Statutory control of land and the administration of agrarian policies in Malawi

~~STATUTORY LAW AND AGRARIAN CHANGE IN MALAWI~~

[An historical study of the role of legislation in the administration of agrarian change, from the colonial to the post-colonial period.]

BY

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Vol I

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ABSTRACT

This thesis traces the evolution of agrarian legislation in Malawi in response to some of the main currents in academic descriptions of the country's agricultural history. In some of the notable studies, prominence has been given to the centrality of colonial land and labour legislation and policies in the "underdevelopment" of agriculture and the general exploitation of peasant communities. This unfortunately obscures the role of legislation on crop marketing, which was just as voluminous as land and labour legislation, and other colonial policies on related issues like the allocation of agricultural credit. By focusing on the whole gamut of agrarian laws and policies, one part of this thesis attempts to present a more complete review of the colonial agricultural economy.

The second part reviews the post-colonial agricultural economy and shifts the debate from colonialism and underdevelopment to post-colonial efforts to transform peasant agriculture using, among other tools, statutory enactments. Unlike other East and Central African countries, the post-colonial agricultural economy of Malawi has only belatedly begun to receive academic attention, and one of the general aims of this study is to contribute to the growing literature on the subject.

Although the thesis responds to some of the trends in the historiography of agriculture in Malawi, it also aspires to contribute to legal scholarship. It is primarily a study of how legislation, the substance of a legal discipline, can be promulgated to serve varying and conflicting interests in an agricultural economy. The historical and socio-legal dimensions provide the necessary information for a critical appraisal of some of the assertions made by lawyers on the importance of law as an instrument for social change.

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In the course of this work, I have inevitably picked from several minds and relied on the assistance of a number of persons of whom only a few can be acknowledged here. At the School of Oriental and African Studies, University of London, I am indebted to Mrs. Rogers for her patient and careful supervision; to Professor Allott for comments on the substance of Chapter II; and to Dr. Simon Coldham for showing considerable interest in my work.

In Malawi, without the co-operation of civil servants and numerous villagers, this work would not have been completed. Responsibility for the conclusions drawn and any errors which may become apparent should not, however, be attached to my informants. I am also grateful to Nangamtani Mtundu for assisting with the fieldwork, and to the Research and Publications Committee of the University of Malawi for providing the necessary funds. The Government of Malawi should also be acknowledged for sponsoring my stay and studies in the United Kingdom.

I should, finally, thank Deborah and Simon Kaplinsky for tolerating my eccentric working habits for more than three years, Sue Blackwell for the typing and proof reading, and my parents and grandfather for endless support and encouragement.

ABBREVIATIONS

A.C.	Appeal Cases Reports
ADMARC	Agricultural Development and Marketing Corporation
A.L.R., Mal.	Africa Law Reports, Malawi series.
A.P.M.B.	Agricultural Production and Marketing Board
A.T.A.	Adjudication of Titles Act
B.C.A.	British Central Africa
B.C.G.A.	British Cotton Growing Association
CILSA	Comparative and International Law Journal of Southern Africa
C.L.D.A.	Customary Land(Development) Act
C.O.	Colonial Office
D.O.	Development Officer
F.M.B.	Farmers Marketing Board
F.O.	Foreign Office
G.V.H.	Group Village Headman
I.B.R.D.	International Bank for Reconstruction and Development
I.D.A.	International Development Association
J.A.A.	Journal of African Administration
J.A.L.	Journal of African Law
K.B.	Kings Bench Reports
K.L.A.A.	Kenya Land Adjudication Act
K.L.R.(S.A.)O.	Kenya Land Registration (Special Areas) Ordinance
L.D.C.	Least Developed Countries
LEGCO	Legislative Council
L.L.B.A.	Local Land Board Act
L.L.D.P.	Lilongwe Land Development Programme
L.L.L.B.	Lilongwe Local Land Board
M.C.P.	Malawi Congress Party
N.R.D.P.	National Rural Development Programme
N.T.B.	Native Tobacco Board
Ny. L.R.	Nyasaland Law Reports
P.R.O.	Public Records Office
R.L.A.	Registered Land Act

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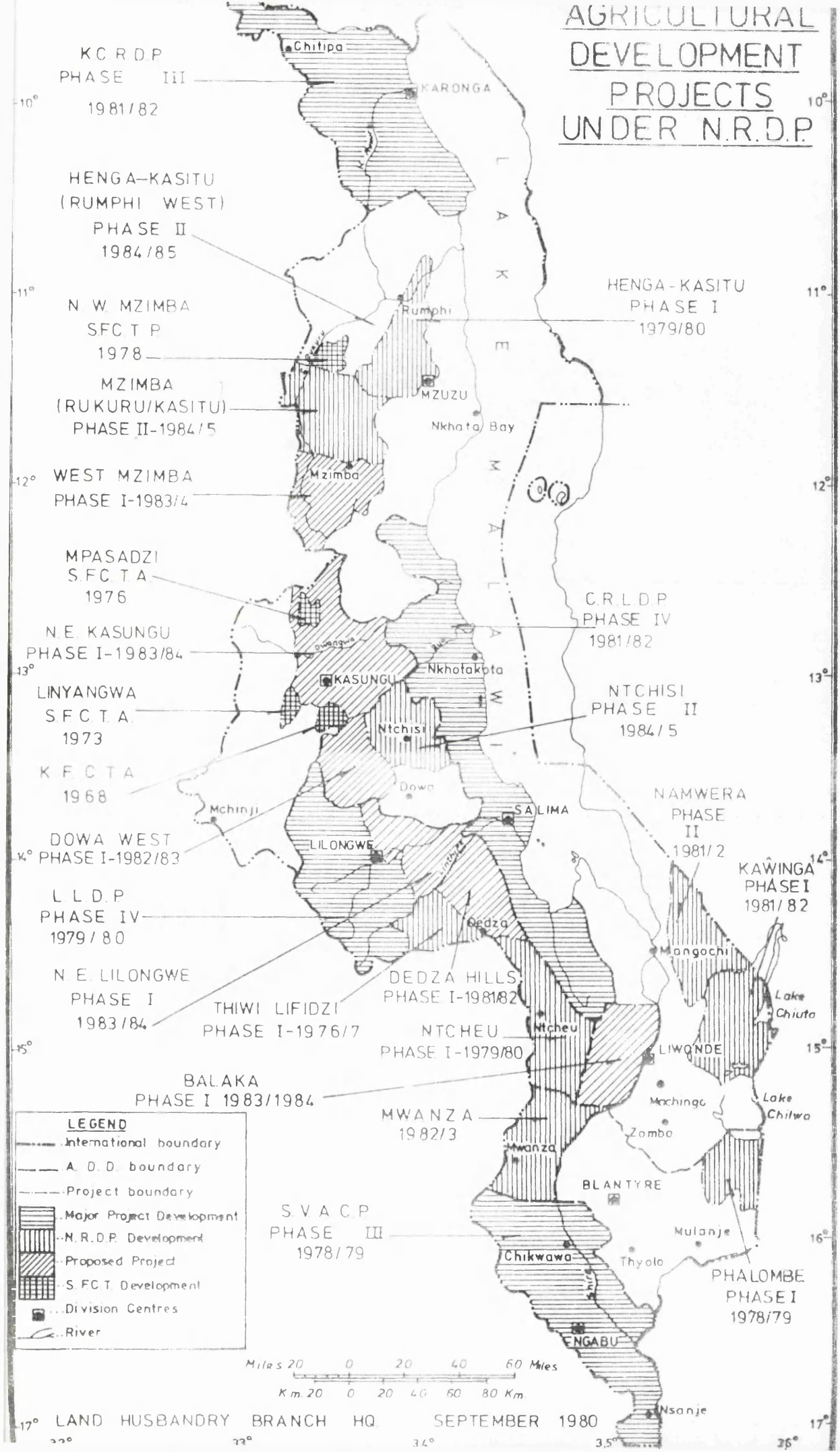
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Nkhotakota
Ntchisi
Dowa
Mchinji
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LILONGWE
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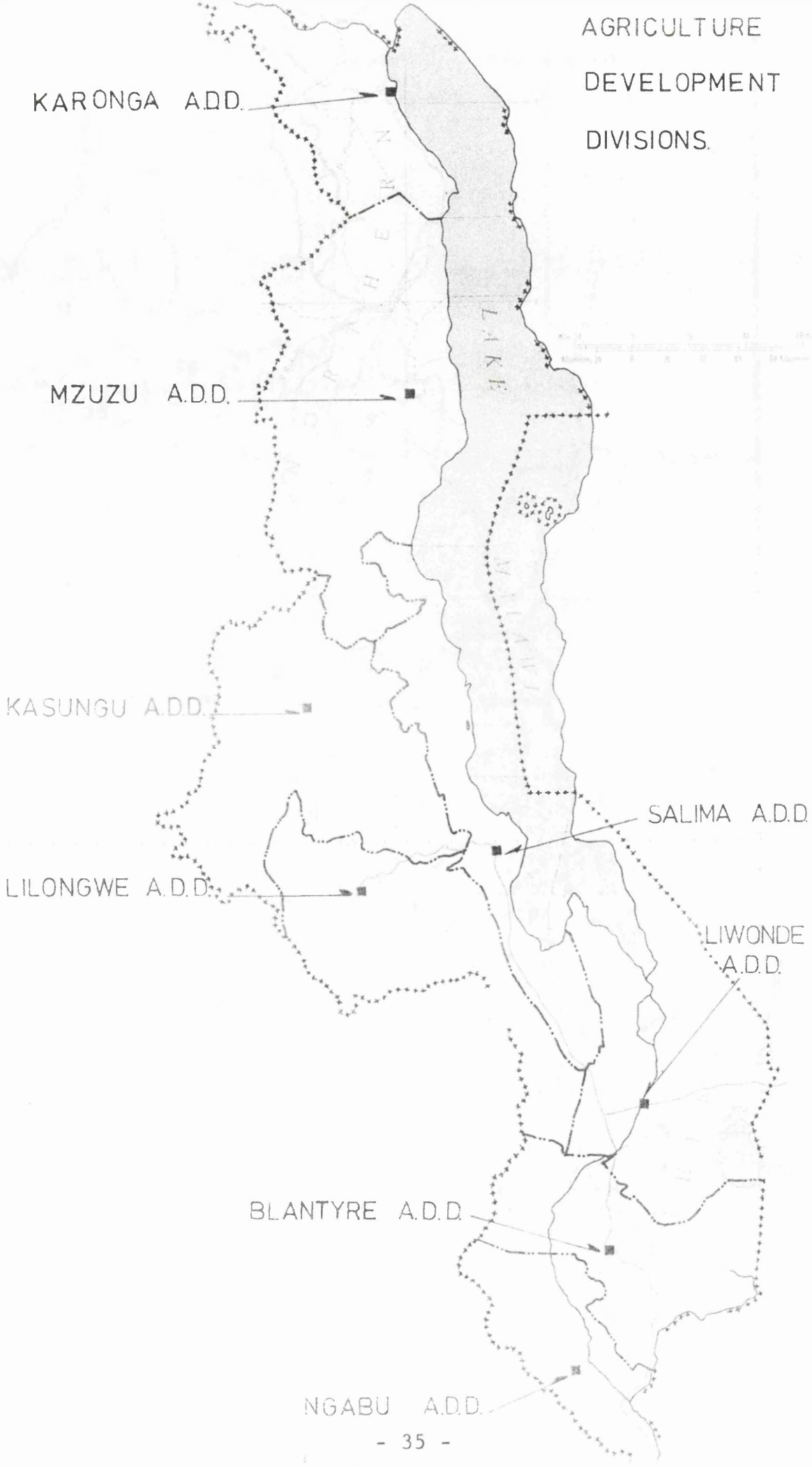
Mangochi
Lake Chiuta
Ntcheu
LIWONDE
Mochinga
Lake Chilwa
Zomba
Mwanza
BLANTYRE
Mulanje
Chikwawa
Thyolo
NGABU
Nsanje
LAKE MALAWI
LEGEND
International boundary
A.D.D. boundary
Project boundary
Major Project Development
N.R.D.P. Development
Proposed Project
S.F.C.T. Development
Division Centres
River
Miles 20 0 20 40 60 Miles
Km 20 0 20 40 60 80 Km
LAND HUSBANDRY BRANCH HQ. SEPTEMBER 1980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DIVISIONS.
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LIWONDE
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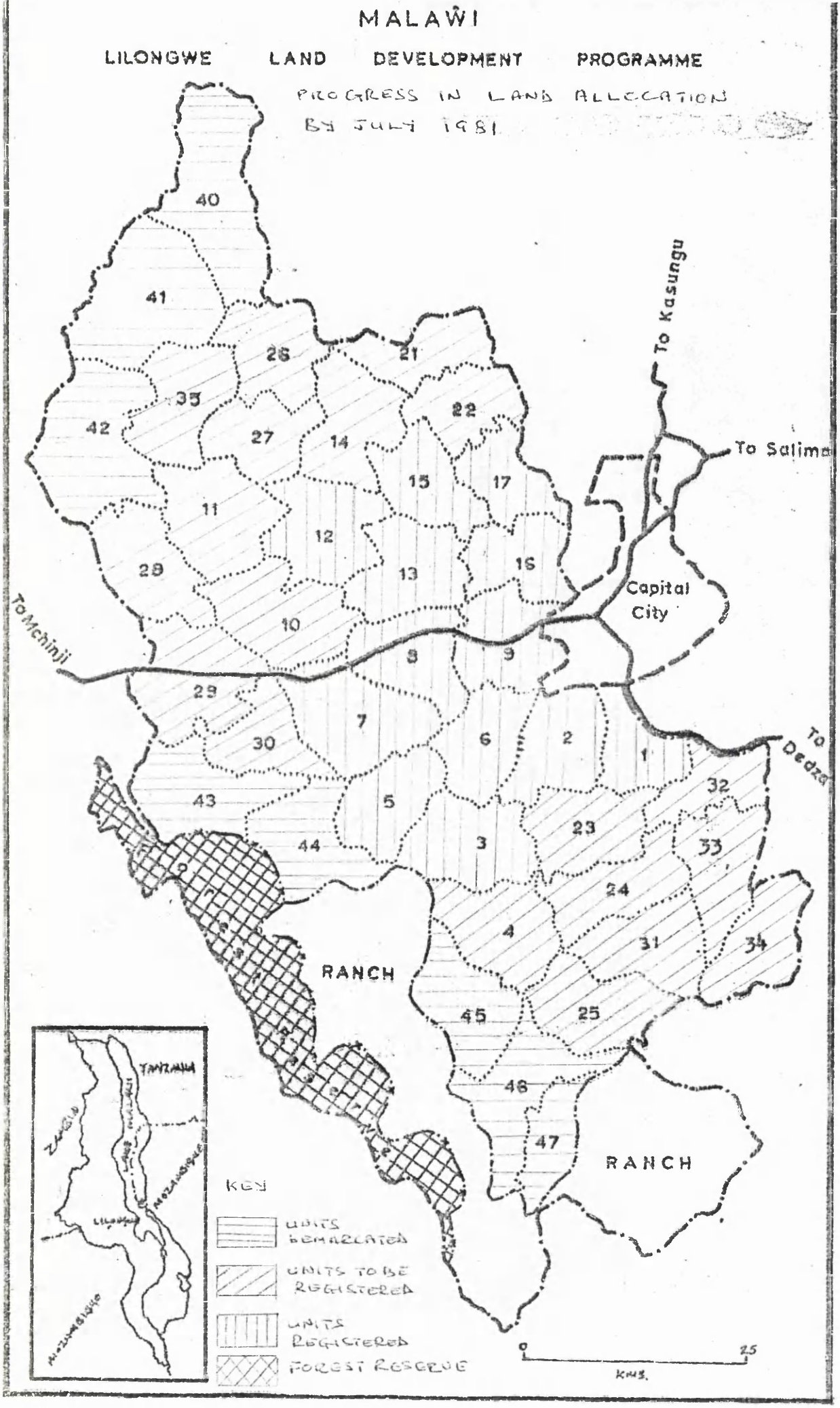
MALAWI
LILONGWE LAND DEVELOPMENT PROGRAMME
PROGRESS IN LAND ALLOCATION
BY JULY 1981
To Kasungu
To Salima
Capital City
To Mchinji
To Dedza
RANCH
RANCH
KEY
UNITS DEMARCATED
UNITS TO BE REGISTERED
UNITS REGISTERED
FOREST RESERVE
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25
KMS.

I INTRODUCTION

This study stems from, and reflects on, some of the dominant trends in the historiography of agriculture in Malawi. As befitting a relatively small and densely-populated country which is almost entirely dependent on agricultural production for its economic well-being,[1] this subject has been of interest to social scientists of different academic orientations.[2] But the theme which pervades the major and more recent studies is that colonial land policies were a very important factor in the "underdevelopment" of agriculture in Malawi. It has been contended that the administration pursued policies which generally furthered the interest of the metropolitan country and local European settlers. It particularly sanctioned the alienation of some of the best arable lands to the settlers and reduced the Africans resident thereon to a servile status under inhuman labour tenancies known as Thangata. Africans from other parts of the country were coerced into the labour market by devices like hut and poll tax. In populist language, colonialism fuelled capitalism by arrogating to the European settlers control over the only means of economic production, and by reducing the Africans to a working or labouring class.[3]

While accepting this thesis, it will be contended that colonialism and capitalism in fact achieved a greater penetration of the African peasantry through government regulation of the production and marketing of economic crops on unalienated African lands. As Chapters III and IV will sugg-

est, the amount of land eventually prised out of African occupation was relatively small. A generous estimate would not put it beyond two fifths of the country's usable land. Despite the emotionality of the alienation episode, and of the subsequent inhuman labour tenancies, a sense of perspective must be maintained. Direct settler control of the only means of economic production was not so total. It cannot be denied that on more than one occasion the colonial administration indicated its preference for achieving agrarian change through the expansion of European settler enterprises. But after the first world war, and definitely after the second, the administration was not oblivious to the fact that the aims of colonialism and capitalism could best be achieved by tapping the wider resources of the Africans who retained the occupation and use of their lands. This must account for the mountain of legislation on African production and marketing of economic crops enacted during the colonial period, especially after the first world war.

It is regrettable that, except for a few "introductory essays",[4] the role of controlled marketing in the "development" or "underdevelopment" of agriculture has not received adequate attention in Malawi's historiography. Yet, the link between land tenure, land use and marketing in an agricultural economy is indisputable. Moreover, as Chapter V will show, the duality and racial distinctions so often noted in the colonial land policies are also visible in the marketing sector. An important aim of this thesis is to redress the imbalance in Malawi's agricultural history by reviewing land policies alongside the laws and policies which governed

the production and marketing of economic crops. Of special interest to legal scholarship is the manner in which the administration used law to engineer agrarian change among the peasants and, generally, to "conciliate" or "balance" the conflicting interests of the Africans, European settlers and the government itself in the colonial agricultural economy. This review is attempted in Chapters IV to V.

The second important aim of the thesis is to study the use of law as a tool for engineering agrarian change in the post-colonial period. This is another area in which existing historiographical accounts of land tenure and agriculture in Malawi can be found wanting. Reviews of the legislative programme of the independent government tend to be brief,[5] simply descriptive,[6] or plain and uninspiring.[7] Chapters VI to IX will review the legislation in detail and assess the socio-economic consequences thereof. Of particular concern will be the working on the ground of land reform statutes implemented in the Lilongwe district of central Malawi. This is the only area so far where Malawi's acclaimed[8] legislation for the reorganization of customary land has seen the light of day. It is important to determine whether any such acclamations are in order.

It will become apparent that the substance of this thesis falls under the realm of learning to which the rubric "law and development" has been applied. According to one of the foremost exponents of the subject, law and development studies can either be "atomistic" or "holistic". Atomistic accounts enquire into the relationship between "specific

norms of law" and "specific sorts of social change". Holistic accounts tend to explicate general relationships and to evolve, validate or invalidate theories or middle-range hypotheses.[9] This is another atomistic study. No attempt will be made to evolve or explicate a theory of law and development. However, Chapter X will conclude the thesis by evaluating the relevance of some of the theories evolved to an understanding of law and agrarian change in Malawi.

The terminology of law and development is not heedlessly employed in this study. The problems associated with definitions of "law" are well known in jurisprudence.[10] It is not necessary for our purposes to court any more controversy by proposing a definition. It will suffice to note that the state has often resorted to rules promulgated by the legislature (legislation) to conciliate conflicting societal interests or engineer social transformation. "Legislation" is the type of "law" under discussion in a large part of the thesis. However, Chapter II will also refer to normative rules governing behaviour in traditional societies commonly identified as "customary law". "Case law" or "judge-made law" has not played a significant role in the social processes described here. As observed by one African scholar, "The judiciary is the least resourceful source of law in the context of social engineering."[11] Judicial law-making is inherently "incremental" and "interstitial". The wishes of the state, on the other hand, may be to move the society in a different direction. Legislation is a faster way of law-making for such purposes.[12] Apart from the inherent drawbacks of judicial law-making, it will be contended that the state in Malawi has purposefully curbed the

utility of judges and courts in social engineering through law. This can be inferred from some of the statutes reviewed in Chapter VI in which reference to the judiciary on potential points of controversy has been expressly excluded.

"Development", like "law", is a term which eludes a standard definition. Some have sought to measure it using economic indices like annual growth rates, per capita income increases and industrialization, the assumption being that the least developed countries (LDCs) will evolve in a unilinear fashion towards the "developed" status attained by western countries.[13] Such measures of development are no longer universally accepted, especially after the failure of the LDCs to achieve even the modest growth rates stipulated under the United Nations' Development decade of the 1960s.[14] In 1972, a gathering of "law and development" scholars suggested the following tenable definition:

> "Development can be seen as a self-conscious social process by which man in society attempts to mold the conditions of his existence. In a sense 'development' occurs in all societies. But for our purposes, 'development' refers specifically to the efforts of the LDC's to achieve a better life for their citizens." [15]

Adopting this general understanding, development in Malawi would, inter alia, require the reallocation of resources for the purpose of alleviating poverty, ignorance, hunger and disease, disabilities which the state and politicians have consciously identified as major "public enemies."[16] This study will not attempt to discuss the role

of law in such a general process of reallocation. It is concerned with only one species of development, namely, agrarian change. At the very least this should be regarded as the process by which resources like land, credit and marketing facilities are reallocated for the purpose of improving the livelihood of peasants and other persons who draw their sustenance from land use. A review of the post-colonial period will show that reallocations of agricultural resources can be attempted in the context of a plan, or a series of plans, with specified goals like the conversion of subsistence farming into commercial agriculture. One measure of agrarian change in such a context is the extent to which the specified goals have been attained.

Prior to the substantive review of law and agrarian change in Chapters IV to IX of the thesis, Chapters II and III will consider the dual or plural land structure of Malawi which shaped the agrarian policies pursued during the colonial and post-colonial periods. The duality of the land structure and agrarian policies began with colonial rule. Chapter II was originally cast as a study of pre-colonial systems of landholding. Due to the effluxion of time, accurate and adequate information was not obtainable. As will be seen, ethnographic and other early accounts are not always reliable for a legal analysis. From the fragmented written and oral testimonies, the chapter has been recast to present an evolutionary model of customary land law in a selected area. It was logical for our purposes to select the parts of the Lilongwe district where customary land reforms have been attempted in the hope that this would in-

crease agricultural output. The effectiveness of the use of legislation to engineer agrarian change in this way cannot be fully appraised before the system destined for replacement has been analysed. Thus, Chapter II reviews customary land law as a prelude to the study of post-independence land reforms attempted in Chapters VII and VIII.

The review of customary land law in general is also a useful prelude to the discussion on colonialism and the establishment of a dual land policy in Chapters III and IV. This discussion will in parts be very familiar to most Malawi historians. Some repetition is unavoidable because the subsequent chapters would be incomplete and out of context without a summary of the land policies pursued during the colonial period. However, in addition to the summary, these chapters will highlight the importance or otherwise attached to the law and legality in the formulation of some of the agrarian policies. This theme has not been fully explored in the existing literature. This part of the thesis will also dwell on neglected topics like the formulation, implementation and efficacy of colonial land use legislation.

It has been customary to preface most theses on law in Malawi with a chapter on the legal system and sources of law. This ritual has been avoided because the works cited in the notes are sufficiently comprehensive on the topic.[17] Moreover, it has been found necessary to devote all the available space in this volume to the proper subject matter of the thesis.

This study has been compiled from several primary sources of information. The historical chapters are generally based on archival records consulted in the Public Records Office, London and the National Archives in Malawi at various times between October 1979 and September 1982. The chapters also cite legislative council debates, especially where other official records have not yet been made public. The chapters on customary land law and post-independence land reforms rely on information abstracted from land allocation and registration records, and from personal interviews with traditional leaders, villagers and officers entrusted with the land reform programme. A clearer general picture of the land reform exercise was also formulated through personal observation of the responsible officers at work during land allocation and subsequent resolution of land disputes. Fieldwork was conducted in Lilongwe between December 1980 and July 1981.

A list of informants is included in the bibliography together with the primary and secondary sources consulted. Interviews were not based on a standard questionnaire or sample survey. Villagers and traditional leaders were simply selected on the basis of their status in society and presumed knowledge of the history and customs of the area. Officers responsible for land reforms were selected on the basis of their job description. Chiefs and headmen were nevertheless encouraged to comment on the following customary land law issues:

(i) The origins of the tribe and the history of their clan, lineage and family;

(ii) The original occupation of village lands and subsequent settlements of "strangers" or "newcomers";

(iii) Control of land by political and social groups before and after the imposition of colonial rule;

(iv) The various ways by which individuals and family groups could acquire or transfer land rights, the interests thereby acquired or transferred, and limitations on the rights of use after acquisitions; and

(v) Any perceptible changes to land rules and customs which occurred before the reform process began.

On the reform process, interviewees were invited to comment on how the exercise proceeded in the area; the nature of the disputes which surfaced and their resolution; new agricultural practices, if any, arising after the reforms; whether land dispositions including sales, mortgages and transmissions on death had occurred after the reforms; and, generally, whether the exercise was perceived as beneficial or disadvantageous. The reforms were still incomplete in many parts of the area at the commencement and conclusion of fieldwork. From the promulgation of the legislation in 1967 to July 1981, only 9 out of 40 sections of the area had gone through all the stages of reform including the granting of new registered land titles.[18] To get a feedback from participants at all levels in the process, field trips and interviews were spread between the registered and unregistered areas. An evaluation of such an ongoing process necessarily implies that some of the conclusions drawn will be

tentative and preliminary. Most of the facts and the law are presented as at the end of July, 1981.

TABLE 1: LAND AREA, POPULATION AND DENSITY BY REGIONS AND DISTRICT, 1966 AND 1977 [19]

AREA:	LAND AREA: (Sq. Km)	POPULATION: 1966	POPULATION: 1977	PERSONS PER SQ. KILOMETRE: 1966	PERSONS PER SQ. KILOMETRE: 1977
Malawi	94,276	4,039,583	5,547,460	43	59
Northern Region	26,931	497,491	648,853	18	24
Chitipa	4,289	59,521	72,316	14	17
Karonga	3,354	77,687	106,923	23	32
Nkhata Bay	4,090	83,911	105,803	21	26
Rumphi	4,768	46,636	62,450	10	13
Mzimba	10,430	229,736	301,361	22	29
Central Region	35,592	1,474,952	2,143,716	41	60
Kasungu	7,879	97,472	194,436	12	25
Nkhota-Kota	4,258	62,918	94,370	15	22
Ntchisi	1,655	66,762	87,437	40	53
Dowa	3,041	182,000	247,603	60	81
Salima	2,196	86,552	132,276	39	60
Lilongwe	6,159	498,524	704,117	81	114
Mchinji	3,357	85,324	158,833	25	47
Dedza	3,623	230,715	298,190	64	82
Ntcheu	3,424	164,685	226,454	48	66
Southern Region	31,753	2,067,140	2,754,891	65	87
Mangochi	6,273	232,692	302,341	37	48
Machinga	5,965	226,506	341,836	38	57
Zomba	2,580	282,391	352,334	109	137
Chiradzulu	767	142,197	176,184	185	230
Blantyre	2,012	237,289	408,062	118	203
Mwanza	2,295	41,981	71,405	18	31
Thyolo	1,714	256,605	322,000	150	188
Mulanje	3,450	398,881	477,546	116	138
Chikwawa	4,755	147,364	194,425	31	41
Nsanje	1,942	101,234	108,758	52	56

NOTES TO CHAPTER I

1 See Table 1 for the land size and population density of Malawi. Geographical and economic facts about Malawi can be found in J.G. Pike, Malawi: A Political and Economic History, London, 1968, Ch. 1, and with G.T. Rimmington, Malawi: a Geographic Study, London, 1965.

2 The range of academics and other commentators who have written about the history of agriculture in Malawi includes historians, lawyers, economists, public administrators and civil servants. The following is a sample of some of the notable writings: H. Dequin, Agricultural Development in Malawi, I.F.O., Munchen, 1970; R.W. Kettlewell, "Agricultural change in Nyasaland: 1945-1960", Food Research Institute Studies of Tropical Food and Agriculture, Vol. 5, no. 3, 1965, pp. 229-285; S. Myambo, The Shire Highlands Plantations: a Socio-economic History of the Plantation System of Production in Malawi, 1891-1938, M.A. thesis, University of Malawi, 1973; B.S. Krishnamurthy, Land and Labour in Nyasaland: 1891-1914, Ph.D. thesis, University of London, 1964; M. Chanock, "Agricultural Change and Continuity in Malawi", in R. Palmer and N. Parsons, The Roots of Rural Poverty in Central and Southern Africa, Heinemann, London, 1977, pp. 396-409; M. Chanock, "Notes for an Agricultural History of Malawi", Rural Africana, Vol. 20, 1973, pp. 27-35; P.A. Cole-King, "Historical Factors in Malawi's Agricultural Development", Society of Malawi Journal, Vol. 25, No. 2, 1972, pp. 32-37; and P.T. Terry, "African Agriculture in Nyasaland 1858-1894", Nyasaland Journal, Vol. XIV, No. 2, 1961, p. 27.

3 See J.A.K. Kandawire, Thangata: Forced Labour or Reciprocal Assistance?, Research and Publications Committee, University of Malawi, 1979, and "The Structure of the Colonial System as a Factor in the Underdevelopment of Agriculture in Colonial Nyasaland", Journal of Social Science, Vol. 4, 1975, pp. 35-45; B.P. Pachai, Land and Politics in Malawi, 1875-1975, Limestone Press, Canada, 1978, and "The Issue of

Thangata in the History of Nyasaland", Journal of Social Science, Vol. 3, 1974, pp. 20-34; and B.P. Wanda, Colonialism, Nationalism and Tradition: The Evolution and Development of the Legal System in Malawi, Ph.D. thesis, University of London, 1979, Vol. 5 on Land Law and Policy. It is remarkable that these three authors, writing contemporaneously on the same issues, failed to acknowledge each other's work.

4 See M. Chanock, "The Political Economy of Independent Agriculture in Colonial Malawi: The Great War to the Great Depression", Journal of Social Science, Vol. I, 1972, pp. 113-129; J. McCracken, "Planters, Peasants and the Colonial State: the Impact of the Native Tobacco Board in the Central Province of Malawi", Journal of Southern African Studies, Vol. 9, No. 2, April 1983, pp. 172-192; R.M. Antill, "A History of the Native Grown Land Tobacco Industry of Nyasaland", Nyasaland Agricultural Quarterly Journal, Vol. 5, No. 3, 1945; and W.H. Rangeley, "A Brief History of the Tobacco Industry in Nyasaland", Parts I and II, Nyasaland Journal, Vol. 10, No. 1, 1957, p. 62, and No. 2, p. 32.

5 See P.H. Brietzke, "Rural Development and Modifications of Malawi's Land Tenure System", Rural Africana, No. 20, 1973, pp. 53-68, and B. Phipps, "Evaluating Development Schemes: Problems and Implications. A Malawi Case Study", Development and Change 7 (1976), pp. 469-484.

6 See Pachai op. cit. Ch. 10, pp. 186-203; Wanda, op. cit., Ch. 23; R. Simpson, "New Land Law in Malawi", Journal of Administration Overseas, Vol. 4, No. 4, 1967, pp. 221-228; J.D.A. Brooke-Taylor, Land Law in Malawi, Mimeograph, University of Malawi, Chancellor College, 1977, pp. 275-296 and pp. 306-315; and C.A. Griffiths, Land Tenure in Malawi and the 1967 Reforms", LL.M. thesis, University of Malawi, 1981.

7 See A. Mercer, "Rural Development in Malawi, the Quiet Revolution", Optima, Vol. 23, Part 1, March 1973, pp. 6-13, and T.A. Blinkhorn, "Lilongwe: A Quiet Revolution", Finance and Development, Vol. 8, No. 2, 1971, pp. 26-31. Note that this assessment of the literature does not take into accout M.R.E. Machika's forthcoming Study on Law and Development in Central Africa, which was not available at the time of writing.

8 Ibid.

9 R. Seidman, "Law and Development: A General Model", Law and Society Review, Vol. 6, 1972, p. 311.

10 See A. Allott, The Limits of Law, London, Butterworths, 1980, Ch. 1, and Lord Lloyd of Hampstead, Introduction to Jurisprudence, London, 1979 (4th ed.), pp. 43-44.

11 T. Ocran, "Law, African Economic Development, and Social Engineering: A Theoretical Nexus", Zambia Law Journal, Vol.s 3 and 4, 1971-1972, p. 36.

12 Ibid.

13 P. Samuelson, Economics, An Introductory Analysis, 7th ed., New York, 1967, p. 736, and, generally, chapter 38.

14 G. Meier, Leading Issues in Economic Development (2nd ed.), Oxford University Press, 1970, pp. 34-35, on the record of the First Development Decade.

15 International Legal Centre, Law and Development: the Future of Law and Development Research, New York, 1974, p. 15.

16 See, for example, Hansard, Report of the Proceedings of the Malawi Parliament, Address by Dr. Banda on State Opening of Parliament, 8th October 1968. For a similar conception of development see Dudley Seers, "The meaning of Development", in N. Uphoff and W. Ilchman, The Political Economy of Development, University of California Press, 1972, p. 124 and, generally, pp. 123-129.

17 Wanda, op. cit., Vol.s 2, 3 and 4; S.A. Roberts, The Growth of an Integrated Legal System in Malawi. A Study in Racial Distinctions in the Law, Ph.D., University of London, 1968, Part I; N.S. Coissoro, The Customary Laws of Succession in Central Africa and Internal Conflicts of Laws, Ph.D., University of London, 1962, Ch. 1; and J.O. Ibik, The Law of Marriage in Nyasaland, Ph.D., University of London, 1966, Ch. 1. See also A. Allott (ed.), Judicial and Legal Systems in Africa, 2nd ed., London, Butterworths, 1970, Part III, pages 203-217.

18 Information supplied by the Lilongwe Land Development Programme, Land Allocation Section. See Chapter VII,

19 Source: Malawi Government, Malawi Statistical Year Book, 1979, Government Printer, Zomba, August 1980, p. 9.

II CUSTOMARY LAND LAW IN A MATRILINEAL SOCIETY: A RE-APPRAISAL

The part of East Central Africa now called Malawi was in precolonial times occupied by several ethnic groups or "tribes". Werner identified the following as the principal "tribes": the Nyanja or Mang'anja, the Yao, the Alolo, the Ngonde, the Tumbuka and the Ngoni.[1] Missing from this list are the Chewa who, together with the Mang'anja, Nyanja and several other sub-groups, formed the largest "tribe" of Bantu-speaking matrilineal peoples known in Portuguese historical records as the "Maravi".[2] This chapter is concerned with customary land law of the Chewa, the most dominant of the "Maravi" sub-groups.

Two accounts on this subject must be acknowledged at the outset. Rangeley's[3] short description is typical of most anthropological and historical analyses of customary land law in Malawi. It employs inappropriate and borrowed property concepts to summarise indigenous ideas, resulting in several misconceptions on the nature of customary law. This chapter will attempt to expose and correct such errors. Ibik's more recent account is relatively free of such conceptual problems; however, it simultaneously describes the land laws of the Chewa, Yao and Ngoni of Kasungu, Mchinji and Lilongwe districts of central Malawi. The inevitable consequence of this approach is a presentation of very general and static rules which gloss over inter-ethnic and regional variations. This chapter concentrates on the Chewa of South-Western Lilongwe for reasons stated in the Intro-

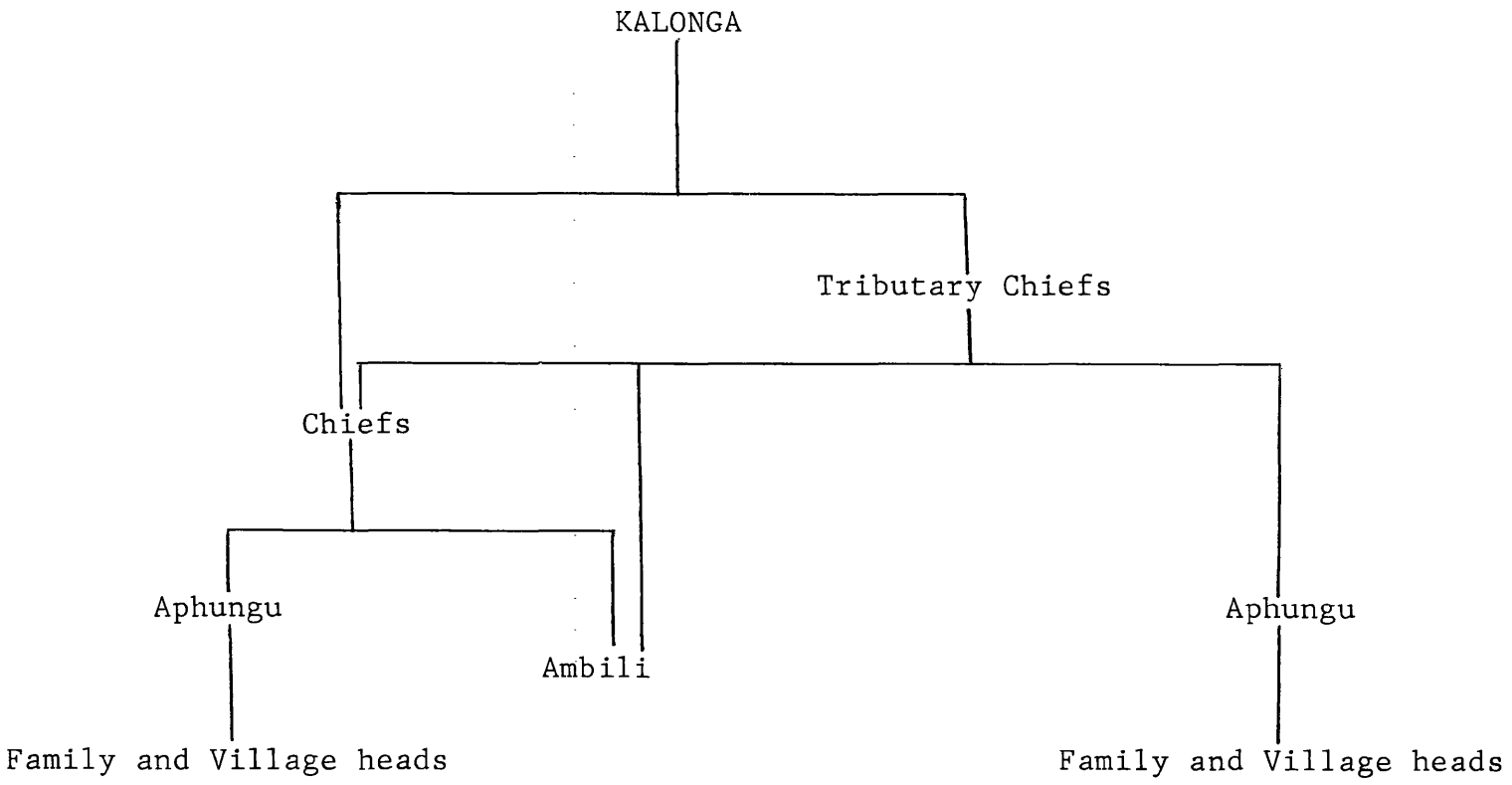
duction. General comparisons will also be made with the laws of other ethnic groups where appropriate. The account begins with Chewa movements into Malawi during the pre-colonial period.

1 The Pre-Colonial Chewa State and Centralised Control of Land

One popular oral tradition claims that the Chewa originated from Luba country in present-day Zaire. They were led to "Malawi" or Mankhamba on the south-western corner of Lake Malawi by a leader of the Phiri clan who was known by the honorific and regal title of Kalonga.[5] This was their last important place of settlement from which the Kalongas consolidated their control over other clans and the surrounding areas. A political state was assembled which, at its peak some time in the 15th or 16th century,[6] extended from Dwangwa river in the north-west to the Zambezi in the south, and from present-day Mozambique in the east to Zambia in the west.[7] Some of the important factors in the maintenance of hegemony over such a wide area were the dispatch of Kalonga's Phiri kinsmen to control fringe areas as tributaries or local chieftaincies, and the centralised control of tribute collection, external trade, shrines and religious centres.[8]

Tributaries and chiefs in the outlying areas of the state in turn authorised lesser chiefs and lieutenants to occupy sections of their district. A Chewa chief had two types of lieutenants called Ankhoswe or Aphungu and Ambili. Ankhoswe or Aphungu were counsellors who belonged to the lineage of the chief. They assisted in the execution of

FIGURE 1: THE CHEWA POLITICAL STATE



judicial and religious functions and were responsible for approving the selection of a successor to a dead chief. Ambili were counsellors belonging to a lineage different from that of the chief. Some of their duties were to act as spies for the chief and to assist in judicial functions. Important counsellors, usually Aphungu, were authorised to occupy larger areas which could be divided into separate villages under subordinate leaders. The rest received enough land for their families and exercised control over one village. The political structure which emerged from these allocations and sub-allocations can be depicted as in Figure 1.[9]

The figure creates the impression of a strong centralised state. This in turn encourages the belief that the idea of a tribe as a land-holding or controlling unit could be countenanced in the case of the Chewa at the height of the rule of the Kalongas. One line of reasoning runs:

> "... Of course the tribe may be a very big unit that its owners of the land may only be nominal especially in decentralised and acephalous societies, but the fact remains that the tribe has the radical title to the community." (sic)[10]

The presumption is that a centralised "tribe" would readily exercise rights and powers attached to the radical title. This idea of tribe as a land-holding or controlling unit has been mooted in reference to more contemporary societies.[11] Nevertheless, it must be rejected for both early and contemporary Chewa political systems. The pre-colonial state was not as well-knit, cohesive and centralised as the

static model of the structure depicts. Political and social instability characterised the system. Sub-groups continuously broke off parent stocks to get established in their own right. It was through fission and movement that the state encompassed such a wide area, but in the end the groups were so dispersed that "tribal" cohesion, necessary for "tribal" government and control of land, was probably non-existent.[12]

Even if cohesion was once detectable, it is a well-known historical fact that the centralised Chewa political state did not live beyond the pre-colonial period. By the time of the Ngoni and Yao invasions in the 19th century, the political structure consisted of small independent chiefs and their subjects. No common front of defence against the invasions was maintained. Most chiefs, including the incumbent Kalonga Sosola, succumbed. Those who were able to resist actually enhanced their own political standing.[13] Decentralisation, dispersal and autonomy of local chiefs were also features of the political systems of other pre-colonial groups in Malawi like the Yao, Tonga and Tumbuka.[14] It is therefore unlikely that "the tribe" was a land-controlling unit of such communities. The 19th century invasions lend further support to this argument. They intensified the intermixing and intermarrying of members of the different tribes. It is difficult to ascribe radical title to "a tribe" where a mixture of the various ethnic groups occupy land in one locality.[15] In any case, by the advent of colonial rule, some of the so-called "tribes" in Malawi were ubiquitous and nebulous entities, characterized as such because of linguistic or dialectical similarities rather than land occupation or control.[16]

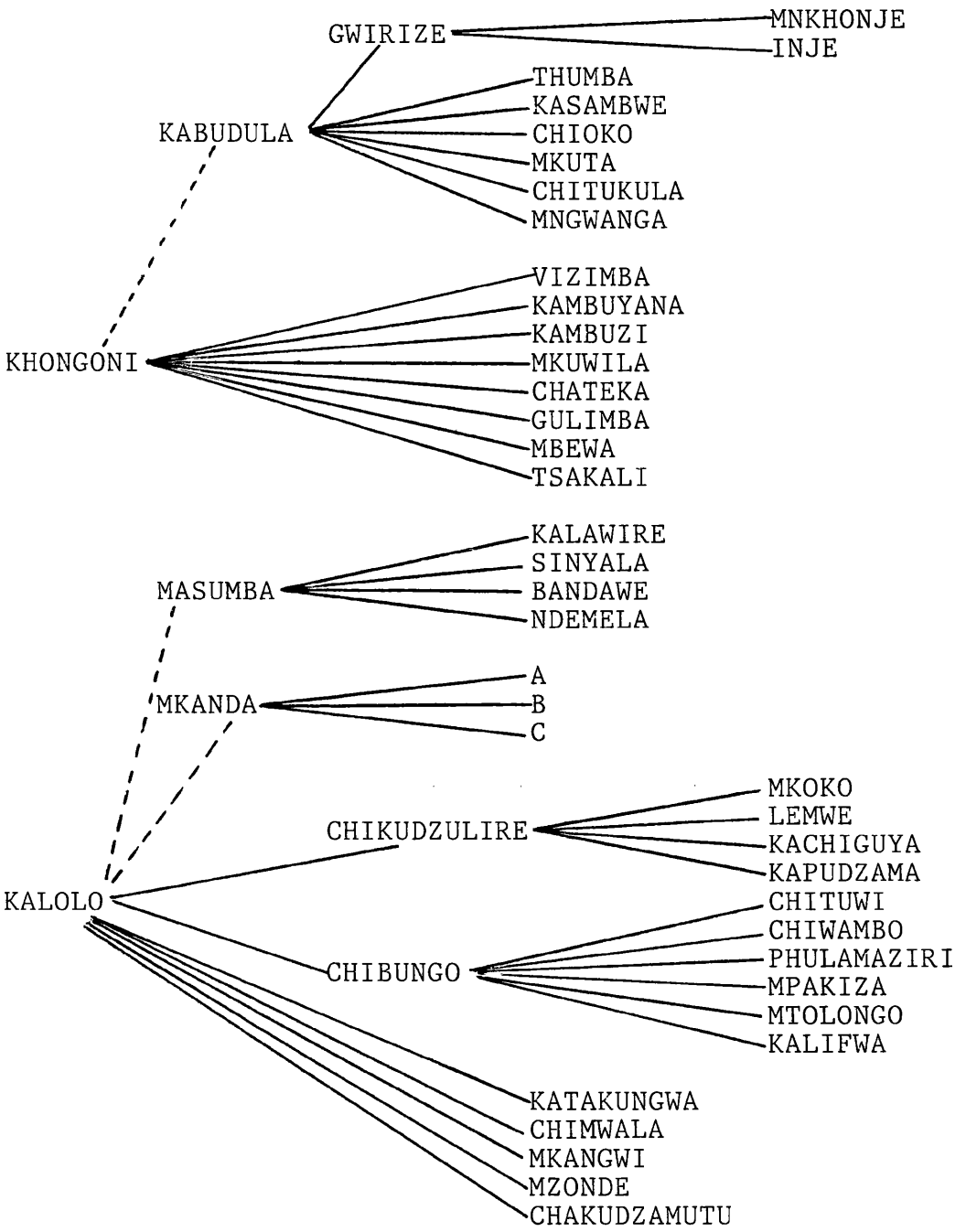
An ethnographical account of the Chewa suggests that clan membership was of more importance to the everyday life of an individual than tribal membership.[17] Clan membership was, however, equally irrelevant as a criterion for holding, controlling or using land. The origins of Chewa clan formations are shrouded in legends.[18] It would appear that clansmen and women could originally trace descent from a remote common ancestress. In local parlance, they regarded each other as abale or "brothers and sisters". Marriages between clan members were prohibited, and certain taboos were observed in certain clans. Beyond this, clan membership was of little value. Although the Kalongas used fellow Phiri clansmen as cornerstones of the Chewa state, ordinary land use and control in the villages was not necessarily organised along clan divisions.[19] Clan consciousness was eventually diluted by the dispersal of the Chewa within the state. Clan relationships became tenuous; intermarriage restrictions and the other taboos petered out. It is wrong to suggest, as some have done,[20] that land belonged to or belongs to the clan and could only be disposed of at its behest. The irrelevance of clan membership in land tenure is also observable among the Yao and Tonga, who used clan-names similar to those adopted by the Chewa.[21] It is also acknowledged all over central Africa.[22] The only Malawi group within which clan consciousness was strong were the Ngoni, who were of a different stock originating from South Africa.[23]

2 Localised Political Organization and the Control of Land

The Chewa chiefs left in control of the south-western plains of Lilongwe after the demise of the Kalongas and the central Chewa state can be divided into two groups.[24] The first group traced their authority to a "charter" from Kalonga, implying that they were despatched from "Malawi" to occupy the area as vassals of the King. Existing chieftaincies remotely associated with such "charters" include Chadza, Chiseka and Kalumbu. The second group owed their allegiance to Undi, a matrilineal kinsman of Kalonga who left "Malawi" to set up his own kingdom centred at the headwaters of the Kampoche river on the boundary of present-day Zambia and Mozambique. Existing chieftaincies of Kalolo, Khongoni, Kabudula and Malili belong to this group.

On arrival, each leader followed the process of assigning control of the surrounding areas to his Aphungu and Ambili. The leader was henceforth honoured by the title mwini dziko (literally and confusingly translated as "owner of the land"). This title was sometimes applied to junior leaders who were authorised to occupy larger sections and were responsible for the control of several smaller sectional leaders. The majority of Aphungu and Ambili possessed the title of mwini mudzi (literally translated as "owner of the village"). Every mwini dziko also controlled a village and was a mwini mudzi. Villages varied in size and composition: the largest were the villages controlled by senior political leaders. They were composed of several segments. Each distinct, semi-

FIGURE 2: LOCAL POLITICAL STRUCTURE AND LAND ALLOCATION IN WESTERN LILONGWE



autonomous and self-contained segment (mtunda) was controlled by a lineage leader who was entitled mwini mtunda. A leader of the title of mwini dziko was also invariably entitled mwini mzinda. Mzinda was a potent bundle of charms which enabled the holder to supervise the holding of initiation ceremonies, masked dances (gule wankulu) and other rituals. The mwini dziko could confer the powers of mzinda on a mwini mudzi who had grown in status.[25] Figure 2 depicts the political organization which emerged from these allocations. It is based on Kalolo, Khongoni and Kabudula chieftaincies in western Lilongwe.[26]

This diagram is neither exhaustive nor accurate. A complete picture cannot be presented within the space and with the information available. At the point of analysis, some political leaders were in transition from a lower to a higher rank: the political system was just as fluid as the previous centralised structure.[27] Some of the leaders depicted as eni mitunda eventually became eni midzi, but upward mobility thereafter was slow and occasional. It was finally halted, and in some cases reversed, by the imposition of indirect rule under colonial rule. The nomenclature of "chiefs" and "headmen" which was introduced failed to reflect social and political mobility in the system. This was complicated by the Chewa tendency of calling a political leader mfumu irrespective of whether he was a mwini dziko or a mwini mudzi.[28] Colonialism also had the tendency of rewarding those who co-operated with the new order and punishing those who did not. Some political leaders lost recognition in this way to usurpers who exploited the new order

of things.[29] The quest for recognition also encouraged the falsification of oral traditions relating to the status and seniority of political leaders.[30]

In their analysis of local political systems, some colonial administrators equated chiefs with land "owners" according to their understanding of this notion. One officer wrote:-

> "There seem to be definite grounds for the belief that in ancient times the chieftaincy of a Chewa tribe or clan was bound up with or derived from ownership of the land."[31]

Similar observations were made on the Yao and Ngonde by other commentators.[32] The belief arose from the fact that chiefs as land allocators were commonly described by the title mwini which can be translated as "owner". This literal translation, it is contended, obfuscated the precise nature of the land rights and duties of political leaders. A distinction should be drawn between a chief's political control of land and his rights as an ordinary villager. As the ultimate political authority, a chief was responsible for authorising land occupation in his domain. He was also the final arbiter of land disputes. But his control and authority did not extend to the use and exploitation of allocated land in the ordinary way. As a controller of a village, the chief also exercised all the land rights and duties vested in village headmen. These included settlement of land disputes at first instance; control over the use of public land and village amenities; and taking the first decision as to whether

new arrivals should be accepted as members of the village and allocated land. As an ordinary villager, a chief or a headman was entitled to an indefinite and uninterrupted use of allocated land.

If, as Obi suggests,[33] "ownership" should refer to the maximum rights and interests permitted by law to be reposed in an individual or group, it is a vague term with which to summarise the rights and duties of chiefs or headmen as described. It is impossible to state categorically that any one of these persons was an "owner" of the land. Chewa law did not repose maximum rights and interest over all aspects of land holding in an individual or group. Political leaders in particular were not "owners", since they had minimum rights and powers over the use of allocated land. The Chewa terms mwini dziko and mwini mudzi do not signify "ownership" but political control over a territory: they are administrative more than property concepts.

The fact that chiefs were not "owners" of land was recognized in some of the central African land tenure studies sponsored by the Rhodes Livingstone Institute after the Second World War. The theme of the researches was "individual ownership" of land and the role of the chief as "a trustee for the tribe".[34] This emphasis was intended to disprove earlier analyses of African land tenure in terms of "tribal or communal ownership of land". The "trust" concept was, unfortunately, equally inapposite. It suggested that the legal title to land was vested in the chief and the rest of the community possessed mere equitable titles.[35] The legal

title was neither the chief's nor the headman's preserve under Chewa law. All eligible members of the community possessed similar rights of exploitation and use of allocated land, irrespective of their political status. These rights were more than equitable. Political leaders enjoyed additional administrative rights, but these were not indicia of legal title. A less controversial term like "controller" summarises their position more accurately than the English property concepts of "trust" or "ownership".[36]

Stemming from the misrepresentation of chiefs as "owners" of land, questionable statements have appeared in some historical studies of pre-colonial and post-colonial Chewa societies on the social function of "tributes" (mituka). These were presents or gifts of various types which were periodically made to political leaders. It has been suggested that a political leader was entitled to collect tribute because "he was the ultimate owner of the land and had given positions as local owners to his subordinates".[37] Tribute was therefore "a thanksgiving for land granted."[38] It is a well-known historical fact that not all chiefs in the pre-colonial Chewa state received land "charters" from Kalonga. Some became sectional rulers by conquest or occupation of uncontrolled territory, but they purported to legitimise their authority by claiming "false charters" from Kalonga.[39] If land grants were the basic rationale for tributes, there was no incentive for these chiefs to oblige.

The nature and manner of offering tribute confirms that it was not necessarily a thanksgiving for a land grant. There were two types of tribute. The first, offered to paramounts and chiefs (eni dziko), was some form of "political tax". They expected the ground tusk of an elephant, or a haunch of game killed within their territory, and rarities like lion or leopard skins and feathers of certain birds. Such tribute could only be presented if and when the occasion arose: for example, when an elephant was killed during a hunt. Thus, when it is claimed that village headmen had an important duty "to give this tribute regularly",[40] it must be emphasized that this did not imply a fixed period of presentation. It was an important duty because repeated failure to do so was tantamount to denying the political superiority of the mwini dziko. He could take any remedial action, including waging war on the recalcitrant. This tribute fell into disuse after the imposition of colonial rule.[41]

The second type of tribute was received by village headmen from members of their village. It was mainly in the form of a basket of harvest or a pot of beer. This tribute was not demanded, but failure to present it regularly was anti-social behaviour.[42] Contrary to what has been stated,[43] such behaviour was not an offence and it did not lead to forfeiture of lands or banishment; it entailed a social disapprobation. This was only logical since Chewa villages were originally composed of matrilineal kinsmen and, to borrow from a statement on the Yao, no village headman "would tax his younger brothers"[44] or expel them from the village for failure to pay this "political tax". If a villager could not be deprived of

land for failure to offer this tribute, it follows that land allocation was not necessarily the basic rationale for its presentation or collection. This type of tribute did not relapse immediately after the imposition of colonial rule. The Chewa retained a deep respect for their political leaders and some of them continued to observe the well-established custom of presenting them with gifts. The conclusion to be drawn from this is that tribute was generally offered as a symbolic gesture, signifying one's allegiance to a political leader. It was "a thanksgiving" for the multitude of duties discharged by the leader, which included responsibility for defence, judicial and religious services. Land allocation was just as important as these other duties.

At the root of all the misconceptions on Chewa political control of land reviewed in this section is the term "ownership". Controversy surrounds the use of the word in any analysis of customary land law in Africa.[45] There is a school of thought, to which this account subscribes, which advocates avoidance of the term "unless its context and possible modes of use are specified".[46] This "requires one to investigate and list the actions which the potential owner under consideration may or may not perform in connection with the property he is alleged to 'own'. It is this specification, and not the employment of one English word or another, which is the more important task."[47] It may be added that attempts by some Malawian writers to qualify "ownership" with epithets like "absolute", "nominal" or "symbolic" do not amount to the required specification.[48] The following sections will attempt to describe some Chewa land rights without recourse to terms like "ownership" or "trust".

3 The Village and Categories of Land

The basic unit in the Chewa social and political structure, within which individuals and groups exercised land rights, was the "village" (mudzi). The original villages were established by political leaders of all grades who led the occupation of the land. They were composed of the matrilineal relatives of the leader and their relatives by marriage. The latter were predominantly male (akamwini) since the Chewa followed uxorilocal residence. There were relatively fewer females living in the village by virtue of marriage to senior male members (zitengwa). The original members of a village traced descent from a common ancestress (kholo) through females (mawele). They were led and represented by a senior, but not necessarily the oldest, male member of the lineage who could also be the village headman. Within the lineage were distinct groups of extended families known as mbumba. These were sub-lineages composed of uterine brothers and sisters and the children of the female members. They were led and represented by a senior male member called the mwini mbumba. The smallest unit within the mbumba was the simple family or household (banja), composed of a husband, wife and their children.[49]

Each mbumba had the potential of growing into an entity capable of establishing a separate village. This took place when the composition of the mbumba was multiplied by the marriage of the daughters of the uterine sisters. The younger generation could regroup into a separate mbumba under the control of a brother, distinct from the mbumba of their mothers under the control of an uncle. Group fission occurred along

the lines of these extended families. In the event of some internal conflict, the group of sisters under a brother could hive off to start anew on vacant land and eventually become the dominant lineage of a new village. When all the areas were brought under the control of various headmen, breakaway families sought membership in established villages or sought to have the original village subdivided. In more recent times simple families too have been breaking away from the mbumba to seek land in a new village.[50]

The fissiparous tendency of Chewa lineages has contributed to the present complex multilineal composition of villages, and this removes any lingering semblance of village corporateness. The original unilineal village had several indicia of a corporate entity. It had a name, usually that of its leader, which persisted through time; it was established on a distinct locality with fairly certain boundaries; there was a definite system of government; the leader acted for and on behalf of the village in its dealings with the outside world: the membership of the village was certain and definable; there was common control over the exploitation of family lands; and some properties like graveyards were used in common.[51] The multilineal composition of the villages due to population growth and lineage segmentation lessened any feelings of corporateness. The mbumba assumed importance in the control of land exploitation and the mwini mbumba replaced the village headman as the group representative to the outside world. Thus, most Chewa villages are no longer corporate land exploiting entities, although several of the above-mentioned indicia still exist.[52]

This lack of corporateness could also be seen in the tight categorisation of village lands over which varying rights were exercised. The important geographical features of the village were the village site, farmlands, pasture land (dambo) and the forest (tchire). Categorisation could proceed according to the different rights exercised in relation to these features.[53] The following categories could be identified: (a) allocated land; (b) public land or land subject to common use; and (c) unallocated land.[54] Allocated land was the category which individuals or families were authorised to occupy. It included the residential site (malo) and cultivable lands (minda). Families and individuals could also establish private graveyards and forests over this category. Since this land was for the exclusive use of persons to whom it was allocated, some individual rights in land have been associated with this category. Ibik identifies it as land subject to the "exclusive use of an individual".[55] This ignores the fact that cultivable land was often allocated to families and not individuals.

Some villages had compact residences built on a common site which was regarded as public land and not allocated land. This residential pattern may have been favoured during the heady days of wars and invasions: it facilitated the construction of defensive walls (malinga) and other strategies.[56] There is now no universal pattern of residential arrangement. Villages have compact residences on public land or isolated family residences surrounded by farmlands. A combination of both patterns can also be found in one village.[57] Other examples of public land were the village meeting ground (bwalo),

village graveyards, footpaths, wells and pasture-land.[58] Every member of the community was entitled to the use of the resources within this category. The exercise of "common rights" in village land was associated with this category. Public land differed from unallocated land in that no automatic right of use over the latter existed by virtue of village membership. The village headman exercised strict control over the "common use" of the resources within unallocated land. This category consisted of land reserved for future allocations and village forests.

The existence of varying rights over these categories and, in particular, the exclusive exploitation and control of allocated land by villagers is evidence of lack of corporateness over the use of cultivable land in a multilineal Chewa village. The existence of these categories also shows the inaccuracy of summarising customary land tenure as either communal or individual. In Amodu Tijani v. The Secretary, Southern Nigeria, Viscount Halden cited with approval the following statement on African land tenure which has been echoed in Malawi:

> "... the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All members of the community, the village or the family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family."[59]

The use of "ownership" or "trust" in analysis of customary land law has already been criticized. The categories of land reviewed above show that all members of the community did not possess equal rights to all land in the village. All members were entitled to the use of public land and sometimes unallocated land, but not allocated land. The existence of exclusive individual rights over some categories of land is also acknowledged in Malawi and other African countries.[60] This statement thus grossly misrepresents African land tenure. Some of the errors in the statement will become apparent in the following sections.

4 Family and Individual Rights over Allocated Land

The family for our purposes can be "loosely" described as a unilineal descent group. It is a matrilineage if descent is traced through females and a patrilineage if it is traced through males. This definition applies equally to maximal or minimal lineages. It is therefore admittedly too general for analysis of group rights in land.[61] Such rights were among the Chewa exercised within smaller segments of the matrilineage identified above as the extended family (mbumba) and the simple, individual household (banja).[62] The important land-holding members of these minimal lineages were women, since the Chewa followed uxorilocal residence after marriage. This led to claims that Chewa men acquired land rights only through marriage and that these were necessarily transient because of the relative impermanence of marriage. Such claims drew support from the common Chewa saying that a husband (mkamwini) was a mere begetter of children, a billy-goat![63] However, such assertions did not reflect an unbending rule of law. Adult male

and female members of the extended family had equal rights in family land so long as they were living in the village of the matrilineage. A prime example here was the family guardian who opted for virilocal residence in order to be near the family. His rights in land were not different from those of the women members. This was also true of unmarried or widowed members and spouses who acquired permanent rights in land.

When Chewa villages were originally founded, or when a family sought land in a different village, the family leader (mwini mbumba) was authorised to select a suitable plot within the village. The boundaries were then delineated if the choice did not conflict with the interests of other villagers. The leader allocated sections of the plot to the various households within the mbumba. It is emphasized that the family leader was free to select an area suited to the requirements of his family, but this was not an open mandate for the family to continue appropriating unallocated land after the initial allocation. The family leader approached the village headman for more land if it was required. There was no guarantee that extensions would be made on land adjacent to the existing holding, and this contributed to fragmentation of family holdings. The Chewa of western Lilongwe are in this respect different from other African societies, who permitted a man to bring under cultivation as much unallocated land as his might could master.[64]

The family leaders were invariably male, but this did not mean that "women could never own land" or that "if they came into the position of 'owner' by succession or chieftainship, they were only regarded as holding it on trust for the next male heir".[65] As observed above, women formed the core of the Chewa mbumba. They possessed important rights in land, irres-

pective of the fact that they were represented by male leaders. The position of the family leader should not be confused with that of an "owner" or a "trustee". Criticisms voiced against this kind of analysis with regard to chiefs and headmen equally apply here. Although the family leader acted for and on behalf of the family in land transactions, he was neither a trustee nor an owner (even in a loose mode of speech). He was simply a spokesman and manager of family affairs.

The managerial powers of the family leader were not unlimited. He could not alienate portions of family land without the consent of senior family members, and he did not wield absolute powers of control over the exploitation of the land. The Chewa, unlike some West African societies, did not reside in one family compound or exploit family land as one group.[66] Gardens were allocated for separate exploitation by individual adults or households. A new son-in-law was sometimes expected to assist the wife's parents and fed from the mother-in-law's granary. This was mere tutelage which rarely continued beyond one season. Thereafter, the new household cultivated its own gardens and retained for exclusive use the fruits of their endeavour, save for occasional assistance to needy family members. The exclusive use of gardens did not, however, prevail over group proprietorship of family land. It is said of the Yao that men and women held land "as their own individual property" and that the head of the matrilineage and the asyene (mwini) mbumba had "no right whatsoever over the gardens cultivated by his dependants".[67] This was not true of the neighbouring Chewa. The mwini mbumba did not ordinarily interfere with the cultivation of gardens, but he could prevent the use of gardens in a manner prejudicial to family interests. He could, for example, prevent unauthorised alienation of gardens

to non-members. He could also persuade a member to surrender his or her garden to a fellow member who was short of land. But the family leader had no rights over gardens acquired in an individual capacity outside the family allocation.

Group proprietorship also prevailed when gardens were abandoned or left to fallow for an excessively long period. These gardens reverted into the family pool for re-allocation. The village headman resumed control over them only when he was so authorised by the family, or if the entire family had moved out of the village. This point has not been readily appreciated by those who claim that abandoned land and fallows immediately fell back into the village pool, or that claims over fallows are a recent phenomenon.[68] Claims over fallows increased because of land shortage, but they were not unheard-of in the past. Group proprietorship was also manifested when land fell vacant because of death. The family had residual powers to allocate the gardens to any deserving member of the family.

The omnipresent family control over the disposal of gardens, irrespective of the fact that they were tilled separately; the defined structure, membership and decision-making process within the family; the concerted action of the members in social and other matters; and the existence of family properties like graveyards and forests, are some of the factors which permit the attribution of corporate status to the mbumba. However, the existence of corporately held family lands was not a universal or abiding feature of Chewa land tenure. An increasing proportion of villagers held land as individuals or as individual households. This was mainly due to "new arrivals" (obwera or okhala nawo) seeking land for individual or immediate family use rather than for the use of the mbumba.

There was no difference in the procedure for acquiring family land or individual holdings. The request for land and its estimated size were presented to the village headman of the area. It was previously assumed that the land was required for farming and residence. This ceased to be the case in some areas when continuous residence in the village was no longer the prerequisite for a land grant. General land shortage and the growth of towns led to the acceptance of the fact that the applicant could be a member of a neighbouring village which did not have sufficient land, or could be residing at his place of work in some town.[69]

Where continuous residence was no longer a prerequisite for a grant, it became necessary for the applicant to indicate whether land was required for farming, residence or business premises. For farming and residential land, the village headman endeavoured to ascertain why the applicant wanted to leave his village of origin. He was required to bring a close relative who would vouch for his identity and witness the transaction. Counsellors and village elders were consulted before any allocations were made. If there were no objections, the applicant selected his plot and boundaries were marked. A day was then fixed for the presentation of the new member to the chief of the area (mwini dziko). Cash or other consideration was not demanded for the allocation; but it was customary for an individual to offer presents to the headman on the selection of the plot, and to the chief on confirmation of his village membership. It was said that a man could not be brought before the chief "empty-handed"![70] In some areas presents were also expected when the individual or family intended to participate

in village ceremonies like initiation, or if they intended to bury their dead and "shave" in the new place of settlement.[71] Presents could also be required after the first harvest, but the "normal tributes" to the village headman applied thereafter.

The new arrivals were entitled to all the "common rights" exercised by the rest of the villagers after the allocation was confirmed by the chiefs and they had commenced cultivation. It is therefore inappropriate to continue calling these people "strangers".[72] They were also entitled to exclusive and uninterrupted use of allocated land for as long as they remained in the village and cultivated the gardens, or until the gardens were surrendered, abandoned or forfeited. This indefinite and exclusive right of cultivation has often been termed "usufruct" of customary land.[73] It has been shown elsewhere that the Roman usufructuary merely enjoyed a jus in re aliena (a right over the land of another) and was bound to return the holding unimpaired to the dominus after a fixed period of time.[74] This concept is not an accurate resume for the enduring rights held in customary land.

5 Common Rights over Public and Unallocated Land

The most important "common rights" in land in a Chewa village were associated with the Dambo and the village forest. Dambos are low-lying swampy areas which criss-cross the undulating Lilongwe plains. Common rights associated with these areas were the right to graze animals; the right to open dimba

(stream) gardens; the right to sink wells; and the right to water animals in the dambo. Village forests were associated with the right to collect firewood, timber and wild fruits, and the right to hunt. It is generally assumed that every member of the community was entitled to free use of the resources within the dambo and the village forest.[75] Evidence from Lilongwe suggests that this was not necessarily the case. Different rules governed the common use of public and unallocated land.

(a) Rights over Public Land

Special permission was not necessary for the use of land or natural resources within this category. Cattle could be grazed or watered in the dambo or water drawn from the village well without consulting the headman. These rights were not even limited to members of one village. Dambos usually formed the natural boundary for several villages, and all members of the surrounding communities were entitled to their exploitation. Chiefs or headmen did not attempt to allocate or restrict grazing patches to separate villages or families.[76]

The liberal exploitation of the resources of the dambo extended to the opening of dimba gardens which were valuable for growing vegetables and out-of-season crops. Dimba gardens were treated as the individual property of the cultivator. Even if the person was residing uxorilocally, he was free to dispose of the garden without consent of his wife's family.[77] Village headmen had no control over the opening of dimba gardens in the dambo in the same way that they could not control

the grazing of cattle therein. It was up to the cultivator to ensure that the garden was well protected from grazing animals. This could be done by encircling the garden with sisal plants or thorn branches.

At the time of fieldwork, the lax rules on the opening of dimba gardens were in the process of being changed. Some political leaders began to assert control over the opening of gardens within their side of the dambo by non-members of the village. Evidence of this change was gathered from areas of western Lilongwe where vegetable cultivation on a commercial scale was gaining prominence. Some farmers in these areas had tenders to supply fresh vegetables to markets and institutions in the city of Lilongwe.[78]

(b) Rights over Unallocated Land

The resources associated with unallocated land were not as liberally available as the resources of public land. Villagers were free to pick firewood and wild fruits from the village forest without permission, but claims that they could also hunt game or cut timber without permission are not supported by oral testimony.[79] The exercise of these rights was strictly regulated because control of virgin bush was of symbolic importance to chiefs and headmen: it was associated with the power to hold mizinda. Virgin bush was a mark of social and political status; the larger the size of the bush, the more senior the status of the controller. Firing the bush and hunting game were simultaneous annual events of great importance to the controller of the bush (mwini tchire). It was a

serious offence to fire the bush prematurely, without permission for the controller. He was entitled to exact any redress he saw fit. The felling of trees within the bush was also strictly controlled by the mwini tchire, even if it was by the members of the village.

These rights over unallocated land have almost disappeared in some villages. Expanding settlements have swallowed virgin bush, converting unallocated land into allocated gardens. This has encouraged the planting of trees on allocated land over which exclusive rights are established by the planter. But where common effort is used to plant the trees, they become common property controlled by the headman.[80]

6 Transfer of Rights in Land

The Chewa originally acquired rights in land by conquest and assimilation or displacement of the conquered, or by occupation of vacant lands. Thereafter families and individuals acquired land rights through allocations supervised by established political rulers. These processes have been considered in previous sections. There were other forms of derivative acquisition and disposition of land, like succession, gifts, sales and loans, which must be noted briefly.

(a) Succession

Acquisition of land rights by succession has been gaining prominence because of land shortage. Succession to gardens was not problematic: every member of the family was given a

garden on attainment of adulthood. There was little contest for the gardens of the deceased, especially if they were not of special value or proven fertility. The family head had a relatively free hand in re-allocating gardens left by the deceased to the most needy members of the extended family. There was, nevertheless, a preference for a certain class of successors, and the marital residence of the deceased was an important factor in the selection of this class.

The gardens of a man residing uxorilocally were usually left to his wife and children. His matrilineal kinsmen were not eligible. Where the man was residing in his village of origin, the eligible class of successors comprised nephews and nieces. Strict law here was tempered by practice. The widow and children who chose to remain in the village were allowed to continue cultivating the gardens. This choice was readily accepted if amicable relations had existed between the family of the deceased and his matrilineal relatives. It was also accepted if the widow was too old to remarry or return to her matrilineal village. Leviratic associations were not common; if they took place, the gardens of the deceased continued to be cultivated by the wife and children, but under the control of the new husband.

If the deceased was a woman residing virilocally, the surviving husband assumed complete control over the gardens. In the case of the usual pattern of uxorilocal residence, the gardens were left to her daughters and sons. The husband was expected to return to his matrilineage. This rule was again tempered by practice. A son-in-law who was too old, or had

lived in the village for such a long time that it was practically his home, and had begotten many children, was allowed to remain and acquired permanent land rights in the village. A favourite son-in-law was sometimes given a second wife from the matrilineage. In that case, some of the gardens of the deceased were allocated to the new wife. There was no preference for a particular group of successors to take over gardens of unmarried adults. They reverted to the family pool for reallocation to the most deserving members.

Land shortage has been undermining the flexibility of the succession rules. It is now extremely difficult for the family leader to secure land in the village for every member on the attainment of adulthood or for every newly-married couple. It is therefore easier for young men to opt out of uxorilocal residence. This has facilitated the acquisition of land by individuals and simple families outside the matrilineage, resulting in several changes to the succession rules. Where virilocal residence is chosen, parents are opting for a subdivision of their gardens amongst their children before death in order to pre-empt the claims of the matrilineal successors. Where land is acquired outside the matrilineage of either spouse, the surviving spouse and children will be preferred to matrilineal successors (nephews and nieces). Settlement in a different village is being regarded as proof of a man's desire to provide for his immediate family. Succession rules are thus evolving to benefit the simple family (banja) more than the extended family (mbumba) where land is acquired in an individual capacity outside the lineage of either spouse.

(b) Gifts

Gifts of land or gardens were not a very common method of transferring rights in land. Little distinction, if any, was drawn between an ordinary allocation by the headman or family leader and a gift. The terms and conditions which applied to the users of land acquired through allocations also applied to acquisitions which resembled gifts. In more recent times, with increasing land shortage, the most quoted examples of gifts invole transfer of land from parent to child. The aim is to evade the operation of matrilineal succession rules which prefer nephews and nieces to the offspring of the holder.

(c) Sale of Land

The transfer of land in return for cash or other monetary consideration is a controversial topic in African law. In Malawi, controversy originated from the alienation of land to early European settlers by traditional leaders. Cash and other presents were received by the leaders in return for the allocations. These transactions were regarded as sales transferring rights in freehold by the recipients and the colonial government.[81] The resulting hue and cry from Africans and scholars of African law was perhaps not unpredictable. It was claimed for most ethnic groups in Malawi that chiefs had no power to sell land. This was prohibited because of religious reasons. In the oft-quoted words of a west African chief, land belonged to a "vast family of which many are dead, few are living and countless members are unborn."[82]

Sweeping generalisations can be misleading here. The fact that sale of land was unknown should not be confused with a clear prohibition. The possibility and existence of legitimate land sales are now acknowledged in several African societies.[83] The Chewa of Lilongwe are, however, emphatic in their assertion that although sale of land was unknown to their ancestors, it still cannot be done. Land is not conceived as a saleable commodity. It is preferred to incorporate land seekers into the community by allocations rather than sales, so that the new holders should not be in a position to ignore "common" rights and interests. Religious inhibitions are not cited as the reason for the lack of commercial dealings in land. There was no incentive for buying or selling land in the past: free land was easily obtainable. Now, land sales are not contemplated because of lack of sufficient land. Land shortage has thus contributed to the stressing of the inalienability of land,[84] instead of encouraging commercial transactions.[85] When land was available, chiefs and headmen were eager to receive new settlers. This was abetted by the system of local administration introduced under colonial rule which measured the status of a leader by the number of names in his tax book.[86] Alienations were freely made; the rights of "the dead" and "unborn" especially were easily ignored!

(d) Land or Garden Loans

This was a very common method of acquiring interest in land for a short period.[87] Gardens were loaned when the occupier was temporarily unable to utilize the field for reasons like absence from the village. The intention was not to part

with the land permanently. The procedure was uncomplicated. The borrower identified individuals or families with spare gardens. If a borrower was a close relation or fellow villager, consent of the village headman was not necessary. Consent was necessary in all other cases, but it was not unduly withheld so long as the family of the lender raised no objection to the transaction. The necessity for consent did not depend on the length of the loan but on the village status of the borrower. It was prudent for the parties to inform the headman if any lengthy loan was contemplated. This, however, was not a requirement where both parties were fellow villagers. The duration of the loan could be left unspecified. The lender was free to demand the return of the garden at any time after the expiration of a reasonable notice.[88] A notice was deemed reasonable if it gave the borrower sufficient time to harvest standing crops and was tendered before clearing the field for the next crop had begun.

A loan of a garden should not be confused with an outright grant, especially where consent to the grant by the chief (mwini dziko) was dispensed with because the applicant was already a member of one of the villages within the domain of the chief.[89] In such cases loans were distinguished from grants by the fact that they were usually made on fallowing gardens (masala). Outright grants were made on virgin bush or unallocated land. Loans should also be distinguished from leases. Gardens were not loaned for any fixed rent or consideration. The borrower was expected to give the lender a small gift of the produce after harvest,[90] but the lender had no right to demand its presentation. Failure to observe the

custom could, however, tempt the lender to tender notice for the return of the garden.

The rules on garden loans appeared to be undergoing a process of change at the time of fieldwork. It was reported in some parts of Lilongwe that individuals were demanding cash in return for the temporary use of a garden. Some informants reported that creditors were also allowed to use a garden for a season or more in lieu of cash repayments (pinyolo).[91] Tobacco and groundnut fields were popular for these arrangements. Transactions akin to pledges or mortgages were previously unknown under the customary laws of the area. The emerging changes were confined to small sections of western Lilongwe and could not be confirmed by court cases.[92] A detailed analysis of the rules and procedures of the new dispositions should, therefore, await more concrete and widespread evidence.

The introduction of the cash factor in garden loans was regarded as a spin-off from the practice of renting houses for cash, which was widespread in the peri-urban villages surrounding the city of Lilongwe. Renting and selling of houses were also unknown under customary law. Houses were personalised properties over which very little had been expended on construction. They were knocked down after the death of the occupier. The observance of this custom relaxed where permanent and expensive houses were involved. They became part of the inheritable estate of the deceased and could be let for cash; but there was little evidence of outright house sales in the rural areas.

(e) Compensation and Fines

The transfer of land as an atonement for a wrong or injury was one of the less known ways of acquiring or transferring rights in land. This type of compensation was rarely ordered. The order could only be addressed to a political leader of the rank of mwini mzinda who was vicariously responsible for the grave misdeeds of his subjects. Very few incidents are recalled for which this compensation was demanded. One example was the accidental killing of a man during the annual hunting ceremony. The controller of the bush (mwini tchire or mwini mzinda) was expected to allocate a small portion of the bush within which the death occurred to the dead man's family. The transfer of land as a fine (lipo) for deaths caused by plain killings or sorcery was more common.[93] The rules and procedure which governed these transactions are not clear, but it can be surmised that they were not different from ordinary grants. These were ancient customs which fell into disuse after the imposition of colonial rule and a new legal order.

(f) Extinction of Rights in Land

The extinction of rights in land was either voluntary or involuntary. Voluntary extinction occurred where the holder expressly surrendered and released the holding to the village headman. This was common where the holder had found a suitable allocation elsewhere. Land rights were also deemed to be extinguished if the holding was abandoned or remained unused for an unreasonably long period.

Involuntary extinction of land rights occurred where the family or an individual were forcibly evicted from the community. This was rare and a measure of last resort, adopted after the holder was found guilty of extreme anti-social behaviour. Examples of such behaviour were: challenging the legitimacy of an established ruler's political authority; disregarding important customs like the annual bush-burning ceremony or disrespecting masked dancers (kunyoza gule); practising witchcraft; and persistent criminal conduct. Expulsion from the village, like admission, had to be endorsed by the mwini dziko. Even in the severest cases, the expulsion could be rescinded if the land-holder ceased to be a menace to the society.[94] Involuntary extinction of rights in land also occurred where no successor could be found to take over a dead man's holding.

7 Summary and Conclusion

Although this chapter has concentrated on customary land law in one area, some of the rules discussed can be regarded as fairly representative for all the Chewa in central Malawi. They after all share a common history, culture and tradition. It would also appear from the writings of Ibik that there is a general uniformity in the land laws of the various ethnic groups in Malawi.[95] It is now necessary, in conclusion, to take stock and recapitulate on the issues raised in the chapter which are of importance for a better understanding of customary land law in Malawi, particularly in the matrilineal areas.

The first preliminary point is on the language of analysis. It has been suggested that political control of land by chiefs, village headmen or family leaders should not be confused with "ownership" or the concept of a "trust" as understood under English law. The Chewa term mwini by which traditional political leaders are commonly described denotes administrative control of community or social matters, but not "ownership" of the land. It has been submitted that analysis of land rights and duties of the political leaders can proceed without recourse to this and other controversial foreign property terms. This submission is scarcely novel in African land tenure studies. It is reiterated here because even more recent descriptions of customary land law in Malawi contain inaccurate statements and misconceptions which can be retraced to the use of the word "owner".[96]

The second issue of importance in the study of customary land law in Malawi is the nature of group rights in land. Viscount Halden's remark that land in African societies "belongs to the community, the village or the family, never to the individual" has been echoed in some of the Malawian accounts.[97] This chapter has suggested that it 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 clans, and 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 village land categories.

The reference to group or "common" rights in land is sometimes intended to stress the inalienability of customary land. As will be seen in subsequent chapters, this has been a controversial topic in Malawi ever since land was allegedly sold by some heedless chiefs to early European settlers immediately before the introduction of colonial rule. There is unanimity that chiefs and other traditional leaders had no right to sell land; but there is no evidence to support claims that absence of land sales was due to religious inhibitions or the low value of crops grown thereon.[98] It can be surmised that the concept was initially unknown. Land was alienable, but only to persons or groups who were willing to become members of the community and be subjected to societal restraints and conditions on its user. This type of alienation has survived the introduction of an agricultural cash economy and the enhancement of land values. Population increases and the need to conserve land for "future generations" are now the most likely explanations for absence of land sales in the new economy. The paradox is that land shortage is often regarded as a factor which can facilitate commercial dealings in land.[99]

As will be seen in later chapters, the preservatory "instincts" of the controllers of customary land and the preponderance of group or "community" interests therein have been singled out as major defects of the system. It has been

claimed that the individual has no precisely definable rights in the land, no security, and thus no incentive to invest in it.[100] This chapter suggests, on the contrary, that despite "community control" over alienation, individuals and groups do enjoy some relative "security" in the use of allocated land. Succession is another species of land disposition which is considered to be a defect of customary land law in a matrilineal society.[101] There is a general preference for uxorilocal residence and the selection of nephews and nieces to succeed to the property of a man under matrilineal customs. It cannot be denied that this system does not encourage men to invest in the land, especially where marriages are relatively impermanent. But the defect should not be overemphasized. This chapter has attempted to show that matrilineal marriage and succession rules are evolving to benefit "simple families" or households and the immediate offspring of a man and wife. Moreover, it has never been proved that matrilineal societies lag behind the patrilineal ones in agricultural production; the available evidence in Malawi would in fact suggest the contrary. Matrilineal areas like Lilongwe are renowned for agricultural productivity. The role of women, the important bearers of land rights, must not be overlooked here.[102]

One final issue of importance which has not featured in the discussion so far is the state of boundaries under customary law. It has been claimed that old chiefs in Malawi had little idea of fixed boundaries, and that land boundaries were vague and impermanent.[103] This is debatable to some extent. Boundaries were inevitably not as fixed or certain as they can be after modern-day surveys. The concept of boundaries was,

however, fully appreciated. The first colonial administrator observed:

> "... The natives have a clear idea of the boundaries of large or small estates, or of their kingdoms; and in the case of the former they are marked by the planting of certain trees of quick growth, while of course streams and mountain ranges are recognised as boundaries and natural limits of territories." [104]

This was especially true of south-western Lilongwe, where the dominant topographical features are undulating plains criss-crossed by many streams, rivers and dambos. Interviews indicated that chiefs and headmen were aware of the limits of their territories and villages. Most of the boundary disputes reported were inter-garden and not "inter-village" or "inter-territorial". This, however, is not to deny the importance and necessity of surveyed, "fixed and certain" boundaries.

NOTES TO CHAPTER II

1 A. Werner, The Natives of British Central Africa, London, 1906, p. 24.

2 J.G. Pike, Malawi, A Political and Economic History, p. 37. "Maravi" was a corruption of the name "Malawi" which the independent government adopted as the name of the country. For the meaning of the name "Malawi", see J.M. Schoffeleers, "The meaning and use of the name Malawi in Oral Traditions and Precolonial Documents" in B. Pachai (ed), The Early History of Malawi, Longman, London, 1972, pp. 91-103.

3 W.H.J. Rangeley, "Notes on Chewa Tribal Law", The Nyasaland Journal, Vol. 1, No. 3, 1948, pp. 5-68, particularly pp. 51-54.

4 J.O. Ibik, Restatement of African Law: 4, Malawi II, The Law of Land, Succession, Moveable Property, Agreements and Civil Wrongs, London, Sweet and Maxwell, 1971, Ch. 2, pp. 11-23.

5 See M.G. Marwick, "History and Tradition in East Africa through the eyes of the Northern Rhodesia Chewa", Journal of African History, Vol. 4, 1963, p. 318; Sorcery in its Social Setting, A Study of the Northern Rhodesia Chewa, Manchester University Press, 1965, pp. 22-33; and B. Pachai, Malawi, The History of the Nation, Longman, London, 1973, p. 5. The works cited also narrate other, less popular oral traditions on the origins of the Chewa.

6 K.M. Phiri, Chewa History in Central Malawi and the use of Oral Tradition, unpublished Ph.D. thesis, University of Wisconsin, 1975, p. 52, claims that the first state founded by the Kalongas was established before or after 1480. E. Alpers, "The Mutapa and Malawi Political Systems to the Time of Ngoni Invasions", in T.O. Ranger (ed.), Aspects of Central African History, Heinemann, London, 1968, claims

that the Malawi empire dates from Kalonga Masula's defeat of Lundu between 1608 and 1620.

7 Price, op. cit., p. 37; cf. Alpers, op. cit., p. 28

8 Phiri, op. cit., pp. 51-56 and H.W. Langworthy, "Chewa or Malawi Political Organization in the Precolonial Era", in B. Pachai (ed.), The Early History of the Nation, pp. 104-122.

9 This paragraph and figure 1 are based on oral testimonies of the Traditional Authorities and village Headmen listed in the Bibliography. In the rest of the Chapter, where no specific note is cited on a point of customary law, it must be taken that there was unanimity among my informants. See Phiri, op. cit., p. 75 for a slightly different depiction of the Chewa political state. File SI/123/36, Folios 101, pp. 10-16 and 207, pp. 28-23, National Archives, Zomba, Malawi, also contains some valuable information on the early Chewa political organizations.

10 B.P. Wanda, Colonialism, Nationalism and Tradition, Vol. 5, p. 192.

11 Ibid., H.H. Johnston, British Central Africa, Methuen and Co., London, 1897, p. 113; and S.S. Murray, A Handbook of Nyasaland, 1932, p. 299.

12 K. Phiri, "Early Malawi Kingship and the Dynamics of Precolonial Chewa Society", Journal of Social Science, Vol. II, 1973, pp. 21-22, and M. Tew, Peoples of the Lake Nyasa Region, Ethnographic Survey of Africa, London, 1959, p. 34.

13 Langworthy, op. cit., pp. 107-109; Pike, op. cit., pp. 40-45; Phiri, Chewa History in Central Malawi, pp. 228-230; Tew, op. cit., p. 45; and S.J. Ntara, The History of the Chewa (Mbiri Ya Achewa), Wiesbaden, 1973, pp. 130-140. In South-Western Lilongwe one of the local chiefs who gained prominence for resisting the Ngoni invasions was Chief Kalolo. This information was supplied by V.H. Dzuluwanda

of T/A Kalolo, Lilongwe, on 22nd June 1981.

14 Tew, op. cit., p. 60; J.C. Mitchell, The Yao Village, Manchester University Press, 1956, p. 31; and J. Van Velsen, The Politics of Kinship, Manchester University Press, 1964, pp. 287-288.

15 Colonial rule further intensified this intermixing of the various ethnic groups. For more recent examples of several tribes occupying land in one locality, see D.G. Bettison, "The Social and Economic Structures of Seventeen Villages, Blantyre-Limbe, Nyasaland", Rhodes Livingstone Communication No. 12, Rhodes Livingstone Institute, Lusaka, 1958, p. 50; and "Demographic Structure of Seventeen Villages, Blantyre-Limbe, Nyasaland", Rhodes Livingstone Communication No. 11, 1958, p. 19. In such localities, even if a dominant tribe can be identified, it does not necessarily follow that its customary laws will prevail over the others. A.W.R. Duly, "The Lower Shire District, Notes on Land Tenure and Individual Rights", The Nyasaland Journal, Vol. 1, No. 2, 1948, pp. 21-22 and generally, pp. 11-44, shows how Sena and Magololo influence has significantly altered some of the marriage customs of the Mang'anja of Lower Shire. Like all "Maravi" peoples, the Mang'anja were matrilineal and practised matrilocal marriages. Because of Sena influence they apparently began to follow patrilineal succession (except in succession to political office), patrilocal residence, payment of bride-price and leviratic marriages. These changes have had a significant impact on land tenure.

16 See G.T. Nurse, Clanship in Central Malawi, Ethnologica Et Linguistica, Nr. 41, Wien, 1978, p. 20, for a definition of a "tribe".

17 Ibid.

18 For a detailed account of the origins of Chewa clan formations and their societal functions, see: Ntara, op. cit., pp. 6-7 and p. 78; File SI/123/36, Folio 101, National

Archives, Malawi; and A.G.O. Hodgson, "Notes on the Achewa and Angoni of Dowa District of the Nyasaland Protectorate", Journal of the Royal Anthropological Institute of Great Britain and Ireland, Vol. 63, 1933, p. 143.

19 Duly, op. cit., pp. 24-45; and Nurse, op. cit., pp. 17-19.

20 Wanda, op. cit., p. 6.

21 Van Velsen, op. cit., p. 44 and Mitchell, "The Yao of Southern Nyasaland" in E. Colson and M. Gluckman (ed.s), Seven Tribes of British Central Africa, Oxford University Press, 1951, pp. 313-314.

22 C.M.N. White, "Terminological Confusion in African Law Tenure", Journal of African Administration, Vol. X, 1958, pp. 124-130, quoted by Rubin and Cotran (ed.s), Readings in African Law, Frank Cass and Co., 1970, p. 257.

23 M. Read, The Ngoni of Nyasaland, Oxford University Press, 1956, pp. 116-119.

24 Ntara, op. cit., pp. 52-55, 58-59 and 78-82. Oral testimonies of Chiefs and Headmen listed in the Bibliography confirm Ntara's discussion here.

25 Phiri, op. cit., pp. 75-76.

26 Figure No. 2 is based on the oral testimonies of Chief Kabudula, V.N. Nyanza and Kambuyana, and Chief Kalolo. See also Ntara, op. cit. pp. 78-82; and File SI/123/36, Folios 101 and 207, National Archives, Malawi. The terminology used in the figure is plural. "Eni" is the plural form for "mwini"; "Mitunda" for "mtunda", and "midzi" for "mudzi".

27 Langworthy, Introduction in Ntara op. cit. pp. xiv-xvii.

28 Read, op. cit., p. 47.

29 File SI/123/36, Folio 2, District Commissioner, Lilongwe to Senior Provincial Commissioner, Northern Province, 9th May 1936, National Archives, Zomba; Mitchell, op. cit., p. 348; and Duly, op. cit., pp. 19-20.

30 Mkanda and Masumba in Western Lilongwe, for example, claimed that they deserved the status of a chief because their predecessors were eni dziko. Existing chiefs of the area hesitated to confirm such claims, although corroborative evidence can be found in Ntara, op. cit., p. 79. It may be that the Chiefs were falsifying oral traditions to create an exaggerated impression of their previous omnipotence. It may also be that Mkanda and Masumba were moving up the political structure but had not yet reached the pinnacle.

31 File SI/123/36, Folio 101, p. 10.

32 Duff MacDonald, Africana or Heart of Heathen Africa, Vol. I, Dowson of Pall Mall, London 1969, p. 154 and D.R. MacKenzie, The Spirit Ridden Konde, London, 1925, p. 93.

33 S.N.C. Obi, The Ibo Law of Property, London, Butterworths, 1963, pp. 43-44.

34 M. Gluckman, "African Land tenure", Human Problems in British Central Africa, Rhodes Livingston Journal, No. 3, June 1945, pp. 1-6; G. Wilson, "Land Rights of Individuals among the Nyakyusa", The Rhodes-Livingstone Papers, No. 1, Livingstone, 1938; Van Velsen, op. cit., pp. 276-280; Duly, op. cit., pp. 11-44; and Mitchell, "Preliminary Notes on Land Tenure and Agriculture among the Machinga Yao", The Nyasaland Journal, Vol. V, No. 2, 1952, pp. 18-50. See Wanda, op. cit., p. 9 and Pachai, Land and Politics in Malawi, p. 8 for more recent accounts, referring to political leaders as "trustees".

35 K. Bentsi-Enchill, Ghana Land Law, Sweet and Maxwell, London, 1964, p. 43.

36 A.N. Allott, "Family Property in West Africa: Its Juristic Basis, Control and Enjoyment" in J.D. Anderson (ed.), Family Law in Asia and Africa, London, 1968, p. 125. Mitchell, op. cit. p. 20, prefers to refer to the chief by another less controversial word - "warden".

37 Langworthy, op. cit., p. 116.

38 Rangeley, op. cit., p. 52.

39 H. Langworthy, "Understanding Malawi's Precolonial History", The Society of Malawi Journal, Vol. XVII, 1970, p. 35 and Phiri, op. cit., pp. 59-69.

40 Rangeley, loc. cit.

41 File SI.123/36, Folio 112, National Archives.

42 The testimony of my informants does not support the claim in file SI/123/36 that this tribute was fixed and paid every year.

43 Rangeley, loc. cit., and Tew, op. cit., p. 45.

44 MacDonald, op. cit., p. 153.

45 See E. Cotran and N. Rubin, op. cit., pp. 259-270 and M. Gluckman, The Ideas in Barotse Jurisprudence, Yale University Press, 1965, p. 75.

46 Allott, op. cit., p. 123.

47 Ibid.

48 Wanda, op. cit., p. 193; Duly, op. cit., p. 24: Tew, op. cit., p. 44; and Krishnamurthy, Land and Labour in Nyasaland, p. 28.

49 See Ntara, op. cit., pp. xiv-xv, and J.O. Ibik, Restatement of African Law: 3, Malawi I, The Law of Marriage and Divorce, London, 1970, pp. 180-181, for the original composition and family structure of Chewa villages. Cf. Mitchell, The Yao Village, pp. 145-146.

50 Oral testimony of V.H. Kalambo, T/A Chiseka, Kalima, Unit 6, Lilongwe, 18th June 1981; and Mrs. Walastoni Batiwele, Kalambo village, T/A Chiseka, Unit 6, Kalima, Lilongwe. Her husband left his home in Unit 3, Lilongwe, to settle in Kalambo village because of family disputes.

51 See A.N. Allott, "Legal Personality in African Law", in M. Gluckman, Ideas and Procedures in African Customary Law, Oxford University Press, London, 1969, pp. 179-192, especially pp. 187-188; and Van Velsen, op. cit., pp. 282-284.

52 The village still has a name, defined membership, structure and government. But there is less concerted action in a lot of matters, and some important land rights are not attributed to it as a group. These are rights over allocated land: see below.

53 P.C. Lloyd, Yoruba Land Law, Oxford University Press for the Nigerian Institute of Social and Economic Research, 1963, pp. 70-76.

54 W. Chipeta, "Land Tenure and Problems in Malawi", Society of Malawi Journal, Vol. 24, No. 1, January 1971 , p. 26, identified the following categories: private customary land, common customary land and public customary land. There is considerable overlap in the definition of rights pertaining to the last two classes. Moreover, some of the rights he attaches to the second category do not exist among the Chewa. Further, claims that the first category is smaller than the second and the third category is the smallest cannot be substantiated by evidence from Lilongwe. It seems that the category of land allocated for the exclusive use of individuals and families is the largest

in most villages, especially now that population pressure has contributed to the disappearance of village forests.

55 Ibik, op. cit., Vol. II, p. 11.

56 Oral testimony of V.H. Dzuluwanda, 22nd June 1981; and Ntara, op. cit., p. 122.

57 Tew, op. cit., p. 39, says that compact villages existed in Kasungu. G.V.H. Mkanda's village, T/A Kalolo, Unit 7, Mawelo, Lilongwe, has both types of residence. Van Velsen, op. cit. p. 33, says that the hamlets which together formed the village among the Tonga were set apart as distinct local units. Mitchell, The Yao Village, pp. 62-63, seems to suggest that the scattered pattern was also a feature of Yao villages.

58 Ibik, loc. cit. This distinction is not clearly reflected in Ibik's or Chipeta's classification. See Part V below for details.

59 Privy Council (1921) A.C. 399; pp. 404-405. See also Wanda op. cit., p. 193; Murray op. cit., p. 299; and C.J. Griffiths, Land Tenure in Malawi and the 1967 Reforms, pp. 4-5.

60 Individual rights in land are acknowledged to exist over stream (dimba) gardens among the Chewa and over craters among the Nyakyusa. See Part No. 5 below; Wilson Passim; Van Velsen, op. cit., pp. 276-281; A. Allott, "Ashanti Law of Property", Sonderabdruck ans Zeitschrift fur vergleichende Rechtswissenschaft, 68. Band, 2. Heft, Ferdinand Enke verlag Stuttgart, 1966 pp. 147-9.

61 Cf. G. Woodman, "The Family as a Corporation in Ghanaian and Nigerian Law", (1974) 11 African Law Studies, p. 6; Allot, "Family Property in West Africa", op. cit. p. 125; and Bentsi-Enchill, op. cit., p. 25.

62 See Read op. cit. p. 133. Van Velsen, op. cit. p. 45, argues that the mbumba was not a corporate unit among the Tonga since women marry into their husband's village. It was not, therefore, a land-holding unit.

63 Rangeley op. cit. p. 63, and P.H. Brietzke, "Rural Development and Modifications of Malawi's Land Tenure System", Rural Africana, no. 20, 1973, pp. 55-56.

64 Cf. N. Coissoro, The Customary Laws of Succession in Central Africa, Lisbon, 1966, pp. 138-140; Allott, op. cit. p. 148; Van Velsen, op. cit. p. 281; and Chipeta, passim.

65 File SI/123/36, Folio 112, p. 15; cf. Rangeley, op. cit., p. 49.

66 Allott, "Family Property in West Africa", pp. 126-130; and Obi, op. cit., p. 48.

67 Coissoro, op. cit., pp. 135-136.

68 Rangeley, op. cit., p. 52; and White, "Land Tenure Report No. 3", Eastern Province, Northern Rhodesia, unpublished, quoted by Coissoro, op. cit., p. 141. Cf. Van Velsen, op. cit. p. 280, for a contrary view which approximates the Chewa position.

69 Cf. Duly op. cit. p. 14; and Mitchell, The Yao Village, pp. 62-63.

70 Chief Chiseka testified that he expected a present of a cow or several goats on confirmation of the settlement of "strangers" in his territory. This, however, was not confirmed as the standard present expected by the other chiefs. It would appear that there was no uniformity on the type, quantity and value of presents expected.

71 Oral testimonies of V.H. Kalambo, 18th June 1981, and Dzuluwanda, 22nd June 1981. V.H. Kalambo testified that the present required for burying the dead in the village

could be a cow or several goats. It was termed "Chozikira mzinda" (a present for the installation of mzinda). After the first harvest, a pot of beer was expected. This was called "Mowa wa chiwanda" or "cho dzulira zitsa" (a present for the breaking of a virgin bush).

72 See Duly op. cit., p. 27. Nevertheless, at the time of fieldwork, original lineages still emphasized that other village members were "obwera", or "okhala nawo" (new settlers or foreigners), irrespective of the fact that no significant differences in land rights existed between the two groups. Perhaps the emphasis was intended to pre-empt any attempts by the "new arrivals" to usurp political control in the village.

73 Duly. op. cit. p. 32; and C.K. Meek, Land Law and Custom in the Colonies, Frank Cass and Co. Limited, London 1968, p. 12.

74 T.O. Elias, Nigerian Land Law and Custom, 3rd Ed., London, 1962, p. 150; Gluckman, The Ideas in Barotse Jurisprudence, p. 86; Obi, op. cit., p. 3; and Bentsi-Enchill, op. cit., p. 231.

75 Chipeta, passim; and Ibik, op. cit., Vol. 2, pp. 12-13.

76 See Coissoro, op. cit. p. 144. Cf. Duly, op. cit. p. 41, who claims that grazing rights in the Lower Shire were allocated by chiefs to separate "owners".

77 Coissoro, ibid., pp. 142-144.

78 Oral testimonies of V.H. Ndemera, 18th June 1981; V.H. Mwanza, 22nd June 1981; and V.H.Dzuluwanda, 22nd June 1981. The latter was one of the commercial growers of vegetables.

79 MacDonald, op. cit., pp. 175 and 177; and file SI/123/36, Folio 112, p. 16.

80 Chalendwa v. Chalendwa, an unreported dispute before the Lilongwe Local Land Board (minutes no. 1/79, 18th November 1979; 2/80, 16th May 1980 and 3/80, 13th June 1980) demonstrated this point. The estate of late village headman Chalendwa included a field of trees. It was proved that they were planted with the assistance of the whole village. Both Chief Malili and the Board ordered that children of the late chief stop cutting the trees and placed the field under the control of a nephew of the deceased (the successor in law). When the son of the deceased refused to oblige, he was threatened with eviction from the village.

81 Johnston, op. cit., pp. 112-113; and Murray, op. cit., pp. 295-296.

82 T.O. Elias, The Nature of African Customary Law, Manchester University Press, 1956, p. 162. This statement has been approvingly quoted or applied by the following writers on Malawi: Brietzke, op. cit. p. 55; Wanda, op. cit. p. 6; Coissoro, op. cit. p. 145; Krishnamurthy, op. cit. p. 16; Chipeta op. cit. p. 28; and Mitchel "Preliminary Notes ...", op. cit., p. 25.

83 Obi, op. cit., p. 42 and pp. 127-128; and Allott, Ashanti Law of Property, op. cit., pp. 173-176.

84 D. Biebuyck (ed.), African Agrarian Systems, Oxford University Press, London, 1963, p. 60.

85 Introduction by Lord Hailey in Meek, op. cit., pp. xi-xix.

86 Kandawire, Thangata, Forced Labour or Reciprocal Assistance?, pp. 101-102.

87 See Duly, op. cit., p. 31; Coissoro, op. cit., p. 143; cf. Rangeley, op. cit., pp. 53-54.

88 Duly, op. cit., pp. 26-27.

89 Ibid. p. 32 and Coissoro op. cit. p. 137.

90 Oral testimony of Chief Chiseka, 17th June 1981 and the Development Officer for Malingunde Unit 3, Lilongwe, where the changes in land tenure were reported.

91 Ibid.

92 Oral testimonies of Chief Chiseka, 17th June 1981; V.H. Kalambo, 18th June 1981; and G.V.H. Mkanda, 22nd June 1981.

93 See Rangeley op. cit. p. 54; Pachai op. cit. p. 4; and Van Velsen op. cit. p. 276, for a similar custom of "chisoka".

94 In Gunda v. Chilinza (unreported dispute before the Lilongwe Local Land Board, minute 2/79, 23rd June 1979), Chief Malili endorsed the expulsion of a villager for assaulting and seriously wounding a village headman. The villager was already notorious for ferocious and bad behaviour. After a few years' sojourn in a different district, the villager was allowed to come back to Lilongwe and repossess his old gardens.

95 Note 4 above.

96. See, for example, note 59.

97 Ibid.

98 Cf. Chipeta, op. cit. p. 28; and Brietzke, op. cit., pp. 55-56.

99 Notes 84 and 85.

100 See Chapter VIII.

101 Ibid.

102 See M. Chanock, "Notes on an Agricultural History of Malawi", Rural Africana No. 20, 1973, pp. 30-31.

103 H.J. Lamport-Stokes, "Land Tenure in Malawi", The Society of Malawi Journal, Vol. XXIII, No. 2, 1970, p. 60; and Brietzke op. cit. p. 55. Cf. Van Velsen, op. cit., p. 273, on the Tonga.

III PROCLAMATION OF A PROTECTORATE AND THE INCEPTION OF A DUAL LAND STRUCTURE

British colonial rule came to Nyasaland[1] following British and European missionaries, planters, traders, hunters and other adventurers who began to settle in the region in the latter half of the 19th century. Nyasaland was formally declared a British Protectorate on 14th May 1891.[2] Harry Johnston was appointed its first Commissioner and Consul-General. One of his immediate concerns in the new dependency was to settle the "land question".[3] Prior to the declaration of the protectorate, vast tracts of customary land had been alienated or allegedly "sold" to the settlers by some African chiefs and headmen. Johnston took it upon himself to investigate these acquisitions and to validate them by issuing formal title documents which he styled "certificates of Claim". These were the origins of "private land titles" in Malawi.

Johnston justified his investigation of the land acquisitions on several grounds, but the most important was that the Crown possessed "rights of pre-emption" or was "the actual owner of the soil by purchase, concession ... or forfeiture in a greater part of the country", and these rights had to be protected.[4] The process by which the Crown acquired such rights over what came to be called "Crown Lands" is the first concern of this chapter. This will be followed by a review of some of the legal and procedural aspects of the creation of "private land", the other new land category.

1 Protectorate Treaties and the Creation of Crown Lands

When Johnston was appointed to take up his post in Nyasaland, he was advised that the source of his authority to govern should be treaties, concessions and other agreements concluded with African chiefs in the protectorate.[5] These arrangements were also initially regarded as the source of all proprietary rights claimed by the administration.[6] African chiefs, headmen and Crown representatives eventually concluded more than 80 documents between 1885 and 1895.[7] For the purpose of determining the extent of Crown rights in land, the documents can be grouped into three sets.

The first set of treaties, of which there were not many, purported to confer upon the Crown "free hold rights" or fee simples over defined pieces of land. The earliest example in this set was "a deed of cession" by which Chief Malemia of Zomba transferred land to Consul Hawes in 1885 on which the first administrative headquarters of the protectorate was constructed.[8] The chief agreed on behalf of his heirs and successors "to cede, transfer, assign and make over absolutely and for all time coming" the piece of land defined by its natural features. In return, the chief received the following items: 96 yards of blue calico; 48 yards of white calico; 2 pieces of red handkerchief; 6 arab scarfs; 2 Muscat scarfs; 1 "Jappanned" tin despatch box; 3 looking glasses and 3 knives. The total value of the goods was £7.15s. For an area of about one hundred acres, the consideration even at that time appeared to be a mere pittance. Consul Hawes, reporting to his superiors in London on the deal, wrote:

"The area of land I have acquired may appear to your lordship to be unnecessarily great, but as the value of ten acres is at present out here practically the same, I consider it advisable to fix the boundaries as laid down in the deed of cession."[9]

This agreement set the pattern for other "outright" government land acquisitions which included a public landing place at Chiromo on the Shire river;[10] the promontory at Cape Maclear on the lake;[11] and the upper plateau of Mulanje mountain, acquired as a European health retreat.[12] The first common feature of these transactions was the small consideration. Since land sales were hitherto unknown, chiefs had no frame of reference for determining land values. They accepted the price on offer, however small. Secondly, it was assumed without debate that the chiefs were capable of conveying, and the government of acquiring, fee simples and freedholds, rights which were hitherto unknown under customary law. We will never know how the chiefs were apprised of the new legal interests and consensus between the parties established. It is very likely that the chiefs thumbed or marked documents the purport of which they did not understand. Finally, although the government assumed freehold rights, the words of conveyance employed in the documents were ambiguous and probably ineffective for that purpose under English principles of conveyancing. Land was variously ceded "absolutely", "in perpetuity", "for ever" and "for all time coming". This homely and crude way of conveyancing was perhaps inevitable, since Johnston and the other administrators had no recourse to legal advice before the transactions were effected.

The second set of documents were concluded between 14th August 1889 and 15th June 1891. These were proper treaties, on a standard Foreign Office form, under which African chiefs and headmen generally agreed to observe peace between their subjects and subjects of the Queen; to permit British subjects to possess property and carry on business or trade in the area; and to refer disputes between their subjects and subjects of the Queen to Her Majesty's representative. The chiefs also promised that they would "at no time cede the territory to any other power or enter into any agreement treaty or arrangement with any foreign government except through and with the consent of Her Majesty's government".[13] Cession of sovereignty by the chiefs enabled the British government to declare a protectorate over Nyasaland, but Johnston also suggested that the treaties conferred upon the Crown "rights of pre-emption" in the land held by the Africans.[14] Johnson was never specific or clear on what such rights imported. He at times created the impression that the Crown obtained the first option to purchase land in African occupation should it come onto the market.[15] Some despatches suggested that such rights empowered the Crown to control all "waste" and unoccupied land previously under the control of the chiefs and headmen.[16] Both interpretations were not borne out by the wording of the documents. Only one of these pre-protectorate treaties is acknowledged to have attempted a transfer of land rights.[17] The rest implied, and were so understood by the chiefs, that the Africans had ceded sovereignty to the Crown and preferred British protection to that of the Portuguese who were also vying for sovereignty over parts of the country.

The third set of documents were concluded after the formal declaration of protectorate rule, between July 1891 and late 1895. There were more than twenty documents in this category, but the total was still less than the number of treaties falling within the second category.[18] The "post-protectorate" documents followed no special format. African chiefs generally ceded to the Crown their sovereign and territorial rights and the right to work minerals. They also accepted or renewed their acceptance of the laws and regulations made by the Commissioner in force in the protectorate. In return, some chiefs were promised a percentage of the profits from minerals exploited within their territory. Some of the chiefs who consented to the payment and collection of taxes were offered a straight annual subsidy or a percentage of the taxes collected within the territory.[19]

In this general form, the "post-protectorate" treaties resembled the earlier documents under which the chiefs and headmen simply placed themselves under British protection and sovereignty. There were, however, certain variations and additions to the common clauses which suggested that sovereignty was in some cases ceded together with land rights. The Machinjili chiefs, for example, made over "the ownership of the soil and all mines and metals and precious stones", together with their sovereignty.[20] Mbengwa, a Makololo chief, ceded "all ... sovereign rights and all other titles whatsoever ... Always excepting the land, rights, and titles already sold."[21] Makwira "sold and made over absolutely to Harry Johnston ..., Her Majesty's Commissioner all my right and title whatsoever to my country."[22] Some Makololo and Bandawe chiefs who had

already signed "pre-protectorate" sovereignty treaties ceded "proprietary rights" and sovereignty for the second time, but subject to two conditions. The first was that existing villages and plantations would not be disturbed. The second was that they should receive a percentage of the sums received from the sale or lease of their lands by the Crown.[23]

The despatches and correspondence to and from the Foreign Office shed some light on the intentions of the parties to these documents which purported to transfer land rights. In accepting Makwira's treaty, the Foreign Office observed that the despatch described it as a deed of cession of sovereign rights, but this was not explicitly mentioned in the document itself.[24] One can infer from this observation that cession of sovereignty was the primary objective of the document, but the drafting went overboard and purported to effect sale of customary land. The treaty signed by the Machinjili chiefs can be similarly interpreted. Johnston claimed that he took advantage of a suggestion by the chiefs that they should "give the whole of their country to the Queen who would make the best use of it and keep bad white men out". As far as he was concerned, the chiefs had given their land "willingly and gratuitously", but he nevertheless gave them a present in cloth worth about £15 in value.[25] It can be argued that Johnston misread the people's desire for British protectorate rule as an intention to give up their land. It would appear that no effort was made to apprise the chiefs of the difference, as Johnston saw it, between ceding sovereignty and giving up land to the Queen for the purpose of keeping bad white men out.

The second treaty concluded with the Bandawe chiefs was explained thus by Johnston:

> "The reason why I considered it advisable to conclude treaties with the Atonga chiefs was that they were, as far as I know, the only chiefs in this protectorate who had not at one time or another conferred their rights of sovereignty on Her Majesty the Queen. Although they imagined they had done so under the original treaties of protection, such was not the case, and I thought the fact of their not having done so might be inconvenient if any question arose as to Her Majesty's right to deal with the land of these people in so far as (it) should be necessary to protect it from aggression at the hands of white men." [26]

It is interesting to observe that the despatch accompanying the earlier treaties concluded with the same chiefs claimed that they gave Her Majesty "a right to control the affairs of the country, which is sufficient at present to supply the necessary authority to regulate the disposal of the land which otherwise remains in the hands of the native chiefs." [27]

Conflicting intentions, statements and policies were the hallmarks of Johnston's conduct in the creation of Crown Lands. The recurring theme of the despatches, that the transfer of African land to the Crown was necessary in order to protect the natives from aggressive Europeans, was subsequently contradicted by Johnston's conduct in the settlement of private land claims. As will be seen in the following section, Johnston liberally granted African land to European settlers, even when their claims were unsatisfactory by his own standards.[28] He was also no less aggressive than the settlers in securing land for the Crown. Even where the chiefs or headmen were not des-

irous of British protection, they were forced to cede sovereignty and their land controlling authority. Those who attempted to resist were threatened with non-recognition of their political status. This was carried on to such an extent that a chief of well-known stature among the Ngoni like Mpezeni was being denied recognition because he was more inclined to deal with Karl Wiese, a German national. Johnston advised the Foreign Office that the Chewa and "Maravi" chiefs were "the real owners of the country", and that Mpezeni was "merely a Zulu raider and not emphatically a native of the country but of the land south of the Zambezi ..."[29] The Foreign Office wisely refused to endorse this view.[30] Johnston had, after all, dealt with other less indigenous chiefs like the Yao and Makololo.

Chiefs like Mpezeni and some of the Yao slave traders who persistently refused British "protection" or rule were eventually subdued by force. Some of their land was then expropriated. Johnston, as the following narration of Mkanda's defeat shows, was not a magnanimous victor:

> "The next day Mkanda sent in to treat for terms and he was told [the conditions for cessation of hostilities] ... No answer has since been received from Mkanda, and I am told he has ran away across the Portuguese border to a district whence he and these obnoxious Yaos came from. If he does not make amends insisted on (and I think I have made them almost impossible of [acceptance]), I intend to permanently occupy his country and to resume possession of it on behalf of the Crown."[31]

Similar treatment was meted out to Mitochi and Chikumbu, two other "obnoxious" Yao chiefs.[32]

Aggression and lack of magnanimity were not the only attributes of Harry Johnston in the acquisition of land for the Crown. He was at times just as deceitful as the private concession seekers from whom the Africans had to be protected. This came out in a letter written after his recall from Nyasaland in which his conduct was summarized thus:

> "Throughout the British Central Africa protectorate I have generally acquired the waste lands for the Crown by means of concessions from native chiefs; but in many cases we have come across tracts of country utterly uninhabited and possessing no apparent owner. To satisfy the lawyers I have usually acquired these territories by first of all recognizing the nearest chief as ruler of them and then getting him to cede them to the Crown. If only for the protection of native rulers and prevention of grabbing on the part of unscrupulous Europeans, I have been obliged in this manner to make the Queen the ostensible ruler of a great part of British Central Africa ... Yet it is necessary that the ownership of these lands should be primarily vested in the Crown so that their disposal may be effectually controlled by the government." [33]

If Johnston was not always convinced of the right of chiefs to dispose of or control most unoccupied land, and if some of the treaties were no more than a facade, drawn for the satisfaction of lawyers and his superiors at the Foreign Office, it is implausible that protection of the African rulers was the overriding consideration for Crown "ownership" or control of unoccupied land. This was first and foremost of importance to the colonial administrators. Colonialism entailed that the Crown should assert as much control over land as was possible, "... because in Africa no less than in England, he

who controls the land is in a good position to influence government ..." [34] Such assertions were initially held in check by the prevailing constitutional theories of protectorate rule. The authority of the Crown in a protectorate was technically limited to the management of external relations and the affairs of British subjects. The indigenous peoples retained "internal sovereignty" and were subject to the control of the protecting power only to the extent agreed in treaties, conventions and other agreements.[35] This theory prompted the Colonial Office to advise that except where a specific agreement so provided, the declaration of a protectorate did not ipso facto pass to the Crown the property in "the soil and minerals" of the protected country, and the powers of colonial administrators to make land grants were not unlimited. An additional reason for the restraint was stated thus:

> "... it is not usually desired that such territories should be regarded as open to extensive agricultural occupation by whites, such protectorates being regarded rather as places where, subject to establishment of mining camps and towns, the natives may find homes protected against the ever-spreading flood of colonial advance." [36]

Such restraints were no longer strictly adhered to by the turn of the century. An infusion of settlers was now believed to be crucial for the development of protectorates like Nyasaland. It was also believed that settlers could be attracted by the possibility of cheap land grants, but such grants could not be promised if most of the land remained under the control of African chiefs.[37] Colonial administrators began to assert control over as much land as possible. The total size of

Crown lands in Nyasaland increased from an estimated one-fifth to three-fifths of the country's land surface.[38] This included all land which was not alienated to European settlers as "private land". Africans continued to use their existing villages and plantations, but they were practically "tenants-at-will" of the Crown who could be moved at any time. All unoccupied land, whether waste or fallow, became Crown land irrespective of whether the treaties with African chiefs so provided. Legal opinions to the Foreign and Colonial Offices encouraged this trend. One report advised:

> "We are of the opinion that in such regions the right of dealing with the waste and unoccupied land accrues to Her Majesty by virtue of her right to the protectorate."[39]

It was suggested that the Crown's authority to deal with land in protectorates over semi-barbarous peoples, with no settled system of government, stemmed from the mere declaration of the protectorate and not from the treaties concluded with native rulers. The Crown was advised to emulate German and French practice of assuming the widest control over internal matters as if the protectorates were Crown colonies.

This report was followed and translated into local law by Nunan, the Chief Judicial Officer, in J. Norris Cox and Geo. W. Pettit v. The African Lakes Corporation.[40] The central issue in the two cases was the validity of an agreement dated 2nd August 1900 by which one Chief William granted a monopoly for the collection of Strophantus seeds (kombe) in his territory to the defendant, the African Lakes Corporation. Nunan held that the agreement was invalid for want of consideration.

He also held that the agreement was ultra vires: Chief William had no power to grant the monopoly because he was no longer "the landlord of the land over which he was chief, the legal ownership having passed with sovereign rights to the sovereign of great Britain ..." by treaties signed by his predecessors. The most pertinent of the treaties acknowledged the cession of "all sovereign rights, including all mineral and mining rights absolutely and without reserve". Nunan conceded that it was "sufficiently vague" and "an English conveyancing counsel would find very much to quarrel with it". He nevertheless gave it the widest interpretation, "in the interests of the British ... and the natives themselves", and held that the chief could no longer dispose of land, easements or profits à prendre without the consent of His Majesty's Commissioner and Consul-General.

This ruling applied to all chiefs in the protectorate, whether or not cession of sovereignty treaties were specific on the transfer of land controlling powers to the commissioner. Nunan contended that the orthodox constitutional theory of protectorate rule was inapplicable in Nyasaland where practically all chiefs lost their authority and influence to the Commissioner upon the establishment of colonial rule. He further contended that there were now many areas without chiefs. Those who maintained their rule invariably relied on the support of the administration; without it, they were "as a reed shaken by the wind". In this setting, Nunan concluded:

> "The position of the chiefs is in practice that of a petty magistrate, acting with the consent of the collector, though according to the strict Austinian

> theory of the indivisibility of sovereignty prevailing at the founding of the protectorate, and still dragging a precarious existence, the collector, as far as natives are personally concerned, is a mere personage authorised to act in the chief's behalf. The chief's jurisdiction, even in theory, is a purely personal jurisdiction over the natives of his tribe. His proprietary rights, in the absence of any special Treaty stipulations, are rights in the name of his tribe to existing villages and plantations, the use of unoccupied lands, and compensation for disturbance. ... The Chief ... is in no sense to be considered the landlord of the land on which he exercises jurisdiction over the natives of his tribe ... All land in this Country is therefore vested in the commissioner, as the representative of His Majesty King Edward VII, and, in addition, the Commissioner, as such representative, and from the necessity of the case, is supreme Chief of the natives of this country, with sole ultimate jurisdiction of all native affairs."

The pronouncements on the demise of chiefs in this judgement were uninformed. Nunan, like most other early colonial administrators, mistook the extreme decentralization of political structures, as in the case of Chewa of Lilongwe district, as a progression towards acephalous societies.[41] He also applied to the whole protectorate a trend observable only in parts of the country which were affected by extensive European settlements. It was only in such areas, notably in the Shire Highlands, that chiefs could be said to have lost some of their influence. It is true that chiefs were not landlords of customary land; this was just one of the many English land law analogies used by the settlers which confused the traditional political control of land. This, however, did not imply that chiefs were as "toothless" as depicted. The institution of

chieftaincy continued to be influential in both personal and proprietary matters of a customary nature irrespective of the fact that particular holders of the office could be appointed or removed by the Commissioner. The Crown may have assumed ultimate responsibility for all land matters in the protectorate, but at local level, as far as the Africans were concerned, the chief was still the ultimate land allocator and arbiter of land disputes.

The decision of the court was probably of benefit to the Africans in the short term, because it prevented chiefs like William from recklessly disposing land rights to unscrupulous settlers. But the description of the country as "chief-less" was primarily of benefit to colonial interests. First, there was concern that the Crown's conduct in land administration could in future be challenged as contrary to the protectorate treaties and theories of protectorate rule. Such a challenge was bound to lead to administrative chaos. To pre-empt this possibility, Nunan contended, in effect, that the Crown's authority to act did not stem from the treaties which were in any case vague, but from a mere declaration of a protectorate over natives with no settled system of government. He contended that the Crown was in this setting entitled to exercise ample jurisdiction as if the protectorate were a colony. This decision also gave a fillip to settler demands for annexation or conversion of the protectorate into a colony for sentimental reasons. It was believed that this would increase settler influence in the formulation and implementation of colonial policies. The quest for annexation gathered momentum in the first two decades of the 20th century. The Colonial Office

received detailed arguments for and against the proposal; the necessary instruments were prepared; and then, the issue was suddenly shelved in 1921. The Colonial Office realised that the practical necessity for annexation was not immediately apparent. There were also other pressing issues like the proposed union of the East African territories. The postponement of the annexation issue ultimately became permanent: Nyasaland remained a protectorate.[42]

The evolution of common law decisions in the 20th century also eventually obviated the need for annexation as a way of pre-empting legal challenges to the assumption of wide powers in land administration by the Crown. This evolution began with cases like Rex v. Earl of Crewe, ex parte Sekgome.[43] The English Court of Appeal decided that the Crown's representative could exercise jurisdiction over non-British subjects in a protectorate if this was in pursuance of an order in council for the administration of justice, peace, order and good government. The detention of a native chief in Bechuanaland protectorate was in this respect lawful. Vaughan Williams L.J. added that the detention could also be justified as an independent Act of State. The principle established in this case was applied to land administration in Re Southern Rhodesia.[44] The privy council held that the Crown could legitimately exercise full dominion over unalloted land if this was authorised by an order in council. The Council went further in Sobhuza II v. Millar[45] and held that African land can be expropriated and reallocated to other Africans or Europeans. As an Act of State, this would be unchallengeable in a court of law, even if it was contrary to the treaty or other instrument by which

protectorate rule was established. In Nyali v. the Attorney-General, a case from East Africa, Denning L.J. finally and unequivocally restated the law thus:[46]

> "Although the jurisdiction of the Crown in the Protectorate is in law a limited jurisdiction, nonetheless the limits may be extended indefinitely so as to embrace the whole field of government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area ... The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus if an Order in Council is made, the courts will accept its validity without question."

The pertinent Order in Council for Nyasaland was issued on 11th August 1902.[47] It typically provided for the administration of justice, the establishment of order and good government, and the exercise of jurisdiction over all natives in the protectorate. By Article 7, all rights of His Majesty in relation to any Crown Lands were vested in the Commissioner as a Trustee. All rights to mines and minerals under Crown Lands or lands occupied by the natives were similarly vested. The Commissioner was empowered to make grants, leases and other dispositions of Crown Lands on such terms and conditions as he saw fit, subject to the provisions of any ordinance. Article

2 defined Crown Lands as "all public lands in the Protectorate which are subject to the control of His Majesty by virtue of any Treaty, Convention, or Agreement, or His Majesty's Protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever."

The problem with this definition of Crown Lands was that the extent of land transferred to the Crown by virtue of treaties or agreements, or of the Protectorate, was never precisely determined. This section has suggested that the treaties and agreements which purported to transfer African land to the Crown for government or public use were not many. The majority purported to cede sovereignty over ill-defined areas, and where this included land rights, the chiefs were not fully apprised of the fact. By Johnston's own admission, some of the treaties were a charade. If the Crown's assertion of proprietary rights over all land not disposed as private land derived from such treaties, then Nunan J. was right to fear that the Crown's conduct on land administration could be contested. But the implication of the decisions reviewed above was that this could not be permitted after the publication of the 1902 Order in Council. Anything done by the Commissioner pursuant to this order would be an Act of State. If it was clearly contrary to a prior treaty or agreement with African chiefs, the courts would deliberately turn a blind eye. This is the first example in this study of the negative use of law to cover the indiscretions and mistakes of administrators at the expense of the less dominant sector of the society. The point has already been made elsewhere that "Those brought up in the traditional view of the judiciary as being the bulwark against

any danger of autocratic tendencies on the part of the executive may find all this somewhat surprising".[48]

2 Certificates of Claim and the Creation of Private Land

The circular requesting all European settlers to submit land claims to Harry Johnston for verification was published on 18th July 1891, a couple of months after the declaration of protectorate rule. The response was generally positive. Johnston proceeded to divide the claims into two groups. The first group consisted of claims relating to mineral rights, which were summarily investigated. Johnston alleged that all admissible claims in this category were backed by executed documents, and his task was simply to ascertain whether the chief admitted making the grant and receiving "a fair value" for it. The second group consisted of claims to land with or without mineral rights. Some of the claims in this category were not supported by signed documents. Johnston alleged that he admitted such claims only where "lengthy occupation and much building or cultivation" could be proved. The few notable examples here were the claims of the missionaries to land in Blantyre and Likoma which was occupied during the early days of European settlements in Nyasaland.[49]

The investigation of the land claims was generally more thorough. Johnston or one of his trusted assistants proceeded to the locality of the claim and attempted to ascertain the following:

(a) That the vendor or lessor had a right to dispose of the land;

(b) That there were no valid counterclaims;

(c) That the value paid for the land was reasonably sufficient, and that the vendor understood the nature of the transaction;

(d) That there were no monopolies or privileges which were inconsistent with British sovereignty, or treaties made between the Crown and native chiefs or foreign powers;

(e) That the rights of the natives were sufficiently secured and proper provisions made for non-disturbance of existing villages or plantations; and

(f) That the boundaries specified in the deed of sale were in accord with the extent of the land claimed.[50]

These guidelines complied with the principles which the Colonial Office later outlined for the "recognition of concessions and titles to immovable property in newly-acquired protectorates and possessions in uncivilized countries".[51] The Colonial Office was particularly against concessions which conferred powers of government on the claimant or trading monopolies which, by Section 5 of the Berlin Act 1885, the Superpowers agreed to prevent in their spheres of influence in Africa.[52]

If Johnston was satisfied that the guidelines set were generally observed in a land deal, he issued a certificate which became irrefutable evidence of the right or interest claimed. A total of 73 certificates were initially issued, but three were later cancelled. Of the original 73, 6 affec-

ted land in Tanganyika territory and 7 conferred only mining rights. The 60 land claims created freehold or "private land" rights over approximately 3,700,000 acres out of a total land surface of approximately 25,161,924 acres.[53] Table 2 lists the principal land holding concerns. As noted above, most of the private land holders were concentrated in the Shire Highlands region of the southern province where the climate was apparently congenial for European settlements. But the largest single block of land was granted in the North Nyasa district under Certificate of Claim No. 61, which confirmed the claim of the African Lakes Corporation to about 2,730,000 acres, practically the whole district. This holding was later transferred to the British South Africa Company.[54]

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TABLE 2: PRINCIPAL PRIVATE LAND HOLDERS IN BRITISH CENTRAL AFRICA PROTECTORATE.[55]

Holder:	Approximate Acreage:
The British South Africa Company	2,731,663
The British Central Africa Company	350,841
A.L. Bruce Trust	169,448
Blantyre and East Africa Limited	91,415
The United Free Church of Scotland	59,206
The Africa Lakes Corporation	49,658
Zambezi Industrial Mission	31,025

.....

The investigation of private land claims commenced in the early autumn of 1892 and was complete by October 1893, when the second report on the subject was submitted to the Foreign Office.[56] Johnston reported with a considerable measure of satisfaction that the rights of European settlers and the government were now sharply defined, and that the settlement was on the whole acceptable and satisfactory to the settler and indigenous communities. The Foreign Office acknowledged Johnston's extraordinary industry in the exercise and conceded that the land question was securely placed on a "sound basis".[57] Johnston's land settlement has also received favourable assessments from some latter-day historians.[58] It cannot be refuted that he showed remarkable industry in attempting the settlement within so short a time and with limited administrative, financial and other resources. But this study will attempt to show that the results were hardly satisfactory, especially for the Africans, and that land law and structure was not placed on a sound footing.[59] As with the creation of Crown Land, Johnston proceeded with the investigation of land claims without due regard for consistency and legality. Important questions on customary land law were glossed over, and even the guidelines which he himself set were often disregarded. This belated uncharitable assessment can be substantiated by a review of the conflicts and controversies which the standard provisions of the Certificate of Claim engendered.

(a) The Preamble

Certificates of Claim for surface land rights were not always exactly alike, except for the preamble which made two

important assertions. The first paragraph recited that Johnston was duly authorised by Her Majesty's Government to enquire into and settle all land claims, and to issue certificates for all approved claims showing the nature of the claim, the size of the land and any restrictions, limitations or conditions attached to the recognition; the certificate then becoming the voucher for the legality of the claim. Such an authorisation, if it was formally made at all, was probably issued after the commencement of the investigations. One Foreign Office memorandum suggested that no authority was issued but Johnston derived his powers from the protectorate treaties concluded with native chiefs under which the Crown "purchased native lands" or acquired "rights of pre-emption".[60]

As suggested above, some of these treaties conferred no such rights upon the Crown. Moreover, when the land settlement exercise commenced in 1892, some of the important chiefs had not yet ceded their sovereignty to the Crown, let alone conferred land rights. Johnston over-stepped his authority, if any, by entertaining claims to land in all parts of the protectorate. Some disgruntled claimants made attempts to challenge the legitimacy of the exercise,[61] but the majority took Johnston's authority for granted. The settlement was eventually regarded by the settlers and the Foreign Office as a fait accompli.

The second paragraph of the preamble recited that the claimant had purchased the fee simple for the land on a particular date; that there were no valid counterclaims; that the vendor was "the sole and rightful owner of the land", and that

the government recognized the claim as valid. This was where Johnston's lack of knowledge of, or respect for, customary land law became apparent. Chapter II has shown that no chief could be regarded as the "sole and rightful owner" of customary land among the major ethnic groups. The English concept of "ownership" was misapplied and confused with political control of land. It has also been shown that "sale of land" was an unknown disposition, and it was obviously ludicrous to suggest or confirm that any claimant purchased "the fee simple, the freehold, or common socage"[62] of the land. Chiefs may have allocated land to some settlers in a customary manner, but this did not amount to a disposition of rights which never existed in their system of jurisprudence.

Johnston was not completely unaware of the fact that chiefs "had no right to alienate the land", but he contended that they assumed such a power with the tacit acceptance of their people.[63] There is no evidence in his reports to support this claim. There was probably some support for, and the acceptance of, the allocations made to early settlers like missionaries. But most purported sales were probably made without the knowledge or consent, express or implicit, of the people. In some of the transactions the vendors were either putative chiefs or headmen promoted by rival claimants, or junior political leaders with no authority to alienate or allocate land. Some of the lands covered by the infamous Certificate of Claim No. 61, for example, were eventually shown to have been alienated by unauthorised sub-chiefs without the knowledge of Chikulamayembe, the paramount of the area.[64] Johnston's attempted dismissal of the Karl Wiese / Mpezeni con-

cession on the ground that the latter was not a true chief proved that he too was prone to dealing with putative or rightful chiefs whenever it was convenient for his case.[65] New trade goods like guns, beads, cloth and scarfs which concession seekers offered in return for the grants were a very strong inducement for surreptitious dealings between chiefs and settlers, without the consent of the villagers.

Consideration for the land grant was the other important feature of the preamble which sometimes appeared elsewhere in the Certificate of Claim. One of the conditions for the recognition of a claim was the receipt by the vendor of a reasonable price. This was difficult to establish. As suggested in the previous section, African chiefs had no frame of reference for land valuation and often took consideration which amounted to a pittance. If the investigation revealed a disagreement between the vendor and purchaser, Johnston imposed arbitrary but equally low values which ranged from 3d per acre for the best land in favoured districts like Blantyre to ½d per acre for the least wanted land. His reason for adopting this low valuation was that the settlers had already conferred great benefits upon the country by opening up the land. If the consideration tendered was deemed inadequate, the purchaser was given the option of increasing the amount or having the land reduced to a size fairly compatible with the first payment.[66] There was only one case in which a European settler was on the receiving end. James Lindsay obtained two leases for a price which Johnston deemed excessive, especially since the land turned out to be of poor quality. Johnston induced the vendors to convert the leases into an estate in fee simple for an

additional payment.[67] Johnston's generosity to the European settler who was presumably in control and aware of the transaction was unwarranted.

There were a few more examples of private land grants emanating from Johnston's generosity instead of proven land claims. One Henry Brown claimed land in Mulanje which the vendors denied ever granting. It was discovered that the document tendered in support of the claim was in fact dated before Brown's arrival in the country. Realising the futility of his claim, Brown "threw himself at the mercy of the court" and was rewarded with a grant of 15 acres in fee simple.[68] The African Lakes Corporation, a company notorious for its land claims, occupied land in the same district and proceeded to prepare it for coffee cultivation without even attempting to prove a land claim. Two agents of the company refused to vacate the land on the ground that the company might at any time be called upon to take over the administration of the country. Johnston acknowledged that the company had acted dishonourably, but he decided not to be severe and offered it 25 acres of Crown Land in fee simple and a lease of 240 acres.[69] Johnston's general attitude was to "meet a claimant half-way", even if a claim was absolutely untenable. He was also exceedingly lenient and generous to claimants who had previously rendered some service to the administration.[70] The Foreign Office did not object to most of these generous land grants which contradicted the guidelines and policies established and the assumption that land was sold by African chiefs.

(b) Boundary and Survey Provisions

The first condition for the recognition of a claim in almost every certificate defined the boundaries of the estate. Johnston asserted that every property was defined with "sedulous accuracy".[71] A perusal of the deeds shows that boundary clauses were generally written versions of customary descriptions of land plots. Natural and physical features were the important landmarks. Imaginary lines measured in yards or miles were also used to supplement the natural features. Precision was sometimes dispensed with in the quest for full and accurate descriptions. Some of the clauses ran into several pages of convoluted descriptions. It was generally impossible for the arbiters of land claims to be "sedulously accurate" in the absence of surveys and technical facilities, and especially where the properties covered distances of 40 or 50 miles.[72] When surveys were eventually conducted in accordance with one of the conditions of the certificates, it was perhaps inevitable that discrepancies would be found between the claimed and actual acreages of some of the properties.[73]

Most of the certificates stipulated that the holder should bear the cost of surveying the property. The plan produced from the survey, together with the written description of the plot, became "the valid and legal evidence" of the extent of the property. The first problem with this condition was the failure of the certificates to indicate whether the plan or description was intended to prevail in conflict situations. It can only be presumed that plans drawn after careful preparation were likely to carry more weight than the earlier

hurried descriptions. Secondly, the government anticipated that all surveys would be performed by its own employees, but some landholders were permitted to engage private surveyors because of the shortage of official personnel. This left room for abuse. Eugene Scharrer, for example, engaged a young man whose knowledge of the profession "only extended to the use of the prismatic compass to make simple plans". When a government officer made a test survey of one of his estates, 70,543 acres shown on the plan were found to be only 68,562 acres on the ground. Scharrer refused to comply with the request for fresh and accurate plans until the government offered to undertake the resurvey at a lower rate of charge. The relevant certificate was issued in 1892 and these errors were discovered in 1899. Scharrer breached a condition of his certificate for seven years, but no remedial action was taken because breaches of this nature were not anticipated when the certificates were drafted. He benefited from his own illegality by having the land resurveyed by the government at a cost which was below standard stipulated charges.[74]

(c) Acquisition of Private Land for Public Works

One of the common conditions in certificates of claim stipulated that "Her Majesty's government shall at all times have the right to make roads, railroads, Tramways or canals, for public use across any part of the ... estate, provided that such roads, railroads, tramways or canals do not alienate more than one-sixth of the ... estate, and that compensation is paid for the disturbance of buildings or growing crops."

The varying interpretations of this clause arose, once again, from Scharrer's certificate of claim. By 1895, plans were afoot for the construction of a railway in Nyasaland. A considerable part of its projected path passed through Scharrer's land and he anticipated that his company would be given the construction franchise. Johnston engaged an engineer in the employ of a rival company to conduct preliminary surveys. Scharrer refused the engineer permission to work on his land, contending that he was entitled to do so as a holder of the fee simple and an absolute owner. Johnston suggested that he might invoke the condition in the certificate of claim which entitled him to take over land not exceeding one-sixth of the estate. When Scharrer refused to oblige, Johnston issued a proclamation which attempted to appropriate and take over all roads made by Scharrer on his estate.[75] The latter then transferred his interests in the land to a new railway company whose chairman, Lord Stanmore, appealed directly to the Marquis Salisbury at the Foreign Office. It was contended that the right of resumption in the certificate could only be exercised if the government itself intended to construct the railway, but not when the right was to be delegated to a rival company. Lord Stanmore further contended that the condition did not entitle the government to appropriate private roads without compensation.[76]

The Foreign Office responded by sending the following instructions to Johnston:

> "I am now to state for your guidance that the administration is not entitled to make roads etc. over land comprised in a grant to a private com-

pany, nor to take for the public, and still less for the use of a private person or company, roads made by the owner of the land at his own expense without compensation, nor in the absence of a law authorising such a proceeding to declare such private roads to be public roads, without compensation."[77]

The implication of Foreign Office interference in the matter was that the colonial administration could not exercise its right to appropriate private land for public works where a private person was to be entrusted with the construction. The administration could invoke the condition only if it was prepared to undertake, directly, the construction of the public works. This, surely, was not Johnston's intention when framing the certificate. On the other hand, he stretched the interpretation of the clause by appropriating private roads without compensation and without ensuring that the land so taken did not exceed one-sixth of the estate.

(d) The Mining Royalty Clause

Another common condition in certificates of claim affecting surface land rights stipulated that "on all minerals metals and precious stones obtained from the said estate, a royalty of five percentum (5%) ad valorem shall be paid to Her Majesty's Government". This seemingly innocuous clause was in 1904 the subject of three High Court disputes commonly known as the Mineral Rights cases. The first two cases, Augusto Paulocci v. The Commissioner For Mines and the Crown Prosecutor v. Augusto Paulocci, were disposed in one judgement.[78] The third case, Crown Prosecutor v. The British Central Africa

Company, was decided several months later, but the main facts and judgement were as in the first two cases.[79]

The central issue in all three cases was whether certificates of claims generally, and the royalty clause in particular, conferred upon the holder the right to all minerals in the land. This issue was provoked by the passage of the British Central Africa Mining Regulations in 1899 which empowered the administration to control the issue of prospecting licences for minerals in the protectorate. Some areas were excluded from the effects of the regulations and these included "lands held under certificates of claim which expressly recognized the right of the holder to mines and minerals".[80] As far as the administration was concerned, this exemption applied to the 7 or so certificates which conferred only mining rights, such as those held by the British South Africa Company for mining in Central Angoniland, Marimba and Upper Shire districts. Areas covered by the 48 surface land certificates in which the above cited royalty clause apppeared were not exempted. The government therefore insisted that it should regulate prospecting and mining on such lands. The holders of the certificates contended that as holders of the fee simple, they were entitled to restrain the government from empowering third parties to prospect on their lands without consent. They also claimed the right to all minerals in the land, subject only to the payment of the five per cent royalty to the government.

Judge Nunan, the former Chief Judicial Officer, held that certificates of claim with the royalty clause did not pass to the holder the right to all minerals, metals and oils without

reserve. Following common law precedent, he claimed that the right to "mines royal" (gold and silver), precious stones and diamonds was vested in the Crown irrespective of the holder's fee simple. Thus, prospecting licences for such properties could be issued to third parties without the prior consent of the certificate holder. But consent was necessary for prospecting licences affecting all other precious metals, base metals, minerals and oils.

The basis of Nunan's ruling on the reservation of "mines royal" and precious stones for the Crown was the fact that even under English law "there was no such thing as absolute ownership of land ..." In Nyasaland, moreover, the case of Cox v. The A.L.C. established that all land was held "mediately or immediately" from the Crown. It could therefore empower its representatives to control mineral exploitation while parting with the fee simple of the land. In so holding, Nunan rejected the assertion of the preamble in certificates of claim that fee simples were purchased from African chiefs.

> "What then is a certificate of claim? It cannot be a mere official recognition of a valid transfer of an estate in fee simple from a native chief or chiefs. An estate in fee simples is an entity peculiar to English law and unlikely to be evolved by Kapeni or Chinsomba or to be thought of by the Germans, Poles, Italians or Hungarians to whom most of the land held by the certificates of claim in the Shire Highlands was confirmed by the Crown."[81]

Nunan concluded that by submitting their claims to enquiry and settlement by Johnston, the claimants should be deemed to have informally surrendered their land to the Crown in anticipation

of a regrant upon such terms and conditions as the Crown deemed suitable. Fee simples, therefore, originated from the Crown, and the certificate of claim was just a memorandum in writing to satisfy Section 4 of the Statute of Frauds, 1677.[82]

Judge Nunan also attempted to distinguish the case of Webb v. Wright,[83] which appeared to contradict his judgement. The Privy Council decided in this case that upon the transfer of jurisdiction over Griqualand West from the Orange Free State to the British Crown, the South African Exploration Company was entitled to retain its original land title free of any reservations to the Crown of the right to precious stones, gold or silver. When applied to Nyasaland, this holding implied that upon the declaration of the protectorate, private land holders should not have been compelled to accept restrictions in the certificate of claim which were not imposed by chiefs in the original land grants. Nunan held that there was no real analogy between the two situations because, first, Roman-Dutch law prevailed in Griqualand West whereas English law was applicable in Nyasaland; and secondly, Griqualand West passed from the jurisdiction of one civilized government to another without the alteration of the system of land tenure. But the sovereignty of the Crown in Nyasaland "introduced into a barbarous country both English law and tenures along with its plenum dominium and all incidents of the prerogative, except where native law and custom are recognized in dealing with the natives themselves ..." Nunan reiterated his familiar argument that in protectorates over uncivilized peoples the Crown "assumed and exercised the fullest powers to impose limitations, restrictions and conditions upon the estates

claimed as purchases from the chiefs".[84]

The importance of the Mineral Rights cases to constitutional law and land policy was such that leave was expressly given for appeals to be lodged with the East African Court of Appeal in Zanzibar. This was the appellate forum for British Central Africa High Court cases at that time. The British Central Africa Company and Paulocci appealed on the following grounds: first, that the certificates of claim were mere confirmations of existing titles conveying rights to mines and minerals and not the original sources of title to private land; second, that although the appellants accepted certain conditions with the certificates which were not imposed by the native vendors, they were not in law compelled to accept them; and third, that the lands in question were clearly exempted from the operation of the Mining Regulations.[85]

The East African Court of Appeal accepted these arguments and the appeals. On the legal status of the certificate of claim, it dismissed Nunan's surrender and regrant hypothesis as a legal fiction which could not be supported by evidence. The court held that the certificate was a mere voucher of a title already vested in the holder. After the declaration of the protectorate, "H.B.M. government, acting only as a protecting power, ... wished to protect the European purchaser of land as well as the native and so confirmed the prior titles and the holders expressly agreed to the conditions laid down in order to get the recognition of those titles clearly given by the protecting power." The court suggested that under the authority of Webb v. Wright, the holders could have rejected

the conditions imposed by the Crown in the certificates, but they chose not to do so "as the consideration for obtaining the recognition of their titles by the protecting power and not as the consideration for obtaining the real title". The court also dismissed Nunan's revised argument that the certificate of claim conferred no title but a moral claim to be recognized by a civilized government. "If that be so", it opined, "there could be no surrender, and the whole framework of [Nunan's] judgement disappears".[86] The revised argument was based on an American case dealing with land claims after the conquest of North American Indians.[87] The Court of Appeal observed that Crown rights in British Central Africa were acquired by treaty and not by conquest.[88]

On the competence of African chiefs to understand "ownership" and pass land titles unknown to customary law, the court found as a fact that the chiefs were "sufficiently civilized to be able to give a good legal title to land". It referred to the "Protectorate treaties" reviewed above and noted that they contained "ample evidence that ownership in land was recognized as among the matters within the comprehension of the chiefs and people so that white settlers might acquire a title to it under native laws." The court also accepted at face value Johnston's assertion in the preamble of every certificate of claim that the vendors were proved to be the "sole and only rightful owners of the land".[89]

On the third ground of appeal, the court first of all noted that the Crown's prerogative to mines royal was limited to gold and silver and did not extend to diamonds or precious

stones as Nunan had suggested. Secondly, it noted that the Crown did not claim the prerogative of exercising justice over the natives before Nunan's judgement in the High Court case of Cox v. the A.L.C.. This was an indication that no prerogative was claimed over mines royal. Following the dismissal of the surrender and regrant theory and Nunan's interpretation of the certificate of claim, it was unnecessary to decide when or whether the prerogative was attached to land in the protectorate. The court concluded that "if words can be taken to mean anything", the famous Clause 4 in certificates of claim clearly recognized the right of the holder to all minerals, metals and precious stones without any reservation, subject only to the payment of a royalty of 5%. The court, moreover, saw no evidence to support the argument that there were two classes of certificates, one of which was affected by the Mining Regulations but not the other. The plain words of Section 2(b) did not support the contention that the exception contained therein referred only to "some 2 or 3 certificates of one class when we know that there are 48 of the other class in the country". The court, therefore, concluded that the intention of the section was to exempt from the mining regulations all land disposed under certificates of claim which included the above-mentioned royalty clause.[90]

The repeal and reversal of his decisions did not please Judge Nunan. He submitted a report to Commissioner Sharpe urging an appeal to the Judicial Committee of the Privy Council on the ground that "if lands ... are not held of the Crown but in virtue of grants from native chiefs, the validity of every land transfer granted by the government before the order

in council of 1902 [would be] open to question". The right of the Crown to impose various conditions in certificates of claim would also be challenged; and the question of the validity of purchases from chiefs would in every case be open to investigation. The judge restated his views on the nature of protectorate rule in Nyasaland and over other uncivilized people as expressed in Cox v. The A.L.C..[91]

Griffin, the Crown Prosecutor, who represented the government in Zanzibar, did not favour another appeal to the Privy Council. Although he subscribed to Nunan's views on the nature of protectorate rule in the country, he felt that an appeal would fail on the main issue: the interpretation of the mining royalty clause and Section 2(b) of the 1899 Mining Regulations by the Court of Appeal was, with respect to Nunan, correct. Griffin was, however, perturbed by the finding that fee simples came from native chiefs, and that landholders had the option of rejecting some of the conditions stipulated in the certifcate of claim. He suggested that landholders should be asked to surrender their titles in return for fresh titles which would confer upon them the right to all minerals including mines royal and precious stones, but subject to any other restrictions and conditions contained in the certificates.[92]

Upon receipt of the judgements and subsequent reports, the Colonial Office sought legal advice on whether or not to authorise an appeal to the Privy Council as Nunan had suggested. The minutes and opinions tendered criticized aspects of both the first instance and appeal court decisions. It was accepted that Nunan's formulation of the surrender and regrant

hypothesis was a legal fiction. Upon the declaration of a protectorate, the Crown did not assume the position of the true and original grantor of land titles. All land claimants obtained their titles from African chiefs; the Crown merely sought to protect the Africans against fraud, and to confirm and bring the claims onto a regular record. On the other hand, the conclusion of the Court of Appeal that claimants could have objected to some of the conditions in the certificates of claim, had they so wished, was also untenable.

"Certificates of Claim", the law officer remarked, "were issued under the authority of the British Government as the sovereign power which assumed the right of conferring or disallowing claims to land, and we do not think that the conditions imposed in those certificates could be questioned in any municipal court".[93] The officers also advised that the government assumed the right of regulating the titles to mines of gold as much as any other real property, but there was no "sufficient foundation for the theory that these mines were vested in the Crown as subjects of property". As regarded the mining royalty claims in the certificates of claim, Griffin's view that it clearly vested in the holder the right to all minerals and precious stones including gold and silver was endorsed. The only reservation for the Crown was the royalty. It was therefore inadvisable to refer the case to the Privy Council although it would have been desirable, on a different occasion, to refer to it questions on the status of a protectorate and property in land.

Following the legal advice tendered, the Colonial Office declined to take up Nunan's request for an appeal. As the law stood, therefore, the East African Court of Appeal conclusively established that European settlers acquired fee simples directly from African chiefs, the certificates of claim being a mere confirmation or regularisation of the transactions. This was arguably an erroneous decision. As suggested in Chapter II, the description adopted by the courts of an African chief as the "sole owner of land" capable of alienating it in fee simple was incompatible with customary land law. Nunan's weighty argument that the Africans could not have passed fee simples because they knew not of such rights was too casually dismissed in the East African Court of Appeal and in the minutes and opinions of the legal advisers to the Colonial Office. The certificate of claim was more than a mere confirmation of fee simples granted by African chiefs; it was the source of such rights, as it was of conditions like the 5% Crown royalty on mineral exploitation which was not imposed by the alleged vendors of the land.

Nunan's surrender and regrant hypothesis may have been fictitious, but it was an ingenious and intelligent attempt to provide a legal explanation for the mess created by Johnston's land settlement. Nunan, however, marred the quality of his arguments by insisting that British Central Africa was a "chief-less" society, hence the justification for the Crown's assumption of proprietary rights which were incompatible with the orthodox theory of protectorate rule. As in Cox v. A.L.C., Nunan was overly concerned with the pre-emption of possible legal challenges to the Crown's assumption of wide powers in

land administration. The legal officers correctly observed that municipal courts were unlikely to entertain such a challenge. It should be noted, however, that the Act of State doctrine which later developed to preclude suits of this nature was probably not yet firmly established in this area of the law when Nunan was making his pronouncements. His fears were therefore not entirely unfounded.

The second point of law established by the East African Court of Appeal was that holders of land certificates with the mining royalty clause were entitled to all minerals, metals and precious stones under the land. This was an extremely unfortunate conclusion in the context of responsibility for mining development. It implied that subject to the 5% royalty the government was not entitled to interfere with the prospecting and exploitation of minerals on private land. It was in the best interest of the country that prospecting licences should be issued to any person with the means. This was the underlying reason behind Nunan's attempt to read Crown prerogatives into the certificates of claim. The practical effect of the Court appeal decision was to entrust prospecting to half-solvent and buccaneering settlers who pioneered land acquisition in the protectorate. If the interpretation of the mining royalty clause by the court and the legal advisers to the Colonial Office was correct, it is further proof of Johnston's lack of foresight in the framing of certificates of claim.

(e) The Non-Disturbance Clause

One of Johnston's policy objectives in the settlement of European land claims was to ensure that existing African land rights were sufficiently safeguarded. He contrived to achieve this through a condition in certificates of claim commonly termed "the non-disturbance clause". There was no standard format for this clause, but the following was the typical wording:

> "That no native village or plantation existing at the time of this certificate on the 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 on the said estate 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."

This clause was not included in all the certificates issued. It was generally assumed that its absence implied that there were no existing villages or plantations requiring protection at the time of the land alienation. This was later disproved by the certificate issued to the Blantyre Mission, which omitted the clause although it was known that there were existing villages and plantations on the alienated land. Johnston and his assistants were not as thorough in their investigation of land claims as his reports suggested.[94]

As with the other clauses of the certificate of claim, no particular care was exercised in the framing of the non-dist-

urbance clause. It contained several ambiguities which eventually rendered illusory the protection it purported to offer. This conclusion can be drawn from a review of the High Court case of Supervisor of Native Affairs v. Blantyre and East Africa Company Limited.[95] The case originated from an agreement concluded in September 1902 between the manager of Blantyre and East Africa Company and several headmen representing residents on the estate of the company in Thyolo district. The headmen agreed to occupy their villages and gardens as tenants of the Company; to renounce any claims which they may have had under the non-disturbance clause of the original certificate of claim in consideration of the fact that they had been allowed "to change their villages and gardens and to enjoy various privileges as tenants"; and to give two months' labour if called upon during the rainy season, or at any other time as may be required, in lieu of rent. The villagers further agreed not to cut timber from stream banks or reserved places, receive new settlers, or shift village sites and gardens without the consent of the company. The company on its part agreed to pay tax for villagers who provided labour for the required two months, so long as the rate remained at three shillings per annum, and to pay the workers a salary for the second month of labour. Any villager who decided to work for any other employer remained responsible for his own taxes in addition to the payment of rent. The company also guaranteed the villagers peaceful and undisturbed possession of their houses, villages and gardens during the currency of the agreement. But it reserved the right to serve eviction notices through the District Collector in the event of a breach caused by the Africans. The entire agreement could be terminated by either

party upon giving a five-month notice in April of any year.

In 1903, Casson, the Supervisor of Native Affairs, petitioned the High Court for a repeal of the agreement on three grounds. First, he argued that it contravened the existing Registration of Documents Regulations because it was not registered and filed in the deeds registry. It was, secondly, inequitable and illegal inasmuch as it contravened the non-disturbance clause of a certificate of claim issued to the company on 11th August 1893. Finally, Casson contended that the headmen were not legally capable of entering into such an agreement which involved the disposition of freehold rights belonging to a tribe or portions of it.

The first and third grounds of the petition were summarily disposed. On the first ground, Nunan J. held that the Registration Regulations did not apply to documents affecting land occupied by Africans under non-disturbance clauses or otherwise under customary law. It applied only to the land privately held under certificates of claim. On the third ground, the judge decided that the headmen, acting with the consent of their people, had the capacity to enter into agreements disposing the freehold rights of the community. But after the decision of Cox v. A.L.C., such agreements were no longer valid without the consent of the Commissioner who was the supreme controller of African lands in the protectorate. The collector of Thyolo district witnessed the attestation of the agreement in question, but he refrained from expressing any approval on behalf of the Commissioner. Since no written consent was formally obtained from the Commissioner, the ag-

reement could be set aside on this ground.

The High Court also held that the agreement could be set aside on the second ground of the petition because it was exceedingly unfair and one-sided.

> "The natives in return for a past consideration, the fact that they have been allowed to change their gardens at some date not mentioned, surrender a freehold or claim of freehold and receive a tenancy at will with the super-added condition that if they do not work for the landowner ... for two months (1) for their tax (2) for pay, during the rainy season (a period at which their labour is particularly valuable to themselves as it includes two out of the three months of their own hoeing time) they are bound to pay 6 /- for their holdings." [96]

Nunan J. observed that an acre of a fee simple could at the time be purchased for half a crown. If the area of a native garden was estimated at two acres, the agreement would bring the company a payment equivalent to 120 per cent of the purchase price of the fee simple. The Africans, on the other hand, would have no security of tenure, would be liable to eviction at five months' notice and would not be entitled to take fresh ground for gardens without permission. The judge concluded that this was not what British protection brought to the Central African native. The terms and conditions were neither fair nor reasonable and the court was "perfectly confident" that the Commissioner would have withheld his approval had he been consulted.

The judgement of the court on the second ground of the petition was intended to be a general indictment against the practice called Thangata of which the agreement in question was a typical example. Thangata in Chichewa literally means assistance. Under a common local custom, villagers often assisted their chief in the cultivation of his gardens.[97] "In the same way", the European settlers claimed, "squatters on private estates settled on the distinct understanding that they would work for or help the owner, but the difference was that they were paid for their work."[98] This was an unconvincing bastardization of the custom. Villagers traditionally rendered assistance or presented tributes to their chiefs, not under the threat of loss of land rights but as a voluntary mark of respect for local political leadership.[99]

Thangata was a coercive landlord/tenant-cum-employer/employee relationship which did not stem from the respect or esteem in which the European settler was held. It was an intensely disliked arrangement which was initially abetted by the colonial hut tax system under which employers of labour were used as collectors and Africans received tax rebates for working for a European estate.[100] Even more important, Thangata was often demanded from squatters as well as lawful members of the villages surrounded by private estates. This attracted the attention of the judiciary as a contravention of the non-disturbance clause. Judge Nunan endeavoured to interpret this clause by posing the following questions:

> "(1) To whom were the rights secured by the certificates of claim? To the tribe, to the village community, or to the individual native?

"(2) What was the nature and extent of the rights so secured?

(3) How are the persons or bodies in whom the rights inhere to be ascertained, and upon whom [does] the onus of proof lie?" [101]

Proposed answers to these questions revealed the extent of the ambiguities in the non-disturbance clause which were exploited by the European settlers.

In his answer to the first question, Nunan observed that the original treaties by which land was alienated "were made in nearly every case with tribes or portions of tribes represented by their chiefs and by the headmen of villages". As in all his judgements so far reviewed, Nunan claimed that the power of chiefs was "shattered beyond the possibility of restoration" by colonial rule and European settlements. He also claimed that tribal divisions ceased to exist and, when land claims were confirmed by certificates of claim, "provision was made for villages only, not for tribes or portions of tribes, nor yet for individuals". The village being the political and social unit which the administration had to deal with on the fall of the tribe, it was recognized in the non-disturbance clause. The judge further observed that individual ownership of land in the village was not insisted upon, but land was not necessarily tilled in common. Village land could be partitioned in lots, but an individual had no right to alienate the "freehold or right of ownership" which was vested in the community as a whole.[102] It is not necessary to repeat here the comments made elsewhere in the study on analyses of customary

land law and on the social and political control of land by chiefs or tribes.[103] It should be noted, however, that Judge Nunan failed to comment on the apparent contradiction between his analysis and the assertion in the preamble of every certificate of claim that the chief was "the sole and rightful owner" of the land disposed.

Nunan's answer to the second question was that the certificate of claim conferred upon the European holder an estate in fee simple over the land specified, but it did not confer upon the Africans a similar estate over the villages and plantations reserved by the non-disturbance clause. He remarked:

> "If there was such an idea, I can find no trace of it. It would have been more than the natives required, and the value of which they would have failed to realise. But the intention of the Crown was to reserve to villagers a freehold right as a community to the said villages and plantations ... without the possibility of disturbance or removal except with the consent of ... the Commissioner ..."[104]

The Judge did not elaborate on this perplexing distinction between the "fee simple" for the Europeans and "freehold rights" for the Africans. He was perhaps simply misusing the English property concept of a freehold to describe customary land rights which subsisted in the protected villages and plantations. According to Johnston, the effect of the non-disturbance clause was to exclude the villages and plantations from the land sold to the Europeans, and to retain them in the hands of the natives to whom they belonged.[105] The implication, therefore, was that customary law continued to apply to

the retained land.

European settlers did not respect the view that the non-disturbance clause excluded African villages and plantations from their purchases. As far as they were concerned, the clause "simply meant that natives originally on the land at the time of the purchase were not to be disturbed (except by government permission), as in the natural course of events they would move and leave the land when they had exhausted its fertility."[106] The land would then revert to the certificate holder. This interpretation stemmed from a deliberate misconception of customary land tenure as a "usufruct" of the land which has been questioned in Chapter II. The settlers alleged, incorrectly, that they had replaced the chief as the dominus to whom the land was returnable after a period of use. Another questionable aspect of this interpretation was the supposition that all Africans had to change village sites and gardens in the natural course of events. Evidence presented to the 1928 North Nyasa Nature Reserves Commission revealed, on the contrary, that some Ngonde villages were still on the same site more than thirty years after the land settlement.[107]

Notwithstanding the wrong premises, the interpretation of the clause by the settlers was borne out by the plain meaning of the words employed in the drafting. It should be recalled that if the disturbance of the Africans was duly approved and carried out, the clause stated: "... the sites of such villages or plantations on the said estate shall revert to the proprietor of the said estate ..." This was a poor choice of words if the intention was permanently to exclude the villages

from the alienated land. As a result of the poor draftsmanship, the so-called "freehold rights" of the Africans were in effect a mere encumbrance on the settlers' land. A missionary succinctly summarised the situation by referring to the Biblical incident in which the kinsmen of Elimelech were prevented by Boaz from purchasing an inheritance (of land) without the encumbrance of Ruth, the widowed daughter-in-law of the dead man Elimelech.[108]

European settlers and Judge Nunan also held different views on the extent of the rights secured by the non-disturbance clause. The settlers regarded villages and plantations as land actually occupied or tilled at the time of the alienation. This excluded vacant land or fallows. If gardens were shifted in accordance with the prevalent practice of shifting cultivation, the Africans were deemed to have forfeited the protection of the clause, and every villager became a tenant at will on whom rental obligations could be imposed. This interpretation was refuted by Judge Nunan. He contended that the intention of the clause was to provide villagers with a "sufficiency of land to obviate the necessity of migration and to allow a proper rotation of gardens and a proper fallow period for the soil according to the native system of cultivation or absence of system". From the evidence adduced in court, he concluded that 6 acres per hut was sufficient for each original village. He suggested the addition of 2 more acres per hut to cover for increases in the population. He also suggested that any village of not less than ten huts did not deserve protection.[109]

The interpretation adopted by the European settlers was clearly at variance with the structure of villages under customary conditions. But Nunan marred his otherwise correct interpretation with the arbitrary size limitation of 8 acres per hut. There were no surveys or statistics of villages in the protectorate to support the estimation. But assuming that the evidence accepted by the judge was fairly accurate, the effect of the limitation would have been to condemn the Africans, forever, to cramped living conditions and subsistence agriculture. It did not occur to the judge that the ideal solution to this ambiguity in the non-disturbance clause would have been to redefine and reduce the ample claims of the settlers who did not require so much land for their agricultural pursuits.

According to Judge Nunan, the third question on the identity of persons or communities entitled to the protection of the non-disturbance clause was the most difficult to answer. Some of the original village communities had moved to distant sites. The other villages had expanded beyond their original limits and had admitted strangers or new arrivals. An important factor in the expansion of the villages was matrilocal or uxorilocal residence practised by the matrilineal groups living in the protected areas. The drafting of the non-disturbance clause failed to take into account these factors. From 1900 onwards the problem was exacerbated by Lomwe migrations from Mozambique into the Shire Highlands area where most Europeans acquired their holdings. Some of the immigrants were deliberately settled on private estates to provide Thangata labour. Those who were settled within the protected villages

were also regarded as squatters and excluded from the protection of the non-disturbance clause. Because of the difficulty in isolating the immigrants from the indigenous protected Africans, some landholders simply regarded every villager as a squatter on whom Thangata obligations could be imposed. Judge Nunan ruled that this was illegal. All indigenous Africans were entitled to protection from Thangata under the non-disturbance clause. If the landholders encouraged, induced or tolerated the shifting of villages and gardens, the doctrine of estoppel in pais would prevent them from claiming that the Africans had lost their protection. The judge then ruled that the onus was on the landholder to show that Africans on the estate were indigenous and protected or immigrants liable to Thangata.

After interpreting the non-disturbance clause generally in favour of the Africans and against Thangata, Nunan concluded his judgement with the following remark:

> "It appears to me that the interests of the native will be best served by a new arrangement by which, without distinction between old occupiers and new settlers, he engages to pay a moderate rent, say three shillings per annum, commutable in case he works for one month during the three months of the rainy season for pay in return for a fixity of tenure and for a grant of an allowance of land sufficient to prevent frequent migration to the village to which he at present belongs, or to which he chooses to attach himself. The consideration to the original native will be the complete recognition and definition of his privileges without further form of law." [110]

This recommendation was based on a conviction that the sifting of indigenous Africans from unprotected new arrivals by Europeans would be an extremely difficult process. The judge envisaged "an incalculable depreciation of property and a vast amount of trouble and heart-burning, as well a complete unsettling of the native mind in the Shire Highlands".[111]

The recommendation amounted to a suggestion that, because of the inadequacies of the certificate of claim and the non-disturbance clause, Africans on private estates should surrender their protected residency in return for a defined and watered-down version of Thangata. This would not have served the interests of the indigenous Africans who, in their opposition to Thangata in any form, were already questioning and repudiating the land transactions by which European settlers obtained their "fee simples". African interests would have been better served had the judge ruled that since the non-disturbance clause referred to spatial features - villages and plantations - but not the occupants, all African residents, whether new or indigenous, were entitled to protection from Thangata and to non-disturbance, so long as they lived within the protected villages.[112] This argument never featured in the judgement, probably because it proposed a solution which would have drastically curtailed cheap labour supplies for the European estates. Nunan's recommendation was primarily intended to preserve the labour supplies ensured by the system of Thangata. This pandering to the needs of European agriculture has been singled out as a major weakness of the judgement. It has been contended that the recommendation prejudged any attempts to settle the problem on the basis of the rights of the parties

as defined by the certificate of claim, and paved the way for further erosion of African land rights. It perpetuated the mischief which the Supervisor of Native Affairs sought to prevent.[113]

Although the judgement was less than perfect and preserved Europeans' interests, Nunan must not be too harshly criticised with the advantage of hindsight. It should not be forgotten that erosion of African land rights did not begin with the judgement, but with Johnston's less than thorough investigation of land claims and inept drafting of the certificate of claim. This section has attempted to show that the certificate of claim was not an ideal basis for defining African land rights, or the rights of the settlers and the colonial administration. Almost all the principal clauses engendered controversy and conflict between the administrations and the settlers, or between the settlers and the Africans.

An ideal and equitable legal solution to all the conflicts and controversies would have entailed a re-examination of the entire land settlement, and this the courts were neither willing nor equipped to undertake. Law and the judiciary were ultimately subservient to those who wielded economic and political power. Africans did not wield such power in the formative years of protectorate rule. It was therefore unrealistic to expect a legal solution to the problem of Thangata which would have preserved most of their land rights. It will be seen in Chapter IV that such a solution was only contrived towards the end of colonial rule, when Africans assumed the reins of economic and political power.[114]

3 Conclusion

This chapter has attempted to show that a "dual" land structure consisting of Crown lands and private land was created after the proclamation of a British Protectorate over Nyasaland in 1891. Crown land encompassed 85% of the country's land surface, estimated to be 25,161,924 acres.[115] Private land covered the other 15%. An important phenomenon in the creation of these two land categories was the subsumption of African land rights. African lands which were not acquired by European settlers were converted *en masse* into Crown Lands. The majority of the Africans continued to occupy the lands under various customary laws, but only as tenants-at-will of the Crown. Those who found themselves resident on private land were similarly deemed to be tenants of the estate holder and subjected to *Thangata* labour tenancies. African chiefs were deemed to have transferred land to the Crown through various treaties, agreements and concessions. But a review of these documents has suggested that the Crown as a protecting power claimed more land rights than were actually granted by the chiefs and headmen. This was also the case with the creation of private land. African chiefs were deemed to have sold "fee simples" to European settlers irrespective of the fact that these were alien conceptions.

There are several historical explanations for this subsumption and subordination of African land rights and interests to the Crown and the European settlers. The most widely accepted explanation can be termed the "revenue thesis". It

has been convincingly demonstrated that lack of revenue and the parsimony of the British treasury compelled the protectorate administration to pursue land and labour policies which could generate much-needed revenue.[116] Thus, Johnston was compelled to appropriate African land for the Crown in order to provide the administration with possible income from land sales or leases to European settlers. Johnston, like most colonialists of his day, was inwardly convinced that an infusion of settler enterprise was the key to agricultural development in the protectorate. Thus, notwithstanding several pronouncements to the contrary, the paramountcy of settler interests was an underlying element in his land policies.[117] It has also been shown that the settlers capitalized on their privileged position and organised powerful pressure-groups which the protectorate administration was wary to antagonize.[118] Thus, Johnston and his successors were compelled to deal favourably with the European settlers, at the expense of the Africans, in order to avoid local political conflicts.

Some of these historical explanations have the incidental effect of deflecting criticism away from Johnston's personal conduct in the land settlement. Some accounts have indeed depicted him as a very able administrator whose land settlement was on the whole satisfactory.[119] This account has attempted to correct such impressions by exposing legal and policy conflicts and contradictions on almost every important aspect of the settlement. The controversies which emerged soon after the settlement were such that, despite the many extraneous problems encountered in the exercise, Johnston cannot escape censure for lack of foresight and disregard for legality and

consistency. Johnston's superiors at the Foreign Office can also be criticised for failing to check some of the glaring inconsistencies. But it should be noted that Foreign Office approval was often sought and obtained for what was already a fait accompli on the ground. Sheer distance between the protectorate and the metropolitan, coupled with Foreign Office preoccupation with other more important dependencies, made close supervision of land settlement in Nyasaland impossible. The metropolitan country also explicitly or tacitly supported local land arrangements which were likely to generate local revenue. It further encouraged Crown assumption of control over African land as a way of strengthening the hand of the government. Finally, the metropolitan country also believed that European settlers were crucial for the development of the protectorate.

The subsumption of African land rights was easily tolerable in this political economy. Law was in fact evolved to pre-empt any legal challenges which the Africans themselves might have contemplated. It covered and protected arbitrary and autocratic tendencies of the omnipotent colonial administrators instead of assisting in the preservation of the rights of the weaker and less dominant sector of the society. This was an inauspicious introduction of the "Rule of Law" to the protectorate.[120] The question for subsequent chapters is whether this negative role of law or its otherwise marginal utility in the administration of agrarian change continued for the rest of the colonial period.

NOTES TO CHAPTER III

1 This was Malawi's name during the colonial period. The protectorate was also called British Central Africa for a short period between February 1893 and July 1907.

2 This was done under the Africa Order in Council, 1889. The declaration appeared in the London Gazette on Friday, 15th May 1891.

3 F.O. 84/2197, Johnston to F.O., 13th October 1892.

4 F.O. 84/2197, Johnston to F.O., 19th November 1892.

5 B.S. Krishnamurthy, "Thompson Treaties and Johnston's Certificate of Claim", African Social Research, Lusaka, No. 8, December 1968, p. 592.

6 F.O. 84/2197, Johnston to F.O., 13th October 1892; and F.O. 2/128, 4th June 1897, enclosing a memorandum on Government rights over waste and unoccupied land in British Central Africa.

7 Pachai, Land and Politics in Malawi, pp. 32-33, observes that 81 treaties were concluded between 1889 and 1892, 63 of these between August 1889 and June 1891. This count does not include some of the tax treaties concluded in 1895 which also ceded land rights and sovereignty. See F.O. 2/89, Johnston to F.O., 28th August 1895 and 13th November 1895. Most of the protectorate treaties have been reproduced by Sir E. Hertslet in The Map of Africa by Treaty, Frank Cass and Co., 1967, pp. 11-33.

8 F.O. 84/1751, Hawes to F.O., 14th January 1886.

9 Ibid.

10 F.O. 84/2021, Buchanan to F.O., 18th October 1890, enclosure 1 in no. 59; and Hertslet, op. cit., pp. 13-16.

11 Hertslet, op. cit. p. 21.

12 F.O. 403/185, Despatch No. 286, Johnston to F.O., 18th October 1893, enclosure no. 2.

13 See, for example, F.O. 84/1942, Ag. Consul Buchanan to F.O., 9th August 1889, 2nd September 1889, 3rd September 1889, 30th September 1889 and 12th October 1889; F.O. 84/2021, Ag. Consul Buchanan to F.O., 17th January 1890 and 30th August 1890.

14 F.O. 84/2197, Johnston to F.O., 13th October 1892.

15 Ibid.

16 F.O. 2/66, Johnston to F.O., Despatch No. 31, 31st March 1894, Report on the first three years' Administration of British Central Africa, section on land settlement.

17 See F.O. 84/2021, Ag. Consul Buchanan to F.O., 17th November 1890, enclosing a treaty by which Chipoka and other chiefs covenanted "we ... most earnestly beseech Her ... Majesty ... to take our country ourselves and our people and [agree] to observe the following conditions:-

1st That we give over all our country within the ... described limits, all sovereign rights, and every other claim absolutely, and without any reservation whatever, to the Queen ...;

2nd That we solemnly pledge ourselves and our people to abide by the laws laid down by Her Majesty's Government or Her representative for our guidance and government."

This treaty was accredited with the creation of 173,000 acres of Crown land. See Pachai, op. cit., pp. 32-33.

18 Cf. Pachai, op. cit. p. 33, who claims that 18 post-protectorate treaties were concluded between 1891 and 1892. As suggested above, this count does not take into account other treaties concluded as late as 1895: see Note 7.

19 It is not clear whether these subsidies and payments were intended to continue after the death of the signatory. It would appear that the payments were rarely made after the formative years of protectorate rule. See F. Moir, Memorandum on Sir Harry Johnston's Policy on Native Land Settlement, 27th June 1897, pp. 16-17 enclosed in File SI/492/32, Folio 11, Ag. Chief Secretary to Chief Secretary, Government of Uganda, 3rd February 1934, Malawi National Archives, Zomba.

20 F.O. 84/2114, Johnston to Salisbury, 21st July 1891.

21 Hertselt, op. cit., p. 28.

22 Ibid.

23 F.O. 2/54, Johnston to F.O., 5th January 1893; F.O. 403/185, Johnston to F.O., 14th October 1893, enclosure no. 9 in 286; and F.O. 2/66, Johnston to F.O. Despatch No. 27, 14th March 1894.

24 F.O. 403/174, F.O. to Johnston, 12th August 1892.

25 F.O. 84/2114, Johnston to F.O., 21st July 189 .

26 F.O. 2/66, Johnston to F.O., Despatch No. 27, 14th March 1894.

27 F.O. 403/185, Johnston to F.O., 14th October 1893, enclosure 1 in No. 283.

28 See Part 2(a) of the chapter.

29 F.O. 2/65, Johnston to F.O., Despatch No. 23 and enclosures, 3rd March 1893.

30 A.J. Hanna, The Beginnings of Nyasaland and North-Eastern Rhodesia 1859-1895, Oxford Clarendon Press, pp. 156-161 and 237-238.

31 F.O. 403/185, Johnston to F.O., 18th October 1893.

32 F.O. 2/66, Johnston to F.O., Despatches No. 10, 22nd January 1894 and No. 15, 4th February 1894.

33 F.O. 2/128, Johnston to the Marquis of Salisbury, 31st January 1897.

34 Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya, Oxford University Press, Nairobi, 1950, p. 25.

35 H. Jenkins, British Rule and Jurisdiction Beyond the Seas, Oxford, Clarendon Press, 1902, pp. 165-166, and generally, Ch. 14.

36 F.O. 403/198, C.O. to F.O., 19th July 1894.

37 Ghai and McAuslan, op. cit., p. 25.

38 F.O. 2/54, Johnston to F.O., 3rd May 1893, where Johnston gave the following categorization of land in the protectorate: one-fifth alienated to missionaries and settlers as private land; one-fifth alienated to the B.S.A. Company also as private land; one-fifth belonging to the Crown; and about two-fifths remaining in the hands of the Africans, subject to the provision that they could not part with the land without the consent of the government. Hanna, op. cit. pp. 235-236, observes that Johnston's summary compared oddly with figures given in the report of the Land Commission of 1920, which showed that all private land, including that held by the B.S.A. Company, totalled one-seventh instead of two-fifths of land in the protectorate. See File SI/492/32, Folio 11, Memorandum on Sir Harry Johnston's Land Settlement, pp. 19-22, for the change of views in the assessment of Crown lands.

39 F.O. 2/693, F.O. to Law Officers, 18th November 1899. See also Morris and Read, Indirect Rule and the Search for Justice, Clarendon Press, Oxford, 1972, pp. 48-49.

40 Also known as the Kombe cases. Copies of the judgements can be found in F.O. 2/471, Sharpe to the Marquis of Lansdowne, 29th July 1901, Despatch No. 188 and enclosures.

41 See F.O. 2/606, Sharpe to the Marquis of Lansdowne, Despatch No. 172, May 1902, enclosing the Annual Report for the protectorate for the year ending 31st March 1902. Cf. Chapter II on decentralisation of Chewa societies.

42 The story of Nyasaland's attempted annexation is adequately narrated by Morris and Read, op. cit. pp. 63-68. See also C.O. 525/49, Despatch No. 219, 14th June 1913, enclosing a Memorandum by C.J. Griffin dated 6th April 1912 and a response by Ag. Governor Pearce dated 14th June 1913.

43 [1910] 2. K.B. 526.

44 [1919] A.C. 211.

45 [1926] A.C. 518

46 [1955] I.Q.B. 1 at p. 15.

47 Published in the London Gazette on 15th August 1902.

48 Morris and Read, op. cit. p. 60. See also Ghai and McAuslan, op. cit., p. 34.

49 For details on the procedures followed in the settlement of private land claims, see Johnston, British Central Africa, pp. 112-113; F.O. 84/21197, Johnston to F.O., Settlement of Land Claims in the Shire Province of Nyasaland, 13th October 1892; and F.O. 403/185, Johnston to F.O., Despatch No. 283, enclosure 1, Report on Settlement of Land Claims in British Central Africa, 14th October 1893.

50 F.O. 84/2197, Johnston to F.O., 13th October 1892.

51 F.O. 403/198, C.O. to F.O., confidential despatch dated 19th February 1894.

52 For a copy of the Act see Hertslet, op. cit., Vol. II, p. 468.

53 See File SI/411^{I}/33, Folio 31, Governor Young to Sir Cunliffe-Lister, confidential despatch. 14th March 1934, pp. 9-11, para. 11; and Pachai, op. cit., pp. 37-40, for a list of all the 73 certificates issued. There is a slight discrepancy in the statistics presented by these two sources on the certificates issued for surface land rights. Pachai claims that a total of 59 instead of 60 were issued; 5 affecting land in Tanganyika. He also claims that 2 certificates instead of 3 were cancelled.

54 Files SI/1519 A to D^{II}/28, National Archives, Zomba, contain the historical details on the acquisition of this large holding and its eventual surrender to the government in 1937.

55 See Murray, A Handbook of Nyasaland, London, 1932, p. 296.

56 See Note 49 above.

57 F.O. 403/196, C.O. to F.O., 15th October 1894.

58 See Hanna, op. cit. p. 238, and generally R.H. Palmer, "Johnston and Jameson: a comparative study in the Imposition of Colonial Rule" in B. Pachai (ed.), The Early History of Malawi, Longman, 1972, pp. 293-320.

59 For similar assessments of Johnston's land settlement see Pachai, op. cit. p. 41; Wanda, Colonialism, Nationalism and Tradition, Ch. 18; and Krishnamurthy, Land and Labour in Nyasaland, p. 128.

60 F.O. 403/197, Memorandum by Sir Clement Hill on Commissioner Johnston's No. 55, Central Africa, October 14th 1895, respecting Land Claims in Central Africa Protectorate and British Sphere North of the Zambezi, Foreign Office, 26th February 1894.

61 See F.O. 403/174, Messr.s Emmanuel and Simmons to the Marquis of Salisbury, 14th May 1892; and F.O. 403/198, Rev. H. Waller to F.O., 10th September 1894 and F.O. to H. Waller, 20th September 1894.

62 See F.O. 2/88, Johnston to F.O., No. 64, 30th May 1895, enclosing a land claim which alleged that African chiefs in Mulanje assigned land in "full and common socage" to Henry Brown. The document was proved to be a fake, and the claim was renounced.

63 Johnston, op. cit., p. 113.

64 SI/1519^{A}/28, Folio 222, District Commissioner, Kalonga, Observations on the Report of the North Nyasa Native Reserves Commission, 4th February 1930; and Folio 30, Governor Thomas to C.O., 29th November 1930.

65 See Note 29 above, and cf. F.O. 2/54, Johnston to F.O., 5th January 1893, in which Johnston preferred to recognize the political authority of Makololo chiefs in the Lower Shire instead of the indigenous Mang'anja. The Makololo were correctly recognized because they were the de facto rulers after the defeat of the indigenous Mang'anja chiefs. Customary law recognized the establishment of political control over land through conquest. But the problem was that Johnston was unwilling to apply this principle consistently to all chiefs, especially if they were hostile to colonial overtures.

66 Johnston, op. cit. p. 113.

67 F.O. 403/185, Johnston to F.O., 14th October 1893.

68 See Note 62 above, and F.O. 84/2197, Johnston to F.O., 13th October 1892.

69 Ibid.

70 See F.O. 2/54, Johnston to F.O., 26th August 1893. This despatch shows that the claims of A.C. Simpson were favourably considered because he once assisted in the translation of the Protectorate treaties signed by African chiefs. Another curious example of leniency concerned John Moir, the dismissed manager of the African Lakes Corporation. He was sold or leased land at extremely low values, simply because he was one of the pioneering settlers in the protectorate. See F.O. 2/66, Johnston to F.O., Despatch No. 30, 26th March 1894.

71 Johnston, loc. cit.

72 See F.O. 84/2115, Buchanan to F.O., 2nd February 1891, enclosing details of Scharer's land purchases which ranged from 12 to 40 miles in width and over 100 miles in length.

73 See Note 74 below.

74 For details of Scharer's certificate of claim and the controversies on the survey condition, see F.O. 2/89, Johnston to F.O., Despatch No. 86 and enclosures, 12th July 1895; F.O. 2/306, Sharpe to F.O., Despatch No. 61, 8th February 1900; F.O. 2/304, F.O. to Sharpe, Despatch No. 52, 3rd May 1900; and F.O. 403/198, C.O. to F.O., 15th October 1894.

75 F.O. 2/88, Johnston to F.O., Despatch No. 72, 7th June 1895.

76 F.O. 403/299, Lord Stanmore to the Marquis of Salisbury, Despatch No. 32 plus enclosures, January 1896.

77 F.O. 2/105, F.O. to Johnston, 27th May 1896.

78 The judgement was delivered on 2nd February 1904 and reported in the British Central Africa Gazette on 20th February 1904.

79 Judgement delivered on 13th October 1904 and reported in the British Central Africa Gazette on 31st October 1904.

80 Section 2(b) of the Mining Regulations in F.O. 2/207, F.O. to Sharpe, Despatch No. 14, 26th June 1898.

81 Note 78 above.

82 29 Charles II, c.3.

83 (1882-83) 8 Appeal Cases, 318.

84 See Note 79 above.

85 Civil Appeals No.s 7 and 8 of 1904, H.B.M. Court of Appeal for East Africa, in C.O. 525/11, 1st April 1905.

86 See Ibid., pp. 45-46, for all the quotations in this paragraph.

87 Johnson v. McIntosh, 8 Wheaton S.C. Rep. 21 U.S. 543.

88 Notes 31 and 32 above show that this was not entirely correct. Crown rights in land were acquired from Mkanda, Mitochi and Mpenzeni after punitive expeditions.

89 For quotations in this paragraph, see p. 47 of the judgement as cited in Note 85 above.

90 Ibid., pp. 48-50.

91 C.O. 525/7, Nunan to Commissioner Sharpe, 31st March 1905, enclosure No. 2 in Despatch No. 102, Sharpe to C.O., 31st March 1905.

92 C.O. 525/7, Griffin to Sharpe, 4th April 1905, enclosure 1 in Despatch No. 114, dated 5th April 1905.

93 C.O. 525/10, R.B. Finley and E. Carson, Law Officers, to A. Littleton, 15th August 1905. See also C.O. 525/11, C.A. Harris to H.B. Cox, minute dated 26th May 1905.

94 See the evidence of Rev. Alexander to the Select Committee of the LEGCO on Agricultural Development, File SI/411^{II}/33, Minutes of meeting held on 11th January 1934; Folio 44, Minutes of the 5th Meeting held on 7th February 1934; and Folio 167, C.O. to Governor Kittermaster, 27th April 1936.

95 Judgement dated 28th April 1903, published in the British Central Africa Gazette Supplement dated 30th April 1903.

96 Ibid., p. 6.

97 Kandawire, op. cit., pp. 10-14 and, generally, Ch. 1.

98 H.S. Hynde and others, Memorandum on private Estates in Nyasaland, 1924, File SI/1330/25, p. 4

99 See Chapter II.

100 For details on the early Hut Tax system, see F.O. 2/55, F.O. to Johnston, 16th December 1895; F.O. 2/65, F.O. to Johnston, 1st April 1894; F.O. 2/307, Despatch No. 142, 19th May 1900, Report on Trade and General Conditions of the British Central Africa Protectorate from 1st April 1899 to 31st March 1900; F.O. 2/470, Despatch No. 160, Sharpe to the Marquis of Lansdowne, 8th July 1901; and F.O. 2/468, The Marquis of Lansdowne to Col. Manning, 1st January 1901.

101 See Note 95 above, p. 6.

102 Ibid. for all quotations in this paragraph.

103 See Chapter II and Part 1 of this chapter.

104 See Note 95 above, p. 7.

105 F.O. 403/185, Johnston to F.O., 14th October 1893, Ch. V; F.O. 2/66, Johnston to F.O., Despatch No. 31, Report of the First Three Years of Administration of British Central Africa, 31st March 1894; and Johnston, British Central Africa, p. 113.

106 Hynde and others, op. cit., p. 6.

107 File SI/1519^{A}/28, Folio 156, p. 3.

108 Note 95 above, p. 4, quoting The Blantyre Mission Paper, Life and Work, for January 1893.

109 See Note 104 above.

110 Ibid., p. 8.

111 Ibid.

112 This argument was first raised by Messr.s Partridge and Kaye-Nicol in their evidence to the Select Committee of LEGCO on Agricultural Development, Folio 11, File SI/411^{I}/33.

113 Wanda, op. cit., p. 85.

114 See Ghai and McAuslan, op. cit. p. 124, for a similar conclusion on Kenyan agrarian administration.

115 Pachai, op. cit. p. 48, and Note 53 above.

116 Krishnamurthy, passim.

117 Palmer, op. cit., p. 312.

118 S. Myambo, The Shire Highlands Plantations, 1973, passim.

119 See Hanna, op. cit., pp. 229-238, especially p. 238, where he concluded that Livingstone would have approved the main lines of Johnston's policy. Hanna also concludes that Sir Percy Anderson was not exaggerating when he claimed that the land question was placed on a just and sound basis. Another account which praises Johnston's general conduct in administration is C.A. Baker, Johnston's Administration 1891-1897, Department of Antiquities, Publication No. 9, February 1971, Chapters 7 and 8.

IV COLONIAL LAND LEGISLATION AND AGRARIAN CHANGE

After the creation of the categories of Private and Crown Lands as described in the previous chapter, the colonial administration began to pass legislation aimed at controlling the holding and use of the land. This chapter will attempt to summarize the major themes of legislation passed during the entire colonial period. It will also consider the manner in which the statutes promoted or demoted the conflicting interests of the European settlers, Africans and the administration in the agricultural economy.

It will become apparent that the thrust of colonial land legislation was dictated by the manner in which Harry Johnston concluded the original land settlement. First, there was the allocation of large tracts of land in fee simple to the European settlers in contravention of customary land law and without sufficient regard to the protection of the interests of the Africans. To what extent did statutory law mitigate or aggravate the subversion of African land rights by the European settlers, and how did the Africans react? What controls did the government evolve to ensure the development or proper use of the fee simples? Secondly, Johnston transferred to the Crown large areas of vacant or occupied African lands. How was the disposal and subsequent occupation of the vacant areas controlled, and how was the use of the areas already under occupation regulated?

1 Control of Thangata on Private Land

The recurring theme in colonial legislation on private land was the issue of Thangata. It should be recalled that this was a practice by which some European settlers demanded labour services in lieu of rent from Africans resident in villages surrounded by private land. Judge Nunan ruled in 1903 that this was an infringement of the non-disturbance clause in title deeds for private land insofar as labour services were demanded from indigenous Africans.[1] But he also suggested that a simple declaration of the legal position was unsatisfactory to both European settlers and Africans. A commission of enquiry presided over by the judge was constituted to investigate and to recommend acceptable solutions to the problem.[2]

(a) Report of the Land Commission, 1903[3]

The Commission took only a few weeks to produce a report. Evidence was taken from some of the principal landholders in the Shire Highlands, but the core of the report relied on the findings of the High Court in the 1903 case. It was recommended that all landholders with estates of 800 acres or more should set aside one-tenth of undeveloped land on which native locations could be established. The locations would then be subdivided into 8-acre plots leased to each family headed by a male tax-paying member at a rent of 4/- per annum payable to the estate holder. The suggested minimum size for a native location was 80 acres for an 800 acre estate and a conglomeration of ten families or huts belonging to families headed by a tax-paying male member.

The idea of native locations was borrowed from the Glen Grey Act 1894 of South Africa, but two local factors influenced the nature of the recommendations. The first was a belief that it was no longer possible to distinguish between Africans who were entitled to non-disturbance or rent-free residence under the Certificates of Claim, from those who were not. The second was a defeatist and pacifist assumption that estate holders would not accept any proposition which attempted to loosen their control over cheap and abundant labour supplies ensured by Thangata. Thus, all Africans were to become rent-paying tenants in locations accessible to the European estates, and under conditions which did not prevent the estate holder from demanding labour services in lieu of rent. The recommendations of the Commission did not amount to an abolition of Thangata; it was simply made slightly less pernicious.

Estate holders were not impressed by the fact that the report ultimately promoted their interests. The recommendation that one-tenth of undeveloped land should be set aside for native locations was described as "an enormous sacrifice of land" which extended to all Africans rights belonging to about 20 per cent of the population. They submitted alternative proposals suggesting the allocation of smaller family plots to this 20 per cent, at a rent which could be commuted by provision of labour services. As for the other 80 per cent of the population, the alternative proposals amounted to a suggestion that settlers should be able to enforce Thangata obligations without restrictions or regulations on the amount of subsistence land offered to the Africans.[4]

The alternative proposals were unacceptable to Acting Commissioner Pearce because they were based on a distortion of the land tenure situation in the Shire Highlands. It was clear that a reservation of one-tenth of undeveloped land was not a great sacrifice to most of the landholders. Large estates were as yet undeveloped and retained for speculation on the land market. The ease with which African chiefs could identify the protected 20 per cent of the population was also exaggerated by the settlers. Some of the immigrants were already integrated and indistinguishable members of the original communities. The figure of 20 per cent was in any case a rough estimation. The settlers further claimed that Africans settled on private estates because they were generally satisfied with Thangata: for if they were not, they could easily move to Crown lands. It was assumed that large areas of Crown Land, more than half the entire Shire Highlands province, were available for the resettlement of the Africans. This was incorrect. Crown lands in the districts most affected by Thangata were already closely settled, and the remaining areas were not necessarily suitable for habitation. Africans did not choose to remain on private estates under the onerous labour tenancies; suitable areas for resettlement elsewhere were not readily available.[5]

The report of the Land Commission was translated into the Native Locations Ordinance 1904,[6] in spite of settler opposition; but the government lacked the political will to put it into operation. It remained on the statute books until it was repealed in 1928.[7] According to some commentators, the government lost an opportunity "to salvage for the African resi-

dents communal rights, a reasonable land grant per family at moderate rent, security of tenure and a chance to reacquire the land by purchase".[8] Such interpretations overlook the unpopularity of locations or native reserves to Africans, even in South Africa where the idea originated.[9] As suggested in the previous chapter, reserves would have reduced opportunities for Africans to participate in the agricultural cash economy other than as providers of labour. Confining Africans to 8 acres per family was the wrong solution while large tracts of private land remained idle, and it was still more unfair to turn indigenous Africans into rent-paying tenants on lands which belonged to them in law. Thus, there was not much to commend in the 1904 Ordinance or the 1903 Land Commission Report, even if judgement is by "the realities of 1903 rather than by the morality of a later age".[10]

Although the recommendations of the 1903 Land Commission were not acted upon, it left a lasting legacy on the approach to the control of Thangata on private land. A precedent was set of proceeding through official enquiries followed by statutory enactments. It was also generally assumed that the problem could be resolved by converting all Africans into rent-paying tenants and by enacting laws with provisions on:

(i) the amount of rent payable for the residence and/or labour services to be rendered in lieu thereof;

(ii) the length of the tenancy and eviction procedures for offending or excess tenants; and

(iii) the amount of subsistence land and other amenities available to the tenants on the estate.

It was only towards the end of colonial rule that solutions most commendable to the Africans were contemplated; namely, rent-free residence for all settled members of village communities regardless of whether they were indigenous Africans or immigrants, and repossession of all idle European estates.

(b) Report of a Commission of Enquiry into the Native Rising of 1915

After the debacle of the 1903 Land Commission, the Native Rising of 1915 presented the second occasion for an enquiry into the problem of Thangata.[11] The story of the rising and the enquiry should be taken back to 1914. The government published a Bill which purported to control Thangata in two ways: first, by insisting that all rent-cum-labour service agreements should be in writing; and, secondly, by giving the tenant the option of electing to pay rent in cash or to work in lieu thereof. The essence of Thangata was the ability of the landlord to demand labour services in lieu of rent at any time irrespective of whether the tenant could afford a cash rent. The Attorney General informed the Legislative Council that, because of the increasing progress of the natives, they must be given a choice in such matters.[12]

Hon. A.L. Bruce, the unofficial LEGCO representative for estate holders, objected to the Bill being pushed through the Chamber at short notice. He also restated the position of landholders that it was labour, not rent, which they required from African residents. He claimed that this was perfectly understood by residents on his estates. No rent was collected

and no hardship was experienced. The advancement of the native was in his view exaggerated. Although some had aspired to better themselves, the majority were still in an unimproved condition. "It was these people who were the real labourers on the land, and he would say that knowing the conditions of the agreements, they would abide by them."[13] He foresaw the reduction of crucial labour supplies for private estates if the native was given the option of paying money rent in lieu of service. The government postponed the passage of the Bill to enable further consultations with settlers to take place as requested by the unofficial representative. When the First World War errupted, "it was decided not to continue with a measure which would have been opposed by the nominated member of council".[14]

Bruce's unabashed defence of Thangata as a source of cheap labour for his estates had a somewhat prophetic twist. In the vicinity of the estates in Chiradzulu, John Chilembwe, one of the few acknowledged progressive Africans of the period, established the headquarters for his "Providence Industrial Mission" from which he orchestrated the ill-fated uprising against colonial rule in 1915. He received considerable support from the allegedly pliant tenants on the estates, and one of the few white victims claimed by the rising was W. Livingstone, the estate Manager. After taking evidence from the Africans, the Commission of Enquiry appointed to investigate the origins of the conflict could not resist mentioning "the treatment of labour and the system of tenancy on the Bruce Estate".[15] It was noted that Livingstone was exceptionally harsh with the tenants, and that the system of accepting no

rent but labour for two months in the rainy season was often abused. A month was equated with 28 days of actual work, but tenants were compelled to work for longer periods by various devices. One ploy was the setting of a very high daily target. If the tenant failed to complete the work, the whole day was deemed lost without credit for hours actually spent on the task. The Commission concluded that the position of tenants on private estates could be significantly improved by "the abolition of work in lieu of rent, except at the option of the tenant". This was, ironically, the principal measure of the Bill shelved in 1914 in deference to A.L. Bruce.

The recommendation was answered by the enactment of the Rents (Private Estates) Ordinance 1917.[16] The option to pay cash rent or work in lieu thereof was a slight improvement in the legal position of some tenants, but not of indigenous Africans who were entitled to rent-free residence on the estate under non-disturbance clauses in Certificates of Claim. It is notable that the draft Ordinance contained a clause specifically abrogating such rights. It was expunged on the advice of the Colonial Office, but this was not intended to be a reprieve for the Africans. Bonar Law contended that the ommission of a provision on this issue avoided controversy but enabled landholders to continue exacting rent from every African.[17] He suggested, contrary to Nunan's earlier holding,[18] that the onus was on the African to show that he was entitled to free residence under the non-disturbance clause. The 1917 Ordinance thus subtly promoted settler interests and further encouraged the subversion of the protected residence of indigenous Africans.

More explicit concessions were also made to European settlers in the drafting of the 1917 Ordinance. Governor Smith was persuaded to drop the requirement of the 1914 Bill that all labour tenancy arrangements should be supported by written documents. The Governor was convinced that "no agreement in the real sense of the term [was] possible in respect of the thousands of natives resident on private estates", and that it was "rather as ferae naturae that the protection of the government [was] to be invoked on their behalf".[19] This perception of African intelligence suggested that the lessons of the Chilembwe rising were quickly lost. The Governor was also unaware of the original intention behind the requirement for written agreements. The Attorney General had stated in the 1914 LEGCO debates that the provision enabled the government to inspect tenancy agreements and advise against any unconscionable terms. This was not always possible where the arrangement was verbal.[20]

Governor Smith also capitulated to settler demands on the procedure for evicting tenants. Section 5(a) in draft form provided that an eviction notice should not begin to run until accommodation was found elsewhere for the tenants. Landholders contended that this amounted to an expropriation of the land. The Governor effected a deletion of the clause, stating that he was prepared to place sufficient trust in the good sense of the settlers not to evict tenants in droves. He assumed that such evictions will always be inimical to the interests of the settlers.[21] Subsequent events, as we shall see later, proved him wrong.

The European settlers remained resolutely opposed to the 1917 Ordinance in spite of the various concessions made to them during the drafting stages. Most of them permitted Africans to reside on the estate for as long as they were willing to provide labour during the required periods. As soon as a resident intimated his unwillingness to work, he was served with an eviction notice regardless of whether he was willing to pay rent in cash. District residents found it difficult to establish the intention of the tenant or to control the eviction because landholders were not obliged to specify reasons for the eviction in the notice, and the Ordinance made no provision for formal or informal hearings of eviction cases. The Ordinance thus failed to accomplish or attain the recommendation of the 1915 enquiry.[22]

(c) Inter-War Enquiries and Legislation

After the end of the First World War, Nyasaland, like some of the East African dependancies, was expected to provide sanctuary for some of the demobilized soldiers. This brought about a significant change in the character of private estates. It accelerated the subdivision of some of the huge undeveloped estates into smaller holdings which were sold to the returnees at profitable prices. Some of these smaller holdings were not able to support African residents without strain or interference in the exploitation of the land. This, and general settler dissatisfaction with the 1917 Ordinance, were some of the factors which led to the appointment of a new Land Commission in 1920. Governor Smith enjoined the Commission to report on various land tenure aspects, including the occupation and use

of private estates by Europeans; the reservation of Crown lands for more European settlements; the creation of native reserves; the introduction of individual land holding in African areas; and general cultivation of economic crops by the Africans on Crown lands.[23] Recommendations on most of these issues will appear in various sections of the chapter. Control of Thangata is the primary concern of this section.

The basic recommendation of the Commission on this issue was that, since the 1917 Ordinance had failed to achieve its objectives, it should be repealed and replaced by an Ordinance which legalized the practice. The Commission suggested that Thangata was not objectionable if properly regulated by law and strictly supervised; and since landholders would not accept tenants except as labourers, "all that legislation should attempt is to provide that if a landlord does accept native tenants he shall do so only upon terms which are fair to the native".[24] The report accordingly attempted to detail terms it considered fair to the natives and acceptable to the settlers. It also suggested the restoration of the requirement for written Thangata agreements which was removed from the 1917 Ordinance, and the amendment of the Employment Ordinance to ensure that combined labour and tenancy agreements were not prohibited.

A recent assessment of the report of the 1920 Land Commission claims that its recommendations "were far-reaching" and, if acted upon, would have removed many of the tenurial defects on African and non-African holdings.[25] It is submitted, with respect, that the recommendations on control of Thangata were

too one-sided and do not deserve such an accolade. The Commission was so biased that it had the temerity to suggest that "fixity of tenure" for the Africans could be achieved by replacing permanent land rights with four-year tenancies. It also supported periodic eviction of tenants, despite the fact that scarcity of resettlement land in the affected areas was by now a well-known fact. It was perhaps a blessing in disguise that the Colonial Office failed to act on the proposals, especially during the reign of Governor Smith, who appeared to be unduly susceptible to overtures from the settler community. When Governor Bowring took office, he instantly recognized that the Crown did not possess sufficient land to absorb all Africans who were likely to be evicted if the recommendations of the Commission were fully implemented. As a temporary measure, while the issue was being restudied, he proposed restrictions on evictions carried out under the 1917 Ordinance before alternative resettlement land was found on Crown lands.[26]

Governor Bowring was also one of the first administrators to moot the idea of private land reacquisitions as a solution to the problem of Thangata. This view was endorsed by the East Africa Commission chaired by Ormsby-Gore M.P. which visited Southern Nyasaland in 1924.[27] The Commission was severely critical of the government's connivance in the treatment of all Africans resident on private estates as rent-paying tenants, contrary to the original Certificates of Claim. It reported:

> "We cannot but regard it as anomalous that in Southern Nyasaland the machinery of government is being used to impose on native residents claims

> not included in their titles, while such claims are not enforced in Northern Nyasaland and are excluded in Northern Rhodesia. This condition of affairs is likely before long to lead to agitation and possibly litigation."[28]

The Commission suggested that, although new African immigrants were not entitled to protection under the Certificates of Claim, it was desirable that, as far as possible, they should be treated as indigenous members of the community and excused from Thangata. It is notable that this desirable proposition came from an external commission which did not include local commissioners. Local enquiries and administrators were not so impervious to pressure from settlers. Even Governor Bowring, who began his tenure with a fair appreciation of the problem, soon became more accommodating to the settlers. After consulting the influential Chamber of Commerce, he recommended the passage of a law which was remarkably similar to the still-born 1904 Ordinance. When changes proposed by the Colonial Office were taken into account, the measure was transformed into a new Natives on Private Estates Ordinance 1928, which repealed and replaced the 1904 and 1917 Ordinances.[29]

The most significant and novel feature of the 1928 Ordinance was the classification of Africans on private estates into the categories of "Exempted Natives", "Natives under Special Agreements" and "Resident Natives". Exempted natives were paid employees like domestic servants, resident in dwellings provided by the estate holder. A native under a special agreement was entitled to residence on the estate by virtue of a written contract, approved by the District Magistrate, which specified that he was entitled to work for the estate holder

for a period not exceeding six months in any one year. This category was included to cater for "visiting tenancy" arrangements. Africans were permitted to reside on private land for a short period for the purpose of growing a specified economic crop under the supervision of the landholder. The crop was then sold to him at preferential prices. A "resident native" was "any male native or unmarried female over the apparent age of 16" resident on the estate for a period of three years, or for any period with the knowledge of the owner, who was neither an exempted native nor resident under a special agreement. Landholders were prohibited from permitting residence on the estates except under one of the three specified categories.[30]

The majority of Africans on private estates were "resident natives", and the Ordinance was primarily concerned with the rights of this group. In return for reasonable amounts of subsistence land and amenities like grass and firewood, every resident native who was not excused from tax payments was liable to pay an annual rent fixed by District Rent Boards. The rental obligation for polygamous males increased with each additional wife taken. Unlike the repealed 1917 Ordinance, the 1928 law specifically permitted the provision of labour "in lieu of or in abatement of rent payable", but the choice was with the resident. If he elected to work, the estate holder was bound to provide employment at prevailing market rates within walking distance from the dwelling of the resident. Each day and month of labour provided entitled the resident to specified rent rebates. The period of employment was also specified to ensure that the resident had time to attend to his gardens during the rainy season. If the estate holder was

unable to provide suitable employment, he was obliged to provide facilities for growing economic crops which he could be requested to purchase at prevailing market prices. Production of specified quantities of a specified crop entitled the resident to a full rent rebate. If neither employment nor facilities for growing crops could be provided, the landholder was deemed to have waived the resident's rental obligation.[31]

The tenure of resident natives was by Section 21 terminable at the end of each quinquennial period, beginning from the day the Ordinance was applied to a particular part of the protectorate.[32] Six months before the end of the period, the estate holder was required to serve notices of intended evictions on the District Resident, who was responsible for implementing them. Not more than ten per cent of resident natives on the estate could be removed on each session. It was incumbent on the government to resettle evicted Africans on Crown land in the vicinity or elsewhere in the protectorate.

By Section 25, one-tenth of an estate exceeding 3,000 acres could be acquired compulsorily for the purpose of establishing native resettlement areas. Crown land of equivalent value in another part of the protectorate could be offered in exchange for the acquired holding. This provision was so stubbornly resisted by estate holders that an amendment which increased the size of acquirable estates to 10,000 acres soon followed the publication of the principal ordinance.[33] This neutralized the effectiveness of the acquisition policy in solving the problem of Thangata on many estates.

The 1928 Ordinance was the most complicated measure yet to emerge on the control of Thangata. Its approach was similar to that of the 1920 Land Commission. It attempted to prescribe "fair" terms for the Africans which were also acceptable to the settlers. This was not an easy task. Both sectors of the community predictably found the principal provisions of the Ordinance wanting and controversial. Controversy started with the definition of "resident native" in Section 3. The High Court ruled in 1930 that the word "knowledge" in the definition did not necessarily imply "approval" or "consent".[34] Thus, Africans living on a private estate without the prior approval of the estate holder could become "resident natives" entitled to registration as soon as the fact of the residence was known to the estate holder. He was not thereafter entitled to evict them summarily, without recourse to the procedures described in Sections 21 and 22. The Court also suggested that even if the Africans in such a case were not resident natives, criminal penalties stipulated by the Ordinance were not applicable. The only remedies available to the estate holder were civil actions for trespass. This decision was regarded by landholders as a threat to their land rights. They feared that nothing would prevent hundreds of natives from becoming "resident natives" without permission and contrary to the specific wishes of the landholder.

Africans were also adversely affected by the definition of a resident native. First, as in all previous statutes, no distinction was made between Africans protected under the original Certificates of Claim and those who were not. Everyone was liable to pay rent, work or grow economic crops. This was

an infringement of the Certificates of Claim. Secondly, the definition did not include "married females" and their husbands living in matrilocal villages under matrilineal customs. As soon as a girl born on the estate got married, she was deemed to have lost the status of a resident native. The new family was permitted to reside on the estate only under special agreements which often entailed onerous labour conditions and an uncertain tenure. Some unscrupulous landholders did not wait for children born on the estate to be married: they were denied the status of resident natives accorded to their parents upon the attainment of adulthood or the apparent age of sixteen. This caused considerable anguish and disruptions of social life in the matrilineal communities.[35]

The fairly wide choice of resident natives on whether to pay cash rent, work or grow economic crops was one explanation for the the efforts of landholders to restrict this category of tenants on the estate. If the landholder wanted strict labour, he could be frustrated by the residents electing to pay cash rent. If, on the other hand, the tenants elected to work, and the landholder was not in need of so much labour, the alternative of providing facilities for growing economic crops was attractive only when commodity prices were good. The provision was regarded as a burden when the world economy was undergoing a slump. There was also the possibility that some of the smaller landholders could not afford to employ all residents or provide them with facilities for growing economic crops. The resulting "no-rent, no-labour tenancy" which the Ordinance insisted upon was disliked by the estate holders. It encouraged them to look forward to mass evictions at the

end of the quinquennial period. Some of them enforced a rigorous rent policy to ensure that a maximum number of resident natives would be eligible for eviction. The maximum rent of £1 per annum fixed by the District Rent Boards, which was already too high, was regarded by such landholders as the minimum acceptable. This was of concern to the African residents as well as the administration, especially since there was insufficient Crown land on which to accommodate residents who were likely to be evicted.[36]

The first quinquennial period ended in 1933 without the mass evictions anticipated. Some landholders claimed that they refrained from exercising their rights in order not to embarrass the government and, in return, they expected favourable responses to the new proposals which were to be made shortly.[37] The administration was by then under Governor Young and, like most of his predecessors, he decided to begin his tenure with a fresh enquiry into the problem. In December 1933 a select committee of the legislative council was appointed to report on new legislation needed to ensure "the fullest agricultural development of the protectorate". After taking evidence from landholders, but not from the tenants, the Committee concluded that two factors were retarding the development of private estates in the country. The first was the continuing uncertainty over the rights of Africans protected by the original Certificates of Claim. The Committee concluded that these rights should be finally extinguished with the co-operation of the newly created Native Authorities, and an appropriate draft Order in Council was prepared. The second factor was the 1928 Ordinance. The Committee concluded that

the rent and labour provisions were too onerous for most of the smaller landholders. A Bill was prepared to repeal the provisions and empower the landlord to collect only a monetary rent. It also purported to replace quinquennial evictions with a system under which tenants could be removed at any time after a court action.[38]

The Secretary of State refused to sanction these amendments, arguing that the 1928 Ordinance had not been in operation for a period long enough to justify the conclusion that it was retarding agricultural development. He regarded the failure of landholders to meet their obligations under the Ordinance as an effect of retarded economic development rather than the cause of it. He further observed that it was a step of doubtful expediency to involve the newly-created Native Authorities in the unpopular exercise of extinguishing protected and privileged African land rights.[39] Governor Kittermaster, who took over from Governor Young in 1934, insisted that a new law was necessary because the 1928 Ordinance was not the "final and best solution to the problem". But the Secretary of State held on to the view that it required a longer trial period. Sixteen months passed before Governor Kittermaster revived the issue; this time against a backdrop of possible evictions at the end of the second quinquennial period. The Secretary of State referred the matter to Sir Robert Bell, who was commissioned at about the same time to enquire into the financial position of Nyasaland.[40]

Sir Robert Bell's report was published in 1938.[41] It was very inconclusive on the control of Thangata and non-disturb-

ance of indigenous African residents on private estates. He suggested two possible courses of action. The first option was to allow conditions which had been "stabilized in the course of ten years to continue". The second course was "to endeavour soon to distinguish between original occupiers (or their descendants) and more recent arrivals, and to make an equitable distinction between them". The original occupiers would then be granted free rights of occupancy over defined areas and the recent arrivals would be treated as resident natives or natives under special agreements. Sir Robert Bell was aware of the possibility of African opposition and other problems likely to be encountered if the second course of action was preferred. He concluded that the choice between the two courses was a matter of government policy, but since the second quinquennial period was about to expire, the only practical course would be to await decisions of landholders on evictions. This dreaded event came to pass in 1938 without large-scale evictions, and the outbreak of the Second World War in 1939 relegated the issue into the background.

(d) Post-War Developments

The reluctance of the Secretary of State to authorise a revision of the 1928 Ordinance before the outbreak of the Second World War had the positive effect of preventing the local administration from striking a bargain with the settlers which would have prejudiced African land rights. But inactivity also kept alive the threat of mass evictions of Africans from private estates. When the third five-year period ended in 1943, a large number of eviction notices were served for the

first time in some of the densely-populated districts.[42] Since the Africans had no other areas to move to, they began to resist eviction, and the threat of serious social unrest became real. Some administrators attempted to minimize the threat as the work of political agitators or emerging African pressure groups. But the seriousness of the situation was soon fully appreciated and, in 1946, Sir Sidney Abrahams was appointed as an independent Land Commissioner with a brief to examine new ways of controlling Thangata and to advise generally on land policy.[43]

After a more exhaustive enquiry than any hitherto attempted, Sir Sidney Abrahams produced a report acknowledged to be one of the best on land tenure in Nyasaland. His recommendations on control of Thangata, although not original, were unequivocally expressed. He reported that there was an unbridgeable difference of opinion and conflict of interest between the settlers and the African residents. The settlers wanted to retain tenants on the estate for as long as they required labour, and to evict them when it was convenient to do so. Africans, on the other hand, wanted to live unmolested, free of rent or labour obligations, like their brethren on Crown lands, and to select where to sell their labour. He concluded that "the only solution was the clear-cut one of getting rid of the status of resident native and leaving him free to quit the estate or stay there on terms satisfactory both to himself and the landlord, substituting contractual for statutory rights".[44] This solution was only possible if alternative accommodation was found elsewhere, but since Crown lands in the affected areas were already congested, the Commissioner suggested the

acquisition of private estates as an essential element in the "emancipation" of the African residents.

The report recommended the selective acquisition of private estates which were "unoccupied and uncultivated" or "occupied and cultivated by resident natives".[45] The acquisition of private estates cultivated by resident wage labour, natives under special agreements or visiting cultivators was not recommended. It was suggested that such acquisitions would not serve any purpose, since there was no resident native problem to solve and no congestion. The report further claimed that the country stood to gain from the retention of such estates under European control. It is submitted, on the contrary, that the acquisition of any estate which was not properly cultivated was more desirable irrespective of the presence or absence of the resident native problem. This was arguably the weakest part of the report. Fearing European opposition, Sir Sidney Abrahams did not propose the acquisition of sufficient land to ensure a complete "emancipation" of the Africans. His proposals would have resulted in large numbers of Africans remaining on the private estates as unprotected labourers, their land rights exchanged for token compensation.[46]

Sir Sidney Abrahams emphasized the need for orderly and controlled resettlements on acquired holdings in order to prevent the recurrence of congestion and bad land use.[47] He suggested that the supervision of all acquisitions and resettlements should be entrusted to a planning committee consisting of government officers from the responsible departments and one or more estate holders. It was anticipated and hoped that land-

holders would amicably negotiate all proposed acquisitions, but in the "extremely improbable" event of non-co-operation, resort to compulsory acquisition was recommended. A new law containing a simpler acquisition procedure was proposed to replace the existing cumbersome Ordinance.[48] This was the first recommendation of the report to be implemented.

The Public Lands Acquisition Ordinance was enacted in 1948.[49] It empowered the government to acquire any private land for "public purposes", but this concept was left undefined, thus foreclosing possible challenges to particular acquisitions as ultra vires of a defined public purpose.[50] The Ordinance provided for the payment of compensation calculated on the basis of the fair market value of the land subject to the acquisition. But the previous requirement for an additional solatium of 15 per cent was omitted. The Ordinance also excluded provisions on reference of contested acquisitions to preliminary enquiries or arbitration. It provided for direct access to the High Court, thus expediting the procedure.

The second recommendation to be implemented was the constitution of the Planning Committee and the publication of its report in 1948.[51] The Committee reported that there were 1,207,000 acres of freehold land with an approximated population of 200,000 residents. It suggested the acquisition of 545,857 acres, priority being given to the purchase of 453,641 acres in the Shire Highlands at an estimated cost of £275,359. The government was invited to declare that further acquisitions would be impracticable, and that Abrahams' solution could not be implemented in full. The Committee was, prima facie,

concerned with the prohibitive cost of "full emancipation". But some of the recommendations show that it reneged because of the perennial bias of all local enquiries to the settlers' view-point. For example, the report concluded:[52]

> "(i) There should be no wholesale acquisition of undeveloped land which is suitable for European cultivation ... where a reasonable assurance is given that the land in question will be used for intensive development under a European management within a reasonable period; and
>
> (ii) Where it is shown that part of an estate acquired primarily for native settlement could more suitably be developed by intensive European methods Government should not hesitate to grant a long lease of such area to a suitable European on definite conditions ..."

The colonial administration predictably accepted the suggestion that "full emancipation" of residents from Thangata was impossible, but it refused to declare that no more acquisitions would be made after the specified acreage was purchased.[53] This was of little significance in practice because private estates were in any case acquired at a very leisurely pace. By May 1956, almost a decade after the publication of the Abrahams Report, only 294,674 acres out of the 545,857 acres recommended by the Planning Committee were acquired.[54] In contrast, immediate priority was given to settler demands for the repeal of the disliked 1928 Ordinance. But pending the enactment of a new law, eviction of resident natives at the end of the quinquennial period of 1948 was temporarily suspended.[55]

The revision of the law was finalised by the enactment of the Africans on Private Estates Ordinance 1952.[56] According to the Chief Secretary, since large-scale periodic evictions under the 1928 Ordinance were no longer possible, the objective of the new law was to prevent unnecessary movements by providing resident Africans with all practicable security of tenure. All major changes in the law were made "with this end directly in view". Other minor amendments had a bearing on this main purpose in that they were designed "to facilitate the maintenance of satisfactory relations between landlord and tenant, which, of course, is a factor which is all-important in the prevention of unnecessary movement".[57] A summary of the principal clauses of the Ordinance refutes these assertions and shows, conclusively, that it neither secured the position of the Africans nor promoted harmonious relationships between tenants and estate holders. Concessions were made to settler demands on almost every key issue, and this made the position of the tenants even more onerous.

The first concession in favour of the settlers was an increase of rent from about 20s. to 52s.6d per annum, subject to further annual increases. The standard rent now payable was three times the statutory monthly wage for unskilled labour. District Boards previously entrusted with the fixing of annual rentals were disbanded and replaced by a single Arbitration Board responsible for resolving other rent and tenancy disputes. Resident Africans retained the right to elect to work in lieu of or in abatement of rent, but landholders were entitled to reject the choice if the tenant proposed to work outside the rainy season.[58]

Another concession was the removal of an estate holder's obligation to provide facilities for growing economic crops in the absence of work. The only option for the tenant was to pay rent in cash or work in lieu thereof. Residents were in fact prohibited from growing economic crops for any purpose without the prior consent of the estate holder. Even the subsistence land available was reduced to the amount which a tenant, his wife and children could cultivate "without assistance". This land could be taken away if if was not maintained "in efficient agricultural use".[59]

The abolition of the quinquennial period of evictions was also of ultimate benefit to the settlers. They were now entitled to evict tenants at any time, and for reasons which did not necessarily imply a breach of the tenancy arrangement. A tenant could be evicted for the simple reason that the land was required for a different purpose. The quid pro quo for loss of protected land rights in such cases was negligible compensation for disturbance. The government could assist in the resettlement of evicted tenants on Trust lands, but the new law stated that this was not a binding obligation.[60]

Since the tenure of residents on private estates was made less secure, but alternative land for resettlements was not readily available, the effect of the 1952 Ordinance was to compel residents to do the estate holder's bidding. This invariably implied providing labour during the rainy season. The Ordinance revived and strengthened Thangata in its original form. It was the least objective of all the statutes so far reviewed. The political milieu in 1952 encouraged the enactment of such a law. This was the penultimate year before

the imposition of the Federation of Rhodesia and Nyasaland, a union demanded by the European settlers but resisted by the Africans. Settler influence was then at its peak.[61] The Nyasaland government abdicated its responsibilities to the Africans to such an extent that it permitted the inclusion of a discriminatory clause in the Ordinance which prohibited resident Africans from driving on private estate roads.[62]

Africans reacted by increasing their opposition to the Ordinance as well as to the Federation and the political order in general. This degenerated into violence and deaths on some estates in 1953, but the government was not sufficiently goaded into remedial action.[63] In 1954, Oliver Lyttleton, the Secretary of State for the Colonies, visited the protectorate and advised the government to hasten the acquisition of estates closely occupied by the Africans. Thangata, in his opinion, had outlived its purpose.[64] The government responded by amending the Land Acquisition Ordinance to provide for reference of "voluntary acquisition" disputes to the High Court.[65] This procedure was previously reserved for compulsory acquisitions. It was claimed that the amendment would facilitate voluntary acquisitions without rendering them compulsory.[66] But an alternative and more plausible explanation would suggest that this was a ploy by landholders, collaborating with the government, to spin out voluntary acquisitions by resorting to dilatory High Court procedures. Other measures adopted in this last decade of settler domination of government had the same effect.

In 1956, an amendment to the 1952 Ordinance was passed to ensure that after 18th July 1956 no person would acquire the status of a resident African on a private estate.[67] This was apparently in keeping with the policy of "progressively" abolishing Thangata. When the new and more vocal contingent of African members of LEGCO insisted that the practice should be abolished immediately, a government spokesman did not hesitate to announce that such a remedy was not available. He insisted that it was not "a matter of legislation with a stroke of the pen to bring an end to this system".[68] This refusal to act led to more protests and criticisms inside and outside the Chamber. When Dr. Banda took over the leadership of the African political party in 1958, the protests against Thangata, colonial agricultural policies and colonial rule gathered a ceaseless momentum. There were more serious social disturbances in 1959. A State of Emergency was declared: Dr. Banda and some of the African political leaders were interned. In the absence of its erstwhile critics, the government passed another amendment to the 1952 Ordinance which increased the ability of estate holders to demand the eviction of resident Africans if the land was to be put "to intensive use - possibly not agricultural".[69] This was the last pro-settler Thangata statute.

When the State of Emergency was lifted and African leaders released, the first General Election was held on 15th August 1961 and was won convincingly by the Malawi Congress Party led by Dr. Banda. Several candidates from the victorious party were invited to join the government. Dr. Banda became Minister for Natural Resources. In May 1962, he introduced a

Bill designed to abolish Thangata "immediately" and to redress long-standing grievances of Africans resident on private estates.[70] The Bill was passed into law without serious opposition from the politically decimated European sector.

The Africans on Private Estates Ordinance 1962[71] retained the threefold classification of residents or tenants as "exempted residents", "resident Africans" and residents under special agreements. It should be recalled that this last-mentioned group was the least protected and more prone to onerous labour conditions. The categories were redefined in such a way that most of the tenants became resident Africans or exempted residents. Any person who was resident on the estate by virtue of a special agreement under the 1952 Ordinance was deemed to be an "exempted resident". In addition, every male or unmarried female over the apparent age of 18 who was resident on the estate in any capacity, except as an employee, was entitled to apply for registration as a resident African within six months from the operative date of the Ordinance (17th August 1962). The Ordinance also provided for the subsequent registration as resident Africans of any males contracting valid marriages with registered unmarried females. This removed a particularly felt grievance against all previous statutes which failed to appreciate or respect the importance of uxorilocal residence after marriage among the matrilineal peoples on private estates. The Ordinance finally transferred the important power of approving new special agreements from magistrates to the Minister, thus ensuring control tempered with political sensitivity.[72]

Significant concessions to the Africans were also made on rental obligations. First, the rate was reduced and fixed at £1 per annum for each group of family dwellings. Secondly, the following persons were exempted from the payment of rent: unmarried women; women married to husbands registered on the estate as resident Africans; persons exempted from paying tax under the Taxation Act; resident Africans deemed to have no means due to sickness, age, infirmity or preoccupation with the care of infant children; and all persons who were "resident natives" on 30th June 1942 under the 1928 Ordinance and their descendants.[73] This last exemption was the most significant. It was a reminder to all estate holders that there were Africans on the estates who were entitled to rent-free residence under the original Certificates of Claim. It should be recalled that this issue was fudged in all previous enquiries because of the problem of distinguishing indigenous Africans from immigrants. The approach of the African government was to ignore finer distinctions and to select an arbitrary date which ensured rent-free residence for the majority. In a different political climate, this would have been resisted as an illegal extension to the majority of rights belonging to some of the residents.[74] But the shift in political power enabled the Africans to disregard such legal niceties and use the law to atone for the earlier transgressions of the settlers.

Every resident African required to pay rent had the choice to "elect to work for wages" at rates fixed under current labour laws. This was not "in lieu or abatement of rent". It was important for the abolition of Thangata to maintain a distinc-

tion between the tenancy and work contracts. Rent was payable by the resident himself from wages earned as an employee and not as a tenant. If the arrangement was to deduct the rent from the wage packet, unless the employee consented to larger deductions, the employer was limited to one-third of the monthly wage. It was now unlawful for any estate owner "to demand work or exact services form any resident African on any estate". The choice lay with the resident, and it could be exercised at any time. The estate owner was no longer entitled to reject offers made outside the rainy season. If there was no work, the estate holder was required to provide facilities for growing economic crops or excuse the tenant from rent.[75] This was a restoration of the position under the 1928 Ordinance.

On the provision of subsistence land, the limitation of allotments to the amount a family was capable of cultivating without assistance was dropped. All exempted and rent-paying resident Africans were entitled to sufficient land for buildings and the growing of food crops. They were also entitled to materials like grass, firewood and building materials on any part of the estate which was not reserved for the protection of water and other natural resources.[76] This was an improvement from the 1952 Ordinance, under which the collection of such amenities was restricted to the small areas allocated to the families.

On the crucial issue of evictions, the 1962 Ordinance did not restore the quinquennial period. Evictions could be carried out annually, but the process was rigorous. An eviction

could only be carried out pursuant to an order issued by a tribunal appointed by the Minister. The order could be issued only on specific grounds. An aggrieved person was entitled to appeal to an Appeal Advisory Board and thereafter to the Minister, who was not bound by the advice of the other institutions. If the order was finally approved and carried out, the government was once again bound to assist in the resettlement of the Africans.[77]

This review of the principal features of the 1962 Ordinance shows that African residents were offered the most favourable tenancy arrangement ever devised. But the Ordinance fell just short of a complete abolition of Thangata because it permitted some Africans to remain on the estates under special agreements. Children of resident Africans, for example, remained on the estates after attaining the age of 18 only as residents under special agreements.[78] This was a perpetuation of the old system. If Thangata was to be completely and immediately abolished, all Africans on private estates should have been categorised as employees or resident Africans with no obligation to pay rent. However, the attainment of this ultimate objective was not far off. The framers of the Ordinance made it sufficiently harsh for the settlers to compel them to release to the government most holdings occupied and cultivated by African residents. With characteristic belligerence, Dr. Banda had this to say to grumbling settler representatives:

> "... I want Europeans in this country to pay to employ and pay direct labour and not to go behind the backdoor of the labour exchange. If you call that confiscation, call it ... This is simply to

tell land owners they must sell their land to the government or else employ Africans to work at monthly wages ..." [79]

This ploy apparently had the desired effect. The Lands Department reported in 1966 that "the policy of acquiring privately owned estates for resettlement was vigorously pursued until the end of 1965 when it was decided that no new resettlement acquisitions were to be undertaken." [80] Privately owned freehold land stood at 380,280 acres or approximately 2.4 per cent of the total land acreage. The report did not give the number of African families still resident on the estates, but the presumption was that most of them were employees or illegal squatters. In 1961 there were 14,800 African families on private land estimated to be 2.8 per cent of the total land acreage. To rid the country of Thangata, freehold land was reduced from the original 15 per cent of the total land surface alienated by Certificates of Claim to approximately 2 per cent at the time of independence. [81]

The problem of Thangata on private land had two visible effects on agrarian change in Southern Nyasaland. First, the disruption of land rights and the social instability in villages prevented Africans from participating fully in the agricultural economy other than as providers of labour. This arrested African agricultural development. Secondly, control of Thangata occupied so much executive and legislative time that the more important issue of actual development of the estates was largely ignored. When the 1903 Land Commission studied the problem, it recommended the imposition of a land tax on undeveloped land. The tax was levied as from 1911, [82] but the

rate was so small that administrative and collection costs almost matched the income generated. Moreover, the settlers discovered that they could abscond on payments with impunity.[83] Collection was eventually stopped in 1950.[84] The only achievement of the land tax was its importance in persuading the B.S.A. Company to surrender its large undeveloped holding in North Nyasa to the government in 1937. The government agreed, in return, to write off tax arrears amounting to £39,507.7s. 4d.[85] Other private land holders continued to operate undeveloped or unmechanized, labour-intensive estates which were eventually streamlined by Thangata reacquisitions.

2 Crown Land Disposals

Although the issue of Thangata consistently dominated colonial land policies, there were times when attention shifted to the vast areas of Crown lands over which the government had assumed control. From the inception of colonial rule to the mid-1930s, Crown land legislation was primarily concerned with the regulation of its disposal to European settlers. This was the period when the assumption that agrarian change depended on European settler enterprise was never seriously debated. The following were the principal instruments by which the disposal of Crown lands was regulated: Queen's Regulations Respecting Government Land Sales in British Central Africa, 1895;[86] The British Central Africa Order in Council, 1902;[87] and the Crown Lands Ordinances of 1912 and 1931.[88] The important issues in all these instruments were the method of land disposal, the nature of the interests to be granted, development conditions and the protection of existing African land rights.

(a) Method of Disposal

The 1895 Regulations on Government Land Sales established a method of land disposal which was adhered to during the entire alienation period.[89] An intending purchaser was required to select a piece of land on his own, and to submit to the District Resident a fee of £2 to cover survey costs, together with an application containing a written description of the plot and a sketch plan. The District Resident commented on the suitability of the proposed alienation and forwarded the application to the Chief Surveyor for verification of the accuracy of the sketch plan and description of the land. If the proposed alienation was finally approved by the Governor, a notice appeared in the government gazette specifying the date on which the plot was to be auctioned at an upset price or rental. The publication of this notice did not entitle the applicant to any preferential treatment; the highest bidder secured the plot on the appointed date. He was then required to pay a deposit of 10 per cent of the amount bid, and the survey fee deposit which was returned to the unsuccessful original applicant. The land was formally transferred to the bidder upon payment of outstanding sums which were expected within one month. The transaction was deemed null and void, and the deposit forfeited, if the bidder failed to complete the payments. The Crown Land Ordinance of 1912 increased the prepayment on land sales to 50 per cent of the amount bid plus a sum sufficient to cover estimated survey costs. The prepayment for leaseholds was an advance rental for half of the year plus estimated survey costs.[90]

The rationale behind this method of disposing of land was that it ensured the government maximum returns and income and offered every settler an equal chance of acquiring the land. But it also implied that land acquisition could be monopolized by the wealthy at the expense of the original applicant. One critic complained:

> "... Land suitable for planting is very hard to find and when a man has spent perhaps two or three months in searching for it and has at last found it, the spot he has found after much trouble is put to public auction and bought over his head at a price he cannot afford to pay." [91]

Potential African buyers were in a worse position. Since they did not generally possess the economic power to outbid most settlers, this method of land disposal virtually prevented them from acquiring Crown lands. The Crown Lands Ordinance of 1912 partially rectified this inherent economic discrimination. The Governor was empowered to authorise direct sales or leases in special cases involving very poor applicants or less important land rights like yearly tenancies and grazing agreements. But this power was apparently very sparingly used in favour of Africans or individual settlers.[92]

The method of land disposal adopted also made it impossible for the administration to exercise certain powers of land control. First, random and unrestricted selection of plots by applicants made planned and orderly arrangement of estates difficult. Secondly, the administration could not effectively control the disposal of land to wealthy but undesirable characters. The need for such control was not apparent when app-

lications for Crown Lands were relatively few. After the First World War, the influx of new settlers and the improvement in tobacco and cotton prices changed the picture. Demand for land increased, and the Crown Land Ordinance 1912 was amended in 1920 to enable the Governor to vet persons eligible for bidding at the public auction.[93] But, as the 1920 Land Commission observed,[94] vetting bidders contradicted the rationale for public auctions. The administration was no longer assured of maximum returns and settlers no longer had an equal chance of acquiring the land. The Commission also noted that little or no bidding took place in practice after vetting was introduced. It therefore recommended the abolition of public auctions and the introduction of direct alienations in all cases. This did not take place during the period of Crown Land disposals.

(b) The Freehold or Leasehold Debate

In his report on the settlement of land in the protectorate, Johnston averred that he was averse to selling Crown Lands to European settlers. "It was bad policy", he wrote, "for the Crown to lose hold of lands which at present would fetch a poor selling price, and which may in time become very valuable."[95] He preferred to lease the land for short periods of 14 or 21 years at very low rentals, thus giving the Crown an opportunity of participating in windfalls from future land appreciation. It is significant to note that this initial preference for a leasehold as the interest to be granted out of Crown Lands was motivated by speculative and financial considerations rather than the need to control agricultural develop-

ment. Johnston, however, predictably contradicted his declared intentions in the actual administration of the land policy. Freehold sales of Crown land exceeded leases during his tenure, and the first statutory instrument on Crown land disposals was devised primarily for permanent alienations.[96]

In 1904, Johnston's successor, Alfred Sharpe, reiterated that Crown lands would, "as a general rule, be leased in preference to being sold".[97] The new terms and conditions upon which land could be leased or sold were indicated in a series of circulars presumably published under the general authority of article 7(3) of the British Central Africa Order in Council 1902. The following were the types of leases envisaged: Annual grazing agreements; yearly tenancies of 1 acre for the construction of native stores in outlying districts; Firewood cutting leases with a maximum tenure of 5 years; Building leases for Township plots with a maximum term of 21 years; and Agricultural leases. This last category was the most important for our purposes. Agricultural leases were subdivided into "Long Tenure" leases (12 to 20 years) for the cultivation of crops like rubber and tea; and "Short Tenure" leases (7 years), for the cultivation of annual crops like cotton. Rent in both cases was fixed at 5 per cent of the upset sale price, payable in advance, per annum. The lease was renewable at the same rate of rent. The lessee could also exercise the option of purchasing the fee simple, and the price was 50 per cent of the total reassessed rent paid. If the option was exercised during the first term, the price was the original upset capital value of the land.[98]

An important factor in the reappraisal of the Crown land sales policy was the finalisation of contracts for the construction of a railway in Nyasaland. The railway was expected to enhance land values and the government, once again, was desirous of participating in anticipated profits from rent reassessments or the redisposal of surrendered leaseholds. The project was, however, ultimately responsible for making the administration realise that stocks of Crown lands were not inexhaustible. Ignoring wiser counsel, the Nyasaland government covenanted to finance the construction of the railway by a private company with land grants of 3,200 acres for every mile. It was subsequently discovered that Crown land stocks were insufficient to cover this obligation. The administration had to "borrow" its way out of the obligation and, for years to come, the repayment of the railway loans prevented it from devising and implementing development projects of more immediate or lasting benefit to the Africans.[99]

Another ill-considered aspect of the revised land policy was the lessee's option to purchase the freehold. Some 48,609½ acres were reportedly acquired through the exercise of this option. Some of the largest acquisitions are listed in the table below. The option clearly contradicted the preference for leases and, after some prevarications between 1906 and 1908, it was finally excluded from government leases as from 1911.[100]

Any policy which did not amount to freehold grants of Crown lands at nominal prices was likely to be opposed by European settlers in Nyasaland, but some of the criticisms voiced

TABLE 3: PARTICULARS OF LARGE ESTATES ACQUIRED IN PURSUANCE OF THE OPTION TO PURCHASE THE FREEHOLD IN LEASES OF CROWN LAND.[101]

GRANTEE	ACREAGE	ESTATE	DISTRICT	YEAR EXERCISED
Dutch Reformed Church, Steblecki	2,000	Mlanda	Dowa	1905
	1,530	Kawaye	Dowa	1907
African Lakes Corporation, Steblecki	8,000	Viza	West Nyasa	1908
	3,000	Tete	Dedza	1910
	3,000	Lingadzi	Dowa	1910
	11,850	Lingadzi	Dowa	1910
Bradshaw	5,200	Lujeri	Mulanje	1913
J. Scott	1,000	Kapeni	Ncheu	1917
E. Mullon	1,032	Meula	Mulanje	1917

.....

against the agricultural leases on offer were not entirely without justification. The leases were too short for both annual and perennial crops, especially in a virgin protectorate with untried soils for some of the estate crops grown, and no proper infrastructure. As one critic observed, the hazards of the planting enterprise, plus the fact that the tenant was not assured of compensation for improvements at the end of the short term, encouraged settlers to extract from the land as much as they could without expending on permanent improvements.[102]

The Crown Lands Ordinance 1912 improved the terms by increasing the length of leases for "slow maturing products" to

99 years with a provision for rent reassessment after the expiry of 33 and 66 years of the term. The Governor was empowered to determine whether a product was slow-maturing. Leases for all other purposes, whether agricultural or not, could be granted for a term not exceeding 21 years, subject to septennial reassessments of rent. The basis for rent reassessment in both cases was 5 per cent of the value of adjacent undeveloped agricultural land of equal quality. Leases were renewable at the end of both terms, but in the event of a reversion, the government was still unwilling to commit itself to the payment of compensation for improvements. It was also stipulated that rent would be reassessed as if the lease was new if a renewal of the term was sought.[103]

Improvements introduced by the 1912 Ordinance did not quench settler demands for freeholds at nominal prices. The Ordinance also evoked two particular comments on rent reassessment. It was contended that prospective tenants were unable to estimate the potential cost of running an estate because future rentals were left uncertain. It was also noted that the basis for rent reassessment was uncertain where there was no adjacent undeveloped land of equal quality to the estate. The 1920 Land Commission proposed, in response, that instead of fresh reassessments, rent should be doubled only upon renewal of 21 year leases, and after one-third and two-thirds of the 99 year leases.[104] But the Commission did not endorse settler demands for longer terms or freeholds. It listed the following arguments against alienation of land in freehold:[105]

(i) It was difficult, if not impossible, to compel adequate development of land or prevent excessive waste when the freehold passed from the Crown; the inefficacy of the land tax introduced in the protectorate was further evidence of this state of affairs.

(ii) It was necessary for the government to retain some choice over estate holders in view of the special relationship between the holders and their native tenants, and once a freehold was granted, the government was likely to lose any control over subsequent alienation of the land to unsuitable estate holders.

(iii) The grant of the freehold terminated the participation of public revenue in the increased value of the land, but this could not happen where leases were subject to periodic reassessments.

(iv) Anything like a general practice of disposing of the freehold of Crown land was likely to encourage speculation with the attendant evil of fictitious values.

(v) The nature of European settlement in a tropical country was not permanent, and provided the interests of the tenant were sufficient to justify expenditure and to require economy of soil, the advantages of a freehold could be equally attained by leasehold grants.

Settler Associations in Nyasaland were so infuriated by these remarks that their criticisms failed to acknowledge that the 1920 Land Commission report was otherwise a pro-settler document.[106] But as far as the administration was concerned,

the case against freeholds was so conclusively put that the leasehold or freehold debate became academic for the rest of the colonial period. The only debatable issues in the aftermath of the report were the terms and conditions of Crown land leases.

In 1928, for example, the administration published a Bill which extended the maximum term of 99 years to leases for fast-growing crops, with a provision for rent revision within 33 years on the basis of the highest rent obtainable on adjacent land.[107] The Bill also proposed to offer compensation for unexhausted improvements to all tenants who preferred to surrender the lease after the revision of rent. The changes proposed attempted to quell complaints that rents were too high and the short term lease was not a mortgageable asset in a world depression with plummeting tobacco prices. Unofficial members of LEGCO insisted that in the absence of freehold grants, the only other acceptable form of tenure was a 999 year lease sold at a fixed premium repayable over a number of years, after which a peppercorn rent would be payable. This was apparently the type of lease in vogue in Kenya.[108] Voting in the legislature was split between the official and unofficial members. Passage of the Bill was postponed to await instructions from the Secretary of State and the report of a Select Committee appointed to reconsider the issue. The main recommendation of the committee was a reintroduction of the lessee's option to purchase the freehold.[109] The Secretary of State, on his part, refused to approve any deviations from the main features of the Bill. He instructed that the law for alienations of Crown lands in Nyasaland should be similar to the Tanganyika Crown

Lands Ordinance but not Kenyan law.[110] Using the government's inbuilt majority in the council, the Bill was bulldozed into the Crown Lands Ordinance 1931.[111]

The persisting depression, however, continued to fuel settler demands for better terms for Crown land leases. At the same time, rent and land tax arrears mounted. In 1931, the administration appointed yet another Select Committee to consider: (a) the determination of leases by notice and re-entry; (b) the extension of time for the repayment of arrears; and (c) the extent to which arrears had become irrecoverable. The Committee reported in 1932 that rent arrears on 127 leases totalled £11,815 by September 1931. The government was entitled to re-enter in most of the cases, but such action was uneconomical if it was not prepared to complete the cultivation and marketing of crops during the current year. The Committee further recommended the reduction of rent where detracting factors like poor soils, distances from the market, inclement weather and shortage of wood or water were pronounced. The suggestions were accepted in principle, but the time was already past for concessions on the major issue of introducing the 999 year leases. Disposals of Crown lands were now guided by the concern for the present and future needs of the Africans, and 999 year leases which were, in effect, not very different from freehold grants would have contradicted this new policy.[112]

(c) Development Covenants

In the initial stage of colonial rule, the administration was so concerned with raising revenue from Crown land disposals that due regard was not given to the regulation of actual land use and its development. One circular issued in 1910 announced that the lessee's option to purchase the freehold would henceforth be exercisable over an area equal to three times the land under actual cultivation.[113] But this was not a development covenant of any meaningful force.

The first statutory instrument to introduce proper development conditions in leases was the Crown Lands Ordinance 1912. All lessees were by Section 10(p) required to expend "a sum representing seven times the annual rental ... in the development of the land" during the first three years of the term. By Section 7(3), it was also a condition of every 99 year lease for "slow-maturing products" that one-third of the area should be planted with the crop specified within three years; that one-half of the area should be employed in proper cultivation of the crop within five years; and that an area not less than half acreage should thereafter be maintained in proper cultivation for the remainder of the term.

According to the 1920 Land Commission, Section 10(p) was rather vague, and the steps necessary to enforce it, including the examination of estate account books, were impracticable. No attempt was apparently made to enforce its observance. The clause did not make provision for the maintenance of cultivation throughout the term. It was probably assumed that this

would be ensured by the initial expenditure. The Commission recommended that if the necessary inspection could be undertaken, as in the case of long leases, the tenant should be required to place under cultivation a certain percentage of the land for the first three years, and a higher percentage for the rest of the term. The extent to which Section 7(3) was enforced was also unclear. The Commission reported that it was impracticable to expect growers of tea, the major slow-growing product of the protectorate, to comply with the covenant if sufficient timber was to be grown and reserved for curing the product. It recommended that the covenant for long "tea-estate" leases should require the planting of one-fourth of the estate within the first five years and no more than one third thereafter.[114]

The Crown Lands Ordinance 1931 introduced far more detailed and specific covenants for development which were apparently copied from a Kenyan Ordinance. The schedule below summarised the nature and value of improvements required.

For the purposes of the Ordinance, permanent improvements included farm buildings, water reservoirs and irrigation works, roads, bridges, drainage or reclamation works, the clearing of land for farming and the planting of trees, hedges or long-life crops. Non-permanent improvements included livestock, farm implements, machinery and similar implements which remained the property of the tenant. Apart from the permanent and non-permanent improvements, the tenant was required to plant approved forest trees on an area equal to ten per cent of the total cultivated land during the first four years of the lease,

TABLE 4: SCHEDULE OF DEVELOPMENT CONDITIONS IN THE CROWN LAND ORDINANCE 1931

AREA OF LAND:	MINIMUM VALUE OF IMPROVEMENTS TO BE EFFECTED WITHIN THE FIRST THREE YEARS OF THE TERM:	NATURE OF IMPROVEMENT:	VALUE OF THE ADDITIONAL IMPROVEMENT TO BE EFFECTED WITHIN THE FIRST FIVE YEARS OF THE TERM:	NATURE OF ADDITIONAL IMPROVEMENTS:
300 acres	£1 per acre subject to a minimum of £30	Permanent.	10s. per acre subject to a minimum of £15	Permanent.
over 300 acres	£300 and, in addition: 4s. per acre in respect of every 300 acres.	Permanent. Permanent and/or non-permanent.	£15 and, in addition: 2s. per acre in respect of every acre over 300 acres.	Permanent Permanent and/or non-permanent.

and five per cent each year thereafter until forest land totalled twenty per cent of the cultivated area.[115]

These covenants were formidable and impressive on paper; but, as was the case with conditions under the 1912 Ordinance, enforcement was a problem. The government neither had sufficient manpower nor the political will to inspect and enforce observance. The Director of Agriculture, ever fearful of provoking settlers, cautioned:

> "This is a matter which must be approached delicately. It is undesirable for Agricultural or Forestry Officers or for that matter District Commissioners to inspect private estates unless there is at least a probability that the terms of the lease are not being carried out."[116]

This was in response to a complaint that some of the departments with the means to evaluate observance of the covenants were not informed of the number of leases granted, or of the need for inspection, nor was any provision made for the cost of travelling.

(d) Non-Disturbance of Existing African Villages

When the 1903 High Court case revealed the ambiguities of the non-disturbance clause in Certificates of Claim,[117] Acting Governor Pearce proposed the insertion of the following redrafted clause in all Crown Land leases:

> "The site of no existing native village, settlement, plantation or pasture land shall be included in the said estate. Such site shall remain vested in His

> Majesty's Commissioner and Consul-General and shall include not less than 8 acres per tax-paying head of family, but may be such other or larger area as His Majesty's Commissioner and Consul-General may direct. Such an area shall not be deducted from the area of the said estate. No rent or other service shall be exacted from any native tenant upon the said estate without the previous approval, in writing, of His Majesty's Commissioner ... or of some person by him thereunto lawfully authorised." [118]

Unlike the clause in Certificates of Claim, the first part of this condition made it very clear that African villages were not part of the leased land and were, therefore, fully protected from Thangata. But this was contradicted by the second part of the clause, which referred to the Africans as "tenants" on whom rent or labour services could not be imposed without the Commissioner's authority. The last sentence of the clause was superfluous if the intention was to exclude native villages from the land alienated to the lessee. The suggested minimum of 8 acres per family was also unnecessary and a hindrance to proper use of African lands.[119]

The Crown Lands Ordinance 1912 effected no significant improvements in the non-disturbance condition. Section 10(h) reiterated that African lands estimated at 8 acres per family formed no part of the leased land. But Section 10(i) anticipated the existence of African residents on the estates and attempted to prohibit lessees from demanding rent or labour services from the original residents or other later arrivals who settled on the estate with the consent of the lessee. This clause anticipated and courted Thangata, especially where the consent of the lessee to the later settlement could not be

proved. What constituted consent was left unclear. It was suggested in one report that "if squatting has continued for some time and has been of the character which the landlord must be reasonably considered to have had knowledge of, and he has not in the past taken any steps to ejectment, the landlord must be held to have consented to the settlement of the [squatters] on his lands and would be barred from taking any action for ejectment ..."[120] This was likely to be opposed by settlers desirous of cheap labour. Potential conflicts were avoidable here if no land was sold or leased with African residents and squatters were not permitted to establish residence on leased estates.

The 1920 Land Commission appreciated the need for leasing land or keeping it permanently free of African residents. It recommended that suitable areas for European settlements should be defined, surveyed in advance, and marked off in blocks of, say, 1000 acres each. These blocks would then be leased to applicants with verifiable financial means and possibly some experience as planters. It recommended that the suitable areas should be selected where the least possible disturbance of native settlements would be required, and such few settlements as would be found upon the land would, on payment of compensation, be gradually moved off.[121] The weakness of this recommendation was the underlying hint that all lands suitable for commercial agriculture should be marked off and reserved for exclusive European settlements, even if it meant removing well-established African settlements. The Commission also exaggerated the availability of Crown land for such purposes. It estimated, without any proper statistics, that tak-

ing into account African needs for 30 years, the protectorate could spare 700,000 acres for European settlements and still leave 2 million acres in reserve.[122] Moreover, the necessity of further alienations to settlers was not questioned although figures quoted by the Commission in a different part of the report revealed an inexcusable under-utilization of land leased or sold to the settlers. Between March 1919 and March 1921, the area under Crown land leases increased from 13,753 to 118,504 acres. From 1918 to 1920, the acreage under cultivation increased from 52,837 to 55,539 acres, and this included leasehold land as well as private land held under Certificates of Claim which exceeded 1 million acres in the Southern and Central province.[123]

Such discrepancies, and the obvious pro-settler bias, made the recommendations of the 1920 Land Commission unworthy of serious consideration and implementation. In any case, from 1912 onwards, Government officers repeatedly insisted that Crown lands were leased free of African residents. The spread of Thangata from private lands to Crown lands was apparently arrested or avoided irrespective of the faulty drafting of the non-disturbance covenants.[124] There is no evidence to contradict such claims. Nevertheless, when the concept of protecting Africans through trust lands crept into Crown land legislation in the 1930s, the likelihood of land being leased with African villages or residents was minimal.

TABLE 5: SUMMARY OF CROWN LAND DISPOSALS (LEASES), 1921 TO 1935.[125]

YEAR	NO. OF LEASES	ACREAGES LEASED	RENT COLLECTED (£)	RENT ARREARS (£)	NO. OF LEASES SURRENDERED	ACREAGES SURRENDERED
1921	36	13,981	-	-	13	6,896
1922	7	2,250	-	3,600	12	7,164
1923	21	18,150	-	6,500	12	6,060
1924	32	6,000	-	5,854	5	25,000
1925	33	7,797	9,627	5,045	4	1,053
1926	38	10,407	7,686	5,044	-	-
1927	50	10,403	13,196	3,204	6	5,200
1928	38	8,410	9,543	6,262	4	1,003
1929	26	5,413	9,155	10,430	8	2,600
1930	21	7,542	11,281	13,181	7	2,711
1931	10	4,071	8,844	15,477	10	7,237
1932	8	1,411	13,002	10,517	8	1,925
1933	19	6,702	10,158	8,172	15	5,187
1934	9	1,454	10,212	6,138	8	-
1935	13	11,851	8,936	6,476	13	6,579

3 The Concept of African Trust Land

The protection of wider African land rights was not a prominent feature of Crown land policy before the inter-war period. As seen above, non-disturbance conditions implied in leases were poorly drafted and, in any case, attempted to protect limited rights over existing settlements. In 1913, Governor Pearce proposed the creation of exclusive native reserves on Crown lands, but no action was taken, probably because the suggestion was premature and the merits of a native reserves policy were not sufficiently analyzed.[126] The 1920 Land Commission was subsequently critical of such a policy. It correctly observed that the "collection of large numbers of natives in defined areas would be an unwarranted interference with the ... occupation ... of their native land and would in addition be totally unsuitable to their manner of life".[127]

As an alternative to the reserves policy the Commission recommended that Africans wishing to break away from the mould of "communal life" should be allowed to lease agricultural holdings not exceeding 100 acres at the same rent paid by Europeans, but for a shorter renewable term of seven years, terminable on the death of the tenant. The Commission further recommended that other Africans cultivating economic crops like cotton and tobacco on Crown land plots exceeding three acres (the limit of what a man and his family could cultivate without external help) should be compelled to take leases and pay rent. Cultivation of such crops was regarded as "foreign to ordinary conditions of native life" and "a special use of what belongs to all for the private benefit of the cultivators".[128]

Literature on pre-colonial agriculture in Nyasaland shows that the growing of economic crops like cotton and tobacco was not foreign to African life. It predated British Colonial rule and the introduction of European estate agriculture.[129] It was also unfair to suggest that Africans should be compelled to take leases and pay rent or a charge for better use of land which, as far as they were concerned, belonged to them regardless of what current legal quirks suggested. This recommendation supposed that Africans were not entitled to the free use of Crown lands. It foreshadowed local acceptance of a decision from the colony of Kenya to the effect that African rights in Crown lands were extinguished by annexation of that country.[130] Nyasaland was still a protectorate, but this did not deter the Commissioners or the administration from regarding Africans as tenants-at-will of the Crown.

The recommendation also revealed the Commission's lack of commitment to the promotion of African agriculture. A charge would have dissuaded most Africans from growing cotton and tobacco. It would appear that the Commission was more interested in preserving European monopoly over the production of these crops, and in keeping the general mass of Africans as providers of cheap labour. It countenanced the elevation to the status of a rural African middle class of only a few individuals who could afford to lease 100 acre agricultural holdings. But the short term proposed for such leases was not the type which the Commission could recommend for European estates. Moreover, some of the senior officers in the administration were willing to concede that the contribution to agrarian change of the small European estates on which proposals for

progressive Africans were modelled was not very significant.[131] It was not regrettable, therefore, that this part of the 1920 Land Commission report was not acted upon. The proposals would have made Africans on Crown lands even less secure, and tensions which were already heightened by the post-war alienations would have increased.

The independent East Africa Commission of 1924 favoured agricultural development through African enterprise and was more sensitive to African feelings on alienations of Crown lands. It suggested that African uneasiness and insecurity could be assuaged by vesting undisposed Crown lands in a Board of Trustees which would be empowered to administer the lands for the use and common benefit of the Africans. This was in keeping with a similar recommendation proposed for the colony of Kenya.[132]

This recommendation was repeated and amplified in a memorandum on native policy circulated to all governments of the East African dependencies in 1930. It suggested that the administration of the territories involved "exercising a trust on behalf of the African population ... the object of which may be defined as the protection and advancement of the native races".[133] This trust could not be delegated or shared. Thus, in the event of conflict between the interests of the Africans and the immigrant races, priority was to be given to the former. The first essential of this trust concept in land administration was "to remove finally from the native mind any feeling of insecurity in regard to tribal lands; and to keep available for all tribes land of such extent and character as

will fairly suffice for their actual and future needs".[134] The memorandum asserted that legal decisions vesting all unalienated lands in the Crown did not imply that Africans in actual occupation of those lands possessed inferior rights unworthy of protection in the courts, "but only that such customary rights have not yet been so sufficiently ascertained and defined that the protection of the courts can in fact be exercised".[135] An early and authoritative ascertainment and definition of customary land rights was, therefore, essential.

The trust concept also required that governments "should not admit restrictions on the possession, occupation or use of land by the natives, as in effect to compel them either directly or indirectly to take service for wages with private employers".[136] Thus, some of the statutes on the control of Thangata passed after 1930 which encouraged or compelled African residents to provide labour "in lieu or abatement of rent" on European estates arguably contradicted this fundamental policy of colonial administration. It should be noted, however, that the trust concept did not require the annullment of rights and interests already acquired by immigrant races in contravention of the policy. Such rights were preserved and protected.

The first statutory instrument to incorporate the principles enunciated in the memorandum was the Nyasaland Protectorate (Native Trust Land) Order in Council 1936.[137] The preamble recited that it was "expedient that the customary rights of the natives ... to use and enjoy the land of the protectorate and the fruits thereof in sufficient quantity to enable

them to provide for the sustenance of themselves, their families and their posterity should be assured, protected, and preserved". The attainment of this objective was attempted by restructuring land in the protectorate into the categories of Crown Lands, Reserved Lands and Native Trust Land. Crown Lands were defined as "all lands and interests in land acquired or occupied by or on behalf of His Majesty". Reserved Lands included lands originally held under Certificates of Claim which were previously categorised as private lands; lands leased, granted or otherwise disposed by the Governor prior to the Order, except yearly tenancies; land other than Crown lands in townships; forest reserves; and certain scheduled areas. The Governor was empowered to amend the schedule to reduce, but not to increase, the category of reserved lands. Land held by private persons in this category could be surrendered and retained in the same capacity or transformed into Native Trust Land. This was the third and most important category. It included all lands in the protectorate, whether vacant or waste, occupied or unoccupied, which were not included within the categories of Crown or Reserved Lands.[138]

Native Trust Land was vested in the Secretary of State for the Colonies, but the Governor was empowered to exercise powers of administration "for the use and common benefit of the natives", subject to the general directions of the Secretary. Without the Governor's sanction, no other person other than an African could assert a right to use or occupy the land. The Governor could grant "rights of occupancy" to natives or non-natives if it appeared to him that the disposal of the land was for the common benefit, direct or indirect, of the

Africans. Due regard was to be given to "native law and customs" in all such disposals.[139] The nature of rights of occupancy was not precisely described in the Order, but they were analogous to Crown land leases and the administration eventually resorted to an indiscriminate and interchangeable use of the two concepts.[140] Rights of occupancy could be granted for a maximum 99 year term, at a rent revisable within 33 year intervals, and subject to any development conditions which the Governor devised.

The procedure for disposing African Trust Land was changed to reflect the new social and political setting. First, the obsolete public auction method of disposal was abandoned. Secondly, the law required prior consultations with, but not necessarily the consent of, the native authority of the area. The concept of trust land was introduced at a time when the policy of "indirect rule", or the use of "authentic" traditional rulers in local administration, was in vogue. Apart from consultations with such rulers, the 1936 Order in Council stipulated that proceeds from the disposal of the land should be paid into the treasury of the Native Authority or into a central fund for all Native Authority treasuries. Finally, the Order required the payment of compensation to persons disturbed by the grant of a right of occupancy. Compensation was required even where the acquisition was for a public purpose, but any payment in this case was made to the Native Authority treasury.[141]

When Sir Sidney Abrahams reported on land policies in Nyasaland in 1946, he revealed two problems on the operation

of the 1936 Order in Council.[142] The first was on publicity. District Residents, Native Authorities and Africans in general were not fully conversant with the terms of the order. In one case, the requirement for prior consultations with Native Authorities before land disposal was treated as a requirement for consent, and the construction of an agricultural station in Lilongwe was held up because the appropriate Native Authority withheld consent at the instigation of the Nyasaland African Congress. This political organization was vigilant and critical of attempts to dispose trust land under the loose pretext that it would be "indirectly" beneficial to the Africans. The vigilance in this particular case may have been misplaced, but the mere involvement of the party suggests that Native Authorities were not the only legitimate African spokesmen on such matters. The party was concerned that some chiefs who owed their positions to the administration would pander to the wishes of their masters and fail to reflect the true wishes of the people. There was need for wider consultations with the party and other pressure groups under the Order.

The second problem concerned the definition of Crown lands. It should be recalled that the definition of the concept under the British Central Africa Order in Council 1902 included land held by the government for public purposes, as well as vacant and occupied African lands[143] which the 1936 Order categorized as "Native Trust Land". But the passage of this Order was not complemented by a revision of the definition in the earlier instrument. Thus, for a time, two definitions of Crown lands existed in the law, one including "Native Trust land", the other excluding the concept. It was also

anomalous for the 1936 Order to classify forests controlled by the government under "reserved lands" instead of "Crown Lands". In 1947, "Crown Lands" were more appropriately redesignated as "Government lands" and the 1902 Order in Council was duly revised.[144] In 1950, "Government Lands" became "public land", and this term was redefined to include forest reserves and land in townships which was not under "private ownership". This later concept replaced the notion of "reserved lands". The word "native" had by now acquired pejorative connotations, and the category of Native Trust Land was restyled African Trust Land.[145]

Apart from the change in nomenclature, the 1950 Order in Council empowered chiefs to allocate land to other Africans under customary law, subject to the general and special directions of the Governor.[146] This was a belated recognition of what had always been the customary right of chiefs irrespective of what statutory law for the time being stated. The new Order also confirmed the Governor's power to grant licences out of African Trust land, a power which was first introduced under an amending Order in 1949.[147] He was additionally empowered to "make any grant of African trust land for an estate [not] greater than a lease or right of occupancy for ninety-nine years".[148] The terminology here was still unsettled. Regulations on Trust land disposals published in the same year defined leases as including rights of occupancy.[149] The regulations appeared to contemplate increased land disposal to European settlers and included detailed covenants on development and land use. This was a sign of the times. African gains secured during the inter-war period of liberalism had to be rolled back after the war in order to provide land for the

resettlement of demobilized soldiers. Moreover, as suggested in the review of Thangata statutes, settler influence in the evolution of land policy was reinvigorated by the impending Federation of Rhodesia and Nyasaland.

The 1950 Order in Council was amended several times, but its principal features remained unaltered. Most of the amendments were due to constitutional developments in the country's progress towards independence.[150] When this was finally granted in 1964, African Trust Land was vested in the Governor-General and administered by the Minister responsible for land matters in the Malawi government for the use and common benefit of the Africans. African use and occupation of the land continued to be regulated by local customary laws. The use and occupation of public land, or land belonging to the government, was regulated by a new ordinance passed in 1951 to take into account the change in status of this category from being the largest at the inception of colonial rule to the second largest. Received English law remained the residuary law for land under "private ownership". This was the smallest of the three land categories.[151]

4 The Regulation of African Land Use

From the earliest days of colonial rule, settlers and administrators alike saw very little to commend in African agricultural practices summarised by the cliches "slash and burn" and "shifting cultivation". Land was opened for cultivation by the "slashing" and burning of virgin bush, using the ash as fertilizer on little mounds of earth on which crops were plan-

ted. The process was repeated on fresh bush upon the exhaustion of the cultivated patch. Harry Johnston typically described this system as "heedless" and "ruinous to the future interests of the country". He wrote:

> "... One of the great lessons we have to teach the Central African negro is fixity of tenure, the need of settling permanently on one piece of land, and by careful manuring, the constant raising of crops within a certain definite area." [152]

There was no concerted effort to teach Africans the lessons suggested during the first period of colonial rule, when the attainment of agrarian change was attempted through settler enterprises. The 1920 Land Commission made generalized comments and recommendations on control of livestock and grazing, bush fires and forestation or deforestation, but as was the case with its other proposals, no action was taken. After the introduction of the concept of African Trust Land, colonial agriculture policies began to aim for increased and better production of food and cash crops for the Africans and the introduction of sound farming practices. At the same time, the imperial government prodded governments of African dependencies to devise and implement schemes for conservation of natural resources and land improvement.[153]

(a) Conservation of Natural Resources

Schemes for the conservation of natural resources in the post-war period focused on the prevention of soil erosion. The campaign in Nyasaland went through several phases marked by legislative changes. Before 1945, it was envisaged that

African interest in soil conservation could be aroused by demonstration and propaganda. Existing local government laws empowering chiefs and headmen to issue orders on the preservation of resources like grass and timber provided a sufficient legal framework for the campaign.[154] Some success was apparently achieved in convincing Africans to plant their crops on contour ridges and not on the traditional raised mounds of earth. The practice of "bunding" was, in contrast, not so enthusiastically adopted. "Bunds" were continuous lines of earth raised across steep slopes to catch storm water. The work involved was harder and had to be performed during the dry season when the soil was hard and Africans were preoccupied with social festivities. Administrative officers lost their patience and began to advocate compulsion. Soil erosion became "the greatest physical danger to mankind which could not be arrested by simple education". The post-war Development Committee submitted:-

> "It is necessary to be cruel to be kind and ... compulsion of a minimum of conservation is essential for the thorough execution of land usage plans in the common interests."[155]

Parliament obliged by passing the Natural Resources Ordinance 1946[156] which provided the organizational framework for possible use of compulsion. This marked the beginning of a new phase in the anti-erosion campaign which lasted until 1949.

The Ordinance established a Natural Resources Board consisting of the Director of Agriculture and several official and unofficial appointees of the Governor. The principal

function of the Board was to prescribe conservation measures and enforce them upon occupiers of private land or African Trust Land. Failure to implement the measures was a criminal offence, for which Africans could be tried in Native Courts,[157] and any other person in the general courts. In addition, the courts could order specific performance, by the Director of Agriculture, if necessary, and the costs thereby incurred became a debt due to the government. Although courts of law were empowered to punish offenders, appeals against the contents of particular orders fell to the Governor. His decision on whether the order was inequitable, unduly harsh or unreasonable was final. Courts were not regarded as appropriate forums for such issues, which were highly technical and administrative in nature. Although the organization framework drew minor distinctions between European settlers and Africans, criminal sanctions were devised largely for the latter. From 1946, reports drawn by provincial Commissioners included statistics on anti-erosion convictions from Native Courts but none from the general courts.[158]

The dissimilar application of criminal sanctions was even more pronounced in the second phase of the anti-erosion campaign which lasted until the later half of the 1950s decade. The focus of the campaign during this period was the reinforcement of contour ridges with contour bunds or banks in selected areas assessed to be more susceptible to erosion. The work was even harder, and non-co-operation more likely, especially since free African labour was demanded for conservation works on land which was not necessarily under direct cultivation. Government officers, whose sense of urgency was already

pronounced, sought to arm themselves with more penal powers and a better organizational framework. The Natural Resources Ordinance 1949[159] repealed the central Natural Resources Board and transferred its functions to provincial and district Boards. In a country with a varied topography like Nyasaland, decentralised Boards were likely to be more efficient in devising measures suitable for specific areas. The Ordinance also increased maximum penalties for anti-erosion convictions and authorised the courts to order the uprooting of the crops of the convicted persons.[160]

The new draconian penal provisions did not receive unanimous support in the legislative council. One member cautiously warned:

> "The policy should be ... to enlist co-operation, particularly of the African community, and should be education rather than the forming of provincial Boards into a police force doing nothing more than chasing people who the Board feel are offending against the Bill ..."[161]

This advice went a-begging. Subsequent amendments to the principal Ordinance in fact had the intended or incidental effect of facilitating the prosecution of African offenders.[162] One notable amendment introduced at the behest of the Secretary of State expunged the clause authorising courts to order the uprooting of the crops of offenders, but the clause was retained or surreptitiously reintroduced in the Natural Resources Rules published in 1952, and no-one spotted, or commented on, the illegality.[163]

The use of criminal sanctions slackened during the third phase of the anti-erosion campaign which began in 1956. The focus of the campaign in this phase was to introduce "more sophisticated methods of conservation ... in the area of greatest potential and promise".[164] The government was not inclined to use compulsion, apparently because compliance with the basic conservation measures was now widespread. But the political factors should not be overlooked here. Opposition to the campaign intensified with the admission of more African politicians to the legislative council and the reorganization of the Nyasaland African Congress. Despite the change in the focus of the campaign, the law remained unchanged until African politicians joined the government and pushed for the repeal of the hated Natural Resources Ordinance and its subsidiary legislation. The Land Use and Protection Ordinance of 1962[165] was enacted to mark the end of the colonial anti-erosion campaign and the beginning of a new phase. The new African Minister for Natural Resources emphasized that "ordinary men and women have to be associated with the responsibility of conserving and protecting their own resources ...", but the success of the campaign depended on "a willing and voluntary partnership and co-operation between the government ..., District Councils ... and [the] ordinary men and women in the villages".[166]

The organizational structure introduced to bring about the co-operation and partnership between the government and the people consisted of a Land Use Advisory Council and Area Land Use and Protection Committees. The main function of the Council was to advise the Minister and co-ordinate country-

wide policies on land use and protection. Its composition consisted of government officers from responsible departments and other ministerial appointees from outside the civil service. Area Committees replaced District Boards, but the Committees could be created for an entire district or parts of one or more districts. The Committees consisted of appointees of the Minister, district councillors and government advisors. The National Council and the Area Committees had the power to constitute smaller special committees for the consideration of special issues at national or local level. The combination of a national council and diffused local committees ensured flexibility in the formulation of measures appropriate to the locality and the implementation of a co-ordinated national policy at local level. This was a better arrangement than the previous organization consisting of rigid provincial and district councils.[167]

One controversial provision in the 1962 Ordinance envisaged the use of criminal law to punish "any person who, by any act or neglect, [caused] damage to another by diverting storm water from its natural course, or who [injured] any soil or water conservation works".[168] The imposition of a penalty for the first limb of the offence was understandable, but the extension of the offence to cover unintentional damage of soil conservation works was out of character with the philosophy of voluntary co-operation. When challenged to comment on this inconsistency, a government spokesman contended that the penalty was necessary for the failings of human nature: it was intended for cases where persuasion had failed. He concluded that there could be no administration without laws.[169]

The anti-erosion campaign does not feature prominently in some of the major accounts on colonial land policies in Nyasaland. Yet it was perhaps the most important episode in the country's history of law and agrarian change. It provided the first example of the direct use of law to engineer agrarian change. Colonial land legislation on most of the topics reviewed in this chapter effected agrarian change indirectly or incidentally. The anti-erosion campaign thus deserves closer attention. The crucial question is whether the use of criminal law was justified and had the desired effect.

Some of the administrators responsible for the campaign did not doubt the necessity of compulsion and its efficacy. They looked to posterity for vindication, and noted that by the end of the third phase practically all Africans were planting crops on ridges instead of raised mounds.[170] However, several arguments can be advanced to show why posterity may not vindicate them. The principal argument was articulated by one perceptive observer who was roundly ignored at the beginning of the campaign. He remarked:

> "With regard to the educational point of view ... I cannot agree with the naive assumption that Europeans are always in a position to teach agriculture to natives. The native may not understand the scientific principles, but the essence of his practice has been drawn from the experience of generations and, though it cannot be denied that there is room for improvement, his methods on the whole are fundamentally sound. European tropical agriculture, on the other hand, is in its infancy, and it is a regrettable fact that a large percentage of its exponents in this country have little to boast of

> when soil erosion, maintenance of fertility and deforestation are under discussion. I cannot agree for a moment that the native has a 'complete disregard of the maintenance of soil fertility' or that he will starve himself in a few years. The plain truth is that in certain directions native methods are as good as European methods and that examples of the gross abuse of good land under European management are not hard to find."[171]

The disregard shown to such views confirms that the theoretical premise of the campaign was questionable. It was based on conventional paternalism of the colonial period which led to naive assumptions that the African did not know what was good for him, and it was up to the government or the settlers to show him the way, by force if necessary. Yet, as more recent accounts have shown, the administrators and the so-called experts often had little practical experience of tropical agriculture.[172] Because of the wrong theoretical premise, it did not occur to the administrators that contour-ridge cultivation was readily accepted during the early phases of the campaign because it made practical sense. On the other hand, the lining of uncultivated steep slopes with ridges or banks in the later phases was resisted partly because the permanent utility of the exercise was not sufficiently apparent to the Africans.

Posterity will also refuse to vindicate the campaign because no-one proved conclusively that criminal sanctions achieved what persuasion could not. The scanty statistics of court convictions during the second phase of the campaign show no downward trend to confirm the existence of a deterrent eff-

ect. On the contrary, the number of convictions increased in some areas, thus confirming the stiffening of resistance. Reports from some courts suggested that most offenders regarded fines as a local rate, the payment of which absolved them from further compliance. This was partly due to inefficient administration of the law by some of the Native Courts. Agricultural officers contributed to this inefficiency by inundating the over-worked courts with long lists of offenders. The courts generally responded by imposing uniform punishments regardless of the severity of the particular infringement or the previous record of the offender. Reports prepared by Agricultural Officers were often regarded as conclusive on the guilt of the accused, and further corroborative evidence was not sought. The result was poor administration of justice and a general failure of the tactic of using criminal law in Native Courts to compel agrarian change.[173]

Finally, even if it could be shown that the use of criminal sanctions induced some agrarian change, the social, political and economic upheavals which ensued far outweighed the gains. The anti-erosion campaign, together with Thangata grievances, were important underlying factors in the social and political disturbances of 1953 and 1959, although "political agitators" were the scapegoats of the administration.[174] The policies were effective ammunition for the so-called agitators. It was sufficiently iniquitous for a person to be sent to prison for failing to construct contour ridges in his garden. The destruction of his crops was even worse. His family was thereby exposed to starvation. The penalty far outweighed the crime and, predictably, Africans rallied behind their pol-

itical leaders in resisting colonial rule and all its vestiges and symbols. The hapless Native Authorities who were partly responsible for the enforcement of the hated laws were one such symbol. Some of them lost the confidence of their people as impartial purveyors of justice. As a result, when the African politicians got into government in 1962, their legislative programme included an ordinance which stripped the legal functions of chiefs, headmen and district administrators and reposed them in a separate judiciary.[175] Other symbols of colonial rule rejected by the Africans were, unfortunately, some of the better land improvement and reorganization reviewed below.

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TABLE 6: ANTI-EROSION CAMPAIGN CONVICTIONS IN NATIVE COURTS[176]

YEAR:	SOUTHERN PROVINCE:	CENTRAL PROVINCE:	NORTHERN PROVINCE:
1945	660	368	1
1946	335	632	65
1947	316	502	-
1948	-	762	173
1949	790	973	849
1950	913	286	177
1951	192	1,572	229
1952	-	-	164
1953	1,501	(over 1,000)	190
1954	935	1,153	-

(b) Land Improvement and Reorganisation Schemes

There was no legislation on land improvement schemes during the colonial period. They nevertheless constituted an important component of the post-war agricultural policy, distinguishable from the anti-erosion campaign. The schemes belatedly attempted to teach the Africans "fixity of tenure", the lesson proposed by the country's first colonial administrator. The first scheme devised for this purpose was the "Master Farmer" programme which became operational in 1952.[177] Progressive and co-operative individual farmers were encouraged to practice good crop husbandry on consolidated holdings with a minimum size of eight acres. They were offered extra extension services, special loans and annual bonuses. It was hoped that they would eventually evolve into a class of yeoman farmers with distinct individual land titles which could be used as security for more development loans. It was also hoped that the apparent success of master farmers would encourage other Africans to aspire for similar titles and privileged positions. These aspirations were not realised. Enthusiasm for the scheme petered out within a decade of its inception.

As the table below shows, the number of farmers who qualified for the scheme was so infinitesimal that no significant impression could be made on peasant agriculture. One factor which contributed to this lack of success was the selection and patronage of a few individuals. This was bound to incite jealousy and envy of other farmers. The minimum acreage requirement was also difficult to fulfil, especially in the high density districts.[178] This was later appreciated, and a var-

iant of the scheme which reduced the minimum acreage to five was introduced in 1959. But development schemes were by then caught in the political struggle for indepandence, and any attempt to grant individual titles to the chosen few would have been fiercely resisted.

TABLE 7: THE MASTER FARMER SCHEME, 1954-1961.[179]

YEAR:	CLASS: 1st	CLASS: 2nd	TOTAL NO. OF PROGRESSIVE FARMERS:	ACREAGE IMPROVED:	BONUSES PAID:
1954	1	52	202	500	533
1955	8	117	-	2103	2262
1956	10	170	-	3012	3196
1957	13	267	282	3484	3770
1958	21	386	407	4719	5169
1959	20	439	617	5000	5015
1960	15	550	745	6227	6535
1961	14	493	540	5639	6005

As soon as it became obvious that the number of individuals qualifying for the Master Farmer scheme was rather insignificant, "a policy intermediate between general treatment of the masses and special treatment of the individuals"[180] was formulated. Village land improvement and resettlement schemes were introduced. Their aim was to reorganize village land along sound agricultural patterns and to redistribute consolidated holdings to each household in place of the previous fragments. The schemes attempted to emulate land reforms in

Central Kenya. The accent in the reorganization procedure was on soil conservation. Land capability plans were drawn from ground and aerial surveys to show areas suitable for cultivation, forests, grazing and outlines of roads, drainage lines, dam sites and other physical features. These outlines were then constructed on the ground and soil conservation measures effected on arable land. The consolidation exercise followed. The location of each consolidated holding was determined by a committee of local elders who were also consulted at every stage in the process.[181]

Village land improvement schemes began with a small pilot project at Nsalu near Lilongwe in 1954. The apparent success of the early experiments led to the formulation of a four-year plan which envisaged reorganisation of 400,000 acres at an estimated cost of £2.25 million. Large schemes were introduced. The most notable were the Nyamphota scheme in Chikwawa which began in 1954 and at one time affected 143 families and 1,016 acres; the Ntaja scheme in Blantyre which affected 800 people, 36 villages and 3,000 acres by 1958; and the Kandiani scheme in Lilongwe under which 450 holdings were regrouped on 2,300 acres of arable land and 2,700 acres planned for afforestation and grazing. There were 30 reorganized areas covering 200,000 acres by 1959. But 80 per cent of the schemes ceased to operate by 1961 and the last scheme was abandoned in 1962. Most farmers reverted to fragmented holdings and to subsistence monocropping agriculture which the schemes had striven to eliminate.[182]

The ephemeral existence of village land improvement schemes was due to several technical, political and legal factors. On the technical side, the implementation of the schemes was originally hampered by lack of field staff. Some of the requirements were also untenable and unpopular. As suggested above, soil conservation measures involved hard work during the dry season - a season ordinarily reserved for festivities. Fallow and crop rotation techniques were abandoned by some farmers because they resulted in a general shortage of food crops during the initial years. The insistence on exclusive grazing areas for reorganized villages was contrary to local customs which required that dambos, the traditional grazing areas, should be open to animals from all surrounding villages. Apart from the practical difficulty of implementing a requirement which was contrary to popular customs, any attempt to enclose parts of the dambo for the exclusive use of select villages or households would have resulted in animosity between villagers within and outside the schemes.

The political factor, as mentioned earlier, was the exploitation by nationalist politicians of widespread hatred against some colonial agricultural policies in mobilising mass support for the independence movement. Villagers were encouraged to be hostile to colonial rule and all its vestiges. Government extension agents were obvious symbols of such rule, and villagers became less receptive to their advice. Moreover, any farmer or customary authority who co-operated with the government risked being caricatured as a "stooge" or an opponent of self-rule.[183]

The legal factor was the absence of any proper legal framework for the Master Farmer or village land improvement schemes. Land reform was attempted in both cases without an enabling statute. The success or failure of the project was entirely dependent on the co-operation of the chief or headman, and on his ability to persuade his subjects to participate. The acquiescence of villagers was not always forthcoming in the existing political climate. Where the land tenure changes were implemented, villagers found it easier to abandon consolidated holdings because the political crises diluted the authority of some of the chiefs and headmen. Perhaps the schemes would have been less transitory if the consolidations were complemented by grants of statutory or legal titles which were not tied to the political influence of the chief or headman. It has been suggested that formal land titles were not granted because Africans felt no insecurity, and tampering with the nature of customary land would have been regarded as a pretext for its acquisition for European agriculture.[184] African suspicions were not entirely unwarranted. The existing political and socio-economic context was not ideal for customary land reforms, but after embarking upon the exercise, the sporadic and unsystematic programmes simply exacerbated African confusion on government intentions.[185]

A report of an economic survey of the country concluded in 1959 that village land improvement schemes offered the best hope for the future of African agriculture.[186] This was wishful thinking. It should have been obvious that Africans were likely to abandon the voluntary and extra-legal arrangements as soon as they felt dissatisfied with the implementation or the results of the schemes.

5 Conclusion

As concluded in the previous chapter, the introduction of a dual land structure following the proclamation of a British protectorate over Nyasaland was effected under a legal regime which was still in its nascent and formative period. This was one of the less unacceptable excuses for the subsumption of African land rights under private and Crown lands. After reviewing colonial legislation on control of Thangata on private land, it can be concluded that there was no significant improvement in the position of the Africans even after formal judicial, executive and legislative structures were introduced. European settlers ensured that the inequitable labour tenancies were propped up by law until it was politically impossible to do so. They tolerated minimum improvements in the position of the Africans, but only for the sake of maintaining equilibrium when social instability loomed. The concessions were often rolled back afterwards. Law thus continued to function negatively by promoting the interests of the politically and economically dominant sector. This was the case even when the official colonial policy on land administration in general shifted from the promotion of agrarian change, through settler enterprises, to the preservation of present and future African interests.

This change of policy, it should be conceded, brought about a rationalisation of the land structure. The original ill-defined dual structure was replaced by a plural structure consisting of the well-defined categories of African Trust Land, Public Land and private land. There was, moreover, a

reduction in the amount of African land leased to European settlers. But this change of policy was not accompanied by a departure from the conventional paternalism in the administration of African affairs. Thus, when land-use regulations were introduced in the latter half of colonial rule, it was thought necessary to deploy criminal law to compel a change in African agrarian practices. It has been suggested that the social, political and, possibly, economic consequences were disastrous. The discriminate use of penal sanctions in the anti-erosion campaign provides another acute example of the negative role of law in the administration of agrarian change. That law played such a role is neither startling nor a novel conclusion. But the restatement attempted here is a necessary prelude to the subsequent chapters on post-colonial agrarian reforms. It will be necessary to determine whether independence brought about a change of perception in the manner in which law was to be used to effect agrarian change.

NOTES TO CHAPTER IV

1 Supervisor of Native Affairs v. Blantyre and East Africa Company Limited, B.C.A. Gazette Supplement, 30th April 1903; and, generally, Chapter III, Part 2(e).

2 F.O. 2/746, Pearce to F.O., 10th April 1903.

3 Land Commission to Ag. Commissioner Pearce, 6th May 1903, enclosure No. 1 in despatch No. 75, Pearce to F.O., F.O. 403/336, 7th July 1903.

4 B.C.A. Chamber of Commerce and Agriculture to Ag. Commissioner Pearce, 26th June 1903, enclosure No. 4 in Despatch No. 75, F.O. 403/336.

5 See generally Despatch No. 75, F.O. 403/336, 7th July 1903; and Despatch No. 84, Sharpe to F.O., 23rd September 1903, F.O. 403/336.

6 No. 5 of 1904.

7 See Note 29 below.

8 Pachai, Land and Politics in Malawi, 1875-1975, p. 90. Cf. Roberts, The Growth of an Integrated Legal System in Malawi, p. 165.

9 See Nyasaland Protectorate, Report of a Commission Appointed to Enquire into and Report upon Certain Matters Connected with the Occupation of Land in the Nyasaland Protectorate, Government Printer, Zomba, 1921, pp. 5-6.

10 Pachai, op. cit., p. 90.

11 For an excellent and invaluable account of the 1915 rising, see G. Shepperson and T. Price, Independent African, John Chilembwe and the Origins, Setting and Significance of the Nyasaland Native Rising of 1915, Edinburgh, The University Press, 1958.

12 Nyasaland Protectorate, Legislative Council (LEGCO) Proceedings, 1908-1926, Government Printer, Zomba, 13th Session, 10th -12th March 1914, pp. 12-13.

13 Ibid. p. 14.

14 File SI/172[I]/19, Folios 5 and 6, National Archives, Zomba.

15 Nyasaland Protectorate, Report of the Commission of Enquiry into the Native Rising of 1915, Government Printer, Zomba, 1916, pp. 5-6, para. 5(e). This enquiry was presided over by Judge L. Grant.

16 No. 16 of 1917, especially Section 3.

17 Bonar Law to Governor Smith, Despatch No. 199, 11th October 1916, Folio 17 in File SI/172[I]/19.

18 See Note 1 above.

19 Governor Smith to Secretary of State, 7th August 1916, Despatch No. 12, Folio 12, File SI/172[I]/19.

20 See Note 12 above.

21 Governor Smith to Secretary of State, 16th April 1917, Despatch No. 121, File SI/172[I]/19; and Governor Bowring to Secretary of State, 14th May 1924, Despatch No. 223, Folio 17, File SI/275/21.

22 Land Commission Report, 1921, p. 14.

23 Ibid., p. iii. This enquiry was presided over by Judge Jackson.

24 Ibid., pp. 14-15, and generally pp. 11-20.

25 Pachai, op. cit. p.111.

26 Governor Bowring to C.O., Despatch No. 223, 14th May 1924, Folio 17, File S1/275/21, and the Native Rents (Private Estates) Bill, 1924, LEGCO proceedings, 30th session, 30th March 1925.

27 Colonial Office, Report of the East African Commission, London, H.M.S.O., 1925, cond. 2387.

28 Ibid., p. 110.

29 See File S1/1330/25; C.O. 525/112, Bowring to C.O., 28th November 1925; LEGCO proceedings, 35th session, 22nd August 1927, Governor's address, p. 4; 36th session, 2nd April 1928, Acting Chief Secretary, pp. 9-10; and Ordinance No. 15 of 1928.

30 Sections 3 and 4, and File S1/411^{II}/3, Folios 77 to 103, for the development of "visiting tenancy" arrangements.

31 See generally Sections 9-19.

32 Proclamation No. 139 of 1928 applied the Ordinance to the whole protectorate, except the North Nyasa District, as from August 1928.

33 Section 6 of the Natives on Private Estates (Amendment) Ordinance, No. 6 of 1928; and File S1/727/26, Folios 78, 80 and 88.

34 Rex v. Jeremiya C. Solomoni, unpublished High Court case No. 3 of 1930 and District Commissioner's Case No. 9/30 reported in File S1/727/26, Folio 127. The two accused in the case were found residing on the estate of the B.C.A. Company in Blantyre, apparently without the knowledge of the estate manager. He ordered them to leave and pulled down their dwellings. They raised other dwellings and refused to leave. A magistrate convicted them of squatting and refusing to obey an order in contravention of Sections 22 and 43 of the 1928 Ordinance. The High Court quashed the conviction upon the request of the

Attorney General. The case was so poorly reported that it is impossible to restate accurately the facts and ratios of the two judgements.

35 For a general review of the 1928 Ordinance, see: Nyasaland Protectorate, Report of the Land Commission 1946 by Sir Sidney Abrahams, Government Printer, Zomba, pp. 10-17.

36 File SI/411^{I}/33, Folio 7, p. 3.

37 Ibid.

38 See Paper No. 7, draft Nyasaland Protectorate (Private Estate) Order in Council 1934 and confidential despatch, Young to Secretary of State, 14th March 1934, Folio 31, File SI/411^{I}/33.

39 Secretary of State to Governor Kittermaster, 24th October 1934, Folio 59, File SI/411^{I}/33.

40 See Folios 13, 64, 68, 71 and 233 in File SI/411^{I}/33.

41 Colonial Office, Report of the Commission of Enquiry into the Financial Position and Further Development of Nyasaland, London, HMSO, 1938, pp. 36-37.

42 Folios 173 to 176, File SI/411^{II}/33, and Land Commission Report, 1946, p. 6.

43 Ibid., p. 5.

44 Ibid., p. 17.

45 Ibid., pp. 18-21.

46 For alternative assessments of the Abrahams Report, see: Roberts, op. cit. p. 182; Wanda, Colonialism, Nationalism and Tradition, p. 144; Kandawire, Thangata, pp. 31-32; and cf. Pachai, op. cit. p. 129.

47 Land Commission Report, 1946, pp. 21-23.

48 Ibid. p. 27, and the Acquisition of Land for Public Purposes Ordinance, No. 4 of 1907.

49 No. 19 of 1948. The Bill was published for discussions in 1947.

50 See Wijeyesekera v. Festing [1919] A.C. 646, p. 649. The case was concerned with the interpretation of a "public purpose" in a statute from Ceylon. The privy council held: "... the decision of the governor that the land is wanted for public purposes is final ... and could not be questioned in any court." This holding influenced the drafting of the Public Land Acquisition Ordinance, but the Attorney General assured the settlers that the Governor would not abuse his power, and would only resort to compulsory acquisition in cases of overriding necessity. See LEGCO proceedings, 63rd Session, 17th February 1948, pp. 38-40.

51 Nyasaland Protectorate, Land Commission 1946, Report of the Planning Committee, 14th June 1948, presented to LEGCO during the 63rd Session on 17th February 1948.

52 Ibid., p. 2, para. 9.

53 A.C. Talbot Edwards, Ag. Chief Secretary, Statement of Government Policy, enclosed in the Report of the Planning Committee, 1948.

54 Secretary for African Affairs, 71st Session of LEGCO, 14th May 1956, p. 5. Cf. Appendix I in the Report of the Planning Committee, 1948.

55 Natives on Private Estates (Temporary Provisions) Ordinance No. 18 of 1948, and proclamation GN 140/1749, which extended the operation of the Ordinance for another year.

56 No. 8 of 1952, which was applied to the Southern Region by G.N. 159/52 on 22nd August 1952.

57 LEGCO proceedings, 67th session, 7th July 1952, p. 3.

58 Ibid., pp. 5-6; and Sections 3, 10(i), 12, 13 and 14 of the 1952 Ordinance.

59 Sections 7, 8 and 18.

60 Sections 20, 21 and 26.

61 For the implementation of the Federation of Rhodesia and Nyasaland and Malawi's political history, see Pike, Malawi, A Political and Economic History, London, 1968, pp. 103-141.

62 Section 29.

63 Nyasaland Protectorate, Report of the Commission of Enquiry into the Disturbances at Mangunda Estates, Luchenza, on 18th and 19th August 1953, Government Printer, Zomba, 1953.

64 Colonial Annual Report, 1954, p. 1; and Governor's Address, LEGCO proceedings, 69th session, 6th July 1954, p. 3.

65 Acquisition of Land for Public Purposes (Amendment) Ordinance, No. 44 of 1954.

66 Chief Secretary, LEGCO proceedings, 69th session, 16th December 1954, pp. 27-28.

67 Africans on Private Estates (Amendment) Ordinance, No. 21 of 1956.

68 LEGCO proceedings, 71st session, 9th July 1956, pp. 50-53, and 3rd February 1957, pp. 18-19.

69 Africans on Private Estates (Amendment) Ordinance, No. 6 of 1959; and LEGCO proceedings, 1st meeting, 6th July 1959, pp. 85-86.

70 LEGCO proceedings, 76th session, 4th meeting, 29th May 1962, p. 270.

71 No. 12 of 1962 and chapter 33:01, Laws of Malawi.

72 Sections 5 and 25.

73 Section 11.

74 See, for example, R.S. Hynde, Memorandum on Private Estates in Nyasaland, 28th May 1925, p. 8, in File S1/1330/25, National Archives, Zomba.

75 Sections 14 to 16.

76 Section 10.

77 Sections 18 to 24.

78 Section 8.

79 LEGCO proceedings, 76th session, 28th May 1962, p. 290. See also pp. 293-296.

80 Annual Report of the Lands Department, 1966, Government Printer, Zomba, p. 3.

81 See Table 11 and Note 53 in Chapter III.

82 Section 3 of the Land Tax Ordinance No. 15 of 1911 imposed a Land Tax of ½d. per acre on all estates exceeding 24 acres.

83 The Land Tax and Recovery Ordinance, No. 9 of 1915, was passed to facilitate recovery operations by enabling the government to apply personal and real property of tax defaulters to the satisfaction of the arrears. But annual

reports of the Lands Department for the period 1919 to 1937 continued to show large land tax arrears.

84 Land Tax (Repeal) Ordinance No. 35 of 1950.

85 See File SI/113/34, Lands Department, Annual Report for 1937; File SI/1519 D^{I}/28, B.S.A. Company, Land and Mineral Rights agreement in Nyasaland; and Note 54 in Chapter III.

86 Published in B.C.A. Gazette of 22nd April 1895.

87 Published in Gazette of 31st October 1902.

88 Ordinances No. 18 of 1912 and No. 1 of 1931.

89 See also the Report on Tenure of Crown Lands in Nyasaland Protectorate, by T.I. Binnie, Chief Surveyor, in C.O. 525/24, Despatch No. 215, Sharpe to Colonial Office, 20th July 1908.

90 Section 6.

91 The Central African Planter, March 1896, enclosed in F.O. 2/106, Johnston to F.O., 16th March 1895.

92 Sections 5 and 11-15; LEGCO proceedings, 10th session, 5th November 1912, pp. 20-21; and the 1920 Land Commission Report, pp. 30-31.

93 Crown Lands (amendment) Ordinance No. 4 of 1920, and the 1920 Land Commission Report, p. 24.

94 Ibid., pp. 30-31.

95 F.O. 84/2197, Johnston to F.O., 13th October 1892.

96 Murray, Memorandum on Land Matters in Nyasaland, dated 9th October 1924, in C.O. 525/109, 10th November 1924; and the Government Land Sales Regulations, 1895.

97 C.O. 525/3, Sharpe to C.O.; Despatch No. 314, 20th October 1904.

98 Circulars No. 8 of 1904, enclosed in C.O. 525/3, 20th October 1904; No. 13 of 1906; and No. 11 of 1910 in C.O. 525/109, 10th November 1924.

99 L. Vail, "Railway Development and Colonial Underdevelopment, The Nyasaland Case", in R. Palmer and N. Parsons (ed.s), The Roots of Rural Poverty in Central and Southern Africa, Heinemann, 1977, pp. 365-395; Pachai, op. cit., pp. 67-82; C.A. Crosby, "Railway Development in Malawi, The Early Years, 1895-1915" in R.J. MacDonand (ed.), From Nyasaland to Malawi, Studies in Colonial History, East Africa Publishing House, Nairobi, 1975, pp. 124-143; and F.O. 2/693, Treasury to F.O., 24th July 1902; F.O. 2/692, Crown Agents to F.O., 21st August 1901; and F.O. 403/245, Memorandum by Sir F. Ommaney on the Construction of Railways in Nyasaland, 8th February 1897.

100 The Land Commission Report 1921, p. 24.

101 Source: File SI/1411^{II}/33, Folio 45.

102 Owen Thomas, "Land Tenure in our African Protectorates", London Times, Saturday 3rd October 1908.

103 Sections 7 and 10.

104 The Land Commission Report 1921, pp. 26-27.

105 Ibid., pp. 24-26.

106 File SI/470/22, Folio 4.

107 Hon. Attorney-General, LEGCO proceedings, 37th Session, 16th July 1928, p. 58.

108 Hon. C. Burberry Seal, 38th Session of LEGCO, 12th November 1928, p. 5; and the Kenyan Crown Lands Ordinance, No. 12 of 1915.

109 Report of the Select Committee of LEGCO on the Crown Land Bill, sessional paper No. 2 of 1931, Government Printer, Zomba. Two members of the Committee, Messr.s Hunter and Burberry Seal, insisted on submitting a minority report which restated the wishes of the European settlers.

110 Ibid., pp. 2-3, Chief Secretary's letter to the President of the Chamber of Commerce; and Tanganyika Crown Land Ordinance No. 3 of 1923.

111 LEGCO proceedings, 43rd Session, 28th and 29th April 1931, pp. 4-7.

112 File SI/38/32, Report of the Rent Arrears Committee, 19th January 1932.

113 Circular No. 11 of 1910.

114 The Land Commission Report 1921, pp. 27-28.

115 See definitions in the schedule to the Crown Land Ordinance 1931 and Ss. 21 to 22.

116 Minute dated 7th February 1939, File SI/297/36, Folios 28 to 29, and Folio 19, minutes of the meeting of Agronomic Sub-Committee held on 8th July 1938.

117 See Chapter III, Part 2(e).

118 F.O. 403/336, Ag. Commissioner Pearce to the Marquess of Lansdowne, Despatch No. 74, enclosure No. 76, 8th July 1903.

119 See Wanda, op. cit. pp. 72-73; and cf. Roberts, op. cit. p. 153, for contrasting interpretations of this clause.

120 Murray, Memorandum on Land Matters in Nyasaland, 1924, pp. 57-58, C.O. 525/109, 10th November 1924.

121 The Land Commission Report 1921, pp. 31-32.

122 Ibid., p. 33; and, generally, pp. 33-35.

123 Ibid. pp. 39-40.

124 See Note 120 above.

125 Source: Lands Department, Annual Reports, 1921 to 1936, National Archives, Zomba. Note that all the acreages and sums given have been rounded off to the nearest whole unit.

126 Pachai, op. cit. p. 58; and Wanda, op. cit. pp. 211-217.

127 The Land Commission Report 1921, p. 5; and generally, pp. 5-6.

128 Ibid., p. 7; and generally, pp. 7-11.

129 See P.T. Terry, "African Agriculture in Nyasaland, 1856 to 1894", The Nyasaland Journal Vol. XIV, No. 2, July 1961, pp. 27-35.

130 Gathomo v. Indangara and Others, civ. cause 626/1921, (1922-23) K.L.R. 102.

131 Ag. Governor to Secretary of State, Despatch No. 422, 26th November 1921, p. 10, Folio 14, File SI/275/21/

132 Report of the East Africa Commission, 1925, p. 109.

133 Colonial Office, Memorandum on Native Policy in East Africa, 1930, cmd. 3573, p. 1, para. 2.

134 Ibid. pp. 8-9, para. 11(i).

135 Ibid.

136 Ibid. p. 11.

137 GN 25/1936.

138 Articles 3 to 4.

139 Articles 5 to 6.

140 For conceptions of "rights of occupancy" in other African countries, see: J. McDowell, "Interpretation of the Land Tenure Law of Northern Nigeria" 1970 J.A.L., pp. 155-177; "An introduction to the problems of ownership of land in Northern Nigeria", Nigerian Law Journal (1964-1965), Vol. I, pp. 202-226; and G.M. Fimbo, "Rights of Occupancy in Tanzania: The Political Economy of an African Land Tenure System", Eastern Africa Law Review, Vol. 7, No. 2, 1974, pp. 121-156.

141 See Articles 5 and 6, and Nyasaland Protectorate (Native Trust Land) Amendment Orders in Council 1940 (GN 135/1940) and 1945 (GN 27/1945).

142 Land Commission Report, 1946, pp. 23-27.

143 See Chapter III, Part I, and Interpretation and General Clauses (Amendment) Ordinance No. 18 of 1935.

144 Nyasaland Protectorate (Native Trust Land)(Amendment) Order in Council 1947, GN 24/1948; and Nyasaland Order in Council, 1947, GN 19/1948.

145 Nyasaland Protectorate (African Trust Land) Order in Council 1950, GN 80/1950, Articles 2 to 4.

146 Article 6(1).

147 Nyasaland Protectorate (Native Trust Land) Order in Council 1949, GN 69/1949, and Article 7 of the 1950 Order in Council.

148 Article 7(1)(b).

149 GN 228/150.

150 The following were some of the principal amendments to the 1950 Order in Council: GN 121/1955; GN 93/1961; GN 94/1961; GN 142/1962; GN 197/1962; and Statutory Instrument No. 884 of 1963.

151 See Public Land Ordinance No. 8 of 1951; Malawi (African Trust Land) Modification Order, 1964, Statutory Instrument No. 884; Malawi Independence Order, 1964, Statutory Instrument No. 916; and Table 11, for the relative sizes of the three land categories.

152 H. Johnston, British Central Africa, pp. 424-425. For the apparent universality of this form of African agriculture in East Central Africa, see W.J. Barber, The Economy of British Central Africa, Oxford University Press, 1961, pp. 44-46.

153 See Nyasaland Protectorate, Report of the Post-War Development Committee, Government Printer, Zomba, 1945; Native Welfare Committee, Memorandum on Native Policy, Government Printer, Zomba, 1939, Chapter III, pp. 15-19; Lord Hailey, An African Survey; Oxford University Press, 1956, Chapter XV, particularly pp. 1033-1035; and Annual Reports, Department of Agriculture, 1945-1960.

154 See Section 8 of the Native Authority Ordinance, No. 13 of 1933.

155 Report of the Post-War Development Committee, 1945, Annex II, Attachment I, p. 109. For the impatience of the administrators and anti-erosion policies pursued during

the several phases see R.W. Kettlewell, "Agricultural Change in Nyasaland: 1945-1960", Food Research Institute Studies in Tropical Food and Agriculture, 1965, Vol. 5, No. 3, pp. 255-258.

156 No. 9 of 1946.

157 Established under the Native Courts Ordinance No. 14 of 1933.

158 Sections 3, 5, 9, 12, 13, 20 and 21 of the 1946 Ordinance; and LEGCO proceedings, 61st Session, 19th to 20th February 1946, pp. 24-29.

159 No. 2 of 1949.

160 Sections 3 to 5.

161 G.G.S.J Hadlow (former member of the disbanded Protectorate Natural Resources Board), LEGCO proceedings, 64th Session, 28th February 1949, p. 9.

162 See: Natural Resources (Amending) Ordinances, No. 22 of 1949, No. 27 of 1950 and No. 22 of 1952; and LEGCO proceedings, 64th Session, 26th September 1949, pp. 16-17; and 65th Session, 24th July 1950.

163 Natural Resources (Amendment)(No. 2) Ordinance, No. 39 of 1951; Director of Agriculture, LEGCO proceedings, 67th Session, 17th December 1951, pp. 22-23; and Section 16(3) of G.N. 56/1952.

164 Kettlewell, op. cit., pp. 255-257.

165 No. 10 of 1962.

166 Dr. Banda, LEGCO proceedings, 76th Session, 4th meeting, 29th to 31st May and 1st June 1962, p. 246.

167 Sections 3 to 8.

168 Section 11.

169 LEGCO proceedings, 76th Session, p. 255.

170 Annual Report for the Department of Agriculture, 1956, p. 1.

171 File SI/411C/33, Folio 10, Development of Native Agriculture, Notes of the Kaye Nicol Memorandum on the Native Agricultural Board Sessional Paper No. 1 of 1930, National Archives, Zomba.

172 J. McCracken, "Experts and Expertise in Colonial Malawi", Chancellor College, History Department, Staff Seminar Paper No. 13, 12th March 1981.

173 Nyasaland Protectorate, Annual Reports of Provincial Commissioners 1945-1953; Annual Reports on Native Administration 1954-1956; and Annual Reports of the Secretary for African Affairs 1957-1959, Government Printer and National Archives, Zomba.

174 See Note 63 above, and Colonial Office, Report of the Nyasaland Commission of Inquiry, July 1959, London, HMSO, Cmnd 814, for the story of the 1959 political disturbances.

175 See Local Courts Ordinance No. 8 of 1962 and LEGCO proceedings, 76th Session, 4th meeting, 29th May to 1st June 1962, pp. 192-195.

176 Source: see Note 173 above.

177 For the objectives and performance of the Master Farmer Scheme, see Kettlewell, op. cit. pp. 274-276, and "An Outline of Agrarian Problems and Policy in Nyasaland", Department of Agriculture, Zomba, 1955; P.A.K. Kishindo, Extension Agents in Agricultural Development, The Malawi Case, M.A. dissertation, University of Malawi, 1980, Chapter 2; and Annual Reports of the Department of Agriculture, 1949-1962.

178 G. Rimmington, "Agricultural Development in Dedza District of Nyasaland", Nyasaland Journal, Vol. 16, No. 1, January 1963, p. 38.

179 Source: Annual Reports of the Department of Agriculture and Colonial Annual Reports, 1949-1962. Note that the table contains only approximate totals. There are several discrepancies between the numbers given in the colonial Annual Reports and the Reports of the Department of Agriculture. The latter have been quoted in such cases.

180 Annual Report, Department of Agriculture, 1954, Part 1, p. 1.

181 For a review of the village land reorganization schemes, see P.F.M. McLoughlin, "Land Reorganization in Malawi, 1950-60: Its Pertinence to current Development", in P. Schatz (ed.), South of the Sahara: Development in African Economies, Temple University Press, Philadelphia, 1972, pp. 128-139; and Kettlewell, op. cit., pp. 276-277.

182 Annual Reports, Department of Agriculture, 1954-1962.

183 See Z.D. Kadzamira, Local Politics and the Administration of Development in Malawi, unpublished Ph.D. thesis, University of Manchester, 1974, pp. 51-54.

184 Kettlewell, op. cit. p. 250.

185 McLoughlin, op. cit. pp. 136-137.

186 Federal Government of Rhodesia and Nyasaland, Report of an Economic Survey of Nyasaland, 1958-59, Government Printer, Zomba, p. 6.

V CONTROL OF THE PRODUCTION AND MARKETING OF ECONOMIC CROPS

1 Introduction and Preliminary Issues

A glance through the Annual Volumes of the Laws of Nyasaland shows that the regulation of production and marketing of crops deemed essential to the economy attracted the largest amount of legislation in the evolution of agrarian laws. This is a sufficient justification, if one is necessary, for giving the subject as much emphasis as land tenure laws in the agricultural history of the country. It is also apparent that most of the ordinances and statutes attempted to regulate the production and marketing of crops grown by Africans on Trust Land. Europeans on private estates were subjected to fewer controls, even where economic crops were produced in competition with the Africans. As seen in the previous chapter, racial distinctions were prominent in the implementation of land use regulations, and thematic continuity is the second justification for this review of marketing laws in a land tenure thesis. But the main justification for this chapter will be the contention that the mountain of legislation was indicative of the relative importance of controlled marketing to the colonial administration. Whereas the review of colonial land legislation has depicted the administration as a clumsy or biased conciliator of the conflicting interests of the Africans and the settlers, this chapter will attempt to show that the administration itself was also a primary beneficiary of controlled marketing.

Crops deemed essential for the economy of the protectorate included both cash and food crops produced for export or the internal market.[1] In line with the policy of attaining agricultural development through settler enterprise, leaving the Africans to supply cheap labour, large-scale production of economic crops was originally undertaken by the settlers. Coffee was the principal export crop, but its reign did not last beyond 1904. A glut on the world market caused by Brazilian overproduction, poor quality of the Nyasaland crop, unsuitable soils and climate, and pest infestation, contributed to the decline of the industry. Cotton replaced coffee as the principal export crop for a short period. Competition from Africans and lower returns drove the settlers out of the industry. Tobacco took over and remained the major export crop for the entire colonial period, except for a short period during which tea, the second major export crop, assumed importance. Tobacco was produced by Africans on Trust Land as well as by Europeans on private estates. Some of the Europeans concentrated on the flue-cured varieties, and dark-fired tobacco was the speciality of the Africans. Tea was produced almost exclusively on European estates. Tung was the other European crop which attracted legislation, but it never got firmly established as an export or cash commodity. The major, economic food crops were maize and groundnuts, and African peasants were the primary producers.

As will become apparent, there was a general similarity in the basic objectives and methods of control evolved for all economic crops. The basic objectives of the legislation were to increase and improve the quality of the crops,[2] and to sta-

bilize or regularize the income of farmers through periods of boom and depression. The methods adopted for the attainment of these objectives included the registration of growers; the fixing of producer prices; the licensing of produce buyers, exporters and market places; and the establishment of Commodity Boards with exclusive or primary responsibilities for all crop marketing processes including the supply of inputs to farmers, the collection, transportation, processing and resale of the commodity. These methods were tried for various economic crops in most parts of British colonial Africa, and the literature on the economic and political consequences of the controls is growing.[3] This chapter will not consciously attempt to add to the economic literature: that is beyond the competence of ordinary legal and historical scholarship and the scope of this work. Any statement on the economic effects of the controls evolved should be treated as tentative and simply suggestive. As with the review of colonial land legislation, the chapter is mainly concerned with the politics of law-making, or the extent to which legislation was influenced by political and social pressures from one or more sectors of the community.

In spite of the general similarity in the objectives and methods of control, to appreciate the political and socio-economic factors behind the law, it is necessary to review separately legislation for the African and European crops, and for each crop within these two broad categories in turn. This is attempted in the first two sections of the chapter. The third section deals with the slightly unrelated, but equally important, subject of controlling the production of economic crops through the provision of credit facilities.

2 African Economic Crops

(a) The Cotton Market

Both cotton and tobacco were grown as cash crops by Africans before the imposition of colonial rule,[4] but they achieved prominence as African economic crops after the establishment of the European plantation economy and protectorate rule. Although cotton was eventually the less prominent of the two crops, it was the first to attract production and marketing controls. The expansion of the European cotton industry in the early part of the 20th century encouraged the resurgence of African production. Between 1903 and 1908 the government experimented with African production through annual distribution of cotton seeds and purchase of the resulting crop. By 1909, it was reported that African cotton was good and probably better than European cotton which was grown in unsuitable areas. European planters began to clamour for curbs on African production, arguing that the popularity of the crop was causing labour shortages on some European estates. It was also the considered opinion of the Director of Agriculture that the popularity of the crop was attracting intermediate purchasers who were offering high prices which could not be maintained. This was undesirable. "The native does not understand market fluctuations", he claimed, "and 1d per lb. seed cotton means, with careful cultivation, a remittance of half his hut tax, and (earnings ranging) from 18s. to 23s. per acre, which is considerable wealth to a native in Nyasaland."[5]

These were some of the opinions which underlay the promulgation of the Cotton Ordinance in 1910.[6] The ordinance gave the Governor a blanket power to make rules, from time to time, for purposes which included the separation of the African from other cotton industries: the importation and distribution of cotton seed to the Africans; and, generally, the protection and control of the cotton industry.[7] When settlers complained that this form of drafting prevented the legislature from debating any rules which may subsequently be made, a government spokesman retorted that the alternative "amounted to suggesting that they should turn legislative councillors pro tempore into executive councillors."[8] A similarly inelegant explanation was provided in answer to the criticism that the measure could be used to deny Africans the liberty to grow cotton and to sell it to anyone as they saw fit. The spokesman said:

> "... the native occupied a peculiar position with reference to our laws, in that he was not entirely sui juris - that is to say he was not in a contractual sense quite his own master. His understanding was too immature to justify them extending to him the same full freedom of contract they themselves enjoyed. When one of the parties to a transaction was under a disability of that sort, then of course it became necessary for someone to interpose on his behalf. It might be a parent, guardian, or a trustee who thus interposed - in (this) case it was the government."[9]

No legal authority was cited to back this extraordinary extension of the rules of contractual incapacity en masse to the Africans.

Apart from restricting the distribution of cotton seeds to African growers, the cotton rules published under the 1910 ordinance required all intermediate purchasers to obtain annual licenses from District Residents, and to submit periodic returns to the administration.[10] No financial or other criteria were stipulated as essential requirements for the buyer's licence. As a result, some of the inexperienced middlemen purchased poor quality cotton at high prices and made losses on resale during the 1911 season. In government circles this was regarded as a vindication of the controls issued under the ordinance! After another season of bad harvest due to drought, new cotton rules were devised in 1913. They attempted to ensure a better quality crop by requiring farmers to uproot and burn used cotton bushes each year. They also attempted to ensure better grading and payment of fair producer prices by requiring that all marketing should take place within established markets.[11]

The new cotton rules were pronounced successful in the first year of operation in 1914, but fluctuating production and price figures after the outbreak of the first world war suggested that the controls were not so effective. It was reported in 1920 that licensed buyers were forming "rings" within the established markets and colluding to offer unremunerative prices to the growers. Indian traders called "Banyans" were also singled out for other malpractices which distorted free competition within the markets. They were accused, for example, of enticing growers to their stalls with gifts of soap or cloth (banyera): of bribing chiefs and headmen who could influence villagers to sell cotton to indi-

vidual licensees; and of advancing money to growers in return for an exclusive right to purchase the crop after harvest and grading. The Director of Agriculture proposed to make these practices illegal, and to replace middlemen with the government as the principal buyer of cotton sold by auction within the market. He also proposed to charge Africans rent for cultivation of cotton plots exceeding two acres.[12]

The colonial office refused to sanction government intervention in the market.[13] A subsequent drop in prices, resulting in reduced African production, nevertheless compelled the government to seek other ways of stabilizing prices and retaining the growers. In 1923 an agreement was struck with the British Cotton Growing Association (BCGA) giving it a five-year monopoly to purchase Crown Land cotton at prices fixed by the Association and the government. The Association agreed, in return, to remit half of its annual profits to the government and to supply cotton seed from its ginnery.[14] To give effect to the agreement, a new clause was added to the 1910 cotton ordinance empowering the Governor to grant any person the sole right to purchase Crown land cotton from specified areas and for fixed periods of time.[15] The amendment inevitably faced strong opposition from LEGCO representatives of the settlers, whose incomes as middlemen were threatened by the monopoly agreement. It passed through the Chamber with the aid of the governor's casting vote.[16]

This first experiment with monopoly marketing was not very successful. The agreement was renewed in 1928 and allowed to expire in 1931 at the instigation of the BCGA. It

was clear by then that some of its principal objectives would not be attained. The BCGA incurred a nett loss of about £42,000 after remitting about £17,300 to the government from profits earned during the few favourable years.[17] Prices and incomes for the cotton grower remained unstabilized. Growers saw prices drop by as much as 50 per cent in one severe season.[18] Some of them predictably abandoned the industry and, by 1933, there was a visible shortfall in hut tax collections from some of the affected districts.[19] The world-wide depression obviously contributed to the failure of the monopoly marketing of cotton. Yet, according to some of the administrators, the African growers were partly responsible for the failure and the poor economy. After noting that production in Tanganyika and Uganda had increased notwithstanding the low prices, Acting Governor Hall lamented: "The Nyasaland native is conservative by nature and he has been slow to adjust his outlook to changed conditions ..."[20] District Residents received instructions to exhort growers to double or treble production if pre-depression levels of income were to be maintained. They were also instructed to refrain from giving prominence to the key issues of low prices and inaccessibility of markets in the propaganda effort.[21]

It is notable that the decline of the European cotton industry or any other agricultural enterprise was tolerable if unremunerative prices were an important factor. Africans, however, were conservative if they showed the same sensitivity to market trends. This perverted reasoning characterized the administration of crop marketing controls during this period of colonial rule and was an important factor in the under-

development of peasant agriculture.[22] It is also notable that although the depression was a convenient scapegoat, world price forecasting in Nyasaland was not as good as in the other African territories. This, more than the innate conservatism of the Nyasaland native, accounted for the poor production figures alongside the depression.[23]

The termination of the BCGA's marketing monopoly prompted the government to introduce new measures under the cotton ordinance in 1934.[24] This was a very long ordinance of 77 provisions, adapted from Uganda on the advice of a small committee of the local Board of Agriculture which was formed in 1932. The thrust of the measures, despite the size of the ordinance, was still two-pronged. A series of provisions attempted to promote the production of the highest quality of cotton by restricting seed distribution to farmers.[25] Another series of sections purported to have the same effect by introducing a licensing system for bailing, ginning and the export of lint.[26] Controls were for the first time extended to the later stages of marketing, which did not involve African participation. The ordinance also attempted to regularize producer prices and income by controlling the activities of licensed middlemen.[27] It was stipulated, for the first time, that licences would not be issued to middlemen unless a ginnery or building within a market at which they proposed to purchase the cotton was specified.[28] The other grounds for which a licence could be withheld or withdrawn were a conviction for fraud or dishonesty, lack of proper arrangements for storage, ginning or bailing, or "public policy grounds".[29] The ordinance also outlawed touting, inducements and other

familiar market malpractices.[30]

In the history of agrarian change and the politics of law-making, the 1934 ordinance is notable for three controversial issues. The first was the retention of the clause empowering the governor to grant "the sole right of purchase of Crown land cotton" to any person.[31] The prospect of another "monopoly" arrangement resulting in loss of lucrative business excited settler representatives on LEGCO, and the clause was passed only after it was agreed that the prior sanction of the Secretary of State should be the prerequisite for the issue of such exclusive licences. The Director of Agriculture also assured the Europeans that nothing in the ordinance was intended to hinder or prevent "the tenant growing of cotton on private estates, or the purchase of Crown land cotton by the owner of an estate if he should wish to supplement his tenant-grown cotton."[32] It was the African grower and the Indian middleman for whom most of the stifling controls were devised. This, however, did not satisfy one pessimist who feared that entrepreneurs would be forced, like the BCGA, to pay a percentage of their profits to the government. Writing under the pseudonym of Kaleromwe, he unfairly dubbed the proposed ordinance "the most mixed up Bill Nyasaland had ever been inflicted with".[33]

The second issue which excited Europeans was the now familiar inclusion of a clause giving the Governor very wide powers to make other regulatory rules in addition to the many already embodied in the ordinance. Section 76 provided that the Governor could make rules for, among other things, "regu-

lating and controlling the method, time and place of growing and harvesting cotton". This attracted a caustic and derisive, but fair, comment from Kaleromwe. "I trust", he wrote, "that his excellency will not be so ill-advised as to bring in this rule. We do not want another episode of King Canute and his wise counsellors. Of course our agricultural officers may have acquired enough information in the last few years, to say when it's going to rain and that the sun will shine on a certain date."[34]

The third controversial issue was the exclusion of provisions on the prior publication of minimum producer prices. Representatives of buyers contended that, although knowledge of the minimum price induced Africans to grow more cotton, it was impossible in practice to guarantee a price for a crop which was to mature later in the existing estimate of fluctuating world prices. This was accepted by the administration and, once again, priority was given to settler interests in the framing of agrarian legislation. This caught the eye of the Secretary of State, who noted that the Director of Agriculture in Tanganyika was able to prefix reasonable minimum prices using information on American cotton prices cabled to him by arrangement with the BCGA.[35] The Director also queried, without disapproving, the very wide powers assumed by the governor with regard to the requisition and destination of cotton seeds from any granary.[36]

Government policy on minimum prices was reversed by an amending ordinance in 1946.[37] Section 41A restored the Governor's power to pre-fix minimum prices, with an important

addition: that varying prices could be fixed for different grades of cotton produced in different areas. By section 61A, the Governor was also empowered to fix maximum prices for bailing and ginning raw cotton. This provision was included for the protection of cotton buyers who did not own ginneries. Under the previous arrangement, ginning and bailing charges were fixed by a gentleman's agreement between the government and the ginners. The provision was deemed necessary to cater for the situation whereby new owners of ginning mills would be reluctant to accede to the gentleman's agreement. Section 7B was the other novel provision introduced by the amendment. It enabled the Governor to proclaim segregated areas where new varieties of cotton could be placed, sold, or ginned under the supervision of the Director of Agriculture.

The circumstances which led to the enactment of the Cotton Ordinance of 1934 changed after the outbreak of the Second World War. Normal competitive buying of African cotton by middlemen ceased. The government became the principal buyer, and each crop was by contract resold to the Raw Cotton Commission. Some middlemen were licensed to purchase African cotton, but only as agents of the government. This arrangement proved lucrative for the government and was continued after the cessation of hostilities.[38] But direct government intervention rendered obsolete most of the cumbrous rules designed to prevent distortion of competitive buying at cotton markets and some of the "quality controls" on seed distribution, ginning and bailing. A new, streamlined cotton ordinance was passed in 1949 to reflect the changes in the nature of cotton marketing.[39] One of the provisions which epitomised the "profit motive" underlying the ordinance declared that it would be

an offence for any person to buy or sell cotton grown on Trust land at a price higher or lower than that fixed by the Director of Agriculture.[40] The government claimed that it was building a "price assistance fund" from the proceeds of its new intervention policy and that, in order to accumulate the necessary sums, it was necessary to suppress producer prices and maximise on resale profits. This was not possible if buying agents were allowed to offer higher prices.[41]

The new marketing strategy was bolstered in 1950 by the enactment of an amending ordinance which made it an offence for a buyer to purchase cotton in excess of the amount stipulated in the licence. The penalty for all offences was also increased from £25 to £100 to ensure that the commission of the offences would not be profitable to the unscrupulous.[42]

When the marketing arrangement with the Raw Cotton Commission expired in 1951, the government had to find another exporter or purchaser of Trust Land cotton. This called for yet another change in the law. The Cotton Ordinance of 1951 constituted a Cotton Marketing Board and entrusted it with intervention and marketing duties which were previously discharged by non-statutory officers and organizations like the Director of Marketing, the Cotton Accountant and his staff, the BCGA and the Raw Cotton Commission. The new statutory board was declared to be a body corporate, with perpetual succession, a common seal and the power to sue and be sued. Its composition was left to the Governor, and the first Board to take office consisted of the Director of Agriculture as Chairman, the three Provincial Commissioners, two agricultural

officers, one European and two African members.[43]

The only other notable new feature of the 1951 ordinance was the establishment of a Cotton Fund which was used to run the price assistance scheme for growers and to meet the expenses of government intervention in marketing. The Fund derived from allocations from the Native Development and Welfare Fund and from the profits of cotton marketing.[44] The Director of Agriculture observed in LEGCO that the Fund and the new Board provided growers with the best opportunity for obtaining steady prices. The economic climate was congenial for the new arrangement because cotton prices on the world market were high.[45] Although the economic arguments for and against the price assistance fund cannot be marshalled here, it is easy to guess that the running of the new institutions was likely to make inroads into actual or potential earnings of peasant farmers. Whether the size of the bureaucracy was relative to the task, thus justifying the inroads into farmer incomes, was debatable, but no firm conclusions can be drawn here due to lack of adequate documentation. It is also beyond the scope of this chapter to determine whether price and income stabilization was achieved under the new arrangements. It will suffice to note that one economic assessment concludes that price controls in the later years actually destabilized incomes for growers.[46]

The Cotton Ordinance of 1951 remained in force for the rest of the colonial period and is still the principal legislation on cotton marketing. It was amended several times before independence, but most notable changes in the law con-

TABLE 8: SEED COTTON PURCHASED FROM AFRICAN GROWERS IN TWO "COTTON" DISTRICTS, 1923-1933[47]

YEAR:	PORT HERALD				CHIKWAWA			
	Quantity (lb.s)	Price per lb. in pence		Total Amount (£)	Quantity (lb.s)	Price per lb. in pence		Total Amount (£)
		Min.	Max.			Min.	Max.	
1923	1,072,946	1	2½	9,397	169,197	1	2½	1,118
1924	1,539,963	1	2½	12,529	286,432	1	2½	2,503
1925	3,636,344	1	2½	35,527	1,170,208	1	2¼	11,318
1926	2,603,578	¾	2	18,074	1,551,121	¾	2	12,007
1927	1,548,630	½	1¾	10,039	986,742	½	1¾	6,491
1928	3,086,068	¾	2	24,197	1,991,099	¾	1¾	16,162
1929	5,175,849	¾	2	31,946	3,797,125	¾	2	22,169
1930	5,185,829	½	1	20,449	5,415,755	½	1	21,762
1931	2,522,701	-	¾	6,560	2,330,409	⅝	-	4,849
1932	4,421,866	½	¾	10,860	1,527,297	½	¾	3,326
1933	4,508,000	½	⅞	-	1,819,207	½	⅞	-

cerned the constitution of the Cotton Board and its amalgamation with other commodity boards.[48] The amalgamation is discussed below.

(b) The Tobacco Market

Whereas the emergence of African grown cotton as as export crop can be attributed to government seed distribution campaigns, the resurgence of the African tobacco industry can be traced to the efforts of two European planters. In 1919, Messr.s Wallace and Barron of Zomba district leased 2,000 acres of Crown land in Lilongwe, central Malawi, and attempted to grow flue-cured tobacco. When this venture foundered, the land was relaid into plots and Africans from nearby villages were invited to grow dark fire-cured tobacco as tenants, on condition that the resulting crop would be purchased by the leaseholders who also supplied seedlings and expert supervision. The financial rewards of this arrangement were high. In 1923 Barron promised to pay the tenants 2d for every pound of tobacco and he was paid 6d per pound upon resale of the crop to the Imperial Tobacco Company in Limbe. The tenants were not in a position to query the margin of profit. They had been "longing for an opportunity of earning money without having to work for somebody else",[49] and their response to the arrangement was enthusiastic. Demand for plots and seedlings grew. Barron improved his organisation. He engaged 6 European and 120 African instructors, increased the number of nurseries and distributed seedlings to tenants on leased land and to other villagers in Lilongwe and surrounding districts. He also established a marketing infrastructure to facilitate the

purchase and transportation of the tobacco to Limbe, the commercial centre. Barron's enterprise was emulated by other European settlers. Crown land tobacco production in the suitable districts of Dowa and Lilongwe grew from 25 tons in the 1923-24 season to approximately 880 tons in the 1925-26 season.[50]

The sharp rise in African tobacco production raised complaints not entirely dissimilar to those which underlay the introduction of controls for the cotton industry. Some European settlers complained of the reduction of labour supplies and feared the decline of estate tobacco farming. Barron and other pioneers also complained of the activities of "middlemen" who were competing keenly for African tobacco, thus undercutting business for the pioneers who had provided expensive production outlays. The middlemen were accused of purchasing poor quality leaf at inflated prices. Barron demanded an exclusive purchasing licence of the type granted to the BCGA in the cotton industry. Although this was rejected, Governor Bowring supported the principal argument for controlled tobacco marketing. "If the native tobacco industry is to be placed on sound and lasting footing", he wrote, "it is most undesirable that prices should be unduly inflated by the speculation of irresponsible buyers. Such speculation has unfortunately taken place both in regard to native cotton and tobacco."[51] On the surface, the administration appeared unmoved by demands for the preservation of labour supplies for European estates or the insulation of the European tobacco industry from competition. But the fact that African production of dark fire-cured tobacco was not encouraged in the Sou-

thern Province, where most European settlers were located, suggested otherwise.[52] It will also be seen that some of the controls proposed for the African industry were far in excess of what was necessary.

The Tobacco Ordinance 1926[53] was the first statutory instrument to impose controls on the production and marketing of Crown land tobacco. Part I of the Ordinance established a Native Tobacco Board to take over the task of "supervising and assisting native tobacco growers" from private entrepreneurs like Barron. It should be noted that this Board was not a body corporate with all the attributes of legal personality. Moreover, unlike the BCGA, it was not empowered to undertake intervention duties on behalf of the government. Its main purpose was to offer extension services to growers. Part II of the Ordinance required the registration of growers, including tenants on private estates and Africans in their own villages. Part III required all middlemen to obtain licences for purchasing African tobacco and for the raising of buying premises. The Governor was also empowered to impose a tax on specified quantities of tobacco purchased. This was the primary source of finance for Board activities. Part IV stipulated penalties for breaches of the Ordinance and empowered the Governor to make additional or specific rules for controlling the industry.

As was to be expected, the proposed measures attracted criticisms from European settlers. Hon. J.M. Partridge protested against the tax which, in his opinion, was imposed to provide excess employment for the agricultural staff. He

argued: "... I do not think that the native requires so much expert training but a little more training in the ordinary methods of agriculture [and this work] could easily be undertaken by the department already in existence ..."[54] W. Taite Bowie, another prominent settler, complained of the extension of registration requirements to tenant growers on private estates. He contended that this was a different culture of tobacco production for which no controls were necessary, but if the need arose, a separate legislation would be more appropriate.[55] The Ordinance was passed regardless of these objections, but settlers were assured that the work of the Board would be confined to Crown land production in two districts of the central province; there was "not the slightest intention" of applying the controls to private estates anywhere.[56] The government also attempted to appease the settlers by appointing two unofficial members of LEGCO to the Board. This was irrespective of the fact that the appointees, Barron and Taite-Bowie, were known to have extensive interests in African tobacco production which were likely to conflict with their Board duties. Yet, no African grower was appointed to the Board. The rest of the members were European officers of the administration.[57]

Lack of African representation and the imbalance in the constitution of the Board was reflected in the policies recommended and pursued between 1928 and 1936 which showed little sensitivity to African interests.[58] The Board recommended and caused the passage of legislation which restricted marketing facilities and concentrated them in a few areas.[59] It also recommended the denial of growing and marketing facili-

ties to Africans who did not comply with the advice of officers to plant within a specified period.[60] All this was done under the pretext of ensuring the best possible quality of African tobacco. In a despatch to the Colonial Office, Governor Thomas added:

> "It may seem very drastic to suggest that a farmer who deliberately neglects advice should be prevented from selling his crop for what it is worth, but there is another aspect to be considered. There is the harm done to the reputation of the industry but far more important is the harm done to the native himself. We desire that he should become a hardworking, thrifty, and reliable member of society: we spend large sums on his education, literacy, technical or agricultural; but we subject him to little or no discipline. We speak of him as a child, but through ignorance or indolence when he acts contrary to his best interests we merely express regret. A sharp lesson now and then can do nothing but good."[61]

Lord Passifield in his response did not doubt that such discipline was required in the interests of the natives. He gave his "full weight" to the views "on the moral ... advantage of enforcing obedience in such matters", but trusted that it would not be necessary to exercise the new powers extensively.[62] This simply encouraged the Board and the government to become more repressive. In 1936, at the instigation of Barron who was responsible for proposing the closure of tobacco markets, rules were published which authorized specified persons to destroy tobacco plants on native gardens deemed to be unreasonably large.[63] This time, however, the Colonial Office criticized the excessiveness of the measure and the rules were

subsequently repealed.[64]

The policies of the Board may have improved the quality of African tobacco, but this was doubted by the report which noted that poor quality leaf was still passing through the markets irrespective of strenuous inspection and grading.[65] The undoubted effect of the excessive controls was to stem the increase in the number of African growers. It is arguable that this was the real intention of the Board. It was more than a coincidence that concern with the quality of African tobacco was expressed at a time when European flue-cured tobacco was not selling very well in London markets and some growers were switching to tenant-production of dark fire-cured tobacco. It is also notable that curbs on African production were imposed at a time when the African industry was producing a larger share of the country's total export crop.[66] The unstated wish of the Board may have been to preserve the flagging European industry even at the expense of a reduction in African production.

An ancilliary but equally important objective of the amendments which imposed curbs on African production between 1929 and 1931 was to facilitate the payment of a tax on tobacco purchases. Buyers were reported to be defaulting regularly. From 1930 onwards, the European and African staff of the Board began to expand with the recruitment of "financially-broken" European planters as supervisors, and more African field capitaoes.[67] The recruitment policy increased overhead charges and made it imperative that tax or cess collection should be more efficient. It also became necessary for the

Board to depress producer prices in order to increase its profit margin. The irony of the situation was that peasant farmers were indirectly required to provide wages and employment for supervisors who were responsible for discouraging increased African production.

After 1936, a crisis induced by a combination of Board policies and the depression beset the African tobacco industry. The Africans produced a record crop in 1937, but the prices offered were so low that some growers refused to sell their crop. Roads leading to tobacco markets in Lilongwe were littered with tobacco leaves which were then set alight. Animated meetings followed, at which the government was blamed for restrictive marketing practices of the Board and the unremunerative prices which had fallen from an average of 3.2d per pound in 1931 to 1.75d in 1937.[68] The government conducted its own enquiries and concluded that Africans could be assured of fair prices by a new system involving the declaration of minimum prices before marketing, intervention by the Board in the crop purchasing, and resale of the crop to exporters at public auctions.[69] It should be noted that a similar system was rejected in 1930 as unacceptable to the Colonial Office and likely to give rise to monopolies or "rings" or buyers or exporters.[70] The Colonial Office raised no objections to the Tobacco Ordinance 1937, which reconstituted the Native Tobacco Board into a body corporate with full legal personality,[71] or the Tobacco Rules 1937 which empowered the Board to purchase Trust land tobacco at fixed prices, and to establish and run auction floors at which the tobacco could be resold.[72] The rules also suspended the registration and

issue of buying licences to middlemen. Any prospective buyer of Trust land tobacco was required to obtain a written permission from the Board chairman.

The new system of marketing African tobacco was beset with problems from its inception. First, the Board decided to construct its own auction floors in Lilongwe, but tobacco exporters and buyers preferred commercial auction floors in Limbe, a town centre which was nearer to the export routes.[73] The Board thus incurred the double expense of constructing unrequired buildings and transporting the African crop some 250 miles before it could be sold. The expenses were undoubtedly passed on to the growers in subsequent price calculations. Secondly, the elimination of "middlemen" from the African industry apparently led to a dramatic increase in the production figures for private estate tenant-produced tobacco. The obvious inference was that some Trust land growers disposed their crop to estate holders in contravention of the law. Other Africans opted for tenant-production in the hope of obtaining better prices.[74]

It was this issue of prices and their correlation with production targets which bedevilled all strategies for marketing African tobacco. Prices improved slightly in 1938, but growers produced yet another record crop. The Board failed to accommodate two years of over-production. It refused to purchase some of the tobacco, allegedly because of poor quality.[75] When these factors recurred in 1939, growers in some areas rioted and drove Native Tobacco Board instructors out of their villages, setting fire to their houses. A report by the Fin-

ancial Secretary acknowledged that the world depression was not entirely to blame for the unremunerative producer prices.[76] The average price for fire-cured tobacco at the auction floors was 4.48d per pound, but growers received 2.77d. The difference was used to provide high salaries and allowances for employees in an overmanned organization. Cuts in Board expenditure, overhead charges and personnel were imperative if growers were to receive prices commensurate with the work involved in tobacco production. Buying procedures at markets were also in need of revision. But the Second World War War intervened and the re-examination of the marketing system was shelved.

A committee was appointed to re-examine the law on tobacco marketing in January 1945, and its recommendations led to the enactment of the Tobacco Ordinance 1946.[77] This was a comprehensive ordinance, but telling changes on the methods of controlling the industry were few. As usual, deference to settlers with vested interests accounted for the "softly, softly" approach. On registration of growers, for example, the declared intention of the administration was to extend the application of the law to "visiting tenants" on private estates. It was belatedly realised that this group was prone to exploitation. They tilled land on which they had no security of tenure; their living conditions were often despicable; and although their earnings sometimes surpassed those of Trust land growers, they had to spend more on food and repayment of input loans to the estate holders. Registration of visiting tenants would not have corrected most of the abuses of the system, but even a minimum amount of state interference was anathema to settlers and their representatives in LEGCO. In

the end, the Attorney-General conceded that "the provision was ... more troublesome than it was worth and did not in fact ensure any proper control over growers".[78] It was removed from the law and replaced with provisions which unnecessarily shifted the controls to Trust land growers. They were required to obtain permits from the Director of Agriculture for the purpose of growing tobacco in parts of Trust land designated by the Governor as controlled areas.[79]

Although settlers forced the government to abandon its plans on the registration of visiting tenants, one notable improvement here was the stipulation that it was an offence for any purchaser of unmanufactured African tobacco to offer anything other than coins and notes recognized as legal tender within the protectorate. This was an attempt to outlaw the practice prevalent on some estates by which tenants received "IOUs" or "chits" which were converted into cash after the crop purchased had been resold at the auction floors. It was discovered that some tenants were unable to claim their due payments if "chits" or similar documents were lost during the intervening period.[80]

A second notable concession to the Africans was on the composition of the reconstituted Native Tobacco Board. In recognition of the fact that more than 66,000 Africans were producers of tobacco on Trust land, they were allowed 4 places out of a total of 9 on the Board.[81] This, however, did not signify the end of the policy of appointing settler representatives with commercial interests which were at variance with the promotion of the African industry. It is notable that

even Barron, the architect of some of the questionable policies pursued by the previous Board, retained his seat. When he retired, the seat was taken by Major Warren, a settler with extensive interests in the production of tobacco by African tenants.[82]

The inclusion of settlers on the Board was perhaps even more appropriate under the 1946 Ordinance because middlemen were once again permitted to purchase Trust land tobacco. Although the Board retained powers to fix minimum prices and run tobacco markets, its monopoly over the purchase of Trust land tobacco was relaxed in an attempt to reduce expenditure and overhead costs. Accordingly, it was no longer an offence per se for European middlemen or estate holders to purchase Trust land tobacco "wittingly" or "unwittingly". "Public opinion", the Attorney-General announced, "indicated that this provision in the law is unfair."[83] Also removed from the law by the same token were the classes of offences relating to touting and the inducement of sellers at bush markets.

The economic climate in 1946 was favourable. There was a sharp rise in prices for both fire-cured and flue-cured tobacco.[84] This may have lulled the administration into relaxing controls over the African tobacco industry when the instincts of some officers, or lessons from the depression, would have suggested otherwise. The liberal policies were, however, pursued for a very short period. Familiar official attitudes on controlled marketing reappeared as prices and productions figures began to fluctuate. In 1947 the offences of touting and unfair inducement of sellers at bush markets were restored to

the Ordinance.[85] The monopoly of the Native Tobacco Board over the purchasing of Trust land tobacco was reimposed in 1948.[86] The Director of Agriculture explained that this change of policy was due to the same reasons as gave rise to the monopoly and the end of competitive buying in 1937. An additional reason was "the very serious dislocation which ... occurred in the equilibrium of [the] internal economy [as a result of] the disproportionately high level of tobacco prices as compared with other commodity prices". The restoration of the monopoly was intended "to enable the government to exercise control in the matter of returns accruing to natives from the sale of Tobacco and [thus] ... promote a healthy balance in crop production".[87] These remarks echoed the justification for the introduction of controls over cotton, the first African economic crop, in 1910. If the deliberate depression of income for peasants was justifiable in 1910, it is arguable that it was the wrong policy in 1948 because inflation and the cost of living had kept apace with the rise in tobacco prices.[88] The most plausible but understated explanation for the volte-face was the Native Tobacco Board itself. It had grown into a self-perpetuating organization and middlemen were cutting its business, driving it into bankruptcy. It required the monopoly to sustain its inefficient operations. Altruistic concerns like the maintenance of a price assistance fund were secondary.

The 1948 Ordinance and the subsequent amendments to it were replaced by a consolidated Tobacco Ordinance in 1950.[89] The opportunity was also taken to make slight changes in the law. By Section 3, the constitution of the Native Tobacco

Board was changed so that some of the official members and African representatives held office at the pleasure of the Governor. Section 4 redefined the duties and powers of the Board. It was now empowered to contribute surpluses from its trading account to the revenues of the protectorate as well as to the Native Development and Welfare Fund which was made up of contributions from all Boards concerned with the marketing of African crops. By Section 5, employees of the Board could be placed under the authority of the Director of Agriculture and used in extensions duties after the marketing season. The character of these changes confirmed that the Board was not an independent organization dealing with the parochial interests of tobacco growers. It was an important organ of government with a mandate to tap the potential earnings of peasant farmers and their resources for use in other sectors of the economy.

Section 17 contained the other interesting change in the law. The Director of Agriculture was empowered, for the first time, to prescribe rules for curing tobacco. It was discovered that poor leaf quality was often due to bad curing rather than poor agronomy.[90] The Board and the government were endeavouring to improve the quality by subsidizing the construction of new and better barns. This was a telling commentary on the previous laws and rules which prescribed drastic penalties for growers who produced their tobacco without sufficient regard to crop husbandry advice from the so-called experts.

Towards the end of 1952, the administration felt that a new Tobacco Ordinance was necessary "to strengthen the pro-

visions of the existing law in several respects and to make numerous improvements in legal drafting".[91] The most important changes in the law attempted to shore up the monopoly of the African Tobacco Board over the purchase of Trust land tobacco. Because of the poor prices offered by the Board, there was a resurgence in illegal trading between African growers and middlemen. Under the 1950 Ordinance, it was possible for some of the parties to the crime to escape punishment. This was demonstrated by the case of Margaret Jennings v. Rex.[92] The appellant was charged, convicted and fined by a lower court of purchasing Trust land tobacco without a valid licence contrary to Section 18 of the Ordinance. She appealed to the High Court on the ground that she was the victim of a trap and had taken all reasonable precautions to ensure that the crop purchased was from her tenants. Rigby, Acting C.J., found that no such precaution was taken because she did not keep a register of her tenant growers and estimates of their production which would have enabled her to detect whether she was being offered unreasonable quantities of tobacco during the marketing season. The decision of the lower court was upheld. The judge also noted that the four African growers who supplied the tobacco were not accomplices or guilty of the crime because the law proscribed the act of buying, but not of selling. The penal disincentive was directed at the European buyers.

Section 23 of the Tobacco Ordinance 1952 extended the arm of the law to the sellers by providing that it was an offence for any African grower who was not a tenant on a private estate to sell his crop to any person other than the Tobacco

Board. In parts IV and VII of the Ordinance, the system of trading licences, now called permits, was extended to growers. No person, except the Board, was entitled to sell or buy tobacco without a valid permit which specified the land on which the tobacco was grown. It was a breach of a condition in the permit to buy or sell tobacco which was not produced on the land specified. But permits were no longer subject to annual renewals; they remained in force until revoked. Moreover, it was no longer necessary to specify the maximum amount of tobacco which the holder of the permit was entitled to buy or sell.

The simplification of the licencing procedure in the Ordinance was intended to quell the opposition of settlers to the general thrust of the measure. But this was not sufficient to ensure the passage of Section 53 (2) in draft form, which attempted to make permit holders responsible for the illegal acts of their employees perpetrated in the course of their employment, notwithstanding specific instructions to the contrary. "Looking at things in their worst possible light", the Director of Agriculture suggested that it was simple for an unscrupulous person to instruct his employee in writing not to purchase Trust land tobacco and at the same time make it clear verbally that, should he indulge in this business, he would be amply rewarded and compensated from any consequences of the law. This presentiment was unacceptable to settler representatives in LEGCO, and they forced the government to delete the clause.[93]

Part II of the Ordinance contained another revealing change in the law. The word "African" replaced the pejorative "native" in the appellation of the Board. Its membership was changed in such a way that places were no longer reserved for representatives of European Tobacco Associations and other pressure groups. It consisted of the Director of Agriculture as chairman, his deputy, and ten other members appointed by the Governor. This enabled him to appoint Europeans or Africans with the business acumen to serve its interests best, irrespective of whether they represented any association.

It was this "business" approach to crop marketing which underlay the enactment of the 1952 Ordinance. As suggested above, the Tobacco Board was developing into a fully-fledged, self-perpetuating business enterprise. Although government officers continued to pay lip-service to the primacy of the interests of the growers, it was more important to keep the Board in business, and its vast number of employees in employment. Thus, when settlers (who were not noted for promoting African interests) complained that prices approved by the Governor for African tobacco in 1952 were inadequate, he poignantly responded:

> "It must be realised ... that like any other business enterprise the Board must cover itself against the risk of a serious financial loss to which it is by the nature of its operations particularly vulnerable. It buys the crop first from growers, but grading and disposal are slower processes, and when all the crop has been bought there may be anything up to half of it unsold. In these circumstances the Board must work to a safer price margin. Moreover in 1952 we could not ignore the gloomy forecasts in

regard to prices which had been made by the local tobacco industry before the season opened and in addition we had very much in our minds the weakness of the market during the previous year ..." [94]

These remarks revealed another feature of the post-war tobacco marketing and, indeed, the marketing of any African economic crop. The reading of market trends and price forecasting was very poor. As the table below will confirm, the Board was not willing to incur losses and, to be on the safe side, the prices paid to growers were very depressed. They compared unfavourably to prices received by the Board at the auction floors. This disparity was pronounced not only in 1952 but during the entire life of the Tobacco Ordinance. This was the last principal statute of the colonial administration on the African tobacco industry.[95]

(c) Food and Produce Marketing

On the basis of the long titles, three categories of colonial legislation on food and produce marketing can be discerned. The first category consisted of emergency legislation for the prevention or elimination of famine. The second category of statutes dealt with the export or internal marketing of maize; and the third category affected various crops, including maize, falling under the definition of "African produce". There was considerable overlap and duplicity in the law because all the statutes directly or indirectly concentrated on maize, the country's staple food crop. The importance of this crop to the agricultural economy was confirmed by the observation that it was grown for subsistence or sale by virtu-

TABLE 9: STATISTICS FOR AFRICAN TRUST LAND (FIRE-CURED) TOBACCO, 1945-1960[96]

YEAR:	Number of registered growers:	Total number of acres:	Acres per grower:	Yield total in lb.s	Yield per acre in lb.s	Receipts per grower, in shillings:	Price paid to growers in pence per lb.:	Sales price: pence per lb.
1945	67,900	62,200	0.92	11,935	192	54	3.70	5.89
1946	57,400	58,000	1.01	8,639	149	135	10.79	14.69
1947	89,000	92,500	1.04	16,906	183	134	8.47	9.94
1948	100,300	90,200	0.90	15,027	167	108	8.64	15.66
1949	83,300	94,300	1.13	15,672	166	124	7.91	20.10
1950	104,500	131,000	1.25	22,371	170	139	7.88	15.80
1951	92,200	140,000	1.52	23,999	171	127	5.87	11.60
1952	63,200	96,400	1.52	12,161	126	102	6.39	16.40
1953	68,300	94,900	1.39	24,498	258	243	8.11	13.85
1954	63,700	94,300	1.48	20,140	213	202	7.72	13.86
1955	50,200	78,900	1.57	12,293	256	185	9.05	19.21
1956	57,700	92,800	1.60	22,459	242	299	9.22	16.83
1957	62,100	108,700	1.75	22,218	204	329	11.02	19.03
1958	73,400	139,200	1.90	26,453	189	348	11.64	15.59
1959	74,000	145,400	1.93	28,470	196	248	7.82	11.61
1960	59,900	95,000	1.58	20,290	214	224	7.94	15.58
Average	73,000	101,000	1.38	18,900	187	181	8.37	14.70

ally every family. "The proportion of an individual cultivator's land devoted to maize varied between 100 per cent in the densely settled areas of the south to 55 per cent in the fertile central region, where tobacco and peanuts played an important part in the economy." It was estimated in 1959 that at least 1.5 million acres of African land were under maize cultivation.[97]

(i) Anti-Famine Measures

Famine or the general shortage of foodstuffs can be the most compelling reason for statutory control of food marketing,[98] and prevention of the latter was the leitmotif for the Native Foodstuffs Ordinance 1912,[99] the first statute on the subject. There was a general similarity in the underlying philosophy and structure between this ordinance and the first cotton statute which was enacted during the same early period of colonial rule. According to government spokesmen, the native was an improvident creature who was likely to impoverish himself by selling his food-crops to European settlers in return for quick cash. The government was in loco parentis to him and obliged to ensure that this did not happen.[100] In a short, widely drawn statute, the Governor was empowered to prohibit unlicensed trading in native foodstuffs, and to fix maximum prices thereof, if he felt that there was a shortage or an impending shortage of such items in a particular area. Native foodstuffs included "every article used for food or drink by natives", and any article ordinarily used in the composition or preparation of the food or drink such as "flavouring matters and condiments".[101] Section 5 provided for the

summary conviction of "any person purchasing or bartering foodstuffs from natives or exporting the same, or selling foodstuffs" in contravention of the Ordinance. Section 6 stipulated the penalties payable.

In June 1952, a proclamation applied the Ordinance to the districts of the southern province where European settlements were located.[102] This suggested that the law was primarily devised for European settlers or middlemen trading in native foodstuffs, but not the natives trading among themselves in their localities. This was later confirmed by Haythorne Reed J. in Rex v. Amisi and Others.[103] Five Africans were convicted by a lower court of exporting native foodstuffs to Portuguese East Africa in contravention of the Ordinance and sentenced to one month's imprisonment with hard labour. The High Court reviewed the case and quashed the convictions. According to the presiding judge, the Ordinance was generally misunderstood; "neither by its intent nor wording" did it prohibit "natives exporting native foodstuffs". It was "aimed at persons cornering native foodstuffs or purchasing them wholesale for resale or export".[104] Since no specific reference was made to the native seller in the Ordinance, he committed no offence by exporting the foodstuffs. He would only be guilty of abetting the offence if foodstuffs were intentionally sold for resale or export to an established dealer. It should be noted that Section 5 referred to the summary conviction of "any person" dealing in native foodstuffs. The poor drafting of this clause unfortunately courted the ambiguity which the judge attempted to correct.

By 1920, the government sought a preferential right to purchase maize grown by Africans and published a Bill amending the 1912 Ordinance. The Chief Secretary announced in LEGCO that the government was engaged in a public works programme requiring large supplies of African labour and food to feed them. But estate holders purchasing maize for their own workers were offering prices which the administration could not match. Moreover, the conventional wisdom of the era suggested that "to allow the high maize prices to continue was not in the interests of the country as the native did not understand the reason for market fluctuations, and once taught to expect these high prices and finding that he could not obtain them for his maize he would quickly reduce his acreage and use his surplus for making beer ..." [105]

The influential Chamber of Commerce and Agriculture, in defence of the interests of the settlers, also made an eloquent and rare defence of African rights. It contended that the Bill constituted "an unwarranted interference with the right of the native to sell his produce in the best market"; and, considering the high prices for consumer goods, and the probability of increased taxation, the native producer was entitled to "reap the full benefit of a free and unrestricted market". The Chamber also noted that holding prices down was likely to defeat the goal of increased maize production. On the other hand, the higher prices were likely to stimulate production and lead to the replenishment of stocks depleted by the war, an influenza epidemic, and the neglect of food production in preference to the more lucrative tobacco and cotton. The Chamber concluded that even the construction of the

railway and similar public projects were not sufficient excuses for the avoidance of normal commercial trading arrangements and the assumption of wide powers which could be used by the administration to the detriment of one or more sectors of the community.[106]

The report of a select committee of LEGCO appointed to consider the various criticisms of the Bill acknowledged that the powers it purported to confer upon the government were too wide and unnecessary for normal trading conditions. But the public works programme was apparently akin to an emergency, and the Bill was justifiable so long as the European planters were assured that the quantities of maize required by the government would not exceed certain levels. The committee rejected the argument that price controls would reduce African production levels and incomes. "Apart from the fact that the Bill provides for the assessment of a fair price, having regard to all conditions", the committee alleged, "the native does not grow foodstuffs especially for sale but naturally prefers the lucrative products such as tobacco."[107] This was an overgeneralization. More accurate accounts acknowledged that Africans in peri-urban areas produced food crops for sale in the growing townships. Besides, not all areas of the country were suitable for cotton or tobacco cultivation.[108]

It need not be emphasized that the "improvident and immature" Africans in the midst of the wrangling between the settlers and the administration were not consulted. The government decided to press on with the revision of the law regardless of settler opposition, and the Governor used his casting

vote in LEGCO. Two notable changes were made to the principal ordinance. First, by a new Section 4(a), the Governor was empowered to control trade in native foodstuffs for the purpose of supplying natives engaged in public works. He was also empowered to appoint a Board consisting of two government officers and two other residents. The duties of the Board included the fixing of prices and assessing the requirements of public workers and other sectors of the community. The second change was the doubling of financial penalties in Section 6 of the Ordinance.[109]

Several features of the anti-famine legislation should be underlined at this juncture. First, the Board created was not a statutory corporation with an independent existence. Secondly, its powers of control did not extend beyond the fixing of prices and the licensing of purchasers. Controls designed to improve the quality of maize and increase production were not deemed necessary. It was not the objective of the legislation to encourage Africans to grow sufficient maize to meet the demand. This can be inferred from government advice to settlers that they should produce their own maize and cease to rely on erratic African supplies.[110] Government intervention in this sector was scarcely justified by altruistic motives like price stabilization. The limited objectives of the legislation were to ensure supplies to the government at prices it could afford and to control internal marketing in response to particular exigencies. The controls lapsed when government stocks were replenished or when the exigency came to pass.[111] This type of law remained in force for the entire colonial period, but towards the end it was supplemented by an ordin-

ance which belatedly dropped the racial tag and applied to all foodstuffs, European or African. The ordinance also extended the controls to include the regulation of "production, treatment, cultivation, storage, movement, transport, distribution, sale, purchase, use or consumption of the foodstuffs".[112] The anomaly here was that this all-embracing measure failed to refer to or repeal the other Foodstuffs Ordinance, which it duplicated.

(ii) Maize Marketing Legislation

The anti-famine measures with their limited objectives did not provide a sufficient or proper legal framework for a concerted and continuous food production and marketing policy. This prompted the government to enact additional laws, the first of which was the Maize Export Ordinance of 1926.[113] The objectives of this law were equally limited. It provided for "the grading of maize exported from Nyasaland and generally for the regulation of such export". The aim was to improve the quality of exported maize; the internal market was not affected. Since none of the conflicting interests of the government, the intermediaries and African growers were at stake, the law passed through LEGCO without the familiar furore.[114] Its very passage suggested that the maize shortages obtaining when the anti-famine measures were proposed no longer existed.

When the supply of maize became erratic once again, the Export Ordinance was repealed and replaced by the Maize Control Ordinance of 1946.[115] The objective of this law was to establish a Maize Control Board with the corporate status and

structure conferred upon tobacco and cotton Boards of the post-war era. The primary duties of the Board were to assess the requirements of consumers in each district and to control maize disposal and distribution. Section 6 ruled that after the 1st of May 1947, all maize held by African or European growers in excess of personal requirements should not be "sold, destroyed, moved or disposed of or otherwise dealt with in any manner" except in accordance with the directions of the Board. Even the Africans were prohibited from purchasing maize except for personal or family consumption. The Board was bestowed with phenomenal powers to control internal maize marketing as well as the import and export trade.[116] The maximum fine for a breach of its rules or regulations was £500.[117] This was the highest financial penalty ever devised for a breach of marketing legislation. Not even the lucrative tobacco market attracted such a penalty. This was indicative of the extent to which the government intended to preserve the omnipotence of the Board.

The 1946 Ordinance was probably the most ambitious of all the marketing laws so far reviewed. Considering that maize was grown virtually in every corner of the protectorate, the task of the Board was onerous, and the objective of controlling distribution was unattainable through one organization. This inherent structural defect was compounded by the familiar problem of poor price forecasting and reading of market trends during the first two years of operation which began in 1947.[118] To cover the cost of maintaining a country-wide marketing network, a very low price was offered to producers and the consumer selling price was doubled. Growers reacted by withholding

maize surpluses from the Board. As a result, by the end of 1948, "the amounts of maize ... available to the large consumers dropped from 8,300 tons to approximately 6,000 tons and ... the allocation to consumers in the southern province had to be reduced from 50% of the requirements to 20%."[119] The Board became the focus of hostility from both growers and consumers.

The self-induced problems of the first two operational years were followed by a failure of rains and the infamous Nyasaland famine of 1949.[120] The government saw the folly of attempting to centralize maize marketing and moved a Bill designed to streamline the responsibilities of the Board. A government spokesman confessed:

> "Whilst it would be possible to provide in law that any person possessing a surplus of maize should dispose of his excess only through the machinery of the Control Board, experience has shown the impossibility of giving effect to any such restriction. Moreover, the compulsory centralizing of all available maize supplies in the hands of the Board necessarily suggests that the Board would have the obligation to meet any reasonable demands made upon it, particularly in the case of Africans, who would normally be able to obtain their requirements without difficulty. ... [This] is not an obligation which can be contemplated since there can be no positive assurance that it would be followed."[121]

The government thus washed its hands of the blame for future shortages. A new Maize Control Ordinance of 1949 authorised the Board to purchase only such maize as could be obtained by its agents from African Trust land growers after taking into

account their food requirements. As for maize produced elsewhere, it was up to the growers to make it available to the Board. African intermediaries were once again permitted to ply the market, but this did not signify a complete liberalization of maize trading. The system of permits for intermediaries was still in place. The Board retained exclusive control over the import and export trade, and its country-wide network was not dismantled. Failure to observe these and other restrictions still entailed the high financial penalty of £500 or six months' imprisonment.[122]

The changes in the law in fact skirted the main issue, i.e. whether the Board and its expansive distribution network were necessary at all. The unofficial representative for Africans in LEGCO suggested that it was unnecessary for the country to "be burdened by the Maize Control Board in perpetual succession like an old man of the sea clinging round its neck".[123] He contended that emergencies were the only occasions when the controls were tolerable. But the government was not yet ready to concede the argument and to revert to the discontinuous anti-famine measures. In 1950, to stimulate production, grower prices were doubled and pegged at this level for the following eight seasons. Farmers duly responded by increasing maize acreages. By 1955, even the world market was oversupplied and export prices fell to unremunerative levels. The cutting-off of the outlet for local overproduction caused a reversal of food production policies. The government began to discourage maize growing in areas deemed agronomically unsuitable. Producer prices were reduced in 1957. By 1960, the marketing activities of the Board were

confined to the purchasing of maize sufficient for use by government departments and for the maintenance of a small food reserve.[124] Even before market forces initiated the dismantling of the distribution network, the repeal of the Maize Control Ordinance in 1952 and the subsequent amalgamation of all Boards dealing with African economic crops amounted to an admission that a separate statutory corporation for maize was an expensive luxury.[125]

(iii) Produce Marketing Legislation

The first statutory instrument in this category was the Purchase of Native Produce Ordinance 1934.[126] This was a very short, relatively insignificant measure which attempted to outlaw the prevalent practice of offering trade or consumer goods in exchange for African produce. Any purchaser of "crops or horticultural produce" in specified areas was required to offer a cash payment or suffer a negligible fine not exceeding £10. The prohibition of barter was eventually incorporated into the Marketing of Native Produce Ordinance 1938,[127] the second statute on the subject, but the first ordinance remained in force until 1947.

The 1938 Ordinance was an enabling measure. The Governor was generally empowered to devise controls for "any produce grown or produced by Africans including fish", if the production and marketing of the item was likely "to be advanced and improved ... and the interests of the inhabitants [of the protectorate] generally promoted thereby ..."[128] This was the first food and produce ordinance to give prominence to the

need for improving African agriculture in the introduction of marketing controls. But some of the methods of control envisaged were familiar. Intermediate buyers, for example, were required to obtain licences or trading permits. It was also expected that most of the trading would take place in established markets and the governor was empowered to approve market rules on grading and the payment of fees and tolls. Provision was also made for the constitution of a non-corporate Board entrusted with the responsibility of "advising the Governor on all matters concerning the marketing of native produce". The notable omission from the usual array of controls envisaged was the Governor's power to fix "fair and reasonable prices" for the produce.[129]

The 1938 Ordinance attracted the inevitable criticism that it was too widely drawn. On this occasion, the government had an acceptable defence. A spokesman noted that a detailed description of the rules and methods of control was impossible because the Ordinance was devised to apply to produce of different kinds in different areas. The Ordinance was in practice applied to food crops like maize, beans, peas, groundnuts, rice and cassava in the various districts in which they were grown in abundance. This unfortunately led to considerable overlap and duplicity between "anti-famine" measures and control orders published under the Ordinance.[130]

The 1938 Ordinance was revised several times,[131] but one amendment on exclusive licences for intermediaries was particularly notable on the theme of the politics of law-making. The original underlying objective of the permit controls was

to squeeze out intermediaries and to bring about "a closer touch" between growers and the principal buyers of African produce. Exclusive licences were considered to be contrary to this underlying philosophy. The administration was, however, swayed by the opinion of one unofficial LECGO member that it was not a bad policy to have a monopoly clause on the statute book for use if it became necessary to protect a new crop industry.[132] Section 11 was added to the Ordinance for this purpose during the drafting stages. In 1939, following a Tanzanian model, the clause was redrafted to provide for the issue of exclusive licences only where the development of a new crop or produce could be stimulated, or advanced "under technical direction and management or other special control".[133] No proclamation granting such a licence was published during the life of the Ordinance. This shows that the administration remained opposed to exclusive produce buying licences. It was the habit of pandering to views of settlers which led to the inclusion of the monopoly clause in the law even when the instincts of the administrators suggested otherwise.

The third produce marketing ordinance was enacted in 1952.[134] The preamble asserted that this was "an ordinance to make further and better provisions for the purchase, storage, distribution, marketing, importation and exportation of agricultural produce and to provide for the constitution of a produce marketing Board". The original intention was to entrust the Board with the marketing of any crop designated as "agricultural produce". European settlers opposed such a wide mandate as an unnecessary interference with private trade.[135] Produce was redefined as "maize, maize flour, beans, peas,

wheat, groundnuts, rice and paddy, sorghums, millets, cassava and cotton seed". The mandate of the Board was limited to the marketing of produce from African Trust land. Produce from other areas could be handled only at the request of the producers.[136]

The concession wrought by the settlers had the desirable effect of ensuring some form of unrestricted private trade in produce marketing. As was often the case, no convincing economic arguments were adduced in support of the government's attempt to preserve all produce marketing for the statutory Board. On the other hand, the concession had the undesirable effect of prolonging the duality of marketing laws. This racial distinction was no longer necessary, especially since most of the food crops were grown by Africans on Trust land.

The new produce Board was similar in structure, functions and duties to the statutory corporations evolved during the period of colonial rule for crops like tobacco and cotton, crops which, for the time being, were not included under the definition of "African produce". As seen above, crop marketing boards of the post-war era were mandated to earn profits from their intervention duties and to remit sums periodically to the Native Development and Welfare Fund. For the attainment of this objective, the repertoire of controls available to the new Produce Board and the Governor included the power to fix minimum purchasing and selling prices.[137] Such a power, it should be recalled, was not included in the Marketing of Native Produce Ordinance 1938.[136]

As hinted above, the other objective of the Produce Marketing Ordinance of 1952 was to repeal the separate legislation on maize marketing and to transfer the functions of the Maize Control Board to the amalgamated Produce Board. The concentration of food marketing responsibilities under one institution was a commendable step which promised to end wasteful duplication of manpower. This, however, did not signify the end of duplicated legislation. Through careless draftsmanship, the redundant Marketing of Native Produce Ordinance of 1938[139] remained in force until its repeal by a new Produce Marketing Ordinance in 1959.[140]

Apart from the integration of produce marketing legislation, the 1959 Ordinance attempted to clarify the marketing policy and "set it out in such a manner as to make it possible for a progressive liberalization of the market, should it be government policy to follow such a course".[141] As noted in the review of maize marketing legislation, this was indeed the thrust of government policy in the latter part of the 1950s decade. The new law accordingly restricted controlled produce marketing to African crops specified by the Governor in council, and the administration promised that the list of produce would not be as long as under the 1952 Ordinance.[142] The intention was to control the marketing of the few crops like maize and groundnuts which required regulations in the public interest and for the good of the economy. There were no fundamental changes in the methods of controlling the marketing of the few crops to be specified. It is notable, however, that in accordance with the policy of progressive liberalization of the market, the Produce Board was stripped of its functions on

price fixing, the licensing of buyers and the supervision of markets. The Governor and other officers of the administration assumed responsibility over such matters. The Board became a licensed buyer like any other intermediary, but if need be, and this was the intention, it could be issued with exclusive buying licences for important crops like groundnuts.[143]

The 1959 Ordinance was the most sensible of the many food and produce marketing ordinances for growers, intermediate traders, and the pundits of private enterprise and free competition in commodity trade. The reduction of the omnipotence of the Board partially fulfilled the basic demand of traders for a free rein to ply the market. Growers were also left with the opportunity of retaining full income, as provided by market forces, without the reductions (through depressed prices) which were used to prop up an outsized marketing bureaucracy. But the Ordinance failed to satisfy settler representatives, who continued to criticize the "enabling" nature of produce legislation. It was also unlikely to satisfy African intermediaries, who were now required to obtain buying licences like other produce buyers. The government changed the long-standing policy of exempting Africans from the permit requirements, apparently because the objective of developing and increasing the number of African entrepreneurs had been achieved.[144]

The progressive liberalization of produce marketing promoted by the 1959 Ordinance was a fleeting experiment. Strict controlled marketing returned soon after the turn of the decade. Important factors in this sudden reversal of policies

were the completion of the policy of amalgamating Commodity Boards and the progress towards political independence.

(d) Amalgamation and Politicization of Commodity Boards

As seen above, the process of unifying laws and institutions concerned with the marketing of African crops began with the Produce Marketing Ordinance of 1952. The process was carried on in 1955 with the transfer of the assets and liabilities, powers and duties of the cotton, tobacco and produce Boards to the Agricultural Production and Marketing Board (APMB). The amalgamated Board also inherited a composition consisting of the Director of Agriculture, his deputy and such other members as the Governor in council saw fit to appoint. In addition, because of its expanded duties, the APMB was empowered to appoint a general manager and three executive committees vested with separate responsibilities for the marketing of cotton, tobacco and general produce.[145]

The origin of the amalgamation policy was a report of a select committee of LEGCO produced in 1952. It recommended that economies of effort, expense and efficiency could be achieved by "one board, with appropriate committees, one buying organization, one headquarters and one stores organization for all African produce whether cotton, tobacco or other crops."[146] On economy of effort, the report singled out the time wasted by the Director of Agriculture in chairing too many Board meetings. Amalgamation obviously reduced the number of meetings and saved time for the other official and unofficial Board members. Economy of expense and efficiency

were more distant goals, to be achieved after the amalgamated Board had reviewed its managerial staff and structural requirements. The attainment of this second set of goals was more important for the success of the policy. As some government critics noted, a simple federation of three Boards under one manager had superficial attractions, but it did not necessarily entail efficiency. It could in fact lead to more red tape and less attention to details which specialized managers could not overlook.[147]

Reports showing the extent to which the APMB streamlined its organization in order to attain efficient amalgamation are not available. Statements made in LEGCO in fact suggested that it continued to operate along familiar lines. It was noted, for example, that expensive capital assets and large funds were accumulated from the difference between prices paid to growers and prices obtained on world commodity markets. This was done under the usual guise of maintaining a price assistance fund. The funds were in practice sometimes dissipated on ventures which remotely benefited the growers like the provision of scholarships for students studying at the University of Rhodesia and Nyasaland.[148] Such schemes were laudable, but only so long as producer prices were not unremunerative or pegged far below the rising cost of living. It would appear that there was a general dissatisfaction with the prices offered by the APMB. Even settler representatives in LEGCO were moved to appeal for better prices for Africans, while pressing their claims for the liberalization of commodity marketing.[149]

As seen above, the government attempted to placate European critics of the APMB by removing some of the restrictions on produce marketing, but this was not extended to the lucrative tobacco and cotton sectors. There was no response to pleas for better producer prices for these crops. At a time when Africans were seeking independence, it was inevitable that the political dimensions of the debate would become pronounced. African politicians began to clamour for increased political control of the Board and grower participation in the decision-making processes. These were some of the themes of the Farmers Marketing Ordinance 1962,[150] the first marketing statute to be introduced by an African dominated LEGCO and government after the 1961 general elections. The leader of the Africans in LEGCO announced that the restructuring of the Board was necessary because of African hostility to it which arose from several factors. First, the Board "was living in isolation from and above the people". Secondly, apart from the marketing of African crops, it supervised production together with the Department of Africulture which was tainted by its coercive approach to agricultural extension and the enforcement of hated agrarian rules. Finally, the Board was disliked because of its privileged position as the sole buyer of African economic crops[151] (a privilege, one might add, often abused by the unremunerative prices offered to the Africans).

The African leader suggested that not all the causes of African hostility to the Board called for legislative action. Closer association between the Board and farmers could be achieved by replacing European Board members with representatives of African farmers. Hostility to the purchasing monopoly

could be neutralized by permitting co-operative societies to market produce, cotton and tobacco, "not in their own right but as agents of the Board or on commission", and by allowing African businessmen with trucks "to share in the business of the Board by acting as transporters and carriers of the produce". This was believed to be the best way of bringing "African farmers, African traders and the co-operative societies to live in peace, if not as friends, at least as co-existors in a state of cold war".[152] This strategy unfortunately offered superficial answers to the primary causes of hostility to the Board, namely the unyielding monopoly of the Board and the low producer prices. It was a strategy which appealed to, and appeased, the conspicuously vocal and politicized African intermediaries who constituted an emerging African middle class. The tobacco or cotton growers at the bottom of the social scale had very little to gain from the new strategy.

Some of the actual changes in the law were also more symbolic than significant: for instance, the renaming of the Board as the Farmers Marketing Board (FMB). Similarly, the transfer to the minister of powers previously exercised by the Governor in council was simply consequent upon the change from a secretarial to a ministerial system of government.[153] The more significant reforms in the law included Section 6, the enabling clause, which was generally more precisely drafted and entrusted the Board with the following new duties: (a) to appoint agents and to fix their remuneration or commission; and (b) to subsidize African farmers in the purchase of inputs, farm implements like ox-carts and other approved items. Other new provisions were in Sections 9 and 10. Section 9

authorised the Board to establish and run seed farms. Section 10 enjoined it to be strictly accountable for services rendered to it by the Department of Agriculture and for any sums disbursed from public funds in the discharge of its principal duties. This confirmed the wish of African leaders to dissolve "the unholy marriage"[154] between the Board and the Department.

On the whole, apart from the addition of the few new duties for the Board, and the change in its political complexion,[155] the Farmers Marketing Ordinance perpetuated old ideas on the marketing of African economic crops. By Section 6(3), for example, it was still necessary for the Board to sell African crops at a profit, or at least at a price higher than that paid to growers, in order to accumulate revenue for a price assistance fund, the running of the expanding bureaucracy, and various other activities. From 1963, such activities included participation in business ventures through the provision of capital or loans.[156] This was a new dimension to crop marketing which portended further inroads into the actual or potential income of peasant farmers. It also foreshadowed the end of "progressive liberalization" in produce marketing and the reimposition of the Board's monopoly. If the Board was to raise sufficient capital for re-investment in business ventures, it was now doubly necessary that European or African intermediaries should not be allowed to compete with the Board in the marketing of African economic crops. This was one of the aims of the Agricultural and Livestock Marketing Ordinance of 1963.[157] The second major aim of the Ordinance was to complete the consolidation under one statute

of the various laws on the marketing of African produce, including cotton and tobacco.

The law on the marketing of general African produce and livestock was contained in Part II of the Ordinance. It is notable that the government abandoned its promise of restricting controls to a few important crops in selected areas. If the Minister so desired, production and marketing controls could be applied to all produce and livestock grown or raised for economic purposes on public or Trust land, even in marginal areas of production. The Minister subsequently applied the controls to virtually every crop produced in significant quantities for sale and/or consumption by Africans in any district of the protectorate.[158] The second notable feature of this part of the Ordinance was the Minister's unlimited power to exempt any person from the necessity of holding a buyer's licence. He was also entitled to order the sale of produce or livestock to any person at any time. These wide powers incidentally obviated the necessity of restoring the general exemption of African intermediaries from the permit requirements which was taken away by the repealed Produce Marketing Ordinance of 1959.[159]

Part III of the 1963 Ordinance incorporated the law on the marketing of cotton. It reaffirmed the absolute monopoly of the FMB over the purchasing of public or Trust land cotton. The Board was not given a similar monopoly over the marketing of African tobacco in Part IV. The Minister could authorise growers to sell their tobacco to some other person. This provision was presumably included to enable the African leader to

fulfill his promise of permitting the participation of co-operatives and African businessmen in the tobacco trade. The notable aspect of Part IV was the attempt to control tobacco production through tenants. Section 15(b) prohibited the dual registration of African growers on public or Trust land and as tenants on private estates. Section 20 attempted to discourage tenant production by providing that notwithstanding any other law, a person with no valid licence was not entitled to purchase tobacco grown by tenants on his land. He was obliged to inform the Board which was entitled to buy the crop at any price deemed reasonable.

Part V on the administration of licences and Part VI containing miscellaneous provisions were notable for the phenomenal powers of the Minister. He was authorised to constitute a licensing authority, but he could also order the issue or revocation of licences at his discretion, even in disregard of the decision of the licensing authority, and his decision was final. His other powers included the right to order the inspection of books and premises of licensed buyers; the right to prohibit trading where the terms of a licence have been violated; and the right to make various rules necessary for the administration of the Ordinance. This was in addition to his usual authority over the specification of produce, the declaration of controlled marketing areas, and the fixing of prices. Under most of the colonial legislation, such powers were at least exercisable by the Governor "in council". The Minister was not subjected to a similar constraint or any other limitation on the exercise of his wide powers. The effect of the Ordinance was to place Ministerial discretion, as

well as indiscretion, in the administration of the law beyond review or challenge.

The 1963 Ordinance was also generally notable for the penal provisions. One member of LEGCO observed that it created a total of 28 offences.[160] The general penalty for most of the offences was £500 and imprisonment for one year. The government signalled through this stricter penal regime that it intended to stamp out and prevent the recurrence of illegal trading in African economic crops. It should be recalled that breaches of the monopoly of crop marketing Boards were especially prevalent when the buoyance of world commodity markets was not reflected in producer prices. The stricter penal regime would not have pleased African growers who were always searching for markets where they could obtain better prices for their produce. The stiffer penalties were also likely to be visited upon the emerging African intermediaries the government was so anxious to please when reforming the law on the APMB. It was ironical that an African-dominated government was resorting to criminal sanctions so soon after noting that African hatred of the APMB was partly due to its "unholy marriage" with the Department of Agriculture which was notorious for using criminal sanctions to compel agrarian change. It was also ironical that a leading settler representative who was originally wary of African political independence had to remind the government of the need to move away from coercive agricultural legislation. Feeling his way cautiously in the new legislative chamber, he submitted:

> "I do feel, however, ... that one would hope to be able to get away from this type of legislation as soon as the old feelings against agricultural control have really passed and the people of the country begin to realize that it is their own bodies which are in fact controlling their produce and the sales of it." [161]

African political leaders may not have appreciated counsel from a person whose previous voting record in LEGCO showed little concern for African or grower interests, but this should not disguise the aptness of his observation on this occasion. The Agricultural Production and Livestock Marketing Ordinance was a disappointingly retrogressive measure which revived some old marketing policies without a careful appraisal of their appropriateness in a new political era. As a final general criticism, it should be noted that the measure did not even attempt to abolish some of the unnecessary racial distinctions in marketing laws which engendered different regulations for the same economic crops. The government claimed that it intended to extend the new law to European produce at a later date.[162] This has not yet taken place.

3 European Economic Crops

Legislation on the production and marketing of economic crops produced exclusively by settlers on private estates was sparse. When coffee was the principal plantation crop, the only controls introduced restricted the importation of seed to prevent the spread of coffee leaf disease. Substantive production and marketing controls were eventually introduced for tea, flue-cured tobacco and tung in this order. Unlike the

African sector, controls were introduced for all these crops at the behest, or with the consent, of the settler associations.

(a) Tea[163]

Legislation on tea marketing was introduced during the inter-war depression. Demand for tea on the world market was far short of the supplies available, and international efforts were made to reduce production. The imperial government, in conjunction with the International Tea Committee, fixed quotas for producing countries in the Indian sub-continent and East Africa. It was estimated that Nyasaland would fill its quota by producing tea from not more than 1,700 acreas annually. The Tea Ordinance of 1934 was enacted to enforce this restriction.[164] It empowered the Director of Agriculture to licence and control the opening and extension of tea estates in the protectorate. Tea grown in contravention of the instructions of the Director could be uprooted. The grower was liable to a fine of £200 and/or imprisonment for a period not exceeding six months. Jurisdiction for offences under the Ordinance was reposed in first and second grade magistrate courts. But the Governor was empowered to hear appeals from any person aggrieved by the Director's decision to withhold a tea-growing licence.[165]

The tea controls were originally devised to last for five years. They were renewed by subsequent amendments to the Ordinance until the international restrictions ceased to be binding on the participating countries in 1948.[166] The Nyasaland

quota had by then risen to 2,500 acres. Another addition to the law was the levy of a cess on tea exports, the proceeds of which were remitted to the Nyasaland Tea Association (formed in 1934) "for use in such manner as it could determine with the approval of the Governor".[167] This was a measure of the co-operation and collaboration which existed between the government and the Tea Association in the administration of the law.

(b) Flue-Cured Tobacco

Flue-cured tobacco was the second European crop to attract controls during the inter-war depression. Nyasaland producers and exporters were experiencing severe difficulties in selling the crop in London markets. The Nyasaland Tobacco Association convened a meeting of all interested persons in Limbe on 15th February 1935. It was agreed that legislation should introduce production and marketing controls similar to those operating in the African dark-fired tobacco sector.[168] Intense consultations between the government and the Association followed, during which no less than three draft bills were prepared. The issue of controversy was whether the legislation should comprehensively control all tobaccos, or be limited to the European sector as was the case in Southern Rhodesia. In deference to settler opinion, the latter option was adopted. The Association also agreed to a minimum of government participation in the marketing of the crop.[169]

The Flue-Cured Tobacco Ordinance was read and passed as a Private Member's Bill in 1936.[170] It created a Tobacco Con-

trol Board consisting of one government official and several members appointed by the various associations representing European tobacco growers, buyers and exporters. The main functions of the Board were to register growers, license purchasers, organize a tobacco pool and, generally, to control the export of quality flue-cured tobacco from Nyasaland. Funds for the Board came from a cess levied on all tobacco exported from the country.[171]

When the economic situation failed to improve in 1936 and 1937, the Flue-Cured Tobacco Ordinance was repealed and replaced by the Tobacco Ordinance enacted in 1937 to give effect to the American system of selling all kinds of tobacco to buyers and exporters at a public auction.[172] The Tobacco Control Board was retained and entrusted with additional duties concerning the management of auction floors. Such duties included the licensing of premises and floor traders, and the fixing of minimum prices. Because of government interest in the marketing of African tobacco by auction, the Ordinance increased official control over the composition of the Board. The Governor assumed the responsibility for the appointment of all Board members, but the various European tobacco Associations retained the right to nominate possible appointees. The membership also included two appointees from the Native Tobacco Board. Following the pattern established for the NTB, the Tobacco Control Board became a body corporate with all the attributes of legal personailty.[173]

The new Tobacco Control Board held its first meeting on 17th January 1938 under the chairmanship of A.J. Hornby, the

Assistant Director of Agriculture. Several meetings followed before the opening of the Limbe auction floors on 4th April 1938.[174] The system apparently operated smoothly before the Second World War interrupted normal commercial trading. After the war, and for most of the remaining colonial period, flue-cured tobacco marketing at the auction floors was governed by integrated tobacco ordinances devised for both the European and African sectors. The legal and policy changes effected during this period were not many or substantial. Under the comprehensive Tobacco Ordinance of 1946,[175] the Control Board was renamed the Tobacco Control Commission to avoid confusion with the Native Tobacco Board. The composition was increased from 8 to 9, and the Director of Agriculture became its permanent Chairman. For the first time, the membership included Africans representing Trust land growers, but settler representatives retained their majority and, therefore, ultimate control of the Commission.

As noted in the review of the African sector, the economic climate in 1946 was favourable.[176] Prices had been rising steadily since 1939. Thus, when the Ordinance reiterated that all tobacco leaving Nyasaland should pass through the auction floors, some growers complained that they were unfairly prevented from earning better prices through direct exports of their produce to London brokers. In response, the Attorney-General contended that it was commercially unsound to market one form of produce in a variety of ways. The auction system brought the buyer to the grower and ensured the standardization of all tobacco sales. It also stimulated competitive buying, resulting in higher prices, and encouraged growers to

produce better quality leaf.[177] The prohibition of direct tobacco exports may have been too drastic a measure, but the government's position was understandable. There was a need for continuity in the system of marketing tobacco. It would have been a bad policy for the government to run a compulsory auction system only when prices were down and a voluntary one when the economic climate was favourable.

As with the African Tobacco Board, the Tobacco Control Commission was reconstituted by the Tobacco Ordinance 1950[178] to give the Governor the power of appointing some members who would hold office at his pleasure. The Ordinance was also notable for Section 53(d), which empowered the Governor to make regulations "providing for the licensing of non-native growers and prescribing returns to be rendered by such growers". The administration was planning to use the regulations "at a future date, ... to differentiate between tobacco grown by the owner of an estate and tobacco grown by tenant producers".[179] The licensing or registration of European growers was indeed overdue, but the administration was timorous and unsure of the reaction of the settlers. In contrast, detailed regulations for African growers on Trust land or private estates were promptly issued.[180] In 1951 the government abandoned all efforts to register the European growers. Section 53 (d) was excised from the law and replaced with a provision which enabled the governor to make rules requiring European growers to obtain licences for the sale of any tobacco other than the flue-cured variety.[181] This was accompanied by the flimsy explanation that the control of tobacco "buying" which had previously underpinned the regulation of the market was

inadequate, and some measure of control was required over "selling".[182] This may have been the case, but introduction of "selling controls" did not, ipso facto, render unnecessary regulations on the registration of non-native tobacco growers.

The Tobacco Ordinance of 1952 which repealed the 1950 Ordinance failed to restore the provision on the registration of the European growers. The law was in fact spared from substantive revisions until the Tobacco Control Commission Ordinance of 1963[183] separately re-enacted the provisions on the marketing of European tobacco by auction. The Ordinance restored the pre-war system under which the African and European tobacco sectors were controlled by separate legislation.

(c) Tung

Tung was not yet established as an economic crop when the inter-war depression caused the introduction of controls for the other European crops. There were about 4,000 acres of tung trees when the Second World War erupted. Demand for tung oil increased during the war and, by 1945, the acreage increased to about 10,000 acres of trees yielding 400 tons of oil.[184] The promise of the industry led to the introduction of the Tung Ordinance in 1946,[185] which was prepared in collaboration with the Tung Association of Nyasaland, an organization formed in 1938. The measure was introduced in LEGCO as a Private Member's Bill, and the presenter remarked:

> "The principles behind this Bill divide themsleves into three. The first is that all tung oil exported from the country should be of the

> highest grade ... possible; secondly, that there should be control as to factories, or rather, all expressing plants; and thirdly, that all tung should be exported collectively, co-operatively." [186]

A Tung Board with corporate personality was established and entrusted with functions which included the licensing of persons involved in the production, extraction and marketing of tung oil. The Board was also empowered to fix prices for tung fruit and factory charges for processing. Failure to observe the regulations issued by the Board entailed a maximum penalty of £100 and/or imprisonment for three months. The small tung industry was willing to impose such penalties upon itself in order to prevent the controls from being "reduced to a farce". The Board consisted of 2 appointees of the Governor and 7 of the Nyasaland Tung Association. This ensured that control of the industry remained firmly in the hands of the growers.[187]

The introduction of the Tung Ordinance failed to encourage the expansion of the industry as expected. World prices began to fall, and when alternative oils and synthetic substitutes invaded the market, local tung tree growing became static. The industry lost its early promise of becoming an important crop in the colonial agricultural economy. The Ordinance rested ineffectively on the statute books until it was repealed by the independent African government.[188]

(d) "Africanization" of European Crops

When the Africans got into government and LEGCO after the 1961 general elections, it was inevitable that some political gesture would be made towards breaking the monopoly of Europeans over the production of crops like flue-cured tobacco, tea and tung. The Special Crops Ordinance of 1963[189] was enacted for such a purpose. This was a simple and uncontroversial enabling ordinance. By Section 3, if the Minister responsible for agriculture "was satisfied that the development of any special crop should be promoted or fostered", he could declare it to be a special crop. By Section 4, he was empowered to establish an "Authority" responsible for the development of the crop. Section 5 vested the authority with legal personality and some of the powers of a statutory commodity marketing Board. Section 6 prohibited the growing, selling or purchase of a special crop without a licence. Although the Ordinance was devised for European crops, Section 3 was drafted in such a way that it could be applied to established African crops. To avoid conflicts in the law, it was subsequently declared that the Special Crops Ordinance would have priority over any existing legislation on the production and marketing of the affected African crop.[190] The Ordinance was indeed originally applied to established African crops like cotton and groundnuts. Concerted efforts to "Africanize" tea and flue-cured tobacco took place after independence with the creation of the Small Holder Tea Authority and the Kasungu Flue-Cured Tobacco Authority.[191]

4 Credit Allocation and the Production of Economic Crops

It is an obvious and proven fact that credit allocation can play a pivotal role in the production of economic crops, especially those which require expensive inputs and production outlays like tea and flue-cured tobacco. State regulation of the provision of agricultural credit is therefore considered to be just as important as controlled marketing in most agricultural economies.[192]

Agricultural credit can be of various types, classified by the period of repayment, actual or potential use, the identity of the lender, the nature of the security or the method of repayment.[193] The categories of agricultural credit available in Nyasaland were generally identified by the repayment period.[194] The notable classes were long-term, medium-term and short-term or seasonal loans. Long-term loans were principally sought by European settlers for the purchase of freehold or leasehold land. The amount required was fairly large and repayments were spread over a number of years. Medium-term loans were used for capital expenditure of a less permanent nature like the purchase of farm implements. Large or small-scale European and African farmers required such loans. Repayments were arranged for periods ranging from two to five years. All categories of farmers also required short-term or seasonal loans for the purchase of inputs or the processing of the harvested crop before marketing. The repayment period was often pegged to the season of the particular crop or limited to a period not exceeding two years. State regulation of the provision of these various loans during the colonial period

depended on the identity of the lender. Different laws and policies were evolved for credit allocation by government agencies, commercial lending institutions and informal sources.

(a) Government Lending Programmes

The "tobacco advances scheme" introduced in 1928 was probably the earliest example of the use of public funds to provide seasonal agricultural credit.[195] The European tobacco industry was going through a slump and commercial banks reduced their lending portfolio to farmers. When some of the insolvent settlers began to leave the protectorate, the government evolved the scheme with the hope of retaining them. It was contended that European estates, whether profitable or not, were important to the economy because they provided employment and were of educational value to the Africans. This justification was, however, undermined by the opinion held by some government officers and settlers that "... the African labourer returning to his garden has normally no idea of reproducing, even when he could easily do so, the methods on which he has been working in the plantation."[196]

The funds available for the advances were limited to a total of £5,000 per annum and the scheme was, therefore, bound to have a negligible effect on agrarian change. It takes its place in the annals of the country's agricultural history primarily because of the strategies evolved to ensure repayments of the loans. The first strategy was to route all credit and repayments through, and to approved clients of, the local commercial banks. This did not prevent defaults, and the scheme

was abandoned after three years when debts amounting to about £1,900 had to be written off. It also became apparent that the assisted farmers managed to produce less than five per cent of the country's tobacco crop. Advances were resumed in 1935 under the tenure of a Governor who was more inclined than his predecessor to accept the prevalent view that even less profitable European enterprises were crucial to the country's agricultural development. The repayment record improved and the scheme was fairly successful because of the second strategy of providing credit only to farmers whose crop a local tobacco company had promised to purchase.

The tobacco advances scheme was introduced at the behest of a local European planters' association which also engineered the appointment in 1934 of a governmental committee empowered to examine the feasibility of a land bank in Nyasaland. The committee reported in 1936 that a capital of £50,000 should be provided to enable the Southern Rhodesia Land Bank to extend its operations to Nyasaland. It also recommended the appointment of a local board, which would advise the bank on its Nyasaland operations. These recommendations were rejected by the Colonial Office, principally on the ground that the case for a land bank was not substantiated by an evaluation of the country's agricultural requirements. It was based on the assumption that every agricultural country needs one. This, as the case of Uganda at the time showed, was not universally true. It was also inapposite to suggest that ultimate control over funds provided by the Nyasaland treasury should be reposed in a foreign bank. The committee's recommendations were probably prompted by the perennial desire of Nyasaland Europ-

eans for a closer political union with their brethren in Southern Rhodesia.[197]

After the war, the government did not initiate any notable credit scheme until the Land and Agricultural Loans Board was established in 1955. This was a simplified and localized version of the aborted land bank. Its terms of reference approximated to those of other banks operating in neighbouring territories. It was formed to provide long-term soft-loans for the acquisition of land for European agriculture and for other capital developments. The fact that the institution was eventually deemed essential for agricultural development in Nyasaland is a reflection of the stronger bargaining position attained by settler pressure groups after the imposition of the Federation of Rhodesia and Nyasaland in 1953. The terms of reference excluded loans for Africans under the familiar argument that they could not provide negotiable titles as security. A separate African Loans Board was created in 1958 to provide unsecured short-term loans to the more progressive African farmers and businessmen.[198]

The European board soon outlived its purpose. After two years, the demand for seasonal loans was exceeding the demand for long-term capitalization loans. In many cases paucity of security caused difficulties not dissimilar to those imagined of African farmers. It was the government's view that short-term credit for European agriculture should be provided by commercial banks. But the majority of the applicants for land loans were settlers who were ineligible for commercial bank loans. The board was exceeding its terms of reference by ex-

tending credit to these farmers. The shift in emphasis from capital to seasonal loans contributed to the reconstitution of the board in 1960 as the Farmers Loan and Subsidy Board.[199] The existence of two separate boards discharging similar functions for Africans and Europeans was an unnecessary duplication and wastage of scarce resources. Further, as table 10 shows, the inequitable disparity between the funds available to the two racial groups at a time of rising nationalism fuelled African opposition to colonial rule and made African farmers chary of government assistance. The result was a general decline in agricultural activity and farming standards.[200]

It can be concluded from this brief review that the contribution of government lending to agricultural productivity during the colonial period was minimal, if not negative. The administration did not attach as much importance to credit allocation as it attached to controlled marketing. It is notable that none of the credit programmes was backed by a specific legislation: they were quasi-legal. The Nyasaland administration was in this respect different from some of the governments of East and Central African dependencies who evolved various forms of statutory controls for credit allocations from public funds.[201] Moreover, the funds available for agricultural credit in Nyasaland were generally small and inequitably distributed between the European and African sectors. The government continued to believe that European estates deserved more financial support, ignoring the fact that it derived more financial benefits from its intervention in the marketing of African produce. It is possible to argue, with hindsight, that the justification for the differential credit all-

ocations on the basis of the inability of Africans to provide tangible securities was overplayed. The operation of the credit schemes revealed that African and European farmers were equally prone to default in repayments. Moreover, the short- or medium-term loans offered by the government did not necessarily require the pledging of coveted land titles as securities.

TABLE 10: ADVANCES BY THE AFRICAN LOANS BOARD AND THE LAND AND AGRICULTURAL LOANS BOARD, 1956-62.[202]

YEAR:	Number of applications:		Amount in £s:	
	L.A.L.B.	A.L.B.	L.A.L.B.	A.L.B.
1956	13	-	16,950	-
1957	12	-	23,900	-
1958	12	57	18,285	4,150
1959	19	208	30,235	11,850
1960	21	214	35,669	12,000
1961	-	-	44,168	-
1962	16	172	26,060	16,336

(b) Commercial Bank Lending

The first banking facilities in Nyasaland were provided in 1894 by the African Lakes Company, one of the first trading concerns to be established in the country. Business was conducted without local statutory controls until the enactment of the Banking Ordinance in 1902.[203] The ordinance required, among other things, the registration of all concerns carrying out the business of banking and the periodic publication of

their accounts and various other details. The enactment of the Ordinance was followed in 1903 by the establishment of a branch of the Standard Bank of South Africa in Blantyre. The African Lakes Company continued to provide banking services until the Barclays Bank (DC and O) Company took over its banking division in 1918. The two banks monopolized commercial bank lending for the entire colonial period.[204]

There are no official or published reports on commercial bank lending during the colonial period, but it can be fairly assumed that the banks ministered to the needs of European estate agriculture and ignored smallholder credit. Long-term loans were probably secured by a first mortgage of the land, the purchase of which necessitated the loan. Estate agriculture during the early years of colonial rule was largely unmechanised and labour-intensive. This reduced possibilities for chattel mortgages and other related securities. As the estates developed, the range of securities increased. Agricultural estates registered under the Companies Act were able to obtain loans secured by debentures covering the fixed and floating assets of the companies. This provided the banks with the best possible cover for long-term loans and, in turn, incorporation under the Act assumed importance in the assessment of creditworthiness.[205]

It would appear that the distinction between medium- and short-term credit was rather blurred in commercial bank lending. The two categories were conveniently treated as short-term loans. The assessment of creditworthiness for such loans depended on the reputation of the borrower as a "planter".

This may not have been difficult to assess because the community of planters was small and concentrated in the Shire Highlands where the main towns were located. The various settler or planter associations could assist in the assessment of a farmer's reputation.[206] Seasonal loans were generally unsecured despite the fact that legislation providing for the registration of bills of sale was introduced in Nyasaland as early as 1916.[207] Bills of sale were not ideal for securing seasonal loans for two reasons. First, stringent requirements were imposed for the execution of bills of sale assigning growing crops separately from the land.[208] Secondly, Section 5 of the Ordinance stipulated:

> "... a bill of sale shall be void, except as against the grantor, in respect of any personal chattels ... of which the grantor was not the true owner at the time of the execution of the bill of sale."

This raised additional problems for farmers desirous of obtaining seasonal loans using the anticipated harvest or growing crops as the security. In the circumstances, it was better to execute the bill of sale after harvest, but loans for the purchase of inputs like seeds and fertilizer would be too late for that crop season.

The Farmers Stop-Order Ordinance of 1955[209] was passed to alleviate some of the problems of charging future or growing crops as security for a loan. A stop-order was defined as a written undertaking which gave the creditors a right over the farmer's future or growing crops. It could be addressed to a third party like a marketing board, authorizing it to satisfy the debt owing to a creditor from the proceeds accruing to the

farmer after the purchase of the crop.[210] The chief value of this instrument to the farmer was its simplicity, which was described thus in LEGCO:

> "A Stop-Order is really a post-dated cheque drawn by a farmer for the money he expects to receive on his crops. It is a useful and convenient device for seasonal credit for farmers especially flue-cured tobacco growers who, faced with a fairly heavy seasonal outlay for a return which under our conditions at any rate, seldom seems to allow for the accumulation of reserves ..." [210]

Stop-Orders were already in use by the time the Ordinance was passed. Tobacco auctioneers had assumed the responsibility for regulating the system. Although no serious problems emerged, this private system left room for abuse. The government decided to put it on a standard legal basis by introducing a simple registration system adapted from Northern Rhodesia. Any unregistered instrument was deemed null and void, and competing instruments ranked in their order of registration. The Bills of Sale Act did not apply to registered Stop-Orders. The other effect of registration was that the following subsequent events did not impair or extinguish the Stop-Order: the sale, mortgage or encumbrance of the land on which the crop was growing; the death or insolvency of the grantor; and the acquisition of the crop by a purchaser for value who had no actual notice of the existence of the Stop-Order. This far-reaching protection of creditors was accompanied by stiff penalties for the farmer who executed an order with the knowledge or reasonable belief that it would not be honoured, or did any act which defeated, impaired, or invalidated the security of the Creditor or disposed the crop without his consent.[212]

This convenient facility for securing seasonal loans was devised for the exclusive benefit of European farmers. The Ordinance defined a farmer as a person cultivating an agricultural holding for profit, either as a tenant or as an owner.[213] This left out the majority of African smallholders and market farmers cultivating African Trust land which they did not "technically own". The Director of Agriculture confirmed that the Ordinance would not apply to the latter until such time as they possessed "either ownership of land or tenancies of it" and added:

> "but I would like to point out that there already exists adequate and more appropriate credit facilities for master farmers which they are freely using."[214]

Credit facilities available to African farmers by 1955 were neither adequate nor appropriate; they were in fact almost non-existent. The master farmer scheme provided some subsidies and bonuses, but it did not even attempt to provide for title registration.[215] As in the case of government lending, undue emphasis was placed on the farmers' "ownership of land" when this was not even part of the security normally required for the seasonal loans. The exclusion of Africans from the Stop-Order scheme was just another example of the pervading discrimination in the colonial agrarian policies.

(c) Informal Credit

In addition to the agricultural loans provided by institutionalized sources, farmers can and do obtain credit informally from traders, businessmen and other members of society

with cash to spare. The contribution of this type of credit to agricultural production is difficult to quantify because of the informality of the setting. But its importance to the peasant farmer should not be underestimated, especially where his formal sources are as limited as they were in Nyasaland.

Informal credit arrangements were frowned upon by the administration from the earliest days of colonial rule. A particularly disliked arrangement pitted the peasant farmer against the Indian trader who habitually supplied goods (including agricultural inputs) on credit, in anticipation of proceeds which the farmer was likely to earn from the sale of his produce during the marketing season.[216] If the goods supplied matched the income subsequently earned, the farmer was likely to be condemned to a cycle of indebtedness. The government moved in 1903 to prevent such arrangements and, generally, to curtail trade with Africans on a non-cash basis. Section 3 of the Credit Trade with Native Ordinance[217] stipulated as follows:

> "No contract for the sale on credit of goods to the value of or at a price of more than twenty-shillings by any trader or other person not being a native ... to any native ... shall be valid unless it is in writing and attested by [a District Resident]."

As seen in previous sections of the chapter, unbridled paternalism underlay most of the legislation affecting Africans passed during this early period of colonial rule. Here, too, the African was improvident and incapable of comprehending the financial subtleties of credit trade. The government,

being in loco parentis to him, had a duty to ensure that he was not swindled.[218] The District Resident was entrusted with a "guardian's" duty of approving the arrangements, and in the process, of explaining its implications, and ensuring that it was understood by the African.[219] Subsequent revisions of the law took into account the economic and educational advancement of some Africans in areas deemed by the Governor to be sufficiently developed. They progressively increased the minimum amounts for credits which did not require official sanction. But the principle of guardianship over the financial dealings of the majority was maintained until African political pressure caused the repeal of the Ordinance in 1958.[220]

Although the restrictions on credit trade with Africans were originally well-intentioned, it is arguable that they were retained for an inordinately long period and may have had a deleterious effect on African agriculture. The most affected were the enterprising individuals who wanted to emulate European estate farming. As observed by one African member of LEGCO in 1950, it was impossible for a farmer, however economical, "to run a good farm spending £30 only in a year", and so long as the Ordinance remained in force, it was a waste of time "for the European farmer to train natives who have no means of getting any help in money or goods to the amount they require".[221] On this occasion, the government elected to believe the representative of the settlers, who contended that "it would be a very dangerous thing to have no restriction whatever on credit to natives", and that it would also be unfortunate "if the general body of the Africans were allowed to get credit beyond the sum of £30..."[222] The restrictions

eventually disappeared within the relatively short period of eight years, causing none of the problems or dangers feared. This left the government prone to the accusation that its policy had been maintained in order to prevent the improvement or development of the African farmer or entrepreneur who was likely to compete with the European settler.

There was an additional explanation for the reluctance of the colonial administrators and the settlers to see the end of restrictions on credit trade with Africans. They repeatedly failed to appreciate that informal credits were not unfamiliar to the Africans, even under customary law. The simplest and most rudimentary conception of a credit transaction at customary law was perhaps the "finger millet borrower" situation. The transaction has been accurately described as follows:

> "If a debtor borrows a plate-full of millet for the purpose of brewing beer, customarily she would be expected to return the millet in either a larger full plate to ensure that the contents returned are substantially more than the original contents borrowed ... Sometimes the debtor would fill two dishes of the original size in return on the basis that the profits obtained on the sale of beer are in part attributable to the loan. Customarily 'every pound makes a pound'." [223]

Although the transaction was not necessarily enforceable in a customary tribunal, and failure to perform as expected was often simply regarded "as uncouth behaviour"[224] it contained some of the essentials of a "legal debt", including a rudimentary notion of interest. When cash was introduced into the rural economy, customary law was able to develop a different

species of credit arrangements under which even a 100 per cent rate of interest could be countenanced. This was known as katapira or chimbazo. It was distinguishable from a simple loan agreement (kubwereka) in that, apart from the debtor and creditor, a katapira agreement involved a third party called mboni who was the witness or surety to the agreement. If the debtor failed to pay the loan plus interest, the creditor could have recourse to the mboni. This third party was not a simple guarantor, but someone closely related to the debtor. Unlike the finger millet transaction, katapira agreements were recognized and enforceable in customary tribunals.[225]

Public policy in the protectorate did not approve of usurious agreements which some of the katapira agreements were. In 1934, the government passed the Loans Recovery Ordinance which conferred upon the court wide powers to re-open loan agreements and relieve the borrower "... from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges, as the court having regard to the risk and the circumstances, may adjudge to be reasonable."[226] The court could intervene in this manner at the instigation of the debtor or in any recovery proceedings begun by the creditor. For the purposes of the Ordinance, a "court" was defined to include the High Court and the higher magistrate courts, but not the Native Authority Courts.[227] This reduced the effectiveness of the legislation in policing the majority of the katapira agreements which involved sums too small to be justiciable in the higher courts.

5 Conclusion

It is generally agreed that the evolution of controlled marketing of economic crops in British colonial Africa followed a familiar pattern. "By 1955 the internal marketing of export crops in almost every country was the legal monopoly of a state, parastatal or private organization."[228] The monopolies have been traced to the great depression of the 1930s and the war-time bulk purchasing arrangements. The depression highlighted the need for stabilized producer prices and incomes if commodity production was to be maintained. It also revealed the inefficiencies of a marketing system which relied on avaricious middlemen, who in East and Central Africa were likely to be East Indians. They provided "exorbitant prices" when the economic climate was favourable and pulled out of the market if it was not so favourable, leaving growers despondent. These problems necessitated statutory intervention in crop marketing, but it was the war-time bulk purchasing arrangements which eventually dictated the method of intervention. For most export crops, the monopolies created were "too convenient to be dismantled".[229] As for domestically consumed commodities, some East and Central African countries elected to relax the controls and to regulate the markets on an *ad hoc* basis.

A summary of the legislation reviewed in this chapter confirms the general picture of controlled marketing in Africa painted above. A sector-by-sector analysis, however, reveals the full complexity of the Nyasaland story. There was no smooth transition from the pre-depression controls to the

post-war legal monopoly. It was almost by accident that the APMB became the principal buyer of African economic crops by 1955. For most of the colonial period marketing legislation was enacted ad hoc, in response to peculiar pressures on a particular industry. A freak result of the unsynchronized laws and policies was the seemingly contradictory advice given to cotton and tobacco growers during the depression. The former were exhorted to grow more cotton if pre-depression levels of income were to be maintained, but the latter were discouraged from increasing production and were denied appropriate marketing facilities. As for food production, the government initially appeared to be disinterested in the levels of production. Its primary concern was simply to obtain sufficient maize supplies for its requirements at affordable prices.

The story of controlled marketing in Nyasaland also shows that Indian traders were not nearly as influential as European settlers in the evolution of the law. The activities of the Indians were an important factor in the introduction of controls for the cotton industry before the First World War but not thereafter. It was the European settlers and their representatives in LEGCO who shaped some of the legislation, especially in the dark-fired African tobacco industry. This was because of settler interest in the production of this type of tobacco through the system of visiting tenancy. It must be noted, however, that the colonial administration was not as accommodating to the settlers as it was in land administration or in the control of Thangata. Most of the legislation on the marketing of African economic crops passed through LEGCO regardless of serious settler opposition. The contribution to

public revenue which the statutory controls entailed accounted for this stance. This actually started with the BCGA marketing arrangement which came into force before the convenient and lucrative war-time arrangements were evolved. The government frequently claimed that the interests of the growers justified the policies pursued. The results of controlled marketing, however, suggested that it was the government and the institutions created which reaped most of the benefits. Even after the war, there was no stability in the prices for some of the lucrative crops like dark-fired tobacco.

Another incidental conclusion of the chapter is that the enthusiasm of the colonial administration in controlling agricultural marketing did not extend to credit allocation. The limited public funds available were allocated disproportionately between the African and European sectors. The latter received a larger share irrespective of the fact that the contribution of European agriculture to public revenue through controlled marketing was minimal. The administration additionally attempted to regulate and restrict the provision of "informal credit" which some peasant farmers utilized in the absence of formal credit.

NOTES TO CHAPTER V

1 For a detailed account of economic crops and their export value in Nyasaland, see C.A. Baker, "Nyasaland, The History of its Export Trade", The Nyasaland Journal, Vol. 15, No. 1, January 1962, pp. 7-35.

2 Note that some of the ordinances attempted to reduce production or the numbers of growers as a way of improving the quality of the produce or matching production with demand. But this was an occasional and transient objective. The general thrust of the legislation was to increase production.

3 The most authoritative work on the subject is perhaps P.T. Bauer's West African Trade, Routledge and Kegan Paul Limited, London, 1963, especially Part 5, chapters 20-24. Other useful accounts include T.M. Ocran, Towards a Jurisprudence of African Economic Development: A Case Study of the Evolution of the Structure and Operations of Zambia's Food Crop and Cotton Marketing Boards From 1936-1970, Ph.D., University of Wisconsin, 1971, especially Chapter 1; R.H. Bates, Markets and States in Tropical Africa, University of California Press, 1981; J.C. Abbott, "The Development of Marketing Institutions", in H. Southworth and B.F. Johnston (ed.s), Agricultural Development and Economic Growth, Cornell University Press, Ithaca, New York, 1967, Chapter 10; W.O. Jones, "Measuring the Effectiveness of Agricultural Marketing in Contributing to Economic Development: Some African Examples", Food Research Institute Studies in Agricultural Economics, Trade and Development, Vol. IX, No. 3, 1970, pp. 175-196; and C.P. Brown, "The Malawi Farmers Marketing Board", East Africa Economic Review, Vol. II (1970b), pp. 37-51.

4 P.T. Terry, "African Agriculture in Nyasaland 1858-1894", The Nyasaland Journal, Vol. XIV, No. 2, July 1961, pp. 27-35.

5 Annual Reports of the Department of Agriculture, 1909-1910; and P.T. Terry, "The Rise of the African Cotton Industry in Nyasaland, 1902 to 1918", The Nyasaland Journal, Vol. XV, No. 1, January 1962, pp. 58-71. For a more recent and interesting account of the rise and fall of the African cotton industry and its impact on social structures in the major producing region see: E. Mandala, "Peasant Cotton Agriculture, Gender and Inter-Generational Relationships: Lower Tshiri (Shire) Valley of Malawi", The African Studies Review, Vol. XXV, No.s 2/3, June/September 1982, pp. 27-44.

6 No. 7 of 1910.

7 Sections 3-4.

8 LEGCO proceedings, 6th session, 12th-18th November 1910, pp. 10-11.

9 Ibid., p. 9.

10 Quoted by Terry, op. cit., pp. 64-65.

11 Cotton Rules, 1913, G.N. 7/1913; and generally, Annual Reports for the Department of Agriculture, 1911-1913.

12 SI/225/20, Folio 2, Memorandum by the Director of Agriculture on Revision of Procedures as to prices and Markets of Native Cotton, 10th April 1920; and Annual Reports for the Department of Agriculture, 1914-1919 and 1920, p. 6.

13 M. Chanock, "The Political Economy of Independent Agriculture in Colonial Malawi: the Great War to the Great Depression", Journal of Social Science, Vol. I, 1972, pp. 113-129.

14 SI/1381/23, Folio 3, enclosing copy of the agreement between the Nyasaland Protectorate and the B.C.G.A. made on 3rd May 1923.

15 Cotton (Amendment) Ordinance No. 8 of 1923.

16 LEGCO proceedings, 27th session, 16th-17th April 1923, pp. 15-18.

17 SI/1381/23, Folios 68 and 682, B.C.G.A. to Ag. Chief Secretary, 1st May 1932, enclosing a statement of losses during the currency of the agreement; and folios 24, 33A, 35, 43 and 51 for the events leading to the termination of the agreement.

18 File SI/965/30; Chanock, op. cit. p. 124; and Table 8. 1930 was the year when maximum prices dropped by about 50 per cent in all cotton districts. The table contains statistics from only two districts where African production of cotton was very high.

19 SI/411C/33, Folio 42.

20 Ibid., Folio 39, Hall to Secretary of State, Despatch No. 207, 27th June 1934.

21 Ibid., Folio 42, enclosing Circular No. 15 of 1934, dated 6th June 1934.

22 Chanock, passim.

23 See, generally, Annual Reports of the Department of Agriculture for the years 1923-1930 and File SI/1381/23, Folios 35, 38, 43 and 51.

24 No. 16 of 1934.

25 Preamble and sections 3-8.

26 Sections 43-50 and 51-67.

27 Sections 9-42.

28 Section 14.

29 Section 15.

30 Some of the hilarious examples of market malpractices which came close to being declared illegal were the playing of gramaphone music and using dummies to attract custom. See File SI/91/34, Folio 174, Director of Agriculture to Chief Secretary, 9th July 1935. The Cotton (Amendment) Ordinance No. 7 of 1935 modified the law to ensure that it would not be illegal for any buyer to issue packing sacks to growers.

31 Section 42.

32 LEGCO proceedings, 49th session, 5th April 1934, p. 32; and File SI/91/34, Folio 95.

33 File SI/91/34, Folio 61; and Nyasaland Times, Friday 8th June 1934. Cf. The Crown Land (Tax) Ordinance No. 1 of 1935, which confirmed some of Kaleromwe's fears by imposing a tax on specified quantities of cotton purchased by middlemen.

34 Ibid.

35 File SI/91/34, Folio III, C.O. to Governor Kittermaster, Despatch No. 43, 7th February 1935.

36 Ibid.; and Section 6 of the Ordinance.

37 Cotton (Amendment) Ordinance No. 24 of 1946; and LEGCO proceedings, 62nd session, 3rd December 1946, p. 28.

38 R.W. Kettlewell, "Agricultural Change in Nyasaland 1945-1960", Food Research Institute Studies, 1965, Vol. 5, No. 3, p. 272.

39 No. 11 of 1949.

40 Section 9(2).

41 Hon. C.B. Garnet, 64th session of LEGCO, 10th June 1949, pp. 22-23.

42 Cotton (Amendment) Ordinance No. 5 of 1950.

43 Section 12 of the Cotton Ordinance, No. 29 of 1951 and G.N. 173/51, revoked by G.N. 38/54.

44 Section 14.

45 Hon. R.W. Kettlewell, 66th session of LEGCO, 5th August 1951, p. 13.

46 Brown, op. cit., pp. 49-50.

47 Source: File SI/411C/33, Folio 53b. For statistics on post-war cotton marketing see: Kettlewell, op. cit., p. 283; and Brown, op. cit., p. 39.

48 See: The Cotton (Amendment) Ordinance No. 39 of 1953, which reconstituted the Board to make it resemble the African tobacco Board; and Ordinances No.s 6 and 11 of 1955, which brought cotton marketing under a new Produce Board.

49 File SI/1879/24; and Chanock, op. cit., pp. 119-120.

50 File SI/2461/23. For a detailed account on the development of the African tobacco industry, see: W.H. Rangeley, "A Brief History of the tobacco Industry in Nyasaland", The Nyasaland Journal, Vol. 10, No. 1, January 1957, pp. 62-83; Vol. 10, No. 2, July 1957, pp. 32-51; and Vol. 11, No. 2, July 1958, pp. 24-27; and R.M. Antill, "A History of the Native Grown Tobacco Industry of Nyasaland", Nyasaland Agricultural Quarterly Journal, Vol. 5, No. 3, 1945.

51 File SI/1879/24, Folio 43, Bowring to Secretary of State, 21st October 1925.

52 Ibid., Folio 55, Ag. Governor Rankine to Secretary of State, Despatch No. 93, 20th February 1926; and File SI/2461/23.

53 No. 5 of 1926.

54 LEGCO proceedings, 31st session, 15th February 1926, pp. 4-5.

55 Ibid., p. 5.

56 Ibid., p. 6.

57 See Note 52 above.

58 For a recent and thorough review of Board policies during this period, see: J. McCracken, "Peasants, Planters and the Colonial State, the Impact of the Native Tobacco in the Central Province of Malawi", Journal of Southern African Studies, Vol. 9, No. 2, April 1983, pp. 172-192.

59 Tobacco (Amendment) Ordinance No. 22 of 1928; and LEGCO proceedings, 38th session, 12th November 1928, p. 9.

60 Tobacco (Amendment) Ordinances, No.s 19 of 1929, 8 of 1930 and 7 of 1931; and LEGCO proceedings, 40th session, 9th December 1929; 41st session, 7th April 1930, p. 11; and 43rd session, 28th April 1931, p. 11.

61 File SI/464/30, Folio 62, Thomas to Secretary of State, despatch no. 510, 6th December 1930, p. 12.

62 Ibid., Despatch No. 32, Lord Passifield to Covernor Thomas, 27th January 1931.

63 Tobacco (uprooting) Rules, 1936, G.N. 3/1935.

64 File SI/437/34, Secretary of State to Governor Kittermaster, 22nd May 1936.

65 Report on the Native Tobacco Industry, Sessional Paper No. 4 of 1931, enclosed in File SI/464/30, Folio 62.

66 Rangeley, op. cit., pp. 32-36. The share of African tobacco rose from 24 per cent of the total export crop in 1924 to 62 per cent in 1929, despite the fact that prices stagnated below 3½d per pound for ten years between 1926 and 1936.

67 Ibid., p. 36; and Annual Report of the Department of Agriculture, 1930. The European Staff of the Board in 1930 comprises one agent, two area supervisors and ten supervisor: an increase of five in the number of supervisors. The number of African field capitaoes increased from 29 to 215.

68 Ibid., pp. 40-41.

69 File SI/318^{I}/34, Folio 73; SI/318^{III}/34, Folios 132 and 134; and Despatch no. 384, Ag. Governor Hall to C.O., 4th September 1937.

70 File SI/464/30, Folio 66.

71 Ordinance No. 17 of 1937.

72 G.N. 88/1937.

73 Rangeley, op. cit., p. 42.

74 Ibid., p. 43.

75 Ibid., p. 42.

76 File SI/275/39; and McCracken, op. cit., pp. 182-183.

77 No. 10 of 1946; and LEGCO proceedings, 61st session, 19th February 1946, pp. 32-42.

78 Ibid., p. 33.

79 Part III of Ordinance No. 10 of 1946.

80 Ag. Senior Provincial Commissioner, LEGCO proceedings, 56th session, 3rd December 1940, pp. 29-31, moving the Tobacco (Amendment) Bill, 1940; and Part VII of Ordinance No. 10 of 1946.

81 Part II of No. 10 of 1946 and 61st session of LEGCO, p. 32.

82 G.N. 56/1946 and G.N. 198/1946.

83 61st session of LEGCO, p. 33.

84 Rangeley, op. cit., p. 44. Average prices in 1945 were 5s.09d. per lb. for fire-cured tobacco and 12s.03d. for flue-cured tobacco. The respective prices for 1946 were 14s.06d. and 22s.04d. per lb.

85 Tobacco (Amendment) Ordinance No. 31 of 1947.

86 Tobacco (Amendment) Ordinance No. 32 of 1948. This amendment introduced other less notable changes on the registration of growers, the licensing of buyers, the functions of the N.T.B. and the Tobacco Control Board, and on the maintenance of a Price Assistance Fund.

87 LEGCO proceedings, 64th session, 16th December 1948, pp. 27-28.

88 Rangeley, op. cit., p. 44, notes, for example, that the post-war cost of a fowl had risen from 3d. or 6d. to 2s.6d. The price for a goat rose from between 3s.6d. and 7s. to 35s. The price for an ox rose from between £3 and £6 to £15.

89 No. 9 of 1950.

90 Kettlewell, op. cit., pp. 267-268.

91 The Director of Agriculture, LEGCO proceedings, 68th session, 1st December 1952, p. 26, and generally, pp. 25-28; and Tobacco Ordinance No. 39 of 1952.

92 Criminal Appeal No. 17 of 1950 (1948-52), Vol. IV, Ny. L.R., p. 154.

93 68th session of LEGCO, pp. 27-35.

94 Ibid., pp. 7-8.

95 The following were some of the notable amendments to the 1952 Ordinance: (a) The Tobacco (Amendment) (No. 3) Ordinance No. 36 of 1953, which provided for the destruction of tobacco produced in contravention of growing and curing regulations; (b) The Tobacco (Amendment) Ordinance No. 42 of 1954, which gave the courts the discretion of ordering the forfeiture and sale of tobacco produced in contravention of the quality regulations; and (c) Ordinance No. 7 of 1955, which transferred the functions, powers and duties of the African Tobacco Board to an amalgamated Produce Board.

96 Source: Kettlewell, op. cit., pp. 281-282.

97 Ibid., p. 258.

98 Ocran, op. cit., pp. 54-55.

99 No. 12 of 1912.

100 LEGCO proceedings, 9th session, 14th May 1912, p. 8.

101 Section 2.

102 Proclamation No. 5 of 1912 applying the Ordinance to the Lower Shire, Ruo, Blantyre, West Shire, Zomba, Upper Shire and South Nyasa districts.

103 (1927-33) Vol. III, Ny. L.R., p. 8.

104 Ibid.

105 LEGCO proceedings, 22nd session, 19th March 1920, pp. 8-9.

106 Ibid., Appendix to the proceedings.

107 Ibid.

108 H.L. Duff, Nyasaland Under the Foreign Office, George Bell and Sons, London, 1903, p. 294; and, generally, M. Vaughan, "Food Production and Family Labour in Southern Malawi: Shire Highlands and Upper Shire Valley in the Early Colonial Period", Journal of African History, Vol. 23, No. 3, 1982, pp. 351-364.

109 Native Foodstuffs (Amendment) Ordinance, No. 11 of 1920. Note that the maximum penalty for a first offence under the Ordinance increased from £25 to £50. The penalty for second and subsequent convictions rose from £50 to £100.

110 Report of the Select Committee of LEGCO on the Native Foodstuffs Ordinance: Note 106 above.

111 The Native Foodstuffs (Amendment) Ordinance, No. 5 of 1941, provided for the automatic expiration of anti-famine measures on the 31st March of the year following the date on which the proclamation was issued.

112 Control of Foodstuffs Ordinance, no. 32 of 1960.

113 No. 7 of 1926.

114 LEGCO proceedings, 32nd session, 19th April 1926.

115 No. 34 of 1946.

116 Section 7.

117 Section 8.

118 G.N. 41/1947; and Annual Report of the Department of Agriculture for 1947.

119 Review of Departmental Activities, Governor Colby, LEGCO proceedings, 64th session, 29th November 1948, p. 3.

120 Annual Report of the Department of Agriculture, 1949; and Colonial Annual Report for Nyasaland, 1949, London, H.M.S.O., pp. 3-4.

121 Hon. C.B. Barnett, LEGCO proceedings, 64th session, 10th June 1949, p. 15.

122 Maize Ordinance, No. 12 of 1949 as amended by Ordinance No. 8 of 1950 and No. 5 of 1951.

123 The Bishop of Nyasaland, 64th session of LEGCO, p. 15.

124 For developments on maize marketing policy after 1949, see Kettlewell, op. cit., pp. 259-260. Note that he is less critical in his description, probably because he was once a Director of Agriculture and therefore responsible for the formulation of some of the policies.

125 For the repeal of the Maize Control Ordinance and amalgamation of the Produce Boards, see the appropriate sections below.

126 No. 12 of 1934, repealed by Ordinance No. 6 of 1947.

127 No. 14 of 1938.

128 Section 2 (as amended by Ordinance No. 27 of 1949) and Section 3.

129 Sections 4-9.

130 See, for example, G.N. 5/1940; 21/1940; 56/1941 and 87/1946 applying the 1938 Ordinance to African food crops in most districts, and cf. G.N. 54/1941 introducing anti-famine measures under the Native Foodstuffs Ordinance.

131 Amending Ordinance No. 27 of 1949, No. 5 of 1943 and No. 46 of 1946.

132 Hon. H.B. Wilson, 53rd session of LEGCO, 22nd March 1938, pp. 20-22.

133 Amending Ordinance No. 20 of 1939.

134 No. 34 of 1952.

135 LEGCO proceedings, 68th session, 1st December 1952, pp. 40-43.

136 Sections 2-3.

137 Section 8.

138 See Note 129 above.

139 As amended by Ordinances No. 35 of 1952, No. 17 of 1953 and No. 6 of 1954.

140 No. 15 of 1959.

141 Hon. R.W. Kettlewell, LEGCO proceedings, 74th session, 14th December 1959, p. 200.

142 Ibid. and Section 3.

143 Ibid., p. 201; and Sections 6-10.

144 Ibid., pp. 129-130; Produce Marketing (Amendment) Ordinance. No. 12 of 1959; and Marketing of Native Produce (Amendment) Ordinance, No. 27 of 1949.

145 Agricultural Production and Marketing Ordinance, No. 11 of 1955; Cotton (Amendment) Ordinance, No. 6 of 1955; and Tobacco (Amendment) Ordinance No. 7 of 1955. In 1956, the A.P.M.B. was additionally vested with the assets of the Nyasaland Farming Corporation. See also Ordinances No. 8 of 1955 and No. 19 of 1956.

146 Paragraph 40 of the Bucquet Report of July 1952, as quoted by Hon. E. Williams, LEGCO proceedings, 69th session, 2nd May 1955, p. 14.

147 Hon. H.M. Blackwood, 69th session of LEGCO, p. 16.

148 Agricultural Production and Marketing (Amending) Ordinance, No. 6 of 1958.

149 For general criticisms of the policies pursued by the A.P.M.B., see: LEGCO proceedings, 69th session, 2nd May 1955, pp. 13-20; and 74th session, 6th-10th June 1959 and 16th December 1959, pp. 3, 129-139, 141-143, 176-177 and 200-201. According to the Governor Armitage in 1959, the A.P.M.B. accumulated funds and assets amounting to £1,800,000 after two years of operation!

150 No. 4 of 1962.

151 Dr. Banda, LEGCO proceedings, 3rd meeting, 76th session, 6th-7th June 1962, p. 155.

152 Ibid., p. 157. Note that unlike other East and Central African British dependencies, co-operatives did not play a significant part in the marketing of African or other economic crops in Nyasaland. The Co-Operative Societies Ordinance, No. 20 of 1946, was enacted to provide for the registration of societies which, the government hoped, would be entrusted with the marketing of "smaller and more localised crops of importance, such as rice, coffee and ghee". The first coffee society was formed in 1950. The first ghee society followed in 1952. By 1960, there were 16 societies for rice, 7 for

coffee and 48 for ghee. Most of the societies were dissolved by the end of the colonial era. Because of their relative unimportance to the marketing of economic crops, it has not been necessary to review in detail the law on co-operative societies and its operation. For a short summary see Kettlewell, op. cit., p. 249. For a review on co-operatives and the law elsewhere in East Africa see: J.P.W.B. McAuslan, "Co-Operatives and the Law in East Africa", in C.G. Widstrand (ed.), Co-Operatives and Rural Development in East Africa, The Scandinavian Institute of African Studies, Upsala, 1970, pp. 81-120.

153 Sections 2-7.

154 Dr. Banda, loc. cit.

155 H. Dequin, Agricultural Development in Malawi, Munchen, 1970, p. 112, shows that the Board was composed of the following members: one Malawian Chairman; one General Manager; one Assistant Manager; three parliamentary members from the three regions of the country; seven representatives chosen by farmers; and four official members from the Ministry of Economic Affairs.

156 Farmers Marketing (Amendment) Ordinance, No. 30 of 1963.

157 No. 3 of 1963.

158 G.N. 60/1963. Two items were exempted from the expansive controls. The production and marketing of potatoes and ghee were controlled only in the districts where production was intense.

159 See preamble of the 1963 Ordinance for the repeal of the 1959 Ordinance.

160 Hon. H.M. Blackwood, LEGCO proceedings, 10th meeting, 76th session, 10th-16th December 1963, p. 1032.

161 Ibid.

162 LEGCO proceedings, 76th session, p. 1031.

163 For a very general account on the introduction of tea in Nyasaland, see G.G.S. Hadlow, "The History of Tea in Nyasaland", The Nyasaland Journal, Vol. 13, No. 1, January 1960, pp. 21-31.

164 Ordinance No. 13 of 1934; and LEGCO proceedings, 50th session, 24th October 1934, pp. 11-12.

165 Sections 3 and 7-15, as amended by Ordinance No. 3 of 1935.

166 Tea (Repeal) Ordinance, No. 5 of 1949; and LEGCO proceedings, 64th session, 28th February 1949, pp. 19-21. See also Tea Ordinance, No. 8 of 1948; and Tea (Amendment) Ordinances, No. 7 of 1939 and No. 16 of 1947.

167 Tea Cess Ordinance, No. 7 of 1935.

168 File SI/318^{I}/34, Folio 103.

169 Ibid., Folios 485, 59, 523, 567, 584 and 679.

170 No. 10 of 1936; and Hon. T.M. Partridge, LEGCO proceedings, 51st session, 21st April 1936, pp. 12-13.

171 Section 4.

172 No. 17 of 1937; Notes 69, 70 and 71 above; and LEGCO proceedings, 53rd session, 16th November 1937, p. 26. This measure was also presented as a Private Member's Bill by Hon. H.B. Wilson.

173 Part I of Ordinance No. 17 of 1937.

174 Annual Report of the Department of Agriculture, 1938, pp. 22-24.

175 No. 10 of 1946, Part V.

176 See Note 84 above.

177 LEGCO proceedings, 61st session, 19th-29th February 1946, pp. 38-39.

178 No. 9 of 1950.

179 LEGCO proceedings, 65th session, 13th February 1950, pp. 4-5.

180 Tobacco (Registration of Growers) Regulation, 1950, G.N. 164/1950.

181 Tobacco (Amendment) Ordinance, No. 9 of 1951.

182 Director of Agriculture, LEGCO proceedings, 66th session, 3rd January 1951.

183 No. 4 of 1963.

184 Kettlewell, op. cit., p. 272.

185 No. 11 of 1946.

186 Hon. M.P. Barrow, LEGCO proceedings, 61st session, 19th February 1946, pp. 54-58.

187 See generally, Sections 3, 8, 10(a), 20 and 22, and the Tung (Amendment) Ordinance, No. 42 of 1946.

188 Tung (Repeal) Act, No. 14 of 1974. For the failure of the Tung industry see Kettlewell, op. cit., pp. 272-273.

189 No. 27 of 1963.

190 Section 43 of the Agricultural and Livestock Marketing Act, chapter 67:01, Laws of Malawi; and Section 37 of the Tobacco Act, chapter 65:02.

191 See G.N. 212/1963, 213/1963, 26/1967, 129/1968, 194/1968 and 129/1969.

192 U.J. Lele, "The Roles of Credit and Marketing in Agricultural Development", in N. Islam (ed.), Agricultural Policy in Developing Countries, International Economic Association, Macmillan Press Limited, London, 1974, pp. 413-415.

193 D. Hunt, Credit For Agricultural Development, A Case Study of Uganda, East Africa Publishing House, Nairobi, 1975, p. 10; and L.F. Miller, Agricultural Credit and Finance in Africa, The Rockefeller Foundation, 1977, p. 8.

194 Report of Land Bank Committee in Nyasaland, 1936, Government Printer, Zomba.

195 All information on the Tobacco Advances Scheme is obtained from files in the National Archives under class mark SI/575/28.

196 Report of the Land Bank Committee, paragraph 70, p. 90.

197 See generally Files S2/11/26, Folio 97; S1/151/36, Folio 49; Land Bank Report 1936; and Report of the Commission Appointed to Enquire into the Financial Position of Nyasaland, 1938, H.M.S.O., London, pp. 275-276.

198 Annual Reports of the Department of Agriculture, 1955-1958; and the Nyasaland African Loans Board, Annual Reports, 1961-1962, Government Printer, Zomba.

199 Annual Report of the Department of Agriculture, 1957, Part I, pp. 16-17; and 1960, p. 14.

200 Kettlewell, op. cit., p. 246; and Colonial Annual Report, 1960, London, H.M.S.O., p. 7.

201 See, for example, Ghai and McAuslan, Public Law and Political Change in Kenya, 1970, pp. 86-88.

202 Source: Annual Reports of the Department of Agriculture, 1955-1962; and Colonial Annual Reports, 1955-1962.

203 No. 2 of 1902; and F.O. 2/670, Sharpe to F.O., 21st July 1902.

204 See Nyasaland Government, The Story of Nyasaland, 1891-1951, Central African Archives, 1951, p. 88, for a note on early banking services in Nyasaland.

205 By Section 93 of the Companies Consolidation Act 1908 (8 Edw. VII C 69), which is applicable in Malawi, any charge by a company must be registered. A perusal of the Register of Company Charges in Blantyre confirms that debentures have been a very popular way of securing agricultural loans from commercial banks.

206 This was the case with the Tobacco Advances Scheme. See File S1/575^{A}/38, Folios 26 to 29.

207 Bills of Sale Ordinance, No. 7 of 1916, as amended by Ordinance No. 7 of 1937. These statutes applied to the protectorate the United Kingdom Bills of Sale Acts 1878 and 1882, 41 and 42 Vict. C 31 and 45 and 46, Vict C 43.

208 Section 4.

209 No. 37 of 1955.

210 Section 2.

211 Hon. R.W. Kettlewell, LEGCO proceedings, 70th session, 5th December 1955, p. 8.

212 Sections 3-13.

213 Section 2.

214 Kettlewell, op. cit., p. 11.

215 See Chapter IV (4)(b).

216 See Note 12 above.

217 No. 5 of 1903.

218 F.O. 2/748, Major Pearce to F.O., Despatch No. 124, 4th June 1903.

219 Section 4.

220 See: General Revision Ordinance, No. 12 of 1912; Credit Trade with Natives Ordinance, No. 15 of 1926 and No. 23 of 1950; and Credit Trade with Africans (Repeal) Ordinance, No. 18 of 1958.

221 Hon. K.E. Mposa, 65th session of LEGCO, 1st May 1950, p. 11.

222 Hon. B.E. Lilley, Ibid., p. 13.

223 L.J. Chimango, "The Money Lender in Court", Journal of Social Science, Vol. 6, 1977, p. 84; and, generally, pp. 83-95.

224 Ibid.

225 Ibid.

226 Section 3 of Ordinance No. 7 of 1934. Note that this clause was a replica of Section 1 of the English Money Lenders Act 1900 (63 and 64 Vict. C 51), but other provisions of this Act were truncated from the Nyasaland Ordinance.

227 Section 2.

228 W.O. Jones, "Agricultural Trade Within Tropical Africa: Historical Background", in R.H. Bates and M. Lofchie (ed.s), Agricultural Development in Africa, Praeger Publishers, New York, 1980, p. 26 and generally, pp. 23-45. For other accounts on the evolution of controlled agricultural marketing in Africa, see: Bauer, op. cit., Chapter 20; Ocran, op. cit., Chapter 1; and Bates, op. cit., Chapter 1.

229 C. Ehrlich, "Marketing Boards in Retrospect; Myth and Reality", in African Public Sector Economics, proceedings of a Seminar held in the Centre of African Studies, University of Edinburgh, November 27th and 28th 1970, p. 124: quoted by Jones, ibid., p. 26.

VI POST-COLONIAL TRENDS IN LAND ADMINISTRATION AND AGRARIAN CHANGE

The preceding chapters have shown that significant changes in colonial agricultural laws and policies began to take place when elected African representatives got into LEGCO and government after the 1961 General Elections. By the time when independence was formally granted on 6th July 1964, Thangata was practically abolished and some of the European estates on which it was practised were repossessed for African occupation; the use of criminal sanctions to compel Africans to adopt new agricultural practices was abandoned in favour of persuasion and co-operation; statutory bodies responsible for the marketing of African produce were amalgamated and placed under greater African political control; the legal framework for encouraging Africans to break the monopoly of Europeans in the cultivation of special economic crops was in place; and racial restrictions on the provision of informal credit to the Africans were removed. All these changes were, however, specific reactions to particularly felt African grievances in the colonial agricultural economy. This settlement of political scores did not of itself provide the legal milieu for rural agrarian change, which was instantly recognized to be the most effective way of dealing with the desperate poverty of the nation and the majority of the population.[1] The African government had to define its agricultural goals and eventually evolve legal and other mechanisms for implementing them.

The first five-year development plan produced by the African government in 1962 listed the following as the basic ob-

jectives of a new agricultural policy:[2]

1. To commercialize farming and make it a source of income for the masses.

2. To increase yields per acre by modernizing farming methods, thereby freeing more land for cash crop production.

3. To conserve and develop natural resources.

4. To undertake research.

The plan also stated that the commercialization of agriculture entailed "encouraging the masses to take cash crop farming, assisting them with loans, introducing new cash crops, streamlining the marketing organization, stabilizing prices of primary products and strengthening extension service staff".[3] The second plan produced for the years 1965-69 deviated from the first plan and the policies on which the Malawi Congress Party fought the 1961 elections by being less specific on the streamlining of the marketing organization and the encouragement of co-operative societies in agricultural production and marketing.[4] There was no change, however, in the other basic objectives of the agricultural policy.

In 1971, a long-term statement on development policies was issued to obviate the need for periodic preparation of development plans. The statement reiterated that increasing agricultural productivity remained the basic objective of the government. The method now favoured for the attainment of this objective was two-pronged, involving "a general effort to raise the productivity of the mass of a million small farmers through extension service and the provision of guaranteed and

acessible markets", and an intensive effort to develop the infrastructure, credit and extension services in projects and schemes located in areas where the potential for certain crops was very good.[5] The aim of this chapter is to investigate how this two-pronged approach to agrarian change has affected the laws and policies on general land administration, production and marketing of economic crops and credit allocation. This will be followed in Chapters VII to VIII by an intensive review of land law reforms considered essential for one of the rural development projects falling within the second limb of the "two-pronged" approach. Before this review of law and agrarian change in the post-colonial era is attempted, a very brief note on the political milieu will be a useful prelude.

1 The Political Context for Agrarian Change

When the M.C.P. emerged as the undisputed victor in the 1961 elections, taking more than 99 per cent of the African vote,[6] other political parties teetered towards extinction. In the pre-independence elections of 1964, all candidates fielded by the M.C.P. were returned unopposed.[7] Malawi, like other former British dependencies in Africa, was set to become a one-party state. This, however, formally took place after a couple of years. In the intervening period, soon after independence, political disagreements errupted between the Prime Minister under the independence constitution and several of his cabinet ministers who were eventually expelled from the government. In the light of these disturbances, the Republican Constitution of 1966 included very unique provisions which ensured that political life in Malawi should revolve around

the M.C.P. and its Life President since September 1960, Ngwazi Dr. H. Kamuzu Banda.[8]

The Constitution declares the M.C.P. to be the sole legal party of Malawi and gives it a greater say in the selection of a candidate to be presented to the electorate for confirmation as President of the Republic, but Dr. Banda was to be the first President.[9] In December 1970, he was made President for life.[10] The powers he can exercise under the Constitution are virtually unlimited. As Head of State, supreme executive authority and commander-in-chief of the Army, he can "act in his own discretion" and is "not obliged to follow advice tendered by any person".[11] There is no Vice-President, but the President can appoint any number of ministers from Parliament or outside it to hold cabinet positions.[12] Any appointee who is not a member of parliament becomes one by virtue of his appointment. As head of the Party, the President has a right to vet persons nominated to stand for parliamentary elections. He can also nominate specified numbers of persons to take seats in the chamber without facing the electorate.[13] Nominated members can lose their seats if the President so directs, and elected members can also be expelled from the chamber if they are deemed to have lost the confidence of their constituency.[14] Since the M.C.P. provides parliamentary candidates and its members dominate the constituencies, loss of Party membership automatically entails loss of the parliamentary seat. The normal tenure for a parliament is five years, but the President can dissolve it at any time and must do so if it passes a vote of no confidence. Parliament will also be automatically dissolved upon the death or resignation of the President.[15]

As a result of these constitutional provisions, Parliament has been made subservient to the President, the executive and the Party. Members are not expected to voice opposition to Party or government policies. Their main duties are to approve legislation; to explain policies to their constituents; and to report back to the Chamber the solid support for Party, government and Life President shown by the constituents. This political disciplining is not confined to members of Parliament. Every citizen of Malawi is implored by the Party to observe the "four corner-stones" upon which the Republic is founded, namely, "unity, loyalty, obedience and discipline".[16] Those who do not take heed can be severely punished, the most effective penalty being preventive detention which is permissible under the Republican constitution. This penalty was difficult to impose under the independence constitution because of an extensive "Bill of Rights" of the type included in the constitutions of several Commonwealth countries on the attainment of independence or self-government status.[17] The Republican Constitution replaced the Bill with a non-justiciable statement of fundamental principles upon which the government is founded, and one principle recognizes the sanctity of personal liberties enshrined in the United Nations Universal Declaration of Human Rights.[18] However, this and other principles in the statement can be abrogated "in the interests of defence, public safety and public order".[19]

The seemingly autocratic political and constitutional system has been described as "a paradigm of all that is antithetical to development".[20] It has been alleged that the concentration of powers in the President leads to "log jams" and

the taking of hasty and superficial decisions. Another criticism is that the system is devoid of "political rights essential to participation and the articulation of interest by the subsistence sector";[21] it encourages political patronage and rewards elites who are faithful to the Party, but does not benefit the bulk of the population.[22] Additional support for this contention derives from the fact that elites and Party leaders in Malawi are openly encouraged to participate in business activities, especially commercial farming, without restrictions of the type imposed by the leadership codes in Zambia or Tanzania.[23]

It is obvious that the political and constitutional system of Malawi leaves much to be desired, but the sweeping allegation that it is a paradigm of all that is antithetical to development overstates the weakness and can be contested on several grounds. First, the evidence in support of the charge that decisions tend to be hastily taken and are superficial is not overwhelming. A more appropriate charge here would, perhaps, be that political calculations have sometimes outweighed economic considerations in the formulation and implementation of key projects.[24] This is not superficiality. Secondly, although the system has the potential for encouraging political patronage and an inequitable distribution of benefits between elites and the bulk of the population, it is difficult, on the evidence available, to indict political leaders of insincerity in the administration of agrarian change. Thirdly, supporters of the regime have been able to contend that the rigorous political disciplining has ensured political stability and continuity of government, which is a sine qua non for

development.[25] It is, moreover, difficult to account for the longevity of the regime if the system is as crudely autocratic and repressive as a superficial analysis would suggest. Repression alone has not sustained many African regimes. This is a truism which has led to more sophisticated analyses showing that some aspects of the system encourage political mobilisation as well as some form of interest articulation by the subsistence sector.[26]

The M.C.P., the sole political party, is structured in a way which encourages political mobilization as well as interest articulation. It is centralized at the top, where the National Executive Committee is composed of Presidential appointees; and diffused at the botton, where local branches located even in the remotest corners of the country are composed of elected office-bearers. These elected representatives have a greater say in the composition of Area, District and Regional Committees for the main party and its two constituent organs called the League of Malawi's Women and the Youth League. Party representatives from Area Committees upwards meet annually at the National Convention to review and discuss the internal policies which affect ordinary men and women in the villages. This gathering has been billed as the "first Parliament of the nation", and some convention resolutions have indeed been translated into statutory enactments. The most notable are perhaps the "decency in dress" laws which prohibited the wearing of mini-skirts in Malawi.[27]

Alongside the Party machinery, a National Development Council was constituted in 1968 for the specific purpose of

planning and co-ordinating the implementation of development programmes. The council consisted of the President as chairman; top civil servants from responsible ministries and government departments; and representatives from important parastatal organizations like ADMARC and the Malawi Development Corporation. Decisions affecting development programmes and feedbacks passed between the Council and village Action Groups through Area Action Groups, District Development Committees or institutionalized rural development projects, and government departments or sections of ministries responsible for various aspects of agricultural development.[28] It is not clear whether the National Development Council is still functioning, but an effective process of interest articulation which is still available is the tabling of parliamentary questions during parliamentary sessions. Members of Parliament have effectively used this process to alert the government and political leaders to the special developmental requirements of their constituencies.

Other interesting features of the political system in Malawi which should not be hastily derided are the anti-communist rhetoric of the politicians, the absence of populist concepts and ideology in the Constitution and Party documents, and the fact that politicians, civil servants and other elites are encouraged to participate in business enterprises. These features confirm the capitalistic tendencies of the present regime, but do not necessarily suggest that colonial capitalism in the agricultural economy has continued unmitigated. Private capital and market forces have not had a free rein in controlling agricultural or business activities in post-

colonial Malawi. State intervention and Ministerial control are some of the pervading themes of agrarian legislation reviewed in this chapter.[29]

2 Land Administration

The first and most important post-colonial statute on land administration is the Land Act of 1965.[30] The Act was passed in appreciation of the fact that land was the "most important asset in the economic life" of the new nation.[31] It heralded a stricter regime of land administration under which the holding and use of each land category was to be controlled, monitored and attuned to the economic needs of the country. The Act also attempted to consolidate the various statutes which dealt with land administration during the colonial period. The strictness of the new regime of land administration can be appreciated by considering the following issues: redefinition of land categories; control of private land dispositions; acquisition and forfeiture; control of public and customary land dispositions; and control of the use of customary land. This will also involve a review of the Forfeiture Act of 1966[32] and the Land Acquisition Act of 1970,[33] two more statutes which were enacted to bolster the strict land administration regime.

(a) Redefinition of Land Categories and the Legal Concept of Land

The three land categories existing at the time of independence were retained by the Land Act, but African Trust

Land was renamed Customary Land. The definition for this category is land "held, occupied or used under customary law". Land "owned, held or occupied" under a Certificate of Claim, a freehold or leasehold title, or a private land title registered under the Registered Land Act is "private land". Public land refers to all land "occupied, used or acquired by the government", and any other land which does not fall within the categories of private and customary land. Public land also includes land reverting to the government on the termination, surrender or falling in of any freehold or leasehold title pursuant to any covenant or the operation of law. Table 11 below shows the relative sizes of these three land categories.[34]

By Section 25 of the Land Act, customary land, the largest category, is declared to be "the lawful and undoubted property of the people and is vested in perpetuity in the President" for the purposes of the Act. As a statement of law, this declaration is ambiguous. It suggests that every Malawian has a right to land. In practice some Malawians have rights to land in certain localities. These could be places of ethnic origin or where land has been allocated elsewhere by customary authorities. The declaration should be regarded as a simple assertion of the fundamental character of customary land law. It echoes the oft-quoted statement attributed to a Nigerian chief that "land belongs to a vast family of which many are dead, few are living and countless are yet unborn".[35] The vesting of the land in the President echoes the position under colonial rule when African Trust Land was vested in the Secretary of State for the use and

common benefit of the Africans. The original version of Section 25 vested the land in the "government", but this was changed, apparently because the term was "too ambiguous, too vague, too impersonal [and] too collective".[36] The Chief "trustee" or "custodian" of customary land had to be a tangible head of state. The land is vested in the President, presumably in his official capacity. It would have been superfluous to add the words "in perpetuity" if the intention was to vest the land in his personal capacity. It is nevertheless unfortunate to describe customary land in this way, because of the complicated ramifications of "perpetuities" under received English land law.[37] It would have sufficed to vest the land in the President as Head of State.

Although the definition of customary land is fairly exclusive, there is an overlap in the definitions of private and public land. Land held by the government on a lease carved out of a freehold title may be private and public land at the same time. The reversion falls within the definition of private land and the lease is within the definition of public land. Conversely, where a lease is granted out of public land, the tenant receives title to private land, but the reversion is evidence of public land. Part IV of the Act appears to suggest that public land leased to private persons should be regarded as private land for the duration of the lease.[38]

If the status of a piece of land is in doubt, the Minister is empowered to issue a certificate which would be prima facie evidence of its category in any legal proceedings.[39]

In practice, there will always be a presumption that land of doubtful identity is public land. This stems from the definition of this category as including all land which is not private or customary land. It is arguable that customary land should have been made the residuary land of the Republic since it is occupied by the majority of the people, and it is not as readily definable as public land. It should also be noted that private land created from leases of customary land does not revert to its former status upon the termination of the lease. It becomes public land as defined by the Act. By this process the government might become the holder of large tracts of land, and customary land which is flamboyantly described as "the lawful and undoubted property of the people" of Malawi may diminish in size.

By Section 8, public land is vested in perpetuity in the President, but not necessarily for the use and common benefit of the people, nor "for the purpose of this Act". Public land is sub-divided into the categories of Government land and public roads. Government land is "all public land other than public roads".[40] The latter bear the meaning described by the Public Roads Act.[41] By Section 9 of the Land Act, "no right of entry into any Government land shall be implied in favour of any person", and the use and occupation of all Government land which is not occupied by the President shall be controlled by the Minister. The effect of these provisions is to make public roads accessible to anyone without permission, but to make it impossible for any squatter to establish land rights by prescription or limitation on Government land.[42] Section 10 makes it an offence for any person to occupy public

land without a valid lease or grant issued under the authority of the Minister.

Although the three categories of land have been defined with some measure of clarity, the Land Act fails to provide a functional definition of land. The significance of this omission becomes apparent when the varying legal conceptions of land are taken into account. The dictionary definition of land is "the solid part of the earth's surface", but the general legal conception at common law is wider.[43] It is encapsulated in two Latin maxims. The first, cuius est solum eius est usque ad coelum et us ad inferos, expresses the idea that land has volume: it extends upwards to infinity and downwards to the centre of the earth; or, in more realistic terms, it includes the soil, the air space above it and the minerals below. The second maxim, quicquid plantatur solo, solo cedit, expresses the idea that whatever is attached to the soil becomes part of the land. Thus, houses built on the land may become part of it. This wide conception of land at common law is often restricted to suit the particular purposes of statutory law.[44]

There is no universal conception of land under the customary laws of various ethnic groups in Africa. One school of thought claims, however, that customary law recognizes a concept of land akin to or corresponding with the maxim quicquid plantatur solo, solo cedit. Thus, natural attachments like rivers, streams, creeks, growing trees and artificial structures like houses pass with the surface soil.[45] A second school of thought claims that land under "customary law" orig-

inally meant "the soil and the soil only"; buildings and trees on it remained the property of the builder or planter, but this conception became unsuitable and was adapted after the introduction of cash crops and permanent buildings.[46] The second school is preferable, if only because it acknowledges that customary laws can be adapted to suit changing socio-economic conditions. But both views can be criticized for attempting to universalise "African customary law". Varying conceptions of land may have applied in different areas, at different times and among dissimilar ethnic groups.[47]

Among the Chewa and other matrilineal groups of Malawi, two conceptions of land should be distinguished.[48] The first, dziko, was synonymous with a country or the political domain of a ruler. In this context land included the soil, subsoil, mountains, lakes, rivers, natural forests and minerals under it. The second concept, malo, referred to a portion of the earth's surface allocated for the use of an individual or family. The community retained some common rights over land in this narrower sense. With the permission of the occupier, which was not to be unduly withheld, villagers were entitled to collect firewood, grass or building materials or graze animals on the land. There was also a distinction between the soil and houses or trees and crops on the soil which remained the exclusive property of the planter or occupier. It can therefore be concluded that the maxim quicquid plantatur solo, solo cedit, was not part of customary law among the matrilineal Chewa of Malawi.[49]

The question which arises under the Land Act is whether one conception of land should apply to all three categories, or whether customary notions should prevail over customary land and the common-law conception over public and private land. The second option would appear to be the logical deduction from the omission of a functional definition from the Act. However, other statutes in pari materia to the Land Act have adopted the Common Law conception. The Customary Land Development Act, for example, defines land as including "land covered with water, all things growing on the land, and buildings and other things permanently affixed to land".[50] It is untidy to have varying conceptions of land in statutes dealing with the same subject-matter. Until otherwise held, it must be presumed, therefore, that sheer oversight prevented the draftsman from including a definition of land in the Land Act which would have been at variance with customary conceptions. The General Interpretation Act provides further indirect support for this presumption by defining immovable property as "land whether covered by water or not, any estate or interest in or over land or arising out of or relating to land and anything attached to the earth or permanently fastened to anything so attached".[51] An additional point to note is that none of the Malawi statutes affecting land adopts the maxim cuis est solum eius est usque ad coelum et us ad inferos. The right to the air space above or the minerals below does not necessarily pass with the occupation or use of the soil.

(b) Control of Private Land Dealings

Apart from enacting laws designed to check Thangata, the colonial administration did not generally concern itself with private land dealings. Sales or leases of private land were private matters to which English land law as received on 11th August 1902 was applicable.[52] Official aloofness on control of private land dealings was short-lived after independence. The Land Act was amended in 1967 to enable the government to police transactions involving foreign corporations.[53] Section 4 of the Land Act now stipulates that land shall not be assured "to or for the benefit of or on behalf of any body corporate" unless it is authorised to hold land by licence from the President or incorporated under local company laws. Any disposition which fails to comply with this stipulation is of no effect and cannot be enforced in any court, and documents of title relating to the transaction can be denied registration in Malawi. The President has an "absolute discretion" to decide whether or not to grant foreign corporations a licence to hold land, and his decision is final and unquestionable in any court. Section 4 also empowers the Minister to make rules prescribing the particulars to be furnished and the fees to be paid with each application for a licence.

Details on the exercise of Presidential and Ministerial powers under Section 4 are not available to the public. It would appear that no particulars or guiding rules have been published by the Minister. Foreign companies wishing to hold land in Malawi probably prefer to have a local subsidiary incorporated under the Companies Act. Apart from the absolute

discretion of the President and the exclusion of the courts from the decision-making process, this measure of control against foreign ownership of land is not controversial. If land-holding and use is to be closely monitored for the sake of the country's economic well-being, it is necessary to keep absentee landholding to a minimum and to ensure that landholders are locally based and accessible.

The second government inroad into private land dealings was effected when Section 24A was added to the Land Act in 1974.[54] This section stipulates that "any person who intends to offer for sale or otherwise to convey, lease, transfer or assign private land shall, not less than thirty days before [making the offer or effecting the transaction], give notice in writing to the Minister of his intention". Acting or attempting to act in contravention of this requirement can attract a fine of k 1,000 and imprisonment for twelve months. But the requirement does not apply to a number of specified transactions, including dispositions by or direct to the government; leases for a non-renewable term not exceeding three years; sales pursuant to a court order or by public officers acting in an official capacity and pursuant to any written law; and any mortgage or other hypothecation made in good faith as a security for the repayment of money lent or for the performance of any contract, so long as the mortgage or hypothecation is not made for the purpose of avoiding or evading the requirements of the section.

The enactment of Section 24A was prefaced by a Ministerial claim that "... because of the rapidly expanding economy

of Malawi, it is absolutely necessary that the Government must know of any intended sales and transfers of private land."[55] The thirty-day notice requirement was apparently intended to give the government an opportunity to decide whether the land may be required for a public purpose and to effect the compulsory acquisition procedure without causing a rescission of private contracts. Knowledge of proposed dealings was also essential for the control of land transfers to absentee landholders. These ostensible reasons for Section 24A are also in the mainstream of the post-colonial land administration regime and are not inherently controversial. The actual application of Section 24A, however, gives rise to some misgivings. It should be noted that the obligation on the potential vendor is to notify the Minister at least thirty days before the transaction is effected. The Land Department, in practice, advises potential vendors to wait for "ministerial consent", even if it takes an inordinately long period to arrive. Private land dealings are matters which the President, being the Minister responsible for land matters, was keen to oversee and take responsibility for issuing "consents". Because of his phenomenal workload, some proposed transactions tooklonger than thirty days to receive ministerial approval, and the use of Section 24A in this way had the general effect of delaying private land conveyancing. Delegation of responsibility to a less senior officer in the Ministry has apparently reduced the delays.[56]

The second problem with the application of Section 24A is that the Minister has been able to withhold consent for transactions, even where land is not required for a public purpose

and the proposed purchaser is not an "absentee landlord". The character or identity of the proposed purchaser has been the most important factor in the rejection of applications. Persons refused permission to purchase land have included criminals, members of proscribed organizations and other political malcontents; Asians attempting to establish trading posts in rural areas contrary to government policy;[57] and non-Malawians resident in the country on a non-permanent basis. Section 24A does not provide an adequate legal basis for the vetoing of proposed transactions in all these cases; it simply requires the vendor to notify the Minister, but not to select a purchaser of a certain political character. The Act is also silent on the question of appeals against Ministerial decisions, and no-one has seen it fit to challenge the Minister in the courts for over-reaching his powers by rejecting proposed transactions under Section 24A. It is acknowledged by land administrators that the position should be clarified by an amendment which is now probably overdue. If the land acquisition law to be presently reviewed is indicative of government thinking, it can be anticipated that an amendment to Section 24A will put Ministerial decisions beyond review and beyond the reach of the courts.

(c) Compulsory Acquisition of Private Land

Compulsory acquisition is one of the processes by which private and customary land can be converted into public land. The justification for initiating the process is some overriding public need, and the occupier is entitled to compensation for the loss of his land rights. Compulsory acquisition

of customary land raises special problems because of the difficulty of ascertaining acquirable individual interests and the amount of compensation due therefor. This may be one of the explanations for the existence of separate provisions on conversion of customary land into public land in the Land Act.[58]

As seen in Chapter IV, the first statute on compulsory acquisition of private land was enacted in 1907. The law was revised in 1948 to facilitate the acquisition of private estates as a solution to the problem of Thangata. This was the law in force at the time of independence. However, Section 16 of the Bill of Rights chapter of the Independence Constitution added several riders to the law.[59] The first conditions reiterated that compulsory acquisition should not be effected unless it was necessary or expedient in the interests of defence or some public concern. Public concern here included acquisition of land for resettlement purposes, or for redevelopments benefitting the community. The second condition stipulated that the law should provide for the prompt payment of compensation and provide for access to courts or other tribunals with authority to determine the legality of the exercise, the sufficiency of the compensation, or the promptness of the payment. A third rider stipulated that the dispossessed proprietor should not be prevented from remitting, within a reasonable time, the compensation received to a country outside Malawi free of taxes, deductions or other changes. This provision was presumably inserted for the benefit of British expatriates who occupied most of the private land which the independent government would have liked to repossess. The effect of the provision was to restrict such acquisitions because of

the economic necessity of avoiding large currency exports.[60]

As seen above, the autochthonous Republican Constitution of 1966 replaced the Bill of Rights with a non-justiciable statement on fundamental principles upon which the government is founded. The clause on compulsory acquisition of property states: "No person should be deprived of his property without payment of fair compensation, and only where the public interest so requires".[61] The generality of this clause was intended to dilute the previous constitutional restraints which were imposed by the British government and accepted with reluctance by the African government. The way was now open for the compulsory acquisition law to be unleashed without the irritation of possible court actions.[62]

Outside the constitutional provisions, the first post-colonial reform of the land acquisition law came as an addition to the Land Act in 1969.[63] A new Section, 35A, empowered the Minister to take over private land which a holder had "wastefully and unreasonably failed to develop". The compensation payable was the sum equivalent to the market value of the land at the time of the Minister's decision. In addition to the unfettered discretion of the Minister in the matter, the other innovatory aspect of Section 35A was the government's willingness to use the compulsory acquisition law to "counter waste and speculation, where these factors act as a damper on rapid development".[64] Such resolution was lacking during the colonial period.

Section 35A was short-lived. It was repealed and replaced by a comprehensive Land Acquisition Act in 1970.[65] This is the law currently in force. Two objectives underlay the enactment of this statute. The first was to consolidate Section 35A of the Land Act and the Land Acquisition Statute inherited from the colonial period. The key provision for the attainment of this objective is Section 3. It empowers the Minister to acquire any land either compulsorily or by agreement "whenever he is of the opinion that it is desirable or expedient in the interests of Malawi to do so". This enables the Minister to counter "waste and speculation" and to acquire land for all the "public purposes", and more, stipulated by the Bill of Rights in the Independence Constitution and the colonial acquisition law. The "surfeiting" of the Minister with discretion is continued by the procedural provisions.[66] An acquisition notice can be served on any person known to have an interest in the land, and he must submit the particulars thereof within two months. If he is capable of transferring the land, this must be done within a specified period of not less than two months. If he fails, notwithstanding the provision of any other law or court order,[67] the Minister assumes the mantle of transferor and transfers the land to the President. The land becomes public land upon registration in the deeds registry, and it is freed of any encumbrances which the transfer document fails to mention.

The second and most important objective of the 1970 Act was to revise provisions on payment of "fair compensation" to the satisfaction of the African government. The bone of contention was the government's obligation to pay compensation

based on the current market value of the land acquired. A spokesman contended that it was inequitable for the government to pay this amount for land which has appreciated in value through no effort of the holder. He submitted:

> "... The privilege of land ownership must carry with it an obligation to develop it to its maximum potential. The existing provisions of the law ignore this fundamental obligation."[68]

The solution proposed by the Act is to provide for the payment of the full current market value of the land only when the efforts of the holder have contributed to the value appreciation.

Section 10(2) enjoins the Minister to assess fair compensation "by adding together-

> (a) The consideration which the person entitled to the land paid in acquiring it;
>
> (b) The value of unexhausted improvements to the land made at the expense of the person entitled thereto since the date of his acquisition thereof; and
>
> (c) Any other appreciation in the value of the land since the date of such acquisition."

If the Minister is satisfied that the landholder has, "either through absence from the country or otherwise", failed to ensure reasonable development or the satisfactory cultivation of the land, the assessment will not include "any other appreciation in the value of the land".[69] If the holder originally acquired the land by way of gift, inheritance or otherwise

without payment of full consideration, or by way of any "fictitious or artificial transaction", the method of assessment stipulated can be discarded and replaced with compensation equal to "the consideration paid on the last preceding acquisition of the land",[70] plus the value of unexhausted improvements effected thereafter by the current holder. In no case, however, is compensation to exceed the current market value of the land.[71] Unexhausted improvements in this context refer to "anything permanently attached to the land directly resulting from the expenditure of capital or labour and increasing the productive capacity, utility or amenity thereof, but does not include the results of ordinary cultivation other than standing crops and growing produce".[72]

Section 9(2) of the Act contains the other key reform on the law relating to the payment of "fair compensation" for the acquisition of private land compulsorily. It gives the Minister the discretion to decide whether to pay the compensation in one lump sum or by instalments, "at such times, and at such rates of interest on outstanding balances, as he may specify". The previous constitutional requirement for "prompt" payments does not appear anywhere in the provision, and the recipient of the compensation is not guaranteed the right to remit the amounts to a country of his choice. Although the African government had no inclination to remain bound by constitutional safeguards imposed by colonial masters, the rise in land prices after independence provided an understandable justification for a change in the law. It was difficult for a government grappling with problems of financial inviability to remain bound by a law which entailed, among other things, large

currency exports. The economic necessity for the reform was accepted by the parliamentary leader of the European settlers. He simply sought assurances that payment of compensation by instalments would be the exception rather than the rule; that the payments would be spread over a minimum period; and that the rates of interest on the outstanding balance would be reasonable.[73]

Another constitutional safeguard which the African government was not inclined to retain was the requirement for access to the courts for the determination of issues like the propriety of the acquisition or the fairness of the compensation. This avenue was left open, but the Act emphasized that "no proceedings in any court shall constitute grounds for delay in yielding up possession of any land" in accordance with the notice served by the Minister.[74] An amendment passed in 1971 then declared that "an assessment of compensation made by the Minister ... shall be final and shall not be subject to any appeal, or to any review by any court".[75] This was accompanied by the rather flimsy explanation that ascertainment of compensation was "more suitably a matter for administrative rather than judicial inquiry, particularly since judges have no special experience or knowledge of the matters involved".[76] It can be argued, with respect, that even the Minister is unlikely to have special experience or knowledge of the matters involved. As one European Member of Parliament noted, the land valuation experts relied upon by the Minister when making his decision could equally be made available to a court of law as expert witnesses in a disputed assessment.[77] The main reason for the amendment was the mistrust of, or lack of confid-

ence in, the courts as proper regulators or supervisors of executive decisions in land administration.

It should be noted, in conclusion, that some of the key features of the post-colonial compulsory land acquisition law in Malawi are not unique or a necessary product of its "idiosyncratic" political system. Tanzania, a country which espouses a different political philosophy, adopted a law under which no constitutional safeguards were retained; compensation on the basis of the full market value was not payable if the land was "inadequately developed"; and a "consolation" or "solatium" was not payable in addition to the compensation. A subsequent law on the acquisition of buildings prevented the courts from reviewing the decisions of the executive. On the other hand, Kenya, a country whose political choices sometimes resemble those of Malawi, retained the constitutional safeguards which the colonial masters imposed, together with provisions on the payment of "market value" compensation plus a solatium of 15 per cent.[78] The latter is an additional payment which was removed from law during the colonial period in Malawi.[79] A feature which, however, seems common to all the East and Central African countries, including Malawi, is the infrequency of resort to compulsory acquisition.[80] In countries where the power and influence of government is so pervasive, prudence dictates that private landholders negotiate acquisitions "voluntarily"!

(d) Forfeiture

This is the second process by which private land can be converted into public land. The law of forfeiture resembles the law of compulsory acquisition in that it is not readily applicable to customary law and it is contained outside the Land Act. But this is where the superficial resemblances end. The law of forfeiture has a different history; it affects a certain class of persons and all kinds of property in addition to land; and it is penal in nature. Compensation is, therefore, not payable.

By Section 2 of the Forfeiture Act,[81] the Minister can declare a person to be subject to forfeiture if he "is, or has been, acting in a manner prejudicial to the safety or the economy of the State or subversive to the authority of the lawfully established Government". A forfeiture order can also be imposed on a person employed in the public service who has committed a theft of public property or money in his custody, or has failed to account for such money or property "as a result of gross negligence or recklessness". The conviction and punishment of the public servant under the appropriate criminal law is irrelevant for the purpose of declaring him subject to forfeiture. The order can also be imposed irrespective of whether the person is within or without Malawi.

The publication of a forfeiture order renders the affected person incapable of entering into contracts or engaging in legal action affecting his real or personal property. Control over the property is transferred to the Registrar General, who

is also empowered to exercise the powers of discovery vested in an official receiver in bankruptcy proceedings. Any transaction made by or on behalf of the affected person after the publication of the order can be rendered void if it appears to the Minister to have been made for the purpose of defeating the forfeiture.[82] By a law passed in 1974, if real property and other business interests of an affected person resident outside the country have been transferred to a nominee who is a citizen of Malawi, there will be a presumption that the affected person is the "sole owner" of the properties.[83]

Section 5 of the Forfeiture Act enjoins the Registrar General to dispose of property vested in him by virtue of a forfeiture order in the following manner:-

(a) In satisfaction of the costs, charges and expenses of forfeiture administration;

(b) In satisfaction of the debts and liabilities of the affected person; and

(c) In paying such sums as he may deem fit, for the avoidance of hardship to any wife, child, reputed child or any relative who can satisfy the Registrar General that he was dependent upon the affected person.

The remainder of the property is transferable to the government to be used and applied in such manner as the Minister may direct. By Section 6, the Minister is empowered to appoint a Forfeiture Committee and entrust it with such functions as he may see fit, one of which may be to issue directions to the Registrar General. The administration of the Act has, so far,

been the responsibility of the Registrar General. No committee has been constituted under this provision. By Section 7, no legal proceedings can be instituted against any person or the government "in respect of anything done or purported to be done under the ... Act". Section 8 concludes the Act by giving the Minister a battery of wide powers to enable him to prescribe regulations for the general administration of the Act.

The assumption by the state of such awesome powers over private property has no peacetime colonial precedent. The law of forfeiture appeared for the first time in 1966. The mischief which occasioned it was reported thus:

> "Since 1964, particularly during September, October, November, December up to now ... people have engaged in subversive activities of one kind or another. Some of these people, fearing the consequences of their subversive activities, have run away, [dishonouring their debt to the government and other persons in the process] ... As the law stands now, there is nothing an individual ..., the government ..., or [a] public body ... can do ... The result is that a number of people are suffering - they cannot sue these people who are out of the country in the courts of law because they cannot be found ..." [84]

The ostensible object of the Act was, therefore, to provide a mechanism for liquidating the debts of subversive persons who absconded from the country. The law was unfortunately extended to apply to another category of offenders, namely, public servants, who may not be subversive and may still be in the country. Malawi in fact has a special, rigorous regime of criminal law and sanctions for "thefts by Public Servants".[85]

The extension of forfeiture law to this class of offenders is disconcerting, not least because it can be done regardless of whether they have been convicted or acquitted under the penal code.

The second disconcerting feature of the law concerns what one critic has appropriately dubbed "a surfeit of discretion"[86] reposed in the Minister. There is no limit to what he may deem to be a "subversive act" or an "act prejudicial to the safety or economy of the state". If such acts are by nature impossible to pre-determine, a minimum assurance against the infringement of basic human rights would be to permit recourse to the courts or impartial tribunals on appeal. The Act is characteristically vague on recourse to the courts. Section 7 indemnifies administrators for anything done under the Act, but it was drafted in such a roundhouse manner that it may be used to preclude suits challenging ministerial decisions. In any case, if the African government is so distrustful of its own courts that it cannot permit recourse to them on more a-political issues like the assessment of compensation for compulsory land acquisitions, it can be presumed that there was no intention to permit judicial interference in forfeiture. This law has been applied regularly since its enactment, but the notices published in the government gazette contain no more than the name and address of the affected person. It has not been possible, therefore, to build a precedent of acts which may entail forfeiture. It can only be said that the Act has been applied to Africans, Asians and Europeans, and to local partnerships as well as private companies.[87]

The third disconcerting feature of forfeiture in Malawi is the ultimate destination of the forfeited property, if there is enough of it to meet the civil obligations of the affected person. There are bound to be cases when the ultimate transfer of the property to the government will be unfair to the person or his family and successors. As observed by one critic of the law in Parliament, a less dramatic approach would have been to treat the affected person as an enemy alien in a state of war, and to hold the remainder of the property until his death, or for as long as the forfeiture order subsisted.[88] The force of this argument was not appreciated because the law was initially devised to apply to absconders, but forfeiture now affects persons resident and accessible in Malawi. Even more important, several orders have been rescinded and the affected persons restored to full public life. The law is silent on whether these people have a legal right to the restoration of traceable property. The practice remains typically subject to the inscrutable discretion of the executive.

Critics of the political order in Malawi are entitled to question the need for the Forfeiture Act outside a state of war, especially when its ostensible objectives can be attained under existing laws or with less repressive adjustments thereto. But if the conduct of government in Malawi necessitates the retention of the law, the Act must be redrafted to ensure that the basis for ministerial conduct is known to the public and legal checks on arbitrariness are imposed. The normal effects of forfeiture are so far-reaching that this may be the absolute minimum necessary for the prevention of unjustifiable erosion of basic human rights.

(e) Control of Public and Customary Land Dispositions

As seen in Chapter II, administration and control of customary land in matrilineal areas of Malawi was the responsibility of chiefs, village headmen and family leaders. Colonial rule superimposed the ultimate authority of the Secretary of State and his local representative, the Governor. The Land Act retains this structure and reposes control over the land and minerals thereunder in the Minister responsible for land matters. Acting under the special and general directions of the President, the Minister must exercise his authority "for the use and common benefit, direct or indirect, of the inhabitants of Malawi".[89] Chiefs have retained their land allocation functions under customary law, but they must observe Ministerial directions if so requested. This may include directions which supersede established land allocation customs and procedures. The Minister may, for example, order the Chief to allocate land en masse to persons from overcrowded regions of the country without requiring them to profess their allegiance and shower him with customary gifts.[90] The emphasis is on land administration for the benefit of the "inhabitants of Malawi", and national concerns can legitimately override local concerns in these resettlement programmes.

Ministerial powers of land administration extend to the conversion of customary land into public land if it is necessary for "a public purpose, that is to say for a purpose which is for the benefit, direct or indirect, of the community as whole or part of [it]".[91] As with the law for the acquisition of private land, the absence of a precise definition of "a

public purpose" is deliberate: it gives the Minister a wider latitude in the matter.[92] Statutory provisions on the acquisition of customary land are, however, rather thin. The acquisition takes effect upon the publication of a declaration in the government gazette, but the law does not provide for preliminary investigations or the service of notices to particular groups of persons with an interest in the land. It can be presumed, however, that this does take place despite the absence of enabling provisions.

By Section 28 of the Land Act, compensation is payable to any person who "suffers any disturbance of, or loss or damage to any interest ... he ... may have had ..." in the land. This is another mark of distinction between acquisition of private and customary land. Compensation is payable for other interests in the land rather than the land itself which, at customary law, is not regarded as a saleable commodity with a market value.[93] Thus, there is no need for the principles of assessment outlined for private land. The Act simply stipulates that the compensation for loss of interests in customary land must be reasonable. The land valuation department has a schedule of interest for which compensation may be payable at estimated values. The list includes houses of various types and durability, and growing crops and trees with varying values for different localities. The values are revised from time to time.

Customary land is on the whole cheaper to acquire than private land. But since it is the only source of livelihood for most peasant farmers, there is a need for some legal or

administrative constraint on profligate acquisitions by the government. Two provisions of the Land Act are useful for this purpose. If a permanent acquisition is not desirable, Section 27(2) enables the Minister to authorize occupation of the land for a temporary period not exceeding 7 years, renewable for a further period of 3 years. The land does not lose its customary status in this case. Even more important, Section 29(1) empowers the Minister to reconvert public land into customary land if it is no longer needed for a public purpose. Statistics on the use of this provision are not available, but the general increase in the size of public land since independence would suggest that it has not been used with telling effects.[94]

As suggested above,[95] it is also possible for customary and public land to be converted into private land. This is possible under Section 5, which empowers the Minister to "make and execute grants, leases or other dispositions of public or customary land for any such estates, interests or terms, and for such purposes and on such terms and conditions, as he may think fit". This is coupled with a proviso that the Minister must not make a grant of customary land for an estate greater than a lease for 99 years. This, in fact, is the preferred maximum interest for all dispositions of public and customary land. The reported exceptions are grants of land for the personal use of the President which have been made in fee simple and several industrial leases with options for the purchase of the freehold which have been exercised.[96] These exceptions will, hopefully, remain isolated aberrations; there is no need for the resuscitation of the leasehold and freehold debate,

which was settled long before the attainment of independence.[97]

Post-colonial leases of public and customary land can be granted for agricultural, industrial, residential and/or trading purposes. The duration ranges from 21, 33, 66 to 99 years. The proposed investment determines the length of a particular lease. Capital is also a determinant of the proposed acreage for an agricultural lease. The administration does not intend to grant expansive estates where the capital is small. Leases for residential and trading premises do not often exceed 1 or 2 acres.

The Minister is required to reserve a rack-rent in most leases, but he may reserve a lesser rent in leases granted to specified bodies like public corporations or charities, or to any other person if it is neither expedient nor equitable to impose the rack-rent.[98] The standard annual rent payable varies with the type of lease. An agricultural lease can fetch a minimum rent of k 1 per acre, despite the fact that profits for estate tobacco or maize can be in hundreds of kwacha per acre.[99] A residential/trading plot can fetch a minimum rental of k 10 per acre. The important variables here are population density and volume of business. Rents in the major towns and industrial centres are obviously higher. Section 16 implies into every lease a right on the part of the Minister to revise the rent at intervals corresponding to one-third and two-thirds of the term or seven years, whichever is less. Other implied covenants are detailed in the Land Act Regulations.[100] They are more or less the same terms applicable before independence. The important difference is that some of the agricultural lea-

ses carry additional development covenants fashioned for the particular estate. But the colonial problem of inspection and enforcement of development covenants still remains.

The number of agricultural leases carved out of customary land has increased dramatically in the post-colonial period because of the policy of encouraging elites and more affluent Malawians to undertake commercial farming of cash crops like tobacco. This is reminiscent of colonial land policy before the evolution of the concept of African Trust land, the fundamental difference being the racial or national identity of the leaseholders. The procedure is also fairly similar, although ultimate disposal is not by public auctions. An intending applicant takes the initiative and seeks an allocation from a chief or village headman. He then submits an application in triplicate to the District Commissioner. Standard application forms are provided on which the details to be shown include the capital proposed for the venture; proposed development plan; the crops to be grown or livestock to be raised; and personal details including farming experience and other land titles held in Malawi. A fee of k 4 (roughly £2) accompanies the application. The District Commissioner ascertains whether the chief or other customary authority has consented to the proposed lease; whether the descriptions, plans, sketches and acreage are accurate; and whether the proposed lease is not in conflict with other projects or proposals. Two copies of the application are passed on to the Regional Agricultural Officer for the ascertainment of the suitability of the land for the proposed venture and for recommendations on development covenants and appropriate rentals. The final decis-

ion on the application is made by the President. If consent is given, the Commissioner for Lands draws an offer stating the terms upon which the lease will be issued. One of the conditions requires the applicant to meet charges for a subsequent proper survey of the land. The offer must be accepted within the specified period. The Commissioner is also responsible for the execution and registration of the lease, and for general land administration on behalf of the Minister. The execution and registration of lease completes the conversion of customary land into private land and the reversion becomes public land.

If this land alienation policy is not properly supervised, it is likely to lead to some of the problems experienced during the colonial period. One problem already apparent is encroachment and some disregard of estate boundaries by villagers, especially where shortage of subsistence land is being experienced.[101] As with the alienations of the early colonial period, some customary authorities must take the blame for encroachments and similar problems. They consent to alienations without appraising villagers of the full facts or seeking their consent. The fact that the land is not officially "purchased" and the authorities are not officially paid for their labour is an important factor here. Unscrupulous authorities appreciate the value of leases which are widely sought by the elites and demand underhand payments or exorbitant "gifts". These underhand payments encourage surreptitiousness and leases which villagers have little or no opportunity of discussing. There is a case for improving the alienation procedure to provide for independent monitoring of the attitude of all villa-

gers towards proposed leases. Payments for the services of customary authorities should be legalized, standardized and brought to public attention.

Another likely result of the policy of leasing customary land will be the juxtaposition of more affluent rural landholders and poorer peasant communities. During the colonial period, this led to the emergence of Thangata in the Shire highlands and "visiting tenancies" elsewhere. Thangata is not likely to re-emerge, because most of the leases granted in the post-colonial period are not large enough to sustain hordes of semi-permanent labourers. Moreover, the African government would be unwilling to tolerate a practice which is likely to evoke bitter memories of the struggle against colonial rule. Visiting tenancy, on the other hand, is reported to be thriving on some of the tobacco estates which mushroomed in the 1970s.[102] It should be recalled that visiting tenancy, unlike Thangata, was spared from immediate abolition by provisions in the law which permitted Africans to remain resident on private estates under special agreements. As under colonial rule, this practice is reducing the productive capacity of peasants on their own lands by turning them into part-time or full-time labourers on the estates. Official toleration of this policy has led to genuine criticisms that it does not augur well for agrarian change or an equitable distribution of the nation's wealth resulting from the tobacco boom.[103] The government's partial and unsatisfactory answer to such criticisms can only be that some of its efforts to control and improve the general use of the remaining customary land will encourage the improvement of peasant agriculture.

TABLE 11: LAND, WATER AREA AND LAND TENURE OF MALAWI 1964-1978 (Mn Hectares).[104]

YEAR:	LAND AREA						
	Private Land		Other		Total	Water Area	Total Area
	Freehold[1]	Leasehold[2]	Public[3]	Customary[4]			
1964	0.2	0.1	1.1	8.0	9.4	2.4	11.8
1965	0.2	0.1	1.1	8.0	9.4	2.4	11.8
1966	0.2	0.1	1.2	7.9	9.4	2.4	11.8
1967	0.2	0.1	1.2	7.9	9.4	2.4	11.8
1968	0.2	0.1	1.3	7.8	9.4	2.4	11.8
1969	0.1	0.1	1.5	7.7	9.4	2.4	11.8
1970	0.1	0.1	1.5	7.7	9.4	2.4	11.8
1971	0.1	0.1	1.5	7.7	9.4	2.4	11.8
1972	0.1	0.1	1.6	7.6	9.4	2.4	11.8
1973	0.1	0.1	1.6	7.6	9.4	2.4	11.8
1974	*	0.2	1.6	7.6	9.4	2.4	11.8
1975	*	0.2	1.6	7.5	9.4	2.4	11.8
1976	*	0.2	1.7	7.5	9.4	2.4	11.8
1977	*	0.2	1.7	7.5	9.4	2.4	11.8
1978	*	0.2	1.7	7.5	9.4	2.4	11.8

Notes:

1. Land held under a freehold title or Certificate of Claim.
2. Land held under a leasehold title.
3. Land occupied, used or acquired by the Government or any other land not being customary land.
4. Land held, used or occupied under customary law.

(f) Control of the User of Customary Land

Part VI of the Land Act empowers the Minister to publish, from time to time, orders for "regulating, managing and controlling the user of all land other than public land or private land situate within a municipality or township".[105] The orders may impose regulations on crop and animal husbandry; fencing of the land and maintenance of a drainage system; preservation of stream and water banks; and general conservation of the soil and other natural resources.[106] Heavy fines and a term of imprisonment can be visited upon any person who fails to comply with the control of land orders.[107] The Minister can additionally terminate the person's right to occupy the land after giving him a second opportunity to make amends.[108] Upon the termination of the right of occupation, leases and other dispositions of private land revert to the person entitled to the reversion thereof. Leases and other dispositions of public and customary land revert to the President as public land. Customary land also becomes public land.[109]

This part of the Land Act repealed the Land Use and Protection Ordinance of 1962.[110] It should be recalled that this ordinance attempted to abolish the colonial policy of using criminal law and sanctions to compel Africans to adopt new agricultural practices. The African government promised to instil a spirit of co-operation between the government and ordinary villagers through the National Land Use Council and area committees. By removing this structure and restoring the stricter penal regime under the Land Act, the government has completed a policy turn-about. This, in theory, is a sign of

impatience and dissatisfaction with the policy of co-operation. However, as under colonial rule, coercion and penal sanctions are unlikely to achieve better and quicker results than patient persuasion. The actual use of force by the African government is difficult to ascertain. There are no statistics or official reports on the number of convictions or acreages of private and customary land taken over for failure to observe land use orders. Lack of adequate documentation is in fact a general feature of post-colonial land administration in Malawi.

Details published between 1965 and 1980 show that Control of Land orders have been regularly used to mark out areas of customary land required for control of ribbon development and for the establishment of forest reserves, game parks, irrigation and settlement schemes, and other agricultural projects. The latter uses show that the orders are important instruments for the agricultural policy outlined in the Statement of Development Policies in 1971.[111] Table 12 contains some of the smaller projects and schemes marked out by Control of Land orders. The major ones are the Lilongwe Land Development Project (L.L.D.P.) which covers approximately 1.15 million acres; the Central Region Lakeshore Development Project which covers approximately 820,000 acres; the Lower Shire Valley Development Project which covers an area of about 1.1 million acres; and the Karonga Rural Development Project which began in 1972 and covers an area of approximately 1,292 square miles. These projects are of an integrated type, involving extensive and expensive infrastructure developments financed by international loans.[112] This approach is ordinarily too expensive for extension to all rural areas. After 1975, the concept of National

Rural Development Programmes was evolved to provide farmers in most rural areas with credit and marketing facilities but without the capital outlays included in the integrated projects.[113]

Control of Land orders for the various agricultural projects generally prohibit villagers from preparing new gardens, planting trees and erecting new houses without the permission of the Minister.[114] This is in preparation for the eventual acquisition of the land by the government should compensation funds become available. The land is then planned, rearranged and redistributed in accordance with the particular scheme or project devised. Even where acquisition of customary land may not be attempted, the Land Act vests the Minister with sufficient powers to compel villagers to rearrange their holdings in accordance with the scheme or project.[115] The rearrangement and redistribution is entrusted to "project managers" or "settlement officers" working with local committees composed of Party leaders, village headmen, district councillors and agricultural advisors.[116] Where customary land has been acquired, rearranged holdings are redistributed to applicants selected on the basis of farming experience, standing in the community, capital resources, age, physical fitness and reputed behaviour. Preference is given to local people, but some schemes and projects include Malawi Young Pioneer graduates who can be selected without recourse to the committee procedure and irrespective of their district of ethnic origin.[117] The successful applicants hold the land on terms and conditions stipulated in a licence which does not provide for the acquisition of the freeholds, leasehold or any permanent interest in the land. Failure to comply with the licence can lead to expulsion from

the scheme, but the participants are assured that the rights of occupation will not be summarily withdrawn for failure to use the land properly in any one season after the initial period. The licence is not assignable or transferable without the consent of the project authorities or the allocation committee. This tight rein ensures that land is held for as long as it is put to effective use and in compliance with the goals of the project or scheme.[118]

Reviews of some schemes and projects in Malawi conclude that they achieve the basic objective of increasing agricultural productivity.[119] The question which remains unanswered is whether control of land orders and the land rights they entail play an important part in this apparent success. Orthodox arguments on land tenure reforms would suggest that the inchoate and ephemeral tenancies assured by settlement licences cannot provide the "security of tenure" often deemed necessary for sustained increases in agricultural production.[120] This may account for some of the Young Pioneer defections reported in several of the schemes. It is beyond the scope of this work to delve into the correlation between forms of tenure and productivity rates. But if the assumption that absence of secure and permanent land rights can be a constraint on agricultural development is embraced,[121] it can be contended, even without expertise on the subject, that the apparent success of the projects and schemes may be due to concentrated investments in infrastructure and better extension services, credit and marketing facilities rather than land administration.

TABLE 12: SELECT CONTROL OF LAND ORDERS PUBLISHED UNDER THE LAND ACT 1965.[122]

GOVERNMENT NOTICE: ORDER NO.	LOCATION OR NAME OF SCHEME OR PROJECT:	SIZE (In Acres unless otherwise stated):
57/1968	Chitala, Salima	1,536
162/1968	Kasungu	37,062.3
166/1968	Liwonde	-
178/1969	Hara Irrigation Project	-
202/1969	Nchalo, Chikwawa	732.85
224/1969	Ndakwera Settlement Scheme, Chikwawa	8,706
225/1969	Mangulenje Scheme, Sucoma, Chikwawa	7,843
226/1969	Ngabu	2,122
232/1969	Rusa Cattle Ranch	52,316
98/1970	Liwonde	-
267/1970	Msenjere, Central Region	9,042
276/1970	Ntcheu and Dedza	45,603
24/1971	Wovwe, Karonga	10,650
172/1971	Bua/Rusa Development Scheme	318,407.24
193/1971	Liwonde	875
41/1972	Wovwe, Karonga	703.3
86/1972	Central Region Lakeshore Development Grazing Areas	21,211.33
155/1972	Luweya Irrigation Scheme	7,055
169/1972	Lilongwe Controlled Area	110,076
89/1973	Kasungu Smallholder Flue-Cured Tobacco Project	45,544
55/1974	Pwadzi, Chikwawa	5,922 Hectares
56/1974	Lower Shire Valley	146,379 Hectares
140/1975	Nankumba Peninsula	965 Hectares
178/1975	Dwanga Sugar Project	48,750 Hectares
21/1976	North-West Mzimba Flue-Cured Tobacco Project	257.63 Km.
63/1976	Mpasadzi Smallholder Flue-Cured Tobacco Project	12,400 Hectares

It is also notable that the schemes and projects sacrifice security of tenure for the tiller for the sake of optimum land use, but a similar policy is not pursued for leases of "customary land" obtained by more affluent Malawians. A more glaring policy contradiction also exists between land administration in the settlement schemes and in one integrated project, the L.L.D.P., where the registration of permanent land rights has been attempted. It should be noted, however, that Section 30 of the Land Act stipulates that the publication of Control of Land orders will not prejudice or prevent the subsequent registration of permanent land rights under the law applied within the L.L.D.P. The policy contradiction can, therefore, be eliminated if the government so wishes. As will be confirmed in the following chapter, however, registration of permanent land rights has not been attempted in many areas, schemes or projects.

3 Legal Regulation of Crop Marketing

Except for the repeal of obsolete food marketing legislation,[123] the legal framework for the marketing of economic crops adopted during the terminal stages of colonial rule remained unchanged for the first five years of the independence period. The first post-colonial reforms affected the tobacco sector. A new Tobacco Act was enacted in 1970[124] in a background of declining productivity on customary land. For two consecutive seasons, production and export targets set for northern division fire-cured tobacco and sun/air-cured tobacco were not met. Market studies suggested that large quantities of the African crop were exported illegally to neighbouring

countries. It was also claimed that proper forecasting and quality controls could not be effected under the existing laws. According to the Minister for Agriculture, the objective of the new Act was "to put 'teeth' in the existing Tobacco Acts in order to control effectively the production and marketing of tobacco with a view to improve its quality and increase its production to enable [the government] to meet increasing marketing demands".[125]

The 1970 Act extends production controls to tobacco grown for African consumption made up in the form of roll, twist, coil or ball which was hitherto unregulated because it was not regarded as an important export commodity. It requires the registration of all growers in scheduled areas, regardless of whether the tobacco is for African consumption or export. The other methods for controlling the sector remain unchanged, but the law has been consolidated under one statute, thus ending the untidy arrangement whereby tobacco production was controlled by the Tobacco Act, marketing by the Agricultural Production and Livestock Marketing Act, and cess collection by the Tobacco Cess Act.[126]

The Minister's perception of the need for tighter controls over African tobacco production should not be dismissed lightly, but it would appear that the registration of growers producing tobacco for personal or African consumption was a peripheral solution to the problem encountered. The history of tobacco marketing in Malawi shows that dissatisfaction with producer prices has always been the important spur for illegal trading. The Minister for Agriculture failed to acknowledge

this elementary truism in his parliamentary address. The attitude of the independent government was on this occasion similar to that of the colonial masters. Tighter controls were imposed on the peasant or customary land tobacco sector to stem shortfalls in production targets, but the issue of inducing increased production through better prices was not a topic for serious debate.[127]

There was another statute enacted for the tobacco sector in 1970. The Control of the Tobacco Auction Floors Act[128] repealed and replaced the Tobacco Control Commission Ordinance of 1963 and introduced three notable changes in the law on marketing of tobacco through the auction system. The first change was on the composition of the Commission entrusted with the responsibility of controlling auction floors. The membership was increased from 9 to 13 appointees of the Minister, of whom 4 were to represent the interests of African tobacco growers.[129] This was a reflection of changes in the patterns of tobacco production. African leaseholders were beginning to dominate the industry.[130] Unlike peasant customary land producers, leaseholders had a direct interest in tobacco marketing by auction because they were not obliged by law to sell their tobacco to the F.M.B. The second reform of the law was effected by Section 25. It prohibited persons licensed as graders from seeking or holding licences as buyers on the auction floors. It was obviously in the interests of the industry to keep these functions separate. The third change in the law was the transfer of responsibility for licensing auction floors, buyers, sellers and graders from the Tobacco Control Commission to the Minister. It was said in Parliament that

this was in keeping with "the present policy of the Malawi government whereby the actual policy decisions are made by the Minister in Cabinet and carried out by the civil service".[131] In common with the general trend of post-colonial agrarian administration, the Act also stipulated that Ministerial decisions would be final and not subject to review in any court.[132]

The epitome of this trend of placing Ministerial decisions beyond the reach of the courts was an amendment to the Special Crops Ordinance in 1972.[133] Apart from declaring that Ministerial decisions would be final and unchallengeable, the Minister was empowered to issue, revoke or suspend the licence of any commodity buyer without assigning any reasons therefor. The sponsor of the measure admitted in parliament, with alarming candidness, that it was devised "to stop courts [probing] into reasons why the Minister has refused or revoked or suspended any licence".[134] This mistrust of judicial review of executive decisions in the administration of agrarian change in post-colonial Malawi borders on the unprecedented. It can also be contended, with respect to the administrators, that even if court interference in most of these issues is unnecessary, an obligation to state reasons for reaching a particular decision may be necessary for good government. It ensures orderliness, predictability, the accumulation or precedents and reduction of arbitrariness in decision-making.

Mistrust of the judiciary in the administration of agrarian change was not, however, at the pith of the most important post-colonial reform of marketing laws in Malawi. This was the reconstitution of the F.M.B. in 1971.[135] As seen in Chap-

ter V, one of the reasons for the establishment of statutory marketing boards with monopolies over the marketing of African crops was the paternalistic assumption that Africans could not understand commodity price fluctuations and were gullible to exploitation by unscrupulous middlemen. The fact that such reasoning was no longer completely acceptable to an African government was one of the ostensible reasons for the reconstitution of the F.M.B. In a budget address to Parliament, the President said:

> "... Today paternalism is ... out of date, out of place ... The purpose of the Board must no longer be confined to or even concerned with ... the narrow limits of stabilizing prices of farm produce, ... but must be widened to include actual development ... of agricultural resources in the country ... Not only that, but even more, those concerned with 'management' must be taught to think in terms of active managers of development and of a business concern which must develop our agricultural resources and make a profit at the same time."[136]

The primacy of development and profit over price stabilization inherent in this policy statement was reflected in changes to the name, structure, objectives, powers and duties of the Board. The name changed from Farmers' Marketing Board to the more suggestive Agricultural Development and Marketing Corporation (ADMARC).[137] The important structural changes were the replacement of a Board headed by a titular chairman with one headed by an executive chairman with day-to-day responsibilities over administration and management. The composition of the Board was also streamlined to the chairman plus not less than four, but not more than eight, directors appoin-

ted by the Minister.[138] The revised objectives of the Board included the following: to increase the volume and improve the quality of exportable economic crops; to improve the marketing of agricultural produce for export with a view to profitability; to promote the consumption of such produce abroad; and to provide and maintain an efficient system for the supply of inputs and agricultural requirements to peasant customary land farmers.[139] For the attainment of these objectives, the Corporation was divided into three sections separately dealing with internal marketing, export trade and management of development projects like farms, grain milling and seed production installations.[140] The Corporation retained most of the powers and duties of the F.M.B., and was given a variety of new ones, of which the following is most notable:

> "to assist any organization, government, corporation, company or co-operative society with capital or credit by means of investment in stock, shares, bonds, debentures or debenture stocks, or with other ways or resources for the prosecution of any works, undertaking, projects, schemes or enterprises relating to the development or improvement of the economy of Malawi."[141]

The upshot of these changes is that the paternalism of colonial marketing boards has been abandoned, but the statutory marketing monopoly over customary land crops has been retained with the specific aim of accumulating profits for reinvestment in other developmental activities. ADMARC's crop trading account for the years 1966-1977 confirms the accrual of substantial profits which were partly invested in a formidable chain of private companies and statutory corporations shown in Table 14. Whether one organization can combine dev-

elopment investment on such a wide scale with an efficient marketing system is now open to doubt. A review of Malawi's agricultural sector by a World Bank report noted that there is "an obvious conflict of goals in the price policy between the maximization and stabilization of smallholder income and the accumulation and investment of development finance".[142] Academic reviews of the post-colonial agriculture economy in Malawi also conclude that ADMARC has been concentrating on the accumulation of profits for investment in various enterprises at the expense of remunerative prices and adequate income for peasant farmers.[143] The beneficiaries of this strategy have been the elites and affluent Malawians holding shares in the companies sponsored by ADMARC's investment programme; an urban population which is assured of reasonably cheap food commodities; and the many employees engaged in ADMARC's burgeoning bureaucracy. This is another point of focus for genuine criticism of the laws and inequitable development or agrarian change in Malawi.

Without attempting to exculpate the independent government, it should be noted that the essence of ADMARC's marketing strategy is neither novel nor unique. It is an intensification of the colonial policy minus its underlying paternalism, and it is also fairly similar to the strategies tried by other independent African countries. One of the notable results of controlled marketing of commodities in some of these countries is abuse of office and corruption by employees of the public agencies responsible for the marketing.[144] ADMARC appeared to be free of such bureaucratic ills. In 1977, however, a long-serving executive director was convicted for misusing corpora-

TABLE 13: ADMARC CROP TRADING ACCOUNTS, 1966-1977 (K'000)

Year Ending:	31/12 1966	31/12 1967	(a) 31/03 1969	31/03 1970	31/03 1971	(b) 31/03 1972	31/03 1973	31/03 1974	31/03 1975	31/03 1976	31/03 1977
SALES	13,406	15,870	19,127	19,175	21,084	27,612	29,227	33,479	38,042	41,446	56,832
Deduct selling expenses	935	1,419	1,495	847	926	901	1,652	2,271	2,177	1,848	2,337
SALES less selling expenses	12,471	14,451	17,634	18,328	20,158	26,711	27,574	31,208	35,866	39,599	54,495
Movement of Stocks: Increase/(Decrease)	3,085	283	(5,371) (c)	(289) (c)	674	865	1,030	(1,269)	834	477	4,025
NET SALES VALUE OF CROPS PURCHASED	15,556	14,734	12,263	18,039	20,833	27,577	28,604	29,939	36,700	40,075	58,520
PURCHASE OF CROPS	11,687	13,529	7,565	10,074	13,538	13,959	16,477	14,347	17,157	20,459	23,042
Add Buying and Direct Expenses	2,458	3,431	2,782	3,110	3,727	3,992	4,943	6,036	7,114	7,780	10,266
PURCHASES AND BUYING EXPENSES	14,145	16,960	10,347	13,184	17,265	17,951	21,420	20,379	24,271	28,239	33,309
GROSS PROFIT/(LOSS)	1,411	(2,226)	1,916	4,855	3,658	9,626	7,184	9,560	12,428	11,837	25,212
Net Administrative Expenditure	1,397	1,402	1,763	878	908	911	858	1,448	1,398	1,860	2,527
NETT PROFIT/(LOSS) ON CROP TRADING	14	(3,628)	152	3,976	2,660	8,715	6,327	8,111	11,030	9,977	22,685

NOTES: See Next Page

NOTES ON TABLE 13

Source: ADMARC Reports and Accounts.

KEY:

(a) Figures in this column are for the 15 month period ending 31/3/79 (not 12 months).

(b) The figures for 1971/72 have been adjusted in the 1972/73 accounts by transferring part of the buying expenses relating to "Bage, twine and hessian" to selling expenses.

(c) The figures for movement of crop stocks for the periods ended 31/3/69 and 13/3/70 do not reconcile with the balance sheet figures for crop stocks. This appears to be due to a change in the valuation basis, and also to a stock adjustment made, increasing the valuation by K 107,437 at 1st January 1969.

NOTES:

1. The accounting period was changed from the calendar year to year ending 31st March, during 1969.

2. Certain changes in the presentation of accounts were made in 1969/70. Figures for that and subsequent periods may not be strictly comparable with earlier periods.

3. Tables may not sum due to rounding.

TABLE 14: ADMARC INVESTMENTS AND LOANS FOR PRIVATE COMPANIES AND STATUTORY CORPORATIONS [145]

Company/Corporation:	%age of issued shares held:	1977 K	1976 K
Admarc Canning Company Ltd. 20,000 shares of K 2 each, fully paid	100	40,000	26,668
Advanx (Blantyre) Limited 103,772 shares of K 1 each, fully paid	50	103,772	103,772
Auction Holdings Limited 355,800 shares of K 1 each, fully paid	52	319,755	319,755
Bata Shoe Company (Malawi) Limited: 134,750 shares of K 2 each, fully paid	49	269,500	269,500
Buwa Tobacco Estates Ltd. 120 shares of K 2 each, fully paid	100	240	240
Central Grading and Packing Company Limited: 25,000 shares of K 2 each, fully paid	55	50,000	50,000
Chasato Estates Limited 400 shares of K 2 each, fully paid	40	200	200
Commercial Bank of Malawi Limited: 115,000 shares of K 2 each, fully paid	10	230,000	230,000
Cory Mann George (Malawi) Limited: 127,500 shares of K 2 each, fully paid	50	280,000	280,000
Cotton Ginners Limited: 98,000 Ordinary Shares of K 1 each, fully paid	49	98,000	98,000
153,934 Redeemable Preference Shares of K 1 each, fully paid	49	153,934	153,934
Dwangwa Sugar Corporation Limited: 7,320,000 Ordinary Shares of K 1 each, paid to 30t.	38	2,196,000	-

TABLE 14 (Continued)

Company/Corporation:	%age of issued shares held:	1977 K	1976 K
Finance Corporation of Malawi Limited: 100,000 shares of K 1 each, fully paid	100	220,000	100,000
Grain and Milling Company Limited: 120,000 shares of K 2 each, fully paid	50	240,000	240,000
Hotels and Tourism Limited 1 share of K 2, fully paid	-	2	2
Investment and Development Bank of Malawi Limited: 350,000 shares of K 1 each, fully paid	25	610,000	350,000
Kasikidzi Estates Limited: 10 shares of K 2 each, fully paid	100	20	20
Lever Brothers (Malawi) Ltd.: 250,000 Ordinary Shares of K 2 each, fully paid	20	575,000	575,000
Livilidzi Estate Limited: 250 shares of K 2 each, partly paid	16	100	100
Malawi Railway Holding Company: 100 shares of K 2 each, fully paid	-	200	200
Malawi Tea Factory Company (Muloza) Limited: 4,000 "A" shares of K 1 each, fully paid	40	4,000	4,000
Manica Mann George (Malawi) Limited: 250,000 Ordinary shares of K 2 each	49	500,000	-
Mpira Estates Limited: 875 shares of K 2 each, fully paid	100	1,750	1,750
National Bank of Malawi: 400,000 shares of K 1 each, fully paid	33	460,000	460,000
1,265,306 shares of K 1 each, paid to 70t		1,174,204	-

TABLE 14 (Continued)

Company/Corporation:	%age of issued shares held:	1977 K	1976 K
National Insurance Company Limited: 20,000 shares of K 2 each, fully paid	20	40,000	40,000
National Oil Industries Limited:			
91,875 shares of K 2 each, fully paid	50	223,750	223,750
270,000 8% Preference shares of K 2 each	100	540,000	-
Optichem (Malawi) Limited: 70,000 Ordinary Shares of K 2 each, fully paid	20	140,000	140,000
P.E.W. Limited: 10,000 Ordinary Shares of K 2 each	50	250,000	-
Portland Cement Company (1974) Limited: 4,000,000 Ordinary Shares of 50t each, fully paid	50	2,250,000	2,000,000
Roadmarc Limited: 30,600 shares of K 1 each, fully paid	51	30,600	30,600
Sugar Corporation of Malawi Limited: 750,000 Ordinary shares of K 2 each	43	1,800,000	-
The Oil Company of Malawi Limited: 10,000 shares of K 2 each, fully paid	10	20,000	20,000
Tobacco Estates Limited 10,000 shares of K 2 each, fully paid	50	20,000	20,000
United Transport (Malawi) Limited: 391,000 shares of K 2 each, fully paid	35	1,391,960	1,391,960
		14,232,987	7,129,451

TABLE 14 (Continued)

Debentures and Other Secured Loans

Company/Corporation:	1977 K	1976 K
Admarc Canning Company Limited: 8½% debentures	146,000	146,000
Buwa Tobacco Estates Limited: 10% loan secured by mortgage, repayable from 1977/1980.	50,000	50,000
David Whitehead and Sons (Malawi) Limited: 6½% series "D" debentures repayable annually from 1977/1979	240,000	240,000
Import and Export Company of Malawi Limited: "E" debenture repayable semi-annually, 1977/1981	993,600	1,107,820
Malawi Development Corporation: 5% perpetual debentures	200,000	200,000
Malawi Tea Factory (Muloza) Limited: 8% series "A" debentures, repayable 1979/1989	355,000	325,000
Press (Holdings) Limited: 6½% loan secured over shares of National Bank of Malawi, repayable from 1977/1981	449,163	449,163
	2,433,763	2,517,983
Income Notes Investment and Development Bank of Malawi Limited	1,830,000	1,170,000

tion property and personnel in his private businesses. He was acquitted of a more serious charge of theft by a public servant because the missing amount of money (about k 400,000) was accounted for in unauthorised loans made by ADMARC to a private company in which the accused and his family were shareholders and directors.[146] Corruption and general inefficiency of board members in ADMARC and other statutory corporations may also be the explanation for the passage of a law in 1980 which stipulated that they should hold office for a short, renewable period of two years.[147] There was a general revamp of board membership in all statutory corporations in 1982.[148] Some executive chairmen were stripped of their managerial responsibilities and reconverted into titular heads. Personnel changes in the ADMARC board will not necessarily improve the quality of agrarian change or the fortunes of peasant farmers if there is no reconsideration of its conflicting roles as a primary marketing organization and a development finance corporation.

4 Provision and Regulation of Agricultural Credit

Government agencies, commercial banks and informal sources have continued to be the major suppliers of credit for agricultural development in the post-colonial period. It was perhaps inevitable that the main thrust of law and policy revisions in this period would be to redress the inbalance of colonial credit allocation policies by increasing the funds available to African farmers.[149] It was necessary for the African government to demonstrate through credit programmes that it did not share the colonial administration's conception

of agrarian change spear-headed by European estate agriculture.

(a) Government Credit Schemes

One of the first actions of the African government on public lending was to end the duplication of government lending boards. The Land and Agricultural Loans Board which ministered to European estate holders and the African Loans Board merged into the Central Farmers Loans Board in 1964. The new Board was empowered to advise the Ministry of Natural Resources on agricultural development, and to assist small farmers in the transition from subsistence to economic agriculture by providing medium- and long-term loans for capital developments to individuals showing the enterprise and capacity to benefit from the investment. It could also provide short-term loans, but only to co-operatives or clubs of farmers with collective responsibility for making repayments to the Board. The Board consisted of a chairman, his deputy, a selected farmer from each of the three regions of the country, and a prominent businessman. It was also expected that District Boards would be created and entrusted with the task of supervising the allocation and use of the loans. In the meantime, the Ministry of Agriculture undertook to provide the supervisory service.[150]

The performance of the Central Farmers Loans Board was not any better than that of its colonial predecessors. Operations were bedevilled by the familiar problem of defaults in repayments. The availability of increased loan facilities soon after independence was regarded as a government largesse by some of the political activists who participated in the

credit programmes. This was compounded by the failure of the Board to provide an effective debt collection service and adequate supervision of the use of the loans. By 1967, the Board was facing serious cash-flow problems and operations were halted.[151] In 1969, it was reconstituted and renamed the Government Loans Board. Its terms of reference on agricultural credit were further restricted to the provision of medium-term loans for the purchase of expensive farm implements and machinery to the few enterprising African farmers who had valuable assets to assign in bills of sale as security for the loan. The emphasis in fact shifted to the provision of loans to African businessmen, and the management of Board affairs was transferred to the Ministry of Trade and Industry. This reconstitution did not improve the repayment record. Capital funds have continued to be whittled away through bad debts and administrative expenses. Periodic injections of further capital from public funds are now necessary to sustain the Board in operation. It is arguable that this is no longer justifiable because the impact of the Board on economic or agrarian change is peripheral. It ministers to a small number of fairly affluent farmers and businessmen, and agricultural productivity is unlikely to be adversely affected by the transfer of this higher income clientele to the commercial banks.[152]

The introduction of a Government Loans Board with a mandate to provide special loans for an elite band of African farmers coincided with the introduction of integrated rural development projects and settlement schemes with credit components. It is through such schemes that the government attempted to achieve its objective of allocating more agricultur-

TABLE 15: DISTRIBUTION OF FARMING LOANS BY THE GOVERNMENT LOANS BOARD.[153]

YEAR:	1977		1978		1979	
REGION:	Total no. approved	Total value (k)	Total no. approved	Total value (k)	Total no. approved	Total value (k)
Northern	101	32,779	70	21,744	7	2,334
Central	181	56,244	182	61,538	27	8,330
Southern	48	13,884	41	11,824	25	7,021.50
Totals:	329	102,907	293	95,136	59	17,685.50

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al credit to subsistence farmers. These farmers rarely have sufficient capital or cash reserves with which to purchase inputs necessary for increasing agricultural productivity. A credit component is therefore regarded as a basic requirement for any project or scheme aiming for the transformation of subsistence agriculture. The long-term aim of credit allocation is to enable the farmers to build the cash reserves and then wean them off. In the formative, building-up period, it is realised that credit schemes may not operate on a commercial basis; credit allocation becomes a specific tool for agrarian change which may entail a justifiable loss of some public funds. Various devices are, however, evolved to ensure that the funds are not needlessly lost.[154]

Medium-term and short-term loans are the preferred types of credit for the transformation of subsistence agriculture in post-colonial projects and schemes. The emphasis is on seasonal loans because the main activity is the growing of annual crops. As far as possible, cash is not handed out to the far-

mers. Experience has shown that cash loans can be easily converted for consumption or use in non-agricultural pursuits. Seasonal loans take the form of pre-determined input packages of improved seed varieties, fertilizers or pesticides. Apart from discouraging misuse, this educates the farmer on the advantage of using improved seeds, fertilizers and other recommended inputs. In the case of medium-term loans, the farmer is directly issued with the farm implement or machinery required on hire-purchase terms. It does not become his property until after the repayment of the cost plus interest. If extra-security is necessary, bills of sale covering the valuable properties of the farmer are executed. This type of credit is normally beyond the means of the majority of the subsistence farmers. Seasonal loans are largely unsecured.[155]

One other way of ensuring that credit will be properly used is to screen the applicants and issue credit only to those showing specified standards of managerial ability. The L.L.D.P., for example, has a five-stage process under which applicants are assessed and rated by extension agents, village headmen, village committees and credit allocation officers.[156] This procedure is, however, prone to the criticism that processing can take an unreasonably long time, and essential inputs may thereby fail to reach growers at the appropriate times.[157] Rigorous screening can also have the effect of excluding the majority of farmers who need credit most. It has been argued that credit schemes in Malawi can achieve the goal of increasing productivity by serving more farmers than the ones able to pass the rigorous screening process.[158] On the other hand, it is difficult to dismiss the counter-argument

that project officers would be irresponsible if credit funds acquired through international loans were expended on farmers who were unlikely to show significant results. One officer is said to have encapsulated the problem thus: "They do not want to put water into leaking buckets".[159]

The third strategy for reducing defaults in credit repayments is to deal with groups and clubs of farmers who agree to be jointly and severally liable for the loan. This has an added advantage of reducing the paperwork and administrative costs which can arise from the maintenance of individual accounts. As seen above, group credit was conceived for seasonal loans under the first post-colonial public landing programme, but a concerted implementation of the strategy within major projects like the L.L.D.P. was attempted from 1974 onwards.[160] Although the groups are registered by the particular credit authority, they have no formal legal structure and their status under statutory law or the common law is unclear. The joint and several liability aspects resemble some of the legal consequences of a partnership, but group members do not fit the statutory definition of partners as "persons carrying on business in common with a view to profit".[161] There is no sharing of profits after the acquisition of inputs on credit. The group can in fact disband. There are no rigid rules on the formation or dissolution of the groups. Any number of farmers within the same locality can form one, but the policy is to encourage groups of not less than 10 or more than 30 farmers from the same or proximate villages. The internal arrangement is a matter for the group. Most of the participants prefer to have elected office-bearers like secretaries

and chairmen in whom greater managerial responsibility is reposed.

"Group credit" is reported to be largely responsible for a very impressive repayment record, particularly during Phase III of the L.L.D.P. which lasted from 1975/6 to 1978/9.[162] It is claimed that the repayment rates, which were approximately 100 per cent, have no parallel in Malawi and other African rural development projects. However, group credit within the L.L.D.P. has its problems. First, there are no indications suggesting that it will eventually become a self-financing venture, even after more than seven years of operation. When high administrative costs are taken into account, the scheme operates on a nett loss. This is partly due to the failure of the groups to evolve self-accounting procedures. Credit officers have to maintain credit accounts not only for the group, but also for the individual members as well. It is also known that farmers and credit officers alike fail to appreciate the legal implications of joint and several liability. This has resulted in credit recovery teams pursuing individual defaulters, even when recourse to the group would have sufficed. These problems could be overcome by more instructions to farmers and credit staff on group credit management.

One other possible solution is to formalize the structure of the groups and provide for statutory registration. This would have the advantage of establishing the precise legal nature of the groups. The disadvantage is that it may lead to the imposition of rigid structures, ill-suited to the needs of rural communities. The brief experiment with co-operatives in

the later stages of colonial rule failed partly because the participants were unfamiliar with the prescribed structure and function of the movements.[163] This is not the case with the autonomous credit groups or farmers' clubs. Carefully-devised statutory regulations will, perhaps, become necessary upon the extension of the activities of the groups to co-operative production and marketing of economic crops, but this is not contemplated under the agricultural goals of the present regime. Formalization of the groups is not immediately necessary for ephemeral activities like the purchase of seasonal inputs on credit. The ultimate objective is, after all, to wean farmers off such lending programmes as soon as possible.[164]

Failure to attain this ultimate objective is the second problem of group credit within the L.L.D.P. By the end of the third phase, most farmers were still unable to accumulate enough cash reserves to "graduate" from the seasonal credit programme. This may never happen with some of the credit recipients who are marginal producers. Other farmers prefer to spend their cash reserves and to rely on credit issues of inputs. It is assumed in such cases that investment of sales returns is regarded as secondary to consumption and other uses. Suggested solutions to the graduation problem include encouraging farmers to save by increasing rural banking facilities; increasing disincentives to credit purchases of inputs by, for example, higher interest rates; and reducing credit facilities to marginal producers.[165] The last two suggestions would pronounce the already visible effect of group credit of benefiting the relatively affluent farmers. Surveys have indicated that farmers with better education and more than average ass-

ets are the ones most likely to take advantage of the group credit facilities. The innovative leaders of such groups tend to be local Party officials, village headmen and other prosperous tobacco farmers.[166] Concentration of development efforts on this category of persons may lead to the creation and entrenchment of rural elites. As noted above, the immediate goal of increasing agricultural productivity can best be attained by avoiding an unnecessary concentration of credit recipients.

The fourth strategy for improving the performance of government lending programmes tried in post-colonial agricultural development projects is to link credit collection with controlled marketing of produce. ADMARC, the statutory corporation with a monopoly over the marketing of economic crops grown on customary land, plays a key role in the credit/marketing link. It is authorised to issue inputs on credit and collect repayments during the marketing season on behalf of credit authorities in most development projects and settlement schemes. The Corporation was originally involved in the provision of credit on its own behalf, but this was discontinued because it could not provide the additional extension and supervisory services essential for the determination of creditworthiness.[167]

The high rate of loan repayments within the L.L.D.P. has been partly attributed to ADMARC's role in the credit/marketing link. The Corporation has also established an impressive infrastructure of about 40 bush markets with storage facilities and 11 parent markets. Each bush market serves a radius averaging 4 kilometres, with a mean distance of 8 kilometres between mar-

kets. All markets are interconnected by a maze of all weather crop extraction roads.[168] Although this infrastructure is very impressive indeed, ADMARC's performance is subject to several recurring criticisms.[169] First, due to poor transport logistics, it sometimes fails to supply the markets with seasonal inputs or to collect the produce at the appropriate times. Secondly, it is reluctant to get involved in the purchase of maize except when it is building up the country's food reserves. The price offered at such times is often below that obtainable from unlicensed traders plying the area, despite being officially barred. The third criticism is that ADMARC prices for another key crop, groundnuts, have at times failed to satisfy growers and have encouraged the preservation of more land for tobacco. Growers of this crop sometimes receive a bonus in addition to the fixed price when the season's crop has been profitably resold by ADMARC at the auction floors. When this two-tier pricing policy results in higher tobacco production at the expense of maize and groundnuts, the original objective of the L.L.D.P. is contradicted. This was to turn the area into the nation's breadbasket.[170] General dissatisfaction with crop prices within the L.L.D.P. is a pointer of the conflict noted above in ADMARC's role as a marketing organization seeking profits from crop trading for investment in business ventures.

In spite of the various criticisms made in this section, it can generally be concluded that post-colonial government lending schemes are a vast improvement on the paltry services offered by the colonial administration. It should be noted, however, that the disbursement of more public funds has not

brought about a significant change in the role of law in credit allocation. As under colonial rule, the various lending schemes are not co-ordinated by uniform statutory regulations, and the African government has not yet decided to establish a public lending institution like a land bank. There is always a possibility of resort to the law courts for the recovery of outstanding credit repayments, but as experience within the L.L.D.P. revealed, even this peripheral use of law can be ineffective. Court processes are inherently slow, and courts which were already overburdened with their ordinary work were unable to cope with increasing default cases. Failure to act promptly was interpreted by some borrowers as a sign of weakness, and they began to disregard court rulings. Court officials in one area were themselves credit defaulters. It eventually became apparent that other strategies, like group credit and the rigorous screening of applicants, were more effective than resort to the courts.[171]

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TABLE 16: PUBLIC LENDING TO FARMER CLUBS OUTSIDE PROJECT AREAS, 1972-1981.[172]

SEASON:	NO. OF CLUBS	NO. OF BORROWERS	VALUE OF CREDIT (in k)
1972/73	3	180	6,300
1973/74	6	360	6,300
1974/75	12	720	55,200
1975/76	27	1,818	51,169
1976/77	38	1,600	74,572
1977/78	69	2,076	131,721
1978/79	100	3,000	220,000
1979/80	100	3,000	220,000
1980/81	788	21,061	690,190

TABLE 17: SEASONAL CREDIT WITHIN THE L.L.D.P. (GROUP AND INDIVIDUAL BORROWERS), 1968/69 TO 1976/77.[173]

SEASON:	TOTAL NUMBER OF FARM FAMILIES:	TOTAL NUMBER OF BORROWERS:	VALUE OF LOAN (K)	AVERAGE LOAN PER BORROWER (K):	REPAYMENT RATE %
1968/69	-	656	4,826	7.4	100.00
1969/70	13,105	561	6,935	12.4	100.00
1970/71	23,436	4,082	83,307	20.4	99.4
1971/72	34,122	20,048	328,662	16.4	97.7
1972/73	42,399	21,058	392,359	18.6	97.2
1973/74	56,999	25,745	481,347	18.7	98.0
1974/75	73,347	25,091	736,264	29.3	98.0
1975/76	83,547	32,253	858,651	26.6	99.97
1976/77	99,954	36,735	1,012,278	27.6	100.00

TABLE 18: ARREARS ON SEASONAL LOANS AT 31ST MARCH 1977 (L.L.D.P.)[174]

	SEASON:	AMOUNT OUTSTANDING: (K)	NUMBER OF DEFAULTERS (K)	AVERAGE AMOUNT PER DEFAULTER (K)
	1968/69	-	-	-
	1969/70	-	-	-
	1970/71	500	66	7.57
Individual	1971/72	7,559	755	10.01
Borrowers	1972/73	10,986	1,211	9.07
	1973/74	9,667	1,060	9.12
	1974/75	14,414	1,047	13.77
	1975/76	24,339	1,834	13.27
	TOTAL:	66,465	5,973	11.29
	1973/74	-	-	-
Group	1974/75	678	12 groups	56.53 per group
Borrowers	1975/76	1,877	14 groups	134.04 per group
	TOTAL:	2,555	26 groups	98.2 per group

(b) Commercial Bank Lending

One of the most significant developments on commercial bank lending in the post-colonial period was the breaking of the monopoly of the Barclays and Standard Banks in the banking business. The Commercial Bank of Malawi was established in 1970 with capital supplied by an American banking concern and two public enterprises, ADMARC and the Malawi Development Corporation. A further development was the merger of the two original banks to form the National Bank of Malawi in 1971. ADMARC also acquired some of the shares in this new bank.[175]

The post-independence forays of public enterprises into the banking business have been interpreted as "nationalisation" with the intention of making the banks more "receptive to subsistence credit needs". This has been emphatically denied by the President. He told Parliament that the government was not nationalising or confiscating the banks; it was simply embarking on local participation in profitable concerns which were too important to be left under the sole control of expatriate owners in a developing country. The government planned to use the profits arising from its share participation in the struggle against financial inviability and budget deficits. Banking was just one of the several profitable businesses in which participation was sought for this purpose. As for the lending record of the banks, the President said:

> "... It should be clear ... that in deciding to enter into partnership with the two banks, the Government has not acted from any feeling of dissatisfaction with the two banks or from cri-

ticism ... in their performance since they have been in this country, express or implied."[177]

This assertion is obliquely confirmed by the lending policy of the banks after the takeovers. Loans in aid of African agriculture have increased, but most of the recipients have been the large farming enterprises, especially the tobacco estates established or acquired by politicians and African elites.[178] The banks have continued to neglect smallholder farmers on customary land, apparently because they cannot provide the fixed and floating assets which are demanded from the estates as security for long-term and medium-term loans. This line of reasoning is not entirely acceptable, because the immediate needs of subsistence farmers can be met by seasonal loans for which extensive securities may not be necessary.[179] However, as business concerns, commercial banks are entitled to insist on supporting enterprises which can generate profits. Partly because of ADMARC's marketing strategy, small-holder farming on customary land in Malawi is not a very profitable occupation.[180] It is therefore unrealistic to expect the banks to be less wary of extending loans to this category of farmers.

The government is partly to blame for the negative attitude of commercial banks on the provision of credit to subsistence farmers. It has not yet amended the Farmers' Stop-Order Act to enable the farmers to obtain seasonal loans secured by stop-orders without the colonial restriction that they should be "owners" of the land which they cultivate.[181] This may be the explanation for the relatively insignificant number of stop-orders registered in the 1970s, as shown in Table 19.

TABLE 19: REGISTERED STOP-ORDERS, 1970-1981.[182]

YEAR:	NUMBER OF STOP-ORDERS:
1970	50
1971	70
1972	57
1973	55
1974	48
1975	97
1976	102
1977	127
1978	138
1979	216
1980	111
1981	73

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The inference from the table is that the Act has been of peripheral influence in stimulating production and agrarian change. As suggested in Chapter V, any grower of marketable economic crops should be allowed to use the convenient facility of a stop-order to obtain seasonal loans. Common law "ownership" of land should not be an overriding criterion, since land is not the normal security for this type of credit. The system would not be very difficult to operate because of the obligation of customary land smallholders to sell their economic crops to licensed ADMARC buyers. Commercial banks can, by arrangement with ADMARC, address the stop-orders to appropriate market supervisors.

The assumption inherent in commercial bank lending throughout the colonial and post-colonial period that large-scale estate farmers are better risks for credit purposes than small-

TABLE 20: QUARTERLY LIABILITIES DUE TO THE NATIONAL BANK, 1973-1980.[183]

YEAR:	MONTH:	AMOUNT IN K'000
1973	March	5,945
	June	3,830
	September	3,543
1974	March	5,931
	June	4,154
	September	5,922
1975	March	7,838
	June	6,724
	September	8,102
	December	10,755
1976	March	14,016
	June	13,846
	September	12,016
	December	17,732
1977	March	17,543
	June	13,846
	September	22,095
	December	22,758
1978	March	39,124
	June	25,253
	September	30,596
	December	45,352
1979	March	58,515
	June	54,714
	September	54,309
	December	62,984
1980	March	70,990
	June	67,346
	September	61,097
	December	73,562

holders has not been vindicated by the repayment record. If figures from the National Bank are representative of other banks, Table 20 suggests that estate agriculture was heavily indebted to the banks in the 1970s. By September 1981, the National Bank had placed 25 farms/estates under receivership. It was claimed that inability to repay was largely due to poor management,[184] but others have suggested that political pressure compelled the banks to provide the loans "with scant regard to standard lending criteria".[185] To combat managerial and other problems on the indebted estates, agricultural liaison officers were appointed in the 1978/79 season and placed at strategic points throughout the country. Their duty was to assist in the preparation of cash flows and estate accounts. The bank was thus venturing into farm administration to secure some returns from its debtors. It is generally outside the province of banks to manage farms and this could have rebounded on productivity. But this was, nevertheless, a sensible course of action, since an attempt to sell or otherwise dispose the assets of the insolvent estates would have been unacceptable to some of the politicians and influential farmers.

(c) Informal Credit

The only post-independence statutory development on informal credit has been the extension of jurisdiction over the Loans Recovery Act to some Traditional Courts.[186] As a result, usurious loan agreements can now be reopened and considered in the High Court or the authorised Traditional Courts. As seen above, only the High Court was previously authorised to exercise jurisdiction under the Loans Recovery Ordinance.[187] The

extension of jurisdiction to Traditional Courts in 1972 was overdue because some of the usurious agreements are concluded in rural areas and involve sums too small for the invocation of High Court litigation. Traditional courts, which were reconstituted in 1969 to dispense with the type of "justice" understood by Malawians in rural communities, in accordance with customary law, where it is applicable, are sometimes more appropriate forums for katapira and other customary loan agreements.[188]

The issue which remains to be decided is whether katapira agreements should be permissible under the law. If public policy so demands, the circumstances under which the courts may intervene to make the terms less onerous for the borrower should be specified. Even before the Traditional Courts were formally authorised to reopen usurious loan agreements, remarks made by some court chairmen were suggesting that katapira agreements should not be enforced, although they were known and enforceable at customary law. The High Court, on the other hand, correctly enforced some agreements as customary law demanded.[189] This is an inelegant conflict situation which requires specific policy choices and guidelines.

5 Conclusion

When Malawi achieved independence in July 1964, it was plainly obvious to the African politicians that improvement of African agricultural production was the only key to economic advancement in the country. The policy of the government has been to promote increased agricultural production through rur-

al development projects for the mass of peasant farmers, and through estate agriculture on leases of "customary land" acquired by Malawian elites. In the language of rural development, at first sight, this policy appears to be a curious mixture of "unimodal" and "bimodal" strategies of agrarian change. The former aims "at the progressive modernization of the bulk of a nation's cultivators", whereas a bimodal strategy "concentrates resources in a highly commercialized subsector".[190] From recent economic reviews, however, it can be contended that Malawi's strategy has been more bimodal than unimodal. The administration has apparently been transferring resources from peasant production to estate agriculture which has the capacity to show higher production figures in a relatively short period, and thus give the impression of an improving agricultural economy. This transfer of resources has been facilitated by changes to marketing laws which have enabled ADMARC, the corporation with a legal monopoly over the marketing of peasant economic crops, to squeeze profits from trading in peasant produce for reinvestment in commercial agriculture and various agrobusinesses. The result, it is claimed, has been a general decline in the relative income of peasant farmers at the expense of quick growth on private estates and in other industries supported by ADMARC.[191]

A bimodal strategy bolstered by reforms in marketing laws is not the only point of focus for genuine criticisms of law and agrarian change in post-colonial Malawi. The general review of laws affecting land administration has revealed a disturbing trend of conferring upon the executive wide powers which can be exercised arbitrarily and without the possibility

of review in the courts. It may be conceded that the administration of agrarian change does not always require judicial interference, but the trend in Malawi reveals a deeper mistrust of law and legal processes insofar as they demand consistency, predictability and the accumulation of precedents in decision-making. Administrators would like to govern without the irritation of legal challenges on any of these grounds. As a result, law in the post-colonial agricultural economy has had the menial role of vesting administrators with the various powers sought and prescribing the various sanctions which can befall those seeking to disregard administrative directions, but it has failed to prescribe minimum standards of behaviour for the exercise of the enormous powers. Similarly, courts have been reduced to playing the less creative role of enforcers of criminal sanctions.[192] It is arguable that this compares unfavourably with the colonial period when courts were, at least in theory, not debarred from entertaining challenges to administrative decisions. As seen in Chapter III, however, one must hasten to add that the colonial legal order was always unwilling to disagree with the colonial administration, even if it meant failing to protect the rights of the weaker and underprivileged members of the society.

It should also be noted that the weaker side in the agricultural economy, namely the peasant farmers, were rarely on the winning side whenever the colonial administration used "law" to adjust the conflicting socio-economic demands of the European settlers and the Africans. Independence brought about a sudden reversal of roles, but only on the issues of political controversy like Thangata. Law has otherwise con-

tinued to serve the dominant sector, the major difference being that African elites have replaced European settlers as the group most likely to draw more attention from the African government.

NOTES TO CHAPTER VI

1 Malawi Congress Party Manifesto, Malawi Press, Limbe, 1961, pp. 14-15.

2 Nyasaland Government, Development Plan 1962-1965, Government Printer, Zomba, 1962, p. 33; and Malawi Congress Party Manifesto, ibid.

3 Ibid.

4 Malawi Government, Development Policies and Plans 1965-69, Ministry of Natural Resources, p. 6. The first Development Plan was largely the work of Dundzu Chisiza, a nationalist politician who died tragically in 1962. His influence and that of several other nationalist politicians who were expelled from the government in the 1964 cabinet crisis may explain the populist tone of the first plan and early Party policies. See S. Thomas, "Economic Developments in Malawi since Independence", Journal of Southern African Studies, Vol. 2, No. 1, October 1975, pp. 35-38.

5 Malawi Government, Office of the President and Cabinet, Developing Malawi, Government Press, Zomba, December 1971, p. 16, paragraph 1.10. This pamphlet is a general summary of the Statement of Development Policies for the period 1971-1980. The role of the Statement of Development Policies in government planning is indicated by Z.D. Kadzamira, "Planning for Development in Malawi: 1954-1974", Journal of Social Science, Vol. 6, 1977, pp. 65-73.

6 T.D. Williams, Malawi, Cornell University Press, 1978, p. 194. For a detailed account of the elections see L.P. Mair, The Nyasaland Elections of 1961, Athlone Press, London, 1962.

7 Williams, ibid., p. 209.

8 For an excellent but outdated review of the Republican constitution see S. Roberts, "The Republican Constitution of Malawi" (1966), Public Law, p. 314.

9 Republic of Malawi (Constitution) Act, No. 23 of 1966, sections 4, 9 and 11.

10 Section 9 as amended by Ordinance No. 35 of 1970.

11 Section 8.

12 Sections 49, 50 and 53.

13 Sections 19 and 20.

14 Section 28.

15 Section 45.

16 Section 2(1)(i).

17 Chapter II of Malawi Independence Order, Schedule 2, Constitution of Malawi, No. 916, HMSO, London, 1964; and J.S. Read, "Bills of Rights in 'The Third World', Some Commonwealth Experiences", Verfassung Und Recht in Uebersee, 1973, pp. 21-46.

18 Section 2(1)(iii).

19 Section 2(3).

20 P. Brietzke, "Law and Rural Development in Africa, with emphasis on Malawi", Zambia Law Journal, Vol. 5, 1973, p. 24.

21 Ibid., p. 25.

22 Williams, passim, especially chapters 7 and 8.

23 For a brief review of Leadership Codes in Zambia, Tanzania and Ghana see R. Seidman, The State Law and Development, Croom Helm, London, 1978, pp. 414-419.

24 See, for example, Williams op. cit. p. 290-294, on the building of a new capital city in Lilongwe; and Thomas, passim.

25 Kadzamira, op. cit., pp. 61-62.

26 R. Hodder-Williams, "'Support' in Eastern Africa: Some Observations on Malawi", in T. Shaw and K. Heard, The Politics of Africa: Dependence and Development, Dalhousie University Press, 1979, pp. 153-181; and "Dr. Banda's Malawi", Journal of Commonwealth and Comparative Politics, Vol. XII, March 1974, pp. 91-114.

27 Ibid., pp. 100-102; and Decency in Dress Act, No. 10 of 1973.

28 Kadzamira, op. cit., pp. 62-71.

29 Thomas, op. cit., p. 34, describes the general economic strategy of Dr. Banda's government as "quasi-state capitalism".

30 No. 25 of 1965, chapter 57:01, Laws of Malawi.

31 Dr. Banda, Hansard, Proceedings of the Malawi Parliament, 2nd Session, 5th Meeting, 12th-13th April 1965, p. 653.

32 No. 18 of 1966, chapter 14:06.

33 No. 21 of 1970, chapter 58:04.

34 See section 2 of the Land Act for the definition of the three land categories.

35 T.O. Elias, The Nature of African Customary Law, Manchester University Press, 1956, p. 162; and C.A. Griffiths, Land Tenure in Malawi and the 1967 Reforms, p. 45.

36 Dr. Banda, Hansard, 4th Session, 4th meeting, 4th April 1967, p. 411.

37 For a discussion of the law of perpetuities under received English land law in Malawi, see J.D.A. Brooke-Taylor, Land Law in Malawi, Chancellor College, 1977, pp. 84-90.

38 This implication is drawn from the heading of the part as "Private Land". The part implies certain covenants into the leases.

39 Section 40.

40 Section 2.

41 Ibid. and section 3 of chapter 69:02.

42 Brooke-Taylor, op. cit., p. 4.

43 J.B. Sykes (ed.), The Pocket Oxford Dictionary, Clarendon Press, Oxford, 1978, p. 481. Cf. the definition in 32 Halsbury's Laws of England, 3rd edition, p. 249.

44 See F.H. Lawson, Introduction to the Law of Property, Clarendon Law Series, Oxford, 1975, p. 20.

45 N. Ollenu, Customary Land Law in Ghana, London, Sweet and Maxwell, 1962, p. 1; and C.O. Olawaye, Title to Land in Nigeria, University of Lagos, 1974, pp. 9-10.

46 R.W. James, Modern Land Law of Nigeria, University of Ile-Ife Press, Nigeria, 1973, pp. 14-15; and B.O. Nwabueze, Nigerian Land Law, Nwafime Publishers, Enugu, Nigeria, 1972, pp. 3-5.

47 See, for example, G.B.A. Coker, Family Property Among the Yoruba, 2nd edition, Sweet and Maxwell, London, 1966, p. 45; and cf. S.N.C. Obi, Ibo Law of Property, London, Butterworths, 1963, p. 32.

48 See Chapter II above and Ibik, Restatement of African Law: 4, Malawi II, Sweet and Maxwell, London, 1971, pp. 38-39, 51-53, 63-64, 76-77.

49 In Kambuwa v. Mjojo, Civil Appeal No. 8 of 1966 [1966-68] 4 ALR Mal. 95 at pp. 96-97. Bolt J. came to the same conclusion by holding that houses were, under customary law, distinguishable from the land on which they stood. The High Court was, therefore, entitled to exercise jurisdiction on a claim over customary dwellings although claims over customary land itself were, by statute, an administrative matter over which the courts had no jurisdiction. This decision can be contrasted with the subsequent case of Mauwa v. Chikudzu, Civil Appeal No. 4 of 1969 [1965-1970] ALR Mal. 183, in which Pike J. held that the High Court had no jurisdiction in a case involving trespass to a house and trees on customary land because it raised issues of "ownership of land". Unlike Bolt J. in the earlier case, Pike J. had no recourse to the advice of assessors or customary law experts on whether the issue of trespass to a house or trees on customary land could be dissociated from the question of land "ownership". He simply applied common law conceptions of land and "ownership" to customary land.

50 Section 2 of chapter 59.01. For similar definitions see section 2 of chapters 58:01, 58:04 and 59:02.

51 Section 2 of chapter 1:01.

52 Art.15(2) of the British Central Africa Order in Council, 1902, as amended by Article 2 of the Nyasaland Order in Council (No. 2) of 1907.

53 Statute Law (Miscellaneous Amendment) Act, No. 37 of 1967.

54 Land (Amendment) Act, No. 7 of 1974.

55 Hon. Minister for Justice and Attorney-General, Hansard, 2nd meeting, 10th session, 28th March 1974, p. 826.

56 Information on the operation of section 24A and general land administration in Malawi was obtained from interviews with land administration officers, Office of the President and Cabinet, Lands Department, Tikwere House, Lilongwe. The Secretary to the President and Cabinet, the highest Civil Servant in the administration, is now responsible for consenting to some transactions under section 24A.

57 See, for example, the Business Licensing (Amendment) Act, No. 18 of 1978.

58 See Part 2(c) of the Chapter.

59 See Note 17 above, Section 16.

60 This was also the effect of a similar Bill of Rights inserted in the Kenyan Independence Constitution. For a review of the Kenyan provision and the law of compulsory acquisition in East Africa, see J.S. Read, "Aspects of East African Experience", in J.F. Garner (ed.), Compensation For Compulsory Purchase, A Comparative Study, U.K. Comparative Law Series, London, 1975, pp. 127-148, and notes on pp. 272-274.

61 Section 2(1)(iv) of the Republic of Malawi Constitution Act No. 23 of 1966.

62 For general African political attitudes on the Republican Constitution, see Hansard, 3rd session, 6th meeting, 17th to 20th May 1966, pp. 548-565.

63 Land (Miscellaneous)(Amendment) Act No. 34 of 1969.

64 Hansard, 1st meeting, 7th session, 17th November 1969, p. 27.

65 Act No. 21 of 1970.

66 Sections 4 to 8 and 12 to 14.

67 Section 12. Emphasis is supplied by the author, not the text of the section.

68 Hansard, 7th session, 3rd meeting, 28th-31st July 1970, p. 552.

69 Section 10(4).

70 Section 19(5).

71 Section 10(6).

72 Section 19(3).

73 Hansard, op. cit., p. 553.

74 Section 19(8)

75 Statute Law (Miscellaneous)(Amendment) Act No. 5 of 1971.

76 Hansard, 7th session, 5th meeting, 6th-9th March 1971, p. 936.

77. Ibid., p. 936.

78 Read, passim; Tanganyika Land Acquisition Act No. 47 of 1967 and Acquisition of Buildings Act, No. 13 of 1971; cf. The Constitution of Kenya Act, No. 5 of 1969, and the Kenya Land Acquisition Act, No. 47 of 1968.

79 See Chapter IV above.

80 Read, op. cit., p. 136.

81 Act No. 1 of 1966, chapter 14:06, as amended by Acts no.s 18 of 1966 and 29 of 1968.

82 Sections 3-4.

83 The Property and Business (Presumption of Ownership) Act No. 11 of 1974.

84 Dr. Banda, Hansard, 3rd session, 4th meeting, 11th-19th January 1966, p. 435.

85 P. Brietzke, "Theft by Public Servant in Malawi", Journal of Social Science Vol. 1, 1972, pp. 65-75; and Section 283 of the Penal Code, chapter 7:01.

86 S. Roberts, "The Malawi Forfeiture Act 1966 - A Surfeit of Discretion", [1966] J.A.L., pp. 131-134.

87 The largest number of forfeiture applications gazetted were 10 in 1936, 13 in 1971 and 22 in 1976.

88 Hon. H.M. Blackwood, Hansard, op. cit., pp. 437-438.

89 Sections 26 and 38.

90 Section 29(2).

91 Section 27(1)

92 The Minister's power is frequently invoked to enable the government to acquire customary land for purposes like construction of roads, government offices, schools and clinics.

93 See Chapter II.

94 See Table 11 below.

95 Part 2(a) of the Chapter.

96 Malawi Government, Report on Land Tenure in Malawi with Particular Reference to Rentals, Office of the President and Cabinet, Lands Department (Valuation), 1978, p. 7.

Information on freeholds belonging to the President was supplied orally by Land Administration Officers.

97 See Chapter IV.

98 Section 5(2) of the Land Act.

99 Report on Land Tenure in Malawi, 1978, p. 11.

100 G.N. 166/1965.

101 Land Administration Officers were generally coy and unwilling to supply details of encroachment disputes settled by the administration. However, I was allowed to witness the settlement of a few encroachment disputes in Kasungu and Lilongwe. It is important to note that encroachment and other disputes involving customary land are settled administratively and kept out of the courts of law. The authority for this arrangement is G.N. 167/1962, L.R.O. 1/1972, which declares that proceedings involving chieftainship, headmanship, or the allocation of land under local customs should be excluded from the jurisdiction of the courts. This is a continuation of the law and policy of the colonial administration which can be traced to the case of Mwafongo v. Mwambande (Civil Appeal No. 1 of 1948)(1948) 6. Ny. L.R. 62. A point which has been overlooked by the colonial and independent governments on this issue is the fact that the law specifically excludes the jurisdiction of the courts over appointment of traditional rulers and land allocation, but not all other disputes involving customary land. See also Note 49 above.

102 J. Kydd and R. Christiansen, "Structural Changes in Malawi Since Independence: Consequences of a Development Strategy based on Large Scale Agriculture", World Development, Vol. 10, No. 5, 1982, p. 358. My informants from the Lands Department were, again, reticent on this issue.

103 Ibid., pp. 355-375.

104 Source: Malawi Government, Malawi Statistical Yearbook 1979, Government Printer, Zomba, August 1980, p. 1. Griffiths, op. cit. p. 211, uses more up-to-date statistics and notes that customary land declined in size from 20 million acres (87%) at independence tp 18.4 million acres (79%) by 1981. Freehold land declined from 410,000 acres to 127,000 acres (0.5%); land leased by the government increased from 200,000 acres (0.9%) to 620,000 acres (2.6%), of which leases of agricultural land covered 420,000 acres. He finally claims that the number of leases increased from 96 before independence to 516, of which 445 were granted after 1970.

105 Section 31(1).

106 Section 31(2)

107 Section 31(3).

108 Section 31(4) and Section 32.

109 Section 35.

110 See Sections 6 and 8 of the Malawi Land (Amendment) Act, No. 8 of 1967.

111 See Note 5 above, p. 1.

112 For a general description of the integrated rural development projects in Malawi, see: P.C.C. Chirwa, Development Constraints in the three Major Agricultural Projects in Malawi, M.Sc. dissertation, University of Wales, Aberystwith, 1975, p. 7 and pp. 26-27; H.P.M. Simukonda, Integrated Rural Development, A Comparative Study, M.Soc. Sc. dissertation, University of Birmingham, 1978; and D.H. Ng'ong'ola, An Economic Analysis of Smallholder Farm Expenditure in Thilwi/Lifidzi, Malawi, M.Sc. dissertation, University of Wales, Aberystwith, 1979, pp. 5-6.

113 See Map on p.34 for integrated and N.R.D.P. projects of Malawi. The National Rural Development Programme Loan Authorization Act No. 1 of 1978 authorized the Minister of Finance to borrow sums not exceeding U.S. $ 25 million for the purpose of financing the N.R.D.P. projects.

114 See, for example, G.N. 170/1969, Control of Land (Hara Irrigation Project) Order, and G.N. 202/1969, Control of Land (Ntchalo Controlled Area) Order.

115 Section 29(2) and Section 31.

116 G.N. 196/1969, order passed under Section 41 of the Land Act.

117 The Malawi Young Pioneers Movement was formed in 1963 to train the youth of Malawi and equip them with skills necessary for "spearheading" rural development. The Malawi Young Pioneers Act, 1965, chapter 13:03, turned the movement into a statutory organization, but its members are highly politicized. They swear fealty to the President and the Malawi Congress Party.

118 File LP/16/3L/Vol. III, folio 10, L.L.D.P., Land Allocation Section, Lilongwe. For detailed reviews of some of the settlement schemes in Malawi see: H. Meliczek, "Land Settlement in Malawi", Land Reform, Land Settlement and Co-Operatives, F.A.O., U.N., No. 1, 1977, pp. 55-68, particularly pp. 62-65; and A. Chilivumbo, "The Response to Planned Change: A study of the Rice Scheme in Chief Mwambo's Area, Lake Chilwa, Zomba, Malawi", The Society of Malawi Journal, Vol. XXII, No. 2, 1969, pp. 38-56, particularly pp. 45-48.

119 Ibid., and: L.L.D.P., Project Completion Report, Phase III, Central Evaluation Unit, MANR, November 1979; IBRD/IDA, Lilongwe Agricultural Development Project, Phase II, Malawi, Appraisal Report, April 1971; and Shire Valley Agricultural Development Project, Phase II, Project Completion Report, December 1978.

120 See Note 112 and Chapter VII.

121 As Chapter VII will show, the independent government of Malawi, like the colonial administration before it, embraces this argument.

122 Source: Malawi Government Gazette, Government Notes and Subsidiary Legislation, 1965-80, Government Printer, Zomba, Malawi.

123 The Statute Law (Miscellaneous Amendment) Act, No. 37 of 1967, repealed The Export of Food (Control) Ordinance, chapter 48; The African Foodstuffs Ordinance, chapter 81; and The Control of Foodstuffs Ordinance, chapter 122.

124 No. 18 of 1970.

125 Hansard, 7th session, 3rd meeting, 28th-31st July 1970, pp. 572-573.

126 For a quick comparison of the old and new law, see Part III of the 1970 Act and cf. section 11, part III of the 1952 Ordinance; and Part IV of the 1970 Act and cf. section 17, part IV of the 1952 Ordinance. There was no equivalent of Parts V and VI of the 1970 Act in the 1952 Ordinance. See Chapter V above for details of colonial legislation on Tobacco Marketing.

127 See Chapter V (2)(b) above.

128 No. 43 of 1970, chapter 65:03.

129 Section 4. The full composition of the new authority was: a chairman, plus two representatives each for the tobacco exporters, the Tobacco Association, the F.M.B. and the government; and four representatives of tobacco growers.

130 Minister for Agriculture, Hansard, 7th session, 4th meeting, 24th November to 3rd December, 1970, p. 629.

131 Ibid.

132 Section 32.

133 Section 6(3) of the Special Crops Act, Chapter 65:01, as amended by Act No. 9 of 1972.

134 Minister for Agriculture, Hansard, 8th session, 3rd meeting, 29th February to 9th March 1972, p. 653.

135 Farmers Marketing (Amendment) Act, No. 16 of 1971.

136 Hansard, 7th session, 5th Meeting, 9th to 16th March 1971, p. 841.

137 Section 3 of ADMARC Act, Chapter 67:03.

138 Section 3A.

139 Section 4.

140 Minister of Agriculture, Hansard, 7th session, 9th to 16th March 1971, p. 1069.

141 Section 6(1)(o).

142 IBRD/IDA, Agricultural Sector Review, Malawi, Report No. 35a-Mai, December 1973, p. 37.

143 Thomas, op. cit. p. 51; and Kydd and Christiansen, op. cit. pp. 368-369.

144 R. Bates, Markets and States in Tropical Africa, University of California Press, 1981, pp. 26-29.

145 Source: Notes to ADMARC Accounts for the year ending 31st March 1957.

146 Republic v. Masiku, Southern Region Traditional Court, Criminal Case No. 48 of 1977, reported in XI CILSA, 1978, pp. 217-218.

147 Statute Law (Miscellaneous Amendments) Act, No. 8 of 1980.

148 Government Gazette Vol. XIX, No. 28, 30th April 1982. G.N. 319/82 reconstituted the ADMARC Board, replacing the Executive Director with a Chairman with no mangerial responsibilities.

149 See Note 2 above, p. 67.

150 Malawi Government, Development Policies and Plans, 1965-1969, Ministry of Natural Resources, 1965, p. 12; and H. Dequin, Agricultural Development in Malawi, Munchen, 1970, p. 113.

151 Z.D. Kadzamira, Local Politics and the Administration of Development in Malawi, Ph.D. Thesis, University of Manchester, 1974, p. 204.

152 Information on the Government Loans Board was obtained mainly from personal interviews with the Secretary of the Board on 15th June 1981. Additional evidence of the insolvency of the Board is in a speech made by the responsible Minister in Parliament, Hansard, 7th session, March 1971, p. 1032.

153 Source: Government Loans Board Secretariate, Ministry of Trade and Industry, Lilongwe, Malawi.

154 L.L.D.P., "Credit for Agricultural Development", Discussion Paper No. 2, Evaluation Section, April 1971; and M.C. Alexander and P.J. Scott, "The Implications of Group Credit for Rural Development in Malawi", East Africa Agricultural Economic Society, Lusaka Conference, May 1974, p. 2.

155 Malawi Government, N.R.D.P., L.L.D.P., Phase IV Proposals, July 1977, Annex 5; and S.V.A.D.P., Phase II, Pro-

ject Completion Report, December 1978, p. 13. Some information on credit allocation within the L.L.D.P. and other agricultural projects was obtained from interviews with credit officers for the L.L.D.P. on 4th May 1981, and the Agricultural Credit Officer at the Ministry of Agriculture Headquarters on 15th June 1981.

156 J.S. Nankumba, "Complicated Procedures or Credit for Asking? A Pragmatic Approach to Credit Use in Malawi", Journal of Social Science, Vol. 8, 1980/81, pp. 62-66.

157 U. Lele, The Design of Rural Development, John Hopkins University Press, Baltimore and London, 1975, pp. 92-93.

158 Ibid., pp. 96-99; and Scott and Alexander, op. cit., p. 5.

159 Quoted by B. Phipps, "Evaluating Development Schemes: Problems and Implications. A Malawi Case Study", Development and Change, 7 (1976), p. 481.

160 For details of group credit within the L.L.D.P., see Scott and Alexander, passim, and L.L.D.P., Group Credit Survey, October 1974, Evaluation Section, March 1975.

161 Sections 3, 4 and 11 of the Partnership Act, chapter 46:04. M. Rogers and A. Allott, "Introduction and Report of the Proceedings of an International Conference on Banking Law and Development in Africa" [1975], J.A.L., p. 17, report that credit groups in Ghana exhibited legal ambiguities similar to those noted in this paragraph. They suggest that there may be several contracts in the group credit arrangement: one between the group and the lender, and other contracts between the group and each individual member.

162 Malawi Government, Project Completion Report, L.L.D.P., Phase III, Central Evaluation Unit, M.A.N.R., November 1979, pp. 10-12 and pp. 29-30, and Tables 16 and 17.

163 Nyasaland Government, Development Plan 1962-1965, p. 46.

164 An interesting example of an attempt to prescribe a formal legal structure for customary groups in the hope that this would facilitate the provision of agricultural credit is the Kenya Land (Group Representatives) Act of 1978. It has been alleged that this Act has failed to achieve its objectives among the Masai partly because the prescribed structures are unsuitable and unfamiliar to the affected groups. See S. Coldham, "The Registration of Group Ranches among the Masai of Kenya: Some Legal Problems", 20, Journal of Legal Pluralism (1982), pp. 1-16.

165 L.L.D.P., "Credit for Agricultural Development", Discussion Paper No. 2, 1971, pp. 3-11.

166 Note 161 above.

167 For information on the credit/marketing link in development projects and schemes, see Notes 155 and 156 above.

168 S.L. Atkins, "Agricultural Marketing in Malawi", L.A.D.D., Evaluation Unit, November 1979, p. 8.

169 Ibid., p. 9; and Lele, op. cit., pp. 105-106.

170 L.L.D.P., Project Completion Report, Phase III, 1979, p. 1 and pp. 40-46.

171 Z.D. Kadzamira, op. cit., p. 218; Lele, op. cit., p. 95; Malawi Government, L.L.D.P. Phase II, Project Completion Report, February 1976, p. 7; and Traditional Courts (Enforcement of Judgement) Rules, 1967, G.N. 94/1967.

172 Source: Chief Agricultural Development Officer, Lilongwe, Malawi. Between 1972/73 and 1979/80, only approximately 50% of the credit demand could be met, due to shortage of funds. By 1980/81 the government raised international loans to finance credit lending under the N.R.D.P. concept. See Note 113 above.

173 Source: Malawi Government, N.R.D.D., L.L.D.P., Phase IV proposals, July 1977.

174 Ibid.

175 For a brief note on these developments see C. Crosby, Historical Dictionary of Malawi, Scarecrow Press, London, 1980, pp. 16-17. The creation of the National Bank was effected under the Standard Bank Limited and Barclays Bank D.C.O. Act No. 13 of 1971, chapter 44:04.

176 P.H. Brietzke, "Rural Development and Modifications of Malawi's Land Tenure System", Rural Africana, No. 20, 1973, p. 64.

177 Hansard, 7th session, March 1971, p. 839; and, generally, pp. 833-839.

178 This can be confirmed by a casual perusal of the Register of Company Charges kept by the Registrar of Companies in Blantyre in which details of loans raised by agricultural estates and all other registered companies are kept.

179 L.F. Miller, Agricultural Credit and Finance in Africa, The Rockefeller Foundation, 1978, p. 9.

180 Kydd and Christiansen, passim.

181 Section 2 of chapter 63:03.

182 Source: Register of Stop-Orders, Registrar General's Office, Blantyre, Malawi. The figure for 1981 is for stop-orders registered by 13th July 1981.

183 Information supplied by the National Bank Head Office, Advances Department, Blantyre.

184 Ibid.

185 Kydd and Christiansen, op. cit., pp. 368-369 and p. 370.

186 Statute Law (Miscellaneous Amendment) Act No. 24 of 1972 and Act No. 13 of 1974.

187 See Chapter V.

188 For a detailed review of the origins and the philosophy behind the Traditional Courts see L.J. Chimango, "Tradition and the Traditional Courts in Malawi", X CILSA, pp. 39-66.

189 June v. Magombo, Civil Appeal No. 127 of 1969, Blantyre Urban Traditional Court, and Majawa v. Jere, Civil Appeal No. 122 of 1973, National Traditional Appeal Court; cf. Mwafulirwa v. Munthali, Civil Appeal No. 17 of 1967, High Court, and Fudzulani v. Thomas, Civil Appeal No. 15 of 1969, High Court. These cases are fully discussed and reviewed by L.J. Chimango, "The Money Lender in Court", Journal of Social Science, Vol. 6, 1977, pp. 83-95.

190 B.F. Johnston and P. Kilby, "'Unimodal' and 'Bimodal' Strategies of Agrarian Change", in J. Harris (ed.), Rural Development, Hutchison University Library, 1982, p. 50 and p. 52.

191 See Note 143 above.

192 For comparable trends in Kenya and Tanzania see J.P.B.W. McAuslan, "Control of Land and Agricultural Development in Kenya and Tanzania", in G.F. Sawyer (ed.), East African Law and Social Change, East Africa Publishing House, Nairobi, 1967, pp. 202-205.

VII REORGANIZATION AND REFORM OF CUSTOMARY LAND

The previous chapter noted in passing that in addition to the general post-colonial trends in land administration discussed, the African government enacted a set of land reform statutes with the specific aim of providing a new legal framework for rural agrarian change.[1] The design, implementation and working on the ground of these statutes should be the central focus of any study of law and the agricultural economy in Malawi. They provide the best opportunity for exploring the inter-related themes of divergencies between law on the statute books and law in action, and the general use of law as a tool for social engineering. The remaining substantive chapters of the thesis will therefore dwell on detailed reviews of each land reform statute.

When the enactment of the statutes was proposed in 1967, the President complained that existing customs for holding and tilling land were outdated, wasteful and totally unsuitable for the development of the country with agriculture as the basis of the economy. Suggesting that the root of the problem was the absence of individual land titles, he remarked:

> "No one is responsible ... for the uneconomic and wasted use of land because no one holds land as an individual. Land is held in common ... and everybody's baby is nobody's baby at all."[2]

The President further suggested that the existing system discouraged individuals and institutions from providing loans for the development of the land. A new system was therefore required to ameliorate the situation in the following ways:

> "First by accepting and recognizing the principle or idea of individual ownership of land and secondly by insisting that anyone who owns land, whether as an individual, or as the head of his or her family, is strictly responsible for the economic and productive use of his or her land; otherwise it must be taken away." [3]

It should be noted that this was not the first time that the idea of "individual ownership" of land was mooted. A similar proposal was made in the Report of the Conference on African Land Tenure in East and Central Africa held in 1956. The report was particularly critical of uxorilocal marriage and matrilineal inheritance prevalent in Southern Malawi, which were described thus:

> "the man lives at his wife's village and helps her to cultivate a garden on her family land; his heirs are his sister's children. This system gives the man no secure interest in the land he uses, whether for himself or for his sons, and it therefore discourages him from investing his labour or his capital in it." [4]

Opinions of this nature also underlay the introduction of the unsuccessful village land improvement schemes discussed in Chapter IV. But a more immediate precedent for the Malawi government was the Kenya land registration system which began during the colonial period and was continued after independence.[5] R. Simpson, an expert familiar with land registration laws implemented in Kenya and elsewhere,[6] was hired to advise on the drafting of the Malawi Statutes.[7] The first of these statutes to be passed through Parliament and implemented was the Customary Land(Development)Act (C.L.D.A.).[8] This chapter is mainly concerned with the design and implementation of this statute.

1 The Design and General Description of the C.L.D.A.

The preamble of the C.L.D.A. suggests that it is "an Act to provide for the ascertainment of rights and interests in Customary Land" and for its reorganization for "better agricultural development". The term "Allocation" of customary land has been coined to emphasize this combination of two processes. Provisions dealing with the ascertainment process were generally adapted form part II of the Sudan Land Registration Ordinance of 1925. The Kenya Land Registration (Special Areas) Ordinance, 1959, and the draft of the Kenya Land Adjudication Act, 1968, were the models for the provisions on land reorganization. The C.L.D.A. also borrowed some provisions from the Lagos Registered Land Act of 1965.[9] The precise influence of these various foreign laws on the design of the Act can be gauged by reviewing the first five of the six parts of the Act. This will also show that it has some peculiarly unique provisions.

The principal provision of Part I is Section 3(1), which declares that the Act should be applied to a defined area by a published order "whenever it appears expedient to the Minister that the ascertainment of interests in customary land and the better agricultural development of such land in any area should be effected ..." In such an order or further orders, the Minister may also prescribe a development scheme for the area. The tenor of this provision suggests that application of the C.L.D.A. will first of all be attempted in areas intended for or with established agricultural development projects or schemes of the type reviewed in the previous chapter. If customary

land rights within the project or scheme are already affected by Control of Land Orders, Section 3(2) empowers the Minister to adjust or revise any previous ascertainment to ensure that allocation is completed in accordance with the C.L.D.A. Even within a project or scheme, Section 3(4) suggests that the Act should not be applied to areas which may be unsuitable or unready for the reforms.

This cautious and selective approach to land reforms gives the Malawi Act a bent not shared by other adjudication statutes which aim for a general ascertainment of interests in land. The Malawi Act was designed in such a way that the ascertainment process would have a bearing on the agricultural economy. It was presumably appreciated that a simple conversion of customary land titles would not bring about agrarian change if the title recipients did not have other necessary facilities such as credit and marketing packages which are provided through development schemes and projects in Malawi. As a result of the selective approach, however, it will take a long time to complete reforms of a sizeable proportion of customary land, and for the results to filter into increased agricultural production. It should not be assumed, therefore, that the Act was designed to have an immediate and wider impact on the post-colonial agricultural economy based on the exploitation on customary land. This is a feature of the Act which has not been given prominence by politicians, project officers and most other commentators.[10]

Part II of the Act is concerned with the appointment of persons responsible for the allocation process after a Minist-

erial order applying the Act to a specified area has been published. Section 4 provides for the appointment of a team consisting of an Allocation Officer and as many Demarcation, Recording and Survey Officers as may be necessary. The whole operation is placed under the overall charge of the Allocation Officer, who is subject to the directions of the Minister. The Allocation Officer is also vested with various administrative powers necessary for the conduct of allocation, including the power to request the production of documents or summon the attendance of witnesses in any enquiry. The other officers are generally empowered to enter upon any piece of land for the purpose of carrying out prescribed duties. The appointment of these officers is standard in adjudication statutes. The only novelty is the title "Allocation Officer", which denotes the special character of the reforms in Malawi. His equivalent under Kenyan law is an Adjudication Officer. The Sudan Ordinance called him a "Settlement Officer", a title which is apt to be confused with simple land occupation as in Malawi's land resettlement and irrigation schemes mentioned in the previous chapter.[11]

Part II of the Act also provides for the appointment of a Land Committee and describes some of its functions. Section 5 stipulates that for any development section or part of it, the Allocation Officer may appoint a panel of not less than six residents, from which he may select, from time to time, Land Committees of not less than five persons. The Section also requires the Allocation Officer to consult the District Commissioner responsible for the development area before making any appointment. He may also appoint an Executive Officer respon-

sible for keeping the records of the Committee. Section 5 stems from Kenyan law which, however, peremptorily empowered the District Commissioner to constitute larger committees of not less than twenty-five members.[12] The assumption was that committees of this size would reduce the likelihood of corruption in the discharge of duties which included effecting land reorganization.[13] Malawi benefited from the experience that large committees decelerated the reform process without necessarily preventing corruption.[14] Section 5 thus provides for smaller committees and Section 6 describes the following less onerous functions: to advise the allocation team on points of customary law; to represent the interests of absentees, minors and other disabled persons in the absence of guardians; to alert the team to claims which have not been lodged; and to assist generally in the allocation process.

Part III on claims and demarcation describes the procedure for ascertaining interest in customary land and for reorganizing the existing pattern of land holding. The first step is the publication of notice which should specify the section of the development area and the period within which claims to interests in land in the section may be ascertained. It is realised that the entire area affected by the C.L.D.A. may be too large for all claims to be ascertained at the same time. The Allocation Officer is therefore empowered to divide the area into two or more sections, each with a different name, for which separate "sectional" notices may be published.[15] Two consequences follow the publication of this notice.[16] First, as from the date indicated, the powers of land control of customary authorities like the Mwini dziko should be suspended.

Secondly, except with the consent in writing of the Allocation Officer, no person or customary authority should proceed with or take cognizance of any land dispute within the section. All disputes instituted before the publication of the notices should be determined or stayed by the time the ascertainment commences. The aim of these provisions is to ensure that the Allocation Officer is the only master over land disputes in the course of demarcation. Customary authorities regain their land control powers over any piece which is allocated and eventually registered as customary land.

The second step in the procedure is the publication of a notice of "intended demarcation" not less than seven clear days before the commencement of demarcation in the section.[17] This notice should be published by the Demarcation Officer and should specify the time, place and manner in which claims should be lodged, and how the boundaries of land claimed should be indicated. A claimant may be required to attend in person or be represented by an agent. If a person with an interest in land fails to submit a claim in the prescribed manner, the allocation team may proceed as if one has been made, but this is not a binding obligation.[18] The team is nevertheless enabled to take into account the interests of absentees and other persons who, for some reason, cannot assert their claims.

Upon the reciept of the claims, the Demarcation Officer is empowered to ascertain the boundaries thereof, plan a fresh layout and rearrange the holdings accordingly.[19] In so doing, he may set aside land required for the present or future needs of the community such as roads, village sites, schools, public

buildings and open places; effect measures prescribed for any development schemes; demarcate rights of way to give enclosed pieces access to public roads or watering places; realign boundaries of plots adjoining public roads and, if necessary, clear any boundary or line for demarcation purposes; terminate all unnecessary customary rights; and, most important, "if he considers the existing lay-out of the land to be uneconomic or inconvenient for the use of the land or inconsistent with the development scheme, prepare a fresh lay-out and by exchange of land or otherwise adjust the existing lay-out".[20]

In the jargon of land reform, the Demarcation Officer is empowered to cure the "fragmentation" of land holdings by effecting "consolidation".[21] Two conditions of land tenure should be distinguished here. First, one piece of land may be split into small fragments held by different persons which may be deemed to be below the optimum size of an agricultural holding prescribed for a particular scheme. Succession regimes which have no concept of primogeniture contribute to this type of "fragmentation" which is distinguishable from excessive dispersal of fragments or units of one farm holder. This latter situation can arise where a farmer prefers to have holdings in different localities in order to utilize soil varieties for the purpose of growing different crops. This is the kind of fragmentation which can be readily cured or controlled by "consolidation" or the exchange and adjustment of holdings as stipulated by Part III of the C.L.D.A. For the control of fragmentation under the first condition, it may be necessary for some farmers to lose their sub-economic holdings and be provided with alternative forms of livelihood in other sectors of the

economy.[22] This may entail the payment of compensation by the government or the remaining landholders. The C.L.D.A. is inadequate for this purpose because it contains no proper compensation provisions. Section 13(1)(a) simply states that whenever land is set aside for the present and future needs of the community, "any detriment caused to owners of pieces by such setting aside shall be shared as equitably as possible between all owners in the development section".

Although the C.L.D.A. may not be adequate for a comprehensive land consolidation programme, it is sufficiently clear that the demarcation envisaged goes beyond adjudication per se which involves a simple ascertainment and recording of existing interests in land.[23] Two differences between the Malawi Act and its Kenyan prototype on this issue should be emphasized. First, as noted earlier, consolidation was entrusted to Land Committees in Kenya, but the Demarcation Officer has the primary responsibility in Malawi. Land Committees may participate in the process, but only to resolve boundary and other disputes which Demarcation and Recording Officers refer to them.[24] The second difference is that Kenyan law included specific details on how consolidation was to be attempted.[25] This was deemed unnecessary in Malawi, presumably because it was not commendable to fetter the discretion of demarcation experts in devising schemes suitable for specific localities, especially where the process excluded the extensive involvement of committees of elders.

In the third and final phase of demarcation, the Survey Officer is empowered to survey all ascertained pieces and pre-

pare a Demarcation Map on which every piece is identified by a distinguishing number.[26] But in order to avoid crowding the map with irrelevant details, public roads and rivers need not be so identified.[27] In respect of each piece of land identified on the map, the Recording Officer is empowered to consider all claims to an interest in land and to prepare an appropriate record.

As noted above, when the ascertainment of land boundaries or the various interests claimed gives rise to a dispute which the allocation team cannot resolve, it may be referred to a Land Committee.[28] Section 16(2) enjoins the Committee to adjudicate and determine the matter "having due regard to any customary law which may be applicable". The Committee should also follow certain procedural requirements on conflict of interests, election of a chairman, formation of a quorum, and the reporting of decisions.[29] On conflict of interests, any member with an indirect or direct interest in a dispute before the Committee should disclose the fact and withdraw from the proceedings. Each Committee is also empowered to elect one member as Chairman, and he should preside at all meetings. In his absence, a temporary Chairman may be elected for the particular meeting. The quorum of a committee is half of the total composition if that number is even, and half plus one if it is an uneven number. The Act assumes that voting will be the method of decision-making, and gives the Chairman or presiding member a casting and an original vote for use whenever there is an equality of votes. Any decision of the Committee should be signified in writing and signed by the Chairman or executive officer.

An additional procedural clause which is not a requirement states that a Committee should not be disqualified for the transaction of business by reason of any vacancy in its membership. Moreover, proceedings should not be rendered invalid because of the participation or attendance of persons who are not entitled to do so.[30] This latter provision anticipates that Committee proceedings would be of interest to persons other than the disputants. Dispute resolution under customary law in a rural setting was a matter for the whole community, and it was not unusual for persons with no direct locus standi in the case to participate in the proceedings.[31]

The last provision in Part III of the C.L.D.A. stipulates that any person aggrieved by the decision of a Committee may lodge an objection with the executive officer within fourteen days of the decision.[32] Upon receipt of the objection, or if the Allocation Officer so directs, the Committee should reconsider its decision and submit findings to the Recording Officer, who is entitled to effect any necessary changes to the Allocation Record.[33] The curious aspect of this appeal procedure is that the same panel may be asked to reconsider its earlier decision. It should be obvious that no panel would readily alter its decision unless substantially new facts are adduced at the rehearing. The Kenyan prototypes stipulated that appeals from Committee decisions should be taken to an arbitration board.[34] This was perhaps regarded as an unnecessary bureaucratization of the process in Malawi, where the committees have a different and less important role to perform.

Part IV of the C.L.D.A. details the principles which the allocation team should follow in preparing the Allocation Record. This is the document from which the land register is eventually abstracted. It consists of a form prepared for each piece of land which purports to show the approximate size of the piece; the persons entitled to registration as proprietors; the designated land category of the piece; and the date on which the form is completed.[35] The principles of allocation depend on whether the piece is to be categorized as private, public or customary land.

With regard to intended private land, Section 19(1) directs the Recording Officer to record persons with customary rights which would entitle them to be registered as proprietors, co-proprietors, or proprietors of family lands. They should respectively be recorded as owners, joint-owners or owners in common, or as owners of family lands. Section 19(2) directs that if any piece is subject to a customary right which is registrable "as a lease, charge, easement, restrictive agreement or profit" under the Registered Land Act, the Recording Officer should take the particulars which would enable the right and the name of the beneficiary to be registered. However, such rights should not be recorded if they have been terminated in accordance with Section 13(1)(e) because of their inconsistency with a development scheme.

Underlying the principles for recording private land is a spurious assumption that a direct correlation can be achieved between customary rights in land and the rights recognized by a land registration statute. This is impossible to achieve,

especially where the statutory rights are couched in alien property concepts. Experience in Kenya revealed that without a guiding table of equivalence, registration officers had neither the time nor the skill to match the two systems of property rights. This resulted in a failure to record and protect some well-known customary rights, while some claimants were conversely accorded land rights greater than those enjoyed under customary tenures. Group rights and the rights of "strangers" or non-indigenous members of rural communities were particularly given short shrift.[36] The Malawi Act attempts to avoid some of these consequences by enabling the allocation team to demarcate and record rights in "family land" as an exception to the general allocation of individual land rights. It was also the prevailing view that "natural individualization of customary tenure" in Malawi was not as well advanced as it was in Kenya to permit a wholesale registration of individual land rights.[37]

The idea of recording family rights and interests in land was borrowed from the Lagos Registered Land Act of 1965,[38] with two important modifications. First, the Malawi Act fortuitously omits provisions on the recording of all family members and their respective shares in the land. By so providing, the Lagos Act assumed that family members held divisible rights in family land. This smacks of comparisons with English property concepts of common ownership of land, which may not exist under customary law.[39] The Lagos Act also provided for the appointment of several family representatives if the family membership was not less than ten or if this was requested by a majority of its members. This was likely to complicate dealings in

family land and the development of a land market, which land registration is generally supposed to encourage. It was therefore decided to provide for the recording of only one family representative in Malawi.[40]

Part IV of the C.L.D.A. also contains a second exception to the idea of recording individual land titles, but this is a peculiar feature of the law in Malawi. By Section 20, if any piece falls into the category of village residential land; "dambo" land; unallocated garden land; or land used for any other special purposes of the community: it should be recorded as customary land. It is seemingly anomalous to provide for the recording of customary land in a statute which purports to reform customary land tenure. But this principle was included because of the necessity of retaining some form of group control over certain categories of village land which were not readily divisible. There was little to be gained from the division and allocation of public amenities like graveyards, woodlands, village sites and dambo grazing areas. This would have unnecessarily complicated demarcation and surveys. Moreover, the subdivision of dambo grazing areas which are traditionally used by all surrounding communities would have resulted in the allocation of insufficient patches to the registered families. It should be recalled that such a policy failed to work under the colonial village land improvement schemes, and it became apparent that even controlled grazing could best be achieved by retaining the dambos under public or group control.[41] In any case, Section 20 does not foreclose the possibility of subdividing and reallocating recorded customary land, should the need arise at a future date.

The only stricture in Section 20 is perhaps the intended designation of the various pieces as customary land. Except for unallocated land, all the mentioned categories refer to land used for the benefit of the general public or a section of the community. It should be recalled that Part III of the Act empowers the Demarcation Officer to set aside land required for the present and future needs of the community such as "sites for villages, ... graveyards and open places".[42] Section 21 empowers the Recording Officer to record land so set aside as intended public land. The recording of village residential land, village open space (bwalo), graveyards, and even unallocated land, as customary land under Section 20 thus contradicts Section 21 and the provision in Part III cited above. These contradictions can be eliminated by recording all the categories mentioned in the three provisions as public land. Control over public land which is not required for government purposes can be entrusted to customary authorities, subject to the directions of the Minister. This would enable the authorities to control the use of village amenities like the dambo, and it would also eliminate the anomaly of referring to allocated land by its original designation of customary land.

When the Allocation Record is completed following the principles outlined, Section 22 directs the Allocation Officer to sign a certificate to that effect, and to give notice of the completion and of the place or places where the Record and Demarcation Map can be inspected. Section 24 in part V of the Act stipulates that "any person named in or affected" by the Record or Map who has an objection may lodge it within sixty days from the publication of the notice of completion. After

giving reasonable notice to all other affected persons, the Allocation Officer has a wide mandate to "determine the matter in such manner as he thinks just". By Section 25, when hearing objections, the Allocation Officer should, "so far as may be practicable", follow the procedure observed in the hearing of civil suits; but he has the discretion to consider evidence which may be inadmissible in a court of law. He may also use evidence adduced in a different claim or contained in any official record, or evidence called on his own motion. For the purposes of the penal code, objection proceedings have a judicial character, and the Allocation Officer is obliged to keep a record of the proceedings.

Following the determination of objections, Recording and Survey Officers may effect consequential alterations to the Allocation Record and Demarcation Map.[43] Before the Record becomes final, the Recording Officer may also correct any error or omission out of his own volition. This may be done with or without the consent of the affected persons, depending on whether the alteration will materially affect their interests.[44] The record becomes final upon the occurrence of the later of the following events: the expiry of the sixty-day viewing period, or the resolution of outstanding objections. The Allocation Officer should then sign a certificate of finality and deliver the Record and Map to the Land Registrar of the district for the preparation of the title register.[45] This finality is subject to the Registered Land Act, which enables the Registrar or a court of law to rectify the land register prepared from the Record. The Registrar can generally rectify the register to correct minor and clerical errors with the con-

sent of the affected persons, or to register a person who has acquired rights by prescription.[46] A court can order rectification "where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake".[47] This is subject to the validity of the title of a third person who was not party to the fraud or mistake.

One of the most notable features of this part of the Act on "Objections and Finality" is the judicial flavour of proceedings during the viewing period. There are no comparable provisions for the earlier resolution of demarcation and recording disputes by Land Committees. Part V of the Act presumes that the Allocation Officer presiding during the viewing period will have some knowledge on the conduct of civil suits and the preparation of official judicial records. Yet, in spite of the judicial flavour, there is no provision permitting appeals against the decision of the Allocation Officer to be taken to a court of law or any other appellate tribunal. In contrast, as will be seen in Chapter IX, a later statute on the adjudication of land other than customary land permits objectors to appeal to the High Court.[48] It may be contended that the formality, mystique, dilatoriness and expense of High Court proceedings render it inappropriate for the resolution of allocation disputes which may be essentially factual. It should also be recalled that one of the objectives of the post-colonial land administration policy is to exclude matters "... involving the allocation of land under local customs" from the jurisdiction of the courts.[49] The government intends to settle such matters administratively. This intention would have been def-

eated by provisions enabling objectors to appeal to judicial tribunals of any type against decisions taken during the process of customary land reforms. An alternative tried in Kenya is to permit objectors to appeal to the Minister, but this has been criticized as time-wasting and expensive.[50] The Minister is not likely to be better informed than the officer responsible for the reforms, and would probably confirm most of the earlier decisions. It can therefore be concluded that strong supportable grounds existed for the manner in which Part V of the Act was drafted.

If the exclusion of courts or any other appellate tribunals from the "Objections and Finality" proceedings excite misgivings as a possible denial of justice, it may be contended that this is partly prevented by the possible rectification of the register after the record has achieved finality. This is another aspect of the C.L.D.A. which distinguishes it from its Kenyan prototypes under which the possibility of challenging first registration, even on the grounds of fraudulent or mistaken recording, was excluded for political reasons.[51] Another difference between the two countries is on the rectification of the Record on the volition of the Allocation Officer before finality is achieved. Under Kenyan law, if the Adjudication Officer decided that the alteration of minor errors would cause unreasonable expense, delay or inconvenience, compensation was payable instead of the rectification.[52] As noted earlier, the absence of proper compensation clauses is a notable feature of the Malawi Act, but it may be desirable in this situation to ensure that all minor and major errors are corrected without exception before the Record is declared to be final.

2 Initiation of Allocation Within the L.L.D.P. and the Selection of a Team.

The Malawi government's wish to start the process of customary land reforms in development schemes and project areas was confirmed by the publication of orders applying the C.L.D.A. to the L.L.D.P.[53] This is the only project to which the Act has so far been applied. It lies to the South and West of the City of Lilongwe in central Malawi in an area containing some of the most fertile and well-watered plains in Malawi.[54] Government documents do not indicate the precise reasons for the selection of this project for land allocation out of the several schemes and projects introduced in the post-colonial era. Some of the following factors were, however, apparently influential. First, the area is predominantly occupied by the matrilineal Chewa communities whose social structure and marriage customs have been regarded as inimical to agrarian change since the days of colonial rule. Secondly, as seen in Chapter VI,[55] the original objective of the L.L.D.P. was to boost maize and groundnut production in order to turn the area into the nation's food basket. This objective was regarded as unattainable without tenure reforms because of the high population density of the area.[56] Thirdly, as Table 21 below indicates, the L.L.D.P. is a phased integrated rural development project which has been partly funded by external loans during each phase. The first phase, which began in 1968, was sponsored by lenders who were keen on land reforms and may have insisted on the registration of individual titles as a condition for the loan.[57]

When the 1956 Report of the Conference on African Land Tenure in East and Central Africa mooted the idea of replacing customary tenures with individual titles, it was suggested that the reforms would be more appropriate in some of the following circumstances: where agricultural development is being held up because of the inadequacy or uncertainty of title; where it is necessary to promote the consolidation of fragmented holdings; where new titles are necessary for the purpose of securing agricultural credit; where the natural emergence of individual titles is leading to increased and unregulated land dealings; and where there is a high incidence of land litigation.[58] All but the last two circumstances could be said to have obtained in Lilongwe immediately prior to the application of the C.D.L.A. Land dealings involving sales were almost non-existent. There are no court records to show the incidence of land litigation, but the assumption is that the levels were not alarming.[59]

The L.L.D.P. organization was divided into several branches responsible for its various structural objectives. Land reform was the responsibility of a Land Allocation section headed by a Senior Land Allocation Officer instead of the Allocation Officer mentioned by the C.L.D.A. This was a simple bureaucratic arrangement which gave Allocation Officers a chance of promotion in the civil service hierarchy. Other officers in the establishment included Demarcation Officers and their assistants. There were no special appointees to the position of Recording Officers as suggested by the Act. The demarcation team simply assumed recording responsibilities after the completion of demarcation. This had the potential of ex-

TABLE 21: PHASING OF DEVELOPMENT WITHIN THE L.L.D.P. [60]

PHASE:	YEAR OF DEV-ELOPMENT:	UNITS DEVELOPED: CUMULATIVE NO.:	TOTAL AREA DEVEL-OPED: CUMULATIVE NO. OF HECTARES	TOTAL NO. OF FARM FAMILIES AFFECTED:	EXTERNAL LOANS: U.S. $ MILLION
I	1968/69	2	13,949	8,266	6.0
	1969/70	5	35,349	15,685	
	1970/71	9	70,507	27,338	
	1971/72	14	111,291	38,795	
II	1972/73	17	135,769	46,984	7.25
	1973/74	23	194,286	61,562	
	1974/75	30	262,373	77,210	
III	1975/76	32	282,850	82,603	8.5
	1976/77	38	333,637	99,954	
	1977/78	40	347,882	106,490	
	1978/79	40	347,882	108,000	

pediting the process, because the recording teams proceeded into the the field with a fair knowledge of claimants and their interests in land through the earlier involvement in demarcation.[61]

The Land Allocation establishment also excluded special appointees to the position of Survey Officers. The government Surveys Department was responsible for L.L.D.P. surveys. Poor liaison between the L.L.D.P. and the Surveys Department was unfortunately partly responsible for delays in land allocation. This was perhaps unavoidable, because the engagement of special project surveyors would have been an expensive luxury, but the alternative of entrusting demarcation to the Surveys Department would have imposed an unacceptable work-load on an overburdened department.[62] Delays inherent in the arrangement between the L.L.D.P. and the Surveys Department were accentuated by the fact that the Senior Land Allocation Officer was not responsible to the Minister or department responsible for land registration and administration but to his project manager. As a result, the conduct of allocation required a tripartite liaison between the L.L.D.P., the Surveys Department and the Lands Department.

Apart from the inelegant division of responsibilities over land allocation, it is notable that the important position of Senior Land Allocation Officer was for a time occupied by expatriate appointees with little or no experience of adjudication work elsewhere in Africa. Such experience and intimate knowledge of the customs of the people affected by the reforms should have been the prerequisites for the job. It was

not generally possible for the earlier appointees to accumulate the experience and knowledge on the job because they served on relatively short-term contracts. The position improved with the promotion of Malawians who were involved in land allocation work since 1968 to top positions in the L.L.D.P. Land Allocation establishment. However, a problem which remained outstanding was the selection of an allocation team from a wider pool of L.L.D.P. officers who almost invariably received some form of agricultural training. This may not have been regarded as a disadvantage. However, without detracting from the hard work, commitment and enthusiasm of the team, it will be contended that salient legal aspects of the C.L.D.A. have been overlooked in its implementation. This has affected the results of the exercise. It is a moot point whether similar results would have obtained had the team included personnel with some legal experience, although not necessarily a legal training.

3 Claims, Demarcation and Principles of Allocation

The L.L.D.P. was planned for infrastructure developments in 40 "input units" which were also adopted as development sections for the purposes of demarcation. The average size of a unit was 8,700 hectares and 2,600 farm families.[63] This, on paper, was not too large; but the time it took for the allocation process to run its course in some of the units suggested otherwise. In Unit 1, for example, demarcation started in 1968 and registration was completed in 1972. The pace apparently increased in subsequent units as the allocation team accumulated experience. The overall progress, however, has been excee-

dingly slow. All 40 units had gone through the demarcation by July 1981, but only 13 units had gone through the recording and registration stages.[64] The need for proceeding with caution is undeniable, but an overly long delay from commencement of allocation to the issue of title certificates can lead to frustration, disappointments and dealings off the register. Some of the traditional leaders interviewed in Lilongwe were unable to appreciate the benefits of land reform, and this was partly due to the fact that the promised results could not become apparent while the process dragged on from year to year without completion. The slow pace of reforms was perhaps inevitable in view of the inelegant division of allocation responsibilities noted above. However, since the integration of the various responsible departments was not possible, delays would have been minimised by the adoption of smaller development sections.[65]

After the publication of the notice indicating the input unit or development section in which demarcation was to begin, the allocation process was conducted in the following stages:[66]

(a) The holding of introductory meetings;

(b) Estimation of the number of villages in the unit and the recording of village histories;

(c) Ascertainment and demarcation of village boundaries, and the settlement of village boundary disputes with the assistance of traditional authorities;

(d) Ascertainment and demarcation of land for family units with the assistance of village headmen: this included land required for special purposes like residential plots, graveyards and woodlands;

(e) Acquisition and demarcation of land required for public purposes like the construction of unit and trading centres, market depots and schools;

(f) Surveying and beaconing of all demarcated pieces, and the production of a Demarcation Map;

(g) Recording of the names of the family unit leaders and persons entitled to hold or cultivate land within the family unit, and the production of an Allocation Record;

(h) Presentation of the completed Record and Map for viewing within sixty days; and

(i) Registration and the granting of title certificates.

The aim of the introductory meetings held at the beginning of the process was to familiarize the audience with allocation procedures and to introduce the demarcation team. Such meetings should ideally be attended by all persons with an interest in land. It was easier in practice to arrange one or two meetings at a focal point within the unit, and to request only the attendance of village headmen, elders and family leaders. These people were relied upon to disseminate information in their villages and within their families. As a result of this practice, a survey revealed that the majority of the villagers who were not invited to attend the meetings were ignorant of allocation aims and procedures.[67] It was subsequently claimed, however, that the process began to generate sufficient publicity among interested villagers as it gathered momentum in several units.

The recording of village histories which followed the introductory meetings was an innovation for which there is no statutory provision. It was a commendable step devised to establish the family structure of the village; how and why the families settled in the Lilongwe plain; and how family land was originally acquired.[68] This information was, in theory, useful for the demarcation of family units and the planning of fresh layouts before the reorganization of the land. Most of the records were unfortunately paltrily drawn, and do not contain sufficient details for these purposes. They indicate that the demarcation team was probably ill-trained and overworked for an effective discharge of this duty.

After the recording of village histories, the demarcation of village and family unit boundaries with the assistance of customary authorities contradicted statutory provisions on the cesser of customary powers of land control and the staying of judicial proceedings after the commencement of demarcation. It should be noted, however, that the C.L.D.A. included such provisions on the assumption that any person with an interest in land would take the initiative to lodge his or her claim. This did not take place in Lilongwe.[69] The Allocation Officer was therefore obliged to adopt a procedure which transferred the initiative to the demarcation team. Existing interests in land could only be identified with the assistance of the customary authorities. The participation of the chiefs and headmen in demarcation was also inevitable because land committees had no role to play at this stage. Customary authorities were also allowed to determine land disputes without the consent in writing required by the Act. The allocation team preferred to

defer decisions on contentious issues until the Traditional Authority of the area had given his verdict. This was accepted and used in demarcation if it was not unconscionable or obviously contrary to the objectives of the Act. This arrangement satisfied all parties, and the conclusion to be drawn from the experience in Lilongwe is that clauses in the C.L.D.A. on cesser of customary land control powers and staying of proceedings are unrealistic, difficult to observe, and should be revised.

Any review of the Act would have to minimise some of the undesirable consequences which can arise from an indiscriminate involvement of customary authorities in the reform process by specifying clearly the limited role which they should play. Some of the chiefs and headmen tended to query the results of demarcation because they served under the erroneous impression that the process would not vary customary arrangements or the patterns which they had suggested as land controlling authorities.[70] This in essence was a publicity problem. Records of most introductory meetings indicated that the effect of the C.L.D.A. on customary political control of land was not fully explained to the chiefs and headmen, although their services were in great demand. They assumed, therefore, that they would be in charge of demarcation instead of the Demarcation Officer.

Excessive reliance on customary authorities also raised the spectre of chiefs and headmen misrepresenting the interests of others for their own gain. This streak of dishonesty once prompted the Allocation Officer to alter the demarcation strategy. Demarcation of villages in the first few units was

previously based on what were called "tchire" (bush) boundaries. Chiefs and headmen were invited to identify their political domains by indicating areas over which they controlled traditional bush-burning and hunting rituals. In some villages such bushes had been replaced by human settlements which could conveniently be demarcated under a separate village; and in most cases headmen tended to claim larger areas than those controlled under traditional law. The identification of villages through "tchire" boundaries was eventually abandoned, and headmen were invited to indicate areas occupied and tilled by most of their matrilineal kinsmen. To this were added fallows, woodlands and unallocated land which could conveniently be demarcated as part of the village.

Demarcation of family units also occasioned allegations that customary authorities were misrepresenting the interests of some disliked families in the villages.[71] It must be emphasized, however, that plain deceit was not always the case here. The definition and demarcation of family units was in itself problematic. It should be recalled that the aim of the C.L.D.A. was to introduce a regime of individual land titles with family land titles as the exception to the rule. Soon after the commencement of the allocation process in Lilongwe, a policy decision was made to demarcate and record only family interests in land contrary to the main objective of the Act. The decision was apparently made after local development committees had voiced strong objections to the concept of "individual ownership" of land. The absence of a land market in Lilongwe also compelled the project officers to conclude that the society was not yet ready for the proposed individual hol-

dings, and that they were unlikely to be retained for a considerable period after registration. The allocation of "family units" or land, on the other hand, was considered to be closer to the social reality, more appropriate for the control of fragmentation, and ideal for the exploitation of land on a co-operative basis should the political philosophy of the government veer in that direction.[72]

Demarcation of the family units proceeded on the assumption that the unit would correspond to village land controlled and cultivated by each extended family consisting of a minimal lineage of consanguine sisters (mbumba), or land allocated to each family or household of "strangers" or non-indigenous villagers.[73] The demarcation team relied on village headmen to identify these social groups. Where land was perceived to be generally insufficient, some headmen tended to suggest the creation of "umbrella family units" covering land held by the dominant maximal lineage of the village and land belonging to the non-indigenous villagers. In some villages, a single family unit was created for all non-indigenous families irrespective of whether they were related by blood or marriage. Such conglomerations were a recipe for internecine conflicts, especially over emotive issues like the appointment of family representatives.

The demarcation problems encountered were partly due to the fact that the team and village headmen had no guidelines on what should be the appropriate size, population and social composition of the family units. The decision to allocate these units exclusively was reached without a prior detailed

investigation of existing family and social structures in the villages which would have revealed more complex arrangements in addition to the presumed extended family groupings. In the absence of guidelines, it is notable that even where land was sufficient to permit the allocation of units to individuals or simple family groups, the demarcation team insisted on allocating it to the mbumba.

The decision to demarcate the family units also presupposed that the mbumba controlled contiguous plots of land. Most family members in Lilongwe cultivated gardens located in separate villages or different sections of the same village. If family units congenial for "better agricultural development" were to be created, an extensive consolidation and garden exchange programme was imperative. This is where the attitude of the allocation team was most ambivalent. Although villagers were generally to remain with gardens located in family units where they were to be recorded, exchange and consolidation of gardens was regarded as a voluntary matter which could not be enforced.[74] Since the exercise can be controversial and complicated, it is not surprising that there was widespread apathy and hardly any response to calls for the voluntary exchanges.[75] The passive stance of the team on this issue was a surprising abdication of responsibilities under Part III of the Act, which anticipates that positive steps would be taken to effect exchanges and adjustments necessary for the economic and convenient exploitation of ascertained land. It can be argued, in retrospect, that the absence of statutory details on the mechanics of consolidation gave the demarcation team an excuse for avoiding a difficult problem. Specific provisions

on the matter, such as those included in the Kenyan prototype, would have left the team in no doubt as to how the problem was to be tackled.

The allocation team also displayed some ambivalence towards the payment of compensation for land set aside for the present and future needs of the community. Because of the large size of an input unit, it was not possible in practice to follow the provision of the Act which suggested that losses suffered in the setting aside of the land should be equitably distributed among all landholders in the development section. The losses fell squarely on the affected individual, family unit or village. Allocation Officers were generally reluctant to authorise the payment of compensation to particular sufferers. It was suggested in one dispute that a holder should be willing to make personal sacrifices for the benefit of the community.[76] This would have been an admirable gesture if the sacrifice was voluntarily made. Where the holder was unwilling to make such a gesture, however, it can be contended that he was entitled to the payment of compensation. It should be recalled that the Land Act provides for the payment of compensation to any person who suffers the loss of an interest in customary land taken over for a public purpose.[77] By Section 21 of the C.L.D.A., land set aside for the needs of the community "shall be deemed to have been declared public land under Section 27(1) of the Land Act" upon the Allocation Record becoming final. The reluctance of the Allocation Officer to authorise the payment of compensation in such cases created the ludicrous situation whereby compensation was payable for customary land converted into public land under the Land Act, but

not through the allocation process. This oddity was further pronounced by the fact that compensation became payable if the same land was required after the Allocation Record became final.[78]

It is beyond the scope of this exercise to comment in detail on the technical aspects of surveying and the preparation of the Demarcation Map,[79] activities which marked the conclusion of demarcation. It may be noted, however, that survey teams used ground and aerial surveys to produce maps of a cadastral nature. Although traditional boundaries were fairly well-known, they were not generally marked by physical features which could be readily reproduced on a topographical map. In the course of demarcation, numbered concrete beacons with steel pins were securely implanted at all boundary intersections and at 1,000 feet intervals. Landholders were encouraged to plant trees or construct ridges along the ascertained boundary lines, but this has not been attempted on a scale which would permit the production of topographical maps.

Two basic problems have been encountered. First, some of the family units are so large that tree planting or ridging would require expensive and concentrated community effort. Secondly, villagers have not been advised on the types of trees and hedges suitable for straight boundary lines. Most of the local trees and bushes grow haphazardly, spread at the base, and are prone to destruction by bush fires and animals. The concrete beacons will therefore remain the most reliable boundary marks. They were apparently so securely fixed that cases of advertent or inadvertent dislocations have been few, and it

has not been unduly difficult to install replacements using plans which contain all the numbers of the beacons.

After the production of the Demarcation Map, the compilation of Allocation Records was obviously bound to be influenced by the decision to demarcate only family unit lands. Section 19(1)(a) on the recording of "individual owners" of intended private land became obsolete. In addition, Sections 19(1)(b) and 19(2) on the recording of "co-owners" and various incumbrances were hardly used because of the familiar problem of identifying customary rights which resemble these English law concepts. The rights readily recordable under these provisions were rights of way to public roads, watering places or common grave sites. On family land, Allocation Records were compiled by simply recording the names of family leaders identified by village headmen during demarcation, and the names of the persons entitled to land rights within the family unit. The latter were identified and recorded at sessions held in each village in the presence of the headman, family leaders, village elders and any interested villagers.

Recording sessions were preceded by general unit or village meetings at which the principles of recording employed were outlined to the public.[80] The first general principle was that every member of the matrilineage for which a family unit was demarcated was entitled to be recorded if he or she was over the apparent age of sixteen. This was irrespective of whether the person was living or cultivating outside the village or family unit. Even lunatics, criminals and other social undesirables were eligible for recording. In accord-

ance with matrilineal customs, spouses living in the marital village who were not members of the matrilineage were to be excluded from the record except where they were too old or had established long and permanent residence in the village. It was also suggested that fathers and maternal uncles should consult before proposing the recording of children in their father's family unit. The second general principle was that every person should be recorded as a member of the family unit within which his or her gardens were located. If the gardens were in more than one unit, the cultivator was advised to seek registration within the preferred unit, and to have children or close relatives recorded in the other units. This principle was evolved when it became apparent that voluntary exchange and consolidation of fragmented holdings was not taking place. It was also evolved to ensure that there was no subversion of the rights of "strangers" and other persons for whom separate family units were not demarcated.

Apart from the protection of the rights of minors, absentees and all cultivators, an ancillary objective of the two general principles of allocation was to minimise the recording of persons in more than one family unit. This was difficult to achieve in practice. Recording teams were unable to ensure that persons with gardens in several units were included as members of only the unit of preference, or that consultations between fathers and maternal uncles took place before the recording of children outside the unit of the matrilineage. Similarly, advice on the recording of spouses was not always followed: some favourite sons-in-law (akamwini) were included as members of the wife's family unit. As a result of the record-

ing principles and practices employed, Allocation Records did not necessarily show the names of persons with existing cultivation rights (since all members of the matrilineage were recorded irrespective of their current residence). The recording of persons wherever their gardens were located, on the other hand, perpetrated the creation of umbrella "family" units whose members were not necessarily related by blood or marriage. This, as suggested above, was a recipe for conflicts. It was, moreover, not the ideal arrangement for possible exploitation of family land on a co-operative basis. The sum effect of allocation was, in fact, to lead to the creation of some entities of land control and exploitation which reflected neither the customary control of family lands nor the underlying objectives of the C.L.D.A.

It was once suggested that perhaps better family units could be created by recording land rights of "strangers" or non-indigenous members of the unit as leases or overriding interests.[81] As seen in Chapter II, despite the repeated reference to non-indigenous members of a Chewa community as "strangers" (obwera), no substantial difference existed between their permanent land rights and those of the indigenous members. If the suggestion was to be followed, there would have been a significant debasement of the legitimate rights of the non-indigenous members, and this would have been contrary to the general understanding of adjudication as the ascertainment of existing interests in land. On the other hand, it would have been proper to record non-indigenous persons holding the transient customary rights acquired through garden loans as holders of overriding interests. Such rights should not be

confused with permanent registrable cultivation rights acquired by the non-indigenous members through the customary process of allocation detailed in Chapter II. Because of the different acquisition procedures, a simple village enquiry should be able to distinguish the permanent registrable rights of the non-indigenous persons from the transient ones. It would appear that redemarcation to ensure that all strangers and different family groups have separate family or individual units would be the only solution to the problem of heterogeneous "family" units.

Unlike intended private land, the recording of public land and customary land under Sections 20 and 21 raised no peculiar problems. It need only be noted that residential plots, graveyard sites, woodlands and dambos were the categories of village land most commonly recorded as customary land under Section 20. Records were rarely produced for unallocated land, presumably because most of the land in this region of a very high population density was closely settled. It may also be that some unallocated land was deliberately or inadvertently demarcated and recorded as family land.

4 Resolution of Land Allocation Disputes

It should be recalled that the allocation procedure outlined in the C.L.D.A. provides for the resolution of disputes at two stages. Disputes can be resolved with the assistance of a Land Committee during demarcation, or by the Allocation Officer during the viewing period. As with the rest of the Act, the actual resolution of the disputes in Lilongwe did not necessarily proceed as stipulated or anticipated by the Act.

At the Committee stage, there were notable divergencies between the law and the practice on constitution of the Committees and on the "procedure in Committee".

When the L.L.D.P. was divided into 40 development sections, it became obvious that, even with the assistance of the District Commissioner, the Allocation Officer was not in a position to appoint Committee members in all the units as required by the law. The assumption that the Allocation Officer and District Commissioner would have sufficient knowledge of residents in each section to make diligent appointments was ill-founded in view of the fairly large average size of the sections. It was therefore decided that Committee members should be elected by the residents invited to attend the introductory land allocation meetings. The primary criterion for election was that the nominees should be persons of long and established residence who possessed intimate knowledge of land matters and other local issues. They were also required to be disciplined, loyal and non-corruptible members of the community. These requirements generally resulted in the election of village headmen and holders of local Party positions who were invited to attend the introductory land allocation meetings. Men dominated committee membership in most of the sections because of the absence of women at these election meetings. The residential requirements also restricted committee membership to male adults who had no regular employment outside the development area. Most of the committees consisted of nine or ten members. It was not found necessary in practice to appoint an executive officer to the Committee. His statutory duties were discharged by a member of the allocation team.[82]

On procedure in committee, it is notable that there was no election of committee chairmen as suggested by the Act. Every chief or Traditional Authority was automatically declared the chairman of the committee in his area. If the development section straddled several chiefdoms, the respective Traditional Authorities became joint-chairmen.[83] As a result of this arrangement, it was very difficult to comply with the statutory provision which required committee members with an indirect or direct interest in a dispute to disclose the fact and withdraw from the proceedings. The chairmen/chiefs were always likely to be interested in any dispute before the committee because it was the demarcation policy to permit them to try and resolve all disputes before they were taken to the committee or the allocation team. This procedure was an acceptance of the reality: most complainants were clearly fond of taking disputes to their chief in the first instance, and to the Allocation Officer if the chief was unable to help.[84] Chiefs were also likely to be indirectly interested in disputes involving most non-indigenous persons, because they were responsible for sanctioning the customary allocation of land and the settlement of all such people within their domain.[85] It was only when the interest of a chief in a dispute was so obviously direct and likely to affect his fair judgement that it became necessary to appoint a new chairman for the proceedings, and this was not a repeated occurrence.[86]

The procedural requirements for the quorum and voting in the committee were not so controversial. Except for the odd case,[87] the attendance record for most committees was reportedly good. This was perhaps due to the fact that the quorum

provisions were fairly easy to fulfill. The use of the Chairman's casting vote was not required, because committees invariably strove to reach unanimous decisions. Although the Act failed to guide the committees on the actual procedure for hearing disputes, it was inevitable that they would follow customary procedures, especially since they were enjoined to resolve disputes using customary law where it was applicable. Disputes were concluded in an inquisitorial manner. Adversaries were entitled to call witnesses who were liable to examination by other parties and committee members. The committees were also willing to consider relevant evidence from any source, even if it was technically inadmissible in a court of law. It was customary to view the site of the land before passing any decision on contested boundaries. The unanimous decision of the committee was delivered by the Chairman. All deliberations were in vernacular, but reports were drawn in English by a member of the allocation team acting as an executive officer of the Committee. This probably contributed to the sub-standard presentation and sketchy contents of most of the reports.[88]

The Act anticipated that Land Committees would be requested to resolve two types of disputes, namely: boundary disputes arising from dissatisfaction with the delineation or readjustment of boundaries by the Demarcation Officer; and proprietorship disputes arising from the failure of the Recording Officer to resolve competing claims over any interest in land.[89] This anticipation can be confirmed from the sketchy records of the L.L.D.P. disputes. It would appear that the majority of boundary disputes arose from the artificial nature of development section, village and family unit boundaries. The demarcation

of these areas did not follow traditional boundaries. Some villages had to be bisected or reduced in size in order to fit the new land structure. This often led to complaints by village headmen and family leaders that they had lost part of their lands to a neighbouring village or family unit. The committees usually followed the official contention that such distortions were inevitable because of the straight line boundaries introduced and the realignments effected under the development plans. The committees also displayed the ambivalence of the allocation teams by refraining from ordering consolidation and exchange of gardens where loss of family land to the next unit was due to the fragmented nature of the family holdings.[90]

The majority of the proprietorship disputes arose from the continued involvement of customary authorities in the demarcation process. They involved an allegation of partiality on the part of the village headman responsible for advising the demarcation team on the number of family units to be created in the village. A common complaint was that the headman had used his position to influence demarcation in such a way that his adversaries, especially non-indigenous villagers, received no separate family units, or were allocated units with less land than their customary entitlements. These disputes were resolved by the creation of separate units for the victims of the deceit, if they were entitled to one under customary law. Separate units could be created where none existed at customary law, if the committee felt that the family subgroup deserved a separate plot.[91]

Committees thus served the useful function of moderating the excesses of customary authorities during demarcation. Annual and quarterly reports of the L.L.D.P. Land Allocation Section, however, show that the allocation team infrequently referred disputes to the committees.[92] The expedient of recording village histories at the commencement of demarcation equipped the team with sufficient knowledge of local conditions and customs to resolve and conclude most disputes. Committee work was also exhausted by the failure of the team to observe statutory requirements on staying of judicial proceedings and customary judicial authority after the publication of sectional notices. It should be recalled that the team preferred to permit Traditional Authorities to resolve all disputes at first instance and to use their verdicts in demarcation. The same Traditional Authorities became the chairmen of land committees. In this set-up, only the very litiguous forced the allocation team to refer to a committee a dispute which the Traditional Authority and the team had already attempted to resolve. Committees were generally reluctant to interfere with the earlier decisions in such cases, especially if the dispute concerned the artificial nature of land boundaries. Despite their obviously marginal utility, use of the committees was, at the very least, an important exercise in public relations. Allocation decisions gained wider acceptability if local leaders and respected members of the society took part in the decision-making.

If the use of land committees in the resolution of land disputes was minimal, and the committees were in any case reluctant to reverse decisions of the allocation team, it was not surprising that they were hardly invited to reconsider their

decisions, as required by the Act, if any party was dissatisfied with their verdict. The normal course was to raise the matter with the Allocation Officer during the viewing period.[93] This period also provided most villagers with the first opportunity to comment on or complain about the allocation process in general and the drawing of the allocation records in particular. Although disputes at this stage were resolved by the Senior Land Allocation Officer or one of his Senior Field Officers sitting individually, the conduct of the proceedings resembled the committee hearings. Deliberations were in vernacular, following customary procedures. The records, drawn in English, suggested that the recorders had neither the skill nor the time to produce reports of the quality of official records of judicial proceedings. The barest details recorded included the names of the objectors; a statement on the nature of the dispute; a brief note of the officer's decision; and the date on which it was passed. The L.L.D.P. experience indicated conclusively that it was futile for the Act to equate proceedings at this stage with civil suits, especially when the presiding officers had no experience of court or legal procedures and were invariably trained as agricultural extension officers.

The nature of the objections also, predictably, resembled the disputes resolved by land committees even where the objector was raising the matter for the first time. Boundary disputes were relatively few. This suggested that villagers were less inclined to complain about the artificial boundaries after hearing that demarcation did not attempt to reproduce traditional boundaries without variations. On family units, the com-

mon complaints were that the wrong persons had been recorded as family representatives or family members, or that the recorded members were incompatible and the holding should be partitioned. The presiding officers were reluctant to sanction the appointment of a new representative unless the majority of family members and the village headman approved of the change. The officers also insisted on retaining the names of all cultivators on the records of the family unit within which their gardens were located, regardless of the fact that they were not related to the dominant matrilineage of the unit. The partition of a family unit with incompatible members was approved if the land was regarded as sufficiently large, but this was not a common decision. The advice to objectors in most cases was simply that eccentrics and incompatibles or non-indigenous members of the unit should be tolerated. The officers were generally reluctant to pass decisions which entailed the redemarcation of the land at this late stage. As a result, the opportunity to ameliorate widespread faulty demarcation of family lands before the records became final was often missed.

5 A Preliminary Assessment of the Reorganization and Reform of Customary Land within the L.L.D.P.

When assessing the results and possible consequences of Malawi's ongoing land reform exercise, several aspects of the law and its implementation in Lilongwe which were highlighted in the earlier sections of the chapter should be given prominence. The first notable aspect is that, although the independent government takes most of the credit for attempting customary land reforms on the basis of individual titles, the idea

was originally conceived by the colonial administration. But efforts to implement the reforms during the colonial period failed because of lack of support from the African participants during the struggle for political independence, and because the reforms were attempted without the aid of statutory law and legal procedures. The independent government mobilized the support of the African participants, and introduced the C.L.D.A. which provided the legal framework and mechanisms for implementing the reforms. This shows an underlying belief in the efficacy of non-punitive law as a tool for facilitating socio-economic change which has rarely been seen in the history of agrarian change in Malawi. The independent government also attempted to implement the C.L.D.A. within an integrated rural development project which includes other structural reforms and components necessary for increased agricultural production. This approach will necessarily decelerate the pace of the reforms, and the impact on peasant agriculture production is unlikely to be significant while a larger proportion of customary land remains unreformed.

The second key feature of tenure reforms in Malawi is that although the C.L.D.A. was modelled on well-tried adjudication statutes from Kenya and the Sudan, its implementation has been unorthodox. A general critique of the allocation procedure shows that this was equally due to the impropriety of some provisions and to the failure of the allocation team to appreciate and carry out some of the salient objectives of the Act.

Some of the provisions which have been singled out as improper, unrealistic and difficult to observe pertain to the cesser of customary powers of land control at the commencement of demarcation; the appointment of land committees by the Allocation Officer; the recording of intended private and customary land; and the conduct of proceedings during the viewing period. Before the C.L.D.A. is applied to any other project area, it will be necessary to consider whether the participation of customary authorities in demarcation and the election of land committees by villagers should be legitimized by fresh provisions. It may also be necessary to consider providing Recording Officers with a "table of equivalence" between customary land rights and rights recognized by the Registered Land Act. This would reduce some of the problems which Recording Officers face when trying to match the two systems of property rights. It may also be necessary to remove conflicts in the provisions on the recording of customary land by stipulating that all land used for community and public purposes should be recorded as public land. Finally, it should be appreciated that Allocation Officers are not appropriately trained to adopt procedures followed in civil suits when hearing objectors during the viewing period. The judicial flavour of the statutory provisions on the hearing procedures is therefore irrelevant.

The passive stance of the allocation team towards the consolidation and exchange of fragmented holdings was the first issue which demonstrated their failure to appreciate and execute the salient objectives of the C.L.D.A. Calls for voluntary garden exchanges were not enough; the Act anticipated that

the Demarcation Officer would take active steps in the readjustment of land-holding patterns. The attitude of the allocation team has in some cases resulted in the perpetuation of land patterns which are not consistent with "the better agricultural development of the land". It has been suggested that the allocation team should be explicitly enjoined to effect consolidation and garden exchanges by new provisions which should specify the details and mechanics of the process. These amendments are pressing for another reason. In 1970, an official review of progress in land allocation recommended the adoption of a new demarcation procedure in order to facilitate the attainment of the development objectives of the Act. The procedure followed in Lilongwe was unorthodox because a record of existing rights in land was produced only after demarcation. This made it almost impossible for the team to plan and execute land consolidation, especially since the records of village histories were poorly drawn. The review recommended the adoption of a more orthodox procedure involving the preparation of a record of existing rights and a preliminary map in the first stage; the planning of new layouts, adjustments and consolidation in the second stage; and the execution of the plan in the third stage.[94] This advice was unfortunately ignored.

The decision to demarcate and record land rights only for family units representing the Chewa mbumba was the second issue which demonstrated the failure of the allocation team to carry out the objectives of the Act. The decision undermined the government's declared objective of replacing group land rights governed by matrilineal customs with individual land

titles governed by statutory law. An attempt has been made to justify the decision by claiming that the allocation of family titles was in fact a preliminary exercise which will be followed by the granting of individual titles at a later, opportune time.[95] The logic for proceeding in this fashion is difficult to grasp, since it is fairly obvious that survey, demarcation and recording costs will multiply with the passage of time. The C.L.D.A., moreover, was not designed for the execution of land reforms in preliminary and final stages. It simply provides that any part of a designated area which is unsuitable or unready for the reforms should be excluded from the application of the Act. No part of the L.L.D.P. area was exempted from the reforms under this provision.

If the African participants were resolutely opposed to the concept of individual land titles, the government should have considered deferring the reforms instead of undermining the objectives of the Act by the exclusive allocation of family titles to land. In view of the fragmented nature of family holdings, this decision now appears to have been hastily taken. Interviewees in some areas indicated that they would have preferred the demarcation and recording of land rights for the individual, simple family or household (banja), or the extended family (mbumba), as the situation demanded on the ground. A closer study of local land holding patterns immediately prior to the commencement of the reforms would have revealed the reason for such a preference. Although the mbumba was still an important social group for the exercise of most Chewa customary rights, the banja or smaller segment of the matrilineage was assuming increasing importance as the unit

for the exercise of land cultivation rights. Unavailability of land in some areas was also diluting uxorilocality to such an extent that a man could seek land cultivation rights outside the marital village in an individual capacity or as the head of a household consisting of his wife and offspring. As suggested in Chapter II, this was one of the factors behind the increasingly multilineal composition of Chewa villages. The exclusive demarcation and recording of land rights for the mbumba overlooked such incipient changes in the social structure and may have reversed the natural emergence of individual land holding patterns.[96]

Criticisms of the execution of land allocation within the L.L.D.P. should not be interpreted as a rejection of the concept of family titles in preference to the system of individual land rights. Registration of family land, as noted earlier, had its attractions, perhaps the most important being that it could enable the government to introduce schemes for co-operative exploitation of land, should this policy become desirable. The problem, however, was to identify an appropriate "family unit" in the Chewa social structure. The identification of dominant maximal or minimal lineages in most areas resulted in the creation of very large units whose members did not necessarily possess cultivation rights on the ground and could not possibly farm on a co-operative basis.[97] In some areas this was compounded by the failure to demarcate separate units for persons not related to the dominant lineages of the villages. It is anomalous to describe the resulting heterogeneous entities in such areas as "family units", since some of the members are not related by blood or by marriage. Land

allocation in Lilongwe in effect amounted to a bisection of original Chewa villages into several semi-autonomous miniature villages with several consequences on the patterns of land holding.

It is notable, first of all, that the new land entities have fixed and certain boundaries which the original Chewa villages did not have. This has enabled an official report to claim that allocation "has reduced quarrels by identifying boundaries and therefore enabling people to devote more time to other activities such as cultivation".[98] In other words, security of tenure, one of the objectives of the C.L.D.A., has been achieved and the exercise can be pronounced a success.[99] This is an exaggeration. Satisfaction with allocation is generally expressed in less populous areas where the creation of genuine family units for minimal lineages of the original Chewa villages was not very controversial. This is not the case in the populous area where heterogeneous units were created and allocation simply reduced "inter-family unit" but not "inter-garden" boundary disputes. Allocation in such areas also precipitated intense rivalries for leadership between the composite natural families of the unit. The success of allocation in fixing boundaries is further qualified by the fact that new family unit boundaries in some areas were either unknown or ignored by family unit members who were not actively involved in their delineation.[100]

A second notable consequence of the bisection of traditional villages into family units or quasi-villages has been the reduction of the power base of village headmen. As seen

in Chapter II, political leadership in matrilineal Chewa communities was intricately woven around control over land distribution and adjudication of land and other disputes. Land reform has removed the omnipotence of the headman over these matters. It has conversely enhanced the social clout of family representatives who can now exercise powers of land control within their units without the sanction of the headman. Loss of influence has been keenly felt by customary authorities in land transactions with a monetary element. Some have complained that it is an affront on their legitimate political authority for family leaders to dispose interests in family land without the consent of the headman or chief and, worse still, to retain all the financial rewards.[101]

The law, however, is very clear. Under Section 121 of the Registered Land Act, family leaders have "the sole and exclusive right of dealing with the land", subject only to the obligation to consult other members of the family and to exercise their power "on behalf of and for the collective benefit of the family". But even if this obligation is not complied with, the validity of any transaction with a bona fide third party for valuable consideration cannot be ignored. Whatever the position at customary law may have been, it is no longer obligatory for customary authorities to sanction family land dealings and to participate in the proceeds thereof. But it is incorrect to suggest that this marks the beginning of a total decline of respect for traditional political leadership.[102] Leaders with commendable personalities will continue to be respected. It should also be remembered that chiefs and headmen discharge other constitutional, administrative and

customary duties befitting respectable persons which will necessarily preserve their influence in rural communities.[103]

Although the implementation of the C.L.D.A. within the L.L.D.P. area has affected the state of land boundaries and the political control of land, improvements in the much-maligned matrilineal succession rules have been negligible. This is one aspect of customary land tenure which is widely acknowledged to be most impervious to change. Experience in other countries has shown that statutory provisions which fail to strike a proper balance between societal perceptions and needs and the objectives of a land reform programme can lead to refusals to report the death of land holders and dealings off the register.[104] This problem, as will be confirmed in Chapter VIII, was not yet apparent in Lilongwe with regard to the replacement of family representatives. On the other hand, succession to various gardens of family members continued to be governed by matrilineal customs despite the introduction of a Wills and Inheritance Act in 1967,[105] which attempted to modernize various customary regimes on intestate successors to all kinds of property.[106] It provides, for example, that three-fifths of the estate of a deceased who married under matrilineal customs and is survived by a wife, issue and dependants, should be passed on to his customary heirs, and two-fifths should devolve to the wife, issue and dependants by fair distribution. If the deceased married under patrilineal customs in lobola paying areas, the shares are one half to the customary heirs and the other half to the wife, issue and dependants. If the deceased is not survived by a wife, issue or dependants, his estate devolves according to customary law. A

similar principle applies to the estate of a deceased woman; but if she is survived by any children, they should be "solely entitled".[107]

This brief resume of some provisions of the Wills and Inheritance Act is sufficient to demonstrate the complexity of statutory law on intestate succession,[108] even more so where the estate includes a share in registered family land. Formidable administrative problems would bedevil any attempt to split the share into parts which can separately devolve under customary law and statutory law. The law here may have anticipated the registration of individual titles to lands. Even in such a case, however, if the land is the only tangible asset of the estate, its division into the stipulated fractions can lead to absurd results, obstructive of better exploitation of the land. The alternative would be to sell the land and divide the proceeds, but this may not be readily acceptable in rural communities where land may be the only source of livelihood for the aspiring successors. In short, existing statutory rules on intestate succession are too complex and neither in tandem with societal needs nor suitable for rural development. It is unlikely that they will ever be applied to registered land. Customary law with its many imperfections will, therefore, continue to apply until it ceases to cater effectively for the needs of the rural communities, or until it is replaced by more suitable and simplified statutory laws. This is a blemish on a reform programme which was buttressed by the argument that matrilineal rules of succession are an impediment to agrarian change.

As a result of the grafting of matrilineal succession rules onto new land patterns, Allocation Records quickly get out of date. Family members die or leave the unit in pursuit of employment or marriage; children grow to the recording age of 16 and, where possible, are allocated gardens; and these factors are not incorporated into the Records. The internal survey of land allocation in 1974 revealed a displacement rate of 26 per cent for family members in Unit I where registration of titles was completed in February 1972, ahead of all other units.[109] This may not have been a representative rate for the other development sections, but it suggested that the displacement of family members was too high to be ignored. Updating the records would obviously increase land administration work. It may be argued that this is unnecessary since only the family leader is empowered to deal with the land and, as will be seen in subsequent chapters, the land certificate includes his name but excludes other details of family membership. The importance of updated details of family membership outside the land certificate and register will, however, become apparent when considering issues like the replacement of family representatives and dealings in family land in Chapter VIII. This is an importance which is now appreciated even by the land administrators themselves.[110] It is acknowledged, for example, that a purchaser would be exceedingly unwise to attempt to buy land from a family representative without acquainting himself with the other details of the family membership, which do not appear on the certificate or register.

Hints of difficulties in dealing with family land lead to the question whether the implementation of the C.L.D.A. can

stimulate the development of a land market. This is one of the sought-after effects of tenure reforms on the basis of individual titles. The absence of a healthy land market under customary tenures is supposed to be another disincentive to entrepreneurial activity and agrarian change. It has been contended that "the occupier frequently will not invest in land if he knows that he may be unable to realise his investment if he must move".[111] A more orthodox argument is that alienability of land enables the holder to use his title as security for a loan, and the lender to sell the land in the event of default. It also enables farmers with sub-economic holdings to sell to others who may be able to accumulate and maintain viable holdings for commercial agriculture. It is freely admitted that the necessary consequence of a healthy land market can be the creation of a "landed and landless class", this being "a normal step in the evolution of a Country".[112] It is this nonchalant acceptance of the emergence of a privileged land-owning class which makes the espoused tenure reforms unsavoury to governments aspiring to a more egalitarian rural society. In East and Central Africa, the policies of the Tanzanian government reflect a rejection of the orthodox argument in support of the development of a land market.[113] Kenya, on the opposite end of the political spectrum, has zealously pursued "individualization of tenure", and a rural landed class is reportedly emerging.[114] A similar trend was predicted in Malawi, presumably because its land reform programme was modelled from Kenyan law.[115]

Evidence from Lilongwe discussed in Chapter VIII shows that by July 1981 land registration had not yet brought about

the predicted flurry of land dealings and the emergence of a landed rural bourgeoisie.[116] Land administrators and holders alike appeared to be decidedly against encouraging the development of a land market. This is not very surprising. The institution of "family lands" is not conducive to increased land dealings; it perpetuates traditional feelings that land must be preserved for future generations.[117] Such feelings have been heightened by an appreciation of the land shortage and population pressure which the demarcation and fixation of boundaries for family land brought into focus. Most of the village headmen and family leaders interviewed in Lilongwe appreciated that one effect of land allocation was to remove the village headman's customary power of reallocating land to accommodate the requirements of needy families. It was appreciated that if a family ran out of land, one of the few options available was to migrate to areas and districts outside the L.L.D.P., but this option would disappear upon the extension of land registration to those areas as well. Most family representatives were therefore unwilling to countenance the alienation of family land.[118]

Allocation of "family lands" has also failed to improve the value of the land as security for agricultural loans. By July 1981, fieldwork could not disclose even a single family representative who had used family land to obtain a loan from a commercial bank. It must be presumed that the banks are aware of the risks involved in lending on the security of land providing sustenance to several families. In the event of default in repayments, any attempt to foreclose or sell the land would surely invite political controversy and repercussions,

especially when some of the family members may never have wanted a loan in the first place. Possible difficulties in realising the security provided by family land also show how foolhardy a lender would be if he simply dealt with the family representative without ensuring that other family members were privy to the agreement. Moreover, even if the security were realisable, in the existing socio-economic climate which is unfavourable to land alienations, it is possible that the sale of family land would not realise the amount of the credit and interest due.[119]

It is now possible to conclude that the L.L.D.P. allocation process is unlikely to achieve most of the articulated objectives of customary land reforms. This is partly due to the fact that the original policy of granting individual titles to land was not pursued. Project officers decided to allocate titles to family land, and this did not amount to a significant reform of the land tenure except for the bisection of villages into smaller segments or "family units", the ascertainment and fixing of unit boundaries, and the shifting of political control over land from the village headmen to the family representatives. Within the allocated units, Chewa customs on land disposal and matrilineal succession have continued to apply without significant alterations. If the litmus test for the success of a land reorganization programme is the extent to which statutory law supplants customary law in regulating land tenure, the L.L.D.P. has not been a resounding success. This failure of the project to bring about a significant change in land tenure has not encouraged the development of a land market. An interesting theme of the reforms in Lil-

ongwe is that the emergence of a rural landless class, perhaps one of the least desirable aspects of the tenure reforms planned, may be avoided by default rather than by design. Policy and statutory objectives articulated at the centre have not been implemented at the periphery.

It should be noted, however, that implementational problems at the periphery can also be attributed to incorrect assumptions in policy formulation at the centre. In Malawi, for example, it was assumed that land reforms would enhance the holder's ability to use the land for securing development loans from commercial lenders. Yet, the experience of other countries like Kenya should have indicated that land registration does not necessarily change the attitudes of commercial lenders towards the "security value" of former customary land.[120] Moreover, a careful assessment of the history of agricultural credit in Malawi (attempted in earlier chapters) would have revealed the falsity of the assumption that borrowing on the security of the land is always crucial for increased agricultural productivity and, therefore, a necessary primary justification for the tenure reforms. It has been observed that the type of agricultural credit most required by the peasant farmers affected by the reforms is seasonal or short-term, for which a land security is unnecessary. A land security may be necessary for long-term credit needed for capitalization of agriculture or the purchase of the cultivation unit.[121] Commercial lenders insist on providing this type of credit to incorporated farming enterprises in order to obtain additional securities from debentures and floating charges. A peasant farmer who already has the unit of cultivation does not require this type of credit,

and cannot possibly afford it, even after land registration. Its desirability is moreover called into question by the excessive indebtedness of farming estates to the commercial banks in Malawi.[122] Seasonal credit is more desirable, because it is unlikely to induce similar widespread indebtedness among peasant farmers; it reaches more people; and it does not tie up vital funds for long periods of time.[123] It is interesting to recall, finally, that the L.L.D.P. in fact runs a fairly successful seasonal credit scheme which ignores completely the land reform component of the same project.[124]

NOTES TO CHAPTER VII

1 See Chapter VI, Introduction, and part 2(f).

2 Hansard, Proceedings of the Malawi Parliament, 4th session, 4th meeting, 4th April 1967, p. 403 and, generally, pp. 399-412.

3 Ibid., p. 403.

4 Report of the Conference on African Land Tenure in East and Central Africa, February 1956, J.A.A., Special Supplement, 1956, p. 3, paragraph 13.

5 For reviews of land registration in Kenya see: M.P.K. Sorrenson, Land Reform in the Kikuyu Country, Oxford University Press, Nairobi, 1967; S.F. Coldham, Registration of Title to Land in the Former Special Areas of Kenya, Ph.D., University of London, January 1977; and M. Rogers, "The Kenya Land Law Reform Programme - A model for Modern Africa?", Verfassung und Recht in Ubersee, 6 (1973), pp. 49-63.

6 The writings of R. Simpson on this subject include "Land Law and Registration in the Sudan", J.A.A. Vol. VII, No. 1, January 1955, pp. 11-17; "New Land Law in Malawi", Journal of Administration Overseas, Vol. IV, No. 4, 1967, pp. 221-226; and Land Law and Registration, Cambridge University Press, 1976. The latter is the most recent and important work on the general subject of land registration. Chapters 21 to 24 in Book 2 contain some of the statutes relevant for a study of the subject in Malawi.

7 This was apparently after local lawyers had advised the President that it was impossible to prepare laws suitable for land tenure reforms in Malawi. He remarked: "The word impossible or difficult is a word I do not like to hear when I have made up my mind". See Hansard, op. cit., p. 402.

8 No. 5 of 1967, chapter 59:01, Laws of Malawi.

9 See Simpson, "New Land Law in Malawi", pp. 221-224.

10 Some commentators have even suggested that the passage and implementation of the Act amounted to a beginning of a quiet but significant "revolution" in rural development. This is misplaced enthusiasm which does not take into account the selective and cautious approach to the implementation of the Act. See A. Mercer, "Rural Development in Malawi, the Quiet Revolution", Optima, Vol. 23, part 1, March 1973, p. 8; and T.A. Blinkhorn, "Lilongwe: a Quiet Revolution", Finance and Development, Vol. 8, No. 2, 1971, p. 28.

11 Simpson, op. cit., pp. 222-223.

12 See Section 9 of the K.L.R. (S.A.) O., 1959, and cf. Section 6 of the K.L.A.A., 1968, which is similar to the provision in the Malawi Act, except for the fact that it requires the appointment of not less than 10 members. Large committees were apparently appointed even under this new provision. See J. Glazier, "Land Law and the Transformation of Customary Tenure: The Mbeere Case", [1976], J.A.L., Vol. 20, No. 1., pp. 44-45.

13 Coldham, op. cit., pp. 83-86.

14 Ibid. and Simpson, op. cit. p. 223.

15 See Sections 7 and 8.

16 See Section 9 for these consequences.

17 Section 10.

18 Section 11.

19 Sections 12 and 13.

20 Section 13(1)(c).

21 For a discussion of the terminology used in the paragraph see: S.R. Simpson, Land Law and Registration, pp. 239-243, and "Land Tenure: Some explanations and definitions", J.A.A., Vol. VI, No. 2, April 1954, p. 61.

22 Cf. Rogers, op. cit., p. 54 for a similar position under Kenyan law.

23 Ibid., pp. 54-55.

24 Section 16.

25 Section 21 of the K.L.R. (S.A.) O., 1959.

26 Section 14.

27 Simpson, Land Law and Registration, pp. 276-277.

28 Note 24 above.

29 Sections 17(1) to 17(4).

30 Section 17(5).

31 See L.J. Chimango, "Tradition and the Traditional Courts in Malawi", X CILSA, 1977, pp. 39-42; and W.H. Rangeley, "Notes on Chewa Tribal Law", The Nyasaland Journal, Vol. 1, No. 3, 1948, pp. 8-11.

32 Section 18(1).

33 Section 18(2).

34 Section 21 of the K.L.A.A., 1968; and Section 11 of the K.L.R. (S.A.) O., 1959.

35 Section 22.

36 See S. Coldham, "The Effect of Registration of Title Upon Customary Land Rights in Kenya", [1978], J.A.L., Vol. 23, No. 2, pp. 96-102; and Republic of Kenya, Report of the Mission on Land Consolidation and Registration in Kenya, 1965-66, p. 34.

37 Simpson, "New Land Law in Malawi", op. cit., pp. 223-224.

38 No. 4 of 1965, Sections 11(3) and 12.

39 Rogers, op. cit., p. 60.

40 Simpson, loc. cit.

41 See Chapter IV.

42 Section 13(1)(9).

43 Section 26(1).

44 Section 26(2).

45 Section 27. In Part VI on Miscellaneous Provisions, Section 26 stipulates that from the date of the finality of the Allocation Record, the Minister may charge each piece of intended private land with the proportionate cost of the Allocation process. He may also prescribe the manner in which the amount of the charge can be recovered from the owner of the piece. Section 29 is of a similar mould: it provides that every person who is party to any proceedings before the Land Committee or the Allocation Officer may be required to pay a prescribed fee. These provisions may never be invoked, because of the possibility of making land reforms unpopular among poor peasant landholders.

46 Section 138 of the R.L.A., chapter 58:01.

47 Section 139.

48 Section 24 of the Adjudication of Title Act, No. 18 of 1971, chapter 58:105.

49 See G.N. 167/1962, L.R.O. 1.1972, passed under Section 11 of the Traditional Courts Act, chapter 3:03, referred to in note 101, chapter VI.

50 Section 29 of the K.L.A.A., 1968; and Coldham, Registration of Title to Land in the Former Special Areas of Kenya, pp. 111-116.

51 Ibid., pp. 163-166.

52 Section 26(2) of the K.L.R. (S.A.) O., 1959; and Section 27(2) of the K.L.A.A., 1968: cf. Section 26 of the C.L.D.A.

53 See G.N. 250/1967, 29/1969 and 123/1969.

54 For a fuller geographical description of the project area, see Mercer, op. cit. p. 8; and L.L.D.P., Project Completion Report, Phase III, M.A.N.R., Central Evaluation Unit, November 1979, p. 2.

55 Part 4(a) and Note 170.

56 For the population density of the area see Mercer, op. cit. p. 9; and I.B.R.D./I.D.A., L.L.D.P. Phase II, Appraisal Report, p. 4. The density after the 1966 Census was estimated at 212 persons per square mile. This was higher than the national average. For a more recent estimation of density in the entire district, see Table 1.

57 The programme was originally sponsored by the U.N.D.P. Most of the development loans were eventually provided by the World Bank. See U.N.D.P. (S.F.) Project, An Application by the Government of Malawi to develop 500,000 acres of Land in Lilongwe district within the Central Region, Interim Report, 19th January 1967; and I.B.R.D./I.D.A., L.L.D.P. Phase II, Malawi, Appraisal Report, 16th April 1971.

58 Note 4 above, p. 8, paragraph 34.

59 See Note 57 above, and Note 118 below.

60 Source: L.L.D.P., Phase III, Project Completion Report, Central Evalutaion Unit, November 1979, p. 2, paragraph 2.4. By the end of the third phase, total allocations to the project from the government and external donors amounted to about M.k. 24.4 million. The project is currently in its fourth phase. The first three phases saw the development of 485,000 hectares, of which 348,000 were for small-holder agriculture and 65,000 for a cattle ranch.

61 Information on the allocation team was obtained from the L.L.D.P. Land Allocation Section, Lilongwe, and from personal interviews with the Acting Senior Land Allocation Officer and the Demarcation Officer in April 1981. Personal interviews with these officers also supplied most of the information on the implementation of the C.L.D.A. used in the rest of the chapter without special notes.

62 See; Simpson, Land Law and Registration, p. 274; and Report of the Conference on African Land Tenure in East and Central Africa, Annex C, p. 33, paragraph 8.

63 See Note 60 above.

64 See Note 61 above and the map on progress in L.L.D.P. Land Allocation by July 1981.

65 A similar suggestion was made in 1970 by J.C.D. Lawrence, Land Tenure Adviser, Foreign and Commonwealth Office, Overseas Development Administration; but no action was taken. See File MP 41835, Vol. II, Folio 155, Lilongwe Land Registry, enclosing "A note on the Customary Land Development Act in Malawi".

66 See: L.L.D.P., Report on an Evaluation Survey of Land Allocation in the Lilongwe Land Development Programme, Land Allocation Section, November 1974, Appendix 1.

67 Ibid., pp. 21-23.

68 Note 66 above.

69 Note 65 above.

70 File LP/16/3L, Vol. II, Folio 103, 22nd October 1973, L.L.D.P., Land Allocation Section, contains a typical dispute in which this attitude of customary authorities was apparent.

71 See Note 92 below.

72 Mercer, op. cit., pp. 12-13; C.G.C. Martin (ed.), Maps and Surveys of Malawi, Cape Town, 1980, p. 233; and Simpson, "New Land Law in Malawi", pp. 223-224.

73 See Chapter II for the social composition of villages within the L.L.D.P.

74 The attitude of the allocation team on exchange of gardens can be seen in the following disputes: Chiyabwe v. Chisambe, 12th November 1976, Folio 28, File LP/16/3L, Vol. IV; and Ngozo v. Khudu, Folio 93, File LP/16/3L, Vol. II.

75 Report of an Evaluation Survey of Land Allocation in the L.L.D.P., pp. 15-16.

76 Minutes of a meeting held at Mitundu Trading Centre on 3rd April 1975, in File LP/16/3L, Vol. III, L.L.D.P., Land Allocation Section.

77 See Section 27(1) of the Land Act; and Chapter VI, part 2(e).

78 See Folio 339, File LP/16/3L, Vol.5(v) L.L.D.P., Land Allocation Section; and Report of an Evaluation Survey of Land Allocation in the L.L.D.P., p. 25.

79 For a technical review of these aspects of land allocation, see Martin, op. cit., chapter 22.

80 The following L.L.D.P. Land Allocation files contain notes on some of the meetings held and the principles outlined: File LP/16/3L, Vol. III, Folio 210 for the meeting held at Nyanja, Unit 28; File LP/16/3L, Vol. 5(v), Folio 356 for the meeting held on 29th May 1980, Unit 31; File LP/16/2L/19, Folio 43 for the meeting held on 24th July 1973 in Unit 18; and File LP/16/3L, Vol. IV, Folio 418 for the meeting held on 22nd September 1978 at Chinkhandwe, Unit 4.

81 See Note 65 above. For a definition of overriding interests, see Section 27(f) of the Registered Land Act, which provides, inter alia, that "the rights of a person in actual occupation of land or in receipt of rents and profits" constitute over-riding interests. Chapter IX, part 3(d) includes a more detailed review of Section 27.

82 File LP/16/3, Vol. II, Folio 104, contains some useful notes of the the election meeting held in Unit 11 on 2nd November 1973. These notes are illustrative of the election procedure adopted in all development sections.

83 File LP/16/3L, Vol. IV, Folio 16, 10th October 1976, notes that chiefs Chadza and Chiseka, for example, were appointed joint chairmen for the Land Committee in Unit 24, Mitundu.

84 The following allocation disputes are typical illustrations of the procedure of taking disputes to the chiefs in the first instance: Mazinga v. Biwi, 28th December 1979; and Chankwantha v. Ziombolana in File LP/16/3L, Vol. 5(v), Folios 323 and 9 respectively.

85 See Chapter II.

86 The only case I could trace in which a Chairman withdrew from Committee proceedings because of conflicting interests is noted in File LP/16/2L/19, Folio 21, 3rd November 1972. Sub-chief Mtema in Unit 17 was asked to withdraw from the hearing of a dispute involving his brother-in-law.

87 See, for example, Matsimbe v. Masula in File LP/16/3L, Vol. I. The hearing of the dispute was once adjourned because a quorum could not be formed due to the absence of the Chairman and several members who had gone to a funeral service. Only two members turned up.

88 The following disputes are illustrative of the actual conduct of committee proceedings in Lilongwe: Mtsogolo v. Manyenje, Unit 44, 23rd May 1980; Mazinga v. Biwi, 28th December 1979; and Chankwantha v. Ziombolana. The cases are noted in Folios 361, 319 and 9 of File LP/16/3L, Vol. 5(v). Most of the allocation disputes from the L.L.D.P. need only be mentioned in these notes. It is not possible to include details of the facts and holding because the accuracy of the case reports cannot be vouched for in view of the substandard reporting.

89 Sections 6 and 16 of the C.L.D.A.; cf. Section 20 of the K.L.A.A., 1968.

90 The following are some of the notable boundary disputes resolved in Lilongwe: Kakwende v. Lende in Folio 4, File LP/16/3L, Vol. 5(v); Kasambatira and Kulinga village disputes, Folio 5, File LP/19/3L, Vol. III; Sinumbe v. Ndoliro, Kathumba and others, Folios 113 and 152; and Sinumbe v. Mkoko, Folio 209 in File LP/16/3L, Vol. III.

91 The following were some of the notable proprietorship disputes resolved: The Chang'ombe village dispute, Folio 146, File LP/16/3L, Vol. III; and Ngwendere v. Kampini Kasuzumira, Folio 157, 24th October 1977, File LP/16/3L, Vol. IV. Files LP/27/66/L and LP/27/25/L also contain a number of notable proprietorship disputes which need not be mentioned.

92 According to the Annual and Quarterly reports for the years 1969-1980, Land Committees held 7 meetings in 1972; 11 in 1973; 5 in 1978, and 1 or 2 meetings during the other years.

93 Information used in the paragraphs on the hearing of objections during the viewing period was obtained from personal interviews with the Senior Land Allocation Officer and Senior Field Officers, and from personal observation of the actual dispute resolution process at Nakachoka development section, Unit 23, in May and June 1981.

94 See Note 65 above.

95 C.A. Griffiths, Land Tenure in Malawi and the 1967 Reforms, unpublished LL.M. thesis, University of Malawi, 1981, p. 178.

96 For a catalogue of other perceptible changes in the matrilineal social structure of the Chewa see K.M. Phiri, "Some changes in the Matrilineal Family System among the Chewa of Malawi since the Nineteenth Century", Journal of African History, 24 (1983), pp. 251-274.

97 A typical example of this state of affairs is Kalolo family unit in Unit 29, Chikeka. 648 members were recorded as holders of cultivation rights in a unit consisting of 1,275.538 acres of private land, 5.70 acres of woodlands and several residential plots and grave sites. The family representative, Chief Kalolo herself, admitted that not all the recorded members were currently cultivating within the unit and that it would be impossible to turn the unit into one co-operative farm.

98 Report of an Evaluation Survey of Land Allocation in the L.L.D.P., p. 19.

99 Griffiths, op. cit., pp. 193-194.

100 See, for example, the report of an investigation of the boundary between Chankondo village (Nsaru, Registration Section 43/1) and Sikaenera village (Nsaru, Registration Section 42/1), Minutes of the L.L.L.B., 9th July 1976.

101 See, for example, the dispute arising as a result of the compensation paid to Kathyokamwendo I family unit for the extraction of gravel from family land, Folio 70, File LP/16/3L, Vol. II, -

102 Cf. G.K. Kainja, "Whither the Registered Land Act?", University of Malawi Students Society, Seminar Papers, 1978-79, pp. 9-10.

103 See, for example, the Chiefs Act, chapter 22:03, Laws of Malawi, and Chapter VIII on the appointment of chiefs and headmen to serve on the local Land Boards.

104 See Coldham, op. cit. pp. 221-268; R. Seidman, "Law and Economic Development in Independent English-Speaking Sub-Saharan Africa", in T.W. Hutchinson (ed.), Africa and the Law, University of Wisconsin Press, Madison, 1968, p. 33; H.W. Okoth-Ogendo, "Land Tenure and Agricultural Development in Kenya and Tanzania", Journal of the Denning Law Society, Dar-es-Salaam, Vol. 2, No. 2, 1969, p. 49; and J.P.B.W. McAuslan, "Control of Land and Agricultural Development in Kenya and Tanzania", in G.F. Sawyer (ed.), East African Law and Social Change, East Africa Publishing House, Nairobi, 1967, pp. 208-209.

105 No. 25 of 1967, chapter 10:02.

106 Section 1(3) of this Act excludes customary land from the ambit of its provisions. It devolves according to the customary law of the area. It is arguable, however, that the Act applies to reformed customary land which becomes private land upon registration.

107 See Sections 16 and 17.

108 For a more extensive review of the Act see S. Roberts, "The Malawi Law of Succession: Another Attempt at Reform", [1968], J.A.L., pp. 81-88.

109 Report of an Evaluation Survey of Land Allocation, p. 6 and p. 4.

110 See Minutes of the L.L.L.B. meeting held on 21st March 1980 at which the Lilongwe Land Board asked the Land Registrar to maintain a constant review of Allocation Records.

111 Seidman, op. cit., p. 51.

112 R.J.M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya, Government Printer, Nairobi, 1954, especially p. 10, paragraph 14.

113 See J.K. Nyerere, "Ujamaa - the Basis of African Socialism", April 1962, in K.E. Svendsen and M. Teisen (ed.s), Self Reliant Tanzania, Tanzania Publishing House, Dar-es-Salaam, 1969, pp. 158-166, especially pp. 162-164.

114 H. Okoth-Ogendo, "African Land Tenure Reform", in J. Heyer et al. (ed.s), Agricultural Development in Kenya, Oxford University Press, Nairobi, 1976, pp. 176-183; Coldham, op. cit. pp. 326-330; and McAuslan, passim.

115 B. Phipps, "Evaluating Development Schemes: Problems and Implications. A Malawi Case Study", in Development and Change, 7 (1976), p. 479.

116 See Table 22.

117 See National Statistical Office, A Sample Survey of Agricultural Smallholdings in Central Region, Malawi, April-June 1967, Government Printer, Zomba, p. 10; A.M. Mercer, L.L.D.P., A Precis of Activities with some Comments on Populace Participation, L.L.D.P., Hq. May 1972, p. 14, and Report of an Evaluation Survey of Land Allocation, p. 15.

118 For an account of some of the problems concerning the value of land as security for credit, see M. Rogers and A.N. Allott, "Introduction and Report of the Proceedings of an International Conference on Banking Law and Development in Africa", [1975], J.A.L., pp. 3-21.

119 Coldham, op. cit. p. 288; and J.C. de Wilde, Experiences with Agricultural Development in Tropical Africa, John Hopkins University Press, Baltimore, 1967, p. 201.

120 Ibid.

121 See Chapter VI, Part 4(b).

122 See L.F. Miller, Agricultural Credit and Finance in Africa, The Rockefeller Foundation, 1977, p. 8; and U.J. Lele, "The Role of Credit and Marketing in Agricultural Development", in N. Islam (ed.), Agricultural Policy in Developing Countries, International Economic Association, Macmillan Press Limited, London, 1971, pp. 418-421.

123 See Chapter VI, part 4(a).

VIII LOCAL LAND BOARDS AND LAND CONTROL AFTER TENURE REFORMS

When the idea of reforming customary tenures was gaining support in various parts of British Colonial Africa, colonial administrators were not oblivious to some of the undesirable consequences which could result from the introduction of individual land titles. In 1955, for example, the East Africa Royal Commission reported:

> "Elsewhere the individual ownership of land in peasant communities has sometimes led to the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little alternative income-earning opportunity for those who have parted with their land." [1]

The report suggested that this could be prevented by laws restricting the transfer of interests in the reformed land.[2] In 1958, a Working Party on African Land Tenure in Kenya proposed legislation under which public boards would be invested with wide discretionary powers to veto, at least during the early years of new land titles, any proposed land transfer deemed undesirable or unnecessary.[3] This proposal was accepted and translated into law by the colonial and independent governments of Kenya.[4] The Kenyan land control system was adapted for Malawi under the Local Land Boards Act (L.L.B.A.)[5] to complete the post-independence trilogy of land reform statutes.[6] This chapter examines the working of the L.L.B.A. and attempts to assess the contribution of the land control system evolved towards the attainment of the articulated objectives of the

land reform in Malawi. It also attempts to demonstrate further the divergences between the design and implementation of the statutory framework for agricultural transformation which has already been noted in the case of the C.L.D.A.[7]

1. Establishment and Composition of Local Land Boards

The L.L.B.A. provides for the establishment of separate Boards for each Land Control Division. The Minister responsible for land matters is empowered to declare Land Control Divisions over Registration Districts constituted under the R.L.A. The Lilongwe Land Registration District, which coincides with the L.L.D.P., has been declared the first Land Control Division for the purposes of the Act.[8]

Within the District are pockets of private or individually held lands which were brought onto the register through the Adjudication of Titles Act[9] instead of the generally applicable C.L.D.A. The L.L.B.A. is silent on whether the control system extends to all categories of land within a Division. The general purpose of the Act, as gleaned from its East African origins, is to control the disposal of newly converted "customary land". It is therefore arguable that it was never intended to affect existing private land titles which were already freely negotiable before being registered. This argument is borne out by the practice in Lilongwe, where the pockets of private land have been informally excluded from control.

The Act specifies the following membership for each Divisional Board:

(a) The District Commissioner in whose District the Division is situated, who shall be Chairman;

(b) Not more than two public officers appointed by name or office by the Minister;

(c) Two persons appointed by Chiefs of the Division; and

(d) Such number of persons, being not less than five nor more than nine, as the Minister shall appoint, from residents within the Division.[10]

The Land Registrar of the District is automatically appointed the executive officer of the Board. He can participate in its deliberations, but he is not entitled to vote.[11]

There are two opposing arguments on the composition of Land Control Boards. The first is that elected members cloak the Board with the necessary local legitimacy and acceptability. The other argument is that such a Board may lack the appropriate personnel or expertise which a wholly appointed Board might provide. The governments of Malawi and Kenya opted for appointed Boards but with a clear bias in favour of local residents. This is an attempt to combine the attributes of the two types of Board composition.[12] In Malawi, the two public officers will provide the Board with most of the technical advice. This blend of locals and technical experts is also essential for the mixture of technical and other duties which the Boards are enjoined to discharge.[13]

When the first Board took office in August 1970, the public officers appointed in their official capacities were the Regional Agricultural Officer and the Senior Land Allocation Officer of the L.L.D.P. The chiefs appointed fellow traditional authorities. The Minister, acting on the advice of the District Commissioner, appointed five residents, of whom two were traditional rulers (a chief and a headman), and three were local progressive farmers. There was a total membership of 10 including the executive officer. The ages of the members ranged from 35 to 68 and the majority of the local residents were over 50 years old.[14] The period of the appointments was left unspecified, and some of the elderly chiefs died in office. Absenteeism was also a recurrent problem. Because of these factors and the natural increase in the volume of work, the membership of the Board was changed and increased to 15 in July 1979. In addition to the Chairman, the two public officers and the executive officer, the new Board consisted of the following unofficial members: three chiefs and one sub-chief; four local farmers, of whom two were appointed by chiefs; and three representatives of the Malawi Congress Party. None of the members was below 35 or above 60 years of age. Care was taken to select residents and customary rulers who were active in public life. Although fluency in English was not a requirement, most members were literate, at least in the vernacular language.[15] Local elites or the more affluent members of rural communities apparently filled local land board operating under Kenyan law.[16] This was not the case with the Lilongwe Board, which was packed with traditionally respectable, but not necessarily affluent, villagers.

The most important element in the new composition of the Board was the inclusion of the three district Chairmen of the Malawi Congress Party and its two constituent organizations, the Youth League and the Women's League. This added political weight to the decisions of the Board and rendered it more effective. The Party's pervasive machinery has been instrumental in the implementation of many other development policies in Malawi.[17] The fear of political repercussions was also likely to ensure local support for Board decisions passed with the implicit support of the Party.[18]

The new composition may have improved the effectiveness of the Board, but it failed to improve the attendance record. A simple quorum of half the membership plus one was often difficult to satisfy.[19] The frequent absentees were the Regional Agricultural Officer, the Party representatives and some of the elderly disinterested local residents. Several factors contributed to the poor attendance. First, the Board Chairman, the Agricultural Officer and Party representatives were usually occupied by their other official duties. The Assistant District Commissioner deputized for the Board Chairman whenever he was absent.[20] Similar arrangements could have been worked out for the Party representatives, but this would have required the conversion of their membership from personal into official capacities. The advantage of such a change would have been to ensure continuity of political representation whenever the political members lost their political office at party elections.

The second major reason for absenteeism was the distance covered by some members in order to attend Board meetings held in the Chairman's conference chamber in the city of Lilongwe. The Land Control Division covers a wide area which is not adequately served by public transport. Members were requested to make personal travel arrangements. For the majority without cars or bicycles, the choice was usually between staying away or reporting late. Attendance could have been improved by the provision of an official members' vehicle. Travel warrants or the provision of refunds for 'bus tickets were meaningless for members living in areas inaccessible to public transport.

The third reason, which was accentuated by lack of transport facilities, was the remuneration. The members who were not civil servants received an allowance of k 3 (approximately £ 1.50), plus a free lunch for each session.[21] Some of them regarded the sum as an inadequate recompense for an arduous day's work. An increase in the stipend could have improved attendance. However, the most important palliative which was being considered was the replacement of unenthusiastic members at periodic intervals.[22] It may now be necessary to pre-fix the tenure of all appointed residents and chiefs on the Board.

2 Execution of Specified Duties and Procedures

The principal duties of Land Boards are to give consents to transactions involving registered land; to supervise family land matters and "to perform such functions in relation to the powers of control of user of land vested in the Minis-

ter by Part VI of the Land Act as may be conferred upon the Board by regulations, directions or instructions issued by the Minister ...".[23] These last two functions set apart Land Boards in Malawi from their Kenyan prototypes which were primarily evolved for the approval of land transactions. The Minister has not yet delegated his power to control the user of land to the Lilongwe Board. This review will therefore concentrate on the other specified duties of the Board. It will suffice to note that the delegation of the Ministerial power would have to be complemented by an increase in the number of Board members with technical expertise to ensure the passing of "proper economic" decisions.

(a) Consent to Transactions

The Act provides that no person should sell, lease, charge, partition, subdivide or acquire land within the Land Control Division without the consent of the appropriate Board. There are three exceptions to this general rule. Consent is unnecessary where the Minister has ordered a general approval or rejection of a specified category of transactions; where the transaction is in favour of the government; or where the transaction is a transmission on the death of an owner which does not involve any subdivision of the land. Any transaction is unenforceable if consent has not been sought within 30 days or if the Board has rejected the application. Any money or consideration paid under the unenforceable contract is recoverable as a civil debt.[24]

Each application for consent must be made in duplicate on prescribed forms, signed by the applicant or his agent, and submitted to the Board through the Land Registrar. The decision of the Board must be noted on the application form, together with the reasons for the refusal where consent has been withheld, or the conditions attached to any approved application.[25] The reasons for the rejection of an application are in practice rarely noted on the application.

In contrast to the Kenyan Land Control Act of 1967,[26] the L.L.B.A. does not specify the grounds upon which a transaction should be granted or withheld. It is a fair assumption that Local Land Boards are intended to have an unfettered discretion. The salient objectives of the system should, however, shape the conduct of each Board. It has been suggested that the objectives of the system envisaged by the East Africa Royal Commission were both social and economic. Of the three justifications cited, only one, namely the prevention of refragmentation, is economic. The prevention of unproductive accumulation of land, rural indebtedness and landlessness are all social considerations. The guidelines in the Kenyan statute are predominantly economic, but social considerations underlie most of the decisions in practice.[27]

When the Land Control Bill was introduced in the Malawi Parliament, the President said that its purpose was "to prevent people to whom land has been allocated from disposing of it irresponsibly, too easily, too freely and too frequently or stupidly ... without due regard to their own future and the future of their own family".[28] It can be inferred from

this that social considerations and paternalistic sentiments underpinned the system. However, the remarks of Simpson, the expert who drafted the Bill, suggested that the Boards were expected to apply both social and economic criteria. He said that each Board would be charged "with the duty of examining every proposed land transaction to see in the first instance whether it is fair ... and secondly to ensure that the transaction will not adversely affect the use of land as it might, for instance, in the case of subdivision or of the sale of farming land to a non-farmer".[29]

Social considerations have so far influenced all the decisions of the Lilongwe Board on proposed transfers of interest in the land. Following an injunction of the President,[30] before consent could be given, the unanimous sanction of all traceable members of the family had to be obtained. The opinions of the womenfolk carried great weight. The primary consideration was whether the family would be left with sufficient land after the transaction. Other factors were the reasons for the proposed transfer, the intended user of the land after the transaction, the consideration and method of payment, and whether the rest of the family understood the legal implications of the proposed transaction.[31] The unanimous sanction of the family members was sometimes predictably very difficult to obtain where land allocation resulted in the creation of "heterogeneous family units". Even where the entire family was willing to approve the proposed transaction, consent could be withheld if the other party to the transaction was a European or an Asian (and perhaps any other non-Malawian).[32] This was apparently in keeping with govern-

ment policy which forbids Asians and Europeans from establishing trading posts in rural areas, although some of the applications rejected on this ground were in fact for residential plots.[33]

For the period under study, the numbers of proposed land transfers presented to the Board for approval were insignificant and a comprehensive assessment of this aspect of land control would be premature.[34] However, some tentative observations can be made. The first striking aspect of the system was the hawkish posture of the Board towards sales and leases of family land. The following remark of a prominent Board member epitomized this attitude:

> "... the family leaders who wanted any money out of the land will no more do that. Anyone found should be reported to the Chairman as soon as possible ... These family lands were given to us not for selling or renting to millionaires but for the people in the area."[35] (sic)

In the perception of the members, the Board was cast into the traditional role of chiefs and headmen of preserving land for future generations. This is in keeping with a consent system which relies on social consideration. But it should be recalled that the aim of the land reform scheme is to reduce customary constraints on land alienation. There is an obvious conflict of goals here, and if limitations are not placed on the use of the social considerations, the land reform programme will be subverted by the perpetuation or readmission of customary controls.

Between leases and sales, the Board advised against the latter because the loss of the land to the family was total and complete. The Majority of the sale and lease applications were for small acreages required for residential or business premises,[36] and the smaller the acreage, the more likelihood of consent being granted. This tendency, if it remains unchecked, will contribute to sub-economic subdivisions which a land control system envisaged by Simpson should ideally prevent.

The Board was less wary of gifts. Of the nine approved by January 1981, five were in favour of close friends and relatives who were short of cultivable land. Such gifts were not unknown under customary law; they were imperative after the reforms because registration, as seen in the previous chapter, made it difficult for families with insufficient land to seek extra allocations from chiefs or headmen. The other four gifts, which were in favour of the government, are not easily explicable. It can only be surmised that they were made in ignorance of the fact that land could be sold to the government after the reforms, and that consent was unnecessary under the Act for this type of transaction.[37] It is desirable that the government should purchase all its land requirements or pay compensation as stipulated by various statutes.[38] By approving the gifts, the Board can be accused of pandering to the administration.

In contrast to the gifts, compensation or some payment was always demanded for "extraction of profits" or minerals from the land. One report claimed that this was intended to

TABLE 22: LAND ISSUES CONSIDERED BY THE LILONGWE LAND BOARD FROM 7TH MAY 1976 TO 21ST JANUARY 1981[39]

NATURE OF CASE:	NUMBER CONSIDERED:	NUMBER REJECTED:
Extraction of profits or minerals	213	-
Gifts of land	9	-
Leases	4	1
Sales	1	1
Land disputes	9	-
Change of name or family leader	2	-
Partition of family land	1	-
TOTALS:	239	2

"teach family members that their land is private and that they should consequently consider how it may be used. At the same time the economic value of the land [was] demonstrated."[40] Under customary law, profits like sand and gravel could be freely extracted from the land, which was often left in a desolate condition. Restoration of the land to its usable form was one of the conditions for the new arrangements which dominated land dealings in Lilongwe. This was due to a boom in the brickmaking and construction industries arising from the heavy construction of buildings for the capital city of Lilongwe. Consent for the arrangements was almost automatic, probably because they did not involve a transfer of title to the land. These are the types of transactions which can benefit from a general ministerial consent. Evidence of one could not be found in Lilongwe; but the Board nevertheless ceased to consider each application separately, leaving it to the Land Registrar to calculate compensation following a specified formula, and to attach any pertinent conditions.

Although Table 22 above does not project a similar impression, the more reliable Board minutes show that less time was spent approving transfers of interest in land. The execution of family land duties was more demanding. Under the Act, these duties pertain to the partition of family land and the replacement of family representatives.[41]

(b) Partition of Family Land

An application for the partition of family land can be made to the Land Registrar on the prescribed forms by the

family representative, any adult member of the family or the Minister. The Registrar submits the application to the Board for the ascertainment of the names of family members and the sizes of their share in the land. The partition must then be effected by the Board with the agreement of the members or in such manner as it may consider "having due regard to the rules of customary law affecting the land".[42] Where partition is impossible or can impair the proper use of the land, the Board is empowered to order the sale of the land. Where partition is possible but likely to result in shares smaller than the prescribed minimum, the Board has power to attach any smaller share to a larger holding, whether or not the parties agree.[43]

As with consent to transactions, there are no specific guidelines indicating the grounds upon which an application for partition should be entertained. Most applications will probably arise from succession disputes or the incompatibility of the unrelated members of some family units. The latter was indeed the cause of the few applications before the Board, of which one was resolved by splitting the land into two separate registrable family units. The Board was unwilling to effect the partition, and because of the applicant's insistence, he was ordered to pay the survey costs.[44] The case has probably established a precedent on the responsibility for the survey costs of any partition or alteration of boundaries. This is likely to dissuade applicants from seeking individual titles. The division of family land into several family units was also contrary to the expectations of the draftsman who suggested in 1967 that "... There is likely

to be an increasing demand for the partition of family land when the merits of individual titles are appreciated and the Board in this regard will carry on the work done by the committee in original adjudication."[45]

This gradual introduction of individual titles was also confounded by two remarkable cases in which the converse of partition was achieved. In the first case, two family leaders invited the Board to amalgamate their units, and place them under a third unit of a relative. They contended that there was insufficient land for the members of the two families, whereas the third family had more land and fewer members, and amalgamation would result in a more equitable distribution of land among their closely related families. The proposal was accepted.[46] The second case is less excusable, because amalgamation was suggested by the Board in an attempt to resolve a protracted succession dispute. The former mwini dziko and village headman of the area was invited to double as leader for the unit in dispute and his own.[47] The Board has power to attach a sub-economic plot to a larger one only where partition has been effected, but not in a case of this nature where the sizes of the units and partition were not the issues in dispute.

It should also be noted that the Board had no directives on the prescribed minimum economic size for a family unit. The application of this concept should not be a pressing issue. As the Mission on Land Consolidation in Kenya observed, the concept is realistic only where all possible variables like soil fertility, climate, people's behaviour and crops

grown have been equated. Since this is ordinarily impossible, its application is often misleading.[48] It is surprising that the same report nevertheless went on to recommend its retention in the land control system on the ground that "... it is so firmly established ... widely understood ... and has some useful effect".[49] The result, as later analyses have shown, has been a continuation of subdivisions beyond the minimum size irrespective of the controls.[50] Apart from complicating the work of the Board, its belated introduction in Lilongwe might conflict with the power of the Board to effect partitions "having due regard to the rules of customary law affecting the land".

(c) Replacement of Family Representatives

The Act empowers Local Land Boards to "nominate" a new family representative if the incumbent is dead; if he is unable to act by reason of mental incapacity, absence from Malawi, imprisonment or detention; or if he is no longer acceptable to the majority of the family members.[51] Any registered member can inform the Registrar orally or in writing of the need for the replacement. There are no prescribed notification forms. The Registrar reports the request to the Board in writing and consultations are held in the village or in the Chairman's conference chambers. The original certificate is recalled and a new one issued after the deliberations. The Board is expected to inform the Registrar in writing of the new nominee.[52] This is unnecessary in practice because the Registrar, as the executive officer of the Board, sits through all its deliberations and is responsible for recording the minutes.

When nominating the new representative, the Board must have "due regard to the wishes of the family and any custom affecting the land".[53] From the use of words like "nomination" or "due regard", it can be deduced that the intention was to confer upon the Board a wider latitude in the selection process. In the applications considered,[54] it preferred to confirm the choice of the family or arbitrate in the disputed cases instead of making a direct nomination. Several principles were applied in the disputed cases. First, the Board insisted that only recorded members of the family unit and the headman or chief who guided the allocation process should take part in the selection of the new leader. The task of the political authorities was to comment on the character and suitability of the candidates presented to the Board.

The second principle was that eligible persons should, as far as possible, be selected in accordance with matrilineal customs. Family leaders were likened to village headmen, and the Board insisted that they should be succeeded by matrilineal kinsmen but not their own offspring. The wishes of a deceased leader could be ignored if they were contrary to this custom. This strict adherence to custom is once again contrary to the tenets of the land reform programme, which attempted to encourage an abandonment of matrilineal succession rules. It is also contributing to the confusion over the exact legal and social status of the family representative vis-a-vis the village headman. Some villagers assume that headmanship is synonymous with family proprietorship. In one case, the Board had to correct a commonplace impression that

it is improper for a person who is not a headman to hold a land certificate.[55]

The third principle applied was that politically unacceptably persons should not be eligible for leadership. Under this principle the Board advised against the selection of the members of the Jehovah's Witnesses sect, which is proscribed in Malawi.[56] Apart from being an infringement of personal rights, use of political factors introduces arbitrariness in the decision-making process which can hardly be justified by any positive contribution to agricultural change. It is inconsistent to exclude members of the proscribed sect from family leadership after admitting that they are entitled to registration as family members so long as they possess registrable land rights.[57] One wonders how the case of an entire family of Watchtower Movement members which has selected a fellow religious believer as a family leader would be approached!

3 Extra-Legal Settlement of General Land Disputes

Apart from exercising control over land dealings, partition of family land and the replacement of family representatives, the Lilongwe Land Board has assumed responsibility for the settlement of most other disputes affecting registered family land.[58] These disputes fall into two loose categories. The complainant in the first category sought to reinforce a right conferred by registration to evict "squatters" or "trespassers", or to prevent his own expulsion from the family land where he was registered. Some of the so-called

trespassers or squatters were in fact persons with customary rights of cultivation which were not recognized or recorded during the allocation process. In the second category, the complainant sought to have the registration documents altered to include names of family members who were originally omitted, or to have the boundaries of the land redrawn. These applications were in effect a challenge to the first registration.

The complainant communicated his intention to commence proceedings in writing or by word of mouth to the executive officer. The Chairman arranged meetings and the executive officer circulated agendas to all Board members, parties and their witnesses at least two weeks in advance. Disputes were settled in private in the Chairman's conference chamber, but public meetings were sometimes arranged in the field when the Board or its representatives went to see the land in dispute. The proceedings were generally conducted in an inquisitorial manner. The Chairman introduced each case and then called in the parties. In adversarial disputes, the complainant and his witnesses stated their case first, followed by the defence. To avoid a fracas, the parties were not allowed to examine each other. All the questioning was conducted by the Chairman and Board members taking turns, a task which some of the chiefs executed with relish and wit. The Board was not bound by technical rules of evidence. It willingly listened to anyone, but witnesses were sharply reminded not to dwell on irrelevancies. Proceedings were frequently and sometimes unnecessarily postponed to ensure the attendance of all important witnesses, who invariably included the headman respon-

sible for guiding the Land Allocation team.[59] This contributed to the slow and ponderous pace of the dispute resolution. At the end of each hearing, the unanimous verdict of the Board was delivered by the Chairman after private consultations between the members.

The proceedings were conducted in vernacular, but the minutes were recorded in English. As was the case with the records of Land Allocation Committees, the reporting was so sub-standard that it is impossible to abstract therefrom any watertight principles. However, some inconsistent and contradictory trends can be spotted. In cases where the applicant sought to enforce his rights to expel trespassers or to prevent expulsion from the land, the guiding principle for a time was that every person should cultivate within the family unit where he or she was registered. Anyone cultivating elsewhere could be evicted as a trespasser. An examination of the Allocation Record was therefore sufficient to determine whether or not one was a trespasser and was being legitimately evicted from the land. If need be, the registered proprietor was asked to pay compensation for houses of unregistered cultivators who had been on the land for a long time.[60] This general principle was later contradicted by a case in which the Board accepted the request of villagers that they should revert to "the old style of cultivation".[61] This meant that every person could cultivate his or her gardens irrespective of their location in one or more different family units, and such a person would not be deemed a trespasser if the garden was outside his unit of registration. This later decision in effect nullified attempts to reorganize the

land under the C.L.D.A. It was perhaps inevitable, in view of the failure of allocation to effect proper consolidation and exchange of holdings. It is also interesting to note that the Board placed the blame for "unrest and confusion" in the area on a hapless Board member who was privately advising his friends to have expelled from their units all other unregistered cultivators. His resignation from the Board was demanded for advocating in private what in effect was the principle behind several Board decisions.

In the several cases where rectification of registration documents was sought, the trend of decisions appeared to favour rectification to include names of persons with customary rights of cultivation who were inadvertently or otherwise omitted from the original Allocation Records.[62] The consent of the majority of the recorded members was demanded before this type of rectification could be ordered. This trend was, however, contradicted by several decisions in which applications were rejected on the ground that no objection was raised during the 60 day period for viewing registration documents provided under the C.L.D.A.[63] This was a stand of doubtful legality. As seen in Chapter VII, the law in Malawi permits the rectification of registration documents in certain circumstances, regardless of the expiration of the viewing period.[64] The Board took this stand in cases where the unanimous consent of the family members to the rectification was not forthcoming or where the Board was unwilling to effect rectifications involving expensive boundary alterations and resurveys.[65]

The contradictions and inconsistencies in the decisions can be attributed to the familiar problem of lack of directives and guidelines on the principles upon which the conduct of Board business should be based. As a result, decisions were passed ad hoc, on the basis of what was fair on the particular facts, and with only occasional references to previous decisions. The objectives of the land reform programme and the legal requirements of the various statutes were either ignored or, most likely, unknown. These charges can be substantiated by two more cases. The first was an encroachment dispute in which the Board discovered that the land in question had been transformed from customary land into the freehold property of the Capital City Development Corporation,[66] and was outside the jurisdiction of the Board. It nevertheless ordered the "putative trespasser" to pay the "putative owner/claimant" the customary compensation of "a full basket of unshelled maize", and the counsellors of a local chief were invited to witness the presentation. The Board was in effect ordering one trespasser to compensate another.[67]

The second case concerned the devolution of registered family land, Thiwi No. 28/2. The proprietor was a former employee of the L.L.D.P. He acquired the land as a customary holding immediately prior to the commencement of the reform programme. He was eventually registered as the leader of a family unit which also comprised his brother and two sisters. The leader died in a car accident before the land was settled or developed, and the headman responsible for the original allocation reclaimed it. The Board accepted the restoration

after satisfying itself that the surviving registered members were not interested in assuming occupation and had sufficient land elsewhere outside the L.L.D.P.[68] This restoration would have been proper under Chewa customary law, but not after the tenure reforms. The case involved a "transmission on the death of an owner" which the Board is not empowered to oversee if there is no subdivision of the land. The majority of the Board members did not appreciate this lack of jurisdiction or the supplanting of customary law with statutory succession provisions.[69] The only exception was the executive officer, who indicated in a private interview before the proceedings that a correct legal solution would be to advise the surviving family members or personal representative to sell the land at current market value and apply the proceeds to the estate of the deceased. This opinion was surprisingly left unaired during the deliberations.

It must be emphasized that this failure to observe salient legal requirements was not necessarily due to the preponderence of lay members on the Board. The technical experts and officers responsible for the implementation of the land reform statutes were equally culpable. At an introductory meeting of the current Board, for example, one chief wanted to know the difference between the decisions of the Board and of traditional authorities on land matters. He was assured that there was no difference, except for the fact that the Board was instituted to hear disputes which traditional authorities had failed to resolve.[70] Since its inception, the Board has been operating on the assumption that it is an appellate tribunal to which land cases should be taken

after exhausting the customary forums.[71] This is unfortunate because satisfactory decisions of the chiefs at first instance cannot be monitored to determine their legality or conformity with the objectives of the L.L.D.P. It is possible that all land disputes at this level are settled in accordance with customary laws which might be incompatible with the tenure reforms. The procedure is also extra-legal. Neither the customary forums nor the Board is empowered to settle general registered family land disputes outside the duties conferred on the Board by the L.L.B.A.

By exercising jurisdiction over the general land disputes presently under review, the Board and the customary tribunals have been transgressing into the province of the courts of law. Under the Land Act, local Traditional and Subordinate Courts are respectively authorised to deal with summonses alleging trespass on, encroachment upon, or unlawful occupation of, customary and private land.[72] Under the R.L.A., as observed in Chapter VII, it is the responsibility of the Land Registrar, and the High and Subordinate Courts of Resident Magistrate grade, to rectify the land register.[73] The Registrar can correct minor and clerical errors, and the courts can correct even major ones where registration was obtained or omitted by fraud or mistake. The courts have not yet issued rectification orders. But between 1976 and 1979, several trespass summonses were drawn and the Lilongwe Resident Magistrate ordered the eviction of the trespassers. None of the orders was enforced. The disputes were eventually taken to the Land Board, which contrived different solutions in one or two cases. The Board Chairman later requested the

Legal Aid Advocate responsible for the summons to refrain from taking family land briefs and to refer all cases to the Board.[74] Although the legality of this request was highly questionable, the absence of court proceedings since 1979 is an indication that it was accepted.

The conflict of jurisdiction between the Courts and the Board was therefore removed extra-legally, and the statutory instruments can now be amended to render legal the de facto position. This would have the effect of severing the already tenuous influence of the judiciary on land control. The L.L.B.A., in common with other tenure reform statutes, is premised on the assumption that administrative controls and wide ministerial discretion are imperative for agricultural transformation. The Minister is not only the final arbiter of land disputes but, in the words of the President, he can also "exercise general and specific control over the functions of or the operation of the Local Land Board".[75] As with the dispute resolution process under the C.L.D.A.,[76] it is tempting for lawyers to view the exclusion of the courts from the land control system with misgivings. Administrative discretion which is not subject to judicial review is notoriously prone to abuse for the political or economic benefit of ruling elites.[77] However, whether formal courts modelled out of Western Capitalist systems are more appropriate for some of these developmental duties is debatable. The following are some of their negative features:[78] firstly, they are generally attuned for norm or sanction enforcement instead of the more appropriate dispute settlement; secondly, the procedures are inflexible, slow, formal and mystifying to laymen;

thirdly, they are often overloaded with other work; and finally, the technical expertise necessary for specialised duties is sometimes lacking on the bench. Some of these features are not apparent in the procedures of the Lilongwe Land Board. Its potential utility, especially over family land matters, should not, therefore, be underestimated.

4 Appeals and Avoidance of Land Control

Any person dissatisfied with the Board's execution of specified and extra-legal duties can apply for a Ministerial review within 15 days.[79] This course of action was rarely taken. The Lilongwe Board was rather indisposed towards any intimation of an intention of appeal. An applicant was warned in one case that he "would be liable to a fine of k 200 (approximately £100) or be put in prison for one year" if he did not abide by its decision.[80] It was only as a last resort that recalcitrants were drawn to the possibility of penal sanctions under the L.L.B.A.[81] The Board preferred to rehear the same dispute and arrive at some accommodation instead of submitting it to a very busy Minister responsible for land matters who was also the Life President of Malawi and holder of several more important Cabinet portfolios.[82]

These efforts to resolve disputes by conciliation were reminiscent of customary tribunals and contributed to the lack of finality and slack pace of proceedings noted earlier. However, it is arguable that speedy appeals to the President could not necessarily result in a more equitable or different solution. He was unlikely to upset a decision of the Board

reached after a first-hand evaluation of the facts on the ground. This possibility was confirmed by the only recorded appeal case received. The Regional Minister, representing the President, advised the parties and the public in general to accept decisions of the Board.[83] This attitude rendered the appeals procedure nugatory. If the rights of landholders are to be adequately protected, there is a case for an appeals board similar to the one operating in Kenya,[84] or for judicial review of the decisions of the Board.

The other course of action for dissatisfied parties is to ignore the ruling of the Board and to proceed as they see fit. As noted above, penal sanctions can be imposed for disregarding the Board and a rejected transaction is legally unenforceable. No-one has yet been prosecuted for disregarding the Board, and these penalties are unlikely to deter determined parties. Decisions of the Board can only be ignored, or the control facilities avoided successfully, in certain types of transactions. There is little evidence to suggest a widespread avoidance of land control with regard to sales, leases or charges of family land which are new concepts in the region. On the other hand, customary loans of gardens, subdivisions and gifts involving close friends and relatives have continued without the knowledge of the Board in some areas. In several cases, even the Board knew that applicants were living on the land with the tolerance of the family before consent for a lease or sale was sought or after it had been rejected.[85] This is an indication of the failure or ineffectiveness of land control. However, the one aspect over which control is regularly exercised is the appointment of new fam-

ily representatives. Vacancies are regularly reported as a way of resolving rivalries for succession to this coveted new social status. As for general land disputes, it has been noted that the Board exercised control only after chiefs and other customary authorities had attempted to resolve the matter in the village.

5 Conclusion

A superficial assessment of land control in Malawi would suggest that it has been highly successful so far in fulfilling the primary objective of preventing improvident disposals of newly acquired land titles. The Lilongwe Land Board, using social considerations, has been rather "hawkish" towards proposed permanent alienations of land. If this trend is allowed to continue, the system may prevent unnecessary land accumulation and landlessness in the rural society. This effect of land control may be considered as a sufficient requital for the the subversion of tenure reform objectives which the hawkish attitude towards land alienation necessarily entails. But this assessment becomes superficial when the low level of land dealings and applications for sales or leases in Lilongwe is taken into account. This is an indication that the rural society is not inclined to dispose recklessly of its lands which are most often the only source of livelihood. Thus, as Brietzke once noted, the paternalistic justification for the land control system was unwarranted.[86] Moreover, even if land transactions intensify, there is no guarantee that a Land Board operating under a wide political ministerial discretion would maintain its stringent controls.

The hawkish attitude of the Board against proposed sales and leases can be contrasted to the Kenyan system, where consents are invariably granted in decisions reached through the application of social factors instead of the stipulated economic criteria. An assessment of the system suggested that it is expensive to run but of little functional utility, and that it should be dismantled.[87] The land control system in Malawi is also expensive,[88] and several aspects of Board decisions passed in the execution of both legal and extra-legal duties raise doubts on its utility. The decisions are woefully contradictory and inconsistent; little regard is paid to legal niceties and the general objectives of tenure reforms; and, through the use of social criteria, aspects of customary land tenure which should have been supplanted by statutory law are perpetuated or re-introduced. Despite these problems, it can be contended that Land Boards in Malawi deserve some reprieve because of their potential utility over the settlement of general land disputes and family land matters. This is a function which sets them apart from Kenyan Land Boards which were primarily evolved for giving consents to land transactions.

It is clear, however, that an overhaul of the land control system will be necessary if the potential utility of the Land Boards is to be realised. The policy choices of the government on tenure reforms must be unequivocally stated and guidelines of the conduct of the Board published. Board members should be made aware of their legal requirements and the objectives of the whole exercise. This could be achieved by the inclusion of one or more legal experts within the member-

ship. It may also be necessary to provide for a judicial review of the conduct of the Board and the Minister. This will inject some legality and consistency into the system and curb some of the unnecessary Ministerial discretion. If the existing gap between the design of the statutory framework for agricultural change and its implementation in the field is still apparent after such an overhaul, the land control system would not be deserving of another reprieve.

NOTES TO CHAPTER VIII

1 Report of the East African Royal Commission, 1953-1955, cmd. 9475, 1955, paragraph 28, p. 355.

2 See, generally, paragraphs 29-36, pp. 355-359.

3 Colony and Protectorate of Kenya, Report of the Working Party on African Land Tenure, 1957-58, Government Printer, Nairobi, 1958.

4 See the Land Control (Native Lands) Ordinance, No. 28 of 1959, and the Land Control Act, no. 34 of 1967.

5 No. 7 of 1967, chapter 59:02.

6 It should be recalled that the other statutes are the Customary Land (Development) Act (C.L.D.A.), No. 5 of 1967, chapter 59:01; and the Registered Land Act (R.L.A.), No. 6 of 1967, chapter 58:01.

7 See Chapter VII.

8 Section and G.N. 185/1970, sub. leg. passed under the C.L.D.A.. chapter 59:01.

9 Act no. 18 of 1971, chapter 58:05.

10 Section 4(1).

11 Section 4(2).

12 See; Report of the Working Party on African Land Tenure, paragraph 98, p. 44 and paragraph 113, p. 45; East African Royal Commission Report, paragraph 50, pp. 362-363; and S. Coldham, "Land Control in Kenya", [1978], J.A.L., Vol. 22, No. 1, pp. 67-68.

13 See parts 1 and 3 of the Chapter.

14 Local Land Board Meeting Procedures and Minutes, Folios 104(b) and 105, File LLR/21, Lilongwe Land Registry.

15 Ibid.

16 Coldham, loc. cit.

17 For a review of this Party's role in agricultural development see Z.D. Kadzamira, Local Politics and the Administration of Development in Malawi, Ph.D. thesis, University of Manchester, 1974.

18 See B. Phipps, "Evaluating Development Schemes, Problems and Implications. A Malawi Case Study", Development and Change, 7 (1976), p. 479.

19 Section 5(2)(a) of the L.L.B.A. Information on absenteeism used here was obtained from Board minutes and interviews with various Board members.

20 Section 5(1) provides that Board members "shall elect one of themselves to preside over a meeting in the absence of the Chairman". The involvement of the Assistant District Commissioner, who was not a directly-appointed member of the Board, was therefore extra-legal.

21 L.L.L.B. Minutes dated 20th June 1979, minute 2/79.

22 L.L.L.B. Minutes dated 6th November 1981.

23 Sections 6-12 of the L.L.B.A.

24 Section 6.

25 Section 8.

26 Section 9.

27 See M.P.K. Sorrenson, Land Reform in the Kikuyu Country, Oxford University Press, Nairobi, 1967, p. 217; and Coldham, op. cit., p. 63 and pp. 69-77.

28 Malawi Hansard, Debates of the 4th session of Parliament, 4th April 1967, p. 409.

29 R. Simpson, "New Land Law in Malawi", Journal of Administration Overseas, Vol. IV, No. 4, October 1967, p. 227.

30 Hansard, op. cit., p. 409.

31 The attitude of the Board can be seen in the following Minutes on proposed transactions: Ching'anga/Sibale lease proposal, 20th June 1979, 12th October 1979, 19th October 1979 and 12th January 1980; Chilinde/Kadzakalowa lease proposal, 25th January 1980 and 14th March 1980; Nachipi/Juma lease proposal, 2nd May 1980 and 20th August 1980; Tambala/Makoka lease proposal, 1st February 1980; Mwela/Mwamadi lease proposal, 7th August 1980; and Mkwatamwendo/Kaphantengo sale proposal, 23rd October 1981.

32 See Re. Crocodile Snake Farm Sale Proposals, L.L.L.B. Minutes, 2nd November 1979; Sutcliffe sale proposal, 2nd October 1979, 19th October 1979 and 5th June 1981; and Nachipi/Mtemang'ombe gift proposal, 2nd October 1981.

33 See the Business Licensing (Amendment) Act, No. 18 of 1978.

34 See Table No. 22. Note that entries in the Land Control Register were often belatedly made, and the figures presented here are not very accurate. The conclusions drawn below are from the more reliable Board Minutes, most of which are cited in Notes 31 and 32 above.

35 Minutes of the L.L.L.B. and M.C.P. meeting held at Phirilanguzi on 26th October 1980.

36 The Mkwatamwendo/Kaphamtengo sale proposal, 23rd October 1981, involved 24 acres of land, and this is the largest acreage for which consent has been sought. The proposed buyer indicated that he wanted to settle on the land. The application was being considered by the time of wri-

ting, and it was not clear whether approval would be granted.

37 See Section 6(1)(a)(ii) of the L.L.B.A.

38 See, for example, Section 28 of the Land Act 1965, chapter 57:01, and The Land Acquisition Act, no. 21 of 1970, chapter 58:04, Section 9.

39 Source: The Land Control Register, Lilongwe District Registry.

40 Report of an Evaluation Survey of Land Allocation in the L.L.D.P., November 1984, p. 25.

41 Part IV, Sections 10-11.

42 Section 10(1) of the L.L.B.A. and Section 101 of the R.L.A.

43 Section 10(3) of the L.L.B.A. and Sections 98-100 of the R.L.A.

44 Makoka v. Thesi, L.L.L.B. minutes dated 2nd November 1979. See also Chibveka v. Mkhake application, 9th September 1980. It is not clear from the minutes whether partition was effected in the second case.

45 Simpson, loc. cit.

46 E. M. Katengeza and G. Mkuluphi v. V.H. Mkungwi, L.L.L.B. minutes, 7th November 1980. The particulars of the units involved were as follows: (a) Mkungwi's family land in Chilaza 21/2 had 284.404 acres with 53 members; (b) Katengeza's family land, Chilaza 22/2 had 56.068 acres and 62 members; and (c) Mnjeza's family land, Chilaza 22/3 had 39.809 acres and 56 members. Mkungwi was the proposed family and leader for the amalgamated holding.

47 Chinkhandwe v. Masula, L.L.L.B. Minutes, 20th June 1980, 11th July 1980 and 22nd August 1980.

48 Republic of Kenya, Report of the Mission on Land Consolidation and Registration in Kenya, 1965-66. p. 81.

49 Ibid.

50 See Coldham, op. cit. p. 71; and R.J.A. Wilson, "Land Control in Kenya's Smallholder Farming Areas", East African Journal of Rural Development, Vol. 5, No.s 1 and 2, 1977, pp. 126-128.

51 Section 11(1) of the L.L.B.A. and Section 122 of the R.L.A.

52 Section 11(3) of the L.L.B.A. and File LP26/29/L, Folio 40, Notes on Procedure for Land Board Meetings, 4th January 1977.

53 Section 11(2).

54 Information on replacement of family representatives was generally abstracted from Minutes for L.L.L.B. meetings held on the following dates: 14th December 1972, 1st June 1975, 12th June 1975, 26th May 1976, 14th December 1979, 21st March 1980, 9th May 1980, 2nd May 1980, 20th June 1980, 11th July 1980 and 22nd August 1980.

55 L. Chindoko v. L.L. Chadza Mdingunda, Malingunde 37/3, L.L.L.B. Minutes, 23rd October 1981.

56 Chikhandwe v. Masula, L.L.L.B. Minutes dated 20th June 1980, 11th July 1980 and 22nd August 1980.

57 See File LP/16/2/L/19, Folio 43, 30th July 1973; and Chapter VII, Part 3.

58 The following analysis is generally based on L.L.L.B. minutes from its inception to 1981 and from fieldwork

observations made between May and July 1981. Special notes will only be included to draw particular attention to important decisions.

59 This, however, was in compliance with section 5(4) and (5) of the L.L.B.A.

60 See Chiyimba v. Chisamba, Minutes dated 24th October 1980; Chakwantha v. Matiyasi, 23rd December 1980; and Jamu v. Kaphaidyani, 7th July 1981.

61 Report of the L.L.L.B. meeting held at Phirilangadzi trading centre following a land dispute between Chakwanila, Silatiyele, Chapendeka, Batiwelo and Vaniwiki, Phirilangudzi 3/1 and Malingunde 1/3, 6th November 1981.

62 See: Nepitala Lazaro dispute, L.L.L.B. minutes dated 26th June 1976; Gunda v. Tumbi, 10th July 1979; and Kumtengela v. Malingi, 26th June 1979.

63 Fulatira v. Chiyendamchiwanda, L.L.L.B. minutes, 22nd February 1980; and Mziche v. Chimanthembwe, 10th July 1979.

64 Sections 138-139 of the R.L.A.; and Chapter VII, Part 1.

65 See, for example, Chamkondo v. Zambo, 21st December 1979.

66 See the Capital City Development Corporation Act, chapter 39:02, section 9.

67 Mateyu v. Konyani, L.L.L.B. minutes dated 8th December 1981.

68 Re. Late Chimutu's Land, L.L.L.B. Minutes dated 25th June 1981.

69 See Section 102 of the R.L.A.; and, generally, the Wills and Inheritance Act, chapter 10:02.

70 L.L.L.B. Minutes for meeting held on 31st October 1979.

71 The classical example here is the Chimlozi v. Chamadenga Dispute, L.L.L.B. minutes dated 25th January 1980, which went through the following tribunals: (i) local Party chairman; (ii) Area Party Chairman; (iii) Village Headman Gwilize; (iv) Chief Kabudula; (v) L.L.D.P. office; and (vii) the local Land Board. The Board reversed the penultimate decision of the L.L.D.P. that the applicant should retain the land.

72 Section 36.

73 See Note 64 above.

74 See: Zintambila v. Levison Masula (unreported), civil cause no. 204 of 1977; Tembwe v. M'gawa (unreported), civil cause no. 1089 of 1976 and L.L.L.B. minutes dated 21st March 1980 and 28th March 1980; Kumtengele v. Malingi (unreported), civil cause no. 69 of 1979; and Tumbi v. Gunda (unreported), civil cause no. 140 of 1979 and L.L.L.B. minutes dated 16th May 1980.

75 Hansard, op. cit., p. 409; and Section 13 of the L.L.B.A.

76 See Chapter VII, part 1, reviewing Part V of the C.L.D.A.

77 See P. Brietzke, "Rural Development and Modifications of Malawi's Land Tenure System" (1973), 20, Rural Africana, p. 62.

78 See R.B. Seidman, The State, Law and Development, London, 1978, pp. 210-223.

79 Section 13 of the L.L.B.A.

80 Chimseka v. J. Katundu and N. Katundu, L.L.L.B. minute 43/81, dated 13th November 1981.

81 Section 14.

82 See L.L.L.B. minutes dated 14th December 1972; Chalendwa v. Chalendwa and Tumbi v. Gunda in minutes dated 16th May 1980. These disputes were repeatedly taken to the Board after the initial resolution and, in the latter case, even after the Resident Magistrate had attempted to solve the problem.

83 Fulatira v. Chiyendamchiwanda, Board minutes dated 11th November 1980.

84 Parts VI and VII of the Land Control Act, 1967. It may not be necessary in Malawi to provide for two rungs of "Appeal Boards" which exist in the Kenyan system.

85 Nachipi/Juma lease proposal, 2nd May 1980 and 20th August 1980; and Mwela/Mwamadi lease proposal, 2nd August 1980.

86 Brietzke, loc. cit.

87 Coldham, op. cit., pp. 75-77.

88 Between December 1980 and May 1981, the operations of the Board were suspended because the administration vote had been exhausted and could not be replenished from Central funds.

IX REFORMS OF CONVEYANCING PRACTICES AND SUBSTANTIVE LAND LAW

When Malawi achieved independence, like most Commonwealth African countries, it inherited a legal system based on English and customary laws. This plurality was even more pronounced in land matters. Customary laws applied to areas designated as customary land, and the substance of the common law doctrines of equity and English statutes of general application in force on 11th August 1902 provided the residual law for public and private lands.[1]

It has been noted in previous chapters that post-independence tenure reforms were premised on the assumption that customary law does not provide a suitable legal milieu for agricultural development. Received English land law is equally inapposite. Learned authorities concur that it is so autochthonous and incomprehensible outside the peculiarities of English history.[2] Moreover, reception of English land law as it stood in 1902 excluded important but perhaps equally untransplantable reforms which took place in England later in the century. The administration or study of the law in the receiving countries is now bereft of vintage pre-reform texts and other authoritative sources.[3] It is therefore obvious that reforms of customary land would have been incomplete without an accompanying code of simplified land law.[4] It is the secondary purpose of this chapter to review the skeleton of such a code outlined in the Registered Land Act (R.L.A.) of 1967.

This new code was not designed for exclusive application to converted customary lands. The opportunity was taken to integrate all land laws; provide for the registration of new and "better" land titles even over private lands which the existing deeds registration system could not provide; and simplify the practices and procedures for transferring interests in private land received or introduced together with the substantive land law.[5] This chapter will be primarily concerned with the simplification of the conveyancing practices and the conversion of private land titles evidenced by registered deeds into the new and "better" registered titles. Apart from the R.L.A., other relevant statutes on these issues are the Deeds Registration Act[6] and the Adjudication of Titles Act 1971 (A.T.A.).[7] It will become apparent that the link between these statutes and the administration of agrarian policies, the main concern of this thesis, is very indirect. However, a study of post-independence tenure reforms in Malawi would not be complete without a review of the implementation of these statutes.

1 The Deeds Registration System

(a) Historical Background

The first scheme of deeds registration in Malawi began with the publication of Queen's Regulations on the Registration of Non-testamentory documents in 1894.[8] The preamble to the Regulations stated that their purpose was "to ensure security of titles to landed estates and attest the existence of all non-testamentary instruments dealing with real property

in British Central Africa". A registry open to public inspection was established in Blantyre and maintained by the filing of the certified copies of documents in the "Register Document File". The other item in the registry was a land register within which the names of the parties to a document, its nature, and the date and hour of registration were recorded. The regulations required the registration of "all non-testamentary documents dealing, or purporting to deal with, real property or any interest of any description therein ..." It was necessary for the document to contain a description of the land sufficient for its proper identification, and the Registrar could refuse the registration of a document which did not satisfy him in this respect.

This original registration scheme was defective in several respects. First, the description of documents subject to registration was vague and incomplete. It excluded wills and made no specific reference to leases. Second, the consequences of non-registration were not specified and the scheme had no apparent effect on the validity of documents, notices or priority. Finally, registration was voluntary and avoidance did not entail penal sanctions. Because of these defects, it was unlikely that the objective of securing titles to land and attesting to the existence of documents affecting real estates would have been attained.

Amending Regulations published in 1901[9] attempted to tackle some of these defects. Wills, leases for a period longer than three years, charges and mortgages became registrable documents. Failure to submit any such document within six

weeks of execution rendered it "null and void". The Land Register became the "conclusive proof of title" subject to a contrary decision of a court of law. On priority and notice, Section 4 provided that "all charges upon land, whether by way of mortgage or otherwise, shall take priority according to the date of registration ... [and] notice of a prior mortgage or charge to the holder of a subsequent registered mortgage or charge shall be disregarded in the absence of actual fraud." Another important provision was Section 6, which empowered the Registrar to correct entries procured or omitted by fraud or mistake and to award compensation to anyone suffering consequential loss. By Section 7, failure to comply with the Regulations rendered a person liable to penalties set out under the Stamp Regulations published on 15th May 1895.

The attempt in 1901 to provide a land register which would be "conclusive proof of title" was out of character with previous and later deed or document registration schemes under which the existence of a registered instrument could be proved without vouching for its validity or the accuracy of the title therein. The scheme, however, was not allowed to operate for a long time. The Registration of Documents Ordinance 1910,[10] passed a few years after the establishment of a local legislature, omitted the provisions on conclusive proof of title and payment of compensation. It was appreciated in the Legislative Council that the Registrar had neither the time nor the skill to ensure that every document registered accurately reflected the land on the ground, and the coffers of the Nyasaland Treasury could not be relied upon to indemn-

ify all losses caused by acts for which the registry could not be blamed. The other important change effected by the 1910 Ordinance was in Section 4. The High Court was empowered to extend the period for registration on proof that delay was unavoidable or caused through no negligence of the applicant, and that no other person was likely to be injured by the extension. It was found that registration within six weeks was too short a period in several cases, and that greater elasticity was required before rendering the documents "null and void".[11]

The 1910 Ordinance was repealed and replaced by the Land Registration Ordinance 1916.[12] Despite its misleading title, this enactment simply consolidated the law on document or deed registration and stiffened the penalties for avoidance of registration to dispel any lingering doubts about the voluntariness of the exercise. It did not attempt to introduce title or land registration as it is known today, or revert to the scheme introduced by the 1901 regulations. The scheme set up in 1916 is now operated with minor modifications under the current Deeds Registration Act, and its salient features will be presently reviewed.

(b) Documents Subject to Compulsory Registration

By Section 6 of the Deeds Registration Act, "... all deeds, conveyances, wills and instruments in writing whether under seal or not whereby any land or interest in or affecting land other than land registered in accordance with the Registered Land Act ... are subject to compulsory registrat-

ion." The first element in this provision is the requirement that the instrument must be in writing. Registration is not compulsory in the few cases of interests in land which do not stem from written instruments. The second element is that registration is compulsory for instruments in writing irrespective of whether the interest created thereunder is legal or equitable. The third element is that the Minister responsible for land matters can waive the compulsory registration of specified classes of leases, tenancies and other instruments. This power has been used to exempt the following: all licences issued by the Minister under Section 5 of the Land Act in connection with agricultural settlement schemes; and all leases, tenancies, agreements or licences for the occupation of land granted by the Malawi Housing Corporation or the Capital City Development Corporation where the term does not exceed one calendar year.[14]

The provision on documents subject to compulsory registration is on the surface straightforward and easy to apply. However, uncertain cases will occasionally arise. In Re Tayub,[15] an applicant took out a summons in the High Court to ascertain whether letters of administration were subject to compulsory registration. A document is defined in Section 2 to include "all deeds and all instruments in writing which pass any interest in land or affecting land and in the case of a will means the probate of a will ... or letters of administration with the will annexed ..." The court held that letters of administration are an authorisation to administer the deceased's estate and differ substantially from the items specified in the definition of a document. It said that the

omission of letters of administration from the clause where probate or letters of administration with a will annexed feature prominently was an indication of the intention to exclude the former from compulsory registration. The court further suggested that the Act was in the nature of a revenue law which imposed the burden of paying fees, and such an obligation must be imposed in unambiguous terms.

Musgrave-Thomas J. demonstrated one ambiguity of the Act in the following statement:

> "The object of the ordinance having been stated in the title and 'document' being defined in the interpretation section, it is reasonable to infer that the intention was to require the registration of 'documents' as defined, and that this was the intention is shown by the marginal note of the operative section 6 'compulsory registration of documents'. By an inexplicable departure from the rules of drafting, however, the word 'document' is omitted altogether from the section. It may well be asked for what purpose did the draftsman define 'document' except to use the word in the only section of the ordinance which makes registration compulsory. In so far as it relates to documents which pass an interest in land, or under which an interest in land is affected, the intention of Section 6 is clear, but beyond that the draftsman's intention cannot be ascertained."[16]

It should be noted that this decision did not rule out optional registration of letters of administration or any instrument which is not subject to compulsory registration. Sections 10 to 12 permit the voluntary registration of a lis pendens and a recognizance or bond affecting an interest in

land. If the parties so wish, similar facilities can presumably be extended to other documents.

(c) Time for Presenting Documents for Registration

By Section 7, documents subject to compulsory registration should be presented within three months of execution if executed in Malawi, and within six months if executed outside the country. The period can be extended by the High Court upon such terms and on such conditions as it may deem reasonable. The court was originally inundated with applications for extension in cases of documents delayed because of stamp duty adjudication in the offices of the Stamp Duty Commissioner.[17] A clause to the effect that the time spent while calculating stamp duty should not be taken into account was added to Section 7 in 1971.[18] It provided that such a document should be presented for registration within thirty days from the date shown on the stamp duty mark. The drafting of this clause was unfortunately imprecise. It gives the impression that a stamped document should be presented for registration within a month from the stamp mark date, even if the ordinarily permissible three-month period has not elapsed. The intention of the amendment is in practice carried out by permitting the registration of documents within a month of the stamp duty date or three months from the date of execution, whichever is later.

Despite the liberal interpretation of Section 7, applications for registration out of time on ground of delay caused by stamp duty commissioners have not been eliminated.[19]

The problem can only be solved by increased administration efficiency in the responsible government department or by vesting the Deeds Registrar with powers of a Stamp Duty adjudicator. Another disturbing trend is the increasing number of applications for registration out of time in which sheer oversight or carelessness of legal practitioners is a major cause for the delay.[20] The High Court invariably grants the extension in all these cases if the Registrar does not object. It may be necessary to look into ways of punishing careless practitioners without, of course, passing on the penalties to the clients.

(d) Procedure

Registration is still by the lodgement of certified copy process established under the Queen's Regulations. The notable differences include the renaming of the Record Document File and the Land Register as the Deeds Registry File and Deeds Register respectively. By Section 23, every copy of a document is numbered consecutively and filed in the order received. The number given to the document, cross references, plus the information which was originally entered in the land register, feature in the Deeds Register. By Section 24, a signed memorandum impressed on every copy of a registered document, showing its number and position in the register, becomes proof of due registration in the absence of evidence to the contrary. The marked original and excess copies are returned to the submitting party. In the case of public land, the purchaser must submit an extra copy which is retained in the registry for government use.

Section 17(1) reiterates the power of the Registrar established in earlier statutes to refuse the registration of documents which do not sufficiently describe the land to which they refer. Section 17(2) adds that "every document presented for registration must contain the registered number of some previous document relating to the land ..." This requirement is, however, inapplicable to specified documents including probates, letters of administration, powers of attorney and instruments on land acquired or disposed by or on behalf of the government. It is not clear from Section 17(2) whether failure to indicate the cross-reference number should result in a refusal of registration. This omission can be easily corrected in the Registry. The power to refuse registration is more specific where the document is in a language other than English and certified copies of an English translation have not been submitted; where prescribed duties and fees have not been paid; where interlineations, blanks, erasures or alterations have not been initialled or otherwise incorporated into the document; where the document has not been executed or authenticated in the required manner; and where it is not presented on paper of durable quality with a left-hand margin of one inch in width.[21]

Despite this formidable array of powers to refuse the registration of improperly prepared or presented documents, Section 22 emphasizes that registration will not cure any defect inherent in the document or confer upon it any validity which it would not otherwise have had. Further, under Section 25, the Registrar and his staff are completely indemnified from all suits and proceedings arising from a bona fide

exercise of their powers. As mentioned earlier, the Registrar and his staff are not in a position to police every transaction in a registered deed to ensure its validity or compliance with the law. They nevertheless try to ensure that the documents registered have no manifest errors of law or fact. Such good intentions received legislative support in 1958, when a provision was introduced to the effect that every document presented for registration must be endorsed with a certificate showing the name of the person or firm presenting it.[22] The importance of this certificate was indicated thus by the Attorney-General:

> "This clause does not require that a document should necessarily be presented by a legal practitioner but looking at some of the documents which have been registered, it might well have been prepared by the practitioner. But the clause will enable a person to ascertain who registered a particular document and if there are difficulties, they can be traced to the proper source and hopefully corrected."[23]

This amendment is put to good use. There is close liaison between the Registry and legal practitioners and some obvious errors of law, fact or procedure are referred back to the presenters for correction. It is not often that laymen hazard to prepare a document for registration. In the few cases, if mistakes are spotted, they are advised to seek professional assistance.

(e) Effect of Non-Registration and Priorities

By Section 28, "the non-registration of a document the registration whereof is compulsory ... will render [it] null and void". If the failure to register is due to wilfullness or negligence, the person responsible can be liable, under Section 31, to a penalty of £50 on summary conviction or £100 on information.

There are no reported cases in which the penalties were imposed, but the effects of the words "null and void" were considered in Hassam Kassam v. Nur Mahomed Omar.[24] The plaintiff brought an action claiming a sum of money for goods sold and delivered to the defendant. The parties were in a landlord/tenant relationship, and the defendant/landlord pleaded that the amount owing was set off against the rent arrears of the plaintiff/tenant. The latter argued that the tenancy arrangement was null and void because of want of registration as required by Section 6 of the Deeds Registration Act, and should not be admitted in evidence. The High Court observed that the document evidencing the tenancy arrangement should have been registered, but held that "the words 'null and void' can in law have a restricted meaning and ... in [the Act] ... they mean 'null and void' except as between the parties to the document".[25] Stroud's judicial dictionary[26] was quoted in aid of the proposition that the words should not necessarily bear their ordinary unrestricted meaning. The judge also quoted Maxwell on the Interpretation of Statutes to show that "on the general principle of avoiding injustice and absurdity" a particular construction of a statute should be rejected if

it enabled a person to "defeat or impair the obligation of his own contract by his own act, or otherwise to profit by his own wrong".[27]

A document which is not registered may not be "null and void" between the parties, but as against third parties, registration is of utmost importance in establishing the priority of competing mortgages, land charges or land transfers. Section 8 reads:

> "All charges upon land or any interest in land whether by way of mortgage or otherwise and whether equitable or otherwise and all transfers, assignments or leases of land shall take priority according to the date of registration.
>
> "All priorities given by this Act shall have full effect in all courts except in cases of actual fraud and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities and no person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice of a prior unregistered document except in cases of actual fraud."

The general rule on priorities at common law is that as between equal interests, the first in time prevails (qui prior est tempore, potior est jure), but a later legal interest of a bona fide purchaser for value without notice can prevail over earlier equitable interests.[28] By Section 8, the first instrument registered prevails irrespective of whether the interest is legal or equitable, and this priority can only be disturbed by actual fraud. Since actual or constructive notice of an earlier unregistered document is not sufficient to

disturb the priority achieved by registration, it must be presumed that a diligent effort to outrace an earlier document to the register will not constitute "actual fraud". The fraud required to defeat priority must not be constructive; it must be open and direct, "carrying with it grave moral blame".[29]

By Section 34, items in the deeds registry are open to search by any person on payment of the prescribed fee, and it must be presumed that a purchaser has constructive notice of interests in land which can be discovered during an ordinary search. This probably includes interests reflected in documents the cross-reference number of which, by statute, must appear on every document presented for registration. Pursuing cross-references backwards can, however, be an exceedingly difficult task which only extra-diligent and experienced searchers can complete with certainty and, as observed elsewhere, there is always a possibility that some document will not be properly cross-indexed.[30] The other onerous consequence of Section 8 arises from the fact that delays often stem from events beyond the purchaser's control such as the stamp duty problems mentioned earlier. The Malawi system does not provide for registration of caveats which other jurisdictions adopt in cases where priority can be lost because of such extraneous problems.

In sum, the effect of registration on priorities qualifies the Malawi Act as a "race-statute" under which the first past the registration post is in the best possible position. Deeds Registration statutes can also fall into two other cat-

egories of "notice" or "race-notice" statutes. In notice statutes the race to the registry is only of importance as a way of notifying the "world" that an interest has been registered. Otherwise, a subsequent purchaser will take subject to earlier unregistered interests which he had notice of. If he had no actual or constructive notice at the time of the purchase, he will be safe. A "race-notice" statute combines features of the other two categories. A subsequent purchaser will prevail over earlier interests if he had no actual or constructive notice and if his interest is the first to be registered.[31]

(f) A General Critique of the System

Since the deeds registration system started operating in the late 19th century, 52,238 documents were registered by 18th May 1981. For most of the colonial peridd and for three years after independence, an average of 446 and 36 deeds were registered each year and month respectively. Since then, the averages have been 1,450 and 120 deeds for year and month.[32] As seen in Chapter VI, from the 1970s, the government began to encourage Malawian elites to obtain leases for commercial farming estates. This is the most likely explanation for the increased number of deeds being registered. African economic advancement in the post-colonial era has also enabled more people to participate in the private land market, and this has resulted in the registration of more deeds.

The long period of operation and the more recent increased usage of the deeds registration system have revealed most

of its merits and demerits. Among the meritorious features, the following have been most notable in facilitating land transfers: first, the publicity of land dealings and accessibility of information arising from the opening of the registry to public inspection; second, the security which arises from the effect of registration on the priority of competing interests and on the evidential value or validity of the document.[33]

The major weakness of the system is a characteristic of most deeds or document registration systems. It arises from the fact that registration does not prove the validity of the holder's title to the land. It is a mere attestation of the existence of a document relating to the land. A purchaser has to establish by other means whether the seller is entitled to sell the land. In conveyancing this requires tracing back the various documents in the history of the land and testing their validity in law.[34] He also has to look behind the register to discover any "invisible" rights like easements which qualify the settler's title. Proving title in this fashion is not as protracted as it can be under the English system of private conveyancing, because the history of public and private land in Malawi is fairly recent. Most private land titles can be retraced to certificates of claim issued by the first colonial administration at the turn of the century or to leases carved out of customary and public land thereafter.[35] However, the abstraction of title for urban plots has been rendered more difficult by the growth of towns and the consequential division and subdivision of the plots. It is now risky for an ordinary land or house buyer to proceed

with a transaction in an old town like Blantyre without professional advice. It is likely that he may not understand the full quality of the title offered.

The devolution of title in urban areas has also reached the stage where even legal practitioners find it difficult to describe the land adequately in the parcels. A regrettable tendency of copying the description in an earlier deed has been noted in several cases.[36] This can lead to descriptions which do not tally with the true position of the land, especially where it has gone through several subdivisions. Some of the horrendous errors later discovered included the selling of one piece of land twice.[37] The registry staff, with due respect to their professionalism, are not always able to detect such errors, perhaps due to their inability to verify plans submitted with some of the deeds. One preventative measure adopted is close liaison between the Deeds Registrar and government surveyors which enables the latter, if called upon by the parties, to resurvey the land and produce authoritative descriptions or to verify surveys made by independent surveyors. It is not a legal requirement that such definitive maps and plans should be produced with every land transfer. It is therefore likely that some faulty maps and descriptions will be made and will escape the attention of the Deeds Registrar or the government surveyors.[38] Another solution to the problem would be to re-investigate all titles and resurvey all land pieces en bloc, and this is now being attempted under the Adjudication of Titles Act.

2 Adjudication of Private Land Titles

The A.T.A. was passed in 1971 "to provide for adjudication of rights and interests in land other than customary land".[39] As noted in earlier chapters, the statutes for the ascertainment and registration of rights and interests in customary land were passed in 1967. The four-year gap gives the impression that the extension of title registration and adjudication to private lands came about as an afterthought, although the registration mechanism established by the R.L.A. was designed for both private and customary land.[40] The structure of the A.T.A. parallels that of its earlier sister statute, the C.L.D.A., but most of its provisions originated from the Turks and Caicos Land Adjudication Law of 1967. This law was similarly enacted for a landholding system affected by received English land law and a deeds registration system of conveyancing.[41]

(a) Initiation of Adjudication and Appointment of Officers

As with the C.L.D.A., the decision to commence adjudication within a defined area should be made by the Minister through orders published in the government gazette.[42] Orders have so far been published applying the A.T.A. to all land other than customary land within the L.L.D.P. area, the City of Lilongwe and specified wards in Blantyre City, west and east.[43] The trend of these orders suggests that adjudication will initially be effected in urban areas where the defects of the deeds registration system are more glaring. There is less urgency to convert and register rural or agricultural

private lands because the titles thereto have been relatively more certain, even under the deeds registration system. Adjudication began in earnest in the city of Lilongwe and surrounding areas and, so far, this is where the A.T.A. has been implemented for a period long enough to enable this review.

After the publication of application orders, the Minister is empowered by Section 4 to appoint an Adjudication Officer (an equivalent of the Allocation Officer under the C.L.D.A.), and as many Demarcation, Recording and Survey Officers as may be necessary. The general powers and duties of these officers are as specified under the C.L.D.A. The only difference is that Land Committees used in "Allocation" of customary land were not deemed necessary for adjudication and the relevant provisions were omitted from the A.T.A.

The first appointments for the City of Lilongwe were gazetted in 1973. G.L. Fournier, a Canadian barrister serving on contract as a Lands Officer, was appointed Adjudication and Recording Officer. A. Hodgson, another expatriate working as a Regional Surveyor in the Surveys Department, was appointed as a Demarcation and Survey Officer.[44] These appointments reflected criticisms made on the draft bill that it was unrealistic to provide for separate Demarcation and Recording Officers in Malawi, and that their functions could be adequately discharged by the Survey and Adjudication Officers.[45] At the time of fieldwork, it had been found necessary to appoint separate Adjudication and Recording Officers. The Commissioner for Lands, a Malawian with legal training, was the Adjudication Officer. The Land Registrar for the Lilongwe

District, another Malawian, was the Recording Officer. He had no formal legal education, but his experience in land administration exceeded a decade of service within the Land Department.[46] Survey duties remained a separate responsibility of the Surveys Department. The only major criticism of these appointments was that the incumbents were already occupied with their general land administration duties, and progress in land administration was consequently very slow.

(b) Claims and Demarcation

Each adjudication area is by Section 5 divisible into two or more adjudication sections. Demarcation in each section is intended to proceed in stages similar to those devised for the allocation of customary land. The first stage involves the publication of notices in the gazette and at other convenient places outlining the period and manner in which claims to land or interests therein should be lodged. On publication of the notice, all land disputes should be concluded or stayed, and no new procedings should be instituted without the consent of the Adjudication Officer. The publication of the sectional notice in the gazette has been criticized as unnecessary in view of the fact that the adjudication area application notice is also published in the gazette. This requirement is omitted from other adjudication statutes.[47] In Malawi, a fairly long period may pass between the publication of the adjudication area and section notices, and the appearance of the later notice in the gazette is not always without merit. In any case, the contents of the two notices are not similar.

In the second demarcation stage, claims should be entertained and boundaries delineated by the various officers. Section 8 stipulates that claims can be made in person, by proxy or by post. To safeguard the rights of absent persons, minors and the unwary, Section 9 empowers the officers to consider interests for which claims have not been lodged, but they are not bound to do so. By Sections 10 and 11, another notice of not less than seven days should be published before the delineation of claimed and unclaimed pieces and any public properties. By Section 12, the Demarcation Officer is empowered to divide the adjudication section into numbered blocks and, with the consent in writing of the affected persons, "adjust boundaries of any land in the adjudication section or reallot the same to ensure the more beneficial occupation thereof or to effect a more suitable subdivision thereof". This process of rearrangement is called "reparcellation". It is notable that such a potentially controversial power can be exercised under comparable provisions of the C.L.D.A. without the consent of the affected persons.[48]

The third demarcation stage involves the surveying of all pieces; the preparation of the Demarcation Index Map, on which every piece within the section can be identified; and the preparation of the adjudication record.[49] Boundary and ownership disputes arising out of demarcation which the Demarcation and Recording Officers cannot resolve should be referred to the Adjudication Officer. This is where Land Committees are brought into use under the C.L.D.A.[50] The Adjudication Officer is empowered to resolve the disputes "having due regard to the law which may be applicable", and should

produce a signed brief record of the proceedings. It has been suggested that these requirements are inadequate, and that if problems are to be avoided in the event of further appeals to the courts, the Adjudication Officer should be enjoined to follow the procedure of civil suits without necessarily adopting technical rules of evidence.[51]

The actual execution of demarcation in Lilongwe varied in some material respects from the statutory procedure outlined. Part of the adjudication area surrounding the city of Lilongwe was divided into the adjudication sections shown in Table 23. Claims in each section were submitted on standard forms which required, inter alia, the following information: the name and address of the claimant; the plot number and description of the land; the nature of the interest claimed, (i.e. whether the claimant was an owner, or person entitled to a lease, charge, easement, profit or restrictive agreement); and the list of all documents on which the claim was based, including the original title deeds, if available.[52] The Adjudication Officer then investigated the root of the title to every piece claimed in the deeds registry, and produced an Adjudication Record. It would appear that the power to effect reparcellation under Section 12 was not used. In some cases, moreover, individual pieces within the section were not resurveyed before the preparation of the adjudication record. The Adjudication Officer was persuaded to accept maps and sketches in the various registered deeds. There were apparently several boundary disputes, but the records, if any were kept, could not be traced.[53]

TABLE 23: ADJUDICATION SECTIONS OF THE LILONGWE AREA ORDER[54]

SECTION	NAME	APPROXIMATE SIZE	G.N. NUMBER
A	Njewa	5,511 acres	123/77
B	Bwaila	4,296 hectares	123/77
C	Malangalanga	5,286 acres	123/77
D	Alimaunde	31,382 acres	123/77
E	Mkomachi	2,163 hectares	598/78

.....

The alarming disregard for statutory demarcation procedures in the City of Lilongwe and surrounding areas was tempered by two factors. The first was that the history of private lands in the areas was not as convoluted as it is in Blantyre where an early concentration of European settlers proliferated land dealings. The Adjudication Officer was therefore able to investigate claims and interests to the original title or for the past thirty years with little difficulty. The second factor was that most pieces in the area were leases, the reversion of which was earlier transferred from the government to a statutory corporation set up for the purpose of developing the new capital city of Malawi in Lilongwe. Skeletal surveys were conducted, and the quality of the leases investigated at the time the reversionary rights were transferred. This facilitated the subsequent adjudication of land in the area.[55]

(c) Principles of Adjudication and the Adjudication Record

By Sections 16 and 17, Recording Officers must investi-

gate and record rights and interests in land amounting to full or provisional ownership, joint or common ownership, a lease, charge, easement, profit, or a restrictive agreement. These rights and interests are more properly defined in the R.L.A. reviewed below. A person is entitled to be recorded as an owner if he has a "good documentary title" and no other person has subsequently acquired title to the same land, or if his claim derives from prescription as defined by the R.L.A.[56] A documentary title is founded on documentary evidence consisting of or commencing with a written law, a grant or conveyance from the state, or a grant, conveyance, assignment or mortgage which is more than thirty years old. The evidence should establish the claimant as an "owner in freehold".[57] By this definition, certificates of claim issued when the concept of private lands came into being provided the best documentary evidence of title.

If the evidence adduced shows mere possession or the right to possession but full ownership cannot be conclusively proved, the claimant should be recorded as a provisional owner. The Recording Officer is required to note the date on which possession began, the particulars of any instrument by which any adverse or derogatory estate, right or interest in the land is manifested, or any other qualification on the title.[58] Provisional titles were not recorded in Lilongwe because most titles could be backed by good documentary evidence and incidents of land acquisition by prescription were non-existent. This provision is likely to be used in Blantyre, where absentee land ownership is not uncommon and some rights in the land could be in the process of being acquired

by prescription.[59] Simpson contends that recording of provisional titles alongside full titles is likely to slacken the pace of adjudication, probably to such an extent that the recording of all titles as provisional in the first instance would be better.[60] Comment here would have to await the results of adjudication in Blantyre.

The recording of concurrent interests or rights registrable as leases, charges, easements, profits or restrictive agreements was not as problematic as it was under the C.L.D.A. where the Recording Officer had no way of matching customary law with these rights. In the case of private land, most of these rights and interests stemmed from registered deeds or documents, and the Adjudication Officer was unwilling to recognize any claim in the absence of such documentary evidence.

If any land is unoccupied, free of private land rights, or the rights therein do not amount to full or provisional ownership, the Recording Officer is empowered to record it as public land until the contrary is proved.[61] This power was rarely exercised because most pieces in Lilongwe were clearly identifiable as either public or private land.

After sorting out the various interests and rights, the Adjudication Officer prepared a record for each piece within the section, showing the following particulars: the adjudication area and section; the number and approximate size of the piece; the particulars of the person entitled to ownership and restrictions on his power of dealing with the land; rights not amounting to ownership such as leases or charges; the

list of documents supporting the title; the guardian of any minor or person with a disability entitled to a registrable right or interest; and the date on which the record was completed.[62] By Section 18, the record is completed by the signature of the Recording Officer and, where possible, by a signed acknowledgement of the persons entitled to the rights and interests shown therein. When all records for the section have been completed, the Adjudication Officer is empowered to publish a notice in the gazette indicating when and where the records can be inspected. Publication in the government gazette is once again peculiar to Malawi.[63]

(d) Objections, Finality and Appeals

Sections 20 to 23 on objections to, and finality of, the adjudication records repeat almost verbatim the equivalent provisions of the C.L.D.A. Any person with an interest in land can query the correctness of the adjudication record or demarcation map within 60 days of the completion notice required by Section 19. The Adjudication Officer considers the objection, this time following the procedure for civil suits. Any errors or omissions discovered can be corrected without consent if the interests of any person are not materially affected, and with consent in all other cases. After the expiration of the 60 day objection period, or the resolution of outstanding objections, whichever is later, the record becomes final. The Adjudication Officer signs a certificate to that effect and submits the record and maps to the Land Registrar for the compilation of the title register.

By Section 24, the government or any person aggrieved by a decision of the Adjudication Officer can appeal to the High Court within three months from the date of the certificate of finality or within such time as the High Court may allow "in the interests of justice". The appeal should be on the ground that the decision of the Adjudication Officer "is erroneous in point of law or on the ground of failure to comply with any procedural requirements of [the] Act". The decision of the High Court on the matter "shall be final and conclusive and shall not be questioned in any proceedings whatsoever". The intention to appeal against a decision of the Adjudication Officer should be communicated on prescribed forms. The Land Registrar should also be notified and he will enter a restriction under Section 131 of the R.L.A. in every land register affected by the appeal. An appeal does not postpone the finality of the adjudication record or title registration. If the decision of the court goes against the Adjudication Officer, the court can order the rectification of the register.

As observed in Chapter VII, there are no comparable provisions on appeals to courts of law against the decisions of the Allocation Officer under the C.L.D.A. The scheme for the conversion of customary land for registration purposes is entirely administrative. Conversion of registered deeds into land titles can possibly lead to difficult problems arising from the application of antiquated English land law. It is proper that the High Court should be the final arbiter on such issues and not the administrative officers. The procedure outlined for objections and appeals was, however, not tested in Lilongwe. Land holders were apparently not very

conversant with adjudication procedures and rarely raised objections during the viewing period.[64] And by July 1981, there were no reported cases in which land claimants contested adjudication decisions in the High Court. An assessment of the effectiveness of the dispute resolution procedures should, therefore, await a more extensive application of the Act.

This is indeed the conclusion to be drawn from the implementation of the entire Act in Lilongwe. Adjudication of private land titles was fairly straightforward because, as mentioned earlier, the history of private land is rather short, and most titles claimed were clearly identifiable leases the reversion of which was vested in the government and later in a statutory corporation. Most of the provisions of the Act appeared to be too complicated and unnecessary for the problems encountered.

3 The Mechanics of Title Registration and Simplified Conveyancing Practices under the Registered Land Act

The centre-piece of land reform statutes in Malawi is the R.L.A., under which rights and interests in land ascertained by allocation and adjudication processes should be registered. Within some 160 sections, the Act purports to simplify and integrate the land laws of the country and provide the mechanism for transferring land which is quick, cheap and more reliable than the deeds registration system.[65] The simplification and codification of land law applicable to registered titles is the hallmark of the Torrens system of title registration, which was designed and first introduced by Sir

Richard Robert Torrens in South Australia in 1858. Some aspects of the simplified conveyancing procedures derive from the English title registration scheme which was first introduced in 1862. This, unlike the Torrens system, did not purport to introduce significant changes in substantive land law.[66] In the more immediate past, the R.L.A. was largely derived from the Kenyan Registered Land Act 1963 which was in turn based on a Report of a Working Party on ownership of land in Lagos produced in 1960.[67]

The literature on title registration in general and on the systems from which the R.L.A. was derived is already voluminous,[68] and this section will not attempt to recount the common details of the Act. It will only be concerned with the provisions which stand out as of particular significance in a Malawian context. The notable provisions on the mechanics of title registration pertain to land registries and officers; compilation of land registers; maps, parcels and boundaries; conclusiveness of the register; non registration, priorities and publicity; and dispositions of registered rights and interests.

(a) Registration District, Land Registry and Officers

The first step in establishing the mechanism for title registration is the constitution of a part or parts of Malawi as a land registration district. This is entrusted to the Minister by Section 4 of the R.L.A. The section also empowers him to exclude from registration any kind of land or dealing which, in his opinion, cannot be conveniently registered

within the district. The Minister constituted the L.L.D.P. area as a land registration district in 1970 following allocation of customary land under the C.L.D.A.[69] The district was extended in 1973 to cover the capital city area following adjudication of private land titles under the A.T.A.[70] No type of land or dealing has so far been excluded from registration within the original or extended district. It is likely that Blantyre city will be constituted the second registration district following the impending adjudication of titles in the area.[71]

By Section 5 of the R.L.A., a "land registry" should be maintained within each registration district. Land registry is used in Malawi to refer to the office within which the following should be kept: land registers; a copy of the registry map; piece files containing documents, filed plans and other instruments supporting subsisting entries in the land registers; an application book containing a record of all applications numbered consecutively in the order in which they are presented to the registry; an index, in alphabetical order, of the names of the proprietors of land, leases and charges, showing the number of the pieces in which they are interested; and a register and file of powers of attorney. It is notable that a land registry stores more items than a deeds registry, in which the principal documents kept are the deeds register and the deeds registry file. It is also notable that the land registry is more localized than the deeds registry, which caters for the whole country.

Subject to the special and general directions of the Minister, the administration of the land registry is by Section 6 entrusted to the Chief Land Registrar and his subordinates. The Land Registry in Lilongwe is an integral part of the Lands Department headquarters; and the Commissioner for Lands who heads the department was appointed Chief Land Registrar.[72] Criticisms made above on the appointment of the Adjudication Officer are equally applicable here. The Commissioner and his subordinates have a heavy workload which includes responsibility for deeds registration, supervision of government leases and general administration of government land policies. Land adjudication and registration, being the most recent of their responsibilities, do not receive the priority they deserve. It is notable, for example, that the recommended establishment for the land registry in 1978 was 16, but only three officers were appointed. In contrast, 11 out of the recommended 13 employees were serving in the deeds registry section.[73] If title registration is to be properly administered, consideration should be given to the detachment of the registry from the Lands Department.

(b) The Land Register

Of all items kept in the land registry, perhaps the "land register" is the most important. It is a record of registered interests in every piece of land within the district, compiled from a final and complete adjudication or allocation record. Section 10 provides that each register should show whether the piece is public or private land and, in the case of a title derived from an adjudication record, whether it is

provisional. The register is divided into the following three parts: the property section, which contains particulars of the piece such as the size and location; the piece number; and a reference to the registry map and filed plan, if any; the proprietorship section, containing the name and address of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition; and the incumbrance section, in which interests burdening the land like charges should be noted.

Land registers used in Lilongwe are of the loose-leaf-binder type which can be easily inserted or removed from a volume containing several titles. Leaseholds are recorded on white registers and absolute or allodial titles on green registers. The leaves are approximately 29½ by 21 centimetres. First registration is effected by typing in the various particulars, and subsequent entries can be typed or handwritten. The Registrar cancels and initials all obsolete entries. He can also open a new edition of the register, showing all subsisting entries but omitting others which have ceased to have effect. This is a feature borrowed from the English system of title registration. Under the Torrens system, obsolete entries are preserved for the purpose of keeping a recorded history of the piece.[74]

(c) Maps, Boundaries and Parcels

The other important item kept in the land registry is a map or series of maps called the "registry map". The registration district should on this map be divided into sections

identified by distinctive names. The sections can be subdivided into blocks identified by distinctive numbers or letters, or a combination of both. Land pieces within the block can be identified by consecutive numbers, the name of the registration section and the number or letter of the block. Separate plans for the pieces can be produced and filed to augment the information on the registry map.[75] The preparation of registry maps and plans is recommended because of their actual or potential use in the identification of plots on the ground, the relocation and adjustment of boundaries, and the calculation of plot sizes.

The preparation and maintenance of the obviously beneficial registry maps and plans was affected by two incidental problems. The first concerned the sharing of responsibilities between the Survey and Land departments. By Sections 15 and 16, the Director of Surveys is responsible for the preparation of the maps and plans, but the Land Registrar has custody and is empowered to effect corrections in certain cases. In practice the Registrar retained the registry map and the Director of Surveys retained originals of the piece plans. This arrangement was inconvenient because the Surveys Department was located in Blantyre, some 250 miles away from the Lilongwe land registry. Liaison was sometimes difficult to maintain, and delays often occurred before maps and plans could be corrected. It was also difficult to ensure that corrections proposed by one department were properly incorporated in copies retained by the other. Efficient administrative arrangements were apparently introduced to eliminate this essentially extra-legal problem.[77]

The second problem stems directly from the legal provisions and has not been resolved. It is on the value of registry maps and plans in the ascertainment of plot boundaries. Under the Torrens system, maps and plans derived from cadastral surveys are intended to be indicative of precise boundary lines. In the professional jargon, they indicate "fixed boundaries". Under the common law conveyancing practices and the deeds registration system operative in Malawi, land parcels are mostly identified by written descriptions and maps or plans are said to be "by way of identification and not of limitation". If the land is properly surveyed and the map or plan intended to prevail over the description, the parcels are said to be "more particularly described in the plan". When title registration was first introduced in England in 1862, an attempt was made to change the common law practice of defining parcels. This proved unworkable and unpopular, and contributed to the failure of the registration exercise. Subsequent registration projects did not attempt to change the established practice on parcel description, and the maps and plans derived from topographical ordnance surveys under the English title registration system are not intended to prevail over the parcel descriptions. They provide "general boundaries", implying that the precise boundary line has not yet been determined.[78]

The registration schemes introduced in Malawi and Kenya combine aspects of the English and Torrens system. The registry maps and plans indicate general boundaries, but the Registrar has the discretion to order the "fixation" of the boundaries of any piece, either on application of an owner or

on his own initiative.[79] This combination was probably due to the fact that proper cadastral or topographical maps are difficult or impossible to produce in the two countries because of financial and other problems. The implication of the retention of general boundaries in Malawi is that one major defect of the deeds registration system will be perpetuated. As noted earlier, some plans and maps included in deeds do not tally with the description of the parcels. During adjudication, the Officer was unfortunately persuaded to accept some of these plans without resurveys. Some of the registered titles may, therefore, have circumspect boundaries. Financial resources permitting, the policy should be to strive for the ultimate fixation of all piece boundaries.

(d) Conclusiveness of the Register

In the general critique of the deeds registration system in Malawi, the fact that registration does not conclusively prove the title of the applicant has been cited as a major failing. The R.L.A. purports to correct this by ascribing finality and conclusiveness to the land register. Section 25 provides that the rights of any registered person, whether acquired by first registration or subsequently for valuable consideration, shall generally be indefeasible and held free from "all other interests and claims whatsoever" which are not on the register. This, however, is subject to several important qualifications and exceptions. Among the qualifications, it is notable that the indefeasibility of the title is subject to the Land Act, which confers upon the government important powers of control over private land. The other

qualification is that registration does not relieve the proprietor of his duties or obligations as a trustee or a family representative and, unless the same is expressly stated, he does not acquire mineral or oil rights in the land.

The most important exception to the conclusiveness of the register is the stipulation in Section 27 that registered land is subject to listed overriding interests which "may for the time being subsist and affect the same without being noted on the register". The list includes rights of compulsory acquisition, sale, entry search and user conferred by any written law; natural rights of water and support; leases for a term not exceeding three years; unpaid rates and charges; rights acquired or in the process of being acquired by prescription; electricity, telegraph and telephone lines and poles, pipelines and water passages or reservoirs constructed in pursuance of any written law; and rights of a person in actual occupation of the land or in receipt of profits and rent which are not disclosed by an enquiry. This last mentioned interest is of extreme importance in former customary land areas where "allocation" could not reveal all existing rights of cultivation in family land. As noted in Chapter VII,[80] cultivators who "borrowed" gardens under customary law were in some cases denied registration as family members, but they did not qualify to be treated as holders of leasehold rights. Instead of being treated as trespassers, they could be noted as holders of overriding interests.

Section 26 contains the other important exception to the conclusiveness of the register. It provides that every pro-

prietor acquiring land, a lease or charge for no valuable consideration will become a holder subject to unregistered rights and interests which qualified the transferor's title. This provision is intended to facilitate the transfer of land as a commercial commodity.[81] It is, however, unlikely to have any perceptible effect in former customary land areas where "gifts" of land to close friends and relatives are likely to be preferred to dispositions for monetary consideration and readily approved by the local Land Board.[82]

Despite these exceptions, the title register is considered to be sufficiently conclusive that, under Section 32, any person dealing or proposing to deal with a proprietor for valuable consideration need not go behind the register to investigate whether consideration passed in previous transactions or consult the deeds register. If the proprietor is a trustee or a family representative, the interest acquired by a bona fide purchaser for valuable consideration shall not be defeated by the fact that the disposition amounted to a breach of the trust or customary obligations. It is not very clear from this provision whether the purchaser from a trustee or a family representative is absolved from making any inquiries whatsoever on the seller's capacity to sell. Because of some of the overriding interests discussed above, and the multiplicity of interests in family land, a prospective purchaser would be very imprudent if he failed to make any inquiries. Indeed, the facilitation of conveyancing underlying Section 32 can be more apparent than real because the process of seeking the consent of the local Land Board before any disposition in any case entails going behind the register to solicit

the views of the rest of the family.

One other important feature of the title register discussed elsewhere is the fact that its finality on first registration is subject to rectification by the Registrar of the High Court under Sections 138 to 139, and interest holders suffering any consequential loss can seek an indemnity under Sections 140 to 144.

(e) Effect of Registration or Non-Registration on some Conveyancing Practices and Principles

In contrast to the deeds registration system, it is not absolutely necessary to specify unambiguously the list of documents subject to compulsory registration under the R.L.A. It is presumed that all land pieces will be covered by first registration and that thereafter land can only be dealt with through the register. By Section 31, any attempt to dispose of a piece of land, lease or charge otherwise than in accordance with the Act "shall be ineffectual to create, extinguish, transfer, vary or affect any right or interest in the land, lease or charge". But this does not prevent an unregistered instrument from operating as a contract capable of creating justiciable rights, so long as there is evidence in writing or part-performance by one of the parties to the contract. The consequences of non-registration here are similar to the position under the deeds registration system where the transaction or document is deemed "null and void", but contractual obligations can still subsist between the parties.[83] One of the major differences is that Section 31 simultaneously pur-

ports to incorporate the provisions of Section 4 of the Statute of Frauds 1677,[84] and to codify the common law on part performance. It is also notable that in both systems penal sanctions can be imposed for wilful failure to comply with registration requirements, but there are no reported cases in which this was done.[85]

The effect of non-registration on priorities in the two systems is also only marginally dissimilar. Section 35 of the R.L.A. stipulates that "... interests appearing on the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may have been delayed." This provision is only more precisely drafted than Section 8 of the Deeds Registration Act, which stipulates that priority depends on the date of registration when in effect the order of presentation is more important. Section 8 is implemented in such a way that the date of reception in the deeds registry determines the date of registration and, in turn, the priority. If the instruments arrive on the same day, the first to be received takes priority. Section 35 of the R.L.A. embellishes this practice by providing that posted instruments received during hours of business shall be deemed to have been presented simultaneously, and instruments received during off-hours shall be deemed to be similarly presented but on the following day of business. If the instruments are presented on the same day, or different days, but at such intervals that the Registrar is unsure about their priority, registration will be postponed

until the parties have been heard and their rights determined. Another embellishment is the provision that an instrument prepared in the registry shall be deemed to be presented on the date on which an application for its preparation was made to the Registrar.

One of the commendable features of the deeds registration is the publicity arising from the accessibility of information stored in the registry. Section 29 of the R.L.A. achieves the same effect by permitting public inspection or search of all items stored in the land registry. Certified copies of the items can also be provided on application and on payment of a prescribed fee. Because of this publicity, it has been suggested above that any purchaser would be deemed to have knowledge of all instruments stored in the deeds registry which he could have discovered during an ordinary search. The R.L.A. replaces this presumption with a specific provision. By Section 28, every proprietor acquiring an interest in land is deemed to have knowledge of every interest in the register relating to the land, lease or charge. Publicity provisions distinguish the Malawi and Torrens systems of title registration from the English system, under which the permission of the registered proprietor should be sought before the register can be inspected.[86]

Section 29 also empowers the Registrar to issue, on application, a certificate of official search showing the subsisting entries in the register of any piece. This certificate and/or copies of the filed instruments were intended to provide conclusive proof of title to any enquirer at a particu-

lar time. There was no provision for the issue of title certificates which were deemed unnecessary because they can only show the state of the register on the date of issue and are of less reliable evidential value at a later date unless accompanied by a certificate of search. Mass production of title certificates, it is argued, can be an unnecessary waste of paper since their evidential value diminishes with each new land transaction. It is also argued that title certificates are prone to destruction or loss and increase possibilities of fraudulent land dealings off the register.[87] These arguments, nevertheless, underestimated the symbolic value of a title certificate in Malawi. It became apparent in Lilongwe that customary land holders felt that they would trade their lands for something inferior in the absense of a tangible title certificate. This prompted the introduction of a new Section 29A in 1970,[86] which stipulates, following a similar provision in Kenya, that title certificates can be issued on request and on payment of a small fee. Title certificates for allocated land in Lilongwe were eventually issued as a matter of course and not simply on request.[89]

(f) Procedural Provisions on Transfer and Dispositions of Rights and Interests in Registered Land

Several sets of provisions on transfers and dispositions are notable when reviewing the simplification of conveyancing procedures in the R.L.A. Transfers and dispositions are somewhat confusingly defined in Section 2. A transfer is "the passing of a land, a lease or a charge by act of the parties and not by operation of law, and also the instrument by which

such passing is effected". Thus, a sale of land or an assignment of a lease is a transfer, but devolution of property on death or insolvency which is by operation of law falls within the definition of a "transmission". A disposition refers to "any act by a proprietor whereby his rights in or over land, lease or charge are affected, but does not include an agreement to transfer". A literal reading of this definition suggests that the actual transfer itself is a disposition, but an agreement which provides for such an effect is not. The underlying reason for this fine distinction is not clear from other provisions in the Act. It is arguable that a disposition should have been a generic term for all agreements and actual dealings which affect an interest in the land, and that a distinction should only be maintained between transfers and transmissions.

Under Section 79, a land lease or charge can be transferred to anyone by an instrument in the prescribed form, whether or not consideration has been tendered. The transfer is completed by registration of the transferee as a proprietor and by filing the instrument. The Registrar, under Sections 80 to 81, can refuse to complete the transfer if there is no accompanying certificate showing that local rates have been paid, or if the transfer is made to take effect on the happening of a future event. Section 82 renders void any conditions in a transfer which purports to restrain the transferee "absolutely" from disposing of his acquired interest. A clause which attempts to determine the acquired interest on the happening or failure of a future event is also void. These provisions will minimize the possibility of land owners

ruling future generations from their graves, and will ensure that conditions repugnant to the interest transferred will not be permitted. By these provisions, the Registrar will have enormous but onerous powers of control over land transfers which were not available to the Deeds Registrar. It remains to be seen whether the Land Registrar in Lilongwe will be able effectively to "police" transfers while, at the same time, discharging his other onerous land administration duties.

By Section 103, dispositions, like transfers, should be affected by instruments in the prescribed form. The proliferate use of prescribed forms is one way of making conveyancing simple, cheap and comprehensible to laymen. It is not surprising that some legal practitioners in Malawi reportedly mistrust the adequacy of the prescribed forms, especially on transfer and dispositions of leases.[90] Simplified conveyancing can jeopardize their income and render useless skills and crafts acquired through years of experience.

By Sections 104 to 106, the instrument showing a disposition must be properly executed, verified and impressed with a stamp duty mark before its acceptance for registration. Once accepted, by Section 107, it will be retained in the registry for as long as it supports a current entry and for six years thereafter, and then removed. Thus, it will not be possible after some time to construct the history of the piece of land from instruments kept in the registry. This is a significant departure from the deeds registration system under which all past and present documents subject to compulsory

registration can be kept indefinitely.

In Part VIII of the R.L.A. (Sections 123 to 133), dispositions and possibly transfers (although this is not specifically indicated) are subject to three types of restraints called inhibitions, cautions and restrictions.

An "inhibition" is a court order prohibiting the registration of any dealing with any land,lease or charge. The order can be made to last for a specified period or until the occurrence of a particular event or the passing of another court order.

A "caution" is lodged by a specified category of persons to prevent the registration of any disposition or the making of entries in the register with respect to a specified land, lease or charge. The category of persons includes anyone with an unregistrable interest, a licensee, a petitioner in the bankruptcy of the proprietor, and bank which has advanced money to the proprietor on a current account. The Registrar should ensure that the caution is not unnecessary and that the proprietor has received due notice. The caution can be withdrawn by the cautioner, by a court, or by the Registrar on the application of any person affected by its registration. A caution can serve many purposes, one of which is to alert potential purchasers or competitors that an interest affecting the land has been created but is being delayed by the stamp duty commissioner. This, as noted above, was one of the failings of the deeds registration system.

Whereas a prohibition is made by the court and a caution by an applicant, a "restriction" is a restraint made by the Registrar on his own initiative. It operates in the same way as the other two restraints. It can be used to prevent fraud or an improper dealing with a land lease or charge. It has also been noted that a restriction can be registered if the decision or conduct of an adjudication officer is challenged in a court of law after the completion of the adjudication record.

4 Codification and Simplification of Substantive Land Law

This objective of the R.L.A. is underlined by Section 3, which reads:

> "Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act:
>
> "Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing."

Thus, subject to other specific statutory powers of land control, the R.L.A. attempts to provide a complete code of land law and procedure. It requires no mean feat of drafting to achieve this objective within some 160 sections, and gaps are bound to remain. Section 160, in anticipation of such problems, stipulates that any matter not provided for should be

resolved "in accordance with the principles of justice, equity and good conscience". There are no court decisions as yet amplifying the nature and content of these principles. However, it can be surmised that courts will find it impossible to ignore or jettison some of the old principles of received English land law. The language of the code, as the incidents of the various types of interests in registered land will presently show, is firmly rooted in the old law. The thrust of the code is towards simplification rather than a complete change of land law and principles. The extent of the simplification exercise can be gauged from the provisions on ownership, leases, charges, easements, profits, restrictive agreements, licences, co-ownership and prescription.[91]

(a) Ownership

By Section 24, registration confers "rights of owner" upon a registered proprietor of private land and a leasehold interest upon the proprietor of a lease. The two major interests in land replace the various tenures and estates of English law received in Malawi by 1902. Section 24 achieves for Malawi what the English Law of Property Act 1925[92] achieved by providing that the only estates capable of existing in land are an estate in fee simple absolute in possession and a term of years absolute.[93] The right of owner is equivalent to the fee simple absolute as the maximum or allodial right in land. The concept of a "fee simple" was not adopted in order to "avoid importing (or even giving the appearance of importing) all the mumbo jumbo of English land law".[94] Ownership was also considered to be less imprecise than the colloquial and common

description of the allodial right as a "freehold".[95]

The Act does not attempt to define "ownership", but this is not a serious defect since it is clear from the provisions that it refers to the allodial or maximum right in land. An attempt to define the word would have caused more problems than it would solve.[96] To emphasize the primacy of the right created, other title registration statutes preface ownership with the word "absolute". The omission of this word from the R.L.A., it is claimed, is unfortunate and creates ambiguities.[97] Such criticisms are petty. Since ownership is incapable of precise definition, its gradation into degrees of absoluteness or otherwise simply exacerbates the problem.

The concept of ownership is already sufficiently understood to refer to allodial land holding, and adding the "absolute" epithet would serve no purpose except perhaps to distinguish full titles from provisional titles registered under Section 24A. But even here, the existing provisions are not ambiguous or confusing. As noted above, provisional titles can be recorded and registered if claims are not backed by conclusive or sufficient documentary evidence during the adjudication of private land. The allodial rights of the holder of the provisional title are subject to adverse interests existing at the time of registration which may be discovered later. The qualification can be subsequently removed upon the discovery of more conclusive evidence or after the expiration of twelve years from the date of first registration.[98] Registration of such obviously imperfect titles is inconsistent with the attempt to provide a reliable land register, but it

is undeniable that waiting for conclusive proof of title in each case can sometimes unnecessarily retard adjudication of private land.

Provisional titles are not issued in former customary land areas. All titles are supposedly "full" after allocation of family lands in which documentary evidence is not expected to play any part. It is, however, notable that the "rights of owner" of a proprietor of family land are more circumscribed than the rights of an individual proprietor of private land. As seen in Chapter VII,[99] by Section 121, the registered proprietor is supposed to exercise his statutory powers having due regard to the interests of family members whose names do not appear on the title certificate or register.

(b) Leases

A lease, the other major interest in land recognized by the R.L.A., is defined in Section 2 as a grant, "with or without consideration, by the proprietor of land of the right to the exclusive possession of his land ..." It includes a sublease but not an agreement for a lease. The grant must be for a definite period or for a period which, although indefinite, may be terminated by the lessor or lessee. Three types of leases are capable of existing under the Act. The first type comprises leases where the term is specifically fixed or related to the period of notice for terminating the arrangement. If the term is not specified in this fashion, or if the tenant holds over at the end of the fixed period, the lease is deemed to be a periodic tenancy. This type of lease can also be cre-

ated where the proprietor permits the exclusive occupation of the land at a rent but without any agreement in writing. The third category comprises leases made for a period commencing on a future date which should not be later than 21 years from the date of execution.[100]

The most notable changes in the common law on leases pertain to creation, implied covenants and remedies for default.

By Section 40, a lease for a specified period exceeding three years should be made on the prescribed forms and completed by registration. Completion comprises "(a) opening of a register in respect of the lease in the name of the lessee; (b) filing the lease; and (c) noting the lease in the encumbrances section of the register of the lessor's land or lease". Simpler forms and registration have thus replaced deeds as the main mechanism for creating leases. At common law a lease for a term of more than three years which did not stem from a properly executed deed would be invalid, but equity sometimes intervened to find "equitable leases" if an enforceable contract could be detected.[101] It would appear that equitable leases can no longer arise where the registration formalities have not been complied with.

Section 46 implies into every lease covenants by the lessor that he will not derogate from the grant, and that the lessee will be entitled to peaceful and quiet possession. By Section 47, the implied covenants on the part of the lessee are to pay rent, rates and other taxes; to repair or make good any defect or breach of the agreement for which he is respons-

ible; to permit the lessor to enter the premises and examine their condition; and to refrain from subletting, transferring, charging or otherwise parting with possession of the lease without the written consent of the lessor. This covenant against subletting and transfer is the most notable. It is not as automatically implied into leases made under received English law as are the rent and quiet possession obligations. The tenant is free to assign or sublet if the lease does not prevent him, but most leases usually do.[102] It is also notable that the covenants implied into leases granted by the government under the Land Act include all the covenants implied by the R.L.A. and many more.[103] Since the Land Act covenants are not necessarily inconsistent with the covenants under the new land code, it must be presumed that they will supersede the narrower R.L.A. covenants in all registered government leases. It is also arguable that, since the R.L.A. does not go into details of the implied covenants, their general nature and character will be as at common law.

The principal reforms on remedies are on the lessor's right to forfeit the lease. At common law, in the unusual case of a lease making no specific provision, this right could be exercised only if the tenant denied the title of the landlord or where the lease was conditional on some continuing eventuality which has ceased. Even in the usual case where the lease provided for forfeiture, enforcement of the right depended on the type of covenant breached. The rules on forfeiture for non-payment of rent varied from the rules on forfeiture for other breaches.[104] Without detailing these variations, it is notable that the R.L.A. streamlines the law. By Section 49,

unless there is a provision to the contrary in the lease, the lessor can forfeit for any breach of express or implied conditions or on the liquidation or bankruptcy of the lessee.

The new procedure for enforcing the right to forfeiture broadly resembles the old procedure in Section 14 of the Conveyancing Act 1881.[105] A written notice must first of all be served indicating the nature of the breach, and where it can be remedied, inviting the lessee to put the matter right. If he fails to do so, the lessor can enforce his right by bringing a court action for possession, or where the lessee is not in occupation, by entering and remaining upon the land. The right to forfeiture can be waived if, with full knowledge of the breach, the lessor receives rent or does any act tantamount to a confirmation of the continuance of the lease obligations. The lessee can also apply to a court for relief against forfeiture, and the court is free to decide the matter as it thinks fit having regard to the conduct of the parties. Forfeiture has the effect of terminating any sublease or other interest on the register arising from the forfeited lease.[106]

Apart from forfeiture, the Act does not mention distress, the other common law remedy for breach of covenants which could have benefited from the reforms. It must be presumed that the intnetion was to exclude this remedy from all registered land leases.

It should also be emphasized that provisions of the R.L.A. on forfeiture and implied covenants are imported into leases so long as there are no specific provisions to the contrary.

The Registrar has in several cases permitted the registration of instruments which varied the implied terms. As mentioned earlier, some practitioners mistrust the adequacy of prescribed forms and the provisions of the Act because they do not include all the terms likely to appear in a well drafted lease at common law.[107] Such variations should only be permitted if they do not seriously compromise the simplification of land law and conveyancing procedures.

(c) Charges

Section 2 defines a charge as an "interest in land securing the payment of money or money's worth or the fulfilment of any condition, and includes a sub-charge and the instrument creating a charge". Loans at common law are usually secured by way of a mortgage. The land is conveyed to the lender with a provision for redemption or a reconveyance when the loan plus interest have been repaid. The borrower usually, but not invariably, remains in possession. A charge differs from a mortgage in that it operates only as a security and not as a conveyance of the land.[108] As with leases and other interests in registered land, charges can only be effectively created by an instrument in the prescribed form and completed by registration. Section 60 of the R.L.A. also adds that the instrument creating the charge should contain a special acknowledgement signed by the chargor showing that he or she understands the effect of the chargee's remedies in the event of a default in repayments. This provision was obviously intended for the protection of former customary land holders from unscrupulous money-lenders.

If the borrower defaults, the common law remedies fall into two categories. First, the lender can enter into possession or appoint a receiver to secure payment of interest and other instalments owing. Second, he can exercise his power of sale or foreclose in order to recover the principal sum lent. By Section 68, all remedies available under the R.L.A. can be used to secure payment of both the principal and interest or other instalments. The lender can appoint a receiver, sell the charged property or sue for the money secured in the charge. A three-month notice is necessary before the exercise of any of the remedies. A second notice of similar duration is also required if a chargee who has already appointed a receiver wants to exercise the power of sale. Section 74 simplifies the law by removing two important but archaic common law remedies. It reads:

> "For the avoidance of doubt, it is hereby declared that the chargee shall not be entitled to foreclose, nor to enter into possession of the charged land or the land comprised in a charged lease or to receive rents and profits thereof by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance of any agreement express or implied in the charge."

The new procedure for exercising remedies of sale or appointment of a receiver borrow some features and rules from the Conveyancing Act 1881, and the details need not be recounted here.[109] Before the power of sale is exercised, the chargor will still be entitled to redeem the property on payment of all monies due plus the chargee's expenses.[110] The right of redemption is generally exercisable on the agreed date, but if

none was set, the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.[111] By Section 66(1), "any agreement or provision which purports to deprive the chargor of this right of redemption shall be void". This is a restatement of the common law rule that there must be no clogs on the equity of redemption.[112] Since there are no further guidelines in the Act, the courts will conceivably face the same "common law problems" when determining whether an agreement constitutes a sufficient "clog on the equity of redemption" or a "deprivation of the chargor's right to redeem".

As with leases, it is notable that Section 73 permits the parties to vary provisions of the Act on the redemption date and the remedies available to the chargee on default. This, however, does not permit the creation of a charge in any way other than as specified, or the addition of the common law remedies abolished by the Act. In any case, the variation or addition under Section 73 cannot be acted upon until the court so orders. Another interesting provision is Section 11(A), by which "Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, equitable mortgage or other form of security which, immediately before registration under this Act of the land affected thereby, was registered under the Deeds Registration Act ..." Such rights and remedies continue to take effect under the law applicable before registration. It was not the intention of the Act to graft new laws onto existing charges and mortgages and thereby alter the rights and obligations which were already binding the parties. The simplified law will therefore

apply only to new charges and there will be an overlap of laws over registered land until after the extinction of all mortgages and charges existing before the R.L.A. became applicable.

(d) Easements, Profits, Restrictive Agreements and Licences

A registered piece of land can be affected by a cluster of minor interests identified in the R.L.A. as easements, profits, restrictive agreements and licences. An easement is "a right attached to a piece of land which allows the proprietor of the piece to use the land of another in a particular manner or to restrict its use to a particular extent, but does not include a profit." A profit is a "right to go on the land of another and take a particular substance from that land". A restrictive agreement is not precisely defined, but it refers to an agreement under which one proprietor restricts the use or enjoyment of his land for the benefit of another land. A licence is a permission given by the proprietor of land or a lease which allows some other person, not necessarily another proprietor, to do some act on the land which would otherwise be a trespass.[113]

An easement, profit or restrictive agreement can be registered by noting it as an encumbrance in the register of the land burdened and in the property section of the benefiting land, and by filing the creating instrument. Easements and profits must additionally be created on prescribed forms on which the following particulars should be indicated: the nature of the easement or profit; the period for which it is granted; and the conditions, limitations or restrictions att-

ached to the grant.[114] By Section 94, a licence is not capable of registration and it is ineffective against a bona fide purchaser for value unless it is protected by the lodgement of a caution under Section 126.

These provisions on minor rights and interests exercisable over the land of another lack detail and, like most other rights and interests in the R.L.A., it must be presumed that easements, profits, restrictive agreements and licences retain their general common law character and nature. Except for Section 93, the R.L.A. is not notable for reforms of the law in this area. Section 93 enables any person affected by an easement, profit or restrictive agreement to apply to the court for the modification or extinction of the right or interest. The order will be made if the court is satisfied that the right or interest is obsolete by reason of changes to the character of the property or the neighbourhood; that its continued existence impedes the reasonable use of the burdened land for public or private purposes without practical benefits to other persons; or that the proposed discharge or modification will not injure the person entitled to benefit.

(e) Co-Proprietorship

One of the principal changes on this aspect of land law is the elimination of two obsolete common law forms of co-ownership known as co-parceny and tenancy by entireties. Section 95 provides for the registration of only the instruments showing whether persons are joint proprietors or proprietors in common of registered land. In the latter case, the share of

each proprietor should also be indicated.

Two of the most important characteristics of joint tenancy have been incorporated into the law under Section 96. First, dispositions can only be made by all joint proprietors. Second, jus accrescendi continues to apply and, on the death of one proprietor, his interest will pass to the surviving proprietors. The section also permits joint proprietors who are not trustees to convert their interest into common proprietorship by severance, using the prescribed forms. By Section 97, proprietors in common hold undivided shares in the whole and jus accrescendi does not apply on the death of one proprietor. Section 98 permits the partition of land held under proprietorship in common by the Registrar if one or more proprietors submit the appropriate application.

Although the co-proprietorship sections achieve some notable reforms of the common law, some of the provisions are less than satisfactory. The effect, for example, of instruments which do not clearly show whether persons are joint proprietors or proprietors in common under Section 95 is not clear. At common law, the presence of the four unities of ownership, interest, title and time or words of severance indicate whether one form of co-ownership or the other can arise.[115] It is arguable that, since the R.L.A. professes to be a self-contained code of land law and procedure, such unclear instruments are not registrable. However, when it is remembered that the majority of rights and interests in registered land are not defined or detailed by the R.L.A. and will probably assume their common law character, it becomes obvious

that a specific provision would have been immensely preferable.

The second problem also concerns Section 95. The Minister, by subsection 2, can prescribe "the maximum number ... of persons ... to be registered in the same register as proprietors; or the maximum denominator of the vulgar fraction which expresses the share of any proprietor ..." No dealing can be registered if these limits are exceeded. The Minister has not yet prescribed these limits, but when the time comes for the exercise of this discretion, there will be a need for clear guidelines on which persons to leave out of the co-ownership beyond the maximum. It will then be appreciated that there are no provisions for compensating the excluded owners. The indemnity provisions in Section 140 do not cater for this type of loss. Although monetary compensation may not be an adequate recompense for loss of land rights, such a provision would appear to be a natural complement of the "maximum number of co-owners" clause.

The third flaw in the Act is the absence of any exceptions to the jus accrescendi principle of joint ownership. Historically equity leant against joint tenancies because of the lottery element in this rule. Two men could put money into a joint venture only for one of them to die soon afterwards, leaving the other to reap the benefits, and perhaps at the expense of destitute family dependants. In such a case, equity preferred ownership of the property in common rather than joint ownership, on the ground that the right of survivorship is incompatible with a commercial undertaking - jus accrescendi inter mercatores pro beneficio commercii locum non habet.[116] The

absence of such a rule under the R.L.A. can lead to unsatisfactory results. A related problem here arises from Section 98(1) which permits the partition of land owned in common on application by one or more co-owners. There are no comparable provisions for partitioning property held under joint proprietorship. A joint proprietor desirous of partition first of all needs the consent of all other owners to engineer a severance of the estate into common ownership under Section 96(3). Thereafter, he can apply for partition under Section 98. This convoluted process can be thwarted at the first stage by uncooperative fellow joint proprietors. Reformed land law should ideally provide for severance or partition in some cases even where the consent of the other joint proprietors is not forthcoming.

(f) Prescription

Before the enactment of the R.L.A., mere possession of private land or an interest in it could mature into ownership in two ways. First, by the Limitation Act, the squatter or possessor could be deemed to have acquired the full title if the rightful owner failed to bring an action to assert his title within twelve years.[117] Second, under the common law and the Prescription Act 1832,[118] easements and profits could be acquired by prescription if there was a continuous and uninterrupted exercise of the rights for various periods, the longest of which was 60 years for certain profits.[119] The difference between prescription and limitation was that use in the former was acquired by passage of time, whereas adverse possession in the latter was confirmed by the loss of a right

to bring a recovery action. The effect to the layman is the same in both cases, possession evolving into ownership of the land, easement or profit.

The law on this subject is of such complexity that the R.L.A. would have palpably failed in its objective of simplifying the law, had it not attempted reforms. By sections 134 to 137, both land and easements or profits can now be acquired by prescription if peaceable, open and uninterrupted possession is exercised for a period of twelve years. There is no distinction between limitation or adverse possession and prescription. The prescription period of twelve years is uniform for all interests in land. Once the period has passed, the possessor can apply for registration of the interest. In the case of land, the Registrar may advertise the application and give the proprietor an opportunity to object. The possessor will be registered after one month of a notice being published and if the Registrar is satisfied that ownership has been established. Easements and profits can only be registered if the proprietor was aware or should, by exercise of reasonable diligence, have been aware of the adverse enjoyment and could have prevented it. The Registrar is not bound to inform the proprietor of the possessor's application for registration, but he has the discretion to publish such notices and advertisements as he may see fit.

A very sensible exception to the new simplified rules is the provision that prescription, whether of land, easement or profit, cannot be established over customary or public land. The government does not have the means to guard against the

manifestation of adverse interests on all public lands, and customary law has its own acquisition rules which need not be compounded by alien concepts of prescription before tenure reforms.

5 Conclusion

As mentioned earlier, some aspects of the simplification of conveyancing procedures in the R.L.A. were derived from the English system of title registration which was first introduced by the English Land Registry Act 1862.[120] This Act attempted "to give certainty to the Title to Real Estates; and to facilitate the proof thereof and also to render the dealing with land more simple and economical".[121] If these objectives are adopted as yardsticks for Malawi, it can be contended that the success of title registration has been partial.

Titles to private lands registered after adjudication under the A.T.A. are much more certain than under the deeds registration system. However, this certainty was in some cases marred by the use of maps and parcel definitions from old deeds whose accuracy was suspect. Registered titles must be unambiguously defined, and this was not completely achieved in Lilongwe.

As regards titles arising from the allocation of customary land under the C.L.D.A., it has been noted that only the name of the family representative appears on the register, and he has the sole and exclusive power of land dealing. But the interests of other family members which are hidden from the

register are equally important, and any prudent purchaser would not proceed without taking them into account. The fact that such interests lie behind the register, in the allocation records, derogates from the continuous finality of the title register and its certainty.

Greater success can be claimed for title registration in Malawi with regard to the rendering of land dealings simple and more economic. This is achieved by the use of prescribed simple forms for all transfers and dispositions of land or the various rights and interests in it. It is notable here that proprietors of private land in urban Lilongwe still prefer to use legal practitioners for most dealings. On the other hand, almost all the dealings involving former customary land have so far been completed with the assistance of only the Land Registrar and the Local Land Board. This is proof, to some extent, that conveyancing procedures and practices have been sufficiently or significantly simplified.

The R.L.A. has also been more successful in attaining its objective of reforming substantive land law. However, these reforms, as noted earlier, pertain towards simplification rather than wholesale changes. The brief review of the new land code shows that although most of the antiquated rules of English land law have been removed, the rights and interests conferred by registration generally retain their common law character and nature. The extent of the codification and simplification exercise can therefore be fully understood only when the replaced law is taken into account. When commenting on the new code of land law in Malawi, Simpson claimed that

"any well educated person can read and understand the whole bill."[122] Any well educated land owner who has no grasp of received English land law is unlikely to appreciate the full extent and nature of all rights in registered land. But this should not colour the achievements of the R.L.A. in simplifying land law. Simpson's claim should be treated as promotional, an attempt to sell the land bill, his product, to the politicians and the legislature.

NOTES TO CHAPTER IX

1 See Section 2 of the Land Act, chapter 57:01. For debates on whether statutes of general application are still part of the received law in Malawi, see: C.E.P. Haynes, "Confusion Double Confounded: the Appearance of Reality", unpublished and undated paper, Chancellor College, University of Malawi; C.M.S. Nzunda, "The Controversy on Statutes of General Application in Malawi", [1981], J.A.L., pp. 115-130; and J.M. Finnis, "Plain-Speaking About Some Existing Laws", unpublished paper, Chancellor College, 1981.

2 Some of these authorities are quoted by R. Simpson in his Land Law and Registration, Cambridge University Press, 1976, pp. 24-26.

3 Federation of Nigeria, A Report on the Registration of Title to Land in Lagos (by R. Simpson), Lagos, Federal Government Printer, 1957, p. 13, paragraph 25.

4 R. Simpson, "New Land Law in Malawi", Journal of Administration Overseas, Vol. IV, No. 4, 1967, pp. 224-226.

5 Ibid.

6 Chapter 58:02, Laws of Malawi.

7 Chapter 58:05.

8 The regulations were published in the British Central Africa Gazette of 20th August 1894, and took effect after 1st February 1894. See also Johnston to F.O., despatch dated 21th January 1894, F.O. 2/66, Public Records Office, London.

9 No. 2 of 1901, signed on 10th July 1901 and published in the B.C.A. Gazette of the same date. See also F.O. to Alfred Sharpe, despatch dated 6th May 1901, F.O. 2/555, Public Records Office, London.

10 No. 12 of 1910.

11 Legislative Council debate, 6th session, 8th to 12th November 1910, p. 20.

12 No. 8 of 1916.

13 LEGCO debate, 16th session, 14th to 16th March 1916, p. 16.

14 G.N. No. 18/1969 and no. 197/1971.

15 [1923-6], A.L.R. Mal. 79.

16 Ibid., p. 81.

17 Interview with the Land Registrar, 3rd June 1981.

18 Sub-section 2 added by amendment no. 51 of 1971.

19 See, for example, E.M. Coombes v. Deeds Registrar, unreported civil cause no. 7 of 1981; K. Gange-Harris v. Deeds Registrar, unreported civil cause no. 5 of 1980; and Aboobaker Brothers v. B.J. Magaleta, unreported civil cause no. 190 of 1980.

20 Seven out of ten cases between 1980 and 1981 were directly or indirectly due to oversight in a legal practitioner's officer. See, for example: L.A. Mahomed and Asani Imani v. Deeds Registrar, unreported civil cause no. 139 of 1981; Girach and Chiuye v. Deeds Registrar, unreported civil cause no. 1226 of 1980; Re. Amin Essaq, unreported civil cause no. 722 of 1980; and M.M. Hansrod v. Deeds Registrar, civil cause no. 13 of 1980. See also File no. D.R. 7, Land Registry, Lilongwe, Malawi.

21 Sections 18 to 21 and G.N. no. 106/1942.

22 Section 16(2).

23 Land Registration (Amendment) Bill 1958, LEGCO proceedings, 2nd meeting, 72nd session, 10th to 13th February 1958, p. 55.

24 [1923-69], A.L.R., Mal. 173.

25 Ibid., p. 177.

26 Stroud's Judicial Dictionary, 2nd edition, 1903, at 2193-2198.

27 See Note 25 and Maxwell on Interpretation of Statutes, 8th edition, 1937, at 183.

28 See J.D.A. Brooke-Taylor, Land Law in Malawi, mimeograph, Chancellor College, 1977, pp. 257-260.

29 Stirling J. in Battison v. Hobson (1896), 2 ch. 403 at 412.

30 Brooke-Taylor, op. cit., p. 281.

31 Simpson, Land Law and Registration, p. 96.

32 Information obtained from the Deeds Registry in Lilongwe and from the Lands Department, Inspection Report no. 114, 18th July 1979.

33 Simpson, op. cit. p. 98, observes that publicity, security and accessibility were the main objectives of the Register of Sassines in Scotland.

34 Ibid. p. 107, and generally chapters 6 and 4.

35 See Chapters III and IV.

36 One such case of inaccurate parcels involved deed no. 50161. The Commissioner for Surveys wrote a memo to the Lands Department pointing out the erroneous descriptions on 23rd October 1979. See File MP/4437/1F, Deeds Registry, Lilongwe.

37 See H.J. Lamport-Stokes, "Land Tenure in Malawi", Society of Malawi Journal, Vol. XXIII, No. 2, July 1970, pp. 71-74.

38 Ibid.

39 Long title to Act no. 18 of 1971.

40 See Hansard, Official Reports of Parliamentary Debates, 8th session, 2nd to 27th July 1971, pp. 179-181.

41 Simpson, op. cit., pp. 638-639, and generally, Chapter 23, pp. 641-664.

42 Section 3 of A.T.A. Cf. Section 3 of the C.L.D.A.

43 G.N. No.s 40/1972, 2/2973, 47/1974, 127/1974, 17/1976, 52/1976 and 53/1976.

44 Information provided by the Land Registrar, 3rd June 1981; and General Notice No. 16, Government Gazette of 12th January 1973.

45 J.C.D. Lawrence to P.D. Lucas, Commissioner for Lands, 30th December 1970, File MP 4/835, Vol. II, Lilongwe Land Registry.

46 Personal interview with the Land Registrar/Recording Officer, 3rd June 1981, Lilongwe.

47 Simpson, op. cit., p. 649.

48 Ibid., p. 652; and Section 13 of the C.L.D.A.

49 Sections 13-14 of the A.T.A.

50 Section 15 of the A.T.A. Cf. Sections 16-18 of the C.L.D.A.

51 Simpson, op. cit., p. 655.

52 See Adjudication of Title Regulation, Form I, G.N. 3/1973.

53 Personal interview with the Land Registrar/Recording Officer, 3rd June 1981.

54 Source: Lilongwe District Land Registry.

55 See the Capital City Development Corporation Act, no. 10 of 1968, chapter 39:02; and subsidiary legislation, published under G.N. 160/1968 and 228/1969.

56 Section 16(1)(a).

57 Section 16(3).

58 Section 16(1)(b).

59 Personal interview with the Land Registrar, 3rd June 1981 and 5th June 1981.

60 Simpson, op. cit., pp. 656-657.

61 Section 16(1)(d) and Section 17(1).

62 Adjudication of Title Regulations, Form II, G.N. 3/1973.

63 Section 19; and Simpson op. cit. p. 660.

64 Personal interview with the Land Registrar, 3rd June 1981 and 5th June 1981.

65 Simpson, "New Land Law in Malawi", pp. 224-225.

66 For a comparison between the Torrens and English systems of title registration, see Simpson, Land Law and Registration, chapter 5, pp. 69-90.

67 Federal Government Printer, Lagos, 1960.

68 See, for example, Simpson, op. cit. Chapter 22; E. Dowson and V. Sheppard, Land Registration, 2nd edition, H.M.S.O., London, 1956; M.A. Yesufa, Registration of Deeds and Titles to Land with Special Reference to the Lagos State of Nigeria, Ph.D. thesis, University of London, 1973; T.W. Mapp, Torrens' Elusive Title, Alberta Law Review Book Series, Vol. 1, 1978; and P.G. Willoughby, "Land Registration in Nigeria: Past, Present and Future", Nigerian Law Journal, 1964-65, pp. 260-283.

69 G.N. No. 185/1970.

70 G.N. No. 50/1973.

71 Personal interview with the Lilongwe Land Registrar, 3rd June 1981 and 5th June 1981.

72 Ibid.

73 Inspection Report no. 114, op. cit., pp. 6-13.

74 Sections 12 to 14 and Simpson, op. cit., p. 487.

75 Section 15.

76 Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, Nairobi, p. 63, paragraph 217; and Simpson, op. cit., p. 148.

77 C.A. Griffiths, Land Tenure in Malawi and the 1967 Reforms, LL.M. thesis, University of Malawi, 1981, pp. 118-127.

78 Simpson, op. cit. Chapter 8, pp. 125-143, reviews the historical developments on fixed and general boundaries.

79 See sections 18 to 19 of the R.L.A.

80 See Part 3.

81 Simpson, op. cit. pp. 176-177, where he quoted J. Baalman, The Singapore Torrens System, Singapore, 1961, p. 86.

82 See Chapter

83 Hassam kassam v. Nur Mahomed Omar, [1923-60], A.L.R. Mal. 173.

84 29, Chapter II, c. 3.

85 Section 34(2) of the R.L.A. Cf. Section 31 of the Deeds Registration Act. The penalties under the latter are notably higher.

86 Simpson, op. cit., p. 358.

87 Ibid. pp. 165-168 and p. 357; and Simpson, "New Land Law in Malawi", p. 226.

88 No. 32 of 1970.

89 Personal interview with the Land Registrar, 5th June 1981.

90 Ibid.

91 For a fuller account of the simplification exercise see Griffiths op. cit., chapter 11.

92 15 and 16 Geo. 5, c. 20.

93 Section 1(1).

94 Report of the Working Party on Land Tenure in Lagos, 1960, p. 17.

95 Ibid.

96 For definitional problems of "ownership" see E. Cotran and N. Rubin (ed.s), Readings in African Law, Frank Cass and Co., 1970, pp. 264-270.

97 B.P. Wanda, Colonialism, Nationalism and Tradition: The Evolution and Development of the Legal System of Malawi, University of London, Ph.D. thesis, 1979, Vol. 5, p. 335.

98 Section 27A.

99 Part 5.

100 Sections 38 to 45.

101 See section 1 of the Statute of Frauds 1677; and E.H. Burns, Cheshire's Modern Law of Real Property (11th ed.), London, Butterworths, 1972, pp. 382-390.

102 Ibid., pp. 411-412.

103 See Regulations made under Section 39 of the Land Act, G.N. 166/1965.

104 Brooke-Taylor, op. cit., pp. 176-179.

105 (44 and 45, Vict. c. 41), expressly received in Malawi by the Conveyancing Act, chapter 58:03.

106 Sections 49 to 52 of the R.L.A.

107 Personal interview with the Land Registrar, 5th June 1981.

108 Brooke-Taylor, op. cit., pp. 245-249.

109 See section 69 and sections 71 to 72 of the R.L.A.; and cf. sections 19 to 24 of the Conveyancing Act 1881.

110 Section 66(2) of the R.L.A.

111 Section 60(2).

112 See Brooke-Taylor, op. cit., pp. 264-266; and Cheshire's Modern Law of Real Property, op. cit., pp. 637-640.

113 These interests are defined in sections 2 and 90 of the R.L.A.

114 Sections 89 to 114.

115 Brooke-Taylor, op. cit., pp. 130-141; and Cheshire, pp. 327-338.

116 Cheshire, op. cit., pp. 331-332.

117 Chapter 6:02, Laws of Malawi, section 6.

118 (2 and 3, Will IV, c. 71)

119 Brooke-Taylor, op. cit., pp. 212-219.

120 (25 and 26, Vict. c. 53)

121 Quoted by Simpson in "New Land Law in Malawi", p. 225.

122 Ibid., p. 226.

X STATUTORY LAW AND AGRARIAN CHANGE IN MALAWI: GENERAL CONCLUSIONS AND THEORETICAL IMPLICATIONS

The end of colonial rule in a large part of Africa and the third world brought into the limelight of post-war politics the issue of "development" or improving the comparatively low quality of material life in the new nations. The development debate was initially dominated by professionals from fields like economics and cultural anthropology. Lawyers had a late start,[1] but they eventually began to carve out a niche in the debate by theorising on, and asserting the centrality of, law and lawyers in developmental processes.[2] After tracing the evolution of agrarian laws in Malawi, one of the poorer new nations whose developmental choices were confined to the agricultural sector, this final chapter of the thesis will attempt to collate the general conclusions of the study and some of the assertions, theories and middle-range hypotheses propounded in the law and development debate.

1 General Conclusions

As the first general conclusion of this study, it should be noted that the shape of the agricultural economy in Malawi and the role of law in it were established from the onset of colonial rule. The proclamation of a protectorate over Nyasaland, as Chapter III has shown, was immediately followed by the confirmation of land transfers from the indigenous Africans to the Crown and European settlers. The authenticity and legitimacy of some of the transfers was highly questionable, but the constitutional laws evolved and applied during the

early colonial period prevented the colonised and dispossessed Africans from pressing their claims for an equitable solution. This resulted in the creation of an agricultural economy in which a minority of European estate holders were dominant, and a sizeable proportion of the African majority who lost their lands were reduced to a servile and labouring group on the estates. This arrangement repeatedly gave rise to social and political tensions. As noted in Chapter IV, the amount of legislative time expended on the management of the resulting tensions was considerable. The legislative measures somehow fell short of proposing an acceptable solution to the Africans and had the effect of preserving the dominance of the European settlers until, finally, political power was wrested from the colonial administration just before independence.

Chapter IV has also suggested that even when the colonial administration was not involved in the management of tension between European estate holders and African tenants-cum-labourers, its programme for the transformation of African agriculture relied on a negative and punitive use of statutory law. The conventional wisdom of the period suggested that peasants heedlessly indulged in bad land use practices and that this had to be halted immediately, using penal sanctions "to back up the orders of the state".[3] The use of law in this way, it has been contended, was socially, politically and economically counter-productive, but this incidentally hastened the demise of colonial rule and the attainment of independence.

Chapter IV, on colonial land law and policies, has been followed in Chapter V by a review of legislation on the prod-

uction and marketing of economic crops. This topic has not received as much attention as the land policies in Malawi's modern economic history. Yet, the amount of legislative time spent on the regulation of the production and marketing of economic crops by the Africans was equally considerable. It has been suggested that this was indicative of the importance that the colonial administration attached to the integration in the colonial agricultural economy of peasant producers who did not lose their land to the dominant European settlers. This integration was financially rewarding to the European settlers, Asians and, subsequently, some Africans who became involved in the marketing of peasant produce as "middle-men". It was even more rewarding to the colonial administration, which derived revenue from squeezing the profit margin of the peasant producers.

A notable general conclusion from Chapter V is that, whereas land legislation was used by the administration to manage tension and "conciliate" the conflicting interests of the Africans and the European estate holders, marketing legislation conferred direct benefits upon the administration, and it became the third party to the equation rather than a conciliator. In this tripartite pull of interests, legislation often carried the wishes of the administration, tempered by the demands of the settlers, who were adequately and vociferously represented in the LEGCO. Peasant producers had no similar representation, and their demands were the last to be reckoned with, although the entire arrangement rested on their continued participation in the agricultural economy.

When African politicians assumed political power towards the end of colonial rule, they hastened to amend agrarian legislation which was particularly objectionable to most Africans. But as suggested in Chapter VI, some of the post-colonial trends in land administration and agrarian change have not improved the position of peasant producers. Marketing legislation, for example, has been amended to enable ADMARC, the sole statutory marketing corporation, to squeeze more profits from the export of peasant produce for re-investment in other sectors of the economy. Political economists have contended that this has resulted in lopsided development. The material life of elites, politicians and managers of other sectors of the economy has been improving at a faster rate than that of the peasant producers.

It is also noticeable from Chapter VI that the African government has decided to manage the economy and administer agrarian change with minimum judicial interference and resort to legal procedures and processes. This may be due to the infamy which law and the legal profession earned when they repeatedly failed to protect and be responsive to the interests of the Africans in the colonial agricultural economy. But this should not mask the seemingly authoritarian character of politics in post-colonial Malawi: politicians would like to govern and exercise power without the irritation of judicial interference and legal constraints. As a result, legislation in the post-colonial agricultural economy has been used to confer broad discretionary powers upon the politicians without establishing minimum standards for the exercise of such powers. Penal clauses have also been a conspicuous feature

of some of the legislation, and the judiciary has been reduced to playing the less creative role of enforcing the penal sanctions prescribed.

To the credit of the African government, it should be acknowledged that it has attempted to use essentially non-punitive and less authoritarian legislation for the purpose of reforming customary and statutory law on land holding. Chapters VII to IX have attempted to review the design and implementation of the land law reform statutes. The general conclusion from this review is that the objectives of the reforms, particularly of customary land, have not been readily attainable. Researches on the ground revealed a wide divergence between law in the statute books and law in action. This was partly due to inappropriate provisions and the failure of project officers to appreciate and carry out the objectives of the legislation.

The failure of customary land reforms in Malawi provides yet another acute example of the ineffectiveness of legislation as a tool for engineering the transformation of peasant or rural communities in Africa and elsewhere.[4] A common explanation for the failure of programmatic social transformation, whether or not it involves the use of legislation, is the exclusion of the affected communities from policy formulation at the critical stages or, in the parlance of rural development, lack of effective and adequate "participation".[5] In customary land reforms, however, social consensus and effective participation in policy formulation may not be contemplated because the essence of a programme may be to transform

society and move it in a particular, pre-determined direction. The programmer decides that the natural evolution of land tenure laws is either too slow or contrary to certain desired goals. If participation is contemplated, this may be at the stage of policy implementation, after the goals of the programme have already been set. As some critics of rural development have noted,

> "Participation seems to mean getting people to do what outsiders think is good for them. 'Overall guidance and control from the centre' defines the relationship between agencies of rural development and peasants. It excludes peasants' conceptions of their own development." [6]

This "second level participation" in policy implementation is, incidentally, one of the explanations for the failure of customary land reforms within the L.L.D.P. Village development committees were apparently consulted at the commencement of the reforms, and they recommended the exclusive adjudication and registration of family land titles. This was contrary to the fundamental objective of the exercise, which was to replace customary tenures with individual land titles. However, instead of blaming the village committees for the failure of the exercise, it is necessary to re-examine the premise of the reforms and the suitability of the legislation which was presented to the committees for adoption. Was customary law sufficiently inimical to agrarian change to make the tenure reforms imperative? After noting the evolution of matrilineal customary land law in Chapter II, and the general results of the L.L.D.P. in Chapters VI to VIII, it can be contended that the African government was perhaps too uncritical

in its acceptance of the well rehearsed, conventional arguments for the reforms.

Even if the reforms were demonstrably necessary for increased agricultural productivity, another contentious issue is whether the peasant producers are the primary beneficiaries of this type of agrarian change. As suggested in parts of Chapters V and VI, both colonial and post-colonial administrations and other politically dominant social groups have at times gained more from controlled marketing of African economic crops than the peasant producers. This may not have escaped the attention of the producers, hence their declining enthusiasm for the tenure reforms or other components of agricultural development projects. It can also be contended that increased agricultural productivity reduces the economic independence of the peasants and integrates them into unpredictable world commodity markets which are more responsive to international capitalism than to the issues of development. These are some of the factors which have led to increasing academic skepticism and disillusionment with high-sounding notions like "rural development" and "agrarian change".[7]

2 Theoretical Implications

Efforts by lawyers to carve out a niche in the development debate initially led to the assertion that "law" has an "instrumental" role to play in processes of social change and that a particular type of legal system is a sine qua non for development.[8] This instrumentalist conception of law was very popular in some American academic circles, and its phil-

osophical inspiration was the sociological jurisprudence of Roscoe Pound (1870-1964),[9] a prolific American jurist. Drawing on the egalitarian and welfare aspects of American society in the first part of the 20th century, Pound regarded law as a social institution for the satisfaction of social wants "- the claims and demands and expectations involved in the existence of civilized society -" through social control and the satisfaction of as many claims as possible for the least sacrifice. In legal history, he saw a record of "a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence - in short, a continually more efficacious social engineering".[10]

Pound supplied the image of law as a tool for social engineering which was invoked in the instrumentalist conception of law in development. But the belief that development was only possible in a particular legal environment was inspired by the earlier writings of Max Weber, the German sociologist (1864-1920).[11] Weber sought to investigate and analyse some of the factors which led to the rise of capitalism in the Western world. He is alleged to have concluded that "rationalization and systematization of law and ... the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of capitalist enterprise, which cannot do without legal security".[12] In Weber's analysis, the "rationalization of law" occurred when a polity self-consciously became reliant on pre-existing rules to resolve social conflicts, and a specialized profession existed to elaborate and enforce

the rules in a universal, precise and consistent manner. Weber contended that "rational law" in such a polity became its own legitimating principle and the basis of all legitimate domination. Such a system was distinguishable from systems where the basis for domination was "tradition" or "charisma". The rationality of law did not exist where commands were treated as legitimate because they were issued in accordance with immutable custom or because they were issued by an individual with exceptional character or charisma.[13]

Weber regarded his three forms of domination as "ideal types" and contended that "legal domination", or the legitimation of domination through rational law, could be encountered in the Western world. "Logically formal rationality" had been attained in the West, and the normative system had achieved the formal and substantive characteristics which were congenial for economic development or the operation of a free market economy. Entrepreneurs could forecast that the normative system would constrain other members of the polity or the dominating authority (the modern bureaucratic state) to act or behave according to the rules in particular situations.[14]

Weber's schema was plucked out of its historical context to underpin law and development conceptions which equated "development" with industrial growth under Western capitalism, and prescribed the emulation of Western legal systems as its precondition. The theoretical guise for this emulation was "modernization of law", described as the ordering of social affairs through legal rules and institutions which, in Weber-

ian terms, could more or less be deemed to be "legally rational".[15] Modernized law would not only be predictable, uniform, consciously wrought and applied by autonomous institutions, but it would also guarantee the liberty of an individual and ensure that governments acted in accordance with the law or the wishes of the people. Modernization of law in this sense assumed the tag of "liberal legalism".[16]

The concept of liberal legalism also assumed that there would be social and political pluralism in the third world; that state institutions rather than local groups would be "the primary locus of social control"; that rules would reflect the interests of the majority of the citizens and would be internalized; and that the courts, the central actors in liberal legalism, "would be relatively autonomous from political, tribal or class interests". According to some American scholars and aid-givers, the key to the attainment of liberal legalism was the training of the legal profession in the third world to cherish its ideals and to think "instrumentally" as social engineers. The profession would then assist in the formulation of laws and institutions which furthered development goals or in the reform of those which failed to do so.[17] Development aid therefore concentrated on training lawyers who would spearhead the emulation of American or Western legal ideals and concepts.

One aspect of Malawi's agricultural economy which could have been inspired by liberal legalism was the land reform exercise. The concept was fashionable by 1967, when Malawi passed the customary land reform legislation reviewed in the

later part of the thesis. It was not inconceivable for the U.N.D.P. and other foreign sponsors of development projects like the the L.L.D.P. to insist on the introduction of a "Western" or "modernized" land tenure system as a precondition for development loans. The failure of this new land tenure system in Lilongwe curiously mirrors some of the flaws and failures of liberal legalism. Just as it was somewhat naive to assume that rural development in Malawi primarily rested on the adoption of a "western" land tenure system, it was similarly naive to assume that legal and social institutions which contributed to the rise of capitalism (and development) in the West could be reproduced with similar effects in the third world, in a different era and under different socio-economic conditions.

There was also some naivety in the assumption that the recipients of development aid shared the belief of liberal legalists in the virtues of an American or modernized legal system and profession, and were keen to duplicate the various ideals of the paradigm in their countries. In Malawi's case, it has already been concluded that at the time of independence colonial law and the legal profession were probably infamous for failing to protect the interests of the Africans in the colonial agricultural economy. The legacy of colonial rule to Malawian politicians was probably that Western law and the legal profession were instruments for governance and domination, and rarely for efficacious social ordering or transformation. It has already been noted that the administration of agrarian change in the post-colonial agricultural economy is often undertaken without recourse to legal pro-

cesses and forms, especially where the hand of the government may be weakened. Outside the agricultural economy, the African government also showed disdain for "Western law" by reforming the legal system to give primacy to "tradition" and "traditional courts" in the administration of justice. This type of "regressive"[18] legal reform is an example par excellence of the rejection of a central tenet of liberal legalism by a third world country.

As some of its original exponents were willing to concede by the middle of the 1970s, liberal legalism was generally flawed by naive, ahistorical and ethnocentric assumptions. This led the exponents to propose an alternative concept of "eclectic critique", which was described thus:

> "Eclectic critique transforms the central assumptions underlying the law and development enterprise into critical standards. They always were this in part, but the belief that they were also factually descriptive involved the scholar in premature and uncritical commitment to particular institutions and policies. In eclectic critique, the assumptions are purified of the admixture of descriptive assertion; they are completely and self-consciously normatized."[19]

This rather incomprehensible articulation betrays a refusal to decant all the ideas and visions of the original American law and development movement. Eclectic critique appears to suggest that an American or Western legal system should remain the model for legal developments in the third world, albeit a suspicious one, and that lawyers should proceed to theorize on the subject on the assumption that, until other-

wise proven, law remains the most important instrument for efficacious social engineering. In other words, eclectic critique is liberal legalism infused with a certain amount of self-doubt and self-criticism. Even in this rearticulated form, the concept has not won new adherents or recaptured the old ones among scholars and politicians in both camps of the development debate. Its exponents are now, perhaps wisely, showing more interest in other more rewarding academic pursuits.[20]

Scholarly disinterest with the concepts of liberal legalism and eclectic critique has not led to total disillusionment with, or rejection of, the underlying instrumentalist conception of law in development. Some law and development scholars have remained true to the instrumentalist creed while rejecting the ethnocentricity and naivety of liberal legalism. Notable among such scholars is Robert Seidman. A pervading theme of his several writings on the subject[21] is that development or social change in Africa should be consciously sought by the state on the basis of formulated plans. Law is the instrument which the government can use to structure its choices, change social institutions to conform with the stated choices, and define the patterns of behaviour expected of state officials. It is also "the most available instrument to state, create, enforce and co-ordinate obligations and their transformation from a network of individual relationships into obligations to the community".[22] Seidman also contends that law and lawyers have a singularly important role to play "at the interface between ends and means, between policy formulation and implementation".[23] This interface is

where policies are transformed into law and given their specific content. The actors involved at this stage include those who "draft legislation, structure options, raise and submit or review drafts, as well as those who finally decide the yea and nay of particular formulations".[24]

Unlike the liberal legalists, Seidman cannot be accused of naivety or ignoring the past record of law as an instrument for social change in Africa. His major work on the subject is in fact an exposition and exhaustive explanation of the failure of law to induce development in Africa.[25] It is a study of what Gunnar Myrdal termed the "soft state" in underdeveloped countries, or

> "... a general lack of social discipline ... signified by many weaknesses: deficiencies in their legislation and, in particular, in law observance and enforcement; lack of obedience to rules and directives handed down to public officials at various levels; frequent collusion of these officials with powerful persons or groups of persons whose conduct they should regulate; and, at bottom, a general inclination of people in all strata to resist public controls and their implementation ..." [26]

Soft state also included corruption which, Myrdal alleged, was on the increase in the underdeveloped world. Seidman's argument and theory, simply stated, is that "to explain the soft state is to discover the limits on law as a tool of social change in conditions of development".[27]

Most of Seidman's explanations for the existence of the soft state in post-colonial Africa, and hence the lack of dev-

elopment, are familiar. The key explanations include the failure of governments effectively to transform legal orders structured for colonial capitalism and exploitation into orders suitable for development (or the elimination of poverty and oppression); the failure to evolve appropriate ideology and institutions for development; the failure to communicate programmes and encourage the participation of the masses in decision making; and the retention of institutions which foster authoritarianism and statutes which confer wide discretionary powers on political elites and bureaucracies. Seidman gingerly concludes that perhaps Tanzania is one of the very few countries to have initiated the changes of the legal order and state institutions which might encourage development.[28]

When Seidman's theory and main arguments are applied to Malawi, it is difficult to envisage agricultural development taking place. Law is not generally regarded by Malawi politicians as the main instrument for structuring the developmental choices of the government. As concluded above, the most notable role of law in the post-colonial agricultural economy is to confer wide discretionary powers upon state officials, but standards of behaviour expected in the exercise of such powers are not defined and the judiciary is not allowed to oversee the conduct of the officials. This relegation of law and the judiciary to subsidiary positions in the agricultural economy, and the general authoritarian character of politics in Malawi, led Brietzke to conclude that the political and legal orders of the country are a paradigm of all that is antithetical to development.[29]

In addition to the comments made in Part 1 of Chapter VI, Brietzke's submission is flawed by some of the conventional generalizations in his description of African agriculture in Malawi and by insufficient familiarity with the actual operation of some of the legislation singled out for criticism. Brietzke uncritically adopted assumptions prevalent during the colonial period that the extended family structure in Malawi discouraged entrepreneurial activities by individuals; that "peer groups" disapproved of progressive farmers and any person who attempted to grow cash crops in areas of land-shortage risked losing his land; and that African agriculture was predominantly on the basis of "slash-and-burn" cultivation.[30] These generalizations were not completely accurate when Brietzke presented his analysis. Other dubious assertions which indicated his unfamiliarity with the operation of statute law in Malawi included the claim that 99 year leases offered under the Land Act were so vague that lessees were unable to plan land use intelligently and were discouraged from effecting capital improvements; that Malawi's educational structure was not linked to the needs of subsistence agriculture and school closures on the grounds of students' bad behaviour were frequent; and that prior to 1966 many of ADMARC's marketing functions were performed by various co-operatives.[31] Researches on the ground could not confirm or substantiate some of these allegations. In contrast to his rather hasty review of Malawi, Brietzke's major work on law, development and the revolution in Ethiopia, although essentially instrumentalist in approach, is more original and draws on evidence which shows sufficient familiarity with the legal and political systems of that country.[32]

Insufficient familiarity with the operation of the legal order in Tanzania, one of the few African countries Seidman is willing to excuse from his criticisms of legal orders in post-colonial Africa, can also be cited as one of the main weaknesses of his account. Other researchers have suggested that the state in Tanzania, as elsewhere in Africa, is not averse to paternalism, authoritarianism and resort to coercive measures in the implementation of some of its development policies.[33] It is also notable that despite the uniqueness of political leadership and institutions in Tanzania, it experiences the same constraints on development as other African countries which rely on the export of surplus agricultural commodities produced by peasants for the accumulation of foreign earnings. The inability of such countries to influence or control the international commodity markets is an important factor in underdevelopment, and this international dimension has not been given sufficient consideration in Seidman's account. As a result, the account obscures the limits of national law in development, a process which is to a large extent controlled by international factors.[34]

Another major criticism of Seidman's account paradoxically stems from his exhaustive explanation of the soft state and lack of development in post-colonial Africa. As the evidence suggests, if law has palpably failed to engineer social change, it is surprising that due consideration is not given to the question whether law does actually have the innate quality for efficacious and positive social engineering. Seidman's theory in fact comes dangerously close to suggesting that once the causes of the soft state have been investigated,

they can be legislated away and development would, hopefully, ensue. Getting rid of the soft state is obviously desirable, and probably a pre-condition for development. However, by implying that development could flow from legislative activity which transforms the political and legal orders, Seidman "invests 'law' with certain magical properties" and treats it as "a meta-historical phenomenon which operates independently ... of human will in order to transform society".[35] Abstractionism in the face of contrary factual evidence renders Seidman's theory and the "instrumentalist" conception of the role of law in development inadequate for application to the general conclusions of this study and for the general understanding of underdevelopment in Malawi and other third world countries.

The inadequacies of the "instrumentalist" school of thought have more recently led to demands for a reorientation of law and development studies to take into account theories of dependency and underdevelopment in national and international political economies.[36] Dependency theories generally reject the view that underdevelopment in the third world can be explained at national or subnational level, and attempt to locate its causes within the world capitalist system. Underdevelopment is explained as a "consequence and a manifestation of the roles of countries (and classes) in the world capitalist economy".[37] The theories also reject as ahistorical the assumption that advanced countries were once underdeveloped and that they developed following a path which third world countries can retrace. "Underdevelopment", it is emphasized, "denotes the consequences, both past and present,

in certain countries of the world of a particular historical process".[38] Contemporary underdeveloped countries occupy a different position in the world system and have vastly different internal characteristics. It is therefore unrealistic to assume that the history of developed countries can provide a model for development in the third world.

The importance of dependency theories to law and development studies is that they supply the international dimension to underdevelopment which some of those who adhere to the "instrumentalist" school of thought do not provide. They also challenge the a priori assumption that law is a value-neutral, autonomous instrument for social ordering and enable "students of law ... to recognize the relatively minor importance of legal rules compared with social, political, or administrative factors ..."[39]

Marxism and Marxist jurisprudence provide the philosophical inspiration for some of the articulations on law and development which incorporate dependency and underdevelopment theories. Karl Marx, it should be recalled, sought to explain social evolution in capitalist societies as a dialectic, involving a struggle between the hostile camps of the bourgeoisie and the proletariat. The anticipated result of this class conflict was a revolution and the establishment of a social order in which the proletariat would no longer be exploited. In Hegelian terminology, this would be the synthesis of the thesis and antithesis in the dialectic. According to Marx, legal relations and forms of state in this dialectic existed for the purpose of class domination; they could nei-

ther be understood by themselves, nor explained by the general process of the human mind, but were rooted in material conditions of life. He described law and political institutions as "superstructures" resting on the economic structure of society which is constituted by relations of production.[40] Upon the change of this economic structure after the predicted revolution, it was envisaged that law and state would "wither away". According to Pashukanis, one of the most distinguished Soviet jurists, law and state were "forms of bourgeois society" which were incapable of "being filled with socialist content". They were bound to die out and be replaced by some form of administration.[41]

This anticipated exhaustion of law and state has not yet occurred anywhere, although several societies in the world have experienced Marxist-inspired revolutions. It may be that such revolutions are still extant: they are at the stage of the dictatorship of the proletariat, which requires some use of bourgeois forms in order to bolster the revolution. It may also be that the prophecies of Marx, Engels, Pashukanis and others were false. Lenin in fact reinterpreted the withering away of the state to refer to the withering away of the proletariat state but not the bourgeois state which was to be smashed during the revolution.[42] Pashukanis was discredited and disappeared from Stalin's Russia. Some Marxist jurists have since envisaged a role for law in a communist society. Soviet law, for example, has been described as "parental law", which is necessary for the purpose of teaching Soviet citizens the morality of communism.[43] It has also been suggested that coercive law and state institutions are necessary for the pro-

tection of socialist states against their capitalist enemies who encircle them, and this necessity would remain "until at any rate most of the world has undergone a socialist revolution".[44]

Although the prophecies of Marxism's principal figures on the demise of law and state have not yet materialized, the general Marxist conception of law as a form for class domination and a phenomenon which cannot be explained outside the economic structure of society provides a viable premise for constructing alternative law and development theories or middle-range hypotheses for application in the third world. One of the few new theories to be constructed using this premise has been offered by Peter Fitzpatrick in his study of law and state in Papua New Guinea.[45] His central thesis is that law and state have a distinctive cast and a structurally more enduring role in the third world than in the West. When capitalism was not yet fully established in the West, law and state assisted in the elimination of pre-capitalist modes of production. They played a broadly similar role when colonial rule was introduced to the third world during the "second imperialism" of the later nineteenth century, but this role was more oriented towards "the conservation and continuing exploitation of the traditional mode".[46] Capitalist penetration in the third world was apparently weak at the economic level, and this called for the tying of the traditional mode of production and the capitalist mode into "an operative whole". Law and state performed this tying function, but they also had the distinctive task of keeping the two modes sufficiently apart to conserve the traditional. "Even the

weak presence of the capitalist mode would, without more, have had too solvent an effect on the traditional."[47]

The enduring quality of law and state arises from the fact that they have served this somewhat contradictory function of integrating the two modes of production while conserving the traditional mode throughout the several historical epochs of third world countries. The function, Fitzpatrick contends, has been discharged through an admixture of coercion and persuasion (ideology). At the inception of colonial rule, coercion was deemed necessary for the incorporation of the colonized and pre-capitalist social formations in the colonial framework and capitalist mode of production. Land had to be prised from traditional control and reposed in the hands of resident colonists; devices like the hut tax had to be used to separate the producers from the traditional mode and to coerce them to supply cheap labour to the colonists; and other peasants had to be forced into controlled and compulsory schemes of cash-cropping. To preserve the traditional mode, it was also necessary to restrict the expansion of the enterprises of the resident colonists, and to prevent the colonized from remaining within the capitalist mode even if they wanted to do so. This resulted in the establishment of an authoritarian legal system which was nevertheless largely responsive to the resident colonists. This bias was apparently due to the necessity of maintaining solidarity among colonists in view of the weakness of colonial rule and capitalist penetration.

An important adjunct of Fitzpatrick's theory is that the conservation of the traditional mode of production through an authoritarian legal system also served to counter class formation and consolidation which the capitalist penetration would have necessarily entailed. However, the economic crises of the period between the two world wars, and capitalism's more intense penetration in the third world after the second world war, prompted the emergence and political assertion of class elements which built on the aspects of the traditional mode. "In this situation, the predominant response of a still weakly-embedded capitalism was the promotion and recruitment of compliant resident class elements whilst maintaining and extending the containment of potentially antagonistic elements."[49] The coercive aspect of law thus began to receive the ideological admixture. This process was intensified as third world countries progressed towards political independence. Racially biased laws which hindered the emergence of a compliant national ruling class were removed, and law and state became capable of enforcing capitalist relations, often in opposition to relations rooted in the traditional mode of production.

When the post-colonial stage arrived, the national ruling class was more firmly established; class formations characteristic of capitalism had emerged; and law and state took on more of the functions which they serve under the capitalist mode of production. Fitzpatrick concludes that economic determinants at this stage reduce the need for resort to legally coercive measures to force production and maintain the economy: "The operative combination of the capitalist and tra-

ditional modes of production is now more structurally set; workers and their families are more reliant on wages; peasants are more tied to production for the market; and there is the ruralization of the cities."[50] Even at this stage, however, the need for conservation of the traditional mode and for protective regulations remains and is heightened by "the disruptive aspects" of the emergence of the national ruling class. This, and "the limited transforming effect of capitalism, result in the retention by law and state of their colonial, authoritarian cast as well".[51]

One of the problems encountered by Fitzpatrick in the formulation of his complex theory is the location of the class elements emerging in the third world within the traditional Marxist groupings of bourgeoisie and proletariat. He observes that the bourgeoisie, for example, can be seen as internally divided into the metropolital bourgeoisie, who were responsible for the introduction of capitalism to the colonial setting, and the national bourgeoisie, who partly consist of the compliant resident class co-opted into the capitalist mode of production. The national bourgeoisie can also be seen as subdivided into the commercial or economic or urban bourgeoisie, the Kulak class or big peasantry or rural bourgeoisie, and the petty or organizational or bureaucratic bourgeoisie. The big peasantry and the bureaucratic bourgeoisies, Fitzpatrick contends, "cannot be placed unequivocally in the bourgeois mould".[52] Similarly, the peasantry and urban-based petty commodity producers cannot be unequivolcally located within the proletariat mould. These two groups, unlike the working class, have significant control over their means of

production. They also have "an operative commitment to both the capitalist mode of production and the traditional mode".[53] Peasants, for example, produce their crops within the traditional mode and realise their surpluses within capitalist markets.

Despite the contradictory locations of the various class elements, Fitzpatrick suggests that "the main lines of class analysis can be presented in terms of a bourgeoisie, a proletariat, a peasantry and a class element of urban-based petty commodity producers".[54] Political power in post-colonial third world countries rests with the national element of the bourgeois, but their economic position is weak and subordinate to that of the metropolitan element, "that great absent member".[55] The national bourgeoisie may attempt to assert itself and to control the metropolitan bourgeoisie, but this serves to render the presence of the latter more acceptable in a new, post-colonial political climate. The potency of law to control the metropolitan bourgeoisie is very limited. The purported controls, moreover, take the form of wide discretionary powers which conveniently fail to specify the criteria of accountability and thereby mask a fundamentally co-operative relationship between the state, the metropolitan bourgeoisie and the national bourgeoisie. Fitzpatrick concludes that one of the most notable functions of law and state in independent third world countries is to mediate between the different elements of the bourgeoisie, but since the national element is "economically stunted" and dependent on the metropolitan element, the mediating function is discharged in a manner predominantly responsive to the "great absent member".[56]

Of the few theories and conceptions of law and development reviewed in the chapter, Fitzpatrick's general framework and theory can be substantiated by some of the general conclusions from the major sections of this thesis and is most pertinent to a fuller understanding of law and agrarian change in Malawi. Chapter III, for instance, has shown that land was prised out of the traditional mode and reposed under the control of resident colonists at the inception of colonial rule. Through devices like hut tax and Thangata, some peasant producers were forced to supply labour to the resident colonists. Yet, at the same time, "non-disturbance clauses" and some of the colonial land legislation reviewed in Chapter IV purported to restrain the resident colonists from effecting a total usurpation of African land and labour rights. Within Fitzpatrick's conception, this could be regarded as an attempt to conserve the traditional mode of production from the solvent effects of even the weak presence of the capitalist mode. It has also been observed that colonial agrarian laws were authoritarian and paternalistic in cast, racially biased, and generally responsive to the demands of the resident colonists, the colonial administration and the capitalist mode of production. As independence approached, with the ascendancy of African elites into positions of political influence, some of the agrarian laws which were particularly offensive to the Africans were removed from the statute books. Fitzpatrick would regard this as a removal of obstacles to the recruitment of a compliant national ruling class and bourgeoisie.

In the post-colonial era, as Chapter VI has concluded, authoritarian features and broad discretionary powers have not yet disappeared from agrarian legislation. The fuzziness of the law here, Fitzpatrick would argue, helps to disguise a co-operative relationship between the state, the metropolitan bourgeoisie and the national ruling elites. Even the post-colonial land reform statutes detailed in Chapters VII to IX can be accounted for under Fitzpatrick's theory as an aspect of "bourgeoisie legality" and part of the general attempt to enforce capitalist relations, often in opposition to relations rooted in the traditional mode of production. He contends that with the emergence of a national bourgeoisie, the system of capitalist law and state seeks to foster the idea of a new economic man who "can seek to have his will override the personalized obligations of traditional community, and to liberate 'private' property from the integral ties of the collective order".[57] New land laws which "facilitate the obtaining of individual ownership of communal land",[58] management and technical (extension) services, development grants and easy credit, are some of the devices used to foster the emergence of this new economic man and class element.

Although Fitzpatrick's framework and theory can be substantiated by some of the general conclusions of this study, a review of his book by Professor Ghai reveals some weaknesses and flaws which should not be overlooked.[59] Professor Ghai suggests that the theme of the importance of the conservation of the traditional mode of production is perhaps overdone, and that political control during the early days of colonial rule, rather than the weaknesses of capitalism, determined

the balance between modes of production and the extent to which the traditional mode was to be conserved. He also queries the continued reference to the conservation of the traditional mode in contemporary situations, when the character of this mode (in terms of both production and exchange) has changed beyond recognition. An additional criticism which is even more pertinent to this study reads:

> "... I also think that the author has exaggerated the importance of law, and ascribed an efficacy to it which is unwarranted. Although he has ably sketched in the economic and political context, he has failed, except in one or two instances, to examine the reproducing dynamics of social forces, which may sometimes reinforce law but at other times divert or nullify its impact. Partly as a result, he occasionally fails to distinguish the consequences of a law from its intention, and ascribes total rationality and prescience to the ruling class. The study has a uni-directional quality, in which all laws and executive action are made, in the design of a grand conspiracy, to fit the framework. Major changes of strategy are outlined, but little indication is given of the ebb and flow of daily struggles, compromises, concessions, uncertain intentions and faltering policies."[60]

In support of this comment, we can point to Chapter V, which has indicated that although marketing laws were generally responsive to colonial capitalism, the interests of the colonial administration and the resident colonists were not always congruent. There was much haggling and bargaining over the form and content of the law, and this often resulted in the adoption of short-sighted policies which made little economic

sense, even for the purpose of integrating peasant producers into the capitalist mode of production. It is somewhat fictional to depict the ruling class in both the colonial and post-colonial periods as actors who constantly and consciously shaped the law to further the interests of the metropolitan bourgeoisie. This result was sometimes achieved fortuitously. However, the defects of Fitzpatrick's theory notwithstanding, it is still more pertinent to an understanding of law and agrarian change in Malawi than the earlier law and development theories. It is a theory which most comprehends the general finding of this study that it is fallacious for lawyers to see in legislation the most efficacious instrument for positive agrarian change.

NOTES TO CHAPTER X

1 Gunnar Myrdal, "The Soft State in Underdeveloped Countries", U.C.L.A. Law Review, Vol. 15, 1968, pp. 1118-9.

2 See, for example, J.D. Nyhart, "The Role of Law in Economic Development", Sudan Law Journal, 1962, pp. 394-410; and W. Friedman, "The Role of Law and the Function of the Lawyer in the Developing Countries", Vanderbilt Law Review, Vol. 17, 1963, pp. 181-191.

3 For a comment on this Austinian approach to law-making under the colonial situation, see R. Seidman, "Law and Stagnation in Africa", Zambia Law Journal, Vol. 5, 1973, pp. 43-49.

4 For an interesting account on the ineffectiveness of law as a tool for social transformation, see A. Allott, The Limits of Law, London, Butterworths, 1980, Chapter 6 entitled "Limits on the Utility of Law for Social Transformation".

5 For a discussion on "participation" in developmental processes, see I. Bothomani, "People's Participation in the Development Process: Problems and Prospects", Journal of Social Science, Vol. 8, 1980/81, pp. 47-59.

6 J. Heyer, P. Roberts and G. Williams (ed.s), Rural Development in Tropical Africa, London, Macmillan, 1981, p. 5.

7 See Heyer et al., passim.

8 See Note 2 above; J. Merryman, "Comparative Law and Social Change: on the Origins, Style, Decline and Revival of the Law and Development Movement", American Journal of Comparative Law, Vol. 25, 1977, pp. 457-491; and E.M. Burg, "Law and Development: A Review of the Literature and a Critique of Scholars in Self-Estrangement",

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9 See J.W. Harris, Legal Philosophies, London, Butterworths, 1980, p. 234.

10 R. Pound, "The End Purpose of Law", in Lloyd, Introduction to Jurisprudence, 4th edition, London, 1979, p. 383.

11 Harris, op. cit., p. 246.

12 D. Trubeck, "Max Weber on the Law and Rise of Capitalism", Wisconsin Law Review, 1972, p. 740, and, generally, "Toward a Social Theory of Law: An Essay on the Study of Law and Development", Yale Law Journal, Vol. 82, No. 1, November 1972, pp. 11-16.

13 Ibid., passim.

14 Ibid.

15 M. Galanter, "The Modernization of Law", in M. Weiner (ed.), Modernization, New York, 1966, pp. 154-156.

16 See D.M. Trubek and M. Galanter, "Scholars in Self Estrangement: Some Reflections on the Crises in the Law and Development Studies in the United States", Wisconsin Law Review, 1974, pp. 1070-1080.

17 Ibid., pp. 1076-1079.

18 This is Professor Allott's description. See The Limits of Law, p. 178. It is beyond the scope of this thesis to discuss the post-colonial reforms of the legal system in Malawi. For an introductory study see L.J. Chimango, "Tradition and Traditional Courts in Malawi", X CILSA, pp. 39-66.

19 Trubek and Galanter, op. cit., p. 1099, and generally, pp. 1080-1099.

20 F.G. Snyder, "The Failure of 'Law and Development'", Wisconsin Law Review, 1982, p. 344.

21 See, for example, R. Seidman, "Law and Development: a General Model", Law and Society Review, Vol. 6, 1972, pp. 311-342; "Law and Economic Development in Independent, English Speaking, Sub-Saharan Africa", in T.W. Hutchinson (ed.), Africa and the Law, The University of Wisconsin Press, 1968, pp. 3-74; and "Law and Development: the Interface Between Policy and Implementation", Journal of Modern African Studies, 13, 4 (1975), pp. 641-652.

22 R. Seidman, "Law and Development: the Interface Between Policy and Implementation", pp. 644-645.

23 Ibid., p. 646.

24 Ibid.

25 R. Seidman, The State, Law and Development, London, 1978.

26 Myrdal, op. cit., p. 1120.

27 Seidman, op. cit., p. 18.

28 Ibid., pp. 464-469.

29 P. Brietzke, "Law and Rural Development in Africa, With Emphasis on Malawi", Zambia Law Journal, Vol. 5, 1973, pp. 1-37.

30 Ibid., pp. 2-4 and pp. 13-14.

31 Ibid., pp. 29-36.

32 P. Brietzke, Law, Development and the Ethiopian Revolution, Bucknell University Press, 1982. See pp. 77-79 for the "instrumentalist" conception of law in this work.

33 See D.V. Williams, "State Coercion against Peasant Farmers: The Tanzanian Case", Journal of Legal Pluralism and Unofficial Law, No. 20, 1982, pp. 95-127; Allott, op. cit. p. 302; and R. Martin, "The Use of State Power to Overcome Underdevelopment", Journal of Modern African Studies, 18, 2 (1980), pp. 323-324.

34 See, generally, Martin, loc. cit.

35 Ibid., p. 322.

36 See F.G. Snyder, "Law and Development in the Light of Dependency Theory", Law and Society Review, Vol. 14, 1980, pp. 723-804.

37 Ibid., p. 749.

38 Ibid., p. 748.

39 Ibid., p. 770.

40 See K. Marx, Preface to Contribution to Critique of Political Economy (1859), in Lloyd, op. cit., pp. 765-766; and, generally, Chapter 10 for Marxist theories of law and state.

41 E. Pashukanis, Theory of Law and Marxism (1924), in Lloyd, ibid., p. 790, and, generally, pp. 786-792.

42 Lenin, The State and Revolution (1912), in Lloyd, Ibid., pp. 774-776.

43 H. Berman, Justice in the U.S.S.R. (1963), in Lloyd, Ibid., pp. 796-801.

44 Harris, op. cit., p. 256.

45 P. Fitzpatrick, Law and State in Papua New Guinea, Academic Press, London, 1980, especially Chapters 1 and 2.

46 Ibid., p. 2.

47 Ibid.

48 Ibid., pp. 36-38.

49 Ibid., p. 248 and p. 39.

50 Ibid., p. 41.

51 Ibid.

52 Ibid., p. 20.

53 Ibid., p. 24.

54 Ibid., p. 27.

55 Ibid., p. 21.

56 Ibid., p. 36

57 Ibid., p. 42.

58 Ibid.

59 Y. Ghai, Journal of Legal Pluralism and Unofficial Law, No. 20, 1982, pp. 137-141.

60 Ibid., p. 140.

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