constituencies for the resolution of the land question in Malawi.

The importance of the control of available arable land as a factor of production is, if anything, highlighted by the competing interests of these key constituencies. An examination of the processes for the adoption and implementation of the country’s National Land Policy of 2002²⁸ reveals the tension amongst them. In Chapter 6, there is a discussion of the complicated interplay of the key constituencies. In relation to the multiplicity of interests in land reform, Sara Berry states:

Competition over land has followed myriad social fault lines, pitting national and local elites against ordinary citizens, neighbour against neighbour, kinsman against kinsman, and husbands against wives.²⁹

²⁵ The *Achikumbe* are in part rooted in the colonial ‘master farmer’ policy whereby landowning, smallholder farmers were incorporated into the estate sector as part of the State’s strategy for increased agricultural productivity: See S Thomas, above. The colonial ‘master farmer’ policy has been perpetuated under the postcolonial State: See S Thomas, in this note; G Mhone, note 12; FE Kanyongolo, note 11; M Chipeta, above; J Harrigan ‘Malawi’ in P Mosley *et al.* (eds.) *Aid and Power: The World Bank and Policy-Based Lending, Volume 2, Case Studies* (London: Routledge, 1991) 201–269, 214; and T Mkandawire ‘Agriculture, Employment and Poverty in Malawi’ ILO/SAMAT Policy Paper Number 9, 1999.

²⁶ Under the census carried out in 2008, the human population of Malawi stands at 13.1 million: See National Statistical Office *Population and Housing Census: Preliminary Report* (Zomba: NSO, 2008).

²⁷ See E Chirwa ‘Access to Land, Growth and Poverty Reduction in Malawi’ (August, 2004) [on file with the author].

²⁸ See Government of Malawi, *National Land Policy* (Lilongwe: Government Printer, 2002) [hereafter the ‘Land Policy’ or ‘Policy’].

²⁹ See S Berry, note 5, 639.

Further, a dissection of the constituency of the land deprived would highlight the emerging issues on migration, urbanization and gender disparity that scholars like Moyo have discussed. However, the treatment of the land deprived in this thesis focuses on their interaction with the postcolonial State and the *Achikumbe* respectively. There is a further examination, first of the role of chiefs (as the purported custodians of ‘customary’ land); and second, the relationship between *eni malo* and *obwera*.³⁰

Following the preceding, prefatory observations on the nature of the land question in Malawi, the central argument in this thesis is that its resolution can be enhanced through the emergence of a responsabilized State under people-generated responsabilization. This should involve the triangulation of four pillars of people-generated responsabilization: *gnosis* and the drama of citizenship, the public trust and the social trust under the Constitution, the beneficial interest in land, and the re-location of law in the political economy. This means that the responsabilized State must desist from an automatic translation of land reform into land law reform. There is a detailed discussion of people-generated responsabilization in Chapter 7. Briefly, people-generated responsabilization is a holistic, bottom-up approach to tackling asymmetrical access to, and ownership of, land in the country. This, it is suggested, must entail proactive, people-based action for a triangulated approach to land reform involving law, macroeconomic frameworks like poverty reduction strategies, and the adherence to the terms of governing under the Constitution. Under this framework, people sovereignty is the root of governing and it is embodied under the public trust and the social trust under the Republican Constitution of 1994.³¹ The public trust and social trust set out the people’s capability of *gnosis* – the ‘methods of knowing’.³²

There are two parts to the analysis of the land question in Malawi under the thesis. The first part is a critique of the normative framework of land reform generally. This is largely the focus of the discussions in Chapters 1, 2 and 3. The second part is a critique of the contextual framework of land reform in Malawi. This

³⁰ ‘*Eni malo*’ is a ChiNyanja descriptor which loosely translated means ‘owners of the land’; and ‘*obwera*’ is also a ChiNyanja descriptor which loosely translated means ‘strangers to the land’.

³¹ Act Number 20 of 1994 [hereafter the ‘Constitution’]. The Constitution came into force provisionally on 18 May 1994 (section 212 of the Constitution) and became fully operational on 18 May 1995 as Act Number 7 of 1995. For a detailed discussion on the coming into force of the Constitution: See DM Chirwa ‘A Full Loaf is Better Than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi’ (2005) 49 (2) *Journal of African Law* 207, 210–212.

³² On the idea of *gnosis*: See VY Mudimbe *The Invention of Africa: Gnosis, Philosophy and the Order of Knowledge* (London: James Currey, 1988). *Gnosis* is further discussed in Chapters 1 and 7.

is more empirical and forms the crux of the discussions in Chapters 4, 5, 6 and 7. This should not suggest that the two parts of the critique are mutually exclusive; they are complementary. However, the first part of the critique is dominated by issues of conception: the meaning of ‘right’; right to property in land; the right to property in land as a social relation, and the attendant issue of the right to property in land as a legal relation; the nature of the ‘customary’ space generally, and the attendant issue relating to ‘customary’ land tenure; and, finally, the emergence and dominance of market-based land reform models. The second part, focused as it is on Malawi, examines the following issues in greater depth: the nature of the land question; the treatment of the right to property under the Constitution and its implication for land reform in the country; the policy initiatives in tackling the land question; the role of the key constituencies in the resolution of the land question; and the strategies that can enhance the resolution of the land question.

II LOCATION OF THE RESEARCH

The on-going land reform in Malawi can be traced to the appointment of the Presidential Commission of Inquiry on Land Policy Reform in 1996, and the land utilization studies that took place in the country between 1995 and 1998. These interventions led to the development of the Land Policy. Generally, the Policy seeks to ameliorate critical lack of access to available arable land on the one hand and foster economic growth through efficient land use on the other. The postcolonial State has, among other things, embarked on land law reform to implement the Land Policy.³³

While the current reform may be delimited to 1995 onwards, this does not mean that the effects of colonial land law and policy and the law and policy framework of the postcolonial State from the mid-1960s have abated. The fact that the land question in Malawi remains unresolved signifies that the effects of colonial and postcolonial land law and policy prior to 1995 are very much alive.

The adoption of the Land Policy in Malawi is not an isolated case. From the turn of the 1990s onwards, a number of land policies mushroomed across Africa; from Ghana in West Africa; to Uganda and Tanzania in East Africa; and to South Africa, Malawi and Mozambique in Southern Africa to mention a representative sample of

³³ See Government of Malawi, note 28; and Malawi Law Commission *Draft Report on the Review of Land-Related Laws* (Lilongwe: Malawi Law Commission, 2006) [on file with the author].

countries that have adopted ‘new’ land policies.³⁴ These land policies emerge in the context of ‘new’ approaches in development discourse which locate the new wave of land reform in broader ‘good governance’ projects meant to inculcate the market economy in sub-Saharan Africa.³⁵

A brief background analysis of the global linkages of the on-going land reform in Malawi takes the ‘narrative’ back to the 1950s.³⁶ With the newly independent, African developmental State at the centre of development on the continent from the 1950s onwards, there was an equally engaged drive in development discourse that agitated for the reform of so-called ‘customary’ land tenure. In the context of the Anglophone African postcolony, the call for the reform can be traced to the work by Lord Frederick Lugard in 1922 and RWJ Swynnerton in 1955.³⁷ The logic of the reform of ‘customary’ land tenure in the Anglophone African colony and postcolony was supposedly premised on the classical economics efficiency argument.³⁸ Since the developmental State arose during the heyday of the first law and development movement, land reform quickly translated into land law reform where the formalization of ‘customary’ land interests was considered the panacea to economic growth of the newly, independent, developmental State. Hence, land reform projects proliferated in sub-Saharan Africa from this period onwards on the back of technical interventions by lawyers, economists and other development ‘experts.’³⁹

³⁴ See for example C Toulmin & J Quan, note 1; and R Palmer ‘Land Policy in Africa: Lessons from Recent Policy and Implementation Processes’ in C Toulmin & J Quan (eds.), note 1, 267–288.

³⁵ See PE Peters, note 6, 275.

³⁶ ‘Narrative’ has been considered a universal means of communication which defies time and space. It is a mediation of ‘complex’ ideas into an intelligible, ‘manageable’ form. By virtue of the ‘manageability’, narrative has also been at the centre of (western) modernity: See R Barthes *Images, Music, Text* (London: Fontana Press, 1977); R Kearney ‘Between Tradition and Utopia: The Hermeneutical Problem of Myth’ in D Wood (ed.) *On Paul Ricoeur: Narrative and Interpretation* (London: Routledge, 1991) 55–73; and J-F Lyotard *The Postmodern Condition: A Report on Knowledge* trans. G Bennington & B Massumi (Manchester: Manchester University Press, 1986). Peter Fitzpatrick has argued that the ‘use’ of narrative can also be ‘emancipatory’: See P Fitzpatrick *The Mythology of Modern Law* (London: Routledge, 1992).

³⁷ See Lord Lugard *The Dual Mandate in British Tropical Africa* (London: Frank Cass & Co., 1965) 280–332 [hereafter the ‘Lugard thesis’]; and RWJ Swynnerton *A Plan to Intensify the Development of African Agriculture in Kenya* (Government Printer, 1955) [hereafter the ‘Swynnerton Plan’].

³⁸ Briefly, the argument states that ownership of an asset under a clearly defined property rights regime leads to greater incentive for investment that then leads to greater present value of returns. Under land reform, the value of net returns refers to greater agricultural yield which, in turn, leads to higher productivity. With greater returns, a new cycle of investment commences: See for example K Griffin *et al.* ‘In Defence of Neo-Classical Neo-Populism’ (2004) 4(3) *Journal of Agrarian Change* 361.

³⁹ See for example PE Peters, note 6.

The trend tapered somewhat towards the late 1980s. This tapering prompted HWO Okoth–Ogendo to declare a ‘crisis’ in African agrarian reform.⁴⁰ Okoth–Ogendo has observed that the ‘African agrarian “crisis” is an extremely complex phenomenon.’⁴¹ He has argued that the lack of consensus on the ‘precise nature’ of the ‘crisis’ has negatively affected the nature of the solutions at the national level in terms of ‘policies, plans and programmes.’⁴² He has contended that the ‘crisis’ emerges in part because the wrong question and therefore the wrong analysis is deployed in African agrarian reform scholarship generally. The analysis of the power dimensions of land and the control of that power in respect of land tenure has often been de-emphasized in African land reform discourse.⁴³

In light of the ‘crisis’ and the reverse economic growth that has been ubiquitous in sub-Saharan Africa, there is renewed vigour for land reform across the continent. This is the context of the emergence of the new wave of land reform which follows in the wake of the well-documented shortcomings of land reform of the 1950s through to the 1980s.⁴⁴ Ambreena Manji, writing in 2006, aptly captures the mood of the re-emergence of the debates around land reform in Africa:

In many parts of Africa, the last two decades have been characterized by debates as to the purpose and direction of land reform, the appointment of commissions of enquiry into land matters, the formulation of national land policies and ultimately by the enactment of new land laws. In short, this has been the age not just of land reform but of land law reform.⁴⁵

The ‘new’ debates emerge in the context of an apparent ‘new donor consensus’ in relation to land reform. The reform, it is suggested, must be ‘more human centred’ in its approach to rights in land; must foster pro-poor economic growth; be less driven by ‘economic prescription’; and must recognise the diversity in the notions of

⁴⁰ See HWO Okoth–Ogendo ‘Some Issues of Theory in the Study of Tenure Relations in African Agriculture’ (1989) 59(1) *Africa: Journal of the International African Institute* 6.

⁴¹ See HWO Okoth–Ogendo, above.

⁴² See HWO Okoth–Ogendo, note 40, 6.

⁴³ See generally HWO Okoth–Ogendo, note 40.

⁴⁴ See for example S Borras, Jr. ‘Can Redistributive Reform be Achieved via Market-Based Voluntary Land Transfer Schemes? Evidence and Lessons from the Philippines’ (2005) 41 *Journal of Development Studies* 90; K Deininger & H Binswanger ‘Evolution of the World Bank’s Land Policy: Principles, Experiences and Future Challenges’ (1999) 14(2) *The World Bank Research Observer* 247; P McAuslan *Bringing the Law Back In: Essays in Land, Law and Development* (Aldershot: Ashgate, 2003); S Moyo *Land Reform under Structural Adjustment in Zimbabwe: Land Use Changes in Mashonaland Provinces* (Uppsala: Nordiska Afrikainstitutet, 2000); and JP Platteau ‘Does Africa Need Land Reform?’ in C Toulmin & J Quan (eds.), note 1, 51–73; and C Nyamu–Musembi ‘Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa’ (2006) *International Development Studies Working Paper Number 272* (Brighton: International Development Studies).

⁴⁵ See A Manji, note 4, 1.

property rights.⁴⁶ In this respect, the current wave of land reform has emerged in the context of shifts in development discourse where ‘development’ has been re-conceptualized through a supposedly decentred focus on economic growth.⁴⁷ The advocates of the new approach to development emphasize the importance of political, social and legal factors. These factors, when taken together, may be located in Amartya Sen’s thesis of development as freedom.⁴⁸

The World Bank, on its part, has included the socio-political agenda to development under the Comprehensive Development Framework.⁴⁹ In relation to land reform, the Bank has conceded that previous land reforms were flawed in their exclusive focus on the individualization of the so-called ‘customary’ land tenure.⁵⁰ The Bank now advocates the view that a ‘human centred’ approach to land reform will enhance legality and legitimacy and ultimately guarantee good governance. The new wave has its critics who point out the often contradictory objectives that emanate from the World Bank; the Bank’s researchers have tended to be more ‘revisionist’ and ‘egalitarian’ while the institution’s official position has robustly gravitated towards a more market-based land reform modelling.⁵¹

Some recent scholarship on land reform in Africa such as that by Camille Toulmin and Julian Quan,⁵² Patrick McAuslan⁵³ and Ambreena Manji,⁵⁴ to mention a few, has repeatedly criticized the longstanding malaise where land reform often translated into land law reform. Despite the critiques, the trends in sub-Saharan

⁴⁶ See C Toulmin & J Quan ‘Evolving Land Rights, Tenure and Policy in Sub-Saharan Africa’ in C Toulmin & J Quan (eds.), note 1, 1–29, 3; and World Bank, note 1.

⁴⁷ See D Trubek & A Santos ‘Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice’ in D Trubek & A Santos (eds.) *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 1–18.

⁴⁸ See D Trubek & A Santos, above, 7; and A Sen *Development as Freedom* (Oxford: Oxford University Press, 1999). This is located in Sen’s capabilities approach to welfare where the focus is on a person’s actual ability to incentivize an asset. Under the new wave, the rhetoric on the decentring emphasizes that a right to property on its own may not lead to greater agricultural production, that is, a greater net return of value.

⁴⁹ The Bank’s former President, James Wolfensohn (1995–2005), argued for an ‘integrated approach’ to development: See his speech entitled ‘The Other Crisis’ at <http://www.worldbank.org/html/extdr/am98/jdw-sp/am98-en.pdf> [visited on 4 June, 2007]. The speech became the foundation for the Comprehensive Development Framework: See <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/CDF/0,,contentMDK:20072662~menuPK:60746~pagePK:139301~piPK:261885~theSitePK:140576,00.html> [visited on 4 June, 2007].

⁵⁰ The World Bank argues that its *Land Reform Policy Paper* of 1975 ‘devoted little attention to the importance of land rights for empowering the poor and improving local governance’: See World Bank, note 1, xiv.

⁵¹ See for example the discussion by PE Peters, note 6.

⁵² See C Toulmin & J Quan, note 1.

⁵³ See P McAuslan, note 44.

⁵⁴ See A Manji, note 4.

Africa reveal that this automatic translation is almost ingrained in land reform discourse. The development agencies, particularly the World Bank, advance an 'official position' that lauds the supposed flexibility, adaptability and negotiability of so-called 'customary' land-holding.⁵⁵ Pauline Peters has argued that there is need for an engaged research on the 'winners' and 'losers' in the context of this flexible, adaptable and negotiable land reform.⁵⁶

In the case of Malawi, scholarship that has looked at the Land Policy has proceeded from a development theory perspective;⁵⁷ an economics analysis that focuses on the prospects for agricultural productivity under the country's policy framework;⁵⁸ a gender analysis that concentrates on women's land rights;⁵⁹ and analyses that looked at the debates on the reform of the 'customary' space and the role of chiefs.⁶⁰ In the legal academy, work on the Land Policy has been the 2005 and 2008 articles by Fidelis Edge Kanyongolo.⁶¹ Kanyongolo's critique is a Marxist-based, critical legal theory analysis.

All the scholarship on the Land Policy acknowledges the importance of access to available arable land for the land deprived in Malawi's development plan. The literature, particularly Peters and Kambewa, also dwells on the problems for land reform that arise out of the conception of the 'customary' space in ways that invariably require its 'formalization' under statute. Finally, the literature emphasizes the over-bearance and influence of the World Bank, the International Monetary Fund and the country's other development partners on the nature and direction of land reform.

However, while the existing scholarship on the Land Policy is laudable, what has been missing in these analyses is the identification of 'situations' and 'processes'

⁵⁵ See PE Peters, note 6, 269, 270.

⁵⁶ See PE Peters, above.

⁵⁷ See B Chinsinga 'Exploring the Politics of Land Reforms in Malawi: A Case Study of the Community Based Rural Land Development Programme (CBRLDP)' IPPG Discussion Paper Number 20 (University of Manchester, 2008).

⁵⁸ See E Chirwa 'Access to Land Farm Investments and Food Production in Malawi' IPPG Discussion Paper Number 18 (University of Manchester, 2008).

⁵⁹ See S Holden *et al.* 'Land Policy Reform: The Role of Markets and Women's Land Rights in Malawi' (Oslo: NORAGRIC Report Number 36, 2006).

⁶⁰ See P Kishindo 'Customary Land Tenure and the New Land Policy in Malawi' (2004) 22(2) *Journal of Contemporary African Studies* 213; and PE Peters & D Kambewa 'Whose Security? Deepening Social Conflict over 'Customary' Land in the Shadow of Land Tenure Reform in Malawi (2007) 45 *Journal of Modern African Studies* 447.

⁶¹ See FE Kanyongolo, note 11; and FE Kanyongolo 'Law, Land and Sustainable Development in Malawi' in KS Amanor & S Moyo (eds.) *Land and Sustainable Development in Africa* (London: Zed Books, 2008) 83–99.

that enhance or undermine the negotiation for a particular social group under the on-going land reform.⁶² Peters in her 2004 article on land reform in Africa generally discusses the point.⁶³ Subsequently, Peters and Kambewa do not analyze the normative issues of ‘situations’ and ‘processes’ to the land question in Malawi in a similar manner as she does when discussing the African land question.⁶⁴

In light of the lack of concerted engagement with ‘situations’ and ‘processes’, this thesis sets out to analyze the underlying processes that enhance or undermine ‘benefit’ to the key constituencies in land reform in Malawi; particularly in the context of the resolution of the land question. It is in this respect that the ‘theory’ for the thesis is based on the Foucauldian ‘idea’ of governmentality and a framework for analysis premised on responsabilization. There is a detailed discussion of governmentality and responsabilization in Chapter 1.

Governmentality is a Foucauldian neologism that refers to ‘governmental rationality’ or ‘rationality of government’.⁶⁵ There is a wider and narrower sense of governmentality. The former relates to the ubiquitous manner a people manage themselves. This is akin to the general understanding of sovereignty. The latter sense relates to the complex deployment of power; it does not rely on sovereignty; it is concerned with who can govern, what governing is, and what or who is governed.⁶⁶

Responsibilization, on the other hand, generally relates to a process where a normative tool of governance is translated into practice or ‘reality’.⁶⁷ Ronen Shamir has argued that there is a framework of ‘expectation’ and ‘assumption’ under responsabilization whereby an economic and social domain merges under a value ‘system’ as the root motivation for action.⁶⁸ The nature of responsabilization that is

⁶² Cf. PE Peters, note 6.

⁶³ See PE Peters, note 6.

⁶⁴ See PE Peters & D Kambewa, note 60 and PE Peters, note 6.

⁶⁵ See C Gordon ‘Governmental rationality: an introduction’ in G Burchell *et al.* (eds.) *The Foucault Effect: Studies in Governmentality* (Hemel Hempstead: Harvester Wheatsheaf, 1991) 1–51, 3. Often Foucault is solely accredited with the development of ‘governmentality’ as an ‘idea’. Colin Gordon clarifies, however, that governmentality as a research project involved several researchers: See C Gordon, in this note, 1.

⁶⁶ See generally C Gordon, above. See also the discussion of governmentality in Chapter 1.

⁶⁷ See generally R Shamir ‘The Age of Responsibilization: On Market-Embedded Morality’ (2008) 37 (1) *Economy & Society* 1. In relation to ‘reality’, Michel Foucault himself has said that in the pursuit to understanding ‘reality’, what is important is not so much the cause of the ‘reality’ but the underlying processes that made the ‘reality’ possible: See M Foucault *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* ed. C Gordon and trans. C Gordon *et al.* (New York: The Harvester Press, 1980) 134–146. Foucault has argued that focusing on the cause is essentialist and polarizing. An examination of the underlying processes – what he has called the ‘technologies of normalization’ – offers a viable opportunity to understanding the ‘reality’: M Foucault, in this note, 137.

⁶⁸ See R Shamir, above.

pervasive in the literature is what may be called hegemonic responsabilization. This is top-down and focuses on the individual. It is based on the dominance of market as value. People-generated responsabilization being proposed under the thesis is the alternative to hegemonic responsabilization.

The 'reality' of land relations in the country emerges under the following broad socio-economic picture: Malawi occupies an area of 118,324 square kilometres of land and water. Land accounts for 94,080 square kilometres. Of this total land mass, 53,070 square kilometres or some 5.3 million hectares is supposedly suitable for cultivation.⁶⁹ This represents about 22 per cent of the total land size of the country. As already noted, in the Population and Housing Census of 2008,⁷⁰ the country's human population is estimated at 13.1 million; the regional proportion being 5.9 million in southern Malawi (46 per cent of the national total), 5.5 million in central Malawi (42 per cent), and 1.7 million in northern Malawi (12 per cent). Between 1998 and 2008, the country's population grew by as much as 32 per cent, representing an annual intercensal growth of 2.8 per cent. With the exception of Rwanda and Burundi, the country has a very high population density in sub-Saharan Africa which currently stands at 139 people per square kilometre; the regional variations in the country being 185 people per square kilometre in southern Malawi, 154 people per square kilometre in central Malawi, and 63 people per square kilometre in northern Malawi. For a regional picture, while Malawi's national population density was 105 people per square kilometre in 1998, Zambia's national population density in 2000 was only 13 people per square kilometre.⁷¹ Since Malawi is a heavily agro-based economy, the incidence of high population growth and high population density puts a lot of pressure on arable land.

Current estimates⁷² indicate that up to 85 per cent of the Malawian population is employed in the agricultural sector; mostly as subsistence, tenant workers. Agriculture contributes over 90 per cent to the country's export earnings; which

⁶⁹ See Government of Malawi *Report of the Presidential Commission of Inquiry on Land Policy Reform, Volume 1* (Zomba: Government Printer, 1999) 13.

⁷⁰ See National Statistical Office, note 26.

⁷¹ See D Potts 'Rural Mobility as a Response to Land Shortages: The Case of Malawi' (2006) 12 *Population, Space and Place* 291.

⁷² See B Chinsinga 'Resurrecting the Vestiges of a Developmental State in Malawi? Reflections and Lessons from the 2005/2006 Fertilizer Subsidy Programme,' a paper presented at the 2007 Guy Mhone Memorial Conference on Development: Public Sector Reforms in Africa: Retrospect and Prospect, 22–24 August, 2007, Zomba, Malawi [on file with the author].

translates to about 39 per cent of the country's Gross Domestic Product (GDP).⁷³ The main agricultural exports are tobacco, tea and sugar. The importance of agriculture in the country's economy is actually increasing and not diminishing. This follows from the devastating effects structural adjustment programmes, with their insistence on free trade, have had on the manufacturing sector throughout the 1980s. For instance, in 2007, the manufacturing sector contributed only 11 per cent to the country's GDP. This has been a result of either total collapse of some industries or reallocation of these industries to neighbouring countries within southern Africa.⁷⁴

Scholars have argued that the extent to which agricultural development can have greater impact on the reduction of impoverishment⁷⁵ depends on the availability of arable land.⁷⁶ However, in the case of Malawi, impoverishment will remain a challenge as long as the land question is unresolved. In 1968, the national average for landholding was estimated at 1.53 hectares. In 1998, the 'ultra poor'⁷⁷ held less than 0.5 hectares per household and produced 48.5 kilogrammes of maize per year. The non-poor held 1.1 hectares per household, producing 115.8 kilogrammes of maize per year.⁷⁸ As already noted, by the 2000s, the national average per capita of cultivated land area was set at 0.22 hectares; with the 'ultra poor' holding 0.16 hectare per capita and the non-poor holding 0.28 hectares.⁷⁹ Land distribution is different across the three administrative regions of the country. In southern Malawi, the average land holding per capita is estimated at 0.178 hectares. In central and northern Malawi it is 0.257 hectares and 0.256 hectares respectively.

Beyond landholding, impoverishment is also severe in the country. In 2007, Malawi's National Statistical Office produced a report of a Welfare Monitoring Survey conducted in 2006.⁸⁰ The Survey shows that the overall proportion of the

⁷³ For a robust critique of GDP as a measurement of 'social welfare': See JCJM van den Bergh 'Abolishing GDP' (2007) Tinbergen Institute Discussion Paper, TI 2007-019/3 available at <http://www.tinbergen.nl/discussionpapers/07019.pdf> [visited on 22 October, 2009].

⁷⁴ See B Chinsinga, note 72.

⁷⁵ See U Baxi *Law and Poverty: Critical Essays* (Bombay: NM Tripathi, 1988) where the author advocates the use of 'impoverishment' instead of 'poverty' as a stop to 'yielding' to 'claims of homogenization'. See also U Baxi 'Global Development and Impoverishment' in P Cane & M Tushnet (eds.) *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 455-482.

⁷⁶ See for example S Moyo, note 5.

⁷⁷ See National Statistical Office, note 26.

⁷⁸ See National Statistical Office *Statistical Yearbook, 2002* (Zomba: NSO, 2002) in E Chirwa, note 58.

⁷⁹ See E Chirwa, note 27.

⁸⁰ See National Statistical Office *Welfare Monitoring Survey, 2006* available at http://www.nso.malawi.net/data_on_line/agriculture/wms_2007/WMS%202007%20REPORT.pdf [visited on 21 October, 2009]. Under the Survey, a household is considered 'poor' if the total annual per capita expenditure is below a threshold or 'poverty line'. The poverty line is a subsistence

incidence of impoverishment at the national level stood at 40 per cent; down from 50 per cent in 2005. The proportion of the ‘ultra poor’ was 15 per cent; down from 21 per cent in 2005. At the level of the country’s administrative regions, rural southern Malawi was the most impoverished at 51 per cent, followed by rural northern Malawi at 46 per cent, and rural central Malawi at 36 per cent. The proportion of the ‘ultra poor’ was 22 per cent in rural southern Malawi, 18 per cent in rural northern Malawi, and 11 per cent in rural central Malawi. In terms of the urban/rural divide at the national level: there was a proportion of 11 per cent ‘urban poor’, down from 24 per cent in 2005; 44 per cent of ‘rural poor’, down from 53 per cent in 2005; 2 per cent of urban ‘ultra poor’, down from 8 per cent in 2005; and 17 per cent of rural ‘ultra poor’, down from 23 per cent.

It is in light of the foregoing socio-economic profile of the country that under the thesis the broad context is the examination of whether the conception of land reform under the Land Policy enhances or undermines the resolution of the land question. The contextual parameters of the thesis entails looking at the linkage between (global) development discourse and land reform in Malawi; and the discursive continuities between colonial and postcolonial land law and policy. The following issues are the crux of the investigation: Conception of the right to property in land and its implication for land reform in Malawi; the precise nature of the land question in Malawi; and the competing interests of the key constituencies and their implication for the resolution of the land question in Malawi.

III A NOTE ON METHODOLOGY AND METHOD

The thesis has complied with The University of Warwick’s Guidelines on Ethical Practice. In view of the scope of the thesis, I adopted a contextual approach that involves a law and policy analysis of land reform in Malawi. The research is largely based on qualitative methodology and used a multi-method approach for data collection, management and analysis.⁸¹ The primary and secondary sources used in

minimum expressed in local currency (the ‘Malawi Kwacha’) determined by the Cost-of-Basic-Needs methodology. The methodology incorporates individual food requirement and critical non-food consumption. The methodology departs from a Purchasing Power Parity approach to measuring welfare. Hence, while structural impoverishment remains relatively unchanged, the figures suggest an improvement in the livelihood of the population.

⁸¹ The work has involved both qualitative and quantitative data for a contextual background on Malawi. For example, information on population density in Malawi, statistics on land ownership, etc., is predominantly quantitative. Norman Denzin and Yvonna Lincoln have suggested that the qualitative and quantitative research dichotomy refers to research styles that are actually doing the same things differently: See N Denzin & Y Lincoln ‘Introduction: Entering the Field of Qualitative Research’ in N

this research include statutes on land in Malawi; policy instruments commissioned by the Government of Malawi, and international institutions such as the World Bank, the International Monetary Fund, and the Department for International Development of the Government of the United Kingdom of Great Britain and Northern Ireland; case law; law reform reports and social science literature on land reform. The methods included: desk research (through library, internet and archival searches); focus group discussions; key informant interviews; and observation.

The data analysis largely involves an interpretive paradigm that incorporates elements of critical discourse analysis.⁸² The interpretive paradigm is rooted in post-positivist, qualitative methodology. The paradigm proceeds on the basis that ‘reality’ is in constant construction through social interaction.⁸³ In contrast, the positivist school assert that ‘reality’ evolves outside the influence of social actors. The post-positivist school falls into the realm of ‘constructivism’; the positivist school belongs to ‘objectivism’.⁸⁴ Hence, an interpretive paradigm allows for the exploration of ‘meaning’.⁸⁵ In this context, the methodology complements the underlying critique of the thesis which is that in the analysis of the land question in Malawi the focus must be on the ‘situations’ and ‘processes’ underpinning the ‘reality’ of land reform in the country. Further, the interpretative paradigm resonates with the ‘theory’ of the thesis based as it is on the Foucauldian ‘idea’ of governmentality and the ‘idea’ of responsabilization.

There are two key assumptions to the thesis: First, a liberal legal order masks the inequality in a society with its emphasis on an abstractionist conception of a ‘right’ and ‘property’, and a de-historicized and de-contextualized approach to analysis. Second, an analysis based on land owner–land deprived dichotomy when looking at the land question masks other esoteric interests underway in the various

Denzin and Y Lincoln (eds.) *The Landscape of Qualitative Research: Theories and Issues* (London; New Delhi; Thousand Oaks, California: Sage, 1999) 1–33, 8–11. See also T Murray *Blending Qualitative and Quantitative Research Methods in Theses and Dissertations* (London; New Delhi; Thousand Oaks, California: Sage Publications, 2003); and N Denzin & Y Lincoln (eds.) *The Sage Handbook of Qualitative Research* (London; New Delhi; Thousand Oaks, California: Sage Publications, 2005).

⁸² On discourse and discourse analysis: See for example N Fairclough *Discourse and Social Change* (Cambridge: Country Press, 1992); M Foucault ‘Incitement to Discourse’ in A Jaworski & N Coupland (eds.) *The Discourse Reader* (London and New York: Routledge, 1999) 514–522; and D Haworth *Discourse* (Buckingham: Open University Press, 2000).

⁸³ See J Grix *The Foundations of Research* (Basingstoke, UK; New York: Palgrave Macmillan, 2004).

⁸⁴ See J Grix, above.

⁸⁵ See for example M Stroh ‘Qualitative Interviewing’ in D Burton (ed.) *Research Training for Social Scientists: A Handbook for Postgraduate Researchers* (London: Sage Publications, 2000) 196–214.

agitations for the resolution of the land question. In view of these assumptions, the analysis of the land question revolves around the interplay among the key constituencies. This means that the research on the land question in Malawi steers towards the analysis of how and why the ‘reality’ of land relations has come to be and its consequences.⁸⁶

A final point on methodology relates to extrapolation. The issue here concerns the extent to which one can generalize findings from qualitative research that has taken place within a limited time and space. The concern is pertinent where the findings from a sample are meant to apply to a wider population.⁸⁷ Under the research, to the extent that the focus has been on ‘situations’ and ‘processes’, the extrapolation of the emerging trends is based on ‘theory’ as opposed to empirical findings.⁸⁸

A Method

The research for the thesis was done between 1 January, 2007 and 31 January, 2010 at two sites: one in Coventry, England and the other in Malawi. During the period of the research I was primarily resident in Coventry, England. Here, the research was based at The University of Warwick and focused mostly on library, internet and archival searches from different libraries in the United Kingdom. Between March and June, 2008 and 28 October to 9 November, 2008, I conducted the research in Malawi through library, internet and archival searches, focus group discussions, key informant interviews, and observation. I discuss the issues on method below:

1 Data Collection

The library, internet and archival searches both at Warwick and in Malawi involved an intensive analysis of primary and secondary sources on land reform discourse generally and Malawi in particular. This exercise largely focused on documentary data. The aim of this exercise was two-fold: to develop a deeper understanding of land reform scholarship; and to locate land reform in Malawi in a global context. The tentative conclusions of the research were presented at workshops in England in June, 2007 and June, 2009, and in Malawi in November, 2008.

⁸⁶ Cf. HWO Okoth-Ogendo, note 40, 12–13.

⁸⁷ See D Silverman *Doing Qualitative Research* (London: Sage Publications, 2005).

⁸⁸ See D Silverman, above.

Beyond desk research, I conducted eight interviews and three focus group discussion sessions during the research trip to Malawi. The interviews were with public officers in Malawi's public service and the owners of the Makandi Estate. While the interviews were largely set through prior arrangement based on a theoretical sampling, two of them were scheduled through dung beetling. The interviews were semi-structured and used open-ended discussion guides that focused on the issues under investigation under the thesis. In this way, there was room for new issues to emerge from the interviewees.

I had focused group discussions with the community in the periphery of Makandi Estate and the resettled community in the Estate.⁸⁹ I recruited a research assistant for the focus group discussions to assist me with note-taking. The focus group discussions were also conducted using open-ended discussion guides.

The challenges that arose during data collection were logistical and surmountable. Where data was unavailable in The University of Warwick library, it was available through another University library within the United Kingdom. In Malawi, three scheduled interviews did not proceed.⁹⁰ These failed interviews were, in my view, adequately compensated for with those that went ahead.

The lingering concern from the focused group discussions is whether the information that was generated from the discussions was not rehearsed and tailor-made to satisfy my enquiry. This is a lingering concern because on account of logistical impossibility I did not have a feedback 'workshop' with the concerned communities in the Makandi area. A process of reflection has compensated for this research limitation.

2 Data Management and Analysis

Note-taking was the major tool for data collection during the interviews and focus group discussions. The note-taking during the focus group discussions with the

⁸⁹ Specifically, I had focused group discussions with the community of Mwitere Village, Traditional Authority Chimaliro, Thyolo district in southern Malawi; and the resettled community in section C of the erstwhile Makandi Estate. The three discussions were as follows: one session with fifteen men from the village; another with fifteen women from the village; and a third with a mixed group of fifteen men and women from section C of the Estate.

⁹⁰ I cancelled the scheduled interviews with public officers in the Ministry of Justice and Constitutional Affairs, Lilongwe, Malawi because none of the officers was willing to give me an audience. Two of the possible interviewees in the Ministry of Lands died before I could schedule a meeting with them. A third potential interviewee demanded a questionnaire. I developed and provided her with the questionnaire. She never returned the questionnaire to me despite my determined efforts to get the completed questionnaire from her. The World Bank, Malawi Office never responded to my requests for an audience.

communities in the periphery of Makandi Estate and the resettled community in the Estate entailed translation from ChiNyanja to English. The translation posed its own challenges. For example, a lingering problematic phrase from the discussions was ‘*Kukhala ndi malo*’;⁹¹ which in one vein can mean ‘land ownership’ or; in another context, ‘land tenure’; or, indeed, simply ‘land possession’. During the data analysis, I have had to rely on the contextual usage of the phrase to determine whether a participant was referring to ownership, tenure or possession.

The data analysis involved the limited use of NVIVO qualitative data analysis software. The core issues for investigation under the research; namely, conception of ‘right’, ‘property’ and ‘tenure’ and its implication for land reform in Malawi; the precise nature of the nature of the land question in Malawi; and the competing interests of the key constituencies in land reform and their implication for land reform; were the main guiding ‘trees’ for the analysis.

3 Sampling and Selection

The sampling and selection of participants in this research was based on theoretical sampling and selection. Theoretical sampling and selection relates to the selection of participants and indeed the sites of study on the basis of their relevance to the research issues and the ‘theory’ of a research. For instance, the choice of the oral data sources in Malawi; namely, officers in the Malawi public service; the officers at the World Bank, Malawi Office; the owners/managers of Makandi Estate; and the households in the periphery of Makandi Estate had been purposive and had been primarily guided by the documents’ review undertaken in the research. These oral data sources are also representative of the key constituencies in land reform in the country: the postcolonial State, the Bretton Woods Institutions, the *Achikumbe*, and the land deprived.

B Access and Ethics Issues

The right to privacy is at the core of access and ethics considerations. Hence, codes of ethics in research outline the rules on informed consent, deception, privacy and confidentiality, and accuracy. Informed consent relates to the right of participants to be informed of the nature of the research. The participants must agree voluntarily to participate in a research; and they must agree on the basis of full and frank disclosure

⁹¹ This is a ChiNyanja phrase which literally translates into ‘to have land’.

on the part of the researcher. The rules against deception also demand strict accuracy in the presentation of research findings.⁹²

In practice, real challenges emerge for a researcher and those challenges apply in my case: the dilemmas that emerge from full disclosure (which may result in denial of access); the potential betrayal of the research participants; and the possibility of suppressing important research findings.⁹³ I adopted what I call a principled, pragmatic approach in the conduct of the field research. A principled, pragmatic approach is useful here whereby a code of (access and) ethics must serve as a guideline and not necessarily stifle full participation for the purposes of the research.

I will share my experiences in Malawi: In relation to the community in the Makandi area, the village headpersons were pivotal in mobilizing the participants to the focus group discussions. This raises the question whether strictly speaking the participants gave their full consent to participate in the discussions considering the power dynamics between a village headperson and a member of village which lean heavily in favour of the village headperson.

In terms of access to the 'field', I adopted a *Kalilombe*⁹⁴ technique; whereby, depending on the setting, I would introduce myself simply as a postgraduate research student from a University in the United Kingdom or indeed I would introduce myself as a senior public officer in Malawi's public service and currently pursuing doctoral studies in the United Kingdom.⁹⁵ The setting would determine which mode of introduction will bring me greater access. However, whichever setting I found myself in, I always made it clear prior to any substantive engagement with the participants that our interaction was towards data collection for the doctoral studies I was pursuing; that I did not have all the answers; and that I was meeting the participants to 'learn' from them.

⁹² See generally CG Christians 'Ethics and Politics in Qualitative Research' in N Denzin & Y Lincoln, note 81, 139–164.

⁹³ See S Ali & M Kelly 'Ethics and Social Research' in C Seale (ed.) *Researching Society and Culture* (London; New Delhi; Thousand Oaks, California: Sage Publications, 2004) 116–127.

⁹⁴ *Kalilombe* is the ChiNyanja name for chameleon. Just as the chameleon changes colour to indicate its physical and physiological condition, and indeed for communication purposes, the *Kalilombe* technique represents a tactical nous for purposes of entry into the 'field'.

⁹⁵ I am a public officer in the law reform section of the Malawi Law Commission. In the institution's hierarchy, I am the fifth most senior officer.

One ethical issue stands out and it relates to the work ethic in sub-Saharan Africa. This concerns to what has been described as the ‘allowance culture’.⁹⁶ At the end of the focus group discussions with the community in the periphery of Makandi Estate and the resettled community in the Estate, I and the participants would share refreshments which I brought with me. Often the discussions would begin around mid-morning and finish just after lunch (precisely around 12.30 p.m. or 1 p.m.) It is possible to interpret this offer of refreshments as part of the ‘allowance culture’ which permeates the conduct of business in the public service in Africa and has been soundly criticised as ‘unethical’.⁹⁷ In my case, these were – to use Ngeyi Kanyongolo’s description – ‘gestures of care’ and did not in any way have an ulterior motive of influencing the nature of the discussions.⁹⁸ In fact, the participants would not know that we would have refreshments until the discussion was formally closed.

IV MAP OF THE THESIS

Besides the Introduction and the Conclusion, the thesis has seven core Chapters. In Chapter 1, I outline the ‘theory’ of the thesis which is based on the ‘idea’ of governmentality and a framework for analysis based on the ‘idea’ of responsabilization. Chapter 2 looks at conception issues; namely, the nature of ‘right’, right to property in land, right to property in land as a social relation, right to property in land as a legal relation, the nature of the ‘customary’ space, and the beneficial interest in land. The main thrust under the Chapter is that clarity in these foundational issues provides a strong platform for understanding the precise nature of the land question in Malawi and in turn leads to informed strategies for its resolution.

In Chapter 3, I discuss the dominance of market-based land reform modelling and its implications for the resolution of the land question in Malawi. Chapter 4 centres on a historicized and contextualized narrative of the land question in Malawi. This is in order to demonstrate that colonial and postcolonial law and policy has consistently led to the responsabilization of the land deprived as a constituency of labour and as small-scale, auxiliary producers that contribute towards national food

⁹⁶ See for example I Mathauer & I Imhoff ‘Health Worker Motivation in Africa: The Role of Non-Financial Incentives and Human Resource Management Tools’ (2006) 4 *Human Resources for Health* 24.

⁹⁷ See for example REV Gyampo ‘The 2008 Political Parties’ Code of Conduct in Ghana: A Toothless Bulldog?’ (2008) 2(3) *African Journal of Political Science and International Relations* 38.

⁹⁸ For a similar concern: See NR Kanyongolo *Social Security and Women in Malawi: A Legal Discourse on Solidarity of Care* (PhD Thesis: University of Warwick, 2007) 125.

security but simultaneously remain vulnerable to ‘capture’ by the large estate agriculture sector.

Chapter 5 looks at the responses that have emerged in the country in relation to the resolution of the land question. The focus is on the Land Policy and to processes prior to its adoption by the postcolonial State in 2002; particularly, the work of the Presidential Commission of Inquiry on Land Policy Reform, and the three land utilization studies that took place between 1995 and 1998. After the adoption of the Land Policy, I look at the intervention of the Malawi Law Commission. Confusion and disjuncture pervade the various interventions. In the end, the Law Commission’s work shows an automatic transition from policy to law which only entrenches the irresolution of the land question.

Chapter 6 discusses the interplay of the key constituencies in Malawi’s land reform. The argument is that a triangulated examination of the key constituencies reveals a multiverse of parochial interests. These parochial interests have made the resolution of the land question in the country very burdensome. The dominance of the macroeconomic frameworks that are imposed on the country from Bretton Woods Institutions suggests that the Institutions ‘end’ or ‘foreclose’ the negotiation by the other constituencies towards a possible resolution of the land question in the country. This ‘ending’ is more pronounced considering the lack of synergy between the Land Policy and the macroeconomic frameworks in the country.

In Chapter 7, I propose a ‘bottom-up’ approach to the strategies that enhance the resolution of the land question in the country. The approach is based on people-generated responsabilization. The main point here is that people-generated responsabilization must lead to a responsabilized State.

V FINAL WORD

The picture that emerges from this Introduction is that land reform in Malawi – or more precisely the resolution of the land question – is a complex enterprise. As the debate on the land question continues, this work seeks to contribute to the debate through a critique of the on-going land reform in Malawi, particularly the translation from land reform to land law reform. The goal is to move the debate forward through a Foucauldian analysis of the land question in the country.

While I have alluded to the power relations that underlie land reform in the country, there are also power relations in the research ‘field’. George Meszaros

cautions the researcher to the complication of power relations in the research ‘field’.

He states:

Power relations, it is argued, pervade the field and thereby define key aspects of the researcher’s relationship to it, and vice versa. Not only may these relations affect the way a project is constituted (for example, sold to prospective funders) or justified to participants themselves; but they will affect the terms of access to so-called gatekeepers; the sorts of questions posed to interviewees; their perceptions of the researcher; the types of answers given; and thereby the conclusions reached. For all these reasons [...] power relations (also referred to as the politics of research) are of vital significance to both the development of a project and, potentially, its very sustainability.⁹⁹

The issues Meszaros highlights also apply to the present work. However, my position is that they have been considerably mitigated by the trajectory of the analysis adopted under this thesis.

⁹⁹ See G Meszaros ‘Researching the Landless Movement in Brazil’ in Mike McConville and Wing Hong Chui (eds.) *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 133–158, 133.

Chapter 1

Governmentality, Responsibilization and the Land Question: Theory and A Framework for Analysis

The resolution of a land question rests, to a large extent, upon clearly defined parameters of the constitutive conception, theory and the framework for analysis.¹ In the case of political economies such as Malawi, the resolution must necessarily be based on the conception, theory and the framework for analysis that incorporates history and context for an understanding of what ought to constitute the precise nature of the reform. The need for clarity of the conception, theory and a framework for analysis, and indeed the nature of the land question in Malawi, sets out the crux of this and the subsequent Chapters. Chapter 2 deals with matters of conception relating to the nature of a right; the nature of the right to property as a social relation (including the right to property as a legal relation, and the right to land); the nature of the ‘customary’ space; and the proposal of a beneficial interest in land. In this Chapter, I outline the theory and the framework for analysis underpinning the thesis.

Theory must be understood in the context of a framework that allows the extension of the ‘frontiers of knowledge’ of a (social) reality. The theory that underpins the thesis is a composite that coalesces under the Foucauldian ‘idea’ of governmentality. In section I, I have made observations on the choice and suitability of the theory for the thesis: The core utility of the theory is that it provides a basis for the depiction of the responsabilization of a population under market-based land reform models. The coalescence comes about in light of the interpretation of the ‘idea’ of governmentality by a variety of scholars such as Mitchell Dean,² and Ben Golder and Peter Fitzpatrick,³ to mention a few. Hence, the use of governmentality is Foucauldian because it is not only limited to Michel Foucault’s work on the ‘idea’ of governmentality. I engage with other re-interpretations of governmentality available in the academy.

Finally, I propose a framework for analysis based on a two-tiered re-interpretation of responsabilization. Under the framework, I am arguing for what I have called the people-generated responsabilization; which primarily involves the

¹ A ‘concept’ constitutes an abstract, universal meaning of an ‘idea’ while ‘conception’ entails its social construction on the basis of multiple variables in a country: See A George ‘The Difficulty of Defining “Property”’ (2005) 25(4) *Oxford Journal of Legal Studies* 793, 797–798.

² See M Dean *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999).

³ See B Golder & P Fitzpatrick *Foucault’s Law* (Abingdon: Routledge, 2009).

responsibilization of the State. People-generated responsibilization is based on people sovereignty. In another description, it is rooted in constituent power. The central role here is to lay down an alternative approach to the resolution of the land question in Malawi.

I THEORY

Theory here must be understood as a scientific rather than an etymological framework for analyzing a (social) phenomenon. The theory coalesces under the Foucauldian ‘idea’ of governmentality. The theory is a fusion of various scholarships from Foucault’s ‘idea’ of governmentality (in the various dimensions that I discuss below) to James Scott’s conception of ‘calculated conformity’.

It is not uncommon in the academy for a scholar to appropriate a particular theory as the basis for ‘solving’ or ‘discussing’ a particular (social) phenomenon.⁴ In my case, there are three reasons for the choice and suitability of the theory: The focus, under the Foucauldian ‘idea’ of governmentality, on a population is useful. In market-based land reform, there is an abstraction and a decontextualization of the constructed individual. The responsibilized individual must be an entrepreneurial individual; they must display universal behaviour in the quest to sustain the market. Secondly, the complexity of governance under current global geopolitics requires a theory that enables an analysis of the possibility of both ‘domination’ and ‘emancipation’. Finally, the theory allows for a demonstration of the interplay among the intra-‘local’, the ‘local’ and the ‘global’ that is not necessarily hierarchical. In sum, the theory allows for an analysis of the ‘situations’ or ‘practices’ that undermine or enhance the resolution of the land question in Malawi in the context of the dominance of market-based land reform models. It allows for an analysis of the ‘rich analytic of power’ that is part of the ‘new ways of ruling’, under what Fitzpatrick describes as a ‘governing mentality’.⁵

⁴ Brian Bix has observed that such appropriation is unfair because ‘purely analytical discussions may be appropriated for purposes that they are not well-suited’: See B Bix *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 2006) 28.

⁵ See D Dupont & F Pearce ‘Foucault Contra Foucault: Rereading the “Governmentality” Papers’ (2001) 5(2) *Theoretical Criminology* 123, 150–151; and P Fitzpatrick, Introduction, note 36, 150. Fitzpatrick notes that Foucault’s work on power emanates from the specific history of France and an exuberant appropriation of Foucault’s arguments may weaken the appropriator’s analysis. Fitzpatrick then argues that governmentality is a cogent, general account of social regulation which is not necessarily confined to France: See P Fitzpatrick, in this note. In this way, governmentality is a useful theoretical basis of this work which looks at the land question in Malawi.

Hence, the choice of the theory here is not so much that it is ‘correct’ or ‘true’. I do not lay a claim to its universal application. In fact, critics may be scathing that a work that starts from Foucault is laying a claim to theory. After all, Foucault himself states:

I am an experimenter and not a theorist. I call a theorist someone who constructs a general system either deductive or analytical, and applies it to different fields in a uniform way. This is not my case. I am an experimenter in the sense that I write in order to change myself and in order not to think the same thing as before.⁶

For my purposes, it is sufficient that the theory does not simply dwell on the ‘points of friction’ but also seeks to examine the various relations – at the intra-‘local’ level, the ‘local’ and the ‘global’ – in the analysis of the resolution of the land question in Malawi.⁷ The focus of the thesis is on situations and processes that have shaped the land question. In Foucauldian terms, these are the ‘technologies of normalization’.⁸

The Foucauldian ‘Idea’ of Governmentality

In the Introduction, it has been noted that governmentality is a Foucauldian neologism that refers to ‘governmental rationality’ or ‘rationality of government’.⁹ However, the nature of government is crucial for analysis. In the ‘Governmentality’ Lecture of 1 February, 1978,¹⁰ Foucault traces the development of governmentality through the discussion of the pastoral power of the era of feudalism in Europe, the Machiavellian Prince, Jean-Jacques Rousseau’s social contract, Adam Smith’s political economy, and the post-war, neo-liberal thought in Germany, USA and France.¹¹ A number of key points are highlighted:

Foucauldian ‘government’ has a general, wide sense and a narrower one. The general, wide sense of governmentality refers to the ubiquitous manner a people manage themselves. This general, wide sense is imbricated in the conventional understanding of sovereignty.¹² The narrower sense, however, does not refer

⁶ See M Foucault ‘Interview with Michel Foucault’ in J Faubion (ed.) *Power* (New York: New Press, 2000) 240. Cf. B Golder & P Fitzpatrick, note 3, 3 who note Michel Foucault’s propensity to reject theory.

⁷ See B Bix, note 4, 29. See also GA Meszaros ‘The MST and the Rule of Law in Brazil’ (2007) 1 *Law, Social Justice & Global Development Journal* available at http://www.go.warwick.ac.uk/elj/lgd/2007_1/meszaros [visited on 14 October, 2008].

⁸ See M Foucault, Introduction, note 67, 137.

⁹ See C Gordon, Introduction, note 65.

¹⁰ See M Foucault ‘Governmentality’ in G Burchell *et al.* (eds.), Introduction, note 65, 87–104.

¹¹ See C Gordon, note 9, 3; M Foucault, above, 87–92.

¹² See M Foucault, 10, 89; M Foucault *Security, Territory, Population: Lectures at the Collège de France, 1977–78*, trans. by G Burchell (New York: Picador; Palgrave Macmillan, 2009) , particularly

exclusively to the sovereign; it is an 'art' with a complex deployment of the 'macrophysics' and 'microphysics' of power.¹³

In relation to the general sense of 'government', Gordon notes that Foucault has interpreted it as the 'conduct of conduct'.¹⁴ In this respect, governmentality relates to the mentality of government where there is collective thought about knowledge of government. The collective thought is taken for granted and relates to the social, political and economic bases leading to the development of a 'truth'.¹⁵ The collective thought converges in the 'State' as the territorial sovereign. In a liberal legal order, the 'State' uses 'freedoms' or 'rights' as the means or techniques of securing the 'ends of government'.¹⁶ Hence, the 'freedoms' may be 'a natural attribute, a product of civilization or the exercise of rational choice in a market.'¹⁷ The law in the realm of governmentality is merely 'an instrument of rule'.¹⁸ In modernity, the 'new modality of power' is central and the State is only a constitutive part of the 'art of government'.¹⁹

The narrower sense of governmentality expounds on the art of government. The art of government is not dependent on a sovereign but at the same time it does not deny the efficacy of the sovereign. The Foucauldian focus here is on the 'activity' or 'practice' as a way of knowing what 'the activity [of government] consisted in, and how it might be carried on.'²⁰ Gordon comments:

[Governmentality] will thus mean a way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or who is governed), capable of making some form of that activity thinkable and practicable both to its practitioners and to those upon whom it was practised.²¹

Indeed Foucault has argued that if government involves morality, the economy and politics, the art of government demonstrates the three 'norms' – morality, economy and politics – as an 'essential continuity' which remains to be 'explained' and 'justified'.²² He states:

the lecture given on 1 February, 1978 (87–114), and the lecture given on 8 February, 1978 (115–134); B Golder & P Fitzpatrick, note 3; and M Dean, note 2.

¹³ See C Gordon, note 9; B Golder & P Fitzpatrick, note 3; and M Dean, note 2.

¹⁴ See C Gordon, note 9, 2.

¹⁵ See M Dean, note 2, 16–18.

¹⁶ See M Dean, note 2, 15.

¹⁷ As above.

¹⁸ See M Dean, note 2, *passim*.

¹⁹ See B Golder & P Fitzpatrick, note 3; and C Gordon, note 9, 4.

²⁰ See C Gordon, note 9, 3.

²¹ See C Gordon, above.

²² See M Foucault, note 10, 91.

The art of government [...] is essentially concerned with answering the question of how to introduce economy – that is to say, the correct manner of managing individuals, goods, wealth within the family (which a good father is expected to do in relation to his wife, children and servants) and of making the family fortunes prosper – how to introduce this meticulous attention of the father towards his family into management of the state.

This, I believe, is the essential issue of the establishment of the art of government: introduction of economy into political practice.²³

Hence, Foucault concluded that ‘the very essence of government’ is to ensure that its objective is ‘the economy’.²⁴ He asserts:

To govern a state will therefore mean to apply economy, to set up an economy at the level of the entire state, which means exercising towards its inhabitants, and the wealth and behaviour of each and all, a form of surveillance and control as attentive as that of the head of a family over his household and his goods.²⁵

What is implicit in Foucault’s interpretation of the narrow sense of the government – the art of government – and its focus on the economy is that there is also a ‘duty’ requiring the ‘right disposition of things’.²⁶ The ‘things’ relate primarily to the regulation of the population.²⁷ He states:

One governs things. But what does this mean? I do not think this a matter of opposing things to men, but rather of showing that what government has to do with is not territory but rather a sort of complex composed of men and things. The things with which in this sense government is to be concerned are in fact men, but men in their relations, their links, their imbrication with those other things which are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, fertility, etc.; men in their relation to that other kind of things, customs, habits, ways of acting and thinking, etc.; lastly, men in their relation to that other kind of things, accidents and misfortunes such as famine, epidemics, death, etc.²⁸

Foucault proceeds to elaborate that the art of government here is not so much concerned with a philosophical or theological ‘common good’ but rather a ‘convenient end’. Foucault argues that ‘convenient end’ implies a ‘plurality of aims’.²⁹ He contends:

[G]overnment will have to ensure that the greatest possible quantity of wealth is produced, that the people are provided with sufficient means of subsistence, that the population is enabled to multiply, etc. There is a whole series of specific finalities, then, which become the objective of government as such. In order to achieve these various finalities, things must be disposed – and this term, dispose, is important because with sovereignty the instrument that allowed to achieve its aim – that is to say, obedience to the laws – was law itself; law and sovereignty were absolutely inseparable. On the contrary, with government it is a question of not imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even using laws themselves as tactics – to arrange things in such a way that, through a certain number of means, such and such ends may be achieved.³⁰

²³ See M Foucault, note 10, 92.

²⁴ See M Foucault, above.

²⁵ See M Foucault, note 23.

²⁶ See M Foucault, note 10, 93.

²⁷ See M Foucault, above.

²⁸ See M Foucault, note 26.

²⁹ See M Foucault, note 10, 95.

³⁰ See M Foucault, above.

Further, Foucault contends that the ‘end of sovereignty’ lies in the ‘shape of its laws’ while the ‘finality of government’ lies in the management of ‘things’, the ‘perfection’ and ‘intensification’ of its processes. The ‘instruments’ of government are not laws but ‘a range of multiform tactics’.³¹

Given that the art of government is concerned with governing ‘things’ for ‘convenient ends’, Foucault’s comments on the control, ownership and use of land in the political economy are illuminating in the context of this thesis. He has said:

The problematic of the *économistes* reintroduces agriculture as a fundamental element of rational governmentality. The land now appears alongside, and at least as much as and more than the town, as the privileged object of governmental intervention. It is a governmentality that takes the land into consideration, but it must no longer focus on the market, on the buying and selling of products, on their circulation, but first of all on production.³²

Land is critical in the light of the Foucauldian ‘police of grains and the phenomenon of scarcity’.³³ First, ‘the phenomenon of scarcity’ refers to ‘man’s greed’; that is, the ‘need to earn’, the ‘desire to earn even more’, the ‘egoism’ which in turn leads to ‘the phenomena of hoarding, monopolization and withholding merchandize’.³⁴ Under Foucault’s analysis, the police of grains and the phenomenon of scarcity entail an ‘economic’ policy based on the abundance of grain (or agricultural produce) and cheap wage labour; whose combination results into maximum dividend from exports. Hence, the control, ownership, and use of land are critical. The art of government – the governmentality – is concerned with the value of return to the producer.³⁵ It is suggested that this producer, under this thesis, is the postcolonial State, the Bretton Woods Institutions and the *Achikumbwe*. In turn, the land deprived have, over time in Malawi, constituted the source of cheap wage labour and the category of small-scale, auxiliary producers under market-based land reform modelling.³⁶

In the context of the emergence of the mercantilist tendencies in 18th Century CE Europe, Foucault contends that the art of government evolved into a ‘science’ of government and in the process maintained its ‘influence’ on the population. Science of government here refers to the ‘statistics’ of the population and the extent to which

³¹ See M Foucault, note 29.

³² See M Foucault *Security, Territory, Population*, note 12, 342.

³³ See M Foucault *Security, Territory, Population*, note 12, 341.

³⁴ See M Foucault *Security, Territory, Population*, note 12, 31.

³⁵ See M Foucault *Security, Territory, Population*, note 12, 343. The system described here works well with a ‘just price’ and a population that does not have an ‘absolute value’ but a ‘relative value’; that is, there must be a sufficient ‘agricultural population’ that becomes wage labour and simultaneously consumers to sustain production: See M Foucault, in this note, 344–345.

³⁶ See the discussion in Chapters 4 and 6.

these statistics derestrict the art of government. The statistics relate to birth, death, disease, labour or wealth.³⁷ Hence, the art of government becomes the ‘exercise of power through [an] economy to regulate [a] population.’³⁸ Foucault concludes:

By this word ‘governmentality’ I mean three things:

1. The ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific albeit very complex, power which has as its target population, as its principal form of knowledge political economy, and as its essential technical instrument apparatuses of security.
2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a series of *saviors*.
3. The process, or rather, the result of the process, through which the state of justice of the Middle Ages transformed into the administrative state in the fifteenth and sixteenth centuries, gradually becomes ‘governmentalized.’³⁹

It is arguable that this notion of governmentality is linked to sovereignty and discipline that is embraced in a liberal, democratic State. Foucault himself concedes that within the framework of the art of government, sovereignty and discipline do not completely disappear.⁴⁰ Governmentality, if anything, is a triangle of ‘sovereignty–discipline–government’.⁴¹ He has said:

[W]e need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government; in reality one has a triangle, sovereignty–discipline–government, which has as its primary target the population and as its essential mechanism the apparatuses of security.⁴²

The apparatuses – or the *dispositifs* – of security have four features: space; uncertainty (or what Foucault calls the ‘aleatory’); ‘normalization’; and fourth, the correlation of security and population.⁴³ In his discussion of the apparatuses, Foucault gives three examples: town planning, food scarcity, and anti–epidemic vaccination campaign. He looks at the government of a polity through a concern with the ‘mobility’ of ‘produce’, people and wealth that circulates in an economy within and between States. While discipline is understood as requiring a particular structure of hierarchy in

³⁷ See M Foucault, note 10, 99.

³⁸ See M Foucault, above, 19; and M Foucault, note 10, 92, 99, 100, 102.

³⁹ See M Foucault *Security, Territory, Population*, note 12, 102–103.

⁴⁰ See M Foucault, note 10, 102.

⁴¹ See M Foucault, above.

⁴² See M Foucault, note 40.

⁴³ See M Foucault *Security, Territory, Population*, note 12, 11.

society, security relates to a particular ‘technology of power’.⁴⁴ Foucault argues that this takes place through the ‘plotting of the normal and the abnormal’ under a process of normalization; or precisely, normation.⁴⁵ In this respect, it is pertinent to consider the ‘disciplinary’ aspect of governmentality. I now consider the ‘idea’ of governmentality in light of the analytics of power – particularly biopower.

1 Governmentality and Analytics of Power

Foucault’s narrower sense of governmentality is more nuanced than mere attribution that it is a collective of the mentality of government. It is ‘counter–Machiavellian’.⁴⁶ Foucault has pointed out that government under the narrower sense of governmentality is not preoccupied with defending the territory, it is embroiled in the conspiracy of men and things; especially men in their relations to wealth, resources, means of subsistence, and the specific qualities of the territory (such as climate and soil fertility).⁴⁷ Dean points out that to the extent that ‘government is economic government’, the ‘law’ need not defend sovereignty as a territorial monopoly of a State.⁴⁸ Indeed, as Foucault has said, the focus of government is the governing of ‘things’ through a ‘range of multiform tactics’ and law is one of the many tactics that may be deployed in this enterprise.

Foucault also acknowledged the irreconcilability of a conception of the sovereign based on an economic model founded on the family.⁴⁹ He contends that the ‘science of government’ derestricts the ‘art of government’ through ‘the recentring of the theme of economy on a different plane from that of family’ to the [general] population. Population is critical because it is the ‘ultimate end of government’.⁵⁰ He states:

In contrast to sovereignty, government has as its purpose not the act of government itself, but the welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health etc., and the means that the government uses to attain these ends are themselves all in some sense immanent to the population; it is the population itself on which government will act either directly through large–scale campaigns, or indirectly through techniques that will make possible, without full awareness of the people, the stimulation of birth rates, the directing of the flow of population now represents more the end of government than the power of the sovereign; the population is the subject of needs, of aspirations, but it is

⁴⁴ See M Foucault *Security, Territory, Population*, note 12, 1–49.

⁴⁵ See M Foucault *Security, Territory, Population*, note 12, 55–86, especially 57, 63.

⁴⁶ See B Golder & P Fitzpatrick, note 3, 31.

⁴⁷ See M Foucault, above note 10, 93.

⁴⁸ See M Dean, note 2, 25.

⁴⁹ See M Dean, note 2, 98–99.

⁵⁰ See M Foucault, note 10, 100.

also the object in the hands of government, of what it wants, but ignorant of what is being done to it.⁵¹

The management of a population requires a nuanced form of ‘discipline’.⁵² In the light of the discussion of the nature of governmentality in the preceding section, the focus here will be on Foucault’s conception of ‘biopower’. Biopower first comes to the fore in *The Will to Knowledge: The History of Sexuality, Volume 1*.⁵³ Foucault’s conception of ‘biopower’ is that it is the ‘power over life’.⁵⁴ Biopower emerges in contrast to the exercise of the authority of the sovereign where the sovereign’s right to rule was based on the underlying possibility of death on the part of the subject; the ‘right to *take* life or *let* live’.⁵⁵ Biopower is bipolar; it encompasses disciplinary power over the individual, human body (the ‘anatomy–politics of the human body’). This centres on the ‘body as a machine’ and is concerned with its ‘discipline’, ‘optimization’, ‘efficiency’, even its ‘docility’.⁵⁶ The second pole of biopower is what Foucault calls ‘a biopolitics of the population’.⁵⁷ The latter pole is concerned with the ‘propagation’, ‘birth’, ‘mortality’, the ‘level of health’, ‘life expectancy’, ‘longevity’, and all factors that may enhance or undermine these conditions in relation to the ‘species body’; that is, the population.⁵⁸ In this respect, it is possible to attribute a global ‘outlook’ or permeation to biopower. Biopower is not the ‘old power of death’; it is the power that ‘invest [sic] life through and through’.⁵⁹ Hence, Michael Hardt and Antonio Negri have commented, for example, that biopower refers to the ‘new paradigm of power’ that internalizes social regulation.⁶⁰ Biopower is a part of ‘a

⁵¹ See M Foucault, above.

⁵² Foucault has a fertile body of literature on ‘discipline’: See for example *Discipline and Punish: The Birth of a Prison* trans. by A Sheridan (Hamondsworth: Penguin, 1991); *Security, Territory, Population*, above note 11; *The Will to Knowledge: The History of Sexuality, Vol. 1*, trans. by R Hurley (Hamondsworth: Penguin, 1979); *Power/Knowledge*, Introduction, note 67; *Abnormal: Lectures at the Collège de France 1974–1975*, trans. by G Burchell (London: Verso, 2003); and ‘*Society Must Be Defended*’: *Lectures at the Collège de France, 1975–76*, trans. by D Macey (London: Allen Lane, 2003).

⁵³ See M Foucault *The Will to Knowledge*, note 52, 140–141, 143–144.

⁵⁴ See M Foucault *The Will to Knowledge*, note 52; H Baxter ‘Bringing Foucault into Law and Law into Foucault’ (1996) 48(2) *Stanford Law Review* 449; and T O’Leary *Foucault: The Art of Ethics* (London: Continuum, 2002) cited in B Golder & P Fitzpatrick, note 3.

⁵⁵ See M Foucault *The Will to Knowledge*, note 52, 135–136 [emphasis in the original].

⁵⁶ See M Foucault, *The Will to Knowledge*, note 52, 139.

⁵⁷ See M Foucault, *The Will to Knowledge*, above.

⁵⁸ See M Foucault, *The Will to Knowledge*, note 56.

⁵⁹ See M Foucault, *The Will to Knowledge*, above.

⁶⁰ See M Hardt & A Negri *Empire* (Cambridge, MA; London: Harvard University Press, 2001) 22–27. Michael Hardt and Antonio Negri have referred to biopower as ‘a form of power that regulates social life from its interior, following it, interpreting it, absorbing it, and rearticulating it.’ They go on to assert that ‘[p]ower can achieve an effective command over the entire life of the population only when

complex multiplicity of power, technologies, strategies and effects' beyond economic development.⁶¹ Power in this sense is not 'static'; it is 'mobile and open.'⁶²

It is worth noting at this point that Golder and Fitzpatrick assert that Foucault never discussed the relationship between governmentality and biopower. They further contend that because of the breadth of the conception of biopower, he never 'fully thematized' it. They contradict Timothy O'Leary who argues that biopower is 'conceptually [...] included in the concept of governmentality.'⁶³ To the extent that Golder and Fitzpatrick themselves acknowledge that governmentality 'as a form of power operates alongside the disciplines',⁶⁴ it is arguable that Foucault's conceptions of governmentality and biopower respectively are complementary.⁶⁵ In my view, if the argument is limited to the context of 'disciplines', Foucault builds on biopower in his articulation of the narrower sense of governmentality. This is apparent in light of the triangle of sovereignty–discipline–government that Foucault has argued constitutes governmentality.

2 Governmentality and Law

In relation to Foucault's general body of work, a number of academic commentators have argued that Foucault expels law from 'his analyses of contemporary power relations.'⁶⁶ The argument here – what Golder and Fitzpatrick call the 'expulsion thesis' – goes as follows: To the extent that Foucault argues that there is an emergent disciplinary power in modernity, this means that there is a transition from 'old forms of law and sovereignty' where law is 'decreasingly important' and serves an instrumental role to the emergent power.⁶⁷ This discussion is limited to the relationship between governmentality and law.

it becomes an integral, vital function that every individual embraces and reactivates of his or her own accord'. They conclude that '[b]iopower refers to a situation in which what is at stake in power is the production and reproduction of life itself.'

⁶¹ See J Joseph 'Neoliberalism, Governmentality and Social Regulation' Paper prepared for SAID Workshop, April, 2007 [on file with the author] 5.

⁶² See J Joseph, above, 29.

⁶³ See B Golder & P Fitzpatrick, note 3, 32. See also T O'Leary *Foucault: The Art of Ethics* (London: Continuum, 2002) cited in B Golder & P Fitzpatrick, in this note.

⁶⁴ See B Golder & P Fitzpatrick, note 3, 33.

⁶⁵ Mitchell Dean attributes a '*techné* of government' and an '*epistémè* of government' in his conceptualization of governmentality. By *techné* of government, Dean refers to the 'the techniques of regulation' in a country. The *epistémè* of government are the 'forms of knowledge' that arise from and 'inform the activity of governing': See M Dean, note 2, 31.

⁶⁶ See B Golder & P Fitzpatrick, note 3, 12–25. From the legal academy, notable a notable critique of Foucault on the point is A Hunt & G Wickham *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994).

⁶⁷ See B Golder & P Fitzpatrick, note 3, 35–39. See also A Hunt & G Wickham, above.

Golder and Fitzpatrick in *Foucault's Law* argue that the place of law under disciplinary power is 'attenuated' rather than completely expelled; that is, law is 'polyvalent'.⁶⁸ It is part of a triangulation under governmentality where it is re-configured in a 'governmental-administrative apparatus'.⁶⁹ As pointed out above, Foucault has argued that law is critical to the 'finality', that is the authority, of the sovereign. In the context of governmentality, law is part of the so-called 'range of multiform tactics'. It is one of the many 'strategies' utilized in the art of government. Law is not as exclusive under governmentality as it is under the sovereign where it is 'the blunt, vicious and antiquated tool of sovereignty'.⁷⁰ The point here is crucial for the analysis of the land question in Malawi. One of the main issues that is analyzed under the thesis is the primacy of law; particularly the tendency to transform land reform into land law reform. Chapters 4, 5 and 6 will show that it is equally vital to focus on other non-law bases of power in analyzing the land question.

3 Governmentality and Calculated Conformity

The etymology of 'conform' indicates that its present meaning '[to] bring into or act in accordance with a pattern, etc.' derives from the Old French word '*conformer*' meaning 'make or be similar'; which itself derives from the Latin word '*conformāre*' meaning 'to fashion of the same form'.⁷¹ 'Conformity' suggests a 'process' of 'bringing into a pattern' or 'making similar'. This could require action or (in)action according to a set 'standard'. It invokes an imagery of a 'standard setter' and 'standard follower', a 'complier'. This in turn provokes a power relationship where the 'standard setter' is the 'dominator' and the 'standard follower' is the 'dominated'.

Against this background, I find James Scott's notion of calculated conformity⁷² valuable and complements the Foucauldian idea of governmentality for the purposes of this thesis. This is the case because through the analysis of the land question under the on-going land reform in Malawi, I seek to demonstrate that the relationship among the key constituencies of the land reform is not perfectly reducible to that of a 'dominator' and a 'dominated'. Scott's 'Brechtian forms of "resistance"'

⁶⁸ See B Golder & P Fitzpatrick, note 3, 53–97.

⁶⁹ See B Golder & P Fitzpatrick, above.

⁷⁰ See B Golder & P Fitzpatrick, note 3.

⁷¹ See CT Onions, Introduction, note 3.

⁷² See JC Scott *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1985).

or ‘struggles’ are useful in understanding how the various constituencies are actually ‘working the system’ to their ‘minimum disadvantage’.⁷³

Scott has observed that a ‘dominated’ constituency does not have the luxury of ‘open, organized, political activity’.⁷⁴ He has argued that, in fact, often a more open defiance to ‘authority’ is suicidal.⁷⁵ Hence, he suggests that it is useful for analysis to dwell on ‘the prosaic, constant struggles’ in a society.⁷⁶ The nature of these ‘prosaic, constant struggles’ – what James Scott has also called ‘the everyday weapons of the weak’ – include foot dragging, dissimulation, desertion, false compliance, theft, feigned ignorance, slander, arson, sabotage, ‘culture’, argument, and imposed mutuality.⁷⁷

Scott further asserts that these struggles are not the monopoly of a particular constituency.⁷⁸ In the context of land reform, the struggles may be within the land deprived; the *Achikumbe* as against the land deprived; the *Achikumbe* or land deprived as against the postcolonial State; or the postcolonial State as against the Bretton Woods Institutions. Hence, while the broader scheme of governmentality generates a ‘disciplined’ population, the Brechtian struggles reveal the ‘disguised struggles’ simultaneously underway in a country that reveal the covert compliance or what Scott calls ‘calculated conformity’.⁷⁹

Indeed, Foucault has contended that in the scheme of ‘shifts’ in the ‘mode of ‘resistance’ in modern society, it is more precise to refer to ‘counter–conduct’ as opposed to ‘misconduct’ or ‘dissidence’. He has said that to the active sense of ‘conduct’, analysis cannot deploy the passive sense of behaviour depicted by ‘misconduct’.⁸⁰ Foucault argues that the use of ‘misconduct’ or ‘dissidence’ allows an undue ‘substantification’.⁸¹ He states:

[T]his word ‘counter–conduct’ enables us to avoid a certain substantification allowed by the word ‘dissidence.’ Because from ‘dissidence’ we get ‘dissident,’ or the other way round, it doesn’t matter, in any case, dissidence is the act of one who is a dissident, and I am not sure that this substantification is very useful. I fear it may even be dangerous, for there is not much sense in saying, for example, that a mad person or a delinquent is a dissident. There is a

⁷³ See JC Scott, note 72, xv ff., and 30.

⁷⁴ See JC Scott, note 72, xv.

⁷⁵ See JC Scott, above.

⁷⁶ See JC Scott, note 72, xvi.

⁷⁷ See JC Scott, note 72.

⁷⁸ See JC Scott, note 72, 30.

⁷⁹ See JC Scott, note 72, 241–242.

⁸⁰ See M Foucault *Security, Territory, Population*, note 12, 191–226, especially, 201. See also G Burchell ‘Review Essay: Confession, Resistance, Subjectivity’ (2009) 13(2) *Journal for Cultural Research* 159–177, 165.

⁸¹ See M Foucault *Security, Territory, Population*, note 12, 202.

process of sanctification or hero worship which does not seem to me of much use. On the other hand, by using the word counter-conduct, and so without having to give a sacred status to this or that person as a dissident, we can no doubt analyze the components in the way in which someone actually acts in the very general field of politics or in the very general field of power relations[.]⁸²

II RESPONSIBILIZATION: A FRAMEWORK FOR ANALYSIS

So far, I have endeavoured to explain the idea of governmentality. While the idea of governmentality is central to the theory under the thesis; a number of ‘meta-theories’ also emerge. This is the case considering the expansive use of the idea of governmentality beyond Foucault, and the incorporation of James Scott’s seminal work on ‘posturing’ in a society; precisely calculated conformity.

The theory as presented is useful because it allows the thesis to focus on ‘situations’ or ‘processes’ that enhance or undermine the resolution of the land question in Malawi. The ‘situations’ or ‘processes’ are primarily considered through the interaction of the four key constituencies in the on-going land reform. Indeed, the use of governmentality in the theory allows the analysis to consider the ‘tactics’ – law and possibly a plethora of others – underway under the land reform. However, while the ‘tactics’ are useful, in the context of a liberal legal order that prevails in Malawi, and further in light of the dominance of market-based land reform models in development discourse, it is equally important in my view to establish the *value* that underlies the use of a particular ‘tactic’ in the political economy.⁸³ It is at this juncture that I propose a framework for analysis based on the conception of responsabilization.

It was noted in the Introduction that the discussion of responsabilization starts with Shamir. He has argued in the context of corporate social responsibility that ‘responsibilization conceptualized as the ‘expectation’ and ‘assumption’ of ‘reflexive, moral capacities of various social actors’ is the link that connects the ideals of governance and actual practices in a political economy.⁸⁴ The reference to the concept of ‘governance’ as a vehicle for responsabilization is important under the thesis. Governance, in this context, entails a ‘mode’ where the economic and social domains merge under what Shamir has called the ‘market of authorities’. Under this ‘market’, central governments evolve from ‘regulators’ with a top-down approach to

⁸² See M Foucault, above.

⁸³ There is a discussion of Malawi’s liberal, constitutional order in Chapter 4. The dominance of market as value in development discourse is covered in Chapter 3. On ‘value’: See for example E Anderson *Value in Ethics and Economics* (Cambridge, Mass.: Harvard University Press, 1995); and A Thomas *Value and Context: The Nature of Moral and Political Knowledge* (Oxford: Oxford University Press, 2006).

⁸⁴ See R Shamir, Introduction, note 67, 7.

‘government’ to ‘facilitators’ who are aware of other ‘nodes’ or ‘sources’ of authority.⁸⁵ Governmental authority under governance does not necessarily need the coercive authority of the State. Under a governance framework, ‘guidelines’, ‘principles’, ‘codes of conduct’ and ‘standards’ have all been ‘produced, distributed, exchanged, negotiated and ultimately consumed’ by a host of State and inter-State agencies, commercial enterprises and non-profit organizations that comprise the ‘market of authorities’.⁸⁶ Finally, governance as a ‘modality of power’ ‘relies on predisposing social actors to assume responsibility for their actions’.⁸⁷ This process of predisposition is the hallmark of responsabilization.

Value underpins responsabilization. Again, Shamir has argued that responsabilization presupposes ‘one’s uncoerced application of certain values as a root motivation for action.’⁸⁸ Indeed, in the context of corporate social responsibility, he has argued that responsabilization relies on the ‘construction of moral agency’ to buttress the importance of the individual as an entrepreneur.⁸⁹ In the end, responsabilization only restructures the market of authorities by adding a value; it is through value that the convergence of the economic and the social is possible.⁹⁰

There are two strands of responsabilization that are submitted here for the analysis of the land question in Malawi. The first strand is pervasive in the academy. It refers to ‘processes’ at the behest of the State or a non-State ‘dominator’ that construct the individual – the population – to serve or indeed behave in a particular way to fulfil a particular role in a political economy.⁹¹ I have called this type of responsabilization hegemonic responsabilization. By hegemonic responsabilization, one may draw from the Gramscian notion of ‘hegemony’ where the ‘value’ of the ‘dominant class’ is imposed on the ‘dominated’ to maintain a status quo.⁹² The second strand of responsabilization stems from the idea of governmentality; and indeed, the nature of Foucauldian ‘power’. Foucauldian ‘power’ is not annihilatory. Scott’s discussion of Brechtian or ‘disguised’ struggles under the ‘idea’ of calculated

⁸⁵ See R Shamir, above.

⁸⁶ See R Shamir, note 84.

⁸⁷ See R Shamir, above.

⁸⁸ See R Shamir, note 84.

⁸⁹ See R Shamir, above.

⁹⁰ See R Shamir, note 84, 10. The idea of market as value is discussed in more detail in Chapter 3.

⁹¹ See J Clarke ‘New Labour’s Citizens: Activated, Empowered, Responsibilized, Abandoned?’ (2005) 25 *Critical Social Policy* 447; and T Parfitt ‘Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty and Development’ (2009) 34 *Alternatives* 41.

⁹² See A Gramsci *Selections from the Prison Notebooks of Antonio Gramsci* ed. and trans. by Q Hoare & GN Smith (London: Lawrence & Wishart, 1971) 5–23.

conformity flourish in this context of a mobile, open ‘power’. Hence, the second strand of responsabilization relates to the strategies by the individual – the population – that shape and re-shape the nature of the exercise of authority by a State or non-State entity at the local, State level and ultimately the global level. These strategies also relate to the Foucauldian ‘counter-conduct’. This is the people-generated responsabilization.⁹³ There is an elaboration of people-generated responsabilization in section B below and in Chapter 7. However, as it was pointed out in the Introduction, people-generated responsabilization is based on people sovereignty rooted in the public trust and the social trust under the Constitution. The value underpinning people-generated responsabilization is that the right to exercise State authority lies in the people as a repository of constituent power.⁹⁴

A The Nature of Hegemonic Responsibilization

In societal interaction, responsibility envisages, at the innate level, that members will act ‘reasonably’ or ‘responsibly’ to maintain ‘harmony’, ‘inclusivity’ and ‘civility’.⁹⁵ This notion of societal interaction stresses an underlying moral ethic.⁹⁶ However, the ‘construction’ of the individual through ‘governmental constitution’ epitomizes hegemonic responsabilization.⁹⁷ Hegemonic responsabilization is pervasive in the debates in the academy.⁹⁸ It refers to processes that include constitutional reform,⁹⁹ new macroeconomic frameworks,¹⁰⁰ grand projects on legal and judicial reforms,¹⁰¹ including new approaches to land law and policy;¹⁰² all meant to attain what has been called a ‘responsibilized citizen’.¹⁰³ Hegemonic responsabilization privileges State or non-State institutional apparatuses

⁹³ See for comparison purposes T Basok & S Ilcan ‘In the Name of Human Rights: Global Organizations and Participating Citizens’ (2006) 10(3) *Citizenship Studies* 309; and O Löweinheim ‘The Responsibility to Responsibilize: Foreign Offices and the Issuing of Travel Warnings’ (2007) 1 *International Political Sociology* 203. See also T Parfitt, note 91, on the ‘creative’ and ‘destructive’ possibilities of Foucauldian biopolitics.

⁹⁴ See for example R Jackson *et al.* *Sovereignty: The Evolution of an Idea* (Cambridge: Country Press, 2007).

⁹⁵ See J Clarke, note 91, 451.

⁹⁶ See J Clarke, above.

⁹⁷ See J Clarke, note 95.

⁹⁸ See for example J Clarke, note 91; T Basok & S Ilcan, note 93; and O Löweinheim, note 93.

⁹⁹ See for example SP Huntington ‘Democracy’s Third Wave’ (1991) 2 *Journal of Democracy* 12.

¹⁰⁰ See for example D Booth *Fighting Poverty in Africa: Are PRSPs Making A Difference?* (London: Overseas Development Institute, 2003).

¹⁰¹ See for example J Faundez ‘Legal Reform in Developing and Transition Countries – Making Haste Slowly’ (2001) 1 *Law, Social Justice and Global Development* available at http://www2.warwick.ac.uk/fac/soc/law/elj/igd/2000_1/faundez/ [visited on 30 June, 2009].

¹⁰² See for example World Bank, Introduction, note 1.

¹⁰³ See J Clarke, note 91, 451–452.

that use *techne* to discipline, in the Foucauldian sense, a population. The proposition here is that under hegemonic responsabilization the ‘market’ based on a Hayekian ‘catallaxy’ as the norm forms the basis of the value that informs the responsabilization of the individual in the political economy.¹⁰⁴ The classic economic efficiency argument that has been applied in land reform discourse would be an example of the nature of hegemonic responsabilization. In the following part, I will introduce an agenda for a framework for people-generated responsabilization. The notion of people-generated responsabilization arises within the possibility under Foucauldian ‘power’ where power is not – as alluded to before – annihilatory. Foucauldian ‘power’ is conducive for creation, re-creation and de-construction.¹⁰⁵

B The Nature of People-Generated Responsibilization

This part lays the foundation for the discussion in Chapter 7. The ‘idea’ of people-generated responsabilization is based on people sovereignty. It has been argued in constitutional theory that the authority to govern derives from the people as a repository of ‘constituent power’. Negri, for instance, has argued that ‘constituent power’ is an expression of the popular will; it is the power of the ‘multitude’. Negri contends that ‘constituent power’ is in constant conflict with ‘constituted power’, which is the fixed power of formal constitutions. ‘Constituent power’, in Negri’s thesis, would lie neither with the legislature nor the judiciary as, according to him; the propensity ‘to revolt’ lies with the people themselves.¹⁰⁶

People-generated responsabilization necessarily requires a focus on the State. In the context of the resolution of the land question under the on-going land reform in Malawi, I propose a two-tiered framework: The first tier relates to an analysis of section 12 of the Constitution which provides for the public trust and the social trust.¹⁰⁷ The constitutional provision outlines a set of duties that the State owes to the people of Malawi in the discharge of its legal and political authority. The second tier

¹⁰⁴ On the ‘catallaxy’: See FA Hayek ‘The Market Order or Catallaxy’, *Law, Legislation and Liberty: Volume 2, The Mirage of Social Justice* (Chicago: The University of Chicago Press, 1976) 107–132. I elaborate on Hayek’s argument in Chapter 3.

¹⁰⁵ See T Parfitt, note 91.

¹⁰⁶ See A Negri *Insurgencies: Constituent Power and the Modern State* (Minneapolis: University of Minneapolis Press, 1999) 1–35.

¹⁰⁷ See G Kamchedzera & CU Banda ‘The right to development, the quality of rural life, and the performance of legislative duties during Malawi’s first five years of multiparty politics’ Research Dissemination Seminar Number Law/2001–2002/001, available at <http://www.sarpn.org.za/documents/d0001966/index.php> [visited on 20 July, 2007]. See also G Kamchedzera & CU Banda ‘Dignified Rural Living, the Right to Development, Multiparty Politics and Legislation in Malawi’ (2009) 25 *South African Journal on Human Rights* 73, 93.

draws from VY Mudimbe's idea of *gnosis*.¹⁰⁸ In *The Invention of Africa*, Mudimbe adopts *gnosis* from the Greek word '*gnosko*' meaning 'to know' in developing his thesis on African knowledge; particularly 'the notion of philosophy to African traditional systems of thought'.¹⁰⁹ He states:

Specifically, *gnosis* means seeking to know, inquiry, methods of knowing, investigation, and even acquaintance with someone [...] *Gnosis* is different from *doxa* or opinion, and, on the other hand, cannot be confused with *episteme*, understood as both science and general intellectual configuration.¹¹⁰

In this context, Mudimbe has argued that *gnosis* has a 'sociohistorical origin' and an epistemological context' that allows 'the notion of conditions of possibility' to flourish.¹¹¹ In this sense, *gnosis* is the cognitive make up of counter-conduct. It need not be institutionally located. It is innate to the human as a social being. Second, the suggestion here is that as a repository of constituent power, the people as a sovereign are the primordial arbiter of 'knowing'; who can govern, what is to govern, or what or who is governed; and the methods of the knowing to govern.¹¹²

The reference to the public trust and the social trust under the Constitution does not mean deference to a formal, legal 'ordering' as the basis for the knowing to govern. The invocation of Mudimbe's *gnosis* is to argue for 'possibility'; for a change of mindset. The public trust and the social trust under the Constitution is an expression of the terms of 'governing' between the citizen as the 'governed' and those entrusted with the exercise of State authority – the 'governors'.¹¹³

In this way, people-generated responsabilization becomes the vehicle through which a constituency of the 'dominated' such as the land deprived assert themselves as the holders of the *gnosis* of 'governing' in a polity. The change of mindset lies in

¹⁰⁸ See VY Mudimbe, Introduction, note 32.

¹⁰⁹ See VY Mudimbe, above, ix.

¹¹⁰ See VY Mudimbe, note 108.

¹¹¹ See VY Mudimbe, note 108, ix–xii.

¹¹² See C Gordon, note 9; A Negri, note 106; and VY Mudimbe, note 108. The suggestion compares with Gramsci's idea of organic intellectual. The only difference is that Gramsci's intellectual is located in a party politics structure. Under a Gramscian interpretation of the organic intellectual, the intellectual is the 'thinker' and 'organizer' whose basic function is to 'direct' the 'ideas' and 'aspirations' of his or her social class in a society: See A Gramsci, note 90. Walter Adamson observes that according to Gramsci, the organic intellectual has a critical role, whose 'social function is to serve as a transmitter of ideas within civil society and between government and civil society': See W Adamson *Hegemony and Revolution: A Study of Antonio Gramsci's Political and Social Theory* (Berkeley: University of California Press, 1980) 143. The organic intellectual is one of a kind 'specialized in the conceptual and philosophical elaboration of ideas': See W Adamson, in this note, 145. The organic intellectual 'acts only to enter into a dialectic with the democratic organization of the masses [. . .] founded on political and intellectual self-activity,' rather than any 'external formula': See W Adamson, in this note, 41.

¹¹³ See VY Mudimbe, note 108.

the realization of the multitude as the ‘setters’ of agenda. This formulation of people-generated responsabilization seeks to transcend the parameters of ‘legality’ and affect the whole political economy. This is one way of actualizing Foucauldian counter-conduct and Scott’s Brechtian struggles under calculated conformity. In Chapter 6, there is a discussion of the interaction of the land deprived with the postcolonial State and the *Achikumbwe* respectively which seeks to demonstrate the operation of people-generated responsabilization.

Scholars such as Boaventura de Sousa Santos have, in my view, tended to remain faithful to ‘legality’ and only criticize what has been called hegemonic globalization for its top-down approach. Santos’ counter-hegemonic globalization thesis or the subaltern cosmopolitan legality thesis argues for bottom-up ‘construction’ of legality.¹¹⁴ This approach has its usefulness. The point here is simply that it must be recognized that a focus on ‘legality’ as *the* site of ‘struggle’ is narrow given the ‘range of multiform tactics’ in a polity.

In this respect, people-generated responsabilization lends credence to David Harvey’s declaration of a ‘battle of ideas’.¹¹⁵ This battle is between a dominant narrative of the universal efficiency of liberalism (or its ‘protégé’, neo-liberalism) against alternative narrative to a broadly construed social well-being. This battle is more so pertinent in Africa under the new wave of land reform. Indeed, scholars such as VY Mudimbe and Achille Mbembe have been scathing. Mbembe has argued, for example, that the ‘African’ has been caught in a ‘trance’ having been betrayed by the erstwhile nationalist elites and a complicit – at best – or ‘docile’ – at worst – middle class.¹¹⁶ This complicity fits into Leslie Sklair’s notion of a self-interested, transnational, capitalist class.¹¹⁷

III A NOTE ON REGULATION: LAW IN THE POLITICAL ECONOMY

For the analysis of the land question in Malawi, I propose that law must be located in the political economy. By political economy, I simply mean the production

¹¹⁴ See B de Sousa Santos *New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002); and B de Sousa Santos ‘Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality’ in B de Sousa Santos & CA Rodriguez-Garavito (eds.) *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

¹¹⁵ See D Harvey *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2007).

¹¹⁶ See VY Mudimbe, note 108; and A Mbembe *On the Postcolony* (Berkeley: University of California Press, 2001).

¹¹⁷ See L Sklair *Globalisation: Capitalism and Its Alternatives* (Oxford: Blackwell, 2002).

and redistribution of wealth; including the provision or denial of the factors of production of wealth. By locating law in the political economy, the analysis goes into ‘situations’ and ‘processes’ that have defined the land question in Malawi. It allows for an examination of ‘ideas’ rather than a functional approach to law. It is in this regard that the starting point for the analysis of the land question in Malawi under the thesis is not merely law for its own sake. Michael McConville and Wing Hong Chui state:

[T]he starting point is not law but problems in society which are likely to be generalized or generalizable. Here, law itself becomes problematic both in the sense that it is a contributor to or the cause of the social problem, and in the sense that while law may provide a solution, other non-law solutions, including political and social re-arrangement, are not precluded and may indeed be preferred.¹¹⁸

This is a pertinent observation that fits in with the argument Foucault makes that under the art of government; law is only a part of a range of multiform tactics. Hence, the proposed re-positioning of law brings in the macro-economic debates on the role of land in the political economy of Malawi. Of prime consideration here is whether land reform must support the estate sector or smallholders (or both) for the country’s agricultural policy direction. The other debate relates to the question whether there is a policy synergy between the land framework – the Land Policy – and the macro-economic framework – particularly the Malawi Growth and Development Strategy. In sum, I am proposing a holistic approach to the land question in Malawi that does not merely involve the translation of land reform into land law reform. I endorse the sentiments of McAuslan here. He contends that the move from ‘policy’ to ‘law’ – precisely legislative drafting – must not focus on ‘legal technicality’; it must remain a ‘policy’ debate throughout the reform process.¹¹⁹ Otherwise, ‘abstract instrumentalism’ perpetuates the land question in a country.¹²⁰

There is also the issue of dignified living, especially in the context of the levels of impoverishment of the land deprived in political economies such as Malawi. Garton Kamchedzera and Chikosa Banda, writing on the right to development and its realization amongst rural communities in Malawi, establish that dignified living is the primary aspiration of people in rural areas of the country. They argue that dignified living refers to the existence of (social) conditions in a locality that makes living a life

¹¹⁸ See M McConville & WH Chui ‘Introduction and Overview’ in M McConville & WH Chui (eds.), Introduction Chapter, note 93, 1–15, 1.

¹¹⁹ See P McAuslan, Introduction, note 44, 251.

¹²⁰ See P McAuslan, above; and P Fitzpatrick *Law as Resistance: Modernism, Imperialism, Legalism* (Aldershot: Ashgate, 2008) 41.

with human dignity possible. In other words, dignified living goes to the root of ‘human-being-ness’.¹²¹

IV FINAL WORD

The theory that I have adopted for the thesis – based as it is on the Foucauldian ‘idea’ of governmentality – seeks to focus the inquiry on the ‘situations’ or ‘processes’ of responsabilization under the on-going land reform in Malawi. In doing so, the analysis will examine the interaction of the key constituencies under the reform in the country; namely the postcolonial State, the Bretton Woods Institutions, the *Achikumbwe* and the land deprived. The examination of this interaction seeks to determine the form and the extent to which the interaction is shaping a responsabilized population under market-based land reform models.

The complementarity of governmentality and responsabilization is such that the latter allows for the recognition and analysis of a value that is underpinning the art of government in a polity. In looking at responsabilization, it has been noted that what I have called hegemonic responsabilization is pervasive in academic scholarship that uses responsabilization as a framework for analysis. Hegemonic responsabilization focuses on the individual as the primary ‘unit’ of a population. Hence, hegemonic responsabilization generates the responsabilized individual.

Beyond hegemonic responsabilization, I make a case for what I have called people-generated responsabilization. I propose that the people-generated responsabilization must necessarily focus on the State itself; particularly the exercise of State authority. People-generated responsabilization must lead to a responsabilized State. The central point here is that the public trust and the social trust under the Constitution underlie the exercise of State authority. A ‘governor’ does the governing with the ‘consent’ or ‘legitimation’ of the people as a repository of constituent power. In the circumstances, if reference is made to Foucauldian ‘convenient ends’ that underpin the art of government, those ‘ends’ must optimally favour the people. Hence, in this context, one way of framing the resolution of the land question becomes: who optimally benefits under the proposed resolution of the question; how does the stated benefit arise; and why is the stated beneficiary, the one to benefit.

Regarding the location of law in the political economy: The point that has been made in the realm of governmentality is that ‘regulation’ or ‘discipline’ does not

¹²¹ See G Kamchedzera & CU Banda ‘Dignified Rural Living, the Right to Development, Multiparty Politics and Legislation in Malawi’, note 107.

reveal itself in the specificity of the law only. There is a range of multiform tactics. Hence, ‘regulation’ or indeed ‘discipline’ emerges from multiple ‘sites’; including ‘ideology’, ‘law’ and ‘policy’.¹²² It is imperative in the circumstances that law is not the only focus of the analysis of the land question in Malawi. A holistic approach that problematizes the whole political economy is preferable.

The ‘reliability’ of the ‘tools’ of inquiry – the theory and a framework for analysis – depends upon the ‘stability’ of the social phenomenon under examination.¹²³ In the short and even long term, the ‘reliability’ of the theory and framework for analysis rests on two assumptions. First, the prevailing land question in Malawi remains unresolved. The second assumption is that the centrality of market as value continues to dominate development discourse. Suffice it to say that while the dominance of market as value remains invasive in the debate in development discourse, the role of the State is once again changing; with the State gravitating towards the centre.¹²⁴

The analysis of the land question in Malawi will require a frontal engagement with the abstraction thesis in rights discourse; the liberal configuration of the right to property, precisely the right to land; and a contextual analysis of the ‘construction’ and ‘re-construction’ of the individual under market-based land reform models. In the next Chapter, I examine the conception issues that relate to the nature of a right; the meaning of ‘property’; the right to property as a legal relation; the right to property as a social relation; the right to land as a specific ‘type’ of the right to property; including the nature of the ‘customary’ space. There is also a proposal for the recognition of the beneficial interest in land that may enhance the resolution of the land question in the country. The conception of market-based land reform models forms the basis of the discussion in Chapter 3.

¹²² See B Golder & P Fitzpatrick, note 3.

¹²³ See FE Kanyongolo *Human Rights Jurisprudence in Polarized Societies: A Comparative Analysis of Malawi and South Africa* (PhD Thesis: University of East Anglia, 1999) 23.

¹²⁴ See for example R Skidelsky *Keynes: The Return of the Master* (London: Allen Lane, 2009).

Chapter 2

The Conception of the Right to Property in Land: The Nature of a 'Right', 'Property' and the 'Customary' Space

In the Introduction, it was pointed out that a clearly defined land question must lead to an equally, clearly established purpose and direction of land reform. However, it was observed that the African or indeed country-specific land questions have been mired in confusion and dissensus and this has undermined the purpose and direction of land reform in the African postcolony. In Chapter 1, it was suggested that clearly defined parameters of the constitutive conception, theory and framework for analysis should complement strategies to resolve a land question. The confusion and dissensus arise because of the lack of clarity in the conception of the right to property in land and the ideological factors that permeate land reform discourse. The conceptual issues relating to a 'right'; 'property'; and the 'customary' space are discussed in this Chapter. The ideological issues relating to a land question are covered in Chapters 3, 4, 5 and 6. The central point of this Chapter is that in formulating the strategies for the resolution of the land question in postcolonial economies such as Malawi, the conception of the right to property in land must be located within the framework of the right to property as a social relation.

The liberal conception of the right to property in land is dominant in land reform discourse. This conception is based on the Lockean labour theory of property or appropriation.¹ This enables a focus on the responsabilization of a *homo economicus* whose responsabilization is crucial for the sustenance of the market. The liberal conception of the right to property in land has meant that it is abstracted, de-historicized and de-contextualized.

The conception of the right to property as a social relation allows a social constructionist approach to 'property'. The approach incorporates history and context as critical factors for the analysis.² The conception of the right to property as a social relation enables the examination of the land question in Malawi that focuses on the underlying 'technologies of normalization' shaping and re-shaping the land question.

¹ See J Locke *Two Treatises on Government* II, Ch. 5, para. 25–31 Peter Laslett ed. (Cambridge: Cambridge University Press, 1988) cited in B Bix, Chapter 1, note 4, 249. See also R D'Souza 'Liberal Theory, Human Rights and Water–Justice: Back to Square One?' 2008 (1) *Law, Social Justice & Global Development Journal* available at http://www.go.warwick.ac.uk/elj/lgd/2008_1/desouza [visited on 14 October, 2008] on liberal theory and liberalism generally.

² See A George, Chapter 1, note 1.

The following summation is pertinent: In relation to the nature of a right to property it must be observed that there are different perspectives to the notion of a 'right'. The dominant discourse on the nature of a 'right' states that it is liberal and exclusive to an individual. In relation to a 'right' to 'property', the reference is not to 'thing' or 'land'; it is *in* the 'thing' or 'land'.³ The right to property is wider and the right to land is narrower. Further, the right to property cannot be arbitrarily deprived or expropriated. The liberal notion of a 'right' to 'property' informs market-based land reform models.

Second, the conception of the right to property as a social relation allows the examination of the 'worldview' relating to the 'customary' space and 'customary' tenure. The worldview regarding 'customary' tenure is that it is communal in nature. The proponents of the reform of the 'customary' space under a land reform programme base their arguments ostensibly on the economic inefficiency of the communitarian *ethos* of the 'customary' tenure. In this Chapter, the 'customary' space is discussed under three approaches: the sentimentalist, the revisionist, and the legal pluralism approaches. The argument is that the conception of the 'customary' space has been a major factor for the irresolution of the land question in a postcolonial economy such as Malawi.

Finally, and beyond the conception of the right to property as a social relation, the Chapter proposes a re-examination of the worldview of 'customary' tenure in ways that seek to emphasize the potential of the beneficial interest in land. The beneficial interest must be conceptualized in a manner that promotes the access of the land deprived to available arable land in a country. This conception of the beneficial interest takes place within an appreciative paradigm of the nature of the right to property in land of the land deprived. It is proposed that such an appreciative paradigm enhances the resolution of the land question in the country. The treatment of the beneficial interest in land is merely prefatory here. There is a more in-depth discussion of its conception in Chapter 7.

I THE NATURE OF A RIGHT TO PROPERTY

The conception of 'property' invites varied perspectives of inquiry. Alexandra George, for instance, suggests three perspectives of inquiry; namely, the normative,

³ See K & S Gray 'The Idea of Property in Land' in S Bright & J Dewar (eds.) *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) 15–51, 15[emphasis in the original]; and *Dorman v Rodgers* (1982) 148 CLR 365.

ontological and utilitarian.⁴ The normative perspective raises questions that address the ‘form of property’; what ‘thing’ is property, the ‘boundaries’ between private property and communal property, and the beneficiary of (particular) property. The ontological perspective raises questions that deal with the ‘innate characteristics’ of ‘property’ in ‘particular whether the ‘innate characteristics’ are universal to all property ‘systems’ or they are ‘conceptually contextual’ or ‘culturally dependent’. Finally, the utilitarian perspective raises what George calls the ‘explanatory questions’; these questions confront the ‘ends’ of ‘property’. The utilitarian perspective seeks to establish whether the end of property is the achievement of social control or social justice.⁵

At a macro level, the normative perspective is concerned with the role the concept of property plays in ordering society. On the other hand, at a micro level, the concern is the instrumentality of the conception of property towards the production of ‘specified social or economic ends or ideological goals in a particular society’.⁶ The various perspectives of inquiry that George suggests are not mutually exclusive. They are interwoven. However, these perspectives buttress the point that ‘property’ let alone the right to property – regardless of its conception – need not be analyzed in abstract and decontextualized terms. It must be historicized and contextualized in analysis.

A Character of a ‘Right’

The hohfeldian analysis of a ‘right’ has been significantly influential in legal theory.⁷ In this respect, a ‘right’ has at least four attributes; a ‘right’ as ‘claim’, ‘liberty’, ‘power’ or ‘immunity’.⁸ Beyond this hohfeldian analysis of a ‘right’, there are differences based on the conceptual nature of a ‘right’ and the policy objective of a ‘right’. The conceptual differences revolve around whether benefit is a constitutive part of a ‘right’; that is, whether a ‘right’ must provide the ‘maximum degree of self-assertion’ or it is enough that a ‘right’ confers a benefit. The former case is what is referred to as the ‘Will/Choice Theory’ which is based on personal sovereignty as a ‘superior will’ and simultaneously lauds the sanctity of ‘individual discretion’. The

⁴ See A George, note 2.

⁵ See A George, note 2, 793.

⁶ See A George, above.

⁷ See B Bix, note 1, 125–131. See also Ronald Dworkin’s discussion on ‘embarrassing questions’: *Taking Rights Seriously* (London: Duckworth, 1977) 14–16.

⁸ See B Bix, note 1, 127–128; and MDA Freeman *Lloyd’s Introduction to Jurisprudence* (London: Sweet & Maxwell, 2001) 355–358.

latter scenario – which is referred to as the ‘Interest/Benefit Theory’ – can be explained in two ways: Its utilitarian explanation is that a ‘right’ must have an inherent benefit from the performance of a ‘duty’. Second, a ‘right’ is contingent upon the recognition of an interest regardless of whether a ‘duty’ is imposed or not.⁹ The policy differences tend to dwell on the category of persons or things that may enjoy a ‘right’.¹⁰

The conceptual and policy differences converge around (de-)abstraction; whether a ‘right’ must be abstracted or de-abstracted.¹¹ The abstraction thesis is grounded in liberal political theory whereby regardless of history and context, it is enough that a rights discourse is located in the supremacy of the individual.¹² This corresponds with the Foucauldian assertion that the individual is a ‘site’ where ‘power’ is most concentrated or targeted.¹³ The de-abstractation thesis, on the other hand, does not necessarily deny the supremacy of the individual. It goes further to state that a denial of history and context works against the very persons a rights discourse seeks to protect.¹⁴

In this thesis, the nature of a ‘right’ in the Hohfeldian sense is useful for its analytical value. It allows the examination of a responsabilization under a rights discourse. Whether a ‘right’ is granted or not depends on the ‘convenient end’ being served in a political economy.¹⁵ Further, the de-abstractation thesis complements the conception of the right to property as a social relation.

B The Meaning of ‘Property’: The Right to Property as a Social Relation

There are three levels to the discussion of the right of property as a social relation. The first looks at the liberal roots of ‘property’. At this level, property is grounded in the Lockean labour theory. The second focuses on the right to property as a social relation; particularly on the social constructionist approach to ‘property’.¹⁶

⁹ See MDA Freeman, above, 354–355.

¹⁰ See B Bix, note 1, 126.

¹¹ See M Tushnet ‘An Essay on Rights’ (1984) 62 *Texas Law Review* 1363 who argues for de-abstractation; and PJ Williams ‘Alchemical Notes: Reconstructing Ideals From Deconstructed Rights’ (1987) 22 *Harvard Civil Rights–Civil Liberties Law Review* 401 for the contrary position.

¹² See PJ Williams, above.

¹³ See M Foucault, *Will to Knowledge*, Chapter 1, note 50.

¹⁴ See M Tushnet, note 11; FE Kanyongolo, Chapter 1, note 120; B Bix, note 7, 218; and MDA Freeman, note 9, 972.

¹⁵ See B Bix, note 1, 128.

¹⁶ See SR Munzer ‘Property as Social Relations’ in SR Munzer (ed.) *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 36–75. See also P Berger

Third, there is a discussion of conception of the ‘customary’ ‘space’, and the beneficial interest in land of the land deprived. This forms the crux of the discussion under sections II and III.

1 The Right to Property as a Legal Relation: The Liberal Roots to ‘Property’

The legal meaning of ‘property’ does not refer to a ‘thing’ but to the relation among persons on the basis of a ‘thing’. The ‘thing’ has been dephysicalized and the focus is no longer on the dominion of persons over ‘things’ but the dominion of the interpersonal relation or relationship.¹⁷ In this dephysicalized mould of ‘property’, Kevin Gray has conceived of ‘property’ as ‘thin air’ and has defined ‘property’ as a ‘power relationship constituted by legally sanctioned control over access to benefits of excludable resources’.¹⁸ The relation can be strictly legal or social.¹⁹ The relation is what, at law, constitutes the ‘right’ or ‘interest’ in ‘property’.²⁰ Hence, in property discourse, the primary reference is to a ‘right’ *to* ‘property’; the secondary reference being to a ‘right’ *to* ‘property’ *in* land.²¹

‘Property’ as a legal relation is rooted in what Stephen Munzer calls ‘the Hohfeld–Honore orthodoxy’.²² There are four attributes of ‘property’ conceived as a legal relation; namely, nominal ownership, benefit, control and management.²³ However, even in light of Gray’s and Munzer’s conception of ‘property’, just as with the consideration of a ‘right’, it must be acknowledged that the conceptual character of ‘property’ is as problematic as its policy trajectory. At the conceptual level, there is what Joshua Gertzler describes as the ‘hohfeldian denial of property as a meaningful juristic category’ and, on the other, its ‘(re)discovery’ as a constitutive ‘block’ of the

& T Luckmann *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Hamondsworth: Penguin, 1971).

¹⁷ See K Vandeveld ‘The New Property of the Nineteenth Century: The Development of the Modern Concept of Property’ (1980) 29 *Buffalo Law Review* 325. See also C Reich ‘The New Property’ (1964) 73 *Yale Law Journal* 773.

¹⁸ See K Gray ‘Property in Thin Air’ (1991) 50(2) *Cambridge Law Journal* 252, 295. See also K & S Gray, note 3.

¹⁹ See SR Munzer, note 16, 37.

²⁰ See JE Penner *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) 49–51.

²¹ See T Honore ‘Property and Ownership: Marginal Comments’ in T Endicott *et al.*, *Properties of Law: Essays in Honour of Jim Harris* (Oxford: Oxford University Press, 2006) 129–136, 131; K Gray, note 18; and K & S Gray, note 3.

²² See SR Munzer, note 16, 37 citing WN Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* WW Cook ed. (Westport: Greenwood Press, 1978) and AM Honore ‘Ownership’ in AG Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961).

²³ See Justice Chitty in *In re Earnshaw–Wall* (1894) 3 Ch.D 156; and K Gray, note 18; SR Munzer, note 16, 37; and GS Kamchedzera ‘Land Tenure Relations, the Law and Development in Malawi’ in Guy Mhone (ed.), Introduction, note 11, 188–204.

legal and social order.²⁴ The conceptual and policy considerations of ‘property’ tend to be conflated in analysis. At the centre of the debates here is the role of the individual and the State in relation to ‘property’.²⁵

The Lockean labour theory is the justification for private property based on the supremacy of individual autonomy. This is in turn premised on the individual’s innate possession of ‘property’ as a reward for their labour. The supremacy of individual autonomy is also justified on the basis of the Benthamite utility argument and the law and economics argument of opportunity cost.²⁶ The libertarian individual is very atomistic.²⁷ The counter–argument to the libertarian argument is that there is a context to the livelihood of the individual; there are family, community and other identities that determine the individual’s functionality.²⁸

The supremacy of the individual under the liberal conception of the right to property is not inadvertent. In Chapter 1, it was asserted that the art of government is concerned with the disposal of things to achieve a convenient end. A range of multiform tactics is used in the process of the disposal. Under a liberal order, the individual is crucial to what Foucault has described as a phenomenon of scarcity. Hence, a liberal conception of the right to property leads to constituencies of land owners and the land deprived; employers and employees respectively. In an agrarian context, what emerges is a land owner whose responsabilization is based on the inordinate exclusion or the hoarding of land from a land deprived.²⁹ The land deprived in this relation becomes a source of labour. Hence, the land owner as a producer, and the land deprived as a labourer all contribute towards the value of return to the producer. The producer’s value of return in turn feeds into the political economy. A

²⁴ See J Gertzler ‘Property, Personality and Violence’ in T Endicott *et al.*, note 21, 246–276, 271.

²⁵ See B Bix, note 1, 248.

²⁶ See J Gertzler, note 24; J Locke, note 1. See also GWF Hegel *Philosophy of Right* trans. TM Know (Oxford: Oxford University Press, 1952); MJ Radin ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957; SR Munzer ‘The Commons and the Anticommons in the Law and Theory of Property’ in MP Golding & WA Edmundson (eds.) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, 2005) 148–162; G Hardin ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243; and for a slightly different view: MA Heller ‘The Tragedy of the Anticommons: Property Transitions From Marx to Markets’ (1998) 111 *Harvard Law Review* 621 all discussed in B Bix, in this note.

²⁷ See J Locke, note 1; Hegel, above; Radin, above; Munzer, above; Hardin, above; J Rawls *Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); and R Nozick *Anarchy, State and Utopia* (New York: Basic Books, 1974).

²⁸ See M Sandel *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1998).

²⁹ See also K Gray, note 18, 294 on excludability as the basis of the ‘propertiness’ in ‘property’. He states that ‘[p]roperty is not about *enjoyment of access* but about *control over access*’: See K Gray, in this note [emphasis in the original].

critical thread to the land owner–land deprived relationship is the exclusion, hoarding or monopolization as a critical part of the phenomenon of scarcity.

2 The Right to Property as a Social Relation

A clear understanding of the right to property as a social relation necessitates a quick overview of social constructionism.³⁰ Social constructionism refers to a number of approaches to the study of human beings as social animals. These approaches include critical psychology, discursive psychology, discourse analysis, deconstruction, and poststructuralism. This is a wide category and it brings with it problems of essentializing subtly different approaches to social phenomena. However, Vivien Burr has suggested that if there is a social constructionist approach at all then it is useful to look at the traits of ‘family resemblance’ for its analytical linkages.³¹ Members of a family are different but there are enough ‘recurrent features’ that identify them as members of one family.³² Hence, Burr argues that the ‘recurrent family features of the social constructionist approach are that it emphasizes critique: scholarship must take a ‘critical stance’ to ‘taken-for-granted ways of understanding the world’; the world is a ‘social world’ because it is a ‘product of social processes’.³³

Under this labelling, the theoretical approach of the thesis may be classified as a type of social constructionism. A pertinent observation is that Peter Berger and Thomas Luckmann have argued that while social practices of human beings shape or construct the ‘reality’, at the same time these human beings may experience (or seek to experience) this ‘reality’ as if it is fixed or pre-ordered.³⁴ In other words, human beings construct the (social) world which then becomes the ‘reality’ to which they must ‘respond’.³⁵ In relation to property, the emphasis is on the subjective, historical and cultural specificity that define the conception of ‘property’ in a particular polity.³⁶ Hence, if anything, the social constructionist approach underlies the law in context approach to (legal) phenomena. Kevin and Susan Gray succinctly capture the social constructionist approach in relation to the right to property as a social relation. They state:

³⁰ For a fuller discussion of social constructionism: See P Berger & T Luckmann, note 16.

³¹ See V Burr *Social Constructionism* (London: Routledge, 2003) 2.

³² See V Burr, above.

³³ See V Burr, note 31, 2–9.

³⁴ See P Berger & T Luckmann, note 16; and V Burr, note 31, Chapter 9.

³⁵ See P Berger & T Luckmann, note 16; and V Burr, note 31, 185–190.

³⁶ See P Berger & T Luckmann, note 16. See also V Burr, note 31, 7.

‘Property’ is, rather, the word used to describe particular concentrations of power *over* things and resources. The term ‘property’ is simply an abbreviated reference to a quantum of socially permissible power exercised in respect of a socially valued resource.³⁷

‘Property’ as a social relation as a ‘complete conception’ can be configured as follows: the individual is not atomistic, he or she is a construction of various competing interests in society; as society is made of constructed individuals, we cannot ignore mutual ‘dependence; ‘power’ or ‘coercion’ that define social relation which in turn has implications for the nature of rights in property; the holder of ‘power’ or ‘coercion’ can undermine or enhance ‘right’ or ‘freedom’; the existence of ‘power’, ‘coercion’ and the constructed individual leaves no room for (illiberal) ‘autonomy’ in a country; the State is partisan; and finally that reform of the theoretical and institutional framework of property law discourse is inevitable.³⁸

In the final analysis, property as a social relation resonates with Foucauldian governmentality; particularly, the emphasis on the relations of ‘men’ and ‘things’.³⁹ Second, property as a social relation and governmentality also echoes the orthodox African thought that property (especially land) is life itself.⁴⁰

3 Reconciling the Right to Property as a Legal Relation and, as a Social Relation

It is acknowledged that some commentators have highlighted the conceptual weakness of the right to property as a social relation on the basis of the breadth of the ‘social’ and ‘social interest’.⁴¹ This, it has been argued, undermines the delineation of the precise nature of the right to property as a social relation. I subscribe to the view that ‘property’ as a legal relation is ultimately a subset of ‘property’ as social relation. This is the case if relation is conceived as the interaction of persons on the basis of ‘things’. While the notion of ‘property’ as a social relation at law may sound redundant, it is useful for a number of reasons: The emphasis on ‘property’ as a social relation demystifies law. ‘Property’ as a social relation is useful for analysis because it allows for the focus on the ‘whole population’. This is the Foucauldian dimension of the analysis. Hence, if an analysis of ‘property’ is de–abstracted and contextualized, it

³⁷ See K & S Gray, note 3, 15.

³⁸ See SR Munzer, note 16, 40–43.

³⁹ See Chapter 1.

⁴⁰ See for example HWO Okoth–Ogendo, Introduction, note 34, 6 and B Cousins, ‘Legislating Negotiability: Tenure Reform in Post–Apartheid South Africa’ in K Juul & C Lund (eds.) *Negotiating Property in Africa* (Portsmouth, New Hampshire: Heinemann, 2002) 67–101; and Focus Group Discussion of 2 May, 2008.

⁴¹ See SR Munzer, note 16, especially 45–46, 71–75.

emphasizes the intricate interaction among persons and the construction and reconstruction of the individual for a defined and responsabilized role in a political economy. Indeed, Issa Shivji has said the conception of the right to property as a social relation reveals the ‘real *substance*, that is, the social relations of production.’⁴²

II THE RIGHT TO PROPERTY IN LAND: AN ANALYSIS OF THE ‘CUSTOMARY’ SPACE

In the discussion so far, a ‘right’ to ‘property’ entails that it is a ‘claim’, ‘power’ or ‘immunity’ in a relation or relationship among persons on the basis of a ‘thing’. The ‘thing’ is not corporeal, it is dephysicalized. Inherent in this conception is the idea of exclusion.⁴³ The ‘right’ is invoked or proclaimed under a ‘threat’ of infringement. At common law, a ‘thing’ as ‘property’ automatically generates its protection from deprivation or expropriation. The deprivation or expropriation of property requires the due process of law and its resulting compensation.⁴⁴

In relation to land, the ‘right’ to ‘property’ entails that a person has a ‘claim’, ‘power’ or ‘immunity’ over a parcel of the land in their relation with (an)other person(s). Precisely, a person does not ‘own’ the physical *solum*; they ‘own’ some ‘unitary jural right’ over the *solum*.⁴⁵ In the context of the ‘customary’ space and the nature of ‘customary’ (land) tenure, if a ‘right’ is at least a ‘claim’, ‘power’ or ‘immunity’ and ‘property’ is the relation among persons on the basis of a ‘thing’, then the nature of the nexus between a ‘right’ and ‘property’ requires a more nuanced, contextualized scrutiny.

In postcolonial economies such as Malawi, a discussion of the right to property as a right to land in the context of land reform must necessarily involve the unpacking of the ‘customary’ space. In looking at the root of the ‘customary’ space; the argument here is that this is embedded in colonial sovereignty. The discussion of the root of the ‘customary’ space is important because it has influenced the worldview of the ‘customary’ space and ‘customary’ (land) tenure in land reform discourse.

⁴² See I Shivji *Class Struggles in Tanzania* (Dar es Salaam: Tanzania Publishing House, 1975) 5 [emphasis in the original].

⁴³ See JE Penner, note 20. James Penner has criticized the notion of ‘property’ as a ‘bundle of rights’ on the basis that the parameters of the bundle are seemingly open-ended: See JE Penner ‘The “Bundle of Rights” Picture of Property’ (1996) 43 *UCLA Law Review* 711 referred to in JE Penner, in this note, 1–6; 49–51. See also K Gray, note 18.

⁴⁴ See K Vandeveld, note 17.

⁴⁵ See K & S Gray, note 3, 27.

A The Root of the ‘Customary’ Space

I have suggested that there are three approaches that are identifiable in relation to the root of the ‘customary’ space; the sentimentalist, revisionist and legal pluralism approaches respectively. The following quick observation may be made regarding ‘conception’; and ‘custom’ or ‘customary’: Building from the reference to ‘conception’ in Chapter 1,⁴⁶ ‘conception’ is grounded in the concept–conception dichotomy that Ronald Dworkin discusses in relation to the ‘aim’ of law in a jurisdiction.⁴⁷ Under this thesis, the emphasis is on conception as a product of interpretive, human agency. George states:

A concept must have an essential character or meaning if it is to survive in a variety of environments: there must be something about a concept that gives it communicative force as a linguistic term regardless of the cultural, social, legal or historical context it is used. Conceptions have a different nature. If the concept is the generic form, the conception is the specific. The conception is the way the concept is interpreted and/or implemented in a specific context.⁴⁸

In relation to ‘custom’ or ‘customary’; the ordinary meaning of the root word ‘custom’ is ‘a practice followed by people of a particular group or region’ or ‘a habitual practice of a person’. In this sense, ‘custom’ is synonymous with ‘habit’.⁴⁹ In law, ‘custom’ refers to ‘a common tradition or usage so long established that it has the force or validity of law’.⁵⁰ The following characteristics are key to the designation of a phenomenon as ‘custom’ or ‘customary’: it is a practice; it is ubiquitous to a (particular) people; and time determines its validity at law.

Turning to the approaches to the ‘customary’ space, they can be summed up as follows: The sentimentalist approach views the ‘customary’ space with deference and reverence. This approach proceeds on the basis that the ‘customary’ space is a pre-colonial repertoire of ‘norm’ with historical continuity.⁵¹ The revisionist approach looks at the ‘customary’ space as a colonial invention with a historical specificity and whose core purpose was to entrench colonial domination.⁵² The legal pluralism

⁴⁶ See Chapter 1, note 1.

⁴⁷ See R Dworkin *Law’s Empire* (Cambridge, Mass.: Belknap Press, 1986) 90–96; and R Dworkin, note 7, 134–136.

⁴⁸ See A George, Chapter 1, note 1, 805.

⁴⁹ See CT Onions, Introduction, note 2.

⁵⁰ B Garner *et al.* (eds.) *Black’s Law Dictionary* (St. Paul, Minnesota: West, 2004).

⁵¹ See S Roberts ‘Some Notes on the “African Customary Law”’ (1984) (1–2) *Journal of African Law* 1.

⁵² See S Roberts, above; F Snyder ‘Colonialism and Legal Form: The Creation of “Customary” Law in Senegal’ in C Sumner (ed.) *Crime, Justice and Underdevelopment* (London: Heinemann, 1981) 90–121; F Snyder ‘Customary Law and the Economy’ (1984) (1–2) *Journal of African Law* 34; P

approach advocates an understanding of the ‘customary’ space that requires the analysis of the lived reality of the ‘indigene’ society; whereby State or ‘lawyers’ ‘customary’ law may be recreated and re–interpreted to serve interests of the ‘indigene’ society.⁵³ A discussion of the three approaches follows:

1 The Sentimentalist Approach to the ‘Customary’ Space

Under this approach, the nature of the ‘customary’ space, particularly its normative basis; and the extent of its survival, transformation and historical continuity, are often taken for granted. In relation to land, ‘customary’ (land) tenure has a communitarian *ethos*. Peters has observed that this communitarian *ethos* to ‘customary’ land tenure stemmed from a patronizing, imperial attitude amongst the early colonial administrators and missionaries who viewed ‘communal’ tenure as inferior to individual, private landholding that was pervasive, for example, under the English landholding system.⁵⁴ In the African context, once colonial rule got entrenched, the communitarian *ethos* of ‘customary’ (land) tenure was ‘profoundly shaped’ and often served the interests of the colonial State, private Europeans and an African elite comprising mostly of male, African chiefs and an emergent male–dominated entrepreneurial class.⁵⁵ This process of ‘shaping’ often led to a restatement of ‘customary’ law of a colony. In the case of the Malawi, for instance, one finds a restatement of customary land law under the Restatement of African Law Project that was done by the School of Oriental and African Studies of the University of London.⁵⁶

Fitzpatrick ‘Traditionalism and Tradition Law’ (1984) (1–2) *Journal of African Law* 20; A & RB Seidman ‘The Political Economy of the Customary Law in the Former British Territories of Africa’ (1984) (1–2) *Journal of African Law* 44; M Chanock *Law, Custom and Social Order* (Cambridge, Cambridge University Press, 1985); T Ranger ‘The Invention of Tradition in Colonial Africa’ in E Hobsbawm & T Ranger (eds.) *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) 211–262; and M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, New Jersey: Princeton University Press, 1996). See also C Ng’ong’ola, *Statutory Control of Land and the Administration of Agrarian Policies in Malawi*, Introduction, note 11; and PE Peters, Introduction, note 6.

⁵³ See for example F von Benda–Beckmann ‘Law out of Context: A Comment on the Creation of Tradition Law Discussion’ (1984) (1–2) *Journal of African Law* 28.

⁵⁴ See PE Peters ‘Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions’ (2009) 37(8) *World Development* 1317, 1317. On the patronizing, imperial attitude: See the Lugard and the Swynnerton Plan, both in Introduction, note 37.

⁵⁵ See PE Peters, above.

⁵⁶ The Project followed the London Conference on the Future of Law in Africa, December, 1959–January, 1960, and the Dar es Salaam Conference on Local Courts and Customary Law in Africa, 1964: See JO Ibik *Restatement of African Law, Volume 4: Malawi II, The Law of Land, Succession, Movable Property, Agreements and Civil Wrongs* (London: Sweet & Maxwell, 1971).

Two points must be made here: The ascertainment of what the ‘customary’ space is poses real methodological challenges because the sources are ‘suspect’ or simply do not exist.⁵⁷ Critics of the approach have argued that the ‘customary’ space has been misrepresented or indeed ‘invented’ such that the emergent ‘distortion’ served a ‘purposive manipulation’.⁵⁸

2 The Revisionist Approach to the ‘Customary’ Space

As it was briefly stated earlier, the revisionist approach proceeds on the basis that the ‘customary’ space is a colonial construction under a scheme that involved the colonial State and the African elite. Some of the most prolific proponents of this approach include Simon Roberts, Francis Snyder, Peter Fitzpatrick, Martin Chanock, Mahmood Mamdani, Anne and Robert Seidman, and Terence Ranger.⁵⁹ These proponents have criticized the sentimentalist approach on the grounds that it reifies a normative continuity from pre-colonial to colonial (African) society; they also raise methodological concerns relating to the ascertainment of the ‘norms’; and more critically, they argue that the interface between the colonial ruler and the male, African elite has produced that which has been called ‘customary’ law and has been applied in the colonial, ‘native’ courts.⁶⁰ They also argue that the violence occasioned by the incidence of colonialism in Africa, for example, entails that the erstwhile ‘acephalous’ African groups were, in the words of Roberts, subjected to ‘discontinuities, abrupt transition and coercive domination’.⁶¹ Fitzpatrick and Snyder have gone on to argue that this ‘shaping’ is generally imbricated in the capitalist mode of production.⁶² Economic and political interests have greatly influenced the interpretation and re-interpretation of the ‘customary’ space.⁶³ The ‘myth’ of the ‘customary’ space, it has been argued, was a necessary ‘totem’ for colonial capitalism to flourish.⁶⁴

⁵⁷ See S Roberts, note 51. See also D Henige ‘Oral Tradition as a Means of Reconstructing the Past’ in JE Philips (ed.) *Writing African History* (Rochester: University of Rochester Press, 2005) 169–190.

⁵⁸ See P Fitzpatrick, note 52.

⁵⁹ See note 52.

⁶⁰ See S Roberts, note 51;

⁶¹ S Roberts, note 51, 3.

⁶² See P Fitzpatrick; F Snyder, both note 52; and F von Benda-Beckmann, note 53.

⁶³ See P Fitzpatrick; and F Snyder, both note 52.

⁶⁴ Cf. P Fitzpatrick, Introduction, note 36; P Fitzpatrick *Modernism and Grounds of Law* (Cambridge: Cambridge University Press, 2001); and A Paliwala ‘Irresolutions of Modernity, Law, Nation and Empire: A Reading of Fitzpatrick’s *Modernism and the Grounds of Law* in conjunction with Hardt and Negri’s *Empire*’ (2003) 1 *Law, Social Justice & Global Development Journal* available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/paliwala/ [visited on 12 November, 2009].

The critics of the revisionist approach contend that the approach does not make a distinction between the ‘customary’ space as applied by the colonial State apparatus or that ‘retrieved’ by Africanist scholars on the one hand and the ‘customary’ space that is lived by the ‘indigenous’ (African) society itself. Franz von Benda–Beckmann has raised another distinction in relation to the treatment of the ‘customary’ space. He has argued that a distinction must be made between created ‘customary’ law that found its way into the State legal system and a ‘customary’ law (that is, a normative system of a people) that remained outside the influence and confines of the State legal system. He has contended that the revisionist approach to the customary space conflates this important distinction.⁶⁵ While this distinction may be made, in my view, the colonial influences also permeate the ‘non–State’ system through, for example, the role of chiefs in colonial public administration.⁶⁶

3 The Legal Pluralism Approach to the ‘Customary’ Space

The reiteration to be made here is that this approach advocates that in the delineation of the ‘customary’ space, the focus must be on the ‘lived’ reality of the ‘indigene’ society.⁶⁷ In relation to land relations, the scholarship on the legal pluralism approach has shown that African societies often had ‘multiple types of authority’ and equally ‘multiple sets of claims over land’.⁶⁸ The scholarship here has increasingly argued that African society had individualized forms of land ownership including rentals and sales.⁶⁹

A number of observations must be made: First, if there is an area of (African) society that has had the most intrusion from the colonial and postcolonial State legal system it is the erstwhile land relations of indigenous (African) society. The distinction that Benda–Beckmann makes above is critical. I will argue here that notions of so-called ‘customary’ land law are in effect elements of statutory land law. Hence, the rhetoric of a continued communitarian *ethos* is not only flawed, it also

⁶⁵ See F von Benda–Beckmann, note 53, 30.

⁶⁶ See for example M Mamdani, note 52.

⁶⁷ See F von Benda–Beckmann, note 53; M Gluckman *The Ideas in Barotse Jurisprudence* (New Haven: Yale University Press, 1965) cited in PE Peters, note 54.

⁶⁸ See PE Peters, note 54. Other scholars criticize mainstream land reform discourse for adopting a linear evolution of ‘customary’ law to ‘formal’ law: See for example A Manji ‘Legal Paradigms in Contemporary Land Reform’ (2006) 44(1) *Commonwealth & Comparative Politics* 151. She argues for a ‘legal–pluralist outlook’ of legal relations because in land reform ‘informal land tenure plays an important part in everyday life, in some cases beneath a thin veneer of state law’: See A Manji, in this note, 163.

⁶⁹ See PE Peters, note 54, 1318.

serves a political purpose which in the postcolony inculcates the interests of the ‘ruling class’. In the case of Malawi, this network of the ruling class includes a coterie of the agents of the Bretton Woods Institutions, the postcolonial State, and the *Achikumbe*. Further, in the Malawi context, Clement Ng’ong’ola has observed that the construction of the communitarian *ethos* of the ‘customary’ space often stemmed from a ‘false oral tradition’ that advocates a certain ‘seniority’ in favour of a local elite.⁷⁰

4 Reconciling the Three Approaches

Going forward, I find the revisionist approach to the ‘customary’ space compelling and useful for the analysis of the land question under the on-going land reform in Malawi. This is the case because the colonial encounter often entailed that newly colonized territories were treated as *res nullius* – land without an owner. *Res nullius* is rooted in the feudal notions of *imperium* – acquisition of a ‘territory’ – and *dominium* – acquisition of the land in the territory.⁷¹ The acquisition of colonial sovereignty implied that a new sovereign owned the land under the principle of eminent domain – *dominium eminens* – and determine the applicable law. In Malawi, the acquisition of eminent domain under colonial sovereignty was under a proclamation. It is this proclamation that transmogrified ‘native title’.⁷²

In the Anglophone colony, the applicable law was the English common law and other ‘laws’ applied after passing through the prism of non-repugnance clauses framed in such language as ‘justice and morality’ or ‘natural justice, equity and good conscience’. Hence in the emergent colonial legal system, the ‘legal reality’ was that there was always one ‘system’ of law – the ‘statutory’ – with an appendage called the ‘customary’.⁷³ In any event, if the etymology of ‘custom’ is anything to go by, what has emerged as the ‘customary’ space from colonialism is, I suggest, a misnomer. In light of the arguments from the revisionist approach which I adopt here; there is no

⁷⁰ See C Ng’ong’ola, note 52, 62.

⁷¹ See K Roberts-Wray *Commonwealth and Colonial Law* (London: Stevens & Co., 1966), 625–636; and P McAuslan ‘Legal pluralism as a policy option: Is it desirable, is it doable?’ UNDP–International Land Coalition Workshop: *Land Rights for African Development: From Knowledge to Action* Nairobi, 31 October–3 November, 2005 (Proceedings: <http://www.undp.org/drylands/lt-workshop-11-05.htm>) [visited on 23 May, 2009].

⁷² See Introduction, note 19.

⁷³ See P McAuslan, note 71, 7–8. On the doctrine of repugnancy: see TO Elias *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (London: Stevens & Sons, 1962).

ubiquitous, timeless practice in property relations in the African postcolony that can be attributed to the pre-colonial practices of ‘indigene’ African society.

A final point to be made here is that the sentimentalist and legal pluralism approaches are complementary. In this case, it is perilous to differentiate an ‘understanding’ of the ‘customary’ space that has been passed down generations of State agents or intra-community from the ‘lived’ reality of the ‘indigene’ society.⁷⁴ In any event, reality is a mosaic that is subjective and, among other things, it is prone to the complexities of perception, depth of knowledge, and interpretation.⁷⁵ Hence, to the extent that ‘reality’ – as lived or otherwise – is prone to construction, the legal pluralism approach to the ‘customary’ space is tenuous. However, beyond the legal ‘capture’, under a process of hegemonic responsabilization new power relations may arise which subordinate both the State and ‘non-State’ spaces.⁷⁶

B The Nature of ‘Customary’ Tenure

Following from the discussion of the root of the ‘customary’ space generally, the central argument here is that a conception of ‘customary’ (land) tenure – with a communitarian *ethos* – as distinct from statutory (land) tenure – with a private, exclusive *ethos* – needs unpacking. Land tenure entails the nature of landholding. A clear understanding of land tenure is pertinent as it informs the direction of its reform. The colonial legacy in Africa trail blazed a dualist land tenure system often sharply contrasted as ‘statutory’ and ‘customary’. The worldview here is that ‘statutory’ tenure is based on a liberal legal order and a right holder has the power to fully transfer or sale the interest in land in favour of another person.⁷⁷ The anti-thesis is that under ‘customary’ tenure while the interest in land is supposedly transferable, it is not saleable.

In the same way that the ‘customary’ space is a colonial construction, the same can be said of ‘customary’ tenure. In the Anglophone African colony, the conception of the so-called ‘customary’ tenure under a communitarian *ethos* and the attribution of the rights in land – the usufruct – to a chief served a critical political function. The role of a chief under ‘customary’ tenure was the basis of indirect rule as a system of

⁷⁴ See F Snyder, note 52.

⁷⁵ See for instance H Bless *Social Cognition: How Individuals Construct Reality* (Hove: Psychology Press, 2004); and also P Bourdieu *In Other Words: Essays Towards a Reflexive Sociology* (Cambridge: Country Press, 1990).

⁷⁶ See the discussion in Chapter 7.

⁷⁷ See M Mamdani, note 52.

control by the colonial Sovereign in the countryside. The discussion of the nature of ‘customary’ tenure looks at the ‘juridical’ construction of ‘customary’ tenure and the discourse arising from the Australian case of *Mabo v Queensland (No. 2)*.⁷⁸

1 The ‘Juridical’ Construction of ‘Customary’ Tenure

In the British Empire, the juridical construction of ‘customary’ tenure occurred in the judiciary as well as the colony’s legislature. In the case of the judiciary, the construction occurred both at the level of the colony and at the centre of Empire through the Privy Council. This judicial and legislative intervention was complemented by the institution of a chief whose role was often legitimized under statute. The combined effect of the judicial and legislative intervention and the role of the chief meant that ‘customary’ tenure assumed the force of law. Below are the interventions:

‘Customary’ Tenure in Court

In the British Empire, three early 20th Century CE decisions have set the pace for the construction of the so-called ‘customary’ tenure. These decisions are *Nireaha Tamaki v Baker*,⁷⁹ *In Re Rhodesia*⁸⁰ and *Amodu Tijani v The Secretary, Southern Nigeria*.⁸¹ The principle that has emerged from these cases is that ‘customary’ tenure – or precisely, ‘native title’ – is dependent on an act of annexation or cession followed by proclamation of a colonial sovereignty. Hence, ‘customary’ tenure is transmogrified from the radical title of the colonial sovereign. The comprehension of the so-called ‘customary’ tenure by the colonial judiciary shows a patronizing undertone. In *In Re Rhodesia*, Lord Davey in delivering the judgement of the Privy Council states:

It seems to be common ground that the ownership of the lands was “tribal” or “communal” but what precisely that means remains to be ascertained.

[...]

The estimation of the rights of the aboriginal tribes is inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our laws and then to transmute it into the substance of transferable rights of property as we know them.⁸²

⁷⁸ (1992) 175 Commonwealth Law Reports 1 [hereafter ‘*Mabo*’].

⁷⁹ [1901] A.C.561 [hereafter ‘*Nireaha Tamaki*’].

⁸⁰ [1919] A.C. 211.

⁸¹ [1921] 2 A.C. 399 [hereafter ‘*Amodu Tijani*’].

⁸² See pages 233–234 of the judgement. See also *R v Earle of Crewe ex parte Sekgome* [1910] 2K.B. 526; *Sobhuza II v Miller* [1926] A.C. 518; and *Nyali v Attorney General* [1955] 1Q.B.1.

This propensity towards ‘othering’ the nature of ‘customary’ tenure almost automatically led to Viscount Haldane in *Amodu Tijani* declaring that native title in land (at least in the British Empire) was a usufructuary right.⁸³ The Viscount went on to state that the title lay in the community and the chief often held a ‘fiduciary’ role akin to a trustee.⁸⁴ He acknowledged, however, that the enjoyment of the right to possession required a close study of the history of the particular community.⁸⁵ The terms of the annexation or cession also determined the precise nature of the ‘customary’ tenure.⁸⁶

Once the nature of the ‘customary’ tenure was proscribed as communitarian and the chief was a repository of the usufruct, it then became, in my view, the juridical fortress of the divisive indirect rule in the Anglophone colony.⁸⁷ This construction, as hinted at earlier, has had implications for the nature of the development of colonial capitalism. This was part of the ideology of colonial domination.⁸⁸

In the same way, there are varied approaches to the ‘customary’ space; the nature of ‘customary’ tenure has polarized scholarship in the academy. Beyond *Nireaha Tamaki*, *In Re Rhodesia* and *Amodu Tijani*, the works by African scholars such as T. Olawale Elias⁸⁹ and Africanist scholars such as Anthony Allott has entrenched the communitarian *ethos* of ‘customary’ tenure. There are however two schools to the communitarian *ethos* of ‘customary’ tenure: First, there are those who argue that pre-colonial African society preclude notions of individual ownership of property. The principle in *Nireaha Tamaki*, *In Re Rhodesia* and *Amodu Tijani* is endorsed as a correct ‘crystallization’ of the law.⁹⁰ The second school, and directly opposed to the first, is that the so-called ‘customary’ tenure was only communitarian prior to the allocation of a piece of land in favour of a particular family. Upon allocation of a piece of land in favour of a family, that family acquired all rights in

⁸³ See page 403 of the judgement.

⁸⁴ See pages 403–404 of the judgement.

⁸⁵ See page 404 of the judgement.

⁸⁶ See page 410 of the judgement.

⁸⁷ Mahmood Mamdani has referred to this state of affairs as ‘decentralized despotism’: See M Mamdani, note 52. See also the Lugard thesis and the Swynnerton Plan, note 54.

⁸⁸ See F Snyder, note 52.

⁸⁹ See for example TO Elias *Nigerian Land Law* (London: Sweet & Maxwell, 1971) and AN Allott *The Ashanti Law of Property* (Stuttgart, 1966) in K Akuffo, Introduction, note 7.

⁹⁰ See the discussion in K Akuffo, above.

that piece of land exclusive of all members of that community.⁹¹ The precise content of the individualized rights is less clear.⁹² The polarization brings to the fore Berger and Luckmann's observation that 'reality' once constructed often it is defended by the constructor and non-creator alike.

On the communitarian *ethos* of 'customary' land tenure, Clement Ng'ong'ola states:

[I]t is incorrect to ascribe land rights to communities or groups identified as 'tribes' or 'clans'. These are now ubiquitous linguistic and cultural clusters of little relevance to land tenure. The 'village' occupied by persons belonging to different tribes in some cases, is the social and geographical unit within which land rights are exercised. But even here, the village 'community' may enjoy rights of user as a group only in unallocated land or public land. Individuals or families may enjoy exclusive and uninterrupted use of allocated gardens. A sweeping statement that land belongs to the community and never to the individual obscures the varying interests which groups and individuals can enjoy in different land categories.⁹³

Beyond Ng'ong'ola, Chanock has also advanced a compelling case in relation to 'customary' tenure.⁹⁴ The nature of 'customary' tenure cannot be divorced from the root of the 'customary' space. In this respect, attempts to locate 'customary' tenure in a pre-colonial or postcolonial society is to ignore the fact that land relations were most aggressively modified and subsumed under a colonial legal system. Chanock has argued in relation to the 'customary' space generally that it is a product of a three-tiered process of 'legal mythology' that has involved the nature of 'British functionalist anthropology' which presented 'traditional' legal systems as 'extant' and tended to downplay any 'elements of conflict' or contradiction; the role of a 'neo-traditionalist African scholarship' which has nurtured the idea of a 'surviving African customary law'; and a value-added 'African legal heritage' that has emerged without a 'history'.⁹⁵

Hence, in the context of this mythologization of the 'customary' space, Chanock has buttressed the revisionist approach to the nature of the 'customary' space (and by extension 'customary' tenure). Using evidence from Anglophone Africa, he contends:

The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualising relationships and powers and a weapon within African communities which were interpreted

⁹¹ See for example M Mamdani, note 52, 139–140; GS Kamchedzera, note 23; J Nankumba 'Customary Land Tenure and Rural Development: The Case of Lilongwe ADD' (1986) 13 *University of Malawi Journal of Social Science* 57; and HWO Okoth-Ogendo, and B Cousins, both note 40, 68.

⁹² See K Akuffo, note 89, 69.

⁹³ See C Ng'ong'ola, note 52, 87–88.

⁹⁴ See generally M Chanock, note 52.

⁹⁵ See M Chanock, note 52, 3–10; especially 3 and 4.

and fought over by those involved in moral terms. The customary law, far from being a survival, was created by these changes and conflicts. It cannot be understood outside of the peculiar institutional setting in which its creation takes place. African legal conceptions, strategies and tactics are formed both by the impact of capitalism and by the interaction of the communities thus affected with the concepts, strategies and power of British colonial legal institutions.⁹⁶

And in respect of the ‘non-statutory’ and ‘non-English’ parts of law applied in colonial and postcolonial courts which have been appropriated as ‘customary law’, Martin Chanock comments:

[I]f we look at how the customary law came into being, resting an Africanising strategy upon it can look a little odd. It is not simply that customary law has changed in both content and form during the colonial period. It is that the circumstances of its development made it a part of an idealisation of the past developed as an attempt to cope with social dislocation. It was defensive in spirit, defensive not only against British rulers but against those Africans whose growing involvement in wage labour and market agriculture was leading them towards different interpretations of obligations and properties.⁹⁷

The following therefore could not have been more poignant from Chanock:

In stressing that customary law is not customary I cannot claim to have made a particularly startling discovery [...] [I]t was a part of a process of legalisation, of a transformation in African institutions rather than a continuity.⁹⁸

Once the nature of the ‘customary’ space (and by extension, the ‘customary’ tenure) is understood neither as a continuity of the pre-colonial into a colonial status quo; nor that the ‘customary’ space is frozen in time and space with the declaration of colonial sovereignty, we can then begin to analyze the interest in the land that may accrue to the land deprived. I begin this discussion under section III below.

Legislative Intervention and the Role of Chiefs

The communitarian *ethos* of ‘customary’ tenure is equally dependent on the chief – the traditional authority – for its optimal functionality. For it is in the chief that the usufruct is vested. The institution of chiefs has been problematic in the African colony and postcolony; particularly in the context of land relations. Whether a chieftaincy predates colonialism or it is its blatant creation, the charge against the African chiefs is that they have been ‘appropriated’ for a multiplicity of aims, including repression and the ‘ordering’ of society into ‘citizens’ and ‘subjects’.⁹⁹ The preoccupation with chiefs arises from a basic tactic. Peters states:

⁹⁶ See M Chanock, note 52, 4.

⁹⁷ See M Chanock, above.

⁹⁸ See M Chanock, note 52, 4. See also K Roberts-Wray, note 71.

⁹⁹ See M Mamdani, note 52; PE Peters, note 52; and F Nyamnjoh ‘Chieftaincy and the Negotiation of Might and Right in Botswana Democracy’ (2003) 21(2) *Journal of Contemporary African Studies* 233. On the tendency to conflate ‘political power’ and ‘power over property’: See C Ng’ong’ola, note 52, 58–64.

[C]olonial rulers confused territoriality with sovereignty, and conflated African ritual roles, whose authority lay in rain-making or fertility of the land, with political roles exerting authority over people in lineage, clan or chiefdom. Where the colonial rulers could not identify an appropriate 'chief', they created one.¹⁰⁰

The African colonial and postcolonial State has legislation for the regulation of chieftaincy through appointments, dismissals, promotions, and suspensions. Mamdani makes a forceful account of decentralized despotism under the British colonial model where the chiefs played a crucial role in 'pacifying' the countryside.¹⁰¹ Indeed in Malawi, for example, chiefs were 'reined in' under the Native Authority Ordinance of 1913 and the Native Courts Ordinance of 1914. The incorporation of existing chieftaincies and the creation of chieftaincies where none existed raise legitimacy problems. This is particularly the case from the perspective of the 'beneficiaries' of land given the fact that the chiefs are the supposed holders of the usufruct under 'customary' tenure.

2 The *Mabo* Discourse

Nireaha Tamaki, In Re Rhodesia and *Amodu Tijani* tacitly entrenched the principle of *terra nullius*.¹⁰² This is the case because the decisions suggest that the basic presumption is that a proclamation of colonial sovereignty superseded all rights or interests in land. The survival of the rights or interests in land of an 'indigene' society turned on the interpretation of the terms of annexation or cession. In the African context, *Amodu Tijani* held that, if anything, the 'indigene' society had a usufruct.

Mabo, in many respects is consistent with *Nireaha Tamaki, In Re Rhodesia* and *Amodu Tijani*. However, *Mabo* is radical in the way it enunciated the following principles: the original right in land of an 'indigene' society is not extinguished by mere lack of recognition by a new sovereign. Second, the original right of the 'indigene' society is extinguished by specific government action through a grant of

¹⁰⁰ See PE Peters, note 52, 272.

¹⁰¹ See M Mamdani, note 52; and R Muriaas 'Local Perspectives on the "Neutrality" of Traditional Authorities in Malawi, South Africa and Uganda' (2009) 47(1) *Commonwealth & Comparative Politics* 28.

¹⁰² It is a principle of international law that generally effective control and occupation of a territory is a basis for recognizing the sovereignty of another state over territory: see M Shaw *International Law* (Cambridge: Cambridge University Press, 2003). Malcolm Shaw suggests that European colonial powers exerted their sovereignty in Africa through cession. He rejects the concept that Africa was treated as *terra nullius*: see M Shaw *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986) 31–33, 38. The way the rights of the indigenous societies were ignored during the colonial encounter reveals a patronizing and hegemonic interpretation of the principle of *terra nullius*. Patrick McAuslan has aptly described the colonial encounter as 'government sanctioned land grabbings': see P McAuslan, Introduction, note 44, 3.

land in freehold or other limitation set down under statute. Third, and subject to the previous two principles, the colonial sovereign did not acquire eminent domain that extinguished original interests in land; the acquisition was by virtue of sovereignty and not by virtue of property.

Since then, *Mabo* has been followed, for instance, in *Wik v Queensland*;¹⁰³ *Transvaal Agricultural Union v Minister of Land Affairs*;¹⁰⁴ and *Alexkor Limited and Another v The Richtersveld Communities and Others*.¹⁰⁵ However, *Mabo*, *Wik*, *Transvaal Agricultural Union* and *Richtersveld* must be understood in their proper context when considered outside the realm of Australia and South Africa. Having said that, in the case of the Anglophone colony, notwithstanding the sentiments in *Amodu Tijani*, the original right was extinguished by a specific government action.¹⁰⁶ In fact, the added significance of *Transvaal Agriculture Union* and *Richtersveld* is that subsequent government action can reverse prior government action that deprived the right to land to a people. For example, in the South African scenario, the prior government action through the Native Land Act of 1913 (which deprived the right to land to largely non-white communities) was reversed by the subsequent government action under section 25 of the Constitution of South Africa as endorsed by the Constitutional Court of South Africa in these ground breaking cases.

In the context of the nature of the nature of ‘customary’ tenure, the *Mabo* discourse is important because if a process of ‘government action’ has led to the construction of the ‘reality’ known as ‘customary’ tenure, it is possible under the same process to enable the deconstruction of this ‘reality’. In other words, if State agency is at the centre of an understanding of ‘customary’ tenure as a colonial construction, the same form of agency can facilitate its de-bunking.¹⁰⁷

III THE BENEFICIAL INTEREST IN LAND

So far, the discussion of the right to land as a part of the right to property as a social relation has shown the construction of the ‘customary’ space and ‘customary’

¹⁰³ (1997) 187 *Commonwealth Law Reports* 1 [hereafter ‘*Wik*’].

¹⁰⁴ 1997 (2) SA 621 [hereafter ‘*Transvaal Agricultural Union*’].

¹⁰⁵ CCT. Number 19 of 2003, Constitutional Court of South Africa [hereafter ‘*Richtersveld*’].

¹⁰⁶ See for example the issuance of Certificates of Claim in Malawi by the Colonial State in 1902: See BS Krishnamurthy ‘Economic policy, land and labour in Nyasaland’ in B Pachai (ed.) *The Early History of Malawi* (London: Longman, 1972) 384–404.

¹⁰⁷ For a pessimistic view: See H Mostert & P Fitzpatrick ‘Law Against Law: Indigenous Rights and the *Richtersveld* Cases’ (2004) (2) *Law, Social Justice & Global Development Journal* available at http://www.go.warwick.ac.uk/elj/lgd/2004_2/mostertfitzpatrick [visited on 25 January, 2010].

tenure under a scheme meant to buttress colonial capitalism. The scheme and indeed the conception of the statutory–‘customary’ dichotomy were premised on the Lockean labour theory of property or appropriation. While under the scheme, the so-called ‘customary’ space and ‘customary’ tenure was the antithesis, it is my argument that in view of the revisionist approach to the ‘customary’ space, the nature of the ‘customary’ space generally and ‘customary’ tenure in particular, ought to be more nuanced for analytical purposes. This is even more important when examined in the context of the resolution of a land question in political economies such as Malawi. In this section, I make a case for a beneficial interest in land. Under the beneficial interest in land, I propose a mechanism that complements other non–legal strategies in seeking to provide the land deprived with a possibility of greater access to available arable land and in turn enhance resolution of the land question in Malawi.

In the context of land ownership, the proponents of the four attributes of property – nominal title, control, benefit, management – point out that different persons may have rights accruing to different attributes to property. This tiered accrual of rights should not automatically lead to the conclusion often reached in land reform discourse that there is a statutory–‘customary’ dichotomy; and further that the ‘customary’ space or ‘customary’ tenure has a communitarian *ethos*. Kamchedzera has argued in the case of Malawi that the ‘wrong conception’ of the nature of ‘customary’ tenure has had negative implications for (the much wider) agrarian reform in the country.¹⁰⁸

The question that arises is how can an understanding of the beneficial interest in land enhance the resolution of the land question in political economies through, as it were, the possibility of greater guarantees for access to available arable land for the land deprived? The argument here is that building on the conception of the right to property as a social relation, the beneficial interest in land potentially enhances the resolution of the land question in political economies such as Malawi. There is a fuller engagement with the case for the resolution of the land question in Malawi in Chapter 7. The discussion here is limited to the conception of the beneficial interest in land.

First, the nature of the beneficial interest: Beneficial interest is more refined in equity than in law. In equity, the beneficial interest is the interest of value, worth or

¹⁰⁸ See GS Kamchedzera, note 23, 190, 192–194.

use of property that a person does not own at law.¹⁰⁹ For my purposes, a beneficial interest must be considered in the context of a fiduciary relationship if it is to add value at all in land reform. A fiduciary relationship may be broadly understood as ‘a relationship of confidence in which equity imposes a duty upon a person in whom confidence is reposed in order to prevent abuse of that confidence.’¹¹⁰ Under a fiduciary relationship, a beneficiary has a proprietary right of claim against another person except a bona fide purchaser of a legal estate for value. A fiduciary relationship is routinely construed strictly to curb fraud.¹¹¹ What underlies a fiduciary relationship is trust. Trust bears confidence (in some ‘entity’ or ‘being’). Trust or confidence connotes responsibility. Responsibility is often described as the ‘state of being responsible’.¹¹² This suggests that there is a benchmark that measures this state. In light of people-generated responsabilization set out in the Introduction, the beneficial interest in land must be understood in the context of a responsabilized State.

The nature of the beneficial interest necessitates a discussion of the conception of ‘customary land’ under the Land Act.¹¹³ ‘Customary land’ is defined as ‘all land held, occupied or used under customary law, but does not include any public land.’¹¹⁴ Notwithstanding the reference to a category of land known as ‘customary land’ under the Land Act, the cumulative effect of the powers reposed in the Minister under the Act as an agent of the postcolonial State should logically lead to the conclusion that ‘customary land’ under the Land Act in Malawi is a phantasm and a majority of the population in the country have interests similar to tenancies at will. This is the reasoning: ‘Customary land’ under the Land Act is supposedly the ‘undoubted property of the people of Malawi’, and further that the land vests in ‘perpetuity in the President.’¹¹⁵ Hence, the legal title in ‘customary land’ does not vest in the people of Malawi; it vests in the President as a symbol of the postcolonial State. The vesting here suggests the creation of a trust. The nature of the trust is not clarified under the

¹⁰⁹ See for example G Watt *Trusts and Equity* (Oxford: Oxford University Press, 2008) and K & S Gray *Elements of Land Law* (Oxford: Oxford University Press, 2009).

¹¹⁰ See G Watt, above; K & S Gray, above; and RP Meagher *et al. Equity: Doctrine and Remedies* (Sydney: Butterworths, 1975) 107.

¹¹¹ See G Watt; K & S Gray, both note 109; and RP Meagher *et al.*, above.

¹¹² See CT Onions, Introduction, note 3.

¹¹³ Cap 57:01, Laws of Malawi.

¹¹⁴ Section 2 of the Land Act.

¹¹⁵ Section 25 of the Land Act. At common law, the tenancy at will may be terminated by mere notice. Under section 10 of the Lands Acquisition Act, ‘fair compensation’ for expropriated land is not based on the value of land or other factors such as loss of business, goodwill etc. This fortifies my view that occupants of ‘customary’ land are in fact akin to tenants at will. This is the sense in which ‘tenancy at will’ or ‘tenant at will’ is used under the thesis.

Act. Its creation is at best declaratory only. If the reference to the ‘people of Malawi’ is meant to give certainty to the objects of the trust, the rights of the objects – the people of Malawi – are not clarified either under the Act. In this respect, this amounts to a ‘political trust’ or, in the words of Vice Chancellor Megarry, a ‘trust in the higher sense’.¹¹⁶ In this respect, it only creates a government obligation which is unenforceable in a court of law.¹¹⁷

Hence, the declaration that customary land is the undoubted property of the people of Malawi is one of principle without any legal significance under the Land Act.¹¹⁸ Section 5 of the Land Act does not grant the people of Malawi any enforceable right at law. The people of Malawi only have the right of use and occupancy over ‘customary land’.¹¹⁹ The postcolonial State has powers to dispose of ‘customary land’ as private land under leasehold;¹²⁰ and may also declare ‘customary land’ as public land¹²¹ in which case it is possible for the land to be converted into freehold.¹²² In sum, section 25 of the Land Act creates a political trust over ‘customary land’ where the President is a trustee of the people of Malawi in a symbolic sense.¹²³

The reference to the people of Malawi under the Land Act is not a reference to legal owners. It is a reference to tenants at will with a beneficial interest based on their right to use or occupancy of the land. Hence, it is useful for analysis to construe a constitutionally-based, ‘fiduciary’ relationship between the postcolonial State and the people of Malawi for purposes of land reform under section 12 of the Constitution. The core duty of the postcolonial State under this ‘fiduciary’ relationship is to guarantee access to available arable land that serves as a meaningful benchmark for dignified living on the part of the land deprived.

IV FINAL WORD

In this Chapter, I set out to provide an understanding of the conception of the right to land through the nature of a ‘right’ and ‘property’ under the framework of a

¹¹⁶ See *Tito & Others v Waddell & Others (No.2)* [1977] 1 Ch. 106 [hereafter ‘*Tito v Waddell (No.2)*’] 216.

¹¹⁷ See *Tito v Waddell (No.2)*, above.

¹¹⁸ See M Msisha ‘Land Law in Malawi’ in Government of Malawi *The Final Report of the Presidential Commission of Inquiry on Land Policy Reform, Volume III* (Zomba: Government Printer, 1999) 30–31.

¹¹⁹ Section 26 of the Land Act.

¹²⁰ Section 5 of the Land Act.

¹²¹ Section 27 of the Land Act.

¹²² Section 38 of the Land Act.

¹²³ See *Tito v Waddell (No.2)*, note 116; and M Msisha, note 118, 32.

right to property as a social relation. The discussion has revealed that the right to land is dominated by liberal discourse which is located in the Lockean labour theory of property or appropriation. This conception is grounded in the de–abstraction approach to rights discourse where history and context are irrelevant for the analysis of social phenomenon.

The liberal tilt of the right to land serves a critical function in a political economy tradition that lauds the efficacy of the market. Building from Chapter 1, I have reiterated the contention that the market is the value that underlies hegemonic responsabilization. This tilt is necessary for the responsabilization of the individual as *homo economicus* to sustain a particular form of land relations. There are land owners and the land deprived who in the scheme of things under the Foucauldian phenomenon of scarcity serve a particular ‘convenient end’ in the political economy.¹²⁴

I have also argued that the framework of a right to property as a social relation is useful in understanding the subjective historical and contextual specificities that define the conception of property, let alone the right to land, in a polity. The emphasis here is on the awareness of the social processes that produce (social) reality. This social constructionist approach is pertinent in the understanding of the ‘customary’ space and ‘customary’ tenure. The ‘customary’ space (and ‘customary’ land tenure) is a product of colonial construction that served the colonial agenda. The delineation of ‘customary’ tenure guaranteed a dual role of skewed land relations and the ‘pacification’ in the colony and the postcolony.

In countering the sentimentalist and legal pluralism approaches to the ‘customary’ space, one of the points worth repeating here is that land relations in the colony and postcolony have been aggressively subsumed under a State legal system. ‘Customary’ land tenure – even as a colonial construct – is validated under statutory law. I suggest that it is a misnomer to talk of ‘customary’ land law because there is always a single statutory land law regime. One thing that emerges from *Nireaha Tamaki*, *In Re Rhodesia*, *Amodu Tijani* and what I have called the *Mabo* discourse is that the recognition and validation of ‘native title’ was through the acknowledgement of the radical title of the State sovereign. However, a positive aspect that emerges from the *Mabo* discourse, particularly the South African cases of *Transvaal*

¹²⁴ See M Foucault, Chapter 1, note 32.

Agriculture Union and *Richtersveld* is that government action can serve an ‘emancipatory’ role in favour of the land deprived. I will build on this point in Chapter 7.

Finally, in light of the recognition of ‘native title’, I have discussed the building blocks for a proposition of the beneficial interest in land that should enhance the resolution of the land question in Malawi. The fleeting discussion so far demonstrates that the ‘customary’ tenure under the Land Act renders a significant proportion of the population in Malawi similar to tenants at will. However, since it is possible to discern an interest in land based on an interest akin to a tenancy at will, the proposal is to explore this possibility under a framework of people-generated responsabilization. Again, the in-depth discussion of the point takes place in Chapter 7.

Chapter 3

Market-Based Modelling in Land Reform Discourse

I THE CONTEXT

Chapter 2 has shown how a process of customarization led to the construction of a particular conception of so-called ‘customary’ land tenure that is supposedly based on a communitarian *ethos*. Indeed, this communitarian *ethos* has led to a ‘conventional logic’ which states that since there is an absence of individual rights and an apparent ‘dominance’ of ‘group rights’ in the ‘customary’ space, the individual is insecure. This insecurity of the individual leads to disinvestment and negative growth in a political economy.¹ This train of thought is variously referred to as the economic inefficiency argument or the tragedy of the commons thesis.²

Since the Lugard thesis, the Swynnerton Plan and on the strength of the efficiency argument, proposals were rife in Anglophone Africa for the reform of ‘customary’ land tenure by its individualization through land titling.³ Research on the land reform projects of the 1960s, 1970s and the early 1980s has documented the failures of these projects to foster credit and land markets, or to generate positive economic growth. These projects dominated the first law and development movement and they tended to seamlessly evolve from land reform into land law reform projects.⁴ These were eras of the archetypal developmental State. In the 1980s, the role of Bretton Woods Institutions has been significant through policy developments relating to structural adjustment programmes and nascent poverty reduction strategies which have had negative implications for land reform in political economies such as Malawi.⁵

At the turn of the 1990s, there has emerged what has been called the ‘human-centred’ approach under the new wave of land reform. The rhetoric here is that land reform must be less ‘economically driven’ and ‘pro-poor’.⁶ The efficiency argument has not disappeared under the new wave. Hernando de Soto through his work aptly entitled *The Mystery of Capital: Why Capital Triumphs in the West and Fails*

¹ See World Bank, and C Toulmin & J Quan, both in Introduction, note 1; PE Peters, Introduction, note 6; and PE Peters, Chapter 2, note 54.

² Hereafter referred to as the ‘efficiency argument’.

³ See the Lugard thesis and the Swynnerton Plan, both in Introduction, note 37.

⁴ See S Borrás, Jr.; K Deininger & H Binswanger; P McAuslan; JP Platteau; C Nyamu-Musembi, all in Introduction, note 44.

⁵ Their role of the Bretton Woods Institutions is further discussed in Chapters 4, 5 and 6.

⁶ See C Toulmin & J Quan, note 1.

Elsewhere,⁷ has, with remarkable tenacity, carried forward the efficiency argument. De Soto's argument is that formalization of interests in land will transform the 'dead capital' of the poor into 'generative capital'.⁸ De Soto's critics have been many.⁹ Peters, for one, has opined that De Soto's thesis is a case of 'an old idea clad in new language'.¹⁰ In her critique of De Soto's thesis, Celestine Nyamu-Musembi has argued that five 'shortcomings' can be highlighted for the failure of land reform in sub-Saharan Africa in the 1960s, 1970s and the early 1980s. The five shortcomings are as follows: the narrow construction of legality meant that legal orders other than the formal legal order are extra legal and hence delegitimized; there has been undue emphasis on the evolutionary theory of land tenure leading to individual title; there has been undue emphasis on the linkage between formal title and the credit market; 'markets' have been narrowly constructed as formal markets; and finally, the insecurity of formal title (through, for example, the threat of foreclosure) has often been ignored.¹¹

Besides De Soto's thesis, it is also worth noting that the new wave of land reform emerges in the context of discontent with State-led land reform. The critics of State-led land reform have raised a number of points: First, they have argued that the reforms were 'slow' due to State bureaucracy. Second, the reforms led to the distortion of land markets through prohibition of land rentals or sales of land earmarked for expropriation. The prohibition, it has been argued, led to land acquisition by inefficient 'producers'. This led to the emergence of a corrupt, informal land market that encouraged speculative landholding in the absence of a 'progressive' land taxation system. Third, the reforms have been criticized for their failure to provide for post-redistribution 'support services' to beneficiaries. Finally, by reason of the 'concept of sovereign guarantee', the reforms have been criticized for being very expensive since the State paid the 'landlords' regardless of whether the beneficiaries paid for the land.¹² Klaus Deininger and Hans Binswanger conclude:

⁷ See H de Soto *The Mystery of Capital: Why Capital Triumphs in the West and Fails Elsewhere* (London: Black Swan, 2001).

⁸ See H de Soto, above; PE Peters, note 1, 1319; and E Wysong & R Perrucci 'Organizations, Resources and Class Analysis: The Distributional Model and US Class Structure' 2007 *Critical Sociology* 211 for a discussion on generative capital.

⁹ See for example C Nyamu-Musembi, note 4; and A Manji, Introduction, note 4.

¹⁰ See PE Peters, note 1, 1319.

¹¹ See C Nyamu-Musembi, note 4.

¹² See S Borras, Jr. *Pro-Poor Land Reform: A Critique* (Ottawa: University of Ottawa Press, 2007).

Most land reforms have relied on expropriation and have been more successful in creating bureaucratic behemoths and in colonizing frontiers than in redistributing land from large to small farmers.¹³

Beyond the problems with State-led land reform, there has surfaced a body of literature that increasingly demonstrates that there is competition and conflict over land. This competition and conflict is accentuated by ‘deepening rifts between and within kin-based, ethnic and regional groups’, and land expropriation by ‘local and non-local agents.’¹⁴ Against this background of competition and conflict, this Chapter looks at the land reform models that are pervasive in current land reform discourse. First, there is a general examination of the power dimension to land reform in section II. Second, section III outlines and analyzes the land reform models that are identifiable in land reform discourse. There are three categories of land reform models that are discussed here, namely; land redistribution, land restitution, and tenure reform respectively. The main argument being made is that to the extent that market as value underpins hegemonic responsabilization, the models are invariably market-based. However, the suggested models ignore the complexity that is presented by the competing interests that are ever-present in a political economy. This indifference undermines the efficacy of market-based land reform models in resolving the land question in political economies such as Malawi. Section IV covers the three emerging issues from the discussion of the categories of market-based land reform models, namely; cooperation of land owners, post-distribution support services, and programme financing.

II THE POWER DIMENSION OF LAND REFORM

Land reform must recognize the power dimension of land and the implication of the control of that power for land reform. Land reform that is oblivious to the power dimensions amongst the various constituencies in a polity will result in virtuous and impractical policies, plans and programmes for a country.¹⁵ A political economy setting is critical in putting land reform in a proper context. In this respect, land reform must clarify who the main beneficiaries are; the suitable approaches for ‘changing patterns of land ownership’; the strategies that are in place to support the livelihood of new land owners etc.¹⁶ The nature of the responses to these fundamental

¹³ See K Deininger & H Binswanger, note 4, 267.

¹⁴ See PE Peters, note 1.

¹⁵ See HWO Okoth-Ogendo, Introduction, note 40.

¹⁶ See L Ntsebeza & R Hall ‘Introduction’ in L Ntsebeza & R Hall (eds.) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (Cape Town: HSRC Press, 2007) 1–24, 2.

queries to land reform will determine the extent to which the reform will ameliorate critical land poverty and ultimately structural impoverishment and inequality in a country.¹⁷

By virtue of the power dimension, the quest for clarity in respect of the direction of land reform is disordered because there are possibly competing social, economic and political perspectives to the reform.¹⁸ The perspectives are not mutually exclusive. They are intertwined and serve a national development objective with slightly different ‘pressure points’: What may be conceived as a social perspective is epitomised by the ‘new donor consensus’ with its focus on ‘livelihoods’ and the reform of the so-called ‘customary’ space. The role of the State is facilitative.¹⁹ Second, an economic perspective emphasizes the growth of a ‘bimodal agrarian policy’ where large scale agriculture operates in parallel to a developed small scale agriculture sector with the former catering for an export agricultural commodity market and the latter satisfying home consumption. The goal here requires a State intervention that ‘sees value in partial ‘delinking’ from the global market’. However, the nature of the current global geopolitics entails that this particular aim faces widespread opposition.²⁰ Finally, what may constitute a political perspective operates at the micro and macro levels: the former is a means to ‘dissolve non-capitalist relations of productions or excessively concentrated power structures’ at the national level. The latter serves as a means of obliterating ‘the political power of large agrarian capital’ and its links with (international) capital.²¹ Suffice it to say that if anything the ultimate goals of the three perspectives are not narrowly compartmentalized; they are intertwined.

The extent to which a society ‘allocates’ a power to a member over a ‘subject matter’ will determine the nature of ‘ownership’ of that ‘subject matter’. Under market-based land reform models, Saturnino Borrás, Jr., in his assessment of land reform discourse, has concluded that the first preference is actually for share tenancy

¹⁷ See R Hall & L Ntsebeza, above, 1–20.

¹⁸ See for example S Moyo, Introduction, notes 5 and 13.

¹⁹ See S Moyo, ‘Land in the Political Economy of African Development: Alternative Strategies for Reform’, Introduction, note 13, 5; C Toulmin & J Quan (eds.), and World Bank, both note 1.

²⁰ See S Moyo, note 19, 6. To a considerable extent, China has ‘gotten away’ with this agenda: see K Griffin *et al.* ‘Poverty and the Distribution of Land’ (2002) 2(3) *Journal of Agrarian Change* 279.

²¹ See S Moyo, note 19. This agenda is perhaps akin to the so-called fast track land reform programme underway in Zimbabwe since 2000: See S Moyo & P Yeros ‘Land Occupations and Land Reform in Zimbabwe: Towards the National Democratic Revolution’ in S Moyo & P Yeros (eds.), Introduction, note 5, 165–205.

reform. He has observed that under the share tenancy reform, the tenancy contracts apparently give the land deprived a ‘footing’ and ‘promise’ for ‘eventual land ownership’ and ‘vertical mobility’ on the ‘agricultural ladder’.²² Hence, a vibrant land rental market is touted as the primary solution to lack of access to land.²³

However, market-based land reform models are more prevalent than share tenancy reform. This is the case because the models are meant to serve as a departure from conventional land policies that did not favour the land deprived.²⁴ Under these models, a key goal is the incorporation of the land deprived themselves in the provision of access to land.²⁵ However, it has been acknowledged that ‘the cooperation of the landlords is the most important factor for any successful implementation’ of these land reform models.²⁶ In practice, these models are said to operate in a negotiated, market context: the land owners – the landlords – ‘volunteer’ to sell their land following an explicit demand by the land deprived to buy. The rhetoric goes that market-based land reform has a demand-driven approach and guarantees a win-win scenario.²⁷

A final word under these introductory observations: While *realpolitik* may partly explain the power dimension of land reform, the real battlefield, in my view, lies in the formulation of the ‘norms’ of land reform as a discourse. Drawing on the discussion of the right to property in Chapter 2, the dominance of the liberal interpretation of the right to property and the calls for the reform of the ‘customary’ space also leads to a focus on the emergence of a nascent, imperial, global State. This State has a ‘decentralized face’ and is ‘underpinned’ by ‘sub-national authorities and spaces’ in favour of ‘a transnational capitalist class’.²⁸ In land reform, the shift to market-based land reform models on the basis of the critique of State-led land reform must also be understood in the context of the changing State. Hence, the nature of land reform in postcolonial economies such as Malawi is shaped by this asymmetry in

²² See S Borras, Jr., note 12, 54.

²³ See S Borras, Jr., above.

²⁴ See S Borras, Jr., note 12, 53.

²⁵ See for example World Bank, note 1.

²⁶ See S Borras, Jr., note 12, 53–54.

²⁷ See S Barros, Jr., note 12, 54–55.

²⁸ See BS Chimni ‘International Institutions Today: An Imperial Global State in the Making’ (2004) 15 *European Journal of International Law* 1. See also OC Okafor ‘Poverty, Agency and Resistance in the Future of International Law: An African Perspective’ (2006) 27(5) *Third World Quarterly* 799. See also L Sklair, Chapter 1, note 117.

global inter-State relations.²⁹ On this note, the next section covers market-based land reform models at the centre of land reform today.

III CATEGORIES OF MARKET-BASED LAND REFORM MODELS

As the net transfer in land ownership epitomises land reform, the transfer can be from the land deprived to the land rich or vice versa. It has been noted that current land reform discourse is tilted towards market-based land reform models. For purposes of this discussion, there are three models designated as: a land redistribution model based on the willing seller/willing buyer approach;³⁰ a land restitution model based on a historicized and contextualized approach to the right to property and more specifically the right to land; and a formal tenure reform model which focuses on the so-called 'customary' land tenure. In most postcolonial States, the three models are used in a combination of at least two or all three models.

Before a detailed discussion of the models ensues, it is pertinent to look at the market as value. In Chapter 1, the ground was laid for the argument that the market is the value underpinning hegemonic responsabilization. Market as value is, in turn, based on the Hayekian catallaxy that underlies neo-liberalism as an ideology. A consideration of market as value highlights the interpretation of so-called neo-liberal frameworks in political economy – what David Harvey calls 'neoliberalization' – as political projects seeking to re-establish and reorganize (global) capitalism.³¹ This re-organization is achieved through 'the prior construction of political consent' rooted in

²⁹ See for example S Borrás, Jr; K Deininger & H Binswanger; and P McAuslan, all in note 4; S Moyo, note 19; H Shams 'Law in the context of "Globalization": A Framework of Analysis' (2001) 35 *International Lawyer* 1589; C Rose 'The "New" Law and Development Movement in Post-Cold War Era: A Vietnam Case Study' (1998) 32 *Law and Society Review* 93. See also D Trubek 'Law and Development: Then and Now' a paper presented to the American Society of International Law, Washington, DC, 1996 cited in C Rose, in this note; M Chibundu 'Law in Development: On Tapping, Gourding and Serving Palm-Wine' (1997) 29 *Case Western Reserve Journal of International Law* 167; A Hanieh 'Praising Empire: Neoliberalism under Pax Americana' in C Mooers (ed.) *The New Imperialists: Ideologies of Empire* (Oxford: One World, 2006) 167–198; S Picciotto 'Networks in International Economic Integration: Fragmented States and the dilemmas of Neo-Liberalism' (1996–1997) 17 *Northwestern Journal of International Law and Business* 1014; S Picciotto 'Liberalization and Democratization: The Form and the Hearth in the Era of Cosmopolitan Post-Industrial Capitalism' (2000) 63(4) *Law and Contemporary Problems* 157; S Picciotto 'The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance' (2005) 18(3) *Governance* 477; RT Roy *et al.* 'Introduction: Neo-liberalism as a shared mental model' in RT Roy *et al.* (eds.) *Neoliberalism: National and Regional Experiments with Global Ideas* (London and New York: Routledge, 2007) 3–13; and L Sklair, note 28.

³⁰ The name of the model signifies a form of hegemonic responsabilization since it points to volition by all parties. In practice, this is not the case. There is a further discussion on the point in Chapter 6.

³¹ See D Harvey, Chapter 1, note 115, 5–38.

a Gramscian ‘common sense’.³² Indeed, in the context of the re-organization, David Harvey observes:

Common sense is constructed out of long-standing practices of cultural socialization often rooted deep in regional or national traditions. It is not the same as the ‘good sense’ that can be constructed out of critical engagement with the issues of the day. Common sense can, therefore, be profoundly misleading, obfuscating or disguising real problems under cultural prejudices.³³

Hence, the dominance of market as a *value* grounding hegemonic responsabilization may be seen through the intellectual permeation and influence of the transnational corporation, the university, the international financial institutional apparatus and the State.³⁴ In the discussion that follows below, what is highlighted is the emergence of market as a dominant *ethos* in development discourse. There are however two levels to this dominance. First, market as value is pervasive at the theoretical level. Market – and indeed neo-liberalism as an economic framework – has not been fully implemented in practice. Second, the nature of neo-liberalism (as the ideology underpinning market as value) is that it is ‘totalistic’³⁵ and grounded in ‘meaning-making’.³⁶ A discussion of market as a value whose ‘goodness’ (or ‘badness’) is embedded in the notion of neo-liberalism as ideology seeks to show that the market is not simply about ‘truth’ or ‘positive description’; it is about ‘normative prescription’.³⁷ In land reform discourse, the relegation of the State into a passive role under a supposedly ‘new’ neo-liberal order is, in my view, part of a process of hegemonic responsabilization whereby the land deprived are constantly shaped as a source of labour or inchoate ‘producers’.³⁸

A Market as *Value*

First, ‘development’ as ‘discourse’ has meant that ‘certain representations’ have dominated its shape and reality while other ‘representations’ have been

³² See D Harvey, above, 39–63.

³³ See D Harvey, note 31, 39.

³⁴ See D Harvey, above.

³⁵ See J Schwarzmantel *Ideology and Politics* (London: Sage, 2008).

³⁶ See S Marks *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 2000).

³⁷ See DK Gondwe *Political Economy, Ideology and the Impact of Economics on the Third World* (New York, London: Praeger, 1992)31–35.

³⁸ The notion of an ‘inchoate producer’ emerges under the land distribution model based on the willing seller/willing buyer approach in so far the model leaves the new, post-distribution owners vulnerable in a land market. The vulnerability arises because there are often weak or non-existent post-distribution support mechanisms for the erstwhile land deprived: See the discussion in section IV of this Chapter and Chapter 6. In this way, inchoate producers are small-scale, auxiliary producers minimally contributing towards national food security.

disqualified ‘and even made impossible’. Hence, development as discourse – development discourse – has meant that development becomes a ‘tale of domination’.³⁹ In this light, development discourse has emphasised the development of the market for economic growth. The role of the State in the market has equally undergone constant invention and re-invention. The role of the State has been shaped as ‘developmental’ in the 1970s; ‘minimalist’ from the mid to late 1980s and 1990s; and at the turn of the 21st Century CE ‘effective’.⁴⁰ The ‘developmental’ State entailed that development policy privileged the role of the State in ‘managing the economy and transforming traditional societies’.⁴¹ The ‘minimalist’ State grew out of the economic failures that marked the end of the 1970s and led to the rise of new economic policy framework in the 1980s which advocated a limited role of the State in the market under structural adjustments programmes devised by the Bretton Woods Institutions.⁴² In this respect, the State was no longer important as the ‘logic of capital’ would govern the market.⁴³ In general terms, this logic of capital in the market has supposedly been underpinned by neo-liberalism.

It is argued that a distinction must be made between market as value which is based on neo-liberalism as an economic framework, and market as value which is based on neo-liberalism as ideology. The distinction is important because the rhetoric underpinning the ‘minimalist’ State corresponds to market as value that is based on neo-liberalism as an ideology. This is the case because the nature of macroeconomics in any country today suggests that the State is in fact far from minimalist in the strict neo-liberal sense.⁴⁴ In this respect, I contend that what has engaged literature on political economy is market as value which is based on neo-liberalism as ideology.⁴⁵

³⁹ See A Escobar *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995) 5.

⁴⁰ See J Ngugi ‘Policing Neo-liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse’ (2005) 26 *University of Pennsylvania Journal of International Economic Law* 513, 525.

⁴¹ See D Trubek & A Santos, Introduction, note 47, 2.

⁴² See J Ngugi, note 40; and D Trubek & A Santos, above.

⁴³ See D Lal *In Praise of Empires: Globalization and Order* (New York: Macmillan, 2006); D Lal and H Myint *The Political Economy of Poverty, Equity and Growth*. (Oxford: Clarendon, 1996) cited in A Hanieh, note 27; S Picciotto, note 27; S Sassen ‘The Participation of States and Citizens in Global Governance’ (2003) 10 *Indiana Journal of Global Legal Studies* 5; and J Stiglitz *Globalization and Its Discontent* (New York & London: Penguin Press, 2002) have argued that the State is important in ensuring that a regulatory framework is in place. The World Bank and the Commission for Africa have appropriated the argument: See World Bank, note 1; and Commission for Africa *Our Common Interest* available from http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf [on file with the author].

⁴⁴ See RT Roy *et al.* (eds.), note 29. Notable exceptions are Chile and Iraq where significant steps were made towards the creation of a ‘neo-liberal State’: See D Harvey, note 31, 5–9, and 64–86.

⁴⁵ See NN Auerbach ‘The meanings of neoliberalism’ in RT Roy *et al.* (eds.), note 29, 26–50, 26–27.

Ideology here is rooted in ‘meaning-making’ as a technique of domination. Susan Marks, for example, has argued that ‘ideology’ must mean ‘the ways in which meaning helps to ground, support, and perpetuate relations of domination.’⁴⁶ She asserts that this conception of ideology allows a ‘critical or oppositional perspective’.⁴⁷

As a way of unpacking neo-liberalism, the following observations are pertinent: The conception of neo-liberalism is rooted in the Mont Pelerin Society’s economic thought which is reflected in the work of Friedrich Hayek; particularly his work that culminates in the catallaxy thesis. The catallaxy has been described as ‘a special kind of spontaneous order produced by the market through people acting within the rules of the law of property, tort and contract.’ On account of this avowed spontaneity, Friedrich Hayek contends that the market is neither ‘a natural phenomenon’ nor ‘is it a result of a contrived government policy’, it is something arrived at through rules of conduct. As the market is a ‘culture’ and not ‘reason’, Hayek concludes that it is unreasonable to have it regulated by the State. The role of the State is to secure the rule of law.⁴⁸

Hayek’s call for rules of conduct – the law of property, tort and contract – resonates with the Foucauldian governmentality thesis which expounds, in part, that government is the conduct of conduct. From this Foucauldian perspective, the Hayekian catallaxy is part of the range of multiform tactics in the regulation of the relationship of persons and things. Hence, the Hayekian catallaxy or market as value are critical tactics in the regulation of production in a market-based economy. Finally, if the notion of neo-liberalism is grounded in the catallaxy thesis, then in recent times, the market as value has since been ‘concretized’ under what has been termed the ‘Washington Consensus’.⁴⁹

The proponents of the Washington Consensus identified three ‘big ideas’ in its original conception: ‘a market economy, openness to the world, and macroeconomic discipline.’⁵⁰ John Williamson articulated a set of ten economic principles as critical

⁴⁶ See S Marks, note 36, 10–11. Susan Marks identifies six conceptions of ‘ideology’, namely, ideology as false consciousness; ideology as class consciousness; ideology as the world view; ideology as political tradition; ideology as social cement; and ideology as culture: see S Marks, in this note, 8–11.

⁴⁷ See S Marks, note 36, 11.

⁴⁸ See FA Hayek, Chapter 1, note 104. See also D Harvey, note 31, 19–22.

⁴⁹ See NN Auerbach, note 45, 27.

⁵⁰ See the discussion in N Serra *et al.*, ‘Introduction: From the Washington Consensus Towards a New Global Governance’ in N Serra & J Stiglitz (eds.) *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford: Oxford University Press, 2008) 3–13.

in the development of a viable market under the Consensus: fiscal discipline; re-direction of public expenditure towards primary health care, primary education, income re-distribution and infrastructure development; tax reform; liberalization of interest rates; competitive exchange rate; trade liberalization; liberalization of foreign direct investment in-flows; privatization of state owned enterprises; deregulation (through the abolition of barriers of entry and exit of goods); and the inevitability of a liberal (private) right to property.⁵¹

The traditional frame of neo-liberal ideology is driven by the conviction that 'free markets and international economic integration [lead to] prosperity, liberal democracy and peace'.⁵² Colin Hay has however acknowledged the difficulty to underpin neo-liberalism in definitional terms, and has noted the primacy of the nexus of neo-liberalism as ideology and market as value.⁵³ It has been suggested that a viable option in understanding neo-liberalism as ideology is to concentrate on its usage as 'one true meaning of the term is impossible'.⁵⁴ Hence, it is arguable that under a political economy analysis, neo-liberalism as ideology must be understood as the platform that informs economic policies that have shaped, and continue to shape, development discourse through privileging market as value. Hence, market as value based on neo-liberalism as ideology informs the agenda of the Bretton Woods Institutions, particularly, the World Bank and the IMF. This neoliberal, ideological characteristic of the market is often the basis of conditionality for loans and grants from the two institutions.

In light of the foregoing, the idea of market as value which is based on neo-liberalism as ideology suggests that it is aspirational. This is the case, as it has been observed earlier, because Statist economic frameworks have never been strictly neo-

⁵¹ See J Williamson 'What Washington Means by Policy Reform', November, 1989 cited in J Ngugi, note 36; and also R Gordon & J Sylvester 'Deconstructing Development' (2004) 22 *Wisconsin International Law Journal* 1. There are varied meanings that have been attached to 'Washington Consensus' which are not the brainchild of John Williamson: The first is the 'bipolar doctrine' of the Bretton Woods Institutions which advocated a fixed or floated exchange rate as opposed to Williamson's competitive exchange rates. The second – again a Bretton Woods institutions' innovation – called for liberalization of capital accounts as opposed to liberalization to capital flows to foreign direct investment. Third, the Consensus has been used as a synonym of neo-liberalism or market fundamentalism: See J Williamson 'A Short History of the Washington Consensus' in N Serra & J Stiglitz (eds.), note 50, 14–30.

⁵² See R Gordon & J Sylvester, above, 44–45.

⁵³ See C Hay 'The genealogy of neo-liberalism' in RT Roy *et al.* (eds.), note 29, 51–70, 51–55.

⁵⁴ See NN Auerbach, note 45, 28.

liberal.⁵⁵ It is suggested that it is more apt to refer to ‘regulated marketization’ in the context of a Statist economic framework.⁵⁶ The description ‘regulated marketization’ is more precise because it is increasingly acknowledged under development discourse that State intervention may be justified in the face of market failure. Under the ‘emerging paradigm’ of regulated marketization, the focus is on ‘appropriate regulation’.⁵⁷ The State is a ‘regulator’ under market-based economic reform in a country. Hence, while development discourse has been marked by shifts in the role of the State in the economy, the primacy of the market has been pervasive and the role of the State has been transformed to varying degrees. If under structural adjustment programmes the role of the State was supposedly decentred, it is also suggested that it has since been re-centred under the Washington Consensus and regulated marketization.⁵⁸

B Categories of Market-Based Land Reform Models

The general principle that emerges from the foregoing discussion is that market as value that is based on neo-liberalism as ideology dominates development discourse. This domination has inevitably permeated land reform discourse.⁵⁹ Land reform models being touted in the ‘South’ are invariably market-based and emerge in the context of the dominance of the efficiency argument.⁶⁰

It has already been noted that land reform must necessarily entail a net transfer of land ownership. A focus on net transfer means that land reform must address concentration of land in a country under an index of the availability of arable land per capita. If arable land per capita is concentrated in a few hands, the net transfer must mean that land transfers will move from the land rich to the land deprived.⁶¹ The three market-based land reform models will now be discussed in turn:

⁵⁵ Cf. FA Hayek, note 48; G Kendall ‘From Liberalism to Neo-liberalism’ available from http://eprints.qut.edu.au/archive/00000134/01/Gavin_Kendall.pdf [on file with the author]; and D Harvey, note 31.

⁵⁶ The term ‘regulated marketization’ has been used in the context of communication: see Y Zhao ‘From Commercialization to Conglomeration: The Transformation of the Chinese Press within the Orbit of the Party State’ (2000) 50(2) *Journal of Communication* 3.

⁵⁷ See D Trubek & A Santos, note 41, 6–7.

⁵⁸ See for example N Serra, note 50.

⁵⁹ See for example J Ngugi, note 40; and RT Roy *et al.* (eds.), note 29.

⁶⁰ See especially H de Soto, note 7, 27–30, 36–61, 160–218. For a critical discussion: See K Griffin *et al.*, note 20, 293; and C Nyamu-Musembi, note 4.

⁶¹ See K Griffin *et al.*, note 20, 283–284.

1 Land Redistribution

Roger van den Brink *et al.* have argued that land redistribution is all about fairness and equity.⁶² They argue that this entails historicizing the land question in a country. If land question arises out of a historical ‘injustice’, land redistribution as a model of land reform may become about ‘a wrong to be righted, no matter what.’⁶³ Hence, land redistribution is premised on the simple fact that in countries with extremely skewed land relations, the distribution of the right to property in land must move from the erstwhile land owners to the land deprived. However, Brink *et al.* observe that there is a ‘reluctance’ to proceed with land redistribution. They state:

Unfortunately, it is exactly this link to feelings of injustice which makes land redistribution in many countries such an urgent development issue, on the one hand, and too political, sensitive, and controversial to be dealt with as a part of the economic development and poverty reduction strategies by governments and development partners alike, on the other. It does not help that even among those who are essentially in favour of land redistribution, there does not exist consensus on the ‘how to do it’ part. This confuses policymakers and the development community at large, providing another excuse for inaction, and avoiding the heart of the matter—the actual redistribution of property rights in land.⁶⁴

These scholars note that the impetus for land redistribution must stem from the desire to achieve ‘conflict prevention, equity, economic growth, jobs, and poverty reduction’ in a country.⁶⁵ The detractors of land redistribution as a land reform model reiterate a number of the arguments against the so-called ‘customary’ land tenure and State-led land reform. These detractors point to the efficiency argument, that is, large farms are economically more efficient than small farms.⁶⁶

The market-based land redistribution model is based on a willing seller/willing buyer approach. The approach requires that the land deprived as the beneficiaries must self-select and, through the agency of the State, enter into negotiation with a land owner for the purchase of land (which the land owner has offered to the State). If a land owner accepts the price offered by the land deprived (through the State) the process of transfer of title in the land may ensue. The implementation of the model in South Africa, for example, has shown that offers of land are simply not forthcoming from land owners. Where land is offered, the purchase price is often consistent with the market valuation or even inflated; often

⁶² See R van den Brink *et al.* *Consensus, Confusion, and Controversy: Selected Land Reform Issues in Sub-Saharan Africa* (Washington DC: World Bank, 2006) 18.

⁶³ See R van den Brink *et al.*, as above. See also S Moyo, note 19, 21–23.

⁶⁴ See R van den Brink *et al.*, note 62, 18.

⁶⁵ See R van den Brink *et al.*, above.

⁶⁶ See R van den Brink *et al.*, note 62, 18–21.

unproductive land is placed on the market; and there is insufficient funding available to the land deprived to sustain viable farming and a dignified livelihood.⁶⁷ Indeed, commentators have concluded that the model ‘makes for a seller’s market’.⁶⁸

Further, Borras has argued that land redistribution, whether market-based or not, must lead to ‘*effective control*’ of the ‘means of production’; it must lead to ‘purposive change’ where the land deprived have a ‘net increase’ of their power to control land and a corresponding net decrease of the power of the erstwhile land owners over the same land; it must include the ‘right to alienate’.⁶⁹ In other words, effective control means ‘the right of access, withdrawal, management, exclusion, and alienation.’⁷⁰ When looked at in terms of an effective-control prism, the market-based land redistribution model becomes problematic. He has said:

[T]here are cases where a person is the full owner of a parcel of land but has no power to fully and effectively exercise ownership rights (the entire range, from the right of access to the right to alienate). This is because the degree of power of an elite to exercise effective control over the same land is much higher than that of the formal (nominal) owner; in this case, the elite’s power may cover almost the entire range of rights, except the formal right to alienate. However, for the elite, the right to alienate is superfluous because the formal-nominal owner’s right to alienate has been effectively clipped through legal or illegal, violent and non-violent means. Indeed, the elite has no need or want to dispose of the owner’s control over the land, at least not in the medium term, and so the right to alienate has no significant value. To the landed elite what is important is the effective control over the land, that is, all the rights except the right to alienate, which also means effective control over non-economic benefits, such as the captive seasonal electoral votes of the people of the land.⁷¹

Given that Borras makes the point in the context of land reform in the Philippines, the problems that arise from lack of effective control form the crux of the discussion under section IV. Suffice it to say that what is clear from Borras’ point is that a process of formalized land transfers is not an end in itself; it can easily amount to tokenism and mask the entrenched role of an erstwhile land owner responsibilized as a producer and that of a land deprived constituency responsibilized as a source of labour and inchoate producers.

2 Land Restitution

The land restitution model has been championed largely in South Africa. The model is entrenched under the Constitution of South Africa and is meant to address

⁶⁷ See F Barros *et al.* (eds.) *The Negative Impact of the World Bank Market Based Land Reform* (Brasilia; Rede Brasil, 2003) cited in S Moyo & P Yeros, note 21, 54; R Hall ‘Transforming Rural South Africa? Taking Stock of Land Reform’ in L Ntsebeza & R Hall (eds.), note 16, 87–106.

⁶⁸ See for example S Moyo & P Yeros, note 21.

⁶⁹ See S Borras, Jr., note 12, 22 [emphasis in the original].

⁷⁰ See S Borras, Jr., note 12, 25.

⁷¹ See S Borras, Jr., note 12, 25–26.

land dispossession that occurred in apartheid South Africa.⁷² Hence, land restitution as a market-based model is a formulation that is peculiar to the political history of South Africa. Under the Native Land Act, 1913 and indeed the Group Areas Act, 1950, non-Whites in South Africa were forcibly removed from 'their' land to specially designated areas based on their profiling as black, coloured or Indian.⁷³

With the dispossessions under the Native Land Act being the cut-off point, dispossessions under colonial conquest are excluded. The beneficiaries under this model have included blacks who were 'banished' to 'so-called homelands', evictees from urban areas, and former labour tenants who previously earned their living on commercial farms.⁷⁴ The model is regulated through 'an expedited' extrajudicial method where claimants negotiate with the (South African) Commission on Restitution of Land Rights and the remedies include 'restoration of land, provision of alternative land, payment of compensation, alternative relief, priority access to housing (sic), and land development programmes.'⁷⁵ The model has suffered from 'institutional fragmentation, unnecessary litigation and a lack of leadership.'⁷⁶ In respect of the stated weaknesses, Ruth Hall notes:

Restitution has turned out to be a gradual and bureaucratically mediated process of returning land to the dispossessed. It is widely considered to be a success story in South Africa, as most of the claims are now settled; however, much of this has been done via payment of cash settlements to urban claimants. Some of the most intractable, costly and potentially conflictual claims in the rural areas are yet to be addressed. These raise fundamental questions about (i) how rights of claimants and current landowners will be addressed; (ii) financing the acquisition of land; and (iii) appropriate models of agriculture for resource-poor claimants.⁷⁷

Hall has misgivings with the land restitution model. Her misgivings stem from the privilege accorded to production under the model. She notes that the land restitution model, just as the land redistribution model, has been determined by the imperative to 'minimise disruption to agricultural production and political stability.'⁷⁸ Again, the

⁷² Section 25(7) of the Constitution of South Africa.

⁷³ Section 25(7) of the Constitution of South Africa; and B Cousins, Chapter 2, note 40, 78. Under South African racial profiling, a 'coloured' referred to a person of 'mixed race': See the Population Registration Act, 1950 [repealed].

⁷⁴ See R Hall, note 67, 92

⁷⁵ See B Cousins, note 73, 78; and R Hall, note 67, 87–106, 92–95. Ruth Hall notes that most restitution claims are settled through cash compensation. Where land has been restored, the new owners have not been able to realize the full potential of their land as they have suffered from an absence of a 'support regime' for a sustainable livelihood.

⁷⁶ See A du Toit 'The End of Restitution: Getting Real About Land Claims' in B Cousins (ed.) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (Cape Town: Programme for Land and Agrarian Studies, University of Western Cape and National Land Committee, 2000) 75–91 cited in B Cousins, note 73, 78.

⁷⁷ See R Hall, note 67, 92.

⁷⁸ See R Hall, above.

point may be made that with all the weaknesses highlighted under the model, the structure of land relations before the implementation of the model remains entrenched. As that is the case, the relation of a land owner as the producer and the land deprived as the source of labour or as an inchoate producer under the process of hegemonic responsabilization persists.⁷⁹ Indeed, Hall has noted that '[s]ettlement of claims is not, then, an end point of restitution, but one moment in the longer and more complex task of restoring land and livelihoods.'⁸⁰ In relation to problems that arise due to lack of effective control of land as pointed out by Borras; in the South African context, it has been noted as follows:

Where poor communities have lacked capital to enable them to continue with existing operations on commercial farms, they have sometimes entered into joint ventures with commercial partners able to provide finance expertise, or even leased out their land to previous owner. These arrangements should be expected to emerge where resource-poor people become owners of commercial farms in the absence of an agricultural support regime.⁸¹

What emerges here is that dignified livelihood, albeit as a 'wider' point, is as important as the 'narrower' point of access to land.

3 Tenure Reform

There are two dimensions to the tenure reform model. The first relates to the reform of the so-called 'customary' land tenure. The second relates to the initiatives to secure the 'tenure' of non-White South Africans living on commercial farms in South Africa. The first scenario is pervasive in localities of land struggles worldwide.⁸² Just like the land restitution model, the second setting is peculiar to South Africa.⁸³

In light of the arguments in Chapter 2 in relation to the 'customary' space, the aspects of the tenure reform model relating to 'customary' land tenure are, in my view, normatively the weakest. This dimension of the tenure reform model emphasizes the reform of 'customary' land tenure. This echoes the call for reform of the so-called 'customary' land tenure that came about under the Lugard thesis and the Swynnerton Plan; at least in Anglophone Africa. Invariably, a legal regime is developed to transform the supposedly communitarian *ethos* of 'customary' land tenure into a statutory regime of the liberal right to property that privileges the

⁷⁹ See B Cousins, note 73.

⁸⁰ See R Hall, note 67, 94.

⁸¹ See R Hall, above.

⁸² See for example S Moyo & P Yeros, note 21.

⁸³ See for example B Cousins, note 73; and R Hall, note 67.

individual. Hence, strategies are put in place to ‘codify’ the ‘local systems’ of landholding; ‘register’ the local rights’, conduct cadastral surveys, and map land uses; and to ‘reform’ rules and procedures for land administration.⁸⁴

It has been acknowledged in the context of the tenure reform model that three difficulties arise: First, regulation of the ‘customary’ space, premised as it is on the ‘controversy’ of the institution of the chief is a ‘profoundly political exercise’. Hence, the so-called codification and registration of rights in land cannot be as ‘open’ and ‘fair’. Second, the multiplicity of interests in the so-called ‘customary’ space makes it difficult to resolve multiple claims of occupancy or ownership. The third point (and it has been made in the context of Francophone West Africa) is that the metropolis has been reluctant to devolve ‘real’ authority to the countryside.⁸⁵

The second trajectory of the tenure reform model is peculiar to South Africa. Here, the model is rights-based and the Constitution guarantees the security of tenure or ‘comparable redress’ to persons whose tenure is insecure as a result of racially discriminatory laws under apartheid South Africa.⁸⁶ The legal regime here is meant to cater for former labour tenants, residents of former black homelands (the so-called Bantustans), and other groups of people who hold land ‘communally’.⁸⁷ These constituencies account for an estimated 19 million people.⁸⁸

The regime is also complemented by the Land Reform (Labour Tenants) Act, 1996 and the Extension of Security of Tenure Act, 1997. The legislation aims at regulating ‘tenure relations between owners and occupiers of farms and determine when and how occupiers may be evicted so as to prevent people from being arbitrarily evicted and left with no alternative place to go.’⁸⁹ Despite the enabling legislation being in place, the model has suffered from institutional capacity constraints to support would-be beneficiaries. Evictions are widespread; there is a lack of precision in terms of the nature of the rights, the holders of the rights, and the space which those rights affect; there is also discontent regarding ‘traditional councils’ set up under statute⁹⁰ where the critics argue that they ‘reinforce the powers of unelected

⁸⁴ See B Cousins, note 73, 71–72.

⁸⁵ See B Cousins, note 73, 72.

⁸⁶ Section 25(6) of the Constitution of South Africa.

⁸⁷ See R Hall, note 67, 95.

⁸⁸ See R Hall, above.

⁸⁹ See R Hall, note 67, 95.

⁹⁰ See the Traditional Leadership and Governance Framework Act, 2003.

traditional authorities and compromises democracy in rural areas'.⁹¹ Finally, Hall sums up the recurring problem of responsabilization of land owners and the land deprived. She states that the 'extension' of land titles will 'aggravate rather than reduce disparities' between the commercial farming space (owned by land owners) and the so-called 'communal areas' (where the land deprived reside).⁹²

IV REFLECTION

Three main issues of sustainability arise from the discussion so far; namely, the lack of cooperation of land owners; the prevalence of weak post-redistribution support services; and the atrophy in programme financing. I discuss the issues in turn:

A Cooperation of Land Owners

The issue of the lack of cooperation of land owners is most pronounced under the land redistribution model. It has been acknowledged that land owners are a 'political powerhouse' in most sub-Saharan African countries due to historical processes of 'coercion' and 'distortion'.⁹³ Hence, a land redistribution model based on the willing seller/willing buyer approach is at the mercy of the landowners. To the extent that it is supposedly 'demand-driven', it is not different from general conveyancing since the transaction price under the model is invariably set by the land owner. This goes against the view that market-based land reform models, unlike State-led land reform, guarantee a win-win situation.

It has been suggested that the State may use its power of expropriation to rein in recalcitrant land owners.⁹⁴ However, even in countries such as South Africa where expropriation is possible under constitutional frameworks, the compensation package has, in practice, been driven by market valuation of land.⁹⁵ Further, the economic downside of expropriation through the cost of litigation and dwindling investor confidence renders it a less likely option for most countries pursuing land reform.⁹⁶ Hence, the constraints that arise in certain cases are political rather than legal. This invariably renders land reform an expensive exercise and negatively affects its sustainability in the longer term.⁹⁷

⁹¹ See R Hall, note 67, 97.

⁹² See R Hall, above.

⁹³ See R van den Brink *et al.*, note 62, 41.

⁹⁴ See R Hall, note 67, 99; and R van den Brink *et al.*, note 62, 40.

⁹⁵ Section 25(2)–(5) of the Constitution of South Africa; and L Ntsebeza 'Land Redistribution in South Africa: The Property Clause Revisited' in L Ntsebeza & R Hall (eds.), note 16, 107–131.

⁹⁶ See R van den Brink *et al.*, note 62, 40–41.

⁹⁷ See R Hall, note 67, 99–100.

B Post–Redistribution Support Services

Market–based land reform models proceed on the assumption that cash grants that are given to the land deprived will adequately cater for the developing of their newly acquired farm land, including the hiring of expertise for farm extension services.⁹⁸ In South Africa, Hall observes that the State acknowledged its capacity constraints to provide human and material resources for adequate agricultural support to the beneficiaries of the land reform.⁹⁹ The situation points to the fact that beneficiaries can only be left to their own machinations, if they were given enough capability to withstand the vicissitudes of the market. Anything to the contrary leaves the beneficiaries prone to distress sales of land and a return to their designation as the land deprived.

C Programme Financing

The issue of programme financing follows from the issue of lack of support services that has been pointed out in the preceding section. The assumption under programme financing is that market–based land reform models factor in a cash grant for beneficiaries of the reform that caters for the purchase of land, and post–transfer development projects.¹⁰⁰ Further assumptions are that the ‘flexibility’ of the models ensures that there is no hand–out mentality among the beneficiaries; there is no basis for universal subsidies since grants are ‘superior’ to subsidies; grants can be targeted and eliminate ‘distortive effects’ and in the process keep the cost of land low; and, finally, since the State is not involved, the transactions costs are low following the elimination of ‘expensive government bureaucracies’.¹⁰¹

However, implementation of the models has shown that the critique of State–led land reform is misplaced in respect of programme financing of market–based land reform. Implementation of market–based land reform models is extremely expensive. Some scholars have argued that the irony is that for the implementation to attain a likelihood of success, it must rest on sound fiscal resources of the implementing State.¹⁰² This is problematic because most countries grappling with unresolved land questions have weak economies and often rely on grants from the Bretton Woods Institutions, particularly the World Bank, for the implementation of their land reform

⁹⁸ See S Borrás, Jr., note 12, 54.

⁹⁹ See R Hall, note 67, 100.

¹⁰⁰ See S Borrás, Jr., note 12, 56.

¹⁰¹ See S Borrás, Jr., note 12, 57.

¹⁰² See R van den Brink *et al.*, note 62, 41.

projects. Immediately, this raises issues of legitimacy, accountability and independence in tackling the country-specific land question. Even in relatively stronger economies that are engaged with the resolution of the land question such as South Africa, adequacy of funds to support land reform is a serious constraint of the implementation process because, more often than not, the projected required funding is humongous.¹⁰³ Hence, far from the State taking a passive role, the State is required to provide financial guarantees for the success of the reform.

V FINAL WORD

It has been noted that the impetus for market-based land reform models has been the increased dominance of market as value in mainstream development discourse and the failure of State-led land reform in the 1960s, 1970s and early 1980s. The dominance of market as value also emerges in the context of asymmetrical inter-State relations at the global level. Some States are more powerful than others and the power game is played out in the confines of the Bretton Woods Institutions. Indeed, in the context of resolving a land question, the assumption of support from the Bretton Woods Institutions or the State only serves to entrench skewed land relations that do not favour the land deprived.

However, it has also been noted that market-based land reform models are not without their own problems. Three issues have been highlighted here: the influence of erstwhile land owners does not augur well for a purported level playing field in the implementation of the reform models; lack of post-redistribution support services raises the likelihood of a return to pre-redistribution land relations; and thirdly, the reforms are capital intensive such that in cases of countries with weak economies, the likelihood of the resolution of the land question is seriously undermined. Under the scheme of market-based land reform models, I have concluded that they account for hegemonic responsabilization in so far as the relationship of an erstwhile land owner as a producer and a land deprived as a source of cheap wage labour or as an inchoate producer is entrenched. Further, the assumption of support from the Bretton Woods Institutions or the State only entrenches the status quo of skewed land relations.¹⁰⁴ At any rate, the land deprived do not have any meaningful in-put in shaping the land

¹⁰³ See R Hall, note 67, 101–102.

¹⁰⁴ See L Tshuma, Introduction, note 15.

reform models. In this respect, the negotiability of the interests of the land deprived is ‘ended’ and the scheme tilts in favour of the erstwhile land owners.¹⁰⁵

Chapter 3 is a watershed. In general terms, under Chapters 1, 2, and this Chapter, I have been discussing the ‘normative terrain’ that underpins this thesis. In Chapters 4, 5 and 6, I delve into the specific law and policy interventions that have been put in place in the task to resolve the land question in Malawi. Chapter 4 deals with the history the land question in Malawi. Chapter 5 focuses on the policy initiatives that have been put in place in the country to resolve the land question. The main focus here is the National Land Policy. In Chapter 6, I look at the various interests of the key constituencies relating to the land question in Malawi; namely the Bretton Woods Institutions, the postcolonial State, the *Achikumbe*, and the land deprived. The discussion of this interaction examines the extent to which the interests of these constituencies enhance or undermine the resolution of the land question. In sum, Chapters 4, 5 and 6 contain the more ‘empirical’ trajectory of the thesis.

¹⁰⁵ See for example E Lahiff “‘Willing Buyer, Willing Seller’: South Africa’s Failed Experiment in Market-Led Agrarian Reform’ (2007) 28(8) *Journal of Agrarian Change* 1577.

Chapter 4

The Land Question: A Historicized and Contextualized Narrative of Land Alienation

In the Introduction, it was observed that besides the need for clarity of purpose, direction, conception and theory of land reform; history and context are equally critical to resolving a land question. Generally, in the analysis of social phenomena, sensitivity to history and context reveals an awareness of the variety of historical and socio-economic circumstances of an economic system prevailing in a polity.¹ Geoffrey Hodgson puts the point succinctly:

History is important, partly because every complex organism, every human being and every society carries the baggage of its past. Evolution builds on past survivals that encumber actions in the present. Choices made by our ancestors can be difficult to undo.

[...]

If history matters – at least in the sense of social development being path dependent – then our analyses must explore the particularities of the past. While we may retain general principles or guidelines, detailed analyses of particular events, structures and circumstances are required.²

Beyond history and context, it was also noted in the Introduction that the African land question has been intertwined with the agrarian question. In this respect, development discourse has been replete with the dominance of the efficiency argument as the blueprint for land reform.³ This status quo is compounded by the fact that most postcolonial African economies have an insignificant non-agricultural economic base.

Third, the continued asymmetry in land relations has been driven by new ‘needs’ relating to mineral resources exploitation, agricultural production, biotechnology, tourism and forestry. This in turn has bred new dimensions of the African land question that relate to rural-to-urban migration; urban and peri-urban land deprivation; and gender disparity in access to available arable land. Again, these new dimensions permeate a national land question.

Finally, beyond the impact of colonialism, land law and policy in the African postcolony and marketized regulation under macroeconomic reform programmes that galvanize an intensified economic globalization, the exact parameters of the land

¹ See for example GM Hodgson *How Economics Forgot History: The Problem of Historical Specificity in Social Science* (London: Routledge, 2001) 21–40.

² See GM Hodgson, above, 3.

³ See S Moyo, Introduction, note 13.

question are delineated by national histories. Currently, the debates amongst ‘Northern’ State and non-State institutions, ‘Southern’ postcolonies, and lobby groups are polarized on the conflicting approaches and preferences to land reform models and the resultant structural imbalances of land ownership.⁴

Regarding the analysis of the land question in Malawi, it has been pointed out in the Introduction that this proceeds under four dimensions: The nature of colonial capitalism; the nature of the neopatrimonial State; the normative issue of the conception of the ‘customary’ space; and the analysis of the competing interests of the key constituencies of the land reform in country; namely, the postcolonial State, the Bretton Woods Institutions, particularly the World Bank and the International Monetary Fund, the *Achikumbwe*, and the land deprived.

This Chapter looks at the first, second and third dimensions of the land question in Malawi. The historicized and contextualized narrative here seeks to show that the liberal conception of the right to property in land served a particular ‘convenient end’; namely, the entrenchment of white economic enterprise. In relation to the conception of the ‘customary’ space, the main arguments have been developed in Chapter 2. The focus here is on the specific instances where the communitarian *ethos* of the so-called ‘customary’ land tenure was validated through law and policy and in the process became the basis for calls for reform grounded in the efficiency argument. The discussion of the ‘customary’ space traverses the first and second dimension of the land question. Further, in relation to the ‘customary’ space, there is also a discussion of the intervention by the Malawian courts relating to the land question. Regarding the fourth dimension of the land question, the treatment of the various interests is merely prefatory here. There is a more detailed discussion of this dimension in Chapter 6. All in all, the running thread in respect of the four dimensions has remained the sustained land alienation in favour of large estate agriculture.

The land question in Malawi must be traced back to the arrival of white missionaries and entrepreneurs in, and the subsequent proclamation of British sovereignty over, the territory that came to be known as Nyasaland.⁵ Prior to British colonial authority, the territory was dominated by various ethnic-based ‘kingdoms’

⁴ See for example S Moyo, above; and S Moyo & P Matondi ‘The Politics of Land Reform in Zimbabwe’ in M Baregu & C Landsberg (eds.) *From Cape to Congo: Southern Africa’s Evolving Security Challenges* (Boulder & London: Lynne Reiner Publishers, 2003) 73–95, 90–91.

⁵ See Introduction, note 19.

the most notable of which were the Ngonde,⁶ the Tumbuka, the Ngoni and the Maravi.⁷ White missionaries and traders acquired vast swaths of lands from African chiefs under transactions whose legal validity has been described as ‘dubious.’⁸ These land acquisitions were formalized under land concession treaties.⁹

The declaration of British colonial sovereignty over Nyasaland served as an official ratification of the land transactions by the missionaries and traders.¹⁰ The colonial State put in place a legal and policy framework that legitimized land alienation in favour of white economic enterprise, and sought to develop a ‘capitalist’ economy based on large estate agriculture.¹¹ The black population were often conscripted for cheap wage labour on those estates.¹² The colonial scheme served a dual role of entrenching colonial capitalism and propagating a modernization mission through the transformation of the apparently ‘traditional’, pre-colonial ‘indigenous’ society.¹³

In the southern African context, the colonial State’s role as a labour ‘reserve’ is more pronounced. Even though there was an emergent local capitalist economy, the territory exported cheap migrant labour to the more industrialized South Africa and, to a lesser extent, Northern Rhodesia (now Zambia) and Southern Rhodesia (now Zimbabwe).¹⁴ The delineation of the colonial State as a labour ‘reserve’ territory is apparently due to the fact that it was generally ‘unattractive’ to white colonial settlement. The lukewarm appeal of the territory amongst the white community at that time has been attributed to lack of ‘known exploitable minerals’, bad communication and an unfavourable climate as compared to, for instance, South Africa and the two Rhodesias.¹⁵ The nature of land relations during the colonial era led to two key results: erstwhile subsistence farmers became ‘labour tenants’ within the country and secondly, migrant labour to the mining sector in South Africa and the two Rhodesias

⁶ See O Kalinga *The Ngonde Kingdom of Northern Malawi c.1600–1895* (PhD Thesis: University of London, 1974); and B Pachai *Malawi: The History of the Nation* (London: Longman, 1973) 8–14.

⁷ See M Read *The Ngoni of Nyasaland* (London: Oxford University Press, 1956); and B Pachai, above, Chapter 1.

⁸ See B Pachai, Introduction, note 11, Chapter 6.

⁹ See Pachai, above, 97–98.

¹⁰ See B Pachai, note 8; BS Krishnamurthy, Chapter 2, note 106.

¹¹ See BS Krishnamurthy, above.

¹² See generally FE Kanyongolo, Chapter 1, note 123.

¹³ See M Chanock, Chapter 2, note 52.

¹⁴ See S Amin, Introduction, note 11.

¹⁵ See G Mhone, Introduction, note 12, 3; C Baker, Introduction, note 11, 2; and FE Kanyongolo, Introduction, note 11, 121.

increased. This state of land relations in the country remains an enduring challenge to date.¹⁶

While the colonial State largely restricted the massive land alienation to southern Malawi, upon independence, the postcolonial State under the Banda Administration aggressively expanded land alienation through the emergence of large estate agriculture in central and northern Malawi in addition to the existent estate sector in southern Malawi. The emergence of the large estate sector was a result of a dual agricultural policy that the Banda Administration followed. The implementation of the dual agricultural policy under a broader development strategy was partly concretized under the land law regime that was finalized for the country in 1967.

The status quo of the land relations under the Banda Administration has largely persisted under the Muluzi and Mutharika Administrations. Some scholars have argued that under the Muluzi and Mutharika Administrations, the land question has equally had a ‘lukewarm response’ or it has been ‘ignored completely’.¹⁷ In the context of wider macroeconomic frameworks based on poverty reduction, Blessings Chinsinga observes:

The proliferation of the poverty reduction initiatives notwithstanding, the momentum leading to the implementation of land reforms has not been as swift as had been implied in the lead up to the political transition. Yet it is widely acknowledged that land in Malawi remains the most critical productive resource and without any major reforms in the land tenure patterns and ownership, poverty reduction initiatives are highly unlikely to deliver their intended strategic impact.¹⁸

The tepid response to the land question in the country is linked to a number of factors. At the local level, the key factors are the neopatrimonial nature of the postcolonial State, and the law and policy framework regulating the largely agro-based economy. Political power and its legitimacy are based on the ‘big *bwana*’ syndrome and the attendant networks of patronage. The nature of the ‘persona’ under which the Banda, Muluzi and Mutharika Administrations respectively operated have led to nuanced differences in the responses to the land question. Out of the three Administrations to date, the Banda Administration overtly perpetuated colonial land law and policy whereby the land deprived continued to be responsibilized as a labour reservoir under a bimodal agricultural policy favourable to large estate agriculture.

¹⁶ See FE Kanyongolo, above, 121–122. Labour tenancy and migrant labour were regulated by law through the Native Tenants (Private Estates) Ordinance, 1917 and the Native Labour Ordinance, 1928. See also S Moyo ‘The Land Question in Southern Africa: A Comparative Review’ in L Ntsebeza & R Hall (eds.), Chapter 3, note 16, 60–84.

¹⁷ See B Chinsinga, Introduction, note 57; and E Chirwa, Introduction, note 58.

¹⁸ See B Chinsinga, above, 9.

While the Muluzi Administration linked the land question to poverty reduction, the ‘democratization of corruption’ that ensued under its watch undermined any meaningful resolution of the land question. The rhetoric under the Mutharika Administration around 2004 pointed to the support of the smallholders. By extension, this support would demand the implementation of strategies that would enhance the resolution of the land question through greater access to available arable land by the land deprived. However, the implementation strategies that have been put in place – particularly under the Community Based Rural Land Development Project – may undermine the resolution of the land question. There is an in-depth discussion of the Project in Chapter 6. Beyond the stated rhetoric and the implementation of the Project, the pronouncements by the Mutharika Administration since May, 2009 indicate a shift in favour of the estate sector.

Finally, the prevailing global geopolitics has influenced the law and policy framework at the national level. The Bretton Woods Institutions, particularly the World Bank and the International Monetary Fund, have been at the helm of driving policy through direct intervention in the agricultural policy arena (in the case of the Bank) and in the macroeconomic policy setting (in the case of the Fund). The influence has resulted in the domination of liberal conception of property and attendant utilization of land in the political economy in Malawi. In conclusion, the responses to the land question in Malawi by the three Administrations have merely reinforced the responsabilization of the majority of the land deprived as a source of labour and inchoate producers.

I LAND ALIENATION UNDER COLONIAL CAPITALISM

The nature of colonial capitalism is the first dimension of the nature of the land question in Malawi and its underlying thematic is land alienation. The precise nature of land alienation in the country from the colonial encounter to date has suffered from the absence of credible statistics on the net transfer of available arable land from the land deprived to the landed constituency. However, the general picture that emerges from the discussion below is that the development strategy of the country has been heavily premised on a vibrant large estate agriculture sector.

The arrival of white missionaries and traders in the country is the beginning of the land question in the country. Vast tracts of land were alienated from the ‘indigenous’ society in lop-sided transactions between African chiefs and white missionaries and traders. Between 1887 and 1891, an estimated 405,000 hectares of

arable land had been alienated under these transactions in southern Malawi. This represents about 4.2 per cent of the total land (arable and non-arable) across the country. This is the first recordable instance of the process of the responsabilization of the constituency of the land deprived as a constituency of tenant labourers. The land alienation from the indigenous society to white missionaries and traders became exponential. The Colonial Commissioner and Consul-General at the time, Sir Harry Johnston, states:

[The] wholesale grabbing of land or, where it is not fair to describe the acquisition of land as 'grabbing', at any rate huge tracts had been bought for disproportionate amounts from the natives.¹⁹

Even though the colonial State investigated all claims of land ownership based on the land purchases that were done before 1891, these purchases were ultimately validated and entrenched as land titles in favour of the new white owners under the Certificates of Claim, 1902 issued by the Colonial Commissioner and Consul-General. The criteria for validation included evidence of long occupation and improvements to the land; lack of a valid counter-claim; the (African) chief in question acknowledging and 'admitting' the 'sale'; availability of an authentic deed; provision for non-disturbance of existing 'African' villages and gardens; and payment of a 'fair value'.²⁰ The new white owners acquired what was effectively an interest of fee simple absolute in the land.

In total, the Colonial Commissioner and Consul-General issued 66 Certificates covering some 1.5 million hectares of available arable land.²¹ The residue land after the issuance of the Certificates of Claim became Crown-controlled land – Crown land – where the Crown had a fee simple interest. The erstwhile indigenous owners of land became tenants at will under privately owned land under the Certificates. The Certificates had the following non-disturbance clause:

That no village or plantation existing at the date of this Certificate on the said Estate shall be disturbed or removed without the consent in writing of Her Majesty's Commissioner and Consul-General, but when such consent shall have been given the sites of such villages or plantations shall revert to the Proprietor of the said estate. No natives can make other and new villages or plantations on the said Estate without the prior consent of the Proprietor.²²

The clause was routinely ignored by the new white owners of the private estates.²³

¹⁹ See C Baker, note 15, 5.

²⁰ See C Baker, note 15, 6.

²¹ See B Pachai, note 8, Chapter 3.

²² See C Baker, note 15, 8.

²³ See C Baker, above.

Even though the pre-1891 land purchases were challenged in *Supervisor of Native Affairs v Blantyre and East African Company Limited*,²⁴ the High Court validated the ‘transfers’ of the title in the land. In *Supervisor of Native Affairs*, the Court considered the question of title of the African chiefs in land as irrelevant to its determination. In the case, the Supervisor petitioned the High Court to set aside an agreement between the defendant Company and certain ‘native’ headmen on an estate of the Company. He challenged the agreement which had been entered into between the Company and the headmen on the basis that it was inequitable and illegal as it was in breach of the rights of the ‘natives’ under a Certificate of Claim issued to the Company in 1893. The Supervisor alleged that the Company subjected the ‘native’ community on its estate to payment of rental through provision of labour under the exploitative *thangata*²⁵ system and this breached the Certificate. Second, he challenged the legality of the purported sale of land by the chiefs to the Company. The Supervisor argued that the ‘native’ headmen were not capable (under ‘customary’ law) of entering into an agreement of the sale of land which involved the alienation of the land belonging to their community.

Judge Nunan set aside the aspects of agreement regarding the provision of labour in lieu of rent – under the *thangata* system – as ‘exceedingly unfair and one-sided.’ However, he sanctioned the sale of the land by the chiefs and the legality of the Certificate. In effect, *Supervisor of Native Affairs* entrenched the interests of white settlers as owners of the land at common law. *Supervisor of Native Affairs* remained the settled position of the law in the country notwithstanding the decisions in *Nireaha Tamaki*, *In Re Rhodesia* and *Amodu Tijani* where native title was validated on the basis of the eminent domain of the Crown sovereign. The court in *Supervisor of Native Affairs* did not establish a clear link with the Crown’s eminent domain stemming from the British Central Africa Order-in-Council, 1902. The Order-in-Council of 1902, purportedly issued for ‘the peace, order and good government’ of the colony went on to declare eminent domain in favour of the British sovereign. The position was reinforced under the Nyasaland Order-in-Council, 1907. The subsequent developments in land law and policy in 1950 and 1951 entrenched the position when the status of these Certificates was eventually defined as valid private

²⁴ Unreported, 28 April, 1903 but discussed in MRE Machika, Introduction 19, 49–51 [hereafter ‘*Supervisor of Native Affairs*’].

²⁵ The term literally means ‘to assist’. The *thangata* system was akin to feudalism.

interests in land under the Nyasaland Protectorate (African Trust Land) Order-in-Council, 1950 and later formed part of the definition of 'private land' under the Land Ordinance, 1951.²⁶

In addition to the development of the legal basis under the *Supervisor of Native Affairs* and the Order-in-Council of 1902, the colonial State enacted the Lands (Native Locations) Ordinance, 1904 which sought to empower the Colonial Commissioner and Consul-General 'to direct landowners to set aside for African locations of up to 10 per cent of undeveloped land, and to allot this land to estate residents on the basis of 3.2 hectares of land per family.'²⁷ Colin Baker observes that the land vested in the 'male tax-paying heads' of the family under joint tenancy without the power to mortgage, sell or pledge in the interest in the land. The Ordinance of 1904 never came into force primarily because, as Baker notes, it would lead to 'undue harshness' on 'small estate owners'.²⁸ In the same year, 1904, some 1.5 million hectares across the country were alienated in favour of white private interests. If the Ordinance of 1904 was in force, some 150,000 hectares would have had to be reserved as African locations.

Further legal instruments, namely; successive Orders-in-Council between 1936 and 1949; the Nyasaland Protectorate (African Trust Land) Order-in-Council, 1950; and the Land Ordinance, 1951 entrenched the legal title of the new land owners. The systemic expansion of white land ownership was also buttressed by the land commissions of 1903, 1920, 1946 and 1952.²⁹ While all the land commissions acknowledged the existing tensions between white land owners and the black population, their recommendations only guaranteed the rights of the black population as labour tenants.³⁰

Hence, land continued to be alienated from erstwhile land owners in favour of white land owners. The erstwhile land owners were re-socialized as a labour reservoir as they were tenants at will at law. Under the Natives on Private Estates Ordinance, 1928, a 'resident African' was entitled to provision of a hut and a small plot for

²⁶ In the 1901 case of *J Norris Cox & Geo W Pettit v The African Lakes Corporation*, the Court entrenched the position that an 'African chief' is not a 'landlord over the land he rules.' Chiefs could not assert rights over the land or allocate any land without recourse to the colonial State: See C Griffiths *Land Tenure in Malawi and the 1967 Reforms* (LLM dissertation: University of Malawi, 1981) 14.

²⁷ See C Baker, note 15, 16.

²⁸ See C Baker, above.

²⁹ See FE Kanyongolo, note 15, 121–122.

³⁰ See FE Kanyongolo, above.

cultivation in exchange for payment of rent or labour. Routinely, the ‘hospitality’ of the land owners was paid for in kind through provision of labour.³¹

Meanwhile, despite growing land pressure due to, primarily, population growth, land alienation continued unabated. For example, until 1936, the British South Africa Company ‘owned’ virtually the whole of northern Malawi when it acquired title to some 1.11 million hectares of land before relinquishing its title in favour of the colonial State while still retaining the mineral rights in the land. The mineral rights were only relinquished when Malawi became independent in 1964.³²

Under the Africans on Private Estates Ordinance, 1952, which replaced the Natives on Private Estates Ordinance, 1928, three key innovations were introduced to regulate land relations in light of the growing tension from land pressure prevalent in the country. The 1952 Ordinance provided that the white estate owners were no longer under an obligation to provide land for ‘sustenance’; evictions were allowed for rental default only; and the Ordinance created a regime for compensation in cases of evictions for development purposes. The 1952 Ordinance followed the recommendations of the Abrahams Commission of 1946 and the Land Planning Committee of 1947 who had concluded among other things that compulsory acquisition of land for redistribution to the ‘African’ was impracticable; that the colonial State should negotiate the purchase of land from the white owners – some based in London, England – for possible redistribution to the ‘African’ on private estates.³³

The 1952 Ordinance represented a compromise between the colonial State and large estate owners who resented the idea of ‘forced’ sales to the State through the threat of a tax on idle, undeveloped private land. The constituency of large estate owners was powerful.³⁴ Two factors worked in their favour: First, the estate sector was the backbone to the colonial economy. The colonial State was ‘deeply reluctant’ to subvert land relations between land owners and indigenous societies as this would affect the supply of labour to the estates. Second, the strong political connections of the estate owners in the political corridors of London meant that the local colonial agents in the country had to live with the status quo.³⁵

³¹ See C Baker; and FE Kanyongolo, both in note 15.

³² See B Pachai, note 8, 100.

³³ See C Baker, note 15, Chapter 3.

³⁴ See C Baker, above.

³⁵ See C Baker, note 15, 45.

In 1950, the colonial State passed the Nyasaland Protectorate (African Trust Land) Order-in-Council. Under the Order-in-Council of 1950, land was classified into three categories: public, native trust and private.³⁶ Native trust land was vested in the Secretary of State.³⁷ The colonial State had extensive powers of entry into native trust land under the doctrine of eminent domain and could dispose of such land through a lease or other right of occupancy as a private interest.³⁸ The indigenous society who were the supposedly beneficiaries of the native trust land had no legal rights to protect their interests in the land. While the Secretary of State was to administer the native trust land for the benefit of the 'Africans' and in accordance with 'African law and custom', the application of 'customary' law was subject to the non-repugnance clause under received law. The 'customary' law applied to the extent that it was not repugnant to principles of justice and morality.³⁹ Hence the normative administrative and legal frameworks of the native trust land were primarily developed to serve the white-dominated estate sector in the (colonial) political economy.

A category of land called 'customary land' was created under the Land Ordinance, 1951. This is the first explicit manifestation at law in the country of the conception of the 'customary' tenure under a communitarian *ethos*. The development seems to have been based on the conception of the 'customary' space under the Lugard thesis and the Swynnerton Plan.⁴⁰ In terms of legal significance, the interest in the land remained in the colonial State and not the 'African' community.⁴¹ Under the Land Ordinance, 1951, the conversion of the so-called 'customary' land holdings into private land was on the basis of zero value to the indigenous land holders.⁴² Yet again, under the 1951 Ordinance, the legal framework entrenched the status of indigenous society as a supply of cheap wage labour. The rights of the indigenous society were not recognized at all.

Between 1955 and 1964, the colonial State embarked on a land acquisition and resettlement programme where idle tracts of land were purchased from the white estate owners in the Shire Highlands in southern Malawi for the resettlement of erstwhile tenants on private estates. The land acquisition proceeded on compensation

³⁶ Section 2 of the Order-in-Council.

³⁷ Section 5 of the Order-in-Council.

³⁸ Section 7 of the Order-in-Council.

³⁹ Section 6 of the Order-in-Council.

⁴⁰ See Lord Lugard and RJM Swynnerton, both in Introduction, note 37.

⁴¹ See M Msisha, Chapter 2, note 118, 17.

⁴² See M Msisha, above, 39.

based on open market valuation. The interest in land of the newly acquired landholdings vested in the colonial State as the land was Trust land. This category of land was effectively Crown land.⁴³ The converse effect of the programme was that it led to new frontiers of land alienation in central and northern Malawi.⁴⁴

From the foregoing discussion, two ‘tactics’ were at the centre of colonial capitalism in the reinforcement of the ‘convenient end’ of achieving white commercial enterprise. These tactics were the frenetic land alienation and restrictive means of production that guaranteed a constituency of cheap wage labourers. Land alienation was consistently supported by law and policy as exemplified under the land concession treaties; the Certificates of Claim, 1902; the various statutory interventions that validated land alienation from 1902 resting with the Land Ordinance, 1951. The restrictive means of production were reinforced through the Special Crops Ordinance, 1963 where the ‘African’ tenants were prohibited by law to grow cash crops such as coffee, tea and tobacco. The restrictive means of production and the exploitative *thangata* system that was entrenched under successive labour tenancy legislation between 1917 and 1952 completed the responsabilization of the local communities of land deprived as a source of cheap wage labour.⁴⁵ Hence, a number of the ‘disciplining’ techniques – the land alienation under the processes leading to the Certificates of Claim, the *thangata* system, and the restrictive provisions on cultivation of cash crops – led to the responsabilization of the ‘indigene’ as an exploited labourer. These techniques were, as it has been shown, reinforced by law. In sum, the colonial State’s law and policy framework shaped the nature of the land question when the Banda Administration assumed office in September, 1961 under an arrangement of self-government.⁴⁶ By this time, as much as 51 per cent of available arable land in southern Malawi, for example, was re-constituted under white ownership.⁴⁷

⁴³ See C Baker, note 15, Chapters 7 and 8.

⁴⁴ See C Baker, above.

⁴⁵ See S Banda ‘Land Law Reform: A Comparative Analysis of South Africa’s Labour Tenancy Contract and Malawi’s Tenant Worker’s Contract’ (2007) *Oxford University Commonwealth Law Journal* 201.

⁴⁶ This followed the multi-party general elections of 15 August, 1961 when the Malawi Congress Party led by H. Kamuzu Banda won a majority of seats in the lower house of the Legislative Council to constitute a self-government that eventually led to the independence of the territory from British colonial rule in 1964: See C Baker, note 15, 168.

⁴⁷ See FE Kanyongolo, note 12, 88–90.

II THE NEOPATRIMONIAL STATE AND THE LAND QUESTION

It has been suggested that the political landscape in postcolonial Malawi has been consistently neopatrimonial in nature.⁴⁸ Scholarship by Diana Cammack *et al.* and David Booth *et al.* suggests that the nature of the neopatrimonial State is such that political power and its legitimacy are based on what they have called the big *bwana* syndrome; that is, a ‘big man’ – an incumbent leader of government – is at the centre of driving policy as opposed to reliance on strong institutions. The big *bwana* syndrome is imbricated in networks as opposed to political party ideology. These networks of patronage are self re-invigorating.⁴⁹ Further, it has been argued that the differing ‘personalities’ and ‘leadership styles’ of Malawi’s Heads of State since independence – Hastings Kamuzu Banda, Bakili Muluzi and Bingu wa Mutharika – and the divergent global geopolitics they have operated in, have had differing development prospects and consequences for the country.⁵⁰ This difference and discontinuity in persona and global geopolitics has led to equally varied responses to the land question in the country under the three Administrations. Notwithstanding the foregoing, I suggest that in general terms, what is common from the responses to the land question under the three Administrations is that they have reinforced the responsabilization of the majority of the land deprived as a source of cheap wage labour and inchoate producers.

A cautionary intervention is appropriate here: The literature on African politics routinely refers to most African regimes as neopatrimonial; and their countries as neopatrimonial states. The conventional position of this scholarship is to treat ‘patrimonialism’ or ‘neopatrimonialism’ as synonyms for ‘corruption’ or ‘bad governance’. Anne Pitcher *et al.* have made a compelling case for a re-thinking on the usage of neopatrimonialism.⁵¹ They have argued that the attribution of neopatrimonialism to the postcolonial African State must be traced back to Max Weber. Pitcher *et al.* point out that the Weberian roots of patrimonialism or indeed neopatrimonialism suggests that Weber was concerned with the source of ‘authority’ as a basis of legitimacy and not so much the nature of a ‘regime’ in his attribution of

⁴⁸ See D Cammack *et al.* ‘Neopatrimonial Politics, Decentralization and Local Government: Uganda and Malawi in 2006’ (2007) Good Governance, Aid Modalities and Poverty Reduction Working Paper Series, Working Paper Number 2; and D Booth *et al.*, Introduction, note 23.

⁴⁹ See D Cammack *et al.*, above, 11; and D Booth *et al.*, above, 8–13.

⁵⁰ See D Cammack *et al.*, note 48, 11; and D Booth *et al.*, note 48.

⁵¹ See A Pitcher *et al.* ‘Rethinking Patrimonialism and Neopatrimonialism in Africa’ (2009) 52(1) *Africa Security Review* 125.

patrimonialism. Patrimonialism ‘delineated’ the basis of ‘legitimate authority’; through a dense network of personal networks of loyalty and reciprocity.⁵² Patrimonialism or indeed neopatrimonialism was rooted in a cultural construction of the personal and the public. In this respect, Pitcher *et al.* discredit the tendency to use patrimonialism and neopatrimonialism as simply a synonym of ‘corruption’ or ‘bad governance’.⁵³ They have said:

[C]omplex reciprocities link the government and its citizens, legitimacy is created and reinforced through both the rule of law and personal bonds, and a mutually constitutive relationship exists between the personal and the public.⁵⁴

The personal–public link resonates with Peter Ekeh’s thesis on the two publics; namely the primordial public and the civic public. In the case of postcolonial States such as Malawi, the nature of the neopatrimonial State lies in divided loyalties under Ekeh’s thesis. By primordial public, Ekeh refers to the moral affinity of groupings or settings which may be based on ethnicity or social class. On the other hand, the civic public relates to the amoral responsibilities that come with the structures of the civil, constitutional State covering the formal demarcations of judicial, legislative or executive government.⁵⁵ The authority of the three Administrations in Malawi arose out of constitutional processes; that is, the right and responsibility to govern emerged from the civic public. However, the actual practice of State power reveals an increasing gravitation towards the primordial public on the part of the incumbent at every point in the country’s history.

A The Banda Administration

A quick reference to the state of the nationalist movement during the period immediately prior to Malawi’s independence in 1964 is pertinent: The nature of the capitalist economy in the colonial State became a major source of agitation for the nationalist movement especially in so far as it was critically premised on a land law and policy framework that configured the black population as tenants at will and a source of cheap wage labour under the *thangata* system.⁵⁶ The agitation is unsurprising considering the centrality of land in the political economy. The

⁵² See A Pitcher *et al.*, above. See also G Erdman & U Engel ‘Neopatrimonialism Reconsidered: Critical Review and Elaboration of an Elusive Concept’ (2007) 45(1) *Commonwealth & Comparative Politics* 95.

⁵³ See A Pitcher *et al.*, note 51, 127.

⁵⁴ See A Pitcher *et al.*, note 51, 150.

⁵⁵ See PP Ekeh ‘Colonialism and the Two Publics in Africa: A Theoretical Statement’ (1975) 17(1) *Comparative Studies in Society and History* 91.

⁵⁶ See G Mhone, note 15, 3.

nationalist period, however, also witnessed the emergence of a ‘totalitarian ideology’ that was ‘deeply intolerant of dissent’.⁵⁷ The big *bwana* syndrome that revolved around Banda co-existed with a social democratic *ethos* within the nationalist movement. While the former is innately despotic, the latter cherished greater freedoms for the citizen.⁵⁸ The wake of the country’s independence demonstrates the triumph of the big *bwana* syndrome which formed the basis of the Banda Administration.

The Banda Administration thrived through economic relations of ‘domination and exploitation’⁵⁹ and a political regime premised on the ‘cult of the personality’ of Banda himself.⁶⁰ He became the *de jure* Life President of the postcolonial State when section 9 of the Constitution of 1966 was amended to provide for his life presidency.⁶¹ He became the law unto himself and personally drove the postcolonial State’s law and policy direction on account of his beliefs. This personalized approach was reflected in the rural agrarian change that was introduced through the legal reforms of 1967.⁶² The reforms and the attendant legal framework are discussed below.

Further, the Banda Administration adopted economic policies that subordinated the welfare of the majority of the population to the creation of a critical mass of the *Achikumbwe*.⁶³ The Banda Administration tied a cheap labour policy to a land policy. The Administration promoted ‘formal privatization of land’ in favour of estate agriculture.⁶⁴ In light of the levels of available arable land to the land deprived at independence, the continued growth of the estate sector meant, in the context of high population density in the country, per capita arable land was on a steady decline. The land deprived could only sustain a livelihood as wage labourers on the estates. Further, highly interventionist State policy fitted the mode of the developmental State prevalent in the global economy in the 1960s and the 1970s.

⁵⁷ See J McCracken ‘Democracy and Nationalism in Historical Perspective: The Case of Malawi’ (1998) 97 *African Affairs* 231.

⁵⁸ As above.

⁵⁹ See G Mhone, note 15, 1.

⁶⁰ See G Mhone, note 15; and J McCracken, note 57.

⁶¹ See the Constitution (Amendment) Act, Number 35 of 1970. See also KM Phiri & K Ross (eds.) *Democratization in Malawi: A Stocktaking* (Blantyre: CLAIM, 1998).

⁶² See for example S Thomas, Introduction, note 20.

⁶³ See G Mhone, note 15, 1; FE Kanyongolo, note 15, 123; and M Chipeta, Introduction, note 24. See also O Kalinga ‘The Master Farmers’ Scheme in Nyasaland, 1950–1962: A Study of A Failed Attempt to Create a ‘Yeoman’ Class’ (1993) 92 *African Affairs* 367.

⁶⁴ See G Mhone, note 15, 13–14.

While the logic of colonial capitalism became the ‘underlying basis’ of the Banda Administration,⁶⁵ Guy Mhone argues that the ‘nationalist fervour for independence was not only driven by the need to eradicate the objectionable labour control and agricultural regulations, but was also driven by the need to open up mobility routes for an emerging and aspiring African elite and entrepreneurial class.’⁶⁶ The neopatrimonial approach is reflected in the Administration’s response to the land question in the country. Through a combination of legal and policy instruments, the Banda Administration merely ‘perpetuated and refined’ colonial practice and the status of land relations at the time of country’s independence remained unruffled.⁶⁷ In the sections that follow below, I consider the specific responses to the land question by the Banda Administration by looking at the legal regime, particularly the constitutional order and the land law reforms that were introduced between 1965 and 1967; the development policy framework; and the implications the recession of the 1980s had for the land question.

1 Postcolonial State’s Constitutional Order and the 1967 Reforms

The legal entrenchment of land alienation under the colonial State was further entrenched under section 16 of the Constitution of Malawi, 1964.⁶⁸ The provision proscribed the deprivation of property without the payment of adequate compensation under the right to property under the Bill of Rights in Chapter II of the 1964 Constitution. The framework of the 1964 Constitution was developed at the Nyasaland Constitutional Conference held in London, England in 1962. It is not clear whether the status of land relations in the country formed part of the agenda of the constitutional conference. The report of the conference certainly makes no record of the discussion of the land question.⁶⁹

Even though the 1964 Constitution provided for a right to property under a Bill of Rights, the Bill of Rights was subsequently ‘expunged’ from the republican Constitution, 1966. The right to property only survived in ‘tepid form’ under the Statement of Fundamental Principles which stated thus:

⁶⁵ See G Mhone, note 15.

⁶⁶ See G Mhone, note 15, 3.

⁶⁷ See G Mhone, note 15, 1–13; and FE Kanyongolo, note 15, 122–125.

⁶⁸ See Schedule 2 of the Malawi Independence Order, 1964, Statutory Instrument Number 916 of 1964.

⁶⁹ See HMSO *Report of the Nyasaland Constitutional Conference* (London: H.M.S.O., 1962). The delegation of the incoming government in Malawi comprised H Kamuzu Banda, MW Kanyama Chiume, Willie Chokani, Orton EC Chirwa, IK Surtee, John ZU Tembo, and A Sattar Sacranie: See *Report of the Nyasaland Constitutional Conference*, in this note, 20.

No person should be deprived of his property without payment of fair compensation, and only where the public interest so requires.⁷⁰

There was a proviso to the Fundamental Principles as follows:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of [the Fundamental Principles] to the extent that the law in question is required in the interest of defence, public safety, public order or the national economy.⁷¹

The property clauses under the 1964 and 1966 Constitutions were ‘ahistorical’ and ‘decontextualized’ and the status quo of land relations under the colonial State prevailed.⁷² Fidelis Kanyongolo has argued that the abstraction and decontextualization underway in the development of a legal order coupled with its lack of historicity undermines its legitimacy.⁷³ At the same time, the wording of the proviso to section 2(2) of the 1966 Constitution allows Banda’s personal agenda for the expansion of large-scale capitalist agricultural sector to flourish.⁷⁴ The wording made it easy to convert land from ‘customary’ land into private holding under the Land Act or forfeit property (including land) under forfeiture laws in the case of those deemed ‘disobedient’ to the political establishment.⁷⁵

The regulatory framework of 1967⁷⁶ comprised the Land Act,⁷⁷ the Registered Land Act,⁷⁸ the Customary Land (Development) Act⁷⁹ and the Local Lands Board Act.⁸⁰ I have argued in Chapter 1 that the legal effect of the category of land known as ‘customary land’ under the Land Act is that it is public land. Scholars like Mhone and Kanyongolo have referred to the increased privatization of land as having led to the reduction of ‘customary’ land available to the land deprived by as much as 40 per cent between 1973 and 1983 and an increase of private land by 30 per cent during the same period. Further, they have pointed out that the net transfer from ‘customary’ land to private land slowed down between 1983 and 1989.⁸¹ On a closer analysis of the

⁷⁰ Section 2(1) (iv) of the Constitution of Malawi of 1966; and also C Ng’ong’ola, ‘Design and Implementation of Customary Land Reforms in Central Malawi’, Introduction, note 11, 125.

⁷¹ Section 2(2) of the Constitution of Malawi of 1966.

⁷² See FE Kanyongolo, note 12.

⁷³ See FE Kanyongolo, note 12, 8, 90–93, 107–108.

⁷⁴ See S Thomas, note 62, 40.

⁷⁵ See for example S Roberts ‘Malawi Forfeiture Act 1966—A Surfeit of Discretion’ (1966) 10(2) *Journal of African Law* 131.

⁷⁶ See FE Kanyongolo, note 15, 123.

⁷⁷ The Land Act was in fact enacted in 1965. The totality of a land law regime was finalized in 1967. For my purposes, I refer to the development collectively as the 1967 reforms.

⁷⁸ Chapter 58:01, Laws of Malawi.

⁷⁹ Chapter 59:01, Laws of Malawi.

⁸⁰ Chapter 59:02, Laws of Malawi.

⁸¹ See G Mhone, note 15, 13–14; and FE Kanyongolo, note 15, 123.

categories of land under the 1967 reforms, these reductions were actually in the public land sector.

The land deprived often could not afford the formal requirements for privatization of land. This led to further asymmetry, rather than the improvement of land relations, that had marked the colonial legacy.⁸² Hence, the *Achikumbe* were the beneficiaries under the regulatory framework.⁸³ It is estimated that between 1979 and 1989, the number of estates in the country increased from 1,200 to 14,671 covering an estimated land size of 1 million hectares of available arable land.⁸⁴ Banda personally accelerated the growth of the estate sector as a means of patronage which also fell within his personal conviction that the postcolonial State's economic growth was hinged upon a vibrant estate sector.⁸⁵ In fact, according to the estimates of the Presidential Commission of Inquiry on Land Policy Reform, land in the estate sector grew from 759,400 hectares in 1980 to as much as 1,148,000 hectares by 1993.⁸⁶ Banda designated himself as '*Mchikumbe* Number One' – Farmer Number One – and accumulated a number of estates across the country in his personal name as well as a private consortium under his control and his closest political allies.⁸⁷ The estate sector was virtually untaxed and the quest to rapidly develop the sector was prompted by the desire of the Banda Administration to de-link the country from British grants-in-aid, create a middle class, and, the general scepticism about 'the ability of the smallholder sector to respond quickly to new economic opportunities.'⁸⁸

Since the postcolonial State under the Banda Administration tied its land policy to a cheap labour policy, it created State agro-based corporations and also subsidized private agricultural entrepreneurs by ensuring availability of cheap wage labour ostensibly for the benefit of the postcolonial State and the *Achikumbe*.⁸⁹ The rhetoric was that increased agricultural productivity would lead to economic growth and 'enhance the welfare of the majority of the population' so that every Malawian

⁸² See FE Kanyongolo, note 15, 124.

⁸³ See FE Kanyongolo, note 15, 123; and M Chipeta, note 63. In cases of Government intervention in the smallholder sector, it targeted the richest 20 per cent: See FE Kanyongolo, in this note, 125.

⁸⁴ See K Stambuli 'Long-run Food Security Implications of a Top-Down Agricultural Strategy in Malawi' (Surrey Institute for Global Research, 2002) cited in B Chinsinga, note 17.

⁸⁵ See B Chinsinga, note 17, 8–9. See also U Lele 'Structural Adjustment, Agricultural Development and the Poor: Some Lessons From the Malawian Experience' (1990) 18(9) *World Development* 1207, 1208.

⁸⁶ See Government of Malawi, Introduction, note 69, 30.

⁸⁷ See G Mhone, note 15; B Chinsinga, note 17; M Chipeta, note 63; U Lele, note 85.

⁸⁸ See U Lele, note 85, 1208.

⁸⁹ See G Mhone, note 15, 12–13; and M Chipeta, note 63, 39–42.

‘could have food in his stomach, a shirt on his back and a roof that does not leak.’⁹⁰ However, the continued decline in per capita available arable land in the public land sector which was also exacerbated by a high population growth meant that the land deprived were resigned to earn a living as wage labourers in the estate sector.⁹¹

One explanation of the predicament of the land deprived may be derived from the Administration’s agricultural policy: The Banda Administration followed a bimodal agricultural policy that favoured the estate sector and not the smallholders. A poignant example of the preference of the estate sector is the legal prohibition of the cultivation by smallholders of cash crops such as burley tobacco, sugarcane, coffee and tea.⁹² By this statutory device, which was a continuation of colonial policy, the estate sector – invariably comprising the *Achikumbwe* – had access to the favourable prices of the global commodity markets which capital could be re-invested into their sector. In contrast, smallholders were only exposed to commodity markets run by the State agro-based corporation, the Agricultural Development and Marketing Corporation, which contrary to any positive development suggestive in its name, and being a monopoly, bought the smallholders’ produce at less competitive prices. The combined effect of the legal prohibition against the smallholders and the undercut pricing for smallholder produce meant that the smallholders remained at subsistence level and had to work in the estate sector to supplement their livelihood. The surpluses from the undercut pricing under the Corporation’s scheme in turn financed the further development of the estate agricultural sector.⁹³

⁹⁰See G Mhone, note 15, 12.

⁹¹ See G Mhone, note 15, 13; and M Chipeta, note 63, 42–45. See also J Nankumba *A Case Study of Tenancy Arrangements on Private Burley Tobacco Estates in Malawi* (Winrock Publications, 1989). Nankumba observed that tenants provide most of the labour and bear most of the risk in the production of the tobacco crop and yet they receive only a fraction of the auction-floor sale price, have no job (or home) security, are typically provided with few social services, have little leverage in negotiating or enforcing contracts. He recommended the improvement of the form and content of tenant–farming contracts provisions being made more complete, precise, equitable and enforceable. He also recommended that the Ministry of Agriculture, which is responsible for issuance of licenses to owners of private estates to grow and sell special crops, should ensure that strict compliance with labour laws in the estate sector to foster the protection of the rights estate tenants.

⁹² See the Special Crops Act, Cap. 65:01, Laws of Malawi.

⁹³ See B Chinsinga, note 15, 8; U Lele, note 85, 1208; and J Kydd & R Christiansen ‘Structural Changes in Malawi since Independence: Consequences of a Development Strategy based on Large-Scale Agriculture’ (1982) 10(5) *World Development* 355.

2 Economic Recession, Emergence of Structural Adjustment Programmes and Land Reform

From about 1979 and throughout the 1980s, the postcolonial State experienced a recession as aftershocks to the global recession triggered by the oil crisis of 1979. Notwithstanding the global element of the recession, the local economic malaise has also been attributed in part to the clientelist approach of the Banda Administration. Jonathan Kydd and Robert Christiansen have argued that a development strategy based on estate agriculture resulted in three things: rapid land alienation amongst an already exploited land deprived constituency, rapid transfer of labour into wage employment in the estate sector, and the decline in importance of peasant production.⁹⁴ The rapid land alienation emerged from the ‘preferential allocation’ of land to the estate sector;⁹⁵ the suppression of peasant production stemmed from the need to maximize surpluses used in the re-capitalization of the estate sector;⁹⁶ and third, the labour demand in the estate sector was met since the ‘rate of return’ in the smallholder sector was significantly low due to poor commodity prices offered by the State, there was a ‘rapid’ flow of labour into the estate sector even though the wages were equally poor here.⁹⁷ The combined effect of the bimodal agricultural policy which was always intertwined with a cheap labour policy meant that the approach resulted in a ‘crisis of under-consumption’ within the domestic market.⁹⁸ Finally, the global nature of the recession – precisely the global oil crisis of 1979, the fall in tobacco prices at global markets and the local adverse climate conditions such as the drought in the 1978–1979 rainy season – all had significant negative impact on the postcolonial State’s macro-economy.⁹⁹

The onset of the 1980s witnessed great intervention from the World Bank and the IMF under structural adjustment programmes in the postcolonial State. The programmes did not translate in a turn around of the recession.¹⁰⁰ The interventions which included, among other things, cut backs on grain investment and fertilizer subsidy, dismantling of the National Rural Development Programme and the

⁹⁴ See J Kydd & R Christiansen, above.

⁹⁵ See J Kydd & R Christiansen, note 93, 366.

⁹⁶ See J Kydd & R Christiansen, note 93, 368.

⁹⁷ See J Kydd & R Christiansen, note 93, 370–371.

⁹⁸ See G Mhone, note 15, 30.

⁹⁹ See U Lele, note 85.

¹⁰⁰ G Mhone, note 15, 28–30; U Lele, note 85; and J Harrigan ‘U Turns and Full Circles: Two Decades of Agricultural Reform in Malawi, 1981–2000’ (2003) 31(5) *World Development* 847.

introduction of an agricultural extension programme were not ‘adequately considered before implementation.’¹⁰¹ Uma Lele notes that the interventions had a double effect. On the one hand, they were laudable to the extent that they removed the grip on the macro-economy of Banda and his network of patronage. On the other hand, they led to the ‘stagnation’ or ‘near paralysis’ of the majority in the smallholder sector.¹⁰²

In the intervening years between 1981 and 2000, at the behest of the World Bank and the IMF, the macro-economic strategy of Malawi has vacillated. From 1981 to 1987, the strategy changed between ‘pricist and minimalist State’; a ‘more flexible approach’ that marked the 1987–1994 period; and the more ‘politicized’ environment of 1994 and beyond.¹⁰³ The latter period of increased ‘politicization’ – where policy followed ‘populism’ – epitomizes the mode of operation of the Muluzi Administration.¹⁰⁴

In relation to the land question, any proposals for land reform under the Banda Administration emerged amidst a perceived crisis in the estate sector.¹⁰⁵ The ‘crisis’ arose because of the bimodal nature of agricultural policy under the Banda Administration. This led to debates on the direction of agricultural production in the country. Two schools of thought prevailed: first, those in favour of food security based on a vibrant smallholder sector supported by a State farm input subsidy programme. Second, those calling for food security based on a cash economy driven by export agricultural commodity.¹⁰⁶ However, it has been noted that the World Bank’s call for the development of a vibrant land market, legislative reform and a ‘gradual and systematic land reform process instead of forced redistribution has prevailed.’¹⁰⁷

In sum, land law and policy under the Banda Administration reveals the various avenues through which the postcolonial State overtly underwent the responsabilization of a particular category of the citizenry – the land deprived – as a labour reserve. A bimodal agricultural policy only entrenched the local networks of capital through the promotion of the development of the estate sector and, by

¹⁰¹ See U Lele, note 85, 1217.

¹⁰² See U Lele, above.

¹⁰³ See J Harrigan, note 100.

¹⁰⁴ See generally J Harrigan, note 100.

¹⁰⁵ See J Harrigan, note 100, 857.

¹⁰⁶ See generally J Harrigan, note 100.

¹⁰⁷ See G Mhone, note 15, 9–10; and M Chipeta, note 63.

extension, the *Achikumbe* were the inevitable beneficiaries under the policy.¹⁰⁸ In this sense, the form of responsabilization under the Banda Administration was similar to that under the colonial State because the ‘disciplining’ techniques were also based on rapid land alienation, inculcation of a labour reserve, and the cultivation of cash crops was restricted to the estate sector.

B The Muluzi Administration

The Muluzi Administration came to power following the victory of its sponsoring political party – the United Democratic Front – in the general elections of 17 May, 1994.¹⁰⁹ The Muluzi Administration went on to govern the country for two constitutional terms between 1994 and 2004.¹¹⁰ During the first term, the big *bwana* syndrome did not necessarily revolve around the persona of Bakili Muluzi. Its nature lay in class-based patronage. This changed during the second term when increasingly political power and legitimacy evolved into a ‘Bandasque’ model and concentrated in the persona of Muluzi.

During the campaign for the general elections of 17 May, 1994, the United Democratic Front and other proponents of multipartyism promised to tackle the land question on the basis of a fair redistribution of land to the land deprived. Once in office, the Muluzi Administration steadily moved away from this promise. This shift has been attributed to three things: the nature of the property clauses under the 1994 Constitution based as it is on a liberal democratic institutional framework; the vested interests of global capital which played a part in the context of the development of the various poverty reduction strategies for the country and in the commissioned research on agrarian reform;¹¹¹ and, finally, in an environment of accountability and transparency in the public resource management, a lack of fiscal discipline that points to Bakili Muluzi himself meant the Administration increasingly relied on what has been called the ‘democratization of corruption’ to gain political patronage. This indiscipline led to a chaotic State policy climate such that the land question and any notions of a response to it inevitably got subsumed in the chaos.¹¹²

¹⁰⁸ See FE Kanyongolo, note 15, 124; G Mhone, note 15; and J Harrigan, note 100.

¹⁰⁹ See KM Phiri & K Ross, note 61, 9–16. Bakili Muluzi is a former Cabinet Minister under the Banda Administration.

¹¹⁰ See D Cammack *et al.*, note 48; D Booth *et al.*, note 48; and section 83(3) of the Constitution which provides that the President, First Vice President or Second Vice President shall hold office for a period of ‘a maximum of two consecutive terms’.

¹¹¹ See Chapters 5 and 6 for a discussion on the global linkages of the land question in Malawi.

¹¹² See B Chinsinga, note 17; D Booth *et al.*, note 48; and D Cammack *et al.*, note 48.

1 Promises on the Campaign Trail, 1992–1994

The starting point of the discussion to the Muluzi Administration's response to the land question is the promises that the advocates of multiparty politics made during the campaigns in the run up to the referendum of 14 June, 1993 and the general elections of 17 May, 1994 respectively. These advocates – particularly the United Democratic Front and the Alliance for Democracy – promised that multipartyism will bring with it land reform based on a fair redistribution of land to the land deprived. This promise was particularly made repeatedly in southern Malawi where land pressure is most acute.¹¹³ The land question was linked to poverty whereby the multiparty advocates often pointed out the asymmetry in land relations under the colonial State and the Banda Administration as a device to sustain the 'crippling levels of poverty' among the land deprived.¹¹⁴ The Muluzi Administration in conjunction with the country's development partners commissioned land utilization studies which were conducted between 1995 and 1998; and empanelled a Presidential Commission of Inquiry on Land Policy Reform in 1996. I discuss these developments fully in Chapter 5. Suffice it to say that there is a disjuncture between the macroeconomic frameworks and the land reform frameworks. Since the former take precedence over all policy initiatives in the country, the disjuncture has led to the continued entrenchment of the land question. To use Shamir's language, the nature of responsabilization here is that one market of authority (the macroeconomic framework) prevails over the other (the land reform initiatives).¹¹⁵

The rhetoric of a fair distribution of land to the land deprived continued in the Legislature after the general elections of 17 May, 1994. There was an exuberant tone regarding land relations: the emphasis was on the urgent need for 'fair distribution' or 'equitable distribution' of arable land for 'economic use' in favour of the land deprived who have had no assistance from the land rich.¹¹⁶ Honourable Thengo

¹¹³ See FE Kanyongolo, note 15, 131; B Chinsinga, note 17; and PE Peters & D Kambewa, Introduction, note 60.

¹¹⁴ See B Chinsinga, note 17, 4.

¹¹⁵ See R Shamir, Introduction, note 67.

¹¹⁶ See Government of Malawi *Proceedings of Parliament, 30th Session, 1st Meeting, 30th June–8th July, 1994* (Zomba: Government Printer, 1994) 24; Government of Malawi *Proceedings of Parliament, 30th Session, 2nd Meeting, 24th October–11th November, 1994* (Zomba: Government Printer, 1994) 227, 487, 527, 554, 633, and 670–671; and Government of Malawi *Proceedings of Parliament, 30th Session 3rd Meeting* (Zomba: Government Printer, 1994) 1072, 1084–1085, 1090, 1092, 1099, 1109, 1178, 1188, 1282–1283, 1287, and 1395. A lone voice from the Opposition cautioned that Government must not interfere with capital and emphasized the 'sanctity' of section 28 of the Constitution where Government has 'no right to take one's property, particularly doing so in total disregard of the law and

Maloya, member of Parliament for Machinga North East (United Democratic Front), speaking in 1994, perfectly captures the prevailing sentiments when he observed that the land deprived have had no assistance for their ‘degradation’ and ‘servitude’ through the ‘selfishness of the wealthy’. He pointed out that the “‘labouring class” are [sic] tenants at the mercy of the landlords’ and work in conditions ‘at the pleasure of the then party leaders and estate owners’ who considered themselves the ‘supreme law’.¹¹⁷

But even amidst the exuberance in the Legislature, the rhetoric changed. Increasingly, by the time of the second term of the Muluzi Administration from 1999 onwards, the rhetoric moved to the promotion of land reform grounded in a land redistribution model based on a willing seller/willing buyer approach. For example, following the presentation of the Ministerial Statement on the National Land Policy delivered to the Legislature in 2002, Honourable Thengo Maloya, now as the Minister responsible for land matters, concludes:

[T]his land policy has been prepared carefully and in a balanced manner to remove most of the pressing problems that have created tenure insecurity and undermined speedy and transparent land transactions in Malawi. In many cases, the inadequacies of the existing laws, retrogressive customary believes (sic) delays in land administration, arbitrary application of the public interest criteria, constraining inheritance laws and uncertainty regarding the strategies for dealing with land pressures have all operated to discourage needed investment and the nation’s ability to eliminate poverty and pursue social harmony.¹¹⁸

And in response to a question from a member of Parliament on land ‘acquisition’ in favour of the land deprived, the Minister said:

Frankly speaking, [...] we acquired that [land] by willing seller/willing buyer.

[...]

This land will definitely be reprocessed on its own to get people [...] those who are really pressed to be resettled at this place. But, the only model is that we are not going to resettle everybody and create no farms. It will be a model that will create homes, houses and then be able to make the same land more productive.

[W]hen there is any land and a willing seller/willing buyer [...] we will buy more and more land that is under-utilized and land being given for sale in order to resettle Malawians.¹¹⁹

against the Constitution, the supreme law of the land.’ The member argued that wanton expropriation would not attract foreign investors: See the contribution of Honourable Louis J Chimango, member of Parliament for Lilongwe Mpenu (Malawi Congress Party) in Government of Malawi *Proceedings of Parliament, 30th Session, 2nd Meeting, 24th October–11th November, 1994* (Zomba: Government Printer, 1994) 633.

¹¹⁷ Government of Malawi *Proceedings of Parliament, 30th Session, 2nd Meeting, 24th October–11th November, 1994* (Zomba: Government Printer, 1994) 554.

¹¹⁸ Government of Malawi *Proceedings of Parliament, 35th Session, 2nd Meeting*, (Lilongwe: Government Printer, 2002) 7.

¹¹⁹ Government of Malawi, above, 11.

The constitutional order of 1994 provides a framework for an analysis of the turn around on the initial campaign promise regarding the land question. The discussion on the nature of the constitutional order and its implications for land reform in the country follows in the next section.

2 The Property Clauses in the Constitution of 1994

In 1994, Malawi adopted a new Constitution that is generally based on a liberal democratic order.¹²⁰ The Constitution replaced a scheme dominated by the colonial and one party, postcolonial State embodied under the 1964 and 1966 Constitutions. It is not clear that the choice for a liberal, democratic constitutional order was based on informed consensus by the citizenry.¹²¹ The adoption of the liberal, democratic constitutional order seems to have merely conformed to the trends of post–Cold War geopolitics.¹²² On the general adoption of the 1994 Constitution, Kanyongolo has said:

The 1994 Constitution was drafted by a [committee] whose members lacked any popular mandate. There was no subsequent popular legitimization of the Constitution through a referendum or similar process and the resolutions of a ‘civil society’ constitutional conference were disregarded by Parliament when it promulgated the final document. In Malawi, therefore, liberal democracy as a system of governance has no demonstrable public legitimacy.¹²³

However, the Constitution is significant because it reversed the authoritarianism of the Banda Administration and, at the same time, complying with the constraints set by the Bretton Woods Institutions and the country’s other development partners. Richard Carver has observed that prior to the multiparty

¹²⁰ In the wake of the end of the Cold War, the changes in international geopolitics precipitated calls for the introduction of multiparty system of government in most sub-Saharan African countries including Malawi. In a national referendum of 14 June, 1993 (the ‘national referendum’), Malawians, by a majority of two-thirds, voted in favour of the introduction of a multiparty system of government. The results of the referendum immediately set in motion normative changes to the legal and political order in the postcolonial State: See MS Nzunda & K Ross (eds.) *Church, Law and Political Transition in Malawi, 1992–1994* (Zomba: Kachere Series, 1995); FE Kanyongolo ‘The Limits of Liberal Democratic Constitutionalism in Malawi’ in KM Phiri & K Ross (eds.), note 61, 353; and generally KM Phiri & K Ross (eds.), in this note. See also Introduction, note 31.

¹²¹ See FE Kanyongolo, note 12, 363–365. The Constitution was drafted by the constitutional sub-committee of the National Consultative Committee between January and May, 1994. Some parts of the Constitution were amended in plenary sessions of a full sitting of the National Consultative Committee. The National Consultative Committee was a multiparty forum for the development of a new Constitution for Malawi following the national referendum: see the National Consultative Act, Number 20 of 1993. The constitutional sub-committee comprised 5 Malawian lawyers and their secretary was a British consultant commissioned by the British Government through the British Council.

¹²² See FE Kanyongolo, note 12; and G Kamchedzera & C Banda, ‘The Right to Development, The Quality of Life, and The Performance of Legislative Duties During Malawi’s First Five Years of Multiparty Politics’ Chapter 1, note 107, 3–4.

¹²³ See FE Kanyongolo, note 12, 371.

general elections of 17 May, 1994, ‘the World Bank ran a series of seminars for political parties on economic and financial management.’ The apparent aim of the seminar series was to ensure that the political parties’ agenda reflected World Bank thinking. This may explain the lack of a detailed examination of the land question during the constitution formulation process.¹²⁴ During the parliamentary debate on the certification of the Constitution, a member of the Opposition lamented at the supposedly external interference when he alleged that ‘certain provisions’ of the Constitution had to be approved by the International Monetary Fund.¹²⁵

A general overview of the Constitution is that it is the supreme law of the land;¹²⁶ provides for a Bill of Rights under Chapter IV; states that the authority to govern is derived from the people of Malawi as expressed through equal and universal suffrage in an election;¹²⁷ proceeds on a very fundamental principle and states that all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the principles of the Constitution;¹²⁸ and creates the public trust and the social trust where all persons exercising powers of State shall do so to the extent of their lawful authority and in accordance with their duties and responsibilities to the people of Malawi.¹²⁹ There is an in-depth discussion on the public trust and the social trust in Chapter 7. Suffice it to say that the Constitution advocates the development of a free market economy in section 13(n). It is suggested however that section 13(n) is tempered down somewhat with an ‘egalitarian’ approach towards State responsibility on, for example, health in section 13(c); education in section 25; and economic and social development in section 30, of the Constitution. In relation to property, section 28 of the Constitution provides:

(1) Every person shall be able to acquire property alone or in association with others.

(2) No person shall be arbitrarily deprived of property.

The Constitution further provides that ‘expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification

¹²⁴ See R Carver ‘Review of *Malawi at the Crossroads: The Postcolonial Political Economy* by Guy C.Z. Mhone (ed.) and *Kamuzu Banda of Malawi: A Study in Promise, Power and Paralysis* by John Lloyd Lwanda’ (1994) 20(3) *Journal of Southern African Studies* 486. See also note 132.

¹²⁵ See the contribution of Dr. Hetherwick Ntaba, member of Parliament for Lilongwe South East (Malawi Congress Party) in Government of Malawi *Proceeding of Parliament, 30th Session, 3rd Meeting* (Zomba: Government Printer, 1995) 1537.

¹²⁶ Section 5 of the Constitution.

¹²⁷ Section 6 of the Constitution.

¹²⁸ Section 12(i) of the Constitution.

¹²⁹ Section 12(ii) of the Constitution.

and appropriate compensation, provided that there shall always be a right to appeal to a court of law.’¹³⁰ Existing rights of persons in property at the coming into force of the Constitution were saved through section 209 of the Constitution. The property clauses in sections 28, 44(4) and 209 of the Constitution are the definitive references to land.¹³¹

It must be noted, however, that the property clauses under the Constitution are neither historicized nor contextualized. The clauses do not address the ‘land grabbings’ under colonial capitalism and tolerated by the postcolonial State under the Banda Administration. This arises in the context where the proponents of a multiparty political system in the country, especially the podium politicians, used the prevalent landlessness (particularly in southern Malawi) to gain the support of the land deprived.¹³²

It is an obtrusive omission that the status quo of land relations in the postcolonial State was not a key issue during the constitutional development process nor did it form part of the key resolutions of the ‘civil society’ constitutional conference.¹³³ Perhaps, this is in part due to the nature of the participants to the constitutional development process, and indeed the ‘civil society’ in the postcolonial State, which was mainly ‘urban-based, elite-led’ and ‘profess[ed] the philosophy of liberal democracy’.¹³⁴ Kanyongolo notes, in respect of ‘civil society’, that the ‘typical

¹³⁰ Section 44(4) of the Constitution. In relation to section 28 of the Constitution, the Malawi Law Commission has concluded that the provision is about ‘capacity’ and not ‘rights’: See Malawi Law Commission *Report on the Technical Review of the Constitution*, Malawi Gazette Extraordinary, 16th November, 1998, 260. Under the constitutional review that began in 2005, the Law Commission did not problematize the property clauses at all: See Malawi Law Commission *Report on the Review of the Constitution* (Lilongwe: Government Printer, 2007).

¹³¹ The provisions do not define ‘property’. Under section 2(1) of the General Interpretation Act, Chapter 2:01, Laws of Malawi, ‘property’ is defined as including ‘money, and every description of property, whether movable or immovable, animate or inanimate, obligations and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incidental to property.’ In comparative constitutional law, ‘property’ equally means far more than a corporeal hereditament: See *Goldberg v Kelly* (1970) 397 US 254. In this sense, ‘property’ is de-physicalized: Chitty, J., in *In re Earnshaw-Wall*; K Gray, Chapter 2, note 18; and K & S Gray, Chapter 2, note 3.

¹³² See FE Kanyongolo, note 15, 131.

¹³³ See FE Kanyongolo, notes 12 and 120. In contrast, section 25 of the Constitution of South Africa is historicized and contextualized in relation to land relations arising out of colonial and apartheid South Africa and provides for land redistribution, land restitution and tenure reform: See the discussion in Chapter 3.

¹³⁴ See FE Kanyongolo, note 12. Cf. FE Kanyongolo on his discussion of the nature and the categories of ‘civil society’ in Malawi: See FE Kanyongolo, note 120, 132. See also E Dokali (ed.) *Building Blocks of the Constitution of Malawi, 1995* (1995) [on file with the author]. The list of participants to the National Constitutional Conference on the Provisional Constitution (held at the New State House, Lilongwe, Malawi, 20–24 February, 1995) shows that the participants were predominantly urban-based professionals from the public and private sectors respectively; members of urban-based, non-governmental organizations; chiefs (as representatives of the rural folk); politicians; local and

[non-governmental organization]' in Malawi is complicit in the scheme of a liberal democratic constitutional order and does not engage in any radical challenge to the status quo of land relations in Malawi.¹³⁵

Section 13(n) of the Constitution advocates the development of a free market economy which is then complemented with an obligation on the part of the State to invest in health, education, economic and social development.¹³⁶ While individual autonomy justifies the free market, Kamchedzera and Banda rightly observe that this is 'deficient because of [the] assumption that capabilities are equal or necessarily need to be equal.'¹³⁷ Hence, the liberal legal order of 1994 continues to obscure the asymmetry in the quality of life amongst persons in the country.¹³⁸

Turning to the actual property clauses, section 28 of the Constitution is as similarly worded as Article 17 of the Universal Declaration of Human Rights. A notable difference is that the operative word under the Constitution is 'acquire' as opposed to 'own' under the Universal Declaration. The wording under the Constitution is broader and may encompass expectations of acquisition of property.¹³⁹ However, there is need to reconcile the reference to 'arbitrary deprivation' in section 28(2) of the Constitution and 'expropriation' in section 44(4) of the Constitution and there implications for land reform in the country.

The proscription of arbitrary deprivation under the Constitution relates to the exercise of police powers of State without due process or a reasonable relationship between the means of the exercise and the purpose of the deprivation.¹⁴⁰ No compensation is ordinarily available for the exercise of police powers.¹⁴¹ Expropriation relates to the exercise of powers of eminent domain by a State. Section

international academics; 'observers' from international organizations; and members of the diplomatic corps. In total, 273 delegates and some 78 local and international observers attended the Conference. All diplomatic missions resident in Malawi also had observer status at the Conference and they had a presence at the Conference: See E Dokali, in this note.

¹³⁵ See FE Kanyongolo, note 15, 132.

¹³⁶ Sections 13(c), 13(f), 25 and 30 of the Constitution.

¹³⁷ See G Kamchedzera & CU Banda, note 122, 4.

¹³⁸ See FE Kanyongolo, notes 15 and 120.

¹³⁹ See for example the commentary by AE Dick Howard *et al.* 'Commentary on the Constitution of Malawi' January, 1995 [on file with the author]. Howard *et al* have argued that 'to acquire' does not necessarily mean 'to hold' and 'to dispose'.

¹⁴⁰ See *Government of Malaysia v Selangor Pilots Association* [1978] AC 337; *Lithgow v United Kingdom* (1986) 8 EHRR 329; *James v United Kingdom* (1986) 8 EHRR 123; *Sporrong & Lonnroth v Sweden* (1983) 5 EHRR 35; L Tribe *American Constitutional Law* (Mineola, New York: Foundation Press, 1988); JW Ely *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992), all cited in M Chaskalson 'The Property Clause: Section 28 of the Constitution' (1994) 10 *South African Journal on Human Rights* 131.

¹⁴¹ See AE Dick Howard *et al.*, note 139; and M Chaskalson, above, 134–135.

44(4) of the Constitution lays down three conditions for expropriation: the expropriation shall be for public utility, there must be adequate notification and appropriate compensation. The Constitution does not define these conditions. Commentators and indeed the courts have concluded that ‘public utility’ or ‘public purpose’ must confer a public benefit or advantage.¹⁴² There need not be actual physical use of the expropriated property by the public. It is enough that the expropriation confers a discernible direct or indirect benefit or advantage to the public.¹⁴³ Finally, expropriation invokes compensation. In view of the trends in comparable jurisdictions, ‘appropriate compensation’ under the Constitution will mean the market value of the property.¹⁴⁴ Since the Constitution in Malawi does not expressly authorize the State to expropriate land at a value lower than the market price, as does the South African Constitution, for example, there is likelihood that the courts may adopt an open market valuation as a yardstick for computing compensation. A compensation regime based on open market valuation poses significant financial challenges for political economies such as Malawi.¹⁴⁵

For comparison purposes, the South African position is illuminating. Section 25(3) of Constitution of South Africa provides for factors that will determine the level of compensation: the current utilization of the property; the history of the acquisition and utilization of the property; the level of State intervention in the initial acquisition; the market value of the property; and the purpose of the expropriation. On the basis of section 25(3) of Constitution of South Africa, some commentators have concluded that in South Africa compensation can actually be less than the market value of the

¹⁴² See for example M Chaskalson, note 140, 136–137; *Pennsylvania Coal Company v Mahon* (1922) 260 US 393. The Supreme Court in *Attorney General v the Malawi Congress Party, LJ Chimango and Dr HM Ntaba* [1997] 2 *Malawi Law Reports* 181 [hereafter ‘*Press Trust (Supreme Court) Case*’] seems to have implicitly adopted the broad interpretation of ‘public utility’. However, the courts in Malawi have not fully discussed the conceptual difference between deprivation and expropriation and the implications for an award (or non-award) of compensation: see the *Press Trust (Supreme Court) Case* and *The Malawi Congress Party, LJ Chimango and Dr HM Ntaba v Attorney General and the Speaker of the National Assembly* [1996] *Malawi Law Reports* 244 [hereafter ‘*Press Trust (High Court) Case*’]. See also FE Kanyongolo, note 12, 107.

¹⁴³ See A Eisenberg “‘Public Purpose’ and Expropriation: Some Comparative Insights and the South African Bill of Rights” (1995) 11 *South African Journal on Human Rights* 207.

¹⁴⁴ See especially A Eisenberg ‘Different Constitutional Formulations of Compensation Clauses’ (1993) 9 *South African Journal on Human Rights* 412. The Malawi Law Commission has observed that the compensation regime under the Lands Acquisition Act (Chapter 58:04, Laws of Malawi) is ‘outdated’ as it disregards the market value of property. The Law Commission has recommended an amendment to the Lands Acquisition Act such that ‘appropriate compensation’ must undoubtedly mean market value: See Malawi Law Commission, Introduction, note 33, 86–95.

¹⁴⁵ The rider is that this point is valid in a ‘normal’ economic climate as opposed to a period of hyperinflation or deflation.

property.¹⁴⁶ In comparison, the property clauses under the Malawi constitutional order are clearly less elaborate on the normative framework for deprivation and expropriation of property.

In light of the foregoing, the following conclusion can be made in the context of land reform in Malawi: The entrenchment of the right to property under the Constitution suggests that land reform in the country can only proceed under a land redistribution model based on a willing seller/willing buyer approach. This is the case because the property clauses are ahistorical and decontextualized; existing rights of persons in property are entrenched under section 209 of the Constitution; land reform is constitutionally sanctionable where ‘public utility’ is broadly construed to mean a ‘public advantage or benefit’; and in the absence of a provision similarly worded as, for instance, section 25(3) of the Constitution of South Africa, expropriation even for purposes of land reform will be based on market valuation. In sum, the Constitution protects existing rights in property more strongly than it guarantees the rights of the land deprived to acquire property. While the Constitution makes provision for expropriation, it is short on details as to whether such expropriation can be effected for purposes of land redistribution to the land deprived and for compensation which is less than the market value. This rigid, liberal interpretation of the property regime has been pervasive in the courts in Malawi.

3 Democratization of Corruption

In light of the constitutional framework adopted in 1994, the Muluzi Administration increasingly resorted to what has been described as the ‘democratization of corruption’. Booth *et al.* have argued that apart from the poverty alleviation programme, the Muluzi Administration did not have a clear development strategy for the postcolonial State.¹⁴⁷ In the context of the stringent accountability and transparency frameworks under the new constitutional order, the Muluzi Administration often engineered policy to facilitate patronage.¹⁴⁸ Hence, patronage was not restricted to loyalists. It was used to induce political opponents to toe the Administration’s line. While the Banda Administration has been described as

¹⁴⁶ See for example M Chaskalson, note 140, 137. In jurisdictions without a comparable provision to section 25(3) of the Constitution of South Africa, compensation will always be a minimum of the market value of the property: See *Cultura2000 v Government of the Republic of Namibia* (1993) 2 SA 12 (Namibia). In practice, however, compensation for land reform purposes in South Africa has been based on open market valuation: See L Ntsebeza, Chapter 3, note 95.

¹⁴⁷ See D Booth *et al.*, note 48, 12.

¹⁴⁸ See D Booth *et al.*, above.

practising a centralized, repressive mode of patronage, Booth *et al.* observe that at least the Banda Administration restricted its plunder to the ‘profits’ of public enterprises. Under the Muluzi Administration, the plunder targeted both the capital and the ‘profits’ of public enterprises.¹⁴⁹ Hence, under the Muluzi Administration, corruption was practised with ‘impunity’; it was ‘democratized’.¹⁵⁰ The ‘democratization of corruption’ lies in the fact that patronage pervaded all levels of the State apparatus; from the President’s office all the way down to the lowest ranked public servant.¹⁵¹

In relation to the land question, the Muluzi Administration does not unsurprisingly exhibit a clear policy of its own initiative.¹⁵² While the processes that led to the adoption of the Land Policy began under the Muluzi Administration, as it will be shown in Chapter 5, its implementation is problematic especially in light of what has been described as the ‘development aid game’. Booth *et al.* have observed that the development aid game leads to poor policy because of the self-induced pressure to disburse on the part of development partners and the manipulation on the part of the local political players for purposes of patronage. The cooperation of the Muluzi Administration during the development of the Land Policy confirms this propensity to cooperate for vested parochial interests.¹⁵³ This point is fully discussed in Chapter 6. Suffice it to say that by 2002, the democratization of corruption had become widespread and the development partners withheld most of the development aid commitments to the country.¹⁵⁴

C The Mutharika Administration

Bingu wa Mutharika came to power following the general elections of 20 May, 2004. He completed a first term (May, 2004 to May, 2009) and following victory in the general elections of 19 May, 2009, he began a second and last term of his Presidency.¹⁵⁵ After the general elections of 2004, he fell under difficult circumstances when he fell out with his sponsoring party – the United Democratic

¹⁴⁹ See D Booth *et al.*, note 48, 12–13.

¹⁵⁰ See D Booth *et al.*, note 48, 12.

¹⁵¹ See D Booth *et al.*, above.

¹⁵² See D Booth *et al.*, note 48, 13.

¹⁵³ See D Booth *et al.*, note 48, 29–37.

¹⁵⁴ See D Booth *et al.*, note 48.

¹⁵⁵ See <http://www.africanelections.org/malawi/results.php> [visited on 10 July, 2009] on the results of the general elections of 19 May, 2009.

Front – and formed his own political party, the Democratic Progressive Party.¹⁵⁶ During its first term, the Mutharika Administration was increasingly undermined at the behest of Bakili Muluzi's politicking. In turn, the Mutharika Administration perpetuated the neopatrimonial nature of the postcolonial State to inculcate and reinforce its own networks of patronage for its political survival. Diana Cammack *et al.* state:

Mutharika has utilised both formal and informal resources in an attempt to build personal and political support, including reaching out to civil society and the media, a zero-tolerance anti-corruption campaign and populist policies (e.g. fertiliser subsidies, road-building). He has also encouraged opposition politicians with political appointments and patronage to cross the floor and harassed media and opponents.¹⁵⁷

The neopatrimonial traits have persisted under the Mutharika Administration. Mutharika has now assumed titles of grandeur such as the *Ngwazi*; which means 'the Ultimate Warrior-Conqueror'; *Mose wa Lero*; which literally translates as 'the Present-day Moses' and it is a title based on the biblical Moses. Mutharika as *Mose wa Lero* epitomizes the god-sent saviour just as the biblical Moses. The continued trend here may be explained in terms of the peculiar nature of African neopatrimonialism. Booth *et al.* have argued that African neopatrimony is innately based on the big *bwana* syndrome.¹⁵⁸

In addition to the acrimonious political climate the Mutharika Administration found itself in, it also inherited a very weak macro-economy following the high level of corruption and patronage-driven policy making under the Muluzi Administration. Malawi's development partners withheld all levels of development aid for the country (except for balance of payments support) following their loss of confidence in the Muluzi Administration.¹⁵⁹

However, in spite of the stated weaknesses that beset the Mutharika Administration, his technocratic background – having worked as a high ranking public servant with the United Nations and the Common Market for East and Southern Africa – has endeared his Administration to the country's development partners. Further, the Administration's commitment to development and the country's sustainable economic growth has cemented the support from the country's

¹⁵⁶ See D Cammack *et al.*, note 48. See also D Cammack 'Malawi: The Politics of Hunger', Overseas Development Institute Opinions, April, 2006 available at <http://www.odi.org.uk/resources/odi-publications/opinions/69-diana-cammack-malawi-politics-hunger.pdf> [visited on 13 March, 2009].

¹⁵⁷ See D Cammack *et al.*, note 48, 12.

¹⁵⁸ See D Booth *et al.*, note 48.

¹⁵⁹ D Booth *et al.*, note 48, describe Malawi's macro-economy in 2004 as being 'at the edge of the abyss'. See also D Cammack *et al.*, note 48.

development partners and increasingly from the general Malawian population.¹⁶⁰

Again Diana Cammack *et al.* sum up the Mutharika Administration as follows:

Mutharika appears to be a suspicious and isolated president, one preoccupied with maintaining his position while implementing challenging reforms, especially in the agricultural sector. These reforms, if they are successful, may well create ‘winners’ and supporters in the 2009 elections.¹⁶¹

In the context of the responses to the land question under the Mutharika Administration, there is continuity regarding the initiatives that were started under the Muluzi Administration. Further, just like under the Banda Administration, the Mutharika Administration is also implementing a bimodal agricultural policy. The only difference between the two Administrations however is that during the first term of the Mutharika Administration, the postcolonial State sought to boost the small holder sector under a targeted farm input subsidy programme which has been in place since 2004.¹⁶² The Mutharika Administration is also implementing the Community-Based Rural Land Development Programme. The Programme is one of the strategies for the implementation of the Land Policy. The Policy and the Programme are discussed fully in Chapters 5 and 6 respectively.¹⁶³ As it has been noted, however, these initiatives are implemented in the shadow of an overarching macroeconomic framework which serves as the country’s main development strategy.

Since May, 2009, the Mutharika Administration is shifting towards a more mechanized, large scale estate agricultural policy. This is apparent from the Budget Statement for the 2009/2010 financial year. In the Statement, the Minister responsible for finance asserts:

Mr. Speaker Sir, Government recognises the fact that agriculture will remain the backbone of the economy for the foreseeable future. In this regard, Government intends to transform the agriculture sector mainly within the framework of the Green Belt Initiative. In the medium term, Government in addition to smallholder farming will promote medium and large scale commercial farming. This would among other things entail increased mechanization and irrigation.¹⁶⁴

¹⁶⁰ See D Cammack *et al.*, note 48.

¹⁶¹ See D Cammack *et al.*, note 48, 12. The ‘prophecy’ by Cammack *et al.* has come to pass as the victory of the Mutharika Administration in the May, 2009 general elections has been attributed to the good economic performance of the Administration: See for example <http://edition.cnn.com/2009/WORLD/africa/05/21/malawi.election/index.html> [visited on 28 November, 2009].

¹⁶² See also B Chinsinga, Introduction, note 72; and D Booth *et al.*, note 48. See also CW Dugger ‘Ending Famine, Simply By Ignoring the Experts’ *The New York Times*, 2 December, 2007 available at http://www.acqualuzminerale.com/~santiago.funes/paraacqua/dugger_malawi.pdf [visited on 13 March, 2009].

¹⁶³ See also B Chinsinga, above.

¹⁶⁴ See Ministerial Budget Statement to the National Assembly, 3 July, 2009 [on file with the author] 24.

The Minister's sentiments echo the President's State of the National Address on the official opening of Parliament on 23 June, 2009. In relation to the Administration's agricultural policy, the President stated that agriculture and food security is one of the Administration's priorities within priorities; that targeted farm input and subsidy that began in 2004 would continue; that the Administration will start the implementation of what has been called the 'Green Belt' programme which will see the utilization of some 1 million hectares of land under irrigation agriculture. This is a strategy that is apparently meant to enhance food security for the country considering the unreliability of rain-fed agriculture.¹⁶⁵ Both the President's and Minister's statements respectively only make tangential rather than direct reference to the land question in the country. Hence, outside the rural land development programme and the Land Policy, the Mutharika Administration has not put in place any deliberate strategies targeted at the land question.

III JUDICIAL INTERVENTION AND THE LAND QUESTION

This part looks at the intervention by the Malawian courts and its implication for the resolution of the land question. This discussion follows from the jurisprudence of *Nireaha Tamaki, In Re Rhodesia*, *Amodu Tijani* and the *Mabo* discourse that was discussed in Chapter 2. It was noted that *Nireaha Tamaki, In Re Rhodesia* and *Amodu Tijani* have established that the basic legal principle of land relations in the Anglophone colony is that a proclamation of colonial sovereignty superseded all rights or interests in land. The survival of the rights or interests in land of an indigenous society turned on the interpretation of the terms of annexation or cession. Indeed in the African context, *Amodu Tijani* held that, if anything, the indigenous society had a usufruct.

Further, the *Mabo* discourse established the following principles: the original right in land of an 'indigene' society is not extinguished by mere lack of recognition by a new sovereign. Second, the original right of the 'indigene' society is extinguished by specific government action through a grant of land in freehold or other limitation set down under statute. Third, and subject to the previous two principles, the colonial sovereign did not acquire eminent domain that extinguished original interests in land; the acquisition was by virtue of sovereignty and not by

¹⁶⁵ See 'Malawi's Economic Miracle', State of the Nation Address by His Excellency Ngwazi Dr. Bingu wa Mutharika, President of the Republic of Malawi on the occasion of the State Opening of the 41st Session of Parliament and the 2009/2010 Budget Meeting, 23 June, 2009 [on file with the author] 9–12.

virtue of property. Indeed, *Transvaal Agriculture Union* and *Richtersveld* have shown that subsequent government action can reverse prior government action that deprived the right to land to a people. It was also concluded in Chapter 2 that *Nireaha v Baker*, *In Re Rhodesia*, *Amodu Tijani* and the *Mabo* discourse must be understood in the context of their localized spaces.

In Malawi, the land question has not been clearly tackled by the courts. The few cases that have gone before the courts that would have implications for the land question have been dealt with in an abstract, legal positivist manner. There are two trains of thought that emerge from the courts; namely the abstraction thesis, and second, the validation of so-called ‘customary’ land interests under section 28 of the Constitution. The adoption of the abstraction thesis is apparent from the *Press Trust (High Court)* Case, the *Press Trust (Supreme Court)* Case, *Mwawa v Jekemu*¹⁶⁶ and *Nchima Tea and Tung Estates v All Concerned Persons*.¹⁶⁷ The constitutional validation approach is best exemplified in the case of *Administrator of the Estate of Dr H Kamuzu Banda v The Attorney General*.¹⁶⁸ Before discussing the two approaches two points must be made: First, under both approaches the communitarian *ethos* of the ‘customary’ space is not problematized at all; it is taken as a well settled principle. I have argued in Chapter 2 that the failure to recognize the colonial construction of the ‘customary’ space undermines the resolution of the land question in postcolonial African economies such as Malawi. Second, the lack of the problematization of the ‘customary’ space has led to inconsistency in dealing with the underlying conceptual issues that relate to the land question.

As pointed out, the abstraction thesis emerges from the *Press Trust (High Court)* Case, the *Press Trust (Supreme Court)* Case, *Mwawa v Jekemu* and *Nchima Tea and Tung Estates*. The facts in the *Press Trust (High Court)* Case and the *Press Trust (Supreme Court)* Case can be merged as follows: The cases revolved around ownership of the Press Trust. The Press Trust was incorporated under the Trustees Incorporation Act¹⁶⁹ in 1992; the Trust Deed was settled in 1982 but the registration under the Trustees Incorporation Act was only done in 1992. The Press Trust was initiated by President Banda ostensibly for the benefit of the nation. The subject of the

¹⁶⁶ Civil Cause Number 883 of 1993 (High Court of Malawi, Principal Registry, Unreported).

¹⁶⁷ Civil Cause Number 338 of 1998 (High Court of Malawi, Principal Registry, Unreported) [hereafter ‘*Nchima Tea and Tung Estates*’].

¹⁶⁸ Civil Cause Number 1839(A) of 1997 (High Court of Malawi, Principal Registry, Unreported).

¹⁶⁹ Chapter 5:03, Laws of Malawi.

trust was the shares held in a limited liability company – the Press Holdings Limited. Press Holding Limited was part of a conglomerate that dominated the private sector in Malawi between 1969 and 1994. The domination was considered beneficial for the development of the country's economy. The conglomerate received considerable privileged treatment from the Banda Administration.

In 1995, the Muluzi Administration enacted the Press Trust (Reconstruction) Act.¹⁷⁰ The Act was meant to reconstruct the administration of the Press Trust. The Muluzi Administration was of the view that the Trust benefitted Banda's cronies in his party, the Malawi Congress Party, and his family to the exclusion of the rest of the Malawian population. One of the strategies under the reconstruction was that the Act empowered the President to appoint new trustees of Press Trust replacing the first trustees and erstwhile incumbent trustees. The respondents argued, among other points, that the Press Trust (Reconstruction) Act violated the right to property under section 28 of the Constitution in so far as the Act purported to deprive the existing trustees of their property in the trust.

In both the *Press Trust (High Court)* Case and the *Press Trust (Supreme Court)* Case, the courts followed an abstraction thesis in the conception of the right to property; that is, they followed the liberal, positivist approach to the right to property. The difference in the two decisions is that in the *Press Trust (High Court)* Case, Justice Mwaungulu held, among other conclusions, that only the ownership of legal title can be protected under the Constitution. On the other hand, Justice of Appeal Mtegha, delivering the judgement of the Malawi Supreme Court of Appeal in the *Press Trust (Supreme Court)* Case, held, among other points, that the beneficial interest in land is capable of constitutional protection and where the beneficial interest is under threat; remedial government action cannot be unconstitutional under section 28 of the Constitution. For purposes of the thesis, the *Press Trust (Supreme Court)* Case is significant for its recognition of the beneficial interest in land and the remedial importance of government action in property discourse.

It is arguable therefore that the *Press Trust (Supreme Court)* Case overrules the narrow, abstractionist view of *Mwawa v Jekemu* and *Nchima Tea and Tung Estates* regarding the right to property in land. In *Mwawa v Jekemu* and *Nchima Tea and Tung Estates*, the defendants were (illegal) 'occupiers' on private land belonging

¹⁷⁰ Cap. 5:04, Laws of Malawi.

to the plaintiffs. In both cases, the plaintiffs brought an action in trespass seeking an order of eviction against the defendants. The courts here adopted the legal positivist dichotomization of a land owner and trespasser in finding against the defendants and making orders of eviction accordingly. Unlike the approach in the *Press Trust (Supreme Court)* Case, there was no attempt in *Mwawa v Jekemu* and *Nchima Tea and Tung Estates* to consider the existence of a beneficial interest in land in favour of the defendants. This would be a worthwhile examination of the case considering that the locality of the land occupied by the defendants in both cases was in the Shire Highlands in southern Malawi; this is an area with acute land shortage following the history of land alienation in favour of the estate sector. The Malawian courts' approach in *Mwawa v Jekemu* and *Nchima Tea and Tung Estates* is consistent with that of the Supreme Court of Canada. The Supreme Court of Canada has entrenched a liberal, positivist approach in relation to the rights of indigenous communities. In *Delgamuukw v British Columbia*,¹⁷¹ the Court did not recognize the right of ownership and jurisdiction of the 'aboriginal tribes' in relation to the land they inhabited. The Court however recognized the right of those tribes to occupancy subject to state law. The cases reveal the courts' attitude against a historicized and contextualized approach to interpretation of property.

Turning to the second approach by the Malawian courts; namely, the constitutional validation of 'customary' land, the first case on the point is *Administrator of the Estate of Dr H Kamuzu Banda v The Attorney General*. In the case, the ownership of a cattle ranch belonging to President Banda was the subject of an acquisition order by the Minister responsible for land matters. The Minister ordered that part of the ranch was required for distribution to the people in the surrounding area. The ranch comprised 4,636 hectares of so-called 'customary' land. Subsequently an order of eviction was served on the administrators of the Estate of President Banda. The High Court held (Justice Chimasula Phiri presiding) that the right to property under sections 28 and 209 of the Constitution, applies to all rights in property including rights of property in 'customary' land; that even those holding beneficial or equitable rights or property in customary land are, under the Constitution, equally entitled to adequate notice and appropriate compensation in

¹⁷¹ [1997] 3 S.C.R. 1010.

terms of section 44 of the Constitution; and following the ‘treatise’ by JO Ibik,¹⁷² that users of customary land hold the beneficial interest in it in perpetuity with additional rights to bequeath it to their heirs or share it with their kin; that the beneficial interest of the user is superior to the allocative power of the chief and the nominal title of the President as provided under the Land Act.

Even though the judge in the *Administrator of the Estate of Dr H Kamuzu Banda v The Attorney General* did not make specific reference to the *Press Trust (Supreme Court)* Case, it re-affirmed the principle that a beneficial interest in land is capable of constitutional protection. However, in light of the discussion of the ‘customary’ space in Chapter 2, it is tenuous in my view, to justify the recognition of the beneficial interest in land on the basis of the Ibik discourse. It has been argued that scholars such as Ibik gave academic legitimacy to the colonial construction of the ‘customary’ space. Further, under the scheme of interests in land under the Land Act, it has been contended that the so-called ‘customary’ land is in full legal effect public land. In this respect, the users of the land are similar to tenants at will. The beneficial interest in the land accrues to these users under the ‘tenancy at will’ and not so much under the so-called ‘customary’ land. The chief serves a political function and not a property discourse function in this scheme.¹⁷³

This problem in the interpretation of the conceptual issues lies at the root of the contrast between *Administrator of the Estate of Dr H Kamuzu Banda v The Attorney General* and *Henry Mbirintengerenji v Traditional Authority Nsomba and Others*.¹⁷⁴ In *Mbirintengerenji* Case, the plaintiff had obtained an *ex parte* injunction against the defendants stopping them from erecting a teacher’s house (as part of a State-run secondary school) on a piece of land the plaintiff claimed he owned. The piece of land was on ‘customary’ land and the plaintiff’s ‘claim to title’ was that he had inherited the land from his parents who traced their claim to title to his grandparents. His grandparents had been allocated the land by a chief of the area. The High Court (Justice Manyungwa presiding) discharged the injunction restraining the defendants from building the teacher’s house arguing that the plaintiff could be adequately compensated in damages if it was later found that his land had been unlawfully expropriated. Justice Manyungwa said:

¹⁷² See JO Ibik, Chapter 2, note 56.

¹⁷³ See note 168.

¹⁷⁴ Civil Cause No 101 of 2007 (High Court of Malawi, Principal Registry, Unreported) [hereafter ‘*Mbirintengerenji* Case’].

It is important [...] to note that the land in question is customary land, and not private land. Section 25 of the Land Act provides that all customary land is property of the people of Malawi and is vested in perpetuity in the President. Thus, although a person may acquire some interest in the customary land, as is the case with the plaintiff, the same cannot be said to amount to title. Simply put, the plaintiff is not the owner of the land as he has no title to it, all he has is beneficial interest. Moreover section 28 of the Land Act provides for compensation to be paid to a person whose interest[s] have been disturbed by converting customary land to public land, and that the acquisition has to be in the public interest.¹⁷⁵

Besides the conceptual problems relating to the conception of the ‘customary’ space and the lack of analysis of existing principles that have been developed in, for example, the *Press Trust (Supreme Court) Case* and *Administrator of the Estate of Dr H Kamuzu Banda v The Attorney General*, the Court in *Mbirintengerenji Case* suggests that beneficial interest in land is not amenable to constitutional protection.

In sum, an important principle that has emerged from the judicial intervention of the Malawian courts in relation to the land question is summed up in the *Press Trust (Supreme Court) Case*: the beneficial interest in land has constitution protection under the Constitution. Second, government action can reverse a status quo that impedes the enjoyment of a beneficial interest in property, and by extension land. These points are further developed in Chapter 7.

IV FINAL WORD

The land question in Malawi has not been resolved under the colonial and postcolonial law and policy frameworks for a host of reasons. Colonial capitalism in the country was based on a large estate agriculture sector dominated by white entrepreneurs. The black population was semi-conscripted into labour reserves to support the colonial State’s development strategy. Under the Banda Administration, colonial practice was merely deracialized. This is apparent from its continued preference of the large estate sector to the smallholders. I have also endeavoured to show that under the Banda Administration, the nature of the neopatrimonial State was such that policy drove patronage. Under the colonial State and the Banda Administration, the nature of responsabilization was marked by land alienation, cheap labour policies, and restrictions on the players in commercial cash crop agriculture in order to reinforce the estate sector.

Under the Muluzi Administration, policy had to fit patronage resulting in a patronage-policy framework. Hence, while the Muluzi Administration put in place initiatives towards the resolution of the land question, besides the nature of the

¹⁷⁵ At page 4 of the ruling.

neopatrimonial State, these have been undermined by three factors: the liberal democratic institutional framework, especially the property clauses under the Constitution; the ‘democratization of corruption’ that defined the Administration’s *ethos*; and the role of the Bretton Woods Institutions that has been alluded to here as shaping the nature of the macro-economy.¹⁷⁶

Just like the Banda Administration, the Mutharika Administration has also put in place a bimodal agricultural policy. During its first term, the Administration suffered from the political reality of being a ‘minority government’ whereby the implementation of its policies was critically hampered by a hostile opposition majority. The rhetoric during this period had been that there were rewards for both the large estate and smallholder sectors. The early signs of the second term of the Mutharika Administration from the post-May, 2009 period seem to be that there will be increasing preference for a large scale agricultural sector.

In light of the increasingly shrinking size of available arable land to the land deprived, the nature of the neopatrimonial State and the Banda, Muluzi and Mutharika Administrations respectively has had varying implications for the land question. I would like to argue that under the Banda Administration, the response was indeed ‘lukewarm’ to the extent that it merely reinforced colonial practice. The implementation of policies under the Muluzi Administration was *ad hoc*, perilously jejune and self-serving, particularly in relation to those within the networks of patronage. In this respect, under the Muluzi Administration, the land question received attention only where it served a particular patronage strategy. The Mutharika Administration’s bimodal agricultural policy is increasingly mirroring the policy under the Banda Administration. In that light, the Mutharika Administration’s approach (or lack of it) to the land question does not augur well for its resolution.

In the context of a dire situation of the land question where going by 1996/1997 national figures, only 0.8 hectares of available arable land accrued to a household (this translates into 0.18 hectares per member of a household),¹⁷⁷ in Chapters 5 and 6 respectively, I discuss the interventions that have been put in place to purportedly resolve the land question. These interventions are primarily the Land Policy and the attendant initiative by the Malawi Law Commission. These are central to the discussion in Chapter 5. In Chapter 6, I discuss the competing interests of the

¹⁷⁶ See further discussion in Chapter 5 and 6.

¹⁷⁷ See D Booth *et al.*, note 48, 6.

key constituencies in land reform in Malawi and how those interests are enhancing or undermining the resolution of the land question; where a resolution would entail an improved access to available arable land by the erstwhile land deprived in the country.

Chapter 5

Policy Intervention and the Land Question

It was noted in the Introduction that the postcolonial State adopted the Land Policy on 17 January, 2002; that the Land Policy is central to the discussion of the policy intervention in relation to the land question in Malawi; and that the adoption of the Policy is located within the new wave of land reform. Second, Chapter 2 demonstrates that the liberal conception of the right to property in land dominates property discourse. This dominance stems from the supremacy of market as value in development discourse. Chapter 3 in part traces the root of market as value back to the Hayekian catallaxy.

It was also observed in Chapter 3 that the implementation of market-based land reform models is beset by three issues: the preferential treatment of land owners in the estate sector; particularly under the land redistribution model based on a willing seller/willing buyer approach has led to the conclusion that the model amounts to a seller's market. Second, the lack of post-redistribution support services has meant that land distributed to the land deprived is amenable to distress sales. Third, the nature of programme financing disfavours weak economies since the implementation of the models requires heavy capitalization which, in the case of weak economies, often is only possible through external capital from the Bretton Woods Institutions. A conclusion of Chapter 3 is that the combined effect of the three issues epitomizes the process of hegemonic responsabilization of the land deprived as a source of cheap wage labour and inchoate producers.

Regarding the Land Policy, the following observations may be made: The Policy was formulated under the aegis of the World Bank. It is grounded in a market-based approach to land reform. Its main thrust is that it 'reflect[s] the imperative of changing economic, political and social circumstances' in Malawi.¹ It forms the basis for the development of 'a comprehensive land law with immense economic and social significance.'² It also seeks to provide 'a sound institutional framework for democratizing the management of land and introduces [...] procedures for protecting

¹ See Government of Malawi, Introduction, note 28, 8.

² See Government of Malawi, above.

land tenure rights, land based investments and management of development at all levels.’³

The process that led to the adoption of the Land Policy follows closely from agrarian and other studies commissioned by the Muluzi Administration in cooperation with the country’s development partners between 1995 and 1998. Notable among these national interventions were the Presidential Commission of Inquiry on Land Policy Reform; and the Public Land Utilization Study, the Estate Land Utilization Study, and the Customary Land Utilization Study. The broad mandate and methodology of the Presidential Commission and the three land utilization studies required them to lead to the development of sound ‘scholarly discourse’ which would in turn lead to an informed intervention towards the resolution of the land question. The rhetoric was that this informed intervention would lead to the development of a robust national land policy. The Presidential Commission and the land utilization studies used a wide participatory approach involving the private sector, ordinary citizens and non-governmental organizations, all geared to aid land reform in the country.⁴

The Presidential Commission’s Report of 1999 and the findings of the three studies are, as it will be shown, contradictory. However, the rhetoric still states that the findings of the Commission and the studies purportedly became an informed basis for the development of the Policy. In turn, the Policy is meant to be the blueprint for the development of a new land law regime for the country.⁵ The Law Commission was tasked with translating the Policy into law. A special Law Commission was empanelled in 2003 whose mandate, among other things, included the review of existing land-related legislation, the development of new legislation for effective land administration, codification of ‘customary’ land law, and the definition of the role of traditional authorities and local government in land administration.⁶ While the Commission finalized its work in March, 2006, Parliament is yet to enact its recommendations into law.⁷ Chinsinga, writing in 2008, concludes:

³ See Government of Malawi, note 1.

⁴ See Government of Malawi, Introduction, note 69, 3–11; and B Chinsinga, Introduction, note 57, 4.

⁵ See the Government of Malawi, note 1; and S Holden *et al.*, Introduction, note 59, 13.

⁶ See Malawi Law Commission, Introduction, note 33, 5–6.

⁷ Key Informant Interview: 25 March, 2008. See also PE Peters & D Kambewa, Introduction, note 60; and B Chinsinga, note 4.

[T]here is mounting evidence that the delays in implementing the land reforms – championed as a priority policy issue to galvanise popular support for the democratization project – is stretching the patience of the ‘land hungry people’.⁸

The work of the Presidential Commission, the land utilization studies, the Policy and the work of the Law Commission are a result of the urge to develop a ‘single’ or ‘comprehensive’ national framework on land.⁹ It was noted in Chapter 4 that a fairly robust sectoral policy, albeit a bimodal one, has always covered the country’s agricultural sector.¹⁰ However, there has been a sustained lack of policy synergy in the strategy deployed for the resolution of the land question. The Presidential Commission, for instance, identified other sectoral policies, namely, the National Land Use and Management Policy; the National Environmental Policy and Action Plan; the National Forestry Policy; the National Irrigation Policy and Development Strategy; the National Housing Policy; and the National Physical Development Plan. However, the Presidential Commission noted that while all these sectoral policies addressed land issues, particularly land tenure; they lacked intersectoral synergy which merged into an integrated framework that forms a basis for efficient resource utilization in the national political economy.¹¹

This Chapter considers the policy intervention that has been undertaken in the country and examines the extent to which the land question can be resolved under the intervention. The policy intervention here emerged on the back of the logic that ‘clear and unambiguous policies [must] precede plans, programmes and implementation instruments.’¹² A number of observations may be made regarding the intervention: it has been dominated by an underlying market-based land reform modelling which has been championed by the postcolonial State’s development partners. It was noted in Chapters 3 and 4 that history and context has not been a key consideration. As the discussion below reveals, this has undermined the nature of the recommendations under the intervention.

Second, the conceptual problems relating to the ‘customary’ space highlighted in Chapter 2 have been perpetuated under the policy intervention in so far as the ‘conception’ of the ‘customary’ space is not problemmatized at all. The nature of ‘customary’ land tenure based on a communitarian *ethos* has been taken for granted.

⁸ See B Chinsinga, note 4.

⁹ See for example Government of Malawi, note 4, 27.

¹⁰ See Government of Malawi, note 4, 29.

¹¹ See Government of Malawi, note 4, 32.

¹² See Government of Malawi, note 4, 35.

Third, the lack of intersectoral synergy that the Presidential Commission itself identified remains. There is a lack of concerted linkages between the country's macroeconomic frameworks and the initiatives under the land reform. This disjuncture between the macroeconomic framework and the Land Policy is discussed in more depth in Chapter 6. Suffice it to say that to the extent that the macroeconomic framework is formulated as the overarching framework for the country's development, it means that the Bretton Woods Institutions define the negotiability of the issues that relate to the land question by the constituencies under the land reform, at least at the policy level. This is yet another manifestation of the Foucauldian technologies of normalization under a process of hegemonic responsabilization. As noted in Chapter 1, uncertainty (in this case revealed through policy disjuncture) is a trait of biopower.

Fourth, while the rhetoric is that the Presidential Commission and the three studies proceeded on a common platform meant to ultimately feed into a national land policy, there is no synergy between the recommendations of the Presidential Commission and the three land utilization studies; nor is there any synergy among the studies themselves. Finally, and more critically in relation to the resolution of the land question, the various initiatives failed to ascertain in definitive terms the area of available arable land in the public land, private land and the so-called 'customary' land sectors. This is the case despite the fact that one of the objectives of the studies was to precisely ascertain the levels of availability of land under the sectors.

In the end, although the Presidential Commission and the three studies are touted as having informed the development of the Policy, a close examination of the processes does not support this position. The conflict and confusion among the reports of the Presidential Commission and the studies does not enrich the Land Policy as a blueprint for the resolution of the land question in the country. In any event, the report of the Presidential Commission was not supported by the postcolonial State. This in my view suggests a further disjuncture between the processes under the Presidential Commission and the three studies, on the one hand, and the Land Policy, on the other. Hence, to the extent that the 'theory' of the Policy is problematic, an automatic transition from policy to law through the work of the Law Commission is equally problematic and only entrenches the irresolution of the land question.

I 'LET SLEEPING DOGS LIE': THE PRESIDENTIAL COMMISSION OF INQUIRY ON LAND POLICY REFORM, 1996

The Presidential Commission was appointed by the Muluzi Administration on 18 March, 1996. It comprised fifteen Commissioners drawn from the academia, private business, parastatal corporations, the estate sector, political parties, women groups, chiefs, and the clergy.¹³ The Commissioners were pre-dominantly urban-based and male; two were male chiefs; two were women; and none were representatives of the land deprived. The Commission's terms of reference included, among other things, 'to undertake a broad review of land problems throughout Malawi, and recommend the main principles of a new land policy which will foster a more economically efficient, environmentally sustainable and socially equitable land tenure system.'¹⁴ Beyond the principles for a new land policy, the Commission was mandated to 'suggest guidelines for basic land law and subsidiary legislation to give effect to the new policy.'¹⁵

The Commission commenced its work in earnest on 8 January, 1997 up to and including 31 March, 1999, a period of some 26 months, when its Report was published. During this period, the Commission conducted 230 public hearings, three regional consultative workshops, and one national workshop on its preliminary findings.¹⁶ At the beginning of its work, the Commission re-interpreted its terms of reference and concluded that: it was not a court of law, the legislature nor a land distribution agency. Hence in its approach to the land question, the Presidential Commission resolved that it would conduct a comprehensive inquiry into the history of land law and policy in the country; the social reality of the land question; the 'nature' and 'performance' of the land tenure systems under the 1967 reforms; the inheritance systems; and the land administration.¹⁷

Despite the re-interpretation, in relation to the land question in the country, the recommendations of the Presidential Commission may be summed up in their own language at page 20 of their report: In view of 'political and economic expediency,' the country must 'let sleeping dogs lie.' This is the Commission's position despite acknowledging the serious land asymmetry due to land law and policy that was

¹³ See Government Notice Number 20 of 1996 published in the Malawi *Gazette* Supplement of 18 March, 1996; and Government of Malawi, note 4, 1–3. One Commissioner passed away in the course of the Commission's work and another left for further studies outside Malawi. Thirteen Commissioners signed the final report.

¹⁴ See Government of Malawi, note 4, 3–7.

¹⁵ See Government of Malawi, note 4, 5.

¹⁶ See Government of Malawi, note 4, 9–10.

¹⁷ See Government of Malawi, note 4, 6–7.

followed under the colonial State and, subsequently, the Banda Administration. The following discussion looks at what the Presidential Commission meant by ‘letting sleeping dogs lie’ and indeed why the dogs could not be awakened.

The Presidential Commission was funded by the postcolonial State; the Danish International Aid Agency (DANIDA); the Food and Agricultural Organization (FAO); the United Nations Development Programme (UNDP); and the World Bank.¹⁸ Besides the Commissioners, a team of at least three Malawian consultants, an FAO team and at least four foreign consultants provided ‘technical’ support.¹⁹ In fact, the Commission acknowledges that the delay to the start of its work (from the time of gazetting on 18 March, 1996 to the actual commencement of work on 8 January, 1997) was due to ‘a number of logistical and substantive issues involving funding, working conditions and infrastructure [that] were [unresolved] by the [G]overnment of Malawi and its bilateral and multilateral partners’ and that work only started when the Project Support Document was signed.²⁰

The Presidential Commission makes a number of observations and findings, and gives recommendations regarding the land question where it deemed it appropriate. Three areas are highlighted: First, the Commission acknowledges the nature of colonial land law and policy as a critical factor in buttressing the land question in the country.²¹ Their observation complements the discussion of the land question in Chapter 4. The Commission observed that since the logic of colonial capitalism was to inculcate white economic enterprise through systemic land alienation, the Commission found that the colonial State ‘stultified’ the evolution of ‘customary land law’.²² This was the case because the ‘indigenous’ society lacked title to land. The ‘customary’ law that applied to them could only be personal as opposed to property law.²³ Hence, the Commission recommended that the 1967 Reforms must be repealed as they perpetuated colonial practice.²⁴ The Commission states:

¹⁸ See Government of Malawi, note 4, especially the acknowledgements section.

¹⁹ See Government of Malawi, above. The Malawian consultants were: Charles Chanthunya, Francis Liuma and Modechai Msisha. The foreign consultants were: Simon Keith, HWO Okoth–Ogendo, Barron Orr and Michael Smart: See Government of Malawi, in this note.

²⁰ See Government of Malawi, note 4, 7.

²¹ See Government of Malawi, note 4, particularly in Chapter 2 of the Report.

²² See Government of Malawi, above.

²³ See Government of Malawi, note 4, 24–25.

²⁴ See Government of Malawi, note 4, 26.

If 'customary land' remained, in law, an integral part of 'public' (or crown) land, what regime of law governed its occupation and use? An answer to that question is to be found in the fact that since under colonial law Africans had no title to land, the only issue of concern was how to regulate occupation rights among them. This was clearly a personal (not property) law issue governed by customary law.

[...]

The domain of customary law was therefore very severely curtailed. That is the position in which indigenous communities found themselves at independence in 1964. At independence the Governor ceased to exercise any power in Malawi. It was now open to the new administration to define its own land policies and law without direct intervention from the colonial administration. In 1965 it passed the Land Act. The Land Act 1965, however, did not change this situation. It merely repeated the existing categories of private, public and customary land adopted in the Land Ordinance of 1951.²⁵

The Commission also concluded that it was impossible to implement radical land redistribution from erstwhile land owners in favour of the land deprived. This was the case notwithstanding the fact that the nature of the land question demanded such a radical step. Hence, the Commission recommended that the postcolonial State must 'refrain' from disturbing the titles derived from the Certificates of Claim that were issued in 1902.²⁶ The Commission observed that in light of the 'neglect' of the 'indigenous' society under colonial law and policy, an alternative approach to the land question would be more meaningful. Here, the Commission recommended the setting up of 'a meaningful social development fund and plan' and the contributors to the fund were to comprise the British Government, large estate owners with freehold title and the postcolonial State. It was the Commission's view that this would lead to the reduction of unemployment and impoverishment, and the 'alleviation of land pressure' particularly in the southern Malawi districts of Thyolo, Mulanje and Chiradzulu.²⁷ A possible explanation is that the alternative approach defines the Commission's language regarding the impossibility of a rather radical approach to the land question. As far as they were concerned this was impossible due to the nature of 'political and economic expediency' in resolving the land question.²⁸

The Commission took the 'compromise' position while simultaneously duly noting the colossal problems relating to land scarcity, land management and land auditing.²⁹ These three aspects to land transcended problems of security of tenure. Beyond the proposed social development fund, the Commission suggested further

²⁵ See Government of Malawi, note 23.

²⁶ See Government of Malawi, note 4, 20.

²⁷ See Government of Malawi, above.

²⁸ See Government of Malawi, note 4, 20 and generally in Chapter 3 of the Report.

²⁹ See Government of Malawi, note 4, particularly in Chapter 3 of the Report.

alternatives to the resolution of the land question: In light of the ‘highly unsustainable’ population growth, the Commission held the view that the postcolonial State must develop strategies that ease land pressure through the ‘restoration’ of erstwhile ‘customary’ land from idle leaseholds or freeholds; ‘enhancement’ of the smallholder sector; and ‘promotion’ of non-agrarian based economic sectors.³⁰ In the Commission’s view, the short term response to easing this land pressure was through a robust and aggressive implementation of the Environment Management Act.³¹

Third, and more critical, the Presidential Commission observed that the continued land alienation from the so-called ‘customary land’ sector as defined under the Land Act into the private land sector through the combined application of the Land Act, the Registered Land Act and the Customary Land (Development) Act, undermined the resolution of the land question.³² It will be clear from the conclusion on the conception of the ‘customary’ space in Chapter 2 that the land alienation if at all occurred in the public land sector. As it was pointed out in Chapter 4, this land alienation from the public land sector was a result of the implementation of the bimodal agricultural policy under the Banda Administration which favoured the estate sector. The Commission recommended that these private land interests must revert to traditional authorities as custodians of communities under customary law.³³ The recommendation is intriguing considering that the Commission, by its own analysis, concluded that no ‘customary’ land law applied in the country as the ‘indigenous’ society did not have title to land at law.³⁴ Hence, the reversion of title to chiefs only highlights the problem of the conception of the ‘customary’ space that has been discussed in Chapter 2. It has been noted in Chapter 4 that the problem stems from the failure to recognize that the so-called customary land is in fact public land under the Land Act especially when the full effect of the legal regime under the 1967 Reforms is taken into account.

Finally, the Presidential Commission recommended that the postcolonial State must develop a new land policy that would be ‘fully integrated’ into the (national) development policy. The Commission recommended that the national land policy would be guided by the principles of the Rio Declaration and Agenda 21 promulgated

³⁰ See Government of Malawi, note 4, 43–56.

³¹ Cap. 60: 02, Laws of Malawi; and Government of Malawi, note 4, particularly in Chapter 3 of the Report.

³² See Government of Malawi, note 4, particularly in Chapter 5 of the Report.

³³ See Government of Malawi, above.

³⁴ See note 21.

at the United Nations Conference on the Environment and Development (the 'Earth Summit') in Rio de Janeiro, Brazil in June, 1992.³⁵ Specifically, the land policy would encompass sovereign control of land; tenure regimes; management systems; land administration procedures; dispute processing procedures; institutional arrangements and sectoral linkages.³⁶ The Commission concluded that the robust policy framework would then be legitimated through a land law regime that builds upon existing land laws.³⁷

The Commission's Report was not well received by both the postcolonial State; specifically the Muluzi Administration, and an intransigent coterie of the country's development partners. While the report was presented to President Muluzi, it was not formally embraced by the State as a policy document nor, contrary to official rhetoric, was it used in the development of the Land Policy. One of the sticking points for this reception is the proposal for the development of the social development fund in the absence of a more radical redistribution of land in favour of the land deprived. The Commission had proposed that the fund that would support the land deprived would be financed by the British government (as the former colonial power in Malawi), large estate owners and the postcolonial State. The proposal for a fund was unacceptable (particularly to the British government) considering that at the regional level the agreement between the British government and Zimbabwe in relation to the latter's land question was turning 'acrimonious' with the Zimbabwean government contemplating the implementation of the fast-track land reform programme.³⁸

Another issue regarding the Commission's work was the heightened expectation for land redistribution following the campaign promises which have been discussed in Chapter 4. The Commission calculatingly represented itself as a 'research organization' rather than 'the land redistribution agency' the land deprived in the country were anxiously waiting for.³⁹ Second, it is possible to infer overbearance of the country's development partners because the Commission's work was simultaneously conducted with the land utilization studies commissioned by the postcolonial State between 1995 and 1998 at the prompting of the country's

³⁵ See Government of Malawi, note 4; especially Chapter 8 of the Report.

³⁶ See Government of Malawi, above.

³⁷ See Government of Malawi, note 4; especially Chapters 8 and 9 of the Report.

³⁸ Key Informant Interview: 4 June, 2008. See also L Tshuma, Introduction, note 15; and S Moyo & P Yeros, Chapter 3, note 21.

³⁹ See R Palmer, Introduction, note 34.

development partners. It is unclear why the objectives of the Presidential Commission and the three land utilization studies were not reconciled. Even though the works were contemporaneous, they were in many respects contradictory. At any rate, a 2004 assessment of the involvement of the Department for International Development (DFID) of the British government observed that strategic British intervention in the land sector in Malawi remained critical to the entrenchment of a market economy in the country.⁴⁰

II THE LAND UTILIZATION STUDIES, 1995–1998

Between 1995 and 1998, the postcolonial State commissioned three land utilization studies; namely, the Public Land Utilization Study; Estate Land Utilization Study and the ‘Customary’ Land Utilization Study. The Public Land Utilization Study was funded by the United States Agency for International Aid (USAID), the Estate Land Utilization Study by the then Overseas Development Administration (ODA) of the British government, and the ‘Customary’ Land Utilization Study by the European Union (EU) through the *Bureau pour le Developpement de la Production Agricole* (BDPA) of the French government.

The studies were commissioned to create a data map ascertaining the land sizes (particularly of arable land) in the public, private and ‘customary’ land sectors; and the levels of land utilization in those sectors. This objective was not sufficiently achieved as the confusion on the statistics on the availability of arable land and its utilization remains. This confusion in part undermines the resolution of the land question.

The Public Land Utilization Study established that very little land remains idle in the sector. The Estate Land Utilization Study found that minute tracts of land – less than 1 per cent – were under-utilized and these were predominantly in the medium sized estates band. Finally, the ‘Customary’ Land Utilization Study established that pieces of land that were recorded as under-utilized in this sector were in fact wetlands or fallow land in the public land sector.

A Public Land Utilization Study

This Study was conducted between April, 1996 and March, 1998. The Study was funded by the USAID who commissioned a team from the University of Arizona

⁴⁰ See M Adams *A Review of DFID's Engagement with Land Reform in Malawi* (21 December, 2004) [on file with the author].

to conduct the Study. The team was led by a non-Malawian Doctor of Philosophy candidate in the University's Department of Arid Land Studies. Out of the four main authors of the report of the Study, only one was a Malawian.

The main objective of the Study was to 'provide biophysical data and social information on the status and use of publicly held lands' and once the information was collated, it would form a basis for 'decision making within Malawi's land policy reform programme.'⁴¹ In the discharge of this broad mandate, the Study looked at: 'the location, distribution, size, and rationale for protection of Malawi's protected areas; the agricultural suitability, erosion hazard, population pressure and impact on these areas; the resource use patterns by neighbouring populations; the role these populations play in local economies; the location, size, purpose, and current status of Malawi's agricultural schemes; and an analytical framework for site-specific tenure change decisions.'⁴² The Study adopted a narrow interpretation of 'public land'; limiting it to forest reserves, national parks and wildlife reserves.⁴³ Notwithstanding this narrow interpretation of 'public land', the Study incorporated agricultural extension schemes across the country.⁴⁴

The following are 1998 figures: The Study established that 20 per cent of Malawi's total land area is protected areas. 10 per cent of the land under protected areas is suitable for agriculture 'at an acceptable risk of soil erosion.'⁴⁵ As expected, population pressure was greatest in southern Malawi followed by central Malawi; with Mulanje in southern Malawi having a high population pressure relative to the protected area of 25 persons per hectare. The Study also noted that while northern Malawi presented 'lower population pressure' on protected areas, it did not necessarily mean that the region experienced 'lower demand for land.' For instance, the Study established that in Rumphi, northern Malawi, the tobacco estates that had mushroomed in the so-called 'customary' land sector posed significant risk of land occupation in the protected areas to alleviate land scarcity in the smallholder farming

⁴¹ See B Orr *et al.* *Public Land Utilization Study: Final Report* (Tucson and Zomba: University of Arizona and Forestry Research Institute of Malawi, 1998) 7.

⁴² See B Orr *et al.*, above.

⁴³ See B Orr *et al.*, note 41.

⁴⁴ See B Orr, *et al.*, above.

⁴⁵ See B Orr *et al.*, note 41, 8.

sector.⁴⁶ Indeed, as Kanyongolo writes in 2005, these land occupations have since occurred in Rumphu.⁴⁷

More critically, the Study made these two findings: First, changes in the protected areas (except the agricultural extension schemes) will entail changes in tenure and land use. This would not be the case in the estate and the so-called 'customary' land sectors. Second, on the basis of an average land holding size of 1 hectare per family household and a population growth of 3.2 per cent; even if all public land were available for redistribution, it would only stem the land question for a period of twenty years up to 2018 (with time beginning to run in 1998 which is the date of the report).⁴⁸

The Study then made some ten recommendations towards the development of a national land policy.⁴⁹ For my purposes, the following four are the most crucial: land policy must be holistic and triangulate the peculiar factors of the public, private and the so-called 'customary' land sectors respectively;⁵⁰ the long term resolution of the land question will not entirely be 'land-based' and there may be need to develop alternative sources of livelihood for the erstwhile smallholder sector;⁵¹ the need to ascertain, in definitive terms, the size of available arable land in the so-called 'customary' land sector;⁵² a biophysical cost-benefit analysis must precede any programme to de-gazette protected areas for purposes of making land available for subsistence farming.⁵³

B Estate Land Utilization Study

The Study was conducted between July, 1995 and April, 1997 and was funded by the ODA through a grant-in-aid. The Study was concentrated in the tea estate sector in the Shire Highlands in southern Malawi. There were four main authors of the report under the Study; only one was a Malawian; and a non-Malawian led the team.

The broad objective of the Study was 'to contribute to a better understanding of the effectiveness (physical, social and economic) of land utilization on estates compared with that on customary and on other land, and the potential impact of land

⁴⁶ See B Orr *et al.*, note 41, 9.

⁴⁷ See FE Kanyongolo, Introduction, note 11, 128.

⁴⁸ See B Orr *et al.*, note 41, 8.

⁴⁹ See B Orr *et al.*, note 41, 11–16.

⁵⁰ See B Orr *et al.*, note 41, 11.

⁵¹ See B Orr *et al.*, above.

⁵² See B Orr *et al.*, note 41, 13.

⁵³ See B Orr *et al.*, note 41, 12.

policy options.’⁵⁴ In relation to the land question, 65 per cent of land in the tea estate sector was deemed ‘suitable’ for agriculture. The tobacco estate sector had 78 per cent of ‘suitable’ land and the sugar estate sector close to 80 per cent. Further, there was no ‘suitable’ land that remained underutilized in the sugar estate sector; only 1 per cent of ‘suitable’ land in the tea estate sector, and 29 per cent in the tobacco sector remained underutilized.⁵⁵

The Study established that the southern Malawi districts of Thyolo and Mulanje experienced acute land pressure. This was mainly due to the very high population densities in the districts; which at the time of the Study stood at 246 persons per square kilometre and 335 persons per square kilometre respectively.⁵⁶ The Study concluded that land redistribution in the estate sector especially in Shire Highlands in southern Malawi would be counter-productive if the land use after the redistribution would result in maize monocropping. The counter-productivity primarily arises because the topography of the area supposedly favoured plantation crops only.⁵⁷

C ‘Customary’ Land Utilization Study

The Study was conducted between March, 1995 and February, 1997 by a team of BDPA researchers. The main objective was ‘to provide the Government of Malawi with reliable information on the extent, intensity and efficiency of the land utilization’ in the so-called ‘customary’ land sector.⁵⁸ The Study had some eight components looking at, among other things, land use, socio-economic analysis of the so-called ‘customary’ land tenure, land allocation, and the interaction of the estate and the so-called ‘customary’ land sectors respectively.⁵⁹ The Study noted that by virtue of the definitions of ‘public land’, ‘private land’ and ‘customary land’ under the Land Act, ‘customary’ land in fact operated as a default once public land and private land had been ascertained under the Act. It concluded that the categorization of land under the Land Act creates problems of ascertainment of the definitive land area under the so-called ‘customary’ land and this undermines the resolution of the land question in the country.

⁵⁴ See RJG Steele *et al.* *Estate Land Utilization Study* (Lilongwe, Malawi: 1997) 1.

⁵⁵ See RJG Steele *et al.*, note 54, 61.

⁵⁶ See RJG Steele *et al.*, note 54, 45.

⁵⁷ See RJG Steele *et al.*, note 54, 61; and Key Informant Interview: 19 May, 2008.

⁵⁸ See BDPA *Customary Land Utilization Study: Report on the Socio-Economic Study on Land Tenure* (Lilongwe, Malawi: 1998) 1.

⁵⁹ See BDPA, note 58, 3.

The Study made the following pertinent observations: Land pressure is a ‘highly localized phenomenon’ such that certain areas of Malawi have acute land shortages and other areas less so. In turn, land redistribution in areas of acute land shortage would only serve as a short-term measure that would wither away in five to ten years. This finding corresponds with the finding under the Estate Land Utilization Study; that land distribution in Malawi in relation to the land question would be a short-term measure that would stem the problems associated with the land question only up to 2018. The second finding was that the estimation of the area under the ‘customary’ land sector suffers from poor data records as a result of several factors including mis-recording of wetland and other fallow land as available ‘customary’ land, and fraudulent under-recording of the sizes of small to medium sized estates by the owners to evade higher land rentals.⁶⁰

D Reconciling the Three Land Utilization Studies

Two points emerge from the three studies; one logistical and operational, the other conceptual and strategic. First, the objective of the creation of a data map on the statistics ascertaining land sizes in the public land, private land, and customary land sectors respectively and information on land utilization was not achieved. Second, the studies concluded that land redistribution would be a short-term resolution of the land question and there was need to consider other non-land-based strategies. Hence, since the three studies did not definitively establish the extent of the available arable land in the country, the nature of the land ownership and land use, it becomes difficult for purposes of analysis to assess the definitive nature of the land question. This is critical since, as it will be shown in section III and Chapter 6, the land redistribution model based on the willing seller/willing buyer approach is central to the land reform in the country.

III LAND POLICY

The Land Policy is touted as the national framework for land reform.⁶¹ The rhetoric is that the Policy is a result of the Report of the Presidential Commission; and the three land utilization studies that have been discussed in the preceding sections.⁶²

⁶⁰ See BDPA, note 58, 18.

⁶¹ See Government of Malawi, note 1.

⁶² In 1995, the postcolonial State, with assistance from the World Bank, established a policy planning unit in the Ministry responsible for land matters. The unit was tasked with coordinating the land reform process which, among other things, included the brief to develop the Policy: See Government of Malawi, note 1; and S Holden *et al.*, note 5.

It has been observed that the Presidential Commission recommended that the postcolonial State needed a comprehensive national land policy. The rationale for the Commission's recommendation was that existing policy statements and legislation were conflicting and lacked inter-sectoral linkages to enable the land sector to meaningfully contribute to economic development. Three problems; namely, poor access to available arable land, improper land use and insecurity of tenure were identified as major constraints to the efficient usage of land.⁶³

While the Presidential Commission noted the nature of the land question was greatly entrenched under the colonial State and the Banda Administration, it recommended that 'for reasons mainly of political and economic expediency', the postcolonial State under the Muluzi Administration should 'refrain' from overturning the status quo of skewed arable land availability and access between erstwhile land owners and the land deprived.⁶⁴ There is no evidence of a deliberate integration of the findings in the report of the Presidential Commission, and the three land utilization studies into the Land Policy. I have argued that there is a disjuncture between the Presidential Commission's Report and the studies, and the development of the Land Policy.

The disjuncture is also apparent in the development of the Land Policy itself. The Policy was primarily developed by the policy planning unit established in the Ministry responsible for land matters. The unit was funded by the EU. It was headed by a consultant under a World Bank contract. Even though the Policy makes reference to the Presidential Commission's Report and the three land utilization studies, the reference in my view, is a casual acknowledgement since there is no clear linkage of principles from the Report and the studies, on the one hand, and the Policy.⁶⁵ In any event, the Policy in large measure proceeds to make recommendations on the 'customary' space that ignore the critique of the efficiency argument in land reform discourse advanced by, for example, Borras, Deininger and Binswanger, McAuslan, Platteau and Nyamu-Musembi.⁶⁶ Second, the recommendations confirm the conception of 'customary' tenure under a communitarian *ethos*. There is a general failure under the Land Policy to engage with the conception of the 'customary' space

⁶³ See Government of Malawi, note 4, 129–134 ff.

⁶⁴ See Government of Malawi, note 4, 20. It is possible to infer that the Presidential Commission's position is a result of the agenda setting influenced by the World Bank: See R Carver, Chapter 4, note 124.

⁶⁵ See note 62.

⁶⁶ See Introduction, note 44.

in the manner that was discussed in Chapter 2. Finally, the recommendations ignore the critique of the transition to formalization of interests in land by for example, Borras, Deininger and Binswanger, McAuslan, Platteau and Nyamu–Musembi.⁶⁷

The following are the specific positions of the postcolonial State under the Policy: A land policy must reflect the changes in the economic, political and social factors in a country. Hence, the key guiding principle of the Policy is that it must lead to a comprehensive land law ‘with immense economic and social significance.’⁶⁸ The Policy is underpinned by ten principles: secure land tenure; sustainable land management; productive and efficient land use; effective land administration; protection of vulnerable groups (these are women, children and persons with disabilities); development of an institutional framework for land management, land information system, and optimum utilization of land.⁶⁹

The postcolonial State has argued that the ‘[f]ailure to reform and secure the tenure rights of smallholder [sic] [farmers in Malawi]’ has had a causal link with ‘under–investment, reliance on primitive technology and [...] low wages in rural areas.’⁷⁰ A legal framework is meant to ‘institutionalize, once and for all, a land administration system at the local and district government level.’⁷¹ The guarantee of security of tenure shall be ‘without any gender bias [or] discrimination to all citizens’ under section 28 of the Constitution.⁷² Further, security of tenure is meant to ‘curb land encroachment, unapproved development, land speculation and racketeering’.⁷³ The discussion below seeks to show the responsabilization of the individual – as the embodiment of the general population – through a market–based conception of two key elements under the Policy; namely, the ‘customary’ estate as part of the categories of land under the Policy, and the land market. The responsabilization raises serious doubts in relation to the resolution of the land question under the Policy.

A Categories of Land under the Land Policy

The Land Policy urges for ‘formal and orderly arrangements’ of titling.⁷⁴ The postcolonial State under the Muluzi Administration equally acknowledged the nature

⁶⁷ See note 66.

⁶⁸ See Government of Malawi, note 1, 1.

⁶⁹ See Government of Malawi, note 1, 3–4.

⁷⁰ See Government of Malawi, note 1, 4.

⁷¹ See Government of Malawi, note 1, 5.

⁷² See Government of Malawi, above.

⁷³ See Government of Malawi, note 71.

⁷⁴ See Government of Malawi, above.

of the land question under both the colonial State and the Banda Administration and its entrenchment through law and policy.⁷⁵ In this respect, there are three categories of land proposed under the Policy as a possible means of redress of the land question. The categories are government, public and private land. The Policy provides the definitions for the three categories of land. Government land shall comprise 'land owned by government and dedicated to a specified national use or made available for private uses at [its] discretion'. This category shall encompass land reserved for government schools, hospitals or offices etc.⁷⁶ Public land shall comprise 'land held in trust and managed by government or [a] traditional authority and [shall] be openly accessible to the public'. This category shall cover national parks, forest reserves, or unallocated land within an area of a traditional authority.⁷⁷ Private land shall comprise land held under freehold, leasehold or 'customary' estate.⁷⁸

1 'Customary' Estate

There is a major departure from the present land law regime in respect of 'customary' land as defined under the Land Act. The Policy provides that all 'customary' land under the jurisdiction of each traditional authority shall be demarcated and registered as a traditional land management area in recognition of the central role of a traditional authority to 'customary' land tenure.⁷⁹ In each traditional land management area, 'customary' landholdings shall be registered and titled as individual landholdings to be known as the 'customary' estate. The 'customary' estate may be registered in 'an individual, a family, corporation or organization allocated 'customary' land'.⁸⁰ The rights in the 'customary' estate shall be 'private usufructuary in perpetuity'.⁸¹ The Policy also provides that 'once registered, the title of the owner will have full legal status [...]'.⁸² The titling and registration of 'customary' land is intended to provide security of tenure, promote access to credit and provide an incentive for investment. The assumption here is that titling and registration of all 'customary' land will lead to the emergence of a 'vibrant formal land market'.⁸³ However, the titling and registration of the 'customary' estate shall not render that

⁷⁵ See Government of Malawi, note 1, 19–20.

⁷⁶ See Government of Malawi, note 1, 12.

⁷⁷ See Government of Malawi, above.

⁷⁸ See Government of Malawi, note 76.

⁷⁹ See Government of Malawi, note 1, 23.

⁸⁰ See Government of Malawi, note 1, 24.

⁸¹ See Government of Malawi, note 1, 25.

⁸² See Government of Malawi, above.

⁸³ See Government of Malawi, note 1.

land freely alienable. The sale, lease or mortgage over the 'customary' estate shall be subject to the interest of the community and shall require the consent of a traditional authority of the area in which the 'customary' estate is located.⁸⁴

The 'customary' estate is a peculiar fusion of the orthodox perception of land tenure. However, a number of observations may be made regarding the 'customary' estate. The effect of titling and registration of the 'customary' estate at law is that a registered person is the owner of the 'customary' estate. Hence, the 'customary' estate is freely alienable subject, of course, to existing planning or other legislation.⁸⁵ The registration of usufructuary rights as envisaged under the Policy is a misnomer. A usufruct arises as an inferior interest in land legally owned by another person. A usufruct cannot accrue to an owner.⁸⁶ The usufruct can arise if the legal ownership in the land is reposed in a traditional authority under a trust or other mechanism under the proposed traditional land management area. Under the 'customary' estate, the 'constructed' or 'responsibilized' individual as the title holder sustains the credit or land markets. Suffice it to say that the problems that relate to involvement of chiefs in land issues in a political economy such as Malawi have been highlighted in the academy.⁸⁷ I discuss the role of chiefs in the country's land question in Chapter 6. Suffice it to say that this construction of the customary estate perpetuates the colonial principle of recognition of 'native title' that was settled in *Nireaha Tamaki, In Re Rhodesia* and *Amodu Tijani*.

B Creation of a Vibrant Land Market

The development of a formal land market is one of the key components of the Policy. Hence, once the 'customary' estate is registered and titled, it may be made available in the credit market. My assessment, however, is that this is not possible under the present nature of the 'customary' estate. A vibrant market will only emerge if the 'customary' estate is freely alienable subject to, as already pointed out, to

⁸⁴ See Government of Malawi, above.

⁸⁵ It is conceded that the Policy envisages that a traditional authority shall provide consent to a sale of a 'customary' estate. In my view, once the estate is registered the 'body' that may exercise the delegated authority of the State under the principle of eminent domain is the Minister responsible for land matters. In the context of a neopatrimonial State, chiefs are relevant as layer of patronage, and to the extent that they are an unelected institution their political legitimacy or supposed 'neutrality' is suspect: See R Muriaas, Chapter 4, note 101; and generally the discussion in Chapter 6 on the role of chiefs in land reform in the country.

⁸⁶ The point was discussed in *Chief JM Kodilinye and Anor. v Anatogu, Philip Akunne* [1955] 1 W.L.R. 231, PC. The decision of the Board was applied in *Anachuna Nwakobi and Others v Eugene Nzekwu and Others* [1964] 1 W.L.R. 1019, PC.

⁸⁷ In the case of Malawi: See PE Peters & D Kambewa, note 7.

existing legislation. It has been observed that the nature of the ‘customary’ estate under the Land Policy is that it is not freely alienable. At any rate, the emphasis on the development of a ‘vibrant land market’ may negatively affect the land deprived through increased insecurity as a result of distress sales, the ‘threat of foreclosure’ and the probability of the dominance of landed elites such as the *Achikumbe* in the market. The insecurity will be inevitable in the absence of enduring strategies to support the livelihood of, for example, post-land redistribution owners under initiatives such as the Community Based Rural Land Development programme. It has been pointed out in Chapter 3 that post-land redistribution support services is a problem under market-based land reform models. Hence, the conception of the ‘customary’ estate as presently constituted is problematic.

From the preceding discussion and the observations that have been made in Chapter 3, I suggest that the development of a formal land market and the facilitation of access to available arable land are contradictory objectives in the context of the history of the land question in the country. A market-based approach to land reform means that land is redistributed based on the willing seller/willing buyer approach. This raises questions about the financial capacity of the postcolonial State to ensure that the land deprived benefit under the model.⁸⁸ Malawi simply does not have such financial capacity.⁸⁹

Finally, in Chapter 4 it was argued that under the Constitution, land reform in the country can only proceed on the basis of market-based models. On this basis, compensation for expropriation can also be at the open market valuation only. Hence, the resolution of the land question under the Policy is undermined because, as it has been observed, the preferential treatment of land owners under market-based land reform models; the need for post-land redistribution support to avoid, among other things, distress sales; and the need for sustained programme financing entail that weak economies such as Malawi may have to rely on external funding to sustain a land reform programme.

IV INTERVENTION OF THE MALAWI LAW COMMISSION

In October, 2002, the Malawi Law Commission received a submission from the Ministry of Lands, Physical Planning and Surveys requesting the review of

⁸⁸ See Government of Malawi, note 1, 29–30.

⁸⁹ See for example Government of Malawi *Malawi Growth and Development Strategy* (Lilongwe: Ministry of Finance, 2005) for an overview of the macroeconomic landscape of Malawi. I discuss the Strategy in depth in Chapter 6.

existing land legislation and the formulation of a new legal framework for land matters in line with the Policy.⁹⁰ The request followed the finalization and adoption of the National Land Policy by the postcolonial State. Hence, In January, 2003, the Malawi Law Commission empanelled a special Law Commission on the Review of Land-Related Laws under section 133(b) of the Constitution. The Commission commenced its work in earnest in March, 2003. The terms of reference for the Commission included the review of existing land-related legislation with a view to developing a new legislative framework for land matters that articulates the principles of the Policy. The work of the Commission was funded by the European Union. In March, 2006, the Commission finalized its Report on the review of existing land-related laws; namely the Land Act, the Customary Land (Development) Act, the Local Land Boards Act, the Registered Land Act, the Town and Country Planning Act,⁹¹ the Forest Act,⁹² the Public Roads Act,⁹³ the Mines and Minerals Act,⁹⁴ the Land Survey Act,⁹⁵ the Lands Acquisition Act, the Adjudication of Title Act,⁹⁶ the Wills and Inheritance Act,⁹⁷ the Local Government Act,⁹⁸ the Malawi Housing Corporation Act,⁹⁹ the Temporary Control of Premises Act,¹⁰⁰ and the Investment Promotion Act.¹⁰¹

The Commission recommends the enactment of eleven Bills relating to core or attendant land matters: the Land Act (Amendment) Bill, 2006; the Registered Land Act (Amendment) Bill, 2006; the Physical Planning Bill, 2006; the Forest Act (Amendment) Bill, 2006; the Public Roads Act (Amendment) Bill, 2006; the Mines and Minerals Act (Amendment) Bill, 2006; the Land Survey Bill, 2006; the Lands

⁹⁰ For the mandate of the Law Commission: See section 135 of the Constitution; for the qualification of special Law Commissioners: See section 133 (b) of the Constitution; for the entrenchment of the independence of the Law Commission: See section 136 of the Constitution; and for publication of reports of the Law Commission: See section 135(d) of the Constitution. In practice, reports of the Law Commission are published by the Commission itself and are presented to Cabinet and Parliament respectively by the Minister of Justice without any changes. The Government may adopt the recommendations of the Law Commission (usually contained in a draft Bill), with or without changes, as a Government Bill.

⁹¹ Cap. 23: 01, Laws of Malawi.

⁹² Cap. 63: 01, Laws of Malawi.

⁹³ Cap. 69: 02, Laws of Malawi.

⁹⁴ Cap. 61: 01, Laws of Malawi.

⁹⁵ Cap. 59: 03, Laws of Malawi.

⁹⁶ Cap. 58: 05, Laws of Malawi.

⁹⁷ Cap. 10: 02, Laws of Malawi.

⁹⁸ Cap. 21: 01, Laws of Malawi.

⁹⁹ Cap. 32: 02, Laws of Malawi.

¹⁰⁰ Cap. 60: 01, Laws of Malawi.

¹⁰¹ Cap. 39: 05, Laws of Malawi.

Acquisition Act (Amendment) Bill, 2006; the Local Government Act (Amendment) Bill, 2006; the Malawi Housing Corporation Act (Amendment) Bill, 2006; and the Customary Land Bill.¹⁰² Of these eleven bills, the Land (Amendment), the Registered Land (Amendment), and the Customary Land Bills respectively are directly pertinent to the land question in the country.

Under the Land (Amendment) Bill, the Commission recommends two categories of land: Public land and Private land. Public land will comprise government land as defined under the Policy and what has been described as ‘unallocated customary land’. Private land will comprise freehold land, leasehold land and the ‘customary’ estate.¹⁰³ The Commission recommends that the ‘customary’ estate under the Policy must be retained in pursuit of promoting private ownership of ‘customary’ land.¹⁰⁴ They re-define the ‘customary’ estate:

‘customary estate’ means any customary land which is owned, held or occupied as private land within a Traditional Land Management Area under a freehold title and which is registered as such under the Registered Land Act;

They also recommend a new definition of ‘freehold’:

‘freehold’ means an interest in land of unlimited duration which is held under free tenure;¹⁰⁵

The Commission’s recommendation regarding the ‘customary’ estate individualizes (as opposed to privatizing) ‘customary’ tenure. This is the case because the recommendation leaves no doubt at all that a ‘customary’ estate is, subject to existing legislation, freely alienable; and as observed by Peters and Kambewa, it provides ‘further means’ with which the landed elites such as the *Achikumbe* can secure their interests in land ‘possibly at the expense’ of the land deprived.¹⁰⁶

Further, the Commission recommends, as a general rule, a minimum land size of 0.5 hectares of arable land per household for the registration of ‘customary’ estates.

The Commission states:

[T]he Commission agreed that there is need to empower the Minister to make rules to regulate minimum holdings of all types of land that should be registrable [sic]. The Commission recommends that in the case of customary estates, the minimum holding should be 0.5 hectares¹⁰⁷ to prevent fragmentation of agricultural land. It was however agreed that exceptions should be made for already existing rights in customary land which are less than

¹⁰² See Malawi Law Commission, note 6.

¹⁰³ See Malawi Law Commission, note 6, 11. See also clause 2 of the Land (Amendment) Bill, 2006 in Malawi Law Commission, in this note, 107–123.

¹⁰⁴ See Malawi Law Commission, note 6, 13.

¹⁰⁵ Clause 2 of the Land (Amendment) Bill in Malawi Law Commission, note 6, 110–111.

¹⁰⁶ See PE Peters & D Kambewa, note 7, 9.

¹⁰⁷ 0.5 hectares was considered adequate for farm structures which constitute a dwelling house, animal houses, granaries, latrine and any other structure that may be required by the household.

the proposed minimum and for units which are proven to be economically viable but the holding is less than the minimum, such as poultry farming.¹⁰⁸

It is conceded that the Commission envisages situations where interests in land of less than 0.5 hectares may be registered under clause 18 of the Customary Land Bill. In effect, all interests in land that fall under the definition of customary estate may be registered under the Commission's proposal. Looking at the statistics, by 1996, the average size of available arable land per household had 'shrunk' to 0.8 hectares.¹⁰⁹ In any event, some scholars have doubted that land sizes as low as 0.5 hectares can be collateralized in a credit market.¹¹⁰ Beyond this performance in a credit market, it has also been observed in the Introduction and Chapter 2 respectively that a decent size of available arable land is crucial to support dignified living.

Hence, the Law Commission's initiative entrenches the market-based land reform models and further inculcates the land deprived as the 'responsibilized' population who would have title to land without the requisite support through capital investment. This would make the land deprived as new beneficiaries under a market-based land reform modelling vulnerable to distress sales. The possibility of distress sales stems from the fact that land sizes of as low as 0.5 hectares may not be collateralized in a credit market. This status quo is arguably a recipe for the reinforcement of this 'responsibilized' individual – the unit of a population – as a source of cheap wage labour. The nature of the responsabilization is that if the land deprived risk losing their land through distress sales, they may have to continue earning their living through provision of labour to the *Achikumbé* who dominate the estate sector.

Another critical point for discussion is that the Commission in its work did not engage with the issues relating to the conception of the 'customary' space at all. The category of land referred to as 'customary land' under the Land Act and attendant legislation was taken at its face value. There was no attempt to problematize it in spite of the debates, as shown in Chapter 2, relating to the 'customary' space in the academy. In the context of this oversight, the Commission, in my view, incipiently entrenches the supposed communitarian *ethos* of the so-called 'customary' space.

¹⁰⁸ On the Law Commission's recommendation: See Malawi Law Commission, note 6, 38–39, 396–422; and also the arguments by D Booth *et al.*, Introduction, note 23.

¹⁰⁹ See D Booth *et al.*, above.

¹¹⁰ See PE Peters & D Kambewa, note 7.

Under its recommendations, the Commission has also reposed statutory powers of land administration in chiefs in relation to a sub-category of public land known as ‘customary land’ under the Land (Amendment) Bill. Under clause 27 of the Land (Amendment) Bill, the Law Commission has recommended that chiefs should have statutory land administration powers over the so-called ‘customary’ land. The exercise of the powers shall be in accordance with the ‘customary’ law in the area of the chief.¹¹¹ Further, under clause 3 of the Lands Acquisition (Amendment) Bill, a chief has power to acquire land for public purposes.¹¹² Finally, the Law Commission has actually developed a whole bill – the ‘Customary’ Land Bill – to regulate the supposedly ‘customary’ space. Under the ‘Customary’ Land Bill, the role of chiefs with the help of ‘customary’ land committees and land clerks is even more detailed and pronounced.¹¹³ It was suggested in Chapter 2 that the chief in property discourse under the scheme of colonial capitalism served a political function. The continued recognition of a chief under a legal framework such as the proposed ‘Customary’ Land Bill is to ignore this ‘convenient end’ that the chief served under the colonial State, and continues to do so under the postcolonial State. Further, in light of the observations by Ng’ong’ola highlighted in Chapter 2 that conferring ‘rights’ or ‘interests’ to ‘villages’ or ‘tribes’ is problematic, the proposed clause 27 of the Land (Amendment) Bill; clause 3 of the Lands Acquisition (Amendment) Bill; and indeed the scheme under the Customary Land Bill, are untenable.

The Land (Amendment) Bill has largely been a mechanistic approach to the land law regime in the country set on entrenching the role of chiefs in land matters in the country. There has been no attempt to engage with the underlying issues relating to the conception of the ‘customary’ space, the so-called ‘customary’ land tenure, and the institution of chiefs as a network of patronage. The role of chiefs is further discussed in Chapter 6.

The Commission’s recommendations, in some respect replicate the 1967 Reforms. The Customary Land Bill, for example, proceeds on the same philosophy that led to the development of the Customary Land (Development) Act in 1967. The Customary Land (Development) Act was developed on the back of the efficiency argument. Hence, to have a so-called ‘customary’ land bill in 2006 proceed along the

¹¹¹ See Malawi Law Commission, note 6, 119.

¹¹² See Malawi Law Commission, note 6, 367.

¹¹³ See Malawi Law Commission, note 6, 396–422.

lines of the efficiency argument is to remarkably ignore a wealth of scholarship that has critiqued this line of thought in land reform discourse.¹¹⁴

In the end, the Commission's initiative is a travesty in light of the nature of the land question in Malawi: McAuslan has correctly pointed out that land reform in the African postcolony has meant land law reform to correct historical inequality that underlies the (African) land question.¹¹⁵ He has argued that the move from 'policy' to 'law' – precisely legislative drafting – must not focus on 'legal technicality'; it must remain a 'policy' debate throughout the reform process.¹¹⁶ Otherwise, 'abstract instrumentalism' perpetuates the land question in a country.¹¹⁷

V FINAL WORD

In this Chapter, it has been demonstrated that while the report of the Presidential Commission and the three land utilization studies were touted as the informed basis of the Land Policy, there is a clear disjuncture between the report of the President Commission and the three land utilization studies, on the one hand, and the Policy on the other.

One of the objectives of the three land utilization studies was to ascertain the area of available arable land in the postcolonial State for purposes of the land reform. However, besides a blanket statement on total available arable land in Malawi in the Presidential Commission's Report – that arable land constitutes some 5.3 million hectares,¹¹⁸ the three land utilization studies did not ascertain in definitive terms the hectares of (available) arable land in the various sectors and the levels of land utilization in those sectors.

What also emerges from the Presidential Commission's Report and the three studies is a reluctance to historicize and contextualize the strategies for the resolution of the land question in the country. Indeed, looking at the Presidential Commission's recommendations and the three studies, it is difficult to fathom how those recommendations will enhance the resolution of the land question considering the discussion in Chapter 4 on a historicized and contextualized process of land alienation in the country. The status quo remains – in the language of the Presidential

¹¹⁴ See note 66.

¹¹⁵ See McAuslan, note 66, 248–249.

¹¹⁶ See P McAuslan, above, 251.

¹¹⁷ See P McAuslan, note 66; and P Fitzpatrick, Chapter 2, note 52, 41.

¹¹⁸ This is the recurring figure pertaining to arable land that I have encountered during the research for the thesis.

Commission – for ‘economic and political expediency’. This is a euphemism that raises a lot of speculation but belies analysis.

The three land utilization studies, particularly the Estate Land Utilization Study, conclude that land redistribution would negatively affect the value added to the economy. In my view, the three studies placed less emphasis on the issue of access to available arable land, especially the asymmetry between the landed elites (comprising the *Achikumbe*), on the one hand and the land deprived, on the other. In the discussions on the existing land relations, the studies focussed on the relationship between the *Achikumbe* and the land deprived in the prism of landlord and tenant or employer and employee. Finally, from the studies; the lack of viability of land redistribution as a strategy to resolve the land question begs the question whether there are strategies in place by the postcolonial State to ease land pressure through the development of a viable non–agricultural economic base.

The Land Policy has embraced the market–based land reform models. The innovations under the Policy, particularly the ‘customary’ estate, do not demonstrate an appreciation of the critique that has been developed in land reform discourse regarding the efficiency argument. In any event, the conception of the ‘customary’ space is not problematized at all under the Policy.

The intervention of the Law Commission also reveals the concerns that have been highlighted in the preceding section regarding the Land Policy. Further, the intervention shows the following: A straightjacket translation of land policy to land law in Malawi is perilous, as it ignores a number of important considerations, such as the macro–economic debates on the role of land in the political economy of the country, and whether land reform must support the estate sector or a smallholder sector (or both) for the country’s agricultural policy direction. Furthermore, it does not address the question whether there is a policy synergy between the land and macro–economic frameworks.

In the context of hegemonic responsabilization, it must be noted that the country’s development partners need not exert ‘direct’ influence beyond the funding of the various policy initiatives. What is crucial is what John Braithwaite and Peter Drahos have described as ‘modeling’. This is based on what they call a ‘globalization

of regulation' through 'norms, standards, principles and rules'.¹¹⁹ This resonates with Shamir's idea of a 'market of authorities' and also fits in with the range of multiform tactics' under Foucauldian governmentality.¹²⁰ This is implemented by 'model missionaries' and 'mercenaries' located at the centre and a periphery such as Malawi.¹²¹ Hence, the policy intervention is skewed towards market-based land reform modelling. This outcome reveals an 'embeddedness' with the conception of market as value.¹²²

In sum, the responses to the land question so far overlook the nation's history and context, and exaggerate the importance of the centrality of market as value in land reform.¹²³ Suffice it to say that in Chapter 3, it was demonstrated that the dominance arises in the context of the centrality of market as value in development discourse. The promise of the rhetoric of a fair redistribution of land to the land deprived has been undermined by the lack of concrete proposals to address the needs of the land deprived. Chapter 6 looks at the interaction between the key constituencies in the land reform in the country and how land relations shape their interaction; particularly within a framework of hegemonic responsabilization. The discussion centres on the interests of the key constituencies under what I have called the 'multiverse'. The task is to examine how these interests can or cannot lead to the resolution of the land question in the country.

¹¹⁹ See J Braithwaite & P Drahos *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) 10.

¹²⁰ See R Shamir, Introduction, note 67; and M Foucault, Chapter 1, note 10.

¹²¹ See J Braithwaite & P Drahos, note 119, 587. See also A Paliwala 'Privatisation in Developing Countries: The Governance Issue' (2000) 1 *Law, Social Justice & Global Development Journal* available at <http://elj.warwick.ac.uk/global/issue/2000-1/paliwala.html> [visited on 30 January, 2010]; and A Manji, Introduction, note 4, on 'networks' in land reform.

¹²² See J Braithwaite & P Drahos, note 119, 14; R Shamir, note 120; and M Foucault, note 120.

¹²³ For a critique on the absence of history and context in market economics, see G Palermo 'Misconceptions of Power: From Alchian and Demsetz to Bowles and Gintis' (2007) 92 *Capital & Class* 147.

Chapter 6

The Land Question and the Challenge of the Multiverse

This Chapter looks at the interaction of the key constituencies in land reform in Malawi; namely, the postcolonial State; the Bretton Woods Institutions; the *Achikumbe*; and the land deprived, and the implications of their parochial interests for the reform. The socio-economic snapshot of the land question is that as much as 85 per cent of the Malawian human population earn their living as subsistence, tenant workers; that the intercensal population growth between 1998 and 2008 has been as high as 32 per cent; that landholding is as low as 0.16 hectare per capita for the ‘ultra poor’ and 0.28 hectares for the ‘non-poor’; and that the land deprived (as the constituency of households with access to less than 0.5 hectares of arable land) account for 10.48 million people in the country.¹

In Chapter 1, it has been argued that governmentality involves the introduction of the economy into family or political practice. This has meant that the regulation of the population should involve the disposition of ‘things’; or rather the relation of men and things. The disposition has led to the adoption of a range of multiform tactics; and these can be law, policy, codes of conduct, standards, guidelines and proposals for reform. Regarding governmentality and a land question in a polity: Foucault states that the focus is on production.² Hence, under the policy of grains and phenomenon of scarcity, ‘man’s greed’ or ‘the need to earn more’ prevails.³ If production is the main focus under the phenomenon of scarcity, the producers for the purposes of the thesis constitute the postcolonial State, the Bretton Woods Institutions and the *Achikumbe*. The land deprived form the constituency of labourers and inchoate producers. These constituencies and their roles are made possible through the process of ‘normation’ which is in turn possible through biopower.⁴

Chapter 1 also discusses Scott’s notion of Brechtian forms of ‘resistance’.⁵ These are the ‘everyday’ ‘struggles’ which a particular constituency utilizes in order

¹ See for example National Statistical Office, Introduction, note 26.

² See M Foucault, *Security, Territory, Population*, Chapter 1, note 12.

³ See M Foucault, above, 341–343.

⁴ See M Foucault, note 2, 55–86.

⁵ See JC Scott, Chapter 1, note 72.

to achieve calculated conformity. Scott has argued that the Brechtian struggles are techniques of ‘behaviour’ used by a particular constituency to ‘work a system’ to their ‘minimum disadvantage’.⁶ In this Chapter, the discussion looks at the extent to which the key constituencies are actually working the system to their minimum disadvantage. While this direction of the analysis is pertinent, it is important to mention that the relationship among the various constituencies in the country is not perfectly reducible to that of the ‘dominant’ and the ‘dominated’. The Brechtian struggles are not the monopoly of a particular constituency. In the context of the land question, the struggles emerge in the interaction between the postcolonial State and the Bretton Woods Institutions; the *Achikumbe* or the land deprived, and the postcolonial State; the *Achikumbe* and the land deprived; and indeed within the constituency of the land deprived.

It is suggested that the interaction amongst the constituencies is complicated. Hence, the central argument in this Chapter is that the multiverse of the interests of the postcolonial State, the Bretton Woods Institutions, the *Achikumbe* and the land deprived undermines the resolution of the land question under the on-going land reform in Malawi. The multiverse emerges through the interaction of these constituencies. The idea of multiverse has been appropriated from multiverse theory in quantum physics. In broad terms, multiverse, in quantum physics, relates to the possibility of the existence of more than one universe in the conception of the ‘cosmos’. Bernard Carr states:

[T]he term ‘universe’ is usually taken to mean the totality of creation, [there is] the possibility that there could be other universes (either connected or disconnected from ours) in which the constants of physics (and perhaps even the laws of nature) are different. The ensemble of universes is then sometimes referred to as the ‘multiverse’ [...]⁷

While the debate on the multiverse rages on in the field of quantum physics, its usage here emphasizes the ensemble of interests of the key constituencies in land reform in a country. Hence this ensemble lies in the competing and parochial interests that are manifested through the interaction of these constituencies. The multiverse requires a

⁶ See JC Scott, above, xv ff, and 30.

⁷ See B Carr (ed.) *Universe or Multiverse?* (Cambridge: Cambridge University Press, 2007) xv. See also David Deutsch ‘The Structure of the Multiverse’ available at <http://xxx.lanl.gov/ftp/quant-ph/papers/0104/0104033.pdf> [visited on 24 June, 2008]. The term itself is a coinage of William James; made as early as 1895: See William James (1895) *The Will to Believe* cited in the *Oxford English Dictionary* (Oxford: Oxford University Press, 2003). The idea of ‘multiverse’ has engaged scholars of cosmology, philosophy, theology and indeed writers of fiction.

meticulous triangulation of the various interests at play at the level of law and policy. The multiverse creates enormous challenges for land reform that proceeds on a rule-based, positivist approach to law as a catalyst for social engineering. The triangulation is essential in light of the varying agenda that scholars have pointed out exist in land reform discourse and practice.⁸ The competition amongst the social, economic and political perspectives to land reform has meant that land reform discourse and practice is often disordered.⁹

The discussion of the multiverse uses Scott's notion of calculated conformity.¹⁰ This is done under two strands of calculated conformity; namely 'predatory calculated conformity' and 'preservatory calculated conformity.' Predatory calculated conformity refers to a type of conformity that is prescribed by the 'dominant' to the 'dominated'. It does not rely on brute force. Its application is fluid and involves standards, guidelines, policy frameworks and even law reform. In this respect, predatory calculated conformity corresponds to hegemonic responsabilization. For example, as it will be shown in this Chapter, this could be in the form of poverty reduction strategies that the Bretton Woods Institutions 'export' to the South. Preservatory calculated conformity, on the other hand, is a coping mechanism used by the 'dominated' to ensure that any disadvantage is minimized as far as possible within the reality of their social setting. For instance, this may involve a process of false compliance where a constituent gives an impression of compliance when in fact they are not. The circumstances surrounding the (non-)enactment of the Land (Amendment) Bill, 2006 by the Malawi legislature are a case in point.¹¹ Both the predatory and preservatory calculated conformity operate within the fluidity of Foucauldian power. This fluidity is discussed in Chapter 1; Foucauldian power is not annihilatory, it is mobile and open. It in fact enables Brechtian struggles to flourish.

The two strands of calculated conformity are discussed at macro and micro levels. The discussion at the macro level engages with the relationship between the postcolonial State (as a local space) and the Bretton Woods Institutions (as a global space). At the micro level, the discussion takes place at four levels: The relationship

⁸ See for example S Moyo, Introduction, note 13.

⁹ See S Moyo, above.

¹⁰ See JC Scott, note 5.

¹¹ Bill Number 19 of 2006.

between the postcolonial State and the *Achikumbe*; the postcolonial State and the land deprived; the *Achikumbe* and the land deprived; and finally, the intra-‘community’ dynamics. These dynamics require an analysis of the political institutions of the ‘community’, especially the chiefs, and the implications of their vested interests for the resolution of the land question. The dynamics also focuses on the complication that emerges among the land deprived. This tiered analysis is not to suggest that there is a lack of ‘influence’ across the various relationships. It merely serves to highlight the interests of the various constituencies under the on-going land reform in the country.

I PREDATORY CALCULATED CONFORMITY

The nature of predatory calculated conformity must be analyzed first, under Malawi’s macroeconomic framework; and second, the World Bank’s land policy framework of 2003, and their implications for the resolution of the land question in the country. The central point here is that the nature of the frameworks developed by the Bretton Woods Institutions as blueprints for (local) political economies such as Malawi gridlock any meaningful esoteric policy development at the local space. In the context of the land question, the postcolonial State must implement a market-based land reform framework that has been prescribed by the Bretton Woods Institutions. In the end, predatory calculated conformity as a form of hegemonic responsabilization undermines the resolution of the land question in the country.

A The Macro Level Analysis of Predatory Calculated Conformity

First, in the examination of the relationship of the postcolonial State and the Bretton Woods Institutions, it is useful to consider the influences that the global space has had on the policy framework at the local Malawian space. In this respect, when one looks at the various macroeconomic frameworks that have been developed in Malawi, it becomes clearer how inevitable it is that land reform in the country has been market-based.

In recent years, the macroeconomic framework in Malawi has been formulated in the context of the poverty reduction strategies promoted by the Bretton Woods

Institutions.¹² In this regard, it is pertinent to consider the poverty reduction strategy in Malawi and examine the extent to which it has shaped the direction of the postcolonial State's land reform. Two documents are worth consideration; the Poverty Reduction Strategy Paper which ran between 1999 and 2004, and the Malawi Growth and Development Strategy which runs from 2005 to 2011. The two documents are the constitutive parts of the macroeconomic framework in the postcolonial State and are considered simultaneously as a site of conformity.

Further, I discuss the World Bank's land policy framework of 2003 and its influence on the nature of Malawi's Land Policy. The context within which the various frameworks for the postcolonial State emerge is narrow and concretized in light of the requirement, as it were, to ensure consistency with the frameworks designed by the Bretton Woods Institutions, particularly the World Bank and the International Monetary Fund.

1 The Macroeconomic Framework as a Site of Conformity

The Malawi Poverty Reduction Strategy Paper stems from a process that began in 1994 with the development of what was called the Vision 2020 programme. The programme was championed by the Bretton Woods Institutions on the back of a changed mindset that long term economic planning (as opposed to the short periods under structural adjustment programmes) were 'beneficial' to national economies. Under the Vision 2020 programme, the postcolonial State was to evolve into 'a technologically driven, middle income country' by the year 2020. The Vision 2020 programme was launched with salute and splendour by the Muluzi Administration on 31 March, 1998 as the blueprint to guide Malawi's development for the next 22 years.

The following issues were given priority under the programme: good governance, sustainable economic growth and development, vibrant culture, well developed economic infrastructure, food security and nutrition, science and

¹²In December, 1999, the Boards of the World Bank and the International Monetary Fund approved poverty reduction strategies as the basis of all World Bank and IMF concessional lending and for debt relief under the enhanced Heavily Indebted Poor Countries (HIPC) Initiative. The terminology 'poverty reduction strategy' refers to the process, evaluation and related financing instruments that underpin a poverty reduction paper: See generally CC Tan *A New Regulatory Discipline: Poverty Reduction Strategy Papers (PRSPs) in the Framework of Postcolonial International Law and Global Governance* (PhD Thesis: University of Warwick, 2007).

technology-led development, social sector development, fair and equitable distribution of income and wealth, and sustainable environmental management. In relation to the land question, the following 'strategic challenge' was identified under the issue of sustainable economic growth and development: increasing access to land by smallholder farming households. The 'strategic' options that were developed included: 'undertaking land reform; moratorium on the conversion of land from the 'customary' land sector to the private land sector for the growth of estate agriculture; establishing an agricultural credit guarantee scheme and establishing a land bank to provide agricultural credit; widening the window of credit provided by financial institutions to all agricultural stakeholders for production, marketing and agro-processing.'¹³

The Vision 2020 programme did not run its full course. The Malawi Poverty Reduction Strategy Paper¹⁴ replaced the Vision 2020 programme after the latter had been in the implementation stage for a period of four of the projected 22 years. In turn, the Malawi Growth and Development Strategy¹⁵ is a continuation of the Malawi Poverty Reduction Strategy Paper after the expiration of the Paper in 2005. In general terms, apart from the difference in periodization, the Vision 2020 programme, the Poverty Reduction Strategy Paper and the Malawi Growth and Development Strategy are a continuum.

It is pertinent to situate the Malawi Poverty Reduction Paper and the Malawi Growth and Development Strategy in the global context. Poverty reduction strategies in the South emerge following the shortcomings of structural adjustment programmes.¹⁶ The rationale of the poverty reduction strategies is grounded in their five core principles; namely: that they are country-driven; that they are result-

¹³ The Vision 2020 programme is fully referred to as the National Long Term Development Perspective, 1997–2020: See Government of Malawi *National Long Term Development Perspective, 1997–2020, Volume 1* available at <http://www.sdn.org.mw/~esaia/ettah/vision-2020/> [visited on 4 December, 2008]. The programme was developed by a core team comprising the following Malawians: Anthony Mawaya (as the Team Leader), Charles L Chanthunya, Josephat M Chikadza, Zangazanga D Chikhosi, Hendrine Givah, Dan Kamwaza, Mercy Kanyuka, Ian N Kumwenda, Maxwell Mkwezalamba and Naomi Ngwira. It was funded by the UNDP: See Government of Malawi, in this note.

¹⁴ See Government of Malawi *Malawi Poverty Reduction Strategy Paper* (Lilongwe: Ministry of Finance, 2002). This programme was implemented from the 2001/2002 fiscal year.

¹⁵ See Government of Malawi, Chapter 5, note 89.

¹⁶ See generally CC Tan, note 12.

oriented; that they are multidimensional in nature in combating poverty; that they are partnership-oriented; and that they are based on a long term strategy for combating poverty reduction.¹⁷

The World Bank has stated that the poverty reduction strategies represent a ‘new form of social contract’ whereby the strategies are the basis for all Bretton Woods Institutions’ financing to low-income countries of the South.¹⁸ The strategies are the condition precedent for qualification under the Heavily Indebted Poor Country (HIPC) Initiative. The emphasis on poverty reduction strategies was meant to symbolize a change in approach by the Institutions themselves. The changed approach is contained in the World Bank’s Comprehensive Development Framework (CDF) and the International Monetary Fund’s Poverty Reduction Growth Facility (PRGF). The CDF and PRGF are to be reflected in poverty reduction strategies developed by country authorities. Countries qualifying for the HIPC Initiative and the Institutions’ concessional lending generally are required to produce a poverty reduction strategy paper. The HIPC Initiative itself has two major preconditions: first, access to HIPC benefits is ‘conditional on the adoption of a range of policies believed necessary for debt sustainability to improve connections between local economies and (international) capital and commodity markets, and to implement mildly nuanced Washington Consensus regimes of macro-fiscal management’.¹⁹ Second, poverty reduction strategy papers serve as an ‘accountability framework to explicitly bind country debt management into global macro-economic, governance and social policies.’²⁰

The advocates of poverty reduction strategies state that the strategies ameliorate the ‘power asymmetry’ prevalent in international development financing.²¹ The antithesis is that the nature of the changed approach is largely oratorical. Celine Tan has argued that, contrary to the rhetoric, poverty reduction strategies perpetuate a

¹⁷ See CC Tan, note 12, 6; and <http://www.imf.org/external/np/exr/facts/prsp.htm> [visited on 15 January, 2009].

¹⁸ See World Bank *Towards Country-Led Development: A Multi-Partner Evaluation of the Comprehensive Development Framework Report* (Washington D.C.: World Bank, 2003) 13.

¹⁹ See D Craig & D Porter ‘Poverty Reduction Strategy Papers: A New Convergence’ (2003) 31(1) *World Development* 53, 60.

²⁰ See D Craig & D Porter, above.

²¹ See CC Tan, note 12, 6.

‘mythologization’ of ‘laboratory’ free market economics.²² Second, Tan argues that poverty reduction strategies are a form of ‘discipline’. She contends:

[T]he framework serves, to a large extent, as a regulatory restraint for the [S]tates subject to its discipline. It follows from the conceptual principles and operational directives underpinning the [...] approach that the [poverty reduction strategies] [S]tate as recipient of concessional financing and debt relief, must demonstrate its desire to be disciplined by a set of rules representing the universal normative framework for all [S]tate resource extraction, allocation and administration.²³

The point resonates with the notion of hegemonic responsabilization. In a market of authorities, the State is a ‘facilitator’ of prescribed code of conduct, standards or guidelines. Poverty reduction strategies are, in this context, prescriptions of ‘conduct’ that the State then facilitates. Under the facilitation, both the State and a non-State may be the agent of responsabilization.

Poverty reduction strategies are expected to boost country ownership of the HIPC Initiative but at the same time they are a mechanism for the accountability and transparency of national budgetary policy at the global level. This represents an inherent contradiction. The reality is that poverty reduction strategy papers are linked to macro-budget planning and expenditure control devices of Bretton Woods Institutions; most notably, the Medium Term Expenditure Framework (MTEF).²⁴ The MTEF links poverty reduction to the top-down resource envelope and a bottom up estimation of the current and medium term costs of development policies.²⁵ Indeed, David Craig and Doug Porter have concluded that the ‘PRSP/MTEF linkage’ forms an ‘extra-parliamentary technocratic decision making’ serving the interests of (international) capital – precisely ‘Northern’ economies – by ensuring adherence to conditionality – often a plethora of ‘pre-defined ends’ – governing sovereign governments.²⁶

The foregoing sets the context of the postcolonial State’s Poverty Reduction Strategy Paper and the Malawi Growth and Development Strategy. It has been observed in Chapter 5 that even though the development of the Land Policy was contemporaneous with the development of the poverty reduction strategy paper for

²² See CC Tan, above.

²³ See CC Tan, note 12, 7.

²⁴ See D Craig & D Porter, note 19, 60–61.

²⁵ See D Craig & D Porter, above.

²⁶ See D Craig & D Porter, note 19, 61.

the country, the land question was not addressed within the context of the macroeconomic framework that was being formulated for the country.

The prescriptions of the Bretton Woods Institutions are apparent within the macroeconomic framework at the local Malawian space. There is a lack of synergy between the macroeconomic frameworks that have been developed by the postcolonial State over the years and the Land Policy. The Malawi Poverty Reduction Paper stated that it was ‘the overarching strategy that will form the basis for all future activities by all stakeholders, including Government’ and its overall goal was ‘to achieve sustainable poverty reduction through empowerment of the poor.’²⁷ The postcolonial State asserted that ‘[r]ather than regarding the poor as helpless victims of poverty in need of hand-outs and passive recipients of trickle-down growth, the [State] sees them as active participants in economic development.’²⁸

While limited access to land was identified as one of the five key causes of poverty in the country,²⁹ it has been observed that under the Malawi Poverty Reduction Strategy, land was ranked seventh among the issues that needed to be resolved to enhance agricultural productivity for pro-poor growth.³⁰ This is the case despite the acknowledged centrality of access to land in boosting the agricultural sector and ultimately the postcolonial State’s efforts in poverty reduction.³¹

The lukewarm prioritization of the land question is perpetuated under the Malawi Growth and Development Strategy. The Malawi Growth and Development Strategy is – again – the ‘overarching strategy’ for the 2006/2007 to 2010/2011 fiscal years and will serve as the ‘single reference document’ for ‘Government policy, private sector, non-governmental organizations and cooperating partners’ in relation to socio-economic growth and development priority.³² It is the national blueprint for poverty reduction through economic growth and infrastructure development. The Strategy is based on five themes: sustainable economic growth; social protection and

²⁷ See Government of Malawi, note 14, xi.

²⁸ See Government of Malawi, note 14.

²⁹ See Government of Malawi, note 14, x. The other key causes are low education, poor health status, limited off-farm employment and a lack of access to credit.

³⁰ See E Chirwa, Introduction, note 58.

³¹ See B Chinsinga, Introduction, note 57, 10.

³² See Government of Malawi, note 15, 3.

disaster management; social development; infrastructure development; and good governance.³³

There is no clear linkage between the Strategy and the Land Policy. The Strategy however provides for agricultural productivity under the theme of sustainable economic growth. The postcolonial State states that smallholder farmers will have to increasingly ‘commercialize’ for them to be competitive in the domestic and export markets.³⁴ The postcolonial State asserts that low agricultural productivity has been due to dependence on rain-fed agriculture, poor land and crop husbandry, declining soil fertility, poor land rights, non-existence or weak linkage to domestic and export markets.³⁵ This call for increased commercialization of the ‘smallholders’ resonates with the findings of the DFID in 2004 and indeed the Ministerial and Presidential Statements of 2009.³⁶ The confluence of language here reveals the nature of responsabilization underway.

One of the implementation strategies to arrest the low agricultural productivity is the recognition and formalization of ‘customary land rights’ of smallholders through appropriate legislation.³⁷ While the Strategy does not make specific reference to the Land Policy, the implementation strategy in respect to ‘customary land rights’ is the only connection between the two Government policy frameworks especially keeping in mind that land tenure is one of the central issues under the Policy.³⁸ The implementation strategy localizes the ‘new approach’ to land reform that the World Bank is now advocating. As I have argued in Chapter 2, the issue is not so much whether an approach is ‘old’ or ‘new’; conception of the ‘customary’ space is problematic. To the extent that land reform in Malawi does not accept that the so-called ‘customary’ land is in fact part of public land and that the occupants under those parcels of land are akin to tenants at will, then the wrong prescription at the normative level may render the land reform in the country futile.

³³ See Government of Malawi, note 15, 5–13.

³⁴ See Government of Malawi, note 15, 6–7.

³⁵ See Government of Malawi, note 15, 35.

³⁶ See M Adams, Chapter 5, note 40; and Chapter 4, notes 164 and 165.

³⁷ See Government of Malawi, note 15, 36.

³⁸ The Strategy must be concerned with access to available arable land as opposed to formalization or recognition of ‘customary land rights’.

Further, the increased commercialization by smallholders may require increased land consolidation. Land consolidation would be in sharp contrast to the call for land redistribution that is advocated under the Land Policy at least in the short term. What is clear, and what seems to be missing from the Strategy, is that increased land pressure points to the absence of a non-agricultural economic base in the country. Clear efforts to develop an alternative economic base in the country may complement initiatives towards the resolution of the land question.

Ultimately, the lack of synergy between the processes of the development of the Land Policy and the macroeconomic frameworks is telling for two reasons. First, the macroeconomic frameworks have been the ‘overarching framework’ for the ‘development’ of the postcolonial State such that in the event of a contradiction between the poverty reduction strategy and a sectoral policy the former takes precedence.³⁹ Second, the macroeconomic frameworks have formed the linkage between the local Malawian space and the global space whereby the Bretton Woods Institutions dictate the direction of the postcolonial State’s macro economy.

This possibility of overriding can be related to Foucault’s apparatuses of security. In Chapter 1, four apparatuses – the *dispositifs* – of security were highlighted; namely, space, uncertainty, normalization and correlation of security of the population. It was noted that the Foucauldian notion of security relates to the technology of power whereby a process of normation – normalization – is key. In the context of the land question, the normative problems relating to the conception of the ‘customary space that have been pointed together with the ‘supremacy’ of the macroeconomic frameworks drive this process of normation.

2 The World Bank’s Land Policy Framework, 2003

The postcolonial State’s implementation strategy to enhance agricultural policy resonates with the World Bank approach to land reform where the land redistribution model based on a willing seller/willing buyer approach is promoted as the benchmark for land reform. In 2003, the Land Policy Division of the World Bank

³⁹ See for example Government of Malawi, note 15, 3. This position was confirmed by a senior officer in the Ministry of Finance of the Government of Malawi: Key Informant Interview: 3 November, 2008.

commissioned a blueprint on land policy frameworks.⁴⁰ The World Bank's land policy framework of 2003 emerges in the shadow of the Land Reform Policy Paper, 1975 and two key draft reports; the *Land Institutions and Land Policy* and the *Land Policy for Pro-Poor Development*, both of 2002, where it was recognized that land reform plays a key role in the wider macroeconomic framework in promoting economic growth and good governance.⁴¹ This recognition jolted the Bank into taking a leading role in setting the policy agenda in land reform. The recognition culminated, as it were, in the land policy framework of 2003.⁴² The land policy framework of the 2003 advocates a supposedly 'human-centred approach' to land reform. In this respect, the Division contends that there is need for 'secure property rights' where there is legal recognition of 'customary' tenure systems.⁴³ The Division makes this conclusion following findings that there is no empirical evidence between individual title and economic growth.⁴⁴ The Division recognizes a 'bundle of property rights' which may comprise access rights, usufruct or full ownership.⁴⁵ The Division also acknowledges that a 'unitary model of the household is often inappropriate' and that 'formal title is not always necessary or sufficient for high levels of security of tenure'.⁴⁶ Hence, the major shift in the Bank's 2003 paper is the consistent reference to 'secure property rights' as opposed to 'formalized title'.

Four key issues are identified under the land policy framework of 2003 to ensure that a land reform makes 'meaningful' contribution to the economic growth of a country: the promotion of owner-operated farms for increased agricultural productivity; security of land tenure; land disputes as disincentives to investment; and promotion of a credit market based on land as collateral.⁴⁷

The views of the Bank's Land Policy Division as contained in the land policy framework of 2003 are not shared by its Macroeconomic, and the Environment and Sustainability Divisions. Anne Whitehead and Dzodzi Tsikata conclude that the

⁴⁰ See World Bank, Introduction, note 1.

⁴¹ See A Manji, Introduction, note 4, 54–57; and K Deininger & H Binswanger, Introduction, note 44.

⁴² See A Manji, above, 54–61.

⁴³ See World Bank, note 40.

⁴⁴ See A Whitehead & D Tsikata 'Policy Discourses on Women's Rights in sub-Saharan Africa: The Implications of the Return of the Customary' (2003) 3(1) *Journal of Agrarian Change* 67, 82.

⁴⁵ See World Bank, note 40, 25.

⁴⁶ See World Bank, note 40, 38–39.

⁴⁷ See World Bank, note 40; and A Manji, note 41, 57.

Macroeconomic, and the Environment and Sustainability Divisions of the Bank respectively are still rooted in the property rights concept under the Bank's seminal paper on land of 1975.⁴⁸ Hence, these Divisions argue that communal forms of property ownership lead to an inefficient market and over-exploitation and suggest that the modernization of the 'customary' space must remain the central pillar of the implementation of land reform in political economies such as Malawi.⁴⁹ The concerns and observations of the Land Policy Division of the Bank seem to have been overridden by the 'philosophy' within the Macroeconomic, and the Environmental and Sustainability Divisions of the Bank.

Alvaro Santos suggests that the diametrically polarized positions by different divisions of the Bank are not atypical. He points out that there is often a lack of consensus within the Bank generally due to 'institutional inertia and constraints, groups' struggles and competition over resources and prestige, and the relationship between groups at the Bank and the governments of borrowing countries.'⁵⁰ While the internal dynamics in the Bank reveal a lack of consensus, the 'dissensus' is often reduced under the rubric of the 'rule of law'.

The absence of consensus within the Bank (especially) means that the nature of land reform, the implementation of reforms in aid-dependent and heavily indebted economies (symptomatic of most postcolonial states) is highly inconsistent and contradictory.⁵¹ However, Joel Ngugi argues that the contradiction in the Bank represents a strength since any traits of 'systemism' are 'decentred' and, in the process, mask its hegemonic character.⁵² This suggests that the contradiction may be exploited by the Bank to its 'advantage'.

While the rhetoric in the Land Policy Division is for a 'human-centred approach' to land reform, the implementation strategy suggests deference to the philosophy of the Macroeconomic, and the Environment and Sustainability Divisions of the Bank. In relation to the broader development agenda, Kerry Rittich has

⁴⁸ See A Whitehead & D Tsikata, note 44, 80–88.

⁴⁹ A Whitehead & D Tsikata, note 44, 82.

⁵⁰ See A Santos 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in D Trubek & A Santos (eds.), Introduction, note 47, 253–300, 255.

⁵¹ See A Whitehead & D Tsikata, note 44, 88.

⁵² See J Ngugi 'The World Bank and the Ideology of Reform and Development in International Economic Development' (2006) 14 *Cardozo Journal of International and Comparative Law* 313, 328.

observed that the ‘basic institutional architecture’ and the ‘core legal reform agenda’ of the international financial institutions have not changed.⁵³

Notwithstanding the dissensus within the Bank, the dissensus at the local Malawian space is ameliorated in two ways. First, the quest for the resolution of the land question is immersed in the broader context of poverty reduction. Second, the coalescing of land reform and poverty reduction leads to an even broader agenda under the rubric of ‘good governance’. The focus on poverty reduction is one way of marginalizing the land question. Suffice it to say that ‘good governance’ is contested territory and its critics consider it a legitimization apparatus for an ‘imperial’ agenda.⁵⁴ One of the critics, Antony Anghie, has observed that the ‘good governance’ initiative is a basic task for the ‘reproduction of principles and institutions’ for ‘progress’ and ‘stability’ in the South.⁵⁵ The point can still be made that the strategic iteration by the Bretton Woods Institutions under the rubric of good governance ensures that their various frameworks are in apparent symmetry at both the global and the local spaces.

B The Micro Level Analysis of Predatory Calculated Conformity

The discussion here takes place at four relational levels. These levels are: the relationship between the postcolonial State and the *Achikumbe*; the postcolonial State and the land deprived; the *Achikumbe* and the land deprived; and the intra-‘community’ dynamics. In relation to the intra-‘community’ dynamics, the discussion looks at the role of chiefs and its implications for land reform. Further, the discussion considers the complication that emerges among the land deprived.

⁵³ See K Rittich ‘The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social’ in D Trubek & A Santos (eds.), Introduction, note 47, 203–252, 205.

⁵⁴ See World Bank *Governance and Development* (Washington DC: World Bank, 1992). For some of the critics: See A Anghie ‘Civilization and Commerce: The Concept of Governance in Historical Perspective’ (2000) 45 *Villanova Law Review* 887; S Prozorov ‘Three Theses on Governance and the Political’ (2004) 7(3) *Journal of International Relations and Development* 267; J Demmers *et al* *Good Governance in the Era of Global Neoliberalism: Conflict and Depoliticization in Latin America, Eastern Europe, Asia and Africa* (London: Routledge, 2004); and AJ Ayers ‘Demystifying Democratization: The Global Constitution of (Neo)liberal Polities in Africa’ (2006) 27(2) *Third World Quarterly* 321.

⁵⁵ See A Anghie, above, 894. For a liberal ideation of ‘good’: See P Selznick *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992).

1 The Postcolonial State and the *Achikumbe*

In the wake of the adoption of a multiparty system of government in Malawi in 1994,⁵⁶ the nature of the so-called ‘fast track’ land reform in Zimbabwe has, in my view, prompted a more proactive approach to land reform in Malawi from the Bretton Woods Institutions and its ‘Northern’ partners. In turn, the approach has influenced the nature of the relationship between the postcolonial State and the *Achikumbe*.⁵⁷ A quick recapitulation of the local context is pertinent: In Chapter 4, it was pointed out that in the run up to the referendum of 14 June, 1993 and the general elections of 17 May, 1994; land reform was a key ‘manifesto’ issue for galvanizing popular support by the proponents of a multiparty system of government. However, these proponents are also part of the *Achikumbe* and invariably benefited from the 1967 land reforms and the patronage that ensued.⁵⁸

In the run up to the 1993 referendum and the 1994 general elections, the call for a land reform based on the land restitution model was either a genuine rallying cry to revolutionize land relations in the country by ensuring that the land deprived have improved access to land or it was mere campaign posturing on the part of the proponents for political mileage. If the quest for a land reform based on the land restitution model was legitimate, it soon evolved into land distribution model based on a willing seller/willing buyer approach in conformity with the trend under the new wave of land. However, if the call was mere politicking, it is more revealing of the vested interests of the proponents of multipartyism as part of the *Achikumbe*. This change in the rhetoric arises from the involvement of the Bretton Woods Institutions and the country’s development partners in the development of the Land Policy through, most notably, the EU, the DFID and the USAID.⁵⁹ The intervention in the postcolonial State was apparently crucial to avoid ‘another Zimbabwe’; where the State unleashed a fast-track land reform programme to ‘repossess’ predominantly white-owned commercial farms.⁶⁰ In view of the violence that ensued under Zimbabwe’s programme, it is possible to suggest that the intervention of the Northern

⁵⁶ See the discussion in Chapter 4.

⁵⁷ See for example S Moyo & P Yeros in Chapter 3, note 21.

⁵⁸ See B Chinsinga, note 31, 4.

⁵⁹ Cf. A Manji, note 41, 62–65 on the role of bilateral donors.

⁶⁰ Key Informant Interview: 4 June, 2008. See also B Chinsinga, note 31, 4, 9–10; and S Moyo & P Yeros, note 57.

agents in Malawi was calculative. This has meant that purportedly ‘excess’ land from the *Achikumbe* is only available to the land deprived through the land redistribution model based on a willing seller/willing buyer approach. This seeks to ‘protect’ the estates under white ownership.⁶¹

The ostensible sincerity of the quest for a land reform based on the land restitution model is depicted in the nature of parliamentary debates during the First Meeting of the 30th Session of the Proceedings of Parliament. During the nine days of this Session, the issue of the land question in the country was raised a total of twenty times. In his Inaugural State of the Nation Address to Parliament, the then newly elected State President, Bakili Muluzi, said:

I would like to remind the House of the fact that land is, next to man, the most important asset a nation may have. With land to live and work on, men and women may be able to translate their nation’s dream and aspiration into reality. In this regard, Government is committed to ensuring that *land is distributed fairly and put to economic use*.⁶²

As it was observed in Chapter 4, the contributing legislators to the debate in this period, who were predominantly from southern Malawi, adopted a firebrand approach to addressing the land question. The incumbent Minister responsible for land matters buttresses the point:

Malawi is an agrarian economy and land is the main factor of production. Unfortunately, for 30 years we have had no comprehensive national land policy. Consequently, land was distributed on *ad hoc* basis. There is in this country [...] a conflict between the smallholder on one hand and the estate sector, the wildlife, the game reserve on the other. We need a solution to this conflict. The situation prevalent now, is that a large percentage of the population has no access to land especially in areas such as Thyolo, Mulanje, Zomba et cetera. Until Malawi makes land available to smallholders, we shall never free ourselves from poverty. Access to arable land [...] by the smallholders will ensure economic and food security and reduce unemployment problems.

I would therefore, Mr. Speaker, Sir, like to endorse word for word His Excellency’s statement on 30th June, that the Government is ‘committed to ensure that land is distributed fairly and put to economic use’. In this regard, my Ministry [...] is undertaking to review the Land Legislations and come up with a comprehensive land policy.

[...]

I would like [...] to make use of this opportunity to send an open invitation to all interested individuals and groups to come forward with suggestions and any land related problems in a spirit of open debate.⁶³

The contributions to the debate on land reform based on a land restitution model changed to that of a land redistribution model based on a willing seller/willing

⁶¹ See Key Informant Interview: 4 June, 2008.

⁶² See Government of Malawi, Chapter 4, note 116, 24 [emphasis added].

⁶³ See the Statement of Honourable Alhaji Itimu in Government of Malawi, above, 670–671.

buyer approach. In Chapter 4, it was noted that then Minister responsible for land matters, Honourable Thengo Maloya, suggested that the Land Policy had been prepared in a careful, balanced manner; that tenure insecurity would be removed; that land transactions would be speedy and transparent; that inadequacies of the existing laws, retrogressive customary beliefs, delays in land administration, arbitrary application of the public interest criteria, constraining inheritance laws and uncertainty regarding the strategies for dealing with land pressures all operated to discourage needed investment and the nation's ability to eliminate poverty.⁶⁴ It was also observed in Chapter 4 that the nature of the property clauses under the 1994 Constitution, and the 'overbearance' of the country's development partners has meant that the change in the rhetoric was inevitable.⁶⁵

Hence, the call for land reform based on the land restitution model is political ruse if looked at in the context of path dependence.⁶⁶ The postcolonial State has acquired estates from erstwhile white owners for the purported distribution to the land deprived. The so-called fair redistribution has been marred by cronyism. While the cronyism has not been accompanied by violence that has, for example, engulfed Zimbabwe, three rather extreme cases of the cronyism in Malawi are worth highlighting: The first case involves President Mutharika. The President has 'bought' the Ndata Estate in Thyolo, southern Malawi. As it has been stated already, Thyolo has colossal problems of access to arable land for the land deprived. At a focus group discussion, a discussant observes:

To the north of this village, there is Ndata Estate. We had heard rumours that the Government has bought the estate to redistribute land to the landless. Later, we heard that the President has bought Ndata [Estate]. We were surprised that the President has bought an estate for himself considering that there is no land for farming here.⁶⁷

The second case involves a one time senior Cabinet minister under the Muluzi Administration. In 1997, the postcolonial State acquired a tea estate – Chitakale Tea Estate – in Mulanje, southern Malawi from erstwhile white owners for land redistribution to the land deprived. The redistribution of the land under the estate was

⁶⁴ See Government of Malawi, Chapter 4, note 118.

⁶⁵ Government of Malawi, above, 11.

⁶⁶ The concept of 'path dependence' states that if a particular constituency has benefited from a historical construction of the nature of ownership and distribution of wealth, the beneficiary constituency will resist change and seek to entrench the status quo: See D North *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) cited in B Chinsinga, note 31.

⁶⁷ Focus Group Discussion: 30April, 2008.

overtaken by efforts by Brown Mpanganjira, using his influence as a senior Cabinet minister at the time, to purchase the estate in his individual capacity. The postcolonial State only took steps to repossess the estate in question when Mr. Mpanganjira fell out with the Muluzi Administration. The repossession was the subject of litigation in the case of *Brown J Mpanganjira v Chitakale Tea Estate Limited and the Attorney General*.⁶⁸

The third case involves a conglomerate of private business, Mulli Brothers Limited. The directors of this conglomerate are closely connected to President Mutharika; they belong to the same political party, one of the directors is a member of Parliament and a Cabinet minister under the Mutharika Administration, and the directors and the President are from the same ethnic group. The conglomerate has since bought Chitakale Tea Estate Limited as a private entity. While the sale of the Estate was conducted under a privatization programme run by the postcolonial State, the fact that Chitakale Tea Estate has still not been made available to the land deprived buttresses the self-interest among the politicians as, simultaneously, part of the postcolonial State machinery and the *Achikumbe*.⁶⁹

The political cronyism is also evident at the regional context. In relation to Zimbabwe, Sam Moyo and Paris Yeros have discussed the blatant political cronyism practised by the State under the fast track land reform programme in that country. The beneficiaries under the programme have been members of the ruling political party and members of the war veterans' grouping.⁷⁰

Hence, under predatory calculated conformity, the relationship between the postcolonial State and the *Achikumbe* has been ambivalent. At one level, the intervention of the Bretton Woods Institutions and the agents of the country's development partners has benefited the *Achikumbe* and has meant that the prospects

⁶⁸ Civil Cause Number 682 of 2001, High Court of Malawi, Principal Registry (Unreported); U Engel & N Gomonda *Prospects of Crisis Prevention and Conflict Management in Mulanje District, Malawi (Southern Region) (Deutsche Gesellschaft für Technische Zusammenarbeit GmbH, 2001)* 38–39; and IIRD *Final Draft Report for the Makandi Estate Case Study* (Lilongwe, Ministry of Lands, Housing and Surveys, 2005).

⁶⁹ Key Informant Electronic Mail: 10 October, 2009. See also www.mullibrothers.com/Chitakale.html [visited on 15 October, 2009]; and Anonymous 'Malawi: The rise and rise of ethnic politics' in *Africa Confidential*, 20 November, 2009, Volume 50, Number 23, 9–10. On the estate's initial ownership: See U Engel & N Gomonda, above, 38; and on its privatization: See http://www.privatisationmalawi.org/index.php?option=com_content&task=blogcategory&id=31&Itemid=151&limit=5&limitstart=5 [visited on 25 January, 2010].

⁷⁰ See S Moyo & P Yeros, note 57.

of a land reform based on the land restitution model have been foreclosed. As it has been discussed in Chapter 3, land reform under a land redistribution model based on the willing seller/willing buyer approach favours the *Achikumbe*.⁷¹

At another level, the key players in the postcolonial State's political hierarchy are themselves the *Achikumbe* such that the nature of the predatory calculated conformity is really in disfavour of the land deprived. To the extent that the key players in the political hierarchy of the country are also the *Achikumbe*, their impact on land relations gravitate towards entrenching the networks with the global commodity chain through a liberal, abstractionist interpretation of the right to property that underpins market-based land reform models such as a land redistribution model based on a willing seller/willing buyer approach.⁷²

2 The Postcolonial State and the Land Deprived

Beyond the Land Policy which has been discussed in Chapter 5, the interface between the postcolonial State and the land deprived is most pronounced through the Community Based Rural Land Development Project. The Project is one of the implementation strategies of the Land Policy. From 2004, the postcolonial State, with support from the World Bank, has been piloting this Project in four districts of southern Malawi.⁷³ At the start of the Project, the estimated total budget was USD28,958,940; with the postcolonial State contributing USD1,958,940 and the Bank USD27,000,000.⁷⁴ The Project, in its pilot phase, was to run for four years. On 19 November, 2009, the World Bank's Board approved the extension of the Project to September, 2011 together with a grant of USD10,000,000.⁷⁵ Beyond 2011, the

⁷¹ See for example S Moyo & P Yeros, Introduction, note 12, 8.

⁷² See A Manji, note 41, 65–72 on her discussion of the global land law reform network.

⁷³ The four districts under the pilot phase are Thyolo, Mulanje, Machinga and Mangochi: See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual* (Lilongwe: Ministry of Lands, Housing and Surveys, 2005). The combined total human population of the project area as at September, 2008 was 2.4 million: See National Statistical Office, Introduction, note 26.

⁷⁴ As at January, 2009, the postcolonial State had contributed USD875,621 (out of a financial commitment of USD1,958,940) while the Bank had met its full financial commitment: Key Informant Electronic Mail: 20 January, 2009. See also Government of Malawi & World Bank *The Community Based Rural Land Development Project (Kudzigulira Malo): Mid-Term Review Report* (March, 2007) 1 [on file with the author].

⁷⁵ See

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MALAWIEXTN/0,.con>

postcolonial State intends to scale up the Project to rest of the country. The scaling up is subject to availability of funds from the postcolonial State's other development partners besides the World Bank. The Bank is reluctant to solely fund a scaled up implementation of the Project.⁷⁶ A key informant working under Project states:

The Project is a pilot which will be scaled up nationwide. The design will involve a lot more donors than just the World Bank. Donor interest is crucial; but the World Bank does not want to fund a scaled up project on its own.⁷⁷

This brings to the fore the issue of programme financing that has been discussed in Chapter 3. I have argued in that Chapter that since the implementation of market-based land reform models requires heavy capitalization, it poses enormous challenges for weak economies such as Malawi.

Poverty reduction is the purported central driver under the Project through 'directly facilitat[ing] access to land by the land deprived beneficiary groups.'⁷⁸ In this respect, it is projected that at the end of the pilot phase, some 15,000 'rural poor households' in the four districts will have been resettled on new tracts of land whose title shall be in the name of the households respectively.⁷⁹

The Project provides for an elaborate eligibility criteria which the land deprived must meet. The land deprived are required to form beneficiary groups which become the minimum level of consideration for an application for land redistribution under the Project. The eligibility criteria⁸⁰ states that each applicant under a beneficiary group must:

- 1) be a citizen of the Republic of Malawi;
- 2) be land deprived and food insecure and a member of a rural household from one of the pilot districts;
- 3) have the least amount of land but has the ability to work on more land than presently accessed, that is, they must have excess labour;

tentMDK:22395961~menuPK:50003484~pagePK:2865066~piPK:2865079~theSitePK:355870.00.html [visited on 25 January, 2010].

⁷⁶ Key Informant Interview: 23 April, 2008.

⁷⁷ Key Informant Interview, above.

⁷⁸ See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73, 3.

⁷⁹ See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73.

⁸⁰ See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73, 6–7.

- 4) be with lowest income and least wealth;
- 5) have inadequate means to secure their annual food requirements and are chronically dependant on food handouts or other forms of external assistance for survival;
- 6) be an ‘eligible vulnerable individual’; that is, for example, an orphan or a person with disability;
- 7) not presently be encroaching on land being applied for, nor involved in a labour disputes with owner of the being applied for.

There are specific requirements relating to the eligibility of a beneficiary group under the Project.⁸¹ A beneficiary group must:

- 1) consist of members that have not benefited from previous land redistribution programmes;
- 2) have a minimum of twenty and a maximum of thirty five members;
- 3) have a constitution and demonstrate sound organizational capacity;
- 4) have strong and identifiable leadership with capabilities to mobilize groups;
- 5) be willing to be relocated and engage in farming;
- 6) must develop a proposal that:
 - a. reflects a need for land as a priority for the land deprived;
 - b. directly benefit the land deprived;
 - c. includes a capacity building element for the beneficiaries to develop and manage the asset;
 - d. demonstrates that transparency and accountability processes were adhered to in the process of negotiating for land;
 - e. demonstrate that there was and will be active participation by the entire group;
 - f. is consistent with sectoral norms and recommended practices;
 - g. ensures that identified land has the potential for improvement by the purchasing community.

The Project implementation guidelines state that the land deprived under a constituted beneficiary group are responsible for identifying land for acquisition and

⁸¹ See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73, 7. The beneficiary groups are ‘trusts’ registered under the Trustees Incorporation Act. Staff from the Project Management Unit under the Project assists the beneficiary groups with the process of developing a constitution for the trust and its registration as required by law.

must directly negotiate with the landowner for the price. If a price is agreed, the land deprived are required to submit a provisional sale agreement to the local government who will then approve or reject the proposed sale. If a sale is approved, the price is paid to the landowner under the Project.⁸²

If a sale has been concluded, the following events ensue:⁸³

- 1) each emigrating household is allocated a minimum of two hectares of land
- 2) each emigrating household is provided with transportation if the acquired is more than fifty kilometres from their erstwhile home
- 3) each emigrating household is provided with a one-off payment of USD1050 for resettlement and farm development; 30 per cent of the amount is for land acquisition, 10 per cent for settlement, and 60 per cent for farm development. The resettlement package includes: six bags of fertilizer, two hoes, a panga, a pick, and maize and tobacco seeds
- 4) the newly acquired land cannot be transferred or leased during the first five years from the date of purchase
- 5) the emigrating beneficiary group is responsible for ground rent, in the case of leasehold land, or land tax, in the case of freehold land.

A civic campaign through the electronic and print media complements the implementation strategy of the Project. Under the civic campaign, the Project is designated as '*kudzigulira malo*' – which literally means 'buying land for oneself'. Such designation of the Project serves three purposes: First, it portrays the land deprived as equal partners with the postcolonial State under the land reform in the country. It presents the land deprived as having financial capacity to 'buy' available arable land for their livelihood. Finally, the designation legitimizes the Project which in real terms is rooted in a land redistribution model based on the willing seller/willing buyer approach. As pointed out earlier, far from the land deprived 'buying' land for themselves, the postcolonial State, with support from the World

⁸² See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73.

⁸³ See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73, 8–14; and B Chinsinga, note 31, 12.

Bank, provides grants to the land deprived for the land transactions under the Project. Hence, the responsabilization lies in the ‘ideology’ of ownership underpinned by the grants.

Further, the scope of the beneficiaries amongst the land deprived under the Project is delineated by the requirement that those who ‘encroach’ on private land do not qualify to benefit from land redistributed for resettlement under the Project. The view of the postcolonial State is that dealing with ‘land invaders’ amounts to ‘rewarding encroachers’ and exacerbates ‘encroachment’ on private land.⁸⁴ In this respect, the postcolonial State has taken a *laissez faire* approach and has desisted from using its statutory powers under the Lands Acquisition Act.⁸⁵ According to the postcolonial State, this approach ensures that the Project is ‘assimilative’ and less ‘confrontational’.⁸⁶ A key informant states:

The State adopts a *laissez faire* approach because historically the State has been weak in enforcing lease covenants. Therefore, under the Project, the Minister’s power of compulsory acquisition under the Lands Acquisition Act is not used. The application of the Land Acquisition Act is not an option under the Project because management [of the Project] feels that using the Lands Acquisition Act will aggravate ‘problems’ that are already there in the application of the Act; especially the enforcement of the lease covenants. Secondly, the Act is not used because the management of the Project does not want to appear ‘confrontational’ to the estate owners.⁸⁷

In the final analysis, some commentators have stated that it is less clear as to whether the Project is piloting the implementation of the Land Policy or a land redistribution model based on the willing seller/willing buyer approach.⁸⁸ In my view, the Project does constitute an implementation of the Land Policy since both frameworks have the same principles; particularly, the land redistribution model based on the willing seller/willing buyer approach. Further, the Project represents a subtle shift in the manner of hegemonic responsabilization. The processes under the

⁸⁴ See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73, 7; Key Informant Interview: 23 April, 2008; and Key Informant Interview: 24 April, 2008. The description here is also crucial. The juridical term ‘encroachment’ is preferred by the postcolonial State and the Bretton Woods Institutions to the more ‘emancipatory’ reference as ‘land occupation’. Cf. GA Meszaros, Introduction, note 99.

⁸⁵ The Malawi Law Commission has observed that the compensation regime under the Lands Acquisition Act is ‘outdated’ as it disregards the market value of property. The Law Commission has recommended an amendment to the Lands Acquisition Act such that ‘appropriate compensation’ must undoubtedly mean an open market valuation: See Malawi Law Commission, Introduction, note 33, 86–95.

⁸⁶ Key Informant Interview: 23 April, 2008.

⁸⁷ Key Informant Interview: 23 April, 2008.

⁸⁸ See particularly the critique by B Chinsinga, note 31.

colonial State and the Banda Administration fostered the responsabilization of a labourer. Under the Project, the responsabilization is that of an inchoate producer who, given the concerns of sustainability raised in Chapter 3, is vulnerable to the vicissitudes of the land market in his or her new capacity as a post-distribution land owner. In this sense, the responsabilization is based on the device of a contract. Third, the intervention of the Malawi Law Commission and its recommendations as discussed in Chapter 5 are incipiently being overtaken by the postcolonial State's initiative under the Project. While the Law Commission's intervention is meant to translate the Land Policy into law,⁸⁹ as a scheme under a range of multiform tactics, the Project has received support from the 'North' most notably, through the World Bank, which has in turn re-aligned the purported resolution of the land question under the guise of *kudzigulira malo*.⁹⁰

3 The *Achikumbe* and the Land Deprived

The relationship between the *Achikumbe* and the land deprived reveals the tensions in land reform discourse relating to the appropriate model and approach for a reform in a particular country. In the context of Malawi, I examine the relationship of the *Achikumbe* in the tea estate sector in southern Malawi with the land deprived in the periphery of the estates. The relationship demonstrates that there is tension between the *Achikumbe* and the land deprived which has revolved around calls from the *Achikumbe* for land reform that does not supposedly jeopardize the postcolonial State's agricultural productivity based on large estates on the one hand, and the agitation from the land deprived for land reform that addresses landlessness as a historically constructed 'wrong'. In the constant posturing that emerges, the *Achikumbe* rely on the efficiency argument and the land deprived base their position on history, context and culture.

The *Achikumbe* in the tea estate sector in southern Malawi have embarked on a number of community-targeted initiatives that are aimed at dissuading the growing 'dissent' that simmer beneath their relationship with the land deprived living in the periphery of the estates. The dissent arises out of lack of access to available arable

⁸⁹ See the discussion below on the relationship between the postcolonial State and the Bretton Woods Institutions under Preservatory Calculated Conformity.

⁹⁰ See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73; and Government of Malawi & World Bank, note 74.

land for their dignified livelihood. The *Achikumbe*'s community-targeted initiatives have included the promotion of smallholder tea growers' cooperatives, provision of technical assistance in crop husbandry, and the provision of social infrastructure and related programmes.

The *Achikumbe* have promoted the formation of cooperatives as a way of 'formalizing' their relationship with the land deprived. It is a symbiotic relationship that serves to guarantee a labour force for the *Achikumbe* and provide a livelihood for erstwhile land deprived without necessarily subverting the status quo of existing land relations. This is the case because the cooperatives will receive support from the *Achikumbe* on the condition that the cooperatives grow tea which will be sold to the *Achikumbe*. The sale of the tea harvest is to occur in a 'participatory' setting where the price is reached by the 'consensus' of the *Achikumbe* and land deprived under a particular cooperative.

The *Achikumbe*'s core agenda in the formation of cooperatives is to curb the high labour turnover in their sector.⁹¹ This transforms the land deprived from mere labourers into inchoate producers under a nascent sharecropping scheme. A key informant, a manager at an estate states:

[We] have encouraged [villagers] to form an association. The association shall operate as a farmers' cooperative. The long-term strategy is that these associations must be self-sustaining through, for example, ownership of a factory. The community initiative is industry-wide; all tea estates are involved. The high population density in the area means that it is possible to have labour from the local community as well as keep the association going. At the moment, there is high labour turnover.⁹²

The rationale here is that under cooperatives, the land deprived will be more settled and to the extent that they are earning an income under a quasi-oligopostic market arrangement, it diffuses calls for land redistribution.⁹³

The provision of the technical expertise in crop husbandry is a technique to ensure the longevity of the cooperatives. In this respect, the initiative by the *Achikumbe* in the tea estate sector is yet another example of a process of normation. The *Achikumbe* provide the green leaf from their nurseries and other farm inputs to the land deprived under the cooperatives. This gesture is to ensure that the cooperatives produce a leaf that is 'suitable' for an international market.⁹⁴ In sum, the

⁹¹ Key Informant Interview: 19 May, 2008.

⁹² Key Informant Interview, above.

⁹³ Key Informant Interview: 19 May, 2008.

⁹⁴ Key Informant Interview: 19 May, 2008.

cooperatives scheme entrenches the roles of the *Achikumbe* as the land owner/producer and the land deprived as the labourer/tenant worker and an inchoate producer that fit a 'norm' of production based on market as value.

Further, the *Achikumbe* provide social infrastructure to the land deprived in the form of school blocks, boreholes for clean and safe water supply, support of HIV and AIDS programmes where the *Achikumbe* assist with the public awareness of the pandemic through civic education, and the provision of anti-retroviral drugs for those who are HIV positive and AIDS sufferers.

Finally, the change towards greater community involvement on the part of the *Achikumbe* has been a recent development.⁹⁵ It is not mere coincidence that the change in approach that has led to the *Achikumbe* investing more in social capital emerges in the context of greater agitation for access to arable land under the land reform underway in the postcolonial State. The *Achikumbe*'s supposedly contextualized social 'responsibility' is a manifestation of responsabilization.⁹⁶ The difference here is that the technique in place has gone beyond the 'construction' of the individual as a wage labourer. The technique permeates the individual's very livelihood; in the Foucauldian sense, the approach is constitutive of 'biopower' – 'the power over life'. A key informant from the *Achikumbe* (a manager-owner at an estate) states:

The market guarantees better social welfare. Better income through provision of labour means that the communities can afford a dignified livelihood. We consider them our partners in progress. The Tea Exporters Association of Malawi [a grouping of tea estate owners] never integrated community initiatives. A change in approach has led to greater community projects' involvement. We now have HIV/AIDS programmes. We are involved in the construction of school blocks; provision of boreholes. We think investment in the communities is a good thing. We have encouraged the communities around our [estate] to form cooperatives. The long term strategy is to empower the cooperatives to have their own factory. We think the future of the sector requires greater support of the government in the smallholder sector.⁹⁷

In the process, there is a slight re-focus; from the issue of access to available arable land to contentment with a healthy, well-looked after labourer. The commonality in the processes governing the relationship of the *Achikumbe* and the land deprived is that they all seek to promote a greater, consensual biopower relationship. A recent statement by a wage labourer at Chitakale Tea Estate sums up the point:

⁹⁵ Key Informant Interview, above.

⁹⁶ Under the scheme of responsabilization under this thesis, this process may be classified as hegemonic if it were State-based. This is perhaps a manifestation of a 'neo-hegemonic' responsabilization that transcends the State apparatus.

⁹⁷ Key Informant Interview: 19 May, 2008.

Since Mulli Brothers Group bought this estate, it is no secret that we are the highest paid estate workers.⁹⁸

The labourer goes on to state that he has worked with the estate when it was both under white and State ownership and he observed that no one envisaged that ‘working life’ at the estate would be as ‘sweet’ under the ‘new’ terms of conditions of service. The labourer further quipped that he and his family now lived in a ‘company house’.⁹⁹

4 The Intra-‘Community’ Dynamics

The focus on the intra-‘community’ dynamics seeks to illustrate that it is erroneous to portray the interests of the land deprived and their social setting – the ‘community’ – with a high degree of consensus. The discussion looks at the role of chiefs, as a key political institution of the ‘community’, and its implications for the resolution of the land question in the country. The complication that emerges among the land deprived themselves is also considered. This complication relates to the tense interface between those among the land deprived that have benefited under some restorative postcolonial State programme and those that are yet to benefit under any programme. The distinction is made between the so-called *eni malo* – who often are the non-beneficiaries – and the so-called *obwera* – who often are the beneficiaries under a restorative programme.

The Role of Chiefs

The discussion of the role of chiefs in the postcolonial State is pertinent because the on-going land reform has been encrypted in a variegated ‘customary’ context. In one shade, chiefs in the postcolonial State have resisted the reform because, as they deem it, it endeavours to erode their power as custodians of land at custom.¹⁰⁰ At another level, the postcolonial State advocates the involvement of chiefs in land administration. The chiefs’ position assumes an innate comprehension of their power relationship in relation to land. The postcolonial State assumes an allocative role of the chiefs where the power relationship in relation to land is a conferment and not a natural entitlement.

⁹⁸ See ‘Chitakale estates transforms [sic] lives’ *Nyasa Times* available at <http://www.nyasatimes.com/national/chitakale-estates-transforms-lives.html> [visited on 5 December, 2009].

⁹⁹ See note 98.

¹⁰⁰ See for example ‘Chiefs reject land bill on land tenure’ *The Nation*, 8 March, 2006; and ‘Meeting advises on new Land Bill’ *The Daily Times*, 9 March, 2006.

The position of chiefs becomes challenging when one seeks to establish the source of their authority and their legitimacy.¹⁰¹ Under colonial and postcolonial State power respectively, the chief has been the subject of strategic deployment within the State apparatus. The colonial State often tolerated subservient incumbents to inculcate domination. Deviant chiefs could be suspended or outright banished. The practice has been perpetuated under the postcolonial State and is often buttressed by law.¹⁰² While it is acknowledged that a majority of chiefs assumed their incumbency through lineage,¹⁰³ it remains to be resolved the extent to which the status of chiefs that is derived from colonial or postcolonial State construction can claim custody over land on the basis of ‘custom’.¹⁰⁴

The call by the chiefs in Malawi that they are the custodians of land at ‘custom’ and that the land reform must not erode their custodianship only seeks to reinforce the relevance of their institution as a unit of patronage.¹⁰⁵ Building on the related arguments in Chapter 4, this is the case for two reasons: chiefs fulfilled a strategic role under colonialism which was precisely to guarantee colonial domination. The institution was a social construction that sustained a particular power relationship.¹⁰⁶ The nature of the social construction and its role has been perpetuated under postcolonial Malawi.¹⁰⁷ The social construction is concretized by the fact that the resource base of chiefs is ill-provided for or non-existent.¹⁰⁸ In this respect, chiefs

¹⁰¹ See for example M Mamdani; and M Chanock, both in Chapter 2, note 52; DC Williams ‘Reconsidering State and Society in Africa: The Institutional Dimension in Land Reform Policies’ (1996) 28(2) *Comparative Politics* 207; and B Chinsinga ‘The Interface between Tradition and Modernity: The Struggle for Political Space at the Local Level in Malawi’ (2006) 54 (1/2) *Civilizations* 255.

¹⁰² See M Mamdani, above; M Chanock, above; DC Williams, above; and B Chinsinga, above. In the case of Malawi, the President has statutory powers to appoint, promote, suspend or dissolve a traditional authority: See section 89(1) (d) of the Constitution and sections 4, 11 and 12 of the Chiefs Act (Chapter 22: 03), Laws of Malawi. The postcolonial State has entrenched the position of chiefs in the formal State apparatus through the provision of salaries to them from the National Budget: see for example the 2008 / 2009 Budget Statement delivered by the Minister of Finance to the National Assembly available at http://www.sdn.org.mw/~stewart/Budget_Speech_2008_09.pdf [visited on 12 January, 2009]. The Malawi Supreme Court of Appeal has confirmed the President’s powers at law in *Group Village Headman Kakopa, Tsakulani Jonisi Kasambwe v Lotani Njeresa Chilozi and the Attorney General* Civil Cause Number 40 of 2000 (Unreported).

¹⁰³ See F Moto ‘Domesticating the Definition of Democracy’, *Bwalo: A Forum for Social Development*, 1998, Issue 2, 24 cited in B Chinsinga, note 101.

¹⁰⁴ See M Mamdani, note 101.

¹⁰⁵ See for example PE Peters & D Kambewa, Introduction, note 60.

¹⁰⁶ See M Mamdani; M Chanock; DC Williams; and B Chinsinga, all in note 101.

¹⁰⁷ See B Chinsinga, note 101.

¹⁰⁸ See B Chinsinga, above.

rely heavily on the postcolonial State machinery for their survival and in the process render themselves pliable to the whims of the State's patronage.

The second reason why chiefs are a unit of patronage directly relates to the land question in the country. Peters and Kambewa have observed that while the Land Policy has reposed considerable trust in chiefs, their legitimacy is suspect since chiefs have been at the centre of land alienation through sales to the *Achikumbe*. In this respect, the suggestion that chiefs advance the interests of their 'subjects' – who partly include the land deprived in the 'community' – is tenuous.¹⁰⁹

In light of the foregoing, the call of chiefs as custodians of land at custom merely serves to perpetuate their relevance as a unit of patronage in their relationship with the postcolonial State. Further, the call also serves to inculcate the power relationship between them and the land deprived; a relationship that is invariably in favour of the chiefs.

Eni Malo and Obwera: The 'Internecine' Conflict of the Land Deprived

The discussion here primarily stems from the events in the wake of the redistribution of Makandi Estate in Thyolo, southern Malawi, and the preliminary findings from the resettled communities under the Community Based Rural Land Development Project.¹¹⁰ The Makandi Estate was established in the 1920s and was owned by Lonrho Agribusiness Limited. The area of the Estate is part of the land that was part of the land expropriation by white missionaries and entrepreneurs in southern Malawi just prior to the declaration of British colonialism.¹¹¹ The black population that worked on the Estate comprised Anguru migrants from Mozambique. A key informant confirmed the point:

The chieftaincy [...] was established in 1930 when our forefathers migrated to the area from Mozambique. The Estate found us. Previously, the Estate used to cultivate cotton, tea, coffee and beans. Things changed. Recently they were just growing tea and coffee. Villagers used to

¹⁰⁹ See PE Peters & D Kambewa, note 105. *Cf.* the position in Tanzania where villagers demanded, and the Land Commission recommended, their greater participation in land administration matters such as land allocation, determination of boundaries and sales: See Government of Tanzania *Report of the Commission of Inquiry into Land Matters, Volume I* (Dar es Salaam: Ministry of Lands, Housing and Urban Development, 1994) 94; and I Shivji *Not Yet Democracy: Reforming Land Tenure in Tanzania* (Dar es Salaam: IIED and HAKIARDI, 1998).

¹¹⁰ On the findings: See B Chinsinga, note 31.

¹¹¹ See generally the discussion in Chapter 4 on the colonial encounter in Malawi.

work on the Estate until the Government bought the Estate and redistributed the land to *obwera*.¹¹²

In 2002, the postcolonial State purchased the estate from Lonrho Agribusiness Limited for redistribution to the land deprived living in its periphery. In total, 1,400 hectares were to be distributed to 498 beneficiaries; an average of 2.8 hectares per beneficiary.

In the run up to the redistribution of the land under the Makandi Estate, the postcolonial State urged the land deprived in the periphery of the estate to identify those households that were in dire need of land for their dignified livelihood.¹¹³ The redistribution exercise immediately degenerated into conflict between the land deprived in the periphery of the estate – the so-called *eni malo*¹¹⁴ – and the land deprived from elsewhere that benefited under the exercise – the so-called *obwera*. The conflict arises because out of a population of approximately 2,000 of the community in the periphery of the estate only twenty people benefited from the redistribution.; representing a paltry 1 per cent of the ‘targeted’ community of the land deprived in the periphery of the estate.¹¹⁵

In the wake of the redistribution, violence and general acrimony ensued where *eni malo* invaded the redistributed pieces of land and vandalized property belonging to *obwera*. *Eni malo* felt cheated under the land redistribution exercise as they could not conceive any discernible difference between their statuses as a land deprived constituency from that of *obwera*. The ‘ring leaders’ of the land occupation were arrested, charged with encroachment contrary to section 36 of the Land Act, prosecuted and convicted. They were sentenced to pay a fine of 5,000 Malawi

¹¹² Key Informant Interview: 24 April, 2008. The establishment of the Estate actually predates the arrival of the community in the periphery of the Estate. The community traces its settlement in the area only as far back as the 1930s. The Estate had been established by then: See S Holden *et al.*, Introduction, note 59.

¹¹³ The then incumbent State President, Bakili Muluzi, held a political rally in the area where he made this assurance: Focus Group Discussions: 30 April, 2008 & 2 May, 2008.

¹¹⁴ The village headperson of the community in the periphery of the estate makes the claim to ownership based on direct ancestral lineage to the ‘ancient’ ownership of the land in question: Key Informant Interview: 24 April, 2008.

¹¹⁵ Key Informant Interview: 24 April, 2008.

Kwacha or, in default, nine months imprisonment. One of the defendants served the term of imprisonment; the rest paid the fine.¹¹⁶ One of the defendants states:

We did not elect leaders. There was fluid ‘leadership’ based on one’s ‘bravery’ and the willingness to ‘occupy’ Makandi. A formal committee would have been counter-productive as the police would have just targeted the leaders. We occupied the Estate for a week. The police came to forcibly remove us; those of us who resisted were arrested. We were initially held at Luchenza Police Station. Our fellow villagers threatened violence to ‘rescue’ those of us who had been arrested. We were then moved to Thyolo Police Station; then to Thyolo Prison. The villagers petitioned our Member of Parliament, the Minister of Lands and the Ombudsman to secure our release. Delegations from the village were sponsored by donations from within the village. Five of us were tried at the magistrate’s court in Limbe. The arrests were meant to ‘intimidate’ us. The rest of the villagers were afraid to ‘occupy’ Makandi after our arrest.¹¹⁷

The relationship between *eni malo* and *obwera* is less than cordial for two primary reasons: The existing power structure among *eni malo* feels undermined as *obwera* created their own power structure and does not recognise the authority and legitimacy of the structure of *eni malo*. Second, and perhaps more tellingly, the Estate provided a source of livelihood to *eni malo* in the form of wage labour. The sale and subsequent redistribution of the land comprising the Estate has meant a loss of livelihood on the part of *eni malo*.¹¹⁸

Further, the conflicts between *eni malo* and *obwera* under the Makandi scenario have been replicated in the receiving districts under the Project.¹¹⁹ First, the ‘socio-cultural integration’ of *obwera* – from a predominantly Christian background – into the community in the receiving districts – which is predominantly Moslem – has had its problems.¹²⁰ The problems have had their toll on the lifestyle of *obwera*.¹²¹ A key informant states:

There is less cooperation in Mangochi [a receiving district under the Project] because Muluzi campaigned there saying the *obwera* from Thyolo [a sending district under the Project] are bent on destroying UDF [an opposition political party] in favour of Mutharika

¹¹⁶ See *Republic v Flyton Jumbe, Simon Andaki Likoswe, Wyson Muhiye, Alfred Mpwitikizi and Rozario Henderesoni*, In the Senior Resident Magistrate’s Court at Dalton Road, Limbe, Criminal Case Number 331 of 2003 (Unreported). The fine is equivalent to GBP20.80 (1GBP=240.38MWK).

¹¹⁷ Focus Group Discussion: 2 May, 2008.

¹¹⁸ See S Holden *et al.*, note 112, 26–27.

¹¹⁹ The receiving districts are Machinga and Mangochi while the sending districts are Mulanje and Thyolo: See Government of Malawi *Community Based Rural Land Development Project: Project Implementation Manual*, note 73. The land for redistribution is purchased from estates in the receiving districts is available for resettlement by the landless and land poor from the sending districts.

¹²⁰ See B Chinsinga, note 31.

¹²¹ The *obwera* cannot rear livestock such as pigs nor take alcoholic drinks which are considered taboo among the Moslems in the receiving districts: See B Chinsinga, note 31, 16; and Key Informant Interview: 24 April, 2008.

and DPP [a ruling political party]. Our attempts to negotiate with the people of Mangochi have always failed at the 'last minute' all the time because of the politics.¹²²

There have been 'myths' perpetrated by the chiefs in the receiving districts that *obwera* are vampires and Satanists.¹²³ The chiefs propagate the 'myths' as they perceive their authority is under threat since *obwera* resettle in the receiving districts under trusts.¹²⁴ Finally, the friction between *obwera* and *eni malo* is aggravated by the dynamics of neopatrimonial nature of the postcolonial State as discussed in Chapter 4. Party politics in the postcolonial State is ethnic-based and the receiving districts are considered the stronghold of one of the opposition parties while the sending districts are considered the stronghold of the party in power.¹²⁵ Hence an influx of *obwera* in the receiving districts undermines the opposition's political power base.¹²⁶

The interests among the constituency of the land deprived are nuanced and marked by dissensus. *Eni malo* agitate for a superior claim to land under the postcolonial State's land redistribution programme on the basis of history, context and culture. To the extent that the alleged basis is tenuous, it amounts to a strategic manoeuvre on the part of *eni malo* to access a scarce resource; namely, land.

II PRESERVATORY CALCULATED CONFORMITY

The notion of preservatory calculated conformity is the converse of predatory calculated conformity. Preservatory calculated conformity refers to the conformity that is a 'coping mechanism' used by the 'dominated' to ensure that any disadvantage is minimized as far as possible within the reality of their social setting. Under the on-going land reform, the postcolonial State, the Bretton Woods Institutions, the *Achikumbe*, and the land deprived, in various ways, ameliorate the effect of the capture and overbearance at the various levels of the various relationships. This process of amelioration is reflected in the relationship between the Bretton Woods

¹²² See Key Informant Interview, above.

¹²³ The undertone of the 'myths' is that *obwera* will annihilate *eni malo*: See B Chinsinga, note 31. This is comparable to James Scott's 'hidden transcript': See JC Scott *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven & London: Yale University Press, 1990).

¹²⁴ See B Chinsinga, note 31, 17.

¹²⁵ On the role of ethnicity in party politics in the country: See W Chijere Chirwa 'The Politics of Ethnicity and Regionalism in Contemporary Malawi' (1994) 1(2) *African Rural and Urban Studies* 93.

¹²⁶ Former State President, Bakili Muluzi, who hails from one of the receiving districts held a political rally in one of the receiving districts where he called on the community to be uncooperative to the land reform under the Project: Key Informant Interview: 24 April, 2008; and B Chinsinga, note 31, 17. The incumbent President, Bingu wa Mutharika, hails from Thyolo; which is one of the sending districts.

Institutions and the postcolonial State; the postcolonial State and the *Achikumbe*; the *Achikumbe* and the land deprived; and in the intra-‘community’ dynamics of the land deprived. At the macro level, the nature of the preservatory calculated conformity is shown through an analysis of the relationship of the postcolonial State and the Bretton Woods Institutions. At the micro level, it is shown through the relationships at four tiers: the postcolonial State and the *Achikumbe*, the *Achikumbe* and the land deprived, and the intra-‘community’ dynamics with a focus on the chiefs and their relationship with the ‘community’.

A The Macro Level Analysis of Preservatory Calculated Conformity

The nature of the development and implementation of the macroeconomic framework creates a picture that portrays the agenda of the Bretton Woods Institutions as robust and sacrosanct. How can the discussion then begin to suggest that even in this seemingly fortified context, the postcolonial State minimizes any disadvantage to itself? The discussion seeks to demonstrate the postcolonial State’s strategy for preservatory calculated conformity through the land law reform initiative that has followed the Land Policy. The initiative of the postcolonial State here has involved the Malawi Law Commission and the Executive. The focus is on circumstances surrounding the (non-)enactment of the Land (Amendment) Bill, 2006.

Part of the discussion in Chapter 5 covered the role of the Law Commission in translating the Land Policy into law. In that discussion, it was concluded that the Commission’s work buttresses market-based land reform models. For the purposes here, it must also be pointed out that the involvement of the Law Commission arose following pressure from the postcolonial State’s development partners who demanded that the translation of the Land Policy into law shall adhere to the Constitution particularly the obligation placed on the postcolonial State and all natural and legal persons to respect existing property rights.¹²⁷

The property clauses of the Constitution have been discussed in Chapter 4. The requirement (to respect existing property rights) highlights the liberal nature of the property clauses of the Constitution based as they are on abstraction and

¹²⁷ Sections 28, 44 and 209 of the Constitution. The postcolonial State echoes this responsibility as well: See the discussion on the Land Policy in Chapter 5. On the pressure from the postcolonial State’s development partners: Key Informant Interview: 27 May, 2008.

decontextualization. It was pointed out in Chapter 5 that the Law Commission finalized its work in March, 2006. To date, the Report of the Law Commission has been presented to neither Cabinet nor Parliament as required by law. This means that the Report is technically a draft one. This state of affairs casts doubt on the commitment of the postcolonial State to finalize the land reform; at least from a legal formalization perspective.

The developments around a Government Bill – the Land (Amendment) Bill, 2006¹²⁸ – need stressing: Under the Constitution, the Executive is responsible for initiating policies and legislation and implementing ‘all laws which embody the express wishes of the people of Malawi and which promote the principles of [the] Constitution.’¹²⁹ Further to the public trust and the social trust under section 12 of the Constitution, the postcolonial State in general is required to ‘actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation’ to achieve specified goals which include the improvement of the quality of rural life.¹³⁰

In 2006, the Executive developed the Land (Amendment) Bill for presentation and possible enactment by the Legislature. While the Bill was introduced in the Legislature, it was not debated and was subsequently cancelled.¹³¹ The sequence of events at the material time is that upon presentation of the Bill in the Legislature, Malawi qualified for the HIPC Initiative. Rob Jenkins and Maxton Tsoka point out that the presentation of a new land bill to the Legislature was one of the conditionalities for Malawi achieving the completion point under the HIPC Initiative.¹³²

Notwithstanding the cancellation of the Bill, it must be noted that the Memorandum accompanying the Land (Amendment) Bill states in part that new land laws developed by the Commission are ready and are meant to address problems created under the existing land law regime. It is suggested here that the objective of the postcolonial State in developing the Land (Amendment) Bill, 2006 was to meet

¹²⁸ Bill Number 19 of 2006.

¹²⁹ Section 7 of the Constitution.

¹³⁰ Section 13 of the Constitution.

¹³¹ See Government Notice Number 24 of 2007.

¹³² See R Jenkins & M Tsoka ‘Malawi’ in D Booth (ed.) *Fighting Poverty in Africa: Are PRSPs Making a Difference?* (London: Overseas Development Institute, 2003) 119.

the qualification criteria for the HIPC Initiative Completion Point. As that has been achieved, it is possible to infer that the postcolonial State is not keen on finalizing the legal formalization of the implementation of the Land Policy. This emerges in a scenario where the nation-wide scaling up of the Community Based Rural Land Development Project remains elusive.¹³³

B The Micro Level Analysis of Preservatory Calculated Conformity

1 The Postcolonial State and the *Achikumbe*

Under the Project, the postcolonial State has received zero offers for purchase of land from the estate sector in the sending districts of Mulanje and Thyolo. What have been on the table from the estate sector are technically invitations to treat whereby the *Achikumbe* in the sector outlined conditions under which they were to 'offer' their land to the land deprived. More critically, the *Achikumbe* demanded that the post-land redistribution owners were to continue growing plantation crops, particularly tea. Second, the *Achikumbe*, as previous owners of the land, would have the first option to buy the tea.¹³⁴ The conditions are the quid pro quo for any land alienation on the part of the *Achikumbe*. The conditions here are interesting because it is evident that the *Achikumbe* do not want to disturb the global commodity chain by the mere fact that they have ceded some of their arable land. The objective in global commodity chain analysis is to establish 'how local, regional and global institutions, policies and other factors' affect each stage in the chain.¹³⁵ In the agricultural sector, this requires the demonstration of the coordination or management of 'the entire upstream commodity chain, from sourcing of raw materials and sub-components to delivery of the final product.'¹³⁶ The convenient end is a particular type of product for a 'niche' market which demands a pre-configured producer to deliver on the set 'standard' of production. Hence, in the Malawian scenario, the *Achikumbe* continue to hold on to their landholding on the basis of the efficiency argument. The

¹³³ See B Chinsinga, note 31. This rather bleak prospect was confirmed by a senior manager under the Project: Key Informant Interview: 23 April, 2008.

¹³⁴ Key Informant Interview: 24 April, 2008.

¹³⁵ See A Paliwala 'WTO and the Banana Farmers: Commodity Chains and the Globalisation of Economic Regulation' Paper presented to the Law and Anthropology Workshop, at Birkbeck College, London, 2004 [on file with the author].

¹³⁶ See B Daviron & P Gibbon 'Global Commodity Chains and African Export Agriculture' (2002) 2(2) *Journal of Agrarian Change* 137, 143.

responsibilization here is such that the *Achikumbe* retain ownership to maintain a certain level of production at the local level of the commodity chain rather than relinquish ownership to a perceived inefficient producer – the land deprived – who may negatively affect the chain.

In the case of ‘offers’ from the *Achikumbe* in the receiving districts under the Project, it has been observed that land is unavailable for redistribution because the *Achikumbe* have held out for a very high price or that in relation to one estate, the owner(s) could not agree on the appropriate sale price.¹³⁷ In cases where a sale has been finalized, the quality of the land has been very poor for viable agricultural productivity.¹³⁸ The observation on poor quality land is not peculiar to Malawi. Moyo and Yeros make a similar observation in respect of land reform in Zimbabwe.¹³⁹ Further, the national political shenanigans between the political party in power and the opposition have resulted in less and less ‘offers’ from the *Achikumbe* in the receiving districts under the Project; the receiving districts being an opposition political power base.¹⁴⁰

2 The Postcolonial State and the Land Deprived

There is evidence of counter-conduct by the land deprived both from the sending districts and receiving districts under the Project.¹⁴¹ In the case of the land deprived from the sending districts, the counter-conduct has included not participating in the Project; registering as prospective beneficiaries in different names to maximize their benefit through the receipt of multiple resettlement grants; receiving resettlement grants and not relocating to the sending districts under the Project; and returning to the place of origin in the sending district after a brief period of relocation to the receiving districts.

The counter-conduct by the land deprived raises the issue of legitimacy. The land deprived consider that the postcolonial State is ‘forcing’ them to re-locate away from their ‘ancestral homes’. The postcolonial State (together with the *Achikumbe* in the sending districts) has not provided arable land to the land deprived. The

¹³⁷ Key Informant Interview: 23 April, 2008.

¹³⁸ Key Informant Interview: 4 June, 2008.

¹³⁹ See S Moyo & P Yeros, note 57.

¹⁴⁰ Key Informant Interview: 23 April, 2008.

¹⁴¹ Key Informant Interviews: 24 & 30 April, 2008.

postcolonial State's position is that the lack of offers from the *Achikumbe* in the sending districts amounts to a *fait accompli* and leaves it with no alternative but to re-locate the land deprived to the receiving districts. Hence while the postcolonial State adjudge these acts 'fraudulent'; the land deprived take their actions as justified, and depending on 'whom one asks', their acts are legal and legitimate.¹⁴²

The *eni malo* in the receiving districts have occupied the land given to the *obwera* from the sending districts on the basis that the latter have acquired 'good land'. Even though the *eni malo* in the receiving districts under the Project are technically 'encroachers' under the Project, they have had to be assimilated into the Project. Often this assimilation has been through their inclusion in the beneficiary groups comprising the *obwera*.¹⁴³ The nature of the harmony between the two groups is unclear.¹⁴⁴ A key informant from the Project management team states:

In Machinga [a receiving district under the Project] *eni malo* were very hostile and violent towards *obwera*. They invaded the plots of the *obwera*. Even though we did not normally incorporate 'encroachers' under the Project, we had to include the *eni malo* in Machinga because the violence would have jeopardized the Project.¹⁴⁵

Notably, the approach taken under the Project to deal with land 'occupation' is markedly different from the one that was used in dealing with the aftermath of land redistribution under the Makandi Estate. The approach under the Project tilts towards more reconciliation as opposed to the bullish use of prosecution under the Makandi scenario.

3 The *Achikumbe* and the Land Deprived

In the context of predatory calculated conformity, I suggest that the community-targeted initiatives by the *Achikumbe* seek to maintain a supply of cheap wage labour and ultimately sustain the global commodity chain. The nature of participation in the initiatives by the land deprived reveals the nature of the preservatory calculated conformity on their part. The reception of the community-targeted initiatives has been at best lukewarm. The land deprived insist on a land

¹⁴² Cf. for example G Meszaros 'Taking the Lands Into Their Hands: The Landless Workers' Movement and the Brazilian State' (2000) 27(4) *Journal of Law & Society* 517–541; Key Informant Interviews: 24 & 30 April, 2008; and Focus Group Discussion: 30 April, 2008.

¹⁴³ Key Informant Interviews: 24 & 30 April, 2008.

¹⁴⁴ Cf. B Chinsinga, note 31.

¹⁴⁵ Key Informant Interview: 24 April, 2008.

reform based on a land restitution model on the basis of history, context and culture which purportedly gives them a superior land claim to the land now in the estate sector.¹⁴⁶ A key informant states:

We wanted Government to give us the land from the estates because this land is from our forefathers. We do not want to leave here. This is our home. All our relations are here.¹⁴⁷

And in relation to community-targeted initiatives:

We just work as labourers to earn some money for our livelihood. We do not grow our own tea.¹⁴⁸

The following sums up the attitude of the *Achikumbe*:

How do we marry economic value and use value? The market guarantees welfare. Better income through provision of labour means that the communities can afford a dignified livelihood. That way, we will be partners in progress.¹⁴⁹

4 The Intra-‘Community’ Dynamics

The main focus here is to explore the relationship of chiefs and the ‘community’; invariably the land deprived. Under predatory calculated conformity, it has been argued chiefs are a self-interested institution who appropriate ‘culture’, ‘custom’ or ‘tradition’ to sustain their relevance as a unit of patronage. Indeed there are allegations against chiefs from the sending districts under the Project who demand cash kickbacks for ‘facilitating’ the relocation of beneficiary groups to the receiving districts.¹⁵⁰ A key informant from the Project states:

There is one case of corruption involving a beneficiary group that relocated to Machinga [a receiving district under the Project]. A chief demanded payment from the members of the group for ‘facilitating’ the land resettlement. The Project received a letter dated 7 December, 2007 from Anti-Corruption Bureau on the alleged corruption. We forwarded the letter to the Ministry of Lands.¹⁵¹

In the case of the land deprived as a constituency, there are diametrically opposed interests of *eni malo* and *obwera* that centre on the notion of ‘culture’, ‘custom’ or ‘tradition’. In the case of the *eni malo* and *obwera*, the suggestion of a superior claim by the *eni malo* over the *obwera* not only manipulates ‘culture’ but

¹⁴⁶ Focus Group Discussions: 30 April, 2008 & 2 May, 2008 respectively.

¹⁴⁷ Focus Group Discussion: 30 April, 2008.

¹⁴⁸ Focus Group Discussion: 2 May, 2008.

¹⁴⁹ Key Informant Interview: 19 May, 2008.

¹⁵⁰ Key Informant Interviews: 24 & 30 April, 2008.

¹⁵¹ Key Informant Interview: 24 April, 2008.

also denies the validity of freedom of movement and residence enshrined under the Constitution.¹⁵²

The attitude of *eni malo* has been thus:

We resisted going to Mangochi or Machinga [the receiving districts under the Project] because our home is here [meaning Thyolo; a sending district under the Project]. May be those people from elsewhere should have been moved to Machinga not us because we were born here.¹⁵³

The *eni malo* are adamant even though the picture of land availability is very grim:

[The] village has got many people and land pressure is acute. There is no land even for a toilet.¹⁵⁴

Hence, these positions based on history, context and culture are counter-conduct in the mould of Scott's Brechtian struggles.

III THE NATURE OF THE MULTIVERSE

The relationship among the key constituencies belies a perfect delineation of the 'dominant' and the 'dominated'. The relationship reveals a multiverse of parochial interests and a multiplicity of conformities.

The relationship between the postcolonial State and the Bretton Woods Institutions demonstrates the following: In the context of predatory calculated conformity, the various frameworks in the postcolonial State's macro economy confirm Kelmanian compliance.¹⁵⁵ The two major macroeconomic frameworks that have been developed in the country post-1994 and the Land Policy show compliance with the frameworks that have emerged from the Bretton Woods Institutions.¹⁵⁶ The touted country 'participation' that enveloped the development of the frameworks at the local, Malawian space amounts to legitimation. The processes were heavily 'agency-sponsored' and only reinforced the power of the Bretton Woods Institutions

¹⁵² Section 39(1) of the Constitution provides that '[e]very person shall have the right of freedom of movement and residence within the borders of Malawi.'

¹⁵³ Focus Group Discussion: 2 May, 2008.

¹⁵⁴ Focus Group Discussion, above.

¹⁵⁵ In the context of social psychology, Herbert Kelman has proposed three types of social attitudes; compliance, identification and internalization. Kelmanian compliance refers to a public conformity while retaining one's personal beliefs [regarding phenomena].: See HC Kelman 'Compliance, Identification and Internalization: Three Processes of Attitude Change' (1958) 2(1) *Conflict Resolution* 51.

¹⁵⁶ These frameworks are the CDF, the PRGF, the HIPC Initiative, and the World Bank's land policy framework of 2003.

and by extension the country's development partners.¹⁵⁷ The Kelmanian compliance underlines the process of normation.

From a preservatory calculated conformity perspective, the relationship of the postcolonial State and the Bretton Woods Institutions reveals a degree of false compliance on the part of the former.¹⁵⁸ This is the case because the translation of the Land Policy into law has largely remained rhetorical. The Law Commission's recommendations technically remain in draft form. The Land (Amendment) Bill, 2006 was an audacious ploy by the postcolonial State to reach the HIPC Completion Point. Hence, the false compliance amounts to the Foucauldian counter-conduct as opposed to dissidence.

The dual identity of the key players in the political hierarchy of the postcolonial State and the *Achikumbe* results in a somewhat ambivalent nature of the relationship of the postcolonial State and the *Achikumbe*. The key players that occupy critical roles in the formal State apparatus are from the constituency of the *Achikumbe*. Hence, while the pre-1994 rhetoric on land reform by the advocates of multipartyism seemingly favoured land reform based on a land restitution model, once they assumed sovereign power, there has been a gradualist approach towards the land restitution model. In fact, the rhetoric has since changed in favour of a land redistribution model based on willing seller/willing buyer approach. In instances where land has been purchased under the Project for redistribution to the land deprived, there have been cases where the post-land redistribution process has fallen prey to cronyism. The duality of the identity of the key political players in the postcolonial State's apparatus and the *Achikumbe* has resulted in an 'impasse' that inculcates lop-sided land relations in disfavour of the land deprived. However, a rider

¹⁵⁷ Participation may be looked at from an instrumental or empowerment approach; where the former is concerned with the 'improvement of implementation, efficiency and equity' and the latter approach 'values the process of increasing participation as an important end in itself.' Participatory processes may be analyzed in terms of the 'intensity of participants' engagement' and the degree of inclusion (or exclusion) of the various constituencies in a country. The participants' engagement may entail information sharing, consultation, joint decision making and initiation and control by the stakeholders. The role and power of the different actors in the process is critical and has 'different implications for who is empowered, as well as for perception of ownership': See F Stewart & M Wang 'Do PRSPs Empower Poor Countries And Disempower the World Bank, Or Is It The Other Way Round?' available from <http://www.eurodad.org/uploadstore/cms/docs/WBevalMay03.pdf> [on file with the author].

¹⁵⁸ Cf. James Scott's discussion on false compliance and hidden transcript: See JC Scott, notes 5 and 123.

is in order: the relationship of the postcolonial State and the *Achikumbe* demonstrates two things. At one level, it shows the limitations of the postcolonial State to digress from market-based land reform models. Second, it also shows the precarious, albeit self serving, nature of the relationship of the postcolonial State and the *Achikumbe* in the context of the macro economy of the country.

Further, the nature of the relationship between the postcolonial State and the land deprived has been marked by legitimization, meaning-making, and elaborate and nuanced forms of false compliance. The postcolonial State has legitimized the Project under its ChiNyanja description as *kudzigulira malo*. This amounts to a disingenuous way of implementing land reform under the land redistribution model based on a willing seller/willing buyer approach. The juridicalization of ‘land occupation’ as the crime of ‘encroachment’ delineates the scope of beneficiaries under the Project among the land deprived. Those who ‘occupy’ land will not benefit under the Project; they are classified as encroachers and criminal in their behaviour.

On their part, the land deprived have resorted to elaborate processes of false compliance; preservatory calculated conformity. These instances of counter-conduct have included households collecting the resettlement grants under the Community Based Rural Land Development Project for a new life in the receiving districts when in truth they remain rooted in their villages in the sending districts; the ‘culture’ argument – where ancestry roots is touted as a factor in seeking resettlement within the district of ‘origin’; and patronage – where the chiefs actually select cronies and not those truly land deprived to benefit under the Project.¹⁵⁹

The relationship of the *Achikumbe* and the land deprived pits the efficiency argument (for instance) against the ‘egalitarian’ argument in land reform discourse. In this respect, the *Achikumbe* have engaged in social capital initiatives that entrench land relations and sustain the global commodity chain. Again, the land deprived engage in Kelmanian compliance while simultaneously agitating for land reform based on a land restitution model. This is evident from the insistence on a superior claim to land based on ancestry.

¹⁵⁹ Key Informant Interviews: 23 April, 2008; and B Chinsinga, note 31.

The relationship of the postcolonial State and the land deprived, and the *Achikumbe* and the land deprived reveal more clearly the hegemonic responsabilization that is underway in land reform in the country. The land distribution model based on a willing seller/willing buyer approach, in my view, entrenches the land question in the country. Under the model, the focus is on production. The efficiency argument prevails. In this way, historical land owners are maintained as producers while the land deprived are responsabilized as labourers and inchoate producers under contractual devices such as the Community Based Rural Land Development Project.

Finally, the intra-‘community’ dynamics among the land deprived leading to the *eni malo* and *obwera* divide shows that history, context and ‘culture’ have become the vessel of patronage. Chiefs are not neutral and devoid of self interest. The insistence on history, context and ‘culture’ reinforces, as it has been argued in Chapters 2 and 4, the requirement for a new comprehension of the ‘customary’ space in land reform.

In general terms, the nature of the multiverse is such that at the macro level (both in the context of predatory or preservatory calculated conformity), the market has become the ‘totem’. In any event, market as value underpins development discourse. At the micro level (again both in the context of predatory or preservatory calculated conformity), history, context and ‘culture’ have an instrumental dimension that serves two purposes: they inculcate the relevance of chiefs in agrarian politics. Second, they buttress the argument of the land deprived in their preference for a land restitution model.

IV FINAL WORD

The picture that emerges at this point is as follows: The multiverse of the parochial interests of the key constituencies is difficult to reconcile and triangulate. This difficulty poses enormous challenges for the resolution of the land question in the country. The land question at this juncture is such that almost 80 per cent of the human population of Malawi eke a living from less than 0.5 hectares per household out of the estimated 5.3 million hectares of available arable land. This represents 10.48 million people living off less than 0.5 hectares.

At the heart of the multiverse at the macro level are the competing interests of the efficiency versus the ‘egalitarian’ argument in land reform discourse. On the other hand, at the micro level, the nuances revolve around de–abstraction – in the case of the postcolonial State and the *Achikumbe*, and the *Achikumbe* and the land deprived. Further, at this level there is also the ‘capture’ of ‘culture’ where history and context are manipulated by chiefs against their ‘subjects’, and in the relationship between *eni malo* and *obwera* – where *eni malo* claim superior legitimacy over the *obwera*.

All in all, the responses to the land question have merely served as the technologies of normalization. The land question in the country remains intact. In Chapter 7, the focus will be on proposals for the resolution of the land question. It is suggested that resolution of the land question requires a more holistic approach in ways that advocate a more egalitarian land distribution in recognition of land as a means of production; and the integration of other non–agricultural economic bases for sources of dignified living of the land deprived. In Chapter 7, the discussion focuses on the four pillars of people–generated responsabilization. The pillars set the parameters of a responsabilized State in the quest to resolve the land question.

Chapter 7

People–Generated Responsibilization: Towards a Responsibilized State

First, a recapitulation: the conception of hegemonic responsabilization under the thesis is that it is ‘State’–generated; that it is top–down; that it engages in the construction and re–construction – the responsabilization – of the individual as an ‘entrepreneur’; that the individual must be atomistic; that the individual fits into a particular role in the grand scheme of a political economy. In the context of the land question in Malawi, the discussion has so far sought to demonstrate that the nature of hegemonic responsabilization has not focused on the market for its own sake. It has not merely focussed on the buying and selling. It has focused on production. In this regard, the Foucauldian phenomenon of scarcity underpins economic policy on the basis of the abundance of ‘produce’ and cheap labour in order to maximize dividends from exports.

Chapter 6 demonstrates that there is a multiverse of parochial interests and a multiplicity of conformities. In general terms, it has been concluded that under a framework of hegemonic responsabilization, the Foucauldian phenomenon of scarcity continues to sustain a breed of the producer and another of the labourer. It was also observed in the Chapter that under the terms of reference of the Community Based Rural Land Development Project, occupiers of land (referred to as encroachers) would not be beneficiaries. In effect, the postcolonial State would not be rewarding criminal behaviour. However, the *eni malo* in the receiving districts under the Project have been assimilated under the Project after they had occupied land given to the *obwera*. This transition to assimilation will be used to illustrate the nature of people sovereignty that underpins people–generated responsabilization.

Counter–conduct has a bearing on the nature of people–generated responsabilization. It is admitted that in Malawi counter–conduct through land occupation in struggles involving the land question has not happened at the same scale as, for example, in other land struggles in Brazil, Mexico or the Philippines.¹ Counter–conduct in Malawi has been, as Scott would put it, largely Brechtian and has involved ‘every day weapons’ that are largely summed up here as false compliance. In

¹ See for example G Meszaros, Introduction, note 93 and Chapter 6, note 126; A Bartra & G Ortero ‘Indian Peasants Movements in Mexico: The Struggle for Land, Autonomy and Democracy’ in S Moyo & P Yeros (eds.), Introduction, note 5, 383–410; and S Borras, Jr., Chapter 3, note 12.

any event, Scott has argued that often, open defiance to ‘authority’ is suicidal. However, the transition to assimilation into a State response to a land question that has been forced through land occupation in the receiving districts under the Project is a ‘small’ but significant development for analytical purposes.

In this Chapter, I make the case for a responsabilized State under people-generated responsabilization as a strategy for the resolution of the land question in Malawi. It has been noted in the Introduction and Chapter 1 that people-generated responsabilization is based on people sovereignty; that to the extent that people-generated responsabilization may be described in terms of constituent power, it has constitutional basis under section 12 of the Constitution; and that the public trust and the social trust under section 12 of the Constitution are its embodiment. In this framework, people-generated responsabilization is complementary to the conception of the right to property as a social relation. Recall that in Chapter 2 the conception of the right to property as a social relation seeks to de-bunk the universality of the liberal basis of a ‘right’ let alone a right to property. The right to property as a social relation brings out the social construction underway in a society in the delineation of the relationship of a person to a dephysicalized ‘thing’.

People-generated responsabilization is an intervention based on de-abstraction. The proposal for a responsabilized State seeks to emphasize that the terms of ‘governing’ that a ‘governor’ may exercise in a polity are set by the people themselves as a sovereign. The submission for people-generated responsabilization leading to the emergence of a responsabilized State has four key pillars: The first is *gnosis* and the ‘drama of citizenship’.² The second is the constitutional basis of the responsabilization under the public trust and the social trust. The *gnosis* and the public trust and social trust form the core of people-generated responsabilization. This core is complemented by two other pillars. The third pillar entails a reconfiguration of the land reform based on the beneficial interest in land. The beneficial interest in land builds on possession as a root of property. Under the fourth pillar, I argue that a land reform that meaningfully confronts the land question in the country must locate law in the political economy.

² See J Holston & A Appadurai ‘Cities and Citizenship’ in J Holston (ed.) *Cities and Citizenship* (Durham, North Carolina: Duke University Press, 1999) 1–20 cited in F Miraftab & S Wills ‘Insurgency and Spaces of Active Citizenship: The Story of Western Cape Anti-eviction Campaign in South Africa’ (2005) 25 *Journal of Planning Education and Research* 200.

Gnosis is the cognitive foundation of counter-conduct. The idea of the public trust and the social trust is based on a Negrian interpretation of constituent power. Under the third pillar it is important to point out that at the normative level, law is subjective. Hence its application in land reform is not always inclusive, democratic and fair. Land reform in Malawi has proceeded on the back of hegemonic responsabilization where a particular conception of the ‘customary’ space has been critical in advancing the dominance of market-based land reform models. The beneficial interest in land is a proposition for the re-configuration of the norms of land reform. This reconfiguration has a political economy justification. Finally, the location of law in the political economy provides an opportunity for a more holistic triangulation of the various agrarian policy interventions and helps ascertain the precise role for law in the resolution of the land question in Malawi.

In sum, the responsabilized State under people-generated responsabilization entails that the land question in Malawi can be resolved through a holistic, bottom-up approach to law, policy and the political economy. This approach recognizes that law is only a constitutive component of governing. Law need not be the panacea to the land question. Section I outlines the idea of *gnosis* and the drama of citizenship. Section II covers the public trust and the social trust under the Constitution. Section III propounds the beneficial interest in land. In section IV, the discussion focuses on law in the political economy.

I GNOSIS AND THE DRAMA OF CITIZENSHIP

In Chapter 1, it has been asserted that the idea of *gnosis* derives from VY Mudimbe’s conception of African knowledge. Mudimbe argues in *The Invention of Africa* that the etymological roots of *gnosis* suggests that it means seeking to know, inquiry, methods of knowing, investigation, and even acquaintance with someone. He asserts that it has a sociohistorical origin; that it has an epistemological context; and that it allows the notion of conditions of possibility to flourish.³ I reiterate that *gnosis* is the cognitive basis of counter-conduct because it need not be institutionally located; it is innate to the human as a social being. Hence, as a repository of constituent power, the people as a sovereign, are the primordial arbiter of ‘knowing’; who can govern, what is to govern, or what or who is governed; and the methods of

³ See VY Mudimbe, Introduction, note 32, ix–xii.

the knowing to govern. The aspiration here in the invocation of Mudimbe's *gnosis* is to argue for 'possibility'; for a change of mindset.

Manthia Diawara has reconciled Mudimbe and Foucault in the context of discourse.⁴ He has argued that Foucault's 'archaeological approach' is 'doubly enabling' because it has made it possible to 'think against the grain' and it has made 'proposals of alternative discursive formations.'⁵ In relation to Mudimbe, Diawara further observes:

Mudimbe uses Foucault's method to unmask and unmake the Western *ratio* that dominates the human sciences and, under the guise of universalism, duplicates Western man in Africa. On the other hand, Mudimbe creates a postcolonial and postimperialist discourse that posits a new regime of truth and a new social appropriation of speech, thereby raising the question of individual subjugation in postcolonial discourse.⁶

Diawara goes on to argue that both Foucault and Mudimbe de-bunk discourse by recognizing its three key 'rules'. First, it sets external rules. Diawara states:

These [rules] include the construction of forbidden speech that bans certain words from certain statements; the designation of madness that opposes reason to insanity; and a regime of truth that determines the desire to know and practices a principle of discrimination[.]⁷

Second, discourse creates an 'internal system'. Here Diawara argues:

This internal system is aimed at classifying, ordering, and distributing discursive materials so as to prevent the emergence of the contingent, of the Other in all its nakedness. This internal system of discursive subjugation involves the concept of authorship, which serves to rarify the quantity of statements that can be made; the construction of the organization of disciplines as a delimiting force; and a notion of commentary that organizes discursive statements according to temporal and spatial hierarchies.⁸

Finally, discourse, according to Foucault and Mudimbe, 'gridlocks' the rules of 'entry'. Again, Diawara states:

[I]t posit[s] the conditions of possibility for putting discourse into play through the subjugation to rules of the individuals involved in discursive deployment. The object, however, is neither to neutralize the return of that which was repressed nor to conjure out the risk of it appearing in discursive practices, but to make sure that 'no one will enter the discursive space unless certain prerequisites are satisfied and one is qualified to do so.'⁹

These observations may be transposed to a governmentality context in so far as 'conduct' or 'rule-making' under discourse is concerned with the 'irruption' of

⁴ See M Diawara 'Reading Africa Through Foucault: V. Y. Mudimbe's Reaffirmation of the Subject' (1990) 55 *October* 79.

⁵ See M Diawara, note 4, 80.

⁶ See M Diawara, above.

⁷ See M Diawara, note 4, 80.

⁸ See M Diawara, above.

⁹ See M Diawara, note 4, 80 [internal citation omitted].

‘discontinuity’ or ‘disorder’.¹⁰ Indeed, in the context of Foucauldian counter–conduct, Graham Burchell has noted that it may be ‘ascetic’; that is, the self rejects prescription on the self; it may be ‘collective’ or ‘communal’, where it involves a communal opposition to ‘doctrine; or it may be ‘mystic’, where it points to possibility of a different ‘truth’ system.¹¹

Against this setting, it is argued that the counter–conduct of the land deprived that has been highlighted in Chapter 6 has nuanced and intertwined economic, political and social undertones. It has been observed that while the counter–conduct of the land deprived has been varied, the focus here is on the land occupation that has led to the transition of assimilation into the postcolonial State programme of land redistribution under the willing seller/willing buyer approach which is being implemented under the Community Based Rural Land Development Project. The occupation demonstrated a ‘knowing’ that land is important for a dignified living. The unwillingness to relocate reveals a calculative conception of ‘culture’ where it is used to justify non–compliance with the State’s programme. Third, since the land deprived are the ‘ultra poor’, in the absence of viable alternatives that promise dignified living away from the land as a resource, the *gnosis* of their counter–conduct is that the ‘good’ land given to the *obwera* is crucial to their dignified living. As the events after the Makandi land redistribution exercise have shown, mere illegalization of their counter–conduct as ‘encroachment’ does not resolve the underlying problem of access to available to arable that epitomizes the land question. It merely displaces the problem; in this case, access to arable land.

However, *gnosis* can flourish in an environment akin to what has been described as the drama of citizenship.¹² The drama of citizenship is ‘active’, ‘engaged’ and ‘grounded in civil society’.¹³ It is concerned with a gamut of issues about civil, political, social and economic rights.¹⁴ It is also decidedly ‘non–formalized’ and permeates ‘the high courts of justice’, ‘the ministerial corridors of government institutions’, ‘the streets of the city’, ‘the squatter camps of hope and despair’, and ‘the everyday life spaces of [the] [excluded]’.¹⁵ The drama of citizenship

¹⁰ See M Diawara, note 4, 81.

¹¹ See G Burchell, Chapter 1, note 80.

¹² See J Holston & A Appadurai, note 2.

¹³ See F Miraftab & S Wills, note 2, 201.

¹⁴ See F Miraftab & S Wills, above.

¹⁵ See F Miraftab & S Wills, note 2, 201–202.

is the opposite of ‘statist citizenship’ where the citizen defers the legitimacy of State and ‘juridical’ government to the ‘governors’.¹⁶

It is duly noted that land struggles in Malawi are not at the same scale as, for example, those in Brazil, Mexico or the Philippines. This should not suggest the absence of dramatic struggles against social injustice in the country. There have been protests against exploitative land relations under the *thangata* system;¹⁷ protests against colonial rule;¹⁸ and in the early 1990s, there were protests against the dictatorial rule of the Banda Administration which led to the adoption of multiparty politics in 1993.¹⁹ It is suggested that these protests were galvanized by a coterie of predominantly Missionary-educated African males during the colonial period; and an urban-based, elite-led alliance of businessmen and intellectuals during the Banda Administration. Both struggles incorporated the land deprived.²⁰ In Chapter 4, it was pointed out that despite the rhetoric of the pre-June, 1993 referendum for land reform based on a land restitution model, this call has gradually dissipated under the Muluzi and Mutharika Administrations. Historically, the land question in the country has been an appendage of a broader political agenda. Once the political transfer of power to an emergent ruling class has been achieved, the land question has been pushed to the margins. The focus on the land question alone (which is critical to the land deprived) does not coalesce with the political aims of the ‘ruling class’ that include the *Achikumbwe*.

It may be asserted that land occupation in Malawi has been sporadic and has occurred under what may be termed inchoate rural movements.²¹ However, as the discussion in Chapter 4 demonstrates, it is useful for analysis to focus on the Brechtian struggles of the land deprived. Besides the complication that arises from looking at the land deprived as a unified entity, Chapter 4 has shown that there are a number of nuanced devices that the land deprived deploy in advancing their interests. This counter-conduct of the land deprived in the country suggests the emergence of

¹⁶ See F Miraftab & S Wills, note 2.

¹⁷ See JAK Kandawire ‘*Thangata* in Pre-Colonial and Colonial Systems of Land Tenure in Southern Malawi with Special Reference to Chingale’ (1977) 47(2) *Africa: Journal of the International African Institute* 185.

¹⁸ See for example RK Tangri ‘The Rise of Nationalism in Colonial Africa: The Case of Colonial Malawi’ (1968) 10 (2) *Comparative Studies in Society and History* 142.

¹⁹ See for example KM Phiri & K Ross (eds.), Chapter 4, note 61; and FE Kanyongolo, Introduction, note 11, 121.

²⁰ See RK Tangri, note 18; and FE Kanyongolo, Chapter 4, 120.

²¹ See FE Kanyongolo, note 19. In any event, it must be noted that ‘docility’ is a feature of Foucauldian biopower under a framework of governmentality: See M Foucault, Chapter 1, note 56.

gnosis that has engendered a ‘critical mind’ amongst the ‘governed’. In turn, the transition to assimilation under the Project presents a ‘possibility’ in re-negotiating the resolution of the land question in the country. The counter-conduct is critical because due to the largely rural nature of the land question, mainstream civil society groups and the ruling elite tends to acquiesce in maintaining the status quo of the land question.²² Manji, in the context of Tanzania and Uganda, also notes the significance of the tactics of rural women movements in advancing their case for access to arable land outside the realm of formal law and institutions.²³

II THE CONSTITUTIONAL BASIS OF THE RESPONSIBILIZED STATE: THE PUBLIC TRUST AND THE SOCIAL TRUST UNDER THE CONSTITUTION

In Chapter 4, it has been noted that Malawi adopted a largely liberal democratic constitution in 1994. The Constitution provides for, among other things, constitutional supremacy; an entrenched Bill of Rights; equal and universal suffrage; fundamental principles which state, among other things, that all legal and political authority of the State derives from the people of Malawi; and creates the public trust and the social trust. More precisely, section 12 of the Constitution provides for the public trust and the social trust which form part of the basis for legal and political authority in Malawi. It states:

This Constitution is founded upon the following underlying principles–

- (i) All legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests.
- (ii) All persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.
- (iii) The authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice.
- (iv) The inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.

²² See FE Kanyongolo, above. Kanyongolo suggests that there are civil society groups that question the status quo of land relations in the country. However, these groups, if anything, are sporadic and spontaneous gatherings of a people agitating for access to arable land: See for example the occupation of the Makandi Estate discussed in Chapter 4. They are not movements in the sense of having a permanent existence and a hierarchy. Hence, I prefer to refer to such incidences as inchoate rural movements.

²³ See A Manji, Introduction, note 4, 99–121.

- (v) As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.
- (vi) All institutions and persons shall observe and uphold the Constitution and the rule of law and no institution or person shall stand above the law.

Section 12 emphasizes some nine principles on exercise of State authority. These principles are: The people are the root of legal and political authority of the State; second, the exercise of the legal and political authority of the State is delineated by the Constitution itself; third, the exercise of the legal and political authority of the State shall be for protection of the interests of the people; fourth, persons exercising the powers of the State do so on trust; fifth, persons exercising powers of the State do so as fiduciaries since they are under a duty to do so lawfully and in line with their responsibilities to the people; sixth, the maintenance of the trust for the exercise of the powers of the State depends on an open, accountable and transparent Government, and informed democratic choice; seventh, the recognition and protection of human rights of persons in the country is derived from the inherent dignity and worth of every person; eighth, all persons are equal before the law; and finally, the Constitution has universal application to all persons and institutions and every person and institution shall comply with it.

The notion of the public trust and the social trust need elaborating. First, it is necessary to clarify the notion of ‘trust’ itself: It has been argued that trust, together with reciprocity, solidarity and cooperation are the ‘habits of the heart’ of social behaviour.²⁴ While it has been difficult to underpin the notion of ‘trust’ in definitive terms, ‘trust’ has been described as an ‘encapsulated interest’. Kenneth Newton states:

Trust involves risk, it is true [...] but it also helps to convert the Hobbesian state of nature from something that is nasty, brutish, and short, into something that is more pleasant, more efficient, and altogether more peaceful. Social life without trust would be more intolerable and, most likely, quite impossible.²⁵

Turning to the public trust and the social trust: The public trust in public law has constituted a ‘mixture of ideas’ which have ‘floated freely’ in constitutional theory. However, central to the notion of the public trust is the idea that the ‘right to govern’ must be exercised for the benefit of the civic public.²⁶ Hence, as a practical

²⁴ See K Newton ‘Social Trust, Social Capital, Civil Society and Democracy’ (2001) 22(2) *International Political Science Review* 201, 202 [internal citations omitted].

²⁵ See K Newton, above, 202 [internal citations omitted].

²⁶ See generally JL Sax ‘The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention’ (1969–70) 68 *Michigan Law Review* 471. For a discussion of the conception of the ‘civic public’: See PP Ekeh, Chapter 4, note 55.

matter, the choices of the ‘governors’ must conform to the wishes of the ‘governed’.²⁷ The social trust, on the other hand, is rooted in social capital theory. It forms the basis of an individual’s participation in a social system.²⁸ While scholars such as Newton make a distinction between social trust and political trust on the basis of social capital and political capital respectively,²⁹ in the context of constitutional theory, I suggest that the distinction is blurred since the exercise of the State, ‘juridical’ power has, one way or the other, implications for the relations of the civic public in a social system.

In respect of the public trust under the section 12 of the Constitution, its nature lies in at least two attributes: the existence of the trust is publicly constituted under the Constitution itself; and the sustenance of the trust is dependent on an open, accountable and transparent Government. The nature of the social trust, on the other hand, lies in the fact that the exercise of the fiduciary duty that the Constitution has reposed in persons exercising the powers of the State shall be in accordance with the responsibilities of those fiduciaries towards the people as specified by the Constitution itself. Indeed, Kamchedzera and Banda have argued that the nature of the social trust also lies in the use of terms such as ‘trust’, ‘open’, ‘accountable’, ‘transparent’; and I would add ‘informed, democratic choice’. All these descriptors point to the nature of governing in the country.³⁰

The public trust and the social trust mark a conceptual shift from social contract to a constitution-based fiduciary relationship between the ‘governed’ and the ‘governors’. Under social contract, the emphasis is on the conduct of ‘citizens’ – the ‘governed’ – while under a constitution-based fiduciary relationship, the focus is on the conduct of the ‘rulers’ – the ‘governors’. The constitution-based fiduciary relationship is underpinned by the Lockean ‘right to revolution’ where a ‘sovereign’ that betrays the trust of ‘men’ must be ‘overthrown’.³¹ In this respect, under the public trust and the social trust under the Constitution, the consent of the people as the

²⁷ See JL Sax, above, 483.

²⁸ See K Newton, note 24.

²⁹ See K Newton, above.

³⁰ See G Kamchedzera & CU Banda, The right to development, the quality of rural life, and the performance of legislative duties during Malawi’s first five years of multiparty politics’, Chapter 1, note 105, 5.

³¹ See J Locke *Two Treaties on Government*, Chapter 2, note 1.

‘governed’ is not deferred. In this way, the exercise of the State authority is always subject to the terms of governing set by the people.³²

To the extent that the people are the root of legal and political authority under section 12 of the Constitution, the public trust and social trust can also be considered in terms of constituent power and constituted power. In constitutional theory, commentators have argued that political authority derives from the people who are the repository of constituent power. Negri contends that constituent power is an expression of the popular will; it is the power of the ‘multitude’. Hence, democracy is appurtenant to the concept and practice of constituent power. He contends that constituent power is in constant conflict with constituted power, which is the fixed power of formal constitutions. Constituent power, in Negri’s thesis, would lie neither with the legislature nor the judiciary as, according to him; the propensity ‘to revolt’ lies with the people themselves.³³

It has been suggested that those whose authority is necessary for constitution-making – the ‘governed’ as the repository of constituent power – cannot do so without surrendering that authority to ‘institutional’ sites – the ‘governors’ as the holders of constituted power. This apparently epitomizes the paradox of constitutionalism.³⁴ The paradox resonates with the point Antonio Gramsci makes on the deference of the ‘governed’ in the context of ‘spontaneous’ consent.³⁵ However, it is contended here that in light of the nature of the public trust and the social trust under the Constitution neither the deference nor the paradox has a basis in Malawi’s constitutional order at least at the normative level. It is clear under the Constitution that the public trust and the social trust maintains a constitution-based fiduciary relationship between the ‘governed’ and the ‘governors’ such that, at the normative level, the terms of governing will have been set down by the ‘governed’ as the repository of constituent power.

In practice, the position is more nuanced. In light of the nature of the neopatrimonial State that has been discussed in Chapter 4, it is possible to conclude that the deference or paradox exists at the level of constitutional practice in Malawi.

³² See A Gramsci, Chapter 1, note 92, 12 on ‘spontaneous’ consent; and AA Mazrui ‘The Tensions of Crossing the Floor in East Africa’ in AA Mazrui (ed.) *Violence and Thought: Essays on Social Tensions in Africa* (London: Longman, 1969) 122–XXX on ‘composite’ consent.

³³ See A Negri, Chapter 1, note 106.

³⁴ See M Loughlin & N Walker (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

³⁵ See A Gramsci, note 32.

The deference or paradox, in my view, arises out of practice as opposed to norm. Since the deference or paradox arises out of practice, the extent to which the land deprived may express *gnosis* is crucial in the resolution of the land question in the country. The normative framework of the public trust and the social trust under the Constitution forms the benchmark for the responsabilized State in land reform in Malawi. Beyond this benchmark, in sections III and IV, I outline the nature of the beneficial interest in land, and the re-location of law in the political economy as the complementary attributes of people-generated responsabilization.

III RE-CONFIGURATION OF LAND REFORM: THE BENEFICIAL INTEREST IN LAND

In Chapter 2 it has been argued that approaching conception of the ‘customary’ space under the right to property as a social relation framework reveals the (social) construction of the space under hegemonic responsabilization. The construction of the ‘customary’ space, in my view, has resulted in a number of problems in resolving the land question. These problems include: an ill-conceived conception of a category of land known as ‘customary land’ under the 1967 Reforms; the continued focus on the efficiency argument in land reform discourse; the ill-conceived conception of the ‘customary’ estate under the Land Policy; the problematic role of chiefs in the ownership of the so-called ‘customary’ land in the ‘customary’ space; and the lack of distinction of attributes of property in terms of nominal title, control, benefit, and management. These four attributes of property have implications for the conception of land ownership and the direction that the land reform may take in the country.

In Chapters 2 and 4, it has been demonstrated that the legal title to the so-called ‘customary’ land under the Land Act vests in the President under a political trust.³⁶ The people of Malawi – as described under the Act – merely have a right to use or occupancy. They do not have an enforceable right at law. Even though the Land Act states that the President holds the ‘customary’ land as a trustee of the people of Malawi, it has been concluded that the comprehensive powers that the postcolonial State has over the ‘customary’ land obliterates any notion of a fiduciary relationship by operation of a trust. If anything, the people of Malawi use or occupy the so-called

³⁶ See *Tito v Waddell (No.2)*, Chapter 2, note 116.

‘customary’ land under an interest similar to a tenancy at will.³⁷ In this framework, the so-called category of land called ‘customary’ land is in fact part of public land under the Land Act.

On the basis of this ‘special’ tenancy, I have argued in Chapters 2 and 4 that it creates a beneficial interest in the land in favour of the people of Malawi on the basis of their use or occupancy of the so-called ‘customary’ land. It has then been concluded, in that context, that it is useful for analysis to construe a constitution-based fiduciary relationship under section 12 of the Constitution. Hence, under the land reform in the country, the responsabilized State must guarantee access to available arable land as the minimum core for dignified living on the part of the land deprived. This is the context of the conception of the beneficial interest in land:

A The Beneficial Interest in Land

There is a legal basis of a beneficial interest in land. In light of the conception of the ‘customary’ space, it is pertinent to ‘disentangle’ the (various) rights, if at all, in this space. In this respect, Jean-Philippe Colin is a good starting point in this ‘disentanglement’.³⁸ He suggests three traits of the ‘right’ to ‘property’: The first trait relates to the right of use. He has said: ‘the rights related to the use of the land’, that is, ‘use right *stricto sensu* (which can be exclusive or not), right to appropriate the return from the land, right to bring long-term improvements such as planting perennial crops, fencing, draining off’. The second trait relates to the right to alienate. This is the right to transfer the preceding rights, temporarily or permanently, through market (land lease through fixed or share contracts, land sale, pledging, mortgaging) or non-market (loan, gift, bequeath, inheritance) devices. Finally, the third trait relates to what he calls ‘administration rights’. He has said the administration rights, that is the rights to define others’ rights by controlling land use and transfer – who can do what with which parcel of land – and therefore who is excluded.’³⁹ Colin concedes that the nature of the ‘rights’ must not be reified as they are not strong and unambiguous.⁴⁰ In the final analysis, the ‘disentanglement’ brings us back to (initial) conception of the ‘customary’ as a space and as a distinct type of ‘tenure’. It is

³⁷ See Chapter 2, note 115.

³⁸ See J-P Colin ‘Disentangling Property Rights in Land: An Economic Ethnography of Intra-Family Access in Lower Cote d’Ivoire’, paper presented at the International Society for New Institutional Economics Conference ‘Economic, Political and Social Behaviour’, Boulder, Colorado, September 22–24, 2006 [on file with the author].

³⁹ As above.

⁴⁰ See J-P Colin, above, 7; and A Whitehead & D Tsikata, Chapter 6, note 44.

possible to conclude from Colin's analysis or 'disentanglement' that the so-called 'customary' tenure is imbricated in the colonial construction of the nature of the 'customary'; and that, in any event, the much lauded communitarian *ethos* (when taken at face value as to its legitimacy) is stratified.

The beneficial interest in land builds upon the nature of the 'tenancy at will' that is located in public land under the categories of land under the Land Act. This development must always be considered in the context of the right to property as a social relationship. It has been observed in Chapter 2 that property has an inherent power relationship. This is the political economy basis of the beneficial interest. The interest arises out of two underlying notions of property as a social relation: property as a 'socially derived privilege of use' and property as a type of trust or stewardship to the civic public.⁴¹ In respect of property conceived as a privilege of use, Gray and Gray state:

'Property' in land can therefore be conceptualized as those publicly endorsed forms of user which the state allows individuals to enjoy and which can be varied or withdrawn at the sole discretion of, and on terms dictated by, the state. 'Property' is no more than a highly qualified, ultimately defeasible privilege for the citizen. On this view, property incorporates a notion not of right but of *restraint*, reflecting a state-directed responsibility to contribute towards the optimal exploitation of all land resources for communal benefit. 'Property' no longer articulates the arrogance of entitlement, but expresses the instead commonality of obligation, 'property' consisting simply of allocations of land-based utility coordinated towards a defined common good.⁴²

Indeed, it has been held that the right to property must be counterweighted with its social function and the State must proactively ensure that the public interest prevails.⁴³ The second notion of property as stewardship emanates from environmental welfare theory.⁴⁴ In relation to the second notion, Gray and Gray observe:

If all 'property' in land is held subject to a wide range of publicly conditioned constraints, it follows that the deeper constraints of 'property' is not absolute or oppositional in nature. It is, instead, delimited by a pervasive sense of community-directed obligation and is rooted in a contextual network of mutual restraint and social accommodation mediated by the agencies of the state.

[...]

⁴¹ See K & S Gray, Chapter 2, note 109, 112–114.

⁴² See K & S Gray, above, 112 [Emphasis in the original. Internal citation omitted.]

⁴³ See *O'Dwyer v Council of the European Union* [1995] ECR II–2071; *Wachauf v Federal Republic of Germany* [1989] ECR 2609; and *R v Chief Constable, ex p International Trader's Ferry Ltd* [1998] QB 477.

⁴⁴ See K & S Gray, note 41, 113.

‘Property’ becomes not a summation of individualized power over scarce resources, but an allocative mechanism for promoting the efficient or ecologically prudent utilization of such resources.⁴⁵

The notion of property as a social relation based on the privilege of use and stewardship respectively resonates with the public trust and the social trust under the Constitution.

Possession as the root to title in land is the core grounding of the beneficial interest in land. Possession has been described as ‘the ultimate basis of “title” to an “estate” in land.’⁴⁶ The nature of ‘possession’ here is nuanced.⁴⁷ It presupposes a number of factors: first, there must be a connection of control by a person over the land.⁴⁸ Second, there must be more than the idea of mere physical occupancy. A person must have the intention to exclusively possess – the *animus possidendi* – which is underlined by the person’s perception that they are entitled to defend and exert permanence of their right to property in the land.⁴⁹ Statutory devices have developed a third and fourth element of possession. These elements are that the possession must not be disturbed⁵⁰ and there must be no superior title to the one claimed by a possessor.⁵¹

It has been argued in Chapter 2 that the so-called ‘customary’ land in Malawi is in actual fact public land if the full effect of the Land Act is taken into account. Hence, the possession that accrues to the land deprived as tenants at will is inferior to the ‘title’ of the postcolonial State in respect of the public land. In light of the obligation of the governors under the public trust and the social trust under the Constitution, the postcolonial State has a constitutional duty to ensure the greater public good by guaranteeing that the land deprived fulfil their aspiration for possession of parcels of land suitable for dignified living. This, as I have also argued before, requires a responsabilization of the State based on constituent power. In this train of thought, I echo CB Macpherson’s words that the ‘idea of property’ must be

⁴⁵ See K & S Gray, above [internal citations omitted].

⁴⁶ See K & S Gray, note 41, 166.

⁴⁷ See K & S Gray, note 41, 150–179.

⁴⁸ See for example the discussion of the *Mabo* discourse in Chapter 2.

⁴⁹ See for example *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

⁵⁰ See *JA Pye (Oxford) Ltd v Graham*, above.

⁵¹ See *Harrow LBC v Qazi* [2004] 1 AC 983; and *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 1083.

broadened to include ‘a right to a kind of society or set of power relations which will enable the individual to live a fully human life.’⁵² He states:

Property will [...] have to include not only a right to a share in political power as instrumental in determining the kind of society, but a right to that kind of society which is instrumental to a full and free life.⁵³

It may be recalled that the constituency of the land deprived has access to less than 0.5 hectares of arable land and such miniscule parcels of land cannot support dignified living.

It needs mentioning that under English land law and trusts law, the beneficial interest in land is ‘engrafted’ to a legal title under a pre-existing trust; regardless of whether the trust is express or implied.⁵⁴ There is an underlying ‘conscientious obligation’ in the nature of the beneficial interest in land under English land law and trusts law that takes precedence over a ‘strict legal right.’⁵⁵ It has been said however that establishing a beneficial interest in land is not an exercise where a court sits ‘under a palm tree’ in order to ‘exercise a general discretion’ that is ‘fair’.⁵⁶ The process is structured and laboured and seeks to establish the intention to set a beneficial interest.⁵⁷

In relation to the land question in Malawi, it is imperative that the land deprived as ‘tenants at will’ under public land are effectively recognized as having beneficial interest in land. It is argued here that while the legal title of the postcolonial State to public land lies in its eminent domain as the sovereign, the existence of a trust arises from section 12 of the Constitution on the basis of a political economy justification. Hence, in the context of dignified living, the beneficial interest may also be justified under human rights law. Here, the general argument is that the link between human rights and human dignity is in recognition at international law of the ‘inherent worth’ of every human being.⁵⁸ This is the root of human-being-ness.⁵⁹ However, Kamchedzera and Banda argue that while human dignity cannot be lost, dignified living can. They argue that ‘certain conditions’ must be existent in a

⁵² See CB Macpherson ‘Capitalism and the Changing Concept of Property’ in E Kamenka & RS Neale (eds.) *Feudalism, Capitalism and Beyond* (Canberra: Edward Arnold, 1975) 105–124 cited in K & S Gray, note 41, 90.

⁵³ See CB Macpherson, above, 121.

⁵⁴ See K & S Gray, note 41, 820; and also *Gissing v Gissing* [1971] AC 886.

⁵⁵ See K & S Gray, note 41, 821.

⁵⁶ See K & S Gray, above.

⁵⁷ See K & S Gray, note 41, 822–824.

⁵⁸ See G Kamchedzera & CU Banda, ‘Dignified Rural Living, the Right to Development, Multiparty Politics and Legislation in Malawi’, Chapter 1, note 107, 76–81.

⁵⁹ See Chapter 1.

political economy which make living dignified and conducive.⁶⁰ In this sense, dignified living is not universal in reality; even though it is a universal aspiration. They also cite a 1997 study which used material and non-material indicators to measure a people's well-being. They note that in that study, lack of land was one example of non-dignified living that the participants highlighted.⁶¹ The human rights context of dignified living resonates with David Bilchitz's minimum core approach to the potential of economic, social and cultural rights in addressing impoverishment and inequality.⁶²

B Securing the Beneficial Interest in Land

If in the words of Macpherson, access to land is a hallmark for a full human life, I propose that in terms of the public trust and the social trust under the Constitution, the postcolonial State has a duty to provide the beneficial interest in land of the land deprived both a legal and non-legal framework of support. The two frameworks must be complementary and not mutually exclusive. In terms of a proposal of a legal framework, the polity may consider the following: The beneficial interest in land may be recognized as private interests in favour of the land deprived on the basis of the fact that the postcolonial State has title to the public land. Presently, there is no basis for a direct recognition of the beneficial interest as private interests. This then raises the presumption of alienability that is pervasive under English land law and trusts law. In view of the economic reality of the land deprived as described in the Introduction, the presumption of alienability immediately raises the issue of the threat of foreclosure and distress sales which would in turn (potentially) leave the land deprived (once again) exposed to destitution. In light of the threat of foreclosure and distress sales, other non-legal strategies may have to be considered.

⁶⁰ See G Kamchedzera & CU Banda, note 58, 76.

⁶¹ See R Chambers *Whose Reality Counts? Putting the First Last* (London: Intermediate Technology Publications, 1997) in See G Kamchedzera & CU Banda, note 58. Other examples of non-dignified living that were cited included: inability to bury the dead decently; poor housing and inadequate financial, practical and emotional help in relation to the number of dependents in each household; effect of disruptive behaviour on families and communities; lack of social support; pressure to put children into employment; demeaning or low status work and precarious food security: See G Kamchedzera & CU Banda, in this note, 79.

⁶² See D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007).

IV LAW IN THE POLITICAL ECONOMY

The recognition of the beneficial interest in land raises its own set of challenges since it is brought within direct ambit of law. The point has been repeated throughout the thesis: It is perilous to privilege law in land reform; especially the tendency to translate land reform into an exclusively land law reform project. This is not to suggest that law does not have a role in land reform at all. However, undue privilege of law in land reform amounts to the continuation of the notion of the objectivity of law. The objectivity of law is a myth. Law does not always support objective goals. The subjectivity of law is writ large and in the context of the land question in the postcolony the position is not different from other contexts. This is particularly the case when close attention is given to legal rules and principles at the expense of equally important social and political contexts. Brink *et al.*⁶³ have argued that the subjectivity stems from the fact that the right to property as a social relation is inherently a political process and the ascertainment of the rights in land is not always inclusive, democratic and fair. A one-dimensional imposition of law as a tool for ascertainment ignores the underlying power relations at play. Once law is analyzed in its political economy, it affords an opportunity to examine the role of law in entrenching a (capitalist) economy, defining or reproducing social relations, and its potential for radical social transformation.⁶⁴ In this vein, I argue that once we acknowledge a nuanced understanding of the ‘customary’ space and the related problems that surround the institutions of chiefs, it becomes pertinent to understand the beneficial interest in land in light of the role of law in the political economy as the country seeks to resolve the land question.

Following the different strands of the nature of the ‘customary’ space that have been discussed in Chapter 2, the debates that ensue in the resolution of the land question in Malawi must address the utility of land in three broad areas: the first area is concerned with the efficiency argument; that is, whether there must be more available arable land to sustain an estate sector or ‘smallholder’ farming, or indeed both, in advancing the agricultural productivity of the country. The second area relates to policy synergy; that is, the extent to which the various policy frameworks that inform the economy of the country may be harmonized in the context of the land

⁶³ See R van den Brink *et al.*, Chapter 3, note 62.

⁶⁴ See Y Ghai *et al* ‘General Introduction’ in Y Ghai *et al.* (eds.) *The Political Economy of Law: A Third World Reader* (Delhi: Oxford University Press, 1987) xi–xvi, xi–xii.

question. This should explore the extent to which the Malawi Growth and Development Strategy and the Land Policy can be harmonized. Finally, the third area relates to the egalitarian argument about fairness in the resolution of the land question. Here the focus is the appropriation of ‘history’ and ‘culture’ on account of path dependence which in the end undermines the resolution of land question in the country.

A ‘Efficiency’: Estate Sector versus Smallholders

The central thrust under the efficiency argument is that small farm sizes are economically inefficient as they do not optimally utilize land, labour and capital for high farm productivity. It must be noted that the efficiency argument has been pervasive in the land reform discourse in the country as the discussions in the preceding Chapters demonstrate.

In the context of the land question in Malawi, the efficiency argument is weakened when other ‘market’ factors are taken into account. Chirwa has pointed out, in the context of an analysis of the Community Based Rural Land Development Project, that a complementary agricultural input programme to households led to greater food security.⁶⁵ He however concluded that sustainability of a food secure environment in ‘smallholder’ households would likely be undermined by the imperfect markets in transport, labour, credit and other financial sectors which often fail to meet the needs of the smallholders.⁶⁶

The current rhetoric from the postcolonial State suggests that the agricultural sector must move towards more commercial agriculture.⁶⁷ It is not clear from the statements that have been made whether the increased commercialization of agriculture will mean that more initiatives will be introduced to support the estate sector only or the smallholders only or both. Conversely, it is not clear whether the increased commercialization will mean the introduction of mechanized agricultural practices in the smallholders since the practices in the sector are traditional and predominantly non-mechanized.

In sum, the efficiency argument that gets polarized between the support for the estate sector or smallholders is reductionist. What must be pursued in the country are

⁶⁵ See E Chirwa, Introduction, note 58, 17.

⁶⁶ See E Chirwa, above.

⁶⁷ See the State of the Nation Address by President Bingu wa Mutharika, Chapter 4, note 165; and the Budget Statement of 2009 by the Minister of Finance, Chapter 4, note 164. See also ‘One million hectares for green belt’, *The Daily Times*, 31 July, 2009.

initiatives that boost agricultural productivity through, at least in the short to medium terms, the provision of State-sponsored complementary agricultural input programmes, and the perfection of the markets in the transport, labour, credit and other financial sectors by making them more smallholder-friendly.⁶⁸ This framework would meaningfully complement initiatives towards the development of the beneficial interest in land.

B Policy Synergy: The Malawi Growth and Development Strategy and the National Land Policy

In Chapters 5 and 6, it has been concluded that there is no synergy between the Malawi Growth and Development Strategy and the Land Policy. I have made the point that while the Land Policy is meant to be the driving force behind reform in the agrarian and other attendant sectors in the country, I pointed out that as long as the Malawi Growth and Development Strategy is the ‘overarching blueprint’ of development in the country, all sectoral policies must conform to the Strategy as the main white paper of the postcolonial State. As things stand, the lack of synergy between the Strategy and the Policy undermines the resolution of the land question. This is an area where the notion of *gnosis* and people sovereignty under the public trust and the social trust may be pursued to ensure that the ‘governors’ in the country re-visit the purposes of establishing the two policy frameworks and, with a sense of urgency, harmonize them.

As the two frameworks currently stand, the land deprived are unlikely to benefit under the land reform in the country. In this respect, the contradiction and confusion between the two frameworks serves as ‘tools’ for ‘economic conquest’ whereby the state of impoverishment is indeed ‘an integral part of the discourse of wealth.’⁶⁹

C ‘Fairness’

Brink *et al.* have observed that the ‘fair’ use and ownership of land changes with time.⁷⁰ The logic of colonial capitalism created a ‘rural apartheid’ which in the regional context entrenched the land question in Southern Africa.⁷¹ Unmediated land

⁶⁸ See CW Dugger, Chapter 4, note 162.

⁶⁹ See G Procacci ‘Social Economy and the Government of Poverty’ in G Burchell *et al.*, (eds.), Chapter 1, note 8, 151–168, 154–155.

⁷⁰ See R van den Brink *et al.*, note 63, 23.

⁷¹ See R van den Brink *et al.*, note 63, 24.

relations that are perceived as ‘unfair’ lead to political and economic instability in a country.⁷² They have stressed that ‘restoring a more equitable distribution of land will greatly contribute to more social cohesion, which will foster more inclusive institutions and policies, and hence better long-term development.’⁷³

V THE RESPONSIBILIZED STATE: A RESTATEMENT

In light of the discussion of the four pillars of people-generated responsabilization, the call for a responsabilized State emerges in the following context: Under hegemonic responsabilization that has marked land relations in the country, availability of arable land has been consistently lop-sided in favour of large estate agriculture. Agricultural policy has been skewed towards increased land alienation to expand the estate sector. This, in effect, has meant dwindling land sizes or greater pressure for access to arable land on the part of the land deprived. The responsabilization has been possible through legal and policy devices that have perpetuated land alienation; unsustainable commodity pricing in the smallholders’ produce markets; exploitative labour policies; and policy responses developed by the Bretton Woods Institutions (particularly the World Bank and the International Monetary Fund) that have merely localized market-based land reform models.

Hence, the proposition of *gnosis* and the drama of citizenship as a key mindset for land reform in the country places a critical responsibility on the citizen (in settling the terms of ‘governing’) to re-interpret the strategies for the resolution of the land question in the country. The re-interpretation that is being proposed must be from the ‘reality’ of the land deprived. Further, under this re-interpretation, it has been asserted that the public trust and the social trust under the Constitution confer constitutional responsibility upon the ‘governors’ in their exercise of the right to ‘govern’ to ensure that the aspiration for dignified living is realized. The public trust and the social trust are rooted in people sovereignty. The constitutional basis of the public trust and the social trust leads to the proposition of the beneficial interest in land. Finally, the re-location of law in the political economy provides the basis for a more holistic approach to the resolution of the land question in the country.

In sum, the nature of the responsabilized State under a framework of analysis based on people-generated responsabilization for purposes of the resolution of the land question emerges from the triangulation of its four pillars. This should allow a

⁷² See R van den Brink *et al.*, note 70.

⁷³ See R van den Brink *et al.*, note 71.

right to access as opposed to the perpetuation of the right to exclude under hegemonic responsabilization; given that the latter is underpinned by market as value.⁷⁴ On this basis, the possibility of government action as recognized under the *Mabo* discourse and the *Press Trust (Supreme Court)* Case provides an opportunity to ameliorate the issues that arise under market-based land reform models as discussed in Chapter 3; namely, the preference of the land owners, the absence of post-land distribution support mechanisms, and insufficient programme financing.

VI FINAL WORD

The framework of a responsabilized State for purposes of enhancing the resolution of the land question in Malawi presupposes assertion and proaction. The responsabilized State only becomes a reality if there is a combination of assertion and proaction on the part of the citizen as the repository of constituent power. The transition of assimilation through the Brechtian struggles of the land deprived that have been discussed in Chapter 6 are significant interventions in shaping the manner of the responses to the land question.

However, such counter-conduct must be complemented by the informed intervention and participation in the development of (macroeconomic) policy for the country. The nature of the intervention and participation during the development of policy is where the battle of ideas must be most fierce. So far, narrow, sector-specific policy intervention; strict advancement of the efficiency argument; one-dimensional, legal positivist approaches; and the lack of meaningful triangulation of all the critical elements of the political economy – all these, have undermined resolution of the land question in the country. People-generated responsabilization proffers a holistic, people-based approach to the land question, where for example, a fair land redistribution model may be re-visited. Second, there is an urgent need in the country to explore ways of relieving pressure off land as the only viable resource for dignified living. This can be through policy interventions that may lead to the development of non-agriculture-based economic enterprise for the erstwhile land deprived.

⁷⁴ See CB Macpherson, note 52 on the distinction between the ‘right to access’ and the ‘right to exclude’.

Conclusion

[The] village has got many people and land pressure is acute. There is no land even for a toilet.¹

I REITERATIONS

The participant's lamentation shows that the land question is not merely about pieces of arable land as factors of production. It is about the dignity inherent in a human being and the attendant aspiration for dignified living. The postcolonial State recognizes this fundamental condition of livelihood. The Malawi Law Commission in making recommendations for the registration of 'customary' estates notes that 0.5 hectares would be adequate for farm structures which constitute a dwelling house, animal houses, granaries, a latrine and any other structure that may be required by the household.²

The socio-economic profile makes the dirge louder: As at 2007 and in a country of some 13.1 million people, as much as 10.48 million people in Malawi have access to less than 0.5 hectares of arable land; that the national average per capita of cultivated land area stands at less than 0.22 hectares; that as much as 40 per cent of the human population is impoverished; that 15 per cent of the population is 'ultra poor'; and that the agricultural sector accounts for 85 per cent of total employment in the country.³ The story of the land question in Malawi is one of impoverishment; it is one of exclusion at the expense of inclusion. It is a story about scarcity that leads to less than dignified living.

Amidst this bleak socio-economic reality, a number of law and policy interventions have been invoked and re-invoked to supposedly foster 'development' in the country. These interventions lead to the automatic translation of land reform into land law reform under the so-called new wave of land reform. In Malawi, the latest 'policy' interventions 'coalesce' under the Land Policy adopted in 2002. The Policy is touted as a key component for a vibrant agro-based economy and simultaneously as the blueprint for the resolution of the land question in the country. Hence, this thesis has sought to examine whether the Land Policy and its attendant framework can or cannot resolve the land question.

¹ Participant, Focus Group Discussion: 2 May, 2008.

² See Chapter 5, notes 107 and 108.

³ See National Statistical Office, Introduction, note 26; B Chinsinga, Introduction, note 71; and E Chirwa, Introduction, note 27.

It has been noted that the nature of the land question at the continent-level in Africa or at the national space is mired in confusion and dissensus. For analytical purposes, the land question in Malawi has four dimensions: the nature of colonial capitalism; the nature of the neopatrimonial State; the normative issue of the conception of the 'customary' space; and finally, the interests of the key constituencies under land reform in the country; namely, the postcolonial State, the Bretton Woods Institutions, the *Achikumbe*, and the land deprived.

Three issues have been the points of focus: Conception of the right to property in land and its implication for land reform; the precise nature of the land question; and the competing interests of the key constituencies and their implication for the resolution of the land question. The thesis is based on the Foucauldian idea of governmentality and a framework for analysis based on the idea of responsabilization. This approach enables an examination of situations and processes that can or cannot enhance the resolution of the land question. This means that in examining the land question, the thesis goes beyond law. Hence, under governmentality, law is only one of the norms; one in a range of multiform tactics.⁴ Responsibilization then relates to the process where a norm, as a tool of governance, becomes practice.⁵

Under a genealogical account of the land question, a number of conclusions have been made: First, the confusion and dissensus that traverses the nature of the African land question has undermined the establishment of a clearly defined purpose and direction of land reform and is replicated in the context of the nature of national land questions. Second, the complication of the African land question is exacerbated by the multiplicity of interests of various constituencies competing for the control of access to available arable land. Related to this, it has been argued that history and context are critical for the examination of the land question in African postcolonial economies such as Malawi. In this respect, the following commonalities have been found useful for analysis: the nature of colonial capitalism, law and policy of the emergent postcolonial State, and economic globalization.

Third, the following four dimensions constitute the land question in Malawi for analytical purposes: The first dimension relates to the nature of colonial capitalism. The second dimension relates to the neopatrimonial nature of the postcolonial State. The third dimension relates to the normative issue of the

⁴ See M Foucault, Chapter 1, note 10, 95; and P Fitzpatrick, Introduction, note 31, 147–163.

⁵ See R Shamir, Introduction, note 67.

conception of the ‘customary’ space. Finally, the fourth dimension relates to the competing interests of the key constituencies.

In relation to the first dimension, the historicized and contextualized narrative of colonial capitalism has shown that the liberal conception of the right to property in land served a particular ‘convenient end’; namely, the legalization and legitimation of land alienation for the entrenchment of white economic enterprise through the development of a plantation agriculture sector. I have argued that the conception of the right to property as a social relation may lead to the prominence of the beneficial interest in land in favour of the land deprived.

Under the second dimension it has been demonstrated that the neopatrimonial State is based on the big *bwana* syndrome. The terms of governing have been rooted in patronage under the three Administrations; namely, the Banda, Muluzi and Mutharika Administrations. This stems from Ekeh’s notion of primordial public whereby the political legitimacy of a ‘regime’ is based on ethnicity or social class. The land question has continued to be determined by the preference for a plantation agriculture sector. Traditionally, the responsabilization entailed the ‘positive shaping’ of the land deprived as labourers. However, under the new wave of land reform, the land deprived are also responsabilized as inchoate producers under contract-based schemes such as the Community Based Rural Land Development Project as a technique of discipline.⁶

The third dimension has been discussed in Chapters 2, 3, 4 and 5. The central argument is that the conception of the ‘customary’ space is a product of colonial construction that served the ‘convenient end’ of inculcating plantation agriculture in the colony and postcolony. Further, it has been argued that the ‘customary’ space must be problemmatized under the land reform in Malawi. Following from the *Mabo* discourse and the Malawi courts’ decision in *Press Trust (Supreme Court) Case*, government action can legitimize the counter-conduct of the land deprived.

The conclusion from the discussion of the fourth dimension is that the multiverse of the interests of the postcolonial State, the Bretton Woods Institutions, the Achikumbe, and the land deprived is difficult to reconcile and poses significant challenges for the resolution of the land question. The nature of the multiverse has been discussed at the macro and micro levels. At the macro level, market as value

⁶ See M Foucault, note 4; and P Fitzpatrick, Introduction, note 4, 151.

underpins land reform in the country. A network comprising Bretton Woods Institutions (particularly the World Bank and the International Monetary Fund), ‘Northern’ agents in policy development, and ‘model missionaries’ has meant that the postcolonial State has had to implement market-based land reform models in response to the land question. At the micro level, history, context and ‘culture’ have often been appropriated to serve patronage or entrench local political hierarchies in agrarian politics.

Following the discussion of the four dimensions to the land question in Malawi, I suggest that the nature of conduct and counter-conduct of the key constituencies respectively means that it is possible to explore people-generated responsabilization under the country’s largely liberal democratic constitutional order. This requires informed intervention and participation by the land deprived in the development of (macroeconomic) policy for the country leading to greater policy synergy. So far, narrow, sector-specific policy intervention; strict economic advancement of the efficiency argument; one-dimensional, legal positivist approaches; and the lack of meaningful triangulation of all the critical elements of the political economy – all these, have undermined the resolution of the land question in the country.

II THE WIDER ANGLE

Beyond the preceding reiterations, I would like to make some general observations regarding the wider context of the thesis:

A Less Government, More Governance

Governance is the epitome of hegemonic responsabilization. It has been noted that under governance, the coercive authority of the State is a sufficient but unnecessary tenet to ‘governing’. Indeed, governance entails the development of guidelines, principles, codes of conduct and standards that are ‘produced’ by the State, inter-State agencies and other non-State players under what has been called a ‘market of authorities’.⁷ Under a governmentality analysis, it can be said that what matters is who can govern; what governing is; what or who is governed.⁸

It has been observed that the development of the various policy frameworks in Malawi under land reform or the wider macro-economy has not been adequately synchronized. It has been disjunctive particularly in relation to the land question. I

⁷ See R Shamir, note 5.

⁸ See C Gordon, Introduction, note 65.

suggest that this disjunction is not an oversight; it is calculative. In any event, Foucault has noted under the phenomenon of scarcity that in relation to land, government intervention focuses on production. Further, ‘uncertainty’ is a feature of biopower. The nature of the macroeconomic frameworks in Malawi do not adequately support the land deprived. Such that even though there is a parallel process of land redistribution under the willing seller/willing buyer approach, and the implementation of macroeconomic reform under poverty reduction strategies such as the Malawi Growth and Development Strategy, in my view, the lack of policy synergy in the country will unlikely resolve the underlying issues relating to structural impoverishment. In any case, it has been noted in Chapter 5 that land redistribution is not a viable long-term solution to the land question. At an average land size of 1 hectare (present figures reveal landholding sizes of less than 0.22 hectares) and with an annual population growth of 3.2 per cent, there would be no arable land to redistribute in the country by 2018. There is an urgent need to develop triangulated policy interventions that explore the development of other non-agricultural economic activity given that at present the country’s economy is heavily agro-based with the agricultural sector accounting for 85 per cent of the total work force.

B The Right to ‘govern’ and the Problem of Abstraction

I would like to raise the issue of ‘abstraction’ in ‘governing’ generally, and let alone in relation to political economies such as Malawi. There is need to examine whether the degree of specificity in relation to a public institution that bears a particular duty correlates to effectiveness in delivery of a duty or effectiveness of a remedy under a process of redress. For example, section 13 of the Constitution provides that the State shall ‘promote the welfare and the development of the people of Malawi’ and shall progressively adopt and implement policies and legislation to achieve some fifteen national goals.⁹ The goals are varied and the question arises whether a specific description of a public institution responsible for each national goal augurs well for the attainment of the particular goal.

A possible quick response is that the right to ‘govern’ must adhere to the tenets of the public trust and the social trust under section 12 of the Constitution. To the extent that there are challenges in the enforcement of the obligations of the

⁹ The fifteen goals relate to gender equality; nutrition; health; the environment; rural life; education; persons with disabilities; children; the family; the elderly; international relations; peaceful settlement of disputes; administration of justice; economic management; and public trust and good governance.

‘governors’ in the postcolonial State, I suggest that the consent that is inherent under the public trust and the social trust also carries with it a corresponding ‘fiduciary risk’. This risk arises when the ‘governors’ fail to deliver their obligation under the liberal constitutional order. Indeed in the context of the land question, the ‘governors’ present a fiduciary risk since for self-interest or otherwise, some 10.48 million people in Malawi have access to less than 0.5 hectares of arable land and in the process are prone to a less dignified livelihood.

C Notions of ‘Possibility’

If conduct underpins hegemonic responsabilization, it is suggested that counter-conduct must underpin people-generated responsabilization. The following recounts a nascent but significant development in the country: In October, 2009, a local daily newspaper ran an online story entitled ‘*Public service charter to restore people as bwanas*’. It was reported that a local human rights non-governmental organization is implementing a programme through a local government authority in the country whereby public officers sign a ‘Public Service Charter’ committing them to ‘improve public service delivery’. An official from the organization argued that the rationale behind the programme is that through the charters, the ‘ordinary people’ will be ‘restored as the real masters since public officers are currently the ones who are looked at as masters by the public’. The charter spells out the duty of a public officer, the process of complaints and redress.¹⁰ The public charter, as a device of accountability and transparency, must be extended to all levels of public service in the country. Admittedly, the initiative has not been fully established. However, it represents the mindset that would mirror the idea of *gnosis* and the drama of citizenship. This demands a proactive, engaged citizen as opposed to a statist citizen. Suffice it to say that it is reported in the same article however that the postcolonial State has developed its own programme where it seeks to introduce ‘a national public service charter programme’ in all public offices in the country.¹¹ It is not clear whether this State programme will go beyond mere civil servants to include the holders of political public offices such as the President, Cabinet ministers or members of Parliament.

¹⁰ See ‘Public service charter to restore people as *bwanas*’, available at <http://www.bnltimes.com/content/view/217/28/> [visited on 14 October, 2009].

¹¹ See note 10.

III THE THESIS: A PRÉCIS

The thesis is a comprehensive law and policy analysis of land reform in Malawi. The broad contextual parameters of the thesis in relation to the land question are twofold: the linkage between (global) development discourse and land reform in Malawi; and the discursive continuity of colonial and postcolonial law and policy, and the attendant outcomes of the hegemonic responsabilization. Against this background, the thesis is restated thus: the land question in Malawi can be resolved through the emergence of a responsabilized State under people-generated responsabilization. People-generated responsabilization is a holistic, bottom-up approach to tackling asymmetrical access to, and ownership of, land in the country. This, it is suggested, must entail proactive, people-based action for a triangulated approach to land reform involving law, macroeconomic frameworks like poverty reduction strategies, and the adherence to the terms of governing under the Constitution.

People-generated responsabilization has been discussed in detail in Chapter 7 and comprises four pillars: *gnosis* and the drama of citizenship, the public trust and the social trust under the Constitution, the beneficial interest in land, and the re-location of law in the political economy. This means that the responsabilized State must desist from an automatic translation of land reform into land law reform. I end with the words of *Mwalimu* – Teacher – Julius Kambarage Nyerere:

If real development is to take place, the people have to be involved.¹²

¹² Available at <http://africanhistory.about.com/od/biography/a/qts-Nyerere01.htm> [visited on 15 December, 2009]; the quote is taken from Nyerere's book *Uhuru na Maendeleo [Freedom and Development]* (Oxford: Oxford University Press, 1973).

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