



Law, Social Justice & Global Development
(An Electronic Law Journal)

Customary Land Tenure Reform and Development: A Critique of
Customary Land Tenure Reform under Malawi's National Land
Policy

Chikosa Mozesi Silungwe
PhD Candidate
School of Law
University of Warwick

c.m.silungwe@warwick.ac.uk

This is a **Refereed Article** published on: 23 April 2009

Citation: Silungwe, C. 'Customary Land Tenure Reform and Development: A Critique of Customary Land Tenure Reform under Malawi's National Land Policy', 2009 (1) Law, Social Justice & Global Development Journal (LGD). http://www.go.warwick.ac.uk/elj/lgd/2009_1/silungwe

Abstract

Development, as a post–Second World War phenomenon, has witnessed the dominance of the market at the close of the twentieth century. In relation to agrarian reform, neo–liberal land reform models laud individual title as a catalyst for economic growth. Customary land tenure has been adjudged anathema to development as it is supposedly economically inefficient. The economy efficiency argument is not new. In Malawi, colonial and post–colonial land law and policy has favoured individual title in pursuit of a ‘capitalist’ economy. In 2002, Malawi adopted a National Land Policy. Despite the claims of a fair redistribution of land to the ‘poor’, the policy adopts a neo–liberal approach to customary land tenure reform, inter alia, to promote a formal land market. The implications of the neo–liberal framework for the ‘poor’ is that it will benefit the ‘non–poor’; it leads to the integration of customary land into the global economy; it perpetuates landlessness on the part of the ‘poor’ who might not withstand the vagaries of a formal land market. In this vein, the neo–liberal approach to customary land tenure reform under the policy will undermine development. I suggest that an effective initiative to empower the ‘poor’ would be the creation of a trust over all land in a traditional land management area with a traditional authority as the public trustee of his or her community. The trust must be created under statute and may retain the elements of customary land law. Macroeconomic strategies may be developed that promote microfinance initiatives that would complement customary land tenure.

Keywords

Land Reform, Customary Land Tenure Reform, Development, Malawi

Author’s Note

The article is a minimally modified version of the dissertation submitted to Warwick Law School, The University of Warwick in partial fulfilment of the requirements of the degree of Master of Laws (Law in Development). The dissertation was submitted to the School in September, 2005.

1. Introduction

Malawi adopted a National Land Policy in January, 2002. The policy, formulated under the aegis of the World Bank, is grounded in a neo-liberal approach to development. The thrust of the policy is that it 'reflect[s] the imperative of changing economic, political and social circumstances' in Malawi (Government of Malawi, 2002:8). The policy forms the basis for 'a comprehensive land law with immense economic and social significance' (Government of Malawi, 2002:8). It seeks to provide 'a sound institutional framework for democratizing the management of land and introduces [...] procedures for protecting land tenure rights, land based investments and management of development at all levels' (Government of Malawi, 2002:8).

The individualization, titling and registration of rights in land ('individual title') are a key tenet of the policy. This stems from the fact that neo-liberal discourse has influenced agrarian reform in the manner that individual title is lauded for its supposedly economic efficiency. In this neo-liberal framework, the predictability that is apparently characteristic of individual title is cherished as a basis for development. In this vein, customary land has been a site of 'conflict' in post-colonial States like Malawi where the competing interests of received law¹ and customary law converge.

The broad aim of this article is to examine whether market-led agrarian reform enhances or undermines development in a predominantly agrarian political economy. Hence, I critique the neo-liberal approach to customary land tenure reform in Malawi under the policy by addressing the following issues: the goal of neo-liberalism in light of development especially in post-colonial² States like Malawi; the goal of customary land tenure reform in Malawi; the link between neo-liberalism and customary land tenure reform in Malawi; and the alternative forms of land tenure that may be compatible with development in Malawi.

The issues are pertinent when one looks at Malawi's economic indicators. The population of Malawi at the time of the last census in 2008 is estimated at 13.1 million. The annual intercensal population growth rate is 2.8 per cent (Government of Malawi, 2008). On the basis of national estimates carried out in 2002, the country's population is estimated to double by 2020. The population is predominantly rural with approximately 85 per cent staying in the countryside. It is estimated that 65.3 per cent of the population is 'poor';³ with 28.2 per cent of the population living in 'dire poverty'. Population density is estimated at 139 persons per square kilometre (Government of Malawi, 2008: 10) and is projected to rise to 220 persons per square kilometre by 2020 (Government of Malawi, 2002). The population pressure on cultivable land is critical and 40 per cent of the smallholder farming population has a landholding size of less than 0.5 hectare per household. In spite of massive inequality in land distribution, the smallholder farming population contribute 70 per cent of annual agricultural produce.⁴ The economy of Malawi is heavily dependent on agriculture which accounts for approximately 42 per cent of GDP and 90 per cent of the country's exports. Tobacco is the main foreign exchange earner. Maize is the main staple food and is the most common crop in subsistence agriculture (Government of Malawi, 2002: 15-17). The centrality of land to the political economy will remain in the foreseeable future following the negative impact of the structural adjustment programmes which has led to the continued shrinkage of the manufacturing sector's contribution to GDP, from 14 per cent in 2002 to 11 per cent in 2007 (Chinsinga, 2008:2).

1.1. Theoretical Framework

The critique of a neo-liberal approach to development examines arguments advanced by neo-liberals like Fukuyama (1992) and Hayek on the one hand; and the approach of Escobar (1995) and analyses such as Adelman and Paliwala (1993) and Purdy (2004) on the other. I look at the goal of customary land tenure reform in the context of a post-colonial society like Malawi using critical legal theory advanced by the critical legal studies movement and the theorization of legal pluralism advanced by Benda-Beckmann (1988, 2000), Griffiths (1986), Merry (1988) and Boaventura Santos (2002). The article also looks at the issue of the commoditization of customary land as a mechanism for integration into the global economy in light of globalization literature especially Fortin (2005). However, the nature of land reform means that the various theoretical approaches overlap in the discussion of the issues.

1.2. Structure of the Article

In section 2 of the article, I discuss the concept of 'development' as discourse. I proceed on the basis that 'development' is a post-World War II phenomenon which has been imposed on the global South through western hegemony. The imposition facilitates global capitalism (Escobar, 1995: 57, 98-99). Indeed if the imposition facilitates global capitalism in the broader scheme for the quest for 'modernity', the interests of the 'poor' are compromised.

In relation to land, there is a spurious link between individual title and economic growth. Notwithstanding various studies (Borras, 2005; Deininger and Binswanger, 2004; McAuslan, 2003; Platteau, 1996) that show that individual title does not automatically lead to economic growth, the persistence of market-led agrarian reform reflects the zeal of its proponents to integrate customary land into the global economy at the expense of the 'poor' (Benda-Beckmann, 2000; Fortin, 2005). This is the case because the 're-design of a property regime through individual title facilitates the flow of global capital' (Benda-Beckmann, 2000: 3).

In section 3, I trace customary land tenure reform under colonial and post-colonial land law and policy in Malawi. Colonial and post-colonial law and policy are similar as their aim has been the entrenchment of a 'capitalist' economy (Kanyongolo, 2004, 2005; Krishnamurthy, 1972). Customary land tenure was suppressed under the two periods as it had been adjudged anathema to development (Nankumba, 1986; Ng'ong'ola, 1986). While the colonial agenda benefited white settlers, post-colonial land law and policy benefits the 'non-poor' in the country (Kanyongolo, 2005:123).

For the discussion of Malawi's National Land Policy in section 4, I restrict myself to looking at the policy as it relates to customary land tenure reform and development. While acknowledging the underlying social and economic factors on land; inter alia, the effects of colonial and post-colonial land law and policy which led to landlessness of the 'poor', the policy has persisted with a neo-liberal conceptualization of land (Government of Malawi, 2002). Here I challenge the neo-liberal approach to customary land tenure reform and argue that a meaningful approach to security of customary land tenure entails the creation of a trust under statute that allows customary land law to govern that category of land. Any other mechanism commoditizes customary land and enhances its integration into the global economy. In this respect, the neo-liberal approach to customary land tenure reform under the policy, with its emphasis on the growth of a formal land market, will benefit the 'non-poor' at the expense of the 'poor' (Fortin, 2005; Moyo, 2004). In this vein, the neo-liberal approach to customary land tenure reform undermines development.

In the conclusion I propose that customary land tenure reform in Malawi must be examined in the context of a larger social, politico-economic enterprise. The history of agrarian reform in Malawi has been one of increasing landlessness. Under colonial rule, the 'poor' constituted a supply of labour for white estate (or large scale) agriculture. Post-colonial land law and policy deprives the 'poor' of any meaningful proprietary rights in customary land and they have remained tenants at will at the mercy of the post-colonial State. Malawi needs to develop legal mechanisms that truly entrench customary land tenure in favour of the 'poor'. The creation of a trust concept over customary land is one such mechanism. The challenge for Malawi is to develop ingenious macroeconomic strategies that complement security of customary land tenure.

2. Development as Discourse

2.1. The Construction of 'Development'

Foucault is the doyen on discourse (Escobar, 1995:5). According to Foucault, discourse entails 'the process through which social reality comes into being' through 'the articulation of knowledge and power' (in Escobar, 1995:39). Hence, development is a discourse because 'certain representations' have dominated its shape and reality while other 'representations' have been disqualified 'and even made impossible' (Escobar, 1995: 5). Development becomes a 'tale of domination' (Escobar, 1995: 5).

Hence, development, as it has been imposed on the global South, is a post-Second World War phenomenon. Its genesis is the proposal by President Harry Truman of a 'fair deal' aimed at improving the lives of people inhabiting underdeveloped areas (Escobar, 1995:3). Gordon and Sylvester (2004:11) argue that '[i]f President Truman discovered global poverty, the World Bank quantified it [...] by defining countries with an annual per capita below \$US100 as poor.' Hence, they contend that 'eradicating poverty, as well as the expanding disparity between industrialized and [less developed] countries, became an important challenge facing the international community' (Gordon and Sylvester, 2004:12). Economic growth became the panacea for poverty in less developed countries (Escobar, 1995:3-4, 21-24).

The roadmap to development has been dominated by the quest for modernity. Adelman and Paliwala (1993:4) contend that there was inherent imperialism in the construction of development with its emphasis on the 'liberal world view, liberal legality and jurisprudence.' Hence, Escobar (1995:39), in describing the role of modernization in development discourse, states that 'modernization [was] the only force capable of destroying archaic superstitions and relations ... [and] [i]ndustrialization and urbanization were seen as the inevitable and necessarily progressive routes to modernization.'

Various theories of modernization⁵ have been at the centre of development discourse culminating in the emergence of neo-liberalism. These theories are a result of western hegemony. Adelman and Paliwala (1993:9) contend that '[t]he amorphous nature of development theory both results from and promotes a tendency towards the colonization of meaning, in which concepts such as development are not merely areas for debate, but are constructed as myths and countermyths.' Hence, the 'myth of modernization' assumes a 'millennial cult' (Adelman and Paliwala, 1993:9; Paliwala, 2003). Fitzpatrick (1993:27ff) also asserts that the 'modern' and the 'traditional', the 'rational' and the 'irrational', and the 'civilized' and the 'uncivilized' have been 'colonized by the historical domination of Western capitalism.' Industrialized countries are assumed to possess the 'expertise, technology and management skills' to bolster development which are lacking elsewhere (Escobar, 1995: 47-8). Hence, development mirrors the ideological hegemony of industrialized countries in the North.

2.2. The Nature of Neo-liberalism

In tracing the dominance of 'economism' in development discourse, Kendall (2003) contends that after the Second World War, liberalism in the North took a new turn in two phases. The first phase encompassed 'welfarism' in terms of which development was premised upon Keynesian economics.⁶ The second phase, which occurred in the 1980s, encompassed development based on liberal and deregulated market with the State playing a facilitative, regulatory role (Kendall, 2003:3). This concept is called neo-liberalism. Hence, since its emergence in the 1980s, neo-liberalism has gained momentum with 'the end of the Cold War [and] the collapse of the Soviet Union' (Thome, 2000:51; Harvey, 2007).

Neo-liberals assert that market rationality ought to be extended to the construction of the 'social' and the need for the 'social' to become the 'economic' (Kendall, 2003:4-9). Fukuyama (1992) lauds the 'increasing homogenization of all human societies' in pursuit of 'economic modernization.' Friedrich Hayek has advanced an even more radical conceptualization of neo-liberalism. He contends that the market is neither 'a natural phenomenon' nor 'is it a result of a contrived government policy', it is something like 'a spontaneous social order' – a catallaxy – arrived at through rules of conduct. As the market is a 'culture' and not 'reason', Hayek concludes that it is unreasonable to have it regulated by the State. The role of the State is to secure the rule of law (Hayek, 1976: 107-132; Kendall, 2003:13).

Hence, neo-liberals argue that 'an efficient market leads to efficient outcomes' (Stiglitz, 2002: xi). In this respect, neo-liberalism entails a list of policy measures ostensibly designed to produce economic stability and growth. These measures include: maintenance of fiscal discipline; restriction of budget deficit to two per cent of GDP; cutting marginal tax while simultaneously extending the tax base; capital market liberalization; lower exchange rates to induce exports; trade liberalization through the lowering of tariffs on imports and exports; abolition of barriers to foreign direct investment; privatization of state owned enterprises; and the establishment of a clear regime of property rights (Purdy, 2004:3). Development is described in terms of 'integration into the global economy' and 'as economic liberalization, privatization and embracing the 'free market'' (Gordon and Sylvester, 2004:44). The World Bank and the International Monetary Fund have embraced neo-liberalism as the orthodoxy for the development of less developed countries and its adoption is a conditionality for loans and grants as the panacea for economic growth (Gordon and Sylvester, 2004: 45; Purdy, 2004:3; Stiglitz, 2002:xii; Serra and Stiglitz, 2008). The presumption of neo-liberalism is that socio-political factors could be subordinated to 'economic logic' (Purdy, 2004:4). In relation to post-colonial States, Purdy (2004:7) asserts that 'neo-liberalism constitute[s] a theory of modernization, the movement from the traditional, place-based lives of inherited roles and obligations to mobile existences where luck and skill matter more than descent in fixing one's place in the world, and choice more than inheritance in determining beliefs and identity.'

Against this background, in the early 1990s some scholars argued that development discourse was at a crossroads especially in the face of continuing 'underdevelopment' in less developed countries (Adelman and Paliwala, 1993).⁷ Adelman and Paliwala (1993:2-3) identify two views that dominate the explanation of 'underdevelopment'. First, development is 'evolutionary' and entails an 'imitative process' in which the less developed countries ought to 'gradually assume the qualities of the [industrialized countries]' (Adelman and Paliwala, 1993:2). The alternative is that development by less developed countries is impossible 'in a global political economy dominated by 'capitalist' relations' (Adelman and Paliwala, 1993:3).

There has emerged a third view in development discourse which has been aptly called the 'New Consensus' (Purdy, 2004:15; Serra and Stiglitz, 2008). The core premise of this consensus is the emphasis on the relationship between economics and politics. Hence, the New Consensus 'rests on the acknowledgement that ... political institutions [are] essential to the legitimacy of economic reforms' (Purdy, 2004:16). This is as much the logic of good governance (Commission for Africa, 2005:30; World Bank, 2003: 1-3) as the Marxist logic of 'political economy' in development discourse. Under the logic of good governance, the World Bank has

contended that land reform must be ‘more human-centred’ in its approach to rights in land; foster pro-poor economic growth; less driven by ‘economic prescription’; and must recognize the diversity in the notions of property rights (World Bank, 2003; Toulmin and Quan, 2000).

The ‘New Consensus’ is a misnomer if the dissensus in the World Bank is taken into account (Alvaro Santos, 2006; Whitehead and Tsikata, 2003; Stiglitz, 2002; Serra and Stiglitz, 2008). Whitehead and Tsikata (2003:80–88) point out that the complex institutional set up of the Bank often leads to different focus and expertise among its various divisions. However, the dissensus is reconciled under the rule of law orthodoxy as a constitutive part of good governance (Alvaro Santos, 2006:255, 287–288).

2.3. A Critique of the Neo-liberal Approach to Development

Having discussed the broad parameters of development and the location of neo-liberalism in it, three points may be raised in a critique of neo-liberalism as a basis for development. First, neo-liberalism delegitimizes non-economic factors. There is an overemphasis on the *homo economicus* who is entrusted with making rational, best choices in the market (Brohman, 1995:297). Second, neo-liberalism places little emphasis on understanding the differences between markets in industrialized countries and less developed countries. The assumption of uniformity of markets, open competition and economic, rational behaviour is flawed especially in relation to less developed countries (Brohman, 1995:299; Purdy, 2004:14). Finally, the assumption of an ‘atomistic individual’ devoid of social relations is again flawed in relation to less developed countries (Brohman, 1995:300). This assumption fails to recognize that African society, for instance, remains relatively collective and the imposition of neo-liberal economic orthodoxy may not translate into economic growth (Chanock, 1985; Chibundu, 1997).

2.4. Law and Development

Law, like modernity, has played a central role in development discourse. The ‘old’ law and development movement of the 1960s and 1970s located law at the centre of the ‘modernization of Africa, Latin America and Asia’ (Chibundu, 1997). Chua (1998: 12) argues that the ‘old’ law and development movement involved ‘supplanting Third World ‘localism’ [...] with unity, uniformity and universality of [the] modern Western State.’ Hence, Trubek and Galanter (1974:1072) (in Chua, 1998: 12–13) observed that the ‘old’ law and development movement failed in its quest for modernity because it was ‘ethnocentric and naïve.’

In the wake of the demise of communism, the ‘new’ law and development movement is located in the context of globalization (Rose, 1998). Law remains central to development under the new mantra of good governance (Rose, 1998; Stiglitz, 2002: 53ff). The ‘new boom’ of law and development favours the market (Benda–Beckmann, 2000: 3–4; Rose, 1998).

The ‘old’ and ‘new’ law and development movements are similar in their quest to ‘marketize’ property (Benda–Beckmann, 2000:3–4). Good governance entails creating the right economic, social and legal framework to encourage economic growth and allow the ‘poor’ to participate in it (Commission for Africa, 2005:30, 52; World Bank, 2003: 1–3). In the case of land, the appropriate legal framework has invariably been individual title (Benda–Beckmann, 2000: 3).

In the pursuit of modernity, law itself is a part of development (Chibundu, 1997). Law is often postured as the liberal, positive, western notion of law (Chibundu, 1997). As development has entailed the transformation of the ‘traditional’ to the ‘modern’, the customary legal order has had to be transformed and formalized in a legal order that prioritizes the individual and the market (Benda–Beckmann, 2000:3; Chibundu, 1997). In this sense, the quest for modernity has meant the transformation of customary law through supplanting western notions of law (Benda–Beckmann, 2000: 3–4; 8; Mamdani, 1996). This is striking as the ‘old’ law and development movement failed, in concert with development economics, to achieve development in the global South precisely because it sought to ignore ‘the strong grip of the tribe, clan and the local community than the ‘nation-state’’ in local political economies (Chua, 1998:12–13). The challenge for law and development today is to understand customary law rather than to treat such law as the problem in development discourse. An understanding of customary law will also highlight the deeper connectivity between law and society in indigenous communities in Africa and elsewhere (Chanock, 1985; Chibundu, 1997; Chua, 1998; Griffiths, 1986; Merry, 1988).

2.5. The Nature of Customary Land Tenure

Customary law is diverse. Nonetheless, a common thread in the nature of customary land tenure under customary law is that the right of ownership is reposed in perpetuity in the ‘community’ and land is inalienable (Griffiths, 1981:4; Kishindo, 2004: 214; Machika, 1983:278–279). Members of a community have the right to

occupy and use land allocated to them to the exclusion of all others. The ‘chief’ is the trustee over the land and has power to allocate land to members of his or her community (Msisha, 1999: 4). Allocation of land is at the level of a household and once land has been thus allocated, the right to occupation and use is in perpetuity (Nankumba, 1986: 59–60). The security of tenure lies in the social networks that accrue to a household as members of a community (Nankumba, 1986: 59–60). Hence, control over land by the ‘chief’ becomes a source of political power (Benda–Beckmann, 2000:10; Chanock, 1985; Cross, 2002: 2).

Mamdani (1996) has argued that the notion of community rights that places it in conflict with individual rights is a distortion of customary land tenure by colonial powers (1996:139). He contends that the right of occupancy and use was ‘individual’ to every household forming part of a community (1996:139). He argues that the second distortion relates to the nature of ‘community’ under customary land tenure. Community did not necessarily mean ‘tribe’ (1996:140). He points out the existence of forms of ‘leases’ to persons who did not belong to the same tribe. Even though land could be leased, it could not be alienated (1996: 140).

2.6. Land Reform and Development

The link between land reform and development in Africa can be traced to the colonial encounter. The colonial agenda generally meant creating a ‘capitalist’ economy in sectors like estate (or large scale) agriculture. Indigenous communities were relevant as a supply of labour. These communities suffered land losses through confiscation and expropriation through the declaration of colonial sovereignty and alienation under white private land titles. The underlying economic interests of the colonial powers also entailed supplanting the legal order whereby received law prevailed over customary law (Mamdani, 1996). Land expropriation by the colonial powers also meant land law reform (Cross, 2002: 2; McAuslan, 2003: 4–5). Customary law became a scapegoat for ‘underdevelopment’ (Benda–Beckmann, 2000: 8). Benda–Beckmann (2000: 8) argues that those with the right to exercise political power will determine whether a claim or relation is ‘legal’. In this case, customary land tenure was delegitimized by the colonial power.

In the wake of decolonization and the emergence of the ‘old’ law and development movement, individual title has taken centre stage in agrarian reform. In the case of the African colony and postcolony, Roger Swynnerton’s monograph published in 1955 remains the seminal work on customary land tenure (Swynnerton, 1955 in Okoth–Ogendo, 1976). The monograph – often referred to as the ‘Swynnerton Plan’ – proposed a solution to the (African) land question through the reform of customary land tenure, consolidation of fragmented holdings, provision of freehold title, promotion of estate agriculture, development of a credit market, and liberalization of the export agricultural commodity market. Hence, the Swynnerton Plan contained a three–tiered plan as follows: land adjudication to ‘phase out’ customary tenure; land consolidation to allow greater specialization in cash crop production; and land registration to provide for security of ownership for purposes of promoting a vibrant land market (Swynnerton, 1955 in Okoth–Ogendo, 1976).

Individual title has also been at the core of law and economics scholarship pioneered by the University of Chicago (the ‘Chicago School’) and most notably through Harold Demsetz’s theory of property rights (1967: 347–355). Demsetz basically contends that individual title allows an efficient and vibrant land market to flourish as it is freely alienable and is less complicated when pledged as collateral for access to credit. Hence, Demsetz concludes that communal property rights are undesirable as they have greater incidence of externalities and the gains of internalizing such rights are much less than is the case with individual property rights (Demsetz, 1967:354–355).

The World Bank also adopted individual title when it issued a Land Reform Policy Paper in 1975 as a strategy for ostensibly combating rural poverty (in Byagumisha and Zakout, 2000:1–2). The paper advocated the abandonment of communal land tenure altogether (in Byagumisha and Zakout, 2000:2). Platteau (1996:30) describes how the ‘evolutionary theory of land rights’ has developed in development economics. The theory states that population pressure on land and market integration leads to the evolution of interests in land towards individual title. Recently, De Soto lauded the liberal conceptualization of property as a catalyst for development. De Soto contends that the key to economic development in the industrialized countries has been the establishment of a formal and comprehensive system of property rights (De Soto, 2001: 160ff). He further contends that a formal system of property rights facilitates a wide range of transactions including access to credit and incentives for investment (De Soto, 2001:160ff).

As alluded to earlier, the World Bank has reined the ‘New Consensus’ whereby, in the context of land reform, and its land policy division advocates the ‘human–centred approach’ to land tenure reform. While the rhetoric suggests a shift in the Bank’s approach, the implementation strategy has remained rooted in the evolutionary theory of land rights. In relation to the broader development agenda, Rittich (2006:205) has observed that the

'basic institutional architecture' and the 'core legal reform agenda' of the international financial institutions have not changed.

The emphasis on individual title for economic growth is misplaced (Sachs, 2005: 321). Diverse factors account for the success or failure of a property regime to foster economic growth (Sachs, 2005: 321). Deininger and Binswanger (1999) contend that in post-colonial States, there is a need to locate land in its social framework. They argue that 'land is not only the primary means for generating a livelihood but often the main vehicle for investing, accumulating wealth, and transferring it between generations. The regulation of access to land, the definition of property rights, and the resolution of ownership disputes has broad implications beyond the sphere of agricultural production' (Deininger and Binswanger, 1999: 247).

Agrarian reform has been concerned with two aspects: land redistribution and customary land tenure reform in the case of 'traditional' societies in less developed countries. Land redistribution is concerned with breaking land monopoly for the benefit of the landless (Borras, 2005). I am concerned with the customary land tenure reform aspects of agrarian reform here as this brings out the tension between received law and customary law in development discourse.

Agrarian reform discourse has shown that individual title does not automatically lead to investment and productivity (Deininger and Binswanger, 1999:248–249). Commoditization of land is only one aspect of land which may be 'grounded in a particular theory' and may not achieve uniform results when applied universally in different settings (McAuslan, 2003:5). There is a need to recognize the social and the economic aspects of land (McAuslan, 2003:5). As in the colonial period, in post-colonial States, land reform has always entailed land law reform where, as a result of the emphasis on the economic aspects of land, customary land law is supplanted to allow for a proliferation of a formal land market under statutory land law (McAuslan, 2003:5).

In sum, individual title has three implications when juxtaposed with customary land tenure. First, individualization of land ownership; second, the alienation of customary land under the domain of customary law and practice and placing them under statute; and finally, the creation of a land market (*cf.* Government of Tanzania, 1994: 113). This leads to the 'exclusion of diverse collective controls – whether of tribe, clan or family – common to many customary land tenure systems' (Government of Tanzania, 1994: 113).

The advocacy for individual title as a catalyst for the development of less developed countries is a myth that needs to be examined. This myth has become a 'globalized localism' in agrarian reform pursued in the transformation of the 'traditional' to the 'modern' (Boaventura Santos, 2002: 178–179). Cross (2002: 3) argues that in these communities 'what is the key is not ownership per se but access to social capital which customary entitlements permit.' He also asserts that '[l]ife on land [is meaningless] without the [social networks] which it subtends' (2002:3).

The persistence with agrarian reform based on individual title might reproduce a 'middle-class dominated economic and political regime' (Chibundu, 1997) and merely facilitate the integration of the customary land into the global economy to serve the interests of the 'non-poor' over those of the 'poor' (Benda-Beckmann, 2000: 3; Fortin, 2005).

3. Customary Land Tenure under Colonial and Post-Colonial Land Law and Policy in Malawi

In this section, I will focus on the underlying principles that have driven colonial and post-colonial land law and policy in relation to customary land tenure in Malawi.

3.1. Colonial Land Law and Policy

The British declared their colonial authority over Nyasaland (as Malawi was then called) through a notification issued by the Foreign Office on 14th May, 1891 and published in the London *Gazette* on 15th May, 1891 (Machika, 1983:46). The colonization lasted until 6th July, 1964 when Malawi was granted independence. The declaration of British sovereignty over Nyasaland inverted land and power relations that existed in the pre-colonial epoch. In general terms, the alienation of land that followed the declaration of British sovereignty transformed the local political economies. The indigenous communities, especially local elites, and the colonial State now co-existed in an altered social setting in view of the changes on land ownership through the incidence on eminent domain in favour of the colonial State and the transfer in title through the land sales between African chiefs and white missionaries and traders. The legal validity of these land sales has been

question and the sales have been adjudged 'dubious' (Kanyongolo, 2005: 121). This is the case because in point of law, it becomes contentious whether the land could be alienated by the chiefs against existing rights of customary landholders (Msisha, 1999: 7).⁸ While there is no legal basis for the failure of the colonial State to recognize customary land rights, the colonial agenda was to engender white commercial enterprise for a 'capitalist' economy in Nyasaland based on estate (or large scale) agriculture (Kanyongolo, 2004; Krishnamurthy, 1972:385).

The rights of the white settlers in the land acquired from indigenous communities were formalized by 'Certificates of claim' issued in 1902 by the colonial Secretary of State. This formalization of the rights in the land was meant to bolster white commercial enterprise (Kanyongolo, 2004; Krishnamurthy, 1972:385). Land consolidation through the Certificates was meant to trigger a vibrant estate agricultural sector which was to form the backbone of the economy in Nyasaland (Cross, 2002; Krishnamurthy, 1972).⁹ Even though in theory the Certificates provided that indigenous communities could not be removed from the land without the consent of the Commissioner, this 'protection clause' was routinely ignored by the white settlers (Msisha, 1999: 4). The status of the indigenous communities on these lands became contentious. In *Supervisor of Native Affairs v Blantyre and East African Company Limited*,¹⁰ the Supervisor petitioned the High Court to set aside an agreement between the defendant Company and certain 'native' headmen on an estate of the Company. He challenged the agreement which had been entered into between the Company and the headmen on the basis that it was inequitable and illegal as it was in breach of the rights of the 'natives' under the Certificate of claim issued to the Company in 1893. The Supervisor alleged that the Company subjected the 'native' community on its estate to payment of rental through provision of labour under the exploitative *thangata*¹¹ system in breach of the Certificate of claim. Second, he challenged the legality of the purported sale of land by the chiefs to the Company. The Supervisor argued that the 'native' headmen were not capable (under customary law) of entering into an agreement of the sale of land which involved the alienation of the land belonging to their community. Judge Nunan set aside the aspects of agreement regarding the provision of labour in lieu of rent – under the *thangata* system – as 'exceedingly unfair and one-sided.' However, he sanctioned the sale of the land by the chiefs and the legality of the Certificate of claim. In effect, the *Supervisor of Native Affairs* case entrenched the interests of white settlers as owners of the land at common law.¹² The status of these Certificates was eventually defined as valid private interests in land under the Nyasaland Protectorate (African Trust Land) Order-in-Council of 1950.¹³

The declaration of British sovereignty over Nyasaland and the Certificates of claim subverted the nature of customary land tenure under customary law. In theory, the right of use may be said to have remained intact but in practice the indigenous communities lost even that right. The right of use was now subject to consent of the white settler landlord (Griffiths, 1981:4; Machika, 1983: 278-279). By operation of the *Supervisor of Native Affairs* and *Cox* cases respectively, customary land tenure was immediately transformed through the imposition of a 'foreign' law; in this case, English common law which was later entrenched under statute. The indigenous landholders became tenants at will of settler landlords.

The Land Commissions of 1903 and 1920 sought to address increasing landlessness among the indigenous communities (Msisha, 1999: 12). Both Commissions recommended strict compliance with the 'protection clause' contained in the Certificates of claim whereby indigenous communities would not enjoy their right of occupancy through the exploitative provision of labour under the *thangata* system. The 1920 Commission further recommended the provision of land reserves for indigenous communities as long as it did not lead to loss of labour by the British settler community. Despite the enactment of the Land Ordinance (Native Locations) Act of 1904 and the Africans on Private Estates Ordinance of 1928, aimed at securing the 'possessory rights' of the indigenous communities to the land they now occupied as tenants of the white settlers, these two statutes were equally ignored by the settlers. It suited the settlers to continue with exploitative labour practices in their economic enterprise.

Between 1936 and 1949, successive Nyasaland Protectorate (Native Trust Land) Orders-in-Council were passed under which the colonial State could declare some parcels of land as 'native trust land' reserved for 'native' settlement. However, the State retained the interest in the land and had the power to dispose of such lands by grant or lease as private land (Msisha, 1999:13).

By the time a comprehensive land law regime was developed by the colonial State in 1950, the indigenous communities in Malawi had lost ownership and control of land through the proclamation of eminent domain reposed in the British Sovereign under the declaration of 1891 and also through the Certificates of claim issued in 1902. The combined effect of the eminent domain of the British Sovereign and the Certificates of claim meant that customary land was converted to Crown land owned by the colonial State or private land owned by white settlers. Krishnamurthy (1972:385) notes that with the issuance of the Certificates, indigenous communities lost

1,482,102 hectares of land, almost 80 per cent of which was expropriated by the British South Africa Company. The sanction of Certificates of claim had a commercial basis which was primarily to boost estate (or large scale) agriculture and export trade (Machika, 1983:54). Nonetheless, fifteen years after the issuance of the Certificates, only one per cent of all land was developed (Machika, 1983:54).

In 1950, the colonial State passed the Nyasaland Protectorate (African Trust Land) Order-in-Council. Under the Order in Council of 1950, land was classified into public, native trust and private land.¹⁴ Native trust land was vested in the Secretary of State.¹⁵ The colonial State had extensive powers of entry into native trust land under the doctrine of eminent domain and could dispose of such land through a lease or other right of occupancy as a private interest.¹⁶ The indigenous communities who were the supposedly beneficiaries of the native trust land had no legal rights to protect their interests in the land. While the Secretary of State was to administer the native trust land for the benefit of the 'Africans' and in accordance with 'African law and custom', the application of customary law was subject to received law to the extent that it was not repugnant to principles of justice and morality.¹⁷ Hence the normative administrative and legal frameworks of the native trust land were primarily developed to advance the colonial agenda. The Order-in-Council of 1950 allowed the colonial State to alienate land from indigenous communities in favour of estate (or large scale) agriculture as practised by the white settlers.

Even though a Land Ordinance was passed in 1951 creating a category of land called 'customary land', in terms of legal significance, the interest in the land remained in the colonial State and not the 'African' communities (Msisha, 1999: 17). The conversion of indigenous land holdings into private land was on the basis of zero value to the indigenous land holders (Msisha, 1999:39).

In sum, indigenous communities lost their customary land tenure under colonial land law and policy. The declaration of protectorate status over Nyasaland in 1891 meant that all land was Crown land. The colonial State recognized the private land interests of white settlers through Certificates of claim issued in 1902. This recognition suited the colonial agenda of creating a 'capitalist' economy based on estate (or large scale) agriculture. The successive legislative instruments of 1904, 1928, the Orders-in-Council of 1936 to 1950, and the Land Ordinance of 1951 entrenched the status of indigenous communities as a supply of labour for white economic enterprise. The rights of the indigenous communities under customary land law were not recognized at all. Finally, the imposition of British sovereignty and the recognition of private interests under Certificates of claim meant that customary land law was constrained from flourishing and evolving (Cross, 2002:2; Government of Malawi, 1999a: 24-25) as indigenous communities had no title to land any way. The constraints subsist under post-colonial land law and policy.

3.2. Post-Colonial Land Law and Policy¹⁸

No comprehensive land policy was formulated in Malawi at independence in 1964. The Malawi Independence Order of 1964 retained the State's legal right in public and customary land. There was no attempt to re-define land relations. Hence Kanyongolo (2005: 123) is able to contend that even though the legal order was 'deracialized', there remained an incipient agenda to advance the interests of a 'capitalist' economy.

However, a comprehensive legal framework for land use and tenure was developed under the Land Act of 1965 that redefines the categories of land under colonial land law into public, private and customary land.¹⁹ Public land is defined as:

all land which is occupied, used or acquired by the Government and any other land, not being customary land or private land, and includes-

- a) any land held by Government consequent upon a reversion thereof to the Government on the termination, surrender or falling-in of any freehold or leasehold estate therein pursuant to any covenant or by operation of law; and
- b) notwithstanding the revocation of the existing Orders, any land which was, immediately before the coming into operation of [the Land] Act, public land within the meaning of the existing Orders.

Private land is defined as:

All land which is owned, held or occupied under a freehold title, or a leasehold title, or a Certificate of claim or which is registered as private land under the Registered Land Act.

Finally, customary land is defined as:

all land held, occupied or used under customary law, but does not include any public land.

The definitions under the Land Act entrench the land alienation that took place during the colonial period. There is no attempt to question the legal validity of Certificates of claim issued in 1902. The definition of customary land is tautological. Further, while the definition of customary land implicitly underscores the inalienability of that land, it does not take into account the land that was alienated from indigenous communities during the colonial period and was converted into Crown or private land.

While the law further states that customary land is ‘undoubted property of the people of Malawi’, the land vests in ‘perpetuity in the President.’²⁰ Hence, the legal title in customary land does not vest in the people of Malawi; it vests in the President as a symbol of the post-colonial State. The declaration that customary land is the undoubted property of the people of Malawi is one of principle without any legal significance under the Land Act (cf. Msisha, 1999:30–31). Section 5 of the Land Act does not grant the people of Malawi any enforceable right at law. The people of Malawi only have the right of use and occupancy over customary land.²¹ The post-colonial State has powers to dispose of customary land as private land under leasehold.²² The post-colonial State may also declare customary land as public land²³ in which case it is possible for the land to be converted into freehold.²⁴ While it may be argued that section 25 of the Land Act purported to create a trust over customary land where the President is a trustee of the people of Malawi, the comprehensive powers reposed in the post-colonial State ‘destroys any notion of the existence of a trust’ (Msisha, 1999:32). The normative legal framework is striking in its failure to meaningfully empower the indigenous communities considering the land alienation they suffered under colonial rule. Customary land can be alienated by the post-colonial State without any compensation for the land itself.²⁵ Hence, the post-colonial State treats customary land as having no owner other than itself.

Having noted the lack of legal ownership of customary land under received law on the part of the indigenous communities, the post-colonial State incipiently recognizes legal title to land held under customary law. In this vein, in 1967, the post-colonial State put in place a legal framework for the conversion of customary land to privately-held leaseholds. This framework is embodied under the Customary Land (Development) Act.²⁶ Customary land converted under this Act can be registered under the Registered Land Act²⁷ as private land vested in an individual or a family unit. The application of the Customary Land (Development) Act is subject to the declaration of a particular customary land area as a ‘development area’.²⁸ The rationale is that registered title is the basis for greater agricultural productivity.²⁹ The classic customary landholding regime is anathema to development since it does not provide access to credit or attract capital-intensive investment (Nankumba, 1986:57; Ng’ong’ola, 1986: 39).

In introducing the Bills relating to the land reform of 1967, then President and Minister responsible for Land Matters, Dr. Hastings Kamuzu Banda said:

...our custom of holding land in this country; our methods of tilling the land...are entirely out of date and totally unsuitable for economic development of this country ... Our country is essentially an agricultural economy ... Development in this country must mean development of agriculture to the highest possible degree ... Under the present method of land holding or land tillage ... we can never hope to develop this country economically with agriculture as the back bone of our economic development.³⁰

In advancing the case for the reform of customary land tenure, Dr. Banda said that:

The government came to the conclusion that the first thing we had to do to ameliorate this situation or lessen the seriousness of the problem was to change our methods of land holding or land tenure, and the second thing was to change our methods of land cultivation and tillage. But we could not do those two things legally [...] we had to change the existing law, land law or laws of this country to pass new ones and amend the old ones.³¹

The land law framework in the post-colonial State is rather confused. The Land Act provides for increased individualization of land while the Customary Land (Development) Act purports to promote economic growth through increased ‘privatization’ of customary land. The success of the scheme under the Customary Land (Development) Act has been evaluated and scholars have concluded that it achieved little or no success (Ng’ong’ola, 1986).

It is possible to argue for linkages between colonial and post-colonial land law and policy. Kanyongolo (2004: 70) argues that the individualization and privatization of customary land by the post-colonial State only serves the interests of the new elites 'who include foreign agribusiness, parastatal estates and indigenous 'capitalist' farmers comprising senior politicians, civil servants, retirees and other formerly non-agrarian business people.'³² The post-colonial land law and policy was equally framed to pursue a 'capitalist' economy.

Of all the customary land holdings registered under the Customary Land (Development) Act, only one was registered by an individual by 1972, five years after the statute came into force. The remainder were registered as 'family land' (Machika, 1983: 436). Machika (1983:436ff) also contends that there is no evidence of an increased willingness to register title under the Customary Land (Development) Act by the customary land holders in order to access credit nor is there evidence that commercial creditors were willing to provide loans collateralized on land registered under the Act. Ng'ong'ola (1986:46) on the other hand asserts that 'no effort was made to ascertain and record 'individual' rights following objections by rural communities' to privatization.

Having said that, the normative framework under the Customary Land (Development) Act is not clear on the distinction between individualization and privatization of land. This lack of clarity, in my view, besides the purported lack of enthusiasm by the targeted communities, undermined the success of the implementation process of the Act.

Until 1994,³³ the post-colonial State advanced agrarian policies that favoured estate (or large scale) agriculture over smallholder farming (Kanyongolo, 2005:125).³⁴ Further, the market reforms advocated by the World Bank, '[which] [insisted] on a complete subsidy removal together with export crop production and food imports' completely marginalizes the smallholder farmer in the absence of radical land redistribution (Cross, 2002:11–12).

The crucial point is that a change in the status of land law governing customary land does not in itself translate in a change in the law governing the social relations of customary land holders (Chanock, 1985). Customary land has implication on issues like marriage and succession and changes in land ownership may not be embraced by the wider society (Chanock, 1985; Ng'ong'ola, 1986). Customary land is also part of a cultural and social heritage (Government of Malawi, 1999a: 125–126). McAuslan contends that the folly of land reform in Africa as advocated by the World Bank has been to look at land merely as an economic entity removed from its social setting (2003: 3–31). Land in 'traditional' societies is part of 'the social relations between people and society' (McAuslan, 2003:5). The land reform of 1967, with its emphasis on estate (or large scale) agriculture, benefited the 'rentier' class that had emerged since independence at the expense of customary land holders (Kanyongolo, 2004:70; 2005:123).

In practice, in the post-colonial period, customary land tenure as recognized under customary law exists in parallel to the formal legal order which seeks to get rid of customary land tenure. Legal commentators have concluded that the category of customary land under the Land Act is only a subset of public land in its legal effect considering the powers of the post-colonial State over the administration of customary land (Msisha, 1999: 32; Ng'ong'ola, 1986:42). Hence, customary land becomes a site of conflict. While legal ownership by communities over customary land is recognized under customary law, that ownership is not equally recognized under received law. The conflict is compounded when one considers that the normative legal framework of received law considers itself superior to customary law.³⁵ Post-colonial land law and policy perpetuates the inequalities entrenched by colonial land law and policy, most notably the alienation of customary land from the 'African' communities. Critical legal theory, based as it is on the Marxist insistence on the centrality of historical and materialist analysis, emphasizes the need to historicize law rather than treat it as neutral and abstract (Kelman, 1987). In this case, post-colonial land law and policy ought to have endeavoured to address the landlessness of the 'native' communities at independence and also to recognize the social context of customary land tenure and the need to entrench such holdings. The failure to examine the interests of the indigenous communities fortifies the assertion that the primary goal of post-colonial land law and policy is the creation of a 'capitalist' economy which benefits the 'non-poor'.

4. The National Land Policy: Customary Land Tenure Reform and Development

There are two major themes that emerge from the discussion of customary land tenure reform in sections 2 and 3. First, the logic of market-led agrarian reform is to enhance the interest of a 'capitalist' economy and the 'poor' are only relevant as a supply of labour. Second, customary land tenure reform based on individual title enhances the integration of customary land into the global economy. The emphasis on individual title prioritizes the 'economic' over the 'social'. This commoditizes land in the quest to convert the alleged 'dead' capital into

'live' capital (Deininger and Binswanger, 1999). The 'poor' might fall prey to the vagaries of the formal land market and this might lead to landlessness.

The central argument in section 3 is that colonial and post-colonial land law and policy was aimed at the development and reproduction of a 'capitalist' economy based on estate (or large scale) agriculture. Post-colonial land law and policy did not seek to address the land alienation that indigenous communities suffered under colonial rule. Customary land tenure does not have any legal significance under received law which is normatively considered superior to customary law. In effect the post-colonial State is the legal owner of customary land under statute and may dispose of such land as it deems fit. However, customary land tenure has survived in social practice outside the realm of 'bourgeois' law.

The land question in Malawi was central in the campaign for the introduction of multiparty politics in the early 1990s and also during the run up to the multiparty elections of May, 1994 (see Kanyongolo, 2005: 131). Upon assuming power, the Muluzi Administration commissioned a number of agrarian studies between 1996 and 1998 through the Presidential Commission of Inquiry on Land Reform established in 1996. The Commission in 1999 recommended the development of a comprehensive national land policy (Government of Malawi, 1999a: 129ff). The rationale was that existing policy statements and legislation were conflicting and lacked inter-sectoral linkages to enable the land sector to meaningfully contribute to economic development. Three problems, namely, poor access to land, improper land use and insecurity of tenure were identified as major constraints to the efficient usage of land (Government of Malawi, 1999a: 134ff). While the Commission noted the massive land losses by indigenous communities through the declaration of British sovereignty and Certificates of claim, it recommended that 'for reasons mainly of political and economic expediency, the [post-colonial State] should ... refrain from disturbing titles derived from Certificates of claim' (Government of Malawi, 1999a: 20). In relation to customary land tenure, the Commission recommended that all customary land should be reposed in traditional authorities under a public trust created under statute for the benefit of the members of the community in the area of each traditional authority (Government of Malawi, 1999a: 153).³⁶ The Government adopted a national land policy in January, 2002.³⁷

It is critical to decipher the extent to which the National Land Policy addresses the question of landlessness and the entrenchment of customary land rights considering that the post-colonial State has legal title in customary land. In this context, in this section, I examine the policy and the extent to which customary land tenure reform might benefit the 'poor'. Second, I seek to examine the extent to which a neo-liberal approach to customary land tenure reform merely facilitates its integration into the global economy. Suffice it say that in view of acknowledged colossal landlessness in Malawi (Government of Malawi, 2002:46-47), it is a dubious assumption under the policy that a market-led approach to land redistribution will solve the problem of landlessness (Cross, 2002: 11).³⁸ Cross (2002: 11-12) advocates a radical policy favouring land redistribution to deal with landlessness. However, he acknowledges that the 'the political economy of patrimonialism [is] not disposed to allow' such an approach (2002:11, 28).

The policy acknowledges that customary land holders suffered land loss under colonial and post-colonial land law policy (Government of Malawi, 2002:19-20). In this respect, the policy sets out three categories of land as a means of redressing the land loss; government, public and private land. Government land shall comprise 'land owned by government and dedicated to a specified national use or made available for private uses at [its] discretion' (Government of Malawi, 2002:21). This category shall encompass land reserved for government schools, hospitals or offices etc. Public land shall comprise 'land held in trust and managed by government or [a] traditional authority and [shall] be openly accessible to the public' (Government of Malawi, 2002:21). This category shall cover national parks, forest reserves, or unallocated land within an area of a traditional authority. Private land shall comprise land held under freehold, leasehold or under a customary estate (Government of Malawi, 2002:22-23).

The policy recommends that all customary land under the jurisdiction of each traditional authority shall be demarcated and registered as a traditional land management area (Government of Malawi, 2002:23) in recognition of the central role of a traditional authority to customary land tenure (Government of Malawi, 2002: 23). In each traditional land management area, customary landholdings shall be registered and titled as individual landholdings to be known as customary estates. Customary estates may be registered in 'an individual, a family, corporation or organization allocated customary land' (Government of Malawi, 2002: 24). The rights in customary estates shall be 'usufructuary in perpetuity' (Government of Malawi, 2002:25). The policy goes on to state that 'once registered, the title of the owner will have full legal status [...]' The titling and registration of customary land is intended to provide security of tenure, promote access to credit and provide an incentive for investment. The assumption here is that titling and registration of all customary land will lead to the emergence of a 'vibrant formal land market' (Government of Malawi, 2002: 25). However, the titling and registration of a

customary estate shall not render that land freely alienable. The sale, lease or mortgage over a customary estate shall be subject to the interest of the community and shall require the consent of a traditional authority of the area in which the customary estate is located (Government of Malawi, 2002:25).

The policy is laudable in its quest to secure the rights of customary landholders. However, a number of observations may be made regarding customary estates. First, the customary estate is grounded in the evolutionary theory of land rights. The effect of titling and registration of the customary estate at law is that a registered person is the owner of a customary estate (Garner, 2004:1522). Hence, the customary estate is freely alienable. The registration of usufructuary rights as envisaged under the policy is a misnomer. A usufruct arises as an inferior interest in land legally owned by another person. A usufruct cannot accrue to an owner.³⁹ The usufruct can arise if the legal ownership in the land is reposed in a traditional authority under a trust or other mechanism. To the extent that a customary estate shall arise from a traditional land management area, it must follow that legal ownership should repose in a traditional authority of that area under a trust concept for the benefit of the members of the community in his or her area. The trust concept must be created under statute. In this scenario, the right of the members of community shall be truly usufruct. The trust concept must incorporate customary land law.⁴⁰ By nature of customary land law, the land is inalienable and the members of a community remain the 'owners' with a beneficial interest under the trust and the land remains (theoretically) available for the use of the members of the community. Under such a trust concept, customary land tenure shall be secured in favour of the 'poor'.⁴¹

Second, the policy vouches for the development of a formal land market. The policy states that once a customary estate is registered and titled, 'the [land] can be leased or used as security for a mortgage[...]' This is not possible under the present nature of a customary estate. This would be possible only if the legal title in a customary estate were reposed in the person who is the legal owner. As the right of such a legal owner is not usufruct, the possibility of using a customary estate for access to credit might lead to loss of land. In that case, the security of tenure is destroyed. If the basis of a land transaction is that land as a commodity has to move from an 'inefficient producer' to an 'efficient' one, the reality is that the 'inefficient producers' in Malawi are the 'poor' (Kishindo, 2004:222). The quest for a formal land market puts the 'poor' at the risk of losing their land to 'efficient producers' who tend to be the elites in 'business or formal employment' (Kishindo, 2004:222) or indeed in politics (Kishindo, 2004:222; Kanyongolo, 2004:70). In this way, customary land tenure reform as advocated under the policy might reinforce landlessness in Malawi since the 'poor' will be exposed to the vagaries of a formal land market. This is undesirable considering that 40 per cent of smallholder farmers have a landholding of less than 0.5 hectares per household.⁴² Hence, Moyo (2004:95) believes that the 'contradiction facing neo-liberal 'development' is the 'unequally globalized markets.' He asserts that neo-liberal economic orthodoxy has tended to exclude the 'poor' in favour of 'domestic elites, and global capital, through the manipulation of the markets and administrative processes which govern resources, such as land' (2004:95).

Third, it is a perilous assumption that customary estate holders might access the formal credit market using land as collateral and in turn utilize their loans for increased agricultural productivity (Cross, 2002:5; cf. Hunt, 2004). In her discussion of Uganda's 1998 Land Act, Hunt notes that farm output expansion in that country is not necessarily negatively affected by a lack of a formal credit market or by the fact that land was previously held under customary land tenure (2004:181). She asserts that farm output may stagnate 'due to lack of profitable market opportunities or of security in reaching markets' (2004:181). She argues that the titling and registration of customary land has not led to a willingness on the part of the commercial banking sector to offer credit to smallholder farmers (2004:182; Fortin, 2005:9).⁴³ She also contends that smallholder farmers have had access to credit under microfinance schemes which are not necessarily based on individual title as collateral for loans (2004:182). Similar findings were made in relation to Malawi in the mid-1980s and by the Commission in 1999 in analyses of the impact of the conversion of customary land into private land under the Customary Land (Development) Act (Nankumba, 1986; Ng'ong'ola, 1986; Government of Malawi, 1999a: 68).

Fourth, the normative framework of the customary estate as recommended by the policy is similar to the conversion of customary land into private interests under the Customary Land (Development) Act. As pointed out in section 3, traditional authorities and their communities resisted the registration of private interests under that Act (Machika, 1983:436ff; Ng'ong'ola, 1986:46). In any event, the purported individualization and privatization under the Customary Land (Development) Act did not lead to automatic access to credit (Machika, 1983:486ff).

In sum, the legal effect of a customary estate as recommended under the policy is that the estate is freely alienable. The emphasis on the development of a 'vibrant land market' may negatively affect the 'poor' (Cross, 2002:5-9; Hunt, 2004:181ff; Kishindo, 2004:222) through increased insecurity as a result of the 'threat of foreclosure' and the probability of losing out to the 'non-poor' comprising a 'rentier' class made up of local elites or those in control of, or connected with, global capital who might dominate the formal land market (Cross,

2002:5–9; Hunt, 2004:181ff; Kishindo, 2004:222). In this sense, the neo-liberal approach to customary land reform under the policy will facilitate the integration of customary land into the global economy (Fortin, 2005). In the context of ‘neo-liberal globalization’ and rising prices of agricultural inputs as a result of market reforms, customary land tenure reform in Malawi may only ‘reaffirm the power, [in Foucauldian terms,] of the [‘non-poor’]’ (Fortin, 2005:14). In the face of landlessness, the policy undermines development.

The logic of the policy ought to be the empowerment of the ‘poor’ who lost their land under colonial and post-colonial land law and policy. The creation of a trust concept is imperative for that empowerment (see Government of Malawi, 1999a:153). Any other mechanism with a view to fostering the growth of a vibrant land market exposes the ‘poor’ to the vagaries of the market and benefits the ‘non-poor’.

5. Conclusion

Customary land tenure reform in Malawi must be examined in the context of a larger social, politico-economic enterprise. The history of agrarian reform in Malawi has been one of landlessness with the ‘poor’ being relevant as a supply of labour. As colonial and post-colonial land law and policy focussed on fostering a ‘capitalist’ economy, customary law was supplanted by statutory law. Customary law was adjudged anathema to development. The myth of development here is that individual title leads to efficiency in agricultural productivity which would then enhance economic growth. This is the logic of modernity in development discourse.

Agrarian reform discourse (Borras, 2005; Deininger and Binswanger, 2004; McAuslan, 2003; Platteau, 1996) shows that individual title does not automatically lead to economic growth. Further, in the context of land alienation that the ‘poor’ endured under colonial and post-colonial land law and policy, customary land tenure reform in Malawi must be engaged with developing legal mechanisms that empower the ‘poor’. The logic of neo-liberal approach to customary land reform is not to benefit the ‘poor’. The approach integrates customary land into the global economy for the benefit of the ‘non-poor’. The persistence with a neo-liberal approach to customary land tenure reform as envisioned under the National Land Policy of 2002 disempowers the ‘poor’ and undermines development.

A legal framework that develops a trust concept over traditional land management areas, in my view, offers security of customary land tenure that benefits the ‘poor’ than the neo-liberal approach of the policy. Under the trust concept, a traditional authority shall be in a fiduciary relationship with the members of his or her community. In that case, the exercise of any power by a traditional authority shall be for the benefit of community. In any event, the rights and obligations of a traditional authority and the members of his or her community shall be delineated under the trust concept. The trust concept offers an alternative form of land ‘tenure’ that is compatible with development in Malawi. A situation of landlessness does not enhance Malawi’s development.

The challenge for Malawi is to develop ingenious macroeconomic strategies to complement the security of customary land tenure under the trust concept. Chirwa (2002) and Hunt (2004) have shown that microfinance offers a viable option of access to credit for customary land holders. Under microfinance schemes, land is not a basis for loans (Chirwa, 2002:2). Loans are disbursed to community groups who form ‘cooperatives’ (Chirwa, 2002:2). This is an ingenious exploitation of social capital. The risk of default under the schemes depends on the ‘radius of trust’ – as Fukuyama (2001: 8) would call it – of the ‘cooperatives’. In the final analysis, Malawi needs a pragmatic approach to agrarian reform which does not see customary law as the problem but as part of the solution.

Endnotes:

¹ Received law refers to English common law, doctrines of equity and statutes of general application introduced into Malawi’s legal system under the British Central Africa Order-in-Council, 1902.

² The term ‘post-colonial’ is used as a synonym of ‘post-independence’. It should not invoke the concept of ‘postcolonial’ in postcolonial discourse: see for example Robert Young (2001) *Postcolonialism: An Historical Introduction*. Oxford, Blackwell.

³ The ‘poor’ means the peasantry and the land hungry. The ‘non-poor’ means the ‘rentier’ class comprising domestic elites and those in control of, or connected with, global capital.

⁴ See

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MALAWIEXTN/0,,menuPK:355882~pagePK:141132~piPK:141107~theSitePK:355870,00.html> 25 July 2005.

⁵ Escobar, 1995: discusses the ‘Golden Age’ of the 1950s and 1960s and the ‘Basic Needs’ Approach of the 1970s. There were also the Structural Adjustment Programmes (SAPs) of the 1980s (Gordon and Sylvester, 2004).

⁶ See also Escobar (1995:38).

⁷ Tamanaha (1995:471,476,481-486) laments that law and development scholarship should move from dwelling on ‘crossroads’ or ‘crisis’ to suggesting positive uses of ‘law’ in the global South.

⁸ It is a principle of international law that generally effective control and occupation of a territory is a basis for recognizing the sovereignty of another state over territory (Shaw, 2003:419). But in the context of customary land rights, this international law principle has been questioned in the cases of *Mabo v Queensland [No.2]* (1992) 175 Commonwealth Law Reports 1; *Wik v Queensland* (1997) 187 Commonwealth Law Reports 1; *Transvaal Agricultural Union v Minister of Land Affairs*, 1997 (2) SA 621; and *Alexkor Limited and Anor v The Richtersveld Communities and Ors* (CCT. Number 19 of 2003, Constitutional Court of South Africa). Shaw (1986: 38) suggests that European colonial powers exerted their sovereignty in Africa through cession. He rejects the concept that Africa was treated as *terra nullius* (1986:31-33). The way the rights of the ‘indigenes’ were ignored during the colonial encounter reveals a patronizing and hegemonic interpretation of the principle of *terra nullius*. McAuslan (2003:3) has aptly described the colonial encounter as ‘government sanctioned land grabbings.’

⁹ Unlike its neighbours, Northern Rhodesia (as Zambia was then called) or Southern Rhodesia (as Zimbabwe was then called), for instance, Nyasaland did not have any mineral resources to be economically exploited.

¹⁰ Unreported, 28 April, 1903 but discussed in Machika, 1983:49–51.

¹¹ The term literally means ‘to assist’. The *thangata* system was akin to feudalism.

¹² Cf. *Mabo v Queensland [No.2]* and *Wik v Queensland* where the courts took a more historical approach in entrenching aboriginal land title in Australia. The historical approach is also replicated under the Constitution (Section 25) and statute (the Restitution of Land Rights Act of 1994) in South Africa and was upheld in the cases of *Transvaal Agricultural Union v Minister of Land Affairs* and *Alexkor Limited and Anor v The Richtersveld Communities and Ors*. In contrast, the Supreme Court of Canada has entrenched a liberal, positivist approach in relation to the rights of indigenous communities. In *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010 the Court did not recognize the right of ownership and jurisdiction of the ‘aboriginal tribes’ in relation to the land they inhabited. The Court however recognized the right of those tribes to occupancy subject to state law. This liberal, positivist approach has been applied by the Malawian courts in the cases of *Mwawa v Jekemu* Civil Cause Number 883 of 1993 (High Court of Malawi, Principal Registry, Unreported) and *Nchima Tea and Tung Estates v All Concerned Persons* Civil Cause Number 338 of 1998 (High Court of Malawi, Principal Registry, Unreported).

¹³ In the 1901 case of *Cox v African Lakes Corporation* the court entrenched the position that an ‘African chief’ is not a ‘landlord over the land he rules.’ Chiefs could not assert rights over the land or allocate any land without recourse to the colonial State (Griffiths, 1981: 14).

¹⁴ Section 2 of the Order-in-Council.

¹⁵ Section 5 of the Order-in-Council.

¹⁶ Section 7 of the Order-in-Council.

¹⁷ Section 6 of the Order-in-Council. Griffiths (1986) has called this ‘recognition’ legal pluralism in a weak sense whereby a sovereign validates different ‘laws’ for different groups.

¹⁸ The discussion here covers the period up to 2002 when Malawi adopted the National Land Policy.

¹⁹ Cap. 57:01, Laws of Malawi, section 2. The Land Act was passed in 1965 and came into force in the same year.

²⁰ Section 25 of the Land Act.

²¹ Section 26 of the Land Act.

²² Section 5 of the Land Act.

²³ Section 27 of the Land Act.

²⁴ Section 38 of the Land Act.

²⁵ Section 28 of the Land Act.

²⁶ Cap. 59:01, Laws of Malawi, section 16. Besides the Customary Land (Development) Act, the Registered Land Act and the Local Lands Board Act (Cap. 59:02) were passed in 1967 to facilitate the conversion of customary land into private land (see also Ng’ong’ola, 1986:40).

²⁷ Cap. 58:01, Laws of Malawi.

²⁸ Section 3(1) and (2) of the Land Act. The provision is significant for purposes of cadastral surveying.

²⁹ The long title of the Act states in part that it is '[a]n Act to provide for the Better Agricultural Productivity of Customary Land[.]'

³⁰ Malawi Government, *Proceedings of Parliament*, 4th Session, 1966–67, Zomba, Government Printer, 1967, 339–402.

³¹ *Ibid.*

³² Machika (1983) contends that the colonial and post-colonial land policy were disjunctive. I disagree. There is a continuum in the policies of both eras and the disjunction does not arise merely by a change of a political regime.

³³ Malawi adopted a multiparty system of government. In the general elections that took place in May, 1994, the Banda Administration gave way to Muluzi Administration. During the campaign before the elections, land was a key issue especially in southern Malawi where there is colossal landlessness (see e.g. Kanyongolo, 2005:131). I will explore the point in Chapter 4.

³⁴ Under the Special Crops Act (Cap. 65:01, Laws of Malawi), which came into force in 1963, a landholding of less than twelve hectares is prohibited from engaging in the farming of cash crops such as tobacco. This effectively marginalizes the smallholder farmer from utilizing his or her land for commercial agriculture albeit in any modest manner.

³⁵ See section 15 of the Malawi (Constitution) Order in Council, 1961; section 15 of the Malawi Independence Order, 1964; section 15 of the Republic of Malawi (Constitution) Act, 1966; and section 200 of the Constitution of the Republic of Malawi, 1994 which entrench the standard 'recognition clause' in relation to the application of customary law generally.

³⁶ 'Traditional authority' is the highest form of chieftaincy as defined under the General Interpretation Act (Cap 1:01), Laws of Malawi.

³⁷ Government is translating the policy into law. At the moment no Bills are available.

³⁸ I will not belabour the point on the correlation between land redistribution and landlessness as it is beyond the scope of this paper.

³⁹ The point was discussed in *Chief J.M. Kodilinye and Anor v Anotogu, Philip Akunne* [1955] 1 W.L.R. 231, PC. The decision of the Board was applied in *Anachuna Nwakobi and Others v Eugene Nzekwu and Others* [1964] 1 W.L.R. 1019, PC.

⁴⁰ Benda–Beckmann (2000:9) calls the recognition of customary law under statute 'retraditionalization'.

⁴¹ The Commission recommended the creation of a public trust over customary land (Government of Malawi, 1999a:153).

⁴² See p.2 *supra*.

⁴³ Harold Jiya, Head of Corporate Banking Division at the National Bank of Malawi, states that in Malawi only two commercial banks provide loans to the smallholder agricultural sector. The loans are made to farmers' groups constituted as cooperatives. Land does not form a basis for collateral. Due to the high risks in this sector, he reckons banks would welcome land titling whereby land may be used as collateral for bank loans (electronic mail response dated 22nd July, 2005).

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